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"THE LIBERAL TREATMENT OF INDIANS": NATIVE PEOPLE IN NINETEENTH CENTURY ONTARIO LAW

SIDNEY L. HARRING*

Canada's tortured relationship with its First Nations can be studied on many levels in virtually every area of human interaction. In the past twenty years, an impressive body of literature has set out to do just that, producing hundreds of scholarly works that recast Canada's relationship to Native people in a new way. Native people themselves, quite independently of scholars, have also recast the relationship of their own nations with Canada. This resurgence of Native politics has led to armed stand-offs, the creation of Nunavut, an Inuit territory within Canada, the demise of the Meech Lake Accord and local assertions of Native rights on a wide variety of fronts.1

This political and cultural resurgence also has a legal dimension, as the First Nations have used the courts to redefine their relationship with the Canadian nation-state. Canadian courts have been notoriously unresponsive to Native legal

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1 There are a number of studies of Native political action in Canada. See M. Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (Toronto: Methuen, 1984). The armed stand-off at Oka in the summer of 1990 brought Canadian native issues to the attention of the world through elaborate media coverage and is the subject of several books. See e.g., R. Hornung, One Nation Under the Gun (Toronto: Stoddart, 1991); G. York & L. Pindera, People of the Pines: The Warriors and the Legacy of Oka (Toronto: Little, Brown, 1991); and A.A. Borovoy, Uncivil Obedience: The Tactics and Tales of a Democratic Agitator (Toronto: Lester Publishing, 1991). Native American political activity is the subject of S.E. Cornell, The Return of the Native: American Indian Political Resurgence (New York: Oxford University Press, 1988), although his primary focus is on the United States.
claims. This is especially evident in a highly unsatisfactory series of judgments in “Indian title” cases, and in many other areas of the law as well. Two landmark cases illustrate the failure of Canadian courts to come to terms with Native rights. In *Delgamuukw v. The Queen*, Chief Justice McEachern of the Supreme Court of British Columbia wrote that “the difficulties facing the Indian populations of the territory...will not be solved in the context of legal rights.”

McEachern further characterized such legal concepts as “ownership,” “sovereignty,” and “rights,” all of which are foundational to Anglo-Canadian jurisprudence, as “fascinating legal concepts” which would not solve the underlying social and economic problems of Native people.

Mr. Justice Steele of the Ontario Supreme Court, in *Attorney-General for Ontario v. Bear Island Foundation*, disposed of the land rights of the Temagami Indians in an even more underhanded way, without even finding the Indian nations’ rights “fascinating legal concepts.” In a lengthy decision that has been characterized as “antideluvian,” Steele took a Victorian and imperialist view of Native rights, aggressively denying every element of the Temagami land claim. These cases, through the sheer magnitude of the legal effort involved, reached the limits of the Canadian legal process as a dispute settlement mechanism. They exhausted both the Indian nations capacities to sustain litigation, and that of the courts to adjudicate disputes. *Delgamuukw* is one of the most extensive ever tried anywhere in the world. The case required 318 days to introduce the evidence and 56 days to argue. The record includes 23,503 pages of evidence at trial, 5,898 pages of argument and 9,200 exhibits, totalling over 50,000 transcript pages; the plaintiff’s draft outline of argument at 3,250 pages and the Province’s 1,975 pages. While *Bear Island* pales by comparison, that trial still took 119 days over two years. The testimony filled 68 volumes, backed by 3,000 exhibits,

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2 *Delgamuukw v. The Queen in Right of the Province of British Columbia and the Attorney General of Canada*, No. 0843 Smithers Registry (1990) at 299. My citations are to the official Smithers Registry report of the case which, because of the considerable interest, was bound and sold by the Court.

3 *Ibid.*. At the risk of seeming impertinent, it is impossible to imagine such dicta being included in a corporate case, arguing that such concepts as “ownership” and “rights” would not solve the problems of a bankrupt corporation. Nor are they “fascinating legal concepts” in any dismissive sense: they are core concepts in Canadian constitutional law.

4 *Attorney-General for Ontario v. Bear Island Foundation et al., Potts et al. v. Attorney-General for Ontario* (1984), 49 O.R. (2d) 353. This decision was upheld on appeal in *Re Bear Island Foundation et al. and the Queen in Right of Ontario et al.* (1989), 70 O.R. (2d) 574.


6 *Delgamuukw*, supra note 2 at 1.
filling an entire courtroom. The underlying message to First Nations is that there is nothing they can do to meet the legal standard of proof required to win their land rights cases. Yet, Bear Island makes clear that it is not the volume of evidence that is the barrier to recognition of Native land rights: it is Canadian legal doctrine, based on Victorian imperialist theory, that essentially denies the Indian nations any rights not directly accorded to them by the Crown.

This abdication by the courts of their role in defining the position of Natives in Canada not only denies Canada’s Native people their legal rights, but also serves to further marginalize Natives from Canadian life and institutions. Judges and courts serve critical social functions in resolving disputes and defining complex social, economic and political relationships. By denying that such issues are “legal” or justiciable, the courts closed down one important institutional area where the resolution of difficult conflicts takes place. In the United States, judges and courts have consistently served a critical role in mediating between national political decisions on Native rights and the Indian nations’ view of their rights. This body of law is cited in virtually every Canadian Native rights case. As in Canada, the American national political processes have been closed to Native Americans because of their poverty, isolation and their distinct political and cultural traditions. Majoritarian political institutions are beyond the access of Native political institutions, expensive beyond the reach of Native resources and more responsive to the votes of the non-Native majority. Accordingly, the American courts, particularly the federal courts, have become a major arena for the resolution of disputes between Natives and the larger society, making issues of Native rights “legal rights” in every sense of the term.

There is no parallel in Canadian Indian law as there is no such elaborate body of Canadian court cases making an effort to delineate the rights of Native people against either the Canadian state or non-Native Canadian people. This study will examine the origins of the failure of the Canadian legal system to develop such doctrines. The focus will be on nineteenth century Ontario, the place where both the Indian Act of 1876 and current Canadian Indian policy has its North American roots. Beyond its historic role, Ontario courts provided Canada with its foundational Native rights case, Regina v. St. Catharine’s Milling and Lumber Company. This case coursed through two Ontario courts and the

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7 “Where Justice Lies”, supra note 5 at 228.
8 C.F. Wilkinson, American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy (New Haven: Yale University Press, 1987) is an analysis of the role of the federal courts, particularly the United States Supreme Court, in creating an elaborate body of federal Indian law.
10 (1885), 10 O. R. 196.
Supreme Court of Canada. Both the Supreme Court and the Privy Council adopted much of the reasoning of the Ontario courts. Although the case dealt narrowly with the question of Indian title to traditional lands, the decision was rendered in the context of a broad denial of Indian rights generally. Ironically, in a case where Native rights were lost, no Indian was a party to the case.

This failure by the Canadian courts to recognize Native rights is doubly ironic. It is fundamental to Canadian legal history that the Canadian frontier was a legally structured frontier, using the law to govern Indian and white relations as a means of avoiding the "collision" of the two cultures. This model is often juxtaposed against the violence of the American frontier. However, the Canadian result is very much the same: Native people are impoverished and deprived of their lands in both countries.

The unique nature of Native rights law universally requires historical analysis and argument. Canadian legal history, like American and Commonwealth legal history, is changing. The traditional legal history of judges, courts and cases has given way to a "new" legal history which focuses on the social impact of the law on the various peoples and processes that make up Canada. Particularly important have been a number of legal histories concerning women and family life, and the application of the criminal law to the lives of ordinary people. In contrast to a large volume of literature on the history of Canadian Indian policy,

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12 The parties were the Province of Ontario and St. Catharine's Milling and Lumber Corporation, a private company with close ties to the Conservative government of Canada, which was indirectly a party, defending the national government's claim to Indian lands in Ontario through the company. The case is discussed in detail in section II.

13 G. Parker, "Canadian Legal Culture" in L.A. Knafla, ed., Law and Justice in a New Land: Essays in Western Canadian Legal History (Toronto: Carswell, 1986) at 3. The model was explicitly at the roots of nineteenth century Ontario Indian law and is central to Chancellor Alexander Boyd's opinion in St. Catharine's Milling. Supra note 10 at 203-16.


15 For a review of this literature, see "Recent Developments in Canadian Law: Legal History", ibid. at 251-53.
the legal history of Native people remains underdeveloped.16

This article will analyze the nineteenth century context of Ontario Indian law. First, it will look at the fifty reported cases which judicially defined native rights in nineteenth century Ontario, together with a few early twentieth century cases that cast light on those earlier cases. Second, it will focus specifically on the legal doctrine of *St. Catharine’s Milling*. This was not an isolated case, but was decided in the context of cases fundamentally hostile to Native rights. Third, it will analyze how the application of Canadian criminal law to Native people directly interfered with Native life. Fourth, an effort will be made to understand how Native people saw Canadian law, and how they attempted to deal with the law’s intrusion into their world. This attempt at an ethno-legal history of Native people is necessarily speculative, but raises important issues in Canadian legal history. Finally, the meaning of Indian law in the context of nineteenth century Ontario legal culture will be considered.

Beyond contributing to the modern understanding of the context of Canadian Indian law, this article also seeks to contribute to the understanding of Canadian legal history. To the extent that the law structures Native/white relations in Canada, a primary focus has been on how the law acts against Native people. There has been no attempt to understand how Native people acted to structure the impact of Canadian law on their lives.

**I. NATIVES UNDER NINETEENTH CENTURY ONTARIO LAW**

While no Native people were parties to *St. Catharine’s Milling*, the evidence is clear that Natives were not strangers to Ontario courts. A search of the indices to Ontario’s seven major reporting systems reveals fifty reported nineteenth century cases concerning Indian rights in some form.17 These reporting systems were commercial enterprises, published for sale to the legal profession. The

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16 Knafla, ed., *supra* note 13, contains three essays on Canadian Indian policy. None of the other works cited contain any reference to the legal history of Native people. Literature on Canadian Indian policy includes dozens of lengthy studies published by the Treaties and Historical Research Centre of the Department of Indian and Northern Affairs. In addition to this work, there are dozens of published studies. See E.B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986). Moving legal histories of Native people and their relationship to Canadian society are clearly contained in both *Bear Island, supra* note 4 and *Delgamuukw, supra* note 2. Published studies include S.L. Harring, “The Rich Men of the Country: Canadian Law in the Land of the Copper Inuit, 1914-1930” (1989) 21 Ottawa L. Rev. 1.

17 The reporters searched were the Upper Canada Reporters (U.C.R.), Upper Canada Common Pleas Reports (U.C.C.P), Ontario Weekly Reporter (O.W.R.), Ontario Practice Reports (O.P.R.), Ontario Appeal Reports (O.A.R.), Ontario Reports (O.R.) and Grants Upper Canada Chancery Reports (Gr.). B. Slattery, *Canadian Native Law Cases* (C.N.L.C.) (Saskatoon: University of Saskatchewan Native Law Centre, 1980) vols. i through iii reprint most of these
selection of cases for inclusion was not random, but based on the commercial importance of the case to the profession. There is question whether important Indian rights cases were omitted from the reporters because two of the most important nineteenth century Ontario Indian cases were not reported. Attorney General of Ontario v. Francis et al., was the first major case calling for an application of the St. Catharine’s Milling decision. It remained unreported for nearly one hundred years, then was published in Canadian Native Law Cases from notes found in the files of a lawyer.  

Caldwell v. Fraser further applied St. Catharine’s Milling in a “learned and elaborate” judgment that has been quoted and discussed in a legal treatise, but has never been reported. There is no simple way of determining how many equally important cases went unreported: such cases lie in obscure records, among the hundreds of benchbooks in the provincial archives.  

These fifty-two cases (including Francis and Caldwell) represent the best existing record of the legal status of Native people in Ontario. Analysis of these cases reveals a great deal about the role of the law in structuring the place of Native people in English-speaking Canada. This is true because of the historical importance of Ontario as the political center of English speaking Canada even if we acknowledge that largely independent legal histories exist for British Columbia and the Maritime Provinces.

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18 (1889), 2 C.N.L.C. 6. The case was found in the Aemilius Irving Papers, Box 42, file 42, item 9 in the Ontario Provincial Archives [unpublished]. Irving, a prominent Ontario lawyer, represented the Province in the case.  


The Ontario Provincial Archives is still collecting original court records from nineteenth century Ontario. These records have been inaccessible to modern scholars, often for a century or more.

The largest number of the reported cases concerned Indian land title acquired by whites. It is clear whose interests were at stake. In most of these cases, no Indians were parties, their title having been alienated to competing white interests. For nineteenth century Ontario’s 28,000 Indians, Canadian law was either the legal foundation of white claims to Indian lands or the basis for locking them in a jail cell for violation of some petty crime under Canadian law, most often an offence unknown to Native tradition. The avaricious designs of colonial whites on Indian lands, as articulated in the Royal Proclamation of 1763, formed the basis of the original colonial Indian policy. Among other provisions, the Proclamation forbade the alienation of Indian lands except by the Crown. It is clear that the major reason for this policy was that the unscrupulous land-grabbing practices of colonial whites provoked Indian wars and destabilized the frontier, alienating the Indian nations at a time when the British needed them as allies. There were also underlying humanistic concerns: many white practices were immoral and unfair to the Indian nations, causing drunkenness, disease and impoverishment. The Proclamation remained a legal foundation of British and later Canadian Indian policy.

While the precise legal issue varied from case to case, the Royal Proclamation established a process for the alienation of those lands that denied frontier whites direct access to ownership of Indian lands. Only the Crown could acquire Indian lands, and then only through the treaty process of negotiation and purchase. The

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22 About half of the reported cases concern some kind of land issue. Most unreported cases were criminal cases.
25 J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada. (Toronto: University of Toronto Press, 1989) e. 3.
Governor or Commander in Chief had the exclusive power to call a public meeting for the restricted purpose of negotiating the sale of Indian lands.\textsuperscript{27} No petty white official could pretend to negotiate an Indian land cession at an ordinary tribal council. An elaborate series of "land surrenders" followed in Southern Ontario in the early 1800s, spreading to the North shore of Lake Superior in the Robinson Treaties of 1850.\textsuperscript{28} Once the land was acquired by the Crown, it could be sold or given to individual whites. While some lands were "reserved" for Natives, these lands were also subject to acquisition and sale by the Crown, with the proceeds to be used for the benefit of the Indians. These reserves apparently have a status short of actual ownership and are still the subject of utilization.\textsuperscript{29} Thus, even Indian reserves became populated by whites.

In theory, these orderly procedures should have led to a relatively stable process of white acquisition of Indian lands. Nearly twenty reported cases, however, indicate that the process was flawed. If we assume that these cases are representative of the range of problems that arose, the land alienation process was fraught with confusion and corruption. Given the difficulty of access to the courts and the large proportion of unreported cases, there must have been many such cases. While these cases commonly raise issues of "Indian title," they did not involve Native people, but rather settled competing white claims for land that was formerly held by Indians—just as \textit{St. Catharine's Milling} did.

At the outset, one legal principle was clear: Canadian law, rather than tribal law, applied to Indian lands. \textit{The King v. Epaphrus Lord Phelps} pitted the Mohawk Nation against the Crown in an early dispute over which law governed Mohawk lands.\textsuperscript{30} Joseph Brant, a Mohawk ally of Great Britain, received title to a large tract of land along the Grand River as a reward for his services.\textsuperscript{31} He

\textsuperscript{27} These provisions are found at page 35 of the Proclamation as reprinted in Getty & Lussier, eds., \textit{infra} note 36 at 29-37.


\textsuperscript{30} (1823), 1 Tay. 47. The case is discussed in detail in W.R. Riddell, "The Sad Tale of an Indian Wife" (1922) 13 Journal of the American Academy of Criminal Law and Criminology 82. This issue was not settled by \textit{Phelps} and went through the Ontario courts to the Supreme Court of Canada in the 1970s in \textit{Isaac et al. v. Davey et al.} (1973), 38 D.L.R. (3d) 23 (Ont. H.C.); (1974), 51 D.L.R. (3d) 170 (Ont.C.A.); Davey et al. \textit{v. Isaac et al.} (1977), 77 D.L.R. (3d) 481 (S.C.C.). To the Iroquois these issues are still unresolved. See \textit{infra} note 273.

\textsuperscript{31} On the early history of Indian and white settlement of the Grand River Valley, see C.M. Johnston, "An Outline of the Early Settlement of the Grand River Valley" (1962) 54 Ontario History 43.
leased a tract of one thousand acres to Phelps for 999 years. Phelps put the lands in trust for the support of his Mohawk wife and children.

Later, guilty of treason against Great Britain in the War of 1812, Phelps fled to the United States. Britain's treason statute provided for the forfeiture of property and the Crown proceeded against Phelps' tract of land. The Mohawk tribe hired a lawyer to defend the wife's lands. William Warren Baldwin, Treasurer of the Law Society of Upper Canada, argued that the Mohawks were allies, not subjects of the Crown, and that their lands were theirs to dispose of under tribal law. The Solicitor General took the position that "the supposition that the Indians are not subject to the laws of Canada is absurd," analogizing Indians with French settlers. The Court upheld this view, and the Crown took the lands.32 The first case in which Canada's Indians appeared in court through their own hired lawyer to defend their lands and sovereignty, they lost completely, their argument dismissed as "absurd." This set the tone for nineteenth century litigation. Tragically, in most cases involving Indian rights, the Indian nations were not even represented by counsel.

While Indians had full legal access to the courts, the reality was that justice was so often denied that a report of the Aborigine's Protection Society, a major London Native rights organization, confused the reality with the law. Concerned about the "neglect of a means of securing justice to Indians in courts of law" the group charged (in an 1839 report) that the Indians were "disabled by the colonial laws to appear in courts of justice either singly or as tribes." The object of the Society was clear: the full extension of law to Indians was necessary to assimilate them into the mainstream of Canadian life. "It is not easy to conceive how a barbarous people can accommodate themselves to the usages of a civilized country when they are studiously excluded from sharing its laws." A lack of provision for Indian land rights was of special concern.33 The colonial government of Canada shared this view. The Bagot Commission, named after Sir Charles Bagot, Governor General of Canada, completed an exhaustive, reserve by reserve report on Indian affairs in Canada in 1844. The Commission concluded that provincial governments had failed to protect the Indians from a massive theft of their lands, producing great poverty on the reserves.34 The British colonial office took direct control over Indian affairs until it passed this authority to the Dominion government at Confederation.35 The policy based on

32 Ibid. at 88-89.
“Indian Acts,” and designed to protect and support the Ontario Indians until they could be assimilated was paternalistic: a policy of “liberal treatment.” It was in this context that the first Ontario court cases were decided.

A. FRONTIER WHITE ATTEMPTS TO BARGAIN FOR INDIAN LANDS

The clearest set of legal issues concerns white attempts to directly alienate Indian land in circumvention of the Crown prerogative. The range of cases suggests that whites were quite persistent and ingenious in their attempts to do so. Ontario courts were equally persistent in their defence of the Crown’s monopoly of control over Indian lands. These cases often pitted the courts against the property interests of both frontier whites and Indians as it denied both the right to dispose of the lands they held. It was a misdemeanor for anyone to alienate Indian lands in any manner, including “purchase or lease, ... or make any contract with said Indians, for or concerning the sale of any lands.” Furthermore, it was a crime to trespass upon or occupy Indian lands. These acts were in response to many attempts by frontier whites to occupy Indian lands, actions that British officials knew had caused Indian wars in the United States. In an effort to bring frontier white designs upon Indian lands under legal control, legislation permitted the appointment of commissioners to investigate and try such cases. The commissioners were expected to enforce Indian land laws, and to protect Indian lands from intrusion by whites.

36 Most of the historical research on Canadian Indian policy concerns these “Indian Acts”; therefore, this study focuses on the judicial, rather than legislative, embodiment of Indian policy. It is important to note, however, that just as the judge-made law of Indian affairs in Canada largely originated in Ontario, so did the “Indian Acts” of Ontario become the basis for the Dominion Indian Acts. R.G. Moore, The Historical Development of the Indian Act (Ottawa: Department of Indian and Northern Affairs Canada, 1979) part 1: “The Pre-Confederation Period” at 1-50. See also J.S. Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change” in L.A.L. Getty & A.S. Lussier, eds., As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies (Vancouver: University of British Columbia Press, 1983).

37 John Robinson, Chief Justice of Ontario, acknowledged the ineffectiveness of government efforts to protect Indian lands in Bown v. West (1846), 1 U.C.E. & A. 117 at 118-19: “[T]he government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from effectual.”

38 13 and 14 Vic. c. 74, section 2.

39 The commissioners were appointed under sec. 1, of 2d Vic. c. 15 specifically to deal with frontier conditions where whites had entered Indian lands, providing the commissioners with extensive powers to travel to frontier localities, summarily try offenders under the Act, to remove them from Indian lands, an authority backed by penal sanctions. This process of the Commissioners’ trials is discussed in The Queen v. Johnson (1850), 1 Gr. 409.
In *Little et al. v. Keating*, an 1840 Walpole Island Reserve case, a squatter, Shepherd Collock, was convicted by commissioners on the complaint of two Indian chiefs of possessing "a portion of the Crown lands."\(^4\) The evidence showed that Collock had occupied this land since 1816 and that the whole of Walpole Island had been set aside as a reserve for the Indians. After granting a new trial on appeal, the Court held that the conviction was defective in that the commissioners had no general jurisdiction over Crown lands, but needed to aver that the lands in question were Indian lands.\(^4\) The opinion was equally technical in other areas, denying that it could "tell judicially whether Walpole Island [was] land occupied and claimed by Indians or not". The Court knew it had the opportunity, at a new trial, to remedy the small defect in the original conviction by simply finding the lands to be Indian lands. The Court of Queen’s Bench found the “complaint of the Indian Chiefs, naming no one and not saying whether upon oath or not” was defective, held the commissioners to a higher standard of evidence, and implied that only Indian testimony under oath was admissible.\(^4\)

At this time, Walpole Island Indian Reserve was heavily occupied by American squatters. The impact of this decision was to leave Collock in illegal possession of land on the reserve. This result can be read in several ways. It cannot be denied that elementary legal principles might well lead the Court to put the commissioners on notice that they owed a higher level of due process to squatters. It is also clear that the Court’s decision went out of its way to put impediments in the path of the commissioner’s ejectment of the squatters. This decision impaired both Indian interests in protecting their diminishing reserved lands, and an official government policy aimed at the stabilization of Indian/white relations. Parallel cases in the following decades found courts more flexible in dealing with frontier conditions and found commissioners providing a higher level of due process.

*Regina v. Baby* is among the first Ontario cases in which an Indian appeared in court as a witness, testifying for the Crown against Baby, a white man charged with alienating Indian lands.\(^4\) The case, tried in 1854 at Sandwich, now Windsor, concerned Indian lands on the Michigan border. These lands, like Walpole Island, had been extensively occupied by aggressive American squatters since the turn of the century. Alexander Clark, a fifty-four year old Indian witness, testified that the immediate lands in question had been in Indian


\(^{41}\) *Ibid.* at 266, 269-70.


\(^{43}\) (1854), 12 U.C.Q.B. 346. See *supra* note 38.
hands for some time. The Indians held a council and decided to take possession of this land and sell it in order to use the money to make improvements in their village. They asked their Indian Agent, Colonel Bruce, for permission to sell the land but “could get no satisfaction.” The tribe then went ahead and sold the land to Mr. Baby for £250. The purchaser specifically agreed to take all risks of the bargain and bear all expenses. The tribe, quite reasonably, had sold title to land they had already lost the use of, getting money they needed for tribal purposes.

Baby was convicted in a jury trial. Baby appealed. First, he denied that the lands were Indian lands, implicitly challenging the Crown to prove the Indians had title, but also arguing that Indian lands were only those lands physically occupied by Indians at the time. The Court of Queen’s Bench completely avoided the title issues, focusing instead on the statute’s prohibition of the act of contract or bargaining with Indians over land—a phrase governing any lands regardless of title. Second, relying on the chaotic state of lands on the frontier, Baby made a number of technical arguments alleging a discrepancy between the lands he was charged with bargaining for and those lands described by the evidence at trial. This argument directly challenged the capacity of the Crown to sustain such convictions with Indian witnesses, who, while they were clearly allowed to give evidence, were not likely to describe lands in the same terms as described in court documents. Again, since the Court focused on the bargaining process, the precise description of the lands involved was irrelevant. Finally, Baby argued that he lacked the criminal intent to violate the law: he did not intend to alienate Indian lands in violation of the statute. Rather, he intended to seek Crown approval for his transaction, describing it as merely “conditional.” In a rare statement of Indian policy, the Ontario Court soundly rejected this argument as running against the public policy designed to protect the Indians from unscrupulous land speculators. While the Court fully accepted the testimony of Indian witnesses, it completely ignored the action of the tribal council, accepting the Indians as absolute dependants of the Crown, at the mercy of the Indian Agent. The council had no right to dispose of a small and useless piece of land nor to assert any voice in the ultimate disposition of that land.

The result in Baby was consistent with the Court’s broad defence of the Crown’s authority over Indian lands as set out in The Queen v. Strong. This case was an action for trespass against a white squatter on the Grand River Reserve.

44 Ibid. at 347.
46 Ibid. at 350-54.
47 Ibid. at 351-53.
48 Ibid. at 359-60.
Strong was among many squatters at Grand River whose ejectment was sought by the tribe. Strong, like Baby, mounted a substantial defence, heavily based on procedural issues and formalities of land title. Having lost before the two commissioners, he appealed, arguing *inter alia* that there was insufficient evidence to prove the lands in question were Indian lands. There was no adequate system of land registration on the frontier. Strong was charged with trespass on Indian lands because, like most white squatters, he made no effort to purchase the land. Therefore, the Court could not evade holding the lands in question were Indian lands within the meaning of the statute. The Court of Chancery rejected Strong’s argument, holding specifically that the parole testimony of one Indian witness was sufficient to establish that the lands in question were occupied by Indians, although ceded to the Province.\(^\text{50}\) While the legal policy underlying this case is the same as Baby, the Indians in *Strong* had requested the assistance of the Crown in removing trespassers from their lands.\(^\text{51}\)

Another Grand River case, *The Queen v. James Hagar*, while ultimately leading to the same result, illustrated the changing nature of Indian land occupancy.\(^\text{52}\) Mary Martin, an Iroquois woman, lived alone on a cultivated lot on the reserve. She was very poor, living on the proceeds of a few vegetables and a government payment of £6 a year from Indian funds. Mary Martin thought it would be more profitable to have her lot worked by whites rather than by Indians and asked James Hagar, a white man, to work the land on shares. They made an oral agreement that he would farm the land for five years, giving her one-third of the proceeds. Upon hearing of the agreement, Iroquois chiefs persuaded the woman to break it off. She agreed to do so and informed Hagar of her decision, but he insisted that she honor the agreement and he planted wheat there. Convicted of making a lease for Indian lands without the consent of the Crown, Hagar appealed, arguing that the statute referred only to “legal leases,” not informal ones. The Court of Common Pleas, consistent with *Baby*, construed the statute broadly, citing its language prohibiting such leases “in any manner or form, or upon any terms whatsoever.”\(^\text{53}\) The Ontario courts had moved beyond narrow formalism in these cases, deciding them broadly in clear defence of the government’s Indian policy.

In fact, the *Hagar* Court directly addressed the policy behind these statutes in response to Hagar’s argument that his agreement was a benefit to Ms. Martin. The Court stated that giving effect to such an agreement would amount to legislating instead of administering the law. By characterizing the statute as “designed to protect the Indians from all contracts made by them in respect to lands set aside for their use, in consequence of their own improvidence,” the

\(^{50}\) Ibid. at 405.

\(^{51}\) Ibid. at 393.

\(^{52}\) (1857), 7 U.C.C.P. 380.

\(^{53}\) Ibid. at 381-82.
Court denied any interest in the substance of the bargain, limiting its inquiry only to the question of whether the Crown had given consent.\textsuperscript{54} As a matter of law, Indians were improvident, even when, as in Baby, they made a good bargain for land they did not want. Of course, the same Indians were not improvident when they made agreements to sell these same lands to the Crown.

The few cases where individual Indians had acquired a legal title to their land provided one exception to this rule. \textit{Totten v. Watson}\textsuperscript{55} is apparently the first case in which Ontario courts dealt directly with the nature of Indian title. The issue here was distinct from other cases because 1200 acres had been patented in 1801 to Captain John Deserontyou, a Mohawk chief.\textsuperscript{56} He had left the land to three sons. In 1842, one of his sons, William John, sold 100 acres of his inheritance to Cuthbertson, a cousin. In 1856, he sold the same land to William Totten, who had already begun to clear and farm it. Squatters continued to live on this land, having been bought out earlier by Totten. Totten’s title was challenged under the same statute that forbade the sale of land by Indians applied in Baby.\textsuperscript{57} Thus, in 1850s Ontario, individual Indians who held patented land were not presumed “improvident” and protected by the same paternalistic statute that governed unsettled or tribal lands.

The Court of Queen’s Bench had no difficulty distinguishing patented lands held by Indians from lands traditionally occupied by Indians. The distinction, of course, was Crown title: Indians were “merely permitted” to occupy and enjoy their traditional lands “at the pleasure of the Crown.” However, the law had never attempted to interfere with the disposition of lands granted to individual Indians by the Crown. The Court noted that “very few such grants have been made.”\textsuperscript{58} In acknowledging the full property rights in patented lands to individual Indians, the court simply dismissed, without legal analysis, any Indian property right in their traditional lands. This position was consistently held by Ontario courts, and formed the basis for Ontario’s argument in \textit{St. Catharine’s Milling}, but was not a part of the decision in \textit{Totten} as the issue was not decided.

The reported cases consistently held whites could not alienate Indian lands except through the Crown, revealing a great deal about the short reach of nineteenth century Ontario law. These reported cases, though fewer than fifteen in number, represent no more than a minute fraction of the thousands of white attempts to alienate Indian lands. The complexity of white schemes can be seen in the above cases, and represents the range of devices employed in gaining control of Indian lands. \textit{Bown v. West} brought out the best legal minds in

\textsuperscript{54} \textit{Ibid.} at 382.
\textsuperscript{55} (1856), 15 U.C.Q.B. 392.
\textsuperscript{56} M.E. Herrington, “Captain John Deserontyou and the Mohawk Settlement at Deseronto” (1921-22) 29 Queen’s Quarterly 165.
\textsuperscript{57} \textit{Supra} note 55 at 393-94.
\textsuperscript{58} \textit{Ibid.} at 396.
Ontario. The court denied a white claim to Indian lands, but was clearly troubled by the magnitude of the problem.\(^{59}\) Isaac Davids, a Mohawk Indian on the Grand River Reserve, assigned to a white man whatever interest he had in several buildings and improvements on thirty-four acres of cleared land that he “owned” according to the customary law of the Six Nations. Bown later entered a contract to buy this interest in the land and the tavern located on it. After finding parts of the ownership in dispute under tribal custom, a dispute arose over the value of the property, and Bown rescinded the contract.\(^{60}\) While the court’s holding was simple—no contract for exchange of Indian lands was valid—the complexity of the land-holding arrangements in effect at Grand River at mid-century was almost beyond the capacity of the law to adjudicate. Chief Justice John Robinson, for example, indicated the Crown, while recognizing that Indian title could not be acquired by whites, often protected white property rights to improvements built upon Indian lands under traditional doctrines of equity. Robinson further recognized that some interests of white occupiers were so substantial that a court of equity could hardly refuse to acknowledge them.\(^{61}\)

The facts of *Attorney General v. Price* speak to exactly this type of problem. The Crown’s recognition of the equity of a white squatter created another legal problem.\(^{62}\) White squatters occupied land on the Island of Point au Pelee under an Indian lease negotiated in 1788. In 1859, the Crown obtained a judgment against them for an illegal intrusion on Indian lands, but did not enforce it. Later, in 1866, an order in Council was passed in Parliament, recommending that a patent be issued to the settlers, in effect legalizing squatters’ illegal occupation. In the meantime, a third party cut timber from the lands. The Attorney General intervened arguing that Indian lands were Crown lands; thus, the Crown was entitled to the value of the timber. This view was upheld by the Court of Chancery in an opinion authored by Oliver Mowat.\(^{63}\) Thus, while the illegal squatter had one kind of property interest recognized, the Crown had still another interest in the property. The common element of all these cases is that they involve whites claiming recognition of land rights somehow derived from Indian title. Indian rights were lost or diminished, as most of these cases did not directly involve Indian rights or Indians.

\(^{59}\) (1846), 1 U.C. Jur. (O.S.) 639; aff’d (1846), U.C.E. & A. 117 (Upper Canada Executive Council).
\(^{60}\) *Ibid.* at 642-50.
\(^{61}\) *Ibid.* at 121.
\(^{62}\) (1868), 15 Gr. 304.
B. INDIAN SALE OF TIMBER AND HAY TO FRONTIER WHITES

The same laws that forbade Indians from making any agreements regarding lands with frontier whites also forbade them from entering agreements regarding the timber, stone, hay and soil on those lands. The courts initially attempted to apply the law in the same way, but were soon caught up in the contradictions of the government policy of treating Indians as dependants: such a literal interpretation of the law destroyed any possibility of reserve Indians contributing to their own livelihood, further reducing them to dependency. The fact that the courts came to treat these natural resources differently than land reveals that the courts had the interpretive capacity to do so.

Of particular interest is the case of Feagan, who was arrested by an Indian commissioner and criminally charged with trespass for purchasing cordwood from John Peters, an Indian on the Grand River Reserve who cut the wood from land he legally occupied.64 The simple fact of this 1869 arrest by Indian Department officials reveals that the Indian Department believed that cordwood was subject to the same restrictions as land, and that it could not be legally disposed of without permission. J. Martin, representing the Crown in the prosecution of the case, argued:

Indians on reserve lands have no interest in the soil. They have the right of occupation and cultivation, and of clearing their land for cultivation, and of taking their necessary firewood for use upon the premises; they have not the right of cutting and selling the timber without regard to cultivation.65

After the case was removed from Division Court to the Court of Queen’s Bench by certiorari as a special case the Court, in two different and inconsistent opinions, ruled against the Crown, handing the Indian Department one of its first legal defeats. Judge Wilson appears to have been troubled by the precise limitation on the whole question of Indian title, ruling that since nothing in the statutes forbade Indians from cutting and selling their timber, they must have the right to do so. He implicitly found some kind of traditional property right to do so, otherwise there would have been no other source of Indian interest in the wood. This interpretation is consistent with Wilson’s remarkable opening assertion that “[t]he land either belongs to or is held by the Crown in trust for the Indians.”66 At the time, few legal minds in Ontario held this view. Virtually no one conceded the Indians actually owned their reserves, and few acknowledged

65 Ibid. at 203.
66 Ibid. at 204.
the land was held in trust for them. Indians were “mere occupants” at the 
pleasure of the Crown.

Judge Morrison concurred in the result, but used reasoning that neither 
challenged the Indian Department nor conceded any Indian rights to the land. 
Rather, Morrison simply held the evidence did not show that the cordwood was 
not cut in clearing the land. The Indian right of occupancy must include the right 
to clear the land for agricultural purposes; therefore, the wood might have been 
legally cut and, having been legally cut, it could be legally sold. Morrison 
endorsed the paternalism of the Indian Department by calling for more 
regulations to protect the Indians from “any evil disposed person who may 
prompt and induce an Indian so to destroy the property belonging to the whole 
tribe”, apparently to make it easier to distinguish between firewood cut 
expressly for sale to whites and firewood cut in furtherance of occupancy.

This case expanded on Vanvleck et al. v. Stewart et al. a much simpler case 
decided nine years earlier on the same reserve. While Indian commissioners had 
licenced the sale of a large quantity of saw logs, there was evidence that some 
other logs were sold directly by the tribe to whites. At trial, the local judge 
charged the jury that Indians on Indian reserve lands could cut and sell logs 
without licence from the Crown. The Crown appealed citing, among other cases, 
Baby, Strong, Hagar, and Totten, all of which referred to the sale of Indian 
lands without licence, and failed to distinguish legally between Indian lands and 
the resources from those lands. On appeal, the Court narrowly held that the 
evidence supported the judgment, refusing to address the legal question raised. 
In dicta, however, the Court indicated a great deal of confusion about the law 
and the need for a new statute.

A later case, Regina v. Good, reveals that the Indian Department did not give 
up on the issue. Good, a white man who married an Indian woman and farmed 
on the Grand River Reserve, was convicted by a magistrate (all Indian Agents 
were magistrates) of selling his own hay without permission of the Indian 
Department and fined $20. Good appealed, arguing among other things, that 
the statute could only mean “natural hay” that was the wild produce of the land 
and not domesticated hay that he had sown and grown with his own labour. The

67 Ibid. at 204-205. This issue was to be fully argued in St. Catharine’s Milling fifteen years later. See infra note 181.
68 Ibid. at 205-206.
69 (1860), 19 U.C.Q.B. 489.
70 Supra note 43.
71 Supra note 49.
72 Supra note 52.
73 Supra note 55.
74 Supra note 69 at 490.
75 Regina v. Good (1889), 17 O.R. 725-27. The reported case contains no indication whether the 
magistrate in this case was the Indian agent.
Court held, following a simple rule of statutory construction, that the word "hay" meant its common meaning, which is both wild and domesticated grasses dried and prepared for feed.\footnote{Ibid. at 726-27.} The conviction was subsequently reversed on a technicality concerning the way in which costs were assigned.\footnote{Ibid. at 727-28.} This result technically upheld the Indian Act, but refused to uphold the conviction entered by the Indian agent, undermining the agent's legal authority.

A parallel case, \textit{Regina v. Fearman}, also lead to reversal on a technicality.\footnote{Ibid.} An unnamed Indian woman had sold a quantity of wood without licence in violation of the \textit{Indian Act}. The wood had been seized and held by the Indian Department on Johnson's property. Fearman and others entered the property and took the wood in question. They were convicted of larceny, but appealed to the High Court, arguing that the wood was not legally seized, thus not legally in the custody of the Indian Department. At issue was a statutory requirement that such a seizure of wood be ordered by a justice of the peace upon a written affidavit, which the Indian Department had neglected to do. The High Court, citing the principle of strict construction of a penal statute, reversed Fearman's conviction, although the facts clearly showed that he had sold wood that he had no legal right to sell.\footnote{Ibid. at 662-63 and 665-68.} In both of these cases the position of the Indian Department could have been upheld. It is not clear whether the Court intended to indicate displeasure with some of the excesses of the department, or simply to hold the department to the formal requirements of the law.

What is clear from both Fearman's theft of Indian Department wood and other cases is that the Grand River Indians resisted the Indian Department's control over their resources by freely violating the law. James Hunter, another Grand River Indian arrested and jailed for selling cordwood, was not only convicted and jailed by the Indian Agent acting as magistrate, but responded by bringing assault charges against the agent, alleging illegal imprisonment.\footnote{Hunter v. Gilkison (1885), 7 O.R. 735.} The case illustrates a great deal of tension between the agent's exercise of his legal powers and the Indians. Hunter had been tried by the Indian superintendent and sentenced to pay a fine of $15 plus costs of $6.75 or serve thirty days in jail on default.\footnote{Ibid. at 736.} Alleging wrongful imprisonment, Hunter was freed on a writ of habeas corpus, after serving seven days in jail. He then charged the Indian Superintendent, J.P. Gillickson, with assaulting and imprisoning him without legal authority.\footnote{Ibid. at 735 and 737.} The Queen's Bench Division of the High Court took little note
of Hunter’s argument, finding that the Indian agent clearly had the authority of a magistrate and acted legally.83

C. THE LEGAL STATUS OF INDIAN PEOPLE

While we can conclude that the property rights of Indians did not fare well in nineteenth century Ontario courts, evidently leaving Indians the right to sell nothing more than their own patented farms and some cordwood, the Ontario courts were disingenuously protective of the juridical rights of individual Indians. This, again, judicially reflected the government’s Indian policy. While Indians and their “property” (whatever property rights they had) were to be paternalistically protected by the white government, individual Indians were legally accorded the same rights as white people. This policy decision, British in its origin, is the most important legal difference between nineteenth century Canadian and American Indian law.84 As early as 1839, Chief Justice Macauley had stated that Indians had “no claims to separate nationality such as would except him from being amenable to the laws of the land.”85

It was always clear that Indians were competent witnesses. The issue was raised in Regina v. Pah-Mah-Gay by the lawyer for the defendant, a Potawatomi Indian sentenced to death at Sandwich in 1859 for shooting his brother in the back while drunk.86 Ironically, Pah-Mah-Gay’s attorney argued, on appeal, that Esh-quay-gonabi, a young pagan Potawatomi, was not a competent witness because, not being Christian, he had not been legally sworn to testify under oath. This put the Crown in the position of defending the veracity of its only witness whose testimony was essential to support the murder conviction and death sentence passed on Pah-Mah-Gay. The High Court relied on several British precedents holding that a Christian oath was not necessary; rather, any affirmation that the witness knew of his obligation to speak the truth was sufficient.87 In dicta, the Court made clear that it was only swayed by the strong precedent of British cases, and would have ordinarily concluded the testimony

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83 Ibid. at 741-45.
84 The “Friends of the Indian” an American reform group, were actively arguing for the full extension of American criminal and civil law to Indians in the 1880s and 1890s, citing Canadian precedent for this policy. W.T. Hagan, The Indian Rights Association: The Herbert Welsh Years, 1882-1904 (Tucson: University of Arizona Press, 1985).
86 (1860), 20 U.C.Q.B. 195.
87 Ibid. at 196. The court cited Omichund v. Barker & Co., (1 Atk. 21) a case arising in India. It must be obvious there could have been no criminal law enforcement in any country in the British Empire without fully accepting the testimony of native witnesses.
was not admissible.\textsuperscript{88} Possibly, the fact that it was the Crown that argued for accepting Esh-quay-gonabi's testimony swayed the Court.

While Indians were clearly liable in civil actions for debt under the common law, a protective statute forbade any person from "obtain[ing] any judgment for any debt or pretended debt" except in special circumstances.\textsuperscript{89} This was an effort to prevent whites from cheating Indians. This statute was repealed in 1869 and was retroactively tested in \textit{McKinnon v. Van Every}.\textsuperscript{90} A County Court judge had held for a white plaintiff who attempted to collect retroactively for a debt incurred by an Indian prior to 1869, arguing that the repeal of the statute had changed the law and had made the Indian fully liable for debt under the law. On appeal, the judgment was reversed. In refusing to give retroactive application to a statute, the Court relied on technical rules of statutory construction and upheld the public policy behind the statute, finding it could not subject every Indian in the Province to lawsuits for debt for a period in which the Legislature had prohibited persons from obtaining judgments against them.\textsuperscript{91} The repeal of this statute left Indians subject to actions for debt, although there were substantial exceptions for personal property on reserves.\textsuperscript{92}

Similarly, it was clear that Indians could make wills passing their personal property, subject to the \textit{Indian Act}. In \textit{Johnson v. Jones}, the will of Catherine Keshegoo, an Indian living on the Grand River Reserve, was challenged by her half-brother and next of kin.\textsuperscript{93} She had left a substantial estate consisting of $400 in promissory notes and $414 in household furniture to another person, James Johnson. Her brother relied on Section 20 of the \textit{Indian Act} providing that if an Indian male died holding a location ticket, that is an Indian agent's designation of a place of habitation on a reserve, his lot and goods went to the next of kin.\textsuperscript{94} Such provision did not apply to the will of Catherine Keshegoo because she was not an Indian male. The Court held that Indians were citizens with all the rights of other citizens except when interfered with by statute.\textsuperscript{95} By this logic, Ms. Keshegoo could leave her personal property to anyone she wished. However, her location could not be bequeathed because Indians had no property right in their reserves. The assignment of locations was a matter for the Indian agent, subject to the statute.\textsuperscript{96}

\textsuperscript{88} \textit{Ibid.} at 197.
\textsuperscript{89} \textit{Infra} note 90 at 284.
\textsuperscript{90} (1870), 5 P.R. 284.
\textsuperscript{91} \textit{Ibid.} at 287.
\textsuperscript{92} \textit{Avery v. Cayuga} (1913), 28 O.L.R. 517.
\textsuperscript{93} (1895), 26 O.R. 109.
\textsuperscript{94} \textit{Ibid.} at 112.
\textsuperscript{95} \textit{Ibid.} at 113-14.
\textsuperscript{96} \textit{Ibid.} at 111-13.
In his ruling, the judge cited Regina ex. rel Gibb v. White, among other cases, for the proposition that Indians had the same rights as other Canadians. Thomas B. White, a Wyandotte Indian, was elected Reeve of the Township of Anderson, Essex County. In addition to receiving monies as an enrolled member of the tribe, White made a good living as a trader and owned patented lands in fee simple. Dallas Norvell, the loser in the election, challenged the election, arguing that White had never been enfranchised or exempted from any of the disabilities of an Indian.

Judge Dalton’s analysis was straightforward, beginning with a comparison of the legal status of Indians in the United States and Canada. While Indians in the United States were “aliens” and not citizens, it was so obvious that Indians were full citizens of Canada that “authorities [were] needless for such a proposition.” While some provisions of the Indian Act protected the rights of reserve Indians, it was clear that any Indian who left the reserve and patented his own lands valued in excess of $100 was not an Indian within the meaning of these provisions and enjoyed the full benefit of the law. The portion of the Indian Act providing for the “enfranchisement” of Indians referred to Indians on reserves still subject to the protection of the government. It did not apply to Indians, like White, who entered into the mainstream of Canadian life. The only restrictions applying to such Indians dealt with the disposition of lands acquired from the tribe, the sale of spirituous liquors and holding in pawn anything pledged to purchase such liquors. Accordingly, no provision of law was necessary to provide for White’s right to hold elective office: he was under the same law as any other citizen.

Another Indian, George W. Hill, of the Grand River Reserve, also functioned successfully in white society until he was challenged and arrested for practicing medicine without a licence. Hill made the opposite argument of White, alleging that as an Indian enrolled on a reserve, he was subject to federal law, not to Ontario law or Ontario police regulations. The courts spent a considerable amount of time on the case. They futilely looked to both the Indian Act (which was silent on the practice of medicine) and the relevant Ontario statute (which was also silent on the question of Indians practicing medicine). The Court of Appeal avoided difficult questions pertaining to the application of Ontario statutes to the activities of reserve Indians, and held that the Indian Act did not limit the activities of Indians. Therefore, when an Indian freely chose to leave the reserve and to engage in a wide sphere of activities, he put himself

97 (1870), 5 P.R. 315.
98 Ibid. at 316.
99 Ibid. at 318.
100 Rex v. Hill (1908), 15 O.L.R. 406.
101 Ibid. at 409-11.
under the same regulations as other people. The Court specifically withheld judgment on whether Ontario law could prevent an Indian from practicing medicine on his reserve.

The problem here was that the *British North America Act* specifically relegated jurisdiction over "Indians and Lands Reserved for the Indians" to the federal government. In an earlier case, *Re John Milloy and the Municipal Council of the Township of Onondaga*, a municipal ordinance regulating domestic animals running at large, had been challenged on the ground that part of the township included part of the Grand River Reserve and the township had no authority to make regulations governing the reserve. This was particularly true in view of the fact that the *Indian Act* specifically gave Indians on reserves the right of limited self-government, including the regulation of domestic animals. Citing the *British North America Act*, the Common Pleas Division of the High Court upheld the by-law, holding that it could regulate the non-Indian lands within the township even though it could not apply to Indian lands. Moreover, the Court noted that no Indian had objected to the by-law and the Township had made no effort to enforce the law on the reserve. The objection of a white man on these grounds raised an issue that would have no impact on the litigant, regardless of how it was decided.

Juridical citizenship did not imply Indians had the same measure of justice under law as whites. Indians were cheated by whites in many ways: these injustices rarely reached the courts. When they did, local courts, responsive to local prejudice, could not be depended on to protect the rights of individual Indians. Owens, a blind and illiterate Indian who did not speak English, was sold a pair of horses for $270 by Tracy, a white man. Later, Tracy presented Owens with a paper to sign. According to witnesses, Owens asked to have the paper read to him but Tracy refused, saying it was of no consequence. Owens signed the paper, which turned out to be a mortgage on the horses.

At trial, Tracy testified he had explained the document to Owens as best he could, but had not read it to him. Another witness, who had accompanied Tracy as an interpreter, testified that he had cautioned Owens against signing the paper and that Owens had "partly" stated he agreed to a mortgage. The jury found for Tracy: clearly an injustice based on this evidence. On appeal, the Court of Common Pleas reversed the judgment and ordered a new trial. Instead of basing

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this judgment on a ruling that would specify Indian rights under such circumstances, the court based it on English common law, requiring that contracts be read to blind persons to be complete.\textsuperscript{109}

With the exception of some confusion over the reach of Ontario police regulations into Indian reserves, there was no question that Ontario Indians were citizens fully subject to Ontario law, limited only by a few minor provisions of the \textit{Indian Act}. By and large, Ontario courts did not challenge the scope of the \textit{Indian Act} and, at least with regard to the status of individual Indians, there were no significant legal challenges to federal power. At the same time, it is clear that Ontario courts neither recognized the unique status of Indians within the province, nor took into account the reality of the racism and crime against Indians by local whites. Such conditions created serious problems for any Indians attempting to assert their legal rights in local courts. For many Indians, simple evidentiary problems must have prevented them from getting their injuries redressed in court. Although Owens had no evidentiary problem, he still lost before a local jury on a particularly egregious fact pattern: blind men cannot execute binding contracts in foreign languages without having the contract read to them. How many Ontario Indians had such a clear set of facts on which to base an appeal from a local court?

D. LAWS REGULATING THE SALE OF LIQUOR TO INDIANS

Selling liquor to Indians appears to have been something of a frontier folk crime, widely engaged in and often, but ineffectively prosecuted. The scope of this prohibition was broader than the rest of the \textit{Indian Act}, in that it covered all Indians regardless of their physical location or legal status.\textsuperscript{110} More reported Ontario cases deal with this issue than any other issue of Indian law, a glaring example of the reality of nineteenth century Indian life. These cases also illustrate the focus of nineteenth century Indian law, a law more concerned with the forced assimilation of Indians than with the protection of Indian rights.

A typical case is \textit{Regina v. McAuley}, which challenged the scope of the magisterial authority of an Indian Agent.\textsuperscript{111} On the testimony of an Indian, Simeon Rocky-Mountain, Agent Duncan McPhee of Rama Indian Reserve convicted Alexander McAuley, a hotel keeper, of selling beer and whisky to four Indians. The testimony showed not only that McAuley’s wife had actually served the liquor, but also that McAuley had been away from his hotel working at a lumber camp in another county when the liquor was sold.\textsuperscript{112} There is no

\textsuperscript{109} \textit{ibid.} at 384.

\textsuperscript{110} \textsuperscript{1870}, 5 P.R. 80.

\textsuperscript{111} \textsuperscript{1887}, 14 O.R. 643.

\textsuperscript{112} \textit{ibid.} at 646.
question that Mrs. McAuley was in the business of selling liquor to Indians. These facts were of no concern to either Agent McPhee or the Court of Common Pleas, following the common law rule that the act of the wife was that of the husband.\textsuperscript{113} McAuley was convicted and fined $50 or ninety days in jail. Having failed to pay the fine, he was arrested on a warrant and taken to jail.\textsuperscript{114}

The Court was, however, very concerned with the precise limits of the magisterial powers of an Indian Agent. Those powers appeared to be quite broad under the statute, giving Indian agents the same powers as police magistrates over "any infraction" brought under the \textit{Indian Act}.\textsuperscript{115} The Court set out to determine the scope of McPhee's powers. This inquiry must have been a bit disingenuous given that McPhee had tried McAuley on the Rama Indian Reserve for a sale of liquor that had occurred in Rama Township, adjacent the reserve. The Court found that McPhee had magistrate's powers at Rama and in the County of Ontario, consistent with the intent and scope of the \textit{Indian Act}. However, the Court also found that McPhee was the "agent for the Chippewa Indians at Rama" and that the indictment was defective because it did not allege that the Indians involved were Chippewa Indians.\textsuperscript{116} McAuley's conviction was reversed. Such a limitation on McPhee's powers was pure nonsense under the \textit{Indian Act}, especially since Indians always moved relatively freely from one reserve to another and the Agent's task was broadly defined as a general supervision of Indian activity in his area.

This interpretation of the act in \textit{McAuley} seems especially dishonest in view of \textit{Regina v. Green}, a case arising a year later.\textsuperscript{117} Green, an Indian, was convicted in Brantford's police magistrate's court of selling liquor to an Indian and sentenced to four months in jail at hard labour. On appeal, he argued he had been charged with selling liquor on September 27 but was convicted of selling liquor on September 29. The \textit{Indian Act}, apparently in recognition of the rough quality of rural or frontier justice, contained a provision that "no conviction...shall be quashed for want of form...and no warrant of commitment shall be held void by reason of any defect therein...if there is a good and valid conviction to sustain the same."\textsuperscript{118} The Judge held where an offence "clearly proved over which the convicting magistrate has jurisdiction" the conviction must be upheld.\textsuperscript{119}

\textit{Regina v. Murdock}\textsuperscript{120} is consistent with the Ontario courts' lack of concern with legal technicalities not going to jurisdiction. In this case, a defective conviction for selling liquor to Indians was amended on appeal, correcting the

\begin{itemize}
  \item \textsuperscript{113} \textit{Ibid.} at 649-50.
  \item \textsuperscript{114} \textit{Ibid.} at 646.
  \item \textsuperscript{115} \textit{Ibid.} at 651.
  \item \textsuperscript{116} \textit{Ibid.} at 653-54.
  \item \textsuperscript{117} (1888), 12 P.R. 373.
  \item \textsuperscript{118} \textit{Ibid.} at 374-75.
  \item \textsuperscript{119} \textit{Ibid.} at 376.
  \item \textsuperscript{120} (1900), 27 O.A.R. 443.
\end{itemize}
defect so that the conviction could be upheld. The Indian agent, acting as a police magistrate, neglected to assert that the person to whom the liquor was sold was an Indian, clearly a substantial issue, similar to failing to allege the tribe of the Indians as in *McAuley*. The appellate court noted the record was silent on this issue and found that the sale had occurred on the Grand River Reserve, and that the law prohibited the sale of liquor "to a person" on an Indian reserve as well as to Indians.121

Additional evidence of the hostility of Ontario courts to the criminal jurisdiction of Indian agents acting as police magistrates under federal authority can be found in *Regina v. MacKenzie*.122 J.P. Gilkinson, Indian Agent at Grand River Reserve, tried James MacKenzie for selling liquor to Andrew Statts, an Indian, in the city of Brantford. MacKenzie refused to appear before Gilkinson, alleging he was prejudiced against him, but was represented by his lawyer. Gilkinson insisted on proceeding with the trial and MacKenzie’s lawyer withdrew from the proceedings. Gilkinson declared the case closed, with no evidence being offered for the defence. Three days later, in the presence of MacKenzie and his lawyer, the judgment was read: MacKenzie was found guilty and was fined $50 or three months in jail upon default of payment. MacKenzie appealed, alleging eight errors in the trial.123

His conviction was reversed on two grounds. First, his sentence to jail in default of fine was unlawful since the statute provided for a fine and imprisonment. This defect could easily have been corrected on appeal. Second, the Court of Common Pleas found that the evidence did not establish that the liquor was not used under the sanction of a medical man or minister of religion, which were legal uses under the statute.124 Legality of the use, a part of the burden of proof, was not raised at trial. Arguably, it was both a defence to the charge and an error of the type that appellate courts might correct on appeal from the record.125 MacKenzie, for example, also alleged that nothing in the record showed Statts to be an Indian, an equally important element of the prosecution’s burden, but the appellate court was not moved by this argument. Young, a tavern keeper in the Village of Caledonia charged with selling liquor without a licence and selling liquor to Indians, had lost a similar appeal the same year, despite arguing it had not been proven that he did not have a licence.126 The appellate court held the burden was on Young to prove he was licenced.127

121 Ibid. at 444-45.
122 (1884), 6 O.R. 165.
123 Ibid. at 166-68.
124 Ibid. at 169.
125 Regina v. White (1871), 21 U.C.C.P. 354 at 356 was cited by the Court for the proposition that under a few circumstances liquor could be legally provided to Indians.
126 Regina v. Young (1884), 7 O.R. 88.
127 Ibid. at 89.
Nineteenth century Ontario jails were filled with Indians charged with being intoxicated. The whites who sold them liquor did considerably better in court. Appellate courts showed an inconsistency in their tolerance of technical defects in such convictions, but appeared to have some reservations about the police magistrate’s powers of Indian agents, which led them to overturn some of their convictions on minor technical grounds. The message to the Indian agents was to restrict their power to Indians and to Indian reserves, and to be cautious about extending their jurisdiction to local whites.

E. INDIANS UNDER CANADIAN CRIMINAL LAW

The same general rule that Indians were fully subject to Canadian law also applied to criminal law: Indians were frequently convicted of crimes in nineteenth century Ontario. The range and type of these convictions will be dealt with in more detail in section III. Here the focus is confined to the legal basis of this criminal jurisdiction. It appears to have been so obvious that Indians were fully subject to Canadian jurisdiction that the lawyer of Pah-Mah-Gay, trying desperately to save the life of a client sentenced to death for murder, did not even raise the jurisdictional issue in his appeal. Rather, he un成功fully challenged the admissibility of the evidence of a pagan witness.128 Similarly, the jurisdictional issue was not challenged by attorneys for Sam Pah-Mah-Gay who was charged in 1858 with murder.129

Only slightly more troubling for the courts was the question of mens rea, the problem of punishing Natives for offences when they lacked any wrongful intent.130 Regina v. Machekequonabe is among the best known Native law cases in the common law world, holding an Ojibwa Indian criminally responsible for manslaughter after he killed a “windigo,” an evil spirit clothed in human flesh.131 The case arose at Sabascon Lake, in the wilderness of Northwestern Ontario, among Indians who had little contact with Canadian society. Machekequonabe was one of eight Indians placed on sentry duty because a windigo had been seen and villagers feared they would be harmed. On seeing what they believed to be a windigo, Machekequonabe and another sentry chased and challenged the unknown figure, a large human form wrapped in a blanket. Finally, in the dark

Machekequonabe fired, tragically killing his own foster father.\textsuperscript{132} The trial court rejected the \textit{mens rea} defence and the defence of insanity and convicted him of manslaughter, sparing him from the death penalty for intentional murder.\textsuperscript{133}

The Indian Department financed an appeal. In Divisional Court, Machekequonabe’s lawyer argued the common law defence of mistake of fact.\textsuperscript{134} The Divisional Court refused to look beyond the narrow question of whether there was adequate evidence to support the jury verdict, ignoring the question of law posed by the defence. The verdict was upheld.\textsuperscript{135} Perhaps illustrating the trial court’s own difficulties with the case, Machekequonabe was given a comparatively light sentence of six months in jail.\textsuperscript{136} Many whites, while broadly defending Canadian jurisdiction over the criminal activity of Indians, were troubled by the court’s failure to take any cognizance of the subjective fear of an Ojibwa band of the windigo. The transcript paints a vivid picture of a band of Indians in real danger, as posting eight sentries illustrates. The intricate and very real cultural world of the Ojibwa found no recognition in Ontario courts. A string of windigo cases followed over the next twenty years in central Canada, leading to similar results.\textsuperscript{137}

What were the goals of Canadian justice in such cases? There is direct evidence of this in the case of \textit{Rex v. Tushwegeh}, another Ojibwa murder case from Northwestern Ontario.\textsuperscript{138} Tushwegeh, for unknown reasons but quite possibly believing he was killing a windigo, strangled Geeshingoose, his brother-in-law, in their camp at Cat Lake. Upon hearing the story of the crime, a police constable was sent to Cat Lake to gather evidence. Unfortunately, this

\textsuperscript{132} \textit{Regina v. Machekequonabe}, \textit{ibid.} at 309. A transcript of this case survives in the Canadian National Archives, RG 13, vol. 2089. This account of the killing is on pages 4 and 5 of the transcript.

\textsuperscript{133} \textit{Ibid.} at 310.

\textsuperscript{134} This defence essentially removes the \textit{mens rea} of intending a criminal act. See E.R. Keedy, “Ignorance and Mistake in the Criminal Law” (1908-1909) 22 Harv. L. Rev. 75; R.M. Perkins, “Ignorance and Mistake in Criminal Law” (1939-40) 88 Univ. of Pennsylvania L. Rev. 35.

\textsuperscript{135} \textit{Regina v. Machekequonabe}, supra note 131 at 311. Correspondence relating to the appeal and a handwritten outline of the appellate argument is held in the Canadian National Archives, RG 13, vol. 2089.

\textsuperscript{136} Letter of A.J. Wink, Barrister at Law, Port Arthur, Ontario to Oliver Mowat, Ontario Minister of Justice (9 December 1896), contained in Canadian National Archives, RG 13, vol. 2089.


\textsuperscript{138} This case is unreported. The case file is held in Ontario Provincial Archives, RG 3, file 181 (1906).
constable died before his evidence could be given, raising the issue of whether another officer should be sent for another attempt to gather evidence. Ontario Department of Justice officials were reluctant to proceed with "such a doubtful case," now two years old. The Indian Department, however, took a different view and, through the Canadian Department of Justice, prevailed over Ontario officials. It was "important that this Indian be put on trial even though prospects of seeing conviction [were] extremely weak, as it [was] necessary that the Indians should understand they [were] within reach of the strong arm of the law." Tushwegeh was brought out of the wilderness in November of 1905, but it was too late in the year to bring out the witnesses. He was held in jail all winter, and finally tried at Kenora in the summer of 1906. He was acquitted because the evidence was inadequate. Nevertheless, the criminal law had served its purpose. It had extended the power of the Canadian state to the farthest reaches of the country. Because the law could effectively be used to control and socialize Native people, it was a powerful instrument to force assimilation. Therefore, the symbolic reach of the law, showing Native people that they must defer to Canadian power, was more important than convictions and prison sentences.

F. FAMILY LAW

Matters involving Indian family law simply were not taken to the Ontario courts. The one case that was decided, Robb v. Robb, considered the legality of a marriage under tribal law. The decision was treated with exceptional hostility, testing even the limits of the excessive reliance on judicial formalism of Ontario law. John Robb died, leaving his estate to his son, William Robb, or his son’s heirs. Since William had died, his daughter, Sarah Jane Robb, stepped forward to claim the estate, but was sued by John Robb’s wife, who claimed that Sarah was illegitimate and thus not entitled to her father’s inheritance. On the facts, a clear case could be made for a marriage under tribal law. In 1869, William journeyed to Vancouver Island and married an Indian woman named Supul-Catle, daughter of Wah-Kus, chief of the Comox tribe. Wah-Kus had given a feast in honor of

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139 Ibid. Letter of Deputy Minister of Justice to Deputy Attorney General of Ontario (15 March 1906).
140 Exactly ten years later Canadian law reached the farthest corner of the country when an RCMP patrol reached the Arctic Ocean at the mouth of the Copper River to arrest Sinnisiak and Uluksuk, two Copper Inuit accused of the murder of two Roman Catholic priests. R.G. Moyles, British Law and Arctic Men: The Celebrated 1917 Murder Trials of Sinnisiak and Uluksuk, First Inuit Tried Under White Man’s Law (Saskatoon: Western Producer Prairie Books, 1979).
141 On the symbolic purposes of early Canadian law in the Arctic, see Harring, supra note 16 at 62-63; on the Northwest Coast see D. Cole & I. Chaikin, An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast (Vancouver: Douglas & McIntyre, 1990).
the couple and presents had been exchanged, indicating an acceptance by all parties of family obligations. The couple lived in Wah-Kus’ home for nearly ten years until the death of Supul-Catle. Robb then took their daughter back to Kingston, introducing her as his child, and raising her in his parents’ house. He claimed he had been legally married to the child’s mother.\footnote{Ibid. at 592-93.}

Judge Robertson, of the Ontario Court of Common Pleas, rejected these facts as proof that a legal marriage existed.\footnote{Ibid. at 595-96.} In so doing, he did not follow Canada’s leading case on the legal status of Indian marriages, \textit{Connolly v. Woolrich}, which, on incredibly similar facts, upheld the legality of such marriages.\footnote{(1867), 11 L.C. Jur. 197 (Superior Ct.). This case is discussed in C. Backhouse, \textit{Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada} (Toronto: Women’s Press, 1991) at 9-28. Connolly, while in the employ of the Hudson’s Bay Company, had married an Indian woman according to tribal custom, and brought his family back to Montreal. Later, he abandoned his wife and, without bothering to obtain a divorce, married another woman. Upon Connolly’s death, his Indian wife sued for a share in his estate. The Quebec court held the marriage under tribal law was legal under Quebec law.} Robertson’s legal reasoning had nothing to do with any idea of legally recognizing tribal institutions and customs. For him, the two cases were distinguished by geography: Connolly, a trader whose “moral character was beyond reproach” (evidently an adverse comment on the moral character of Robb), would have had to travel “3,000 to 4,000 miles in canoes, or on foot, to get married by a priest or magistrate.” Robb, on the other hand, was within the jurisdiction of British Columbia, presumably within reach of such authorities, therefore, he could have contracted a marriage under British Columbia law if he had desired.\footnote{Judge Robertson’s gratuitous comment on Connolly’s moral character in view of his close knowledge of the facts of the case, which centered on Connolly’s abandonment of his Indian wife and their children, can only be understood as a reflection of his racism. He would surely have seen Connolly’s actions as morally reprehensible according to the values of Victorian Ontario if he had abandoned his white wife and their family. Moreover, Robertson was wildly ignorant of both Canadian geography and Canadian history. By the mid-nineteenth century missionaries of many denominations were attending to the Indians of the Northwest and no place in Athabasca was more than 1,000 miles from a clergyman, far less in many cases.} Moreover, Robertson was reluctant to accord tribal marriages any legal status under Ontario law due to his concerns that the Comox were pagans and practiced plural marriages.\footnote{Supra note 142 at 596-97.} Finally, after again rejecting any recognition of a marriage under Comox tribal law or custom, Robertson recognized the marriage under the common law maxim that “when a doubt exists as to the legality of a marriage, courts of justice are bound to decide in favour of the alleged marriage.”\footnote{Ibid. at 597.} The fact of simple geography distinguished the two marriages and provided Judge Robertson with a basis for believing that a legal marriage might have occurred: Robb had access to British Columbia magistrates.
and clergy.\textsuperscript{149} Thus, while the courts of Quebec explicitly recognized marriages under Indian law or custom, Ontario courts expressly rejected this view. Robb's marriage was only valid because there was a legal presumption that he had contracted a legal marriage under British Columbia law. This judicial attitude, coupled with the paucity of cases, clearly suggests that family matters involving Indian custom were not brought to Ontario courts.\textsuperscript{150}

G. FISH AND GAME LAWS

The only major area of Indian activity for which there are no reported Ontario cases is criminal prosecution under fish and game laws. Although there appears to have been a substantial number of prosecutions, none led to reported cases, doubtlessly reflecting the lack of individual Indian defendant's resources to finance appeals. The records of the Ontario Attorney General clearly indicate that Ontario denied Indians any right to hunt and fish, holding Indians to the same fish and game laws as whites. William McKirdy, a trader at Nipigon Lake, directly posed this question in an 1892 letter to the Attorney General. McKirdy pointed out that Indians in his region had "no means of living except from fishing and hunting and serious results [would] follow from applying Ontario fish and game laws."\textsuperscript{151}

The province's answer was disingenuous: J.M. Gibson, Provincial Secretary, wrote that although Ontario laws did apply, the laws specifically provided that "Indians or settlers in unorganized districts could kill game for food or necessities of life, but not for sale or traffic."\textsuperscript{152} That was exactly the point. McKirdy wrote back immediately, arguing that hunting was of no use unless the Indians could sell their furs.\textsuperscript{153}

The Indians hunted anyway, risking the punishment of Ontario law. Thomas Fox was arrested in 1909 for illegal possession of ten beaver pelts. He received a jail sentence, but the magistrate suspended it because Fox had no ability to pay.

\textsuperscript{149} Ibid. at 596.

\textsuperscript{150} Ontario was not unique in refusing to recognize Indian marriages under customary law. This legal recognition of Indian marriages did not extend to plural marriages in the West which were prosecuted under Canadian law by the end of the nineteenth century. Bear's Shin Bone, a Blood Indian, appears to have been jailed on bigamy charges in 1899. \textit{The Queen v. "Bear's Shin Bone"} (1899), [1898-1901] 4 Terr. L.R. 173.

\textsuperscript{151} Letter of William McKirdy to Attorney General, Ontario Provincial Archives, RG 8, Series, 1-1-D, no. 3257 (1892).

\textsuperscript{152} Telegram of Gibson to McKirdy, Ontario Provincial Archives, RG 8, Series, 1-1-D, no. 3257 (4 July 1892).

\textsuperscript{153} Letter of McKirdy to Gibson, \textit{ibid}. 
Since the statute did not provide for a suspended sentence, the Attorney General was asked for a ruling. The Attorney General ruled the magistrate “has no power to suspend sentence” but recognizing the hopelessness of the situation, he added that “it might be better to let the matter stand.”

A year later, W.F. Langworthy, Crown Attorney at Thunder Bay, wrote for instructions on the same matter. Two Indians had been arrested for shooting a moose near Sturgeon Lake and were defended in court by their Indian Agent. Even though the shooting occurred off the reserve, the Agent argued that the Robinson Treaty gave the Indians the right to hunt. The Attorney General again replied that the position of the Province was that Indians were subject to the same fish and game laws as others, denying any legal impact of the Robinson Treaty on Ontario law.

Doubtlessly, the arrogance of the Ontario government caused much suffering among the Indians, especially in Northern and Western Ontario. It also caused at least one death. Pierre Hunter, an Ojibwa hunter from Sioux Lookout charged with hunting moose out of season, froze to death in the winter of 1915-16 after being discharged from prison with no money. In the fall of 1914, Hunter had been warned by an Ontario Fish and Game officer, George Fanning, of a report that he and another Indian were selling moose meat at night in Sioux Lookout. Threatened with jail, he had agreed to return to his home at Wako and stop hunting. Three weeks later, Fanning heard that Hunter had shot two large moose, leaving the meat for white men and Indians to see, saying he would get even with the game warden. The next fall, Hunter returned to Sioux Lookout and started selling moose again. He was arrested by Fanning and taken before a police magistrate. Sentenced to a fine of $20 and costs or thirty days in jail, he was taken to jail in Port Arthur because he had no money. Asked to file a report after Hunter’s death, Fanning stated he had no regrets as “sending him to jail done him no harm...but it did the Indians around here considerable good.”

Ontario’s interpretation and application of its fish and game laws to Indians was simply wrong, a legal arrogance not corrected until the middle of the twentieth century.

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154 Memorandum of Attorney General to Cartwright, Ontario Provincial Archives, RG 1, file 1799 (1907).
156 RG 4, file 1572 (1916).
These cases, taken together, show a substantial amount of legal activity involving Indians in nineteenth century Ontario. Few consistent doctrines of Indian law emerged from the Ontario courts as was the case in United States courts. Despite a clear denial of Indian land title and a clear recognition of Indian legal rights in other areas of law, courts were conservative in their approach to questions of Native law, relying heavily but inconsistently on judicial formalism, the endless citation of technicalities of law in ways that obscured the clear policy choices the courts were making.\textsuperscript{158} It cannot be said that the courts followed the policies set out by the executive branch by rote. For example, a clear Indian Department policy of punishing the sale of liquor to Indians was not given full effect by the courts when it would have been quite simple to do so. Similarly, Indian Department paternalism in controlling Indian resources was deemed inappropriate by the courts and judges weakened the capacity of the Indian Department to control Indian wood and hay. Perhaps in both areas of liquor law enforcement and the control of Indian resources, local white interests conflicted with national policies and the Ontario courts were responsive to local interests. This local/national conflict is at the core of Indian law, both in Canada and the United States, and is traditionally one of the foundations of the idea that Indian Affairs are matters of national, not local concern.

\textbf{II. ST. CATHARINE’S MILLING: THE INDIAN TITLE CASES}

There is no question that the major contribution of the nineteenth century Ontario judiciary to Canadian Indian law is \textit{St. Catharine’s Milling and Lumber Company v. Attorney General of Ontario}.\textsuperscript{159} This is true not only because the case arose in Ontario, but because Ontario lawyers and judges determined both the argument and disposition of the case from beginning to end, with their arguments convincing both the fledgling Supreme Court of Canada and the Privy Council. The case represented a great political victory for Ontario and the provinces over the Dominion government. Native people, who were not even parties to the case, were even greater losers. They were denied the ownership of their ancestral lands, although they were left with some lesser usage rights.


At the core of this dispute was control of Ontario’s vast lands. Under the British North America Act, Indian lands and Indians were clearly under federal jurisdiction. Crown lands within the provinces were under provincial jurisdiction. This federal arrangement became the political foundation of Canada.

The first case to implicate the difficulties involved was Bown v. West. It involved a suit for breach of a contract to sell Indian lands on the Grand River Reserve. The Court of Chancery denied relief on the ground that Indian lands were vested in the Crown, hence could not be contracted for sale. In reality, this holding was narrower than it appeared because the Grand River Iroquois had received their lands from the Crown and were not traditional occupants.

Given the unique legal history of Grand River land title, Church v. Fenton was the most important land title case prior to St. Catharine’s Milling. The lands involved were Indian lands, surrendered to the Crown by the Indians in 1854, and held by the Indian Department as “Indian lands” under the control of the Dominion government. The Dominion sold the land to whites, with the first of ten annual installments to be paid in 1857. Upon completion of payment, a patent dated June 14, 1869 was issued. In 1870, the land was sold because taxes were in arrears for 1864-1869. The owner argued that until the land was patented, it was still “Indian lands” under Dominion jurisdiction and was not subject to provincial taxes. This issue was significant because Indian lands were commonly sold in installments and a substantial proportion of the frontier tax base was in question. Also involved was a larger issue of federalism—the reach of Dominion powers into local provincial matters.

Much Indian land was disposed of in this way, with proceeds held “for the benefit of the Indians.” In theory, the Dominion’s expensive Indian policy could be self-supporting. Ultimately, most of the Indian lands in Ontario were sold to whites. For example, the Grand River Reserve was reduced to less than ten percent of its original size. This policy was of great benefit to local whites and to the Province as the land became taxable under provincial jurisdiction.

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160 BNA Act, s. 24. The entire discussion which follows treats a legal issue of great complexity in a few pages. See e.g., B. Slattery, The Land Rights of Indigenous Canadian Peoples, supra note 24; B. Clark, Indian Territory: Crown Rights Inchoate (M.A. Thesis, University of Western Ontario, 1986); and D. Johnston, The Taking of Indian Lands in Canada: Consent or Coercion? (Saskatoon: University of Saskatchewan Native Law Centre, 1989).

161 (1843) 11 Grants Chancery 639.

162 The legal status of the Grand River Reserve is still at issue. See supra note 29.

163 (1878), 28 C.P. 384.

However, the policy contributed to increasing poverty of the Indians, and deprived tribes of their economic base.

The Ontario Court of Common Pleas’ decision in Church v. Fenton is illuminating. The court took a long detour into the nature of Indian title that was not necessary to support its judgment. Judge Gwynne held the lands were subject to taxation and tax sale by broadly interpreting a pre-confederation statute which made assigned Crown lands subject to local taxation to include assigned Indian lands. He analogized that Indian lands were simply a type of Crown land sold in the same way, for the same purpose and therefore subject to the same Act. Indian title was dealt with specifically by asserting that the Crown had a “right by conquest” over Indian lands, but had “waived” that right and had chosen to extinguish Indian title by “treaty of surrender.” The Court went on to describe this arrangement as the basis of the “expression” to the effect that certain lands were vested in the Crown “in trust” for Indians. Although the legal basis of this trust arrangement was openly doubted by the Court, it held the legal basis was irrelevant to the outcome of this particular case.

Recognizing that Indian lands were held “in trust” would have given the tribes an actionable property right in their lands. It was clear that Ontario courts did not accept the trust doctrine, dismissing it as irrelevant. Instead, the Court in Church v. Fenton asserted a fictional “right by conquest”: Ontario lands had never been taken from the Indians by conquest. This false assertion was not challenged, and provided much of the basis for Ontario’s case in St. Catharine’s Milling. Indian lands were indistinguishable from Crown lands as all land in Canada was swept under the Crown by a noble conquest of an empty new world. Church did not directly decide any questions of Indian title: it simply turned on matters of frontier tax policy under Canadian federalism.

The historical context of St. Catharine’s Milling is thoroughly documented. St. Catharine’s Milling, the most extensively litigated Native rights case in Ontario prior to Bear Island, involved Indian title only in an obscure way. Ontario and the Dominion government each claimed title to Indian lands, but each based possession of those lands on different theories of acquisition from the Indians and the process of alienation of Indian title. Upon Confederation, title to Crown lands within the provinces went to the provinces, while responsibility for Indian lands went to the Dominion government. This created an obvious potential for conflict. St. Catharine’s Milling and Lumber Company was an Ottawa corporation that took a lease from the Dominion government on an extensive tract of pinelands at Wabigoon Lake near Dryden in Northwestern Ontario.

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165 Supra note 163 at 395-401.
166 Ibid. at 388.
167 Ibid. at 388.
168 Supra note 11.
Perhaps more important than the reported opinions are the respective arguments of both Ontario and the Dominion about the nature of Indian title, for these arguments represent the best legal analysis on issues of Native rights available in Canada at the time. The Dominion government claimed that it had taken the lands from the Ojibwa through their land surrender in Treaty Three, the North-West Angle Treaty of 1873.\(^{169}\) According to this view, these lands were "Indian lands" until ceded to the Dominion government by treaty and were therefore "Indian lands" at Confederation in 1867. Ontario claimed the lands were Crown lands because the Indians held no title. Rather, they possessed a lesser right to occupy and use the lands. Therefore, Ontario argued the Dominion government had negotiated a treaty for political purposes only (to ensure good relations with the Indians), and had not acquired any proprietary interest in the land through the treaties. It followed that St. Catharine's Milling Company had neither legal lease nor any right to take timber on Crown lands that had been passed to Ontario at confederation.\(^{170}\)

Canadian Indians had no right to their land other than what the Crown permitted. At stake was more than ownership, control and development of millions of acres of Crown land. The whole structure of Canadian federalism was in the process of development. Ontario, leading the provinces, took the view that they were full partners in the federal system, a model involving a relatively weak central government. The Dominion government argued for a model with a much stronger central government and much weaker provincial governments.\(^{171}\)

The briefs of both sides, as argued in the Supreme Court of Canada, survive together with a printed appendix of the primary historical documents cited.\(^{172}\) While there is no complete record of the arguments in the two Ontario courts which preceded, the Supreme Court case doubtlessly represents a polished version of Ontario's original arguments. Apparently, the Dominion's case was not firmly established until the Supreme Court argument. Having lost in the Ontario courts, the Dominion had considerably more incentive to rethink its case. The case moved with great rapidity through the courts. It was argued first in Chancery Division in June, 1885; subsequently in the Ontario Court of Appeal in December, 1885; and finally in the Supreme Court of Canada in November of

\(^{169}\) Morris, \textit{supra} note 28 at 44-76.

\(^{170}\) S.B. Cottam, "Indian Title as a 'Celestial Institution' ", \textit{supra} note 11 at 247-48. Here, besides acknowledging that I base my historical analysis of \textit{St. Catharine's Milling} on Barry Cottam's work, I gratefully acknowledge that he read this manuscript, made a number of helpful suggestions on \textit{St. Catharine's Milling} (and other issues throughout this article) and pointed out errors in my analysis. I, of course, am responsible for the errors that remain.


\(^{172}\) The original case file is held in the Canadian National Archives, RG 125, vol. 58, file 648, parts 1 and 2.
1886. The respective briefs in the Supreme Court are essentially evolutions of the original arguments.

Ontario had a powerful advantage in bringing the case in its own courts. The case was tried in the Chancery Division, before Ontario’s own judge, Chancellor John Alexander Boyd. His decision and its underlying reasoning was substantially upheld (with some significant limitations) all the way to the Privy Council. Chancellor Boyd had been President of the Chancery Division of the High Court of Ontario for four years at the time he heard *St. Catharine’s Milling*. Prior to that, he had spent twenty-two years as a partner in Edward Blake, one of Toronto’s elite law firms. Blake, who was a leading liberal politician and member of one of Ontario’s most distinguished families, ultimately argued the *St. Catharine’s* case before the Privy Council. Boyd was well schooled in the technical intricacies of the law and was a conservative jurist who could be depended on to write well-crafted opinions. He appeared to have had no knowledge of either Indians or Indian law prior to the case, although he was evidently familiar with the Indians in the vicinity of his summer house north of Toronto. Indeed, the title to his house on Georgian Bay may have been clouded by the same Indian title problems as St. Catharine’s Milling Company’s timber tract, giving Boyd a direct interest in the outcome of the case.

Clearly showing this was no ordinary case, Oliver Mowat, Premier and Attorney General of Ontario from 1872-1896 and the dominant political leader in the Province during that entire period, personally appeared as one of the province’s lawyers.

The Ontario argument was essentially the work of David Mills, a rural Ontario lawyer, judge, Member of Parliament and cabinet minister. Ironically, Mills was something of a progressive on matters of Indian rights in land at the time of *St. Catharine’s Milling*. He was in charge of Indian affairs during his term as Minister of the Interior in the 1876-78 Liberal government of Alexander MacKenzie. He had paid particular attention to the condition of Indians in British Columbia since the Province did not recognize Indian title and was rapidly alienating Indian land. Mills thought that Indians had some “right or

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175 I am indebted to Professor Peter Barton, a distant relative of Boyd, for this information in a private communication of 22 January 1993.

176 A.M. Evans, “Oliver Mowat: Nineteenth-Century Ontario Liberal” in Swainson, ed., *supra* note 171, 34. Mowat’s role in the argument was symbolic, asserting the political importance of the case.

177 British Columbian Indian land title has a legal history distinctly different from that of Ontario, stemming from that province’s distinct colonial status. *Aboriginal Peoples and Politics*, *supra* note 21.
title" to their lands that had to be legally extinguished before white settlement could begin.\textsuperscript{178} In 1881, Mills asserted in Parliament:

> [both] the British Parliament and the American Supreme Court “have always recognized a title in the Indians—not a political sovereignty over the country, but a personal right of property in the soil. That title in all other British colonies had been always considered as existing before the Crown undertook to deal with the lands for the purpose of sale or disposal to other parties.”\textsuperscript{179}

As a staunch provincial rightist in Parliament, Mills came to represent Ontario’s interests in expanding to the northwest, and his position on Indian title shifted. Although accused of denying that government acknowledgement of Indian land title meant the land actually \textit{belonged} to the Indians, he argued this recognition of title was a mere political expediency designed to protect good relations with Indians.\textsuperscript{180} This conception of Indian title was central to the Ontario argument.

The main thrust of the Ontario argument was far removed from the legal and historical nature of Indian title. Ontario’s argument focused on the intent of the \textit{British North America Act}, arguing the phrase “Indian lands” meant only reserves, and not all the unoccupied land in Canada. Most judicial efforts and most of the reported pages in the opinions dealt with this issue of interpretation.

The legal and historical nature of Indian title, however, was a critical element of the Ontario case, playing a complex role in its structure. In some ways, the argument about the nature of “Indian title” was little more than the fodder of an exercise in judicial formalism, at times hardly even relevant to the case in the minds of the judges. In this context, it is a misnomer to refer to the case by its popular name, the “Indian title” case: Indian titles were not really at issue, except to the extent that some provincial or Dominion legal right might stem from that title. Yet, even if Indian title was fodder, it was a special kind of fodder, for it brought into the common law the full range of nineteenth century ideas concerning Indian land ownership. Building on this context and the judicial maxim that one cannot separate the holding in a case from its facts, \textit{St. Catharine’s Milling} arguably turns on issues other than Indian title; thus, it is inappropriate as a judicial precedent for Indian title questions. A detailed look at the four opinions and the arguments of both sides in the Supreme Court will put the Indian title argument in the context of the rest of the case.

\textsuperscript{178} S.B. Cottam, “Indian Title as a ‘Celestial Institution’: David Mills and the \textit{St. Catharine’s Milling Case}” in Abel & Friesen, eds., \textit{supra} note 11 at 250-52.

\textsuperscript{179} \textit{Ibid.} at 252.

\textsuperscript{180} \textit{Ibid.} at 253. For a summary of different common law legal approaches to aboriginal title see B. Slattery, \textit{Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title} (Saskatoon: University of Saskatchewan Native Law Centre, 1983).
At trial in Chancery Division, Premier Oliver Mowat's argument centered on Indian title, asserting that Ontario Indians had only a moral claim to the land, a claim not recognized in law.\textsuperscript{181} He cited two Ontario cases, \textit{Brown v. West} and \textit{Church v. Fenton}; the American case, \textit{Johnson v. M'Intosh}; and the American commentator Chancellor Kent in support of this proposition.\textsuperscript{182} According to Mowat's view, the numerous Ontario land surrenders, which had involved very complex and direct negotiations between the Crown and the various tribes in Ontario, were dismissed as "only out of endeavor to satisfy the Indians." Mowat denied that any property right underlay the policy.\textsuperscript{183} To underscore this point, Mowat argued that British Columbia had never recognized any Indian land title, implicitly denying that Ontario had an entirely different legal and political history.\textsuperscript{184}

Attorney D'Alton McCarthy, Jr. appeared for St. Catharine's Milling Company, was paid by the Dominion government, and argued the case for the Dominion's claim to the land. He relied more extensively on American cases, which supported both the proposition that the Indians had some form of title, and that Indian matters in a federal system fell to the national government. This federal power was broad, not simply the narrow authority over small reserves that Ontario would have recognized. While McCarthy cited \textit{The Cherokee Nation v. Georgia}, \textit{Worcester v. Georgia} (collectively referred to as the "Cherokee cases") and a number of other American cases and commentators, he failed to refer to their context, which involved a complex and parallel dispute between the states and the national government over both the alienation of Indian lands and the political control of Indian affairs.\textsuperscript{185}

Chancellor Boyd's opinion was addressed to the issues raised by Mowat. He began by noting that lands in Canada had been vested in the Crown by conquest,  

\textsuperscript{181} \textit{R. v. St. Catharine's Milling and Lumber Co.} (1886), 10 O.R. 196 at 199-201. The case was argued during the Northwest Uprising of 1885, a Métis uprising over land rights and other grievances. Obviously, this context might tend to undermine any idea that the Indians had extensive legal rights. See Smith, \textit{supra} note 11 at 9-10.

\textsuperscript{182} \textit{Ibid.} at 199; \textit{Johnston v. M'Intosh} 8 Wheat. 543 (1824); J. Kent, \textit{Commentaries on American Law}, vol. 1, ed. by O.W. Holmes, (Boston: Little, Brown, 1896) at 258.

\textsuperscript{183} \textit{St. Catharine's Milling, ibid.} at 200.


and that public lands in Ontario had been transferred from the Crown to the Province in 1837 by statute. 186 Boyd then turned to the Indian title issues, the bases of Ontario’s claim. Characterizing the Indians as “heathens and barbarians,” Boyd denied that any “legal ownership of the land was ever attributed to them”, citing a 1675 New York opinion of a “multitude of counsellors.” 187 Boyd then cited Johnson v. M’Intosh in support of the proposition that Indians did not have legal ownership of the land. 188 Given both the complexity and the weight of the historical evidence, Boyd’s reasoning and use of precedent for the proposition that Indians had no title in their unsurrendered lands is simply wrong. Moreover, his reference to Chief Justice John Marshall in Johnson v. M’Intosh is misleading. While Marshall’s opinion does subscribe to a conquest-based theory of the extinguishment of Indian title, the case clearly held that the Indians have a substantial property right in their lands that could only be surrendered to the government of the United States and not to private parties. This construction would have supported the St. Catharine’s Milling Company’s view of the case. 189 Boyd, presumably deliberately and disingenuously, ignored Chief Justice Marshall’s opinions in the Cherokee cases, precedents that would have been enormously damaging to his view of Indians as “barbarians” without legal rights to their lands. Indeed, Marshall’s holding that the Cherokees were “domestic, dependent nations” with a substantial amount of political sovereignty and a legal right to their lands is considered foundational for United States Indian law, but simply was not dealt with by nineteenth century Canadian courts. Even today, while the concept of tribal sovereignty is at the core of United States Indian law, Canadian courts have either denied or evaded the issue.

Boyd then analyzed Canadian Indian policy. He referred to a “benevolent policy” for the “liberal treatment of Indians” (whom he also referred to as “rude red-men”), and recited a short history of British paternalism, which was designed to open up the frontier to whites while protecting the Indians and avoiding a “collision” between the two groups. 190 Although the Indians were regularly given various “guarantees” to protect their “territories,” only reserves

186  St. Catharine’s Milling, ibid. at 205. Act. 7 Will. IV, c. 118.
187  St. Catharine’s Milling, ibid. at 206-208. Documents Relating to the Colonial History of the State of New York, vol. xiii, 486. The opinion itself was reprinted in Boyd’s judgment, occupying more than two pages of fine print.
188  St. Catharine’s Milling, ibid. at 209. 8 Wheat. 595 (1823).
190  These racist views of Indians were common to Canadians of the day. For an analysis of the Canadian Indian in nineteenth century Canadian social thought, see B.G. Trigger, Natives and Newcomers: Canada’s “Heroic Age” Reconsidered (Montreal: McGill-Queen’s University Press, 1985) c. 1: “The Indian Image in Canadian History” at 3-49.
formally surrendered by treaty were "reserves" held for the Indians by the Crown. In Boyd's analysis, these reserves were the "Indian lands" placed under Dominion control by the British North America Act. All other lands were Crown lands belonging to Ontario.191

The Ontario Court of Appeal concentrated on the allocation of powers between the Dominion and provincial governments, rather than the issue of Indian title. The opinion of Chief Justice Hagarty, upholding Ontario's claim to the land in dispute, turned on his interpretation of the intent of the BNA Act, not on his view of Indian title. In fact, Hagarty admitted the question of Indian title was difficult, rejecting Boyd's view. Hagarty believed the 1873 North-West Angle Treaty extinguished Indian claims, a view that necessarily admits the Indians still held some form of property right until the treaty.192

Judge Burton's separate opinion was much more consistent with Boyd's analysis. Burton stated that the contention that the Indians had title to the land was a "startling one"193 never argued in a British Court of Justice before, and he dismissed the American cases without referring to their arguments with any particularity.194 While generally endorsing the views of Boyd, Burton went beyond the chancellor and took a strong position defending the prerogatives of the Province. He claimed the Province had control over the Indians and the delegates of the provinces who negotiated the confederation agreement would never have yielded control over the vast lands of Canada to the Dominion.195

Based on Boyd's construction of the British North America Act, Judge Patterson concurred with Burton's claim, but neither Patterson nor Hagarty agreed with Boyd on the question of Indian title. Patterson recognized that the relationship between the Indians and Europeans was "peculiar" and that the Indians had some type of sovereignty over the land which included some right to sell or transfer it.196 Judge Osler, without writing a separate opinion, agreed with Judge Hagarty.

While Chancellor Boyd's opinion largely turned on the nature of Indian title, the opinion of the Ontario Court of Appeal primarily relied on the Court's interpretation of the intent of the British North America Act. Although Burton used demeaning and racist language similar to Boyd's in characterizing Indians, the two judges believed that the Indians had a more substantial right to their lands, and did not base their judgments on a complete denial of Indian title.

The Supreme Court of Canada missed its opportunity to write a masterful opinion definitively setting out the rights of Indians. This is not surprising given

191 St. Catharine's Milling, supra note 181 at 218-20.
192 (1886), 13 O.A.R. 148 at 154 and 156-57.
193 Ibid. at 159.
194 Ibid. at 160-61.
195 Ibid. at 163-64.
196 Ibid. at 169.
the troubled history of the Court. Created in 1875, the Court had not yet established a clear role for itself between powerful provincial appellate courts and a final appeal to the Privy Council. St. Catharine’s Milling was the first important case decided by the court. The court had so little prestige that it was difficult to appoint qualified judges.\footnote{The Supreme Court of Canada did not fully emerge as an important appellate court until after 1949 when it became Canada’s highest court of appeal, replacing the Privy Council. Before that it was a weak institution. D.H. Flaherty, “Writing Canadian Legal History: An Introduction” in Flaherty, ed., \textit{supra} note 14, vol. 1 at 10. A complete history of the Court is found in J.G. Snell & F. Vaughan, \textit{The Supreme Court of Canada: History of The Institution} (Toronto: University of Toronto Press, 1985).}

An outline of the respective cases made by Ontario and by St. Catharine’s Milling Company (directly representing the interests of the Dominion government) can be gleaned both from their briefs and from the brief summary printed in the reported opinion. Both briefs are tedious documents, heavily laden with technical formalities rather than good legal argument. The brief for Ontario is surprisingly weak, given what was at stake and the eminence of the lawyers who produced it. Signed by Oliver Mowat and E.F.B. Johnson, the brief runs barely fourteen pages, half of which is composed of rote strings of citations. Essentially, it is little more than a bald-faced assertion of Ontario’s view of the dispute, with no real argument of the complexities of Indian rights raised by St. Catharine’s attorneys.\footnote{“Respondents’ Factum,” printed copy in RG 125, vol. 58, file 642, part 1.}

The appellants’ brief is much more complete, reflecting the complexity of St. Catharine’s view of Indian title.\footnote{The Dominion government for political reasons chose to use the St. Catharine’s Milling Company as its proxy in the case, directly paying its lawyers, who argued the Dominion’s case. While it is commonly assumed that St. Catharine’s Milling simply represented the Dominion’s position, this was denied by both parties, especially after St. Catharine’s lost and the Dominion government wanted to distance themselves from a losing case. See \textit{An Historical Background of the St. Catharine’s Milling and Lumber Company Case}, \textit{supra} note 11 at 59-61 and 70-75.} The work is quite scholarly and detailed, running seventy-nine pages.\footnote{“Appellants’ Factum,” printed copy in RG 125, vol. 58, file 642, part 1.} The major thrust of the argument is that Indians’ rights to their lands had always been recognized in North America in a variety of different ways. The brief also contains well-edited excerpts from dozens of treaties and cases—largely American—showing precisely the nature and extent of Indian title.\footnote{\textit{Ibid.}} However, the appellants failed to put forward any theory of Indian title. Rather, their position inherited all of the ambiguity of previous cases, even those that had recognized some Indian property right: the appellants failed to indicate the precise nature of that right. How would an upholding of that right and a decision for St. Catharine’s Milling affect Indian title and Dominion/provincial relations in Canada?
Part of the answer to this failure may lie in a discussion of a major body of American sources not cited in the factum. By 1886, there was a substantial body of American jurisprudence on tribal rights, including approximately twenty United States Supreme Court cases and several hundred lower federal and state court cases. The main thrust of these cases recognized significant Indian rights, including land rights and political sovereignty. They also reflected an extensive conflict between the states and the federal government over control of Indian lands, and Indians on their lands, a conflict the states had lost by the 1880s.\textsuperscript{202} Given the great extent of the research cited in St. Catharine’s brief, including references to very obscure American documents, it is clear that St. Catharine’s lawyers could have accessed these cases. Their failure to do so is difficult to explain, especially in light of their substantial reliance on American historical evidence. One possible explanation is that the concept of tribal sovereignty is central to American Indian law and neither St. Catharine’s Milling Company nor the Dominion government wanted the issue introduced into Canadian Indian policy.\textsuperscript{203} While the interests of the Dominion very much depended on the Indians having some recognized legal title to their lands, the ultimate aim was to purchase that title cheaply and to settle Indian lands under Dominion, rather than Provincial control. Thus, companies like St. Catharine’s Milling would pay their royalties to and take their titles from the national government. The Dominion was not defending the legal and political interests of Native people. Any legal talk of tribal sovereignty was not in the interests of either party.

Beyond the sovereignty implications, American cases were technically and mechanically used ineffectively by all parties in \textit{St. Catharine’s Milling} at every level. The lawyers involved in the case were among the best lawyers in Canada so this cannot reflect their legal abilities. Rather, it must reflect their analytical choices. While this may be excusable for the Ontario lawyers who were paid to represent the Province’s political and legal position, it was bad lawyering for St. Catharine’s lawyers. Their brief was a model of ineffective legal writing: it was a mere list of more than one hundred citations for the proposition that American colonies recognized some Indian title to their land.\textsuperscript{204} Moreover, this evidence was primarily in the form of colonial treaties and land grants, not nineteenth century cases that might have been more persuasive as legal precedent. Dozens of American state court cases had discussed the question of Indian rights in general, and Indian title in particular, dealing directly with Ontario’s view of


\textsuperscript{203} Bruce Clark argues that Native sovereignty has survived in Canadian law, although it has not been recognized by the Canadian courts. See his Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada (Montreal: McGill-Queen’s University Press, 1990).

\textsuperscript{204} See "Appeillants’ Factum" and "Joint Appendix," Canadian National Archives, RG 125, vol. 58, file 642, part 1.
Indian title. By and large, all of these views had been rejected in the United States, either by the state courts themselves, or following the “Cherokee cases,” by federal courts. The federal courts rejected state claims to Indian lands based on theories of inferential Indian rights in a federal system which were comparable to the Dominion’s claim to jurisdiction over Indian lands. The “Cherokee cases” involved an expansive Georgia claim to Cherokee lands based on Georgia’s views of its state sovereignty over lands within its borders. In the early 1830s, Georgia and the neighbouring states of Alabama and Tennessee had made detailed and sophisticated arguments about the nature of the state’s extinguishment of Indian title that were rejected by American law. While there are obviously differences between the claims of Georgia and Ontario (for example, the intent of the BNA Act in allocating “Crown” lands), evidence of these differences was not organized by St. Catharine’s Milling Company lawyers into a coherent legal argument.

The worst offenders were the respective judges who refused to recognize any Native right to their land, citing American cases to support that proposition. Their misuse of precedent is so dishonest that it appears that St. Catharine’s Milling would have lost no matter how well they had argued. Of all the judges, the legal reasoning of Chancellor Boyd was the most disingenuous. He reduced (and misstated) Chief Justice John Marshall’s lengthy and complex views on Indian title to “concisely stat[ing] the same law of the mother-country” that “[a]ll our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right.” Marshall took a much more complex view of Indian title in Johnson v. M’Intosh than had been taken in the “Cherokee cases.” On appeal, Judge Burton cited Fletcher v. Peck for the proposition that United States law did not support any idea of Indian title. Rather, United States law only recognized an occupancy right. Judge Burton completely ignored the “Cherokee cases,” as well as the subsequent evolution of Indian rights in American law which clearly superseded Fletcher v. Peck as a statement of Indian property rights. Chief Justice Sir William Ritchie of the Supreme Court used the same method, taking a quotation from Justice Joseph Story’s treatise on the United

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205 Crow Dog’s Case, supra note 202, c. 2: “Corn Tassel: State and Federal Conflict over Tribal Sovereignty”.

206 The literature on the Cherokees’ legal conflict with Georgia is voluminous. Supra note 185.

207 C.P. Magrath, Yazoo. Law and Politics in the New Republic: The Case of Fletcher v. Peck (Providence: Brown University Press, 1966). State v. George Tassells, 1 Dud. 229 (1830); Caldwell v. State, 6 Peter 327 (1832); State v. Foreman, 8 Yerg. 256 (1835). Caldwell runs 118 pages, while Foreman is only a few pages less, making these the most elaborate judicial statements of Indian law in the United States.

208 Supra note 181 at 209, citing Johnson v. M’Intosh.

209 Supra note 192 at 159, citing Fletcher v. Peck.
States Constitution completely out of context and misstating its meaning. The opinions of Ritchie and Burton took statements out of context, never looking to a full interpretation of the evolution, either of John Marshall’s decisions or of American law through the early 1880s. The landmark American case, *U.S. v. Kagama*, decided in early 1886, included the judicial pronouncement of the “plenary power doctrine” of nearly unlimited governmental power over Indians. Although this case supported the Ontario position, it was never cited anywhere in the *St. Catharine’s* proceedings. Perhaps this omission can be explained by the slowness with which American reporters reached Canada, but more likely was due to the mechanical quality of research done by the *St. Catharine’s* lawyers and judges. Only Judges Strong and Gwynne, who dissented, adequately came to grips with the American cases. Perhaps they were persuaded by their reading of the cases; however, it is more than likely that they were using the American cases for their own political ends. Their discussions, particularly Strong’s, reveal a sound understanding of American precedent on the question of Indian title.

Although not central to either party’s case, a 279 page “Joint Appendix” was prepared and printed on the order of Justice Fournier about six weeks before the case was heard. About fifty of these pages dealt with the American colonies, with the remainder exhaustively covering British relations with Indians in the various Canadian provinces. This meticulously crafted document, which

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210 J. Story, *Story on the Constitution*, 4th ed. ss. 687: “The crown has the right to grant the soil while yet in possession of the Indians, subject, however, to their right of occupancy.” Story, who had written a separate opinion in *Cherokee Nation v. Georgia*, believed that the Indian Nations were sovereign nations and that their right, while one of “occupancy,” was a substantial property right that could only be extinguished by a nation to nation treaty process.

211 118 U.S. 375 (1886). *Kagama* was decided in April of 1886. *St. Catharine’s Milling* was argued in the Supreme Court of Canada in late November of 1886, with a final day of argument in June of 1887. It would have certainly been reported by the second argument. *Kagama* and the plenary power doctrine it establishes was the basis for the United States’ own *St. Catharine’s Milling: Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) which holds that whatever the Indians property right in their lands, it could be denied at the will of Congress, with no right of compensation to the tribes. This position, however, did not need to deny tribal property rights in their lands. Rather, it turned on the political nature of the federal government’s power over Indians; thus, although it achieves the same result as *St. Catharine’s Milling*, it is based on an entirely distinct legal theory. N.J. Newton, “Federal Power Over Indians: Its Sources, Scope and Limitations” (1984) 132 Univ. of Pennsylvania L. Rev. 195.

212 (1887), 13 S.C.R. 577 at 602-38 and 650-76. It should be noted that Strong and Gwynne wrote the longest of the various opinions. Together they wrote 62 pages of the 99 page opinion, while the other five judges wrote only 37 pages between them. Ironically, the two Ontario judges on the Court were the dissenters, raising an issue whether their opinions were political as both were appointed by a federal Conservative government which was attempting to extend dominion power against a Liberal Ontario provincial government that was seeking to limit dominion power.

contained all of the historical references made by both parties, put the nature of Indian title in Canadian history directly at issue.

Chief Justice Sir William Ritchie's opinion immediately addressed the issue of land title. He held that the Indians had a right of occupancy, and the Crown had a legal title in the land—a decision following the Ontario position and denying an Indian property right in the land. The decision was a great victory for Ontario, effectively making Ontario's Indian law every bit as national as Ontario's Indian policy had become. Chief Justice Ritchie's three page opinion ended on exactly that note, acknowledging that the case had been so "fully and ably dealt with by the learned Chancellor...I feel I can add nothing to what has been said by him."215

Justice Samuel Strong carefully analyzed the nature of Indian title in a thirty-six page opinion, relying heavily on American cases. He construed the question narrowly: whether "lands reserved for Indians" in the BNA Act included the lands surrendered by the Ojibwa in Treaty Number Three. He surveyed different types of traditional land tenure arrangements and found that all had one common element: lands held traditionally were "lands reserved for the Indians", with the Indians having definite property rights. Heavily influenced by American law, Strong found an unwritten common law that "these territorial rights of the Indians were strictly legal rights" which had to be taken into account in the distribution of property between the Dominion and the provinces upon confederation. Following American precedent, Strong held that Indian lands were not the property of the Crown and had not passed to Ontario.

In a lengthy opinion, Justice John Gwynne agreed with Strong.220 Justices William Henry, Telesphore Fournier and Henri-Elzear Taschereau agreed with Ritchie in short opinions. Henry again complemented Boyd's work, saying he "entirely approved" of Boyd's opinion. Fournier, who had ordered the printing of the Appendix, simply concurred with Ritchie without writing a separate opinion. Ontario had won 4-2 in the Supreme Court.

214 St. Catharine's Milling: Lone Wolf v. Hitchcock, supra note 211 at 599. Ritchie had formerly been Chief Justice of New Brunswick and had never written an opinion on Native rights. The land rights of Indians in the Maritime Provinces were as unclear as they were in Ontario, and the tribes there had been largely stripped of their lands. See Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867, supra note 21.

215 St. Catharine's Milling, supra note 212 at 601.


217 Ibid. at 603; British North America Act, ss. 91, 24.

218 Ibid. at 613.

219 Ibid. at 638.

220 Ibid. at 650-76.

221 Ibid. at 639.

222 Ibid. at 638.
By now, the issues had been argued and the judges had written opinions on both sides. The appeal to the Privy Council was perfunctory. The court focused more on the intention of the BNA Act than on Indian title. Once again, Ontario won and the legal views of Chancellor Boyd were substantially vindicated. Indians in Ontario—and Canada—had only a right of occupancy, not ownership of their lands. This usufructuary right was a significant right and amounted to a greater Native interest in their traditional lands than Ontario had supported. Nonetheless, undeveloped lands within provincial boundaries belonged to the provinces, not the national government.

Several important cases followed in the wake of St. Catharine’s Milling, but they add little doctrinally. Rather, these cases continue Ontario’s aggressive policy of asserting provincial claims over Indian lands. Neither the interests of the Indians nor the Dominion government did very well. In Attorney General of Ontario v. Francis, another Dominion timber lease was at issue, again in the far Northwest of Ontario. These lands, however, had been made part of an Indian reserve in the Robinson-Huron Treaty of 1850. The Canadian government had the lands surveyed in 1884. In July 1886, the timber was sold for the benefit of the Indians, with the money to be held in trust. However, Ontario had also sold the same timber in 1872. The Ontario timber leases were “widely advertised” but the Dominion government neither objected nor made any claim that an Indian reserve was contained on the lands.

As if this confusion and ineptness of both governments in managing Indian lands was not sufficient, a heavy measure of arrogance and a continuation of the dispute over basic issues of federalism also emerged. When the Dominion government learned by accident of the Ontario sale, Mr. Vankoughnet, a veteran official of the Indian Department, travelled from Ottawa to Toronto expressly to resolve the matter. At the end of his interview with Ontario’s Deputy Commissioner of Crown Lands, he was left with the impression that Ontario would “settle with the purchasers of its licences.” The Indian Department proceeded with the sale of the federal licences. Ontario, however, did not do so, pitting two sets of licencees against each other, with the Attorney General of Ontario suing in Chancery to eject the federal licencees.

The Dominion government had no evidence of the existence of an Indian reserve of its own creation, a sad commentary on the state of its administration.

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223 (1889), 14 A.C. 46.
224 Supra note 18. This case was not reported until found in the Ontario Provincial Archives in 1980.
226 Supra note 18 at 10.
227 Ibid. at 11.
228 Ibid. at 12-13. Vankoughnet’s long career with the Indian Department is analyzed in D. Leighton, “A Victorian Civil Servant at Work: Lawrence Vankoughnet and the Canadian Indian Department, 1874-1893” in Getty & Lussier, eds., supra note 36 at 104.
of Indian affairs. The Dominion called Mongowin, chief of the Ojibwa band that lived on the reserve at issue as a witness. Mongowin had intimate knowledge of his heritage and testified that his father, Shewanakishick, had called a council at Whitefish Lake to ask the band if he should agree to the reserve granted in the treaty. Mongowin also testified to the boundaries of the reserve described at that council: "following the road" around the reserve beginning with Nebenenekahming, place of the high cranberries, and after describing nine places, ending with Muckohdehwaugohming, Black Lake.\textsuperscript{229} Several other Indian witnesses testified as well. Based on this testimony, the Court found the reserve existed. What remained was to set its boundaries. This was a simple matter as the Ojibwa description closely matched the recent Dominion survey.\textsuperscript{230}

Ontario argued that surrendered Indian lands reverted to the Province under the \textit{BNA Act}, no longer being "Indian lands or lands reserved for Indians." Judge Ferguson quickly rejected this argument, holding the Dominion’s sale of timber was a simple act of administration done for the benefit of the band.\textsuperscript{231} Traditionally, Indian lands had been sold or leased "for the benefit of the Indians." Ontario’s argument attempted to deny that practice would have had the effect of shifting much Indian land—and assets—to provincial administration. Because the lands in question were "Indian lands," the Dominion prevailed. The opinion was handed down within a month of the Privy Council’s decision in \textit{St. Catharine’s Milling}. The Court specifically withheld their decision pending a decision of the Privy Council, but later found that that decision had no bearing on the case: "lands reserved for Indians" were under Dominion jurisdiction under the \textit{BNA Act}.\textsuperscript{232}

However, Ontario was not yet finished with its expansive claims to lands reserved for Indians prior to confederation. The province sought control over its lands and resources in a way that simply ignored Native rights. \textit{The Ontario Mining Company v. Seybold} involved another Indian reserve, again in Northwestern Ontario.\textsuperscript{233} The case was decided by Chancellor Boyd and contained many elements of his original \textit{St. Catharine’s Milling} opinion. At stake was provincial title to another tract of Indian lands that the Dominion secured through Treaty Three, the same 1873 process that ultimately was the foundation for the Dominion’s claim on the lands disputed in \textit{St. Catharine’s Milling}. In negotiating Treaty Three, the Dominion granted the Indians a number of reserves, including Sultana Island in Lake of the Woods. In 1886, however,

\textsuperscript{229} \textit{Ibid.} at 14-15.
\textsuperscript{230} \textit{Ibid.} at 17-18.
\textsuperscript{231} \textit{Ibid.} at 21-22.
\textsuperscript{232} \textit{Ibid.} at 22-25. In the same year, the New Brunswick Supreme Court handed down an opinion holding that title to Indian reserves, following \textit{St. Catharine’s Milling}, lay in the Province and not in the Dominion. \textit{Doe Dem. Burk v. Cormier} (1890), 30 N.B.R. 142.
\textsuperscript{233} (1899), 31 O.R. 386.
the Ojibwa Indians had surrendered Sultana Island to the Dominion to sell "for the benefit of the Indians" and to hold the monies received in trust. The Dominion sold the land, which was rich in minerals, to the Ontario Mining Company. The Province of Ontario, following the Privy Council decision in *St. Catharine's Milling*, disputed this title, arguing that since the Dominion did not have title to Treaty Three lands, it could not transfer any title to Ontario Mining Company.234

While some legal elements of this case were similar to those in *St. Catharine's Milling*, the issue was not just land title. Ontario conceded Dominion authority over Indian affairs, but the capacity of the Dominion government to conduct Indian affairs in the West was weakened because the Dominion lacked the capacity to grant reserves to the Indians. Rather, the process required the consent of the provinces, who could protect local interests, ensuring that Indians received only the most worthless and remote lands.

Chancellor Boyd was unwilling to go that far, but his ruling did curtail Dominion powers over Indian lands. Boyd conceded that the Dominion had a right to grant a reserve to the Indians, and a right to sell those lands and hold money in trust for the Indians. These powers were limited by their purpose: if that land or money was not used to benefit Indians it reverted to the Province, for it was the Province that ultimately held title to the land.235 Mineral rights were not included in the sale of lands since the Indians had no interest in minerals. Ownership of those minerals remained with the Crown and was passed to Ontario at Confederation.236 On appeal to a Divisional Court, Boyd’s judgment was upheld in a three page opinion, once again complementing Chancellor Boyd’s reasoning.237 The Supreme Court of Canada again upheld Boyd’s ruling, an action that increased the wealth of the provinces at the expense of both the Indians and the Dominion.238 Like *St. Catharine’s Milling*, the case went to the Privy Council, where the Dominion once again lost.239 The Dominion government was forced to negotiate an agreement with Ontario to gain access to any land for purposes of Indian reserves.240 Without the consent of Ontario,

234 *Ibid.* at 387-88. It appears that the Dominion, in the 1870s, did not think that it acquired title to these lands through Indian title. Rather, it took that argument from Ontario’s claim, first raised in *St. Catharine’s Milling*, that the opposite was the case.


237 (1900), 32 O.R. 301.

238 (1903), 32 S.C.R. 1.

239 (1902), 3 C.N.L.C. 203 (P.C.); *Indian Reserves and Aboriginal Lands in Canada*, supra note 29 at 66-67.

240 An 1894 agreement between Ontario and the Dominion, providing for a Joint Commission to settle all land disputes pertaining to Indian reserve lands "in order to avoid dissatisfaction or discontent among the Indians" attempted to resolve this jurisdictional problem, but the issue is still problematic: see *The Province of Ontario v. The Dominion of Canada and the Province of Quebec* (1896), 25 S.C.R. 434. For Ontario’s view of the effect of this agreement, see Memorandum: “Re The Indian Question” Office of the Attorney General of Ontario, March 21, 1910, RG 4, series 4-32, (1910) file 587.
Indians had no right to the land on which their shacks and homes were situated.

The process of adjudication in these cases left all sides dissatisfied and contributed to the feeling among government officials that courts should be kept out of Indian policy. The message was clear: the provinces and the Dominion needed to negotiate these jurisdictional differences and should not rely on litigation. This spirit was reflected in a letter from the Ontario Secretary of the Treasury to Prime Minister Wilfrid Laurier, written while Ontario Mining was being litigated:

Every now and again questions are arising where doubts as to jurisdiction exist, and it seems to me that instead of depending upon the slow, inconvenient and expensive process of leaving the determination to the courts,...much might be accomplished by an effort to arrive at an understanding as to what jurisdiction should be...241

It is no accident that few major Indian cases were decided by Canadian courts until the 1960s.242 Substantial issues of Native rights existed, but courts deferred Indian legal rights to political policy-makers, depriving Native people of their legal rights in Canadian society and access to the courts as an institution to defend Native rights.

III. CANADIAN CRIMINAL LAW AND THE GRAND RIVER IROQUOIS: CANADIAN LAW AND INDIAN LIFE

The reported cases provide a good insight into nineteenth century Ontario jurisprudence and an understanding of the formal legal thought governing Indian/white relations. These cases are necessarily highly selective, representing only those in which either or both parties had the will and the resources to appeal a trial court judgment. Given the poverty of nineteenth century Ontario Indians and the lack of any form of legal aid, only in those few cases where the Indian Department felt some duty (or policy imperative) to hire a lawyer to represent an Indian in local courts were cases appealed and reported. Yet, the evidence is clear that one kind of law to which Indians did not lack access was Canadian criminal law: thousands of criminal cases were brought against Ontario Indians in the nineteenth century.

241 Letter of Ontario Secretary of the Treasury to Wilfrid Laurier, re: Georgian Bay Islands, RG 3, Series 03-01-0-20 (26 February 1900).

242 It is probably the range of legal disputes over tribal hunting and fishing rights that brought Indian rights back to the courts. See the cases discussed, supra section 1F. The major issues of Indian title did not return to the court until the 1970s in Calder et al. v. Attorney-General of British Columbia (1973), 34 D.L.R. (3d) 145. W.H. McConnell, “The Calder Case in Historical Perspective” (1973-74) 38:1 Sask. L. Rev. 88.
Indian legal activity in the area of civil law would be a better measure of the legal integration of Indians into late nineteenth century Ontario because civil law reflects both the individual choice to use the law as well as the social capacity to do so. However, civil cases involving Indians are rare, reflecting Indian poverty and isolation from Ontario society. These cases are also difficult to access because civil court records do not uniformly record race, and most Southern Ontario Indians had Christian names. Therefore, appellate civil cases may provide an idea of the range of issues raised, but not their frequency.

Criminal cases involving Indians measure a different kind of Indian legal involvement with Ontario society. Generally, criminal cases were not disputes between Indians initiated by the Indians themselves. These charges were brought by Canadian officials, either Indian agents or police officers, applying either general Canadian criminal law or offences under the Indian Act particular to Indians. The law involved might be called "imposed law" because it was external to Native society, and was part of an attempt by whites to enforce their standards of behavior on Indian people.243

The run of criminal cases from the Grand River Reserve suggests there was a great deal of legal activity there. The area concentrated three thousand Iroquois whose people, allies of the British Crown, had moved to Canada from New York State following the American Revolution. They occupied substantial agricultural lands in the midst of a settled white population.244 The Brantford Jail Register carefully recorded a great deal of data for each person lodged there, including a clear indication of their race, occupation, residence, offence, sentence, number of previous arrests and the discharge date. The register provides a detailed (but not complete) listing of the Indians charged with criminal offences.245 An examination of the number and types of criminal charges brought against Indians will provide some measure of one form of Canadian legal activity involving Indians.

In the early 1800s, Brant County, of which Brantford was the major city (population 12,000), was a prosperous agricultural county of 34,000, of which approximately 3,000 were Iroquois. This, in itself, reflects Canada's betrayal of

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244 *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899*, infra note 321 at 29-31. The Crown almost immediately refused to recognize any Indian legal title in this reserve. As early as 1797, six blocks of Iroquois land, ranging from 19,000 to 94,000 acres each, were sold to white speculators by the Indians, the sale being affirmed by the Crown.

245 Brantford Jail Register, Ontario Provincial Archives, RG 21.
the Iroquois. Brant County, named after Chief Joseph Brant who was an ally of the British in the Revolutionary War, had once been Indian lands. A huge reserve on the Grand River was granted to Brant’s people as a reward for their assistance in the war. Most of the rich Grand River lands were surrendered to whites. By 1880, the Iroquois lands were largely limited to Tuscarora Township, which was essentially co-extensive with the current Grand River Reserve.246 Of the 2,891 inhabitants of Tuscarora Township, 2,509 were Indian. The Iroquois lived as small farmers and labourers, essentially isolated in a dispersed rural Iroquois community five to ten miles from Brantford. They were presided over by an Indian agent. The Reserve had no villages, but a post office, store and mission were located as Oswekon, at the reserve. Initially, the Indians kept to themselves, applying their own traditional law to offences and land tenure, but Canadian authorities increasingly intervened in tribal matters.247 A published account of the operation of Iroquois law on the reserve shows that both tribal law and Canadian law were in operation in the late nineteenth century.248

Simply stated, Grand River Indians went to jail in great numbers after 1873 (when jail records are first available). Moreover, there was a clear change in the racial pattern of jailings. Initially, Indians were jailed at a rate roughly equivalent to their proportion of the population. However, by the end of the century, Indians were jailed at a greatly disproportionate rate, as is the situation for Native people in modern Canada.249 For example, for the last eight months of 1873 (no records exist for the first four months) out of 359 lodged in jail, 27 or 7.5% were Indians.250 Indians represented about 9% of the total population. This data reflects that they were arrested roughly in proportion to their share of the population. During 1874, Indian arrests amounted to 57 arrests of 519, or about

250 Brantford Jail Register, Ontario Provincial Archives, RG 21. The first volume available records all those lodged into the jail from April 1873 through the end of 1880. The second volume is missing. The third volume begins in October of 1899. After that date the data is complete. I recorded all arrests for 1873, 1874, 1880 and 1899-1901, believing that this same data would permit some analysis of changing arrest patterns over time.
11%. In 1880, Indians comprised 49 arrests out of 210, or 23% of all jailings. At the end of the century (partly representing a gap in the records), comparable data indicates this higher proportion of Indians jailed has continued: for the year October 1899 through September 1900, 37 Indians of a total of 176 persons, or 21%, were lodged in the jail. For the year of October 1900 through September 1901, 41 Indians were jailed of 203 persons, or 20%. These last figures show Grand River Indians were jailed at a rate more than twice their proportion in the population.

These jailings reflect the imposition of Canadian law on the Grand River Iroquois, a people who in the early part of the nineteenth century were self-governing and applied their own laws in accordance with a right guaranteed to them by treaty. The imposition of Canadian law into Grand River Iroquois life was a deliberate policy designed to subordinate these Indians to the Canadian state, denying them any legal status other than as dependents of the government. The use of these arrests to enforce Indian Department rules regarding the cutting of timber and hay was resisted by the Iroquois and has already been documented.

An examination of the pattern of Indian jailings reveals some details of the economy and society of the Grand River Iroquois, and indicates the scope of the imposition of Canadian law on Indians. Most Indians were jailed for drunkenness, commonly after failing to pay small fines. Ellen Doxtader, a "housekeeper" (meaning a housewife), was jailed for 20 days after failing to pay a $5 fine for being "drunk and disorderly." Mary English, whose occupation was listed as "prostitute," served the same sentence for failing to pay the same $5 fine after being charged with being "drunk and disorderly." She was not charged with prostitution. John Whiskey and Joseph Hill, both labourers, served the same sentence on the same charge for failing to pay the same $5 fine.

Little changed over time: the number of arrests simply increased; the standard sentence for "drunk and disorderly" increased from twenty to thirty days; and the number of previous arrests, not surprisingly, continued to get larger. Julia Good, a forty-nine year old housekeeper, spent the Christmases of 1899, 1900 and 1901 in Brantford jail. She served thirty days for assault in November of 1899, her thirty-first jailing. In December she served fourteen days for vagrancy. By

251 I use a year beginning October 1 through September 30 to accommodate the fact that the volume begins with October data.


253 Supra section 1B.

December of 1901, her record showed thirty-eight previous arrests. She was an old woman jailed nine times in two years.  

James Hill, a farmer who was sentenced to thirty days or a $5 fine for drunkenness, paid his fine. The jail records show that only a few Indians ever paid their fines, probably reflecting the absolute poverty of the Grand River Iroquois. In a cash-poor society, even $5 fines meant a month in jail. Given the nature of Iroquois society, extended families must have struggled to raise the money to pay fines. Richard Marade, a twenty-seven year old labourer, was sentenced to ninety days in jail for assault, or a fine of $18. The fine was paid after he had served fourteen days in jail, apparently reflecting the amount of time it took friends or relatives to raise the money.

Besides the run of petty drinking and assault arrests, a large number of jailings involved petty property crimes, theft, vandalism, or trespassing. It is difficult to characterize the meaning of these jailings. They may suggest a considerable effort on the part of the Indian Agent to use Canadian law to force Indians to adopt white property values. Similarly, arrests under the Indian Act for resource disposition offences, such as selling timber and hay without the Agent’s permission, fall in this category. The prison records do not record sufficient information in most cases to ascertain the kinds of property interests involved.

Of particular interest is that petty property offences were the most likely to result in acquittals, a rare event in drunk and disorderly arrests. Aurelia Sero, aged fourteen, was held for one day on a charge of “destroying property” and then acquitted. James Hill, Peter Davis and Henry Hill, boys aged ten to thirteen, were arrested for stealing property from a railroad, and held for two days before being acquitted. Lucy Sero, a servant aged seventy, was arrested for “obtaining goods under false pretenses,” but was discharged. Meshak Green, a twenty-two year old labourer, was discharged after serving two days on the same charge. William King, jailed for “horse-stealing,” was discharged after four days. Emily Carver was arrested twice, once for “theft” and once for “destroying property,” only to have both charges dropped. Well over half of all persons jailed for property crimes were discharged without being convicted, usually after one to four days in jail, suggesting that the Crown could not secure convictions in those cases. This must mean that, unlike in drunk and disorderly cases where a police officer was the complaining witness, the prosecution was unable to get the testimony of complaining witnesses in property crime cases. It may be that the

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255 Ibid. vol. 3, November 1899 through December 1901.
256 Ibid. vol. 3, January 1900.
257 Ibid. vol. 3, July 1900. I have no direct evidence on the reasons why Indians did not pay their fines. It is possible that there were other reasons besides poverty; for example, there could be cultural reasons why families simply did not go to the jail to bail out their brothers and sisters, mothers and fathers. Similarly, refusal to pay bail could have been an act of political defiance, a statement of the illegitimacy of white authority.
258 Ibid. vol. 3, July 1900 to January 1901.
property crimes charged did not victimize individuals, either Indian or white, because these individuals would have had the motivation to prosecute the cases, especially once they had taken the trouble to bring the initial complaint. Rather, it suggests that these property offences were brought by the Crown with the Crown as a victim, probably upon the action of the Indian agent, acting on various sorts of information that was not legal evidence. The fact that most of the charges were dropped in a few days was of no concern: the majesty and power of the government was established merely by arresting the Indians and locking them in jail for a few days.

Felony charges against Indians were rare. Of these, about half were for the crime of horse-stealing. This was probably the most common nineteenth century rural crime given that horses were the most valuable property that could be removed easily from a farm. Peter English, an eighteen year old farmer, drew a three year sentence for horse-stealing. In one incident, four Indian men were convicted of horse-stealing. John Everett and Peter Green, both illiterate twenty-one year old labourers, drew four year sentences. George Green, twenty years old, received a one year sentence and Peter English, seventeen, a six month sentence.\(^{259}\) The fact that jail records listed all four young men as “unable to read” at a time when most Indians (and virtually all younger Indians) were listed as literate, indicates that even the most basic formal education was not reaching all segments of the Grand River population. Because distances were not great, it is likely that those Indians who avoided white schools did so for personal reasons, making the traditional choice to avoid Canadian institutions.

Serious crimes of violence were more rare. Ed Wilson, a twenty-two year old carpenter, received a five year sentence for rape: the only rape conviction reported in the five years sampled.\(^ {260}\) Several other rape charges were dismissed. There appear to have been three homicides involving Grand River Indians between 1873 and 1901. In one case, Ben Carrier, a twenty-eight year old labourer, was convicted of killing his wife and was hanged.\(^ {261}\) John Yellow, convicted of manslaughter for a drunken killing, received a ten year sentence.\(^ {262}\) Saddest of all was the case of Margaret Wabaneeb. She killed her daughter, Margaret Fox, by hitting her on the head with an axe while visiting her in the Brantford Jail. Fox had been convicted of vagrancy and was serving a thirty day sentence. Wabaneeb was released on bail and ultimately acquitted of


\(^{261}\) *Ibid.* vol. 1, April 1880. The case file is held in the Ontario Provincial Archives, RG 22, 392-0-278, Box 7 “Brant County.” This box contains ten Indian felony case files from the 1880s.

\(^{262}\) *Ibid.* vol. 1, September 1880. The case file is held in the Ontario Provincial Archives, RG 22, 392-0-278, Box 7.
manslaughter charges, probably reflecting the hopelessness of convicting an eighty-five year old woman of such a crime.\textsuperscript{263}

Most of these convictions were the result of summary trials before police magistrates. The Indian Agent at Grand River Reserve was also legally empowered to act as a police magistrate and we know from several appellate cases that he aggressively did so.\textsuperscript{264} Unfortunately, jail data does not show whether the convictions of individual Indians involved police magistrates in Brantford or other localities off the reservation, or involved the Indian agent. Obviously, this distinction is a significant one, for the intrusion of Canadian law into the life of reserve Indians is a distinct issue from the question of holding off-reserve Indians legally accountable for illegal activities.

If we extrapolate from the 1873-1880 and 1899-1901 data to estimate the arrests in the missing volume of the Brantford Jail records (and assume that the pattern between volumes one and three is stable) it appears that about 1,000 Grand River Indians were jailed from 1873 to 1901 inclusive. This is a staggering proportion of a population of 3,000. While some of the jailings involved recidivists, most offenders are listed as never having been previously jailed. Julia Good was arrested thirty-nine times, the highest number of arrests recorded. Joseph John was arrested twenty-four times. Between 1899 and 1901, no other Indians had more than five arrests. Further, eight of ten Indians jailed had never been jailed before. This data suggests that jailings were widespread in the Indian population at Grand River, and involved a substantial proportion of the adult male population. Even though Julia Good was jailed the most times, few of those jailed were women.

This evidence also suggests that the stereotype of Indians being arrested repeatedly for drunkenness does not describe the situation at Grand River and Brantford. The fact that two Indians appear to fit that pattern shows that local authorities were willing to arrest Indians repeatedly for drunkenness. This willingness appears to show that no other Indians fit that pattern—otherwise they would have been repeatedly arrested as well. Most arrests were for drunk and disorderly behaviour, and they generally involved only one incident. However, the widespread distribution of jailings resulted in the coercive impact of Canadian criminal law and was employed against a much larger proportion of Grand River Indians. The social and cultural meaning of being jailed in nineteenth century Ontario must have been far different for Indians than for whites. Jail, as a social institution, was completely foreign to tribal society: placing human beings, free in nature, in small cages must have seemed bizarre and cruel to Native people.\textsuperscript{265} Western society routinely accepts jail, even for

\textsuperscript{263} \textit{ibid.} vol. 1, August 1880. The case file is held in Ontario Provincial Archives, RG 22, 392-0-278.

\textsuperscript{264} Hunter v. Gilkison, supra note 80.

\textsuperscript{265} This issue is the subject of a Royal Commission on Aboriginal Deaths in Custody in Australia.
small offences involving non-violent people. At least one Grand River Indian in
four went to Brantford Jail between 1873 and 1900, an experience that must
have had a serious impact on the social and cultural life of Native people there.
Through this process, Canadian law was imposed on the Grand River Iroquois.
The open use of tribal law to resolve disputes and to maintain social control was
impaired. This was a deliberate, colonial interference with Iroquois life and
culture.

IV. CANADIAN LAW AND THE LEGAL CULTURE OF
NINETEENTH CENTURY ONTARIO INDIANS

Nineteenth century Ontario Indians were legal actors, actively using both their
traditional law and Canadian law to structure the rapid social change
transforming Native society. While as many as one-fourth of the Grand River
Indians were jailed at some point in their lives for petty offences under Canadian
law, the same Indians also used Canadian law to frame a claim against the
Dominion government for the loss of some of their lands in 1832 to the Grand
River Canal Company. This was one of the first successful claims won by a tribe
against the Canadian state.266 The Grand Council of the League of the Iroquois
regularly included in its meetings the adjudication of disputes. This tribal
government of the Grand River Reserve handed down judgments that were
legally binding on the reserve under tribal, not Canadian law.267 While the Grand
River Iroquois were highly organized, none of these processes were unique to
Grand River: Indians throughout Ontario were legally active, constructing their
own legal relationships with each other, local whites and Ontario and Dominion
institutions. A legal history of this Native activity is just beginning to exist in
formal scholarship, but has always existed in Native tradition.

This enquiry must begin with the survival and transformation of Native law
and legal institutions in nineteenth century Ontario. The Grand River Iroquois’
legal history is the most carefully preserved, with dozens of recorded case
dispositions. These reported cases, dealing primarily with constitutional law,
land law, Indian citizenship and inheritance, reveal a fully functioning Grand

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266 R.C. Daniel, A History of Native Claims Processes in Canada, 1867-1979 (Ottawa: Department
of Indian and Northern Affairs, 1980) at 122-30.
Book of Iroquois Law” begins at 115, and reports more than a hundred cases. Noon based these
reports on official records of the Grand Council, containing only the disposition of cases
brought before the Council. Noon then obtained the facts of each case by interviewing two
chiefs in the 1930s who had sat on the council, providing a factual statement of the issues in
cases extending back to the 1870s.
River legal system. While matters of criminal law were not decided, the Council of Chiefs exercised its powers in areas of misconduct. The Council used the tribe's "forest bailiff" to eject individuals from lands occupied without legal rights, to investigate the unlawful taking of wood from neighbours' lands and to eject a young man guilty of adultery from his father's house. These cases indicate that the Grand River Iroquois exercised tribal jurisdiction over many of the same issues that the Crown tried in its District Courts.

Clearly, there was direct competition between the courts evidenced by an action brought by Jonas Baptiste in the Grand Council for improvements to lands to which he had lost title by failing to make payments. When the Grand Council ruled against Baptiste, he threatened to bring the suit in Ontario District Court. He was expressly forbidden to do so by the Council, but defiantly brought the lawsuit anyway. Baptiste was non-suited for jurisdictional reasons that are not clear, and he was ordered to pay the costs. Later, Baptiste applied to the tribe for assistance in paying his court costs, but the Grand Council refused, deciding that he could go to jail for failing to pay. The tribe's action in forbidding access to Ontario courts was doubtlessly an attempt to protect its own jurisdiction in intratribal matters.

This act was also in defiance of an 1890 Order in Council in which the Dominion government stated that Canadian courts were "open to enforce their [Six Nations] contracts, or to afford redress for injuries to their persons or property, not only as between them and the white people, but in relation to each other." The Six Nations, however, did not accept this view of their legal rights. Their legal dispute with the Dominion, still unresolved, intensified in the early twentieth century as the tribe protected its legal jurisdiction against the increased attempts of both Dominion and Ontario officials to exercise jurisdiction over Grand River Indians. In Council v. Estate of Jasper Jones, Sophie General and Department of Indian Affairs, the Council held that it, and not the Department of Indian Affairs, had jurisdiction over inheritances on the Grand River Reserve.

Ibid.: Jonas Baptiste v. Council at 117; Job Green v. Gus Green at 118; In Re Peter Williams at 118; Josiah Staats v. Simon Staats at 119. The Council did not concede that it lacked criminal jurisdiction, rather it simply did not actively assert it. On the contrary, in Council v. Estate of Jasper Jones, Sophie General and Department of Indian Affairs at 149, the Council held: "[I]t is a tradition repeatedly confirmed by testimony of the chiefs that the Confederacy delegated to the Crown, and later to the Dominion government, full jurisdiction over only three matters. These are: rape, treason and murder."

269 Jonas Baptiste v. Council, ibid. at 118. Noon reports the legal issue in this case as: "Can a Six Nations Indian enter suit in the courts of the province of Ontario?" This statement was clearly not accurate in late nineteenth century Ontario law; however, it reflects the issue as the chiefs, who were Noon's informants, saw it. Thus, while Ontario law clearly recognized the right of Indians to bring suit in Ontario courts, the Iroquois apparently did not know that this was the case.
270 Order in Council, P.C. 2102 (12 November 1890).
271 Estate of Jasper Jones, supra note 268 at 146 (1917).
Shortly thereafter, in *Sero v. Gault*, a Mohawk woman sued to recover her net, which had been seized by Thomas Gault, an Ontario fishery inspector. She argued that no Ontario warden had any authority on an Indian reserve.\(^{272}\) Although this was not a Grand River case, the Six Nations mobilized behind the treaty-based defence. After losing in Ontario courts, the Indians took the case to the League of Nations.\(^{273}\)

The cases reflect a clear sense of an evolving Iroquois law. William Jamieson sued the Council for damages when stray dogs killed some of his sheep.\(^{274}\) The Grand Council refused to pay, citing the lack of a tribal statute. They sought a final decision from the Firekeepers, traditional Onondaga chiefs charged with guarding the wampum belts,\(^{275}\) who decided that the tribe should not pay damages in such cases. This decision differed from local law on similar matters. While the Township of Onondaga, adjacent to and including part of the reservation, had a local by-law forbidding dogs to run at large, such a by-law did not reach the Grand River Reserve because Indians and Indian lands were under Dominion, not provincial law.\(^{276}\)

While the legal culture of the Six Nations was unique, legal matters were not the monopoly of Six Nations Indians alone. The Grand General Council of Ontario Indians met regularly in the late nineteenth century, frequently addressing legal issues. For example, their 1883 meeting at Hagersville involved 109 delegates from 21 reserves.\(^{277}\) They specifically addressed three legal issues in their minutes. First, they objected to a section of the Indian Act that denied Indians the payment of government interest monies while in custody for criminal offences. The delegates believed this denial was a “great injustice” since Indians were “doubly punished for crime”: they paid the same penalty as a white, and the Indian Department denied their interest money.\(^{278}\)

A discussion of enfranchisement followed with most delegates favouring the

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\(^{272}\) (1921), 50 O.R. 27.


\(^{277}\) *Minutes of the Grand General Council, New Credit Indian Reserve* (Hagersville, Ontario, 1883).

\(^{278}\) *Ibid.* at 17-18. The discussion refers to s. 82 of the *Indian Act*. 
full political rights of Indians. A minority were opposed, believing that full enfranchisement would be used to break up the reserves. Delegates also believed that Indians should be able to make a will bequeathing property without the interference of the Indian Agent who, under the Indian Act, had to approve such inheritances. This meeting shows that Indians were political actors, striving to reform the Indian Act to increase the rights of individual Indians. Whole bands met in council, voted to request enfranchisement, and petitioned the Ontario government to that effect. The Cape Croker Band petitioned for enfranchisement, but went far beyond, asking that the control of tribal money be transferred from a corrupt Indian Agent to their chief. They further demanded removal of the Agent for illegality and incompetence, citing eleven reasons. Like the Dominion and Ontario governments, the tribes could cite the law to protect their interests. Unlike the Dominion and Ontario governments, they lacked the power to put the law in motion.

A large gathering of Indian leaders probably produced the clearest articulation of Ontario Indian legal culture. This gathering was nothing more than representatives of dozens of reserves, large and small, spread from the highly developed corners of Eastern Ontario to its wilderness Northwestern boundary. Local level legal and political articulation of Indian positions are not commonly represented in Canadian legal history. A number of studies clarify that Indians resisted the paternalism of the Indian Department. For example, Chief Michel Dokis negotiated a reserve for his small Ojibwa band on the French River in the Robinson Treaty of 1850. This reserve included sixty-one square miles of the finest timber in Ontario. A critical element of the fiction of Canada’s “liberal” treatment of Indians is that the Indian’s right to the land (whatever it was) was freely purchased and obtained by consent. Any alienation of the Dokis’ lands also required consent. This was not a problem until the 1880s, when logging companies approached Chief Dokis and the Indian Department to lease timber rights to the reserve. Even after being told that all other reserves in the area had sold their timber, the tribe refused to do the same. Under the Indian Act, a tribe had to consent to the sale of its timber. Briefly, the Indian Department considered changing the law so that timber reserves of “unreasonable” Indians could be sold without their consent, but decided not to take such action as it would expose the fiction of Indian consent, and possibly bring about a popular

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279 Ibid.
280 Ibid. at 15-16.
281 Petition, Munsey Band of Indians to Attorney General of Ontario, Ontario Provincial Archives, RG 4, file 1598 (1906).
reaction. The Department tried to bribe the tribe to surrender its timber by arranging a surrender vote and promising high payments. Chief Dokis was a strong leader of a small band and he prevailed—the tribe voted against surrender. The tribe held out until 1908, when they voted eleven to six to surrender the timber. Their timber was ultimately "voluntarily" surrendered, just as their lands had been fifty-eight years before. The election was not a fair one: the Department called it without sufficient notice to Chief Dokis to organize his resistance, and arranged a large quantity of liquor for a feast the day before the election. Despite having lost the timber, the tribe benefited from the chief’s resistance: instead of the few thousand dollars first offered in 1881, the timber sold for $1.1 million: $600 per person per year instead of the $4 originally offered. The Dokis Indians became the richest tribe, per capita, in Canada.

At a local level, the evidence suggests that Indians worked both inside and outside the law in a number of ways to protect their autonomy against white intervention, either in the form of the Indian Agent or local officials. The variety and types of these actions suggest that Indians developed an effective grasp of both Ontario and Indian law. At the level of basic sustenance, Indians continued to hunt, fish and collect wood and hay in spite of Ontario or Canadian laws to the contrary. It must have been clear to tribes and individual Indians that these were their rights, and white attempts to interfere with their exercise was simply wrong. The policing of such activity was virtually impossible. The arrests that were made likely reflect only a small proportion of the total activity.

The complaint of H.P. Blackwood, president of the Minaki Campers Association, reflects the frustration of whites who could not stop the Indians from carrying on their lives as they wished despite the intrusion of whites on their lands. Winnipeg citizens had built many elaborate summer homes on Lake Minaki, but Indians, often under the influence of alcohol, camped on beaches near these summer homes and engaged in "dreadful behaviour." Thefts were occurring and, according to Blackwood, "ladies [were] complaining that it [was] not safe to stay at the lake." The Indian Department sent a special agent to investigate Blackwood’s charges. The agent identified a saloon-keeper as the source of the liquor. The Department, however, was not able to stop the liquor trade, or restrict the activities of the Indians.

Local officials refused to arrest Indians because such arrests were pointless. The Secretary of the Department of Indian Affairs complained to the Attorney General of Ontario about the lock-up at Fort Francis in Northwest Ontario. Six or seven Indians escaped from Fort Francis but the local authorities, knowing

284 Ibid. at 186-87.
285 Ibid. at 190.
286 Ibid. at 196.
287 Letter of H.P. Blackwood to Superintendent, Indian Department. RG 4, series 4-32 (1913).
288 Ibid. Report of W.E. Bennett, Indian Department Special Agent, to Superintendent.
where the escapees were, did not bother to re-arrest them. Because Indians had served one to two days in jail before the escape, local officials probably thought that whatever justice was served by sentencing them to jail had already been served. The situation at Kenora was arguably even worse: their jail was so full that Indians tried and sentenced for liquor offences had to be released with a suspended sentence. Again the Indian Department intervened, requesting the Ontario Attorney General ensure sufficient jail “accommodation” was available to “receive Indian prisoners.”

The same issue arose at Little Current, where local authorities refused to allow the Indian constable to admit Indian prisoners into the jail. The Mantouaning Reserve had no jail of its own, which necessitated either taking prisoners to the next jail twenty-three miles away, or releasing them. Local authorities claimed the village lacked funds required for a full time jail-keeper, but the local Indian Agent claimed this excuse was false. Rather, it seemed that the town simply did not want the trouble of a jail filled with intoxicated Indians. All of these cases suggest some of the limits of Ontario criminal law in locking up Indian defendants. The Indian Department must have been concerned with how Ontario law appeared to the Indians under such circumstances.

William Young, police magistrate at Rat Portage, went with a constable to investigate complaints of trouble with Indians and theft at lumber camps in the Lake of the Woods area. Young complained that “rather a dishonest set of Indians lived in this locality” who stole many provisions from the lumber companies. The Indians simply “took to the woods” when Young arrived and were safe from arrest. The magistrate, a model of Ontario legality, left an arrest warrant with the foreman of one of the lumber camps. He was quite proud of his initiative, writing that an arrest “will be easily done as they will have no suspicion of his being authorized to arrest anyone.” Young went on to write that “the Indians must be made to understand that acts of this kind will bring punishment on them.” No further record of this case remains; hence, it is unknown whether the arrest warrant was executed. In any case, this report provides insight into the quality of criminal justice being rendered to Indians in Western Ontario. A logging company employee was empowered to arrest Indians who were allegedly stealing company property. The capacity of Indians

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289 Letter of Superintendent of Indian Affairs to Attorney General, Ontario Provincial Archives, RG 4, Series 4-32, file 1324 (24 September 1904).
290 Letter of Mr. Pedley, Deputy Superintendent of Indian Affairs to J.J. Foy, Attorney General of Ontario, Ontario Provincial Archives, RG 4, file 608 (2 May 1906).
291 Letter of Tom McLean, Secretary, Department of Indian Affairs, to Ontario Attorney General, Ontario Provincial Archives, RG 4, file 865 (18 May 1907).
292 Ibid. Letter of Mr. Sims, Indian Agent, to Secretary, Department of Indian Affairs (7 May 1908).
293 Report of William Young, Police Magistrate at Rat Portage, RG 4, series 4-32, file 574 (1898).
294 Ibid.
to “take to the woods” was not without boundaries as the changing economy required increasing contact with whites.295

Complaints reporting theft by Indians were frequent, but it is impossible to ascertain the extent of such activity. Theft is clearly a survival mechanism of starving people. It also has social and political meanings, especially where Indian land and livelihood had been stolen from them—or had been taken away according to legal processes unparalleled in Native society.296

The picture of Native life in Ontario at the turn of the century is a dismal one. Gradually, Indians retreated to their reserves, increasingly becoming less visible. Racism ran rampant in rural villages. Reverend J. Cadot, a Roman Catholic missionary, complained of conditions at Wiarton and reported that Indians resented the affront of discrimination in the inns and barbershops in the village. Indians were forced to eat at separate tables in remote sections of inns, not properly cleaned or waited on.297 This discrimination occasionally reached embarrassing proportions. When Peter Whiteduck and Jocko escaped from Pembroke jail and killed a jailer in the process, their village was occupied by a large force of vigilantes. Men were not permitted to leave their homes to report to work, houses were illegally searched and the occupants were abused. Even the Attorney General of Ontario complained that local authorities had abused their authority, reporting that no white community could ever be treated that way.298 Jocko was shot dead by a civilian posse under questionable circumstances and Whiteduck was returned to jail. While in jail he wrote several sad letters on toilet paper, asking his friends to help him escape to the woods. The letters, seized by his jailor, were used in court as evidence of his dangerousness when, in fact, they testify more to Whiteduck’s despair, isolation and loneliness.299

While the imposition of Canadian law on the Indian tribes involved legal violence in individual cases, Canadian Indian policy generally reflected pride in the “liberal treatment of Indians,” a legal policy that promoted the immigration of Europeans such that “their contact in the interior might not become

295 Recall the case of Pierre Hunter, who froze to death after his jailing for shooting and selling moose. He escaped punishment for a year by retiring to his remote village, but ultimately returned to Sioux Narrows to earn a livelihood. See supra section 1F.
297 Letter of J. Cadot to Attorney General of Ontario, Ontario Provincial Archives, RG 4, file 109 (9 January 1908). Wiarton is near the Cape Croker Reserve on the Bruce Peninsula. For a history of Ojibwa life, see The Ojibwa of Southern Ontario, supra note 282, c. 8: “Reserve Stagnation” at 180-226.
299 Case file, Rex v. Peter Whiteduck, RG 22, series 392, Box 134 (1916).
collision.”

The low incidence of violent confrontation of the frontier in Canada compared to the hundred or more Indian wars of the United States, invites comparative analysis. There is scant evidence of either Native resistance to Canadian authority or of the legal structuring of frontier violence. Most Native resistance took forms other than violent resistance to Canadian authority. However, Ontario had at least one important incident in which Indians violently resisted Canadian authority—the “Manitoulin Incident of 1863.” Indians objected to a white fishery operating on unceded tribal lands. The Indian Department requested a fishery inspector, the only government official in the area, to warn the Indians to leave the fishery alone. The inspector, William Gibbard, left the village after a shouting match. The Indians were determined to drive the whites from their land. Twenty-five Indians landed at the fishery and threatened whites at knife-point. Reinforcements from a nearby ship drove the Indians off, but fifty Indians returned the next day and forced the whites away from the fishery. The Indian Department dealt with this violation of Canadian law using a legal model: Gibbard recruited thirteen armed police officers from Toronto and Barrie and returned to Manitoulin Island to arrest the offenders. The Indians resisted: some Indians verbally harassed the police, while others returned with guns. A shouting and pushing match ensued. The police withdrew after an Indian agreed to submit to arrest when the police boat returned from patrol. A second Indian was also arrested, but no disposition of either case is reported.

While the event reflects some success of the model using the law to structure Indian/white relations, it also reveals the limitations of that model.

The Bear Island case brought to public attention—and to Ontario law—the legal history of the Temagami Ojibwa. Their story is an amazing one, not because it is unique, but because it illustrates the complex legal and political histories of every Indian band. Nebenegwune, headman of the band, was not present at the signing of the Robinson Treaty at Manitoulin. During the late nineteenth century, the band zealously guarded their independence, trading in furs for a livelihood in complete ignorance of Ontario law. The killing of Chief

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300 This description of Canadian Indian policy was written by Chancellor Alexander Boyd in St. Catharine’s Milling, supra note 181 at 215.

301 The focus on overt warfare as a form of Native resistance to the imposition of colonial authority denies the resistance of Native people who chose other forms of resistance, a prudent choice given the genocide that routinely followed colonial wars. For an analysis of the various forms of Native resistance to colonial authority in a comparative context see R. Guha, Elementary Aspects of Peasant Insurgency in Colonial India (Delhi: Oxford University Press, 1983); and J.C. Scott, Domination and the Arts of Resistance: Hidden Transcripts (New Haven: Yale University Press, 1990).


303 Ibid. at 121-24.
Cana Chintz by his brother Syagquasay led to a maze of jurisdictional confusion between Quebec and Ontario. The tribe finally punished the crime under its own law.\textsuperscript{304} The band tried hard to negotiate a favourable accommodation between itself and the government on its own terms. This agreement was necessitated by the legal confusion of \textit{St. Catharine's Milling}: any wilderness land the Dominion would provide as a reserve belonged to Ontario, thus requiring Ontario to agree to any settlement. Ontario and Dominion negotiators were not able to agree on the Temagami claims. In 1929, Ontario demanded the Indians pay rent on the land on which their Bear Island homes were built.\textsuperscript{305} This whole story is still in litigation. Judge Steele did not accept much of the oral history presented in support of the band’s claim, holding, for example, that the Temagami were represented by Tawgaiwene, a neighbouring chief, at the Robinson-Huron treaty negotiations.\textsuperscript{306} Ontario, conceding some Native settlement rights to a few hundred acres, still refuses to recognize anything more than the band’s very limited usufructuary right to its land. The band, in turn, has an unbroken history of asserting its rights to both land and sovereignty against both Ontario and the Dominion. The evidence of Temagami legal tradition—legal precedent in tribal law—was approached by the Ontario court through the formalistic framework of Canadian law. The question of Nebegwune’s legal status as headman in 1850 should have turned entirely on Temagami law, as should the question of any Temagami relationship with Tawgaiwene. Instead, the result turned on the law of evidence. Judge Steele applied a “balance of probabilities” test to his own culture-bound and subjective reading of Temagami history.\textsuperscript{307}

\section*{V. CANADIAN LEGAL CULTURE AND NATIVE RIGHTS}

Canadian judges have not adequately addressed the issue of Native rights, deferring “legal” issues concerning Native people to legislative power. This is true even though the Anglo-Canadian legal tradition provides an adequate framework for addressing the issues. Despite Canadian awareness of United

\textsuperscript{304} B.W. Hodgins, “The Temagami Indians and Canadian Federalism, 1867-1943” 11 Laurentian University Review 71 at 72-73; and The Temagami Experience: Recreation, Resources and Aboriginal Rights in the Northern Ontario Wilderness. \textit{supra} note 5.

\textsuperscript{305} “The Temagami Indians and Canadian Federalism, 1867-1943”, \textit{ibid}. at 78-87.

\textsuperscript{306} Attorney-General for Ontario v. Bear Island Foundation et al. (1984), 49 O.R. (2d) 353 at 441-47.

States legal literature on the status of Indians under American law, which is extensively cited throughout Ontario Indian cases and especially in *St. Catharine's Milling*, Canadian judges still failed to address issues of native rights. Virtually all commentators on nineteenth century Ontario (and Canadian) law agree that it was dominated by "judicial conservatism," a judicial reluctance to depart from narrow interpretations of existing precedent and to shape a substantive law more responsive to the needs of a changing and expanding nineteenth century society.\(^{308}\)

Legal formalism, the construction of elaborate opinions carefully following precedent, is one manifestation of judicial conservatism. Risk, a careful observer of late nineteenth century Ontario law, succinctly states the impact of this formalism on the courts' decision-making process:

In Ontario the courts seemed to assume that the common law was composed of rules firmly settled by authority, primarily English authority. It was almost never expressly justified, beyond the justification implicit in its mere existence and the internal authority of courts in a hierarchy.... The process of making decisions usually seemed to be simply finding facts and applying the rules. If the law was obscure or uncertain, the court simply had to look harder to find it.\(^{309}\)

Moreover, this judicial conservatism occurred in a context where the highest appeal was to the Privy Council, which made British law, an unusually formalistic body of law, the law of Canada. Obviously, the implications of such conservatism in the law of Indian rights are clear: there was no legal precedent, leaving the courts to follow narrowly legislative policy, itself poorly developed until after the 1876 consolidation of the Indian Acts.\(^{310}\)

Judicial conservatism can be seen in the highly unsatisfactory state of the Ontario case law on Indian matters prior to *St. Catharine's Milling*. These decisions are models of ambiguity and vagueness, settling narrow questions without ever expressly stating major legal conclusions about Indians' rights. This explains the apparent anomaly of the large number of nineteenth century


\(^{310}\) All of Canada's Indian laws were consolidated in 1876—nine years after Confederation—into a single "Indian Act." R.G. Moore, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Treaties and Historical Research Centre, P.R.E. Group, Department of Indian and Northern Affairs, 1978) at 60-70.
Ontario cases involving Native rights, which left the law of Native rights poorly defined and ambiguous. This tradition continues in Ontario law through *Bear Island*.

Judicial conservatism, in itself, does not explain the course of Indian law in Ontario, for this decision-making process was the product of a very narrow circle of judges. The highest levels of nineteenth century legal policy-making in Ontario were occupied by only a few people who exercised great, often unchallenged influence, for long periods of time. For political and personal reasons, none of these men had the slightest concern for questions of Native rights.

John Beverley Robinson was Chief Justice of Ontario from 1829 to 1862, capping a public legal career as Solicitor General and Attorney General of Ontario.311 There is not a single piece of evidence to suggest that Robinson, whose legal mind dominated Ontario jurisprudence in the first half of the nineteenth century, was cognizant of any legal issues presented by the presence of Ontario’s 25,000 Indian people, a far more substantial portion of Ontario’s population early in the century than at the end.312 Robinson was a loyalist, the son of a wealthy Virginia planter who had fought the revolutionary forces in the United States. He moved to Kingston, Ontario to create a loyalist colony after their loss in the Revolutionary War. Ontario was their creation: it was the political and legal embodiment of colonial loyalism. There was more than legal conservatism at the center of this jurisprudence: it was loyalty to the Crown, and a strong legal defence of the Crown’s prerogatives.313

Not surprisingly, the legal issue as Robinson saw it in *Regina v. Baby* was that the “Indian lands” involved were simply “Crown lands,” and therefore could not be alienated without the consent of the Crown.314 Robinson actually had to express some view of Native people two years later in *Totten v. Watson*, a case involving the white alienation of land granted to an Indian chief in fee simple.315

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312 This would have represented about ten percent of Ontario’s 1840 population of about 250,000. By 1900, Ontario, typical of the growth of the white population of all of North America, had a population of 1,200,000, reducing the Indian proportion to about two percent. The term “Indians” appears twice in Robinson’s biography, both times referring to his service with Indian allies in the Detroit area in the War of 1812. *Sir John Beverley Robinson*, ibid. at 14 and 16.


His opinion turned on his view of Crown prerogatives; however, this time it was cast in racial terms. In general, the legislature "might possibly have intended to protect the Indians...for they are a helpless race, much exposed, from their want of education and acquaintance with business, and the intemperate habits of many of them..." [emphasis added] 316 However, this policy conflicted with the action of the Crown in granting this particular plot of land to "leading persons among the Indians, who...had been treated by the [C]rown as officers in their service, and who, it might be assumed, had sufficient intelligence to take care of their property." 317 Thus, Robinson would not judicially recognize the policy behind provincial legislation to protect Indian lands from alienation. Nevertheless, he inferred a distinct status to the Indian land at issue because the Crown’s land grant must carry with it the Crown’s judgment that the Indians in question were distinct from the majority of the Indians in Ontario, and intelligent enough to manage their own affairs.

William Hume Blake, Chancellor of Ontario from 1849 to 1862 and law partner of Alexander Boyd, forms a key link between the early nineteenth century Ontario of Robinson and the late nineteenth century Ontario of Oliver Mowat. While Robinson was grounded in loyalist legal theory, believing Ontario law was an extension of British law, even conservatives realized that the new world had distinct social and economic needs that were not readily accommodated in British law. Blake represented the interests of Ontario’s mid-nineteenth century economic elite who were interested in opening up the vast wealth of the province. 318 His contribution to Ontario law reform was in restructuring the courts and the law to make the range of legal problems developing from new economic forms more readily actionable, thereby structuring more efficient legal resolution of disputes. This restructuring made Ontario law more accessible to problems involving Indian rights, but did not itself change the conservative tradition of deciding such cases. Blake himself, perhaps the most competent jurist in nineteenth century Ontario, never decided a reported Indian rights case. 319

Robinson’s centering of legal thought on the rights of the Crown and Blake’s business-oriented legal reforms came together in the late nineteenth century legal structuring of economic development in Ontario, as represented in the Province’s view of its rights in St. Catharine’s Milling. While American frontier development was characterized by a rapid transfer of the public domain into unrestricted private ownership, a policy that put Indians in direct confrontation

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316 Ibid. at 395.
317 Ibid. at 396. Robinson also referred to both Native rights and government policy in Bown v. West, discussed supra at notes 59-61.
319 Ibid. at 164.
with all but uncontrollable white interests, Ontario resources policy involved much more governmental control through Crown ownership, and timber and mining leases.320 While out of control American miners first alienated Indian lands in the Black Hills, it was the Ontario and Canadian governments that “leased” Indian timber to whites.

This was the aggressive policy of Oliver Mowat, who served as Prime Minister and Attorney General of Ontario from 1872 to the end of the century. Mowat wanted Ontario governmental control of economic development, but in a conservative, pro-business climate. Mowat, a former judge who had served in the Ontario Court of Chancery in the 1860s, would never be regarded as a legal scholar.321 He was a pragmatist, desiring to use the institutions of government to open up the wealth of Ontario.322 He was supported by business interests who saw their own access to economic resources better served under Ontario control than under Dominion control.323 Indians, in this model, were not only in the way, but were also a financial liability best borne by Dominion resources. The legal result of this model is exemplified in St. Catharine’s Milling. Mowat was happy to concede direct control over Indians and to cede small Indian reserves to the Dominion government even though he viewed the land as “belonging” to Ontario. In return, Ontario gained control of resources without any responsibility to the traditional owners of the land.

Thus, a framework of judicial conservatism created a context in which no juridical concept of Indian rights could find any recognition in Indian cases. Courts carefully framed every legal question to adhere rigidly to legal precedent. This concept did not previously exist in British law, nor could it be easily derived by analogy from related legal principles. Whenever an Indian came into an Ontario court, the court took jurisdiction over her because it took jurisdiction over all persons. The court then treated Indian cases as it would any other case under Ontario law, with only a slight deference to the Dominion policy of paternalism as embodied in statutory law.

By and large, this analysis has avoided direct comparisons to United States Indian law, but Canadian legal history has a long tradition of comparison to the United States. In many ways, this comparison is profitable because the two

320 H.V. Nelles, The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941 (Toronto: MacMillan of Canada, 1974) at 39. This history of the rapid development of lands that were largely in the possession of Indians does not contain one reference to “Indians”—they were totally irrelevant to the development of the Ontario wilderness.


323 Flaherty, ed., supra note 14 at 181.
countries share a similar common law and colonial heritage. Canadian courts frequently cited American cases throughout the nineteenth century. Moreover, the nineteenth century economic development of the two nations took parallel forms. In particular, Ontario legal history has been interpreted in a comparative context in reference to the legal history of Wisconsin, building on the work of Willard Hurst.\(^\text{324}\) Hurst constructed a careful and elaborate legal history of the use of law to structure the rapid economic development of a frontier state. He found Wisconsin was roughly comparable to Ontario. Both had agricultural, timber, and mining interests which dominated the state’s economy; huge tracts of wilderness; a single substantial metropolitan area; and roughly comparable populations, reaching over a million before the end of the nineteenth century.\(^\text{325}\) The Canadian legal historian R.C.B. Risk applied a Hurstian framework to Ontario economic development, but made no reference to Indians.\(^\text{326}\) This choice does not reflect any kind of conscious desire to avoid dealing with the significance of Indian rights in either Wisconsin or Ontario legal history. Rather, it reflects only the few references to Indians in the major cases defining economic development. Chief Justice Robinson’s court filled fifteen volumes of reporters. He wrote only two opinions concerning Indian rights.\(^\text{327}\)

While American and Canadian Indian policy might profitably be compared, the focus here is on the judicial determination of Indian rights in the context of those policies. Wisconsin judges, like Ontario judges, occasionally decided cases involving Indian rights. There were markedly fewer such reported cases in Wisconsin—ten before 1900, compared to fifty in Ontario. This difference reflects two factors independent from the actual incidence of such cases. First, Wisconsin had fewer Indians, about half that of the Ontario Indian population. This was due both to the state’s smaller size, and to a policy of Indian removal that had led to the emigration of Winnebago, Sauk and Fox Indians.\(^\text{328}\) Second, Wisconsin courts decided Indian cases in the context of a fully developed system of federal courts. These federal courts decided not only several Wisconsin cases,


\(^{325}\) “Writing Canadian Legal History: An Introduction”, \textit{ibid}.


\(^{327}\) \textit{This is based on my own search through the indices of the Upper Canada Reporter.}

but also decided cases from other states which clearly applied to all states, thus legally binding Wisconsin courts and leading to routine applications of federal law that would ordinarily not be reported. Beyond these differences, it can be argued that Wisconsin courts decided Indian cases in ways remarkably similar to Ontario courts, essentially rationalizing local white intrusions into tribal life and state jurisdiction over Indians and Indian resources.

Wisconsin, in fact, was one of the most aggressive states in this respect, even refusing to defer to the authority of federal law. In State v. Doxtater, a murder case arising on an Indian reservation, the Wisconsin Supreme Court held that the state had criminal jurisdiction over Indians on reservations as an attribute of state sovereignty, even though federal law clearly rejected this view.329 Later, the same court held that state school lands within Indian reservations were under state jurisdiction, again inconsistent with federal law.330 The state also claimed its fish and game laws applied to reservation Indians, locking up a Chippewa Indian, John Blackbird, for “seining a few suckers.”331 Similarly, the Wisconsin Supreme Court permitted the application of state tort law to Chippewa Indians on the Bad River Reservation to permit an Indian arrested under federal authority to sue the federal officer for assault.332 Indeed, this case is indicative of the entire history of state Indian law in the United States.

But there are limitations to any comparison between Canadian and American Indian law. Nineteenth century Ontario courts not only lacked a body of Dominion Indian law to which they could defer, but had it existed they would not have deferred to it. Ontario lawyers and judges successfully took control of Canadian Indian law in St. Catharine’s Milling. What is most distinct about nineteenth century Ontario Indian law is not that its judges were unique in refusing to recognize Indian rights in any meaningful way. Rather, their particularly conservative traditions of deciding cases left them no way to conceptualize Indian rights independent of the narrow traditions of established British and Canadian law. It appears, for example, that the courts lacked the analytical tools to structure even existing Indian law into a coherent opinion in the St. Catharine’s Milling case. Therefore, the issue is more than one of judicial conservatism. Legal formalism was used to deny the political choice inherent in the courts’ Native rights decisions.

At the same time, British law and legal tradition exercised a clear hold on Ontario law that structured Indian law decisions very differently from the way that federal Indian law structured state law in the United States. While United States Indian law provided direct precedent that decided specific questions of Indian rights for state courts, British law simply did not resolve parallel frontier

329 47 Wis. 278 (1879).
331 In Re Blackbird, 109 Fed. 139 (1901).
332 Deragon v. Sero, 137 Wis. 276 (1898).
disputes in Ontario. The British Crown, however, was a much more complete sovereign than any existing state or federal authority under United States law. Indeed, it is precisely the question of the relationship between the colony and the Crown that most clearly distinguishes Canadian from American legal history. Modes of judicial thought that easily permitted frontier judges in the United States to write broad and sweeping opinions on questions of Indian rights reflect a populism absent in nineteenth century Canadian law.

A comparison of the legal analysis of Native rights of the Canadian courts in the context of the St. Catharine’s Milling case with the legal analysis of the American courts in the context of the “Cherokee cases” demonstrates the different approaches to Native rights used in the two countries. The cases are similar in that the parties involved recognized that major Indian rights issues were at stake. In addition, the cases pitted the rights of the provinces (and states) against the national governments in the context of new nations where formal models of federalism were only beginning to develop. Some of the best legal minds of both countries worked on the cases, as opinions were delivered by dozens of judges of provincial, state and national courts.

The position that states had control of their lands as an attribute of state sovereignty and had full jurisdiction over Indians flowing from that same sovereignty was analyzed in State v. Caldwell, State v. Foreman and St. Catharine’s Milling. The legal analysis in the American cases is far better than that found in the Ontario case. The best lawyers in Alabama and Tennessee probably had less education and fewer library resources than Ontario’s lawyers, but crafted much better conservative legal arguments. Essentially, they referred to a parallel body of primary historical materials: treaties, the history of British and colonial dealings with the Indians and the Proclamation of 1763.

Similarly, St. Catharine’s Milling fails as a statement of Indian legal rights and cannot stand beside Cherokee Nation v. Georgia or Worcester v. Georgia. In defence of the Supreme Court of Canada, one might argue that it did not have the same issue before it; however, in fact it did. All parties understood that this was an “Indian title” case, deciding the legal status of Indians in relationship to their land. No clear statement of Native rights emerges from the case, nor is there a significant discussion of the issues. This is true even though Judges Strong and Gwynne dissented, raising reasonable and articulate legal arguments defending some kind of Indian title. The majority simply did not engage the substantive view that there was any question of Indian title: it was absolutely clear from their understanding of precedent that this was impossible. Judge Burton of the Ontario Court of Appeal thought that the idea of Indian title was

\[333\] This is the thesis of D. Howes, “Property, God and Nature in the Thought of Sir John Beverley Robinson”, supra note 313.

\[334\] State v. George Tassells, 1 Dud. 229 (1830); Caldwell v. State, 6 Peter 327 (1832); State v. Foreman, 8 Yerg. 256 (1835).
"startling" and to the best of his knowledge it was "the first time that such a contention [had] been urged in a British Court of Justice."\textsuperscript{335} It is clear from this ignorant statement that Judge Burton's reasons represent more than a careful study of precedent.

VI. CONCLUSION

What does historical study of nineteenth century Ontario Indian law reveal that is relevant to the current status of Native people in Ontario and in Canada? There can be no question that it illustrates both the power of the law as a political institution and the failure of law to come to terms with the legal rights of Native people. The Ontario courts were critical in structuring Indian rights in nineteenth century Ontario, notwithstanding the existence of the Indian Acts and judicial deference to both statute and politics. While the courts deferred to the Indian Acts, they did not mechanically follow them. For example, the judicial view that Indians were complete persons in the eyes of Ontario law was inconsistent with both the theory and practice of Indian Department policy and the Indian Acts. The courts supported their view by subjecting many of the elements of Indian Department paternalism to the strict formalistic requirements of the law. For example, the courts required Indian Agents to act as police magistrates and to follow the letter of the law, a process difficult for agents who were untrained in law. Similarly, Indian alienation of timber and hay was of great concern to the Indian Department, which invested many resources into paternalistically controlling individual Indian economic activity. However, Ontario courts were more balanced. They gave some effect to the Indian Act, as required by their formalistic framework, but they also weakened the law, thereby strengthening the power of individual Indians through a number of judicial interpretations which permitted Indians to dispose of timber and hay without permission.

Similarly, Ontario courts were consistent in according full legal rights to Indians in every case where Indian legal status was at issue. This approach implicitly weakened the paternalistic policy behind the Indian Act, a policy that viewed Indians as unable to exercise the full responsibilities of citizenship and as requiring the protection of the Indian Department. Statutory law governing most of these rights was unclear. Therefore, the courts' consistency had a major impact on defining the rights of nineteenth century Indians as individual citizens. While the courts recognized the rights of Indians as individuals, the courts simply did not come to terms with the political rights of the Indian people as tribes, or with the broader concerns of Indian culture and social life.

\textsuperscript{335} Supra note 192 at 159.
There is no way of determining whether this “liberal treatment of Indians”—the extension of law to the frontier to govern the meeting of Indians and whites there—accounts for the reduced violence occurring under Canadian domination of the tribes. Clearly, there was starvation, a deprivation of lands and the destruction of Native cultures and communities, but the fact remains that the wholesale massacres that occurred by the hundreds in the United States did not occur in Canada.

Finally, nothing in the Indian Acts statutorily dealt with Indian title or with Indian property rights to the lands they had lived on since time immemorial. While Indians were forbidden to sell land to anyone, nothing in the statutes declared what property rights they held in their lands. This question was implicitly left to Ontario courts. Arguably, it was the most important legal issue affecting the rights of Canadian Indians. Contrary to some of the dicta in *St. Catharine's Milling*, the Ontario courts simply did not decide the land title question prior to this case. In fact, following formalistic legal traditions, it seems clear that the courts decided every case involving ownership of Indian lands very narrowly and thus avoided deciding the question of Indian property rights in their lands. The Ontario courts decided the question directly in *St. Catharine's* but only because it was directly put to them by the government of Ontario in a context where they had no choice. Had the issue been raised by an Indian tribe, Ontario courts would have avoided the issue, deciding the case on other grounds. This broad contribution of the Ontario courts to Canadian legal tradition on issues of Native rights, then, does not narrowly follow Indian Department policy and the Indian Acts, but creates a common law of Native rights that is distinct from statutory policy.

The issue of native rights presents constitutional problems. The “aboriginal and treaty rights of the aboriginal people of Canada” are recognized in the Canadian Constitution, but are not defined. First it must be recognized that these rights are legal rights, defensible in Canadian courts. Thus, when Chief Justice Allan MEachern of the British Columbia Supreme Court denies that the “difficulties facing the Indian populations of...[Canada], will not be solved in the context of legal rights,” he is directly denying that Native “difficulties” arise from a lack of legal rights—rights to land, economic development and self-government. He is wrong. In referring to rights in such non-legal terms as “difficulties,” he not only demeans Native people’s conceptions of their own legal history, but demeans Canadian law, limiting the whole conception of “rights” to the colonial settler population. As succeeding events have shown,

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336 *Home and Native Land: Aboriginal Rights and the Canadian Constitution*, *supra* note 1 at 1-12.


338 Delgamuukw, *supra* note 2 at 299.

339 No one refers to white assertions of legal rights as “difficulties” not appropriately remedied in Canadian courts.
the failure of Canadian courts to honour the legal rights of Native people undermines the whole Constitutional accord and renders the Constitutional framework unworkable, placing Native people outside its structure.

There can be no question that the Gitksan and Temagami must be able to defend their legal rights in Ontario and Canadian courts. It follows that Canadian law must be reconstructed to respect those rights. This historical analysis of the origins of Ontario Indian law shows not only that Canadian Indians lost many of their legal rights in a legal process, but it also suggests that Indian rights are legal rights, and that Canadian courts have the power to recognize these rights.

Canadian courts can exercise this power in several ways. Courts could begin by reinterpretting St. Catharine’s Milling, not in an attempt to re-write history, but to recognize that its context gives it a narrow meaning, rather than the broad effect that it is given in both Delgamuukw and Bear Island. In the least, it is fair to say that no Native interests were legally defended in the case; hence, its holding should be limited to secondary disputes between whites claiming title through Indian title. New Indian land claims should be analyzed in modern terms, interpreting Native rights in the context of both current recognition of the equal status of the First Nations, and current legal theories of Native rights, a body of jurisprudence that has given a great amount of attention to legal history and current constitutional theory. A study of the legal history of Indian rights cases is, of course, a study of precedent. St. Catharine’s Milling simply cannot stand for the proposition that Indian title never existed and fell to the Crown on some version of conquest theory. Based on a reasonable interpretation of the legal history of North America, such a proposition cannot be supported by the case when broken down to its elements. Rather, some judges narrowly reached a holding denying Indian property rights in the land for reasons deeply rooted in politics, ignorance, Victorian racism and ethnocentrism. The Privy Council’s opinion, after hearing arguments that included many different theories of Indian title, specifically held that it was unnecessary to chose between these theories as long as whatever title the Indians had was less than the Crown’s underlying title. Any modern citation to St. Catharine’s Milling must take that into account and reinterpret directly the same sources that the respective courts misinterpreted.

Judge Steele’s Bear Island opinion fails to accomplish these tasks. One can easily imagine the Bear Island case being brought in the 1890s, in the immediate wake of St. Catharine’s Milling. Judge Steele’s legal reasoning fits precisely into that historical context and lacks not only humanity, but also honesty. His judgment, based on legal formalism, does not reflect the current law of Native rights, but rather nineteenth century Native rights.

Beyond Native rights is a related set of issues, also rooted in the history of Native people. Nineteenth century Ontario legal history is a history of Anglo-Canadian law, not of Native law. Native legal, social and political histories exist in twentieth century Ontario, just as they existed in the nineteenth century. The
legal history of the Grand River Iroquois spans both centuries: their legal dispute with Canada over their right to their land has continued for over two hundred years, and is evidenced by thousands of pages of documents and dozens of court cases. The legal history of the Dokis band of Ojibwa is much less documented. The legal histories of other bands are not documented at all in Ontario or Canadian case law. These histories are documented in the minds of Native people.

Both Bear Island and Delgamuukw make important contributions to Canadian legal history in that they reveal the extent to which legal history lives in the hearts and minds of Native people. Among the most important legal “facts” in both cases are facts that have existed in the minds of Native people for a hundred years: none of these Native peoples ceded any of their lands to Canada through treaties. Careful descriptions documenting how these peoples interacted legally with provincial and dominion authorities survived and were revealed in great detail in court. The nature of the exercise of political and legal authority in both bands a hundred years ago was carefully documented in court. There can be no question that this Native legal history has a place as legal tradition in Canadian law. This legal tradition is not only legal fact to be used by courts in deciding cases, but is also legal precedent. Further, it is the only possible precedent for Native people historically and substantially excluded from Canadian courts.

The Dominion of Canada somehow “lost” an Ojibwa reserve they had created through negotiations with the Indians at Whitefish Lake in 1850. Thirty-nine years later, the Dominion was involved in litigation with Ontario over whether the reserve had in fact been created. Ironically, the Dominion called as its witnesses Shewanaskishick and Mongowin, who remembered precisely where the agreed upon boundaries of the reserve were. The memories of the two men were perfect, setting out the exact boundaries that their fathers and the government of Canada had carefully negotiated. Neither the statutory law nor the common law of Canada embodied the legality of that reserve: Native legal culture preserved that law for Canada and for the small band involved. Native law and Native recollection of both the substance of Canadian law and of the legal facts underlying Native rights cases must be given the effect of law because judicial formalism cannot give effect to either the substance or common law of Native rights.

339 Attorney General of Ontario v. Francis et al., supra note 18 at 13-17.