FLAWED PRECEDENT

The *St. Catherine's* Case and Aboriginal Title

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UBCPress · Vancouver · Toronto

Contents

INTRODUCTION

Judicial Precedent and Indigenous Rights

The common law system – which developed in England and has been applied in Canada (apart from Quebec) since the British colonized this country – is based on precedent. As judges resolve disputes that end up in court, the decisions become sources of law for lawyers advising their clients and judges deciding subsequent cases. In this manner, the legal structure has been built case by case over centuries of decision making. A classic statement of this process, and the reasons for abiding by it, was given by Justice Parke in the House of Lords in 1833:

> Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.[1]

The higher the court, of course, the greater the authority of its decisions. By the rule of *stare decisis*, lower courts are bound by decisions of superior courts, up the judicial ladder to the highest court of appeal. For a time, the House of Lords in England even regarded itself as bound by its own decisions,[2] an excessively rigid approach that their lordships officially discarded in 1966.[3]

The value of strict adherence to the common law doctrine of *stare decisis* is a matter of considerable debate.[4] Consistency and certainty are purchased at the price of inflexibility and possible injustice in some cases.[5] Moreover, the common law has been constructed largely by upper- and middle-class Anglo-Saxon men, whose interests it has naturally tended to serve.[6] Although the bar and to a lesser extent the bench have become more diverse in England and Canada, and while the Supreme Court of Canada has become more flexible in its adherence to *stare decisis*,[7] the judiciary's scope for creative innovation is still limited by precedent. Nor is it realistic to expect legislatures to take on the whole task of reforming the law to remove class, gender, and racial bias. The legal system is too complex, and the bias too prevalent and entrenched, for legislative transformation alone.

The problems created by the doctrine of precedent are especially evident in jurisdictions where the common law has been applied to Indigenous peoples as a consequence of colonization.[8] That law was originally developed to meet the particular needs of English society, albeit favouring men in the dominant classes. It is culturally specific, as all systems of law necessarily are, being derived in part from the customs of the people.[9] The doctrine of precedent itself, if not uniquely English, is at least characteristic of the common law. Continental European legal systems based on Roman law and Quebec's similar civil law system do not rely on precedent to the same extent; they follow instead a more deductive approach from general principles set out in codified form.[10]

The difficulty in the colonial context is really twofold. First, the common law itself cannot be appropriately applied to colonized peoples for the obvious reason that they have their own cultures, including legal conceptions and norms very different from those of English law.[11] For example, English real property law, with its intricate rules grounded in feudal relations cannot appreciate or adequately accommodate notions of land held by the Indigenous peoples of North America.[12] Second, judicial decisions are necessarily the product of the particular historical periods in which the cases came before the courts. Judicial decisions are undoubtedly influenced by the contemporary context, including the attitudes towards Indigenous peoples prevalent at the time. As will be shown, these attitudes have often been racist: Indigenous peoples have been regarded as inferior to peoples of European origin, and Indigenous cultures have been devalued and actively suppressed. Indeed, such attitudes are integral to the process of colonization. These circumstances raise a fundamental question: Is it appropriate to apply the doctrine of precedent in situations where the relevant case law reveals racist attitudes that are unacceptable by today's standards? The answer is unequivocal: to the extent that these cases are the product of historical periods when racist attitudes towards Indigenous peoples prevailed, they must be treated with caution and replaced with jurisprudence that acknowledges the legitimate rights of Indigenous peoples as the original inhabitants of North America and that respects the validity of their cultures, including their legal orders.[13] This is particularly necessary in cases where judicial decisions based on ignorance of those cultures resulted in factual assumptions that we now know to be erroneous.

This book delves into these problems by examining an early seminal case on Indigenous land rights in Canada, *St. Catherine's Milling and Lumber Company v. The Queen*.[14] The case, which involved an assessment of the source and nature of the Saulteaux's land rights that were the subject of

Treaty 3 in 1873, is of vital importance because it was the leading decision on Indigenous land rights in Canada until the 1970s, when its value as a precedent on the source and nature of these rights began to be reassessed by the Supreme Court of Canada. As will be demonstrated, the decisions of all the judges in the case, from the trial right up to the Privy Council in London, were made not just in ignorance of the Saulteaux people but, worse still, on the basis of erroneous assumptions about their way of life and the nature of their society that were not supported by evidence. For this reason, the value of the *St. Catherine's* case as a legal precedent on the nature of Indigenous land rights is called into question.

Chapter 1 opens with a broad overview of the political atmosphere and ideological currents relating to Indigenous peoples and their legal rights in the 1880s, when the case went to court. Chapter 2 focuses on the historical context of the case and explains why it came to be litigated and what was at stake. Turning to the case itself, Chapter 3 examines the factual background, cause of action, and evidence presented at trial. Chapter 4 discusses the trial decision, in which prejudiced and erroneous assumptions were made that created the factual record for the appeal courts. Chapters 5 and 6 examine the judgments in the Ontario Court of Appeal and the Supreme Court of Canada, and Chapter 7 analyzes the final decision of the Judicial Committee of the Privy Council, which served as the precedent that defined the legal contours of Aboriginal title in Canada for close to one hundred years. Chapter 8 discusses the immediate impact of the Privy Council's decision and follows the controversy over Indigenous land rights that took place in British Columbia in the shadow of *St. Catherine's.* Chapter 9 explores the way the case has been dealt with by the Supreme Court in decisions from the 1970s to the present. I conclude by offering some reflections on the use of the *St. Catherine's* case as a legal precedent in Indigenous rights litigation.

This book analyzes the decisions in the *St. Catherine's* case within the context of the Canadian legal system in which the case arose and served as a precedent. That body of law assumes – and all the judges who sat on the case took for granted – that the Crown acquired sovereignty over Indigenous peoples in what is now Canada, including the Saulteaux and their lands, without conquering or entering into a treaty with them.[15] In the Privy Council decision, their lordships regarded Crown sovereignty over the region in question as having been acquired by the British conquest of the French and cession of New France to Britain by the Treaty of Paris in 1763. One of the Supreme Court of Canada judges, Justice Taschereau, explained that the French king had acquired sovereignty over French Canada by discovery, disregarding the presence of Indigenous peoples. The doctrine of discovery and the racist assumptions that underlie it have been subjected to severe criticism,[16] including the condemnation of it by the Truth and Reconciliation Commission in its 2015 report.[17] As I have discussed elsewhere, the notion that European colonizing nations could acquire sovereignty in North America by discovery, symbolic acts of possession, treaties among themselves, and mere assertion does not stand up to scrutiny.[18] However, as the analysis in this book is undertaken within the limited context of Canadian law as applied by the courts, the more fundamental issues of Crown sovereignty and how Canadian law came to apply to Indigenous peoples and their territories in the first place will not be addressed directly.[19] Instead, this book discusses how the flawed precedent of the *St. Catherine's* case distorted the legal conception of Aboriginal title in Canada until the 1970s. It demonstrates how more knowledge of Indigenous societies helped to dispel prejudiced assumptions and led to an understanding of Aboriginal title more in keeping with the common law and with Indigenous relationships with the land.

Cataloguing data is available from Library and Archives Canada.

ISBN 978-0-7748-6105-2 (hardcover)
ISBN 978-0-7748-6107-6 (PDF)
ISBN 978-0-7748-6108-3 (epub)
ISBN 978-0-7748-6109-0 (Kindle)

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
www.ubcpress.ca