Who Rules the Valley of the Six Nations?
(A discussion of Isaac v. Davey)

Introduction

Next fall the case of *Isaac* v. *Davey*[1] will be appealed before the Supreme Court of Canada. Given the present high profile and contentious nature of Native land claims, it is likely that a full Bench will entertain counsels' arguments.

It is hoped that the following discussion of the decisions both of Osler J.[2] in the Ontario High Court and of Schroeder, Jessup and Arnup JJ.A. in the Court of Appeal, coupled with a brief reference to the surrounding history, will provide some insight into the "series of interwoven issues"[3] that comprise this most complex case.

Facts

Briefly, the case deals with the two rival factions of the Six Nations Indians, both living on the "tract" near Brantford, Ontario. The plaintiffs (respondents) are adherents of the elective system of selecting their governing council members pursuant to the *Indian Act*,[4] while the defendants (appellants) are seeking a return to (or in their view preservation of), government by "Hereditary Chiefs".[5]

The dissidence arose out of the alleged failure of the Elected Council to maintain contact with the people it was meant to represent. The Council reportedly neglected to consult its constituents on matters such as the closing of the Mohawk Institute (the local school), and the taking of soil samples by strangers. Since the inception of the Elected Council in 1924, the frustration with the Council gradually grew to the point where a spirit of passive cooperation evolved into a tactic of confrontation.[6]

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1 (1974) 51 D.L.R. (3d) 170.

2 (1973) 38 D.L.R. (3d) 23.

3 *Supra*, note 1, 172.

4 R.S.C. 1970, c.I-6.

5 In *Logan* v. *Styres* (1959) 20 D.L.R. (2d) 416, 417, the term "Hereditary Chiefs" was used "to describe the system whereby the Clan Mothers designated a Chief from the male members of certain families within the Clan".

6 *Isaac* v. *Davey*, *supra*, note 2, the Examination for Discovery of Elwood Green, January 10, 1972, 9. It is also interesting to note that in *Logan* v. *Styres*, *ibid.*, 418, the passive yet almost overwhelming attitude of the Six Nations Band led the court to conclude the following:

In an attempt to bring matters to a head, the defendants secured with padlocks the doors of the Council House in which the government of the band was conducted, and generally obstructed and interfered with its use. This action was followed by at least two very unproductive meetings between the plaintiffs and defendants which only served to solidify the animosity betwen them. As a result, on July 15, 1970 the plaintiffs commenced an action for an injunction restraining the defendants from interfering with the plaintiffs' use of the Council House.

Up until 1924 when the provisions of Part II of the *Indian Act*, entitled "Indian Advancement" and dealing with the elective system of chiefs and councillors,[7] were made applicable to the Six Nations Band by Order in Council P.C. 1629,[8] the Hereditary Chiefs had the right to possession of the Council House. However, when the Elected Council allegedly became the governing body through the operation of this Order in Council, the possession of the Council House passed to its members.

The decision to convert the system of government of the Six Nations Indians from one of Hereditary Chiefs to that of Elected Council was reached on the basis of the report by Lieutenant Colonel Andrew Thompson, K.C. commissioned by the Governor General in Council on March 20, 1923.[9] The report concluded that

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"It would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councillors or to provide for the surrender of Reserve lands by means of a vote. Such members of the Six Nations Indians it would appear, simply refrain from voting at all and in the proposed surrender of the lands in question when a vote was held on July 27, 1957, only 53 votes were cast ... out of about 3,600 eligible voters."

Even more recently it is reported in the judgement of Osler J. in *Isaac* v. *Davey*, *supra*, note 2, 34 that:

"In 1969 of some 10,000 band members of whom about 5,000 are in actual residence, a total of 547 votes were cast. Of these 315 were cast for Richard Isaac as chief councillor. Acclamations apparently occurred in all other districts but Nos. 5 and 6. In those districts totals of 225 and 156 votes were cast respectively and the winning candidate obtained in district No. 5, 70 and 62 votes and in district No. 6, 42 and 41 votes".

[7] R.S.C. 1906, c.81, Part II.

[8] Order in Council P.C. 1629, September 17, 1924, revoked and replaced by Order in Council P.C. 6015, November 13, 1951.

[9] The report was "to investigate and inquire generally into the affairs of the Six Nations Indians, including matters relating to education, health, morality, election of chiefs, powers assumed by the council, administration of justice, soldiers' settlement and other matters affecting the management, life and progress of the said Indians as may be required by the Superintendent General of Indian Affairs"; see P.C. 1629, *supra*, note 8, 1.

> ... a comparatively small number of old women have the selection of those who are entrusted with the transaction of the business of the Six Nations Indians, while the vast majority have nothing whatsoever to say in the choice of their public servants.[10]

It was this which led the Privy Council to attempt to apply Part II of the *Indian Act*[11] to the Six Nations Band of Indians.[12]

In both the Ontario High Court and the Court of Appeal the defense to the charges of obstruction and interference were predicated on the assertion that the Elected Council had no rights in law to enter the Council House. The defendants argued that the Elected Council could only be legitimized by P.C. 1629[13] made pursuant to section 93 of the *Indian Act*.[14] However, for the *Indian Act* to apply, the Six Nations Confederacy must be a "band" as defined in section 2(d):

> ... any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown....

Section 2(i) defines a "reserve" as:

> ... any tract of land set apart by treaty ... for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart ... .[15]

Clearly both definitions require that legal title be vested in the Crown. The contention of the defendants is that title to the Six Nations lands is *not* vested in the Crown, from which it follows that the Indians are not a "band" and do not live on a "reserve". Assuming this to be so it is clear that any provisions made pursuant to section 93 of the *Indian Act* cannot apply to the Six Nations Indians, since that section reads:

> Whenever the Governor in Council deems it advisable for the good government of a *band*, to introduce the elective system of chiefs and councillors ... he may provide that the chief and councillors ... of any *band* shall be elected, as hereinafter provided ... .[16]

Order in Council P.C. 1629 which purported to establish an Elected Council for the Six Nations Confederacy is such a provision.

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[10] *Ibid.*, 2.

[11] *Supra*, note 7.

[12] Unfortunately, as noted in *The Globe and Mail*, October 5, 1974: "In effect, the majority of the Six Nations living on the reserve have refused to recognize the application of the Indian Act to them and to the reserve."

[13] *Supra*, note 8.

[14] R.S.C. 1906, c.81, s.93 (subsequently R.S.C. 1952, c.149, s.73(1), now R.S.C. 1970, c.I-6, s.74(1)).

[15] R.S.C. 1906, c.81, s.2(d) and (i) (subsequently R.S.C. 1952, c.149, s.2(1)(a) and (o), now R.S.C. 1970, c.I-6, s.2(1)).

[16] *Supra*, note 14 (emphasis added).

Essentially Osler J.'s decision was based on the finding that the Six Nations Indians had been granted ownership in fee simple of their lands by the Simcoe Patent of 1793[17] and thus section 93 of the *Indian Act* could not apply to them.[18] As a result he ruled in favour of the defendants and dismissed the action for an injunction.

But if the Six Nations Confederacy is not a "band" on a "reserve" then what is it? Exactly this question was put to one of the defendants, Elwood Green, by counsel for the plaintiffs during the examination for discovery. Green, the spokesman for the warriors at Oshwekan (the location of the demonstration that gave rise to the action) replied:

> It's not an organization as such. It's actually the Six Nations Confederacy as — what remains of it as it was established prior to even the coming of Columbus. It's not an organization such as Kiwanis, Knights of Columbus, or Allied Iroquois Association or anything like that. It's not that type of an organization. It's the actual Government of the Iroquois people [h]as (*sic*) it had been established since the formation of the Iroquois Confederacy.[19]

Before discussing the judgment of Arnup J.A. of the Court of Appeal, it is appropriate to outline the historical events surrounding the grant of the controversial Simcoe Patent,[20] since the Court of Appeal attached some weight to these circumstances. On the question of title Osler J. simply found that "in [his] opinion, the 'Simcoe grant' of 1793 was effective to pass title to all members of the Six Nations Band in fee simple".[21] Arnup J.A., on the other hand, in overturning Osler J.'s decision stated that:

> The task of the Court is to construe the Simcoe Patent to determine what it was meant to do. In this task the Court must not only look at the words used in the document, but must construe those words against the background of the history and the facts existing at the time it was executed.[22]

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[17] See Appendix II, *infra.*

[18] Osler J.'s alternative argument based on the *Canadian Bill of Rights,* S.C. 1960, c.44 (see R.S.C. 1970, Appendix III), *supra,* note 2, 34-37, will not be dealt with here since much of his argument was predicated on cases now greatly mitigated by *Attorney-General of Canada* v. *Lavell* [1974] S.C.R. 1349. This is not to suggest that the Supreme Court will be unwilling to hear arguments based on the Bill of Rights, in fact it may well be that leave to appeal, granted by Laskin C.J.C., Judson and Spence JJ., was based on such considerations especially in the light of the fact that both Laskin C.J.C. and Spence J. dissented in the *Lavell* decision and more recently in the case of *Attorney-General of Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548.

[19] The Examination for Discovery of Elwood Green, *supra,* note 6, 3.

[20] *Supra,* note 17.

[21] *Supra,* note 2, 30.

[22] *Supra,* note 1, 180.

He then proceeded to find that the Simcoe Patent vested in the Six Nations Indians merely a personal and usufructuary right.

History of the Simcoe Patent

On July 6, 1775, almost a year before the Declaration of Independence, the Second Continental Congress of what was to become the United States of America issued its eloquent Declaration of Cause of Taking Up Arms. By December of that same year colonial relations had been irrevocably jeopardized by the Crown's enactment of the American Prohibitory Act. These events led the British to begin counting their allies in North America so that even before the Declaration of Independence they had enlisted the alliance of the Six Nations Tribes.[23] It is true not all of the Six Nations rallied to the King but certainly a significant number fought alongside the British troops.[23a]

Originally, the Six Nations had occupied the northern section of what is now New York, Pennsylvania and Ohio. In exchange for their loyalty the British had assured the Six Nations Indians that their property rights would be fully restored at the end of hostilities.[24] In 1780 and 1781 when "so much depended on the Indians' ability and readiness to maintain adequate pressure on the American Forces",[25] the promises of Sir Guy Carleton, Governor of Quebec, later reiterated by Sir Frederick Haldimand in 1779, were constantly stressed. However, as the British position worsened the Indians became increasingly worried over the validity of the British promises to restore their property rights "to the condition they were in before the contest began".[26] The truth of the matter is that no definite provision was made, either in the preliminary negotiations or in the definitive treaty of peace concluded in September 1783, to provide for the territorial rights of the Six Nations. In short, the British did not even attempt to make good their promises to their loyal allies.[27]

Finally, at the insistence of Chief Joseph Brant and in an attempt to keep the Six Nations "in Good Humour" and to convince them that Britain was still strong and capable of protecting their in-

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[23] The Six Nations Tribes included the Cayuga, Mohawk, Oneida, Onondaga, Seneca and Tuscarora Indians; P. A. Cumming and N. H. Mickenberg (eds.), *Native Rights in Canada* 2d ed. (1972), 108-109.

[23a] For a history of British relations with the Six Nations Indians, see C. M. Johnston (ed.), *The Valley of the Six Nations* (1964).

[24] *Ibid.*, xxxiv.

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

terests,[28] Lord Haldimand, in his capacity as Governor of Quebec, bought a tract of land for £ 1,180.7.4 from the Mississagua Indians and gave it to the Six Nations Indians.[29]

Even today we are not certain of the exact boundaries of the tract he gave to the Six Nations in exchange for their loyalty;[29a] what we do know however, is that out of the Haldimand Proclamation of 1784 came a conveyance which allowed the

> ... Mohawk Nation, and such other of the Six Nation Indians as wish to settle in that Quarter to take Possession of, & Settle upon the Banks of the River ... which them & their Posterity are to enjoy for ever.[30]

Apparently a disagreement as to whether or not the Six Nations Indians could alienate the lands arose at once. The Indian leader Brant stressed the necessity of allowing the whites to buy up some of the land:

> From the very beginning the chief, obviously a considerably Europeanized entrepreneur, appears to have realized that the original grant of 1784 was much too large to be managed productively by the Six Nations alone and that the ingenuity of and examples set by, white merchants and farmers would be highly desirable assets.[31]

Due to several problems with the Haldimand Proclamation, not the least of which was its lack of the Great Seal,[32] vagueness concerning the physical boundaries of the tract[33] and uncertainty as to the legal nature of the title that was to vest,[34] Lord Simcoe in 1793 attempted to resolve matters by a final and unambiguous deed. It is the interpretation of the Simcoe Patent of 1793[35] that is at issue in this case. If, as Osler J. found, the Patent gave the Six Nations Indians fee simple ownership in the property, then, as explained above, the *Indian Act* cannot be applied to this particular group. If, however (and *only* if), the Patent is interpreted as giving the Six Nations Indians merely the *use* of the land, then the *Indian Act* and all its consequences will apply.

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[28] *Ibid.*

[29] *Supra,* note 1, 175.

[29a] *Infra,* note 33.

[30] See Appendix I, *infra.*

[31] *Supra,* note 23a, xliii. It is interesting that the use of land as an economic base and bargaining lever is part of Indian strategy even today.

[32] *Doe ex Dem. Jackson* v. *Wilkes* (1851) 4 U.C.Q.B. (O.S.) 142, 146.

[33] C. M. Johnston, *supra,* note 23a, xxxix-xl.

[34] C. M. Johnston, *Brant County* (1967), 7.

[35] *Supra,* note 17.

The Interpretation of the Simcoe Patent by the Ontario Court of Appeal

As mentioned above,[36] Arnup J.A. saw the task of the Court as extending beyond the mere application of the technical language of the Simcoe Patent; he believed that is was necessary to construe the words of the Patent against its background and history.

From one point of view, Arnup J.A., is undoubtedly correct in his formulation of the Court's duty;[37] the problem, of course, is to construe properly the words of the Simcoe Patent. However, it appears there are at least three levels of analysis that may be applied to the Patent. The first is simply to construe the words as they appear on the face of the document:

> We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained of providing a convenient Tract of Land under our protection for a safe and comfortable Retreat for them and their posterity Have of our Special Grace certain Knowledge and mere motion given and granted and by these presents Do Give and Grant to the Chiefs, Warriors, Women and people of the said Six Nations *and their heirs forever* All that District or Territory of Land being parcel of a certain District lately purchased by us ....
>
> IT IS OUR ROYAL WILL AND PLEASURE that *no transfer alienation* conveyance sale gift exchange lease property or possession shall at any time be made or given of the said District or Territory or any part or parcel thereof by any of the said Chiefs Warriors Women or people ... .[38]

Initial analysis of the phrase "and their heirs forever" would lead one to conclude that the conveyance is a fee simple subject to a restraint on alienation. Since the restriction appears to be one that

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[36] *Supra*, note 22.

[37] In the case of *Re Walker* (1925) 56 O.L.R. 517, a testator gave property to his wife, intending her to have all the rights incident to ownership with a direction that "should any portion of my estate still remain in the hands of my said wife at the time of [her] decease undisposed of by her such remainder shall be divided as follows"; (at 518).

Middleton J.A. commenting on the duty of the court said:

> "When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains *in specie* at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention." (at 522).

[38] *Supra*, note 17 (emphasis added).

substantially deprives the Six Nations Band of its power to alienate,[39] it probably cannot be allowed to stand:

> In accordance with the cardinal principle that the power of alienation is necessarily and inseparably incidental to ownership, it has been held in a long line of decisions that if an *absolute* interests is given to a donee ... any restriction which *substantially* takes that power away is void as being repugnant to the very conception of ownership.[40]

However, should the court decide that the restriction does *not* substantially deprive the Band of its power to alienate, the grant in fee simple would stand until such time as the Band sought to alienate their lands. Should this occur, the Crown would have a right of re-entry, not an occurrence uncommon to fee simple estates.

The more likely conclusion however, is that the restriction on alienation is repugnant to the fee simple conveyance and the two cannot stand together. Thus in order to determine the precise nature of the interest presently vested in the Six Nations Band, it would have to be decided whether the Simcoe Patent grants a fee simple subject to a condition subsequent or a fee simple determinable. Should a court hold that it grants the latter, the clause restricting alienation would invalidate the whole deed: "A determinable interest fails altogether if the possibility of reverter is invalidated, for to treat it as absolute would be to alter its quantum as fixed by the limitation."[41] Should a court come to such a decision, the result would be the possibility of completely divesting the Six Nations Indians of any title to the land.

However, due to the composition of the Simcoe Patent, it is unlikely that the court would find the restriction on alienation to be anything other than a condition subsequent, since an examination of the Patent leads one to conclude that the terminating event is not "an integral and necessary part of the formula from which the size of the interest is to be ascertained", but rather that "the terminating event is external to the limitation ... a divided clause from the grant".[42] If so, the repugnant condition would be struck down, leaving the Six Nations with an unencumbered fee simple estate.[43]

While it appears clear that of the two possibilities presented above a court would recognize the Patent as a fee simple with a

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[39] For an illustration of a court's attempt to restrict the concept of substantial deprivation, see the much criticized case of *Re Macleay* (1875) L.R. 20 Eq. 186.

[40] E. H. Burn, *Chesire's Modern Law of Real Property* 11th ed. (1972), 319. See also R. Megarry, *A Manual of the Law of Real Property* (1969), 33.

[41] Cheshire, *ibid.*, 318.

[42] *Ibid.*, 316.

[43] *Ibid.*, 319.

condition subsequent, such a decision is not vital to the determination of the case at Bar (although it could conceivably have significant results at a later date), for all that must be shown by the defendant for the purposes of this case is that the Patent does not convey a "use" of the land in which the Crown retains title.

While the type of analysis outlined above may be appropriate in some instances, it is important to remember that a second canon of interpretation holds that:

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.[44]

From this viewpoint, the task of the Court is to try and interpret the words of the Simcoe Patent in a way which avoids the repugnancy that apparently exists on the face of the Patent.

In an attempt to do so, the Court of Appeal refers[45] to the case of *R.* v. *St Catharine's Milling & Lumber Co.*,[46] for an analysis of the history of public lands and colonial policy.[47] It is interesting that among a number of other cases dealing with the extinguishment of Native title, set out in Appendix "D" of the judgment,[48] the most recent and authoritative Supreme Court decision of *Calder* v. *Attorney-General of B.C.*[49] is merely listed and not discussed. It is significant because Arnup J.A. is satisfied that "[f]or the purposes of this case... Indian title in Ontario has been a 'personal and usufructuary right, dependent on the goodwill of the Sovereign' ".[50] The problem is that such a characterization is vague and imprecise at best. Even in the *St Catharine's Milling* case "there was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right but their Lordships [did] not consider it necessary to express any opinion on the point".[51] In the *Calder* decision Mr Justice Judson stated:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occu-

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[44] *Re Levy* (1881) 17 Ch.D. 746, 751 *per* Jessel M.R.
[45] *Supra*, note 1, 180.
[46] (1885) 10 O.R. 196; aff'd (1887) 13 S.C.R. 577; aff'd (1889) 14 App.Cas.46.
[47] (1885) 10 O.R. 196, 203-6.
[48] *Supra*, note 1, 188.
[49] [1973] S.C.R. 313.
[50] *Supra*, note 1, 180.
[51] *St Catharine's Milling and Lumber Co.* v. *The Queen* (1889) 14 App.Cas.46, 54-55.

> pying the land as their forefathers had done for centuries. *This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'.*[52]

Whatever expression the courts eventually adopt to designate the Indian land title deriving from occupation from time immemorial,[53] it is clear that Native title arising from the Royal Proclamation of 1763[54] results from an established right.[54a] The Proclamation, sometimes referred to as the "Charter of Indian Rights", "[l]ike so many great charters in English history ... does not create rights but rather affirms old rights".[55] The view that the Proclamation of 1763 did not create new rights is further strengthened in an article by Professor J. C. Smith[56] (to which we are thoughtfully directed by the Court of Appeal). Professor Smith expounds the rationale behind the concept of Native title:

> In exchange for a voluntary recognition of sovereignty, active support in its wars to acquire and retain territory in North America, the peaceful opening up of land for settlement by members of the dominant society, the crown recognized the property of the native peoples of Canada to their land which they historically occupied and possessed. This recognition, along with the development and adoption of certain rules and practices, constituted an institution of property between the native peoples of Canada and the crown.[57]

As a result of the above statements, it is submitted that the Royal Proclamation of 1763 cannot apply to the Six Nations Indians in the determination of their property interests, since it was not a question of recognizing pre-existing rights in the land, but of granting a tract hitherto unowned and unpossessed by the Six Nations Band as a reward for fighting with the British.

However, Mr Justice Arnup does not in fact maintain that the Royal Proclamation should apply to the Six Nations Indians *per se*. Rather he takes the Proclamation as an indication of the British policy towards the Indians at the time of Simcoe Patent and in doing so adopts a third level of interpretation which looks not only to the context of the words of the deed under construction, but also to the wider context of surrounding circumstances. He states:

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[52] *Supra*, note 49, 328 (emphasis added).

[53] Arnup J.A. uses the phrase "a personal and usufructuary right" noting that "[f]or the purposes of this case it is sufficient"; *supra*, note 1, 180.

[54] *The Royal Proclamation, 1763*, R.S.C. 1970, Appendix II.

[54a] It is likely that as a result of the *Calder* case, *supra*, note 49, the Royal Proclamation of 1763 is not the only source of aboriginal title in Canada.

[55] *R.* v. *Koonungnak* (1963) 45 W.W.R. 282, 302 (N.W.T. Terr.Ct.) *per* Sissons J.

[56] J. C. Smith, *The Concept of Native Title* (1974) 24 U.of T. L.J. 1.

[57] *Ibid.*, 16.

> The words of the Simcoe Patent prohibiting alienation by the Indians to anyone not of the band are also in keeping with the policy of the times and the understanding of both the Indians and the Crown even prior to the Haldimand Proclamation, and enunciated in 1763.[58]

As to exactly what British policy towards the Six Nations Indians prior to the Simcoe Patent was we shall probably always be in doubt. For Lord Haldimand did not see fit to restrict alienation, and even more ironically Lord Dorchester, Lord Simcoe's titular superior

> ... publicly expressed the opinion that despite the lack of conventional legal sanctions the 'advantages' Haldimand had conferred upon the Confederacy — including presumably the right of alienation — should be unconditionally reaffirmed.[59]

As further evidence towards proving the British policy of giving Native People a "communal use" of the land they occupied at the time of the white man's arrival rather than an outright grant, the cases of *Amodu Tijani* v. *Secretary, Southern Nigeria,*[60] *Sunmonu* v. *Disu Raphael,*[61] *Sakariyawo Oshodi* v. *Moriamo Dakolo,*[62] and *Oyekan* v. *Adele,*[63] are listed by the Court of Appeal without discussion. All refer to a communal usufruct or a similar interest being communally vested in the Native people of Nigeria.[64] The Court comes to the conclusion that under circumstances such as those surrounding the Simcoe Patent, British policy was to give a personal and usufructuary right, and that this is what was granted to the Six Nations Indians — *because* they were Indians and regardless of the fact that they had not occupied the land from time immemorial. The four Nigerian cases mentioned above, coupled with the 1885 case of *St Catharine's Milling & Lumber Co.*[65] and a reference to Professor Smith's article *The Concept of Native Title*[66] form the body of authority which the Court believes is sufficient to arrive at this conclusion. It is interesting to note however that Profesor Smith

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[58] *Supra,* note 1, 181. *R.* v. *Lady McMaster* [1926] Ex. C.R. 68 was listed in Appendix "D" to the judgement in *Isaac* v. *Davey, ibid.,* 188, presumably as authority for saying that British policy was not to allow Indians any right of alienation, but in that case, the Regis Indian tribe was assumed to have been in occupation prior to 1763 and presumably since time immemorial: see *R.* v. *Lady McMaster,* ibid., 69.

[59] C. M. Johnston, *supra,* note 23a, xlvi.

[60] [1921] 2 A.C. 339, 402.

[61] [1927] A.C. 881.

[62] [1930] A.C. 667.

[63] [1957] 2 All E.R. 785, 789.

[64] For a much more comprehensive study of the aboriginal land question throughout the world see the judgement of Blackburn J. in *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 F.L.R. 141.

[65] *Supra,* note 46.

[66] *Supra,* note 56.

rejects all blanket statements regarding the nature of Indian title. After dismissing the proposition that Indian title is to be viewed as possessing all of the qualities of a fee simple estate he points out that it is not "really correct to say categorically that native title is a usufructuary interest".[67]

The characterization of Native title in the United States is similar to that in Canada[68] so far as discussion is limited to an investigation of aboriginal land title arising from continued occupation from time immemorial. Nowhere is there authority in the cases cited by the Court of Appeal for the proposition that when Native peoples are given land for purposes other than that of extinguishing aboriginal title, the court is to assume that the Native people have vested in them a mere use of the land.

Other cases were referred to by the Court merely through being included in Appendix "D" of the judgement.[68a] The cases of *Brown* v. *West*[69] and *Doe ex Dem. Jackson* v. *Wilkes*[70] are presumably listed in an attempt to show that the British policy towards the Six Nations Indians, as it should have been reflected in the Haldimand Proclamation of 1784, was "to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants".[71]

No mention of the Simcoe Patent is made in either case. In fact Robinson C.J. in *Doe ex Dem. Jackson* v. *Wilkes*,[72] which dealt with the significance of the Great Seal[73] in the Haldimand Proclamation, refers to a letter written by Mr Goulburn, Under-Secretary of State for the colonies in 1816, to an Indian agent, Captain Norton, in which it was stated that:

> ... there is no difficulty on the part of his Majesty's government, to admit that the grant on the Grand River, which was after the peace of 1783 made to the Five Nations and their posterity forever, is a grant *as full and as binding upon the government as any other made to individual settlers*.[74]

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[67] *Ibid.*, 14.

[68] In *R.* v. *White and Bob* (1964) 50 D.L.R. (2d) 613, 631, (B.C.C.A.), aff'd (1965) 52 D.L.R. (2d) 481 (S.C.C.) Norris J. reviewed *Johnson* v. *McIntosh* 8 Wheaton 543, 21 U.S. 240 (1823) (U.S.S.C.) and concluded "[t]he judgement of the learned Chief Justice is entirely consistent with the Privy Council in *St Catharine's Milling & Lumber Co.* v. *The Queen*"; (*supra*, note 46).

[68a] *Supra*, note 1, 188.

[69] (1846) 1 Gr.E. & A. 117.

[70] (1851) 4 U.C.Q.B. (O.S.) 142.

[71] *Supra*, note 69, 118.

[72] *Supra*, note 70, 149.

[73] *Doe dem. Sheldon* v. *Ramsay* (1853) 9 U.C.Q.B. 105 dealt with essentially the same problem.

[74] *Supra*, note 70, 143 (emphasis added).

Robinson C.J. admits this letter's possible significance, offering that:

> It states very openly and candidly what effect the Government are willing to concede to it, so far as their rights and the rights of the Indians are concerned, and would be a very strong document in support of the Indians if anything had been since done by the Government inconsistent with the frank avowal contained in that letter.[75]

However, he felt that the letter could not be allowed to affect the Court's construction of the document under consideration.

There is, however, one case listed by the Court in Appendix "D", *Sero* v. *Gault*,[76] which does deal with a specific grant to an Indian Band. It concerns a grant by Lord Simcoe to the Bay of Quinte Indians[77] "to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages".[77a] The Ontario Supreme Court decided that the words "customs and usages" were "words of tenure, setting out the estate of the grantees in the land"[78] and did not, as the Indians contended, exempt them from section 4 of the *Game and Fisheries Act*,[79] which prohibited fishing with nets without a license.

Even if *Sero* v. *Gault*[80] had expressly stated that the Indians were only to get the use of the land, we would still be wise to be very cautious in applying the case to the Simcoe Patent concerning the tract near Brantford. As Jessel M.R. said in *Aspen* v. *Seddon*, "I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same".[81]

Furthermore, even assuming that a British policy towards Indians not coming under the Proclamation of 1763 could be ascertained, there would still be great difficulty in construing the Simcoe Patent:

> [T]he question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in

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[75] *Ibid.*, 149.

[76] (1921) 64 D.L.R. 327.

[77] These Indians were originally part of the Six Nations Band but on being forced from the United States chose to break with Chief Joseph Brant and settle in the Bay of Quinte; *supra*, note 1, 174.

[77a] *Supra*, note 76, 332.

[78] *Ibid.*

[79] R.S.O. 1914, c.262.

[80] *Supra*, note 76.

[81] (1874) L.R. 10 Ch.394, 397.

> that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions.[82]

While it is true that the literal meaning of a deed may be discerned by extrinsic evidence where the deed is unclear, it should also be noted, as was pointed out by Lord Cranworth in *Attorney-General* v. *Clapham*,[83] that such evidence may not be received if it contradicts the actual terms of the deed; it is only admissible in so far as it aids the court in understanding the sense in which the words were used, for example "as a dictionary for a foreign language or a book of science".[84]

The question that now must be asked is: can an intention on the part of the Crown to give a personal and usufructuary right to the Six Nations Indians be construed from the wording of the deed? The wording of the Simcoe Patent is not similar to the Royal Proclamation of 1763 which reads: "to reserve under our Sovereignty, Protection, and Dominion, *for the use* of the said Indians...".[84a] The Simcoe Patent uses the phrases "Do Give and Grant to the Chiefs, Warriors, Women and people of the said Six Nations *and their heirs for ever*" and "no transfer, alienation ... shall at any time be made or given".[85] As suggested above, a strict construction of these phrases indicates the grant of a fee simple with a restriction on alienation. However, the Court of Appeal has decided that the Simcoe Patent vests a personal and usufructuary right by construing it in the lights of its historical context. This raises two serious questions.

First, under what authority does the Court justify recourse to extrinsic evidence?

> It is to be noticed that extrinsic evidence here does not mean evidence of the writer's intention but evidence to enable the court to interpret the language used. It is only admissible, as so often with this subject of construction, when there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer.[86]

In interpreting the Simcoe Patent, therefore, the Court must find words in the Patent itself which show an intention to vest in the grantees something other than a fee simple subject to a restriction on alienation. It can no doubt be persuasively argued that the very existence of a fee simple with a restriction on alienation should put the interpreter of the Patent on notice. However, being put on notice

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[82] *Monypenny* v. *Monypenny* 11 E.R. (H.L.) 671, 684, (1861) 9 H.L.C. 114, 146 *per* Lord Wensleydale.

[83] 43 E.R. (Ch.), 638, 653, (1855) 4 De G.M. & G. 591, 627.

[84] G. Dworkin, *Odger's Construction of Deeds* 5th ed. (1967), 47-48.

[84a] *Supra*, note 54 (emphasis added).

[85] *Supra*, note 17.

[86] G. Dworkin, *supra*, note 84, 43-44.

that the grantors may have had an intention other than that expressed on the face of the deed is clearly not enough to decide this case in favour of the plaintiffs. To achieve such a result the Court must find that there is wording in the Patent itself which would indicate an intention on the part of Lord Simcoe to vest in the Six Nations Indians a personal and usufructuary right. There appears to be no such indication unless one resorts to the actual collateral statements of Simcoe himself. To permit this would clearly contravene the basic rules of interpretation set out above and would seriously jeopardize the reliability of deeds in general and particularly those made under the Great Seal.

Following from this a second question, relating to the Court's contention that a personal and usufructuary right was given to the Six Nations Indians, arises. How can a deed, by indirect historical reference alone, and lacking any specific words to this effect, create an interest in the grantees that does not even exist at common law? Surely for the Court to find a personal and usufructuary interest in such a deed, where none exists at common law, transcends the point of merely interpreting the language of the Patent to the extent that it approaches a complete rewriting of the document by the Court.

Summary

From the above it is clear that the Simcoe Patent lends itself to three possible levels of analysis:

1. The first is to construe strictly the words of the Patent and to find a fee simple with a restriction on alienation. It is submitted that this is too simplistic an approach and does not give adequate recourse to the circumstances surrounding the deed.
2. The second is to read the document as a whole and through recourse to past usage of the words attempt to reconcile the repugnancy in the Patent. It is submitted that this is the correct approach and that the Court found no custom allowing the words of this deed to be interpreted as conveying a mere personal and usufructuary right to the Six Nations Indians.
3. The third is to interpret the deed in the light of Lord Simcoe's intention and British policy as revealed not only through reference to the deed itself, but also by considering extrinsic evidence as to what the Patent was supposed to accomplish. It is this third level of analysis which was adopted by the Court of Appeal. However, even taking this broader view, it is submitted that there is little evidence to show that the British custom towards Indians

not falling under the terms of the Royal Proclamation of 1763[87] was to vest in the grantees a personal and usufructuary right.

It is important to remember that for the purposes of this case the plaintiffs must show that the tract given to the Six Nations Indians falls under the definition of a *"reserve"*, that is:

> ... any tract or tracts of land set apart by treaty ... for the use or benefit of or granted to a particular band of Indians, of which the *legal title is in the Crown,* and which remains so set apart... .[88]

The case is indeed complicated and not every issue that will be before the Supreme Court has been canvassed in this comment. Nevertheless, the Bill of Rights[89] argument aside,[90] the case must turn on the interpretation the Supreme Court decides to give the Simcoe Patent.

Strictly speaking there is no opportunity for the Supreme Court to take judicial consideration of the method of government the Band itself wishes to live under. Instead, the Court is unfortunately restricted to deciding the case on the basis of an interpretation of the Simcoe Patent, which will either confirm or deny that the Six Nations Indians have an interest in the land other than that described in section 2(i) of the *Indian Act.*[91] Should the Court decide that the *Indian Act* applies to the Six Nations tract, the Elected Council will remain the legally sanctioned government of the Six Nations: if not, the Indians will be allowed to carry on with their six-hundred year old traditional form of government by Hereditary Chiefs.

Peter Maxwell Jacobsen*

APPENDIX I

The Haldimand Proclamation, 1784

Whereas His Majesty having been pleased to direct that in Consideration of the early Attachment to His Cause manifested by the Mohawk Indians, & of the Loss of their Settlement they thereby sustained that a Convenient Tract of Land under His protection should be chosen as a Safe & Com-

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[87] *Supra,* note 54.

[88] *Indian Act, supra,* note 15, s.2(i) (emphasis added).

[89] *Supra,* note 18.

[90] *Supra,* note 18; *supra,* note 1, 176.

[91] *Supra,* note 15.

* LL.B. III (McGill). I would like to thank the Editorial Board of the McGill Law Journal for their help in preparing this article for publication.

fortable Retreat for them & others of the Six Nations who have either lost their Settlements within the Territory of the American States, or wish to retire from them to the British — I have, at the earnest Desire of many of these His Majesty's faithfull Allies purchased a Tract of Land, from the Indians situated between the Lakes Ontario, Erie, & Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such other of the Six Nation Indians as wish to settle in that Quarter to take Possessions of, & Settle upon the Banks of the River commonly called Ours [Ouse] or Grand River, running into Lake Erie, allotting to them for that Purpose Six Miles deep from each Side of the River beginning at Lake Erie, & extending in that Proportion to the Head of the said River, which them & their Posterity are to enjoy for ever.

Given under my Hand & Seal &c &c
25th Oct. 1784
(Signed) Fred: Haldimand

APPENDIX II

The Simcoe Patent, 1793

J. Graves Simco.

George the third by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith and so forth. To all to whom these presents shall come Greeting — Know ye that whereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and our Government has been made manifest on divers occasions by their spirited and zealous exertions and by the bravery of their conduct and We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained of providing a convenient Tract of Land under our protection for a safe and comfortable Retreat for them and their posterity Have of our special Grace certain Knowledge and mere motion given and granted and by these presents Do Give and Grant to the Chiefs, Warriors, Women and people of the said Six Nations and their heirs for ever All that District or Territory of Land being parcel of a certain District lately purchased by us of the Mississague Nation lying and being in the Home District of Our Province of Upper Canada, beginning at the mouth of a certain River formerly known by the name of Ours or Grand River now called the River Ouse, where it empties itself into Lake Erie and running along the Banks of the same for the space of six miles on each side of the said River or a space co-extensive therewith conformably to a certain survey made of the said Tract of Land and annexed to these presents and continuing along the said River to a place called or known by the name of the forks and from thence along the main stream of the said River for the space of six miles on each side of the said stream or for a space equally extensive therewith as shall be set out by a survey to be made of the same to the utmost extent of the said River as far as the same has been purchased by Us and as the same is bounded and limited in a certain Deed made to us by the Chiefs and people of the said Mississague Nation, bearing date the seventh day of December in the year of our Lord one thousand seven hundred and ninety-two to Have and to Hold the said District or Territory of Land so bounded as aforesaid of

Us our Heirs and successors to them the Chiefs Warriors Women and people of the Six Nations and to and for the sole use and behoof of them and their heirs for ever freely and clearly of and from all and all manner of Rents, fines and services whatever to be rendered by them or any of them to Us or Our Successors for the same and of and from all conditions stipulations and agreements whatever except as hereinafter by Us expressed and declared Giving and Granting and by these presents confirming to the said Chiefs Warriors Women and people of the Six Nations and their heirs the full and entire possession Use benefit and advantage of the said District or Territory to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them the said Chiefs Warriors Women and people of the said Six Nations Provided always and be it understood to be the true intent and meaning of these presents that for the purpose of assuring the said Lands as aforesaid to the said Chiefs Warriors Women and people of the Six Nations and their heirs and of securing to them the free and undisturbed possession and enjoyment of the same.

IT IS OUR ROYAL WILL AND PLEASURE that no transfer alienation conveyance sale gift exchange lease property or possession shall at any time be made or given of the said District or Territory or any part or parcel thereof by any of the said Chiefs Warriors Women or people person or persons whatever other than among themselves the said Chiefs Warriors Women and people, but that any such transfer alienation conveyance sale gift exchange lease or possession shall be null and void and of no effect whatever. And that no person or persons shall possess or occupy the said District or Territory or any part or parcel thereof by or under pretence of any such alienation Title or conveyance as aforesaid or by or under any pretence whatever under pain of our severe displeasure And that in case any person or persons other than them the said Chiefs Warriors Women and people of the said Six Nations shall under pretence of any such title as aforesaid presume to possess or occupy the said District or Territory or any part or parcel thereof that it shall and may be lawful for us our Heirs and Successors at any time hereafter to enter upon the Lands so occupied and possessed by any person or persons other than the people of the said Six Nations and them the said intruders thereof and therefrom wholly to dispossess and evict and to resume the part or parcel so occupied to Ourselves, our heirs and successors Provided always that if at any time the said Chiefs Warriors Women and people of the said Six Nations should be inclined to dispose of and surrender their use and interest in the said District or Territory or any part thereof the same shall be purchased for Us, our Heirs and Successors at some public meeting or assembly of the Chiefs Warriors and people of the said Six Nations to be holden for that purpose by the Governor, Lieutenant-Governor or person administering Our Government in our Province of Upper Canada, IN TESTIMONY whereof, We have caused these our Letters to be made patent and the great seal of our said Province to be hereunto affixed.

Witness, John Graves Simcoe, Esquire, Lieutenant-Governor and Colonel commanding our forces in Our said Province.

Given at Our Government House at Navy Hall this fourteenth day of January in the year of our Lord, One thousand seven hundred and ninety-three, in the thirty-third year of Our Reign.