WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE, Sidney L. Harring (Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 1998)

After repeatedly seeing a threatening wendigo around a Sabascon settlement for months, Machekequonabe, one of eight Ojibwa men on sentry duty, shot at what he believed was the dangerous spirit, killing instead his foster father, Peskawakeequic, another of the sentries. The ensuing case, *R.* v. *Machekequonabe,* came to be one of the best known indigenous law cases in the common law world and provided the foundational tenet that colonial law applied to indigenous peoples even though they had no knowledge of the law or its principles. Machekequonabe was quickly found guilty of manslaughter, and a string of wendigo cases followed in the central Canadian legal system. The case brought forth to non-native society much of the intricate cultural and legal worlds of Ojibwa-Cree societies; likewise, it also demonstrated the extent to which Canadian legal authorities would go to impose their own legal system upon Native peoples.

Since the 1970s, there has been significant developments in the writing of Canadian history, including within the sub-discipline of Canadian legal history. As Jim Phillips has argued elsewhere, prior to the 1970s most practitioners of Canadian legal history were primarily lawyer-antiquarians who were preoccupied with "internal legal issues": legal doctrine and ideas, the profession, the courts, and the judiciary.[1] More recently, influenced by broader historiographic trends, legal history has embraced "external" legal issues involving women, labour, ethnicity and race, with the aim of placing the history of law within broader social contexts.[2] While "internal" legal histories still make frequent appearances, Sidney Harring's *White Man's Law* is an important social history that, as he states, is concerned as much "about people as it is about law."[3]

White Man's Law pursues several broad themes. Harring examines the context of nineteenth and early twentieth-century Canadian law as it applies to Natives - with particular attention to the judicial rather than legislative role - across Canada's regions, although admittedly he neglects the North.[4] In general, colonial and Canadian authorities supposedly sought a policy of "liberal treatment," a term filled with contradictions and ambiguities. On the rarest of occasions, this was interpreted in an extraordinarily sensitive manner: in 1867, Judge Samuel Monk in *Connolly* v. *Woolrich*[5] created a multicultural legal order that recognized both indigenous laws and

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1 J. Phillips, "Recent Publications in Canadian Legal History" (1997) 78 Canadian Historical Rev. 236.

2 *Ibid.* at 237-38. Phillips provides a survey of some recent examples of both "internal" and "external" legal histories.

3 S.L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press and The Osgoode Society, 1998) at 15 [hereinafter *White Man's Law*].

4 For a comment by Harring on indigenous people and Canadian law in the North, see S.L. Harring, "The Rich Men of the Country: Canadian Law in the Land of the Copper Inuit, 1914-1930" (1989) 21 Ottawa L. Rev. 1.

5 (1867), 11 L.C.J. 197 (Que. S.C.).

American precedent, declaring Natives as distinct people. Less than twenty years later, however, Monk sat on the Quebec Court of Queen's Bench and wrote in dissent as Alexander Cross denied the legality of indigenous law, even among Natives. Monk's ruling in Connolly was an exception, and most often "liberal treatment" did nothing to protect Native property or rights. Under the terms of the Union, when British Columbia entered Confederation in 1871, it was agreed that "a policy as liberal" as that "pursued by the British Columbia government shall be continued by the Dominion Government."[6] In fact, British Columbia made no treaties beyond the initial Vancouver Island agreements and denied aboriginal title, a policy that continued until the 1990s. Perhaps more significant, Harring makes an introductory effort to incorporate Native law into the broader and more studied colonial and Canadian legal past. He maintains that the actions of Machekequonabe and the Ojibwa described earlier can only be understood with attention to indigenous cultural and legal traditions. To do so, of course, was beyond colonial jurisprudence, and wendigo cases ultimately helped to further alienate indigenous people from Canadian law.

Despite obvious regional and tribal variations, Harring points toward the centrality of Ontario in defining Canadian treatment of indigenous people. In particular, Harring devotes separate chapters to John Beverley Robinson, Chief Justice of Upper Canada from 1829 to 1862, and to *Ontario (A.G.)* v. *St. Catherine's Milling and Lumber Company*,[7] a foundational case in Canadian law. As chief justice during a formative period in the settlement of Upper Canada, Robinson authored more opinions than any other nineteenth-century judge. His opinions concerning indigenous legal matters were widely inconsistent; generally, however, Robinson denied the Six Nations had any legal rights and did not support Crown measures to expel squatters until the last decade of his career. In *St. Catherine's Milling*, Native people were not even a party to the case although they were, without question, the greatest losers. In *St. Catherine's Milling*, Ontario and the Dominion each claimed title to land although each based their claims on very different theories of the alienation of Native title. The case was first argued in the Chancery Division of the High Court of Ontario in 1885 where Chancellor John Alexander Boyd sided with the Ontario argument and, for the first time in a Canadian judicial opinion, characterized Natives as "barbarians" and "degraded." When the Privy Council ultimately upheld Boyd's decision in 1888, Harring argues that it was, in fact, a vindication of the chancellor's racist views. While Harring rightly points to the centrality of *St. Catherine's Milling* in nineteenth-century jurisprudence, he ignores some of the intellectual currents that help make it so. The Privy Council's argument that Natives possessed (albeit ill-defined) "usufructory" rights to the land, but did not fully own it, drew from Lockean concepts of property that were central to the nineteenth-century resettlement process. Similarly, although Harring suggests that Boyd's racist language represents a change of attitude among Canada's educated elite, he does not examine the changing nature of anthropological theory that made it so.

White Man's Law is an erudite and passionate analysis destined to be a core legal history text in its field. This book embraces a prodigious amount of primary and

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6 *White Man's Law* at 186.

7 See Chapters three and six in *White Man's Law*.

secondary material: indeed, its notes serve as the best introduction to the available literature. Recent decades have made it apparent that the question of aboriginal rights and title is often muddled and unclear; *White Man's Law* helps to explain that this is not an altogether recent development.

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