

**RESEARCHING AND ASSERTING
ABORIGINAL RIGHTS IN RUPERT'S LAND**

JOHN STEWART MURDOCH

Bachelor of Education, University of Saskatchewan, 1978

Master of Education, University of Manitoba, 1981

Doctor of Philosophy, University of Manitoba 1986

A Thesis

Submitted to the School of Graduate Studies
of the University of Lethbridge
in Partial Fulfillment of the
Requirements for the Degree

MASTER OF ARTS

Department of Native American Studies
University of Lethbridge
LETHBRIDGE, ALBERTA, CANADA
December, 2007

© John Stewart Murdoch 2007

ACKNOWLEDGEMENTS

Without supervision appropriate to the Aboriginal world in which this thesis study's innovations are to be applied, and without access to relevant legal expertise, achieving the aims of this study would have proven impossible. This author is very grateful to Leroy Little Bear for that supervision throughout this study. His timely comments and suggestions allowed the author to explore and innovate to a greater degree than would have been otherwise possible. Exploration and innovation, have throughout this study been prerequisite to accommodating an Aboriginal cognitive style and an Aboriginal customary legal style. Not only did this author benefit from Little Bear's generosity, he also gained access to his peers. This author acknowledges the kind and advice of Kent McNeil, James Youngblood Henderson, John Borrows, Brian Slattery, and Mark Walters.

Given the surprising discoveries of this study and their likely impact, the objectivity of my thesis study committee members, Shawn Bubel and Steve Ferzacca, in requiring pertinent and probative evidence within an appropriate framework, was essential to achieving the aims of this study. This author is also much indebted to Kathy Schrage for her patient support and rescue services when they were needed.

Being at the University of Lethbridge meant being far from home, Waskaganish, northern Quebec. That was prevented from being a significant obstacle by good friends such as Lois and Harley Frank and their family, Rodney Big Bull, Adrian and Leslie Stimson, Delray Wodsworth, Ray and Mary Amato, and the late Joan Ryan.

This thesis would neither have been as interesting or possible without the moral support this author has enjoyed from his wife Gerti, along with five sons and daughters, plus ten grandchildren. This author's motivations to both take on this challenge and to complete it were very much motivated by a desire to make them proud.

ABSTRACT

It was the realization that certain legal, economic and political questions, unresolved, frustrate, even prevent satisfying lives in the relatively small world of Waskaganish that motivated this thesis study about protecting the liberties of the Aboriginal inhabitants of what was formerly called Rupert's Land. This author was well aware that such liberties have not enjoyed the kind and level of protection that is normal elsewhere in Canada from arbitrary use of authority. But, this author believed and is now assured that this is an error that can be corrected within the current Canadian legal and political system.

Investigating the assurances granted to the inhabitants of Rupert's Land at the time of annexation produced a solemn and binding promise made by the Canadian House of Commons and Senate to Her Majesty's Government of Great Britain. That promise was entrenched in Canada's first constitution, itself a British statute. In the form of proclamations, orders-in-council, published documents and sworn testimony, this study uncovered the proof of such assurances, their content and their survival. Moreover, these forms of proof are all admissible in the fact-finding of Canadian courts as 'so notorious as to not require any further proof'.

The resurrection and revival of these assurances is fundamentally important to achieving any education or socio-cultural goal. Equally important is the need to understand why and how these assurances have been so long suppressed. In addition, this author needed to explore the convergence possible between the command order of the Canadian state and the customary order of the Aboriginal inhabitants of Rupert's Land. Such convergence is prerequisite to restoring the relative equilibrium that characterized two centuries of a bijural relationship between the Hudson's Bay Company and Aboriginal First Nations.

Finally, the author illustrates and corroborates such a bijural approach in the example of training, apprenticeship and recognition of competence within common, provincially certified trades.

FORWARD

Don't ask what is right or wrong... These questions are very dangerous... Right is only the goodness you carry in your heart, love for your ancestors, for your family. Wrong is what comes between you and that love.

(Advice of father to daughter, Le Ly Fong, a Vietnamese woman in 1970s, war torn Viet Nam, in an autobiographical movie, Heaven and Earth, 1989)

This author has relied on this piece of wisdom during a life where there have been often conflicting standards for right or wrong. This author would add, that any uncertainty of one's family or ancestors could be compensated for by the love of lifelong friends. Although fine examples of parents and grandparents were readily available, it was at times challenging when negotiating more than one world, to know what a man should do in a new and challenging situation. On October 22, 2007, the author lost a dear friend of almost forty years. Stephen Ratt of Wemindji died suddenly while recovering from a year of illness. Only a day earlier, the author had made plans to fly up the east coast of James Bay to visit him in order, as he had done many times before, pick Stephen's brains, this time on efforts that had arisen from this thesis study. Since first meeting in 1970, the author had valued Stephen's kind words, good humour and reliable advice. Stephen will be missed, but this author will always know what Stephen would advise in any situation as easily as remembering the melody and words of a favourite song.

TABLE OF CONTENTS

Approval	ii
Acknowledgements	iii
Abstract	iv
Foreword	v
Table of Contents	vi
CHAPTER ONE: INTRODUCTION	
Statement of Problem	1
Aim of This Study	11
Orientation of this Study in Relation to Relevant Literature	11
Law	11
History	13
Anthropology	14
Economics	15
Limitations of This Study	16
Methodology	16
Organization of This Study	17
CHAPTER TWO: RUPERT'S LAND RIGHTS	
History and International Function of the Rule of Law	20
British Imperial Tradition	22
British Imperial Tradition in Colonial Canada	23
The Rule of Law in the History of Rupert's Land	24
The End of Hudson's Bay Company	
Rule of Rupert's Land	26
Her Majesty's Terms	29
A Fumbled Transition	34
CHAPTER THREE: THE TIDE OF HISTORY	
Meaning of the Tide of History	43
Historical Suppression of Rupert's Land Rights	51
Tide of History Reliant on the Legislature	54
Tide of History Reliant on the Court	63
Conclusion	71
CHAPTER FOUR: A CANADIAN CONSTITUTION PARADIGM – ORIGINS	
British Tradition of Parliamentary Supremacy	74
Federal Tradition of Dividing Powers	77
Colonial Tradition of Imperial Supervision	84

CHAPTER FIVE: A CANADIAN CONSTITUTION PARADIGM – CREATING REMEDIES	
Liberal Tradition	100
Command and Spontaneous Order	102
Statute, Common Law and Custom	105
Legal Foundations of Custom	109
CHAPTER SIX: TRAINING, APPRENTICESHIP & CERTIFICATION IN A RECOGNIZED TRADE	
Basis of Sovereignty in Rupert’s Land	113
Growth of Illiberal Democracy in Eastern Rupert’s Land	116
Effect of Related Provincial Statutes, Regulations and Policies	118
Training, Apprenticeship and Certification by Custom	121
From Principles to Practice	123
Operational Information	124
Judicial Review and Reference	125
Ownership, Administration and Use of Resources	125
CHAPTER SEVEN: CONCLUSION	
What Has Been Learned	129
Implications for Further Research	130
FIGURES	
Figure 1 - Map of Rupert’s Land	16
Figure 2 - Establishing Character with Similar Facts	70
APPENDICES	
A - Indian & Northern Affairs Staff	132
B - Content of Individual Freedoms Protected by Charter	134
C - British Parliamentary Debate, June 1, 1869	135
D - Royal Proclamation December 6, 1869, Wolseley’s Proclamation 1870	152
E - Indian & Northern Affairs Chronology	155
F - Definition of a Jew	158
G - Lord Mansfield’s Six Principles	160
H - Nomads in Canadian Courts	163
I - Macdonald - Granville Correspondence on Judicial Review	174
J - Facts on Indirect Rule	176
K - Continuity of the Legal Rights of Every Aboriginal Individual	177
L - <i>Connolly v. Woolrich</i> [1867], 11 L.C. Jur. 197	179

M - Boards, Commissions and Committees	181
N - Delegation of Federal Powers to Provincial Governments	183
O - Quebec Youth Protection Act - Excerpts	185
P - Québec Commission des Droits de la Personne et des Droits de la Jeunesse	188
Q - Gandhi's 'The Violence Family Tree'	191

TABLES

Court Cases Cited	192
Statutes, Orders-in-Council, Proclamations, etc.	194

BIBLIOGRAPHY	195
--------------	-----

ABBREVIATIONS

BNA Act	British North America Act, 1867
CNA	Cree Naskapi Act, 1984
CLVA	Colonial Laws Validity Act, 1865
RL&NWTO	Rupert's Land & North-Western Territory Order, 1870
RP1763	Royal Proclamation, 1763
RP1869	Royal Proclamation, 1869

CHAPTER ONE

INTRODUCTION

Statement of Problem

During the late summer and fall of 2003, this author began a long awaited opportunity to participate in delivering a secondary school education, organized to serve the needs and preferences of northern Algonquian Aboriginals. Almost three decades earlier, this author had completed a doctoral thesis in education and anthropology entitled, The Legacy of Dress-Up Creek: Formal Education for Northern Algonquian Hunters. For most of the intervening years, this author had worked with the Cree School Board, Cree Trapper's Association, Crees of Waskaganish First Nation and other similar organizations of northern Quebec, developing programs to serve the same needs and preferences. From 1989 through 1990, this author had opportunities with Cree and Ojibwa adults from the northern parts of Manitoba, Ontario and Quebec to develop and implement training of three or four months duration, in tourism outfitting and traditional hunting and trapping. In the late summer of 2003, as a teacher of 'academic' courses, this author was to have an opportunity to assist the delivery of a normal, junior matriculation (Quebec first cycle) secondary school curriculum, in a traditional Waskaganish Cree social context. This implied moving from one location to another according to a traditional Cree cycle and functioning socially as a hunting group. The students, five boys and five girls were in their mid teens. This Alternative Education Program was their last chance to get a secondary school education as they had already experienced too many difficulties, usually social difficulties, in order to continue in the conventional, Euro-Canadian styled school of Waskaganish. In addition to this author, a Waskaganish Cree couple, Mary and Charlie Diamond, were also hired to teach, especially those matters that related to traditional Cree culture. The plan was that, Mary and Charlie Diamond, recognized as Cree elders and this author, qualified by formal education and relevant experience, could together deliver an authentic secondary school education to the ten Cree teenagers, in a manner more attuned to their needs and preferences than the Euro-Canadian styled school of Waskaganish.

Certainly, a traditional Cree camp proved to be just the kind of intimate and nurturing climate needed. The fact that Mary and Charlie Diamond are this author's sister-in-law and brother-in-law and that the students were either related or well known, encouraged such an atmosphere. The absence of imposed structure such as classroom walls, and rotation on a schedule helped as well, in adopting the more spontaneous or intuitive traditional Cree order of a hunting camp. It was also possible to lever those activities which students enjoyed less, such as mathematics, language arts and other written work, against those activities such as hunting, fishing and crafts which they enjoyed more.

Unfortunately, as our efforts became increasingly spontaneous, even though the students proved to be significantly more productive, the monopoly of coercive authority retained by the school and school board administration grew ever larger as a serious and unpredictable obstacle. For example, 'teachers' are qualified in a Cree context by their particular experience with the student combined with their competence in the particular knowledge and skills required. The 'best' teachers are typically those persons who have already established an effective and affectionate relationship with the student. In contrast, Euro-centric qualifications are authoritative, based on formal education sanctioned by the state. Because the human and financial resources of the school and the school board were organized in accordance with Euro-Canadian authoritative criteria, the 'best' teachers were beyond the reach of our Alternative Education Program. Worse, instead of being directed and organized by Cree traditions of leadership and consensus, our program was subject to commands, constructed in isolation. It did not take the students and their families long to realize that our program was in fact organized in the same manner as the conventional village school, but located in an alternative place. Finally, compelled to act as conventional Euro-Canadian styled teachers, Mary, Charlie and this author were obliged to use or depend on a monopoly of coercive authority for maintaining order in a non-Euro-Canadian context. By mid November, the Alternative Education Project was suffering most of the same organizational difficulties as the regular village school, exacerbated by the rigors of the Canadian subarctic and a dependence on a distant administration, increasingly more imposing and unpredictable.

The experience of the Alternative Education Project confirmed both the positive and the negative conclusions reached by this author as a result of previous experience with both adults acquiring vocational skills, and children following a secondary school education. First, most if not all of the terminal objectives of knowledge and skill that comprise a secondary school education could be very effectively accomplished in a Cree socio-cultural setting according to established Cree practices. For those students who could not or would not embrace Euro-Canadian cognitive and social style, probably the only way that they will complete a secondary education is by such a Cree socio-cultural approach. Secondly, when Cree, Aboriginal spontaneous order is subjected to interference by Euro-centric commanded order, the former order disintegrates and the latter commanded order fails to accomplish compliant order. Without an appearance of fairness and justification, Euro-centric commanded order fails to stimulate effective Cree participation and deference. As in the Euro-centric village school, students and their families expressed their resistance to commanded order with their feet, with the result that the village school produces a ninety percent or greater student dropout rate. Thirdly, Euro-centric educators, especially those with authority, did not believe in the existence or value of a Cree, Aboriginal order. Fourthly, based on his formal education as well as both incidental and deliberate experience, this author believes the brightest prospects for improving Cree Aboriginal performance in secondary school lie in protecting Cree individual freedoms from interference, usually Eurocentric.

Thus the purpose of this thesis study is the development of strategies for protecting the Cree practices or customs that shield individual freedoms from infringement whether by accident or by design. The context of acquiring knowledge and skills is chosen because of the author's familiarity with it and because it clearly engages individual freedoms, values and customs.

As a means of gaining access to the expertise able to conceive and organize such protection, this author sought and was most fortunate to gain the mentorship of a scholar who had been relied upon by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where the issue at trial was Aboriginal individual liberties in fishing activities. Subordination as a student to this scholar, Leroy Little Bear, assured this author

primacy of an Aboriginal perspective while exploring both Canadian and Aboriginal systems of legal order. This relationship also engendered access to his peers, such as Brian Slattery, Kent McNeil, John Borrows, James Youngblood Henderson, and Mark Walters.

In his seminal work, Understanding Aboriginal Rights, Brian Slattery, the law professor most often cited on such matters by Canadian courts, described the subject of Aboriginal rights thus:

The subject of aboriginal rights is like an overgrown and poorly excavated archaeological site. Most visitors are content to wander around the ruins, climb to the top of the highest mound, or poke about in the dust for souvenirs. Others, prompted by curiosity or official duty, select a likely spot and sink a trench through the layers of historical deposits, uncovering, perhaps, the severed foot of a colossal statue, or a worn inscription. But the meaning of these objects is unclear. Even when they can be identified and dated, their larger import escapes us. [Slattery 1987:727-728]

The ambiguity and confusion described by Professor Slattery can be attributed to a number of sources. The term 'Aboriginal' is a vague quasi-racial expression without a constant social or cultural meaning. A Mohawk Aboriginal, for example, is a traditional warrior-hunter and farmer, while a northern Cree Aboriginal is more exclusively a hunter who traditionally, prefers not to be a warrior.

As this author quickly learned, during this thesis study, normal obligations accorded other Canadian citizens, to respect legal precedents, international agreements, or declarations of human rights, have not always been considered when dealing with Aboriginal actions. The principle of stare decisis, literally meaning, *standing by decisions*, has not been carefully or consistently followed in Canadian courts. As a result, Canadian court decisions about Aboriginal rights have not evolved in such a manner that a clear body of jurisprudence or previous decisions has emerged. Without principles laid down in advance as is normal in actions involving other groups of Canadians, Aboriginal rights are much more dependent upon new discoveries at each separate trial.

Paul Rubin convincingly argued in his 1977 article, *Why Is the Common Law Efficient*, "the evolutionary pressure [to create common law] comes from the behaviour of litigants, rather than judges" and that "when different types of parties have an interest

in the same type of case, we would expect inconsistencies to exist in the law”, (Rubin 1977:61). The Crown and Aboriginal interests in the same types of cases are consistently so different as to be diametrically opposed. Being obliged to prove occupation at the time of European arrival in order to have property and related Aboriginal rights validated by Canadian courts, also introduces uncertainty. Kent McNeil drew attention to this problem in his article, *A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?* noting that “proving Aboriginal occupation of specific lands at the time of colonization may itself be a formidable task” (McNeil 1990:108).

This author argues that much of the formidability flows from the burden of proving occupation against the Crown's unsubstantiated character allegations that Aboriginal, alleged nomadic occupation does not constitute occupation. Non-Aboriginal Canadians do not face the same burden of character evidence in any trial because such character evidence is prohibited without a body of similar facts, evoking a striking pattern of similar acts manifesting the discreditable character at issue. Moreover, for other Canadian citizens or immigrants to Canada, 'different' does not constitute discreditable. For example, at Immigration Review Board hearings, immigrants or refugees may invoke their own customs of marriage, family ties or inheritance and unlike Aboriginal oral accounts, their testimony cannot be doubted without clear and admissible evidence to justify skepticism. In *Maldonado v. Minister of Employment and Immigration [1980]* 2 F.C. 302 at paragraph 5, the Federal Court instructed that:

It is my opinion that the Board acted arbitrarily in choosing without valid reasons, to doubt the applicant's credibility concerning the sworn statements made by him ...When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.

During the past ten years, this principle has been applied in more than a hundred judgments of non-Aboriginal issues, but only once in Aboriginal issues in *Benoit v. Canada, [2002] FCT 243*.

As this author argues in this thesis study, the greatest causes of confusion, convoluted and discontinuity lie in the failure of the excavators of Aboriginal rights to include other relevant perspectives and their attendant bodies of tacit knowledge. Kent

McNeil wrote in his article, *Sovereignty and the Aboriginal Nations of Rupert's Land*, that:

Where the rights of the Aboriginal peoples of Canada are concerned, history and law are inseparable. Lawyers working on Aboriginal claims ignore history at their peril. But the converse is also true – historians whose work involves the Aboriginal peoples cannot afford to disregard law. Nowhere is this more apparent than in Rupert's Land, out of which the province of Manitoba was at least partially created. (McNeil 1999:1)

This inseparability of history and law is well illustrated by the fact that the *Royal Proclamation of December 6, 1869* has only been noticed by University of Manitoba, History professor, Jack Bumsted (1996), who had neither seen its full text nor appreciated its legal weight. But, the history *of* law is no less important. Failing to research the history *of* law, especially common law is no less perilous. For example, the lawyers representing the Manitoba Metis Federation and others against Manitoba and Canada in their Final Argument, referred to the same Royal Proclamation as “Governor General Sir John Young’s Proclamation of December 6, 1869”, completely missing its common law status as an executive order where Her Majesty had used Her power exhaustively and whereby such a proclamation’s terms could only be altered later by British Parliament or an elected assembly of Rupert’s Land inhabitants. A study of the history of such proclamations would have uncovered the principles declared in *Campbell v. Hall*, [1774], 1 Cowp. 204, 98 E.R. 1045, by Lord Mansfield, Chief Justice of the highest court in the British Empire. Such a study would also have uncovered how these principles had since been applied in *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313 at p. 388, by the Supreme Court of Canada. It is the history of purpose, executive authority, and manner of promulgation, defined by Lord Mansfield, that distinguishes Governor General Sir John Young’s Proclamation of December 6, 1869 as a *Royal* Proclamation. In fact, it was not Governor General Sir John Young’s Proclamation at all, but rather the proclamation of the cabinet of Her Majesty’s Government of Great Britain and Ireland, justified by a debate on the subject, June 1, 1869, in British parliament.

Much confusion and convolution has been caused to the subject of Aboriginal rights by ignoring or uncritically enlisting the help of anthropologists, including archaeologists, cultural anthropologist and linguists without reconciling their methods and resulting

expertise with relevant common law. By following eminent Clifford Geertz' maxim that "by searching out and analyzing the symbolic forms - words, images, institutions and behaviors - in terms of which, in each place, people actually represent themselves to themselves and to one another", some anthropologists have created a 'thick description' from which to deduce a theory of the character or cultural behaviour of a given society (Geertz 1974:30). 'Thick description' is a considerable body of related facts derived from personal experience with a subject people. Thus acquired, an expert's generalizations emerge from underlying patterns of shared behaviour. Accordingly, the theories and the facts witnessed by anthropologists using 'thick description' satisfy common law on admissibility of character evidence at trial. Such common law on admissibility of character evidence was well described by a former judge of the Supreme Court of Canada, John Sopinka:

The theory or generalizations must arise from a substantial body of relevant, probative similar facts as a striking pattern or system of behaviour which could not be accounted for as coincidence by a reasonable person. The facts themselves must describe acts which illustrate motive, intent, method or some other aspect of a particular individual or group's behaviour. (The Law of Evidence in Canada, 2nd Edition, 11.1.1)

However, as this author demonstrates later in this thesis, Canadian courts have often admitted expert evidence, even allowing unsubstantiated use of such propensity terms as 'nomad', or 'primitive' without the presentation of any observed facts whatsoever. The bar against admitting such evidence has existed since early in the 19th century (Cocks 2003:45; Farmer 2005:18-19). Beginning late in the 19th century, where a pattern of behaviour can be proven, with relevant, probative and similar facts of similar acts, an exception to a bar against character evidence has been allowed (Hoffmann 1975:202). But, expert opinions about Aboriginal behaviour, motives, intentions, or methods, based on literature, *not* 'thick descriptions' of witnessed facts, never have and not likely ever will be admissible as evidence at trial. Admission of hearsay evidence such as scholarly writings describing Aboriginal character has noticeably prejudiced Canadian courts' determination of Aboriginal rights. Moreover, unchecked, such expert opinion based on

hearsay rather than witnessed facts has affected both the length and clarity of judgment of many recent trials.

In this author's opinion, it is a lack of experience with and a lack of tacit knowledge of customary law that most seriously inhibits discovering the meaning and import of Aboriginal rights. La Forest J wrote for the Supreme Court of Canada, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 that:

"Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be given a broader definition. In any event, both courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym.

This view that 'custom' as a rule having the force of law is now rare and antiquated has very much diminished the meaning and import of Aboriginal legal systems based on custom. Integrated with unchecked character evidence of nomads and primitives, this notion of custom as being archaic and having fallen into disuse, obscures the fundamental difference between Aboriginal and Canadian legal systems – how individual freedoms are protected. This author has lived in accordance with the customs of the Crees of Waskaganish First Nation for almost four decades. Customs have guided and informed his behaviour as a husband, father, family or community member. More importantly, customs have conveyed accepted Cree values and practices for performing a wide range of roles, which are themselves not a normal part of Cree socio-cultural traditions. As a school principal, guidance counselor, and classroom teacher, this author has relied upon Cree values and custom to shape his relations with other family and community members in resolving problems from trivial to crisis in magnitude. Whatever additional advice was needed in order to properly apply such accepted practices, was readily available from others with vested interests. Moreover, when this author began graduate thesis fieldwork throughout the Boreal Forest, the Eastern Arctic and the Australian outback, many of the same values and customs provided a good starting point for engaging with these other Aboriginal communities.

Far from being obsolete, especially beyond the reach of Euro-centric interference, customs protect individual freedoms by providing ways of exercising freedoms, least likely to result in collisions with others. This customary approach is quite different from a 'rights' approach where, in latter instance, the state monopolizes coercive force and offers limited protection from its use, for such substantive freedoms as: freedom of thought and religion; equality under and before the law; and a less clearly defined, life, liberty and security of person. A customary legal system, on the other hand, avoids and discourages the use of coercion altogether. Thus, 'rights' are neither relevant nor necessary when social order and protection of individual freedoms are achieved through Aboriginal customs.

Denial of customs as a legitimate basis for a legal system, accompanied by a narrow view that protection of individual freedoms can only be accomplished with 'rights', also denies the changes which have occurred within a Canadian legal system since 1982. Prior to the *Constitution Act of 1982*, the state may well have had a monopoly on coercion, acting through legislative supremacy. Since 1982, however, the aforementioned substantive freedoms are now protected from state coercion, not by the state itself, but rather by the coercive powers of Canadian courts and tribunals. In other words, within those private domains such as home, family and faith, Canadian individuals are now living in stateless societies where instead the accepted practices or customs of home, family and faith, guide their freedom. The same myopic perspective that still believes in the state/stateless dichotomy between Euro-Canadian and Aboriginal legal order, fails to fully appreciate a spontaneous or customary order, very much in use in economic and international affairs. This author found the same aversion to using coercive force that characterizes Aboriginal legal order, also motivates the spontaneous order of economic and international affairs. Accordingly, much of the literature describing past and current practices in economic and international affairs, proved quite helpful in this study for explaining and anticipating the effects of Aboriginal legal order.

Finally, much of the meaning and import of protecting Aboriginal individual freedom have not escaped clear definition merely as the result of poorly conceived or poorly coordinated efforts. Unlike the individual freedoms of other groups of Canadian

citizens or immigrants, mainly by the federal and provincial governments, Aboriginal freedoms are attacked, reduced and extinguished by, well financed, and sustained efforts. It has become increasingly more apparent that federal and provincial governments do not own or have dubious titles to the 'treasure house' of land and natural resources. The threat of successful challenges is a directly related to the survival and assertion of Aboriginal rights. Governments' preoccupation with that threat is apparent in the manner in which they relate to Aboriginal Canadians. This author created a staff list of permanent employees of Indian & Northern Affairs Canada from the information available online from Public Services Canada (see Appendix A). On one hand there are more than a hundred lawyers and paralegals for litigating against Aboriginals, but there are no employees charged with protecting, or monitoring respect of Aboriginal rights to education, health, justice, potable water, etc.. There *is* an ombudsman, but only responsible for departmental staff. Since 1996 there has been a team of scholars, unofficially known as the 'Indian fighters' maintained on contracts to oppose Aboriginal claims, reduce the weight of Aboriginal evidence and to gather evidence in support of extinguishing Aboriginal claims (Barnsley 2001; Brownlie 2006; Pryce 1992). The Canadian government does not seem to have established other such teams as the 'Franco-Manitoban fighters', 'Gay fighters', or 'Sikh fighters' in response to those groups, actually more successful efforts to preserve their freedoms. As this author will illustrate in chapter 4, Canada's various teams have proven quite effective in creating common law on Aboriginal rights which confounds definitions of: individual and communal rights; property rights; and, the distinction of Aboriginal substantive rights from procedural rights or privileges. In the same chapter, this author will show how Canada, in order to maintain its international economic advantage of a treasure house of natural resources, has used unlimited discretionary powers, passive violence, gerrymandering, and suppression of documented promises to respect and protect rights.

In summary, the ambiguity of the meaning and import of the subject of protecting Aboriginal freedoms is, in this author's opinion, the direct result of accidental and deliberate omission of important perspectives, not the least of which has been that of Aboriginal custom.

Aim of This Study

In order to resolve the meaning and import of protecting Aboriginal freedoms, this author has organized this thesis study to:

- i) trace the history of the manner in which Aboriginal freedoms were alleged to be protected and were in fact treated, before and after the annexation of Rupert's Land (including the traditional lands of the Crees of Waskaganish First Nation);
- ii) locate within a Canadian constitutional paradigm, the promise to respect the legal rights of every individual and to locate their protection by the civil procedure of the court of competent jurisdiction (the Quebec Superior Court);
- iii) explain how Canada's federal and provincial governments have been able to evade their constitutional obligations to respect and protect the legal rights of every individual; and,
- iv) explain and propose the remedy of Quebec's and Canada's evasion of respect and protection of the legal rights of the Crees of Waskaganish First Nation, using a current, pressing example of training, apprenticeship and certification of competence in skilled trades.

Orientation in Relation to Relevant Literature

This author has identified four bodies of literature relevant to his thesis problem, including: law, history, anthropology, and economics.

Law

The body of relevant law literature engaged by this researcher can be further subdivided into four areas: Aboriginal, administrative and constitutional law, and civil procedures. In all cases, this author's identification of authoritative works began with their citation, usually by superior courts and the Supreme Court of Canada. After identifying the writers preferred by Canadian courts, this researcher read extensively each

writer's cited and other works. In most instances, it was also possible to ask these writers' advice on the various positions taken on Aboriginal issues. Early on, it became clearer to this researcher that the more general notion of Aboriginal rights, aptly characterized as overgrown and poorly excavated by Slattery, were of less importance than the specific and clear facts of the legal rights in the *Rupert's Land & North-Western Territory Order, 1870*, clearly enunciated and constitutionally entrenched, this researcher examined more closely the works of Kent McNeil, Brian Slattery and Mark Walters. Upon discovery of the *Royal Proclamation of December 6, 1869*, this researcher turned to the common law which has evolved, for applying such executive orders of Her Majesty's Government, notably Lord Mansfield's judgment of *Campbell v. Hall, [1774]* and *Calder v. Attorney-General of B.C., [1973]*. In order to locate Rupert's Land legal rights within a Canadian constitutional paradigm, once more, this researcher turned to the writers cited by Canada's superior courts and the Supreme Court of Canada. Especially helpful and authoritative were Peter H. Hogg, W. R. Lederman, A. V. Dicey, Gerard V. La Forest, Beverley McLachlin, John Bora Laskin, Joseph Raz, Ruth Sullivan and Robert J. Sharpe. In the course of exploring Aboriginal issues at trial, this author was immediately aware of the scarcity of facts to support experts' assertions about Aboriginal character. For a better understanding of the common law of evidence, this researcher began with those writers cited in Aboriginal actions in superior courts and the Supreme Court of Canada. Next, this author compared the standards of admissibility and assigned weight adopted in judgments of Aboriginal actions with those standards applied to non-Aboriginal actions. As a result of this comparison, this researcher discovered a blind spot in fact finding in Aboriginal actions, especially in applying the principles of a similar fact exception to the prohibition against character evidence. This author noted especially the in the requirement that a properly qualified expert present the facts upon which his expert opinion was based. The views of L. H. Hoffmann, J. R. S. Forbes, John Sopinka, Ronald B. Sklar, Ronald Joseph Delisle, and Sidney L. Phipson, adopted by Canadian courts were carefully examined.

After exploring writings on economic and international spontaneous order, and particularly the role of customary law, this researcher read widely the writings of such

legal scholars as Mark D. Walters, Lon L. Fuller, Taslim Olawale Elias, and A. N. Allott. Recent studies by various Australian and New Zealand law commissions were also helpful in appreciating the challenges of converging customary law with statutory law.

Finally this author referred to current Canadian laws and regulations for pleading, discovery and trial in Canadian courts. A customary law approach to achieving training, apprenticeship and certification in a trade, described in Chapter 7, anticipates the need to follow Canadian civil procedure in order to secure the protection of Quebec Superior Court of the legal rights of the Cree of Waskaganish First Nation.

History

For general overviews of the history of the time period, approximately 1850 through 1900, this author relied upon the writings of William Louis Morton, Desmond Morton, Arthur S. Morton, Jack Bumsted, Edwin Ernst Rich, John S. Galbraith, and Paul Knaplund. For descriptions of the arrival of Canadian law enforcement and courts, this author relied upon the writings of Howard Robert Baker, Louis Knafla, Sidney L. Harring, and Hamar Foster. Biographies of important figures were easily found at the University of Toronto's and the Université Laval's [Dictionary of Canadian Biography Online](#).

As the reader will notice especially in chapters 2 and 4, there were significant discrepancies in various historical accounts of the period 1857 through 1900, so much so that this researcher resorted to the first hand accounts of key participants such as the bishops, news reporters, soldiers and politicians of the period. It was only through comparing such personal accounts that it was possible to determine that important documents had in fact not been distributed. In addition, this author was able to resolve ambiguities and conflicts surrounding historical events using the debates of the Canadian senate and house of commons, censuses, and the many sets of sessional papers prepared to brief members of parliament on important events. These sources of information were for the most part available online through the University of Alberta's database, [Peel's Prairie Provinces](#) and the Canadian Institute for Historical Microreproduction's [Early Canadiana Online](#). First hand accounts and official government documents are especially

important as admissible evidence in the event that the support of a superior court becomes necessary for the protection of individual legal rights.

Anthropology

Two anthropological issues were especially important to this thesis study. First, this author was concerned with the approach to fieldwork promoted by Clifford Geertz and Gilbert Ryle based on: intuiting systems of cultural behaviour from thick descriptions; that is, the information resulting from sustained participation and observation within a cultural community. Of particular importance to this author was a focus on the motives, intentions and explanations of the subjects being studied. This is the only well known anthropological approach to researching cultural behaviour or propensity that respects common law on the admissibility of character evidence by eliciting similar facts to prove similar acts. The anthropological writings of Julius Lips, Richard J. Preston, Jose Mailhot, Adrian Tanner, Harvey Feit and Jean Briggs were useful for their 'thick descriptions' based on intracultural meanings among Rupert's Land individuals, especially the Crees of Waskaganish First Nation and their neighbours. Terms such as 'nomad', 'primitive', 'preliterate' are the hallmarks of writings produced by authors gathering facts to support a theory constructed exterior to the culture studied. Such approaches at common law are at best trawling, or the fruit of poisonous reasoning, and are thus inadmissible as similar fact evidence. Reviewing literature for opinions or hearsay information to support an externally constructed theory does not provide the foundation on witnessed facts to authenticate expert opinion.

The second anthropological issue of concern to this author during this thesis study was the identification of the substantive individual freedoms that are the object of protection, either by custom or by rights. At common law, those cultural behaviours were described in *New Brunswick (Minister of Health and Community Services) v. G. (J)*, [1999] 3 S.C.R. 46, by Chief Justice Lamer, when he wrote for a majority:

For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological

integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

In *Blencoe v. British Columbia (Human Rights Commission)*, [2000], 2 S.C.R. 307, Chief Justice McLachlin, writing for a majority, comprised a list of examples from the previous decade where liberty had been compromised by the state:

The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices.

The correlation with profound effect on a person's psychological integrity as well as engagement with important and fundamental life choices, correspond exactly with Felix Maxwell Keesings inventory of seven general areas of cultural behaviour, which if disturbed voluntarily or otherwise result in acute psychological stress and disorientation (Keesing 1958:411-412). This inventory was especially useful in creating customary solutions and identifying the freedoms which customs for training, apprenticeship and certification must enable and avoid interfering with (for the complete list see Appendix B).

Economics

Notably, the writings of Friedrich August von Hayek and Michael Polanyi describe a spontaneous order essential to economic and international relations in the absence of a state monopoly of coercive force either over its own citizens or other states. Although neither Hayek nor Polanyi were much concerned with Aboriginal societies, their writings and their commentators describe an excellent theoretical model for explaining Aboriginal spontaneous order created through customs. The main distinction between Hayek and Polanyi's spontaneous order, on one hand, and Aboriginal spontaneous order on the other, is that where the former needs some rules or legislation to compensate for the lack of morality in a free market, the latter Aboriginal hybrid is characterized by a strong moral gravitational field which curbs any such amoral centrifugal force.

Limitations of This Study

The range of literature engaged has been vast and multidisciplinary. For reasons of practicality and relevance, this author adopted a framework appropriate to achieving the very concrete goal of remedying current infringement of legal rights in the specific context of training, apprenticeship and certification in trades common to Rupert's Land, such as, carpenter, plumber electrician, heavy equipment operator, automotive mechanic, and traditional hunter. A further limit of the Crees of Waskaganish First Nation is added in order to reduce the scope of this study to that of a band or basic political group, quite

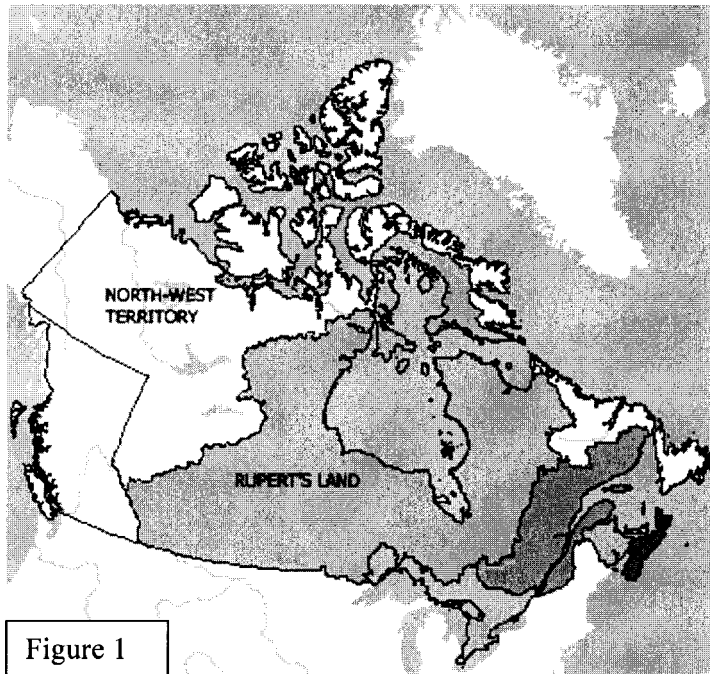


Figure 1

typical in most of Rupert's Land and the Northwestern Territory. Finally, the scope of this thesis is limited to those facts, allegations and points of law which might need to be pleaded in order to secure the protection of a court of competent jurisdiction, in this area, the Quebec Superior Court, as promised in Canada's constitution.

Methodology

This research created 'thick descriptions' of not only Aboriginals, but as well of the legal scholars, social scientists and historical figures that described Aboriginals. In the hermeneutic style of Hodder (1977:268-269) and Preston (1999:152-153) this researcher intuited hypotheses, tested them further in relevant contexts, edited these hypotheses in accordance with the inconsistencies apparent during testing, tested them in further relevant contexts, etc. etc.. This researcher repeated this process until a 'thick description' had been produced, which in the words of Gilbert Ryle (1968:16), allowed this researcher

“to march along some stretches of some of his old tracks, pacing this time not interrogatively but didactically ... able to pilot others along ways along which no one had piloted him and delete some of the queries that he had inscribed on his own, originally hypothetical signposts”. As this researcher approached the subject matter of chapters 5 and 6, increasingly, it became necessary to involve Crees of Waskaganish First Nation in the hermeneutical process.

Organization of This Thesis

Chapter 1 - Introduction

In this chapter, the researcher introduces the nature of the problem that undermines the meaning and import of Aboriginal rights – the omission of important historical, anthropological, customary and economic perspectives. The aim of this study is to remedy these omissions in the course of creating a customary remedy to the current infringement of the legal rights of the Crees of Waskaganish First Nation, a typical band of Rupert’s Land and the Northwestern Territory. The author concludes this chapter by stating the limitations, methodology used and the organization of this study.

Chapter 2 - Rupert’s Land Rights as Historical Fact

In this chapter, the researcher develops the notion that Canada’s international and domestic application of the rule of law is derived from British Imperial history and principles. Rupert’s Land rights are the result of British Imperial law. The author traces the rights of the Aboriginal inhabitants of Rupert’s Land, noting Canada’s promise that its government and Parliament shall respect the legal rights of any individual within the territory and to place them under the protection of courts of competent jurisdiction. This chapter concludes with extensive and unequivocal proof from authoritative sources as to the authenticity of legal rights of Rupert’s Land Aboriginal inhabitants.

Chapter 3 - Tide of History

This chapter narrates the history of how Rupert’s Land rights were suppressed upon union with Canada. This chapter also illustrates the manner in which the Canadian

Crown, or executive has enlisted the assistance, first of legislative powers and more recently, judiciary powers in order to create unlimited discretionary power for itself and illiberal democracy for Aboriginals. These effects have been euphemistically known as ‘the tide of history’ and are an important part of a continuing economic strategy that relies on ignoring Aboriginal property and legal rights in order to achieve an international economic advantage.

Chapter 4 - A Canadian Constitutional Paradigm - Origins

In this chapter, this author examines the basic principles of Canada’s first constitution. These organizing principles are examined within the British, Federal and Colonial traditions from which they are derived. This chapter ends with a summary as to the combined effect of these principles and traditions of Canadian constitutionalism on Canadians in general and Aboriginals in particular.

Chapter 5 - A Canadian Constitutional Paradigm - Creating Remedies

Using modern theoretical models for spontaneous order in economic and international affairs, this chapter explains blueprints of the convergence of Rupert’s Land Aboriginal customary order with Canadian constitutional and civil order. Further, this chapter describes a Rupert’s Land customary order which is compatible with and uses the adaptive features of Canadian constitutional and civil order necessary for the protection of the individual freedoms of Rupert’s Land Aboriginal inhabitants. Here the author resumes his attention to a Canadian constitutional paradigm with an examination of the Liberal tradition introduced by the Constitution patriated from Great Britain in 1982. This author pays particular attention to the manner in which the changes introduced limits to executive and legislative powers, spontaneously creating new space within for individual freedoms relatively uninhibited by coercive force either by the state or any other source.

Chapter 6 - Training, Apprenticeship and Certification

This chapter narrates the development of a customary approach to training, apprenticeship and certification based on: the provisions of the RL&NWTO; the values

and established practices of the Crees of Waskaganish First Nation; and, the important objectives of the Quebec government. This chapter, as an integral part of this thesis study, is intended to illustrate and provide further tacit knowledge of the subject – application of Rupert's Land legal rights.

Chapter 7 - Conclusion

This chapter summarizes what has been learned in the course of this thesis study. Here, the author proposes some of the implications this study has for Aboriginals and other Canadians as well. This chapter concludes with suggestions as to what further research is needed or will be of use to those concerned with the legal rights of the inhabitants of Rupert's Land and the North-West Territories.

CHAPTER TWO

RUPERT'S LAND RIGHTS AS HISTORICAL FACT

History and International Function of the Rule of Law:

The notion of the rule of law having a function of protecting the rights of individuals is a much more recent development than the rule of law's main purpose of maintaining order, particularly among diverse populations or populations that are spread over vast regions. This value of maintaining order is no less appreciated today by American forces in Afganistan and Iraq than it was by Roman forces more than two thousand years ago. Rome, for example, with a minimum of resources was able to maintain its sovereignty over great distances and over dissimilar populations by maintaining the rule of law. The law component was very often the customary laws of the ruled kingdom. The customary laws of a newly acquired territory, however foreign to Rome, were already installed, tightly woven with the values and traditions of the conquered people. Upheld by imperial Rome, these customary laws invariably provided a more effective system of law and order than any system Rome could ever impose. Pontius Pilot's deference to the Hebrew clerics in the judgment of Jesus Christ was in accordance with a Roman policy of continuity of the rule of law.

By the middle of the 16th century, increasingly laws were created and modified by courts. Britain, especially excelled at this art, well illustrated by the judgments of: Edmond Coke, William Blackstone, and, Lord Mansfield. Given the frequency with which these jurors' decisions were cited in support of a coherent body of British Imperial traditions, it is fair to say that they are the main authors of a British doctrine of continuity, that is an international version of the rule of law. Aimed at maintaining normative order as peacefully and as frugally as possible, the notion of continuity flows from Coke's, Blackstone's and Mansfield's common belief that the rule of law or peace and good order, critically depend on persons and institutions retaining their laws and property during changes in sovereignty.

By the dawn of the 17th century, the efficiency of the rule of law in maintaining obedience and order among citizens far from the authority of the state, was being greatly

challenged by ventures into the New World. Not only was the rule of law being strained over great distances, it was also being required to protect citizens and regulate their behaviour internationally with other very different states. In order to avoid competitive, mutual destruction, colonizing states had to agree on laws to regulate relations between states. This burden was in addition to maintaining law and order within the colony.

Throughout the 19th century, into the dawn of the 20th century, Britain continued to extend its sovereignty over distant regions of the world such as Africa, North and Central America, Asia and the South Pacific, each time using the formula refined by Coke, Blackstone and Mansfield. In fact, British Imperial rules have changed little over four centuries. In his 1998, The Rule of Law in International Affairs, renown Oxford scholar, Ian Brownlie outlined key elements constituting an international version of the Rule of Law:

1. Powers exercised by officials must be based upon authority conferred by law.
2. The law itself must conform to certain standards of justice, both substantial and procedural.
3. There must be a substantial separation of powers between the executive, the legislature and the judicial function. Whilst this separation is difficult to maintain in practice, it is at least accepted that a body determining facts and applying legal principles with dispositive effect, even if it is not constituted as a tribunal, should observe certain standards of procedural fairness.
4. The judiciary should not be subject to the control of the executive.
5. All legal persons are subject to rules of law which are applied on the basis of equality. To the elements offered above, it should be added that the Rule of Law implies the absence of wide discretionary powers in the Government which may encroach on personal liberty, rights of property or freedom of contract. [Brownlie 1998:213-214]

Brownlie's international description of the rule-of law resonates in the descriptions presented later in this chapter based on Canadian sources. This is more than mere coincidence. During the last two decades, Brownlie's Principles of Public International Law, has been the authority most often cited by the Supreme Court of Canada (see Brownlie 2003) on international issues, moreover, he was a mentor of Brian Slattery.

British Imperial Tradition

In accordance with British Imperial traditions, the rule of law prevailed in the acquisition of or exercise of sovereignty over Aboriginal property. For example, in West Africa, according to Aboriginal customary laws land could not be owned, subsequently lands were leased not expropriated from their Aboriginal owners. At the Judiciary Committee of Britain's Privy Council's judgment in *Adeyinka Oyekan et al v. Musendiku Adele* 26, June 1957, Lord Denning wrote, "... there is one guiding principle. It is this: the courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected ... if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law", (*Journal of African Law*, Vol. 1, No. 3, p.189). The "native law and custom" Lord Denning referred to are remarkably similar to those traditionally followed by Aborigines of Rupert's Land: "no one man was entitled to own a piece of land absolutely"; "it belonged to the family for their use"; "the Chief had charge of it on behalf of the family but could not sell it. The idea of sale did not come into the scheme of things at all"; and, "the Chief had control of the land, and any member of the family who wanted to make use of it had to go to him for it, but even the Chief could not make any important disposition of it without consulting the elders of the family".

The Judiciary Committee was just as willing to overrule Aboriginal government or customary law decisions in order to maintain the rule of law. During the 1960's in Ceylon (Sri Lanka) a pro-Western officer named Liyanage and others were convicted of charges relating to an attempted coup d'etat. Ceylon's legislature passed a number of statutes, specifically to punish the perpetrators. The latter appealed their convictions to the highest court of the time, the Judiciary Committee of the Privy Council of Britain. In its landmark ruling the latter overturned the convictions, declaring the statutes null and void for their offense to the rule of law. Lord Pierce declared:

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must

presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid. *Liyana v. The Queen* [1967] 1 A.C. 259

As a result of its respect of the rule of law, especially according to Aboriginal norms and customs of facts and fairness, the British Empire's sovereignty was usually bolstered by leadership and values of conquered or annexed populations, making it possible for Britain to maintain a vast empire with minimal force or consequent expense.

British Tradition in Colonial Canada

Canada as a nation under the rule of law came into being shortly after Britain's conquest of New France in 1759. The *RP1763*, was one of its earliest acts of applying a doctrine of continuity. R. A. Humphreys (1934:256-257), in his description of the construction of the Royal Proclamations, states:

...One of the reasons adduced by Pownall for his definition of the boundaries of Canada had been to prevent the Canadians from being put "under a variety of different governments from which they could receive no protection and to which they would consequently pay no obedience or yield any subjection to laws or constitution to them unknown and founded on principles the most adverse in their nature and consciences that can be imagined.

Norman Macdonald describes the early governance of Quebec by Generals Murray and Carleton whose scrupulous respect of Quebec's property and legal rights bolstered civil order and loyalty to the British Crown:

Murray's pro-French sympathies and his opposition to the selfish designs of the 'old subjects' precipitated a bitter quarrel that resulted in his recall (April 1, 1765): he was made the scapegoat of official blunders for loyally carrying out the instructions of 1763. The seigneurs, however, testified to his 'clearsightedness, equity and wisdom' in maintaining public peace..... Murray was succeeded by General Guy Carleton, a Scotsman by an Irishman, a lesser man by greater, though in many respects they had much in common. Both were members of the landed gentry and distinguished

soldiers, with the merits and shortcomings of their class; conservative in outlook yet tolerant; free from national prejudices and able to appreciate the point of view of a foreign race and to treat them fairly; cold and imperious towards humbler men, yet gifted with common sense and practical ability.... Carleton saw in the satisfaction of the French claims the best method of preserving the internal harmony of the colony and securing obedience to the civil authority. (Macdonald 1934:34-35)

The harmony and obedience noted by Macdonald was further promoted by the entrenchment of French civil rights in the Quebec Act of 1774. Restoring French civil law, probably kept Quebec from supporting the American Revolution soon after (Laskin 1969:5). Similarly, the Constitutional Act of 1791 achieved the separation of English speaking Upper Canada from French speaking Lower Canada (Quebec) reducing any further possibility of French-English friction (Laskin 1969:5), further promoting Quebec's loyalty to Britain during the War of 1812. Britain responded in a like manner to Canadian rebelliousness during the mid 19th century. Continuing efforts to secure harmony, obedience, and British sovereignty culminated in the Quebec conference of 1864. Canada's first constitution of 1867 began with a preamble that declares that Canada is to have a "constitution similar in principle to that of the United Kingdom". In an article he coauthored with Cara F. Zwibel, the eminent Peter H. Hogg wrote:

The Supreme Court of Canada has held that this language contains an implicit recognition of the rule of law. In our later discussion of the cases, we shall see that the Court has invoked the two preambles from time to time when it has relied on the rule of law. [Hogg & Zwibel 2005:720]

The rule of law is a hallmark of British traditions of governance which uses individual and group freedom.

The Rule of Law in the History of Rupert's Land

In 1670, Charles II of England granted a charter to a group of English merchants to operate as the Hudson's Bay Company. This charter was essentially "a grant of a right to acquire lands within the Hudson watershed by actually possessing them or purchasing them from the Aboriginal people" (McNeil 1999:3).

According to Slattery, “the legislative powers of the Company are explicitly confined to the Company proper and its officers. They do not extend to persons not employed by the Company and in particular the indigenous inhabitants of the region” (Slattery 1979:159). Slattery continued that “the Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately – it did not abrogate the Indian law and usages (Slattery 1979:161). J. E. Cote noted that, “though the Company had governmental powers, it did little to exercise them until the founding of Selkirk Colony (Cote 1964:263-264).

Hamar Foster (1990) noted that the Hudson’s Bay Company took the view that its law enforcement obligations did not apply to offenses committed among Indians. That view was most evident in 1857 in testimony before a British House of Commons Select Committee inquiring into the rights and privileges of the Company (Galbraith 1949:458). Most of the questions asked were related to agriculture, climate and travel. When asked if the Company was required to prosecute Indians for crimes against Europeans, Governor George Simpson replied, “we are obliged to punish Indians as a measure of self-preservation in some parts of the country” (Select Committee Hearings, February 26, 1857:1060) and, that “we seldom get hold of them for the purpose of a trial and they are usually punished by their own tribe” (February 26, 1857 – 1061).

When asked if the Company had ignored Aboriginal title to the land, Simpson replied, “No, the land was purchased of them, I think, in the time of Lord Selkirk by a regular purchase; a certain quantity of ammunition and tobacco and various other supplies being given for it” (February 26, 1857 – 1096).

Later in the interview, Simpson, testified that not only did the Company not have general legislative powers in Rupert’s Land, on the advice of their legal counsel, they did not have freehold title to the land, rather they had a 999 year lease (1159-1164). On March 2, 1857 when the inquiry resumed, Simpson was again asked about the Company’s control over the Aboriginals of Rupert’s Land, to which Simpson replied, “They are perfectly at liberty to do what they please: we never restrain Indians”, that the Company had no authority over them whatsoever (1748-1751).

Even for “Whites”, it is far from certain that the laws of Rupert’s Land were the laws of England. Howard Robert Baker, called such an assertion that English law applied, “perhaps the largest legal fiction ever imposed on Assiniboia” (Baker 1999:244). Baker noted that in 1851, the governing council had appointed a law amendment committee of three men. In its report, the latter committee commented that, “the laws of England [1670] independently of their inherent and essential inferiority are difficult, nay generally speaking impossible to be ascertained, more particularly in such a wilderness as this” (Baker 1999:244). In fact, as Louis A. Knafla writes,

.... the company officers used a mixture of private and public law at their posts. Because they lacked any knowledge of formal law, their rule was characterized by discretion. [Joseph] Isbister’s method resulted in conflict and poor trade. [James] Isham’s method led to a collegial atmosphere in which there were few breaches of order and a successful level of trade. Natives who dealt with Isbister would have little interest in English common law. Those who dealt with Isham must have seen it as customary practices not unlike their own. (Knafla 2005:13).

This view of a Rupert’s Land being ordered by custom and leadership rather than statute and state is very consistent with the testimonies of Simpson and other witnesses who appeared before the Select Committee, and as well it is very consistent with the views of Baker’s and Knafla’s of Red River throughout the 19th century. Finally, such order of Rupert’s Land by custom quite consistent with both British Imperial and modern Canadian definitions of the ‘rule of law’ as the most efficient means to allow people with different interests and values to live together in society without resorting to discord, conflict, or civil war.

The End of Hudson’s Bay Company Rule of Rupert’s Land

The hearings during 1857 of the Select Committee on the Hudson’s Bay Company, held by the British House of Commons signaled the end of the Company’s monopoly. Indeed, the hearings were conducted by British Parliament in response to growing protests against the Company’s rule and treatment of individual legal rights, especially in the Assiniboia or Red River region of present day Manitoba. Chief Justice William Draper sent by Upper Canada disputed the Company’s claim to territory, especially that

between Lake Superior and the Rocky Mountains, later to be known as the 'Fertile Belt'. By 1859 the Company had transferred sovereignty for all lands back to British Imperial hands. In 1863, the Company was sold to an association of investors, the International Finance Society, who were much more interested in colonization (and land sales) than the Company previously had been. The International Finance Society, was deeply involved with the Grand Trunk Railroad, and generally ignored the 'wintering partners', the chief factors and partners who previously had always been at the centre of Company decision making (Galbraith 1949:458-459).

By 1864, however, the threat of an American expansion into Rupert's Land grew significantly. This threat was amplified by an American attempt at pursuit of Sioux Indians into the Red River area. A Major E. A. C. Hatch of the United States Army requested of and was granted permission by A. G. Dallas, Hudson's Bay Company Governor in Chief of Rupert's Land to pursue with an armed force, a band of Sioux into the Poplar Point area, near Red River (Rogers 1864). However, when the few of the band who had participated in the massacre of American troops at Little Big Horn were extradited to Pembina, U.S.A., the remaining Sioux were given refuge in Canada. The fear was not of an invasion by American troops but rather the arrival of American troops as a positive expression of support of some faction of Rupert's land inhabitants, followed by an American reluctance or refusal to leave. Moreover, without a trail, railroad or water route over British territory from Canada to Rupert's Land, British subjects had no choice but to reach Rupert's Land through the United States. In July 1864, Edward Cardwell, Britain's Secretary of State for the Colonies advised Canada's Governor-General, Viscount Monck that if Rupert's Land was to remain British it must be annexed to Canada. George Brown was immediately sent from Canada to Britain to begin negotiations. He proved poorly suited, largely because of his previous editorials which heaped abuse on the Hudson's Bay Company, and questioned the Company's legal claims. In 1865, a delegation of four, John A. MacDonald, George E. Cartier, George Brown, and Alexander T. Galt arrived in London to reopen discussions. The Hudson's Bay Company wanted the greatest return on the sale of their interests while Canada wanted to gain sovereignty over Rupert's Land as cheaply as possible. For the next two

years, negotiations, refereed by Britain's Colonial Office were fractious with little progress realized. The political threats of American expansion as well as unrest in the Red River area continued to grow (Galbraith 1949:466-468), (Morton 1939:852-869). The Quebec Conference of 1864 and the London Conference of 1866 had produced the British North America Act of 1867 as well as a resulting union of the three British colonies, Canada, Nova Scotia, and New Brunswick under a single Canadian federal government. Annexation of Rupert's Land were anticipated in s. 146 of the British North America Act, but by 1867, the necessary surrender by the Hudson's Bay Company and terms fit to approve for transfer to a new Canadian sovereign still eluded the British Imperial government.

During the summer of 1867, in Quebec's Superior Court, a judgment on Aboriginal customary law and civil rights was rendered, which is absent from authoritative political histories of the times, nevertheless is described as seminal among legal scholars. This author refers to the judgment of *Connolly v. Woolrich* [1867] 11 L.C. Jur. 197; 17 R.J.R.Q. rendered by Samuel C. Monk. The plaintiff was John Connolly, son of a chief trader, William Connolly and the daughter of a Cree chief from the Athabaska region of Rupert's Land, Suzanne. In 1803, William and Suzanne had been married in accordance with Cree Aboriginal customary law. After almost thirty years of marriage and six children, William sent his Cree wife, Suzanne to live in a convent in the Red River settlement, in order that he could marry his second cousin, Julia Woolrich. William Connolly later died leaving all of his property to his second wife, Julia Woolrich, and their two children. After his mother Suzanne's death in 1862, William's son by Suzanne, John Connolly sued Julia Woolrich for his share of his father William Connolly's estate. Judge Samuel C. Monk found for the plaintiff, John Connolly, recognizing Aboriginal customary law as a legal basis for marriage and annulling William Connolly's second marriage to Julia Woolrich. In one, well reasoned, clearly written judgment, Monk had recognized Aboriginal laws in Rupert Land's, declared 'half-castes' British subjects as legitimate heirs to Euro-Canadian property, and declared pure blood European British subjects to be 'illegitimate'. It is difficult to imagine that this judgment did not catch the attention of the Canadian and British officials negotiating the transfer of sovereignty.

Monk, presiding over Quebec Superior Court, a court of competent jurisdiction according to the BNA Act for determining legal rights, declared a previous Rupert's Land Aboriginal customary law marriage valid and a later English law marriage invalid.

Her Majesty's Terms

A few months after *Connolly v. Woolrich [1867]*, on December 7, 1867, a proposal of terms was made before the Canadian House of Commons to be included in the address to Her Majesty for transfer of Rupert's Land:

...the legal rights of any Corporation, Company or individual within the same, will be respected, and that in the case of difference of opinion as to the extent, nature or value of these rights, the same shall be submitted to judicial decision, or be determined by mutual agreement between the Government of Canada and the parties interested; such an agreement to have no effect or validity until first sanctioned by the Parliament of Canada. [Journals of the House of Commons of the Dominion of Canada from November 6, 1867 to May 22, 1868, Vol. I, p. 54]

Such terms completely favoured Canada over the Hudson's Bay Company and fell far short of Her Majesty's doctrine of continuity that preserved normative order by respecting inhabitants legal rights. Consequently, Canada's proposal was unacceptable to either Britain or the Hudson's Bay Company. Accordingly, a revised text was presented once more, on December 12, 1867 to the Canadian House of Commons:

... the legal rights of any Corporation, Company or individual shall be respected, and placed under the protection of Courts of competent jurisdiction. [Journals of the House of Commons of the Dominion of Canada from November 6, 1867 to May 22, 1868, Vol. I, p. 67, Emphasis added]

That text worked its way through the Canadian House of Commons and Senate and can still be found in the Address to Her Majesty the Queen of December 17, 1867, Appendix A of the RL&NWTO which itself is in Schedule B of Canada's Constitution Act, 1982. Monk's ruling in *Connolly v. Woolrich [1867]* on the legal rights is especially important in that from a court of competent jurisdiction, sworn by Canada to protect any individual's legal rights, made clear that the customary laws of Aboriginal inhabitants

survived still and were to be upheld by Canadian courts. Monk's description of the Hudson's Bay Company's Charter as being of "doubtful validity" would not likely have gone unnoticed either.

By the Deed of Surrender, passed by Britain's Parliament in the fall of 1868, the Hudson's Bay Company transferred all of its interests in Rupert's Land and the North-West Territory to the British Imperial government. Now only the terms of transferring sovereignty to Canada remained. Lord Granville, Colonial Secretary to the newly elected British government of William Gladstone, invited George E. Cartier and William McDougall of the Canadian government to London for negotiations with Sir Stafford Northcote, representing the Hudson's Bay Company. Representatives of Canada and the Company, unfortunately, soon fell into their opposing positions over legal titles and payments for the Company's interests (Galbraith 1949:473-474).

Meanwhile in Red River, a series of jail breakings began. Dr. John Christian Schultz had been arrested for nonpayment of a debt on January 17, 1868. The following morning, Schultz wife accompanied by fifteen others broke him out of jail (Clarke 2000:2). Without the help of a much larger police force or soldiers, the Hudson's Bay Company's Red River government could do little to stop what became a series of jail breaks (Corbett 1888:32-37). Thus the winter of 1868 marked a noticeable decline in the Company's ability to maintain peace and good order in a colony whose population had now grown to more than twelve thousand permanent residents.

In order to break the impasse in negotiations between Canada and the Hudson's Bay Company, Lord Granville threatened to put the matter as a legal question before the Judiciary Committee of the Privy Council. Neither Canada nor the Company were willing to risk the judgment of the Privy Council. During the winter of 1868-1869, Monk's judgment of *Connolly v. Woolrich* was again before the courts on appeal. Monk's detailed and scholarly treatment of the Company's claims as well as his upholding Aboriginal customary law must have dampened any enthusiasm either the Company or Canada might have had to face the Privy Council. Thus Granville's terms, virtually identical to those previously rejected, were finally accepted by both parties in a new a

more cooperative light. Northcote, after an initial storm was able to secure the support of his Hudson's Bay Company on March 20, 1869.

Canada, by this date had already accepted Granville's terms. In addition to the solemn promise that "the legal rights of any Corporation, Company or individual shall be respected" were two other terms "as stated in the Letter from Sir Frederic Rogers of 9th March, 1869" also attached to the RL&NWTO:

Resolved, -- That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and wellbeing are involved in the transfer.

[.. and as part of a "Memorandum" providing greater detail to the resolutions]

That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and wellbeing are involved in the transfer, and we authorize and empower the Governor in Council to arrange any details that may be necessary to carry out the terms and conditions of the above agreement.

Though the major obstacle of an agreement between Canada and the Hudson's Bay Company had been resolved, the road ahead for the transfer of Rupert's Land was far from clear. On June 1, 1869, Gladstone faced strong opposition to the transfer without stronger guarantees of Aboriginal rights made by Canada. His own British House of Commons felt that without such guarantees that the Imperial Government was breaking faith with its Indian subjects [U.K. Hansard, June 1, 1869, 1127-1128].

Even a cursory reading of the debates in Britain's Parliament during June 1, 1869 (see a complete record of the debate in Appendix C) will resolve any ambiguity as to the inclusion of Aboriginals in the 'any individuals' contained in Canada's promise. Sir Harry Vinney (June 1, 1869 at 1099) opened the debate, calling for 'arrangements to be made for "respecting native rights and regulating their legal position and dealings with the Europeans". Mr. R. N. Fowler, spoke sharply of the Hudson's Bay Company (at 1100-1101), recalling a petition of Indian chiefs placed before the House in 1860 complaining that the Company had sold their lands along the Red and Assiniboine Rivers, praying "the House to take the matter into serious consideration to grant them and

their people the customary native title to their lands and ordain facilities for conveying the same to each other and to their children's children". Fowler declared that:

...the House had now an opportunity of answering that Petition. He earnestly hoped that before the negotiations which were now going on were terminated, Her Majesty's Government would make due provision for protecting the rights of the Indians. The question was not rendered difficult by there being a very large number of them. (June 1, 1869:1100-1101)
...As the Indians could not protect themselves, he thought it was the duty of Her Majesty's Government to make such arrangements as would secure the rights and interests of these our fellow subjects on the handing over of the Hudson's Bay territories to the Dominion of Canada. (1103)

Member, Mr. Kinnaird thanked Fowler for his remarks but offered praises of the Hudson's Bay Company to dampen the former's sharp criticism of the latter, adding his hope "that the Colonial Office would take care that the Indians should not suffer by the proposed transfer", and that "proper protection would be assured to them" (June 1, 1869:1104).

The House was unanimous on the need to protect the legal rights of Aboriginal inhabitants from both the European settlers and the Dominion Government. British Parliament would have easily passed a motion to, in some way supervise or guarantee a lawful transfer of sovereignty beyond the promises contained in the transfer order; however, Under Secretary for the Colonies, Monsell did not respond to such assertions from all quarters of Parliament that some assurances should be extracted from Canada. He, instead described the looming American threat to the south, combined with Sioux Indians using Rupert's Land as a base from which to raid Americans, and of the consequent need to not push Canada too far, to make such guarantees (June 1, 1869:1109). These alleged threats are not very credible given the concessions which Britain had made to the United States, generous access to the fisheries on both coasts and the complete withdrawal of the British garrisons in North America.

Neither was the Sioux Indian threat based on fact. Alexander Morris, a decade later wrote of the Sioux Indians in whom the Americans had such great interest, that "during their sojourn of thirteen years on British territory, these Indians have on the whole, been orderly, and there was only one grave crime committed among them, under peculiar

circumstances – the putting to death of one of their number, which was done under their tribal law” (Morris 1880:281). The risk involved by the Sioux was not their behaviour so much as the excuse the Sioux presence might provide an American Government to send soldiers into the Fertile Belt to remain indefinitely. Combined with the relations between America and the Metis being friendlier than with Canada, there was much for Britain to worry about. Prime Minister Gladstone confided later in his Colonial Secretary Lord Granville that he would have preferred to have put annexation of Rupert’s Land to Canada to a plebiscite but was afraid that Metis might use their newly asserted legal rights to invite the United States in (Knaplund 1934:77).

Monsell’s offer to produce the ‘Papers’ bearing Canada’s promises (June 1, 1869:1112) did not sway Viscount Bury (Sir Charles Dilke), certainly, the most eloquent and effective critic. Viscount Bury, “having held the office of superintendent-general of the Indian tribes during the time that he was in Canada” unleashed a scathing criticism of Canadian treatment of Indians thus far (June 1, 1869:115-1119)

Prime Minister Gladstone brought debate to a close, responding to an array of issues contained in comments made by other members of the House. In closing, he remarked:

I cannot adopt an absolute rule on this subject. It is impossible to say that there will be no such thing proposed to this House as a colonial guarantee. But whenever a Government has proposed a colonial guarantee in the past, this House has always expected that Government to show that the proposal was made with a view of escaping from the kind of relations under which alone such a guarantee was required, and of establishing freer relations under which our colonial fellow-subjects would bear their own burdens and leave us to bear ours. In conclusion, I thank the hon. Member for Chelsea (Sir Charles Dilke) for having given the House the benefit of his experience with regard to the difficulties with which this portion of the subject is based. (June 1, 1869:1127)

The Viscount, Sir Charles Dilke, apologized if he had described their treatment too harshly, but:

...he had had in his mind at the time a covering dispatch from Sir Edmund Head, who said that he approached the subject with pain and misgiving, never having been able to persuade himself that the conduct of this country

towards the Indians had been consistent with good faith. (June 1, 1969:1127)

A Fumbled Transition

Anticipating a December 1, 1869 transfer of territory to Canada, Prime Minister John A. Macdonald pushed through a statute, *Temporary Government of Rupert's Land Act*, assented on June 22, 1869. Macdonald's Minister of Public Works, William McDougall had already sent survey crews to Assiniboia, including John Stoughton, John Snow and Charles Mair. Macdonald would within a few months, very much regret his choice of McDougall for the territories first Lieutenant Governor. McDougall had already demonstrated a "righteous paternalism in his dealings with natives" (Zeller 2000:1) during his repossession of Indian reserves on Manitoulin Island, on the grounds that these lands had not been put to agricultural use.

Even before McDougall's own arrival, his survey crew had already created quite a stir. According to most who testified before an 1874 Parliamentary committee (Journals of the House of Commons, Vol. VIII, 1874, Appendix 6), Snow and Mair carried on editorial correspondence with Ontario papers which resulted in a continuing series of highly inflammatory articles, most insulting to the Metis and Half-Breed majority of Assiniboia (Machray 1909:83). Snow used liquor to obtain land from the Indians. Surveys were limited to Metis and Half-Breed lands and disregarded completely the riverstrip holdings of the Metis (Bale 1985:466) (Kilgour 1988). During the summer, news reached the area that the Hudson's Bay Company was to be paid three-hundred thousand pounds sterling for land it claimed to own.

As the unrest in Assiniboia grew, the Canadian government's attention undoubtedly also was taken by another event. On September 8, 1869 Quebec's Court of Appeal rendered judgment of *Johnston et al v. Connolly [1869]*, 17 R.J.R.Q. 266, actually an appeal of *Connolly v. Woolrich [1867]*. The majority of the court dismissed the appeal and unanimously upheld both Monk's judgment and his reasons. The Euro-Canadian appellants now planned to present their case to the Judiciary Committee of the Privy Council of Britain. For a number of reasons, such a further appeal would put both the legal positions of the Hudson's Bay Company and that of the government of Canada

squarely before the highest court in the Empire, after both had already agreed to Granville's terms to avoid just such an event. A closer look at *Connolly v. Woolrich* [1867] and the appeal, *Johnston et al v. Connolly* [1869], leaves no questions of their fears. Slattery (1979:161) and many writers since view these decisions as an affirmation of the British Imperial 'rule of law' or doctrine of continuity. Samuel C. Monk was described by his peers as possessing impressive language and legal skills:

His knowledge of both the French and English languages is so perfect that it would be impossible for a stranger to tell by his speech to which nationality he belonged.

The old French law, which forms the basis of the jurisprudence in the province of Quebec is so familiar to him that when a case is heard in court of Queen's Bench, before him and his associates, one can easily find out that, after reading the printed factum of both parties, he is generally ready to give his opinion and support it with the most learned and scientific arguments. [Canadian Biographical Dictionary 1881:263]

More simply, here was Monk, a judge in the very court of 'competent jurisdiction' responsible for protecting individual legal rights, rendering a judgment which was upheld on appeal recognizing the very Aboriginal rights in Rupert's Land which Canada was already set to later ignore and extinguish. The fact that Monk was highly skilled and respected at applying British Imperial doctrine of continuity in a bijural system in Quebec would have impressed the Judiciary Committee even more. Monk had written:

Neither the French government nor any of its colonists or their trading associations ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion.

[...and by the English or the Hudson's Bay Company..]

..it [English law] could be administered and enforced only among, and in favor of, and against those who belonged to the Company or were living under them. It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full

of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately – it did not abrogate the Indian laws and usages. [*Connolly v. Woolrich* [1867] 11 L.C. Jur. 197]

Slattery (1979:161) notes that “these views were unanimously approved on appeal and have been adopted in a number of subsequent cases. Indeed this author has noted more than twenty, such citations, the most recent being, *R. v. Morris and Olsen*, [2004] BCCA. Monk’s judgment reasons and their strength against appeal would have shaken the Hudson’s Bay Company. Monk’s first two judgment reasons included:

Held:

1. That though the Hudson’s Bay Company’s Charter is of doubtful validity, yet if valid, the chartered limits of the company did not extend westward beyond navigable waters of the rivers flowing into the Bay;
2. That the English Common Law prevailing in the Hudson’s Bay territories, did not apply to natives who were joint occupants of the territories; nor did it supersede or abrogate even within the limits of the Charter, the laws, usages, and customs of the aborigines; [*Connolly v. Woolrich* [1867] 11 L.C. Jur. 197]

Fortunately for both Canada and the Hudson’s Bay Company, for reasons this author has yet to discover, the appeal to the Privy Council was abandoned by William Connolly’s European heirs. Based on Monk’s judgment and Slattery’s own research of other authorities, Slattery concluded that:

Rupert’s Land was initially deemed to be a conquered colony, in which the laws and property rights of the inhabitants remained in force until modified. The Charter of 1670 effected a partial introduction of English law, but only as regards Company employees and others living under their rule; the customary laws of the indigenous peoples were otherwise unaffected. The grant of propriety rights in the Charter vested in the Company no more than what the Crown itself purported to hold in the territory, namely an underlying title to the soil subject to subsisting aboriginal interests, along with an exclusive right to extinguish such interests by cession or purchase. (Slattery 1979:164)

Believing a pending transfer of sovereignty to be only a month or two away, McDougall arrived in Pembina, U.S.A., south of Red River and the Canadian border on

October 30, 1869 planning to establish his government at Red River (Zeller 2000:3). McDougall had sent ahead a proclamation which aside from pompous wording offered no assurances or even a hint of Canada's likely respect of the rights of inhabitants of the territories being annexed. By October 25, 1869, Louis Riel and his supporters had met with most of the inhabitants of Red River to assure continued loyalty to the Hudson's Bay Company and Her Majesty while opposing Canada's continued ignorance of their rights. On November 2, McDougall was met near Pembina, by an armed Metis party that warned him not to enter Rupert's Land. The same day, Riel and his followers occupied Fort Garry (Morton 1939:882-888). McDougall soon after returned in embarrassment to Canada. McDougall's embarrassment was much deepened by Prime Minister Macdonald's change of position. The latter told Britain and the Hudson's Bay Company that Canada would not accept responsibility until civil order was reestablished. Macdonald's sudden change of posture left McDougall as the new Canadian governor effectively abandoned.

On November 30, 1869 Lord Granville, the main representative of Britain's Colonial Office wrote to Canada's Lieutenant Governor John Young, urging an immediate resolution of peace and good order at Red River:

On the 22nd of June 1866, the Executive Council of Canada expressed the opinion that the most inviting parts of the territory would shortly be peopled by persons whom the Company were unable to control, and who would establish a Government and tribunals of their own, and assert their political independence; that such a community would cut British North America in two, and retard or prevent their communications by railway and therefore that 'the future interests of Canada and all British North America were virtually concerned in the immediate establishment of a strong Government there, and its settlement as a part of the British Colonial System. (Sessional Papers, Vol. 5, #12, 1870, p.139)

This letter described the British Imperial government's greatest fear only partially expressed. The population of Red River was united and rebellious, beyond the control of the Hudson's Bay Company, and now as a result of McDougall's bungling, alienated from Canada, her nearest British North American neighbour, The United States of America stood nearby most willing to offer support of Red River's independence. Her

Majesty's government did next what she had done once before, in 1763 under similar circumstances. Her Majesty's Government had in 1763 then and now in 1869 issued a Royal Proclamation, reassuring both her colonies as well as her Aboriginal allies fair treatment while at the same time asserting her sovereignty over British North America. The *RP1763* was intended to: diffuse expansion of American settlement; quell an uprising among Aboriginals; and consolidate as a single colony, territory newly acquired in battle with France (Suddard 2002:2-5). An uprising led by Pontiac was seen to have occurred as a result of Governor Jeffrey Amherst's mishandling of relations with Aboriginals (Cashin 2003). Until 1768, the responsibilities of the British Secretary of State for the Southern Department included British North America. In 1763, that Secretary of State was Charles Wyndham, 2nd Earl of Egremont. The *RP1763* was based on a draft written for Egremont by Henry Ellis, the Governor of Georgia (Cashin 2003:2-3).

The *RP1869* was written by the Earl Granville, Secretary of State for the Colonies, serving under William Ewart Gladstone, Prime Minister of Her Majesty's Government. Meant to remedy the complications which were provoked by McDougall, this Royal Proclamation of 1869 assured 'Her Subjects in the North-West', the area to be affected by the RL&NWTO, that:

...By Her Majesty's authority I do therefore assure you, that on the Union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws and in the spirit of British justice. [see the complete proclamation in Appendix D]

On December 10, 1869, Donald Smith, an officer of the Hudson's Bay Company in Montreal, was recruited by Canada's Prime Minister, John A. McDonald to lead a team to negotiate an end to the trouble that had arisen (Reford 2000:2-3). Smith arrived at Red River on December 27, 1869, allegedly leaving the Royal Proclamation of December 6, 1869 at Pembina to prevent its interception. On January 19, 1870 the contents of this proclamation and other similar assurances were read aloud to an assembly of Red River inhabitants. For reasons better explained by this author in Chapter 4, the true status and

gravity of this or royal proclamations in general have yet to be fully appreciated. As did the proclamation of 1763, this proclamation of 1869 triggered a British Imperial principle described by Lord Mansfield in *Campbell v. Hall*, [1774], 1 Cowp. 204, 98 E.R. 1045, that is, the terms of such a Royal Proclamation have the effect of a statute of the Parliament of Great Britain.

Accordingly, once proclaimed, the provisions contained can only be altered by a local legislature. This principle was accepted in 1887 by Gwynne J. in *St. Catharines Milling and Lumber Company v. The Queen*, citing the RP1763 as the 'Indian Bill of Rights'; and was cited again in 1973 by Hall, J. in *Calder v. Attorney-General of BC* [1973], S.C.R. 313, supporting the claim of the Nisga'as. Both 1763 and 1869 Royal Proclamations were issued on instructions from cabinet, by the responsible minister of Her Majesty's Government to prevent collisions between colonists and Aborigines, as well as to restore peace and good order under British sovereignty. This 1869 proclamation was published in Canada under the signature of Her Majesty's representative, Governor General Sir John Young, Lord Lisgar. Telegraphed and later published correspondence leave no doubt of the authenticity of the *Royal Proclamation of December 6, 1869*. Notwithstanding the crowd's failure to fully appreciate their full legal weight, the words of this Royal Proclamation had their intended effect. The peace they encouraged might have lasted until Rupert's Land officially was annexed by Canada five months later. Unfortunately, on February 18th, a Canadian, Thomas Scott and 47 others were captured while challenging Riel's control over the Red River. Scott was an obnoxious prisoner and was finally beaten for his behaviour on February 28, 1870. On March 3, Scott was tried and sentenced to death. In spite of pleas by other leaders and clergy, Scott was executed on March 4, 1870.

Granville, expressing concern for the growing unrest in the Red River region, on April 9, 1870, appointed Sir John Young, the current Governor General of Canada, as Governor of Rupert's Land. On May 3rd, 1200 troops departed from Toronto under the command of a most experienced British Imperial officer, Colonel Garnet Joseph Wolseley. This force was made up of one-third British and two-third Canadian soldiers. The force arrived by steamer, June 30th, adjacent to Fort William, present day Thunder

Bay. Traveling south and parallel to the column, through Chicago, the south shore of Lake Superior, Duluth, and Marquette, Minnesota, a Lieutenant William Francis Butler conducted a secret mission, assessing any danger that might be posed by Fenians who had threatened to disrupt the expedition. Butler (1872) carried out his mission without incident, reporting that the Fenians were no threat at all. Wolseley expected him to rejoin the column mid way between Thunder Bay and Fort Garry. Visiting Fort Garry was left by Wolseley entirely to Butler's discretion. While in St. Paul's, Butler had met Bishop Tache, securing from him a letter of introduction that was to protect him from interference by Riel or the Metis. As a result, Butler risked visiting Fort Garry. He arrived on the steamer, the International, jumping off in the dark shortly before its arrival at Fort Garry. Butler was able to visit Hudson's Bay Company Governor McTavish, Anglican Bishop of Rupert's Land Machray and Indian Chief Henry Prince. After a brief meeting with Louis Riel himself, Butler set out to intercept Colonel Wolseley and the expedition. Butler rejoined Wolseley at the mouth of Rainy River, assuring him there was no Fenian threat as well as giving him a full account of conditions at Red River. Alexander Begg's diary (Morton 1956:391-394), leaves no doubt that a proclamation from Colonel Wolseley was published Saturday July 23, 1870 while Butler was still in Red River. He was credited by Begg's diary with having brought it to the settlement. In order to resolve the manner in which this proclamation actually arrived, this researcher needed to review the first person accounts of Wolseley's other officers, traveling with the column. Butler himself makes no reference to the proclamation while clear and detailed reference is made by Captain G. L. Huyshe of the 60th Royal Rifles, traveling under Wolseley's command:

Mr. Donald Smith, who had succeeded the late Mr. McTavish as Governor of the Hudson's Bay Company, had arrived at Fort William on his way to 'Norway House' and to him Colonel Wolseley entrusted the delivery of a proclamation, which he had drawn up, to the Red River people. Mr. Donald Smith undertook to send it into the settlement, by a safe hand, from Fort Alexander, at the entrance to Lake Winnipeg.

....

Copies of this proclamation were sent to the Protestant and Roman Catholic Bishops at Red River, and to the Hudson's Bay Company's officer at Fort Garry. (Huyshe 1871:88-89)

Wolseley's proclamation was to be delivered to Red River by Smith who assumed an official status that bridged the transition of sovereignty. Smith represented Sir John Young, the Acting Governor under British Imperial sovereignty, and the Canadian government. On and after July 15, 1870, Smith was the Acting Governor until Governor Adams George Archibald, the permanent governor appointed by Canada arrived to take up office. Completely consistent with the *Royal Proclamation of December 6, 1869 (RP1869)*, issued by Her Majesty's Government, this second proclamation declared "the loyal Indians or Half Breeds being as dear to our Queen as any other loyal subjects ... The force I have the honour of commanding will enter your Province representing no party either in religion or politics, and will offer equal protection to the lives and property of all races and all creeds", (see full text in Appendix D). This second proclamation, signed by Wolseley and the *Rupert's Land & North-Western Territory Order, 1870 (RL&NWTO)* were both issued after his scheduled communication with British Cabinet on his arrival at Port Arthur. It is not surprising that Wolseley would trust Donald A. Smith with its delivery. Smith, according to M. Bell Irvine's accounting report of the expedition (Irvine 1871:5-9) had already provided not only useful advice on supplies, but a regular mail service to the to the expedition as well. This researcher also noted that Smith and Wolseley had already shared at least one close friend in Montreal, a George Stephen, later to become Lord Mount-Stephen. George Stephen was actually Smith's cousin with whom he had already invested in many financial ventures, later including the Canadian Pacific Railroad. Wolseley, on the other hand dedicated his 1904 autobiography, *The Story of a Soldier's Life*, to George Stephen, "who for forty years have given me your unvarying friendship" (Wolseley 1904:vii).

But, neither Smith, nor the bishops had shared Wolseley's proclamation with anyone in Red River. As this author explains in greater detail in the next chapter, Smith and the bishops suppressed this proclamation as they had already done the Royal Proclamation of Her Majesty's Government some seven months earlier. This author was able to determine through newspaper articles, diaries and other personal accounts that, in fact, William Francis Butler arrived a month ahead to reconnoiter the settlement for his

Colonel, only to discover that the proclamation had not been published. In addition assuring the Cree and Saulteaux in the region, Butler obtained Governor McTavish's copy. After a meeting between Butler and Riel, Riel himself supervised its printing and publication (Morton 1939:917-918). Colonel Wolseley arrived with his complete force on August 23rd. The RL&NWTO, establishing Canada's sovereignty had, in July 15, 1870, become part of the *BNA Act*, Canada's constitution, while Wolseley had been en route with his army between Lake Superior and the Red River.

CHAPTER THREE

THE TIDE OF HISTORY

Meaning of the Tide of History

In October 1987, thirty-six members of the Abenaki Nation staged a 'fish-in' demonstration on land they claimed as their ancestral home. The State of Vermont charged the thirty-six with fishing without a license. Those charged claimed they were not subject to state regulation because they held Aboriginal rights to the land. After a lengthy trial, charges were dismissed by Vermont Trial Court. In 1992, Vermont Supreme Court reinstated charges because whatever rights the Abenaki's had, had been extinguished by the 'weight of history' (Lord & Shutkin 1994:7; Duthu 2000:185; Lowndes 1994)

In 2002, Olney J wrote for the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58, that:

[107] ... The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs.

As a result, the members of the Yorta Yorta Aboriginal Community lost all claim to their lands or their rights to live under their own legal system. David Ritter wrote in criticism of this judgment:

Justice Olney evoked notions of an inevitable submergence of ancient customs, resulting in decay and ultimately loss, stones eroded, shells tumbled into sand, headlands crumbled into dust, a traditional Aboriginal past obliterated by the blind and relentless power of Western civilization. (Ritter 2001:121)

Canadian Aboriginals have not fared much better. A majority of the Supreme Court of Canada determined a similar outcome for Nova Scotia and New Brunswick Mi'kmaq in *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, because "the accused did not establish that they hold aboriginal title to the lands they logged". Ritter's commentary of *Mabo v. Queensland (No 2)* [1992] HCA 23, where Australia highest court rejected terra nullius, that is a European right of discovery, could have been read as a foreboding of the "tide of history" doctrine which replaced them:

....the High Court's apparent 'rejection of terra nullius' in *Mabo* is highly ambiguous and requires explanation that goes beyond mere doctrine (p.6)... the High Court in rejecting terra nullius threw away a name but retained the substance (p.32), (Ritter 1996:6-32)

The substance of terra nullius or discovery doctrines are that since ownership of property, (or legal occupation under English law) is a result of a legal system and that lacking such a legal system, Aboriginal lands were not legally owned or occupied. The 'tide of history' merely says that even if at one time Aboriginals were legal owners, the 'tide of history' has washed away the evidence of such ownership and therefore their claim, leaving only the original European claim. In his 2004 comments on *Yorta Yorta*, Ritter commented that:

When Justice Olney employed the 'tide of history' he etymologically married the decision in the case to certain venerable, religious, imperial and racist discourses, all of which had long previously been relied upon to deliver the 'verdict of the world' on Indigenous civilizations. In the physical world, tides are not inexplicable and neither is the metaphoric 'tide of history'. (Ritter 2004:118)

Indeed, this author discovered that during the 19th century, 'the tide of history' or other similar term was being used in Canada to explain and justify, European displacement of Aboriginals. Until shortly after the Second World War, the driving force behind the tide was the executive branch of the Canadian government, supported by the legislature. The *Canadian Bill of Rights* which made possible the first successful attack on the *Indian Act*, *R. v. Drybones*, [1970] S.C.R. 282, striking down the criminalization of alcohol for Canadian Aboriginals. This author believes a sea change was predictable

when the federal governments notorious 1969 White Paper met previously unheard of resistance from Aboriginals across Canada. Moreover, Canadian parliament appeared unlikely to endorse the changes required by the White Paper to liquidate Indian assets and place them in the care of respective provinces.

Without a willing legislature as a partner, the Canadian executive then needed to drive its tide of history using its unlimited discretionary powers and the courts. To understand why a tide of history has been necessary at all and why it should be necessary to resort to such indirect means, one must consider the problem raised by Professor McNeil in his seminal work, Common Law Aboriginal Title. As Professor McNeil explains in authoritative detail, “it is quite impossible in English law for the Crown to acquire an original title to lands that are already occupied by the Indians” (McNeil 1989:229). Even in the High Arctic, Canada could assert a much stronger claim to title based on thousands of years of occupation but would have to sacrifice its present exercise of absolute control over the ‘treasure house’ of resources as well as the individual freedoms of the region’s Aboriginal inhabitants. The particular choice of method for the tide of history was well described by Alexis de Tocqueville, the 19th century philosopher, historian, and author of two volumes entitled, Democracy in America:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquility, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity. (de Tocqueville 1945:345)

Paraphrasing de Tocqueville, University of California Professor Philip Frickey wrote:

.... De Tocqueville recognized that America is a constitutional democracy built through the legalized coercion of colonialism. The rule of law did double work, providing the glue holding the republic together while legitimating the displacement of indigenous institutions to make room for it.
...

For de Tocqueville, a commitment to liberty, egalitarianism, individualism, populism, and laissez-faire made America exceptional. These values are largely consistent with the constitutional democracy that was built on top of the colonial process, but patently incongruent with the colonization buried underneath. It is unsurprising, then, that federal Indian law – the law governing the historical and ongoing colonial process underpinning the United States – is itself a largely overlooked, little understood paradox. (Frickey 2005)

Canadian courts and politicians embraced the colonial process praised by the American statesman, Benjamin Franklin and enunciated by Emerich de Vattel in his Law of Nations. U. S. Supreme Court Chief Justice John Marshall's adopted and created an attendant common law of Aboriginal title. As a result, a Canadian colonial process is undistinguishable from its American counterpart. A better understanding of this colonial process, today, euphemistically called the 'tide of history' is important to this study, by way of explaining why and how the legal rights of the Aboriginal inhabitants of Rupert's Land were allegedly washed away.

The 'tide of history' or the 'march of civilization' critically depends on the monopoly of coercive force wielded by a state that is disconnected from a respect for individual freedoms in order that it can make legal and justifiable for material wealth, that which is immoral – the destruction of other people or living entities. This disconnection is virtually impossible for societies whose legal systems are based on customs or accepted practices that protect individual freedoms. Indeed, the Canadian common law proof of the existence of custom is two fold. Claimants must prove the alleged custom or practice – a foundation on values since time immemorial and a consensus to ensure that it will be respected (see Chapter 5 for a more complete explanation). During two hundred years of relations with Hudson's Bay Company employees, it was in neither Aboriginal nor Company interests to accept such a monopoly of coercive force. Accordingly, both the Company and Aboriginal societies within Rupert's Land used customary legal systems, among themselves, as well as among their societies. During and after the annexation of Rupert's Land by Canada, the feat of achieving such peace and good order, was often attributed "to the manner in which they were dealt with for generations by the Hudson's Bay Company" (Morris 1890:285)

It was Aboriginal confidence, however misplaced, in the continuation, even enhancement of this balance, that kept them from responding to European and Euro-Canadian arrivals in defense of their values and customs with coercive force of their own. This balance achieved under British sovereignty was upset when the Canadian government used a combination of false promises, illiberal laws and coercive force in order to gain material advantages at the expense of the Aboriginal inhabitants of Rupert's Land. It was not weakness but rather aversion to using coercive force and adopting immoral behaviour that prevented Aboriginals from opposing a European and Euro-Canadian onslaught. Initially, before the latter were present in large enough numbers, the Canadian state feigned moral intentions with attendant noble behaviour and generous assurances. Morton recorded a interview given by William McDougall, the member of Canadian parliament who Prime Minister John A. Macdonald had first appointed Lieutenant-Governor of the new territory. McDougall was interviewed by news correspondent, John Robertson-Ross in St. Paul, Minneapolis, for an article printed in the *Daily Telegraph* of Toronto, January 6, 1870

- Correspondent - Are all the Indians loyal?
 Governor - Yes, all the Indian tribes are loyal and would at a moment's warning take up arms in defense of the British Government. They know full well that if ever annexation took place their changes would be small.
- Correspondent - You intended, did you not, to recognize the Indian claims?
 Governor - Certainly. I intended to look on the Indians as owners of the land, and would treat for it with them as such. (Morton 1956:482)
- ...
- Correspondent - Did they [Americans] dread an Indian uprising?
 Governor - Yes. They knew well that the Indians have been always decently treated by the British Government and that if any trouble did ensue, their chances would not be very good. They swore, knowing this, that if Americans had to suffer our party should be cleaned out first. (Morton 1956:483)

This position differs greatly from McDougall's treatment a few years earlier of Aboriginals on Manitoulin Island, where he sold their lands out from under them (Zeller 2000:2). Most important, McDougall's position described to the reporter differs

completely from that taken by his superior, Prime Minister Macdonald, who pushed through parliament, *An Act for the Gradual Enfranchisement of Indians*, assented to June 22, 1869, which among many other oppressive measures, established that:

1. In Townships or other tracts of land set apart for Indians in Canada, and subdivided by survey into lots, no Indian or person claiming to be of Indian blood, or intermarried with an Indian family, shall be deemed to be lawfully in possession of any land in such Townships or tracts, unless he or she has been or shall be located for the same by the order of the Superintendent General. ...

In his instructions to Colonel Wolseley, Lieutenant-General James Lindsay, on March 24, 1870 advised:

23. In conclusion it will doubtless occur to you that owing to the mixed character of the Force, and its inexperience in the nature of the service, the proximity of the United States frontier, the peculiar character of Indians and voyageurs, great care will be required in enforcing strict attention to orders. Indians should be ceremoniously treated. (The War Office to Lieutenant-General the Honourable James Lindsay, 24 March, 1870, CIHM 91209)

Colonel Wolseley, in turn, issued Standing Orders for the Red River Expeditionary Force, from Toronto, 14th May, 1870, cautioning his officers:

35. All officers belonging to this Force will be most careful in impressing upon those under their command the great necessity there is for cultivating the good will of the Indians and others employed as voyageurs.
Colonel Wolseley will punish with the utmost severity any one who ill treats them.
The same rule applies to all Indians who may be met on the line of route. It must be remembered that the Government has made a treaty with them securing the right of way through their country; all are therefore bound to protect them from injury, and it is of special importance that our intercourse with them should be of the utmost friendly nature.

As Wolseley wrote soon after his return to Britain, these precautions were well conceived.

[... of the mainly Aboriginal, Métis and Half-Breed population of Red River] It would have been impossible to have carried out the measure in the face of their opposition, so it became necessary to soothe their alarm by fair promises; no coercion was to be attempted, and the troops, for the protection of law and order. In fact, they were going there, more in the capacity of police than of soldiers. (Wolseley 1870:714)

As they [the Aboriginals of NW Ontario] are all armed and capable of great endurance, and as the country generally is a network of lakes, where they can go in any direction for hundreds of miles in their light canoes, they might cause endless trouble and great loss to any military force seeming to push its way through the country without their permission. (Wolseley 1870:718)

Wolseley's expeditionary force was guided by Indians and en route between Thunder Bay and Red River, stretched one-hundred-fifty miles (Wolseley 1971:65). Her Majesty's Government of Great Britain and Ireland was well aware of Canada's colonial behaviour. Historian Paul Knaplund's explanation of this duplicity may be less acceptable today but was quite well reasonable then:

Gladstone and the majority of his colleagues hoped to keep the colonies within the Empire by applying the principle of freedom. This principle could not always be followed; true statesmanship must be opportunistic. (Knaplund 1966:139)

Wolseley in a characteristically blunt style explained the situation more plainly:

He [Georges-Etienne Cartier] is a firm friend and a good hater. His ordinary promise is more to be relied upon than the oath of many of his contemporaries and he is a hard working public servant. To accuse him of descending at times into the lowest depths of jobbery and political trickery is merely to accuse him of being a Canadian politician. (Wolseley 1870:715)

Thus, it was allegedly as a result of naivety, a weakness, on the part of Aboriginals that they did not sufficiently doubt British and Canadian sincerity. Aboriginals were not averse to separating the use of coercive force from morality in order to be free to accomplish 'legal and justified objectives' through immoral means -- conniving use of deceit and coercive force. What had been a positive trait shared by Europeans and Aboriginals alike for more than two hundred years in Rupert's Land -- mutual acceptance

of established moral practices, was now archaic and a weakness in the paths of relentless advancing European civilizations.

Only by exercise of coercive force in a covert manner, disconnected from ordinary morals would it have been possible to achieve the goals of both imperial and colonial governments. Recruiting the unscrupulous and uninhibited agents required of such a project was not so difficult as it might seem. In his classic work, The Road to Serfdom, in a chapter entitled, *Why the Worst Get on Top*, Frederich Hayek (1945:149) explained:

Just as the democratic statesman who sets out to plan economic life will soon be confronted with the alternative of either assuming dictatorial powers or abandoning his plans, so the totalitarian dictator would soon have to choose between disregard of ordinary morals and failure. It is for this reason that the unscrupulous and uninhibited are likely to be more successful in a society tending toward totalitarianism.

Hayek (1945:150) continues his essay, describing the circumstances that present opportunity and justification for the “suppression of democratic institutions”:

We must here return for a moment to the position which precedes the suppression of democratic institutions and the creation of a totalitarian regime. In this stage it is the general demand for quick and determined government action that is the dominating element in the situation, dissatisfaction with the slow and cumbersome course of democratic procedure which makes action for action’s sake the goal. It is then the man or the party who seems strong and resolute enough ‘to get things done’ who exercises the greatest appeal.

Hayek (1945:152-153) identifies three factors contributing to “why such a numerous and strong group with fairly homogeneous views is not likely to be formed by the best, but rather by the worst elements of any society”:

... the higher the education and intelligence of individuals become, the more likely their views and tastes are differentiated and less likely they are to agree on a particular hierarchy of values. It is a corollary of this that if we wish to find a high degree of uniformity and similarity of outlook, we have to descend to the regions of lower moral and intellectual standards where the more primitive and ‘common’ instincts and tastes prevail. This does not mean that the majority of people have low moral standards; it merely means

that the largest group of people whose values are very similar are the people with low standards.

If, however, a political dictator had to rely entirely on those whose uncomplicated and primitive instincts happen to be very similar, their number would scarcely give sufficient weight to their endeavours. He will have to increase their numbers by converting more to the same simple creed.

...
It is in connection with the deliberate effort of the skilful demagogue to weld together a closely coherent and homogeneous body of supporters that the third and perhaps most important negative element of selection enters. It seems to be almost a law of human nature that it is easier for people to agree on a negative program – on the hatred of an enemy, on the envy of those better off – than on any positive task.

The project to annex Rupert's Land found dedicated and effective demagogues in such major characters as John A. Macdonald, George-Etienne Cartier, Bishop Alexandre Tache, Louis Riel, Donald A. Smith, skillfully manipulating factions and the tensions which separated them. Though divided by hatred and envy for one another, these factions were united in their attitudes toward the Aboriginal inhabitants. Significant departures from Christian beliefs, codes of honour and democratic values happened easily in the face of choices between "disregard of ordinary morals and failure" of their various projects - the expansion of Canada (and curbing of the U.S.); realizing a new Catholic and Francophone province (to offset the power of an Orange Ontario); or, exploiting huge economic opportunities such as railroads, telegraph, mining, farming and forestry (without having to share with or compensate the owners).

Historical Suppression of Rupert's Land Rights

The *Royal Proclamation of December 6, 1869* might have achieved the same peace and order that its predecessor the *RP1763* had, if it was faithfully circulated and had achieved warranted recognition as a general statement of British Imperial doctrine of continuity in British North America. Indeed, Colonel Wolseley's own proclamation was mainly necessary because the proclamation issued by Her Majesty's Government was never distributed.

The federal and provincial governments of Canada have thus far succeeded in suppressing the same legal rights of every individual that they are obliged to respect and place under the protection of by superior courts. This suppression has been mainly accomplished by physically removing the *Royal Proclamation of December 6, 1869*, from public view and on the rare occasions when that has not been possible, by obscuring its legal import.

According to the sworn testimony of Prime Minister John A. Macdonald, published by Canadian Parliament in its Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70, Appendix 6, 1874, this Royal Proclamation issued by Her Majesty's Government of Great Britain and Ireland, was entrusted to the Roman Catholic missionary, Jean-Baptiste Thibault, Donald A. Smith and Bishop Taché.

Hector Langevin, Macdonald's Minister of Public Works, sent for Jean-Baptiste Thibault, a missionary who had been on the prairie's since 1842, who had established a mission at Lac Ste. Anne, in present-day Alberta and had published a number of hymn and prayer books in the Cree language. During the Select Committee hearings of 1874, Macdonald testified that:

The proclamation, as first issued was transmitted for dissemination in the North-West through the Very Reverend Mr. Thibault. It was printed in English, French, and Cree, at Ottawa, and sent by him. At the same time, the Bishop of St. Boniface was telegraphed for and requested to return, if possible, and use his great influence among the people of his diocese. The Government here was informed that, though Mr. Thibault was allowed access to the Territory, he was deprived of the proclamation given him and they were not published. When Bishop Taché arrived in Ottawa, circumstances in the North-West had not materially changed and the Governor-General decided that the proclamation should be entrusted for publication to the Bishop. (Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70:100-102)

The same report includes a letter (p. 17) from Joseph Howe, December 6, 1869 to Very Reverend Mr. Thibault explaining, "herewith you will receive 500 copies of a proclamation, signed by the Queen's representative, for distribution in the North-West; and 100 copies of the instructions given to the Hon. Mr. McDougall on September 28th".

The report also includes a letter (p. 192-193), from Governor-General Young to Bishop Taché, February 16, 1870:

I need not try to furnish you with any instructions for your guidance, beyond those contained in the telegraphic message sent me by Lord Granville on the part of the British Cabinet, in the Proclamation which I drew up in accordance with that message, and in the letters which I addressed to Gov. McTavish, your Vicar General and Mr. Smith.

Bishop Taché never saw fit to publish the Royal Proclamation in the North-West. However, the Royal Proclamation was produced in 1875, when Taché argued to have the death sentence of Elzear Goulet commuted (Sessional Papers #11 – House of Commons 1875) and again two decades later in a valiant effort to save French language and schooling rights from being abolished by the Manitoba Legislature. Donald A. Smith read a few sentences from the Proclamation to a crowd gathered in front of Fort Garry, January 19, 1870. As noted by Jack Bumsted in his book, The Red River Rebellion, “the best shorthand reporter in the settlement, William Coldwell, was on hand as reporter for the *New Nation* to keep an official record of the proceedings” (Bumsted 1996:122). This record does, in fact, appear in the *New Nation* for January 20, 1870. As Bumsted commented:

Not every listener believed the promises of the Canadians; however, [Thomas] Bunn emphasized that the governor-general’s proclamation of December 7, which called upon the people to lay down their arms and disperse was not available and was not read at this gathering. (Bumsted 1996:126)

Donald A. Smith served on the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70, and was as a result able to control the manner in which the documents and testimony were reported and the manner in which they were used to explain the difficulties surrounding the annexation of Rupert’s Land.

After Vicar General Jean Baptiste Thibault allegedly lost his copies of the Royal Proclamation in English, French and Cree, the promulgation of this important document was left to Bishop Taché. The latter chose not to release it until he required it in his 1874

efforts in support of Goulet and his efforts to save Francophone education and language rights, fifteen years later.

Even today, the Crown continues to suppress the existence and full meaning of both the *Royal Proclamation of December 6, 1869* and *Colonel Wolseley's Proclamation of June 1870*, (see Chronology in Appendix E).

Tide of History Reliant on the Legislature

The exact form of the 'tide of history', the metaphor which disguises calculated and sustained efforts of the executive of the Canadian government has shape shifted according to the changes occurring in a larger Canadian context. The Crown has alternately used whatever branch of government has been the most amenable to tolerate the tide of history for preventing and washing away any Aboriginal resistance. Chief Justice Brian Dickson characterized the separate branches of Canadian government and their respective roles in the Supreme Courts judgment of *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455

39 There is in Canada a separation of powers among the three branches of government--the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

From 1869, until 1951, Canada's federal executive was able to write whatever legislation it needed in order to legally (as opposed to morally or fairly acquire unlimited discretionary powers. In preparation for its annexation of Rupert's Land, John A. Macdonald's government presented in 1868, its *Act for the Gradual Enfranchisement of Indians*. This legislation was at first objected to by Senator McCully (Senate Debates April 20, 1868:179):

Hon. Mr. McCully wished to express his strong disapprobation and objection to the vast and dangerous powers, as he thought, which the bill gave to the head of the Department, respecting the administration of the Indian lands and taking the functions and powers of the ordinary tribunals of the country, which would be alike dangerous and unwise, such as the arrest and imprisonment of trespassers, etc.. Such vast and extraordinary powers

were unheard of in any free and civilized country where British laws were administered.

Senator Ross responded on behalf of the governing Conservative party:

In the case of the Indians, who were infants in the eye of the law, some guardian had to be appointed, and who so well suited and likely to act so fairly as the Government, who could have no motive or inducement to do wrong between them and the public domain.

However strongly felt Senator McCully's objectives were, he and his fellow senators, on June 9th 1869, approved the *Act for the Gradual Enfranchisement of Indians*, with only one amendment (Debates of the Senate, 2nd Session, 1st Parliament, April 15 - June 22, 1869:279) requiring the band of any Indian convicted of a crime to pay the expenses of his incarceration. During passages of the bill, Senator McCully remarked "the Indians of Nova Scotia had not advanced to that state of civilization to enable them to inherit property". Less than two weeks later, Royal Assent was given the bill by the Governor-General. On December 17th, 1869 the Minister of Colonial Affairs advised Governor General John Young that "Her Majesty will not be advised to exercise Her power of disallowance with respect to the following Acts of the Legislature of Canada" (Sessional Papers, 1st Parliament, 1870 Vol. VI, #39:1-2). The list included the *Act for the Gradual Enfranchisement of Indians*, as well as *An Act for the Temporary Government of Rupert's Land*. Using these draconian powers, Prime Minister Macdonald drew the boundaries of Manitoba in such a manner that non-Aboriginals were in the majority. Within ten years, after the immigration of more than eighty-thousand, mostly from Ontario, even the French speaking Metis who had until 1879 controlled the Manitoba legislature, were also outnumbered. By 1890, Franco Manitoban language and education rights were legislated away by an English dominated legislature.

The normal process for non-Aboriginal Canadians has long been that: first, the need for particular legislation arises, in the views expressed by voting citizens; initially as part of an election platform. Then, the elected government strikes committees to consult further and to draft the necessary legislation. After a series of readings in Parliament and the Senate, the bill is finally put before both the House of Commons and Senate and revisions according to feedback with a reasonable expectation of passage. The fairness

and reasonableness of Canadian laws critically depend on this lengthy and democratic process in order that the resulting laws will be obeyed by citizens and upheld by the courts.

Aboriginals have never had any democratic voice in proposing, constructing or approving the laws they are subjected to. A failing of the Canadian system noted by Keith Penner and Jim Manly, respectively, during the pronouncement of Bill C-31 in June 1985, allegedly removing discrimination against women from the Indian Act:

I think there was the overwhelming feeling that if we are to have the concept of Indian status, anyone recognized by the Indian people as being a band member should also be recognized as having Indian status in the eyes of the Government. I regret to say that the amendments brought forth by the Minister do not yet satisfy that requirement. This is a serious shortcoming in the Bill and one that continues to exist. ... Every amendment that we approve or reject must be done in recognition of the fact that at some point, and let it not be too far down the road, we will have to take the big leap forward so that in the next Parliament and the Parliament after that we will not be engaged in the same kind of exercise. It is long overdue that we cease this constant meddling and interfering and turn matters like this to the proper authorities, namely, the First Nations themselves. (House of Commons Debates, June 10, 1985, p.5571)

Rights to vote in provincial and federal elections were only granted long after electoral boundaries had been drawn in such a manner that Aboriginals were, and continue to be, severely outvoted by non-Aboriginals. Even in those more recent ridings, where Aboriginals are in a majority, such as northern Manitoba or the northern Territories, the members of parliament elected do not represent a strong enough voice in Canadian Parliament to influence changes in, for example, the *Indian Act*; *Cree Naskapi Act (CNA)*; or, *Nunavut Act*. This author has noticed that, for the legislation it puts before parliament, the Crown has used a different process in order to create an illusion of fairness and reasonableness. The first such commission was the Bagot Commission of 1844, led by, Governor-General Sir Charles Bagot. The commissioners' main concern was the appraisal of the current situation. It was mainly focused on land.

As Benjamin Franklin (Penn 1829:22) and Chief Justice John Marshal of the U.S. Supreme Court had already done, Governor-General Bagot adopted, without a foundation

in fact, the opinion of Emmerich de Vattel, presented in the latter's 1758 work, The Law of Nations. The following is one of Vattel's most often cited principle:

§ 81. The cultivation of the soil a natural obligation

The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. ... There are others, who, to avoid labour, choose to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.

[Emphasis added by author]

Bagot advised that if "the Government had not made arrangements for the voluntary surrender of the lands, the white settlers would gradually have taken possession of them, without offering any compensation whatever". Resisting white encroachment upon Indian lands, notwithstanding promises made by Her Majesty's government, was viewed by Bagot as resisting "the natural laws of society" and "impolitic to check the tide of immigration" (Bagot 1845). Thus, Vattel provided a legal opinion which allowed the Canadian colonial government to disconnect morality from its use of coercive force in order to break solemn promises and dispossess Aborigines. Adopting Vattel's logic made this possible, in the words of Tocqueville, "with singular felicity, tranquility, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world". Supported by the Bagot Commission Report, the colonial government wrote and passed into law, the first *Indian Act*, 1850,

largely concerned with the disposal of Indian lands and the legal definition of an 'Indian'. The Pennefather Commission, led by Richard T. Pennefather, Superintendent General of Indian Affairs, produced the Report of the Special Commissioners Appointed on the 8th of September 1856, to Investigate Indian Affairs in Canada. The commissions objectives were two fold, to investigate: "the best means of securing the future progress and civilization of the Indian Tribes in Canada"; and, "the best mode of so managing the Indian Properties as to secure its full benefit to the Indians, without impeding the settlement of the country". Under the heading of *Position of the Native Tribes in the Eye of the Law*, the report noted:

In 1840, the Attorney General gave it as his opinion,

1st. That Indians under the age of 21 years are minors in the eye of the law, beyond that age they have the rights of other subjects.

2nd. That they are not incapable of making civil contracts.

3^{rdly}. That they have legal capacity, either as plaintiffs or defendants.

At this time there was no legislative declaration bearing upon the subject matter of these opinions, but the Canadian Parliament have from time to time provided for the Indians as a class incapable in many respects of managing their own affairs. Indeed the *20 Vic. c. 26* expressly acknowledges their inferiority in regard to their legal rights and liabilities as compared with Her Majesty's other subjects resident in this Province, and provides means whereby they may be gradually enfranchised. (Pennefather 1858:99)

In their recommendations, Pennefather and his colleagues advised a strategy of aggressive assimilation of Indians to the language and culture of English and French citizens:

Great stress should be laid upon instruction either in French or English. It is true that the Missionaries in the North-West districts urge the propriety of some instruction being given in the native tongue, and no doubt it may facilitate the important object of spreading Christianity among the adults. In our opinion however nothing will so pave the way for the amalgamation of the Indian and white races, as the disuse among the former of their peculiar dialects. So long as they continue to cling to them, they will remain a distinct people dwelling apart in the midst of their White neighbours. ... Another point of vital importance to be kept steadily in view, is the gradual destruction of the tribal organization. It has been proposed to substitute Municipal Institutions, at once for it. (Pennefather 1858:152)

On March 14th 1879, Nicholas Flood Davin submitted the report he was commissioned by Prime Minister John A. Macdonald to complete. Davin reported a thorough research of “Industrial Schools for the education of Indians and mixed-bloods in the United States, and on the advisability of establishing similar institutions in the North-West Territories of the Dominion” (Davin 1979:1). Davin described the industrial school as “the principal feature of the policy known as aggressive civilization”, inaugurated by President Grant in 1869 on recommendations made by the Peace Commission. The latter commission had recommended that: “the Indians should be consolidated on few reservations”; “provided with permanent individual homes”; “the tribal relation should be abolished”; “lands should be allotted in severalty not in common”; and, “that the Indian should speedily become a citizen of the United States”. Davin’s reasons for a preference for a residential school over a day school leaves little doubt that the intent of aggressive civilization is to wipe out Aboriginal language and culture:

... it was found that the day-school did not work, because the influence of the wigwam was stronger than the influence of the school. ... The experience of the United States is the same as our own as far as the adult Indian is concerned. Little can be done with him. He can be taught to do a little at farming, and at stock-raising, and to dress in a more civilized manner, but that is all. The child, again, who goes to a day school learns little, and what he learns is soon forgotten, while his tastes are fashioned at home, and his inherited aversion to toil is in no way combated. (Davin 1879:1-2)

Not until shortly after the Second World War did the Crown feel the need to significantly alter the *Indian Act* or its policies. In 1947, the Special Joint Committee of the Senate and the House of Commons, revisited this legislation with some sort of final solution in mind. Diamond Jenness, the Dominion Anthropologist, testified and submitted a single page report, Plan for Liquidating Canada’s Indian Problem within 25 Years. As suggested by the title, the objective of this plan, well received by the committee was “to abolish, gradually but rapidly the separate political and social status of the Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing” (Jenness 1947). The resulting 1951 *Indian Act* appeared

to have lost some of its undemocratic features, for example, it was no longer a crime to raise money for legal counsel or to hire a lawyers to present a claim in court. However, the revised *Act* markedly increased the discretionary powers of the Department of Indian & Northern Affairs and its officers (Lawrence 2004:36). Approximately twenty years after Jenness' plan, Professor Harry Hawthorn and a team of his academic peers were hired to research and report on economic, political, educational situations of contemporary Indians of Canada, making suggestions as to the policies that might best be adopted. Hawthorn submitted his report in two volumes in 1966 and 1967. At more than four-hundred-sixty pages in two volumes, Hawthorn's report was more detailed and delivered the same message as Jenness' in a kinder and a more gentle fashion. The sorry state of contemporary Aboriginals, Hawthorn attributed to "general isolation, poverty, and backwardness which prevail in most Canadian Indian communities". Like his predecessors, Hawthorn saw 'tribal structure' as a major obstacle to both desirable and inevitable assimilation:

3. Kinship Ties and Obligations

One of the most widely observed factors in economic development, generally held to be negative in its effects, is the obligation of the individual to his kinship group. In most tribal and peasant societies, a fairly wide kinship group is the basic unit of organization, economic and otherwise. It defines the role and status of the individual, and provides him with some degree of security; that is, in terms of a right to minimum subsistence and other prerequisites in times of need. The mutual ties of rights and obligations act as deterrents to economic advancement in an industrial society. The individual's mobility may be reduced, for one thing, as he may be reluctant to sacrifice his security by moving to centres of job opportunity elsewhere. Where an individual does advance himself, through wage employment or successful entrepreneurship, the claims of his kinfolk may reduce his standard of living and his capital. This sort of pattern is conspicuous and therefore easily and frequently observed by outsiders. (Hawthorn 1966:121-122)

Hawthorn, like his predecessors characterized the legal relationship between Aboriginals and the Crown as "due to the fact that they were waiting on the shore when the White man first set foot on the northern half of this continent" (Hawthorn 1966:396).

From Charles Bagot to Harry Hawthorn, all were commissioned by the Crown, to conduct research relying exclusively upon non-Aboriginals who exercised control over Aboriginals. Even the most recent, Hawthorn Report is based for the most part on ethnocentric non-Aboriginal observations of Aboriginal behaviour. None of these efforts provided opportunity for Aboriginals to present the facts of Aboriginal motives, intentions and methodology. Vattel's legal reasoning for dispossessing Aboriginals of their lands as well as their culture and an attendant characterization of Aboriginals as backward or primitive wards was incorporated in each report without factual foundations.

Soon after the patriation of Canada's constitution with entrenched protection of individual rights, the *Indian Act* came under scrutiny by the first bipartisan committee that sought and received Aboriginal testimony. Chaired by Keith Penner, this parliamentary committee was to review Indian Self-Government. The committee's second report, submitted September 12, 1983, is commonly known as The Penner Report. This report made fifty-eight recommendations, mostly related to general findings that: "the programs of the Department of Indian Affairs and Northern Development relating to Indian people be phased out"; "the best way to promote Indian rights is through Indian self-government and not by special representation for First Nations in Parliament"; and, "the implementation of this report in its entirety, legislatively and constitutionally, is the best means of satisfying international standards in relation to Indian First Nations" (Penner 1983:148). Rather than blueprinting the tide of history for Aboriginals, the Penner Report provided a road map, back from the brink of extinction. This report began with the following quotation from Leo Tolstoy's 1866, What Then Must We Do?

I sit on a man's back choking him and making him carry me and yet assure myself and others that I am sorry for him and wish to lighten his load by all possible means – except by getting off his back.

Immediately before its conclusions and recommendations, the Penner Report included the remarks of former Commissioner of Indian Claims, Dr. Lloyd Barber:

I hope that we are psychologically prepared for this challenge. It has come upon us rather suddenly and tends to shake the basis on which we have always thought about our relationship with native people. I suppose in a

way, we tend to react like somebody who has been standing on the other fellow's toes for so long that we are indignant when he wants to pull his foot out. I hope we can overcome this for his sake and ours.

This author experienced difficulty in locating the Penner Report and noticed its virtual disappearance from literature, less than a decade after its release. Much easier to find are the more recent reports of the 1996, Royal Commission on Aboriginal People and the 2007, Report of the Ipperwash Inquiry, both are available on the internet and in most Canadian libraries.

The only recent change to the *Indian Act*, Bill C-31 passed into law in June of 1985, allegedly to eliminate gender discrimination, provided unlimited discretionary powers to the Minister of Indian Affairs. The regulations used to implement these changes, still secret to all but immediate staff, have precipitated much litigation and a large Aboriginal migration to urban centers. One such action, *Sawridge Band v. Canada*, [2001] FCA 338 (CanLII), [2002] 2 F.C. 346 has been through more than forty-four hearings and is now cited as jurisprudence for a judge to refuse a motion as 'abusive'. Although Minister David Crombie's objectives, presented in parliament, for Bill C-31 were altruistic, this legislation, written with ambiguity and silent on important matters, placed in the hands of senior Crown officials, an unlimited discretionary power. The enabling regulations created with such sweeping power and the government's application of them, threaten the very survival of Aboriginal people (Liberal Party of Canada 2002; Clatworthy & Delisle 2004; Lawrence 2004). The Crown's regulations use the approach of referring to grand parents instead of the more offensive term of blood quantum. In addition to contributing to confusion that these regulations are in some way related to Aboriginal customs. During recent research conducted by this author for an Alberta First Nation, this researcher quickly realized that not only was blood quantum not an Aboriginal custom, its logic and objectives were not well understood.

While searching for historical illustrations of blood quantum limits applied to identity or citizenship, this researcher was provided by the Simon Weisenthal Holocaust Center with The Definition of a Jew, proclaimed by Governor-General Frank (see Appendix F). Though the genocide in this case was literal, the approach is identical to the cultural genocide intended by the Crown. In fact, this author's findings in his research

conducted for the Alberta First Nation indicated that the Crown's blood quantum controls, in combination with its other its controls of education, health and social services, if unchecked, will cause the disappearance of the subject First Nation, even sooner than anticipated by Clatworthy, the Assembly of First Nations; and, Liberal Party of Canada 2002.

Very recently, on June 8th 2007, in *McIvor v. The Registrar, Indian and Northern Affairs Canada*, [2007] BCSC 827, the section of the *Indian Act* altered by Bill C-31 has been struck down by the BC Supreme Court, for the following reasons cited by Honorable Madam Justice Ross:

[343] I have concluded that s. 6 of the 1985 Act violates s. 15(1) of the Charter in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, and discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women. I have concluded that these provisions are not saved by s. 1.

Given these results are now well known, it seems highly unlikely that Canadian Parliament will ever allow itself to again be blind sided with amendments to the *Indian Act* that are as open to abusive use of executive authority as Bill C-31 has been.

Tide of History Reliant on the Courts

It is this author's belief that the Crown has more recently adjusted its *tide of history* strategy, to rely more on Canadian courts for assistance, exploiting the substance which Ritter (1996:32) notes has been retained since rejection of the name, 'terra nullius' in *Mabo*. To appreciate this distinction between name and substance, one needs to examine what was been adopted from *Mabo* by the Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 S.C.R. 507;

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. (*Mabo v. Queensland [No. 2]*, [1992], 175 C.L.R. 1 at p. 58)

[Emphasis added by this author]

This *Mabo* principle gave rise to the *Van der Peet* Test, most often cited as...

46. ...in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. (*Van der Peet*)

Essentially, *Mabo* and *Van der Peet* require Aboriginals to prove the past existence and present day survival of the very customs and tribal structure which the Bagot, Pennefather, Davin, Jenness and Hawthorne Reports made recommendations for erasing. These are the same customs and tribal structure which successive amendments to the *Indian Act* have been dedicated to criminalizing and suppressing -- the same customs and tribal structure characterized by Vattel as errant and part of ranging rather than legally occupying. Vattel's opinion of Aboriginal legal character was adopted by Chief Justice John Marshall, in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), without any factual foundation (McNeil 1989:301-302; Harvard 1984:423-425; Seifert 2004:295-301). Thus, the role of the Crown's 'Indian Fighters' has been to disguise as the *tide of history*, the efforts of their patron to destroy Aboriginal customs and tribal structure and to discredit Aboriginal legal character as being too errant to amount to legal occupation rather than mere ranging. An especially active member of the Crown's team of experts, Dr. Alexander von Gernet, has proven himself most effective in discrediting Aboriginal legal character and in reducing the weight of Aboriginal historical evidence based on oral traditions. Von Gernet's expert testimony was a major factor in the Crown winning an eventual Supreme Court of Canada decision in *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220. The importance of Von Gernet's testimony to the Crown's arguments against the Mi'kmaq, were clearly acknowledged in the lower court judgment, with such phrases as "Dr. von Gernet replied, convincingly"; and, "Dr. von Gernet's conclusion is accurate", (see Appendix G for more examples)

This shift by the Crown away from legislative support toward judicial support for its *tide of history* will not succeed long. The character or propensity evidence presented by von Gernet, were it presented in non-Aboriginal actions, would not likely have been

admitted into the fact finding of a trial, regardless of whether it is a criminal or civil matter. Writing for a unanimous Supreme Court of Canada in *R. v. Handy*, [2002] 2 S.C.R. 908, Binnie J wrote:

- 39 It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.)*, supra, at p. 744:

The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

- 40 The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": Hamlet, Act I, Scene v, ll. 66-67.

[Emphasis added by this author]

Although the latter reasons relate to criminal trials, the reasons for not admitting character or propensity evidence in civil trials are remarkably similar, well explained by Supreme Court Justice John Sopinka in his seminal article, *Character Evidence in Civil Cases*:

It has perhaps been demonstrated that the law of evidence in civil cases is somewhat of a hodgepodge. There does not appear to be a consistent legal thread connecting the various rules. Some evidence is excluded which appears to be logically relevant. This over-zealousness on the part of the courts to protect character is perhaps the hallmark of an advanced civilization. One must be free to indulge his idiosyncrasies, oddities and peculiar habits without fear of having them exposed when seeking civil redress. Failure to cry at one's mother's funeral may not live up to the

expectations of those who sit in judgment, but it should not be a basis for attracting liability. (Sopinka 1972:257)

[Emphasis added by this author]

An exception to the prohibition against character or propensity evidence is the admission of, under specific conditions, similar fact evidence. Similar fact evidence is evidence of past discreditable conduct, adduced to prove that the accused is guilty of the offence for which he is now charged. The concept of similar fact evidence is now two centuries old. Clear principles for its admission were laid down more than a century ago in 1894 in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57. To what had previously been a simple exclusionary rule was added a rule for exceptionally admitting similar fact evidence to prove plan or design and to rebut a defense that would otherwise have been open to the accused. More than a century later, two tests for admissibility were enunciated in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421: (i) that the evidence must be of positive probative value; or, (ii) that it be uniquely or strikingly similar. Principles for determining admissibility have become more focused since *Boardman*, as pronounced by Supreme Court Justice McLachlin, writing for a majority in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717:

The Canadian jurisprudence since *Boardman* is generally consistent with the approach advocated in that case. It has followed *Boardman* in rejecting the category approach to the admission of similar fact evidence. At the same time, cases in Canada have on the whole maintained an emphasis on the general rule that evidence of mere propensity is inadmissible, and have continued to emphasize the necessity that such evidence possess high probative value in relation to its potential prejudice.

By 2000, a step by step method for determining admissibility of similar fact evidence evolved, pronounced by Cory J for a unanimous Supreme Court of Canada in *R. v. Arp*, [1998] 3 S.C.R. 339:

50 In summary, in considering the admissibility of similar fact evidence, the basic rule is that the trial judge must first determine whether the probative value of the evidence outweighs its prejudicial effect. In most

cases where similar fact evidence is adduced to prove identity it might be helpful for the trial judge to consider the following suggestions in deciding whether to admit the evidence:

- (1) Generally where similar fact evidence is adduced to prove identity a high degree of similarity between the acts is required in order to ensure that the similar fact evidence has the requisite probative value of outweighing its prejudicial effect to be admissible. The similarity between the acts may consist of a unique trademark or signature on a series of significant similarities.
- (2) In assessing the similarity of the acts, the trial judge should only consider the manner in which the acts were committed and not the evidence as to the accused's involvement in each act.
- (3) There may well be exceptions but as a general rule if there is such a degree of similarity between the acts that it is likely that they were committed by the same person then the similar fact evidence will ordinarily have sufficient probative force to outweigh its prejudicial effect and may be admitted.
- (4) The jury will then be able to consider all the evidence related to the alleged similar acts in determining the accused's guilt for any one act.

The hallmark or pattern of strikingly similar acts must not be confused with trawling to find facts which support a theory -- poisonous reasoning, as defined in *R. v. Handy*. Likewise, the evidence of acts that comprise a striking pattern, which cannot be explained as coincidence, must not include other forms of evidence other than observed facts, such as expert opinion or treatise evidence. Master Calum U.C. MacLeod of Ontario Superior Court, spoke to this issue in *Toronto (City) v. MFP Financial Services Ltd.*, [2002] CanLII 45516 (ON S.C.), citing Sopinka's The Law of Evidence in Canada, 2nd Edition, para. 11.5

..... when the disposition or propensity of a person is proven by either expert opinion or reputation evidence, the term "similar fact evidence" seems inappropriate.

To summarize then, before similar fact evidence of the character or propensity of a defendant can be admitted to the fact finding of a trial, the following four stages must be accomplished, using only relevant, probative, observed facts:

- 1) a high degree of similarity between acts, not likely explained by a reasonable person as coincidence;
- 2) the similarity of acts must be proven, not the subject's involvement;
- 3) that the acts were committed by the same person; and,
- 4) only after accomplishing stages 1), 2), and 3), then the subject's involvement must be proven.

There is a particular problem with the propensity term 'nomad' or 'nomadic', resulting from the connotation attached to it in Canadian courtrooms. Especially since *Bear Island Foundation et al v. Ontario Attorney General*, [1984] 49 O.R. (2d) 353, generalizations about Aboriginal propensity to discreditable behaviour – living as 'nomads' have been admitted into the fact finding of trials, invariably on the strength of treatise evidence, without factual foundation at all. As an indication of the extent to which the prohibition against character evidence and the principles for the exception of similar facts have been ignored, in Aboriginal actions, this author offers the example of the term 'nomad' found in recent Canadian court decisions.

In judgments rendered by Canadian courts since 1982, this author found one-hundred-three judgments using the term 'nomad'. In thirty-one judgments, 'nomad' was used to describe the criminal character of the members of a criminal organization, a chapter of a motorcycle gang named the 'Hell's Angels', These 'nomads' are outlawed because of members' involvement in drug trafficking, prostitution, murder, extortion and organized crime. Proving the facts of this definition of 'nomad' generally have not been difficult as these nomads wear insignia and associate with other known members in a pattern of criminal activities, easily proven with admissible evidence gained from wire taps, photographs, video tape, financial paper trails, and testimony of under cover police officers.

In twenty-eight judgments in Canadian courts, the term 'nomad' was used to describe the social character of persons of no particular ethnic or criminal affiliation, but

who have changed their addresses a number of times within a short time. The facts of such address changes would be easily proven with such readily admissible physical evidence as utility bills, cancelled cheques for rent paid, etc., in combination with evidence to prove that the defendant was unemployed, had no fixed motive or intentions.

In forty-four judgments in Canadian courts the term 'nomad' was used to describe the cultural character of Aboriginals. This characterization accepted into the fact finding of these trials, invariably resulted in a reduction of the freedoms of the people to whom such character was attributed.

Not only did the court in such Aboriginal cases fail to demand a clear statement of the generalizations implied by the use of the character term 'nomad', being made about Aboriginal motives, intentions and methods, but the court also failed to require admissible factual proof that there was ever a striking and frequent pattern of similar facts about similar acts to attest to the actual existence of such a cultural nomad (as opposed to a criminal or social one), anywhere on earth, at any time. Considering the history of the propensity term, 'nomad' researched by William W. Bassett, that proof would be extremely difficult, if not impossible to produce:

The myth of the nomad took its origins with comparisons drawn out of Renaissance travelogues and applied by the English conquerors to the native Irish in Elizabethan times. The myth was confirmed by eighteenth century European ethnology. In variations, however, the myth has been used in America through the centuries not only on the Indians, but also on Blacks, Asians, Jews, Gypsies, Catholics, Mormons, immigrants from southern and eastern Europe, women, tenants, migrant workers, and countless other victims of legal discrimination. The myth of the nomad deprecates legal personhood by stripping away the human expectation of private property rights and the equal protection of the laws. (Bassett 1986:150-151)

In the unlikely event that a hallmark system of motive, intention or method had been adduced for any 'nomad', founded on admissible similar facts, evoking striking patterns whose frequency could not be explained by coincidence, *still*, the Crown should be compelled to prove a nexus between that 'nomad' behaviour and the cultural behaviour of the subject Aboriginal people. This multifaceted burden of evidence is more easily illustrated in a diagram than in words and phrases.

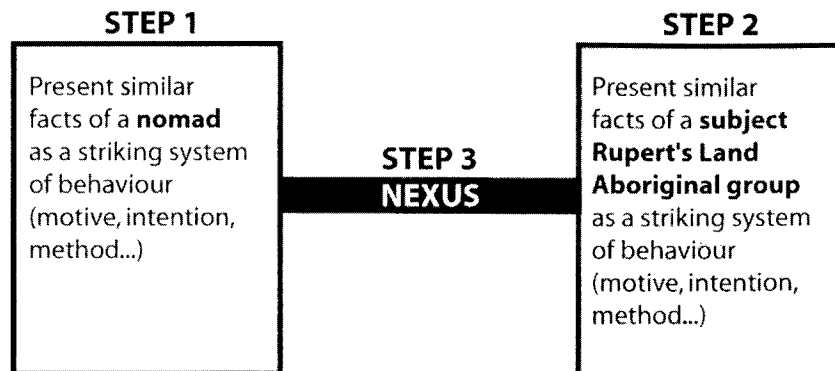


Figure 2

Not only was the term ‘nomad’ admitted into the fact finding in each judgment (step 1), the generalization of a connection (step 2) with Canadian Aboriginals and generalizations of similar propensity (step 3) were admitted without any factual foundation at all. Based on such poisonous reasoning, the legal rights of the subject Aboriginals were either denigrated or denied altogether. The expert evidence of Alexander Von Gernet provides a spectacular example of this abdication from the prohibition of character evidence in adjudication of Aboriginal rights. By his own admission Von Gernet has no personal experience with Aboriginal persons, a fact acknowledged by Judge Stevens-Guille in *R. v. Frank*, [1999] ABPC 81.

Von Gernet has never heard an Aboriginal oral tradition, nor has he ever witnessed or solicited the similar facts that would establish for the court, an important pattern of issues such as motives, intentions and methods. Yet, at a much accelerated rate during the past ten years, Von Gernet and many of his similarly qualified colleagues have been allowed with their expert opinions to poison the fact finding of numerous trials (see Appendix G). His practical training was in archaeological field methods applied to sites in southern Ontario. His research related to the cultural behaviour and history of Canadian Aboriginal communities, according to his expert reports, is entirely based on the writings of others. According to Canadian common law of evidence, such sources are hearsay. Because their reliability is open to debate they are therefore not admissible by judicial notice. Without presentation of the facts upon which the generalizations contained depend, such expert testimony and reports are inadmissible. Neither Von

Gernet, nor any other scholars have been required to, nor have they ever provided factual proof of the existence in reality of a 'nomad' as a system of shared motives, intentions or methods or a connection with any group of Canadian Aboriginals.

What Von Gernet and his fellow expert witnesses *have* presented, have been generalizations about 'nomadic character' and the alleged propensity of various Aboriginal communities, without being asked for the similar fact foundations required by the laws of evidence in Canadian courts. Not only is their evidence inadmissible as character evidence by similar fact exception, it is also inadmissible because they cannot present the facts upon which their expert opinions are based. As the Supreme Court of Canada's judgments of *R. v. Abbey*, [1982] 2 S.C.R. 24 and *R. v. Mohan*, [1994] 2 S.C.R. 9, declared "before any weight can be given to expert opinion evidence, the facts upon which the opinion is based must be found to exist".

Conclusion

In conclusion, the Crown *is* the tide of history "that has washed away any real acknowledgment of traditional law and any real observance of traditional customs", in order to precipitate the disappearance of "the foundation of native title". However successful the Crown may have been as the tide of history, it has not washed away such documents as the *Canadian Constitution*, the RL&NWTO, *Wolseley's Proclamation*, the *RP1869* or British Hansard records of the debates in British Parliament on June 1, 1869.

Lamer CJ's *Van der Peet* Test is not relevant in the protection of the freedoms of every individual inhabiting Rupert's Land as both the freedoms and their protection by Canadian courts of competent jurisdiction are clearly enunciated in the aforementioned documents, not requiring discovery by the court, already determined to be so notorious as requiring no further proof.

The federal and provincial statutes which have been applied to the lives of every individual inhabiting Rupert's Land are unconstitutional and of no legal force to the extent that they are inconsistent with the customs that define the legal system which protects the individual freedoms of the Aboriginal inhabitants. Having such federal and provincial statutes struck down for their repugnance to a Aboriginal custom is only part

of the project of asserting individual freedoms in Rupert's Land. A remedy, an alternative to an offending federal or provincial statute is also required. This author found that failure to plead remedies has been a common and serious weakness of approaches to litigating of Aboriginal issues. For example, in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the Supreme Court noted that:

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

More simply, because no claim of self-government was made in the first pleading of the Gitksan and Wet'suwet'en against the Attorney-General of British Columbia and naturally, no remedy of Aboriginal title or self-governance was included, these considerations could not be added in later appeal stages either. The Supreme Court sent the parties to negotiate a remedy. Now, ten years since the victory of *Delgamuukw*, the "process of negotiation and reconciliation" with the Crown has still not produced a remedy. A similar Aboriginal victory in *McIvor v. The Registrar*, may wait some time because a remedy was not included in the original statement of claim. Ross J disposed of the case by offering "the parties the opportunity to draft appropriate relief". Without setting a time limit, he added, "Should the parties fail to reach agreement, I will hear further submissions on the issue of remedy".

As well as a considerable delay, this may also allow the Crown opportunity to limit the scope of the court's decision to a single section of the impugned statute and to a single band. This, it was able to do in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, limiting the scope to one section of the *Indian Act*, s. 77(1) and to one band, Batchewana Indian Band.

It is this author's view that the pleading of *McIvor v. The Registrar* should have included the remedy of restoring McIvor's Rupert's Land right to live in accordance with the membership customs of her family and the other families of Montreal Lake Band of present day Saskatchewan. Pleading such a remedy would have been well supported by:

- 1) Judge Monk's reasons for judgment in *Connolly v. Woolrich* as well as their confirmation on appeal and their 1895 approval by the highest court in the British Empire;
- 2) British Hansard of Parliamentary Debates, June 1, 1869;
- 3) both the *Royal Proclamation of December 6, 1869* and Wolseley's of June 1870; and,
- 4) the sworn testimony of Prime Minister John A. Macdonald in the Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70.

The relevant customs should have been alleged in pleading, with the names of elders, middle aged and older as witnesses for proving the existence of such customs in the manner prescribed by Halsbury's Laws of England, 4th Edition, previously used in 2000 in the BC Supreme Court, in *Prince & Julian v. HMQ et al*, [2000] BCSC 1066. Most important to this author's thesis study, the authoritative inclusion of such a remedy in pleading would likely encourage the Crown to negotiate an accord for respecting the individual freedoms of the Aboriginal inhabitants of Rupert's Land instead of invoking a judicial *tide of history* to extinguish them. It seems reasonable that the Crown (provincial or federal), faced with a choice between negotiating in good faith and alternately risking judicial review of its abuse of power may prefer the former to the latter.

Accordingly, this author now directs this thesis study to the construction of remedies to infringement of the protection of the freedoms of every individual inhabiting Rupert's Land, which can be negotiated or litigated if necessary. Two major themes now require attention: the nature of the Canadian constitutional paradigm; and, the nature of Aboriginal legal systems based on customs.

CHAPTER FOUR

A CANADIAN CONSTITUTIONAL PARADIGM - ORIGINS

This author has recognized four distinct traditions that affect a Canadian constitutional paradigm. They are: a British tradition of legislative supremacy; a Federal tradition of dividing powers among a central and provincial governments; a Colonial tradition of supervision by and accountability to an Imperial government (executive, legislature and judiciary); and, a Liberal tradition of greater protection of individual freedoms. These four traditions are not mutually exclusive but are easily identified by the principles which define them. This author does not pretend to present a complete description of Canadian constitutionalism since 1867, but rather the practical minimum required for locating the legal rights of every individual inhabiting Rupert's Land. Canada's first constitution, a British Imperial statute, the *BNA Act*, was firmly based on the latter three traditions. The fourth and last, Liberal tradition, addressed in the next chapter, embraces principles of limiting legislative and executive powers to protect individual freedoms. These principles were inferred in Canada's first constitution but entrenched in Canada's second, patriated constitution of 1982.

British Tradition of Parliamentary Supremacy

Essentially, the British tradition of legislative or parliamentary supremacy, in the words of Professor Peter H. Hogg, meant "the hard fact remained that if a statute plainly took away a civil liberty there was no redress for the injured citizen" (Hogg 1984:25).

An early application of this attitude by Canadian politicians to the liberties of Aboriginals can be found in the Pennefather Report, 1858, where it was noted that according to the Attorney General in 1840, that "beyond that age [21] they [Indians] have the rights of other subjects":

... but the Canadian Parliament have from time to time provided for the Indians as a class incapable in many respects of managing their own affairs. Indeed the 20 Vic. c. 26 expressly acknowledges their inferiority in regard to their legal rights and liabilities as compared with Her Majesty's other

subjects resident in this Province, and provides means whereby they may be gradually enfranchised. (Pennefather 1858:99)

Similar remarks were made at the 1885 appeal of Louis Riel's conviction of high treason by Judge Killam of the Manitoba Court of Queen's Bench:

There can be no doubt that the Imperial Parliament has full power to legislate away any of the rights claimed within Great Britain and Ireland. ... It thus appears that the Parliament of Canada is not, within its legislative powers, placed in an inferior position to that of Britain. ... From this necessarily follows the complete supremacy of Parliament, its power to legislate away the rights guaranteed by Magna Charta, the Bill of Rights, or any enactments of Parliament or charters of the Sovereign. ... A court of justice cannot set itself above the legislature.

In practice among non-Aboriginals, the British notion of supremacy of the legislature, however, has not been quite so sweeping. There are certain long established British Parliamentary principles found in common law, that is, the judgments of British courts, including: "the independence of the judiciary, the separation of executive, judiciary and legislative powers, all commonly expressed as the rule of law" (Weiler 1973:233). "A statute or government action was unconstitutional, therefore illegal, if it did not satisfy such an important British Parliamentary principle" (Weiler 1973:235). The operation of this British tradition in Canada was alternately described in 1925 by Herbert A. Smith:

Under the British scheme of government the general doctrine is that judges have no control over the policy of Parliament, except when they are called upon to decide between the conflicting claims of rival legislatures in a federal system. If they hold that a particular statute is ultra vires, then the result automatically follows that it must fall within the proper competence of some other assembly. The current of law-making power may be diverted, but it cannot be prevented from flowing, as soon as it has found its proper channel, and the only real corrective for legislative folly is that which the suffrage places in the hands of the people themselves. (Smith 1925:286)

Notions of judicial independence and the separation of powers were integrated in the seminal writings of Charles de Secondat, Baron de Montesquieu, in his book, *l'Esprit des Lois* [The Spirit of Laws], first published in 1758:

Tout serait perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs: celui de faire des lois, celui d'exécuter des résolutions publiques, et celui de juger les crimes ou les différends des particuliers. (De l'esprit des lois, XI, 8, in Oeuvres Complètes, Paris, RF: Pléiade, 1958:397)

[Translation by this author: All would be lost if the same man, or the same body of principals or nobles or people, exercised these three powers: the one of making laws, the one of executing their public implementation, and the one of judging their breach or variance]

A recent application of judicial independence and the separation of powers can be found in the judgment reasons of Supreme Court Justice Arbour, in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519:

23 Applying the two Hunter criteria discussed above to child apprehension, it becomes apparent that the director or a representative of the Child and Family Services agency, as well as a peace officer, is empowered under Part III of the Act generally, and under s. 21(1) specifically, to act as both investigator of whether a child is in need of protection and adjudicator of whether or not the need for protection has risen to the level where the child must be removed from his or her parent's care. The conflation of these two roles within the same agency seriously undermines the ability of these investigators to act impartially and, consequently, risks the possibility that the statutory requirement of reasonable and probable grounds will be diluted — possibly to the extent that children may be apprehended on the basis of suspicion.

Thus, it could be seen that the principle of separation of powers (executing and judging) is still applied by the Supreme Court of Canada as part of the common law associated with the British tradition of the legislative supremacy. In his renowned work, Introduction to the Study of the Law of the Constitution, 8th Edition, A. V. Dicey describes an *internal* and an *external* limitation of the legislature:

[citing Leslie Stephen's Science of Ethics] '... from a scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of

imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it'. (Dicey 1915:78-79)

A British or a Canadian approach to protecting liberty by *strengthening* legislatures (legislative supremacy) undoubtedly contrast with the American alternative of *limiting* legislatures. This difference is probably rooted in a different history of British and Canadian revolts against the executive abuses of the Stuart kings and colonial governors in contrast with an American revolt against a British legislature (Risk & Vipond 1996:15)

Federal Tradition of Dividing Powers

This author found great irony in the history of the effect which a federal tradition of dividing powers among legislatures has had on the aforementioned British tradition of legislative supremacy. The latter British tradition is based on the principle that the power of the legislature is practically beyond the reach of the courts. There are still no traditions for judicial review in Britain today. As quoted earlier of Smith (1925:286), according to British traditions, the “current of law-making power may be diverted, but it cannot be prevented from flowing”. Simply expressed, there is no provision within British constitutional paradigm for a court to review legislation or executive acts.

Such corrections must be made on the floor of the legislature. In spite of this, there seems little doubt among legal scholars that it was judicial review of the legislation and acts of American colonial government, by a Judicial Committee of the British Privy Council, that inspired an independent United States of America to include judicial review in its constitution (Beth 1976:40-41). Moreover, Canada’s first constitution began with the statement of its provinces desire to be “federally united”, “with a constitution similar in principle to that of the United Kingdom”. But, Canada could not function without an independent judiciary with extraordinary powers (from a British perspective) to review and even prevent any statute enacted by a legislature or any action taken (or not taken) by an executive. A. V. Dicey, in his discussion of federalism in his authoritative volume, Introduction to the Study of the Law of the Constitution, 8th edition, wrote that “federalism, lastly, means legalism – the predominance of the judiciary in the constitution

– the prevalence of a spirit of legality among the people. That in a confederation like the United States, the Courts become the pivot on which the constitutional arrangements of the country turn, is obvious” (Dicey 1915:170). In adopting a federal tradition, Canada adopted judicial review by an independent judiciary. Most of the constitutional cases before the Judicial Committee of Britain’s Privy Council came from Canada and Australia (Beth 1976:32). Supreme Court Justice John Bora Laskin doubted the Fathers of Confederation fully appreciated that “Canadian federalism did require judicial review and there is some indication they believed conflicts of jurisdiction would rarely arise” (Laskin 1959:102). As one of the authors of Canada’s first constitution as well as the first prime minister, John A. Macdonald’s vision was of a central federal legislature with powers of disallowance over inferior provincial legislatures. That vision was quickly lost in a pitched battle with a most worthy adversary, Ontario’s first premier, Sir Oliver Mowat (Smith 1925:282-283). The Privy Council of Great Britain, as the authority to which questions of constitutional power were appealed, heard appeals directly from the provinces or on more rare occasions, on appeal from the decision of the highest court of Canada. After 1875, that highest court was the Supreme Court of Canada (Haines 1915:574). As a result of such access to the highest court in the British Empire, “as colonies gained their own constitutional powers of self-government, of course, the possibility of using disallowance vanished, since the powers of the local legislature [in this case, provincial] came to approximate those of the English Parliament, and were irreversible by the disallowance technique – a fact which may have tended to increase the number of attempts to use judicial review through litigation” (Beth 1976:35). Macdonald’s battle for federal dominance over provincial governments was ended in 1883 in *Hodge v. The Queen*, [1883] 9 App Cas. 117. The origins and outcome of this battle are well described by Herbert A. Smith, in his article, *Judicial Control of Legislation in the British Empire*:

In the debates which preceded confederation Macdonald had not concealed his own preference for a purely unitary scheme of government, and only accepted the federal solution as the best which could be obtained in the circumstances. As Premier of Canada he pressed strongly for the view that the Dominion Parliament was the only truly sovereign legislature in Canada,

and that the provincial bodies were rather on the footing of municipal councils enjoying only delegated powers. This doctrine was condemned in *Hodge v. The Queen*, and on the whole Mowat was the winner in a long struggle. But the Canadian solution differed from the American in that the last word lay with men who had played no part in Canadian political controversy. (Smith 1925:283)

W. R. Lederman, often cited as an authority on the Canadian constitution and judiciary, wrote:

Unique flexibility for Canada comes from having many power-conferring phrases in competition with one another, and the equilibrium points established between them portray the critical detail of Canadian federalism. The power conferring phrases themselves are given by the B.N.A. Act, but the equilibrium points are not to be found there. They have necessarily been worked out painstakingly by judicial interpretation and precedent over many years. Furthermore, particular equilibrium points are not fixed for all time. As conditions in the country genuinely change and truly new statutory schemes are enacted, judicial interpretation can adjust and refine the equilibrium of the division of legislative powers to meet the new needs. So the high importance of sophisticated judicial interpretation as an ongoing process is obvious. (Lederman 1976:38)

In addition to legislatures not invading each other's sphere of authority, certain additional principles have become part of the Canadian common law in order to regulate the collateral effect one legislature enactments have upon another. For example, in similarly reconciling the powers of state legislatures with the central federal legislature, the immortal Chief Justice John Marshall of the U. S. Supreme Court pronounced in 1819, a principle in *M'Culloch v. Maryland*, [1819] 17 U.S. (4 Wheat.) 316, which has never become outdated. Cited as recently as *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, the principle is:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Judicial review of either legislation or an action of an executive, may also need to examine the purpose for which the legislature or corresponding executive was delegated power. Lord Cranworth L.C. of Great Britain's Privy Council in *Galloway v. City of London* [1866], L.R. 1 H.L. 34, stated "persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers". Sometimes called the 'doctrine of improper purposes' this principle has been applied to curtail the actions of legislatures and executives that have used powers granted, for example, to expropriate land, for very different purposes than what the same powers were assigned.

By 1949, the provincial legislatures had come to respect the Privy Council as a guardian of their jurisdiction, so much so that "there was considerable fear that an Ottawa based Supreme Court, unshackled from the Privy Council, would push the Constitution in a highly centralized direction" (Russell 1987:339). However, as former Supreme Court justice, Gerard La Forest (1975:135-142) noted, "delegation of legislative power in Canada, though still a source of fascination for constitutional scholars, was no longer a 'live subject'". La Forest commented in 1975 that this was "in sharp contrast to the situation some years ago when it was a major issue, not only in the courts and with legal commentators, but also in any serious political discussion of constitutional change". The issue was very much settled in *Attorney-General of Nova Scotia v. Attorney-General of Canada*, [1951] S.C.R.. This was an appeal from the Supreme Court of Nova Scotia on a reference regarding the validity of a Nova Scotia statute, the *Delegation of Legislative Jurisdiction Act*, proposed by Nova Scotia to exchange respective powers to legislate for employment and retail sales taxes.

Nova Scotia's highest court found this statute 'ultra vires', that is, beyond the powers given to Nova Scotia in the Canadian constitution. The Supreme Court of Canada affirmed that judgment of the Supreme Court of Nova Scotia. La Forest explained that the Supreme Court of Canada's reasons were two fold: "if a power of delegation had been intended, it would have been expressly given"; and, "each [legislature] was sovereign within its sphere, but delegation involves subordination to the delegator" (La

Forest 1975:135-137). Thus, according to the Supreme Court, “interdelegation between the federal Parliament and provincial legislatures, therefore, appears impossible”.

However, the boundaries between federal and provincial powers are not ‘water tight’. Bruce Ryder describes a ‘classic’ and a ‘modern’ paradigm where the latter allows for some ‘leakage’ whereas the former does not (Ryder 1991:312-313). Peter W. Hogg, often cited by Canadian courts on constitutional law, explains that federal and provincial legislatures *may not* “directly delegate their respective legislative powers to each other”, but, *may* delegate the administration of otherwise validly enacted laws to a subordinate agency that is established by validly enacted legislation of the receiving jurisdiction” (Hogg 1992:14).

Hogg, as do other legal scholars such as Harrison (1997:405), La Forest (1975:137-138) and Ryder (1991:312-313), identifies ‘incorporation by reference’ as an approach that allows one legislature to incorporate statutes from another legislature by making reference to them but without doing the forbidden – actually delegating powers. For example, a federal, that is, national statute regulating trucking could incorporate provincial statutes by making reference to them. The advantage to this incorporation by reference is that it avoids duplication or confusion between legislatures by having to repeat each of the other participating legislatures’ statutes. La Forest, in his authoritative 1975 article warns that incorporation by reference is not allowed when it is “so broad as to amount in substance to a grant of legislative power” (La Forest 1975:142). La Forest also explained the important need served by incorporation by reference:

Flexibility or ‘leakage’ as Ryder calls it is important for the respect and protection of Rupert’s Land civil rights in that many of the supports required are not available under federal powers. Education and health, for example, though of federal national concern, are usually made available to Canadian citizens generally under provincial statutes.

The most common power-sharing device between Canadian legislatures has become the accord. A very recent example is the *Agreement on Internal Trade*, signed in 1994. Its main objective is to remove or prevent trade barriers between provinces and territories by developing practices for power sharing between Canadian legislatures and

executives. This accord includes chapters on procurement, investment, labour mobility, consumer standards, agricultural and food goods, alcoholic beverages, natural resources, communications, transportation and environmental protection.

The accord differs from the ‘incorporation by reference’ approach in that the various legislatures work out an agreement upon the principles or values that need to be respected in order to achieve some shared purpose. Then each legislature incorporates this agreement as the principles or values to be embraced in applying respective legislation. In some cases legislation needs to be modified. In most cases, only the enabling regulations established by ministers need to be altered or merely interpreted as agreed within the inter-legislative accord.

Notwithstanding the common law that has evolved since 1867 for refereeing between legislatures, there is one issue that has occasionally surfaced, but, which none of the existing legislatures appear eager to resolve – residual power not delegated to either a federal legislature or to a provincial legislature. The federal and provincial governments have long argued that when the *BNA Act* divided powers among them, it did so exhaustively, with the result that there were no powers left over. This opinion was shared by most legal scholars during almost a century and a half, that “among the salient features of the Canadian federal system is the provision that powers not specifically granted to the provinces are reserved to the Dominion” (Haines 1915:568-569), a view seemingly supported by Britain’s Privy Council in *Attorney-General of Ontario v. Attorney-General of Canada*, [1912] A.C. 571, at p. 581, when it proclaimed “..there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada”. Therefore, there are no legislative powers left for Aboriginals.

During the last twenty-five years this question of residual powers of Aboriginal self-governance has arisen repeatedly as a collateral issue. In 2000, when the provincial government of British Columbia challenged the Nisga’a’s rights of self-governance contained in the Nisga’a Treaty between the province, Canada and the Nisga’as, the issue of residual power was the central issue. Writing for the BC Supreme Court, Williamson,

J. identified the flaw in the Crown's reasoning of exhaustive distribution of power. Further on, noted at p. 584, Williamson J, in *Attorney-General of Ontario v. Attorney-General of Canada*, the Privy Council in 1912 had clarified its position that, "whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act". As a result, Williamson J. held that:

[76] Thus, what was distributed in ss. 91 and 92 of the British North America Act was all of (but no more than) the powers which until June 30, 1867 had belonged to the colonies. Anything outside of the powers enjoyed by the colonies was not encompassed by ss. 91 and 92 and remained outside of the power of Parliament and the legislative assemblies just as it had been beyond the powers of the colonies.

As a result of this finding, together with a review of the treatment of such residual Aboriginal power by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335; and, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, Williamson J. concluded:

... that the Constitution Act, 1867 did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92 (subject until 1931 to the Imperial Parliament). But the Constitution Act, 1867, did not purport to, and does not end, what remains of the royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982.

It is this author's belief that Aboriginals thus far have not been able to make use of this residual power because they have not yet pleaded the facts of traditional systems of self-governance, a former exercise of residual power. Moreover, the stereotypes of nomad and primitive bolstered by the Crown's recent strategy to litigate extinguishments, casts doubts that Aboriginals ever exercised powers of self-governance.

The legal rights of every individual in Rupert's Land were defined, for example, by English law in the case of non-Aboriginals employed by the Hudson's Bay Company or, by Aboriginal custom in the case of the Aboriginal inhabitants. This bijural arrangement, described authoritatively by Judge Samuel Monk in *Connolly v. Woolrich* was permanently entrenched in Canada's constitution as a result of the *BNA Act, s. 146* and

the *RL&NWTO*. Unequivocal assurances of continuity of this bijural relationship, or in Williamson J's parlance 'diminished but not extinguished power of self-government' were provided by British Cabinet in its *RP1869*. According to the common law of such proclamations or orders-in-council enunciated by Lord Mansfield in *Campbell v. Hall*, those unequivocal assurances of continuity could not be diminished in the subsequent order-in-council, the *RL&NWTO*. More simply stated, the powers of self-government of the collectivity of every individual is far from residual or diminished, it was clearly pronounced and entrenched as one of those historical agreements without which there would be no Canada.

Colonial Tradition of Imperial Supervision

Undoubtedly one of the most important instruments of a Colonial tradition has been the Imperial government's use of Royal prerogative in the form of proclamations and orders-in-council. For an historical definition, this author found an excellent review of the literature, especially sensitive to historical context, in Michael Suddard's essay, *The Royal Proclamation of 1763: A Temporary and Permanent Solution*. He reviewed the writings of such eminent writers as: Robert Allen, Olive Dickason, Victor Lytwyn, Desmond Morton, and Arthur Ray, identifying an historical context with missions to be accomplished. Suddard argues convincingly that a royal proclamation addressed two main issues, with an attendant need "to move quickly in an attempt to quell the problems within North America before they got out of control". Though separated by one hundred years, the historical contexts and objectives of both proclamations were remarkably similar. The *Treaty of Paris* and the annexation of Rupert's Land and the North-Western Territory to Canada both caused major shifts in sovereignty within the British Empire. In both cases, there was much anxiety as to "what the British would do with the Amerindian population" (Suddard 2002:1). On the eve of peacefully transferring Rupert's Land to Canada, in the middle of plans to remove its remaining garrison of soldiers from North America, as a direct result of Canada's fumbling and agitations, the legal governor of Rupert's Land was under house arrest with what control that remained, held by Métis, engaged in friendly relations with Americans. In light of Britain's concessions of coastal

fisheries and removing her troops, the Americans would not likely invade, but might well support Métis independence. Canada was refusing to assume control of Rupert's Land until lawful order was restored by Britain.

For a legal, constitutional definition of a Royal Proclamation, this author turned to an authoritative source, A. V. Dicey's, Introduction to the Study of the Law of the Constitution, 8th Edition, *Chapter XI – The Responsibility of Ministers*:

In order that an act of the Crown may be recognised as an expression of the Royal will and have any legal effect whatever, it must in general be done with the assent of, or through some Minister or Ministers who will be held responsible for it. For the Royal will can, generally speaking, be expressed only in one of three different ways, viz. (1) by order in Council; (2) by order, commission, or warrant under the sign-manual; (3) by proclamations, writs, patents, letters, or other documents under the Great Seal. (Dicey 1915:321-322)

In his 1951 article, *Judicial Review of Royal Proclamations and Orders in Council*, legal scholar, Glendon A. Schubert Jr. described the defining features and uses of Royal Proclamations and Orders in Council since 1611, Edmond Coke's judgment in *Case of Proclamations [1611]*, 77 E.R. 1352:

Among the more important aspects of what Blackstone [in W. Blackstone Commentaries on the Laws of England, p. 248-249 Dublin 1794] calls direct prerogative are the power to declare war and to make peace; to wage war and call up troops as commander-in-chief of the army and navy; to regulate commerce ... The traditional attitudes towards the exercise of prerogative powers within the realm were set in their classic mould by Sir Edward Coke almost three and a half centuries ago in his celebrated judgment in the *Case of Proclamations [1611]*. The effect of Coke's decision was to limit the scope of such royal proclamations to declaring, publicizing, and providing for the enforcement of statutory law - a relationship clearly analogous to that between statutes and the common law only two centuries earlier! ... The last two centuries have brought about no expansion in the scope of the royal legislative prerogative in municipal law as outlined thus by Blackstone. (Schubert 1951:77-79)

Great Britain's own political evolution between 1763 and 1869 might be considered as a mitigating factor, if executive control of British governance had changed much in any relevant way since 1763, or since Mansfield's judgment of 1774. Schubert noted that

no such relevant, executive change had occurred. According to Schubert, at the time of Montesquieu's 1748 publication of his *L'Esprit des Lois*, "England was ruled not by kings but by cabinets. The principle of parliamentary supremacy was by this time firmly established (Schubert 1951:69 Note 2). Schubert's findings are confirmed by Margaret A. Banks, a Canadian legal historian, who deciphered, in her article, *Privy Council, Cabinet, and Ministry in Britain and Canada: A Story of Confusion*, the sometimes confusing connections between British and Canadian traditions of Privy Council, Queen-in-Council, and Cabinet.

Thus the legal facts are rather plain. The *RP1763* was approved by the British Cabinet, issued by the minister responsible for the Americas, Lord Egremont, and promulgated by respective Governors in the Americas, notably General Murray, in what later became Upper and Lower Canada. The format and method of promulgation of both 1763 and 1869 proclamations were as described by Coke, Blackstone and Dicey. The *RP1869* was approved by the British Cabinet and subsequently issued by the Minister for Colonial Affairs, Earl Granville, and promulgated by Governor General John Young in Canada, in order to prevent conflict, by reassuring the potential combatants that protection of their legal rights was official Imperial policy. These facts are part of the sworn testimony of both Prime Minister of Canada and the Governor-General, before the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70. According to Prime Minister Macdonald's testimony, the document that he referred to as a proclamation, was translated into English, French and Cree and printed in quantity, five-hundred copies, for distribution throughout the territory being annexed. Though, many more languages were spoken by the inhabitants, the three languages into which the proclamation was translated were the three main trading languages of the territories being annexed. Jean-Bapiste Thibault, himself had used Cree to communicate with his Dene parishioners in northern Saskatchewan (Dorge 2000:2). For all of these historical and legal reasons, the proclamation of December 6, 1869 *is a Royal Proclamation*.

After the proclamations, the next most important instrument of the Colonial tradition was the British Imperial statute, the *British North America Act, 1867*, that

created Canada and provide a constitutional blueprint for its evolution. The *BNA Act's* instructions for the annexation of Rupert's Land are contained in s. 146:

146. ... to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

Interpreting the *RP1869* must be founded on the six principles enunciated by Chief Justice Lord Mansfield in *Campbell v. Hall*, [1774], 1 Cowp. 204, 98 E.R. 1045. Those six principles (see Appendix G) have since been applied by both Mansfield's court, the Judicial Committee of the Privy Council of Great Britain in *St. Catharines Milling & Lumber Company v. The Queen*, [1888] 14 A.C. 46, and the Supreme Court of Canada in: *Calder v. A.G. British Columbia*, [1973] S.C.R. 313; *R. v. Côté*, [1996] 3 S.C.R. 139; and, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911. Lord Mansfield's fourth, fifth and sixth principles are of particular importance to this study, quoted below as they were cited in *Calder v. A. G. British Columbia*, 1973:

- Fourth - "that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives".
- Fifth - "In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known."
- Sixth - "he cannot make any new change contrary to fundamental principles"

The very act of interpreting by the highest courts of Britain and Canada, of the legislative enactments of their respective governments in accordance with Lord Mansfield's principles, followed by government compliance with the courts' modifications and limits is fundamentally important to this thesis study. This judicial review, followed by executive and legislative compliance, attest to the validity of Lord Mansfield's principles. Taken together, the action of the court followed by compliance also attest to the independence of the judiciary in determining matters of fact. The value of a separate judicial power for declaring fact and submission to its findings by executive and legislative powers is also consistent with Dicey's internal and external limits of legislative supremacy. The meaning of royal proclamations enunciated by Lord Mansfield, preserved in British and Canadian constitutional law, must also be integrated with the judicial interpretation of the relevant facts as they were determined by competent Canadian courts at the time: in *Connolly v. Woolwich* (1) 11 L.C. Jur. 197; upheld in *Johnston et al v. Connolly* [1869], 17 R.J.R.Q. 266; and, approved by the Judicial Committee of the Privy Council, in *Ontario v. The Dominion of Canada and Quebec; In Re Indian Claims*, [1895] 25 S. C. R. 434. The facts of property and self-government were determined to be:

Neither the French government nor any of its colonists or their trading associations ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion.

[...and by the English or the Hudson's Bay Company..]

..it [English law] could be administered and enforced only among, and in favor of, and against those who belonged to the Company or were living under them. It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately – it did not abrogate the Indian laws and usages.

Given that this fact-finding was confirmed on appeal on September 8, 1869 in *Johnston et al v. Connolly*, Judge Monk's facts are those that must be integrated with Lord Mansfield's principles in order to interpret and give legal effect to the *RP1869*. Stated more clearly, "By Her Majesty's authority I do therefore assure you, that on the Union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws and in the spirit of British justice" must be interpreted in such a manner consistent with both Lord Mansfield's principles and Monk J's fact-finding. Accordingly: 'you' refers to all individuals and all property (Lord Mansfield principle #4); that individuals "shall continue to be governed by their own laws" (Lord Mansfield principle #5); and, that in a manner consistent with British traditions of the rule of law and doctrine of continuity, two different systems of law, Aboriginal and English, will prevail in the sort of bijural system which Monk J, himself adjudicated in Quebec (Lord Mansfield #5 and #6).

The British Cabinet had exhausted its power with the *RP1869*, defining 'individuals' as the inhabitants of Rupert's Land and the North-Western Territory, with no reference to race or creed. Moreover, acting under direct orders from the British Cabinet, from Port Arthur (present day Thunder Bay, Ontario), Colonel Wolseley issued a further proclamation, promising "equal protection to the lives and property of all races and all creeds". Wolseley's assurances were consistent with Mansfield's fourth and fifth principles for interpreting such royal prerogative as proclamations and orders-in-council issued by a member or members of the British Cabinet. The *RP1869*, as such a British Imperial statute, ensures that any exclusion of Aboriginals as 'individuals' in applying the 1870, RL&NWTO, could not survive judicial review, not in 1870, nor in 2007.

Allegedly, such an unconstitutional interpretation was made 'legal', however; by the *CLVA*. The British Parliament's passage of this *Act*, was officially intended to free colonial legislatures from British traditions, such as the rule of law, judicial independence or the separation of powers, thus allowing colonial legislatures to discover their own internal and external limits. Accordingly, s. 3 of this *Act* provided that:

No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

Notwithstanding the fact that this *Act* was a British statute offending *Campbell v. Hall* as well as other long-established British traditions, the *RP1869* also enjoyed status as a British statute, therefore invalid in accordance with s. 2 of the *CLVA*:

Any colonial law, which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.

As earlier mentioned by this author, the Canadian executive and parliament had in 1867, similar powers of disallowance over provincial executives and legislatures; nonetheless, it was the provinces access to the Judicial Committee of the Privy Council of Great Britain that rendered impotent such federal powers of disallowance. Aboriginals did not fare as well as did the provinces. Three years after Macdonald's vision of a subordinate provincial government was destroyed by the Judicial Committee's judgment in *Hodge v. The Queen*; less than a year after the Riel Rebellion, Six Nations Indians challenged the same federal powers of disallowance over Aboriginal self-government. Granville brought the Six Nations' challenge to the attention of Prime Minister John A. Macdonald. Sixteen years earlier, Earl Granville, representing the British Cabinet, had made transferring territory and providing military support *conditional* upon Canada's passage of the Manitoba Act to protect the civil rights of inhabitants of the Red River area. In the case of the Aboriginals of southern Ontario, Granville refused to intervene on the rather flimsy grounds that:

I do not feel able to advise Her Majesty to exercise her power under the Act 3 and 4 William IV, cap. 41, and to refer this matter to the Judicial Committee of the Privy Council, seeing that the request is made only at the instance of one party to the dispute, and there is no statement of ascertained

facts upon which that tribunal could come to a decision. I shall, however, be prepared to advise Her Majesty so to refer the matter, if such is also the desire of the Dominion Government, and if both parties will agree upon a statement of facts, in the form of a special case, which can be argued by counsel before the Judicial Committee. (Granville to Macdonald, May 3, 1886 – see Appendix H for complete text)

Macdonald responded, not surprisingly, referring to Indians as “inveterate grumblers” and commenting “the present claim of the Six Nations has no merits and does not deserve any exceptional consideration” (see Appendix H). While Macdonald acknowledged a “right to appeal to the Judicial Committee of the Privy Council”, “should the Six Nations be dissatisfied with the judgment of a Canadian court”, he also added:

5. The introduction of a new practice of submitting Indian claims in the first instance to the Judicial Committee would operate as a complete change in the manner in which the Indian races have hitherto been dealt with and would establish a distinction between them and the other inhabitants of Canada. This is very objectionable, as the great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit for the change. (Macdonald to Granville, January 3, 1887)

In fact, by 1927, Her Majesty’s Government of Great Britain allowed amendments to the *Indian Act* that made Aboriginal efforts to seek justice in Canadian courts a crime punishable with severe fines and imprisonment. Such selective use of the powers of disallowance and access to the Judiciary Committee of the Privy Council aroused this researcher’s curiosity as to the actual interests served by the *CLVA*, not only in Canada, but as well, in the other colonies to which it applied. As in Canada, the legislatures that represented European settlers were usually able to circumvent the *Act* by placing their grievances before a colonial court which upheld “the law of England”, specifically, the common law - such as the rule of law, judicial independence or the separation of power. Using Dicey’s metaphor, in the unlikely event that a colonial legislature passed a law that “all blue-eyed babies should be murdered”, invariably, blue-eyed adults would likely find relief in a colonial court, if not, certainly with the Judiciary Committee of the Privy Council.

The *CLVA* was a nineteenth century version of earlier similar enactments, designed to protect “the economic and social interests of the ruling classes at home and in the colonies”:

From the seventeenth and eighteenth century British point of view the semi-popular legislatures in America must be prevented from enacting laws prejudicial to the economic and social interests of the ruling classes at home and in the colonies as well. ... The Privy Council was given or acquired three kinds of power to defeat or annul laws made in the colonies: 1) disallowance or repeal of colonial statutes; 2) veto of such statutes; 3) judicial annulment of such statutes, commonly called judicial review of legislation. (McGoveny 1945:60-61)

It was the effect on ruling class interests by 19th century Australian judge, Benjamin Boothby’s application of English common law to property that precipitated the enactment of the *CLVA* in 1865 (Walters 2003:108-109; Taylor 2001:515). In Canada, and other settler colonies such as Australia and South Africa, the *CLVA* performed its real service in freeing the colonial legislatures from Her Majesty’s Government disallowance powers for the kind of draconian legislation used to extinguish Aboriginal legal and property rights. Europeans were rarely ever charged, judged or sentenced in the same manner as Aboriginals. The former usually faced judges of their own ethnicity. According to Louis Knafla, “many judges in the West in the First Formative Period were positivists, men who had a strong belief in case law, precedents and in the rule of law. They were strong on traditional rights and would deny the application of recent decisions from other British or Canadian jurisdictions if they were thought to be inapplicable (Knafla 1986:64). Inevitably, research of the application of the *CLVA* becomes a study of ‘Indirect Rule’, a colonial strategy perfected by Her Majesty’s Government during the 19th century.

Early in the 19th century, British Prime Minister Robert Peel borrowed a page from Napoleon’s play book for maintaining order in a defeated country, using ‘gendarme’, a highly mobile police force, in place of soldiers. The Royal Irish Constabulary, as it was called, “was intended to crush agrarian unrest and sporadic terrorism directed against British rule. Unlike the Metropolitan Police it was armed, organized on semi-military lines, housed in barracks and kept under the direct orders of the colonial government in Dublin” (Arnold 1976:4). A few decades later, in India, a similar force, based on the

Royal Irish Constabulary model was established after crushing the mutiny of Indian troops in 1857. Following the Queen's proclamation of 1858, British control of India was stabilized by applying another important lesson learned about colonial control. According to Michael H. Fisher's important history of the period, *Indirect Rule in the British Empire: The Foundations of the Residency System in India (1764-1858)*:

.... the 1857 'Mutiny' had been confined primarily to the areas under direct British control. Princely states like Hyderabad had been held out of the conflict by their rulers and Residents. Even in the areas where the populace had risen against the British, the princes had exerted authority which the British sought after 1858 to harness to their own purposes. British attitudes toward the princes thus changed significantly following 1858, as the Queen's proclamation indicates. After that date, the British annexed few of the remaining princely states. Indeed, British policy depended on the princes as 'the natural leaders' who would hold the people of their states in loyalty to the British crown. (Fisher 1984:402) ... Both in East and later in West Africa, the application of the principle of indirect rule was largely the work of Frederick Lugard. By birth and training, Lugard knew India well. From his first confrontation with a well developed indigenous political structure in Uganda to his extensive use of indirect rule in northern Nigeria, Lugard appealed to the Indian model. (Fisher 1984:424) ...the application of indirect rule in Southeast Asia and Africa drew heavily and explicitly on the Indian example. This example provided the explicit justification for indirect rule and the body of experience upon which later imperialists drew. The significant references to the Indian case by imperial politicians and officials in Southeast Asia and Africa does not imply that they slavishly imitated their Indian colleagues. Rather it seeks to indicate the power of the Indian precedent. (Fisher 1984:427-428)

The dramatic differences in efficiency, that is the minimal use of European officials while relying more on local, 'natural' leaders' is well illustrated by Fisher's statistics on Indian and African states (see Appendix I). Ugandan born, anthropologists and political scientist, Mahood Mamdani, describes Britain's development of her colonial project as:

... a protracted process of thinking through 'tradition' analytically, of separating its authoritarian strands from its popular strands. The construction of a 'customary' law, whereby authoritarian strands in tradition would form the building blocks of a legal regime disciplining 'natives' in the name of enforcing 'tradition', began in India, not in Africa. In India, though this measure came late, mainly in the aftermath of the great 1857 rebellion, too late to affect the form of land tenure in the colony. Defined in

a religious idiom, the scope of the 'customary' was thus restricted to personal law. In Africa, however, its scope was broadened, most importantly to include land. (Mandami 1999:869)

Especially British colonial initiatives, were very much catalyzed by dramatic changes in communications and transportation. After its invention by Morse in 1835, telegraph "lines were put into operation in Britain, Europe, North America, and even in parts of the Near East. Dover and Calais were connected by submarine cable as early as 1851" (Cell 1970:224). Before the end of the decade, a transatlantic cable had been laid. Thomas Parker Moon identified 'surplus manufactures' as "the chief cause of the imperialistic expansion of Europe in the last quarter of the nineteenth century" (Moon 1926:28). This surplus, in turn precipitated three other expansions: large scale steamships for making colonial produce profitable; railways to make commercial and military penetration of the interior wilds of Africa, Asia, (and Canada) possible; and, telegraph lines to bind colonies close to mother-countries. Moon noted that approximately 24,000 miles of railway mid century had become half a million by 1900. Approximately a quarter of the world's total shipping was by steamship in 1873, became seventy-seven per cent a quarter century later. Five thousand miles of telegraph lines mid century became more than a million by 1900 (Moon 1926:30 see Appendix I).

The strategy of establishing 'indirect rule', later known as 'the Birmingham Screw', (Cain & Hopkins 1993:386; Ashafa 2006:6), went approximately, this way. First, Her Majesty's Government or some representative would declare or offer peaceful terms for British indirect rule of a region or state. The Minister of Colonial Affairs in collaboration with the Treasury and Minister of War would organize troops, investors and loans to pay for an initial military force to establish order, construction of telegraph and railway lines. Ordinarily, such projects would be too risky and challenging to attract investors. Military and Treasury Board support changed that entirely. Citing the 1886 findings of French economist, Leroy-Beaulieu, Moon (1926:31) noted that "the same capital which will earn three or four percent in agricultural improvements in France will bring ten, fifteen, twenty percent in an agricultural enterprise in United States, Canada, La Plata, Australia, or New Zealand". Lord Frederick Lugard, a military commander and governor who coined the term 'Birmingham Screw' for its systematic ruthlessness, in honour of his

superior Joseph Chamberlain, Minister of Colonial Affairs. Lugard described the objects of this particular brand of imperialism:

The more tangible motives of the present demands appear to me, however, to be based on three separate grounds, viz: a. Pressure of population and the need of colonies to which the surplus population can emigrate; b. The need of access to supplies of raw materials and food-stuffs and to markets for manufactured goods; and, c. The right to equality with the present Colonial Powers, on grounds of national prestige and status. (Lugard 1936:118)

The economic importance of Canadian annexation and development of new territories to Britain is well described by P. J. Cain and A. G. Hopkins, in their tome, British Imperialism: Innovation and Expansion 1688 – 1914. “It was the extension of railway and shipping networks, embodying many technological improvements over half a century, which brought the price of transport tumbling down and made it possible, by the 1890s, for wheat to be brought thousands of miles from the newly settled frontier to Britain and sold at a price which was half that ruling in the British market 20 years earlier” (Cain & Hopkins 1993:230). Similarly, evolving from 1850, when most Canadian financial reserves were held by New York City banks, “the economic integration of east and west after 1870 formed the basis for an independent Canadian state in the twentieth century; and it was financed to a large degree by London bankers (Cain & Hopkins 1993:271). Canadian infrastructure was paid for through the liquidation of Aboriginal lands and natural resources, whereas African and Asian were paid for by refinancing over a period of decades (Dumett 1975:321). British confidence that the U. S. would not interfere with Canada’s annexations was based on: “tacit recognition of its own military hegemony in Northern America, implied by British military withdrawal”; and, “improved fishing rights for American vessels in Canadian waters” (Cain & Hopkins 1993:266). There are many examples of key individuals who served the same purposes in Canada as well as Africa. For example, it was Colonel Wolseley who played the role of military commander in Red River in 1870, Asante, South Africa and the Sudan. Wolseley had served in India with distinction during the 1857 rebellion. One of his officers, who had also served in India, William Francis Butler, had recommended in 1871 to the Canadian government, establishing a North West Mounted Police force based on the

Royal Irish Constabulary model. Sir Percy Girouard, a Canadian railway engineer “was able to double the line between Bloemfontein and Johannesburg, at one place laying 80 miles of track in 48 hours”. That made Lord Robert’s march on Pretoria, South Africa possible (Kirk-Greene 1984:217).

The implementation of the ‘Birmingham Screw’ deserves much more attention than this researcher dares offer here. This author has provided this discussion in order to suggest motives why the executive of Her Majesty’s Government of Britain might enact a *CLVA* and assist Canada and her other colonies to prevent Aboriginal access to the Judicial Committee of the Privy Council. As had proven true for Canada’s provincial legislatures, judicial review by the latter had made federal subordination of provincial power quite impossible. *Connolly v. Woolrich, 1867* recognizing the legitimacy of a Rupert’s Land Aboriginal legal system had been used elsewhere in the Empire by the Privy Council in *Bethel v. Hildyard [1888]*; *Brinkley v. Attorney-General [1890]*; *Kenward v. Kenward [1950]*; and most importantly, in its 1897 judgment of an 1895 Ontario, Quebec and Canada boundary dispute, *Ontario v. The Dominion of Canada and Quebec; In Re Indian Claims, [1895] 25 S. C. R. 434*.

Typically, the Birmingham Screw or ‘Indirect Rule’ as it is more widely known, requires a determination by the executive of an imperial or colonial government that the occupying Aboriginal inhabitants are culturally inferior, justifying their legal regard as wards of the imperial or colonial government. As wards, Aboriginals and their lands can be legally regulated at the discretion of the executive, without reference to either the legislature (parliament) or the courts. The resulting sweeping powers allow the executive to engage the Treasury, War Department and Colonial Affairs to extraordinary economic advantage. The elements of the screw as implied involve initial pressure imposed on Aboriginals to enter into treaties of peace and friendship whose wording usually allows them to be resurrected later as surrenders. As imperial or colonial governments establish the necessary infrastructure, such as railroads, telegraph lines and a rapid deployment police force such as the Royal Irish Constabulary or North West Mounted Police, the screw tightens. More coercive force and much less friendship can be used. Increasingly, the Aboriginal tribal structure and customary legal system are deprived of their

spontaneity as traditional leaders are replaced by chiefs who are merely spokespersons of administrators wielding unlimited discretionary power. Unlimited discretionary power is unconstitutional because it offends the rule of law. It is impossible in the absence of laws known in advance to be able to organize one's life accordingly. For example, there are no laws for Aboriginals, governing education, health, social services, public security, etc., which the government is obliged to follow.

Without access to judicial review, Canadian Aboriginals have been powerless to prevent the Crown's distortion of the traditions and principles of the Canadian constitutional paradigm. The internal and external limits of a British tradition of legislative supremacy; residual powers of Aboriginal self-governance which should have been supported within a federal tradition; and, the respect and protection of Aboriginal individual freedoms during annexation under the *BNA Act*, have all been disabled or distorted by the Crown. Though Canadian judges and politicians have commented on the repugnance of federal control of Aboriginal individual freedoms, none have proposed or offered remedy. This author has provided this discussion of colonial strategy to offer a plausible explanation as to why Canadian Aboriginals share a remarkably similar current situation with those other populations of Africa and Asia to which the policy of 'Indirect Rule', the Birmingham Screw, was applied. A recent United Nations report described the situation of Canadian Aboriginals as "among the most pressing human rights issues facing Canada" (Stavenhagen 2005:7#17)

This is very similar to that described of Africa by Muna Ndulo, a Zambian authority on African legal systems. "The continent has vast mineral, oil, water, land, and human resources. Nonetheless, about 240 million Africans live on less than one dollar a day, have no access to safe drinking water, and are illiterate. ... Africa receives only five per cent of all direct foreign investment flowing to developing countries. This is in spite of the fact that investments made in Africa consistently generate high rates of return. For example, during the period from 1990 to 1994, the average annual return on book value of US direct investment in Africa was nearly twenty-eight percent, compared with eight and a half per cent for US direct investment worldwide" (Ndulo 2003:326). The African

situation Ndulo describes after “forty years or so into independence” resembles, for the most part, a Canadian Aboriginal situation:

(1) highly centralized systems of governance; (2) excessive state control coupled with limited capacity to govern; (3) arbitrary policymaking and abuse of executive power; (4) erosion of the boundaries between state and civil society; (5) weak institutions of both state and civil society, with few forces countervailing the executive branch of authority; (6) unaccountable bureaucracies; (7) widespread corruption; (8) unenforced or unjust legal systems; (9) widespread violation of human rights; (10) limited participation in governance by the general citizenry; and (11) preferential access to power and resources often determined by religious, ethnic or geographical considerations. The lack of democratic governance has resulted in unprecedented economic decline and mismanagement, causing unimaginable poverty and conflict. (Ndulo 2003:334)

Without doubt, both Canadian and African Aboriginal situations are a direct result of similar abuses of colonial power and are correspondingly, soluble by similar means. As A. N. Allott wrote in 1965, “pre-colonial integration of societies destroyed by indirect rule imposed higher up without regard for disintegration”... “Therefore independence requires re-integration” (Allott 1965:389). Maxwell Owusu, in his article, *Democracy and Africa – A View from the Village*, prescribes, “decentralisation is widely held to be an antidote to the concentration and corruption of power, and as a means of strengthening the intermediate voluntaristic institutions of civil society, and of ensuring that the basic needs and expectations of local communities and citizenry are respected. Popular, participatory democracy based on African concepts of community appears to be an essential element in any meaningful answer to endemic political and economic troubles” (Owusu 1992:379-380). Mahmood Mamdani adds that, “the theoretical lesson of the latest round of radical reforms may be the simple proposition that, for democratization to happen, reform will also have to contend with how to join *representation* in the central state with *participation* in the local sphere” (Mamdani 1999:885). Fareed Zakaria, in his 1997 article, followed by a book (Zakaria 2003), described the ‘rise of ‘illiberal democracy’. “The two strands of liberal democracy, interwoven in the Western political fabric, are coming apart in the rest of the world. Democracy is flourishing; constitutional liberalism is not” (Zakaria 1997:22). Very much in agreement with Allott, Owusu, and

Mamdani, Fareed Zakaria noted that “the tension between constitutional liberalism and democracy centers on the scope of governmental authority. Constitutional liberalism is about the limitation of power, democracy about its accumulation and use” (Zakaria 1997:22).

This author believes that the antidote required in Rupert’s Land is two fold. First, Aboriginal inhabitants must have the same access to judicial review as other Canadians, in order to ensure the respect and protection of individual freedoms promised in British proclamations and always entrenched in Canada’s constitutions. Second, remedial solutions to unconstitutional laws and executive behaviour must be resolved through remedies constructed within the customary legal systems of the Aboriginal societies of Rupert’s Land, for example through the revival, maintenance and innovation of customs through Aboriginal processes . Here, this author means customs, synonymous with the ‘reasonable expectations’ articulated by La Forest J in *Lac Minerals*. That is, customs are authenticated against reasonable expectations of Aboriginals themselves, not to be confused with the Euro-centric principles for authentication declared by Chief Justice Lamer in *R. v. Van der Peet*. To this end, an exploration of a more modern Canadian Liberal tradition is in order, along with an exploration of converging both Canadian and Aboriginal legal systems, the former based on made law and the latter based on customs, or discovered laws.

CHAPTER FIVE

A CANADIAN CONSTITUTIONAL PARADIGM – CREATING SOLUTIONS

Liberal Tradition

As most states have, during the decades immediately after the Second World War, Canada found itself very much changed. In 1960, Prime Minister Deifenbaker had succeeded with the passage of a Canadian Bill of Rights. A decade later, in *R v. Drybones*, [1970] S.C.R. 282, this Bill of Rights was used in a successful challenge of the *Indian Act's* discriminatory provisions that criminalized Aboriginal use of alcohol off reserve. The offending s. 94b was removed a year later. By 1977, when most provinces had passed legislation protecting human rights, the federal government passed its *Canadian Human Rights Act*, establishing tribunals for receiving, investigating and remedying infringements of individual freedoms. Nevertheless, the application of the *Canadian Bill of Rights* after *Drybones* proved timid and disappointing as Canadian courts still seemed reluctant to challenge the supremacy of legislatures, a fundamental tradition inherited from Great Britain.

This was all to change, however, along with the role of Canadian courts. In her 1990 lecture to the County Carleton Law Association, Chief Justice Beverley McLachlin described the situation precipitated by the amendment and patriation of Canada's constitution:

During the nineteenth and for a large part of the twentieth century, Canada could best be described as a small, agricultural, Caucasian, Christian society. Its structures rested on a virtually unquestioned core of shared common values. We are no longer an essentially Caucasian country. One has only to walk the streets of our major cities – Montreal, Toronto, Vancouver and Ottawa – to realize that we are a country of mixed race. In this newly cosmopolitan Canada, issues arising from divergences of race and culture increasingly find their way into our legal system. In sum, Canadian society has experienced a revolution in recent decades, however quiet and incipient may have been its passage. Our society is large, diverse and multifaceted. It is no longer homogeneous. While we can still speak of

shared values, we find ourselves increasingly confronted by conflict between divergent sets of shared values. (McLachlin 1990:1-4)

In order to meet the demands of such a dramatically altered citizenry, the role of Canadian courts and tribunals was made much more explicit as also were the traditions of justice that, previously, had been only implied. As a result of this change, Canada became a constitutional, that is, a liberal democracy. In more recent parlance, Fareed Zakaria, in his article and his book, The Rise of Illiberal Democracy, describes liberal democracy as “a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property” (Zakaria 1997:22-23; 2003). Before, merely implied, the ‘rule of law’, after 1982 is now explicitly stated in the preamble of Canada’s Constitution.

All of the historic agreements and orders in council which made confederation and annexation of new territories possible are much more visible in the schedules appended under the heading ‘Schedule to the Constitution Act, 1982, Modernization of the Constitution’. As well, s. 52 clearly establishes both the contents and the supremacy of the constitution as the supreme law of Canada and that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. The previous character of parliamentary and legislative supremacy is now balanced against the sovereignty of individuals. More simply, no legislature or executive is allowed to infringe upon the freedoms of citizens, except: for reasons and in a manner as can be justified in a free and democratic society. The constitution also asserts the right of individuals to a judicial review of the behaviour of an executive or legislature where their freedoms are believed to have been infringed. Such basic liberties as speech, assembly, religion, equality, life, liberty and security of person, Canadian courts have determined, can only be justifiably infringed during crises or national emergencies. When infringement is justified for important objectives, executives and legislatures are limited to only those infringements that are necessary, reasonable, and proportional, and that infringe as little as possible.

Such an independent and robust role of the Courts has injected new life into established doctrines. The “Doctrine of the Living Tree”, enunciated when women were

accorded legal status as persons in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, was applied only once more, in 1979, before judicial review of infringement of individual freedoms was constitutionally entrenched. The *Constitution Act, 1982*, has enlarged doctrines that had previously been applied only in the protection of federal or provincial powers, to new, individual powers to enjoy basic liberties. The changes to Canada's constitution has breathed new life into historical agreements, such as the guarantee of Catholic and Protestant education in Ontario and Quebec respectively, and the language rights of Franco Manitobans. The general effect of the Liberal tradition established by Canada's 1982 Constitution has been, in the words of McLachlin CJ, "a culture of justification, [where] an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness" (McLachlin 1999:289). Alternately described by Gus diZerega:

... most importantly, liberal democracies universally subordinate the state institutions of police, military, courts, and law making to the systemic principles which characterize spontaneous orders in Hayek's sense. (diZerega 2000:4) In my view the pre-eminent contemporary liberal thinker was F. A. Hayek. Along with Michael Polanyi, Hayek focused on the expanded role in modern society of what they termed "spontaneous orders" as liberalism's most important institutional innovation.... Hayek is the pre-eminent theorist of spontaneous order of the market and Polanyi the equivalent theorist of such an order in science. (Hayek 1948, pp. 77-106, 1978, pp. 179-90; Lachmann, 1986; Polanyi, 1969; Ziman, 1968; Hall, 1988). (diZerega 2000:3)

Command vs. Spontaneous Order

In his contribution to *Essays in Honour of Fredrich A. von Hayek*, Michael Polanyi described command order as, "incorporation in a hierarchy of command, on the lines on which for example an army is organized when it goes into action"; and, the latter as "that of self co-ordination ... [where] ... each has to adjust himself to the situation created by the others and by doing so he contributes to the adjustment of all to their common task" (Polanyi 1969:166). Although Canada's adoption of a Liberal tradition, in addition to original British, federal and colonial traditions has resulted in greater spontaneity, its basic legal character remains exogenous control, reliant on command of coercive powers. On the other hand,

the legal character of Rupert's Land Aboriginal societies remain spontaneous, as described by Julius Lips, in his seminal work Naskapi Law, reliant on 'mutual assistance' and 'public opinion' (Lips 1947:472). This author's own personal experiences, throughout the eastern Arctic and the Boreal Forest of Rupert's Land, are quite consistent with Lip's notion of Naskapi order – "the law of the Naskapi is not a judge-made law, nor is it a scholar-made law. It is a law of the people, by the people, for the people" (Lips 1947:483). According to this author's experience, the essential character, either command or spontaneous is most clearly evident in times of crisis. For example, at such a time the Supreme Court of Canada considers that the state has a right to infringe most of the liberties of its citizens. Dickson J. writing for the majority in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, adopted the view of Mortimer J. Adler that "living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it" (Adler 1981:144).

Lips, on the other hand, remarked of Naskapi law that "... it is noteworthy that these rules of mutual assistance have the greatest effect in immediate danger of life or of starvation. In such cases they have full priority even over those norms which under ordinary circumstances are sacrosanct" (Lips 1947:472). A Canadian reflex in the face of crisis is typically to restore command where as Naskapi reflexes favour restoring endogenous cues, that is, spontaneity. Even today, Aboriginals seeking to restore order are more likely to turn inward, renewing ties of family and faith, rather than resort to coercion.

Command and spontaneous orders also process knowledge differently. In one of his most important articles, *Use of Knowledge in Society*, Hayek determined that, in a spontaneous order, "the whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all" (Hayek 1945:526). DiZerega describes a spontaneous order as "primarily a

communications network” whose signals generated “increase the likelihood that participants independently chosen plans will be successful” (diZerega 2004:446). Rather than one market, command order compartmentalizes knowledge and assigns different weight to different bodies of knowledge. Further compartmentalizing and further weighing takes place within subsequent compartments or disciplines, to the degree that whatever overlap may have been noticed by individuals disappears from general view. Ultimately, in a command order, individuals are divided rather than united by the dissemination of knowledge within a command order (Castillo 2002). Paraphrasing Michael Polanyi, Straun Jacobs wrote that even the hierarchical aspect of authority challenges any unity that might arise from processing information:

Communication and decisions flowing vertically must clog up the official channels causing chaos at ground level; while permitting more horizontal communication and decisions at the base of the organization would undermine its structure of authority. (Jacobs 1999:115).

Dacey’s external and internal limits or framework of a British tradition of command order discussed in the previous chapter have proven less and less reliable for maintaining order as Canada’s population has become more socially diverse on such measures as race, ethnicity, or gender. Canada’s more recent addition of a Liberal tradition has shifted the coercive power of command in order to protect those differences from state or other interference. That is the definition of ‘rights’, statutory or commanded protection of individual freedoms.

Spontaneous order, on the other hand, is endogenously organized and in crisis resorts to ‘mutual assistance’ or kinship for cohesiveness. In the relative absence of command or coercion, the framework or basic rules for reproducing spontaneous order are understandably different. Barry McLeod-Cullinane describes this aspect of spontaneous order accordingly:

Because customary law is rooted in “the existence of ‘social mores’ defining rules of conduct” it is necessarily associated with the basic rules establishing civil association, i.e. it is dependent upon the morality of duty. Three conditions, Fuller suggests, underpin duty. “*First*, the relationship of

reciprocity out of which the duty arises must result from a voluntary agreement between the parties affected; they themselves 'create' the duty. *Second*, the reciprocal performances must in some sense be equal in value." Because it is nonsensical to consider equality as exact identity some common unit of measurement, into which differences can be subsumed, is necessary. And, "[t]hird, the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow in other words, the relationship of duty must in theory and in practice be reversible." (McLeod-Cullinane 1995:6)

Similarly, liberties are shaped differently. Paraphrasing Polanyi's theory of spontaneous order, Straun Jacobs identifies respective notions of liberties as an additional factor determining unity within command or spontaneous orders. While liberty within a made order is achieved by shielding individual liberties, Liberty within a spontaneous order is achieved by avoiding coercion, depending on leadership and persuasion instead of command:

A person left to her own devices, acting on personal desires and not obliged to serve any externally defined purpose, was seen by Polanyi as enjoying 'private' liberty. It is 'the converse of personal servitude', people devoid of it are as 'slaves or villains'. 'Public' liberty on the other hand is exercised within spontaneous orders, someone (or some corporation) being free in this sense when able to act as she/he personally considers appropriate in a given context in relation to a predetermined public goal or ideal end. The agent here acts independently, on her own initiative without having to follow instructions, contrasting the duty of a subordinate official in a planned or corporate order. Polanyi associated public liberty with performance of 'social functions' or tasks, describing their discharge as a 'public responsibility' that participants accept as a condition of being members of a spontaneous order as they conscientiously work toward the ideal end or absolute value of the order. (Jacobs 1999:119).

Statute, Common Law and Custom

Deemed by John Hasnas as likely the result of his lack of training as an attorney and not having been raised in a common law country, Hayek confused customary law with common law as interchangeable alternatives of 'unplanned law' (Hasnas 2005:79-81). Hasnas describes the important differences between customary and common law, that were confused by Hayek:

By the end of the nineteenth century, the operation of these forces [merging of various common law courts, more reliable case reports and the practice of holding judges bound to decisions of higher courts] had transformed the common law process from one designed to properly prepare a dispute for submission to a jury, who would do justice according to custom, to one designed to ensure that courts of inferior jurisdiction were applying both procedural and substantial rules of law consistently with the rules announced in prior judicial decisions. Significantly, the focus of the process had shifted from the just resolution of particular disputes to the maintenance of a consistent and coherent body of rules. At this point, the common law had lost its character as a customary law. No longer a discoverer of customs, the judge is now an intellectual craftsman, charged with sculpting the rules into a consistent and coherent body of law while ensuring that the whole does not lose touch with the normative ends it is designed to serve. In every appellate decision, the judge must consider not merely what is fair to the parties to the dispute, but how the decision will impact the law's twin goals of maintaining a reasonable consistency with past rulings and advancing good public policy. Hence, the modern common law is case-generated, but judge-made law. (Hasnas 2005:94-96)

Essential to this study, common law differs from customary law to the extent that the common law is made, affected by command and no longer, law of liberty. The extent to which stare decisis or case-generated characterizations of Aboriginals as lawless nomads, ineligible for liberties would not have survived customary adjudication which is rooted in notions of natural justice rather established than legal conventions. As discussed earlier in relation to the events surrounding the transfer of sovereignty for Rupert's Land to Canada, it was the possibility of disconnecting morality from coercive power to make legal what is immoral, that was the most decisive factor in the denial of the liberties of the Aboriginal inhabitants of Rupert's Land. Lon Fuller, renowned legal scholar, offers a superior definition of customary law:

Customary law is not the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men towards one another... This neglect of the phenomenon called customary law has, I think, done great damage to our thinking about law generally. Even if we accept the rather casual analysis of the subject offered by the treatises, it still remains true that a proper understanding of customary law is of capital importance to the world. ... I shall argue that the phenomenon called customary law can best be described as a *language of interaction*. To

interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. We sometimes speak of customary law as offering an unwritten code of conduct. The word code is appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses. (Fuller 1981:212-214)

The normative function of customary law, rooted in social mores is fundamentally important to the survival of the Aboriginal inhabitants of Rupert's Land, unfortunately too often a casualty of 'analysis of the subject offered by the treatises'. Certainly, it is overlooked in the typical comment that "on account of its decentralization, general international law has the character of a primitive law" (Campbell 1988:182). Michael Polanyi's brother Karl, in his influential work, The Great Transformation, identified the spontaneous order of a free market as a potentially destructive force threatening social order. Ronaldo Munck wrote in his review, *Globalization and Democracy: A New "Great Transformation"?*:

For Polanyi (1957), a major characteristic of the market society was that it had become "disembedded" socially; that is to say it was uprooted or divorced from its social and political institutions. What a disembedded and self-regulating market economy produces in people is insecurity and social anxiety. Protective countermovements by society and the state must also seek to block the total disembedding of the market through re-embedding it through state intervention and social legislation. Of course, in the era of globalization, that re-embedding will also occur at an international level to be effective, even more than was the case in the 1930s. (Munck 2002:18)

Here, corporate economic entities, not individuals, have escaped or 'become disembedded' from the social and political institutions that might normally control them. The solution, it is generally agreed, is to use international customs (actually enforced by coercion) to 're-embed' them, a process suggested by Alina Rocha Menocal:

Successfully mediating state-market relations is a double-sided process that requires a fine balance between fostering market forces on the one hand and protecting the population against harmful consequences on the other. (Menocal 2004:775)

Another example of the allegedly interchangeability of the terms customary order and spontaneous order needs closer examination. Mark A. Drumbl describes the current state of 'customary law' in Afghanistan:

Afghanistan's widespread poverty has increased the practice of the sale by parents of their young daughters, putatively as brides but in practice as prostitutes, thereby contributing to global patterns of sex trafficking. Although selling girls is prohibited by Islamic law, local custom is more ambiguous, so much so that one Afghan jurist opines that "nobody would ever be charged for selling a daughter." (Drumbl 2004:110)

Especially revealing to this author, is Drumbl acceptance of a disconnect between Islamic law and local custom. Clearly, Islamic law is a normative system concerned with social mores and should influence local custom. In the absence of a normative underlayer, these practices would more accurately be described as bad habits. As in the case of the character of 'nomads' there is not sufficient overlap between the tacit knowledge of legal scholars with that of economists or political scientists to support a 'one market' connotation of the terms spontaneous order, or customary law. As in the case of the 'nomad', the term 'customary law' has become disconnected from the probative and relevant evidence of behaviour upon which its legal meaning is founded. It is unfortunate that in this example, the terms custom and law have been used without reference to the traits which define them. In this Afghanistan example there is reference to Islamic law, local custom, and apparently a secular court. Is the Islamic law, statutory law, enforced with the coercive powers of a state. Apparently not if parents are able to sell daughters or use them as currency in dispute resolution. The 'local custom' obviously involves a common practice but obviously also lacks the normative element required to create spontaneous, customary peace and good order. Finally, no reference is made of the kind of legal system presided over by an Afghan jurist. As this author will now argue, the legitimacy of custom, custom worthy of a Canadian court of competent jurisdiction, lies in its capacity for creating voluntary peace and good order, based on public opinion, mutual dependence, and reasonable expectations.

Legal Foundations of Custom

In accordance with British and Canadian common law of evidence, whenever customs are alleged, they must be proven as a matter of fact, in accordance with the long established provisions of Halsbury's Laws of England, 4th Edition, and *Angu v. Atta [1916]* Gold Coast Privy Council Judgments, 1874-1928, 43, 44 (PC):

Halsbury's Laws of England (4th) states that, in proving custom, "the usual course taken is to call persons of middle or old age to state that in their times. . .the custom has always prevailed". (Zlotkin 1984)

As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them." *Angu v. Atta [1916]*

A. St. John Hannigan noted that in the Privy Councils judgment of *Bongay v. Macauley*, 1 W.A.C.A., p. 225, a Sierra Leonean case, Kingdon, C.J., refers at page 229, to the dictum of the Privy Council in the Nigerian case of *Eleko v. The Officer Administering the Government of Nigeria & anor. [1931]*, A.C., 662, at p. 673, "It is the assent of the native community that gives a custom its validity and, therefore, barbarous or mild, it must be shown to be recognized by the community whose conduct it is supposed to regulate". (Hannigan 1958:112). Beyond the manner of proving the existence of a custom, the case law from the British Empire reached the Privy Council from lower colonial courts which invariably bent Aboriginal customary legal systems to suit policies of Indirect Rule (Ibhawoh 2002:76; Killingray 1986:413; Seidman 1970:188; Heussler 1968:48; and, Forde 1939:153-154). Here, custom has been subordinated to the political and economic projects of a colonial government, As noted by Roger S. Gocking of British Africa, "local chiefs who attempted to adjudicate more than trivial criminal cases invariably found themselves in conflict with both the Chief Magistrate and the Governor" (Gocking 1993:4-5). Failing to appreciate critical differences between command and spontaneous orders, there is an even greater risk that well-meaning efforts will attempt to fuse the two. For example, Erika Techera, described such an effort in her article, *Local Approaches to the Protection of Biological Diversity: The Role of Customary Law in Community Based Conservation in the South Pacific*:

Power is given to the *Fono* to punish anyone who fails to obey any direction of the *Fono* according to the traditional custom and usage of the village ... This is practically viable and desirable in the context of the South Pacific Island States. More broadly, the examples of Samoa and Vanuatu demonstrate that it is possible to synthesise customary law with western style legislation, provided the political will to do so is present. (Techera 2007:7-13)

Whatever, the logic used, the delegation of coercive power by a Western styled command order to an Aboriginal leader of a spontaneous order, notwithstanding good intentions will eventually produce the same results as Indirect Rule. Moreover, such synthesis is irrelevant in Rupert's Land where a Canadian government is committed to respect and protect the legal system that safeguards the freedoms of every individual, a purpose quite different from subordinating legal systems to satisfy its own colonial objectives. Subsequently, the principles for conceiving or proving important features of such a customary legal system must be drawn from sources intended to respect its integrity.

The International Court of Justice in the Hague enunciated such principles in its judgment of *Federal Republic of Germany v. Denmark*, North Sea Continental Shelf Cases, 1968. They are well described by Judge Kotaro Tanaka:

The formation of a customary law in a given society, be it municipal or international, is a complex psychological and sociological process, and therefore, it is not an easy matter to decide. The first factor of customary law, which can be called its *corpus*, constitutes a usage or a continuous repetition of the same kind of acts; in customary international law State practice is required. It represents a quantitative factor of customary law. The second factor of customary law, which can be called its *animus*, constitutes *opinio juris sive necessitatis* by which a simple usage can be transformed into a custom with the binding power. It represents a qualitative factor of customary law. (Tanaka 1968:175)

Francesco Parisi, in his 2001 article, *The Formation of Customary Law*, clearly identifies the two defining elements:

- (1) the practice should emerge out of the spontaneous and uncoerced behaviour of various members of a group, and

- (2) the parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (*opinio iuris*).
(Parisi 2001:7-8)

These same principles of: uncoerced behaviour; plus, *opinio iuris*; applied by the ICJ in *Nicaragua v. The United States of America* were applied recently by the Supreme Court of Canada in *R. v. Hape*, [2007] S.C.C. 26, at paragraph 46:

46. Sovereign equality remains a cornerstone of the international legal system. Its foundational principles – including non-intervention and respect for the territorial sovereignty of foreign states – cannot be regarded as anything less than firmly established rules of customary international law, as the International Court of Justice held when it recognized non-intervention as a customary principle in the *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14, at pp. 106. As the International Court of Justice noted on that occasion, the status of these principles as international customs is supported by both state practice and *opinio iuris*, the two necessary elements of customary international law.

[Emphasis added by this author]

In conclusion, the legal rights of every Aboriginal inhabitant of Rupert's Land that requires the respect of the government and parliament of Canada are well described in the *RP1869*, issued by the British Cabinet. The protection of these rights by Canada's courts of competent jurisdiction will require judicial notice and protection of the customs which comprise the customary legal system of the Aboriginal families and bands of Rupert's Land. These customs are distinguished by spontaneous, uncoerced behaviour, as well as attendant beliefs and social mores. What is needed now is a practical illustration of their application in a meaningful context. This author has chosen the context of recognized trades, including the traditional Cree trade of hunting and trapping, as well as those normally certified by Canadian provinces. Specifically, this illustration involves the Aboriginal inhabitants of northern Quebec in general, the Crees of Waskaganish First Nation in particular. Including approximately 2300 individuals, this band of families was identified in the *RL&NWTO* as affiliated with Rupert House trading post, the oldest, continuously occupied post of the Hudson's Bay Company in Canada. This example was

chosen by this author because of his extensive experience in training, apprenticeship and certification of competence in skilled trades. This example will be relevant to the greatest number of individuals, their families, bands and First Nations, elsewhere in Rupert's Land. As emergent, rather than designed order, customary legal systems are more easily and clearly illustrated in behaviour engaging reasonable expectations and attendant values.

CHAPTER SIX

TRAINING, APPRENTICESHIP AND CERTIFICATION IN A RECOGNIZED TRADE

Basis of Sovereignty in Rupert's Land

In 1870, Canada could not claim anything more in sovereignty in Rupert's Land from Her Majesty's Government, than the latter had claimed, nor could Canada claim anything more than allowed by the terms under which the transfer was made. Throughout this study, this author has presented the facts, principles of interpretation and constitutionally entrenched promises to respect and protect the legal rights of every individual Aboriginal inhabitant of Rupert's Land upon annexation to Canada. They are embedded in documents such as orders in council, minutes and reports of parliament, royal proclamations, court judgments, legislation and constitutions, which, according to English and Canadian civil procedure are "so notorious as to require no further proof" and may be included as facts, in a statement of claim or pleading (Jacob & Goldrein (1990:61-62). These facts underpin the meaning of the phrase, "the legal rights of every individual" which Canada's denial of legal rights balances on – the notion that Indians (Aboriginals) are not legally individuals as a result of Canada's reduction of their status towards in an exercise of legislative supremacy. That argument is not saved by the *CLVA*, s.2, which provided that "in any respect repugnant" was "absolutely void and inoperative".

The *RP1869* and the *RL&NWTO*, June 23, 1870 were both orders-in-council issued by the British Cabinet. Any Canadian federal or provincial enactment that denied the legal rights of every individual Aboriginal inhabitant of Rupert's Land was therefore repugnant, absolutely void and inoperative. This was not changed by the *Statute of Westminster, 1931*, which freed the Canada's parliament from the *CLVA*:

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

The *Constitution Act, 1982* patriated Canada's constitution, explicitly referring in s. 52, to the RL&NWTO, in the Schedules #3, as part of the constitution. The continuity of the legal rights of every Aboriginal individual is illustrated in Appendix J.

During the first hundred years of annexation by Canada, notwithstanding two boundary extensions (1898 and 1912), Quebec largely ignored Rupert's Land. Suddenly, on November 24, 1966, Quebec established a Commission d'Étude sur l'Intégrité du Territoire du Québec [Commission to Study the Integrity of Quebec's Territory], and appointed Henri Dorion as its president. The organization and methodology of this project closely resembled similar efforts by federal commissions to legitimate a denial or extinguishment of Aboriginal rights. Hearings were not frequent enough nor ever held in the north to pretend any democratic process. The commissions rather large, Rapport de la Commission d'Étude sur l'Intégrité du Territoire du Québec was released February 5, 1971. Its recommendations were reduced to a few pages in Cree, Montagnais, Iroquois and Inuktitut. This author recognizes the syllabic font used for the Cree as that of Father Louis-Philippe Vaillancourt, an Oblate priest who verified Cree testimony for Hydro Quebec during the court sessions of 1973. This author was present in the Cree communities after the Dorion Commission's report was released. The few pages translated into Cree never arrived in the Cree communities.

The report's legal opinion was largely written by Université de Laval professor, Henri Brun. Though *Connolly v. Woolrich*, was a judgment of a Quebec court, confirmed on appeal and adopted throughout the Empire (see Appendix K), Brun completely ignored it as well as most of the primary source materials in Appendix J. Brun accepted Canada's view that Indians were not legally 'individuals'. Volume 4 of the Rapport de la Commission d'Étude sur l'Intégrité du Territoire du Québec, contains Brun opinion, largely based on views of legal scholars, including Ermerrich de Vattel. Brun determined, based on a blatantly selective use of hearsay evidence, and the exclusion of most of the primary sources in Appendix J, that no Aboriginal rights of sovereignty or land title had survived. This was, he claimed, largely the result of federal legislation that could extinguish or alter, explicitly or tacitly, what there may once have been, without any legal obligation for compensation. Brun added :

... un titre indien de nature privée existe théoretiquement sur une immense partie du territoire actuel du Québec, - en l'occurrence sur la partie s'étendant au nord de la province de Québec de 1763 [an Indian title of a 'private nature' theoretically exists on an immense part of the territory of northern Quebec, north of the province of Quebec of 1763] (Brun 1967 :111)

By implication, Brun alleges, that private interest or title was limited to traditional uses such as hunting and fishing. Brun's position was very much like the position taken by most governments and legal scholars prior to *Calder v. AG BC*; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; and *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Brun's legal reasoning is an earlier rendition of the 'overgrown and poorly excavated archaeological site' which the field of Aboriginal rights continues to be. It is not relevant to this study of the legal rights of every individual inhabiting Rupert's Land which is based on notorious facts rather than the reasoning of legal scholars. The prevalence of Brun's opinion and its adoption by legal counsel and judges do, however, explain the outcomes of *Gros Louis et al v. SDBJ*, [1973] and *La Société de Développement de la Baie James et al. v. Kanatewat et al* [1973], and a view of the James Bay & Northern Quebec Agreement in 1975 as an Aboriginal victory, notwithstanding is purported extinguishment of many legal and all property rights. Most of these judgments could easily be reversed because of their inconsistency with the rule of law, principles of fundamental justice, a free and democratic society and existing Aboriginal rights which survive because, contrary to Brun's opinion, they were not extinguished tacitly, by legislation lacking 'clear and plain intention'. As this author has clearly shown, the legal rights of the Aboriginal inhabitants of Rupert's Land were always entrenched in the Canadian constitution, beyond the reach of legislatures or executives. As enunciated by the Supreme Court of Canada in *R. v. Badger*, [1996] 1 SCR 771, at para. 76, treaties and land settlement agreements, are not the sources of rights, but rather "are analogous to contracts, albeit of a very solemn and special, public nature". Subsequently, any aspects of treaties and land settlement agreements, as well as any federal or provincial statutes that are inconsistent with the legal rights of the Aboriginal individuals inhabiting Rupert's Land are, according to: the *CLVA*, s.2 until 1931; the *Statute of Westminster, 1931*, 7(1) until 1982; and, the *Constitution Act, 1982*, s. 52(1) to present, "to the extent of the inconsistency, of

no force or effect". A number of treaties or accords have been signed between, mainly Quebec and the Crees since 1975. The most recent, the *Paix des Braves, 2002* was negotiated in secret between Quebec Premier Bernard Landry and Grand Chief Ted Moses, each assisted by only a few aids. This agreement was even more complex than the James Bay & Northern Quebec Agreement, more lucrative and enjoyed much less unanimity.

The Growth of Illiberal Democracy in Eastern Rupert's Land

Now, almost thirty years ago, in a influential work, Negotiating a Way of Life, a group of mostly social scientists, commented on the "nature of Cree participation":

What really is at issue, however, is the sort of role the new Cree regional staff have in their structure. What is their position vis-a-vis the consultants who have played such an important role in the development of the organization? There is evidence (which shall be presented and developed more completely in the following papers) to suggest that a system has developed wherein Cree are trained in and assume control of the more routine aspects of administration, while the more active or dynamic areas of bureaucracy – the level at which decision and policy-making power resides – remain under the determining influence of consultants, in general, and legal advisers in particular. From such a situation, it is not surprising that one already sees some early signs of a potential resentment developing among the Cree concerning the power of consultants and the difficulty of controlling them. (La Rusic et al 1979 :50-51)

[Emphasis added by this author]

The remarks underlined above by this author have since proven to be prophetic. But, the Crees performing administrative tasks have become a cohort in a legion led by consultants. The growing resentment is, today, most sharply felt by the general Cree population, the subject or clients of the legion. In 1978, the total budget of the Cree School Board was less than eight-million dollars per year, Today, thirty years later, the same Cree School Board's budget exceeds ten times that amount. A Cree Board of Health & Social Services, barely visible in 1978, today reaches deep into the lives of every inhabitant of eastern Rupert's Land. Controlling these institutions or the consultants and administrative staff that animate them through supposedly democratically elected boards

or committees is a numerical impossibility (see Appendix M). In Waskaganish alone, virtually every person over the age of eighteen would need to be serving on some board or committee, more than sixty-three and growing. In fact, the roles of board or committee members fall to a rather small number of community members who might serve on as many as ten or twelve boards or committees at a time. The regular meetings required of such democratic institutions are usually organized in Montreal, Quebec City, Ottawa or some urban centre far from the Cree community being represented. The agenda, background information, political and legal implications relevant to these meetings in forms not publically accessible are maintained by the consultants and sometimes senior administrators. Consequently, it should not surprise the reader that the rule of law, separation of powers, procedural fairness and respect for individual freedoms that distinguish democratic tyranny from liberal democracy are largely absent from that part of eastern Rupert's Land, now known as the James Bay Territory of northern Quebec.

The rule of law according to Hayek (1994:80) and Raz (1979:2-3) requires "that government in all its actions is bound by rules fixed and announced beforehand"; and, that "it is possible to foresee with fair certainty how authority will use its coercive powers in given circumstances and plan one's individual affairs on the basis of this knowledge". Both Canada and Quebec have organized electoral boundaries in such a manner that non-Aboriginal interests in northern development outvote many times over an opposing Aboriginal interest in maintaining legal and property rights. In the same manner that s. 88 of the *Indian Act* operates to make provincial laws of general application enforceable by provincial authorities upon Aboriginals, the *CNA*, a federal statute does the same to the Crees of northern Quebec (see Appendix N). Even before considering the effect on Aboriginal individuals, such delegation of powers clearly violates an important Federal tradition of Canadian constitutionalism, that is, there can be no delegation of powers between legislatures that result in an abdication of responsibilities. Supreme Court Justice, Gerard La Forest wrote that when such legislation is vaguely written, it amounts to such forbidden abdication of powers. As an illustration of such abdication, this author offers the example of youth protection (see Appendix N). The life, liberty and security of parent and child are so closely intertwined that its not possible for the state to infringe

upon one without infringing substantive individual freedoms of both. In Quebec, as in most provinces, there is procedural fairness built into the system to protect such substantive individual freedoms from arbitrary, unjustified infringement by government agencies. That procedural fairness, in Quebec, takes the form of a Commission des Droits de la Personne et des Droits de la Jeunesse, [Human Rights and Youth Rights Commission]. This commission (see Appendix P), is an indispensable part of a fair and justified application in Quebec of a provincial statute, the *Youth Protection Act*. The reader will also notice that there is no commission or office responsible for northern Quebec. In short, the *CNA*, a federal statute, has allowed the federal government to delegate its powers to regulate Aboriginal lives, abdicating its constitutional responsibility to protect their individual rights. A survey of provincial education, health, social services, and public security statutes will reveal that the substantive individual freedoms of Aborigines are mostly unprotected. This practice of delegating federal powers to provinces combined with abdicating responsibilities for protecting the rights of Aborigines also offends the rule of law. Obvious in this author's example of youth protection, neither federal nor provincial governments are "bound by rules fixed and announced beforehand", with the result that it is impossible "to foresee with fair certainty how authority will use its coercive powers in given circumstances". Subsequently, it is impossible for an Aboriginal "to plan one's individual affairs on the basis of this knowledge". In the absence of the normal provincial measures of procedural fairness, an Aboriginal is forced to depend on the particular officer wielding such powers – an arrangement which the Supreme Court of Canada refused to accept in: *R. v. Adams*, [1996] 3 S.C.R. 101, at paragraph 54; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, at paragraph 141.

Effect of Related Provincial Statutes, Regulations and Policies:

As a result of research conducted during the last twenty years, this author noticed the situation faced by Aborigines in most provinces varies little. The federal government delegates its powers to the provinces for Aboriginal training, apprenticeships and proving

competence in certified trades performed by carpenters, electricians, plumbers, mechanics, etc..

In a recent interprovincial accord, the *Agreement on Internal Trade (AIT), Chapter 7 – Labour Mobility*, most of those trades are now harmonized among provinces. Training, apprenticeship and recognition in these trades engage most individual freedoms in some manner, all of which are protected with procedural fairness in some form, such as tribunals, ombudsmen, and other appeal processes. The *AIT, Chapter 7* provides similar protection of a constitutional right to mobility. As in the *Youth Protection Act* example offered earlier, the federal government has delegated to Quebec, its powers over training, apprenticeships and proving competence for Aboriginals, stripped of any board that might represent Aboriginal interests, and the tribunals, ombudsmen, and other appeal processes that might protect Aboriginals from the arbitrary behaviour of government officials.

Achieving knowledge, skills and recognition in a certified trade requires the careful and seamless integration of three main activities : formal training, supervised apprenticeship and testing. In the James Bay Territory of northern Quebec, jurisdiction for formal training has usually been held by the Cree School Board, operating under Quebec statutes. Apprenticeships are not usually available to Crees as the Quebec offices responsible are located outside Cree communities, although they do offer services to non-Aboriginal corporations such as Hydro-Quebec on the latter's project sites on traditional Cree lands. Nor is competence testing available. Cree workers wishing to write such tests have gone to Val d'Or and Montreal ; however, there they face another, much larger obstacle. In the largest sector, construction trades, authenticating hours of work experience hours to qualify as apprentices or to maintain competence in a trade, can only be done through membership in one of five Quebec certified trade unions. Preparation to write the competence exams is usually only available through a union affiliated with the work site. The company employing the apprentice or worker must also be recognized by the Quebec government. Construction companies must have an *RBQ*, that is a Quebec building permit. There are no apprenticeship services available in Cree communities, no unions and few Cree employers have the necessary Quebec permits. As a result of these

shortcomings and especially the lack of judicial review of abuse of unlimited discretionary powers, there are very few recognized Cree tradesmen. Those few had to leave the James Bay Territory in order to achieve such recognition or they were allowed to log hours of experience and write exams with the normal support of trade unions. Should the latter become too numerous, it would be reasonable to expect their recognition to be challenged by trade unions and revoked as having been accomplished outside legal means.

As one might expect, a highly skilled Cree workforce upon which the Cree communities critically depend are neither recognized nor paid accordingly. Most of the projects and employers operating on Cree lands are obliged to operate in compliance with an array of provincial statutes. Responsibility for protecting Cree rights to equality under provincial statutes has been abdicated by the federal government, while the power to serve their training, apprenticeship and certification needs has been delegated to the province. The aspirations of a youth of becoming a tradesperson with recognized and lucrative skills is just as remote as the aspirations of the older skilled worker who has been denied both recognition and fair compensation. This federal government strategy of simultaneously putting a class of citizens in harms way and withholding protection is called "passive violence". Arun Gandhi explained his famous grandfather's views on the subject, highly relevant to this study:

.... Grandfather explained to me the connection between passive and physical violence. Passive violence, he said, generates anger in the victim, and because justice in modern times has come to mean revenge, the victim resorts to physical violence. Thus passive violence is the fuel that ignites physical violence..... (Ghandhi 1995)

The usual form of "passive violence", Ghandi taught as 'The Violence Family Tree' (see Appendix Q) corresponds very closely to the observations of Aboriginal legal experts, Howard E. Staats, a Mohawk from Brantford; Leroy Little Bear, a Blackfoot from southern Alberta; and, John Borrows, an Chippewa from southwestern Ontario:

To a large extent both the social the social dislocation and the public image which plague the Indian in Canada today can be traced to the legal position in which the Indian finds himself. (Staats 1964:36-37)

Colonization created a fragmentary worldview among Aboriginal peoples. By force, terror, and educational policy, it attempted to destroy the Aboriginal worldview – but failed. Instead, colonization left a heritage of jagged worldviews among Indigenous peoples. They no longer had an Aboriginal worldview. Nor did they adopt a Eurocentric worldview. Their consciousness became a random puzzle, a jigsaw puzzle that each person has to attempt to understand. Many collective views of the world competed for control of their behaviour, and since none was dominant modern Aboriginal people had to make guesses or choices about everything. Aboriginal consciousness became a site of overlapping, contentious, fragmented, competing desires and values. Such jagged world views minimize legitimate cultural and social control; thus, external force and law, relatives of terrorism, become the instruments of social control. (Little Bear 2000:84-85)

We have a real crisis in the rule of law in Aboriginal communities; it is not a crisis because Aboriginal peoples do not have the rule of law, it is a crisis of legitimacy about the rule of law in Aboriginal communities. If Aboriginal peoples were able to start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, I believe that would go at least some distance to diminishing some of our problems. It is not the whole solution, but it is a part of the solution. (Borrows 2005:168)

Even with a more equitable delivery of training, apprenticeship and certification services, and the installation of the procedural protection of individual freedoms available to non-Aboriginals, the essential problem of command order by statute, disrupting spontaneous order by custom would remain. Moreover, the socio-economic conditions to which spontaneous order is so well suited, also remain – in addition to a diverse and rapidly changing population spread over a vast geographic area. A recent study of international, circumpolar Aboriginal populations actually increase rather than abandon their traditional subsistence activities as wage employment provides them more cash (Kruse & Poppel 2007).

Training, Apprenticeship and Trade Certification by Custom

Using the basic principles which this author developed in the previous chapter, this author now describes the form which training, apprenticeship and recognition of competence much assume when spontaneously ordered by custom rather than

commanded by statute. The following five principles define a framework for this approach.

<p>1. Customs Must Be Defined in Accordance with Stable Principles</p> <p>The framework must conform to definition of customary law upheld by Canadian and British Empire courts and the International Court of Justice</p> <ul style="list-style-type: none">a) providing for the voluntary, uncoerced behaviour of participants ; and,b) a concensus on the obligatory or necessary nature of defining practices.
<p>2. Acceptance of Public Goals in Exchange for Liberty</p> <p>Participants must be able to act independently, on initiative rather than instructions where freedom is expanded through increasing the number of choices for achieving predetermined public goals or ideals.</p> <ul style="list-style-type: none">a) the goals of instructors, students and functionaries will be clearly prescribed, that is, mandatory, but methodologies and relationships will only be advisory;b) the paths to recognition of trade competence to be followed and resources made available to expert, semi-skilled and novice workers will vary, the minimum standard of competence required for recognition will be the same for all.
<p>3. Relations between Participants Will Be Voluntary</p> <p>The predominant pedagogical approach will be learning by example and refining in practice.</p>
<p>4. Information Will Be Maintained in a Single Open 'Market'</p> <p>All pertinent information such as required trade competences, availability of human and material resources, experience opportunities, etc., will be maintained in one 'market', accessible to all actual and potential participants</p> <ul style="list-style-type: none">a) animated by leadership and organized by custom, all of the decisions normally related to training, apprenticeship and recognizing competence in certified trades will be determined by concensus within an open, single market of relevant information ;b) notwithstanding the knowledge, skills and attitudes upon which certified tradecompetences are based, all other decisions related to curriculum, pedagogical approach and organization of instructions will be made by an appropriate group of skilled family/band members and ratified by every family.
<p>5. Judicial Review Will Maintain Justification, Fairness and Opinio Juris</p> <p>All disputes or complaints and of any individual(s) should be resolved in the first instance within the family or the band of families. The final arbitor of all disputes or complaints is the Superior Court of Quebec, under whose protection the legal rights of every individual were placed.</p> <ul style="list-style-type: none">a) every individual will have easy access to judicial review of any disputes or complaints: within the family, within the band of families, and, in the absence of resolution by the latter, with the Superior Court of Quebec; and,b) in the case of infringement of the freedoms of any individual, family or the band of families, by any external organization or individual, relief should be sought from the Superior Court of Quebec

From Principles to Practice

The practice of customary, spontaneous order must accomplish and maintain two main objectives. First, it must establish and maintain spontaneous order, an endogenous order navigated by values. Those values must be shared Cree values as well as two main Quebec goals – achievement of the knowledge and skills seeking recognition; and the scrupulous use of public funds.

Secondly, and closely related to the first, the practice must always be defensible as fair and justified to both the individuals whose freedoms are engaged and the ‘court of competent jurisdiction’ constitutionally mandated to protect them. Where a potentially coercive force is required, it must be introduced in a fashion not disruptive of spontaneous order, that is, as guide posts rather than as commands. This approach is now a Canadian one. Since the constitutional entrenchment of the rule of law and protection of individual freedoms, Canadian governments (executives and legislatures) are restrained by judicial review. As a result of the frequent review of their behaviour by tribunals and courts, and the latter’s restraint of such behaviour when it is inconsistent with the constitution, a body of unwritten but well known values as to what government can get away with has evolved. The threat of a successful challenge of questionable behaviour being supported by the judiciary, provides internal values or guide posts which navigate government’s use of its coercive powers. At the same time, individuals learn what they may and may not be allowed to do. Subsequently, judicial review is superior to command for promoting and maintaining spontaneous order. Judicial review also safeguards the ‘*opinio juris*’ which must be clearly evident should a custom or behaviour in accordance with a custom require judicial notice or protection by a court of competent jurisdiction. For the Crees of Waskaganish First Nation, that court is the Superior Court of Quebec. An Aboriginal customary legal system in present-day Rupert’s Land can no longer rely on abandonment or banishment to provide the coercive authority or guide posts needed for protection of its customs. Specifically, it is the *opinio juris* or social legitimacy of customs that most needs protection. Judicial review is thus important to prevent social legitimacy from becoming disembedded from practices. Accordingly, a Canadian liberal

tradition of judicial review must be adopted in order to 'protect the legal rights of every individual' by protecting the customs that enable rather than shield the individual's freedoms.

Safeguarding Cree and accepted Quebec values are attended by a further normative advantage. In a customary order, instructors are chosen by their students and maintain their credibility based on respect for their competence and ability to relate well to the student. In such a social order, the relationship between the instructor and student is the complete, albeit voluntary submission of the latter to the former, aptly described by Michael Polanyi in his Personal Knowledge: Toward a Post-Critical Philosophy:

To learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot analyze and account in detail for its effectiveness. By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly known to the master himself. These hidden rules can be assimilated only by a person who surrenders himself to the extent uncritically to the imitation of another. A society which wants to preserve a fund of personal knowledge must submit to tradition. (Polanyi 1964:53)

Operational Information

Unlike command authority, such voluntary submission to authority promotes rather than disrupts spontaneous order. To the degree that 'made' order depends on the integrity and efficacy of its design, found in its statute and common laws, spontaneous order depends on the integrity and efficacy of a communications network and a freedom of individuals to pursue private interests without supervision or obstruction. Consequently, all information relevant to both public goals and private interests must be readily available in a single 'market', such as a CD or website where the information is also in a highly accessible form such as photographs or short movie clips which provide a novice with an overview at the same time as providing a master with a contextual depiction of the subject with all the nuances only a master would know. The public nature of this approach also satisfies the rule of law - "it is possible to foresee with fair certainty how authority will use its coercive powers in given circumstances and plan one's individual affairs on the basis of this knowledge" (Raz 1979:2-3).

The rules or guideposts should also be as accessible and based on public acceptance as a customary approach to achieving public goals through the pursuit of private interests. A loose-leaf operations manual, ratified annually with the community, with version and dates accepted on page margins, downloadable from a website, would assure both accessibility and concensus.

Judicial Review and Reference

There should be judicial review available within each family, band of families and the Quebec Superior Court, easily accessible as needs arise. In order to ensure the principles of a unified market of information as well as a sense of fairness and justification, judicial review should be organized in the same hierarchical order as within a Canadian liberal tradition. In other words, in the event that a complaint or dispute cannot be resolved within a family, either because parties cannot agree or because the issue is important outside the family, the issue should be resolved in the band tribunal. The band referred to here is the band comprised of families, defined by custom, not the band defined and subject to federal and provincial legislation. In the event that a complaint or dispute cannot be resolved by the band tribunal, either because parties cannot agree or because the issue is important outside the band, for example with provincial and federal government, the issue should be resolved in negotiations or by the Quebec Superior Court. Similarly, in order to avoid conflicts, references or important questions to be resolved should be made in advance to family and band tribunals and to the Quebec Superior Court.

Ownership, Administration and Use of Resources

A distinction needs to be made between family and band resources. Facilities and equipment need to be maintained and used in accordance with the customs of both a family and band. Decisions to share, improve or dispose of facilities and equipment must be made within the band, as most negotiating, acquiring and reporting will likely occur between the band, Quebec and Canada. For the same reason, public funding to support training, apprenticeship and examination activities need to be maintained and used in

accordance with the customs of both a family and band. Typically, the norms or guideposts will be negotiated between the band, Quebec and Canada while the application of those norms will be determined within a particular family. Naturally, the terms negotiated between the band, Quebec and Canada must have the consent of the individuals and families represented.

In those instances where the family and band believe there is value in recognition of instructors by the Cree School Board, or any other federal or provincial entity, then, the attendant norms of that organization will be adopted as a limited custom for achieving the valued purpose. For example, there may not be adequate numbers of English, French, Physics or Chemistry instructors available to students. In such a case, it may become necessary to hire or borrow a teacher in a relationship with the Cree School Board, respecting the salary schedules, work load, etc., of the current collective agreement between the Cree School Board and the appropriate union. These terms would be treated as a 'band custom' subject to application by family custom within the agreed framework. Undoubtedly, a director (school principal) and other permanent staff will be required. In the same manner that conventional administrations must respect the rights of staff, parents and students and work to the satisfaction of a board in accordance with commands order ; so too, a customary administration must respect the customs of the families and band allowing staff, parents and students to pursue private interests with minimal supervision, while respecting public goals and working to the satisfaction of family and band customs.

The spontaneous approach to training, apprenticeship and recognition within a certified trade proposed here could easily exist as a program within an existing command or 'made' entity, such as the Cree School Board, Cree Board of Health & Social Services. The latter entities are creations of provincial and federal legislation. Both the legislatures and their respective executives are bound by the Constitution Act, 1982, including the assurances of respect and protection contained in the RL&NWTO, keeping with the voluntary nature of customary order, the present services of such entities should continue to exist as alternatives to Crees who have a choice of living according to Canadian (and Quebec) order or according to Cree order.

Current 'organized' approaches to training, apprenticeship and recognition and a spontaneous or customary approach would share the same terminal objectives of preparing a person to prove or demonstrate the same knowledge, skills and attitudes which comprise Canadian industry or trade standards. The main difference between the two approaches would be the style of organization adopted in order to achieve such common terminal objectives. For example, the conventional 'organized' approach imposes a common design especially upon learning experiences. The customary approach offers a greater degree of personal freedom as long as the individual accepts the 'reasonable expectations' of the group.

This author confidence that such a customary approach is not only possible but also the only consistently reliable one is based on forty years of experience in adapting formal instruction to a customary social organization. To describe in advance what form the 'reasonable expectations' or customs might take, risks precluding the voluntary, mutually dependent, co-operative nature of a customary approach. The latter form of democracy requires full participation of all members, not merely their elected representatives; moreover, the absence of a coercive state to enforce custom implies that peace and good order depends on endogenous rather than exogenous pressures. Accordingly, public opinion, mutual dependence and a fear of being left out for ignoring the reasonable expectations of others are the forces upon which customary peace and good order depend. Deciding in advance anything more than the knowledge, skills and attitudes which are certified by provincial authorities, risks undermining or frustrating the endogenous processes upon which customary, spontaneous order depends.

There is not enough space in this thesis for the author to defend or explain customary order or the personal freedom it makes possible to individuals who accept their dependence upon their family and fellow band members. Moreover, customary legal systems have been given a bad reputation by societies that substitute coercive force for opinion juris. But, such societies would not be protected by either the International Court of Justice or Canadian courts as they would fail the common law tests of validity. Rather than a thesis, this author believes what is now needed is an individual invoking the protection of his or her legal rights, according to the RL&NWTO, by the Canadian Court

of competent jurisdiction, as those legal rights are created by customs that can be proven to exist according to a remarkably well integrated body of British, Canadian and International common law.

This author believes that any apprehension about potential losses of individual freedom or the obsolescence of customary law are based on a lack of experience with the kind of customary order that would achieve judicial notice by Canadian or International Courts. Ironically, Canadian legal order began as customary order because there were not the courts, police or prisons to support a statutory order in a vast territory. Since 1982, and the addition of protection of individual freedoms to the supreme law, Canadian legal order has evolved once again in a customary direction. Peace and good order are maintained by the supremacy of 'reasonable expectations' determined by a judiciary. Canada is no longer governed merely by the statutes preferred by the majority. Although Canada and the world have seemed to grow smaller, both have at the same time become much more diverse. Reasonable expectations enunciated by Canadian courts have increasingly limited government interference with the personal freedoms of citizens. Canadian citizens have in turn, notwithstanding significant ethical and ethnic differences, have shown themselves much more sensitive to public opinion, mutual dependence and more likely to voluntarily obey the reasonable expectations enunciated by Canadian courts.

CHAPTER SEVEN

CONCLUSION

What Has Been Learned

Already sensitive from previous thesis study, to the need for a thoughtful and deliberate methodology, this author has been even more deeply impressed with the implications which methodology has for the accuracy of information and generalizations generated. The 'thick description', hermeneutics and preoccupation with the motives, intentions, and methods of the subjects being studied articulated by anthropologists, Geertz, Ryle and Hodder corresponds closely with the emergent order sought by political scientists, Hayek, Polanyi and Fuller. Both approaches, anthropological and political science maintain the concern for emergent order based on observable similar facts connected to similar acts supporting a pattern of behaviour are compatible with the common law enunciated by Canadian courts on admissibility of evidence. Especially as related to expert opinion on the behaviour of the Aboriginal inhabitants of Rupert's Land, methods used are incompatible with the common law. Even such giants as Robert Lowie, Julian Steward, Alfred Irving Hallowell or Frank Speck have employed methods which were navigated by current thought within their discipline rather than an generalizations which emerged from participant observation. The hallmark of this methodology is a preoccupation with a subject's difference with Euro-centric norms attended by a corresponding lack of interest in the subject's motives, intentions and own methodology. The myopic labeling of Aboriginals as nomads and the unquestioning acceptance of such expert opinion as fact is the result of circuitous reasoning, deemed poisonous by Binnie J in the Supreme Court of Canada's judgment of *R. v. Handy*. Without the thick description or the similar facts (not opinions) describing similar acts, the researcher asks and answers his own question and in Binnie J's use of Shakespeare's words, "once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body'".

Ethnocentric blindness of Canadian courts and a lack of diligence of legal counsel nurtured a potential calamity of thousands of reversible judgments. This author

discovered that the real architect of this situation, the federal government, has delegated power over Aboriginals to provinces who share a federal interest in extinguishing Aboriginal rights. This delegation has become passive violence because the federal government has at the same time, abdicated its responsibility to protect Aboriginals. This responsibility was clearly articulated for Rupert's Land, "to respect the legal rights of every individual and place them under the protection of courts of competent jurisdiction". As this author has demonstrated, that promise survives still, entrenched in Canada's constitution, supported by ample and unequivocal proof of its true meaning. As a result of such unconstitutional delegation with abdication, Aboriginals are made subject to all of the same laws as other Canadians but with few or none of the usual protection of freedoms. The noticeable disarray and social stress of most Aboriginal communities is more logically attributable to the passive violence they are subject to than to the stereotype of being primitive or nomadic, engineered by government.

As a result of what has been learned, not only about the reverseable errors in fact-finding, the unconstitutional delegation of power with abdication of responsibility and the suppression of the constitutionally entrenched legal rights of every Aboriginal in Rupert's Land and the North-Western Territory, neither legislatures nor courts should provide the necessary coercive force for destroying tribal structure as a means to extinguish Aboriginal rights. Moreover, as a result of what has been learned of customary order, Aboriginals in all of Canada should be free to restore the spontaneous order of their families and communities, relying on court protection of their customs, no longer reliant on court discovery of their rights.

Implications for Further Research

Even without the debate of British Parliament in June of 1869, *RP1869*, or Wolseley's Proclamation of 1870, there still remains enough unequivocal support, recently reaffirmed by the Supreme Court of Canada. For example, the *RP1763*, interpreted in accordance with Lord Mansfield's six principles (see Appendix G), s. 25 and s. 35(1) of the Constitution Act, 1982 provide more than adequate support for a statement of claim for striking out, reading in or reading down any law that is

inconsistent with an individual, a family, a band (in the Aboriginal sense) or a First Nation to live in accordance with custom. Where this author found the greatest need for research was in identifying Aboriginal customs, their practices and their inherent legitimacy to Aboriginals themselves. The disingenuous questions posed by those interested in extinguishing Aboriginal freedoms should be discarded in favour of those questions that will elicit Aboriginal motive, intention and methodology. In this author's opinion, these latter questions are more likely to contribute useful knowledge to respective disciplines and at the same time provide the authentic assistance to Canadian courts that is expected of expert witnesses.

This study's critique of authoritative historical description of Canada's first few decades, especially in revelation of documents and events suppressed by powerful interests, implies that future historical research would do well to apply the same values of thick description, emergent order and similar fact standards for admitting character evidence. Moreover, the common law's scepticism of admitting the writings of others without presentation of a factual foundation is vindicated by this study.

Having accomplished the aim of this study, this author now intends to pursue the further research required to implement customary remedies. Supported by the knowledge of Canadian and international civil procedure required for seeking judicial notice of custom, this author would next like to explore the instrumentality and inherent legitimacy of those Aboriginal customs that will be needed for restoring much needed composure to Aboriginal lives.

APPENDIX A

INDIAN & NORTHERN AFFAIRS CANADA Staff

Although in Canada's constitution, s. 91(24), the federal government has power to regulate Indians and Indian Lands, and an attendant responsibility to protect Aboriginals (Indians) and their lands, it is obvious that it is organized to litigate against or impose treaties on Aboriginals in order to extinguish their rights. The Auditor General of Canada drew attention to this in her Report of the Auditor General of Canada – April 2000:

...many departmental regions interpret their major role as that of providing a funding service. Only one of seven regional offices maintains an education program; however, even there, the major priority is to negotiate and provide educational funding. [para. 4.33, pg. 4-11]:

The following Indian & Northern Affairs, Ottawa legal staff list was composed using the contact information available through Public Works Canada's Directory. Indian & Northern Affairs does not offer such a list or an organigram to the public

Indian & Northern Affairs, Ottawa, Headquarters Staff Summary

<u>Clerical</u>		<u>Management</u>	
Agent	5	Administrator/Registrar	42
Assistant	228	Chief or A/Chief	19
Clerk	59	Coordinator or A/Coordinator	71
Receptionist	5	Deputy or A/Deputy	13
Secretary	26	Director or A/Director	124
Student	15	Executive +	19
Support Staff	19	Head or A/Head	32
<u>Legal</u>	Total 357	Manager or A/Manager	240
A/Paralegal	1	Project Leader	10
Counsel (Lawyer)	79	Sr., A/Sr., Senior, or A/Senior	271
Legal Assistance	26	Supervisor or A/Supervisor	9
Paralegal	4	Team Leader	13
	Total 110		Total 841

Indian & Northern Affairs, Ottawa, Headquarters Staff Summary (cont'd)

Management

Professional

Advisor 110
 Analyst 186
 Consultant 109
 Negotiator 25
 Other Professionals 110
 Researcher or Research Officer 8

Technical

Officer 318
 Technician 10
 Various Technician 12
 Total 340

Total Headquarters Staff: 2196

Total 548

INDIAN & NORTHERN AFFAIRS EDUCATION STAFF

Headquarters

Educational Staff

Socio-Economic & Regional Operations
 Education Branch
 - Director General
 - Sr Policy Manager
 - Sr. Analyst-Records Consultant
 - Administrative Assistant
 - Executive Assistant

Education Policy & Planning
 Planning and Liaison Advisor
 - Director
 - Policy Analyst
 - Administrative Assistant
 - Senior Policy Analyst
 - Policy Analyst

First Nation Education System Development
 - Sr Program Analyst
 - Policy Officer
 - A/Director
 - Policy Analyst-
 - Policy Analyst

Alberta Region

Educational Staff

Corporate Services
 Data Collections, Processing & Analysis
 - Education Clerk

First Nations Relations, Treaty 6
 Field Operational Services
 - Education Officer

First Nations Relations, Treaty 7
 Field Operational Services
 - Education Officer

First Nations Relations, Treaty 8
 Field Operational Services
 - Education Officer

Operational Program & Policy
 - Education Officer
 - A/Education Policy Officer
 - Special Education Officer
 - Education Officer

**Content of Individual Freedoms Protected by
Canadian Charter of Rights & Freedoms**

F. M. Keesing, <u>Cultural Anthropology: The Science of Custom</u> 1958:411-412		Canadian Charter of Rights & Freedoms
1	Essentials of early constitutional conditioning	s. 7 Life, liberty and security of person
2	Essentials of organic maintenance	s. 7 Life, liberty and security of person
3	Essentials of communication	s. 2 Freedom of thought, religion and speech s. 7 Life, liberty and security of person
4	Essentials of primary group relations or societal security	s. 7 Life, liberty and security of person
5	Essentials for the maintenance of high prestige status	s. 7 Life, liberty and security of person
6	Essentials of territorial security	s. 7 Life, liberty and security of person
7	Essentials of ideological security	s. 2 Freedom of thought, religion and speech s. 7 Life, liberty and security of person

APPENDIX C

HANSARD'S
PARLIAMENTARY DEBATES,

THIRD SERIES:

COMMENCING WITH THE ACCESSION OF
WILLIAM IV.

32° VICTORIÆ, 1868-9.

VOL. CXCVI.

COMPRISING THE PERIOD FROM
THE THIRD DAY OF MAY 1869,
TO
THE SIXTEENTH DAY OF JUNE 1869.

Third Volume of the Session

LONDON:
PUBLISHED BY CORNELIUS BUCK,
AT THE OFFICE FOR "HANSARD'S PARLIAMENTARY DEBATES,"
23, PATERNOSTER ROW. [E.C.]

1869.

HOUSE OF COMMONS,

Tuesday, 1st June, 1869.

MINUTES.—*Severy*—considered in Committee Resolution (May 31) reported—Exchequer Bonds (£3,360,000).
 Finance Bills—*Second Reading*—*Poor Relief (Ireland) Act (1867) Amendment** [117];
*Oxford University Statutes** [126].
 Considered as amended—*Exchequer, &c.* [116-141].
Third Reading—*Norfolk Island Fisheries** [104];
*Customs and Inland Revenue Duties** [122] and passed.

CIVIL OFFICES PENSIONS BILL.

QUESTION.

MR. FAWCETT said, he would beg to ask the First Lord of the Treasury, whether it will be possible for a person deriving a pension, either from the Indian or Colonial Revenues, at the same time to receive a pension under the Civil Offices Pensions Bill; and, if so, whether it is the intention of the Government to meet such a case by introducing a new Clause upon the Report of this Bill?

MR. GLADSTONE, in reply, said, his hon. Friend would perceive, from Clause 6 of the Bill, that its intention was to impose a stringent limitation upon the receipts of these political pensions. He did not think the restrictions in the Bill would apply to Indian and colonial pensions. He proposed, therefore, to re-consider the question, and to insert a clause which would be uniform in its application, as the circumstances connected with the two cases were entirely different. He begged, therefore, to move the postponement of the Order for Consideration till Monday next.

TAXES ON SERVANTS.—QUESTION.

VISCOUNT GALWAY said, he would beg to ask Mr. Chancellor of the Exchequer, whether, under the Customs and Inland Revenue Duties Bill, a farm servant living in the house of his employer will be liable to be taxed to the amount of fifteen shillings?

THE CHANCELLOR OF THE EXCHEQUER replied that living in the house made no difference. A farm servant or labourer employed solely in that capacity would not make his master liable to the tax by living in the house; but if he were employed in any of the capa-

cities mentioned in the Bill the fact that he was a farm servant would not secure his master exemption.

VISCOUNT GALWAY said, he wished to ask, whether the farm servant living in the House would become an under gardener if he were occasionally employed in the garden?

THE CHANCELLOR OF THE EXCHEQUER said, that point involved the question of skilled labour. If the man worked as a gardener his master would become liable; if he worked only as a labourer no liability would be incurred.

BRITISH COLUMBIA.

NOTICES FOR PAPERS.

SIR HARRY VERNEY rose to call attention to the result of the negotiations of the Government with the Hudson's Bay Company and the Government of Canada. The most opposite accounts as to the value of the territories of that Company are to be found in the Papers presented to Parliament. In some it had been stated that the territory between Lake Superior and the Rocky Mountains consisted entirely of uninhabitable regions frozen during half the year, where cereals could not grow, and where settling, without costly protection, was impossible owing to the enmity of the Indians; but others, disinterested and conversant with the facts, stated that the country west of Lake Superior was likely to become of very high importance and value; that large portions of the district were very fertile and capable of producing cereals; and that the Indians were friendly, thanks to the fair dealing of the Company, and ready to work for adequate remuneration. The approach to the Rocky Mountains from Lake Superior was said to be excellent—travellers from the East could tell when they had reached the height of land between the Atlantic and the Pacific only by the flow of the water to the West, so gradual was the ascent, and it would be an easy thing to make land and water communication between Lake Superior and the Rocky Mountains. But as these points were in dispute he desired to have the authoritative statement of the Under Secretary for the Colonies upon them. Up to this time there had been a friendly feeling between the Hudson's Bay Company and the Indians, for both had

the same interest, and both desired that the land should be the resort of the trapper and the hunter; but it was not certain that when Canadians and Americans and our own countrymen resorted there for the purpose of settling that the Indians would view the newcomers with favour. Arrangements ought to be made for respecting native rights, and regulating their legal position and dealings with the Europeans. It was certain that the Americans had an eye to the country. They had sent Commissioners thither, who had declared that out of the Hudson's Bay territory four or five first-class American States might be formed. It was also alleged that the Commissioners said that it was a country worth fighting for, and had made some offer which had been entertained by the authorities of the United States. If the favourable reports which had reached us were true, this vast territory might afford a solution of some of the difficulties which created anxiety among us from time to time. It was stated on high authority that there was land in this territory extensive and fertile enough to maintain a population as large as that of England and Wales, and that railway communication might easily be established. It was of great importance that encouragement should be given to the commerce of Europe and Asia passing through British territory; and he entertained a hope that we might yet see that country inhabited by an industrious, well-conducted population, which might spread the honour and the influence of England. There was a class of politicians who were of opinion that our colonies were of no value to us. To that opinion he could not subscribe. He held that they greatly enhanced our power, our influence, and our ability to do good to the world. Those who had never left their own home were little aware how affectionately the old country was viewed by some of those who had located themselves in America and other of our possessions, and how jealous these people were with regard to all that affected the honour and the welfare of this country. He entertained sanguine hopes that rapid communication might be established in a short time with Vancouver's Island and with British Columbia. That district contained a great amount of mineral wealth, but in the mining part sufficient food could

Sir Harry Verney

not be grown for those who arrived there. On the one side of the Rocky Mountains, however, there were millions of acres which might be cultivated, and which would afford food to those who worked the mines to the west. He trusted the Government of Canada would take up this question in the way it ought to be viewed, and that the right hon. Gentleman the Under Secretary for the Colonies would be able to inform the House that the Parliament and Government of Canada, as well as the authorities of British Columbia and the Hudson's Bay Company had come to some agreement, so that those vast territories might be utilized. He begged to move for any Papers on the union of British Columbia with the Dominion of Canada.

MR. R. N. FOWLER, in seconding the Motion, said, he would take that opportunity of making an appeal on behalf of the Indians resident in the Hudson's Bay territory. The Hudson's Bay Company had never recognized the Indian title; but as they had never been a colonizing company, and had always discouraged colonization, that was not, practically, a point of great importance. The question now, however, was about to assume a different aspect; we were going to annex that country to Canada, and we all hoped that colonization would go on. Under these circumstances it was most important that the question affecting the Indians should be carefully considered both by the Home and Colonial Government. On this point he might quote Professor Hinde, who said that when he asked an Ojibbeway chief at the Lake of the Woods whether he would permit one of his tribe to guide him through a swampy district, said—
"It is hard to deny your request; but we see how the Indians are treated far away. The white man comes, looks at their places, their trees, and their rivers; others soon follow; the lands of the Indians pass from their hands, and they have nowhere a home." Such was, he could not help thinking, a very natural feeling on the part of the Indian; looking at the way in which colonization had driven the Indians into the far West in other parts of the American continent. A Petition of Indian chiefs was presented to that House in 1860. The petitioners complained that the Hudson's Bay Company had sold their lands in

the valley of the Red River and the Assiniboine, and they prayed the House to take the matter into its serious consideration; to "grant to them and their people the customary native title to their lands, and certain facilities for conveying the same to each other, and to their children's children." The House had now an opportunity of answering that Petition. He earnestly hoped that before the negotiations which were now going on were terminated, Her Majesty's Government would make due provision for protecting the rights of the Indians. The question was not rendered difficult by there being a very large number of them. Sir George Simpson, in reply to a question put to him by a Committee of that House which sat in 1857, stated that his estimate of their number was 55,570. Since that period he understood there had been an emigration of Indians from the United States into the Hudson's Bay territory, and therefore the number might be further increased. The Duke of Buckingham, when Secretary of State, in conjunction with the right hon. Gentleman near him (Mr. Adley), contemplated an equitable settlement of the Indian title. In a Paper dated the 1st of December last the Duke of Buckingham proposed that—

"Such lands as Her Majesty's Government shall deem necessary to be set aside for the use of the native Indian population shall be reserved altogether from this arrangement, and the Company shall not be entitled to the payment of any share of royalties or any royalty thereon or rights of alienation thereof, under previous articles; subjects for such part, if any, of these lands as may be appropriated, with the consent of the Crown, to any other purpose than that of the benefit of the Indian natives."

Canada had always been honourably distinguished for the course it had taken towards the Indians, and he did not wish to speak as distrusting the kindly intentions of the Canadian Government. But in others of our colonies and colonial Parliaments, he feared there had often been a disposition not to deal kindly towards the natives. He would appeal to the right hon. Gentleman (Mr. Monell) to make provision for the protection of the Indians before the power over the Hudson's Bay territories passed altogether out of the hands of that House, as that was probably the last occasion on which the House would have an opportunity of discussing the affairs of the Hudson's Bay Company. On the 6th De-

cember, 1867, both Houses of the Canadian Parliament forwarded an Address to the Queen, in which they promised—

"That upon the termination of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly prevailed the British Crown in its dealings with the aborigines."

He hoped Her Majesty's Government and the Canadian Parliament would carry out the spirit of that address. On this subject he would read two extracts from a letter which had been written to him by Mr. Leblond, a gentleman who had been connected with the Red River Settlement, but who now resided in this country, and was the head master of the Stationers' School. That gentleman was considered an authority on this question. He was examined as a witness before the Committee of 1857, and in a former debate he had been quoted as such by no less a person than the right hon. Gentleman opposite the First Minister of the Crown. Mr. Leblond said—

"The fundamental principle in the history of the colonization of Canada is thus referred to in the Report of the Commissioners appointed to investigate the Indian affairs of the Province in 1847:—'Although the Crown claims the territorial estate and ultimate dominion in Canada, as in other of the older colonies, it has ever since its possession of the Province conceded to the Indians the right of sovereignty upon their old hunting grounds, and a claim to compensation for its surrender, reserving to itself the exclusive privilege of treating with them for the surrender or purchase of any portions of the land. This is distinctly laid down in the Proclamation of 1763, and this principle has since been generally acknowledged, and rarely infringed upon by the Government.' The Proclamations here referred to, extending the sovereignty of Great Britain over Canada (so far as relates to the Indians) is as follows:—and, considering the important results it has been the means of securing for the province, is well worthy of attention at the present juncture, when we are entering upon an experiment in colonization in every respect analogous to the early settlement of that great and prosperous colony:—'And we do further declare it to be our Royal will and pleasure, for the persons as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the source of the river which fall into the sea from the west and north west as aforesaid. And we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of the lands above reserved, without our special leave and license for that purpose.' What I would venture to suggest is, that the terms of

the Proclamation, or something equivalent to them, should be embodied in the Proclamation annexing the Hudson's Bay territory to Canada, in order that there should be no misunderstanding from the outset as to the principles on which the settlement and administration of the country are to proceed."

As the Indians could not protect themselves, he thought it was the duty of Her Majesty's Government to make such arrangements as would secure the rights and interests of these our fellow-subjects on the hazyling over of the Hudson's Bay territories to the Dominion of Canada. There was another point in connection with this matter—there was a large native population of Indian origin inhabiting these territories. They had not lost their sympathy with the Indian race, and might be made of great use in facilitating the new arrangements. He hoped Her Majesty's Government would endeavour to secure, in the negotiations that were going on, that ample reserves of land should be given to the Indian population.

Motion made, and Question proposed.

"That an humble Address be presented to Her Majesty, that She will be graciously pleased to give directions that there be laid before this House any Papers on the Union of British Canada with the Dominion of Canada."—(*Sir Harry Tenney.*)

Mr. SINCLAIR AYTOUN said, he did not believe, whatever ends might be answered by the negotiations between the Government and the Hudson's Bay Company, that they would produce any results beneficial to the people of this country. As to the acquisition of new territory, we had already more than enough territory to last us for 100 years to come in North America, Australia, and the Cape of Good Hope; and he believed that the opening up of new countries to colonization under those circumstances would only tend to increase the patronage of the Ministers of the Crown. He wished to know from the Under Secretary for the Colonies whether the Government had any intention to ask the House to sanction a guarantee of money to be raised by Canada for the purpose of purchasing the rights of the Hudson's Bay Company, or for in any way facilitating the changes which were to be effected; and, if so, whether the matter would be brought before the House before the Session had drawn towards its close?

Mr. R. N. Keele.

Of all the bad modes in which the public money could be disposed of, he thought guarantees were the very worst possible; and at a time, when they were receiving intelligence that the money raised under the Canada Loan Act of 1867, for the express purpose of being applied to the construction of the Intercolonial Railway, was being expended by the Canadian Government in paying the old debts of the Canadian Dominion, it became doubly important that the House should have timely intimation from the Government of any such intention as he had referred to being entertained by them, in order that hon. Members might be in their places to oppose any such proposal.

Mr. KINNARD said, he thought the hon. Gentleman seemed to be in perpetual error of guarantees as applied to colonial interests. The real question before the House related to the state of the negotiations between the Hudson's Bay Company, the Government, and the Canadian Dominion, which was a matter of Imperial interest. He thanked the hon. Member for Palmouth (Mr. R. N. Fowler) for bringing forward the present position of the Indians, and, he must say, to the credit of the Hudson's Bay Company, that never in history was there a case in which the aborigines had been treated better, or in which more had been done in every way for their comfort than had been done by that company in a very inhospitable climate; and he earnestly hoped that the Colonial Office would take care that the Indians should not suffer by the proposed transfer of territory, and their condition not be deteriorated by it, but that ample reserves of land and proper protection would be secured to them. Referring to another point, the shortest route to China lay through North America; and we ought to remember what the United States were doing in that matter. They had now completed the new route from New York to San Francisco, and the journey could be completed in seven days and nights in the most comfortable manner, by means of sleeping cars, restaurants, &c., which were provided for passengers. He should like to inquire how we should have stood in regard to railways in India without guarantees? He hoped, therefore, that the Government of this country would sanction guarantees in order to develop the route referred to by the hon. Baronet the Mem-

ber for Buckingham (Sir Harry Verney) and that they would not be deterred from doing so by the alarm of the hon. Member who had spoken last.

COLONEL SYKES said, he was much disposed to sympathize in the alarm of the hon. Member for Kirkcaldy (Mr. Aytoun) as to guarantees. We were now pledged to thirteen or fourteen guarantees on some of them, the parties to whom those guarantees were given being unable to do so, and ultimately we might be obliged to pay the capital. The extension of the guarantee system was highly impolitic, mischievous, and contrary to the wishes of a great part of the people of this country. As to a short and direct route to China through the Rocky Mountains or through Canada, he was afraid the views of the hon. Member for Perth (Mr. Kinnaird) were a little visionary.

Mr. R. SAMUELSON urged that it was impossible for them to be too jealous about guarantees, and submitted that the case of India could not be justly quoted as a precedent in the case under consideration. In India, our dominion being despotic, we were directly responsible for the good government and for the development of that country. But the case was altogether different in respect to any of our Anglo-Saxon colonies. The time had come when we ought to endeavour to free ourselves as much as possible from any expenditure on behalf of those colonies. They were well able to take care of themselves; and the labouring man out there earned a much larger income, with no more fatigue, than his fellow-subjects of the same grade in the mother country. The hon. Baronet (Sir Harry Verney) had given a very fair account of the country in respect of which we might be hereafter called upon to incur great expense. It appeared that we knew very little about the country, except that it contained a tract of fertile land about the size of these kingdoms. That of course could not be compared with the vast tracts of land which our own countrymen were cultivating in the Western States of America. The question which the hon. Baronet had brought forward might be extremely interesting to the Canadian Parliament or the Royal Geographical Society; but in his opinion the House of Commons ought not to give

itself too much concern about it. The more we considered our position with regard to Canada, the more we should be led to hope that the bonds between Canada and this country might be still further loosened, and that Canada might ultimately become entirely independent of the mother country. We ought to be especially careful to keep clear of all difficulties in connection with Canada, not only on account of the proximity of that colony to the United States, but also because we had not found in our North American fellow-subjects any great disposition to be grateful for our interference with their affairs. Within the last few Sessions, Petitions had been presented from Nova Scotia to that House, and powerfully supported by the right hon. Gentleman the President of the Board of Trade, complaining that that colony had not been consulted on the subject of the consolidation of the Dominion of Canada. The prayer of those Petitions was supported by politicians of mark in the colony, and yet in a short time these very men turned completely round, and now approved the arrangements which were then entered into. We had, in fact, no sure means of ascertaining the real state of public opinion in the colonies, and therefore the less we meddled with questions of this kind the better. It was evident that our connection with Canada could only be a source of anxiety both to the Canadians and ourselves. In the event of a dispute with the United States, we should not be able to render the Canadians prompt and efficient assistance, and they would therefore have to bear the brunt of the contest. The more attempt on our part, fruitless as it was, to defend Canada would involve an expense during the present year of £300,000 sterling, and if the cost of stores, the transport of troops, and all the items of the non-effective service were added, the total cost would be nearly double the amount he had mentioned. If war broke out between this country and the United States to-morrow, every soldier in the Dominion would probably be taken prisoner if he were not speedily withdrawn. He was glad the hon. Member for Kirkcaldy (Mr. Aytoun) had called attention to the possibility of our being called upon to give guarantees on behalf of some scheme of communication which might be hereafter proposed; and he trusted the right

hon. Gentlemen the Under Secretary for the Colonies would not only be able to give an assurance that nothing of the kind was intended, but that he would also be able to announce that it was the policy of the Government to withdraw as far as possible from all connection or interference with Canadian affairs. The hon. Gentlemen who seconded the Motion (Mr. R. N. Fowler) wished this House to become a great Aborigine Protection Society, and to provide that in any arrangement between the Hudson's Bay Company and the Dominion of Canada, reserves should be made for the Indians. But surely the result of our dealings with the natives at the Cape—in New Zealand—and elsewhere, was such as ought to make us extremely cautious in interfering in such matters. At all events the Dominion of Canada would be perfectly competent to take care that the Indians of the Hudson's Bay Company were properly protected. He hoped it would not go forth to those tribes that we were about to pledge ourselves to make war for their defence against the United States, or that we intended to interfere in any way with the measures which the Government of Canada might deem sufficient for their protection against those who settled within the territory. The main stream of emigration flowed to the United States, and in his opinion it would be impossible to divert its course by a system of bounties and guarantees. At all events the more this country abstained from all such attempts at the expense of the tax-payers, the better.

Mr. MONSELL said, he hoped the hon. Gentleman who had just sat down would pardon him if he confined himself chiefly to the question of the Hudson's Bay Company, instead of entering into those general questions of colonial policy to which the hon. Gentleman had directed his remarks. He might, however, state at once that it was the policy of Her Majesty's Government to throw on the colonies, as far as was possible, the cost of their own self-defence. They had already taken steps in that direction, which had saved a considerable amount of public expenditure. They also meant to extend that course still further in the ensuing year, and to make arrangements that, where it was absolutely necessary, that Imperial troops should be kept in any self-governing colony, the colony

Mr. H. Smeaton

should pay the whole cost of the troops. He would now return to the question put by his hon. Friend who had brought this subject forward, and, in the first place, he must sincerely thank his hon. Friend for the great courtesy he had shown to him in so often postponing the subject during the progress of the negotiations between the Hudson's Bay Company and the Canadian Commissioners. The result of those negotiations had, he believed, been altogether satisfactory; for, although Her Majesty's Government had not at present received any official account of them, yet, as the Canadian Parliament had consented to the arrangement approved by the Hudson's Bay Company, and also taking into consideration the addresses presented in Canada to Sir George Carter, and his replies to them, he had no doubt that the arrangement was regarded in Canada as a satisfactory one, and that it would be ratified by the Canadian Parliament. He entirely concurred with his hon. Friend in his estimate of the importance of this question. It was not a mere question, as the hon. Gentleman who last spoke seemed to suppose, of some few hundred thousand acres of land being conceded; it was a question of opening a great and fertile territory, from which colonization and civilization had been entirely excluded by the proceedings of a fur trading company; of opening the way to civilization; and of satisfying the just and legitimate ambition of the Canadian Government to extend their dominion from the Atlantic to the Pacific, and, in addition, to remove a source of considerable inconvenience from the Imperial Government, which had to be responsible for the acts of Her Majesty's subjects in a district where there was no sufficient guarantee for law or order, and where, as he should show in the course of his remarks, serious difficulties arose within the last four or five years with the neighbouring American Government on account of the absence of any proper control within the Hudson's Bay territory. His hon. Friend had asked his opinion as to the value of the different statements he had quoted as to the fertility of the Red River Settlement and the district which extended from the Saskatchewan to the Rocky Mountains. The Government had the highest possi-

ble authority on the subject, the authority of Colonel Palliser, who was sent out specially to investigate the matter, and the high authority of the noble Lord the Member for West Yorkshire (Viscount Milton) who had written a most interesting volume with respect to that country. They stated, and the statement was amply confirmed, that there were millions of acres of the very richest land, producing several products which in this country we could not produce—maize, for instance, and wheat—in the greatest abundance, and that there was, besides, the most excellent meadow and grass land, and that in every way the country was one that invited colonization. But there was another reason why there could be no doubt at all on the subject. The neighbouring territory of Minnesota was on the average less fertile than the Red River Settlement, and proved what could be done in a few years by the exertions of energetic men. The point was one, indeed, upon which it was rather painful for us to reflect. When the present subject had been brought before the House, some twenty years ago, for the first time in recent years, by his noble Friend the late Duke of Newcastle, there were in Minnesota only 2,000 inhabitants, while there were now 400,000. There were also 562 manufacturing establishments there; more than 500 miles of railway constructed or in the course of construction; and in a very short time all the prominent parts of the State would be brought into communication by railway with Chicago. Contrast that state of things with the position of the Hudson's Bay territory. In its case there had been no advance, or, at all events, a very small advance in population; there had been no colonization and no progress of any kind. The absence of any system of government in the Hudson's Bay territory had also, he might add, led to very serious international complications. In 1864, the inhabitants of the Red River Settlement, in order to obtain protection against the Indians, were obliged to ask the American Government to send troops to take care of them. In 1867, an application was made by the American Government for permission to send American troops into the Hudson's Bay territory for the purpose of preventing it being made a resort by Indians who were

carrying on war against the Government of the United States. Not only, therefore, colonial, but Imperial interests were mixed up in the matter; for it was not desirable that there should be any portion of Her Majesty's dominions in which she should not be able to preserve law and order, or do that which was necessary to keep on terms of amity with a neighbouring State. His hon. Friend had asked him a question with respect to British Columbia. There had been several indications by means of public meetings and by addresses to the Legislature, of a great desire on the part of the inhabitants of British Columbia to become connected with the Dominion of Canada. The most recent information was to the effect that they had undergone a change in that respect; but whether they had changed their minds or not, he was quite sure they would change them back again, for it was perfectly obvious that it was to the advantage of British Columbia to be connected with Canada, and that the rich valley of the Saskatchewan was almost a necessary complement to her territory. There was in British Columbia vast mineral wealth, and also in Vancouver's Island the finding of coal was going on very rapidly. Of that fact there could be no better proof than that the dividends of the Vancouver's Coal Company had risen from 2 or 3 to 20 per cent, at which price they stood at present. In Vancouver's Island, too, and in Queen Charlotte's Island, the best bed of coal was to be found which could be found in that part of the Pacific—a matter of great importance in the development of the resources of a country. The proposal which had been made by his noble Friend (Earl Granville), and which had been accepted by the Hudson's Bay Company, and which he hoped and believed would be accepted by the Canadian Government, would, of course, in no way touch British Columbia. This question, so far as it affected them, the inhabitants of British Columbia would have to decide for themselves; but the Government would afford them every facility should they wish to join the Dominion of Canada, and he entertained very little doubt that they would very soon adopt that course. The subject to which his hon. Friend had called attention was one which had now been under the notice of the Government for many

years. Ever since the Committee of 1857 successive Governments had endeavoured to arrange terms between the Canadian Government and the Hudson's Bay Company. It had been held that that was the only true solution of the question and the only way of opening the Hudson's Bay territory to civilization. When, however, the present Government came into Office they were almost reduced to despair in the matter. In a letter dated the 9th of February last Sir George Cartier, addressing his noble Friend (Earl Granville), expressed it to be his opinion that no money which might be offered by either the Canadian or the Imperial Government, and which they might deem reasonable, would be accepted by the Hudson's Bay Company. His noble Friend, however, was not discouraged, and the result of the negotiations had been the success which he had to state to the House. His hon. Friend took a great interest in the guarantee, and asked whether any promise of a guarantee had been given. There was an engagement that a sum of £300,000 which was to be paid by Canada to the Hudson's Bay Company was to be guaranteed; but that matter would be brought before the House, and the fullest opportunity of discussing it would be afforded. His hon. Friend had unintentionally misrepresented the steps which had been taken by the Canadian Government with regard to the money raised under the guarantee given two or three years ago. His statement, as he understood it, was that the Canadian Government had appropriated that money to the payment of certain debts of the Dominion. What, however, they had really done was, that, finding they had £1,500,000 which had been raised under the guarantee at a very low rate of interest, and that they were paying a very high interest for debts due by the Dominion, they paid off those debts with the money, securing at the same time by means of the credit which they had with Messrs. Glyn and Baring for £250,000 or £300,000, and another credit they had with the Montreal Bank, that when the money was required for the purposes of the railway it should be immediately forthcoming. He did not express any opinion upon the matter; but it was due to the Canadian Government that the true facts of the case should go forth, and that it should not

Mr. Mansell

be supposed that they had deliberately taken the money to pay the debts of the Canadians. He felt with his hon. Friend (Mr. Fowler) that they had a duty to perform with regard to the Indians, and he might say that the Hudson's Bay Company had always discharged that duty in a way that reflected the highest credit upon them. The Government had communicated their opinion upon this to the Canadian Government, and had expressed their conviction that the Canadian Government would not forget to bestow due care upon the Indians. He believed that this was a perfectly wise course to take, and they had received the assurance of those distinguished men who had negotiated the matter that the rights of the Indians should be carefully attended to. He thought that it was better to rely upon the Canadian Government to pursue the same course of conduct which they had hitherto pursued towards the Indians in their own dominion, rather than endeavour to bind them down by any stringent conditions. He hoped the proposed arrangement would be brought to a satisfactory conclusion, because he believed that it would result in the great territory of the Hudson's Bay Company being civilized by colonization, and that it would be beneficial to Canada and redound to the honour of the British Empire. There would be no objection to produce the Papers.

SIR STAFFORD NORTHCOTE wished to say a few words in consequence of an observation made by the right hon. Gentleman the Under Secretary for the Colonies, and which, he thought, was open to be understood in a way not intended by the right hon. Gentleman himself. Speaking of the country in question, the right hon. Gentleman said that there were fine territories, which were capable of development, but that civilization and colonization had been hitherto excluded from them by a far-trading company. No doubt the expression was not used to cast blame upon the Hudson's Bay Company, but still it might lead to misunderstanding. It was quite true that a very appreciable proportion of this enormous district was, by its natural advantages of soil and climate, capable of sustaining a large population—that was to say, it would yield a very considerable produce. This, however, was not all that

was required to render a country capable of settlement by colonization. It was also required that there should be convenient means of access; and, moreover, it was required, when settlers were invited to go to a territory, that they should be certain that when they got there they would have the advantage of a regular form of government; that they would have protection, and the means of carrying on their affairs. Until a comparatively recent period this had not been the case with the territory to which reference had been made, and that, not owing to any fault on the part of the Company, but owing to the comparatively slow progress of the neighbouring countries. The right hon. Gentleman (Mr. Monsell) had contrasted Minnesota with the Red River Settlement, but it should be borne in mind that Minnesota had immediate connection with the United States, and that population had been advancing to Minnesota with comparative ease; whereas to get to the Red River Settlement a very difficult country had to be traversed. There was also the question as to what was to be the position of the settlers when they did get there. In Minnesota there could be no difficulty, for the American Constitution provided for the case; but with regard to the Red River Territory there was a difficulty because of the peculiar position and powers of the Company. It was a Company which had been formed for the purposes of trade; it had certain rights, and powers to administer government, but those rights were very imperfect, and it was improbable that a proper settlement of territory could be made unless the powers of the Company were extended, or unless the Imperial Government took the matter in hand, and formed a colony there; or lastly, unless there were some arrangement for annexing the territory to a British colony. The administrators of the Hudson's Bay Company had always expressed themselves ready to aid the Government in the adoption of any measures which might be taken for the settlement of that portion of their territory capable of settlement; but there was an enormous tract of country which never could be made suitable for settlement, and in which the fur trade would continue to be carried on. The directors of the Hudson's Bay Company had always been ready to co-operate with the Imperial

Government; but the uncertainty which had existed during the last six or seven years in relation to the proposed Confederation of the American Provinces had kept things back. And further, it was at the request of the Imperial Government that the Hudson's Bay Company had abstained from coming to arrangements to develop the country, and they were very pleased to find that arrangements were now being made to open up the country. They thought that it was far better that those arrangements should be made through the instrumentality of the Government than by giving to the Company a character that would be foreign to them, or than by the Government establishing a Crown colony, though something might be said for this latter course. Those who were best informed were convinced that it would be for the advantage of Canada that she should have this territory connected with her, and at the same time he believed that such an arrangement would be the best for this country, and the best calculated to develop the territory of the Company. Feeling that this was a matter in which the honour and interests of the Imperial Government were concerned, he thought that the Government should facilitate the arrangements which Canada was making, and which arrangements would tend to relieve this country of responsibility. For instance, there was this question of our relations to the Indians, in which we should be relieved of responsibility. The Hudson's Bay Company had always done the best they could to preserve the Indian tribes with whom they came into communication. They had done a good deal to prevent the introduction of spirits, and had done other things to promote the welfare of the tribes. He believed that it was owing to the great skill with which the noble Lord (Earl Granville) had managed this matter that there was a chance of a satisfactory settlement. No doubt that when the question of guarantee was raised in such a form as that it could be discussed in that House the matter would be more thoroughly gone into; but at present he would content himself with thanking the Government, and more especially the noble Lord (Earl Granville), for the patience with which they had dealt with the matter, and in their not having despaired of the settlement when there seemed very little hope

of its being brought about. He felt certain he was only correctly representing what was the right hon. Gentleman's meaning in saying that he (Mr. Monseil) had no intention of casting any reflection on the Hudson's Bay Company.

MR. MONSELL said, that his right hon. Friend was correct in assuming that it was not his intention to cast any reflections on the Company.

VISCOUNT BURY said, he had taken for many years past great interest in this territory. He had not anticipated any discussion on the Motion before the House, because he had understood that the Papers asked for would be presented, and he believed that little now remained beyond expressing satisfaction at the termination of a long and tedious dispute that had for years existed. In spite of what had fallen from the right hon. Baronet the Member for North Devon (Sir Stafford Northcote), he maintained that the Hudson's Bay Company had shut up the territory from any possibility of development, and had kept it entirely to themselves. He was glad that this peaceful solution had been brought about, and had it been otherwise he should have been prepared to argue that the claims of the Hudson's Bay Company were untenable and indefensible. He trusted the Canadian Government would see that they would be incurring great responsibility by throwing obstacles in the way of a peaceful solution of the difficulty. They were, no doubt, of opinion that the rights of the Hudson's Bay Company, if they existed at all, had been very much exaggerated; and they might perhaps think it unfair that the £300,000 which they were called upon to pay should come out of their pockets, or be a charge upon them. As one who agreed with the Canadians in the main, he nevertheless trusted that they would not raise such an objection, but that they should take the long tenure of the Hudson's Bay Company as a guarantee that their rights did exist in some way or another. At all events, if he were a member of the Canadian House of Assembly, he would not raise such an objection, but would accept the settlement now arrived at as the best that could be devised. The right hon. Baronet who had just sat down had pleaded very strongly in favour of the Company, and he seemed to argue that the Company had done the best they

Sir Stafford Northcote

could for the Indians. He (Viscount Bury) did not think that was the case. The Hudson's Bay Company, of course, wanted people to procure the furs for them, and for this purpose they employed the aborigines. But they took little care of them. They always discouraged any attempt to educate the Indians, and the backwardness of the country was entirely due to the course they pursued. As the right hon. Gentleman at the head of the Government said some years since, they placed a "No Thoroughfare" board at the entrance to their dominions, and prohibited all access to them. There was enough fertile land to afford a farm and homestead for every man, woman, and child in the British dominions, and it was that which they were about to obtain for the £300,000 to which allusion had been made. The only way into it had been through the Red River, and there the Hudson's Bay Company established a military post for the purpose of cutting off communication with the interior. That post was established in 1812 by Lord Selkirk to prevent the North-west and Canadian Companies' hunters from entering the Hudson's Bay territories, who interfered with their fur-bearing animals, and that post had been maintained ever since. So far, however, from the establishment of that post being a friendly act towards the Indians, he regarded it solely as showing that the Company had determined to hold the territory as long as they could. The hon. Member for Banbury (Mr. B. Samuelson) had expressed a doubt whether emigration could be attracted into this country—because the tide of emigration was exclusively turned towards the United States—from their being no access to this land. He (Viscount Bury) hoped that now easy access would be given to the interior, in which case there would be as vast and as rapid a tide of British emigration into that country as there now was into the West of the United States. A man when he landed in America was forwarded on to the fertile prairies of the West, but if he went to Canada he had to hew down a vast forest before he could plant his first crop. A man did not like to encounter such labour and toil when he knew that by going a little south of the 49th parallel he came on a vast tract of prairie land, where he could at once commence his ploughing and sowing operations, and in the course

of a year reap a harvest. If Canada did her duty—as he was sure she would—they would have a fair and free access to land as fertile as that which was so eagerly sought after in the United States. No man who had not seen this country could form any conception what wealth nature had placed there. A great deal had been said about the barrenness of the country. It had been compared to Siberia and the rocky regions around the North Pole. Some portions, undoubtedly, were inaccessible to colonization; but others were equal to any part of Europe in the abundance of crops that they offered in return for moderate labour and moderate tillage. He hoped, too, that by-and-by we should through this territory have an excellent route to our possessions in the East; and he believed that within the lifetime of many now living there would be established, by ship, canal, railroad, and telegraph, direct communication between the Atlantic and the Pacific. The navigation required improvement he believed only in three places in order to admit of their taking a ship straight from England to the foot of the Rocky Mountains without discharging cargo. The land, too, could be easily adapted to the laying of railways, as the gradients to be overcome were very few and very slight. The enterprise was a magnificent one in an engineering point of view, but apprehensions had been expressed that it could never be a good commercial speculation, since being constructed in part upon the slopes of the Sierra Nevada, it could not be worked during some months in winter. Another line somewhat lower down had been designed, but not yet constructed, and, if carried out, this, he believed, would be a route in every way suited to the traffic of which he had spoken. But there was another line passing through Canada, and lying, as it were, ready to our hands, and our Canadian fellow-subjects were not the men to let slip an opportunity without improving it. Having held the office of superintendent-general of the Indian tribes during the time that he was in Canada, he had to a certain extent studied the Indian question and felt considerably interested in it. He hoped the Government would not fall into mistakes similar to those which had been committed on former occasions. The practice of setting aside reserves of land for Indians he believed to be an erro-

neous policy; for if the lands were well placed, and suitable for purposes of settlement, in time they became mere baits to attract the cupidity of squatters, who must be displaced in favour of the Indians if faith were to be kept with them. There had been a painful illustration already of the mode in which engagements entered into with the Indians had been dealt with. When the lands were taken from the Indians and apportioned among the settlers the Indians were promised British protection, and told in the figurative language of their own treaties, that as long as grass grew and water ran they should receive certain annual presents from the British Government. These were given to them for many years, till a time came when the British Government grew tired of the payments, and, supposing, apparently, that, being savages, they were incapable, as a mass, of civilization, proceeded to act upon the principle that the faith of treaties need not be kept up with them. At the time when he himself was in Office he was instructed, as his predecessor had also been, to prepare a scheme by which, once for all, those presents from the British Government should be discontinued. They had been discontinued, and a great breach of faith with the Indians had been committed. It was one of those things that were gone and past, but he could not, when he looked back, but lament it. He had been often asked by the Indians themselves, whether their great mother across the Atlantic—as they called the Queen—really knew of the fraud which, they said, had been committed upon the children of those who had faithfully served her fathers in former years. This question was one which he could not answer, and he had felt the shame of being obliged to hold his tongue before these untutored savages. He hoped that we should avoid these errors in future, and, while extending to the Indians the protection of British Law, we should no longer keep them under perpetual tutelage, teaching them to look to the Government for the food they ate and the plough they tilled the land with. We had made the property of the Indians not that of the individual, but of the tribe; we had made them incapable of being sued for debt, incapable of even running up a tavern score. He himself had seen a new plough left in the soil,

a new seine left on the bank of the river, simply because no one was responsible for the care of their implements, which belonged to the tribe. Had the Government acted towards them on a different principle, the Methodists—who were by far the best missionaries—would soon have taught them the value and the duty of protecting property. Some of the native Indians were quite capable of civilization—he had known one who was a barrister, and a very able one, too—but, he was bound to confess that, as a general rule, they were not up to the mark of the average of the population. In Lower Canada they were more nearly on a level as regards intelligence, but in Upper Canada the comparison was not quite fair, for the average intelligence there was much greater than amongst the rest of the population. The separation in point of language between the Indians and the English-speaking population was the real difficulty in the way of the progress of the tribes. He would not discuss the question of the rights of the Hudson's Bay Company. If they were merely sitting round a table, some one possibly might advance the opinion that the Company had no rights at all; but he thought it most undesirable that any such question should be raised, and he conjured the Government to let it alone. He could not sit down without protesting against the doubt which had been thrown out by some hon. Members in the course of this debate, as to the loyalty of the Canadians and their attachment to the Queen and British institutions. Putting the matter on the lowest ground of self-interest, he could see no reason why the Canadians should wish to join the Confederacy of the United States. Why should they who possessed complete autonomy, be anxious to throw themselves in the arms of that democracy? The yoke of the Queen did not press heavily upon the Canadians, and they escaped from finding themselves every four years involved in the throes of what resembled the sublimated essence of a general election—the election of a President,—which was no sooner decided than they were thrown afresh into the turmoil of canvassing for his successor. Canada, moreover, in place of diminishing her taxation, by joining the United States, would have to take over a share of the existing debt. On the other hand, by

Viccent Bury

remaining as she was, with one half of the continent of America in her hands, her future prospects were not inferior to those of the United States. The Canadians had been brought up under the British flag—they were attached to our form of government—they revered our beloved Queen, and he was persuaded that nothing would induce them to change the form of government under which they had commenced such a happy era of prosperity.

Mr. ELLICE concurred to the fullest extent in all that his noble Friend (Viscount Bury) had asserted respecting the loyalty of the Canadians, but wished that even a part of his great expectations, as to the future progress of the North-west territory, might be fulfilled. He thought that the Government had taken a proper step in the settlement they had made with the Hudson's Bay Company. He agreed that a trading company was the worst possible body to do the work of colonization; but, at the same time, he did not think that the past management of the Hudson's Bay Company had been open to all the criticisms of his noble Friend. The North-west territory was the only British colony where there had been a considerable expenditure of British capital, which had not cost the taxpayers of this country a single sixpence. With respect to the Indians, it was the interest of the Company, supposing they were influenced by no other motive, to nurse and to maintain them; and it was perfectly well known that if the Company were to be withdrawn tomorrow from that territory, the Indians would starve. They had given up their primitive habits in hunting for the service of the Company, and by the Company they were supported. He agreed with the noble Lord that reserves were of no use for the Indians. It was useless to shun the fact that the Indians and civilization were incompatible with one another, and that, as civilization advanced, so, in Canada, as in the United States, the Indians would disappear. As long, however, as the Hudson's Bay Company existed, as a fur-trading company, they could not do without the Indians; and it was to that Company that the House must trust for their future protection and maintenance. With respect to the settlement proposed by the Colonial Office, it was, upon the whole, fair and equitable,

and beneficial to this country; because, as long as there was an independent territory in America having no means of protecting itself, and claiming protection from this country, there was always an element of danger in the connection. Now that it was united to Canada, the Government of that country must take charge of it, and this country would cease to be responsible. He trusted that the Colonial Office had received a guarantee from the Colonial Government for the establishment of a proper Government in the Red River territory. He thought it wise on the part of the Colonial Office to give the guarantee of £300,000, if it succeeded in effecting a settlement with the Hudson's Bay Company, and relieving this country of all responsibility with regard to the settlement; but the Colonial Office ought to insist that a Government should be placed by Canada in the Red River to enforce the law, and maintain good order in the settlement.

Sir CHARLES DILKE said, that as the House might not have another opportunity of discussing this question, he was anxious to make a reply to one or two of the points raised by the noble Lord (Viscount Bury). When the noble Lord represented it to be a matter of vital importance that there should be a communication through the British territory from the Atlantic to the Pacific, and drew an analogy with the case of the United States, he (Sir Charles Dilke) desired to point out that this communication—in the case of the United States—was mainly established for political, and not for commercial reasons; whereas, in the case of Canada, if the consideration there was also political, then it was for the consideration of the Colonial and not of the Home Government; or, if it was to be alleged that the through communication was desirable for commercial purposes, then he took exception to that statement altogether. In the first place, the American line had got the start; and further, he was convinced that no line of railway, whether English or American, could ever compete, in the China and India trade, with water carriage. The main articles of that trade were tea and silks, and both suffered great damage from repeated transshipments. The time occupied by the journey was of no great importance, but it was strictly necessary to avoid the four

shipments and transshipments that would be needed if the goods were sent from the Pacific to the Atlantic by land. It might, perhaps, be said that the railway was required for the purpose of opening-up the country to emigration from England, but he much doubted the truth of that representation, because European emigrants generally remained in the cities and large towns, and the natives, whose labour they displaced, sought the plains of the West. He made these remarks because he was afraid that an opinion prevailed in Canada that this country would be inclined to guarantee an extension of the Inter-colonial Railroad.

Mr. ADDERLEY said, he was glad attention had been called to this subject, because what had been stated by the Under Secretary for the Colonies, by the noble Lord the Member for Berwick-on-Tweed (Viscount Bury), and the discussion which had followed, would spread abroad in the country a knowledge of the great resources which the fertile belt in the Hudson's Bay territory would offer to colonization. It was a misfortune to this country that so much ignorance should prevail among the people with reference to the space of country which belonged to them. It had often struck him that in our primary schools every geography was taught but that of our colonies. Americans who visited this country were astonished that so little attention was given to this subject in the primary education of the great mass of the people. Our colonies ought to be as valuable to us—as a means of relieving over-population and the pent-up industries of the kingdom—as the Far West was to the United States. They should be almost a guarantee against the prevalence of chronic poverty among us; but for want of information and familiarity their advantages were never looked to as a provision for the poor and enterprising, if, indeed, they had not purposely been kept in mystery not to use the horrors of transportation. Representing, to a certain extent, the late Government, he offered his congratulations to Her Majesty's Ministers on the successful termination of the negotiations with the Hudson's Bay Company. The late Government had conducted the negotiations from the time of the Confederation of Canada upon the foundation of the previous negotiations

commenced by the Duke of Newcastle. The negotiations had extended over a great number of years, and had, by the intricacy of claims, and doubtfulness of rights, become a great deal too complicated; but their complication had been very much curtailed, and he had to compliment the Government on the simpler arrangement which had been made with the Company. He thought the payment of a sum of £300,000 down, instead of a sum gradually accumulating by instalments over a number of years, was greatly preferable; the reserves of land were also simpler, and the position of the Company for the future was improved. Canada undertook at once both the territory and its government. He said this particularly with reference to the observation of the hon. Member for St. Andrew's (Mr. Ellice), who said he hoped that some stipulation had been made with Canada as to government. They handed over the reins to Canada, and, of course, Canada was to govern; if not the negotiations would fall through. Canada would undertake the promotion of all those objects which had been alluded to in the debate connected with the opening up of the country. As to reserves of land for Indians, the late Government had made no stipulations. Scrupulously avoiding laying down any specific recommendations as to the treatment of the Indians, they had expressed a hope that they would be scrupulously considered, as they should, and, no doubt, would be, but leaving it entirely to the wisdom of the Canadian Government how they should be treated; for the Canadian Government were as good judges of the interests of the Indians as we could be, and so far much better, because they would have to suffer by any unwise arrangement they might make. These things were left to Canada, and all we took on ourselves in the negotiations was the guarantee proposed for the loan by which the £300,000 was to be raised. If that was all, the liability we incurred in so successful an arrangement as this, he must say a great object had been gained for the country at very little cost or risk to ourselves. He quite agreed as to the general impolicy of offering guarantees. He had himself had the misfortune to have the task of proposing to the House the guarantee in connection with the Intercolonial Railway, and he had

Mr. Adderley

pledged himself never to do anything of the kind again. In the present instance he acquiesced in the proposal as special and exceptional, because they gained an enormous advantage at very little cost. He quite agreed with the Under Secretary that this was not simply a Canadian question; it was one of very great Imperial interest. There could not be a doubt about it. England had a great interest in making this arrangement as easy, speedy, and perfect as possible. We had to stand out of the way of a great country's growth, impeded by an old charter of one of our Kings. We were removing that barrier we had ourselves created; and, having done so, we undertook no more than to unite with our fellow-countrymen in Canada in opening up the resources of this vast tract, and rendering it as available to those who emigrate hence as to those who live on the spot. When it was said that recent expressions of opinion, especially in British Columbia, had run in favour of annexation to the United States, it was well to remember that the reason was this—that the greater part of the present population of Columbia—98 per cent—had come from the United States, and therefore it was natural that their inclination should be stronger for their own country than towards Great Britain; but when once the intervening territory was opened, the tide of population from this country would be greatly increased, an English population would spread over it; English connection and attachment would supersede the alien sympathies, and a territorial provision would become available for every family in England that chose to go there.

Mr. E. T. HAMILTON agreed in the desirability of making known in this country facilities for communication with other parts of Her Majesty's dominions, but he also thought it desirable that no delusive hopes should be held out. He understood from the resident Governor of the Hudson's Bay Company that the settlement from Canada of the fertile tract of territory which had been alluded to was almost impossible. If that settlement were effected it must be from the overflow of population from Minnesota, and not from Canada.

Mr. GLADSTONE: There are one or two topics that have been mentioned in this debate on which I wish to make a few remarks. I cannot but say I am

exceedingly glad that the time has at length arrived when a very difficult problem has reached its solution. Twenty years ago, when discussions took place in this House having in view the very object that is now about to be attained, I was one of those who, at the time, feeling a very lively interest in the question, entered keenly into the matter, and, perhaps, did somewhat less than justice to the Hudson's Bay Company, to whom now everyone would wish that the fullest justice should be done. At the same time I think that, fundamentally, we were right in the policy we then endeavoured to recommend, because it has been frankly admitted in this debate, and is now generally conceded, in the first place, that the Hudson's Bay Company, as a company with exclusive privileges, and constituted for the purpose of fur trading, neither was nor possibly could be a good steward of the great interests involved in the government of a large continent; and, in the second place, that it was not possible for this country to take upon itself and to administer directly the responsibilities that were then incumbent upon the Hudson's Bay Company. Canada evidently was pointed out by nature and by circumstances as the proper person to come into that position, and that position she is about at length to adopt. My hon. Friend the Member for St. Andrew's (Mr. Ellice) asks us whether we took an engagement from Canada for the government of this territory, and I shall repeat on the part of the Government the answer made by my right hon. Friend the Member for North Staffordshire (Mr. Adderley), that it would be neither becoming nor possible to ask Canada to give such an engagement. Canada would be senseless unless she entertained the fullest sense of her responsibility and duty in this matter, and her interests are as much connected with the fulfilment of this duty as in any possible case they could be. There was a remark that fell from my noble Friend the Member for Berwick (Viscount Bury) that I am loth to pass without some qualification. I must thank him—and I think I express the general feeling—for the interesting and able speech which he delivered. I am sure he will excuse me if on one point I venture to say a word for the honour of this country, though in apparent opposition to what he

said—I mean with respect to that very animated censure which he passed upon the course taken by the British Parliament in regard to the presents made to the Indians, and which he did not scruple to describe as a gross breach of faith, of which the undivided responsibility lay with this country—if with this country, then necessarily and exclusively with this House. The ground of my noble Friend's charge was this—that a covenant had been made with the Indians that these presents should be annually given to them "so long as the grass grow and the water ran." I will not attempt to escape from the stringency of that covenant; but this I will say, that I do not think it necessary for me to attempt to defend England against a charge of gross breach of faith by shifting the responsibility elsewhere. But this I do say, that that covenant to give presents to the Indians was strictly and essentially an incident of the position which we then held in regard to Canada. At the time when we entered into that covenant we held Canada not so much for the benefit of Canada as for the benefit of this country, and Canada was managed, not according to her own will and discretion, but according to ours. In process of time that state of things was fundamentally changed. Every power that we had exercised over Canada for our own use or supposed advantage was successively given over into the hands of Canada. With these powers the people of this country practically came to the conclusion that it was necessary that the incidental costs and burdens should be likewise handed over, and among those incidental costs and burdens that of the annual presents to the Indians. That is the real ground on which this House proceeded. I do not think it was any part of our duty to determine whether the covenant with the Indians was liable to change in consequence of the altered circumstances. The question to which we looked was whether we could fairly and justly, under this covenant, continue to ask the tax-payer of this country to pay a sum of, I think, a good many thousands a year for the purpose of these presents to the Indians, when Canada became a country for every practical purpose perfectly independent. The House of Commons arrived at the conclusion that it was not reasonable or just to make that demand upon the people of

England. I notice this part of my noble Friend's speech, because nothing can be more unworthy of an Assembly like the present than to have it supposed that, in respect to the engagements we concluded, we adhered to them less faithfully when dealing with a weak people than when stipulating with a strong country. With regard to the other topics of debate, I must say it certainly is a question of the greatest interest to consider what will be the course of events with respect to the future settlement of the great valley of Saskatchewan. There is very conflicting testimony on the subject; and probably it is affected by so many circumstances of which as yet we have no experience, that the soundest judgment and the most extensive knowledge cannot speak with confidence upon it at the present time. When Sir George Simpson published that interesting account of his voyage round the world he spoke in the most sanguine terms of this territory; but subsequently when he gave evidence before a Committee of this House, he very much qualified and almost contradicted his former statements. The future alone can tell what are the capabilities of this territory. I think it necessary to say a word with regard to continuing colonial guarantees. I believe that in the private relations of life it often happens that a man who is ready to undertake an engagement on the part of somebody else, by the fact of his undertaking such engagement, instead of leaving on the mind of the other party the impression that he ought not to apply to him again, leaves, on the contrary, the impression that he is an accommodating person, and that nothing but a succession of pertinacious, or at least energetic applications is required in order to extend the process of entering into engagements. I hope our excellent Canadian fellow-subjects are not under an impression of this kind; but whether they are or not, I feel content to bear my testimony to what the right hon. Gentleman opposite (Mr. Adderley) has said on colonial guarantees. I cannot adopt an absolute rule on this subject. It is impossible to say that there will be no such thing proposed to this House as a colonial guarantee. But whenever a Government has proposed a colonial guarantee in the past, this House has always expected that Government to show that the proposal was made with a view of

Mr. Gladstone

escaping from the kind of relations under which alone such a guarantee was required, and of establishing freer relations under which our colonial fellow-subjects would bear their own burdens and leave us to bear ours. In conclusion, I thank the hon. Member for Chelsea (Sir Charles Dilke) for having given the House the benefit of his experience with regard to the difficulties with which this portion of the subject is beset.

VISCOUNT BURY apologized if he had used too strong expressions with regard to our treatment of the Indians; but he had had in his mind at the time a covering despatch from Sir Edmund Head, who said that he approached the subject with pain and misgiving, never having been able to persuade himself that the conduct of this country towards the Indians had been consistent with good faith.

MR. HADFIELD said, it was strange that the opportunities for emigration which these vast regions presented were so much neglected by the English people. While those regions were inviting settlers, England was over-run with population, often hard driven to find employment. He regretted greatly that the sons of our aristocracy, instead of remaining at home to fill up all the places which they could obtain in the army, the navy, the church, or the law, did not follow the examples of their ancestors, and set themselves the task of colonizing fresh regions of the earth. He had heard it said that the reason why the younger sons of the aristocracy remained at home was because they did not wish to leave the luxuries of their fathers' tables. It was a poor reason; and he thought that the teeming population of this country ought to be better instructed as to the position and advantages of our colonies as fields for emigration.

Motion put, and agreed to.

MAIL CONTRACTS.—RESOLUTIONS.

MR. SEELY, in calling attention to the Report of the Select Committee on the American Mail Contracts, said that these contracts had been objected to last year on various grounds. It was said that they ought not to have been entered into for so long a period as eight years; that it was unwise to pay a fixed subsidy annually to certain firms, irrespective of the number of letters carried;

APPENDIX D

Version Published by Parliament of the United Kingdom in August 1870, in
Correspondence Relating to the Recent Disturbances in the Red River Settlement, Printed
by William Clowes & Sons, London

PROCLAMATION.

V. R.

By His Excellency the Right Honourable Sir JOHN YOUNG, Baronet, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of The Most Honourable Order of the Bath, Knight Grand Cross of The Most Distinguished Order of St. Michael and St. George, Governor General of Canada.

To all and every the Loyal Subjects of Her Majesty the Queen, and to all to whom these Presents shall come

GREETING:

THE QUEEN has charged me, as Her Representative, to inform you that certain misguided persons in Her Settlements on the Red River, have banded themselves together to oppose by force the entry into Her North-Western Territories of the Officer selected to administer, in her name, the Government, when the Territories are united to the Dominion of Canada, under the authority of the late Act of the Parliament of the United Kingdom; and that those parties have also forcibly, and with violence, prevented others of Her loyal Subjects from ingress into the Country.

Her Majesty feels assured that She may rely upon the loyalty of Her Subjects in the North-West, and believes those men who have thus illegally joined together, have done so from some misrepresentation.

The Queen is convinced that in sanctioning the Union of the North-West Territories with Canada, She is promoting the best interests of the residents, and at the same time strengthening and consolidating Her North American Possessions as part of the British Empire. You may judge then of her sorrow and displeasure with which the Queen views the unreasonable and lawless proceedings which have occurred.

Her Majesty commands me to state to you, that She will always be ready through me as Her Representative, to redress all well founded grievances, and that She has instructed me to hear and consider any complaints that may be made, or desires that may be expressed to me as Governor-General. At the same time She has charged me to exercise all the powers and authority with which She has intrusted me in the support of order, and the suppression of unlawful disturbances.

By Her Majesty's authority I do therefore assure you, that on the Union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws, and in the spirit of British justice.

I do, further, under Her authority, entrust and command those of you who are still assembled and banded together, in defiance of law, peaceably to disperse and return to your homes, under the penalties of the law in case of disobedience.

And I do lastly inform you, that in case of your immediate and peaceable obedience and submission, I shall order that no legal proceedings be taken against any parties implicated in these unfortunate breaches of the law.

Given under my Hand and Seal at Arms at Ottawa, this Sixth day of December, in the year of Our Lord One Thousand Eight Hundred and Sixty-nine, and in the Thirty-second year of Her Majesty's Reign.

SEAL.

By Command,

JOHN YOUNG.

H. L. LANGEVIN, Secretary of State.

Version Published by Parliament of Canada late in 1870, in Correspondence and Papers Connected with Recent Occurrences in the North-West Territories, Printed by Order of Parliament, Sessional Papers, Volume V, Third Session of the First Parliament of the Dominion of Canada, Session 1870, Printed by I. B. Taylor, Ottawa

PROCLAMATION.



By His Excellency the Right Honorable Sir JOHN YOUNG, Baronet, a Member of Her Majesty's Most Honorable Privy Council, Knight Grand Cross of the Most Honorable Order of the Bath, Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George, Governor General of Canada.

To all and every the Loyal Subjects of Her Majesty the Queen, and to all to whom these Presents shall come,

GREETING :

THE QUEEN has charged me, as Her representative, to inform you that certain misguided persons in Her Settlements on the Red River, have banded themselves together to oppose by force the entry into Her North-Western Territories of the officer selected to administer, in Her Name, the Government, when the Territories are united to the Dominion of Canada, under the authority of the late Act of the Parliament of the United Kingdom; and that those parties have also forcibly, and with violence, prevented others of Her loyal subjects from ingress into the country.

Her Majesty feels assured that she may rely upon the loyalty of her subjects in the North-West, and believes those men, who have thus illegally joined together, have done so from some misrepresentation.

The Queen is convinced that in sanctioning the Union of the North-West Territories with Canada, she is promoting the best interest of the residents, and at the same time strengthening and consolidating her North American possessions as part of the British Empire. You may judge then of the sorrow and displeasure with which the Queen views the unreasonable and lawless proceedings which have occurred.

Her Majesty commands me to state to you, that she will always be ready through me as her representative, to redress all well founded grievances, and that she has instructed me to hear and consider any complaints that may be made, or desires that may be expressed to me as Governor General. At the same time she has charged me to exercise all the powers and authority with which she has entrusted me in the support of order, and the suppression of unlawful disturbances.

By Her Majesty's authority I do therefore assure you, that on the union with Canada all your civil and religious rights and privileges will be respected, your properties secured to you, and that your Country will be governed, as in the past, under British laws, and in the spirit of British justice.

I do, further, under her authority, entreat and command those of you who are still assembled and banded together in defiance of law, peaceably to disperse and return to your homes, under the penalties of the law in case of disobedience.

And I do lastly inform you, that in case of your immediate and peaceable obedience and dispersion, I shall order that no legal proceeding be taken against any parties implicated in these unfortunate breaches of the law.

Given under my Hand and Seal at Arms at Ottawa, this Sixth day of December, in the year of our Lord, One Thousand Eight Hundred and Sixty-nine, and in the Thirty-third year of Her Majesty's Reign.

[SEAL.]

By Command.

JOHN YOUNG.

H. L. Langevin,
Secretary of State.

Colonel Garnet Joseph Wolseley's Proclamation

To the Loyal Inhabitants of Manitoba

Her Majesty's Government having determined upon stationing some troops among you, I have been instructed by the Lieutenant-General Commanding in British North America to proceed to Fort Garry with the force under my command. Our mission is one of peace and the sole object of the expedition is to secure Her Majesty's sovereign authority – Courts of Law such as are common to every portion of Her Majesty's Empire will be duly established and Justice will be impartially administered to all races and to all classes. The Loyal Indians or Half Breeds being as dear to our Queen as any other Loyal Subjects.

The force I have the honour of commanding will enter your Province representing no party either in Religion or Politics, and will offer equal protection to the lives and property of all races and all creeds.

The strictest order and discipline will be maintained and private property will be carefully respected. All supplies furnished to the troops will be duly paid for – should any one consider himself injured by any individual attached to the force his grievances shall be promptly enquired into.

All loyal people are earnestly invited to aid me in carrying out the above mentioned subjects.

G. J. Wolseley
Colonel
Commanding Red River Force

Port Arthur's Landing
30th June 1870

[Emphasis added by the author]

Reproduced by:

Louis Riel on the New Nation Press (Butler 1870)

Morton, W. L.

1956 Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869-1870, Toronto, ON: Champlain Society

Huyshe, G. L.

1871 The Red River Expedition, London, UK: Macmillan and Company

APPENDIX E

Indian & Northern Affairs Chronology

http://www.ainc-inac.gc.ca/pr/trts/hti/site/mpindex_e.htm

This series of maps and description illustrate the historical evolution of Canada through treaty-making between 1867 and 1999, focussing on the Numbered Treaties. This chronology appears on the Indian & Northern Affairs Canada website. It presents a rather distorted and partial view of events, completely omitting the promises made in 1867 and the proclamations and orders-in-council of the British Cabinet issued during annexation.

Map Date/ Description
1867 Canada - Territorial Evolution Map (PDF 449 kb) Confederation. By the time Nova Scotia, New Brunswick, Ontario and Quebec form the Dominion of Canada, the Robinson Treaties, Upper Canada Land Surrenders and Peace and Friendship Treaties are already in place.
1870 Canada - Territorial Evolution Map (PDF 1567 kb) Purchase of Rupert's Land. Canada acquires Rupert's Land and the adjacent North-Western Territory from the Hudson's Bay Company. Manitoba enters Confederation.
1871 Canada - Territorial Evolution Map (PDF 1622 kb) Treaty No. 1 & Treaty No. 2. The first post-Confederation treaty, Treaty One, is concluded in August 1871 and covers Manitoba as it existed then. Treaty Two is concluded a few weeks later and covers areas needed for expansion and settlement in the west and north of the Province. British Columbia enters Confederation on the understanding that construction of the east-west railway will begin in two years and will be completed in ten.
1873 Canada - Territorial Evolution Map (PDF 1630 kb) Treaty No. 3. After three years of negotiations, the Dominion of Canada and the Saulteaux tribe of Ojibway Indians entered into treaty at the North-West Angle of the Lake of the Woods. With the Saulteaux surrendering title to an area of 14,245,000 hectares, Canada acquired land for agriculture, settlement and mineral discovery. More importantly, Canada secured communications with the North-West Territories, including the route of the future Canadian Pacific Railway. In 1873, Prince Edward Island enters Confederation, bringing the number of provinces in the Dominion to seven.
1874 Canada - Territorial Evolution Map (PDF 1646 kb) Treaty No. 4. Initiated by Indians and Métis concerned about the declining numbers of animals which provided them with a living. Treaty 4 covers present-day southern Saskatchewan. Provisional boundary set in northern Ontario.
1875 Canada - Territorial Evolution Map (PDF 1651 kb) Treaty No. 5. This treaty originated in two historical processes. The southern part, negotiated in 1875, was one of the southern Prairie treaties, and was in large part a result

<p>of the insistence of the Native people of that region that their aboriginal rights be recognized by the Canadian government, which had recently acquired title to their lands. The northern part of Treaty 5 was negotiated in 1908.</p>
<p>1876 Canada - Territorial Evolution Map (PDF 1665 kb) Treaty No. 6 - The negotiation of this treaty took place during a difficult period for the Plains Cree, who were suffering from the rapid decline of the buffalo. The documents indicate that their concerns included medical care and relief in case of need.</p>
<p>1877 Canada - Territorial Evolution Map (PDF 1662 kb) Treaty No. 7. The last of the numbered treaties negotiated and signed during the 1870s. The treaty covers the southern part of present-day Alberta. Addition of Arctic Islands. British rights to these islands pass to Canada.</p>
<p>1881 Canada - Territorial Evolution Map (PDF 1956 kb) Addition to Manitoba. The boundaries of Manitoba are extended to include substantially all the area covered by Treaties One, Two and Three.</p>
<p>1889 Canada - Territorial Evolution Map (PDF 1962 kb) Treaty No. 6 Adhesion (Montreal Lake). Addition to Ontario (Kenora District)</p>
<p>1898 Canada - Territorial Evolution Map (PDF 1984 kb) Creation of the Yukon. The Yukon becomes a Territory separate from the North-West Territories. The boundaries of Quebec are extended north, almost complementing the revised northern boundary of Ontario.</p>
<p>1899 Canada - Territorial Evolution Map (PDF 2057 kb) Treaty No. 8. The first of the northern treaties covered an area of 324,900 sq miles and represents the most geographically extensive treaty activity undertaken. It comprises what is now the northern half of Alberta, the northeast quarter of British Columbia, the northwest corner of Saskatchewan, and the area south of Hay River and Great Slave Lake in the Northwest Territories.</p>
<p>1905 Canada - Territorial Evolution Map (PDF 2048 kb) Treaty No. 9. In response to continuous petitions from the Cree and Ojibwa people of northern Ontario, and in keeping with its policy of paving the way for settlement and development, the federal government in 1905-1906 negotiated Treaty 9, also known as the James Bay Treaty. For the first and only time, a provincial government took an active role in negotiations. Together with the area acquired by adhesions in 1929-1930, Treaty 9 covers almost two-thirds of the area that became northern Ontario. In 1905, the provinces of Alberta and Saskatchewan are created.</p>
<p>1906 Canada - Territorial Evolution Map (PDF 2028 kb) Treaty No. 10. Covers 220,000 square kilometres of northern Saskatchewan and Alberta. Unlike the land in southern Saskatchewan, the Treaty 10 lands were deemed unsuitable for agriculture and so the federal government did not respond to demands from the region's Native people for a treaty until the early 20th century, when the mixed-blood people of northern Saskatchewan began to demand compensation for loss of aboriginal rights and the Provinces of Saskatchewan and Alberta had been created.</p>
<p>1908 Canada - Territorial Evolution Map (PDF 2033 kb)</p>

<p>Adhesion to Treaty No. 5. Though requested for many years by the Native people, this adhesion was the result of government initiative.</p>
<p>1912 Canada - Territorial Evolution Map (PDF 2052 kb) Ontario and Manitoba attain their present boundaries. Quebec extends northward to absorb the Ungava District and agrees to negotiate surrender of the Indian title to the territory; the Quebec-Labrador boundary remains in contention.</p>
<p>1921 Canada - Territorial Evolution Map (PDF 2163 kb) Treaty No. 11. The last of the numbered treaties covers most of the Mackenzie District. The land in the area was deemed unsuitable for agriculture, so the federal government was reluctant to conclude treaties. Immediately following the discovery of oil at Fort Norman in 1920, however, the government moved to begin treaty negotiations.</p>
<p>1923 Canada - Territorial Evolution Map (PDF 2100 kb) Williams Treaties. Treaty-making activities along the north shore of Lake Ontario in 1783-84, variously known as the Toronto Purchase, the Carrying Place Purchase, the Crawford Purchases and the Gunshot Treaty, produced lingering uncertainties that are resolved in large part by the Chippewa and Mississauga Agreements negotiated in 1923.</p>
<p>1949 Canada - Territorial Evolution Map (PDF 2185 kb) Newfoundland and Labrador enter Confederation.</p>
<p>1999 Canada - Territorial Evolution Map (PDF 2585 kb) Creation of Nunavut.</p>
<p>Historical Treaties of Canada (PDF 1615 kb) Historical Treaties of Canada</p>

***Regulation for the Definition of the Term "Jew"
in the Government-General
July 24, 1940***

§ 1

Where the word "Jew" is used in Legal and Administrative Provisions in the Government-General, it is to be interpreted as follows:

- 1) Anyone who is a Jew, or is considered a Jew, in accordance with the Legal Provisions in the Reich-,
- 2) Anyone who is a Jew, or is considered a Jew, and is a former Polish citizen or stateless person, under § 2 of this Regulation.

§ 2

- 1) A Jew is a person descended from at least three fully Jewish grandparents by race.
- 2) A person is considered a Jew:
 - a) if he is descended from two grandparents who are full Jews by race and if he was a member of the Jewish Religious Community on September 1, 1939, or joined such a community subsequently;
 - b) if he was married to a Jew on the date on which this Regulation came into force, or married a Jew subsequently;
 - c) if he is the product of extra-marital intercourse with a Jew in accordance with para. I and was born after May 31, 1941.
- 3) A grandparent is automatically considered a full Jew if he was a member of a Jewish community.

§ 3

- 1) Where the concept [person of] Jewish Mischling is used in Legal and Administrative Provisions of the Government-General, it is to be interpreted as follows:
 - a) a person who is a Jewish Mischling in accordance with the Reich Legal Provisions-,
 - b) any person who is a former Polish citizen or stateless, and is descended from one or two grandparents who are full Jews by race, unless he is considered a Jew under § 2, para. 2. 2) The provisions under § 2, para. 3 apply similarly.

§ 4

- 1) A business enterprise is considered Jewish if the owner is a Jew in accordance with § 1.
- 2) A business enterprise which is owned by a Limited Company is considered Jewish if one or more members who are personally responsible are Jews....
- 3) A place of business is also considered Jewish if it is in practice under the dominant influence of Jews.
- 4) The provisions under para. 1-4 also apply to Associations, Endowments, Institutions and other organizations which are not business enterprises.

§ 5

Legal and Administrative Provisions issued for Jews apply to Jewish Mischling only where this is expressly stated.

§ 6

This Regulation comes into effect on August 1, 1940.

Cracow, July 24, 1940

The Governor General for the Occupied Polish Territories
Frank

Provided from the archives of the Simon Wiesenthal Center <http://motlc.wiesenthal.com>
The text is reproduced from an actual edict issued under the authority of the Nuremberg
Laws of Nazi Germany, 1935

**Common Law Application of
British Imperial & Hudson's Bay Company Policy**

Campbell v. Hall, [1774] 1 Cowp. 204, 98 E.R. 1045

Lord Mansfield

Cited from the Supreme Court of Canada in:

Calder v. Attorney-General of British Columbia [1973] S.C.R. 313

(198) CALDER v. A.-G. B.C. 145

In Re Southern Rhodesia, [1919] A.C. 211, Lord Sumner said at pp. 233-4:

In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." *On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.*

(Emphasis added.)

Chief Justice Marshall in his judgment in *Johnson v. M'Intosh* referred to the English case of *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045. This case was an important and decisive one which has been regarded as authoritative throughout the Commonwealth and the United States. It involved the rights and status of residents of the Island of Grenada which had recently been taken by British arms in open war with France. The judgment was given by Lord Mansfield. In his reasons he said at pp. 208-9:

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, and Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the

146 CALDER v. A.-G. B.C. (199)

limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case [(1608), 7 Co. Rep. 1a, Moore (K.B.) 790 sub nom. Case del Union, del Realm, D'Escose, ove Angleterre, 72 E.R. 908], shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or

give him privileges exclusive of his other subjects; and so in many other instances which might be put.

A fortiori the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration.

It is of importance that in all those areas where Indian lands were being taken by the Crown treaties were negotiated and entered into between the Crown and the Indian tribe on land then in occupation. The effect of these treaties was discussed by Davey, J.A. (as he then was), for the majority in *White and Bob* as follows at pp. 617-8:

It was also the long standing policy of the Imperial Government and of the Hudson's Bay Co. that the Crown or the company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Co. in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard ex. 8 as a mere agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety of these facts, I entertain no doubt that Parliament intended the word "Treaty" in s. 87 [Indian Act, R.S.C. 1952, c. 149] to include all such agreements, and to except their provisions from the operative part of the section.

Judgments Where *Campbell v. Hall* Was Used to Interpret:

- *Connolly v. Woolrich & Johnson et al.* [1867], 17 R.J.R.Q. 75 (also reported: 11 L.C.Jur. 197)
- *St. Catharines Milling and Lumber Company v. The Queen* (1887), 13 S.C.R. 577
- *St. Catharines Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46
- *R. v. George* [1963], 41 D.L.R. (2d) 31 (also reported: [1964] 1 O.R. 24, [1963] 3 C.C.C. 109)
- *R. v. White and Bob*, [1964], 50 D.L.R. (2d) 613 (also reported: 52 W.W.R. 193)
- *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313
- *R. v. Kruger and Manuel* [1974], 19 C.C.C. (2d) 162 (B.C.Co.Ct.)
- *Delgamuukw v. British Columbia*, [1993] CanLII 4516 (BC C.A.)
- *R. v. Côté*, [1996] 3 S.C.R. 139
- *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911
- *R. v. Marshall (S.F.)*, 2002 NSSC 57

NOTE: During recent years, most uses of the *Royal Proclamation 1763* are in BC or Federal courtrooms; however, no use of *Campbell v. Hall* was made in more than 142 actions since the *Royal Proclamation* appeared in the *Constitution Act, 1982*

Nomads in Canadian Courts

In Reference to Cultural Behaviour of Aboriginals (44 cases):

- Beattie v. Canada (Minister of Indian Affairs and Northern Development), 2002 FCA 105 (CanLII)
- Beattie v. Canada, 2001 CanLII 22180 (F.C.)
- Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) (C.A.), [1993] 3 F.C. 28, 1993 CanLII 2932 (F.C.A.)
- Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344
- Buffalo v. Canada, 2005 FC 1622 (CanLII)
- Chingee v. British Columbia, 1997 CanLII 4215 (BC S.C.)
- Constant c. Québec (Procureur général), 2003 IIJCan 47824 (QC C.A.)
- Dans la situation de K.(M.-K.), 2002 IIJCan 38040 (QC C.Q.)
- Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010
- Delgamuukw v. British Columbia, 1991 CanLII 2372 (BC S.C.)
- Fond du Lac Band v. Canada (Minister of Indian and Northern Affairs) (T.D.), [1993] 1 F.C. 195, 1992 CanLII 2404 (F.C.)
- Goulet c. Québec (Procureur général), 2003 IIJCan 42450 (QC C.A.)
- HMTQ v. Chief Jules et al., 2005 BCSC 1312 (CanLII)
- Jeddore v. The Queen, 2001 CanLII 917 (T.C.C.)
- Kadlak v. Nunavut (Minister of Sustainable Development), 2001 NUCJ 1 (CanLII)
- Lac La Ronge Indian Band v. Canada, 1999 SKQB 218 (CanLII)
- Lac La Ronge Indian Band v. Canada, 2001 SKCA 109 (CanLII)
- McLeod Lake Indian Band v. British Columbia, 1998 CanLII 6743 (BC S.C.)
- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 (CanLII)
- Montana Band v. Canada, 2006 FC 261 (CanLII)
- N.T.I. v. Canada (Attorney General), 2003 NUCJ 1 (CanLII)
- Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2004 ABQB 655 (CanLII)
- Première Nation de Betsiamites c. Canada (Procureur général), 2005 IIJCan 21668 (QC C.S.)
- Québec (Procureur général) c. Young, 2003 IIJCan 47908 (QC C.A.)
- R. v. Adams, [1996] 3 S.C.R. 101, 1996 CanLII 169 (S.C.C.)
- R. v. Bernard, 2003 NBCA 55 (CanLII)
- R. v. Billy and Johnny, 2006 BCPC 48 (CanLII)
- R. v. Blais, 2001 MBCA 55 (CanLII)
- R. v. Côté, [1996] 3 S.C.R. 139, 1996 CanLII 170 (S.C.C.)
- R. v. Horse, [1988] 1 S.C.R. 187, 1988 CanLII 91 (S.C.C.)
- R. v. Marshall (S.F.), 2002 NSSC 57 (CanLII)
- R. v. Marshall, 2001 NSPC 2 (CanLII)

- R. v. Marshall, 2003 NSCA 105 (CanLII)
- R. v. Marshall; R. v. Bernard, [2005] 2 S.C.R. 220, 2005 SCC 43 (CanLII)
- R. v. Sappier and Polchies, 2003 NBPC 2 (CanLII)
- R. v. Van der Peet, [1996] 2 S.C.R. 507
- Regina v. Campbell, 2000 BCSC 956 (CanLII)
- Regina v. Gregory Willison, 2005 BCPC 131 (CanLII)
- Regina v. Howse, 2002 BCSC 235 (CanLII)
- Sawridge Band v. Canada (T.D.), [1996] 1 F.C. 3, 1995 CanLII 3521 (F.C.)
- Scrimbitt v. Sakimay Indian Band Council (T.D.), [2000] 1 F.C. 513, 1999 CanLII 9381 (F.C.)
- Snake v. The Queen, 2001 FCT 858 (CanLII)
- Union of Nova Scotia Indians et al. v. Nova Scotia (Attorney General), 2001 NSCA 110 (CanLII)
- Young c. Québec (Procureur général), 2003 IIJCan 47909 (QC C.A.)

In Reference to a Criminal Organization, a Biker Gang (31 cases):

- Beauchamp v. R., 2005 QCCA 580 (CanLII)
- États-Unis d'Amérique c. Le Page, 2002 IIJCan 41974 (QC C.S.)
- R. c. Auger, 2002 IIJCan 24374 (QC C.Q.)
- R. c. Avenir, 2001 IIJCan 16944 (QC C.Q.)
- R. c. Beauchamp, 2002 IIJCan 29128 (QC C.S.)
- R. c. Beauchamp, 2002 IIJCan 39853 (QC C.S.)
- R. c. Beauchamp, 2004 IIJCan 26645 (QC C.S.)
- R. c. Bédard, 2002 IIJCan 29251 (QC C.S.)
- R. c. Bordeleau, 2002 IIJCan 27908 (QC C.S.)
- R. c. Bordeleau, 2002 IIJCan 28300 (QC C.S.)
- R. c. Bordeleau, 2002 IIJCan 39080 (QC C.S.)
- R. c. Boucher, 2000 IIJCan 6087 (QC C.A.)
- R. c. Boucher, 2002 IIJCan 24850 (QC C.S.)
- R. c. Boucher, 2002 IIJCan 6092 (QC C.S.)
- R. c. Couture, 2002 IIJCan 24750 (QC C.S.)
- R. c. Duguay, 2004 IIJCan 50577 (QC C.S.)
- R. c. Faucher, 2002 IIJCan 12137 (QC C.S.)
- R. c. Faucher, 2004 IIJCan 40612 (QC C.S.)
- R. c. Mayrand, 2002 IIJCan 35588 (QC C.S.)
- R. c. Robitaille, 2005 IIJCan 8540 (QC C.S.)
- R. c. Rose, 2004 IIJCan 19428 (QC C.S.)
- R. c. St-Pierre, 2003 IIJCan 44389 (QC C.S.)
- R. c. Wooley, 2002 IIJCan 42038 (QC C.S.)
- R. c. Woolley, 2004 IIJCan 46744 (QC C.S.)
- R. c. Woolley, 2004 IIJCan 46948 (QC C.S.)
- R. c. Woolley, 2004 IIJCan 46952 (QC C.S.)
- R. c. Woolley, 2004 IIJCan 47475 (QC C.S.)
- R. v. Lindsay, 2005 CanLII 24240 (ON S.C.)
- R. v. Lindsay, 2005 CanLII 479 (ON S.C.)

- R. v. McCurrach, 2000 ABPC 127 (CanLII)
- R. v. Stadnick, 2004 CanLII 2116 (QC C.S.)
- R. v. Stadnick, 2004 CanLII 31543 (QC C.S.)
- R. v. Stadnick, 2004 CanLII 32952 (QC C.S.)
- Stockford v. R., 2001 CanLII 17962 (QC C.S.)
- Syndicat de la fonction publique du Québec c. Sûreté du Québec, 2001 IIJCan 18121 (QC A.G.)

In Reference to Transient Individuals (28 cases):

- A.M.-J., Re, 2005 IIJCan 50973 (QC C.Q.)
son mode de vie nomade, la mère a peu de capacités d'implication et sa collaboration est minimale.
- Allahi v. Canada (Minister of Citizenship and Immigration), 2004 FC 271 (CanLII)
he was unwilling to return to live with nomadic family
- Beson v. Director of Child Welfare (NFLD.), [1982] 2 S.C.R. 71
a boy who has lived up to this time what he described as "a nomadic existence".
- C. H. v. T. C., 2004 CanLII 53142 (NL P.C.)

The real problem, as the Court sees it, lies with the nomadic lifestyle of the birth mother which results in her staying at C.H.'s residence from time to time when she is encountering difficulties in her relationship with her partner.

- C. M. v. Canada (Attorney General), 2004 SKQB 174 (CanLII)
C.M. testifies to a nomadic lifestyle during her adolescent years after leaving Gordon's.
- Camaday v. Desmond, 1999 CanLII 6047 (BC S.C.)
The parties, after sale of the Westsyde home in August 1994, followed a somewhat nomadic life.
- Cesari c. Très-Saint-Rédempteur (Municipalité), 2004 IIJCan 12185 (QC C.S.)
Personne sans domicile fixe. - clochard, vagabond; nomade, squatteur. Ellipt Les sans domicile fixe. - S. D. F. Violation de domicile
- Damer-Basso v. Basso, 2003 CanLII 2055 (ON S.C.)
He would feel like a nomad, evicted from his home right before Christmas.
- Durham Children's Aid Society v. D. W., 2003 CanLII 2105 (ON S.C.)
She has for at least two years led her children on a chaotic, nomadic and desperate life where moves were sometimes a weekly

- Eland v. Yellowhead Helicopters Ltd., 1997 CanLII 3156 (BC S.C.)
The life of a young helicopter pilot was nomadic
- F. C. c. J. R., 2004 IIJCan 6439 (QC C.S.)
un nomade, de sorte que lorsqu'il n'est pas sur la route c'est son véhicule qui lui sert d'habitation, dans le garage où il le gare et fait l'entretien
- Fisher v. Fisher, 1995 CanLII 2718 (BC S.C.)
she is not the nomad the respondent considers her to be.
- Goodwin v. Goodwin, 2004 YKSC 84 (CanLII)
While I recognize that this is simply the opinion of the mother, there is some support for her belief in the results of the father's psychological assessment, in particular the MCMI, which put the father in the category of "nomadic antisocials".
- Hallett v. Hallett, 1993 CanLII 3049 (ON C.J.)
A two-week alternating residence would continue these children's existence as nomads
- Harmon v. Nishikawara, 1993 CanLII 267 (BC S.C.)
It was a nomadic existence from job to job and place to place.
- M. (C.L.) v. L. (D.), 1998 CanLII 1651 (BC S.C.)
Ms M. has led a more nomadic existence than Mr. L. and presently resides in Kelowna
- M.L. c. É.M., 2005 IIJCan 29866 (QC C.S.)
le travail « nomade » de chauffeur de camion longue distance
- Molson v. Molson, 1998 ABQB 476 (CanLII)
she has, in fact, led a nomadic lifestyle that would make it difficult to assert that she has established residence in Alberta even today.
- Nistor v. Canada (Minister of Citizenship and Immigration), 2005 FC 1467 (CanLII)
Many have forgone the more traditional nomadic lifestyle under duress rather than by choice.
- Norman v. R, 2005 NBCA 33 (CanLII)
Beginning in mid-adolescence, his existence became rather nomadic except for periods of incarceration
- Pearse v. Pearse, 2000 BCSC 715 (CanLII)

When the parties first came together they lived a nomadic lifestyle.

- PJ v. Nova Scotia (Director of Victim Services), 2001 NSUARB 67 (CanLII)
In the winter, Mr. J followed a nomadic lifestyle in southern Canada, living in various places.
- R. v. Bourgeois, 2003 NBPC 1 (CanLII)
He was born and raised in Ontario and I'm told that in recent years he started to live somewhat of a nomadic lifestyle
- R. v. Buckley, 2000 BCPC 84 (CanLII)
Over the years Mr. Buckley moved back and forth between his father's residence and his mother's, resulting in him leading a somewhat nomadic lifestyle.
- R. v. Krymowski, 2003 CanLII 52152 (ON C.A.)
The term gypsy in its broadest sense is often used to refer to people who lead a nomadic life, and for many Roma, the term gypsy conjures up unflattering or stereotypical images.
- R.R. c. L.C., 2006 QCCS 428 (IIJCan)
Les parents ont su jusqu'à présent simplifier les déplacements de l'enfant qui s'adapte assez bien à la vie de nomade.
- Robinson v. Williams (Estate of), 2005 ABQB 659 (CanLII)
his essentially nomadic lifestyle undermines his evidence on those issues.
- S.A.D. v. E.E.P. Estate, 2003 BCSC 1535 (CanLII)
she has lived a nomadic life, moving from women's shelter to women's shelter.

Alexander Von Gernet's Effect on Fact Finding & Judgment

1996

Sawridge Band v. Canada (T.D.), [1996] 1 F.C. 3

Doctor Von Gernet's report in Part 6 is most pertinent. It is replete with end-noted references to various authorities, as is the rest of his report. Here are some persuasive passages (with end-note references deleted) which the Court finds convincing.....

...

On all of this evidence, including Doctor Von Gernet's opinion, this Court finds that there was no "aboriginal", (and certainly no treaty) "right of members of the said bands [or camps or chiefs' peoples], under their respective customary laws, to determine membership in the bands [camps, chiefs' peoples] and to veto the admission of any persons to membership in

the said bands [camps, chiefs' peoples]". The Court holds that there were no such rights and no such customary laws as pleaded by the plaintiffs in the particulars given by virtue of Mr. Justice Strayer's order dated October 31, 1986. Those particulars express a fictitious revisionism.

1997

Mitchell v. Canada (Minister of National Revenue)

Dr. Von Gernet also noted that the concurrence of voices was a weak test; hence, even when all the Mohawk witnesses "embody one truth", this does not mean that such a truth bears any relation to an actual history or that this raises a reasonable presumption that their facts are clear.

In my view, Dr. Von Gernet's opinion on oral histories is contrary to the position of the Supreme Court of Canada, which has directed that oral narratives or oral histories should be accepted as any documentary evidence would in cases involving aboriginal peoples. The Supreme Court in *Van der Peet*, supra at paragraph 48 warned that:

[t]he courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tort case.

I have reviewed the oral histories given by the plaintiff's witnesses in the same manner that I have reviewed documentary evidence provided by both parties. The weight that I accord to oral history and to documentary evidence does not depend on the form in which the evidence was presented to the Court. The aboriginal perspective is based on oral tradition and history, and not on belief as submitted by the defendant.

1999 R. v. Frank, 1999 ABPC 81

[52] In rebuttal the Crown called Dr. Alexander von Guernet. He was qualified as an anthropologist specializing in the use of archeological evidence, written documentation, and oral histories or traditions to reconstruct past cultures and practices of aboriginal peoples, including the Blackfoot, as well as the history of contact between aboriginal peoples and European newcomers.

[53] Dr. von Guernet prepared two reports, which were filed as exhibits 13 and 13A, together with the content of historical references on which he relied in preparing his report. These references numbered 249, in his first report, and were filed as fourteen volumes of exhibits.

[55] While I would have concluded that the other evidence did not demonstrate the pre-contact practice contended for, I had as well the expert testimony in that regard of Dr. von Guernet whose credentials to give the evidence which he did were impressive.

Mitchell v. M.N.R (C.A.), [1999] 1 F.C. 375

The Trial Judge accepted this position and specifically rejected the view of the appellant's expert, Dr. Von Gernet, on the basis that he concentrated "too much on the raiding activities" of the Mohawks and because it was inconsistent with archaeological evidence from Daniel Richter's article entitled "Ordeal of the Longhouse: The Five Nations in Early American History" in *Beyond the Covenant Chain: the Iroquois and their Neighbors in Indian North America 1600-1800*, D. K. Richter and J. H. Merrel eds. (Syracuse N.Y.: Syracuse University Press, 1987).

2001

R. v. Marshall, 2001 NSPC 2

49. Dr. Von Gernet said there was no evidence family hunting territories were an ancient Mi'kmaq tradition. He said they existed in the 19th century, but could not be traced back with any degree of certainty beyond the second half of the 18th century. Based on the evidence presented in this case, Dr. Von Gernet's conclusion is accurate.

55. Mi'kmaq communities were allied with each other, with the French and with the other aboriginal groups in the Maritimes and Maine. However, as Dr. Von Gernet put it, they did not have a fully-developed sense of being a nation. None of the French missionaries who wrote about the Mi'kmaq ever mentioned seven districts, a grand council or grand chief. Biard said they had "State Councils", but did not suggest those were formalized as a kind of government. From 1749 to 1759 the missionaries Le Loutre and Maillard claimed to speak at times for all the Mi'kmaq, but the treaties of 1749, 1752 and 1760-61 were all with individual communities. They were still a collection of communities.

2001

Jeddore v. The Queen Docket: 96-2182-IT-G

[238] I was, in this difficult case, very impressed with the knowledge, quality of preparation and demeanour of the expert witnesses, the major part of whose evidence was presented by Cuff and Von Gernet. While in no way minimizing Cuff's efforts, I, as stated above, was led through my own analysis of the evidence to adopt Von Gernet's view as a logical and reasonable interpretation of the events under review.

[239] The appeal will be dismissed. There is, accordingly, no need to deal with the matter of the Appellant's investment income.

Mitchell v. M.N.R., [2001] 1 S.C.R. 911, 2001 SCC 33

46 Consequently, while Richter's book may support the pre-contact existence of north-south trade routes, it refutes the direct involvement of the Mohawks in this trade. This is a significant fact, given the reliance by the trial judge on this evidence in concluding the aboriginal right was

established, and in rejecting the testimony of the appellant's expert witness, Dr. Von Gernet, to the effect that he had "yet to find a single archeological site anywhere in Ontario dating to the prehistoric, the protohistoric or the early historical period which has in any way ever been associated with the Mohawks" (p. 30).

2002

Benoit v. Canada, 2002 FCT 243

G. Findings respecting weight

[294] As an alternate strategy to challenging the evidence of oral tradition through cross examination, Canada and Alberta rely on other evidence to diminish its weight. In particular, Alberta relies on the evidence of Dr. Von Gernet as quoted above. For Dr. Von Gernet's general concerns about the accuracy of evidence of oral tradition to diminish the weight to be given to it as presented in the present case, I find that the concerns must be made specific to the individuals giving the evidence. That is, some proof must be found that, in some way, a witness to the oral tradition has failed to recount it accurately. I find that this has not been accomplished.

Canada AG v. Anishnabe of Wauzhushk Onigum Band

[65] The words "Saulteaux Tribe" were words used to describe signatory Bands in other treaties covering land outside the geographical territory of Treaty 3. Three different groups, all collectively described as the "Saulteaux tribe", signed 3 different treaties in 3 different parts of Canada. This strongly suggests that the term "Saulteaux Tribe" was not a description of a particular, identifiable polity, but rather a convenient synecdoche. The "Saulteaux" did not actually exist as a "tribe". [7] I accept the evidence of A. Von Gernet, a Professor of Anthropology at the University of Toronto, that the Ojibwa west of Lake Superior, unlike the Iroquoian speaking peoples, never recognized themselves as an identifiable and distinct group. The basic communal unit was comprised of a core nuclear family along with other relatives who would form relatively small winter residential groups and come together in the summer into larger groups with no sense of organization. Further, as the resources in a particular area became depleted, these groups would move to new areas so that territories and boundaries were never permanent or identifiable to any one or several groups.

R. v. Marshall, 2002 NSSC 57

[45] All of this evidence supports a finding that it was not in the contemplation of the British or Mi'kmaq that the Treaties would give the Mi'kmaq a right to commercially harvest timber. The evidence supports the Trial Judges conclusion that trade in logs or commercial

logging was not a right afforded to the Mi'kmaq under any of the known treaties of 1760-1761. If there is a right to engage in commercial logging activities it would have to be based on something other than the treaties.

I refer to other evidence which supported the Trial Judge's conclusion. Dr. Von Gernet referred to evidence Chief Augustine gave in relation to a wampum belt at the Vatican Archives. Chief Augustine suggested this was a representation of the linking of the Mi'kmaq nation with Christianity when Membertou was baptized in the early 1600's. Dr. Von Gernet went to the Vatican Archives and studied the belt, finding conclusive evidence that it had been made by Aborigines in Quebec as a gift for the Pope more than 200 years after Membertou's baptism. It was conceded by the Appellant's counsel at trial that the belt had nothing to do with Nova Scotia or the Mi'kmaq. Dr. Von Gernet cautioned about neo-traditionalism in relation to proof of historical events. He recognized that many traditions are very important to many modern native societies. That does not necessarily mean they are rooted in history.

Benoit v. Canada, 2003 FCA 236

[113] I agree with Dr. Von Gernet that oral history evidence cannot be accepted, per se, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. Von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In Mitchell, supra, for example, the Trial Judge and the Supreme Court of Canada accepted the oral history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.

Jeddore v. The Queen, 2003 FCA 323

[31] The Judge adopted the explanation of subsequent events offered by an expert witness for the Crown, Dr. Alexander Von Gernet. Thus, for example, Bell T.C.C.J. concluded that the protests over the activities of Lake's sawmill at the turn of the century, and the legislative response to them, probably had more to do with lumbering rights than with a desire on the part of the Government to protect an Indian reserve. Further, the Judge regarded the fact that in 1907 Chief Reuben Lewis petitioned the Government for a grant of 363 acres (lots 1-7) of the land included in the Conne River settlement as inconsistent with a widely held view that the whole of the settlement as shown on the plan constituted a reserve.

.....
[92] For the most part, the oral history evidence is very vague about identifying the government officials who represented to the Mi'kmaq that land would be or had been set aside for them at Conne River. In Dr. Von Gernet's opinion, which the Judge apparently accepted, the oral history evidence lacked specificity and temporal depth.

Nat'l Automobile, Aerospace, Transportation & General Workers Union of Canada, loc. 444 v. Great Blue Heron Gaming Co.

37. The Attorney General of Ontario relied on the affidavits of Alexander Von Gernet, expert anthropologist and ethno historian concerning aboriginal peoples, and Mort Mitchnick, lawyer, arbitrator, mediator and past Chair of the Board.

Canada v. Benoit, 2003 FCA 236

[113] I agree with Dr. Von Gernet that oral history evidence cannot be accepted, per se, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. Von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In Mitchell, supra, for example, the Trial Judge and the Supreme Court of Canada accepted the oral history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.

CONCLUSION

[117] Since there is nothing in the record which can reasonably support the conclusion reached by the Trial Judge, I am compelled to find that he made a palpable and overriding error. The Trial Judge appears to have failed to consider a sizeable portion of the evidence and to have misapprehended material evidence. Had he not made these errors, he could only have come to the conclusion that the evidence adduced by the respondents was not sufficient to allow him to reach the conclusion that he did.

[118] Consequently, I conclude that the respondents did not establish that the Aboriginal signatories of Treaty 8 understood that the Treaty Commissioners had made a promise exempting them from taxation at any time for any reason.

R. v. Marshall, 2003 NSCA 105

[92] In my opinion, the evidence supports the trial judge's conclusion that the Mi'kmaq could fairly be characterized as a moderately nomadic people. I am not persuaded that the SCAC erred in its review of that conclusion of the trial judge. In addition, the appellants' argument overlooks a clear finding of the trial judge which they do not challenge. At paras. 48 and 49 of his reasons, the judge accepted Dr. Von Gernet's opinion that there was no evidence that family hunting territories were an ancient Mi'kmaq tradition and that they could not be traced back with any degree of certainty beyond the second half of the 18th Century.

[49] Dr. Von Gernet said there was no evidence family hunting territories were an ancient Mi'kmaq tradition. He said they existed in the 19th century, but could not be traced back with any degree of certainty beyond the second half of the 18th century. Based on the evidence presented in this case, Dr. Von Gernet's conclusion is accurate.

Nat'l Automobile, Aerospace, Transportation & General Workers Union of Canada, loc. 444 v. Great Blue Heron Gaming Co.

89. Much was made by the parties about the significance or value to be attributed to the Covenant Chain. The claims of the First Nation in this regard were vigorously challenged by the trade union and the Attorneys General. Alexander Von Gernet, the expert witness retained by the Attorney General of Ontario was of the view that the Covenant Chain did not conform to what an anthropologist would consider to be a treaty. Mr. Von Gernet understood the Covenant Chain to be "...originally and principally an Iroquoian metaphor for an ill defined alliance...".

Sawridge Band v. Canada, 2004 FC 1436

113. I agree with Dr. Von Gernet that oral history evidence cannot be accepted, per se, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. Von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In Mitchell, supra, for example, the Trial Judge and the Supreme Court of Canada accepted the oral history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.

**John A. Macdonald – Earl Granville
Correspondence on Judicial Review**

Source:

Return to an Order of the House of Commons, dated the 2nd May, 1887; - For copies of all title deeds, patents, correspondence, and all documents respecting the claim of the Six Nations Indians, as set forth in their Petition presented to this House on the 18th April, 1887, Journals of the House of Commons, Sessional Papers No. 20B, 1887, page 31 and page 37

Earl Granville to the Governor General.

DOWNING STREET, 3rd May, 1886.

MY LORD,—I have the honor to acknowledge the receipt of Your Lordship's despatch, No. 66, of the 9th of March, transmitting a copy of a letter, addressed by your direction to the chiefs of the Six Nation Indians, with one which they have addressed to me through the chief, William Smith, of Brantford, in connection with their claim to certain land on the banks of the Grand River, alleged to have been ceded to them in 1784.

Your Government will, no doubt, agree with me that it will be for the general advantage that this claim of the Indians, which, from their point of view, involves a sense of injustice at the hands of the Dominion Government, should be openly investigated, and that a decision should be arrived at upon it, in order that the matter may be finally set at rest. The Indians, in fact, desire that such an enquiry should be held, for they request that their claim may be submitted to the Privy Council.

I do not feel able to advise Her Majesty to exercise her power under the Act 3 and 4 William IV, cap. 41, and to refer this matter to the Judicial Committee of the Privy Council, seeing that the request is made only at the instance of one party to the dispute, and that there is no statement of ascertained facts upon which that tribunal could come to a decision. I shall, however, be prepared to advise Her Majesty so to refer the matter, if such is also the desire of the Dominion Government, and if both parties will agree upon a statement of the facts, in the form of a special case, which can be argued by counsel before the Judicial Committee.

At the same time I would suggest, for the consideration of both the Dominion Government and of the Indians, whether a decision might not be equally well obtained by the arbitration of three independent and impartial persons, of whom one might be selected by the Governor General, and one by the Indians, the third being chosen either by both parties conjointly, or if so desired, nominated by the Secretary of State; and in that case it would be possible to send some one from this country, if such a course were thought desirable and provided Her Majesty's Government were not put to expense in the matter. A board of arbitration of this nature might assemble and dispose of the matter before the end of the coming autumn and probably at less expense than would be involved in a hearing before a Judicial Committee of the Privy Council.

I have, &c.,

GRANVILLE.

3rd January, 1887.

MEMORANDUM.—With reference to a despatch from the Right Hon. Earl Granville, Secretary of State for the Colonies, dated 3rd May, 1886, on the subject of a claim preferred by the Six Nations Indians to certain lands on the banks of the Grand River, which claim they desire to be submitted by Her Majesty to the Judicial Committee of the Privy Council, the undersigned has the honor to state that as Lord Granville had informed Your Excellency that he was not prepared to advise such submission, the Indian Department did not consider any action on the despatch necessary.

The undersigned however having had his attention called to the subject by Your Excellency begs leave to report that in his opinion,

1. It is extremely inexpedient to deal with the Indian bands in the Dominion (except those inhabiting the territories acquired from the Hudson's Bay Company) as being in any way separate nations. They are governed by Canadian statutes, and for any wrongs or grievances have the right of recourse to the legal tribunals of the country as fully and readily as their white fellow-subjects, which right they do not hesitate to exercise.

2. As Indians are inveterate grumblers, if it were once known that this application had been granted there would be no end of similar demands by other bands, a refusal of which would cause much discontent. It would be difficult, if not impossible to make another tribe understand why it should not receive the same consideration as the Six Nations, and great consequent jealousies and heart-burnings ensue.

3. Should the Six Nations be dissatisfied with the judgment of a Canadian court, they have the right to appeal to the Judicial Committee of the Privy Council, according to the practice of that court.

4. As the claim of the Six Nations rests on legal considerations and affects the title to land, it can more properly be determined by a court of law than by arbitration, and they are well able to bear the expense of the necessary litigation, which need not be more costly than a reference, and would be much more satisfactory.

5. The introduction of a new practice of submitting Indian claims in the first instance to the Judicial Committee would operate as a complete change in the manner in which the Indian races have hitherto been dealt with, and would establish a distinction between them and the other inhabitants of Canada. This is very objectionable, as the great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion, as speedily as they are fit for the change.

6. The present claim of the Six Nations has no merits, and does not deserve any exceptional consideration.

All which is respectfully submitted.

J. A. MACDONALD.

To the Hon. the Privy Council of Canada.

FACTS ON INDIRECT RULE

Table 3.1 Ratio of European Officials to Estimated Local Population Direct and Indirect Rule in Africa and India

Colony or <u>European Local State</u>	Type <u>of Rule</u>	European <u>Officials</u>	Estimated <u>Population</u>	<u>Year</u>	Ratio <u>(nearest 100)</u>
British Kenya	More Direct	164	3,100,000	1930s	1:18,900
French West Africa	Mixed	526	14,500,000	1921	1:27,600
Belgian Congo	Mixed	316	11,000,000	1936	1:34,800
British Nigeria /Cameroons	Mixed	386	20,000,000	1930s	1:51,800
India (all)	Mixed	c.950	253,900,000	1881	1:267,300
Awadh	More Direct	38	11,220,000	1872	1:295,300
Princely India	Indirect	107b	94,000,000	1947	1:878,500
Hyderabad	Indirect	2c	10,666,000	1872	1:5,333,000
Awadh	Indirect	2c	11,000,000	1856	1:5,500,000

Source:

Fisher, Michael H.

1991 Indirect Rule in the British Empire: The Foundations of the Residency System in India (1764-1858), Oxford, UK: Oxford University Press.

Expansion of Transport & Communications during 19th Century

	1850	1873	1880	1890	1900
Railways (thousands of miles)	24	---	224	---	500
Steam Shipping (as % of world's ttl shipping)	---	25	---	59	77
Telegraphs (thousands of miles)	5	---	440	---	1,180

Source:

Moon, Parker Thomas

1926 Imperialism and World Politics, New York, NY: Garland Publishers, 22nd printing, 1967

**Factual & Constitutional Basis of
Sovereignty in Rupert's Land**

Event	Status
Cree Naskapi Act, 1984 Delegation of federal powers to provincial government, Quebec	Federal Statute
Constitution Act, 1982, s. 52; Schedules: #1, #3, and #, Supremacy of Constitution, Continuity of RL & NWT Order, CLV Act	Constitution
James Bay & Northern Quebec Agreement, 1975 Canada, Quebec, Crees – Read as a contract as per <i>R. v. Badger</i>	Accord/Contract
Statute of Westminster, 1931 Continuity of: BNA Act, 1867 and Rupert's Land & NWT Order	Constitution
Quebec Boundary Extensions 1898, 1912 Extension of Quebec boundaries to present position	Federal Statutes
<i>Ontario v. The Dominion of Canada and Quebec; In Re Indian Claims,</i> [1895] 25 S. C. R. 434 Judicial Committee of Privy Council UK uses <i>Connolly v. Woolrich</i>	Notorious
Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70 PM Macdonald's Confirmation of Royal Proclamation, December 6, 1869 as an Order of British Cabinet, Addressed to All Races & Creeds	Notorious Facts
Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70 Proclamation 1869, correspondence UK & Canada re its distribution	Notorious Facts
Narrative of the Red River Expedition, Blackwood's Edinburgh Magazine, 1870-1871 Described by Col. Wolseley as a police action in face of superior Aboriginal strength, Canada claimed to have a treaty for safe passage	Notorious Facts
Colonel Garnet Wolseley's Proclamation, June 30, 1870 Reassurance of inhabitants after communication with British Cabinet	Notorious Facts
Rupert's Land & Northwester Territory Order, June 23, 1870 After prearranged communications from Col. Wolseley, Port Arthur	Constitutional
British Cabinet Orders to Lt.-Gen. J. Lindsay & Col. G. Wolseley	Notorious Facts
Royal Proclamation, December 6, 1869 Assurance of legal rights, property, etc. – <i>Campbell v. Hall</i> applies	Constitutional
Debates in British Parliament re-Aboriginal Rights, June 1, 1869 All parties ask British Cabinet to demand stronger guarantees of Canada	Notorious Facts
<i>Connolly v. Woolrich</i> [1867], 11 L.C. Jur. 197 (see Appendix K) Attest to Aboriginal rights, upheld on appeal, later used by JC PC	Notorious Facts

Canadian House of Commons & Senate Agree on Annexation Terms After an unacceptable first draft, joint address to British Cabinet sent	Notorious Facts
BNA Act, 1867, s. 146 – Process for Annex of Rupert’s Land & NWT Address accepted, British Cabinet issues order – becomes constitutional	Constitutional
BNA Act, 1867, Federal Powers 91(24) Indians and Indian Lands Galloway v. City of London [1866], L.R. 1 H.L. 34, at p. 43	Notorious & Constitutional
Colonial Laws Validity Act, 1865 Colonial statutes conflict with British orders or statutes – no legal force	Constitutional
Select Committee Hearings, British Parliament February 26, 1857 Gov. G. Simpson testifies re 999 year lease, bijural sovereignty	Notorious Facts

Connolly v. Woolrich [1867], 11 L.C. Jur. 197

Judge Samuel C. Monk's fact-finding and reasons for judgment were upheld on appeal in *Johnston et al v. Connolly [1869]*, 17 R.J.R.Q. 266; and, approved by the highest court in the British Empire, the Judicial Committee of the Privy Council of Great Britain, in its 1897 arbitration of *Ontario v. The Dominion of Canada and Quebec; In Re Indian Claims*, [1895] 25 S. C. R. 434.

Connolly v. Woolrich did not reach the Judicial Committee by the usual channels, an appeal from a Canadian court or legislature. Rather, as noted in *Kenward v. Kenward*, it was first reported in "Sir Eric Beckett's valuable article in *Law Quarterly Review*, Vol. 48, p. 369". No doubt, the same readers read the 1868 report that appeared in the Canada Law Journal, Vol. 4, p. 58. The latter report was detailed and included the remarks that:

Mr. Justice Monk, who heard the cause, gave a very elaborate judgment, which with his full statement of the case is not contained in less than 67 closely printed pages of the *Jurist*. The principal points decided by him incidental to question principally involved, were shortly these: -
That though the Hudson's Bay Company's Charter is of doubtful validity ... that the English Common law, prevailing in the Hudson's Bay territories, did not apply to natives who were joint occupants of the territories; nor did it supersede or abrogate, even within the limits of the Charter, the laws, usages, and customs of aborigines: (Canada Law Journal 1868:57-58)

The Jurist, a law journal, was published in London by S. Sweet, 1838-1867 and accordingly was readily available to not only the members of the Judicial Committee, but as to courts and lawyers throughout the British Empire. The Law Quarterly Review was also published in London, by Stevens & Sons from January 1885 to 1925. The Canada Law Journal was initially, 1867-1868, published in Montreal by J. Lovell. In 1868, it was moved to Toronto and published by W. C. Chewett & Compant from 1868 until 1922. The last volume was Volume 58, December 1922. At this point the Canada Law Journal was merged with the Canadian Law Times to become the Canadian Bar Review.

In addition to *Ontario v. The Dominion of Canada and Quebec; In Re Indian Claims*, and *Kenward v. Kenward*, the Judicial Committee of the Privy Council of Great Britain applied *Connolly v. Woolrich* at least three times outside North America: in *Re Bethel v. Hildyard 1888*, at p. 225-226, attesting that "the marriage was valid notwithstanding the assumed existence of polygamy, and divorce at will obtained"; in *Brinkley v. Attorney-General 1890*, at p. 78, attesting that "such a marriage is valid wherever celebrated, if celebrated in accordance with the forms required by lex loci [local Aboriginal laws]"; and, in *Kenward v. Kenward 1950*, at p. 145-146, attesting that "the marriage is valid by the law of her country and should also for many purposes be regarded as valid here".

Connolly v. Woolrich in Canadian Courts

No doubt as a result of its citation in Canadian law textbooks and scholarly journals, Connolly v. Woolrich has often been cited in the judgment reasons of Canadian courts, involving family law or spousal privileges. The following is an example taken from a 1968 article published in the *Alberta Law Review*, Vol. 3, p. 278(1968) – *Table of English Statutes in Force in Canada*

“It is an enlarged and updated version of one which appeared as Appendix C of Clements’ Canadian Constitution 1060 (2nd edition 1916)” ...p.285

<u>Statute</u>	<u>Subject Matter</u>	<u>Whether In Force</u>	<u>Prov.</u>	<u>Authority</u>
26 Geo. 2c. 33	Marriage	No	N.W.T.	Connolly v. Woolrich (1867) 11 L. C. Jur. 197; not as regards Indians in remote parts: R. v. Nanequisaka 1 Terr. L.R. 211

<u>Year:</u>	<u>Court:</u>	<u>Case:</u>
1884	Quebec Superior Court	Fraser v. Pouliot et al, [1884], 13 R.L.O.S. 1
1885	Supreme Court of Canada	Fraser v. Pouliot et al, [1885], 13 R.L.O.S. 520
1889	NWTerritorial Court	Regina v. Nan-e-quis-a-ka, [1889], 1 Terr.L.R. 211 (also reported: 1 (No. 2) N.W.T.R. 21)
1891	Ontario Provincial Court	Robb v. Robb et al. [1891], 20 O.R. 591
1899	NWTerritorial Court	R. v. Bear's Shin Bone (1899), 4 Terr. L.R. 173 (N.W.T.S.C.), as per R. v. Nan-e-quis-a-ka
1961	NWTerritorial Court	Re Noah Estate, [1961], 32 D.L.R. (2d) 185
1971	Saskatchewan, Queen's Bench and Court of Appeal	Ex Parte Cote, [1971], 22 D.L.R. (3d) 353
1993	BC Court of Appeal	Casimel v. Insurance Corp. of British Columbia, [1993] BC C.A.
2000	BC Supreme Court	Prince & Julian v. HMTQ et al, 2000 BCSC 1066
2000	BC Supreme Court	Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al, 2000 BCSC 1123

Boards, Commissions and Committees

The following list of more than sixty public committees, boards, committees and corporations that govern the lives of the Crees of Waskaganish First Nations. These are part of the Cree government institutions. Not included, are the committees, boards, committees and corporations of the federal and provincial government. With the exception of two, the Crees of Waskaganish First Nation and Council and the parents committee, none of the boards, commissions or committees existed thirty years ago. No doubt there are more than on this list that continues to grow, which were established by Quebec or Canada, that communities will only know about in time.

1	3899462 & Massenor (1992) Inc. Joint Venture Management Committee	33	Regional Childcare Advisory Board
2	Air Creebec Inc.	34	Sara Stephen Memorial Arena
3	Chief Malcolm Diamond Memorial Training Centre Inc.	35	Transmission Line Technical Committee Representatives
4	Court Worker Program - Court of Abitibi	36	Waaseskun Childcare Services
5	Cree Board of Compensation	37	Waskaganish Business Centre
6	Cree Board of Health and Social Services	38	Waskaganish Community Radio Board of Trustees
7	Cree Child & Family Services	39	Waskaganish Cultural Institute
8	Cree Construction Company	40	Waskaganish Enterprises Development Corporation
9	Cree Human Resources Development	41	Waskaganish Finance Committee
10	Cree Income Security Board	42	Waskaganish First Nation Elders Council
11	Cree Naskapi Commission	43	Waskaganish First Nation Firemen Volunteers
12	Cree Outfitters and Tourism Association	44	Waskaganish First Nation Housing Committee
13	Cree Regional Authority	45	Waskaganish First Nation Local Task Force on Eeyou Governance
14	Cree Regional Youth Committee	46	Waskaganish First Nation Minor Sports Association Committee

15	Cree School Board	47	Waskaganish First Nation Youth Council
16	Cree School Board Vocational Training Committee	48	Waskaganish Forestry Working Group
17	Cree Trappers' Association	49	Waskaganish Health and Social Services Committee
18	Crees of the Waskaganish First Nation Council	50	Waskaganish Housing Committee
19	Waskaganish Diabetes Committee	51	Waskaganish Housing Corporation Board of Directors
20	Gathering Place Management Advisory Board	52	Waskaganish Joint Forestry Working Group
21	Headstart Program	53	Waskaganish Mamou Medweoun Committee
22	James Bay Communications Society	54	Waskaganish Management Committee
23	James Bay Cultural Education Foundation	55	Waskaganish Police Service
24	James Bay Eyou Corporation	56	Waskaganish Public Security Committee
25	Kanio Kashee Lodge	57	Waskaganish Public Security Working Group
26	Local Aboriginal Management Board	58	Waskaganish School Commissioner
27	Local Cree Trappers Committee	59	Waskaganish School Parent Committee
28	Multiservice Day Centre	60	Waskaganish School Parents Committee
29	Natamuh Advisory Board	61	Waskaganish Wellness Centre
30	Navcanada	62	Wiinibekuu Air Committee
31	Niskamoon Corporation	63	Youth Protection
32	NNADP		

**Delegation of Federal Powers
to Provincial Governments**

Cree-Naskapi (of Quebec) Act, S.C. 1984, c. 18

INCONSISTENCY WITH FEDERAL OR PROVINCIAL LAW

- | | | |
|---|----|--|
| Provincial laws of
general application | 4. | Provincial laws of general application do not apply to the extent that they are inconsistent or in conflict with this Act or a regulation or by-law made thereunder or to the extent that they make provision for a matter that is provided for by this Act. |
|---|----|--|

...

INCORPORATION BY REFERENCE OF PROVINCIAL LAWS

- | | | |
|---|-----|---|
| Incorporation by
reference of
provincial laws | 11. | (1) For the purpose of applying the portion of paragraph 5.1.13 of the James Bay and Northern Quebec Agreement and of paragraph 5.1.13 of the Northeastern Quebec Agreement dealing with the leasing of lands and the granting of real rights to non-Natives, the Governor in Council may make regulations for the purpose of making provincial law in force in the Province applicable to leasehold interests or other real rights in Category IA or IA-N land granted to non-beneficiaries for periods exceeding five years, including any renewal thereof. |
|---|-----|---|

...

PART XVI: POLICING

- | | | |
|-------------------------------------|------|--|
| Agreements for
policing services | 192. | 196.(2) A police force and the members thereof providing policing services pursuant to an agreement made under subsection (1) have jurisdiction over the Category IA or IA-N land of the band for the purposes of enforcing the applicable laws of Canada and Quebec and the applicable by-laws of the band. |
|-------------------------------------|------|--|

Indian Act, R.S.C. 1985, c. I-5

LEGAL RIGHTS

- General provincial laws applicable to Indians
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management Act , or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.
- R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151.

Quebec

Youth Protection Act, R.S.Q. c. P-34.1

...

DIVISION I

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE
LA JEUNESSE

Duties of the Commission.

23. The Commission shall, in conformity with the other provisions of this Act, discharge the following duties:
- (a) it shall ensure, by any appropriate measures, the promotion and protection of the rights of children which are recognized by this Act and the Youth Criminal Justice Act (Statutes of Canada, 2002, chapter 1);
 - (b) upon an application or of its own motion, it shall investigate any situation where it has reason to believe that the rights of a child or of a group of children have been encroached upon by persons, institutions or bodies, unless the tribunal is already seized of it;
 - (c) it shall take the legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon;
 - (d) it shall prepare and implement information and educational programs on the rights of children for the benefit of the public in general and of children in particular;
 - (e) it may, at all times, make recommendations, in particular, to the Minister of Health and Social Services, the Minister of Education, Recreation and Sports and to the Minister of Justice;
 - (f) it may carry out or cause to be carried out studies and research on any question related to its competence, of its own motion or at the request

of the Minister of Health and Social Services and of the Minister of Justice.

1977, c. 20, s. 23; 1981, c. 2, s. 5; 1984, c. 4, s. 10; 1985, c. 21, s. 81; 1985, c. 23, s. 24; 1988, c. 21, s. 119; 1988, c. 41, s. 88; 1989, c. 53, s. 11, s. 12; 1992, c. 21, s. 375; 1993, c. 51, s. 45; 1994, c. 16, s. 50; 1995, c. 27, s. 11; 2005, c. 28, s. 195; 2006, c. 34, s. 73.

Discharge of duty.

23.1 The duty provided for in paragraph b of section 23 must be discharged by a group of not less than three members of the Commission designated by the president.

Decisions.

However, the decision to hold an investigation, to file an application for the disclosure of information under the second paragraph of section 72.5 or to disclose information under the second paragraph of section 72.6 or under section 72.7 shall be made by the president or by a person designated by the president from among the members of the Commission or its personnel.

Review.

The Commission may review the decision to hold an investigation made under the second paragraph.

1981, c. 2, s. 6; 1984, c. 4, s. 10; 1989, c. 53, s. 3; 1994, c. 35, s. 14; 1995, c. 27, s. 12; 2002, c. 34, s. 6.

Duties.

24. The duties provided for in paragraph c of section 23 and in sections 25.2 and 25.3 may be discharged, on behalf of the Commission, by a group of members designated pursuant to the first paragraph of section 23.1.

1977, c. 20, s. 24; 1984, c. 4, s. 11; 1989, c. 53, s. 12; 1995, c. 27, s. 13.

Access.

25. A member of the Commission or any person in its employment may, with the written authorization of a justice of the peace, enter premises in which he has reasonable cause to believe there is a child whose security or development is or may be considered to be in danger and where entry is necessary for the purposes of an inquiry of the Commission.

Authorization granted.

The justice of the peace may grant the authorization, subject to such conditions as he may specify therein, if he is satisfied on the basis of a sworn statement by the member of the Commission or the person in the employment of the Commission that there is reasonable cause to believe that there is therein a child whose security or development is or may be considered to be in danger and if entry therein is necessary for the purposes of an inquiry. The authorization, whether acted upon or not, shall be returned to the justice of the peace who granted it, within 15 days after its issue.

No authorization required.

No authorization is required, however, if the conditions for obtaining it exist and if, owing to exigent circumstances, the time necessary to obtain the authorization may result in danger to the security of a child.

1977, c. 20, s. 25; 1984, c. 4, s. 12; 1986, c. 95, s. 246; 1989, c. 53, s. 12; 1999, c. 40, s. 226.

**QUEBEC
COMMISSION DES DROITS DE LA PERSONNE
ET DES DROITS DE LA JEUNESSE**

[Quebec Human Rights and Youth Rights Commission]

Children and adolescents affected by an intervention under the Youth Protection Act or the Youth Criminal Justice Act have specific rights. These include:

- * the right to be informed of their rights and to know what is going to happen to them
- * the right to consult an advocate
- * the right to make their views known concerning the measures to be taken
- * the right to be informed and prepared before being transferred from one facility to another
- * the right to receive adequate health, social and educational services while under protection
- * the right to communicate confidentially with family members while housed in a facility
- * the right to be informed of the rules applicable in a rehabilitation center
- * the right to be protected against arbitrary disciplinary measures
- * the right to be housed in an appropriate facility and the right to respect for their rights, when removed from their family environment
- * the right to confidentiality
- * the right to receive regular communications from the DYP

The mandate of the Commission

The mandate of the Commission des droits de la personne et des droits de la jeunesse is to ensure that those rights are respected. The Commission intervenes in or investigates any case when it considers that the rights of a child or a group of children are being, or have been, infringed.

The Commission intervenes to

- * stop situations that may threaten the rights of children and adolescents
- * prevent the reoccurrence of such situations

When can I file a complaint?

You can file a complaint with the Commission when

- * you are not satisfied with the services you are receiving under the Youth Protection Act or the Youth Criminal Justice Act
- * you know of a child who is not receiving the services to which he or she is entitled
- * you know of a child who is receiving inadequate services, and whose rights are violated or encroached

Who can file a complaint for intervention by the Commission?

Any person who believes that the rights of a child are being, or have been, violated may bring the situation to the attention of the Commission.

A child who has been taken in charge under the Youth Protection Act or the Youth Criminal Justice Act may contact the Commission directly to complain about the services he or she is receiving. The child may also ask a lawyer to file the complaint.

Any adult who comes into contact with and knows about the situation of a child (parents, family members, friends, service providers, professionals, etc.) can use the Commission's services at any time.

Procedure

You can choose the best way to ask the Commission to intervene – by phone, in writing, or in person at one of the Commission's offices. You will not need to fill out any forms, and all the Commission's services are free.

All complaints for intervention are treated as confidential. When dealing with the Commission, you can bring another person along for support or appoint a representative.

The Commission personnel can help make your complaint and to clarify the problem affecting you or a child.

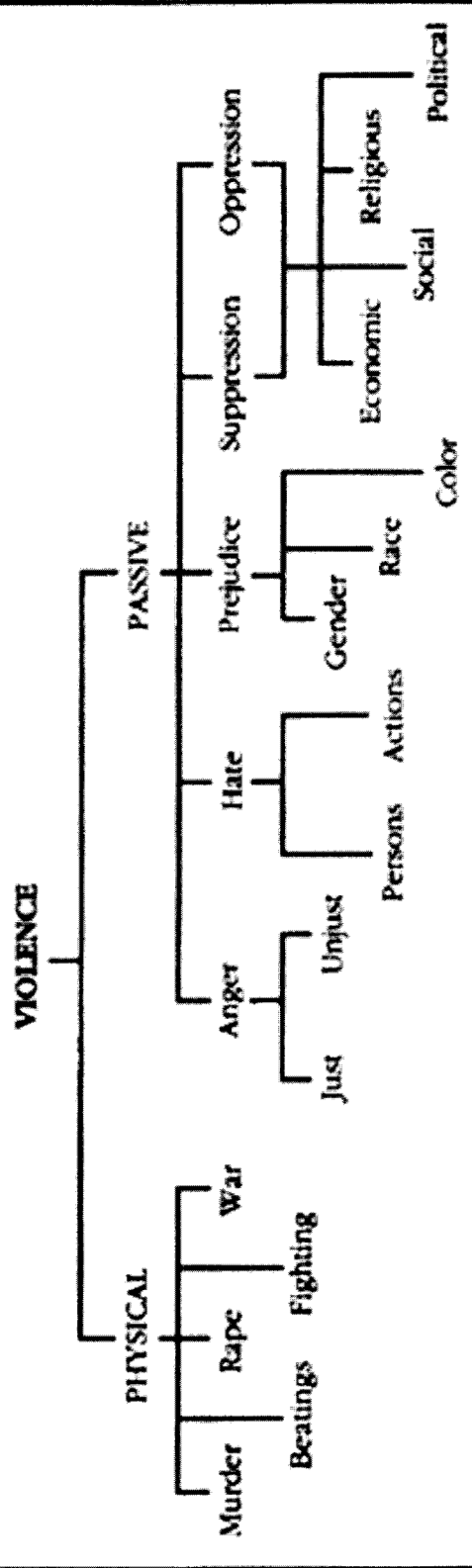
Where to file a complaint

Complaints can be filed at one of the Commission's offices:

Offices / Investigation and regional representation

- * Gatineau
- * Longueuil
- * Montréal métropolitain
- * Québec
- * Rimouski
- * Saguenay
- * Saint-Jérôme
- * Sept-Iles
- * Sherbrooke
- * Trois-Rivières
- * Val-d'Or

Figure
The Violence "Family Tree"



**The Violence
Family Tree**

Source:
Arun Gandhi
1995 Nonviolence and Us, Business
Horizons, March/April 1995, p.1-2

COURT CASES CITED

- Adeyinka Oyekan et al v. Musendiku Adele 26, June 1957
- Angu v. Atta [1916] Gold Coast Privy Council Judgments, 1874-1928, 43
- Attorney-General of Nova Scotia v. Attorney-General of Canada, [1951] S.C.R.
- Attorney-General of Ontario v. Attorney-General of Canada, [1912] A.C. 571
- Bear Island Foundation et al v. Ontario Attorney General, [1984] 49 O.R. (2d) 353
- Benoit v. Canada, [2002] FCT 243
- Bethel v. Hildyard [1888]
- Blencoe v. British Columbia (Human Rights Commission), [2000], 2 S.C.R. 307
- Bongay v. Macauley, 1 W.A.C.A.,
- Brinkley v. Attorney-General [1890]
- Calder v. British Columbia Attorney General [1973], S.C.R. 313
- Campbell et al v. AG BC/AG Canada & Nisga'a Nation et al, 2000 BCSC 1123
- Campbell v. Hall, [1774], 1 Cowp. 204, 98 E.R. 1045
- Case of Proclamations [1611], 77 E.R. 1352
- Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203
- Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010
- Delgamuukw v. British Columbia, [1991] CanLII 2372 (BC S.C.); 5 C.N.L.R. 5
- Director of Public Prosecutions v. Boardman, [1975] A.C. 421
- Edwards v. Attorney-General for Canada, [1930] A.C. 124
- Eleko v. The Officer Administering the Government of Nigeria & anor. [1931],
A.C., 662
- Federal Republic of Germany v. Denmark, North Sea Continental Shelf Cases,
1968
- Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455
- Connolly v. Woolrich [1867] 11 L.C. Jur. 197
- Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.)
- Galloway v. City of London [1866], L.R. 1 H.L. 34
- Gros Louis et al v. SDBJ, [1974]
- Guerin v. The Queen, [1984] 2 S.C.R. 335
- Hodge v. The Queen, [1883] 9 App Cas. 117
- Johnston et al v. Connolly [1869], 17 R.J.R.Q. 266
- Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823)
- Kenward v. Kenward [1950]
- La Société de Développement de la Baie James*et al. v. Kanatewat et al [1973]
- Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574
- Little Sisters Book & Art Emporium v. Canada (Min. of Justice), [2000] 2 S.C.R.
1120
- Liyanage v. The Queen [1967] 1 A.C. 259
- Mabo v. Queensland (No 2) [1992] HCA 23
- Makin v. Attorney-General for New South Wales, [1894] A.C. 57
- Maldonado v. Minister of Employment and Immigration [1980] 2 F.C. 302
- M'Culloch v. Maryland, [1819] 17 U.S. (4 Wheat.) 316

- *McIvor v. The Registrar, Indian and Northern Affairs Canada*, [2007] BCSC 827
- *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58
- *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911
- *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46
- *Nicaragua v. The United States of America*, 1986
- *Ontario v. The Dominion of Canada & Quebec; In Re Indian Claims*, [1895] 25 S.C.R. 434
- *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441
- *Prince & Julian v. HMTQ et al*, [2000] BCSC 1066
- *R. v. Abbey*, [1982] 2 S.C.R. 24
- *R. v. Adams*, [1996] 3 S.C.R. 101
- *R. v. Arp*, [1998] 3 S.C.R. 339
- *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717
- *R. v. Badger*, [1996] 1 SCR 771
- *R. v. Côté*, [1996] 3 S.C.R. 139
- *R. v. Drybones*, [1970] S.C.R. 282
- *R. v. Frank*, [1999] ABPC 81
- *R. v. Handy*, [2002] 2 S.C.R. 908
- *R. v. Hape*, [2007] S.C.C. 26
- *R. v. Louis Riel*, [1885]
- *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220
- *R. v. Mohan*, [1994] 2 S.C.R. 9
- *R. v. Morris and Olsen*, [2004] BCCA
- *R. v. Sparrow*, [1990] 1 S.C.R. 1075
- *R. v. Van der Peet*, [1996] 2 SCR 507
- *Sawridge Band v. Canada*, [2001] FCA 338 (CanLII), [2002] 2 F.C. 346
- *St. Catharines Milling and Lumber Company v. The Queen* [1888], 14 A.C. 46
- *Toronto (City) v. MFP Financial Services Ltd.*, [2002] CanLII 45516 (ON S.C.)
- *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519

TABLE

STATUTES, ORDERS-IN-COUNCIL, PROCLAMATIONS, ETC.

- Act for the Gradual Enfranchisement of Indians, 1869
- Agreement on Internal Trade, 1994
- British North America Act, 1867 (Constitution Act, 1867)
- Canadian Bill of Rights, 1960
- Canadian Human Rights Act, 1977
- Colonial Laws Validity Act, 1865
- Constitution Act, 1982
- Cree Naskapi Act, 1984
- Indian Act, 1951
- James Bay & Northern Quebec Agreement, 1975
- Paix des Braves, 2002
- Nunavut Act
- Royal Proclamation of 1763
- Royal Proclamation of December 6, 1869
- Rupert's Land and North-Western Territory Order, 1870
- Statute of Westminster, 1931,
- Temporary Government of Rupert's Land Act, 1869
- Youth Protection Act

BIBLIOGRAPHY

Adler, Mortimer J.

- 1981 Six Great Ideas, New York, NY: Macmillan Publishing Company

Allott, A. N.

- 1965 Towards the Unification of Laws in Africa, *International & Comparative Law Quarterly*, Vol. 14, p. 366

Anonymous

- 1881 Hon. Samuel C. Monk, *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men, Quebec and the Maritime Provinces* Volume, Toronto, ON: American Biographical Publishing Company

Arnold, David

- 1976 The Police and Colonial Control in South India, *Social Scientist*, Vol. 4, No. 12, (Jul., 1976), p. 3-16

Ashafa, Abdullahi M.

- 2006 British Conquest of Northern Nigeria: A Historiography of the Military Strategy and Tactics, presented at a National Conference to Commemorate the Centenary of Hadejia Emirate's Resistance Against the British Colonial Invasion, 1906-2006, held April 23-24, 2006 Hadejia Town

Bagot, Charles

- 1845 Report on the Affairs of the Indians in Canada, Laid before the Legislative Assembly, 20th March, 1845, *Sessional Papers of the Province of Canada*, 1844-1845, Appendix EEE.
- 1847 Report on the Affairs of the Indians in Canada, Submitted to the Honorable Legislative Assembly, for Their Information, 24th June, 1847, *Sessional Papers of the Province of Canada*, 1847, Appendix T

Baker, Howard Robert

- 1996 *Law Transplanted, Justice Invented: Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670-1870*, MA Thesis, Winnipeg, MB: University of Manitoba
- 1999 Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51, *Law and History Review*, Vol. 17, No. 2, p. 209-246

Banks, Margaret A.

- 1965 Privy Council, Cabinet, and Ministry in Britain and Canada: A Story of Confusion, *Canadian Journal of Economics and Political Science*, Vol. 31, No. 2, (May, 1965), p. 193-205

Barnsley, Paul

- 2001 The Expert Witness - Fully Grown or Fully Owned? Windspeaker, May 2001, Calgary, AB: Windspeaker

Bassett, William W.

- 1986 The Myth of the Nomad in Property Law, Journal of Law and Religion, Vol. 4, No. 1, p.133-152

Beth, Loren P.

- 1976 The Judicial Committee of the Privy Council and the Development of Judicial Review, American Journal of Comparative Law, Vol. 24, No. 1, p. 22-42

Borrows, John Joseph

- 1992 A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government, Osgoode Hall Law Journal, Vol. 30, p. 291
- 1996 With or Without You: First Nations Law (in Canada), McGill Law Journal, Vol. 41, p. 629
- 1997 Frozen Rights in Canada: Constitutional Interpretation and the Trickster, American Indian Law Review, Vol. 22, p. 37-64
- 2000 Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism, Speaking Truth to Power - A Treaty Forum, Vancouver, BC: British Columbia Treaty Commission and Law Commission of Canada
- 2002 Recovering Canada: The Resurgence of Indigenous Law, Toronto, ON: University of Toronto Press
- 2003 Aboriginal Legal Issues Cases, Materials & Commentary, 2nd Edition, Toronto, ON: LexisNexis, Butterworths
- 2004 Throwing the Baby Eagle Out of the Nest, Native Law Center, University of Saskatchewan, <http://www.usask.ca/nativelaw/publications/jah/borrows.html>
- 2005 Tracking Trajectories: Aboriginal Governance as an Aboriginal Right, University of British Columbia, Vol. 38, p. 285
- 2005 Creating an Indigenous Legal Community, McGill Law Journal, Vol. 50, p. 153

- Brownlie, Robin Jarvis
 2007 Abstraction, Decontextualization, Westernization, Generalization: Alexander von Gernet's Dismissal of Aboriginal Oral History, presented at meeting of Canadian Indigenous/Native Studies Association (CINSA), Saskatoon, May 27-30, 2007.
- Brownlie, Ian
 1998 The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations, London, UK: Martinus Nijhoff Publishers
 2003 Principles of Public International Law, 6th Edition, Oxford, UK: Clarendon Press
- Brun, Henri
 1967 Les Droits des Indiens sur le Territoire du Quebec, Le Domaine Indien, Rapport de la Commission d'étude sur l'Intégrité du Territoire du Québec, Vol. 4.2, Henri Dorion, ed., Quebec, QC
- Bumsted, John Michael
 1996 The Red River Rebellion, Winnipeg, MB: Watson & Dwyer
 2003 Reporting the Resistance : Alexander Begg and Joseph Hargrave on the Red River Resistance, Winnipeg, MB: University of Manitoba Press
- Butler, William Francis
 1871 Butler's Report 1871 of His Journey from Fort Garry to Rocky Mountain House and Back during the Winter of 1870-1871, Winnipeg, MB
 1872 The Great Loane Land: A Narrative of Travel and Adventure in the North-West of America, London, UK: Sampson Low, Marston Low & Searle
- Cain, P. J. and Hopkins, Anthony G.
 1993 British Imperialism: Innovation and Expansion, 1688-1914, New York, NY: Longman
- Caldwell, Bruce
 1997 Hayek and Socialism, Journal of Economic Literature, Vol. 35, No. 4, (Dec., 1997), p. 1856-1890
- Campbell, A.
 1988 International Law and Primitive Law, Oxford Journal of Legal Studies, Vol. 8, No. 2, p.169-196

Canada, House of Commons

- 1844 Copies of Addresses to the House of Assembly to the Governor-General Respecting the Civil List; of Report of Seigniorial Tenures, Etc., Ordered by the House of Commons to Be Printed, 1 April 1844
- 1864 Sioux Indians – Copies or Extracts of Correspondence between the Commanding Officers of the United States Troops in Minnesota and the Resident Governor of the Hudson's Bay Company at Red River, respecting a Tribe of Sioux Indians who were Refugees within the British Territory, ordered by the House of Commons to be printed, 17 June 1864
- 1867 Sessional Papers No. 19, Return to an Address from the House of Commons, dated 18th November, 1867 for Correspondence, Report of Proceeding and other documents, in possession of the Government relative to Hudson's Bay Territory
- 1868 Sessional Papers No. 59, Return to an Address from the House of Commons, dated 17th March, 1868 for Copy of all Correspondence had with the Government respecting the North-West Territory, including British Columbia, since 5th December 1867
- 1874 Journals of the House of Commons of the Dominion of Canada from the 26th March to the 26th May, 1874 ... being the 1st session of the 3rd Parliament of Canada, session 1874
- 1985 House of Commons Debates, June 10, 1985
- 1996 Report of the Royal Commission on Aboriginal Peoples, Vol. 1 - Looking Forward, Looking Back; Vol. 2 - Restructuring the Relationship; Vol. 3 - Gathering Strength; Vol. 4 - Perspectives and Realities; Vol. 5 - Renewal, a Twenty-Year Commitment; René Dussault, Georges Erasmus, eds., Ottawa, ON: Canada, Royal Commission on Aboriginal Peoples

Canada, Indian and Northern Affairs

- 1969 Statement of the Government of Canada on Indian Policy, [White Paper], Published under the authority of the Honourable Jean Chretien, PC, MP, Minister of Indian Affairs and Northern Development, Ottawa, ON: Queen's Printer, Cat. No. R32-2469

Canada, Parliament

- 1844 Copies of Addresses of the House of Assembly to the Governor-General respecting the Civil List, of the Report of Seigniorial Tenures, etc. 1, April, 1844
- 1867 Sessional Papers #19 - - Return to an Address of the House of Commons dated 18 December, 1867 for correspondence; Report of Proceedings and

other documents in possession of the government relevant to the Hudson's Bay Territory.

- 1868 Sessional Papers #59 – Return to an Address of the House of Commons dated 17 March, 1868 for Copy of all Correspondence had with the Government respecting the North-West Territory, including British Columbia, since the 5th December 1867
- 1893 Judgment of the Judiciary Committee of the Privy Council in the Manitoba School Case with Factums and Other Documents in Connection therewith, Session 1893, Ottawa, ON: S. E. Dawson, Printer to the Queen's Most Excellent Majesty [No. 33a & 33b]

Canada, Senate

- 1868 Senate Debates April 20, 1868
- 1869 Debates of the Senate, 2nd Session, 1st Parliament, April 15 - June 22, 1869
- 1870 Report of the Select Committee of the Senate on the Subject of Rupert's Land, Red River, and the North-West Territory, together with the Minutes of Evidence, Journals of the Senate of Canada, Session 1870, Appendix to Third Volume
- 1874 Report of the Select Committee on the Causes of the Difficulties in the North-West Territory in 1869-70, Appendix 6, 1874

Canada, Statistics Canada

- 1876 Census of Canada 1665 to 1871, Statistics of Canada, Vol. IV, Ottawa, ON: I. B. Taylor

Cashin, Edward J.

- 2003 Henry Ellis, (1721-1806), The New Georgia Encyclopedia, University of Georgia Press.

Castillo, Jose

- 2002 A Note on the Concept of Tacit Knowledge, Journal Of Management, Inquiry, Vol. 11, No. 1, p. 46-57

Castles, Alex. C.

- 1969 Benjamin Boothby, (1803 - 1868)', Australian Dictionary of Biography, Volume 3, Melbourne University Press, 1969, p 194-196

Cell, John Whitson

- 1970 British Colonial Administration in the Mid-nineteenth Century: The Policy-Making Process, New Haven, CT: Yale University Press

- Chamberland, Luc
 2000 Manuel de Plaidoirie – Techniques et Stratégies d’un Procès Civil,
 Cowansville, QC: Les Éditions Yvon Blais Inc.
- Chartrand, Larry and Whitecloud, Wendy
 2001 Manitoba Justice Inquiry, Final Report, June 29, 2001, Winnipeg, MB:
 Government of Manitoba
- Clatworthy, Stewart
 2003 Impacts of the 1985 Amendments to the Indian Act on First Nations
 Populations, Aboriginal Conditions, Paul S. Maxim and Beavon, Dan eds.,
 Vancouver, BC: UBC Press
- Clatworthy, Stewart and Delisle, Andrew
 2004 Towards a New Aboriginal Governance Agenda: Roundtable on Citizenship
 and Membership Issues, Ottawa, October 20, 2004, Institute On Governance
 Roundtable Series,
http://www.iog.ca/publications/2004_tanaga2summary.pdf.
- Cochran, Clarke E.
 1977 Authority and Community: The Contributions of Carl Friedrich, Yves R.
 Simon, and Michael Polanyi, American Political Science Review, Vol. 71,
 No. 2, (Jun., 1977), p. 546-558
- Cocks, H.
 2003 Trials of Character: The Use of Character Evidence in Victorian Sodomy
 Trials, The Trial in History II, Domestic and International Tribunals, 1700-
 2000, R.A. Melikan, ed., Manchester, UK: Manchester University Press
- Cohen, Felix S.
 1953 The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy, Yale
 Law Journal, Vol. 62, No. 3, (Feb. 1953), p. 348-390
- Colvin, Eric
 1989 Section Seven of the Canadian Charter of Rights and Freedoms, Canadian Bar
 Review, Vol. 68, p. 560
- Corbett, G. O.
 1868 Notes on Rupert’s America, Its History and Resources, Enclosed with a Letter
 to His Grace the Duke of Buckingham, Secretary of State for the Colonies,
 London, UK: E. Menge & Brothers, Printers
- 1870 An Appeal – To the Right Hon. W. E. Gladstone, M. P. Her Majesty’s Prime
 Minister, Respecting the Suppression of Certain Papers by the Government,
 the ‘Riel Rebellion’ and the Illegal Transfer of the North-West Territories to

the Canadian Government, 1870, London, UK: Cassell, Petter, and Galpin,
Ludgate Hill, E.C.

Cote, J. E.

1964 The Introduction of English Law into Alberta, *Alberta Law Review*, Vol. 3, p.
262-276

1977 The Reception of English Law, *Alberta Law Review*, Vol. 15, p. 29

Cristi, F. R.

1984 Hayek and Schmitt on the Rule of Law, *Canadian Journal of Political Science*,
Vol. 17, No. 3, (Sep., 1984), p. 521-535

Cronk, Lee

1988 Spontaneous Order Analysis and Anthropology, *Cultural Dynamics*, Vol. 1, p.
282

Cross, Sir Rupert and Tapper, Colin

1985 *Cross on Evidence*, 6th ed. By Sir Rupert Cross and Colin Tapper, London,
UK: Butterworths

2000 *Cross on Evidence*, 10th ed. By Sir Rupert Cross and Colin Tapper, London,
UK: LexisNexis

Davin, N. F.

1879 Report on Residential Schools for Indians and Half-Breeds, Ottawa, 14th
March 1879, made to the Minister of the Interior, Dominion of Canada

1885 Interview with Riel: His Parting Message to Mankind, *Regina Leader*, Vol. 3,
No. 38, November 19, 1885

Davis, Erik

1998 Three Forms of Spontaneous Order and Their Place within Civil Society,
Journal for Institutional Innovation, Development, and Transition, Vol. 2, p.
19

Delisle, Ronald Joseph

1993 *Evidence, Principles and Problems*, 3rd Edition, Toronto, ON: Carswell

1996 *Evidence in a Nut Shell*, Toronto, ON: Carswell

2004 *Evidence: Principles and Problems*, 7th Edition, Toronto, ON: Carswell

- Dengler, Lorie A.
 2005 Disaster Lessons: What You Don't Know Can Kill You, News Release, 14 October 2005 GSA Release No. 05-39, The Geological Society of America, Arcata, CA: Humboldt State University, Department of Geological Sciences
- Dicey, A. V.
 1915 Introduction to the Study of the Law of the Constitution, 8th Edition, London, UK: Macmillan
 1926 Introduction to the Study of the Law of the Constitution, Eighth Edition, Reprint 1996, Holmes Beach, FL: Gaunt Inc.
 1932 Blackstone's Commentaries, Cambridge Law Journal, Vol. 4, p. 286
- Dickason, Olive P.
 2000 Making Claim, Beaver, February/March 2000, Vol. 80, No. 1
 2002 Canada's First Nations: A History of Founding Peoples from Earliest Times, Third Edition, Don Mills, ON: Oxford University Press
- Dickson, Brian
 1985 The Rule of Law: Judicial Independence and the Separation of Powers, An Address by the Right Honourable Brian Dickson, P. C. Supreme Court of Canada to the Canadian Bar Association, August 21, 1985
 1993 The Canadian Charter of Rights and Freedoms: Dawn of a New Era? Review of Constitutional Studies, Vol. 2, #1
- diZerega, Gus
 1991 Elites and Democratic Theory: Insights from the Self-Organizing Model, Review of Politics, Vol. 53, No. 2, (Spring, 1991), p. 340-372
 1994 Federalism, Self-organization and the Dissolution of the State, Telos, Summer 1994, No.100
 1995 Democracies and Peace: The Self-Organizing Foundation for the Democratic Peace, Review of Politics, Vol. 57, No. 2, (Spring, 1995), p. 279-308
 1995 Empathy, Society, Nature, and the Relational Self: Deep Ecology and Liberal Modernity, Social Theory & Practice, Summer 95, Vol. 21, No. 2, p. 239-269
 1996 Deep Ecology and Liberalism: The Greener Implications of Evolutionary Liberal Theory, Review of Politics, Vol. 58, No. 4, (Autumn, 1996), p. 699-734

- 2000 Democracy, Spontaneous Order and Peace: Implications for the Classical Liberal Critique of Democratic Politics, Independent Institute Working Paper #20, January 2000, Berkeley, CA: University of California
- 2001 Liberalism, Democracy, and the State: Reclaiming the Unity of Liberal Politics, *Review of Politics*, Vol. 63, No. 4, (Autumn, 2001), p. 755-782
- 2002 Emergent Order and Liberal Political Theory, *The Good Society*, Volume 11, No. 3, 2002, p. 29
- 2004 Toward a Hayekian Theory of Commodification and Systematic Contradiction: Citizens, Consumers and the Media, *Review of Politics*, Vol. 66, No. 3, p. 445

Doherty, Michael P.

- 2001 *The Portable Guide to Evidence*, Toronto, ON: Carswell

Donovan, Brian

- 2001 *The Common Law Basis of Aboriginal Entitlements to Land in Canada: The Law's Crooked Path*, Thesis, Master of Laws, University of Manitoba, Faculty of Law

Dorge, Lionel

- 2000 Jean-Baptiste Thibault, *Canadian Dictionary of Biography Online*, University of Toronto

Dorion, Henri

- 1967 *Rapport de la Commission d'Étude sur l'Intégrité du Territoire du Québec*

Doucet, N. B.

- 1842 *Fundamental Principles of the Laws of Canada*, Montreal, QC: John Lovell

Drumbl, Mark A.

- 2004 Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan, *Columbia Journal of Transnational Law*, Vol. 42, p. 100

Dukelow, Daphne A.

- 2004 *The Dictionary of Canadian Law*, 3rd Edition, Toronto, ON: Thomson Canada Limited

Dumett, R. E.

- 1975 Joseph Chamberlain, Imperial Finance and Railway Policy in British West Africa in the Late Nineteenth Century, *The English Historical Review*, Vol. 90, No. 355, (Apr., 1975), p. 287-321

- Duthu, N. Bruce
2000 Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature, *Harvard Human Rights Journal*, Vol. 13, Spring 2000, p. 141
- Dworkin, Ronald
1998 The Partnership Conception of Democracy, *California Law Review*, Vol. 86, No. 3, The Brennan Center Symposium on Constitutional Law, (May, 1998), p. 453-458
- Dyzenhaus, David
2002 Constituting the Rule of Law: Fundamental Values in Administrative Law, *Queen's Law Journal*, Vol. 27, p. 445

2005 The Logic of the Rule of Law, *University of Toronto Law Review*, Vol. 55, p.691-714
- Elias, Taslim Olawale
1951 Nigeria's Contribution to Colonial Law, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 33, No. 3/4, p. 49-55

1955 Colonial Courts and the Doctrine of Judicial Precedent, *Modern Law Review*, Vol. 18, No. 4, p. 356-370

1955 Form and Content of Colonial Law II, *International and Comparative Law Quarterly*, Vol. 4, No. 4, p. 533-541
- Evans, J. M.
1991 The Principles of Fundamental Justice: The Constitution and the Common Law, *Osgoode Hall Law Journal*, Vol. 29, p. 51
- Farmer, Lindsay
2005 Criminal Responsibility and the Proof of Guilt, Center for the Study of Law and Society Faculty Working Papers, University of California, Berkeley, Paper No. 33
- Fiori, Stefano
2001 Visible and Invisible Order. The Theoretical Duality of Smith's Political Economy, *European Journal of the History of Economic Thought*, Winter 2001, Vol. 8, No. 4, p. 429-448

2006 The Emergence of Institutions in Hayek's Theory: Two Views or One? *Constitutional Political Economy*, (2006), Vol.17, p. 49-61

Finkelstein, Neil

1986 Laskin's Canadian Constitutional Law, 5th Edition, Volume I, Toronto, ON: Carswell

1986 Laskin's Canadian Constitutional Law, 5th Edition, Volume II, Toronto, ON: Carswell

Fisher, Michael Herbert

1991 Indirect Rule in India: Residents and the Residency System, 1764-1858, New York, NY: Oxford University Press

Forbes, J. R. S.

1987 Similar Facts, Agincourt, ON: Carswell

Forde, Daryll

1939 Government in Umor: A Study of Social Change and Problems of Indirect Rule in a Nigerian Village Community, Africa: Journal of the International African Institute, Vol. 12, No. 2, p. 129-162

Foster, Hamar

1990 Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1858, American Journal of Legal History, Vol. 34, No. 1, p. 1-48

1994 Conflict Resolution during the Fur Trade in the Canadian North West, 1803-1859, Cambrian Law Review, Vol. 25, p. 127

2005 Law and necessity in Western Rupert's Land and beyond, 1670-1870, Laws and societies in the Canadian prairie west, 1670-1940, Louis A. Knafla and Jonathan Swainger, Vancouver, BC: UBC Press

Frank, Governor-General

1940 Regulation for the Definition of the Term "Jew", July 24, 1940, Cracow, July 24, 1940, for the Occupied Polish Territories, under the authority of the Nuremberg Laws of Nazi Germany, 1935, from the archives of the Simon Weisenthal Holocaust Center

Frickey, Philip P.

2005 (Native) American Exceptionalism in Federal Public Law, Harvard Law Review, Vol. 119, No. 2, December 2005, p.433

Frieman, Mark J. and Berenblut, Mark L.

1997 The Litigator's Guide to Expert Witnesses, Aurora, ON: Canada Law Book Inc.

Fukuyama, Francis

- 1991 Liberal Democracy as a Global Phenomenon, *Political Science and Politics*, Vol. 24, No. 4, (Dec., 1991), p. 659-664
- 2004 Hayek's Incomplete Victory, *Wilson Quarterly*, Spring 2004, Vol. 28, No. 2
- 2004 Nation-Building 101, *Atlantic Monthly*, (Jan/Feb2004), Vol. 293, No. 1, p. 159-162
- 2005 Do We Really Know How to Promote Democracy? *Romanian Journal of Political Science*, Spring 2005, Vol. 5, No. 1, p. 161-173

Fuller, Lon L.

- 1955 Freedom: A Suggested Analysis, *Harvard Law Review*, Vol. 68, No. 8, (Jun., 1955), p. 1305-1325
- 1960 Adjudication and the Rule of Law, *American Society of International Law, Proceedings 1960*, Vol. 54, p. 1
- 1964 *The Morality of Law*, New Haven, CT: Yale University Press
- 1967 *Legal Fictions*, Stanford, CA: Stanford University Press
- 1968 *Anatomy of the Law*, London, UK: Frederick A. Praeger, Publishers
- 1969 Human Purpose and Natural Law, *Natural Law Forum*, Vol. 3, p. 69
- 1971 Mediation – Its Forms and Functions, *Southern California Law Review*, Vol. 44, p. 305
- 1975 Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction, *Brigham Young University Law Review*, 1975, p. 89
- 1981 *The Principles of Social Order: Selected Essays of Lon L. Fuller*, edited with an introduction by Kenneth I. Winston, Durham, NC: Duke University Press

Galbraith, John S.

- 1949 The Hudson's Bay Land Controversy, 1863-1869, *Mississippi Valley Historical Review*, Vol. 36, No. 3, p. 457-478
- 1977 *The Hudson's Bay Company as an Imperial Factor, 1821-1869*, New York, NY: Octagon Books

Gandhi, Arun

- 1995 Nonviolence and Us, *Business Horizons*, March/April 1995, p.1-2

- Garner, Bryan A.
 1990 Black's Law Dictionary, 8th ed. St. Paul, MN: West Publishing
- Garnet, Graham
 2005 Section 1, Canadian Charter of Rights and Freedoms Digest, Canadian Legal Information Institute, Montréal, QC: LexUM, Faculté de droit, Université de Montréal
- Geertz, Clifford
 1973 Toward and Interpretive Theory of Culture, The Interpretation of Culture, New York, NY: Basic Books
 1974 From the Native's Point of View": On the Nature of Anthropological Understanding, Bulletin of the American Academy of Arts and Sciences, Vol. 28, No. 1, (Oct., 1974), p. 26-45
- Geoffrion, Felix
 1874 Memorandum on the North-West Question, Ottawa, ON: Peel 562
- Gerrans, Philip
 2004 The Disposition of Things: Spontaneous Order in Esprit des Lois, The European Legacy, Vol. 9, No. 6, p. 751-765
- Gillespie, Nick and Caldwell, Bruce
 2005 Hayek for the 21st Century, Policy, Winter 2005, Vol. 21, No. 2, p. 49-53
- Gocking, Roger S.
 1993 British Justice and the Native Tribunals of the Southern Gold Coast Colony, Journal of African History, Vol. 34, No. 1, p. 93
- Goldman, Calvin S.
 1974 The Use of Learned Treatises in Canadian and United States Litigation, University of Toronto Law Review, Vol. 24, No. 4, p. 423-452
- Gooch, John
 1867 Manual or Explanatory Development of the Act for the Union of Canada, Nova Scotia and New Brunswick in One Dominion under the Name of Canada, Synthetical and Analytical: with the Text of the Act etc., and Index to the Act and the Treatises, Ottawa, ON: G. E. Desbarats
- Goodman, C. P.
 1997 Polanyi on Liberal Neutrality, Tradition & Discovery, Vol. 23, No. 3, (1996-1997), p. 38

Gray, John

1978 On Liberty, Liberalism and Essential Contestability, *British Journal of Political Science*, Vol. 8, No. 4, (Oct., 1978), p. 385-402

1981 Hayek on Liberty, Rights, and Justice, *Ethics*, Vol. 92, No. 1, Special Issue on Rights, (Oct., 1981), p. 73-84

Graham, Michael H.

2003 *Federal Rules of Evidence in a Nutshell*, 6th Edition, Toronto, ON: Thomson

Green, Leslie Claude

1970 Native Law and the Common Law: Conflict or Harmony, *Malaya Law Review*, Vol. 12, p. 38-59

1972 Legal Significance of Treaties Affecting Canada's Indians, *Anglo-American Law Review*, Vol. 1, p. 119-162

1975 North America's Indians and the Trusteeship Concept, *Anglo-American Law Review*, vol. 4, p. 137

1975 Civilized Law and Primitive Peoples, *Osgoode Hall Law Journal*, Vol. 13, p. 233-249

Green, Leslie Claude and Dickason, Olive P.

1989 *The Law of Nations and the New World*, Edmonton, AB: University of Alberta Press

Grinnell, George Bird

1907 Tenure of Land among the Indians, *American Anthropologist*, New Series, Vol. 9, No. 1, p. 1-11

Haines, Charles G.

1915 Judicial Review of Legislation in Canada, *Harvard Law Review*, Vol. 28, No. 6, (April 1915), p. 565-588

Haller, Markus

2000 Carl Menger's Theory of Invisible-Hand Explanations, *Social Science Information —sur Les— Sciences Sociales*, Vol. 39, No. 4, p. 529-565

Halsbury, Hardinge Stanley Giffard, Earl of

1907 *The Laws of England: Being and Complete Statement of the Whole Law of England*, 4th Edition, London, UK: Butterworth

Hamowy, Ronald

1968 Adam Smith, Adam Ferguson, and the Division of Labour, *Economica*, New Series, Vol. 35, No. 139, (Aug., 1968), p. 249-259

- 1999 F. A. Hayek, on the Occasion of the Centenary of His Birth, *CATO Journal*, Fall99, Vol. 19, No. 2, p. 279
- 2003 F. A. Hayek and the Common Law, *The Cato Journal*, Vol. 23, No. 2, (Fall 2003), p. 241
- Hannigan, A. St. J. J.
- 1958 Native Custom, Its Similarity to English Conventional Custom and Its Mode of Proof, *Journal of African Law*, Vol. 2, No. 2, (Summer, 1958), p. 101-115
- Hanson, J. Carlisle
- 1952 The Preamble to the British North America Act, *University of New Brunswick Law Journal*, Vol. 5, p. 9-19
- Harring, Sidney L.
- 2005 There Seemed to Be No Recognized Law: Canadian Law and the Prairie First Nations, *Laws and societies in the Canadian prairie west, 1670-1940*, Louis A. Knafla and Jonathan Swainger, Vancouver, BC: UBC Press
- Harris, Douglas C.
- 2000 Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery, *U. B. C. Law Review*, Vol. 34, No. 1, p. 195
- 2003 Historian and Courts: *R. v. Marshall and Mi'kmaq Treaties on Trial*, *Canadian Journal of Law and Society*, Vol. 18, p. 123
- Harrison, Rowland J.
- 1997 The Interface between Federal and Provincial Jurisdiction over Pipelines: Recent Developments, Current Issues and a Suggested Mechanism for Reducing Turbulence in the Buffer Zone, *Alberta Law Review*, Vol. 35, p. 389
- Harvard Law Review
- 1984 Rethinking the Trust Doctrine in Federal Indian Law, *Harvard Law Review*, Vol. 98, p. 422
- Hasnas, John
- 2005 Hayek, The Common Law and Fluid Drive, *New York University Journal of Law & Liberty*, Vol. 1, p. 79
- Hawthorn, Harry H.
- 1966 A Survey of the Contemporary Indians of Canada - Economic, Political, Educational Needs and Policies, Volume I, Ottawa, ON: Indian Affairs Branch

1967 A Survey of the Contemporary Indians of Canada - Economic, Political, Educational Needs and Policies, Volume II, Ottawa, ON: Indian Affairs Branch

Hayek, Frederick August

1945 Use of Knowledge in Society, American Economic Review, Vol. 35, No. 4, (Sep., 1945), p. 519-530

1945 The Road to Serfdom, with Forward by John Chamberlain, Chicago, IL: University of Chicago Press

1948 Individualism and Economic Order, Chicago, IL: University of Chicago Press

1949 The Intellectuals and Socialism, University of Chicago Law Review, Vol. 16, p. 417

1952 The Counter-Revolution of Science: Studies on the Abuse of Reason, Glencoe, IL: The Free Press

1962 Rules, Perception, and Intelligibility, Proceedings of the British Academy 1962, London, UK: Oxford University Press

1963 The Constitution of Liberty, London, UK: Routledge & Kegan Paul

1967 Studies in Philosophy, Politics and Economics. London, UK: Routledge and Chicago University Press

1973 Law, Legislation and Liberty - Volume I - Rules and Order, London, UK: Routledge & Kegan Paul

1976 Law, Legislation and Liberty - Volume II - The Mirage of Social Justice, London, UK: Routledge & Kegan Paul

1976 Law, Legislation and Liberty - Volume III - The Political Order of a Free People, London, UK: Routledge & Kegan Paul

1988 The Fatal Conceit: The Errors of Socialism. London, UK: Routledge.

1994 The Road to Serfdom, 15th Anniversary Edition, with a New Introduction by Milton Friedman, Chicago, IL: University of Chicago Press

Heath, Eugene

1989 How to Understand Liberalism as Gardening: Galeotti on Hayek, Political Theory, Vol. 17, No. 1, (Feb., 1989), p. 107-113

- 1992 Rules, Function, and the Invisible Hand: An Interpretation of Hayek's Social Theory, *Philosophy of the Social Sciences*, March 1992, Vol. 22, No.1, p. 28

Henderson, David R.

- 2002 Biography of Friedrich August Hayek (1899-1992), *The Concise Encyclopedia of Economics*,
<http://www.econlib.org/LIBRARY/Enc/bios/Hayek.html>

Henderson, William B.

- 1991 Evidentiary Problems in Aboriginal Cases, *Special Lectures of the Law Society of Upper Canada: 1991 - Applying the Law of Evidence - Tactics and Techniques for the Nineties*, Toronto, ON: Carswell

Henry, Alexander

- 1809 *Travels and Adventures in Canada and the Indian Territories, between the years 1760 and 1776*, New York, NY: I. Riley

Hepburn, Samantha

- 1995 Disinterested Truth: Legitimation of the Doctrine of Tenure Post-Mabo, *Melbourne University Law Review*, Vol. 29, p. 1
- 2005 Feudal Tenure and Native Title: Revising an Enduring Fiction, *Sydney Law Review*, Vol. 27, p. 49

Heussler, Robert

- 1968 *The British in Northern Nigeria*, London, UK: Oxford University Press

Hodder, Ian

- 1977 *The Distribution of Material Culture Items in the Baringo District, Western Kenya, Man, New Series*, Vol. 12, No. 2, p. 239-269
- 1987 *The Archaeology of Contextual Meanings*, Cambridge, UK: Cambridge University Press
- 1991 Interpretive Archaeology and Its Role, *American Antiquity*, Vol. 56, No. 1, p. 7-18
- 1999 *The Archaeological Process: An Introduction*, Oxford, UK: Blackwell Publishers Ltd.

Hoffmann, L. H.

- 1975 Similar Facts after Boardman, *Law Quarterly Review*, Vol. 91, p. 193-206

Hogg, Peter W.

- 1976 Is Judicial Review of Administrative Action Guaranteed by the British North America Act? *Canadian Bar Review*, Vol. LIV, p. 716

- 1984 Canada's New Charter of Rights, *American Journal of Comparative Law*, Vol. 32, No. 2, p. 283-305
- 1984 The New Canadian Constitution: Introduction, *American Journal of Comparative Law*, Vol. 32, No. 2, p. 221-224
- 1992 *Constitutional Law of Canada*, 4th Edition, Toronto, ON: Carswell
- 2001 The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis, *Canadian Bar Review*, Vol. 80, p. 171
- 2004 *Constitutional Law of Canada*, Toronto, ON: Carswell
- 2006 *Canada: From Privy Council to Supreme Court, Interpreting Constitutions - A Comparative Study*, Jeffrey Goldsworthy, ed., Toronto, ON: Oxford University Press
- Hogg, Peter W. and Bushell, Allison A.
- 1997 The Charter Dialogue between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All), *Osgoode Hall Law Journal*, Vol. 35, p. 75
- Hogg, Peter W. and Turpel, Mary Ellen
- 1995 Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues, *Canadian Bar Review*, Vol. 74, p. 187
- Hogg, Peter W. and Zwibel, Cara F.
- 2005 The Rule of Law in the Supreme Court of Canada, *University of Toronto Law Review*, Vol. 55, p.715-732
- Horwitz, Steven
- 2001 From Smith to Menger to Hayek Liberalism in the Spontaneous-Order Tradition, *Independent Review*, Vol. 6, No.1, Summer 2001, p. 81-97
- Hudson's Bay Company
- 1875 Confidential – Correspondence Relating to Disturbances of Red River, 1864-1870, London, UK: Sir Joseph Causton and Sons
- Humphreys, R. A.
- 1934 Lord Shelbourne and the Proclamation of 1763, *English Historical Review*, Vol. 49, No. 194, p. 241-264

- Hunter, Claire E.
2004 New Justification for an Old Approach: In Defence of Characterizing First Nations Treaties as Contracts, *University of Toronto Faculty of Law Review*, Vol. 62, p. 61
- Hurley, Mary C.
1996 Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions before the Federal Court of Canada, *McGill Law Journal*, Vol. 41, p. 317-386
- Huyshe, G. L.
1871 *The Red River Expedition*, London, UK: Macmillan and Company
- Ibhawoh, Bonny
2002 Stronger than the Maxim Gun Law, *Human Rights and British Colonial Hegemony in Nigeria, Africa*, 2002, Vol. 72 Issue 1, p55
- Ioannides, Stavros
2003 Orders and Organizations: Hayekian Insights for a Theory of Economic Organization, *American Journal of Economics and Sociology*, Vol. 62, No. 3, (July 2003), p. 533
- Irvine, M. Bell
1871 *Report of the Red River Expedition of 1870*, London, UK: W. Harrison & Sons
- Isaac, Thomas
1992 Individual Versus Collective Rights: Aboriginal People and the Significance of *Thomas v. Norris*", *Manitoba Law Journal*, Vol. 21, p. 618-630
- Jacob, Jack and Goldrein, Ian S.
1990 *Pleadings: Principles and Practice*, Litigation Library, London, UK: Sweet & Maxwell
- Jacobs, Laverne A. and Kuttner, Thomas S.
2002 Discovering What Tribunals Do: Tribunal Standing before the Courts, *Canadian Bar Review*, Vol. 87, p. 616-645
- Jacobs, Struan
1999 Michael Polanyi's Theory of Spontaneous Orders, *Review of Austrian Economics*, Vol.11, p. 111-127
- Jacques, Maurice
1987 *Initiation à l'Art de la Plaidoirie*, Montréal, QC: Wilson & Lafleur Ltée.

- Jaeger, Gertrude and Selznick, Philip
 1964 A Normative Theory of Culture, *American Sociological Review*, Vol. 29, No. 5, (Oct., 1964), p. 653-669
- Jenkins, Christopher D.
 1998 John Marshal's Aboriginal Rights Theory and Its Treatment in Canadian Jurisprudence, *University of British Columbia Law Review*, Vol. 35, p. 1-42
- Jenness, Diamond
 1933 *The Antiquity of Man in America in the Light of Archaeology, The American Aborigines: Their Origin and Antiquity*, N. C. Nelson, ed., Toronto, ON: University of Toronto Press
- 1937 *The Indian Background of Canadian History*, Ottawa, ON: Canada, Department of Mines and Resources, Bulletin No. 86
- 1947 *Plan for Liquidating Canada's Indian Problem Within 25 Years*, Special Joint Committee, Minutes of Proceedings and Evidence, p. 310, Ottawa, ON: Indian & Northern Affairs Canada
- Josselin, Jean-Michel and Marciano, Alain
 2002 The Making of the French Civil Code: An Economic Interpretation, *European Journal of Law and Economics*, Vol.14, p. 193-203
- Journal of African Law
 1957 Adeyinka Oyekan and Others v. Musendiku Adele, *Journal of African Law*, Vol. 1, No. 3, p. 186-192
- Justice as Healing, Editor
 1997 A Healing Circle in the Innu Community of Sheshashit, *Justice as Healing*, Vol. 2. No. 2, Summer 1997
- Kades, Eric
 1999 Winfalls, *Yale Law Journal*, Vol. 108, No. 7, p. 1489-1568
- 2000 The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands, *University of Pennsylvania Law Review*, Vol. 148, p. 1065
- 2001 History and Interpretation of the Great Case of John v. M'Intosh, *Law & History Review*, Vol. 19, p. 67
- Kaye, David H.
 2004 *The New Wigmore - A Treatise on Evidence*, New York, NY: Aspen Publishers

- Keesing, Felix Maxwell
1958 Cultural Anthropology: The Science of Custom, New York, NY: Rinehart & Company, Inc.
- Keith, A. Berriedale
1931 Notes on Imperial Constitutional Law, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 13, No. 1, p. 114-127
1931 Notes on Imperial Constitutional Law, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 13, No. 4, p. 246-265
1938 Notes on Imperial Constitutional Law, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 20, No. 4, p. 251-261
1940 Notes on Imperial Constitutional Law, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 22, No. 1, p. 77-92
- Kelly, James B.
1999 The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997, *Osgoode Hall Law Journal*, Vol. 37, No. 3, p. 626
2005 *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, Vancouver, BC: UBC Press
- Kennedy, William Paul McClure
1973 *The Constitution of Canada, 1534-1937: An Introduction to its Development, Law and Custom*, 2nd Edition, New York, NY: Russell & Russell
- Khalil, Elias L.
1997 Friedrich Hayek's Theory of Spontaneous Order: Two Problems, *Constitutional Political Economy*, Vol. 8, p. 301-317
- Kilgour, David
1988 *Uneasy Patriots: Western Canadians in Confederation*, Edmonton, AB: Lone Pine Publishing
- Killingray, David
1986 The Maintenance of Law and Order in British Colonial Africa, *African Affairs*, Vol. 85, No. 340. (Jul., 1986), p. 411-437
- Kilpatrick, Henry E. Jr.
2001 Complexity, Spontaneous Order, and Friedrich Hayek: Are Spontaneous Order and Complexity Essentially the Same Thing? *Complexity*, Vol. 6, No. 3, p. 16

Kirk-Greene, A. H. M.

- 1984 Canada in Africa: Sir Percy Girouard, Neglected Colonial Governor, *African Affairs*, Vol. 83, No. 331, (Apr., 1984), p. 207-239

Knafla, Louis A.

- 1986 *Law and Justice in a New Land: Essays in Western Canadian Legal History*, Louis A. Knafla, Calgary, AB: Carswell

From Oral to Written Memory: The Common Law Tradition in Western Canada, *Law and Justice in a New Land: Essays in Western Canadian Legal History*, Louis A. Knafla, Calgary, AB: Carswell

- 2005 Introduction: Laws and Societies in the Anglo-Canadian North-West Frontier and Prairie Provinces, 1670-1940, *Laws and Societies in the Canadian Prairie West, 1670-1940*, Louis A. Knafla and Jonathan Swainger, eds., Vancouver, BC: UBC Press

Knaplund, Paul

- 1925 The Dano-Norwegian Conflict over Greenland, *American Journal of International Law*, Vol. 19, No. 2, p. 374-377
- 1934 Gladstone on the Red River Rebellion, 1870, *Mississippi Valley Historical Review*, Vol. 22, No. 1, p. 76-77
- 1935 *Gladstone's Foreign Policy*, New York, NY: Harper & Brothers Publishers
- 1941 *The British Empire, 1815-1939*, New York, NY: Harper & Brothers Publishers
- 1956 *Britain Commonwealth and Empire, 1901-1955*, London, UK: Hamish Hamilton
- 1961 Gladstone-Gordon Correspondence, 1851-1896: Selections from the Private Correspondence of a British Prime Minister and a Colonial Governor, *Transactions of the American Philosophical Society, New Series*, Vol. 51, No. 4, p. 1-116
- 1966 *Gladstone and Britain's Imperial Policy*, London, UK: Frank Cass & Co.

Knox, Bruce A.

- 1971 The Rise of Colonial Federation as an Object of British Policy, 1850-1870, *Journal of British Studies*, Vol. 11, No. 1, p. 92-112

Koebner, Richard and Schmidt, Helmut Dan

- 1965 *Imperialism: The Story and Significance of a Political Word, 1840-1960*, London, UK: Cambridge University Press

- Kruse, Jack and Poppel, Birger
 2007 Survey of Living Conditions in the Arctic, Anchorage, Alaska: Institute of Social & Economic Research, University of Alaska Anchorage
- Kushner, Gilbert; Gibson, Mickey; Gulick, John; Honigman, John J. and Nonas, Richard
 1962 What Accounts for Sociocultural Change? A Propositional Inventory, Chapel Hill, NC: Institute for Research in Social Science, University of North Carolina
- La Forest, Gerard V.
 1975 Delegation of Legislative Power in Canada, McGill Law Journal, Vol. 21, p. 131
- 1983 The Canadian Charter of Rights and Freedoms: An Overview, Canadian Bar Review, Vol. 61, p. 19
- La Forest, Gerard V.; Dupuis, Renee; Black, William W. and Jain, Harish
 2000 The Indian Act Exception, Promoting Equality: A New Vision - The Report of the Canadian Human Rights Act Review Panel, Ottawa, ON: Canada, Department of Justice
- Labouchere, Henry
 1856 Canada West and the Hudson's Bay Company: A Political and Humane Question of Vital Importance to the Honour of Great Britain; to the Prosperity of Canada and to the Existence of the Native Tribes, London, UK: Aborigine Protection Society, William Tweedie Printers
- LaForme, Harry S.
 1991 Indian Sovereignty: What Does It Mean? Canadian Journal of Native Studies, Vol. 11, No. 2, p. 253-66
- Lahey, Kathleen A.
 1998 Legal 'Persons' and the Charter of Rights: Gender, Race, and Sexuality in Canada, Canadian Bar Review, vol. 77, p. 401
- Lamer, Antonio
 1994 Canada's Legal Revolution: Judging in the Age of the Charter of Rights, Israel Law Review, Vol. 28, No. 4, p. 579
- 1996 The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change, University of New Brunswick Law Journal, Vol. 45, p. 3

- La Rusic, Ignatius E. et al
 1979 *Negotiating a Way of Life : Initial Cree Experience with Administrative Structure Arising from the James Bay Agreement*, Montreal, QC: SSDCC Inc. & Ottawa, ON: Department of Indian & Northern Affairs
- Laskin, John Bora
 1959 *An Inquiry into the Diefenbaker Bill of Rights" (1959)*, 37 *Canadian Bar Review*, Vol. 37, p. 77
- 1969 *The British Tradition in Canadian Law*, London, UK: Stevens & Sons
- Laskin, John B. and Sharpe, Robert J.
 1980 *Constructing Federal Court Jurisdiction: A Comment on Fuller Construction*, *University of Toronto Law Journal*, Vol. 30, p. 283
- Lawrence, Bonita
 2004 *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*, Lincoln, NE: University of Nebraska Press
- Lawrence, T. J.
 1913 *A Handbook of Public International Law*, 8th Edition, London, UK: Macmillan & Company
- Lederman, W. R.
 1956 *The Independence of the Judiciary*, 34 *Canadian Bar Review*, Vol. 34, p. 769, p. 1139
- 1959 *The Nature and Problems of a Bill of Rights*, *Canadian Bar Review*, Vol. 37, p. 4-15
- 1967 *Some Forms and Limitations of Co-operative Federalism*, *Canadian Bar Review*, Vol. 45, p. 409-436
- 1976 *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, *Alberta Law Review*, Vol. 14, p. 34-49
- 1987 *Judicial Independence and Court Reforms in Canada for the 1990's*, *Queen's Law Journal*, Vol. 12, p. 385-398
- Leonard, Robert
 2005 *Hayek's Challenge: An Intellectual Biography of F. A. Hayek*, *ISIS: Journal of the History of Science in Society*, March 2005, Vol. 96, No. 1, p. 141-142

Leslie, John F.

- 1999 Assimilation, Integration or Termination? The Development of Canadian Indian Policy, 1943-1963, Phd. Thesis, Ottawa, ON: Carleton University, Department of History

Leslie, John F. and Maguire, Ron

- 1978 The Historical Development of the Indian Act, Ottawa, ON: Indian & Northern Affairs, Treaties and Historical Research Centre, 2nd Edition

Liberal Part of Canada

- 2002 Liberal Party of Canada (Ontario) Top 10 Priority Policy Resolutions, Passed on September 21st, 2002,
http://www.lpc.o.ca/docs/LPC_O_%20Top%2010%20Priority%20Resolutions02.pdf

Lips, Julius E.

- 1937 Public Opinion and Mutual Assistance among the Montagnais-Naskapi, American Anthropologist, New Series, Vol. 39, No. 2, p. 222-228
- 1937 The Savage Strikes Back, New Hyde Park, NY: University Books, 1966 Edition
- 1947 Naskapi Law (Lake St. John and Lake Mistassini Bands) Law and Order in a Hunting Society, Transactions of the American Philosophical Society, New Series, Vol. 37, No. 4, p. 379-492

Little Bear, Leroy

- 1982 A Concept of Native Title, Canadian Legal Aid Bulletin, No. 2&3, p. 99
- 1986 The Impact of s. 88 of the Indian Act on Application of Provincial Laws to Indians, submitted to Professor Robb, University of Alberta
- Aboriginal Rights and the Canadian "Grundnorm", Arduous Journey: Canadian Indians and Decolonization, J. Rick Ponting, ed., Toronto. ON: McClelland & Stewart
- 2000 Jagged Worldviews Colliding, Reclaiming Indigenous Voice and Vision, Marie Battiste, p. 77, Vancouver, BC: UBC Press

Little Bear, Leroy; Bolt, Menno and Long, J. Anthony

- 1984 Pathways to Determination: Canadian Indians and the Canadian State, Toronto, ON: University of Toronto Press

Little Bear, Leroy and Heavy Head, Ryan

- 2004 A Conceptual Anatomy of the Blackfoot Word, ReVision, Vol. 26, No. 3, p. 31

- Lord, Charles P. and Shutkin, William A.
 1994 Environmental Justice and the Use of History, *Boston College Environmental Affairs Law Review*, Fall 1994, Vol. 22, No. 1
- Loughton, Gavin
 2004 Calvin's Case and the Origins of the Rule Governing 'Conquest' in English Law, *Australian Journal of Legal History*, Vol. 8, No. 13
- Low, Charles Rathbone
 1878 A memoir of Lieutenant-General Sir Garnet J. Wolseley, K.C.B., G.C.M.G., D.C.L., LL.D., London, UK: R. Bentley
- Lowie, Robert H.
 1948 Some Aspects of Political Organization Among the American Aborigines, *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, Vol. 78, No. 1/2, p. 11-24
 1962 *The Origin of the State*, New York, NY: Russell & Russell Inc.
- Lowndes, John P.
 1994 When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title, *Buffalo Law Review*, Vol. 42, p. 77
- Lussier, Sylvain
 2006 The 'Aboriginal Title' of the Nomadic Nations of the East, *Dejardins, Ducharme, Stein, Monast, Newsletter* 06/01
- Lisztig, Michael
 1999 Canada's Long Road to Nowhere: Why the Circle of Command Liberalism Cannot Be Squared, *Canadian Journal of Political Science*, Vol. 32, No. 3, p. 451-470
- Lugard, Frederick John Dealtry
 1936 *The Basis of the Claim for Colonies*, *International Affairs (Royal Institute of International Affairs 1931-1939)*, Vol. 15, No. 1. (Jan. - Feb., 1936), p. 3-25
 1965 *The Dual Mandate in British Tropical*, 5th Edition, London, UK: Frank Cass
 1970 *Political Memoranda, Revision of Instructions to Political Officers on Subjects Chiefly Political and Administrative 1913-1918*, 3rd Edition, London, UK: F. Cass
- Lyon, J. Noel
 1988 An Essay on Constitutional Interpretation, *Osgoode Hall Law Journal*, Vol. 26, No. 1, p. 95

- Lysyk, Kenneth
 1967 The Unique Constitutional Position of the Canadian Indian, *Canadian Bar Review*, Vol. 45, p. 513
- Macdonald, Norman
 1934 English Land Tenure on the North American Continent: A Summary, *Contributions to Canadian Economics*, Vol. 7, p. 21-44
- Macedo, Stephen
 1999 Hayek's Liberal Legacy, *Cato Journal*, Fall 1999, Vol. 19, No. 2, p. 289
- Machray, Robert
 1909 Life of Robert Machray, D.D., LL.D., D.C.L., Archbishop of Rupert's Land, Primate of All Canada, Toronto, ON: The Macmillan Company of Canada
- MacInnes, T. R. L.
 1946 History of Indian Administration in Canada, *Canadian Journal of Economics and Political Science*, Vol. 12, No. 3, p. 387-394
- MacLeod, Roderick C.
 2000 William Francis Butler, *Canadian Dictionary of Biography Online*, University of Toronto
- Mailhot, Philippe R.
 2000 Noel-Joseph Richtot, *Canadian Dictionary of Biography Online*, University of Toronto
- Mainville, Robert
 1999 Compensation in Cases of Infringement to Aboriginal and Treaty Rights, MA Thesis, McGill University, Faculty of Law
- 2001 An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach, Saskatoon, SK: Purich Publishing Ltd.
- Mamdani, Mahmood
 1999 Historicizing Power and Responses to Power: Indirect Rule and Its Reform, *Social Research*, Vol. 66, No. 3, p. 859
- Marks, John
 1985 Two Kinds of Order, <http://www.ertnet.demon.co.uk/2kinds.html>
- Mason, Anthony
 1997 The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown, *International & Comparative Law Quarterly*, Vol. 46, p. 812

- Matson, J. N.
 1993 The Common Law Abroad: English and Indigenous Laws in the British Commonwealth, *International and Comparative Law Quarterly*, Vol. 42, No. 4, p. 753-779
- Maurice, Frederick Barton and Arthur, George Compton Archibald
 1924 The Life of Lord Wolseley, New York, NY: Doubleday
- McArthur, Alex
 1882 The Causes of the Rising in the Red River Settlement 1869-70, Winnipeg, MB: Manitoba Free Press
- McConnell, W. H.
 1989 Bilingualism on the Prairies: The Constitutional Status of French in Saskatchewan, *Saskatchewan Law Review*, Vol. 53, p. 143
- McCullough, H. B.
 1992 Parliamentary Supremacy and a Constitutional Grid: The Canadian Charter of Rights, *International and Comparative Law Quarterly*, Vol. 41, No. 4, p. 751-768
- McDaniel, Charles
 2004 Frederick Heyek and Reinhold Niebuhr on the Moral Persistence of Liberal Society, *Journal of Interdisciplinary Studies*, Vol. 16, No. 1/2, p. 133
- McGillivray, Angus J.
 1918 Dominion and Provincial Powers under the British North America Act, 1867, *Illinois Law Review*, Vol. 13, p. 500
- McGovney, Dudley Odell
 1945 The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto, *University of Pennsylvania Law Review*, Vol. 94, No. 1, p. 59-93
- McKinnon, J. Bruce
 2001 Administrative Agencies and the Charter, prepared for the Administrative Justice Project, Ministry of Attorney General, Victoria, BC
- McLachlan, Beverley M.
 1990 The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator? *University of New Brunswick Law Journal*, Vol. 39, p. 43
- The Changing Role of the Supreme Court of Canada and Its Judges, address to County Carleton Law Association Conference, November 17, 1990, Ottawa, ON

1991 The Charter: A New Role for the Judiciary? Weir Memorial Lecture, October 16, 1990, Edmonton, AB: University of Alberta, Alberta Law Review, Vol. 29, No. 3, p.540

The Canadian Charter and the Democratic Process, address to the 18th Allen Hope Southey Memorial Lecture, University of Melbourne, August 29, 1991, Melbourne Australia

The Demystification of the Judiciary, McGill Law Journal 7th Annual Alumni Lecture, Chancellor Day Hall, February 19, 1991, Montreal, QC

Of Power, Democracy and the Judiciary, address to a Dinner Meeting of the Lawyers Club, Toronto, January 7, 1991, published in the Law Society Gazette

1995 The Role of Judges in Modern Commonwealth Society, The Advocate, Vol. 53, No. 5, p. 681

1996 The Evolution of Equality, The Advocate, Vol. 54, No. 4, p. 559

1998 The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law, Canadian Journal of Administrative Law and Practice, Vol. 12, p.174

1999 Charter Myths, UBC Law Review, Vol. 33, p. 23

2000 Remarks of the Right Honourable Beverley McLachlin, P.C., Famous Five Breakfast, October 17, 2000

2001 Judicial Independence, Remarks of the Right Honourable Beverley McLachlin, P. C., May 11, 2001, The 300th Anniversary of the Act of Settlement Conference, Vancouver, BC

Democracy and Rights: A Canadian Perspective, Canadian Speeches, January-February, 2001, Vol. 14, No. 6, p.1

2003 The Civilization of Difference, Remarks of the Right Honourable Beverley McLachlin, P. C., March 7, 2003, La Fontaine-Baldwin Symposium, Toronto, ON: Dominion Institute

Aboriginal Peoples and Reconciliation, Canterbury Law Review, Vol. 9, p. 240

2004 Respecting Democratic Roles, Remarks of the Right Honourable Beverley McLachlin, P. C., November 22, 2004

Globalization, Identity and Citizenship, Remarks of the Right Honourable Beverley McLachlin, P.C., October 26, 2004

Judging in a Democratic State, June 3, 2004, Remarks of the Right Honourable Beverley McLachlin, P. C.

2005 Unwritten Constitutional Principles: What Is Going On? Lord Cooke Lecture, Remarks of the Right Honourable Beverley McLachlin, P.C., December 1, 2005, Wellington, New Zealand

Embargoed until Delivered – Check Against Delivery, Remarks of the Right Honourable Beverley McLachlin, P.C., August 13, 2005, Vancouver, BC to the Canadian Bar Association Council, CBA Canadian Legal Conference

McLachlin, Beverley M. et al

1989 Swearing in Ceremony, The Honourable Beverley McLachlin, April 17, 1989, Ottawa, ON: Supreme Court of Canada

McLachlin, Beverley M. and Miller, Andrea

1982 Rothman: Police Trickery: Is the Game Worth the Candle, UBC Law Review, Vol. 16, p. 115

McLachlin, Campbell

1988 The Recognition of Aboriginal Customary Law: Pluralism beyond the Colonial Paradigm: A Review Article, International and Comparative Law Quarterly, Vol. 37, No. 2, p. 368-386

McLeod, Clay

1992 The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past, Alberta Law Review Vol. 30, p. 1276

McLeod-Cullinane, Barry

1995 Lon L. Fuller and the Enterprise of Law, Legal Notes, No. 22, London, UK: Libertarian Alliance

McNeil, Kent

1982 Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations, Saskatoon, SK: University of Saskatchewan, Native Law Centre

1989 Common Law Aboriginal Title, Toronto, ON: Oxford University Press

1990 A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals? Monash University Law Review, Vol. 16, p. 91

- 1992 Commentary on: Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute, *Canadian Journal of Law & Society*, Vol. 7, p. 207
- 1994 Envisaging Constitutional Space for Aboriginal Governments, *Queen's Law Journal*, Vol. 19, p. 95
- 1996 Aboriginal Governments and the Canadian Charter of Rights and Freedoms, *Osgoode Hall Law Journal*, Vol. 34, No. 1, p. 61
- 1997 The Meaning of Aboriginal Title, Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference, Michael Asch ed., Vancouver BC: UBC Press, p. 135
- 1997 How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified? *Constitutional Forum*, Vol. 8, No. 2, p. 33
- Aboriginal Title and Aboriginal Rights: What's the Connection? *Alberta Law Review*, Vol. 36, p. 117
- 1998 Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction, Toronto, ON: York University, Osgoode Hall Law School
- 1999 Sovereignty and the Aboriginal Nations of Rupert's Land, *Manitoba History*, Spring/Summer 1999, No. 37
- 2000 Aboriginal Title and Section 88 of the Indian Act, *U. B. C. Law Review*, Vol. 34, p. 159
- 2001 Self-Government and the Inalienability of Aboriginal Title, *McGill Law Journal*, Vol. 47, p. 473
- 2002 Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion, *Ottawa Law Review*, Vol. 33, p. 301
- Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations, a research paper prepared for the Office of the B. C. Regional Vice-Chief of the Assembly of First Nations
- 2003 Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin, *Indigenous Law Journal*, Vol. 2, p. 1
- 2004 The Vulnerability of Indigenous Land Rights in Australia and Canada, *Osgoode Hall Law Journal*, Vol. 42, p. 271

- McTurnan, Lee B.
 1963 An Approach to Common Mistake in English Law, *Canadian Bar Review*, Vol. 41, No. 1, p. 1
- Meek, Charles Kingsley
 1970 *Law and Authority in a Nigerian tribe: A Study in Indirect Rule*, New York, NY: Barnes and Noble
- Menocal, Alina Rocha
 1998 The Politics of Marginalization: Poverty and the Rights of the Indigenous People in Mexico, *Journal of International Affairs*, Fall 1998, Vol. 52, No. 1, p. 85
- 2004 And If There Was No State? Critical Reflections on Bates, Polanyi and Evans on the Role of the State in Promoting Development, *Third World Quarterly*, June, Vol. 25, No. 4, p. 765-777
- Migone, Andrea
 2006 *Globalization between the Hayekian and Polanyian Perspectives: Spontaneous Order or Embeddedness?* Phd Thesis, Vancouver, BC: Simon Fraser University, Department of Political Science
- Mioche, Antoine
 2006 Spreading Liberty without Democracy: The Extension of the Rule of Law in the British Empire, presented at a conference, *Globalization, Empire, and Imperialism in Historical Perspective*, June 1-4, 2006, Chapel Hill, NC: University of North Carolina
- Mish, Frederick C.
 2001 *Merriam-Webster's Collegiate Dictionary*, 10th Edition, Springfield, MA: Merriam-Webster
- Montesquieu, Charles de Secondat
 1758 [The Spirit of Laws], *Oeuvres complètes de Charles de Secondat Montesquieu*, texte présenté et annoté par Roger Caillois, Paris, RF: Gallimard, edition de 1958
- Moon, Parker Thomas
 1973 *Imperialism and World Politics*, New York, NY: Garland Publishers
- Moore, W. Harrison
 1922 The Powers of Colonial Legislatures, *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. 4, No. 1, p. 11-23

- Morice, A. G.
 1935 A Critical History of the Red River Insurrection after Official Documents and Non-Catholic Sources, Winnipeg, MB: Canadian Publishers
- Morris, Alexander
 1890 The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations of Which They Were Based and Other Information Relating Thereto, Toronto, ON: Befords, Clarke & Co., Publishers
- Morris, Henry Francis and Read, James S.
 1972 Indirect Rule and the Search for Justice: Essays in East African Legal History, Oxford, UK: Clarendon Press
- Morrison, F. Paul and Wayland, Christopher A.
 2003 Browne v. Dunn and Similar Fact Evidence – Isle of Change in a Calm Civil Evidence Sea, Toronto, ON: McCarthy Tétrault LLP
- Morton, Arthur S.
 1939 A History of the Canadian West to 1870-71 being a History of Rupert's Land (The Hudson's Bay Company's Territory) and of the North-West Territory, London, UK: T. Nelson & Sons
- Morton, James C.
 2000 Pocket Guide to Evidence, Toronto, ON: Butterworths Canada
- Morton, W. L.
 1956 Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869-1870, Toronto, ON: Champlain Society
- Motte, Standish
 1840 Outline of a System of Legislation for Securing Protection to the Aboriginal Inhabitants of All Countries Colonized by Great Britain, London, UK: Aborigines Protection Society
- Mulligan, Robert F.
 2004 Spontaneously Evolved Social Order versus Positive Legislation in English Constitutional History, Review of Austrian Economics, Vol. 17, No. 1, p. 41-65
 2005 The Common Law Character of English Charters: Spontaneous Order in the Constitutions of Clarendon (1164), Constitutional Political Economy, Vol.16, p. 285-311

Mullins, Phil

- 2003 Michael Polanyi (1891–1976), *Religion & Liberty*, Vol. 13, No. 3, May-June 2003

Munck, Ronaldo

- 2002 Globalization and Democracy: A New Great Transformation? *Annals of the American Academy of Political & Social Sciences*, Vol. 581, Globalization & Democracy, May 2002, p. 10-21

Murdoch, John Stewart

- 1975 Accommodation of the Spring Goose Hunting Season by Eastern Cree Community Schools, *Proceedings of the 2nd Annual Meeting of the Canadian Ethnology Society*, Ottawa, ON: National Museums of Canada
- 1977 Amerindianization, the Institution and the Happening, *National Museums of Canada, Canadian Ethnology Service Paper No. 17*; Reprinted in *The Northian*, Saskatoon, SK: University of Saskatchewan, 1977
- 1981 Syllabics: A Successful Educational Innovation, Thesis (M.Ed.), University of Manitoba
- 1982 Cree Literacy in Formal Education: A Problem in Educational Innovation, *Proceedings of the 13th Algonquian Conference (1981)*, William Cowan, ed., Ottawa, ON: Carleton University
- 1983 *Le Mode de Connaissance des Cris et l'Elaboration d'un Programme Scolaire, Recherches Amerindiennes au Quebec*, Vol. 13, No. 2, p. 115-123
- A Bibliography of Algonquian Syllabic Texts in Canadian Repositories, Waskaganish, QC: Project ASTIC
- 1984 Ethnorelativism in Cree Curriculum Development, *Multiculturalism in Canada: Social and Educational Perspectives*, Ronald J. Samuda; John H. Berry; Michel Laferrière, eds., Toronto, ON: Allyn and Bacon, Inc.
- 1985 The Aspect of Hunter-Gatherer Cognitive Style in the Linguistic Efforts of Certain North American Indigenous People, *International Journal of American Linguistics*, (October 1985), Vol. 51, No. 4, p. 518 – 521
- The Spread of Native Literacy, *Education Manitoba*, (October 1985), Vol. 13, No. 2, p. 9-11
- A Syllabary or an Alphabet: A Choice between Phonemic Differentiation or Economy, *Promoting Native Writing Systems in Canada*, Barbara Burnaby, ed., Toronto, ON: Ontario Institute for Studies in Education Press

- 1986 The Legacy of Dress-Up Creek: Formal Education for Northern Algonquian Hunters, Thesis (Phd.) University of Manitoba
- 1988 Cree Cognition in Natural and Educational Contexts, Indigenous Cognition: Functioning in Cultural Context, John W. Berry; S. H. Irvine; and, E. G. Hunt, eds., Dordrecht: Martinus Nijhoff Publishers, NATO Science Series D, Vol. 41
- 1994 Education for Cree Children in the James Bay Territory of Northern Quebec: A Retrospective View of Foundations and Processes, research study prepared for Royal Commission on Aboriginal Peoples, Ottawa, ON: Royal Commission on Aboriginal Peoples
- 2004 Aboriginal Oral Traditions are the Target of the Crown's Use of Racist Social Doctrines, First Nations Strategic Bulletin, Vol. 2, Issue 11, December 31, 2004
- Cree Science & Technology Program, May 2004, a complete Quebec Secondary School Education and CGEP program, developed for delivery in the James Bay Territory, northern Quebec, for Sabtuan, Cree School Board's Continuing Education Department and the Cree Trappers' Association
- 2006 Literature Review: Aboriginal Justice and Policing, Submitted to the Kainai Police Commission, Stand Off, AB
- Report on the Constitutional Rights of the Crees of Waskaganish First Nation, presentation to the Crees of Waskaganish First Nation and the public hearings of Hydro-Quebec, held at Waskaganish, May 30-31, 2006

Murphy, Colleen

- 2005 Lon Fuller and the Moral Value of the Rule of Law, Law and Philosophy, (2005), Vol. 24, p. 239-263

Murphy, Robert F. and Steward, Julian H.

- 1954 Tappers and Trappers: Parallel Process in Acculturation, Economic Development and Cultural Change, Vol. 4, No. 4, p. 335-355

Nakatsuru, Shaun

- 1985 A Constitutional Right of Indian Self-Government, University of Toronto, Faculty of Law Review, Vol. 43, p. 72

Ndulo, Muna

- 2003 The Democratization Process and Structural Adjustment in Africa, Indiana Journal of Global Legal Studies, Vol. 10, Issue 1, Winter 2003, p. 315-368

- Neumann, Michael
 2002 *The Rule of Law - Politicizing Ethnics*, Burlington, VT: Ashgate Publishing Co.
- Newman, Warren J.
 1999 *The Quebec Secession Reference - The Rule of Law and the Position of the Attorney General of Canada*, Toronto, ON: York University
- Nigol, Paul C.
 2001 *Discipline, Discretion and Control: The Private Justice System of the Hudson's Bay Company in Rupert's Land, 1670-1770*, Phd. Thesis, Calgary, AB: University of Calgary, Department of History
- Nye, Joseph S. Jr.
 1976 *The Third Century, Independence and Interdependence*, *Foreign Policy*, No. 22, (Spring, 1976), p. 130-161
 1990 *Soft Power*, *Foreign Policy*, No. 80, Twentieth Anniversary, (Autumn, 1990), p. 153-171
 The Changing Nature of World Power, *Political Science Quarterly*, Vol. 105, No. 2, (Summer, 1990), p. 177-192
 2003 *The Velvet Hegemon*, *Foreign Policy*, No. 136, (May - Jun., 2003), p. 74-75
- Nwankwo, Uchenna
 1988 *Strategy for Political Stability*, Ikeja, Lagos: Pathway Communications
- O'Driscoll, Gerald P. Jr.
 2004 *The Puzzle of Hayek*, *Independent Review*, Fall 2004, Vol. 9, No. 2, p. 271-281
- O'Hare, John and Browne, Kevin
 2005 *Civil Litigation*, Twelfth Edition, *Litigation Library*, London, UK: Sweet & Maxwell
- Ogus, A. I.
 1989 *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, *Journal of Law and Society*, Vol. 16, No. 4, p.393-409
- Oliver, Peter C.
 2005 *The Constitution of Independence, The Development of Constitutional Theory in Australia, Canada, and New Zealand*, Toronto, ON: Oxford University Press

- Oppenheim, L.
 1917 The Legal Relations between an Occupying Power and the Inhabitants, *Law Quarterly Review*, Vol. 33, p. 363-356
- Osterhammel, Jürgen
 2002 *Colonialism: A Theoretical Overview*, translated from German by Shelley L. Frisch, 2nd Printing, Princeton, NJ: Markus Wiener Publishers
- Owram, D. R.
 2000 Alexander Begg, *Canadian Dictionary of Biography Online*, University of Toronto
- Owusu, Maxwell
 1992 Democracy and Africa -- A View from the Village, *Journal of Modern African Studies*, Vol. 30, No. 3, (Sep., 1992), p. 369-396
- Paciocco, David M. and Stuesser, Lee
 1999 *The Law of Evidence*, 2nd edition, Toronto, ON: Irwin Law
- Palmer, Geoffrey
 2006 *Converging Currents: Custom and Human Rights in the Pacific - Te Aka Matua O Te Ture*, Wellington, NZ: New Zealand Law Commission
- Parisi, Francesco
 2001 The Formation of Customary Law, 96th Annual Conference of the American Political Science Association, Washington, D.C., August 31 - September 3, 2000
- Payne, Michael
 2006 *Redrawing the West: The Politics of Provincehood in 1905*, *Canadian Encyclopedia*, Toronto, ON: Historica Foundation of Canada
- Peel, Bruce
 2002 William Connolly, *Dictionary of Canadian Biography Online*, University of Toronto
- Penn, William
 1829 *Essays on the Present Crisis in the Condition of the American Indians*, Boston, MA: Perkins & Marvin
- Pennefather, Richard T.
 1858 Report of the Special Commissioners Apointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada, Toronto, ON: Stewart Derbyshire & George Desbarats, *Sessional Papers of the Province of Canada*, 1858, Appendix 21.

- Penner, Keith
 1983 Penner Report, Second Report to the House, Minutes of Proceedings of the Special Committee on Indian Self-Government, House of Commons, Issue No. 40
- Percival, Christel Skinner
 2003 Testing Braithwaite's Theory of Reintegrative Shaming through Data on the Circle Sentencing Program in the Yukon, Phd Thesis, University of Hawai'i
- Perell, Paul
 1987 Stare Decisis and Techniques of Legal Reasoning and Legal Argument, Legal Research Update, Vol. 2, p. 3
- Phillips, O. Hood
 1982 The Canada Act 1982, International and Comparative Law Quarterly, Vol. 31, No. 4, p. 845-848
- Phipson, Sidney L. and Howard, M. N.
 1990 Phipson on Evidence, 14th Edition, London, UK: Sweet & Maxwell
 2000 Phipson on Evidence, 15th Edition, London, UK: Sweet & Maxwell
- Pigeon, Louis-Philippe
 1959 The Bill of Rights and the British North America Act, Canadian Bar Review, Vol. 37, p. 66
 1988 Drafting and Interpreting Legislation, Toronto, ON: Carswell
- Polanyi, Karl
 1944 The Great Transformation, Boston, MA: Beacon Press, 1967 Edition
- Polanyi, Michael
 1951 The Logic of Liberty: Reflections and Rejoinders, Chicago: University of Chicago Press
 1964 Personal Knowledge: Toward a Post-Critical Philosophy, New York, NY: Harper & Row Publishers
 Science, Faith and Society, Chicago, IL: Phoenix Books
 1966 The Tacit Dimension, Garden City, NY: Doubleday & Company, Inc.
 1969 The Determinants of Social Action, Roads to Freedom: Essays in Honour of Fredrich A. von Hayek, Erich Streissler, ed., New York, NY: Augustus M. Kelley Publishers

- 1975 *Meaning: A Series of Lectures by Michael Polanyi with a preface by Harry Prosch*, Chicago, IL: University of Chicago Press
- 1997 *Society, Economics & Philosophy: Selected Papers of Michael Polanyi*, edited with introduction by R. T. Allen, London, UK: Transaction Publishers
- Pound, Roscoe
1959 *Jurisprudence*, Vol. 4, p. 56, St. Paul, Minneapolis: West Publishing Co.
- Preston, Richard Joseph III
1999 *Reflections on Culture, History, and Authenticity, Theorizing the Americanist Tradition*, Lisa Philips Valentine and Regna Darnell, eds., Toronto, ON: University of Toronto Press
- Pryce, Paula
1992 *The Manipulation of Culture and History: A Critique of Two Expert Witnesses*, *Native Studies Review*, Vol. 8, No.1, p. 35-46
- Quebec, Commission des Droits de la Personne et Droits de la Jeunesse
2002 *Your Rights and Freedoms According to the Charter of Human Rights and Freedoms of Quebec*, Quebec, QC: Imprimerie Reprotech Inc.
- Raeder, Linda C.
1998 *Liberalism and the Common Good: A Hayekian Perspective on Communitarianism*, *Independent Review*, Vol. 2, No. 4, (Spring 1998), p. 519
- 2001 *Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation*, *Constitutional Political Economy*, Vol. 12, p. 51-75
- 2003 *Securing Constitutional Government: The Perpetual Challenge*, *Independent Review*, Vol. 8, No. 1, Summer 2003, p. 5-26
- 2005 *Cultural Diversity and Liberal Society*, *Independent Review*, Fall 2005, Vol. 10, No. 2, p. 249-271
- Rambaut, Thomas D.
1887 *The Hudson's Bay Half-Breeds and Louis Riel's Rebellions*, *Political Science Quarterly*, Vol. 2, No. 1, p. 135-167
- Ratnapala, Suri
2003 *Securing Constitutional Government: The Perpetual Challenge*, *Independent Review*, Vol. 8, No. 1, Summer 2003, p. 5-26
- 2005 *Cultural Diversity and Liberal Society*, *Independent Review*, Fall 2005, Vol. 10, No. 2, p. 249-271

- Raz, Joseph
1979 Rule of Law and Its Virtue, Liberty and the Rule of Law, Robert L. Cunningham, ed., Houston, TX: Texas A&M University Press
- Read, Colin Frederick
2000 John Stoughton Dennis, Canadian Dictionary of Biography Online, University of Toronto
- Reford, Alexander
2000 Donald Alexander Smith, Dictionary of Canadian Biography Online, University of Toronto
2004 George Stephen, Lord Mount, Dictionary of Canadian Biography Online, University of Toronto, Université de Laval
- Regehr, Theodore D.
2000 William Cornelius Van Horne, Dictionary of Canadian Biography Online, University of Toronto
- Reiter, Robert Alan
1996 The Law of First Nations, Juris Analytica Publishing Inc.
- Rich, Edwin Ernest
1959 Hudson's Bay Company, 1670-1870, Volume II: 1763-1870, London, UK: The Hudson's Bay Record Society
1960 Hudson's Bay Company, 1670-1870, Volume III: 1821-1870, Toronto, ON: McClelland and Stewart Limited
1976 The Fur Trade and the Northwest to 1857, Toronto, ON: McClelland and Stewart
2000 James Isham, Dictionary of Canadian Biography Online, University of Toronto
- Riel, Louis David
1874 L'Amnistie: Memoire sur les Causes des Troubles du Nord-Ouest et sur les Necotiations Qui Ont Amene Leur Reglement Amiable, Winnipeg, MB : Bureau du 'Nouveau Monde '
- Rimmer, Reginald
1900 Colonial Reports - Miscellaneous, No. 15, Canada - Memorandum on the Legal Status of British North American Indians, London, UK: Darling & Son, Ltd.

- Risk, Richard and Vipond, Robert C.
 1996 Rights Talk in Canada in the Late Nineteenth Century: The Good Sense and Right Feeling of the People, *Law and History Review*, Vol. 14, No. 1, (Spring 1996), p. 1-32
- Ritter, David
 1996 The Rejection of Terra Nullius in Mabo: A Critical Analysis, *Sydney Law Review*, Vol. 18, p. 5
 2004 The Judgment of the World: The Yorta Yorta Case and the Tide of History, *Australian Historical Studies*, Vol. 128, p. 106-121
- Robert, Jean-Claude et al
 2000 The Judicial Committee of the Privy Council, Early Canadiana Online, Ottawa, ON: Canadian Institute for Historical Microreproductions
- Roberston-Ross, Patrick
 1873 Reconnaissance of the North West Provinces and Indian Territories of the Dominion of Canada, and Narrative of Journey across the Continent through Canadian Territory to British Columbia and Vancouver Island, *Sessional Papers (No. 9) A.1873, CVII to CXXVII*, Ottawa, ON: Parliament of Canada
- Robertson-Ross, John in
 1870 Interview with William McDougall, St. Paul, Minneapolis, for an article printed in the *Daily Telegraph* of Toronto, January 6, 1870
- Rogers, Edward S.
 1973 The Quest for Food and Furs: The Mistassini Cree, 1953-1954, Ottawa, ON: National Museums of Canada
- Rogers, Fredric
 1864 Sioux Indians – Copies or Extracts of Correspondence between the Commanding Officers of the United States Troops in Minnesota and the Resident Governor of the Hudson's Bay Company at Red River Respecting a Tribe of Sioux Indians Who Were Refugees within the British Territory, Ordered by the House of Commons, 17 June 1864.
- Rosen, Lawrence
 1977 The Anthropologist as Expert Witness, *American Anthropologist*, New Series, Vol. 79, No. 3, p. 555-578
 1979 Response to Stewart, *American Anthropologist*, New Series, Vol. 81, No. 1, p. 111-112

- Ross, Stephen F.
2000 Statutory Interpretation in the Courtroom, The Classroom, and Canadian Legal Literature, Ottawa Law Review, Vol. 31, p. 39
- Rubin, Paul H.
1977 Why Is the Common Law Efficient? Journal of Legal Studies, Vol. 6, No. 1, (Jan., 1977), p. 51-63
- Rubin, Paul H. and Gick, Evelyn
2004 Hayek and Modern Evolutionary Theory, Evolutionary Psychology and Economic Theory, Advances in Austrian Economics, R. Koppl, editor, Vol. 7
- Russell, Peter H.
1987 The Judiciary in Canada: The Third Branch of Government, Toronto, ON: McGraw-Hill Ryerson Limited
- Ryder, Bruce
1991 The Demise and rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations, McGill Law Journal, Vol. 36, p. 308
- Ryle, Gilbert
1968 The Thinking of Thoughts: What is 'Le Penseur' Doing? Reprinted from 'University Lectures', no.18, 1968, Saskatoon, SK: University of Saskatchewan
- Rynard, Paul
2000 Welcome In, But Check Your Rights at the Door: The James Bay and Nisga's Agreements in Canada, Canadian Journal of Political Science, Vol. 33, No. 2, p. 211-243
- Sanders Douglas E.
1972 The Bill of Rights and Indian Status, University of British Columbia Law Review, Vol. 7, p. 81
- 1984 Some Current Issues Affecting Indian Government, Pathways to Determination: Canadian Indians and the Canadian State, Toronto, ON: University of Toronto Press
- 1990 The Supreme Court of Canada and the 'Legal and Political Struggle' over Indigenous Rights, Canadian Ethnic Studies, Vol. 22, No. 3
- 1991 Collective Rights, Human Rights Quarterly, Vol. 13, p. 368-386
- Sartori, Giovanni
1997 Understanding Pluralism, Journal of Democracy, Vol. 8, No. 4, p. 58-69

- Saunders, Cheryl and Le Roy, Katherine
 2003 Perspectives on the Rule of Law, The Rule of Law, Leichardt, Cheryl
 Saunders and Katherine Le Roy, eds., NSW: The Federation Press
- Savoie, Donat
 2001 Land Occupancy by the Amerindians of the Canadian Northwest in the 19th
 Century, as Reported by Emile Petitot, Ottawa, ON: INAC, Occasional
 Publication Series No.49
- Schubert, Glendon A. Jr.
 1951 Judicial Review of Royal Proclamations and Orders in Council
- Sceptical Lawyer
 2006 Native Title: A Hayekian Analysis, The Native Title Act and Spontaneous
 Order – How Legislating in Place of the Common Law Has Undermined
 Formal Equality and the Rule of Law,
[http://alsblog.wordpress.com/2006/09/06/native-title-a-hayekian-
 analysis/#more-9](http://alsblog.wordpress.com/2006/09/06/native-title-a-hayekian-analysis/#more-9)
- Scott, F. R.
 1942 Section 94 of the British North America Act, Canadian Bar Review, Vol. XX,
 p.525
- Scott, W. R.
 1897 Synopsis of the Manitoba School Case, with Appendix of Explanatory Notes,
 Ottawa, ON: Government Printing Bureau
- Secretan, J. H. E.
 1924 Canada's Great Highway: From the First Stake to the Last Spike, Ottawa, ON:
 Thorburn and Abbott
- Seidman, Robert B.
 1970 Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the
 Reception of Foreign Law, Law & Society Review, Vol. 5, No. 2. (Nov.,
 1970), p. 161-204
- Seifert, Joshua L.
 2004 The Myth of Johnson v. M'Intosh, University of California Los Angeles Law
 Review, Vol. 52, p. 289
- Selznick, Philip
 1948 Foundations of the Theory of Organization, American Sociological Review,
 February 1948, Vol. 13, No. 1, p. 25-35

- 1951 Institutional Vulnerability in Mass Society, *American Journal of Sociology*, Vol. 56, No. 4, (Jan., 1951), p. 320-331
- 1978 Lon L. Fuller 1902-1978, *Law & Society Review*, Vol. 12, No. 2, (Winter, 1978), p. 187
- 1987 The Idea of a Communitarian Morality, *California Law Review*, January 1987, Vol. 75, No. 1, p. 445
- 1989 Dworkin's Unfinished Task, *California Law Review*, May 1989, Vol. 77, No. 3, p. 505
- 1994 Political Liberalism, *Society*, September/October 1994, Vol. 31, No. 6, p. 90-93
- 1995 Thinking about Community: Ten Theses, *Society*, July-August 1995, Vol. 32, No. 5, p. 33-37

Shadle, Brett L.

- 1999 Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60, *Journal of African History*, Vol. 40, No. 3, p. 411-431

Sharpe, Robert J.

- 1988 Judicial Development of Principles in Applying the Charter, *Charter Issues in Civil Cases*, Neil R. Finklestein and Brian McLeod-Rogers, eds., Toronto, ON: Carswell

Sheleff, Leon

- 1999 *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, London, UK: Frank Cass

Shelford, Frederic

- 1925 Land Tenure in the Crown Colonies, *Journal of the Royal African Society*, Vol. 25, No. 97, p. 23-26

Shklar, Judith N.

- 1987 Political Theory and the Rule of Law, *The Rule of Law: Ideal or Ideology*, Allan C. Hutchinson and Patrick Monahan, eds., Toronto, ON: Carswell

Sklar, Ronald B.

- 1977 Similar Fact Evidence - Catchwords and Cartwheels, *McGill Law Journal*, Vol. 23, p. 60

Sidebottom, Naomi

- 2001 Judicial Review: Is There Still a Role for Unreasonableness? Murdoch University Electronic Journal of Law, Vol. 8, No. 1, p.1

Sime, Stuart

- 2006 A Practical Approach to Civil Procedure, Ninth Edition, London, UK: Oxford University Press

Slattery, Brian

- 1979 The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories, Phd. Thesis, Oxford University, Wadham College
- 1982 The Constitutional Guarantee of Aboriginal and Treaty Rights, Queen's Law Journal, Vol. 8, p. 232
- 1984 The Hidden Constitution: Aboriginal Rights in Canada, American Journal of Comparative Law, Vol. 32, p. 361
- 1987 Understanding Aboriginal Rights, Canadian Bar Review, Vol. 66, p. 727
- 1991 Aboriginal Sovereignty and Imperial Claims, Osgood Hall Law Journal, Vol. 29, p. 681
- 1992 First Nations and the Constitution: A Question of Trust, Canadian Bar Review, Vol. 71, p. 261
- 1996 The Legal Basis of Aboriginal Title in British Columbia: Delgamuukw v. The Queen, Frank Cassidy, ed., Lantzville, BC: Oolichan Books
- 1996 Did France Claim Canada upon 'Discovery' ? Interpreting Canada's Past, Vol. I, Before Confederation, J. M. Bumsted, ed., Toronto, ON: Oxford University Press
- 2000 Making Sense of Aboriginal and Treaty Rights, Canadian Bar Review, Vol. 79, p. 196
- 2003 Generic and Specific Aboriginal Rights, Toronto, ON: York University, Osgoode Hall Law School

Slattery, Brian; Henderson, William and Krasnick, Mark R.

- 1990 Native Law [Sound Recording]: The Sparrow Case, 2 sound cassettes, S-90-940-S-90-941, Richmond Hill, ON: Audio Archives of Canada

- Smandych, Russell C.
 2005 The Exclusionary Effect of Colonial Law: Indigenous Peoples and the English Law in Western Canada, 1670-1870, *Laws and Societies in the Canadian Prairie West, 1670-1940*, Louis A. Knafla and Jonathan Swainger, Vancouver, BC: UBC Press
- Smillie, J. A.
 1969 Jurisdictional Review of Abuse of Discretionary Power, *Canadian Bar Review*, Vol. XLVII, p. 623
- Smith, Donald A.
 1870 Report of Donald A. Smith, Esq. Ottawa, 12th April 1870; *Sessional Papers, Volume V, #12, Third Session of the First Parliament of the Dominion of Canada, Session 1870*
- Smith, Herbert A.
 1925 Judicial Control of Legislation in the British Empire, *Yale Law Journal*, Vol. 34, No. 3, (January, 1925), p. 277-286
- Smith, J. C.
 1971 Regina v. Drybones and Equality before the Law, *Canadian Bar Review*, Vol. 49, p. 163-187
- Sopinka, John
 1972 Character Evidence in Civil Cases, *McGill Law Journal*, Vol. 18, p. 246
 2000 *The Conduct of an Appeal*, 2nd Edition, Toronto, ON: Butterworths
- Sopinka, John; Lederman, Sidney N. and Bryant, Alan W.
 1992 *The Law of Evidence in Canada*, Toronto, ON: Butterworth's
 1999 *The Law of Evidence in Canada*, 2nd Edition, Toronto, ON: Butterworths
 2004 *The Law of Evidence in Canada*, 2nd Edition Supplement. Toronto, ON: Butterworth's
- Sorrell, William H.
 2003 State of Vermont Response to Petition for Federal Acknowledgement of the St. Francis/Sokoki Band of the Abenaki Nation of Vermont
- Sossin, Lorne
 2002 The Intersection of Charter and Administrative Law: Tribunal Jurisdiction to Decide Charter Challenges, Ontario Bar Association Charter Conference, October 10, 2002

- Staats, Howard E.
1964 Some Aspects of the Legal Status of Canadian Indians, *Osgoode Hall Law Journal*, Vol. 3, p. 36
- Stavenhagen, Rodolfo
2005 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People - Mission to Canada, E/CN.4/2005/88/Add.3, December 2, 2004, United Nations Commission on Human Rights, 61st Session
- Steward, Julian H.
1976 *Theory of Culture Change: The Methodology of Multilinear Evolution*, Chicago, IL: University of Illinois Press
- Stewart, Omer C.
1979 An Expert Witness Answers Rosen, *American Anthropologist*, New Series, Vol. 81, No. 1, p. 108-111
- Stiebel, A.
1933 The Statute of Westminster and Its Effect, *Transactions of the Grotius Society*, Vol. 19, p. 32-40
- Stone, Oliver
1993 *When Heaven and Earth Changed Places: A Vietnamese Woman's Journey from War to Peace*, New York: Doubleday, Movie, 2 hours 22 minutes, New Regency Productions, Warner Bros. Pictures, Inc., released in 1993, screenplay by Oliver Stone
- Suddard, Michael
2002 *The Royal Proclamation of 1763: A Temporary and Permanent Solution*, <http://www.michaelsuddard.com/proclamation1763.html>
- Sugden, Robert
1989 Spontaneous Order, *Journal of Economic Perspectives*, Vol. 3, No. 4, (Autumn, 1989), p. 85-97
- Sullivan, Ruth
1994 *Driedger on the Construction of Statutes*, Third Edition, Toronto, ON: Butterworths

2000 Statutory Interpretation in the Supreme Court of Canada, *Ottawa Law Review*, Vol. 30, p. 175

2001 The Promise of Plain Language Drafting, *McGill Law Journal*, Vol. 47, p. 97-129

- Sulte, Benjamin
 1871 L'Expedition Militaire de Manitoba 1870, Montreal, QC: Eusebe Senecal
 Imprimeur, Editeur
- Sunderland, David
 2004 Managing the British Empire: The Crown Agents, 1833-1914, Woodbridge,
 Suffolk, UK: Royal Historical Society
- Synge, Millington H.
 1862 Rupert Land, the Colony and Its Limits, Proceedings of the Royal
 Geographical Society of London, Vol. 7, No. 2, p. 71-76
- Tache, Alexandre-Antonin
 1874 Histoire et Origine des Troubles de N.-Ouest, Racontees sous Serment par Sa
 Grandeur Mgr. L'Archeveque de St-Boniface, %%%
- Tamanaha, Brian Z.
 2004 On the Rule of Law: History, Politics, Theory, Cambridge, UK: Cambridge
 University Press
- Tanaka, Kotaro
 1968 Dissenting Opinion of Judge Tanaka, Federal Republic of Germany v.
 Denmark, North Sea Continental Shelf Cases, International Court of Justice,
 The Hague, Netherlands
- Tanner, Adrian
 1971 Existe-t-Il des Territoires de Chasse? Recherches Amerindiennes au Quebec,
 Vol. 1. No. 4-5, p. 69
- 1979 Bringing Home Animals: Religious Ideology and Mode of Production of the
 Mistassini Cree Hunters, St. John's, NFLD: Institute of Social and Economic
 Research, Memorial University of Newfoundland
- 1983 Algonquian Land Tenure and State Structures in the North, Canadian Journal
 of Native Studies, Vol. 3 No. 2
- 1986 The New Hunting Territory Debate: An Introduction to Some Unresolved
 Issues, Anthropologica, Vol. 28, No. 1/2, p. 19
- Taylor, Greg
 2001 The Grand Jury of South Australia, American Journal of Legal History, Vol.
 45, No. 4, (Oct., 2001), p. 468-516

Techera, Erika

- 2007 Local Approaches to the Protection of Biological Diversity: The Role of Customary Law in Community Based Conservation in the South Pacific, MacQuarie University, Division of Law

Thibault, Jean Baptiste

- 1870 Report of the Very Reverend J. B. Thibault, G. V., St. Boniface March 17, 1870; Sessional Papers, Volume V, #12, Third Session of the First Parliament of the Dominion of Canada, Session 1870

Thibodeau, Marc Arthur

- 1979 The Legality of an Independent Quebec: Canadian Constitutional Law and Self-Determination in International Law, Boston College International & Comparative Law Review, Vol. III, No. I, p. 101-142

Thomas, Lewis H.

- 2000 Louis Riel, Dictionary of Canadian Biography Online, University of Toronto, Université de Laval

Thomson, James A.

- 1981 Principles and Theories of Constitutional Interpretation and Application: Some Preliminary Notes, Melbourne University Law Review, Vol. 13, p. 597

Thorpe, Charles

- 2001 Science Against Modernism: The Relevance of the Social Theory of Michael Polanyi, British Journal of Sociology, March 2001, Vol. 52, No. 1, p. 19-35
- 2002 Disciplining Experts: Scientific Authority and Liberal Democracy in the Oppenheimer Case, Social Studies of Science, Vol. 32, No. 4, (Aug., 2002), p. 525-562

Tocqueville, Alexis de

- 1945 Democracy in America, the Henry Reeve text as revised by Francis Bowen, New York, NY: Vintage Books, reprinted in 1990

Todd, Alpheus

- 1894 Parliamentary Government in the British Colonies, 2nd Edition, London, UK: Longmans, Green

Tough, Frank J.

- 2004 Prof v. Prof in the Trial of the Benoit Treaty Eight Tax Case: Some Thoughts on Academics as Expert Witnesses, Native Studies Review, Vol. 15, No. 1, p.53

Treves, G. E.

- 1947 Administrative Discretion and Judicial Control, *Modern Law Review*, Vol. 10, p. 276

Trudeau, Pierre Elliott

- 1985 Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters, 8-9 March 1984, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, Menno Boldt and J. Anthony Long, eds., Toronto, ON: University of Toronto Press

United Kingdom, Parliament

- 1857 Minutes of Evidence Taken before the Select Committee on the Hudson's Bay Company, February to March 1857, London, UK: Her Majesty's Government, House of Commons
- 1864 Papers Relating to the Sioux Indians, 17 June 1864, Ordered by the House of Commons
- 1870 Correspondence Relative to the Recent Disturbances in the Red River Settlement, Presented to Both Houses of Parliament by Command of Her Majesty, August 1870, London, UK: William Clowes & Sons
- 1870 Confidential: Correspondence Relating to the Military Expedition to Red River, , London, UK: William Clowes & Sons
- 1875 Confidential: Correspondence Relating to Disturbances at Red River, 1869-70, London, UK: Sir Joseph Causton and Sons

Vattel, Emer de

- 1758 *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Book II, New Edition, 1834, London, UK: S. Sweet, Book 1, s. 231; Book 2, s. 125

Vaughn, Karen

- 1999 Hayek's Implicit Economics: Rules and the Problem of Order, *Review of Austrian Economics*, Vol. 11, p. 129-144

Von Gernet, Alexander Detrich

- 1996 *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literatures on Oral Traditions and Oral Histories*. Ottawa: Department of Indian Affairs and Northern Development.
- 2001 *Cree Territory at the Time of First European Contact: Report Prepared for the Defendants [Canada in Samson Cree v. Canada 2001]*, Calgary, AB: Federal Court

Waldrop, M. Mitchell

- 1990 Spontaneous Order, Evolution and Life, Science, New Series, Vol. 247, No. 4950, March 30, 1990, p. 1543-1545

Wallace, N. Willoughby

- 1872 The Rebellion in the Red River Settlement, 1869-70: Its Causes and Suppression, Barnstaple, UK: Henry T. Cook, Steam Printer

Walters, Mark D.

- 1992 British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia, Queen's Law Journal, Vol. 17, p. 350

- 1995 Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America, Osgoode Hall Law Journal, Vol. 33, No. 4, p. 785

The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shawanakiskie Case (1822-26), University of Toronto Law Journal, Vol. 46, p. 273

- 1998 Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada, Queen's Law Journal, Vol. 23, p. 301

- 1999 The Golden Thread of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982, McGill Law Journal, Vol. 44, p. 711-752

- 2001 The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law, University of Toronto Law Review, Vol. 51, No. 2, p. 91-141

The Sanctity of Patents: Some Thoughts on the Validity of Crown Patents for Un-Surrendered Aboriginal Lands, Vancouver, BC: Pacific Business & Law Institute

- 2003 Incorporating Common Law into the Constitution of Canada: *Egale v. Canada* and the Status of Marriage, Osgoode Hall Law Journal, Vol. 41, No. 1, p. 75

- 2006 The Morality of Aboriginal Law, Queen's Law Journal, Vol. 31, p. 470

Weaver, Sally M.

- 1981 Making Canadian Indian Policy - The Hidden Agenda, 1968-70, Toronto, ON: University of Toronto Press

- 1982 The Joint Cabinet National Indian Brotherhood Committee: A Unique Experiment in Pressure Group Relations." Canadian Public Administration, Vol. 25, No. 2, p. 211-239

- 1984 Indian Government: A Concept in Need of a Definition, Pathways to Determination: Canadian Indians and the Canadian State, Toronto, ON: University of Toronto Press
- 1985 Federal Difficulties with Aboriginal Rights Demands, The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, Menno Boldt and J. Anthony Long, eds., Toronto, ON: University of Toronto Press

Weber, Max

- 1946 Politics as a Vocation, Max Weber: Essays in Sociology, pp. 77-128, H.H. Gerth and C. Wright Mills (translators and editors), New York, NY: Oxford University Press

Webber, Jeremy

- 1995 Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples, Osgoode Hall Law Journal, Vol. 33, No. 4, p. 623

Webster, Richard

- 2002 Similar Fact Evidence: The Origins and Erosions of the Modern Similar Fact Principle, Memorandum to the House of Commons Affairs Committee (UK) in respect of their inquiry into police trawling operations, February 2002, <http://www.richardweb>

Weiler, Paul C.

- 1973 The Supreme Court of Canada and Canadian Federalism, Osgoode Hall Law Journal, Vol. 11, p. 225

Wenar, Leif

- 1992 Review: Hayek and Modern Liberalism, Ethics, 1992, p. 663-664

Westlake, John

- 1894 Chapters on the Principles of International Law, Cambridge, UK: Cambridge University Press

Wheaton, Henry

- 1836 Elements of International Law, with a Sketch of the History of the Science, 1972 edition, New York, NY: Da Capo Press

Whitehall, I. G.

- 1988 Administrative Tribunals and Section 7 of the Charter, Charter Issues in Civil Cases, Neil R. Finkelstein and Brian MacLeod-Rogers, eds., Toronto, ON: Carswell, p. 257

Wigner, E. P. and Hodgkin, R. A.

- 1977 Michael Polanyi. 12 March 1891 -- 22 February 1976, Biographical Memoirs of Fellows of the Royal Society, Vol. 23, (Nov., 1977), p. 413-448

Wilkins, Robert Kerry

- 1999 ...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government, University of Toronto Law Journal, Vol. 49, p. 53

- 2000 Still Crazy After All These Years: Section 88 of the Indian Act at Fifty, Alberta Law Review, Vol. 38, No. 2, p. 458

- 2002 Negative Capability: Of Provinces and Lands Reserved for the Indians, Indigenous Law Journal, Vol. 1, p. 57

Williams, Victoria

- 2005 Civil Procedure Handbook, London, UK: Oxford University Press

Willock, Roger

- 1958 Green Jackets on the Red River, Military Affairs, Vol. 22, No. 1, p. 26-37

Woodward, Michael and George, Bruce

- 1983 The Canadian Indian Lobby of Westminster 1979-1982, Journal of Canadian Studies, Autumn 1983, Vol.18, No. 3, p. 119-143

Wolseley, Garnet Joseph

- 1870 Narrative of the Red River Expedition: By an Officer of the Expeditionary Force, Part I, Blackwood's Edinburgh Magazine, Vol. 108, July – December, 1870, p.704 – 718

- 1871 Narrative of the Red River Expedition: By an Officer of the Expeditionary Force, Part II, Blackwood's Edinburgh Magazine, Vol. 109, January, 1871, p.48 – 73

- 1871 Narrative of the Red River Expedition: By an Officer of the Expeditionary Force, Conclusion, Blackwood's Edinburgh Magazine, Vol. 109, February, 1871, p.164 – 181

- 1904 The Story of a Soldier's Life by Field-Marshal Viscount Wolseley, 2 Volumes. Toronto, ON: The Book Supply Company

Yale Law Journal

- 1977 Statutory Entitlement and the Concept of Property, Yale Law Journal, Vol. 86, No. 4, p. 695-714

- Yengoyan, Aram A.
1984 Review: Politics and History in Band Societies, *Man*, New Series, Vol. 19, No. 4, p. 691
- Young, Owen
1977 Aborigines and the Constitutions of Australia, Canada, and the United States, *University of Toronto, Faculty of Law Review*, Vol. 35, p. 87
- Younkins, Edward
2002 Customary Law as an Evolved Good Shortcut, *Vivre Le Quebec Libre*, October 26, 2002, No 112
- Zakaria, Fareed
1997 The Rise of Illiberal Democracy, *Foreign Affairs*, Vol. 76, No. 6, p. 22

2003 The Future of Freedom: Illiberal Democracy at Home and Abroad, New York, NY: W. W. Norton & Company
- Zeller, Suzanne
2000 William McDougall, *Dictionary of Canadian Biography Online*, University of Toronto
- Zlotkin, Norman K.
1984 Judicial Recognition of Aboriginal Customary Law in Canada, Selected Marriage and Adoption Cases, *Canadian Native Law Reporter*, 1984, Vol. 4
- Zywicki, Todd J.
1996 A Unanimity-Reinforcing Model of Efficiency in the Common Law, *Case Western Reserve Law Review*, Summer 1996, Vol. 46, No. 4, p. 961

1998 Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization, *Constitutional Political Economy*, Vol. 9, p. 143–150

2002 The Rule of Law, Freedom, and Prosperity, *Supreme Court Economic Review*, 2002, Vol. 10, No. 1, p. 1