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Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s

Kent McNeil

Discussions of Indian title to land in Canada usually start with *St. Catherine’s Milling and Lumber Company v. The Queen,*¹ a case that took three years to progress through the Canadian courts before finally being decided in 1888 in London, England, by the Judicial Committee of the Privy Council, then the highest appeal tribunal for the British Empire.

Unfortunately, judicial analyses of the *St. Catherine’s* case rarely take into account the impact of the historical context or contemporary attitudes toward the Indian peoples in Canada. While important insights into the case are found in the commentary of historians such as Donald Smith, S. Barry Cottam, and Anthony J. Hall,² the case is still cited as a judicial precedent on the meaning of Indian title to land without any consideration of these matters. But one does not have to look very hard to find that the attitudes of Whites toward the Indian peoples in the 1880s were generally based on ignorance of Indian cultures and prejudicial views of human society. Moreover, it is clear that those attitudes influenced judicial conceptions of Indian title to land in the *St. Catherine’s* case, making reliance on that aspect of the case highly problematic.

The Decision of the Privy Council

The *St. Catherine’s* case did not, in fact, involve a conflict over Indian land rights. It arose from the grant of a timber permit to a private company, the St. Catherine’s Milling and Lumber Company, by the government of Canada in 1883. The permit purported to authorize the company to cut timber on lands in the region of Wabigoon Lake, to the east of the Lake of the Woods in northwestern Ontario. A dispute arose because the province of Ontario claimed that the lands in question were provincial rather than federal lands, and that the permit was therefore invalid. The government of Canada disagreed. It argued that the lands were federal lands because the Canadian government had purchased them from the Saulteaux Tribe of Ojibwa Indians by Treaty 3 in 1873.

The Privy Council decided in favor of the province on the basis that the Indian title of the Saulteaux did not amount to ownership that could be transferred to the government of Canada. Instead, the title amounted to “a personal and usufructuary right” that burdened the underlying title of the province.³ When the Indian title was surrendered by the 1873 treaty, this burden was removed, and thus the provincial title became full ownership. The federal government received nothing, and therefore had no authority to grant a timber permit to the St. Catherine’s Company.

Because the Saulteaux had already surrendered their Indian title by the treaty, they had no direct interest in the case and were not parties to it. Nor were any Saulteaux or other Indians called as witnesses. In fact,
the sole witness in the case was Alexander Morris, one of the Canadian commissioners who had negotiated the treaty. Morris's testimony is in the Supreme Court Appeal Book, *In the Supreme Court of Canada, between The Queen and St. Catherines Milling and Lumber Company: Case*. His book, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, containing the treaty and a record of the negotiations, was also put in as evidence. He substantiated that the commissioners had signed the treaty on the authority of the Canadian government. Other than that, the case was argued entirely on documents. The Privy Council relied heavily upon the Royal Proclamation of 1763, which, among other things, reserved all unsurrendered Indian lands in British North America for the various Indian tribes. The Privy Council decided that Indian title stemmed from this Proclamation, and based its description of that title as "a personal and usufructuary right" on the Proclamation's terms. Implicit in this decision is the assumption that Indian title had no legal basis apart from the Proclamation.

To understand why the Privy Council made this assumption, we need to go back and look at how the case was dealt with at trial by Chancellor Boyd. His decision is important because the factual findings he made would have formed the basis for the decisions on the legal issues, both at trial and on appeal. As we will see, his findings regarding the Saulteaux Indians and their relationship to the lands they surrendered by the 1873 treaty had practically no basis in fact as established by evidence. Instead, they were derived from racist perceptions of Indian societies, which were all too prevalent at the time. A brief look at theories of race and culture in the latter half of the 19th century and the assimilationist policies that those theories spawned is therefore necessary to put Chancellor Boyd's judgment in context.

**Race, Culture, and Government Policy in the 1880s**

During the second half of the 19th century, social theorists adapted the compelling ideas on biological evolution brought to public attention by the publication of Charles Darwin's *Origin of Species* in 1859 and applied them to human societies, producing what was thought to be a scientific basis for the widespread belief among Whites in their own racial and cultural superiority. Introductions to the extensive literature on this subject can be found in John S. Haller, Jr., *Outcasts from Evolution*, and Robert F. Berkhofer, Jr., *The White Man's Indian*. Another aspect of this social Darwinism, as developed by Herbert Spencer in England and popularized by William Graham Sumner in the United States, used the concepts of survival of the fittest and natural selection to justify competitive individualism and class structures.

The indigenous peoples of Africa, Australia, and North America, in particular, were viewed as primitive examples of human society in the earlier stages of its development. Evolutionary theory was thus used to support earlier attitudes of this sort, such as that expressed in 1777 by William Robertson in his influential book, *The History of America*:

> The discovery of the New World enlarged the sphere of contemplation, and presented nations to our view, in stages of their progress, much less advanced than those wherein they have been observed in our continent. In America, man appears under the rudest form in which we can conceive him to subsist. We behold communities just beginning to unite, and may examine the sentiments and actions of human beings in the infancy of social life, while they feel but imperfectly the force of its ties, and have scarcely relinquished their native liberty.4

Edward Tylor, one of the founders of modern anthropology and a leading proponent of this developing evolutionary theory, wrote in 1871 that progress and decline consisted of

> ... movement along a measured line from grade to grade of actual savagery, barbarism, and civiliza-

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*Building a canoe, northwest angle, at Lake of the Woods, October 1872.*

National Archives of Canada, C-079651.
tion. The thesis which I venture to sustain, within limits, is simply this, that the savage state in some measure represents an early condition of mankind, out of which the higher culture has gradually been developed or evolved.5

Applying ethnocentric standards of measurement inherent in this so-called "new science of anthropology," Lewis Henry Morgan concluded in a book published in 1877 that the Indians had

... commenced their career on the American continent in savagery; and, although possessed of inferior mental endowments, the body of them had emerged from savagery and attained to the Lower Status of barbarism; whilst a portion of them, the Village Indians of North and South America, had risen to the Middle Status.6

This passage reflects Morgan's refinement of Tylor's classifications by subdividing the categories of savagery and barbarism into three levels — lower, middle, and upper.

As this last passage reveals, theorists like Morgan tended to link cultural evolution to biological evolution, creating a virulent form of "scientific" racism that gained wide currency in the last decades of the 19th century. In 1878 Morgan noted:

We wonder that our Indians cannot civilize; but how could they, any more than our own remote barbarous ancestors, jump ethnical periods? They have the skulls and brains of barbarians, and must grow towards civilization as all mankind have done who attained to it by a progressive experience.7

Among anthropologists, these views prevailed into the present century, slowly succumbing to the new understanding of cultural relativity and pluralism developed by Franz Boas and his students, who led the way "in repudiating raciology and evolutionism and espousing the idea of culture as a way of understanding human diversity in lifestyles." By the 1930s, it was generally unacceptable in anthropological circles to evaluate any culture by reference to the standards and values of another — though an exception to this can be found in Diamond Jenness, The Indian Background of Canadian History. However, a reaction against Boasian anthropology led to the emergence of a new evolutionism by the 1940s and 1950s, as can be seen in works by Leslie White, a collection of articles edited by Marshall D. Sahlins and Elman R. Service, and discussion by Marvin Harris. Nonetheless, Berkofer comments that

... [e]ven the new evolutionism did not seek to establish a unilinear sequence of inevitable social development as actual history nor did it question the moral relativism, or should we say moral agnosticism, of cultural pluralism.9

There can be no doubt that the evolutionary theories of human societies prevalent in the latter half of the 19th century influenced government policy toward Indians in the United States and Canada. For example, allotment of tribal lands to individuals in the United States, and the residential school system in both countries, which were actively pursued in the 1880s, were primarily designed to bridge the supposed gap between Indian savagery or barbarism and Euro-based civilization, so that the Indians could be "raised" to the level of Whites through a process of education and assimilation. The General Allotment Act of 1887 (the Dawes Act) was designed to
convert communal tribal lands into private holdings and supposedly teach the Indians the value of private property in order to assimilate them. But due to allotment, Indian land holdings in the United States actually fell from 138 to 52 million acres between 1887 and 1934, when the program was ended.

The rationale for residential schools for the Indians was frankly stated in Parliament on May 9, 1883, by John A. Macdonald, Prime Minister of Canada and Superintendent of Indian Affairs:

When the school is on the reserve, the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed upon myself, as head of the Department [of Indian Affairs], that the Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men. . . . That is the system which is largely adopted in the United States. . . . That is a scheme which I will lay before the House rather later in the week.10

An exchange in the Canadian House of Commons between Member of Parliament Charlton and Prime Minister Macdonald, also on May 9, is illustrative of the attitudes behind this policy:

Mr. Charlton. I should infer that the efforts to educate and Christianize the Indians, and make them good members of society, are not being attended with marked success.

Sir John A. Macdonald. I believe they are very good Christians; they go to church regularly, and are getting a fair education, but they are nomadic in their habits, and will not settle down.

The fact of the matter is, that it takes generations for the Indians to get an aptitude for the cultivation of the soil. According to the principle of development, that must be of slow growth, not in one generation. As Tyendinaga once told me: "There is no use talking about it, we are still animal; and you cannot make a deer into an ox."

Mr. Charlton. The evolution, I understand, is a very gradual one. Has the hon. gentleman any information as to the number of generations it will take?
Sir John A. MacDonald. I am not sufficiently Darwinian to tell that.11

Debate over the proper policy to be pursued tended to stem not so much from disagreement over the desirability of civilizing the Indians, as from divergent views of their capacity to raise themselves up in a relatively short space of time. Policymakers who promoted schemes for rapid assimilation tended to believe that it was primarily a matter of education, whereas critics who adhered to the biologically based theory of social evolution exemplified by Lewis Henry Morgan regarded such schemes with skepticism. In the United States, the Christian reformers who, after the Civil War, took on the task of civilizing the Indians, apparently paid little heed to the racial aspect of Morgan’s theory. Francis Paul Prucha states:

... [t]heir goal was to speed up the [evolutionary] process by education and other civilizing programs — to accomplish in one generation what nature alone had taken eons to effect.12

In Canada, however, policymakers seem to have been less sure of the amenability of the Indians to Euro-Canadian civilization, as evidenced in the House of Commons Debates.13

It was during this period of racist attitudes and assimilationist policies based on social Darwinian misconceptions of the progression of human societies that the St. Catherine’s case came before the courts.

The Trial Judge’s Decision in the St. Catherine’s Case

While academic commentary on the St. Catherine’s case usually deals with the Privy Council’s decision, it is important to focus as well on the trial decision of Chancellor Boyd, as it was up to him to find the facts that would form the basis for determining the issues of law. His decision, as well as the assumptions that underlay it, therefore set the tone and established the parameters for debate in the appeal courts.

Boyd was faced with a question of vital importance that had never been directly confronted by Canadian courts before: Did the Indian tribes have legal title to their traditional lands after the British Crown asserted territorial sovereignty? After reviewing the Royal Proclamation of 1763 and a variety of statutes relating to Indian lands in Canada, Boyd concluded that once reserves are created for them, the Indians have “a legally recognized tenure in defined lands,” but prior to that they have no legal right to their traditional lands as against the Crown.

The relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them.14

Among other things, Boyd purported to rely on U.S. Chief Justice Marshall’s decision in Johnson v. M’Intosh; on the addresses of the Canadian Parliament to Queen Victoria on December 16 and 17, 1867, and May 29 and 31, 1869, that requested the transfer of Rupert’s Land and the North-Western Territory to Canada, pursuant to section 146 of the British North America Act, 1867; and on the Manitoba Act, 1870. He also referred to other statutes and cases, but principally to show that lands subject to unextinguished “Indian title” (“so called,” he added) were not “Lands reserved for the Indians” within the meaning of section 91(24) of the British North America Act, 1867.15 However, a careful examination of those sources shows that they do not support his conclusion that, in his words, “[b]efore the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown.”16 On the contrary, it would appear that the real explanation for that conclusion lies not in legal sources, but in the factual assumptions and value judgments Boyd made concerning Indians in general, and the Saulteaux Tribe of Ojibwa in particular, based on racist attitudes that were typical of his day.

Turning to Boyd’s decision in St. Catherine’s, we find his knowledge of and attitude toward Indians and their
land claims revealed to some extent in a passage relating to the colonial policy of Great Britain:

Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "justly and graciously," as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. 17

He contrasted the condition of Indians who had been living in close contact with the French with tribes living farther inland:

At the time of the conquest [of French Canada by Britain in the Seven Years War, 1756-1763], the Indian population of Lower Canada was, as a body, Christianized, and in possession of villages and settlements, known as "Indian Country." 18 ... But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. 19

In dealing with the "rude red-men," as he called them, Boyd stated the problem, arising out of the "necessary territorial constriction" of the Indians to make room for "an ever-advancing tide of European and Canadian civilization," as follows:

... how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupilage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. 20

Later in the judgment, Boyd said that Indians who had settled on reserves were "regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization." 21 The object of the reserve system, he continued, was "to segregate the red from the white population, in order that the former may be trained up to a level of advancement that the latter" 22 at the time Treaty 3 was signed in 1873, the Saulteaux Indians were still in Boyd's "wild and primitive" category. He described them as "scattered bands of Ojibbeways, most of them presenting a more than usually degraded Indian type." 23

It is clear that Indians as a whole could not enjoy rights apart from the reserves. Compared with the white population, Indians who had not yet been fixed on reserves were "wild," "primitive," "untaught," "uncivilized," "rude," and "degraded." They were wandering "heathens and barbarians," who were "scattered over the continent" and generally had "no fixed abodes or place of settlement." They could, however, as Boyd put it, make the "transition from barbarism to civilization" on the reserves where they could "be trained up to a level" the whites. Whether Boyd had read the works of Edward Tylor and Lewis Henry Morgan or not, the influence of social Darwinian thought on his judgment was general, and of the Saulteaux in particular, his racist stereotypes rather than on facts. Referring to the "known of the people in this remote region." 24 And yet he was able to conclude that they were "more than usually degraded Indian type." 25

Boyd's decision was affirmed all the way up to the Privy Council. Although the appeal judges avoided his racist language for the most part, many of them praised and adopted his judgment without expressing any disagreement with his assessment of Indian societies. Ontario Chief Justice Hagarty praised the "care and perspicacity" of Chancellor Boyd's judgment:

Otisqua and his family, Kenora District, Ontario, ca. 1907. Archives of Ontario, C224-0-0-50-93.
It therefore appears that their Lordships accepted Chancellor Boyd’s conclusion that the Saulteaux and other Indian tribes had no rights at common law to their traditional lands, a conclusion based on racist stereotypes of Indian societies rather than on fact or precedent.

Disposing of the St. Catherine’s Case

The decision in the St. Catherine’s case that Indian title in Canada is derived solely from the Royal Proclamation has in fact been rejected by the Supreme Court of Canada in more recent decisions.27 In spite of that, the Privy Council’s description of Indian title as a “personal and usufructuary right” has been used in a number of lower court decisions, and as recently as 1993 by one member of the British Columbia Court of Appeal in Delgamuukw v. British Columbia,28 in limiting Indian title to traditional, historic uses of land by the Indian people who claim the title.29 While that aspect of the Delgamuukw decision was overturned by Canada’s highest court on appeal,30 the Supreme Court has used the Privy Council’s description of Indian title as a “personal and usufructuary right” in assessing the effect of a surrender of the Indian interest in reserve land.31

Even more disturbing, the social Darwinian thinking that underlay the St. Catherine’s decision still surfaces on occasion in judicial analyses of Indian title in Canada. The most glaring example is the 1991 trial decision in the Delgamuukw case, where Chief Justice McEachern made the following comments about the Gitksan and Wet’suwet’en peoples whose rights were at issue:

The plaintiffs’ ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic], that aboriginal life in the territory was, at best, “nasty, brutish and short.” . . . William Brown of the Hudson’s Bay Company — one of our most useful historians — . . . [who] visited some of the Babine River villages in the 1820s . . . reports some minimal levels of social organization but the primitive condition of the natives described by early observers is not impressive. . . . The evidence suggests that the Indians of the territory were, by historical standards, a primi-

We may fully accept his historical treatment of the subject from the earliest period down to the Confederation Act of 1867. The review of the authorities as to the true nature and extent of the alleged “Indian Title” may well warrant our full acceptance of the conclusion at which the learned Chancellor has arrived on this important branch of the case.32

However, Boyd’s conclusion that the Indian tribes generally, and the Saulteaux in particular, did not have a legal interest in their lands was to some extent modified by the Privy Council, which, as we have seen, accorded the Indians “a personal and usufructuary right” to their unsurrendered lands.33 That description of Indian title, however, was derived from the Privy Council’s interpretation of the Royal Proclamation of 1763. By relying on the Proclamation, the Privy Council implicitly dismissed other potential sources of Indian title. In the words of Lord Watson, who delivered the Privy Council’s judgment,

. . . [the Saulteaux’s] possession [of the lands surrendered by Treaty 3], such as it was, [could] only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.34
tive people without any form of writing, horses, or wheeled wagons. McEachern also found “much wisdom” in the words of Lord Sumner in Re Southern Rhodesia, decided by the Privy Council in 1919, where the influence of social Darwinism is apparent:

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.

A more informed and enlightened approach to the Re Southern Rhodesia case and the social Darwinian assumptions that underlay it can be found in the 1992 decision of the High Court of Australia in Mabo [No. 2] v. Queensland. After quoting the above passage from that case, Brennan J. (as he then was), in his majority judgment, said:

...doctrines of the common law which depend on the notion that native peoples may be “so low in the scale of social organization” that it is “idle to impute to such people some shadow of the rights known to our law” can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

Brennan went on to reject the authority of Re Southern Rhodesia and other cases that had used racist conceptions of human societies to deny land rights to indigenous peoples.

To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue...to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.

Courts in Canada should follow the lead of the High Court in this respect. Judicial precedents involving Indian rights should not be blindly applied without examining their historical context and the underlying assumptions on which they were based. When that kind of examination reveals the influence of prejudicial attitudes or racial bias, the decisions should be tossed into a judicial garbage can. Insofar as it relates to Indian title, that is where the St. Catherine’s case belongs.

NOTES

1. (1885) 10 O.R. 196 (Ont. Ch.); (1886) 13 O.A.R. 148 (Ont. C.A.); (1887) 13 S.C.R. 566 (S.C.C.); (1888) 14 App. Cas. 46 (P.C.). Note that the lower court reports spelled the company’s name as “St. Catharines,” which appears to be incorrect. In this article, “St. Catharine’s” will be used, except when citing one of the lower court decisions.


3. (1888) 14 App. Cas. 46, 54, 58.


8. Berkhofer, Jr., The White Man’s Indian, n. 7, 62. See also, Stocking, Race, Culture, and Evolution, n. 7, ch. 9.


11. House of Commons Debates (Canada), 46 Vict. (9 May 1883), 14:1101.

12. Prucha, American Indian Policy in Crisis, n. 10, 156; see also, on the evolutionists’ perspective, Brian W. Dippie, The Vanishing American: White Attitudes and U.S. Indian Policy (Middletown, CT: Wesleyan University Press, 1982), 164-171.


15. Johnson v. McIntosh, 8 Wheat. 543 (1823), U.S. Supreme Court; addresses annexed to the Rupert’s Land and North-Western Territory Order, June 23, 1870, R.S.C. 1885, App. II, No. 9; British North America Act, 1867, 30 & 31 Vict. c. 3 (UK), now the Constitution Act, 1867; Manitoba Act, 1870, 33 Vict. c. 3 (Can.), ss. 30-32.


17. Ibid., 206.
18. Ibid., 210-211.
19. Ibid., 211.
20. Ibid., 228.
21. Ibid.
22. Ibid., 227.
23. Ibid.
24. Ontario Court of Appeal, (1886) 13 O.A.R. 148, 148. See also Patterson J. A., 168-169, and Osler J.A., 173. In the Supreme Court of Canada, (1887) 13 S.C.R. 577, 601, Ritchie C. J. (Fournier J. concurring) said: "This case has been so fully and ably dealt with by the learned Chancellor, and I so entirely agree with the conclusions at which he has arrived, that I feel I can add nothing to what has been said by him." See also Henry J., 639, Tschereau J., 643, to the same effect. Compare per Strong and Gwynne J.J., dissenting.
26. Ibid.
31. Smith v. The Queen [1983] 1 S.C.R. 554, 569. Chancellor Boyd's judgment was relied on as well in the Bear Island case, n. 29, 29, Steele J. expressly agreed with it (except on the construction of s.91(24) of the British North America Act, 1867, which need not concern us), and with the assessment in Isaac v. Davey, (1974) 5 O.R. (2d) 610, 620, where Arnup J.A., speaking for the Ontario Court of Appeal, found "the judgment at trial of Chancellor Boyd — a most learned, accurate and respected Judge — in R. v. St. Catharines Milling & Lumber Co., to be of great assistance."
34. (1992) 175 C.L.R. 1 (H.C. Aust.).
35. Ibid., 41-42.
36. Ibid., 58.
37. However, on another issue, namely that of extinguishment of the land rights of indigenous peoples, the High Court's decision sanctions racial discrimination and should not be followed. See Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title," Australian Indigenous Law Reporter, 1 (1996): 181-222.

ADDITIONAL SOURCES
Jenness, Diamond. The Indian Background of Canadian History (Ottawa: King's Printer, 1937).
Morris, Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto, Canada: Belfords, Clark & Co., 1880).
Supreme Court Appeal Book. In the Supreme Court of Canada, between The Queen and St. Catharines Milling and Lumber Company: Case (Toronto, Canada: Dudley & Burns, 1886), 10-12.

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