

Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases

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I. LAW AND HISTORY

TWO THEORIES OF ABORIGINAL rights compete for pride of place in Canadian law.¹ In one, dubbed the “contingent theory,” some form of state recognition — usually by treaty or statute — is required in order to transform Aboriginal possession and custom into legal title and rights. Without such recognition courts will not protect Aboriginal rights against competing interests, so on this view state recognition and legal enforceability are equivalent. In the second theory, Aboriginal rights are “inherent” — i.e., rooted in the legal history of each Aboriginal nation and its treaty relations with Europeans — and became part of colonial common law quite independently of any affirmative state action.² Statutory or other recognition in this context simply acknowledges what already exists as a juridical concept, what is already legally enforceable.³

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¹ By “Canadian” law, I mean the common and statute law relating to Aboriginal peoples, not the law of any particular First Nation.

² The two theories have been discussed by a number of scholars, notably M. Asch & P. Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 *Alta. L. Rev.* 498; P. Macklem “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 *McGill L.J.* 382; K. McNeil, *Common Law Aboriginal Title* (New York: Oxford University Press, 1989); and B. Slattery, “Understanding Aboriginal Rights” (1987) 66 *Can. Bar Rev.* 727. I have also discussed them, although in a much less detailed way, in “The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title” (1989) 23 *U.B.C. L. Rev.* 629.

³ Thus in *R. (ex rel. McIntosh) v. Symonds* (1847), [1840-1932] N.Z.P.C. Cases 387, the New Zealand Supreme Court stated that “in solemnly guaranteeing the Native title ... the Treaty of Waitangi ... does not assert either in doctrine or in practice anything new

Insofar as Aboriginal title is concerned, the contingent theory has been dead for years: such title clearly exists in Canadian law by virtue of the fact of possession (variously defined), and most treaties merely acknowledge and confirm its existence. They do not create it.⁴ But even inherent (or pre-existing) title may be subject to unilateral extinguishment by a competent legislative authority. The conventional view is that from Confederation until s. 35(1) of the *Constitution Act, 1982* came into force that authority was Parliament.⁵

It seems tolerably clear that some inherent form of self-government also exists at law, either as an incident of title or as an independent right based upon the incontrovertible fact that First Nations not only had territories but lived on them in organized, self-governing societies.⁶ This is the position in the United States, where courts equated self-government with Aboriginal rights to land and ruled that Indian tribes are inherently sovereign (self-governing). These rulings, however, were prompted by considerations related to American federalism as well as Aboriginal rights, and the courts soon decided that tribal sovereignty, like other Aboriginal rights in the United States, is subject to Congressional extinguishment.⁷ Hence, perhaps, Professor Slattery's contention that the significance of the doctrine of

and unsettled." Of course, even if treaties only confirm existing rights, such confirmation impresses those rights more firmly in the public consciousness.

⁴ See, especially, *Guerin v. R.*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*]. If there were any lingering doubts about this, they have been dispelled by the Supreme Court of Canada's judgment in *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, [1991] 127 N.R. 147, [1991] 3 C.N.L.R. 79, wherein the Court affirmed that Aboriginal title is established by factual evidence of occupation. For an analysis of some of the more disappointing aspects of this decision, see K. McNeil "The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case" [1992] 1 C.N.L.R. 40.

⁵ Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. Because s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act*) allots legislative jurisdiction over "Indians, and Lands reserved for the Indians" to Ottawa.

⁶ See the judgment of Judson J. in *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

⁷ The leading cases include *U.S. v. Kagama*, 118 U.S. 375 (1886) and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) [hereinafter *Lone Wolf*]. The history of this aspect of American Indian Law is thoughtfully analyzed by C.F. Wilkinson in *American Indians, Time and the Law: Historical Rights at the Bar of the Supreme Court* (New Haven: Yale University Press, 1987).

inherent sovereignty has been “underestimated” in its country of origin.⁸

In Canada, the view that Indians became British subjects when their territory was brought under British jurisdiction gradually became the accepted one, and the proposition that the tribes are inherently sovereign has been more controversial.⁹ This is mainly because rights of self-government seem to threaten the authority of the Crown in ways that land “claims” do not. In the language of positivism — which has been the everyday language of law for some time — anyone can have title to land, but there can be only one sovereign with jurisdiction to govern. All authority other than that of the sovereign is therefore subordinate: it exists only because the sovereign has chosen to delegate it, the notion of “delegation” functioning here in the same way that “state recognition” does with respect to title.¹⁰

Given this contrast between the two jurisdictions, it is somewhat ironic that Aboriginal governments in Canada may soon enjoy a right of self-government which is not only as extensive as the American one, but more firmly established. The reason is s. 35(1) of the *Constitution Act, 1982*, which provides that “existing” Aboriginal and treaty rights are recognized and affirmed. This means that, if the old cases are re-assessed and the courts do find an inherent Aboriginal right to self-government, neither it nor Aboriginal title will be subject to American-style legislative extinguishment. Such title and sovereignty as managed to survive until 1982 are constitutionally protected by

⁸ B. Slattery, “Aboriginal Sovereignty and Imperial Claims” in F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) at 212. However, while the Americans may have underestimated inherent sovereignty, Thomas Isaac’s view that “inherent” is necessarily the same as “absolute” sovereignty seems equally restrictive: see “The Storm Over Aboriginal Self-Government: Section 35 of the *Constitution Act, 1982* and the Redefinition of the Inherent Right of Aboriginal Self-Government” [1992] 2 C.N.L.R. 6. As the American example reveals, when Aboriginal people seek the protection of “European” law (or have it imposed upon them), the content of their sovereignty may be reduced; but the residue remains “inherent.”

⁹ How Indians became British subjects has never been adequately explained, but the authorities that are usually quoted in support include *Sanderson v. Heap* (1909), 19 Man. R. 122 (S.C.), where it is simply asserted, and *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.), where it is linked to accepting the protection of the Crown. This is in marked contrast to U.S. precedent, and the international law authorities (e.g., Vattel) invoked therein. See text accompanying notes 38–42.

¹⁰ This is a surprising obsession in a federal state, where Ottawa and the provinces are each sovereign in their respective spheres, and neither is a delegate of the other. On this see Macklem, “First Nations Self-Government,” *supra* note 2.

s. 35(1), and “inherent” in this context will mean a sovereignty that is more or less inviolate as well as non-delegated. It is therefore all the more remarkable that Canadians seem more willing today than at any time in the nation’s history to recognize an inherent Aboriginal right of self-government. At time of writing, they even seem willing to remove all doubt by amending the constitution to say so specifically, perhaps even without defining the right in any detail.¹¹

The potential import of s. 35(1) may help to explain the element of caution in *R. v. Sparrow*, otherwise one of the boldest decisions in the Supreme Court of Canada’s one hundred and seventeen year history.¹² In it, the Court held that the Aboriginal right of the Musqueam people to their food fishery was quite capable of surviving a century of extensive federal regulation, so as to qualify as an “existing” Aboriginal right that is protected by s. 35(1). Clearly, such an interpretation gives the section sharp teeth indeed, and appears to take a large bite out of the federal government’s position that Aboriginal rights that have never been specifically extinguished may nonetheless have been “superseded” by law. But in the course of delivering this judgment, the justices also took pains to emphasize the other side of the equation. They read s. 35 rights as being limited in a manner not unlike the way s. 1 limits *Charter* rights, and they based their overall approach upon the conventional, European view of sovereignty. “It is worth recalling,” they said,

that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset *never any doubt* that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson v. McIntosh*, 8 Wheaton 543 (1823) (USSC) ...¹³

Of course, in law the claim that there was “never any doubt” is often a sign of distant rumblings, and the passage is tantalizingly incomplete. We are not told what “from the outset” means, nor are we told how sovereignty and title could, without conquest or formal expropriation, be unilaterally transferred. Even more noteworthy, the passage

¹¹ And without using the qualifier, “existing,” that appears in s. 35(1).

¹² *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 56 C.C.C. (3d) 263 [hereinafter *Sparrow* cited to C.C.C.].

¹³ *Ibid.* at 283 [emphasis added]. It should be added, however, that ultimate sovereignty is in the Crown only if by “Crown” the Court means the King in Parliament, and not merely the executive authority.

does not say whether this vesting of sovereignty in the Crown should be viewed as having obliterated native sovereignty all at once, or whether it simply had the potential, over time, of doing so. Could it, for example, have inserted a tier of sovereignty above Aboriginal governments, but without extinguishing the sovereignty of those governments in internal matters? The only clue is the invocation of *Johnson v. M'Intosh*, one of a series of American cases that ultimately affirmed the inherent sovereignty of the Indian tribes of that country, albeit in a limited way.¹⁴

To these rather complex questions of interpretation one should add a simple question of fact: was there really "never any doubt" that sovereignty vested in the Crown from "the outset"? I shall attempt to show that there was in fact considerable doubt, primarily by examining evidence that goes beyond the confident assertions of trial and appellate decisions made decades after the relevant events. Such assertions are, of course, to be expected. Law achieves its clarity partly by constructing an orthodoxy determined more by political theory than historical accuracy, an orthodoxy that masks competing points of view. Words disappear, or slowly change their meaning, until certain ideas are no longer sayable in legal language. A remark by Justice Meredith of the Ontario Court of Appeal in 1908 is illustrative. The proposition "that the Criminal [law] does not apply to Indians," he said, is "so manifestly absurd as to require no refutation."¹⁵ As we shall see, there have been times when to assert such a proposition in court was not absurd at all. But in the courts of Ontario in 1908 it was absurd, and the reason is not hard to find. As the colonial machine grinds forward through time and space, the law tends to repress alternatives rejected by power, sometimes even to deny that these alternatives ever existed. If this "legitimizing" enterprise is so effective that it makes what was once a coherent and competing view unthinkable, then it has succeeded most admirably. And by succeeding, distortion ceases to distort: bad history becomes good law.

On the other hand, the almost Darwinian selection involved in this process of re-stating legal orthodoxy is matched by the quixotic perils associated with seeking to restore lost context. However impressed one may be upon discovering that a suppressed way of seeing things was

¹⁴ 21 U.S. (8 Wheat.) 543 (1823) [hereinafter *Johnson*]. See also *infra* note 18.

¹⁵ *R. v. Beboning* (1908), 17 O.L.R. 23 at 25 (C.A.), where counsel argued that, in the circumstances of that case, the *Indian Act* had ousted the *Criminal Code*. I am grateful to His Honour Judge Edward O'Donnell of the Provincial Court of British Columbia for bringing this decision to my attention.

once a plausible and vigorous theory, at common law there are no clear rules for deciding when history can re-make doctrine, or for ascertaining with certainty when we move from one to the other. As Justice Holmes remarked in a well-known passage, "the felt necessities of the times, the prevalent moral and political theories, [and] the intuitions of public policy, avowed or unconscious ... have had a good deal more to do than the syllogism in determining the rules by which men should be governed."¹⁶ As a consequence, whether lawyers ask historians to show us where the law went wrong or, alternatively, how it gradually and logically achieved the rational perfection of the present, transforming either project into a courtroom argument is a highly artificial undertaking. As Frederic William Maitland pointed out more than a century ago, a "mixture of legal dogma and legal history is in general an unsatisfactory compound," because lawyers and historians want different things.

That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better. This when stated is obvious; but often we conceal it from ourselves under some phrase about "the common law."¹⁷

Maitland's warning suggests that, whether engaged in attacking or defending legal orthodoxy, the best that historians can do is supply missing context. Lawyers may wish to present the resulting evidence either as proving the true but neglected meaning of the common law,

¹⁶ O.W. Holmes, Jr., *The Common Law & Other Writings* (Birmingham: Legal Classics Library, 1982) at 1. In *Mabo v. Queensland*, [1992] 107 A.L.R. 1 at 19 (H.C.), Brennan J. stated that

It is not possible, a priori, to distinguish between cases that express a [fundamental] principle [of our law] and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights [If it does, then a court must decide] whether the ... rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit

¹⁷ "Why the History of English Law is Not Written" in H.A.L. Fisher, ed., *The Collected Papers of Frederic William Maitland*, vol. 1 (Cambridge: University Press, 1911) at 491. For a critique of Maitland's despairing view, see DeL.J. Guth, "Archives, Historicism, and Empiricism: Searching the Past for Proof or Discovery" (Paper presented to the "Law, State and Society in History Conference" at Osgoode Hall, Toronto, May 1992).

or as confirming the wisdom of the *status quo*, but what it really does is reveal the other side of a hitherto lop-sided debate. Although legal history can point the way, it is for the parties and, ultimately, the courts to decide whether this revelation is sufficient to justify a new reading of old books, or perhaps even a radical departure from established precedent.

The reference to *Johnson* in *Sparrow* certainly hints at just such an opportunity.¹⁸ It implies that there are similarities between the law of Canada and the United States and that, in the absence of a clear and plain intention to extinguish, the inherent right to self-government will survive statutory regulation. If so, the question whether a statute such as the *Indian Act* meets this exacting standard becomes, to say the least, quite interesting.¹⁹ At the same time, whether a domestic court is an appropriate place to resolve such issues may be open to doubt. The positivist tradition remains strong, and Her Majesty's judges are unlikely to feel comfortable about even appearing to qualify the authority of the sovereign in whose name they were appointed. If First Nations and others submit Aboriginal rights and title issues for adjudication by Canadian courts according to Canadian law, this is a fact of judicial life that must be accepted. Nonetheless, a decision holding that Aboriginal self-government has survived a particular species of regulation would no more illegitimately qualify the authority of the sovereign than *Sparrow* did. It would simply recognize that, whatever the Aboriginal right at stake, the power to extinguish — which since 1982 has been severely curtailed by s. 35(1) — is not the same as the legally effective exercise of that power.²⁰

¹⁸ I say "hints" because it is in the subsequent cases of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) [hereinafter *Cherokee Nation*] and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [hereinafter *Worcester*] that the notion of tribal sovereignty is really developed. It is unclear whether the Court has deliberately chosen to cite *Johnson* rather than *Worcester*, i.e. whether it is presently unwilling to take a more expansive view of tribal sovereignty, but the justices did specifically cite *Worcester* in *Québec (A.G.) v. Sioui*, [1990] 1 S.C.R. 1025 at 1054 [hereinafter *Sioui*].

¹⁹ R.S.C. 1985, c. I-5. Of course *Sparrow* not only set a high threshold for extinguishment; it also developed rigorous standards for assessing the validity of statutes that purport only to regulate Aboriginal rights. On the application of these standards to the *Indian Act*, see *infra* notes 131–137 and accompanying text, and B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261.

²⁰ *Ex parte Crow Dog*, 109 U.S. 556 (1883) is an American example of this principle in action. When Crow Dog killed Spotted Tail on a Sioux reservation within the Dakota Territory, the Territorial Government attempted to invoke federal criminal law. But the

II. THE CLARK THESIS

IN A RECENT BOOK entitled *Native Liberty, Crown Sovereignty*, Bruce Clark reaches a similar conclusion, i.e. that the "existing" Aboriginal rights recognized and affirmed by section 35(1) of the 1982 constitution include self-government.²¹ But he criticizes those who would ground this right in common law, charging that statutory provisions such as s.88 of the Indian Act virtually obliterate self-government, rendering the domestic common law approach of the Americans a "paper tiger" in Canada.²² So, instead of basing his argument upon the failure of legislators to express their intention to extinguish with sufficient clarity, he maintains that colonial (including federal) law-makers have not only been constitutionally incapable of such extinguishment since 1982, but that they have always been so. Hence

Supreme Court of the United States held that the wording of the relevant treaties and legislation was insufficient to justify such a significant abridgment of tribal sovereignty. Speaking for the Court, Justice Matthews ruled that subjecting the defendant to white man's law would require "a clear expression of the intention of Congress," which intention the Court was unable to find. So too with the fishing regulations in *Sparrow*. It is one thing to assert that ultimate sovereignty and legislative power have moved from A to B; it is quite another to assert that these powers have been exercised so as to obliterate, "from the outset," all that went before. The difference between the two jurisdictions is that, after the Sioux case, Congress responded to settler outrage by imposing what the judges were unwilling to infer: they enacted the *Major Crimes Act of 1885*, which specifically extended United States law to serious crimes committed by Indians in Indian Country: 18 U.S.C.A. § 1152. Section 35(1) makes this sort of legislative response to a judicial declaration of Aboriginal rights highly problematic in post-1982 Canada.

²¹ *Native Liberty, Crown Sovereignty: The Existing Right of Aboriginal Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990).

²² *Ibid.* at 35. He has a point: s. 88 and some of the Supreme Court of Canada's earlier decisions do pose a problem. But many of the cases that stand in the way of a more expansive interpretation of the common law (e.g. *Sheldon v. Ramsay* (1852), 9 U.C.R. 105 (Q.B.) and *Sero v. Gault* (1921), 50 O.L.R. 27 depend upon the same sort of colonial biases that were expressed in *R. v. Syliboy* (1928), 50 C.C.C. 389, and later rejected in *Simon v. R.*, [1985] 2 S.C.R. 387. Moreover, some students of the subject don't agree that the Indian Act had this effect on self-government: see, for example, J.J. Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government* (LL.M Thesis, University of Toronto, 1991) [unpublished] and Slattery, *supra* note 19, who doubts that s. 88 meets the *Sparrow* standard of justification.

the somewhat breathless reaction of some reviewers and the limited tolerance of some judges.²³

In essence, Clark argues that certain imperial legislative instruments and judicial precedents are a constitutional bar to extinguishing Aboriginal self-government on unceded Indian lands, a bar that pre-dates s. 35(1). He concedes that two imperial statutes — the *Canada Jurisdiction Act* of 1803 and the *Regulation of the Fur Trade Act* that supplemented it in 1821 — subjected Indians to colonial *criminal* law, but otherwise his position is that prerogative instruments such as the *Royal Proclamation of 1763* and decisions such as *Campbell v. Hall*, which have never been repealed or overruled, protect Aboriginal title and government.²⁴ The significance of his thesis is that if constitutional protection has been in place all along, there is that much more for s. 35(1) to recognize and affirm. Courts therefore need not inquire whether, as a matter of statutory interpretation, the *Indian Act* extinguished self-government prior to 1982. As a matter of constitutional law, it could not have done so.

Given the extensive authorities that Clark marshalls in support of his thesis, and the intensity with which he has advanced it in court, one might legitimately expect it to become the object of considerable scrutiny, especially if negotiations directed at fleshing out the notion of an inherent right of self-government prove difficult. In what follows, however, I attempt no such general critique. Nor shall I engage in the sort of philosophical analysis that one finds in the thoughtful writings of scholars like Brian Slattery, although I hope that the evidence presented here is part of the “detailed inquiry” into the history of

²³ For example, in a review in (1990) 15 Queen’s L.J. 361, Noel Lyon wrote that Clark’s book is perhaps “the most important single piece of writing on the subject of Aboriginal rights in Canada” since the *Calder* case. Clark’s courtroom confrontations have also attracted media attention. Philip Raphals reported in the May 1991 issue of *Canadian Forum* that one B.C. Court of Appeal justice suggested that the Law Society consider taking disciplinary action against Clark for allegedly impugning the conduct of a chambers judge. According to Raphals, Clark had described the injunction that was being challenged as a “fraud,” and had accused the chambers judge of perpetrating a “gross miscarriage of justice” because he “wilfully blinded himself” to the law.

²⁴ See *An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces* (U.K.), 43 Geo. 3, c. 138 [hereinafter *Canada Jurisdiction Act*]; *An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America* (U.K.), 1 & 2 Geo. 4, c. 66 [hereinafter *Regulation of the Fur Trade Act*]; the *Royal Proclamation of 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1; and *Campbell v. Hall* (1774), Lofft 655, 98 E.R. 848 (K.B.).

relations between settler and Aboriginal nations for which he has called.²⁵ To that end, my focus will be upon one element of Clark's book, and one element only: the surprising concession, referred to above, that the *Canada Jurisdiction Act* and the *Regulation of the Fur Trade Act* subjected Indians to colonial criminal law. As he puts it, these statutes

embraced "all persons." The natives upon yet unceded Indian territories were no longer beyond the reach of the colonial governments' laws regarding "crimes and offences." Henceforth they were subject not only to the colonists' laws in respect of the serious "crimes," such as murder and robbery, but also "offences" of lesser status.²⁶

This concession seems designed to qualify, and presumably to make more acceptable, the otherwise sweeping nature of the main argument. It enables Clark to maintain that Canadian statutes that contemplate the application of penal laws to Indians are probably constitutional, because they merely confirm what the *Canada Jurisdiction Act* had already accomplished and authorized.²⁷ More importantly, he can then conclude that, because laws impairing Aboriginal self-government in other respects have no such prior, imperial approval, they are unconstitutional.

Although Clark's thesis is a powerful one, I think that his interpretation of the statutes of 1803 and 1821 pays insufficient attention to the context of these two laws and, on the evidence, need not have been made.²⁸ In the first place, the 1821 law is concerned with both civil and criminal jurisdiction, and at least half of its fourteen sections deal with establishing civil jurisdiction and executing civil process.²⁹ It is

²⁵ See Slattery, *supra* note 8 at 212, and also the writings of Kent McNeil, Doug Sanders, and many others, some of whom are referred to *supra* note 2.

²⁶ *Supra* note 21 at 127. This passage implies that, even before the statutes, Indians in the Indian Territories who committed serious crimes were subject to colonial criminal law. When read in context, however, it seems unlikely that this was the intended meaning: see pp. 125-126.

²⁷ *Ibid.* at 128. It is necessary to say "probably" constitutional because, as Clark points out at 128-130, one could argue that many activities "bear a civil as well as a criminal aspect."

²⁸ Since his book was published, he has also made this concession in court: see *British Columbia (A.G.) v. Mount Currie Indian Band*, [1992] 1 C.N.L.R. 70 (B.C.S.C.).

²⁹ A point that was noted by the defence in the proceedings against Louis Riel and others subsequent to the Red River Rebellion of 1869-70: see *Preliminary Investigation and Trial of Ambroise Lepine for the Murder of Thomas Scott* (Montréal: Burland-Desbarats, 1874) at 7. Thus, s. VI of the 1821 Act confers jurisdiction over contracts,

therefore difficult to understand why Clark construes it as he does, confining its intrusive effect to crime. Secondly and more importantly, his thesis is weakened, and perhaps even undermined, by archival and other evidence relating to the intent of the men who lobbied for the *Canada Jurisdiction Act* and the *Regulation of the Fur Trade Act*, and the policy and attitudes of those who lived under this statutory regime and who were responsible for law enforcement.

Of course, the lawyer's response to such historical evidence will be that the attitudes of lobbyists and administrators do not make law. True enough. But they can give us a sense of the reality of a situation; and, in fact, the jurisprudence concerning the application of the statutes is consistent with these attitudes. Transcripts of many of the *Canada Jurisdiction Act* cases do exist, and they include arguments of counsel and rulings from the bench that have been ignored or, more likely, simply forgotten. All of this evidence, which is presented in Parts IV and V, below, tends to show not only that many people doubted whether these statutes applied to Indians, but even whether the Imperial Parliament had any jurisdiction at all in the Indian Territories.

For their part, Aboriginal peoples who had acknowledged the ultimate sovereignty of the Queen, whether by treaty or otherwise, did not see this acknowledgment as an automatic forfeiture of their title and powers of self-government. As Nisga'a chief Charles Russ put it to a royal commission in British Columbia in 1887: "We took the Queen's flag and laws to honour them. We never thought when we did that she was taking the land away from us."³⁰ Soldiers and colonial officials who had any experience at all with Indian nations were well aware of these attitudes, and of how theoretical British declarations of sovereignty really were, especially at the "outset." In October of 1765, for example, the Superintendent of Indian Affairs, Sir William Johnson, advised the attorney general of New York that

it is the policy of our Constitution that Where-so-ever the Kings Dominions extend, he is the fountain of all property in Lands &c. But how can this be made to Extend to the native rights of a people whose property none of our Kings have claimed a right to

property and debts in the Indian Territories on the Upper Canadian courts; s. VII provides for civil process; s. XI provides for the establishment of courts of civil as well as criminal jurisdiction in the Indian Territories; s. XIII provides for appeals to the Privy Council in civil causes, etc.

³⁰ British Columbia, "Report of the Commission appointed to enquire into the state and condition of the Indians of the North-West Coast of British Columbia" in *Sessional Papers* (1888) 415 at 433.

invade, & to whom the Laws have never Extended without which Dominion cannot be said to be Exercised.

Strictly speaking our rights of soil Extend no farther than they are actually purchased by Consent of the natives, 'tho' in a *political* sense our Claims are much more Extensive, & in several Colonies include Lands we never saw, and over which we could not Extend full Dominion with 10,000 of the best Troops in Europe, but these claims are kept up by European Powers to prevent the Encroachments or pretensions of each other, *nor can it be consistent with the Justice of our Constitution to extend it farther ...*³¹

General Thomas Gage made a similar point a few years later. "It is asserted as a general Principle," he wrote to Johnson,

that the Six [Iroquois] Nations having conquered such and such Nations, their territories belong to them, and the Six Nations being the King's Subjects which by treaty they have acknowledged themselves to be, those lands belong to the King. I believe it is for our Interest to lay down such principles especially when we were squabbling with the French about Territory, and they played us off in the same style of their Indian subjects ... [But if] we are to search for truth and examine her to the Bottom, I dont imagine we shall find that any conquered [Indian] Nation ever formally ceded their Country to their Conquerors, or that the latter ever required it ... *As for the Six Nations having acknowledged themselves Subjects of the English, that I conclude must be a very gross Mistake and am well satisfied were they told so, they would not be well pleased.*³²

Johnson and Gage were soldier-administrators talking about the reality of Aboriginal power, not lawyers talking about law, so their views may seem to be of limited importance. But when the American law of Aboriginal rights began to take shape during the first three decades of the *Canada Jurisdiction Act's* existence, the Supreme Court of the United States incorporated what was essentially the Johnson/Gage perspective into their solution to the sovereignty dilemma. To be sure, the jurisprudence that was created there had nothing to do with the *Canada Jurisdiction Act*; but the ideas it embodied were not confined to lawyers south of the border, and it is relevant to an understanding of the historical context of Aboriginal sovereignty. Because the Supreme Court of Canada has cited some of this American law with approval in more than one recent case, it may also shed some light on the historical context of the test for extinguishment laid down in *Sparrow*.³³

³¹ Johnson to John Tabor Kempe, 7 October 1765, quoted in F. Jennings, "Tribal Loyalty and Tribal Independence" in E. Wright, ed., *Red, White and True Blue: The Loyalists in the Revolution* (New York: AMS Press, 1976) at 22-23 [emphasis added].

³² *Ibid.* at 21 [emphasis added].

³³ See, e.g., the references in *Guerin* and *Sioui*.

III. AMERICAN LAW, 1810–1835

BETWEEN 1810 AND 1835 the United States Supreme Court decided five cases dealing with questions of federal jurisdiction and Indian title, three of which — the so-called Marshall trilogy — are especially significant.³⁴ These cases are to federal Indian law in that country, and indeed to the law of Aboriginal rights everywhere, what *Donoghue v. Stevenson* is to tort law. The first is *Johnson v. M'Intosh*, cited by the Supreme Court of Canada in the passage from *Sparrow* reproduced above. Relying upon British law and practice, Chief Justice John Marshall held that European discovery may have impaired native rights, but it did not destroy them. Instead, the “original inhabitants” were

admitted to be the rightful occupants of the soil, *with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion*; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.³⁵

This meant that until such time as the land was ceded by treaty, whether as a result of military defeat or otherwise, its native inhabitants were regarded as enjoying (i) a right of occupancy that amounted to *de facto* ownership and (ii) a right to govern themselves according to their own laws. At the same time, the Indian nations' sovereignty over their territories was now limited by the principle that they could no longer sell to just anyone. They remained sovereign in other respects, *e.g.*, they continued to govern their lands and to sell to other Indian nations or individuals (“to use it according to their own discretion”); but insofar as Europeans were concerned, native owners could sell only to the nation acknowledged by other European states as having acquired the right to purchase. Chief Justice Marshall, like the Supreme Court of Canada, does not explain how this unfettered right to sell could be lost; he says only that some such distributive principle was necessary in order to avoid, or at least to reduce, conflict among the imperial powers. But he does acknowledge the legal *legerdemain*

³⁴ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Johnson*; *Cherokee Nation*; *Worcester*; and *Mitchell v. U.S.*, 34 U.S. (9 Pet.) 711 (1835).

³⁵ *Johnson*, *supra* note 14 at 574 [emphasis added]. This is the passage quoted by the Supreme Court of Canada in *Guerin*.

involved, conceding that the "pretension of converting the discovery of an inhabited country into" a form of title is an "extravagant" one.³⁶

Johnson was decided in 1823, and the doctrine it propounded limited the sovereignty of the Indian tribes only in this one particular. Although the right conceded to the "discovering" nation was described as constituting a form of title, in practical terms it amounted to an exclusive right to purchase and nothing more.³⁷ Then in 1831 the Court created an even stronger precedent for the view that the Indian nations within the borders of the United States were sovereign. In *Cherokee Nation* Justices Thompson and Story ruled that the tribes were like foreign nations, and that they had lost none of their rights to sovereignty and self-government by allying themselves to the United States by treaty. As Justice Thompson put it,

provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power.³⁸

Justices Marshall and Mclean did not go quite so far. Because Indian title could be ceded only to the United States, they held that the tribes were more appropriately described as "domestic dependent nations." In other words, they were nations, but they were no longer foreign — a distinction that relieved the Court, for a few months at least, from deciding a highly politically charged issue between the Cherokees and the state of Georgia.³⁹ This approach also emphasized the second lim-

³⁶ *Ibid.* at 591. See also B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, Studies in Aboriginal Rights No. 2, (Saskatoon, University of Saskatchewan Native Law Centre, 1983).

³⁷ The meaning of the phrase "exclusive title" in the excerpt quoted earlier from *Johnson* is ambiguous, and the Supreme Court of Canada is not alone in interpreting it to mean the underlying, radical or allodial title. However, in *Worcester*, Chief Justice Marshall seems to be quite clear that it really amounts only to an exclusive right to purchase.

³⁸ *Supra* note 18 at 53. The views of the justices in this case are described in more detail in note 39 *infra*.

³⁹ The decision in *Cherokee Nation* turned on whether the U.S. Supreme Court had jurisdiction in a dispute between a state and an Indian tribe, and this depended upon whether the Cherokees were a "foreign state" within the meaning of U.S. Const. art. III, § 2. The Court decided 4:2 that they were not (Thompson and Story JJ. dissenting), so the case was dismissed. But two in the majority (Marshall C.J. and McLean J.) held that, although the Cherokees were not a foreign state, they were a sovereign nation, albeit in a special sense. As a result, only two of the six justices (Johnson and Baldwin

itation on the tribes' sovereignty established by the Marshall Court: they could not conduct foreign relations with other European powers.

A year later the Supreme Court of the United States decided its most important tribal sovereignty case, *Worcester*, ruling that the commerce and supremacy clauses of the federal Constitution conferred exclusive jurisdiction with respect to Indians on Congress.⁴⁰ A law passed by the state of Georgia that purported to affect the Cherokee Nation, most of which was located within Georgia's borders, was therefore void "as being repugnant to the constitution, treaties and laws of the United States." Chief Justice Marshall delivered the opinion of the Court, and in it he continued to view the tribes as domestic dependent nations. But he emphasized nationhood over dependence, and abandoned the language of "exclusive title" used in *Johnson* and repeated by the Supreme Court of Canada in *Sparrow*. At least until treaties were entered into, the chief justice ruled, nothing more than the unlimited right to sell land and conduct foreign relations had been lost. Then, in words reminiscent of those used by General Gage and Superintendent Johnson years before, he asserted that

[t]he extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, *according to the common law of European sovereigns respecting America*, they might rightfully convey, and no more. *This was the exclusive right of purchasing such lands as the natives were willing to sell.*⁴¹

Thus when Indian tribes entered into treaties they did so as nations and, according to the terms of the treaty, continued as such. "The Indian nations," he wrote,

had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which

JJ.) held that the Cherokees possessed no sovereignty at all.

⁴⁰ The Commerce Clause (U.S. Const. art. I, § 8) authorizes Congress to "regulate Commerce with foreign Nations, and the several States, and with the Indian Tribes." The Supremacy Clause (art. VI, § 2) provides that federal treaties are part of the supreme law of the land.

⁴¹ *Worcester*, *supra* note 18 at 544–45 [emphasis added].

those European potentates imposed on themselves, as well as on the Indians ... The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. *They are applied to all in the same sense.*⁴²

Towards the end of his opinion, he paraphrases almost word for word the views expressed by Justice Thompson in *Cherokee Nation* concerning sovereignty and alliances between strong and weak states.

Over the years, American courts have tended to regard *Worcester* as a case in which Georgia's laws were ousted by federal treaties and statutes guaranteeing Cherokee sovereignty, rather than by that sovereignty alone. In other words, Congress had jurisdiction *over* Indians, as opposed to merely jurisdiction to treat with them. This meant that if Congress could acknowledge and guarantee tribal sovereignty, it could also restrict or extinguish it; and it has done so on many occasions.⁴³ But unlike many "foundation" cases, which are really of no more than historical interest, *Johnson* and the *Cherokee Nation* cases remain vital and are constantly cited, both within and without their country of origin.⁴⁴ As interpreted, they have come to mean that federal Indian law in the United States is based upon two fundamental principles: first, that the sovereignty of the tribes is subject to the will, not of the state legislatures, but of Congress; and secondly, that this sovereignty continues to the extent that it has not been specifically abolished by Congress. Although vulnerable, it is nonetheless inherent, and does not depend upon a grant from

⁴² *Ibid.* at 559-60 [emphasis added].

⁴³ One landmark was the decision, in 1871, to stop making Indian treaties. Only the Senate ratified treaties, and the House of Representatives resented the fact that it had to vote funds for implementing obligations that it had no role in negotiating. Another was the *Lone Wolf* case, which held that Congress could unilaterally abrogate provisions in treaties already made. Although the Supreme Court of Canada's decision in *R. v. Horseman* (1990), 55 C.C.C. (3d) 353 (S.C.C.) indicates that the *Lone Wolf* position continues to obtain in Canada as well, the Court recently cast some doubt upon this in *Sioui*, *supra* note 18 at 1063. Not only did Lamer, J. (as he then was) acknowledge for the first time that the British regarded the Indians as independent nations, he also stated that "the very definition of a treaty ... makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."

⁴⁴ F.L. Ragsdale, Jr., "There Dragons Be" (Paper presented to the Transboundary Legal History Conference at the University of Victoria, February 1991). According to C.F. Wilkinson, modern courts have cited the *Worcester* opinion more often than "all pre-Civil War Supreme Court opinions save three." (See "Indian Tribes and the American Constitution" in F.E. Hoxie, ed., *Indians in American History* (Arlington Heights: Harland Davidson, 1988) at 118.)

Congress or any other source.⁴⁵ As a standard American casebook concludes, and as attendance at any conference on American Indian Law will quickly confirm, Indian tribal sovereignty has survived the battering it has received since *Worcester*, and “remains a doctrine of considerable vitality.”⁴⁶

Unfortunately, what is written in the Marshall decisions was only half the story, even in the 1830s. Going to the white man’s law, and discovering that it was on their side, did not save the Cherokees. There was gold on their tribal lands, gold that non-Aboriginals and especially the state of Georgia wanted. In addition, the realities of American politics at the time, notably the Nullification Controversy over states’ rights, made a constitutional confrontation between Georgia and the United States too dangerous to risk. President Jackson may not have actually said, “John Marshall has made his decision; now let him enforce it,” but he almost certainly thought it. As a result, the Cherokees won the battle but lost the war.⁴⁷ Notwithstanding *Worcester*, some were bribed to give up their lands, others were driven from them, and all were removed to the artificially created Indian Territory far to the west. The “Trail of Tears” that this entailed led to the death of one-quarter of their population.

Alexis de Tocqueville was in the United States at the time, gathering material for his study of *Democracy in America*. In 1831 he had observed a band of Choctaws who had been removed, just as the Cherokees would be several years later. The group he saw was crossing the Missouri at St. Louis, and he wrote that it was a sight that would “never fade from my memory.”

⁴⁵ In the words of Felix Cohen, probably the most celebrated federal Indian law scholar, powers “lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.” Cohen put these words in italics, and added that they express what is “[p]erhaps the most basic principle of all Indian law.” See *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1942) at 122.

⁴⁶ D.H. Getches & C.F. Wilkinson, *Cases and Materials on Federal Indian Law*, 2d ed. (St. Paul: West, 1986) at 269.

⁴⁷ *Ibid.* at 45. That Jackson did think this is evident in his Message to both Houses of Congress reported in the *Times*, 2 January 1833 (Hudson’s Bay Company Archives [hereinafter H.B.C.A.], A.71/1 at 310–20). “Whatever differences of opinion may have prevailed respecting the just claims of [the Cherokees],” he said, “there will probably be none respecting the liberality of the [terms of the Government’s offer]. They were, however, rejected, and thus, the position of these Indians remains unchanged, as do my views ...” He made no mention of *Worcester*.

It was then the depths of winter, and that year the cold was exceptionally severe; the snow was hard on the ground, and huge masses of ice drifted on the river. The Indians brought their families with them; there were among them the wounded, the sick, newborn babies and the old men on the point of death ... Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable.⁴⁸

Reflecting upon this and other events, De Toqueville was impressed by how Americans dealt with Indians, detecting in what he called their "chaste affection for legal formalities" a perverse consequence. "The Spaniards," he said,

by unparalleled atrocities, which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the ... Americans have attained both these results with wonderful ease, quietly, legally, and philanthropically ... It is impossible to destroy men with more respect to the laws of humanity.⁴⁹

At the time the *Canada Jurisdiction Act* and the *Regulation of the Fur Trade Act* were passed, the legal doctrines enunciated by the Marshall Court possessed an even greater practical reality in the Indian Territories of British North America, where there was virtually no settlement, than they had in the United States. But although the *British North America Act*, like the U.S. Constitution, confers jurisdiction over Indians and their lands upon the federal legislature, the American courts' emphasis upon tribal sovereignty has, in Canada, been conspicuously absent. The first principle described above, that Indians were subject to the will of Parliament, was embraced; the second, that tribal sovereignty is inherent and survives until specifically extinguished, was quickly lost. It is true that Justice Samuel Cornwallis Monk quoted at length in 1867 from *Worcester* to support his conclusion that tribal sovereignty had survived contact. As he put it,

the territorial rights, political organization such as it was ... [and] the laws and usages of the Indian tribes, were [not] abrogated ... when [France and England] began to trade

⁴⁸ A. de Tocqueville, *Democracy in America* (Garden City: Doubleday, 1969) at 324.

⁴⁹ *Ibid.* at 339. Perhaps if de Tocqueville had written his book half a century later, after Sand Creek and Wounded Knee, he would have decided that American policy was not so unlike Spain's after all.

with [them] ... In my opinion it is beyond controversy that ... so far from being abolished, they were left in full force.⁵⁰

But Monk was atypical, and he was dealing with events that took place up to 1803. By the late nineteenth century the concept of tribal sovereignty had lost its legal potency even in the United States. In Canada, it almost completely disappeared.⁵¹

The waning of Indian power in the face of European numbers and technology, and the growth of legal positivism at the expense of an earlier, natural law tradition which did not confine sovereignty to nation-states, were powerful contributing factors. So too was the need to deal with the legal relationship between individual Indians and the institutions of the wider society, especially where property was involved.⁵² This meant that, except for the Roosevelt and Truman administrations, the emphasis in the United States was upon breaking up tribal lands and terminating tribal status. In the late 1950s, however, the pendulum re-traced its swing. The "termination" policy of the Eisenhower era was repudiated, and the United States Supreme Court revived the Marshall cases, holding in *Williams v. Lee* that, although the principles laid down in *Worcester* may have been eclipsed, they had never been overruled.⁵³ As one commentator has put it, the Court

⁵⁰ *Connolly v. Woolrich* (1867), 11 L.C.J. 197; aff'd (1869) 1 R.L.O.S. 253. Clark discusses the case in his book, *supra* note 21 at 13–18, and there is a detailed description in C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Osgoode Society, 1991) at 1–22.

⁵¹ In the United States, the process began early. In at least two circuit court decisions in the 1830s, Justice McLean advanced his view that state law could apply to crimes committed in Indian country. Although the Supreme Court remained faithful to Marshall's view that only federal law applied, the emphasis in their decisions gradually moved from tribal sovereignty to Congressional supervision: see cases cited *supra* note 7. In Canada, on the other hand, it was not really until after the Second World War that Parliament (s. 88 of the *Indian Act*) and the Supreme Court (e.g., *Cardinal v. Alberta (A.G.)*, [1974] S.C.R. 695 [hereinafter *Cardinal*]) made emphatic statements about federal authority and the applicability of provincial law to Indians and their lands, statements that stand in marked contrast to U.S. law.

⁵² See Ragsdale, *supra* note 44, and R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash. L. Rev. 643.

⁵³ *Williams v. Lee*, 358 U.S. 217 (1959). See also D. Sanders, "Getting Back to Rights" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 261 at 264–65.

embraced the notion that Indian tribes were still unique political entities empowered with a degree of self-government that had survived the sweep of history. That sweep should not be ignored because in *Williams* [there] are string cites recognizing the changes that tribes and individuals had been subjected to as the course of law tried to accommodate tribes and individuals into the fabric of the American system. As the Supreme Court noted, the law is as it always has been. So, in spite of the many attempts to assimilate Indians into the system, *Williams* ensured survival as domestic dependent nations.⁵⁴

Until quite recently this process of revival has been much slower in Canada. As a result, when the idea that is the basis of the relationship between the federal government and the tribes in the United States began to resurface among non-Aboriginal people in this country, it tended to conjure up scary images of independent chiefdoms and embassies in foreign capitals. Predictably, this has meant that Aboriginal frustration and non-Aboriginal apprehension have gone hand-in-hand with the increased likelihood of negotiated self-government, a likelihood that may mean that, to a degree, the sort of legal arguments canvassed here will be overtaken by events.

Yet, if such negotiations founder because Canadians are unable to define inherent sovereignty, there is nothing to prevent the courts from adopting a position analogous to that taken in American law.⁵⁵ Although the prospect of having s. 35(1) shield judicial conclusions from legislative interference may be somewhat daunting, a judge forced by failed negotiations to confront the issue could find good reasons for concluding that the eclipse of such sovereignty in Canada, although accomplished by massive regulatory intrusion by the federal government, does not amount to complete extinguishment.⁵⁶ As for provincial laws, their application to Indians and Indian lands has been largely a matter of judicial interpretation rather than express statutory directive, and even s. 88 of the *Indian Act* — which provides, subject to treaty and other limitations, for the application of provincial laws to Indians — does not specifically refer to Indian *lands*. If the latter may be construed as including lands to which the Aboriginal title has not been extinguished as well as reserves, it may be possible

⁵⁴ Ragsdale, *supra* note 44 at 4.

⁵⁵ It goes without saying, of course, that by analogous I do not mean identical, and that many people find the American approach inadequate.

⁵⁶ As Professor Slattery has put it, a fresh look at Canada's Aboriginal and constitutional history should lead to the conclusion that First nations "continue to hold a residue of the sovereignty they once possessed" (*supra* note 8 at 212).

to adopt a view of sovereignty over traditional territories, or at least portions of them, that is sufficiently wide to re-start negotiations.⁵⁷

It is not my intention, however, to construct an elaborate legal argument in support of an "existing" right of self-government in s. 35(1), nor to anticipate and attempt to counter the arguments against it. That is being done by others, including Dr. Clark. Instead, I want to steal a page from Chief Justice Marshall's book, wherein he suggests that casting a glance at the origin of things, before the premature hardening of our legal categories set in, "might shed some light on existing pretensions."⁵⁸ One of these pretensions is that the *Canada Jurisdiction Act* applied colonial criminal law to the Indians of the Indian Territories.

IV. THE CANADA JURISDICTION ACT

ON 30 APRIL 1803 France formally ceded the Louisiana Territory to the United States for \$15,000,000. In keeping with the theory of Aboriginal title soon to be propounded by the Marshall Court, over the succeeding decades the American government paid the various Indian tribes more than twenty times that much for the lands they occupied within it.⁵⁹ Louisiana was a vast acquisition that stretched from the Gulf of Mexico in the south to what is now the Idaho-Montana border in the west. It had been claimed by both France and Spain before the cession of 1803, and both it and the old North West Territory, just south and west of the Great Lakes, were home to a potentially lucrative and ethnically diverse fur trade.

In 1803, Canadians seeking profits had been in this trade for over a century. Indeed, when the Revolutionary War ended in 1783 and the United States took possession of the extensive lands northwest of the Ohio River, there was hardly an American citizen there. Except for

⁵⁷ This is admittedly a difficult and complex issue, and the effect of s. 35(1) upon the Supreme Court's decision in *Dick v. R.*, [1985] 2 S.C.R. 309 — assuming that much of it survives the implications of *Sparrow* — remains to be worked out. For present purposes it is enough to point out that, in *St. Catherine's Milling and Lumber Co. v. R.* (1887), 13 S.C.R. 577; (1888) 14 App. Cas. 46 [hereinafter *St. Catherine's Milling*], the Privy Council decided that the expression "lands reserved for the Indians" in s. 91 (24) of the *British North American Act* was not restricted to reserves, and that in *Derrickson v. Derrickson*, [1986] 2 C.N.L.R. 45 the Supreme Court of Canada acknowledged that the application of provincial laws touching "Indianness" to reserves was unsettled.

⁵⁸ *Worcester*, *supra* note 18 at 543.

⁵⁹ F.S. Cohen, "Original Indian Title" 32 *Minn. L. Rev.* 28 at 34–35.

some *habitants* in the French settlements along the Illinois, "the only white men in this immense territory were Canadian traders with the Indians."⁶⁰ Partly because borders were uncertain — the 49th parallel was not agreed upon east of the Rockies until 1818, nor west of them until 1846 — and partly because so much remained unexplored, these traders continued to advance in every direction. The North West Company, operating out of Montréal, was especially adventuresome. Alexander Mackenzie reached the Arctic in 1789 and the Pacific in 1793; Simon Fraser penetrated the Rockies in 1805, gaining a jump on both the Americans and the Hudson's Bay Company for the far western trade of New Caledonia; David Thompson reached the mouth of the Columbia in 1811, only a few months after the Americans established Fort Astoria; and, under the leadership of William McGillivray, the Company joined forces with John Jacob Astor in that same year to exploit the furs south of the Great Lakes.⁶¹

At least two points are worth noting about the expanding and international world of the early nineteenth century fur trade. The first is that the perception that Indian tribes were "nations" with their own laws and territories was not one that could easily be confined to the United States, especially as it was originally a British policy. The second is that it was for this transboundary world that, on August 11, 1803, *An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces* was passed. According to the Act's preamble, its long arms stretched into "any" of the Indian Territories and other parts of North America that were beyond the indistinct boundaries of the Canadas, including, in certain circumstances, the colonies of other European powers, and even disputed areas that were not subject to the civil government of the United States.⁶²

⁶⁰ S.F. Bemis, *Jay's Treaty, a Study in Commerce and Diplomacy* (New York: MacMillan, 1923) at 1, quoted in A.S. Morton, "The Canada Jurisdiction Act (1803) and the North-West" 32 Proceedings of the Royal Society of Canada, Section II, 121 at 123.

⁶¹ The result was the South West Company: see M.W. Campbell *The North West Company* (Toronto: MacMillan, 1973) at 167-9

⁶² *Supra* note 24. Not only was the boundary between American and British territory the subject of dispute, there was also considerable uncertainty about where the Canadas ended and Rupert's Land began — see, e.g., *infra* note 94.

Although the preamble refers to crimes and offences in the “Indian Territories,” the mischief against which the Act was directed was European, not Aboriginal. It was not passed in order to apply colonial criminal law to Indians, but to enable the courts at Montréal to try Canadian traders who had committed serious offences against one another in the fur country, even in regions so far away as Oregon or Russian America.⁶³ Empirically, four facts about the *Canada Jurisdiction Act*’s history stand out. In the first place, it appears that no prosecution was ever brought pursuant to its successor, the *Regulation of the Fur Trade Act*, which was passed in 1821 to consolidate the trade and to supplement the earlier Act; so the meaning and effect of that law were never put to the test.⁶⁴ Secondly, all of the prosecutions under the *Canada Jurisdiction Act* were for murder, except for a number of the cases brought by Lord Selkirk and the North West Company against each other in 1818. Thirdly, all of the Métis or “half breeds” charged pursuant to the Act appear to have been either directly employed by or otherwise closely associated with the fur companies. Finally and most important for present purposes, no one who was tried in the Canadas under the Act was a “full-blooded” Indian.

The motives of those who lobbied for the 1803 Act are recorded in documents collected for the annual Report prepared by the Canadian Archives in the *Sessional Papers* for 1893.⁶⁵ These reveal that by 1802 the business community and the colonial government of Lower Canada were afraid that increasing violence between the concerns trading out of Montréal to the fur country was threatening the colony’s economy. The problem was fur traders committing acts of violence against each other, and the solution, so far as those directly affected were concerned, was a law that permitted such cases to be tried in Lower Canada. The judges of the King’s Bench, the grand jury at Montréal, the attorney general, prominent merchants and even the lieutenant governor himself urged the passage of an imperial statute

⁶³ A case from west of the mountains was sent to Canada in 1817, but it was the only one and it probably never got to trial: see H. Foster, “Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763–1859” (1990) 34 *Am. J. Legal Hist.* 1 at 31–32.

⁶⁴ The one case brought after 1821 (see text accompanying notes 108–117) was tried in Lower Canada pursuant to the *Canada Jurisdiction Act*. Moreover, during the life of the Hudson’s Bay Company’s exclusive licence to trade (1821–1859), none of the territorial courts contemplated by s. XI of the *Regulation of the Fur Trade Act* were established.

⁶⁵ Canada, Courts of Justice for the Indian Country, “Report of the Archives” in *Sessional Papers* (1893) No. 7A at 136–146.

that would accomplish this. No one spoke of using such a law against the Indian tribes; it was directed, not at the Cree or the Chipewyan or any other Indian nation, but at extending the process of the Canadian courts to traders who would otherwise have to be sent to England for trial or, more likely, who would escape punishment altogether. The only cases cited as justifying the intervention of the Imperial Parliament — with the exception of a few that arose just after the Revolutionary War — reflect this concern.⁶⁶

Their pre-occupation with crimes by traders against traders explains why the law's supporters anticipated no real unfairness to prisoners and witnesses. The trade operated out of Montréal, so accused persons would be returned to their homes to be judged by a jury of their peers, and no more homicide prosecutions would fail for want of jurisdiction. Admittedly, this safeguard was quickly lost when the North West Company and the XY Company merged in 1804 and directed their combined energies against the Hudson's Bay Company.⁶⁷ The latter had no presence at that time in Montréal. Their employees were therefore subject, as Aboriginal prisoners would have been, to trial by strangers; strangers, moreover, who were probably sympathetic to their commercial rivals.⁶⁸ But this unanticipated con-

⁶⁶ The exceptions involved soldiers who found themselves in what had probably become United States territory as a result of the British defeat. The fur trade cases were from Athabaska (1788) and the Saskatchewan country (1802). The former involved the alleged murder of John Ross by François Nadeau and Eustache Le Comte, two of Peter Pond's men; the latter arose out of the killing of James King, a North Wester, by Joseph Maurice Lamothe, a young employee of the XY Company. The two men accused of Ross' murder were not tried because the government decided that the evidence did not meet the standard for trial required by 33 Hen. 8, c. 23 (1541): see *Report of a Special Committee of the Privy Council*, dated Québec 20 May 1788, National Archives of Canada [hereinafter N.A.C.], MG 11, Vol. 217; "Q" series, Vol. 36, Part I (1788). Afterwards, it was determined that, even if it had met this standard, such a trial could be held only in England. This impediment also prevented the Lamothe case from proceeding, and led directly to the enactment of the 1803 statute. (These events are discussed in Foster, *supra* note 63; and Morton, *supra* note 60.)

⁶⁷ According to Lord Selkirk, the North West Company was interested in proceeding against King's killer only prior to the merger; afterwards, they had no commercial incentive to do so, even though the *Canada Jurisdiction Act* was then in force: *A Sketch of the British Fur Trade in North America* (London, 1816) at 90–91.

⁶⁸ Lord Selkirk therefore felt obliged to protect his people by maintaining that the *Canada Jurisdiction Act* did not apply to Rupert's Land, because it was legally distinct from the Indian Territories to the north and west. It was in fact Selkirk's vigorous defence of the Hudson's Bay Company Charter that helped to establish this distinction in the public and legal consciousness, and which led to a clause in the *Regulation of the Fur Trade Act* of 1821 which provided that the Act applied in Rupert's Land as well as

sequence does not alter the fact that prosecutions were confined to Europeans, and to "half breeds" connected to the trading concerns.

Archival evidence in Great Britain may one day reveal more about the origins of the *Canada Jurisdiction Act*, but this seems unlikely.⁶⁹ Documents at the Record Office of the House of Lords show only that leave was granted to the attorney general and solicitor general to prepare and introduce it, and that one unspecified amendment was made in the Commons. Hansard records no debate.⁷⁰ The *Regulation of the Fur Trade Act* also left few traces.⁷¹ A more helpful source is the *Report* made by the Select Committee on the Hudson's Bay Company, which looked into the fur trade in 1857. Edward "Bear" Ellice, one of the prime movers of the coalition between the North West and Hudson's Bay Companies in 1821, testified at length before this Committee. He had been intimately involved in securing the passage of the 1821 statute which authorized the Crown to grant an exclusive license to trade in the Indian country, and knew as much about it as anyone. But nowhere in over thirty printed pages of testimony does he suggest that the statute rendered Indians subject to colonial criminal law.⁷²

Ellice's negative evidence is strengthened by testimony of the North American governor of the Hudson's Bay Company, Sir George Simpson, whom the Committee questioned quite closely on the point. Because the *Regulation of the Fur Trade Act* obliged the Hudson's Bay Company to send all capital crimes and civil cases where more than £200 was at stake to Canada for trial, the Committee wanted to know

the Indian Territories.

⁶⁹ Selkirk (*supra* note 67 at 85–6 and 106–08) confirms that the Act was passed by British legislators who were quite ignorant of conditions in the fur trade. They seemed to have been unaware, he said, of the Hudson's Bay Company territories to the west of the Canadas, and the Company "never received any intimation of such a measure [the *Canada Jurisdiction Act*] being in contemplation."

⁷⁰ U.K., *Journals of the House of Commons*, vol. 58 at 653. There were no amendments in the Lords, and there appears to be no record of any debate (personal communication from H.S. Cobb, Clerk of the Records, House of Lords, 30 July 1991). Personal papers of the officials involved might yield more information; unfortunately, however, those of Henry Goulburn, who was under-secretary of state for war and the colonies at the time, apparently make no useful references to Canada: see J.M. Gray, *Lord Selkirk of Red River* (Toronto: Macmillan, 1963) at 346.

⁷¹ U.K., *Journals of the House of Commons*, vol. 76 at 408. Mr. Cobb, *ibid.* at 70, advises that in this case there were several unspecified amendments in the Commons but, again, none in the Lords.

⁷² *Report from the Select Committee on the Hudson's Bay Company* (London: The House of Commons, 1857). Ellice's testimony is at 322–353.

how the Company had interpreted their responsibilities.⁷³ These are a few representative questions and responses from Simpson's testimony:

Q. [It is said] that the Company has the invariable rule of avenging the murder by Indians of any of its servants, by blood for blood, without trial of any kind. Is that the case? — We are obliged to punish Indians as a measure of self-preservation in some parts of the country.

...

Q. You exercise no authority whatever over the Indian tribes? — None at all.

...

Q. Then it is the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? - They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.

Q. What law do you consider in force in the case of the Indians committing any crime upon the Whites; do you consider that the clause in your licence to trade, by which you are bound to transport criminals to Canada for trial, refers to the Indians, or solely to the Whites. — To the Whites, we conceive.⁷⁴

Thus the senior official in the Hudson's Bay Company not only believed that colonial criminal law had no application to disputes that involved Indians only, but also that it had no application to Indians who injured or killed Europeans. This is hardly surprising. The wording of both the licence to trade and s. 3 of the *Regulation of the Fur Trade Act* required the Hudson's Bay Company to deliver into custody "for purposes of trial all persons in their employ or acting under their authority within the said territories who should be charged with any criminal offence ..."⁷⁵ In this respect the statutes of 1803 and 1821

⁷³ Section 3 of the statute required the licence holder to enter into security to ensure that certain conditions would be met, including delivering up accused persons for trial. Pursuant to this section, the statutory licence provided for a penal bond in the amount of £5,000 for ensuring "the due execution of all criminal processes, and of every civil process in any suit where the matter in dispute shall exceed £200 ..."

⁷⁴ *Supra* note 72 at questions 1060, 1749, and 1752-53 [emphasis added]. For a similar perspective on the extent to which the Hudson's Bay Company had subjected the Indian Territories to their control, see K. McNeil "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have" [forthcoming].

⁷⁵ In contrast, the Hudson's Bay Company charter of 1670 conferred authority upon the Governor and Council "to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall ... " Arguably,

followed the precedent set by the *Royal Proclamation of 1763*, and by legislation enacted by the Imperial Parliament prior to the American Revolution, which was designed to enable colonial courts to try Europeans — not Indians — for crimes committed in the Indian Territories.⁷⁶

The opinion lower down the corporate ladder also appears to have been that Indians were not affected by the *Canada Jurisdiction Act*. The views of one chief trader who disagreed with this view are instructive. John Tod was an unconventional man, principled and scrupulous — to a fault, some might say. He had seen copies of the statutes of 1803 and 1821 at York Factory, and although he believed that it was illegal to kill Indians in retaliation for alleged wrongs, he conceded that no attempt was ever made to apply the statutes to such cases. Instead, the offending parties were simply hunted down and killed, “useful as that enforcement of justice was, and approved by many of the Indian tribes.” Seemingly oblivious to the law of accessories, Tod maintained that, although he had captured Indians who had killed traders, he never took part in their “actual killing, deeming such to be on my part unwarranted.”⁷⁷

Tod set down his views long after the event, and the accuracy of his recollections may have been affected by time and by a desire to appear respectable. North Wester Willard-Ferdinand Wentzel, on the other hand, expressed his opinion when public awareness of the *Canada Jurisdiction Act* was at its height. Stationed at Great Slave Lake in 1820, Wentzel complained about the failure of the statute to protect men in the fur country from the “violence and oppression” occasioned by the competition and conflict between the North West and Hudson’s Bay Companies. He went on:

the italicized phrase could include a wider class of persons than the statute.

⁷⁶ In addition to the *Royal Proclamation of 1763*, which prohibited entry into the Indian Territories without royal licence, see 6 Geo. 3, c. 18 (1765) and 16 Geo. 3, c. 15 (1775) referred to in D.H. Brown, “Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886” (1979) 17 Alta. L. Rev. 497. Section 29 of the 1775 statute provides that “any Person ... not being a Soldier” who committed an offence “within his Majesty’s Dominions in America, which are not within the Limits or Jurisdiction of any Civil Government hitherto established” was liable to be transported to “the next adjoining Province” where he could be tried as if that were where he had committed the offence. This is hardly language that supports the view that Indians would be liable to such proceedings.

⁷⁷ M. Wolfenden, ed., “John Tod: ‘Career of a Scotch Boy’ ” (1954) 18 B.C. Hist. Q. 133 at 196–97.

How, also, are we to have satisfaction afforded to us if any of our people are murdered by the Natives? We have no legislature residing in the country to have recourse to; but perhaps I may be told that my narrow understanding is too shallow to comprehend the extent of the Legislature's meaning in the enactment of laws for the Indian Territories ...⁷⁸

Whatever Parliament's meaning may have been, and whatever the correct construction of the statutes' wording, these excerpts are revealing. They show that, as a practical matter, the statute was not interpreted as applying colonial criminal law to Indians, nor as requiring that they be sent east for trial.

V. THE JURISPRUDENCE

ADMITTEDLY, THE *CANADA JURISDICTION Act* is not so restricted on its face. Sections 1–3 authorized the trial in Lower (and, exceptionally, Upper) Canada of any person committing an offence in the Indian Territories, just as if the offence had been committed in the Canadas. And ss. 4–5 provided that, so long as they were British subjects, persons could be prosecuted in Canada even if the *situs* of the offence appeared to be within territory belonging to another European state (e.g., Russian America). This wording has led not only Clark but the distinguished historian, A.S. Morton, to assume that Indians were subject to the Act.⁷⁹ Concern about similar assumptions may have led the Dominion Parliament to state explicitly, in the original *Indian Act* of 1876, that the term "person" did *not* include Indians unless the context clearly required that construction.⁸⁰

But no court appears to have ruled that members of the Indian nations were liable to prosecution under the *Canada Jurisdiction Act*. The first judge who had to interpret the statute was Jonathan Sewell,

⁷⁸ Wentzel to Roderic McKenzie, 23 May 1820, in L.R. Masson, *Les Bourgeois de la Compagnie du Nord-Ouest* (New York: Antiquarian Press, 1960), at 126.

⁷⁹ *Supra* note 60 at 122. Morton, however, describes the Act as applying to "any persons, Indians or British subjects," thus implying that Indians were not British subjects.

⁸⁰ S.C. 1876, c. 18, s. 3(12). Similar issues arose regarding the meaning of "persons" when women sought to be admitted to the bar and appointed to the senate: see *Re Mabel Penery French* (1905), 37 N.B.R. 359; *Re Mabel Penery French* (1912), 17 B.C.R. 1 (C.A.); and *Edwards v. Canada (A.G.)*, [1930] A.C. 124, [1930] 1 D.L.R. 98 (J.C.P.C.), rev'g [1928] S.C.R. 276. These are discussed in C. Mullins, "Mabel Penery French" (1986) 44 *Advocate* 676 and S.K. McCallum & A.A. McLellan "The Persons' Case: A Beginning — Not the End" in *Women as Persons: Proceedings of the Third Annual Meeting of the Canadian Research Institute for the Advancement of Women* (Toronto: Resources for Feminist Research, 1980) at 76–79.

Chief Justice of Lower Canada, in 1818.⁸¹ During Charles De Reinhard's trial at Québec for the murder of Owen Keveny, one of Lord Selkirk's men, Sewell said that Parliament intended,

first, to punish the perpetrators of offences committed in the Indian territory, *whether they be, or be not, subjects*; and 2ndly, to punish the perpetrators of offences committed in any European colony, or settlement, in *America, being subjects*. It is equally manifest, that ... it did not intend, to give *any* jurisdiction over offences committed in *European* colonies, if perpetrated by aliens.⁸²

Jurisdiction was therefore based upon two variables, one territorial, the other, British citizenship; but the latter mattered only if the offence were committed in a European colony. Because the *situs* of De Reinhard's crime (the Dalles, near what is now Kenora, Ontario) was held to be in the Indian Territories, the court ruled that it did not matter that he was not a British subject; he was convicted of Keveny's murder notwithstanding that he was Swiss.⁸³ But, British or not, De Reinhard was European; the question whether *Indians* were "persons" for the purposes of the Act was not dealt with because, on the facts, it did not arise.

⁸¹ This was not the first *Canada Jurisdiction Act* case, however. In 1811 Hudson's Bay Company man John Mowat was tried at Montréal for the murder of North Wester Aeneas Macdonnell. He was convicted of manslaughter and sentenced to six months imprisonment and branding on the thumb, but it appears that no issues of jurisdiction were raised: see "James Tate's Journal, 1809-12" in G. Williams, ed., *Hudson's Bay Miscellany 1670-1870* (Winnipeg: Hudson's Bay Record Society, 1975) at 95-150. Lord Selkirk was aware of the case, and was severely critical of the Act and the legal authorities in Montréal who applied it, expressing the hope in 1816 that, "as Mowat's trial was the first which occurred under the Act of 1803, so it may be the last" (*supra* note 67 at 106). A few years earlier he had advised his colonists to object to the jurisdiction of Canadian courts should any of them be sent to Montréal "as Mowat was": Selkirk to Miles Macdonnell, 13 June 1813, in E.H. Oliver, ed., *The Canadian North-West: Its Early Development and Legislative Records* (Ottawa: Government Printing Bureau, 1914-15) at 178.

⁸² W.S. Simpson, *Report at Large of the Trial of Charles De Reinhard* (Montréal: J. Lane, 1819) at 283.

⁸³ However, the offence had been committed in Rupert's Land, not the Indian Territories, and Lord Selkirk's doubts about whether the *Canada Jurisdiction Act* applied to Rupert's Land (*supra* note 68) now became a weapon in the hands of his opponents. As a result, Selkirk's only successful prosecution was frustrated, and De Reinhard's sentence was not carried out. It is not clear whether this was because the Act simply did not apply to Rupert's land, or because Rupert's Land was regarded as a colony within the meaning of s. 4 of the Act. If the latter, De Reinhard could be prosecuted in Canada only if he were a British subject.

It is true that an Indian named *Neganabinés*, "known throughout these trials as *José, fils de la Perdrix Blanche*" (Son of the White Partridge), was implicated in Keveny's murder, and that he had gone down to Lower Canada as a witness. The attorney general of Lower Canada even decided to indict him, prompting counsel for De Reinhard to cry foul and allege that *Neganibinés* and a few others whose testimony might assist the defence were being charged solely to prevent them from testifying.⁸⁴ Whatever the truth of that allegation, the decision to charge *Neganibinés* might have been evidence that the *Canada Jurisdiction Act* applied to Indians, were it not for two rather important considerations. In the first place, *Neganibinés* was connected to the North West Company, and this was vital to the question of whether he could be brought within the Act.⁸⁵ Secondly, he either escaped or simply left Lower Canada long before the trial began, so the question of whether Indians were "amenable" to the law also disappeared as a potential issue in the case.

De Reinhard's counsel included J.R. Vallières de St. Réal, who would later become chief justice of Montréal, and Andrew Stuart, a future solicitor general.⁸⁶ They decided to challenge the right of the British Parliament to pass legislation affecting the Indian Territories. In the alternative, they argued that, if Parliament did have that right, the legislation had to be confined to British subjects. Stuart argued the point, stressing that England had neither conquered nor occupied the Indian Territories. As he put it, the country remained in the possession of the "*aborigines* of the soil, who consider themselves the lords of it, and it may be questioned whether the power of legislation over it actually exists as a right."⁸⁷ As for occupancy, England and France had

none whatever. They visited it as traders, and were permitted to traffic, and erect trading posts, but the *French* and the *British* have no more real occupancy or possession thereby, than they have of *Smyrna* or *Constantinople*, because they have established

⁸⁴ *Supra* note 82 at v, 329.

⁸⁵ Although, unlike the *Regulation of the Fur Trade Act*, the *Canada Jurisdiction Act* did not specify an obligation to send for trial only those persons employed by the fur companies or acting under their authority, the legislative history of these laws shows that this was the intent. In any event, this is what the courts ultimately appear to have decided: see text accompanying note 112.

⁸⁶ Mr. George Vanfelson also appeared for the defence. Attorney General Uniacke and Solicitor General Marshall prosecuted.

⁸⁷ *Supra* note 82 at 238.

factories there. The ... position I maintain is this, that the British have only a precarious possession of any part of this immense and unexplored wilderness, a possession similar to that enjoyed by the *French* traders, by permission from the *aborigines*, not acquired by conquest, and therefore incapable of being transferred or ceded ...⁸⁸

Later in his argument, Stuart appeared to refer to the absent *Neganabinés* when he stated that

*one of the persons included in this indictment is a Savage, and he stands indicted for an offence committed on his own soil, the soil of which he is one of the lords, as being one of the aborigines, in a Court of a country foreign to him, and to which he owes no allegiance, and of whose people he knows nothing, but that he permitted them to trade in his territory ... That this territory is theirs is evident from the [Canada Jurisdiction] act itself which calls it Indian territory. It is not called British territory ... for the most obvious of all reasons, because it never was, in point of fact, in our possession, it never was conquered by us, and therefore could not be called other than Indian territory, because, neither by conquest nor by occupancy, had it ever become ours.*⁸⁹

It was true, he conceded, that among European nations very slight evidence of occupancy — such as the erection of a flag — might satisfy international law.⁹⁰ But there was no reason that the tribes should

⁸⁸ *Ibid.* at 239 [emphasis in original].

⁸⁹ *Ibid.* at 250 [emphasis in original]. A similar view of the significance of the phrase “Indian Territories” was taken by Téléphonse Fournier, the Dominion Minister of Justice, when he advised the cabinet in 1875 that British Columbia’s land law should be disallowed because it made no provision for Indian lands: see Report of the Honourable the Minister of Justice, reproduced in *Proceedings, Reports and the Evidence of the Parliamentary Inquiry into the Claims of the Allied Tribes of British Columbia*, 1927 at 39ff. Fournier was concerned that the failure of the colonial government in B.C. to make treaties with the Indians meant that the Crown’s title to the lands of the province was impaired. Prime Minister Macdonald may have had this opinion in mind when he told the House of Commons in 1881 that “if the Government raised the question of the Indian title, the Courts of this country and the Courts of England ... would maintain the right of the Indians and their title to the occupation of the soil until that right whatever it might amount to was extinguished” *House of Commons Debates* (11 March 1881) at 1348, cited in S.B. Cottam, “Indian Title as a ‘Celestial Institution’: David Mills and the *St. Catherine’s Case*” in K. Abel & J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991) at 252.

⁹⁰ This concession probably should not have been made, because by the early nineteenth century the doctrine of discovery was losing ground in international law. In the Nootka Sound Convention of 1790 Britain and Spain had agreed that mere discovery was insufficient to exclude other European nations, and a similar accord was reached by Britain and the United States in Oregon: see H.R. Berman, “The Concept of Aboriginal Rights in the Early Legal History of the United States” (1978) 27 *Buffalo L. Rev.* 637 at

concede that such an act might be a "confiscation" of their territory. Anticipating the views of Justice Thompson and Chief Justice Marshall in the *Cherokee Nation* case, Stuart asserted that the tribes were nations which made war and allied themselves to European powers, and that each considered themselves to be "an independent people, acknowledging no [other] jurisdiction over them." As a consequence, they might well expect to render "blood for blood" if a British court were to execute one of their own.⁹¹ Clearly referring to De Reinhard's status as a Swiss national, he concluded that

the British legislature could not, for a moment, entertain any right to make laws to bind any, but her own subjects, in the Indian Territory; nor do I admit that they could even go that length, but, without admitting or denying their power over their *own* subjects, it could extend no farther [Tribal] independence has been, and is, recognized by *Great Britain* herself. If I only refer to the numerous treaties made *with* the Indians by the British nation [and] look to the very act upon which this indictment is founded ... I deduce the same favourable confirmation of my position. It is an act for the punishment of crimes and offences in the *Indian* territories.⁹²

In ruling on these submissions, Chief Justice Sewell was content to remark that the *Canada Jurisdiction Act*

claims, or assumes, all parts of America, not being within either of the province of Upper or Lower Canada, nor within the limits of any civil government of the United States of America, nor in the actual occupancy of any European state to be *Indian territory, within British jurisdiction*, and subject to *British legislation*, and holds all persons there being, to be bound to that power, whether *aliens or subjects*.⁹³

Sewell clearly regarded this ambitious jurisdictional claim as justified, and rejected Stuart's submission that the Indian Territories referred to in the Act were outside His Majesty's dominions. After all, he had been attorney general when the government of Lower Canada petitioned for the Act, specifically to cover a case such as De Reinhard's. In this respect the ruling anticipates the other half of the American solution, which subjected the doctrine of inherent sovereignty to Congressional jurisdiction. But the context of this debate must not be

651-52.

⁹¹ *Supra* note 82 at 250-51 [emphasis in original].

⁹² *Ibid.* at 252 [emphasis in original].

⁹³ *Ibid.* at 283 [emphasis in original]. Of course in the same year the trial was held the British government agreed that a large portion of the territory where Keveny had been killed was not British. All of the lands in the Selkirk grant that were south of 49° went to the United States in 1818.

forgotten. Stuart did not advance his argument to benefit Aboriginal people, nor did Sewell brush it aside in order to subject them to the Act. The only issue in this part of the case was whether De Reinhard, a European who was not a British subject, could be brought within the jurisdiction of the Canadian courts. That is the significance of Chief Justice Sewell's reference to "aliens or subjects."⁹⁴ Thus the questions (a) whether Indians were included in the phrase, "all persons ... whether aliens or subjects," and (b) who had title to land within the Indian Territories, did not need to be addressed. Nor were they.

The trials arising out of the destruction of Lord Selkirk's settlement at Red River in 1816 were held a few months later at York, in Upper Canada. Only four of the participants in the events at Seven Oaks were indicted as principals for their role in the killing of Governor Robert Semple, and only two of these, Paul Brown and François Firmin Boucher, actually stood trial as such. The other two, Cuthbert Grant and Louis Perrault, violated their bail and fled back to the Indian country. A further fourteen North Westers were indicted as accessories before and after the fact, most of whom had not been at Seven Oaks. All of these were either acquitted, or had their cases dropped for technical non-compliance with the procedural provisions of the *Canada Jurisdiction Act*. Hence the statute's reputation as a rather toothless piece of legislation, and Lord Selkirk's complaint about the "glorious uncertainty of the law."⁹⁵ The remainder of the approximately seventy mounted men of the primarily Métis force that engaged Semple's party at Seven Oaks were never charged.⁹⁶

⁹⁴ At trial, De Reinhard's counsel argued that he could not be tried pursuant to the *Canada Jurisdiction Act* because the Dalles were not in the Indian Territories, but Upper Canada. Hence he should have been tried in the usual course, at York. In the alternative, they argued that even if the Dalles were not in Upper Canada, jurisdiction depended upon whether De Reinhard was a British subject. Although this argument failed at trial, it may have succeeded afterwards (see *supra* note 83).

⁹⁵ Quoted in Gray, *supra* note 70 at 331, who describes the Selkirk trials in chapter 12. See also C. Martin, *Lord Selkirk's Work in Canada* (Toronto: Oxford University Press, 1916), c. 10 and G.M. Gressley, "Lord Selkirk and the Canadian Courts" in J.M. Bumsted, ed., *Canadian History Before Confederation: Essays and Interpretations*, 2d ed. (Georgetown, Ont.: Irwin Dorsey, 1979) at 277-293. Although there are a few minor errors in these accounts concerning some of the legal issues involved, they are generally quite helpful.

⁹⁶ The indictments and the submissions concerning technical dismissals, etc. are all in the Hudson's Bay Company's and the North West Company's editions of the transcripts of the trials. A. Amos' *Report of Trials in the Courts of Canada, Relative to the Destruction of the Earl of Selkirk's Settlement on the Red River; with Observations* (London: J. Murray, 1820) is of course highly critical of the North West Company and

One of these was an Indian, a man named *Fils de la Corneille* (Son of the Crow).⁹⁷ His role was described by two witnesses who gave evidence at the trial of Brown and Boucher. They testified that Semple had been shot in the thigh during the first exchange of fire at Seven Oaks. However, his wound was probably not mortal and Métis leader Cuthbert Grant told him that he would be conveyed to Fort Douglas. Grant then left Semple in the charge of one of the Canadians. While he lay waiting, *Fils de la Corneille* "came up and shot him in the breast, and killed him upon the spot."⁹⁸ Although the Indian title to the settlement had not been extinguished when these events occurred, Seven Oaks was in Rupert's Land, on soil that the Hudson's Bay Company had purported to convey to Lord Selkirk.⁹⁹ Nonetheless, the man whom two witnesses described as Governor Semple's murderer was not charged, nor even sent to the Canadas as a potential witness.

In defence of Brown and Boucher, Samuel and Livius Sherwood made arguments similar to those submitted by counsel for De Reinhard at Québec. They submitted that the Indian Territories could not be regarded as part of the King's dominions until they had been purchased. However, Chief Justice William Dummer Powell's response was that "it can not, in the present instance, be a question that can at all bear on the case, one way or the other, whether or not these lands were ever bought from the Indians." The only issue was whether

the Canadian legal system, which served Selkirk so poorly. The North West Company's *Report of the Proceedings Connected with the Disputes between the Earl of Selkirk and the North-West Company at the Assizes, Held at York, in Upper Canada, October 1818* (London: 1819) blames Selkirk.

⁹⁷ As with everything else associated with the events at Red River, there were two views about the involvement of the Cree, Saulteaux and Assiniboine in the conflict between the settlement and the North West Company. According to Selkirk and his supporters, the Indian nations generally welcomed the settlement, and were well pleased with the land cession treaty he made with them after its destruction. On this view, such opposition as there was stemmed from North West Company deception and incitement. The latter, however, claimed that the Indians were hostile from the start and that Selkirk was risking the lives of his settlers. One interesting document is the record of a speech made by the Chippewa chief *Grandes Oreilles*, made at the Indian hall at the forks of the Red River 19 June 1814. It was sent to Lord Bathurst by Sir Gordon Drummond and is reproduced in the *Series of British Parliamentary Papers: Colonies Canada*, vol. 5 (Shannon: Irish University Press, 1971) at 198-99.

⁹⁸ Testimony of John Pritchard and Michael Martin in the North West Company's report of the trials, *supra* note 96 at 120 and 189.

⁹⁹ The land cession treaty Selkirk made in 1817 is reproduced in the appendix to Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, etc.* (Toronto: Belfords, Clarke & Co., 1991).

Brown and Boucher were guilty of murder. "We have nothing to do, at present, with any body else."¹⁰⁰ In fact, Powell reserved his own view of whether the Indian Territories were within the King's dominions for a letter he wrote the following year to the lieutenant governor, Sir Peregrine Maitland. Sovereignty over the Indian Territories, he said, was in the Crown, but the soil was "in the aborigines and inhabited only by Indians and their lawless followers."¹⁰¹ The question whether the *Canada Jurisdiction Act* extended colonial criminal law to Indians, and not simply to Europeans and Métis employed by the fur companies, remained unanswered.

Counsel for Brown and Boucher also put forward a novel defence that the attorney-general, John Beverly Robinson, was at great pains to dismiss as preposterous. Citing Hale and Blackstone in support, they argued that a state of "private war" existed in the Indian Territories analogous to the baronial wars of the fourteenth century in England, and that in such circumstances what would otherwise be murder was a misdemeanour at most. The transcript of the proceedings leaves some doubt as to the extent to which this defence influenced the outcome. Jurors do not give reasons for their decisions, and although Chief Justice Powell appeared to discount the Blackstone argument in his charge to the jury, earlier in the trial the bench appeared equally willing to let them consider it.¹⁰² Whatever the proper interpretation, the jury acquitted both men.

Twenty years elapsed before another Indian Territories case came before the courts. But, not long after the last of the Selkirk trials was over, the authorities in Upper Canada were presented with a related issue. An Ottawa named Shawanakiskie had been convicted and sentenced to death for the murder of an Indian woman committed in the streets of Amherstburg. Because defence counsel had argued that Indians were "in no case amenable to our Laws, being exempted therefrom by treaty," the assize judge had respited the sentence and reported to Maitland. Concerned by the suggestion that some of the other judges shared the view that Shawanakiskie was not subject to Canadian law, Maitland wrote in 1823 to Lord Bathurst, secretary of state for war and the colonies. There was, he told Bathurst, "no

¹⁰⁰ North West Company's *Report*, *supra* note 96 at 71, 77.

¹⁰¹ Powell to Maitland, 1 May 1819, quoted in the judgment of Strong J. in *St. Catherine's Milling*, *supra* note 57 at 613-14.

¹⁰² See Amos' *Report*, *supra* note 96 at 106-107 and 175.

precedent on record in this Province of a case similar to the present."¹⁰³ The suggestion that, even within an established colony, a treaty might have preserved Aboriginal rights to this extent was clearly not a ridiculous one, because Lord Bathurst wanted to know only one thing: was there any such treaty? For some reason it took Maitland more than two years to respond to this short and blindingly obvious inquiry. When he did, he reported that a "most diligent Search in the records of the Indian Department of this Country" had failed to turn up anything to support defence counsel's contention. A special warrant for execution therefore issued, confirming the jurisdiction of the courts of Upper Canada over offences "committed within Our Territory [by Indians] against each other."¹⁰⁴

The Shawanakiskie case reveals that, even if legislative power was vested in the Crown, there were significant doubts about the extent to which Canadian law applied to Indians long after what the Supreme Court of Canada in *Sparrow* called the "outset." Amherstburg, moreover, was not a fur post deep within the Indian Territories. It was a town in Upper Canada, and one would have thought that, in such circumstances, prosecuting Shawanakiskie would have been uncontroversial: when one enters another jurisdiction, one submits to its laws.¹⁰⁵ Yet this case was believed to be the first of its kind. Moreover, there was clearly a concern that treaties may have confirmed Aboriginal jurisdiction over offences involving Indians, wherever situate, and that Shawanakiskie therefore enjoyed a kind of limited diplomatic immunity.¹⁰⁶ If this is a possibility that could be

¹⁰³ Maitland to Bathurst, 14 February 1823, including an extract from the report of Justice Campbell dated 9 September 1822, in A.G. Doughty & N. Story, eds., *Documents Relating to the Constitutional History of Canada 1819-1828* (Ottawa: J.O. Patenaude, 1935) at 175-76.

¹⁰⁴ *Ibid.* at 176-78 (Bathurst to Maitland, 11 August 1823; Maitland to Bathurst, 4 November 1825). The warrant, dated 13 February 1826, also vested a discretion in the executive to grant Shawanakiskie a pardon, conditional upon his transportation to Australia for life, or imprisonment in Upper Canada for a like term at hard labour.

¹⁰⁵ In this respect, the *Canada Jurisdiction Act* is exceptional in that it provides for trial elsewhere, according to a different law. The Imperial Parliament passed a number of statutes between the 16th and the late 19th centuries that had this effect, but in most of those cases it was clear that they applied to offences committed outside as well as inside British Territory.

¹⁰⁶ It is not clear what other considerations may have influenced the case, nor which treaties counsel had in mind. He seems to have meant Indian treaties. Another possibility is the Treaty of Ghent, Article IX of which provided for the restoration of tribal privileges as they existed prior to the War of 1812. This argument, however, may have run

entertained by the authorities respecting an offence committed within a settled township in Upper Canada, how likely is it that colonial criminal law applied to Indians on unceded Indian land?¹⁰⁷

The clearest answer I have found to this question, i.e., whether the *Canada Jurisdiction Act* should be construed as having subjected the Indians of the Indian Territories to colonial criminal law, comes from a prosecution brought in Trois Rivières in 1838. The accused, one Baptiste Cadien, was indicted for the murder of a *Kashot'ine* (Hare) Indian near Great Bear Lake in the Indian Territories.¹⁰⁸ The prosecution's case was that Cadien and his four *Tlichó* (Dogrib) and Métis companions had massacred an encampment of people in order to obtain a woman, leaving only a few survivors. The sole witness at the trial was Baptiste Jourdain, one of the Métis who had been with Cadien and who would have been indicted himself if his evidence had not been required for the prosecution. As it turned out, it was sufficient to secure a conviction and sentence of death. But because of pressure exerted by circumstance and by an informal coalition that included Cadien's counsel, two of the judges, the local clergy and a number of the citizenry of Trois Rivières, the sentence was commuted to transportation to Van Dieman's Land. Cadien therefore did not die in 1838 on a gallows in Lower Canada, but six years later on a prison

headlong into the somewhat perverse doctrine (at least where Aboriginal rights are concerned) that international treaties have no domestic force unless they have been adopted by statute: see *Francis v. R.* (1956), 3 D.L.R. (2d) 641 (S.C.C.).

¹⁰⁷ In Australia, where there were neither treaties nor land cessions, this question came before three colonial courts between 1836 and 1841. Judges in Victoria and South Australia were of the view that, as Chief Justice Cooper put it, they had no jurisdiction over offences committed by Aboriginals against other Aboriginals, because "claiming no protection from the law, they owed it no allegiance." The Supreme Court of New South Wales saw the matter differently. In *R. v. Jack Congo Murrell* (1836), Legge 72, the murder was not committed out in the bush but on the Richmond Road in Windsor. Consistent with the result in Shawanakiskie's case, the court ruled that the criminal law applied to the accused as it would to a white man, unless there were an express provision to the contrary.

One hundred and thirty-five years later, the Supreme Court of the Northern Territory reviewed these cases and held that *Murrell* was the law. Blackburn, J. stated that the opinions expressed by the judges in Victoria and South Australia were significant only "as curiosities of Australian legal history": *Milirrump v. Nabalco Pty. Ltd.*, [1970] 17 F.L.R. 141 at 261-262.

¹⁰⁸ The Dene words for the different peoples of Denendeh are taken from "Mom, we've been discovered!" (Dene Cultural Institute, 1989). The *Kashot'ine* prefer to be known in English as North Slavey rather than Hare.

hulk in Portsmouth harbour in England, where he had been confined awaiting transportation.¹⁰⁹

Like Jourdain, Cadien was Métis. His father was also Métis, or perhaps Canadian, and his mother was Tlicho. Employed as an interpreter by the Hudson's Bay Company, he had probably never been out of the Mackenzie's River district of the Indian country until he was sent to Lower Canada pursuant to the provisions of the *Canada Jurisdiction Act*. At the trial, Jourdain expressed surprise at the course the law was taking. He apparently saw neither the *Kashot'ine* nor Cadien as within the white man's law. "I never heard," he said during cross-examination, referring to Cadien, "of an Indian having been made a prisoner for killing another."¹¹⁰ Cadien's *Tlicho* accomplices, like *Fils del la Corneille* in the Seven Oaks case, were neither charged nor sent east as witnesses.

When defence counsel argued that the court had no jurisdiction over the accused, Chief Justice James Reid told the jury that this depended partly upon whether Cadien was a British subject. If he were "a mere Indian, attached to no place of residence [meaning a trading post]," he was someone "over whom no jurisdiction could be maintained." In other words, Cadien's socio-economic affiliations with the fur trade pulled in one direction, his "Indianness" in another. If he were simply an Indian on Indian territory, the *Canada Jurisdiction Act* did not reach him. In deciding this issue, the Chief Justice instructed the jury to consider "the character, situation and general occupations in life of the prisoner, and his connections with the ... Hudson's Bay Company in the Indian Territories."¹¹¹ The Imperial Parliament might have legislative authority in Indian country, but if so, the charge to the jury in Cadien's case clearly assumed that it had not yet extended the repressive force of this authority to Indians and Métis who remained independent of the Hudson's Bay Company. This of course is consistent with the wording of the *Regulation of the Fur Trade Act* and the

¹⁰⁹ A detailed account of the case is in H. Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie's River Murders, 1835-1839" (1989) 10 *Criminal Justice History* 23.

¹¹⁰ G. Stobbs, *Case of Baptiste Cadien for Murder* (Three Rivers, 1838), N.A.C., MG 11, CO 42, Vol. 281 at 50-61.

¹¹¹ Report of Chief Justice Reid in N.A.C., MG 11 ("Q" Series), Lower Canada No. 245, Pt. I, Vol. 6 at 55-56. Reid also instructed the jury that they had to find that the site of the murders was within the Indian Territories and that Jourdain was a credible witness.

Hudson Bay Company's licence to trade.¹¹² Because Cadien was tried pursuant to the *Canada Jurisdiction Act*, Chief Justice Reid's charge to the jury amounts to a decision to interpret both statutes in the same way.

An even narrower interpretation is to be found in what was said by Vallières de St. Réal, one of the lawyers who had defended De Reinhard in 1818. By 1838 he was the resident judge at Trois Rivières, and he and Justice Elzéar Bédard made up the remainder of the bench at Cadien's trial. Both men were disturbed by the conviction, and Vallières de St. Réal wrote to the government to express his concern. The fact that the accused had been "born of a foreign woman in a foreign country" was critical, he said, and this ought not to be affected by his status as a Hudson's Bay Company *engagé*. Echoing Andrew Stuart's submission in the De Reinhard case, he said he doubted that British law and authority had been extended so far as Great Bear Lake and pointed out that "a Chinese employed as an interpreter or servant to the British merchants at Canton would still be a subject of the Celestial, not of the British Empire."¹¹³ Perhaps the point was made most forcefully, however, in a letter written by "Cinadon" to the editor of the *Montreal Herald* when Cadien was indicted. How far, asked this anonymous correspondent, can a Canadian jury exercise dominion over "regions which God and nature have given to other men, and clearly marked out as the portion of another race?"¹¹⁴ Eventually, these and other questions about the legality of Cadien's conviction led the law officers to advise Queen Victoria to commute the sentence.¹¹⁵

¹¹² See text accompanying note 75. The preamble to the 1821 statute speaks of "native Indians and of other persons subjects of His Majesty ..."

¹¹³ Vallières de St. Réal to Col. William Rowan, secretary to Sir John Colborne, administrator of the government of Lower Canada, 6 April 1838, N.A.C., MG 11, No. 245 at 97-101. A citizen's petition on behalf of Cadien asserted that there was no English law at Great Bear Lake and that the *Canada Jurisdiction Act* did not apply to Indians in Indian Territory. In language quite similar to that used by Chief Justice Cooper in Australia (*supra* note 107), the petitioners reasoned that, because obedience to the law is premised upon the protection of the law, "the one is not to be expected where the other is not to be found" (Petition dated 30 March 1838, N.A.C., MG 11, No. 245 at 104-110).

¹¹⁴ (28 September 1837).

¹¹⁵ Lord Glenelg to Lord Durham, 25 July 1838, Public Record Office (PRO), CO 43, Vol. 34 at 150-51. One of the other problems with Cadien's conviction was that the court may not have complied strictly with all the requirements of the *Murder Act, 1751* (U.K.), 25 Geo. 2, c. 37.

Thus, although those who were of the view that the Indian Territories were not within Her Majesty's dominions appear to have been in the minority, the *Canada Jurisdiction Act* was not interpreted as having any purpose other than that of making fur traders answerable in Canada for their crimes in Indian country. Had Baptiste Cadien been a hunter who supplied the fort with meat or a trapper who traded furs, he would never have seen the inside of the common gaol at Trois Rivières, nor ended his days upon the hulk *Leviathan* in Portsmouth harbour. Aboriginal inhabitants of the Indian Territories who had not accepted wages from the Hudson's Bay Company as regular employees — a category that surely includes virtually all Indians and many Métis — were not within the Act. As it is, Cadien enjoys the dubious distinction of being the last man to be tried in Canada for a crime committed in the Indian Territories, and one of the very few to have been convicted.¹¹⁶ The Hudson's Bay Company did not, however, lack for opportunities: there were a number of clashes between traders and Indians in the 1840s and '50s in which people on both sides were killed. Yet there were no trials, and no indication that anyone agreed with John Tod's view that Indians could be prosecuted for what they did in Indian country.¹¹⁷

One other case that the Company seriously considered treating formally is therefore most interesting. The event that gave rise to it occurred in 1842, when a number of the men stationed at Fort Stikine killed the clerk in charge of the post.¹¹⁸ Stikine was on land that the Hudson's Bay Company leased from Russia, but when it became apparent that the Russians would not assume jurisdiction, the Governor & Committee decided that the problems involved in sending the

¹¹⁶ There appear to have been no more prosecutions brought under the Act after 1838. Although Creole La Graisse, the third Métis involved in the Great Bear Lake case, was sent to Lower Canada (via England) to stand trial, there is no real evidence of such a trial having occurred: see *supra* note 109 at 54, 54n.

¹¹⁷ See text accompanying note 77. When the Crown granted Vancouver Island to the Hudson's Bay Company in 1848–49, and during the parliamentary investigation of the Company in 1857, some of their political opponents tried, without success, to argue that they should have been applying colonial law to Indians.

¹¹⁸ An account of this incident may be found in W.K. Lamb's introduction to E.E. Rich, ed., *The Letters of John McLoughlin From Fort Vancouver to the Governor and Committee, Second Series, 1839–44*, vol. 6 (Toronto: Hudson's Bay Record Society, 1943). See also H. Foster, "Killing Mr. John: Law and Jurisdiction at Fort Stikine, 1842–1846" in J. McLaren et al., eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains Research Centre, 1992).

men to Canada for trial were too great and dropped the case. Before doing so, however, Simpson consulted Adam Thom, the Company's recorder at Red River, for legal advice. Thom advised against the prosecution, adding that a court was likely to rule that one of the accused men, Pierre Kanaquassé, could not be tried under the *Canada Jurisdiction Act* for a crime committed in Russian America. Kanaquassé was Iroquois, he explained, and the "liberal and indulgent principles of penal interpretation" would probably lead to the conclusion that he was not a British subject.¹¹⁹

This opinion seems wrong, because Kanaquassé was a regular employee of the Hudson's Bay Company and, presumably, a British subject at least insofar as the Act was concerned.¹²⁰ Certainly Thom's attitude towards his own jurisdiction was much more expansive. A year after advising Simpson in the Stikine case, he decided that he could deal with anyone who dared offend in Rupert's Land, and approved the conviction and execution of a Salteau for murder.¹²¹ However, Rupert's Land was a proprietary colony and not, strictly speaking, part of the Indian Territories. The fact remains that the only judge west of the Canadas appears to have agreed with the Court of King's Bench at Trois Rivières: in the absence of express statutory language, Indians in Indian Country were not to be regarded as subject to colonial criminal law.

VI. CONCLUSION

BECAUSE THE LAW IS often forced to deal in polite, and sometimes not so polite, fictions, lawyers are under a great deal of pressure to present coherent doctrines. To do so, they sometimes construct an edifice of certainty, silencing voices whose view of the world is not

¹¹⁹ The text of this opinion has not been found, but it is referred to in a despatch from Simpson to the Governor and Committee dated 21 June 1844, quoted by Lamb, *ibid.* at xlvi-xlvii.

¹²⁰ Perhaps Thom was taking the view that the ruling in Cadien's case (to which Simpson does not refer) applied only to offences within the Indian Territories, not to those committed in European colonies such as Russian America, which came within s. 4 of the Act.

¹²¹ See K.M. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: Osgoode Society, 1981) at 61 and D. & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis, 1972) at 30-31. After Thom was retired, the Company reverted to a more cautious view: see *infra*, note 126.

nearly as outlandish as they would have us believe. Indeed, the positivist and colonial cast of our own law has such deep roots that even counter-arguments such as Clark's are virtually obliged to reflect the one-dimensional quality that traditional legal argument seems to demand.¹²² The story of the *Canada Jurisdiction Act*, if nothing else, reminds us of life's messy confusion, and that the contextual approach is necessary if we want to understand more about how things were than we can find in appellate reports and statutory instruments. Such reminders may not always be convenient, but as one of Maitland's most distinguished successors put it, the legal historian

is generally tolerated by lawyers on a false basis: he is thought somehow to testify that all the wisdom of the ages is behind the present arrangements. But in fact the only distinctive service he can do for his own day is to raise doubts.¹²³

So when the Supreme Court of Canada confidently asserts in *Sparrow* that "there was from the outset never any doubt that sovereignty and legislative power ... vested in the Crown," we must be on our guard. There were in fact plenty of doubts, especially "at the outset." In *Canada Jurisdiction Act* cases the courts interpreted the statute as leaving Indian law intact, and counsel argued forcefully — albeit unsuccessfully — that the Indian Territories were beyond the jurisdiction of the Imperial Parliament. One cannot know why juries decided as they did, but many citizens also regarded Indian country

¹²² Thus the picture painted by Clark is one in which the imperial authorities enacted absolute protections for Aboriginal sovereignty and title to which they remained committed, and that, even in the 20th century, these fetter the dominion Parliament's authority. It is a powerful argument, but it glosses over a great deal of historical evidence that, by the mid-19th century, the colonial office saw itself as relinquishing full authority over Indians to colonial governments. As the century progressed, statutes like the *Canada Jurisdiction Act* were repealed, and replaced by domestic ones. Again, the views of officials are not law; but the statute providing for the government of British Columbia in 1858 bestowed authority on the governor to make "all such Laws ... as may be necessary ... for the Peace, order and good Government of Her majesty's subjects and others therein" [*An Act to Provide for the Government of British Columbia* (U.K.), 21 & 22 Vict., c. 99], and James Douglas' instructions were basically to do what he thought best. This was the widest possible grant of authority, contained in an imperial statute. Had Douglas proclaimed an ordinance explicitly and unilaterally extinguishing Indian title or rights, such a law might well have been disallowed; but the climate of the times leads one to suspect that, rightly or wrongly, it would have been done because it violated good policy rather than imperial law.

¹²³ S.F.C. Milsom, *Studies in the History of the Common Law* (London: Hambledon Press, 1985) at 209.

as without the law.¹²⁴ In the *Shawanakiskie* case, questions were even raised about jurisdiction over Indians in a town within an established colony.¹²⁵ Over the years, time and the law papered these uncertainties over.¹²⁶ In the process, the jurisprudence confining the *Canada Jurisdiction Act* to fur traders was forgotten, and an arid and exclusive view of sovereignty unsuitable for a federation became ascendant.

How the act of discovery or mere words on paper can be transformed into rights and jurisdiction over Aboriginal nations remains a mystery. This is especially true in Canada, where Aboriginal people were supposed to welcome the change because it made them British subjects, albeit ones who could neither elect nor be elected to the legislative bodies that went on to enact the *Indian Act* and like statutes. But even if one is obliged to accept the elevation of that mystery into a legal doctrine, a corollary is that what went before remains until specifically abrogated: only the clearest legislation, clearly communicated to those affected, can have such a fatal effect. Case law is insufficient, because of that other mystery of the common law system, the one Frederic William Maitland flagged as causing so much misunderstanding between lawyers and historians.¹²⁷ It is that, even when judges change their minds, they simply declare the law as it always has been. So it may not matter that the courts have hitherto set their faces against tribal sovereignty. It can be revived and can qualify as an “existing” Aboriginal right under s. 35(1)

¹²⁴ See *supra* note 113 and text accompanying note 144.

¹²⁵ See text accompanying notes 103–07.

¹²⁶ In 1867 lawyer Montague Bere advised that the “wisest and safest” way for the Hudson’s Bay Company to proceed against the leader of a band of American Indians who killed an American in British Territory was to send him to Canada for trial pursuant to the *Canada Jurisdiction Act*. The “Wolverine” had committed this “outrage” at Portage la Prairie, which, although in Rupert’s Land, was not within the District of Assiniboia; and neither Bere nor the Company wanted the question raised as to whether an Indian outside of Red River was subject to Hudson’s Bay Company jurisdiction as a person “living under” them (see *supra* note 75). He seems to have assumed that the Act applied to Indians, and to have preferred that the jurisdiction of Canada’s courts be challenged rather than that of the Company’s: see *Request for advice for Governor McTavish of Assiniboia as to the “legal mode of procedure” in the Wolverine case*, 13[?] May 1867, H.B.C.A., A. 39/7 at 340–343d.

¹²⁷ See text accompanying note 17.

because it has always been there, had we only the wit to see it.¹²⁸ As an impartial observer might say: if we are going to have mysteries, let us be certain that they work both ways.

For legal historians, there is no corresponding need to pretend that the colonialism of the past was some kind of legal accident, and to relegate it to some Orwellian repository of incorrect thought. The reality is that, like the dying Elizabeth I, it has simply been surprised by time.¹²⁹ Courts should therefore respond to perceived injustice by re-evaluating the ways in which the abrogation of Indian sovereignty is said to have been accomplished. At common law, such a re-evaluation can and should lead to the application of strict criteria for holding that something as precious as title to one's homeland and the right to govern it can be obliterated with a stroke of the pen, whether held by a politician or a judge. The doubts of yesterday and today surely require no less, as does the promise of s. 35(1).

I have sought in this essay to acknowledge such doubts, and to provide evidence for the following propositions, some of which are familiar, others much less so:

First, that colonial soldiers, administrators and officials were aware of the artificial nature of imperial assertions of sovereignty over and ownership of Indian lands, even if many settlers were not. This was true not only "at the outset," but for a considerable length of time thereafter.

Secondly, that American law came to recognize the inherent sovereignty of the various Indian tribes or nations, and that this continues to be the American position, notwithstanding that the principles it embodies have waxed and waned with the passage of time. At the time the Marshall Court developed this jurisprudence there was an extensive transboundary flow of information, and the belief that Indian tribes were self-governing, land-holding nations was not confined to the United States.

Thirdly, that this belief may be found not only in the evidence left behind by fur traders and colonial administrators, but also in hitherto

¹²⁸ Indeed, the Supreme Court of Canada has spoken of the possibility of "reviving" the enclave doctrine rejected in *Cardinal*, *supra* note 51, even though they declined to do so: see *Four B Manufacturing Ltd. v. United Garment Workers* (1979), 102 D.L.R. (3d) 385 at 398. That which can be revived has not been extinguished.

¹²⁹ C.D. Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Toronto: Little, Brown & Co., 1956) at 199. As Brennan J. put it in *Mabo v. Queensland*, *supra* note 16 at 19: "Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies."

neglected submissions of counsel and judicial rulings in *Canada Jurisdiction Act* cases. The former were, admittedly, motivated by considerations of what was most in the interests of the lawyers' non-Aboriginal clients. But good counsel do not make arguments that have no hope of success, and these were good counsel.

Fourthly, that applying colonial criminal law to the Indians of the Indian Territories was not one of the considerations prompting those who requested, drafted and passed the statutes of 1803 and 1821.

Fifthly, that, while most of the judges appear to have been of the view that the Indian Territories were part of His Majesty's dominions — a proposition that was by no means clear — they did not rule that the *Canada Jurisdiction Act* subjected Indians to colonial criminal law. On the contrary, Chief Justice Reid told the jury in the Cadien case that the statute did not apply to Indians unless they placed themselves in the employ of the fur company. This seems to have meant that, although the Imperial Parliament was competent to impose colonial criminal law on all the Indians of the Indian Territories, as a matter of statutory interpretation it had not yet done so. Some judges would have denied the statute even this limited effect. Vallières de St. Réal and Adam Thom, for example, were of the opinion that corporate employment, at least to the west and north of Rupert's land, could not transform a Dene, Métis or Iroquois into a British subject. Indeed, it seems that for the purposes of the *Canada Jurisdiction Act* there were three categories: British subjects, aliens, and Indians.

Sixthly, that these cases provide further support for the already well-established principle, both in Canada and the United States, that treaties and statutes relating to Indians should be "liberally construed and doubtful expressions resolved in favour of the Indian."¹³⁰ This was confirmed by the Supreme Court in *Sparrow*, when the justices held that only a statute exhibiting a "clear and plain" intention to extinguish Aboriginal rights ought to be viewed as having this effect. Acquiescence, extensive regulation, and judicial decisions that do not apply this test should not be enough, even where Indians are conceded to be British subjects.¹³¹ Although statutes like the *Indian Act* may

¹³⁰ *Nowegijick v. R.*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193 at 198. Where statutes are concerned, this principle may have been clearer before the Supreme Court's decision in *Mitchell v. Peguis Indian Band*, [1990] 5 W.W.R. 97 (S.C.C.) than it is now; however, there ought to be no doubt about its application to Aboriginal rights.

¹³¹ American citizenship and tribal sovereignty have not proved incompatible in the United States.

constitute a considerable obstacle to holding that there is much sovereignty left to be recognized and affirmed under s. 35(1) of the 1982 Constitution, *Sparrow* suggests that such laws — even where Indian rights are singled out for regulation — may be less expansive than they first appear.¹³² Indeed, had they chosen to do so, the Supreme Court could have found a precedent for this sort of approach not only in the *Canada Jurisdiction Act* cases, but also in the dissenting judgment of Strong J. in *St. Catherine's Milling*, the Court's first Indian title decision.¹³³

There are of course litigation strategies other than the one contained in *Sparrow*, notably the sort of outright rejection of the doctrine of discovery (also called the "settlement thesis") advocated by Slattery, Asch, Macklem and others.¹³⁴ These are attractive alternatives, and seem well within the mysterious capacity of the common law to renew itself, especially with a boost from s. 35(1). But where issues of sovereignty are concerned, even Asch and Macklem concede that such strategies may not — given the current state of the law and of legal imagination — be realistic ones.¹³⁵ Clark's approach seems to have even more serious problems, because judges are unlikely to hold that imperial law forbade the colonies and later the dominion from passing legislation extinguishing title and self-government. Moreover, if Clark's concession that colonial criminal law applied to Indians was designed to make his main argument more palatable, it cannot bear the weight he puts upon it. The statutes of 1803 and 1821 either

¹³² See *infra* note 137, and Slattery, *supra* note 19.

¹³³ *Supra* note 57 at 616–17. To interpret the B.N.A. Act as "by implication abolishing all right and property of the Indians in unsundered lands ... would attribute to the Imperial Parliament the intention of taking away proprietary rights, without express words and without any adequate reason," wrote Justice Strong. Such an interpretation, he continued, would constitute a departure from "the long cherished and most successful policy originally inaugurated by the British Government for the treatment of the Indian tribes ... and must be rejected."

¹³⁴ See the articles cited *supra* notes 2 and 8. Of course, one aspect of the doctrine — the notion that, in a settled colony, beneficial title to all land vests immediately in the Crown — was rejected some time ago in New Zealand and Canada (see text accompanying note 4). In Australia, it survived until this year: see *Mabo v. Queensland*.

¹³⁵ Asch & Macklem, *supra* note 2 at 505. I stress that here I am speaking about litigation strategy only; rejection of the settlement thesis by way of a constitutional amendment is another matter. Even then, however, the mutual legal history of Aboriginal and non-Aboriginal peoples in Canada will remain an important interpretative tool when it comes to working out the details of inherent self-government: see Slattery, *supra* note 8 at 212–13.

imposed colonial law, both civil and criminal, on the Aboriginal inhabitants of the Indian Territories, or they did not. The available evidence suggests that they did not, but both alternatives cast doubt upon an important step in Clark's argument.

On the other hand, the *Canada Jurisdiction Act* cases are quite consistent with tribal sovereignty and the *Sparrow* approach to Aboriginal rights and s. 35(1), whatever may have happened in the intervening years. So courts that feel unable to agree that the constitutional bar to extinguishment is centuries-old are only half done: they still must subject statutes purporting to extinguish Aboriginal rights to the strictest scrutiny. In doing so, they may well find that a significant degree of sovereignty has survived the extensive legislative interference of the past and that statutory limitations upon it may not meet the rigorous test laid down in *Sparrow*.¹³⁶ Indeed, even if the political process completely outstrips the legal one and the inherent right to self-government is placed firmly in the constitution, the usefulness of applying the *Sparrow* test to the effects of years of Aboriginal/non-Aboriginal interaction should not be discounted. It reminds us of how draconian the implications of unilateral extinguishment really are, and it may be one of the few mutually intelligible signposts on our overdue journey into what promises to be a new and expanded Confederation.

¹³⁶ This is a version of the second alternative advanced by Asch & Macklem, *supra* note 2 at 505–06, and it may well be, as they put it, a comparatively “fragile” one. But as Johnson, *supra* note 52 at 693–95, 714–15 has pointed out, the *Sparrow* doctrine closely resembles the strict scrutiny approach to equal protection guarantees in the United States, and “very few statutes that trigger strict scrutiny pass this test.”