

Who Controls the Hunt?

First Nations, Treaty Rights,
and Wildlife Conservation
in Ontario, 1783–1939

DAVID CALVERLEY

FOREWORD BY GRAEME WYNN



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Introduction

What is the legal position of the Indian?

– *Hugh Conn*

Testifying before a Senate committee on Indian Affairs in 1961, Hugh Conn, wildlife supervisor with the Department of Indian Affairs, spoke of the complexity of provincial and federal wildlife laws in relation to First Nations hunting rights:

As the law stands at present, an Indian could walk up to the shores of [a lake] ... He is hungry, not starving, and has food 25 miles away in his cache, but now he needs food for one meal. Swimming in the eddy to his left is a small sturgeon. Off the point, about 25 yards out, is one of those red headed merganser ducks and upstream is a female moose heavy with calf. What is the legal position of the Indian? He cannot catch the sturgeon or shoot the duck, but he can shoot the moose. Is it any wonder we cannot, under these circumstances, explain his position?¹

As legal scholar Kenneth Lysyk noted six years later: “The native Indian finds himself in many respects subject to laws different, and differently administered, from those which apply to other Canadians.”² Conn and Lysyk were asking who controlled the hunt.

Neither Conn nor Lysyk addressed the fundamental issue: reconciling the treaty rights of First Nations and the power of the state. A non-Aboriginal hunter faced with Conn’s hypothetical problem is, in many ways, in a simpler legal position than an Aboriginal hunter. The state defines non-Aboriginal hunting privileges because non-Aboriginals do not possess any hunting rights; the state determines what they can hunt, how they hunt, and when and where they can hunt. First Nations, in comparison, are unique. Their history and relationship with the Crown sets them apart from other Canadians, and they possess rights other Canadians do not possess.

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Early studies of Aboriginal treaties largely focused on the transfer of land from First Nations to the Crown, and the creation of both the treaty system and the Indian Department.³ Later studies examined how successive colonial and Canadian governments broke treaty rights. Historians and scholars redirected their research in the 1980s as Supreme Court decisions and section 35 of Canada's new constitution reframed Aboriginal issues. They began to examine Aboriginal rights and treaty promises that were either not contained in the legal text of the treaties or understood differently by First Nations. These works laid a foundation for understanding how First Nations have historically related to the Canadian state.

This study considers changes in First Nations/state relations between 1800 and 1940, specifically as they pertain to Aboriginal hunting and trapping activity in Ontario. Specifically, it focuses largely on the Anishinaabeg of northern Ontario, the federal or Dominion government (primarily the Department of Indian Affairs), the Ontario government (in the form of the Game and Fish Commission and its later manifestations, which this study will refer to as the Game Commission), and the Hudson's Bay Company. It seeks to explain how the Ontario government and the Department of Indian Affairs sought to deprive the Anishinaabeg of their treaty rights to hunt and trap. It argues that concepts of liberty, property, and equality, as defined by the dominant Euro-Canadian society, shaped political conflicts over wildlife conservation and resulted in the erosion of treaty rights to hunt and trap. This is not simply a story of paternalism and racism, the concepts that define many studies of First Nations history. Both are present and are important components, but they cannot fully explain the resource issues at stake, the constitutional questions, the impact of conservation paradigms, and historical factors particular to First Nations.

History and treaties placed First Nations outside the normal subject/citizen–state relationship. As the twentieth century began, neither the Ontario nor the Dominion government tried to fit treaties into Canada's evolving constitutional framework. Constitutions, according to legal scholar Patrick Macklem, are meant to distribute power “primarily in the form of rights and jurisdiction ... which systematically benefit[s] certain groups at the expense of others.”⁴ Canada's 1867 agreement, beyond assigning “Indians” to federal jurisdiction, ignored First Nations. It failed to acknowledge that treaties afforded significant levels of sovereignty to First Nations. Already in a weakened position by 1867, the political power of First Nations continued to recede following Confederation.⁵ Canada's early colonial governments once considered treaties to be agreements

designed to “distribute constitutional authority between Aboriginal peoples and the Canadian state.”⁶ By the late nineteenth century, treaties became a process whereby the Dominion government could acquire land, extend Canadian sovereignty, and place a legal and political yoke on the collective necks of First Nations. Canada’s constitution had no place for First Nations except as something to be regulated.

FIRST NATIONS AND THE ONTARIO GOVERNMENT/STATE

At the signing of the Robinson Treaties of 1850, the Crown told the Anishinaabeg that they could continue to hunt as they had “heretofore been in the habit of doing.” Concerned more with minerals and timber than wildlife, the Crown believed that this was a small concession. It failed to appreciate, however, that it made a promise with no expiry date. As the economic value of wildlife increased, the Ontario government began to reconsider the promise made by its political ancestor. Eventually the Robinson Treaties and the Anishinaabeg posed a legal and constitutional threat to the provincial government and the liberal principles of liberty, private property, and equality, what Ian McKay labels the “liberal order.”⁷

First Nations and governments understood the concept of liberty differently. To First Nations, the treaties secured their liberties. They believed (see Chapter 1) that the treaties guaranteed not just their hunting and trapping rights but also the land tenure system that supported wildlife harvesting.⁸ Colonial governments generally shared this perspective until Indian Affairs adopted its policy of acculturation in the 1830s and 1840s.⁹ As acculturation slowly took hold, the department’s perception of treaties shifted from one of securing alliances to one of removing First Nations as an impediment to development. It was an approach adopted by the Ontario government as it moved to diminish the treaties and extend conservation laws to First Nations. As conflicts over hunting and trapping unfolded, Anishinaabeg leaders wrote provincial and federal officials quoting from the treaties. These documents defined and protected their rights – rights the Ontario government denied them. Occasionally, First Nations wrote directly to the King for help. On the face of it, this action appears quaint and innocent – there was no chance the British monarch would embroil himself in this issue. However, it reflects the Anishinaabeg belief that they had liberties other Canadians did not have – rights protected by treaty and their unique relationship with the Crown.

These rights challenged the liberal concept of equality. Equality is a multifaceted idea. A key element of the liberal understanding of the state is every citizen's equality before the law. Under Ontario's ever-broadening and rigid system of wildlife conservation, all Ontarians were subject to these new laws and regulations. Ontario made no provision for anyone who might possess more rights than the average citizen or who used wildlife in a manner that lay outside of the state's paradigm. First Nations have more rights by virtue of history and their treaties, but Ontario could not allow this to hamper the equal application of its laws. It was an attitude that found its genesis in Ontario's colonial past. Legal scholar Sidney Harring outlines how First Nations increasingly found the law applied to them in eighteenth- and nineteenth-century Upper Canada regardless of their own legal traditions and treaty rights. This application was less forceful in areas removed from denser Euro-Canadian settlement. As the state extended its authority northward, First Nations found their traditional lives disrupted. As conservation laws encompassed northern Ontario, the provincial state refused to allow for the exceptionality of Aboriginal or treaty rights. Instead, these rights became an affront to the dominant concept of equality. Ontario's new conservation bureaucrats expected First Nations to give up their treaty rights and traditional harvesting practices and acculturate. Acculturation was the path to equality.

With regard to property, treaties and the treaty right to hunt threatened provincial control of an increasingly important resource. Unlike minerals and timber, no one can own wildlife (unless they put it behind a fence or in a cage). Only the Crown is legally capable of owning wildlife. Hunters receive state permission to access this property when they receive a hunting or trapping licence. A licence reflects the hunter's acceptance of the state's regulatory system. First Nations existed outside of this regulatory paradigm. The Robinson Treaties protected the Anishinaabeg right to access this resource (or property) both when they wanted and according to their traditional modes of use; however a non-Indigenous hunter had to access wildlife in a manner sanctioned by the state. An Anishinaabeg trapper could set a trapline on his familial territory, but a non-Aboriginal trapper applied for a licence to use a state-created trapline. Another Aboriginal hunter might seek permission from an Indigenous family to hunt on their traditional grounds to avoid cultural sanctions against trespass. A non-Aboriginal hunter trapped or hunted based on open and closed seasons. Anishinaabeg hunters certainly appreciated when an animal's fur was at its best, but they also hunted and trapped

for subsistence purposes regardless of state-established schedules. At every turn, the Anishinaabeg faced arrest for exercising their treaty rights and attempting to continue with their traditional approach to hunting and trapping and their traditional conceptualizations of property. Similar patterns of disempowerment occurred elsewhere in North America as the regulatory power of the state displaced traditional approaches to wildlife. Outlining how state-level conservation laws displaced pre-existing folkways in parts of the United States, Karl Jacoby notes that the state took on a “powerful, managerial role, standardizing and simplifying what had been a dense thicket of particularistic, local approaches to the natural world.”¹⁰

This new faith in conservation fused with pre-existing ideas about inferior and superior races and their ways of life. Conservation enthusiasts soon began to single out and denigrate First Nations treaties and hunting practices. Treaty rights, they argued, made First Nations lazy because treaties allowed them to use improper hunting and trapping practices. Many early conservationists referred to traditional First Nations harvesting practices as destructive, and argued that Aboriginal peoples needed to adopt modern, proper, and scientific attitudes towards wildlife. During Ontario's early colonial period, settlers and officials considered First Nations hunting a complementary and at times necessary support for British settlement. Conservation flipped this idea. Now First Nations were a threat to conservation.

There was also the broader constitutional issue. Under the British North America Act, the Dominion government assumed jurisdiction over Indians and lands reserved to Indians and the provinces controlled natural resources within their borders. Ontario was always touchy in this regard, owing in large part to the efforts of its second premier, the provincial rights champion Oliver Mowat.¹¹ Mowat brooked no Dominion interference in his empire, and was quick to challenge any effort by Ottawa to trespass on Queen's Park's constitutional jurisdiction. It was an attitude that remained long after Mowat left politics, even when the resource was as economically inconsequential as wildlife (relative to the value of other natural resources such as minerals and timber). While the Ontario government perceived the main threat to wildlife to be First Nations and their treaties, it quickly linked the issue of treaty rights to the Dominion government's control over First Nations. Any effort on the part of Indian Affairs to ameliorate the position of First Nations relative to the game laws met with fierce provincial opposition.

INDIAN AFFAIRS

After 1867, it is difficult to separate constitutional concerns from many Aboriginal issues. As the power of provincial governments grew, jurisdictional problems with the federal government expanded correspondingly. The *St. Catherine's Milling* decision of 1888, in which the Privy Council confirmed a lower court decision establishing provincial (rather than federal) jurisdiction over Crown land beyond reserves, is the most obvious example of an early conflict between Queen's Park and Ottawa. Christopher Armstrong's *The Politics of Federalism* provides a solid explanation for the behaviour of Ontario's bureaucrats during conflicts with their federal counterparts.¹² They were well aware of their powers under sections 92(5) (provincial authority over "the management and sale of public lands belonging to the Province") and 109 ("Lands, Mines, Minerals and Royalties"). Successive Ontario governments refused to admit that a competing interest in the land and its resources possessed any right of access. Armstrong demonstrates that federal bureaucrats and politicians were equally willing to argue with the Ontario government over these concerns, but his thesis falters when applied to First Nations' issues. Unlike their battles with Ontario over the control of natural resources such as mining and timber, federal bureaucrats did not behave aggressively to assert their constitutional control under section 91(24), "Indians and Lands reserved for Indians." Rather than protect treaty rights and its control over First Nations, Indian Affairs operated using the same liberal concepts of equality, liberty, and property that Ian McKay ascribes to the state. Convincing First Nations to acculturate and adopt these principles (leavened with a heavy dose of Christianity) was the impetus behind the department's civilization policy, and it affected its willingness and ability to protect treaty rights from Ontario's conservation laws. To protect treaty rights would work against Indian Affairs' own policies. Ontario's denial of First Nations treaty rights to hunt and trap forced First Nations to look for wage labour. Furthermore, protecting treaty rights amounted to recognition by Indian Affairs that treaties created a *sui generis* class of citizens, over whom the Dominion government had limited jurisdiction. Recognizing the treaty harvesting rights of the Anishinaabeg meant recognizing a level of independence from the Canadian state. If treaties overrode the Ontario government's jurisdiction over wildlife, a legal precedent would be set that threatened the foundation of federal Indian policy.

Indian Affairs, however, could not ignore the problem created by Ontario's game laws. Indian agents' reports showed that the provincial enforcement officials unfairly targeted the Anishinaabeg. Agents noted that the Robinson Treaties should offer protection, and that restricting Anishinaabeg hunting rights cost Indian Affairs money in increased assistance programs. Indian Affairs, however, saw a problem only with the pace of the restriction. Ontario's game laws were fast-tracking acculturation before First Nations were fully prepared to abandon hunting and trapping; it was not in the First Nations' best interests to have their treaty rights fully protected but, at the same time, it was not in their interest to have those rights completely denied. Indian Affairs favoured slowly whittling away at Aboriginal hunting rights and easing them out of traditional pursuits. Once acculturated, First Nations could be enfranchised and brought fully into the Canadian state. Acculturation offered equality.

Indian Affairs' policy became the maintenance of acculturation while working to convince the Ontario government to show the Anishinaabeg some leniency. This allowed Indian Affairs to accomplish three goals: keep acculturation and enfranchisement at the forefront of its policy, afford (or try to afford) First Nations some protection, and deny the treaties any legal weight. In this context, acculturation takes on a different hue. Indian Affairs did push back against Ontario's prosecution of the Anishinaabeg, and it occasionally pursued legal action against the province, but there were limits to how far it could proceed without undermining its own policy of acculturating First Nations across Canada.

The state is not monolithic, however. Indian agents, usually portrayed as the front-line troops of paternalism, often defended treaty hunting rights. As the actions of the Ontario government became increasingly punitive towards First Nations, Indian agents' efforts to protect bands in their agencies grew apace. Agents saw communities in their charge losing the ability to support themselves through traditional harvesting, and they found it difficult to conceal their frustration from their superiors. This sentiment slowly filtered upward to senior bureaucrats, including the often-vilified Duncan Campbell Scott. Compared with his predecessors, Scott made a substantial effort to seek legal protection for First Nations treaty rights to hunt. After his retirement, the policy he started continued and gained strength. Indian Affairs became increasingly forceful in its efforts, although its efforts were always more focused on maintaining its bureaucratic control over First Nations than on protecting their treaty rights.

HISTORIOGRAPHICAL ISSUES

Over the last fifteen years, wildlife conservation (and conservation in general) has become an increasingly dominant theme in Canadian historical writing. What is clear from these studies is that local circumstances shaped and directed approaches to conservation. Each province developed its own legal structure to regulate wildlife and how First Nations fit into that structure. Describing a single history of wildlife conservation and First Nations is therefore difficult.

If there is a consistent element to this history, however, it is in the generally negative impact conservation laws had on First Nations. Frank Tester and Peter Kulchyski's study *Kiumajut* is an excellent examination of the conservation regime in the Canadian Arctic and its impact on the Inuit.¹³ Using Jean-Paul Sartre's concept of the totalizing regime, they argue that wildlife conservation in the High North reflected ethnocentric assumptions that discounted Aboriginal concepts of land, land use, and wildlife management. Government officials believed that a scientific approach to wildlife would ensure its long-term viability. Mixed into this were the paternalistic goals of the federal government: that the Inuit needed to live as Euro-Canadians (in permanent settlements) and adopt wage labour.¹⁴ Denigrating and then replacing Inuit concepts about the land and its resources were part of the state's efforts to acculturate the Inuit.¹⁵ However, Kulchyski and Tester acknowledge that state actors varied in their attitudes, that they sometimes contradicted official state policy, and that they occasionally joined in resistance against the state.

Some historians portray conservation as a Canadian success story. Animal species and ecosystems under threat received protection and regulation. Governments set aside thousands of square kilometres for parks and preserves and protected Canada's wilderness heritage. Conservation was not a success for everyone, however. The Migratory Birds Convention Act, for example, created many difficulties for First Nations that relied on annual migrations of ducks and geese as a source of food.¹⁶ Historians of national and provincial parks often overlook the fact that these lands were once the traditional harvesting grounds of First Nations.¹⁷ While Ontario's provincial records are scarce on this issue, an examination of Indian Affairs files show that the province not only cared little for the rights of Aboriginal peoples but actively worked against them. One important provincial source, the early reports of the Ontario Game and Fish Commission, shows that successive bureaucrats did not care about treaty rights, and often denigrated treaty rights and First Nations in their official

reports. Provincial parks and game preserves often meant that First Nations families lost access to traditional hunting territories, and game wardens and officers arrested those who attempted to re-enter land designated as protected. Mark David Spence notes regarding US national parks and First Nations removal that there is a “widespread cultural myopia” among Americans who believe that these lands were never occupied.¹⁸ It is a perspective that continues to dominate the Canadian scene.

OUTLINE OF THE BOOK

This book begins with a contextualization of how the Anishinaabeg of northern Ontario hunted and trapped in the mid-nineteenth century, and how the Robinson Treaties reflected Anishinaabeg resource use. Chapter 2 outlines the origins of Ontario’s Game and Fish Commission in 1892 within the broader context of North American conservation. It also situates Ontario’s conservation policies within the “Empire Ontario” mentality of the late nineteenth century. Chapter 3 examines the first application of the Ontario Game Act to the Anishinaabeg, their reaction to it, and the lukewarm response of Indian Affairs. It outlines why Indian Affairs, within the broader framework of Dominion/Ontario relations, was unwilling to protect Anishinaabeg harvesting rights. Chapter 4 continues this analysis by describing the Hudson’s Bay Company’s (HBC) challenge of the Game Act between 1910 and 1914, and the impact this process had on Indian Affairs and the Game Commission. Chapters 5 and 6 outline the efforts and partial success of the Anishinaabeg in influencing the debate at the local level. Chapter 5 outlines how the Anishinaabeg gained allies among some local officials and elites in their attempts to protect their treaty rights. Chapter 6 continues this analysis by examining several issues that restricted not only the Anishinaabeg’s physical right to hunt but also their traditional system of land and resource management. Duncan Campbell Scott figures prominently in both chapters as his growing understanding of local Anishinaabeg circumstances affected Indian Affairs policy. Chapter 7 outlines the events surrounding *R. v. Commanda*, and how the failure of Indian Affairs to appeal this decision paved the way for three more decades of indecision about hunting rights.

Lastly, a note on terminology is needed. Throughout the book, I use the terms Anishinaabeg (for the Ojibwa) and Haudenosaunee or Six Nations (for the Iroquois). Although this book is not concerned directly with the Cree, there are references to Treaty 9 in this study. Treaty 9 is

composed of several distinct groups or nations: the Cree, the Oji-Cree, and the Anishinaabeg. The Muskegog Cree Council of Treaty 9 adopted the name “Mushkegowuk” in 1987. However, some communities prefer the term *Ininiw*, which means human being. (This term itself has different pronunciations depending on the local dialect.) I use the term Mushkegowuk to refer to the Cree of Treaty 9, recognizing that there are two other nations in the area, and there continues to be discussion about terminology.¹⁹

I recognize that these were not the terms used by the people studied in this book. Government officials usually used the term “Indian” and did not bother indicating what nation someone belonged to. During this time, most First Nations groups also used the term Indian in their correspondence. I decided contemporary terminology is more appropriate and more precise. Unless specifically noted in the text, “Anishinaabeg” refers to those who reside in the Robinson Treaties area, not the Anishinaabeg of southern and central Ontario.

Other words such as “Indian” are used when they appear in a document or when referring to historical institutions (i.e., the Indian Department or Indian Affairs), past occupations (i.e., Indian agent), or the legal concept of a “status Indian” or a “treaty Indian.” I use the term “First Nation(s)” in this study except in the aforementioned exceptions or when the word “Indian” seemed a more appropriate term. The term “Aboriginal,” under section 35 of the Constitution Act, 1982, includes the Métis and Inuit. Obviously, this study is not concerned with the Inuit, but the term “Aboriginal” should not be extended to encompass Métis claims to Aboriginal harvesting rights. Métis harvesting claims constitute a separate historical and legal question.²⁰ In this study, “Aboriginal” refers only to First Nations.

Resolving ambiguity with the words “hunting,” “trapping,” and “harvesting” is also necessary. This study is concerned with the two first activities only. “Harvesting” is a more generalized term that applies to First Nations use of natural resources. It can refer to shooting deer, trapping muskrat, fishing for pike, gathering blueberries, harvesting wild rice, or cutting down trees. When used in this study, “harvesting” refers to hunting and trapping. Fishing is not considered here. Studies already exist regarding First Nations fishing activity in Upper Canada/Ontario.²¹