

**Pedantic Hero: An Analysis of David Mills Contributions to a Canadian Approach to International Law**

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## **Abstract**

David Mills (1831 – 1903), a longstanding Member of Parliament, an academic and a Supreme Court judge, was one of the first English-speaking Canadians to take a professional interest in international law. While Mills is primarily remembered for his distinguished career in Parliament and his expertise in constitutional law, his contributions to international law are largely unrecognized. However, in addition to teaching international law at two Canadian universities, Mills published extensively on international law issues most notably, the South African War and the Alaska Boundary Dispute.

During Mills' career, the new Dominion of Canada struggled to establish a national identity, while maintaining ties with Britain and the United States. By the turn of the century, Canadians were becoming increasingly dissatisfied with their country's inferior position, and sought increased status within these relationships. To further this nationalistic goal, a group of Canadian politicians, including David Mills, looked to international law and policy.

Mills was a well-known proponent of the Canada's involvement in the South African War. His extensive commentaries on the subject provide insight into how loyalty to Britain coupled with an increasing Canadian nationalism contributed to Canadian imperialism and involvement in this war. Mills also wrote extensively on the Alaska Boundary Dispute, and used international law, particularly treaty interpretation, to support Canada's legal position in this dispute. Mills' views on the Alaska Boundary Dispute provide insight into Canadian-American relations and growing anti-American sentiments in turn-of-the-century Canada. Mills' commentaries on the South African War

and the Alaska Boundary Dispute provide a window into the history of international law in Canada in the years following Confederation, a time when Canada was developing a self-conscious national identity.

## **Introduction**

In the years following Confederation, the new Dominion of Canada struggled to establish a national identity, while maintaining ties with Britain and the United States. By the turn of the century, Canadians were becoming increasingly dissatisfied with their country's inferior position within this North Atlantic Triangle, and sought increased status within these relationships. To further this nationalistic goal, a group of Canadian politicians, David Mills among them, looked to international law and policy.

David Mills, a longstanding Member of Parliament, an academic and later a Supreme Court judge, was one of the first English-speaking Canadians to have a serious professional interest in international law.<sup>1</sup> While Mills is primarily remembered for his distinguished career in Parliament and his expertise in constitutional law, his contributions to international law have been largely unrecognized. However, in addition to teaching international law at two Canadian universities, Mills wrote articles on a variety of boundary disputes concerning the Atlantic fisheries, the Behring Sea, the Venezuela boundary, and the Panama Canal.<sup>2</sup>

Arguably the two most contentious international law matters in turn-of-the-century Canada were Canada's involvement in the Boer War in South Africa, and the Alaska Boundary Dispute. Not surprisingly, Mills had a keen interest in both issues. The

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<sup>1</sup> Ronald St. John Macdonald, "A Historical Introduction to the Teaching of International Law in Canada: Part II," *The Canadian Yearbook of International Law* 13 (1975): 264.

<sup>2</sup> *Ibid.*, 263-264.

first section of this paper examines Mills' extensive commentaries on the South African war in order to discern how loyalty to Britain along with an increasing Canadian nationalism contributed to Canadian imperialism and involvement in the South African War. The influence of late nineteenth and early twentieth century ideologies, such as Social Darwinism will also be investigated. The second part of this paper examines Mills' views on the Alaska Boundary Dispute to assess Canadian-American relations and growing anti-American sentiments in turn-of-the-century Canada. The third section of this paper examines Mills' academic career at the London Law School and the University of Toronto. The final section of this paper looks at whether there is tension between David Mills, the politician, and David Mills, the international law scholar. It asks specifically whether Mills equated what was in Canada's best interests with the proper international law position, or whether he approached international law in a more non-partisan manner. David Mills' contributions to international law provide a window into the history of international law in Canada in the years following Confederation, a time when Canada was developing a self-conscious national identity.

## **I. Background**

David Mills can be easily characterized as a Renaissance man. He was an educator, a lawyer, a Member of Parliament, a cabinet minister, a senator, a newspaper editor, an author and a judge of the Supreme Court of Canada.<sup>3</sup> Born on March 18, 1831 in the pioneer farming community of Orford Township, Kent County, in South Western

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<sup>3</sup> Robert C. Vipond, *David Mills*, 2000, Dictionary of Canadian Biography Online, 10 January 2006, <<http://www.biographi.ca/EN/ShowBio.asp?BioId=41057&query=>>

Ontario,<sup>4</sup> Mills was educated in the local common school, and later received private tutoring.<sup>5</sup>

In 1865, after serving as superintendent of schools for Kent County for almost a decade, Mills, then a father of three, decided to study law at the University of Michigan.<sup>6</sup> Mills' decision to attend an American law school was unconventional by the standards of the time, as the Law Society of Upper Canada did not recognize American legal training.<sup>7</sup> In Canada, formal instruction was not required to be called to the bar. Aspiring lawyers needed only to article in a law office and pass the required tests.<sup>8</sup> Mills' decision to study at the University of Michigan indicates that his objective was not simply to gain admittance to the bar of Upper Canada. He may have already been contemplating a career that would go beyond the parameters of a small town legal practice. This decision to study law outside the country might also have been an indication that he viewed his career as extending beyond the national level.

At the University of Michigan, Mills developed a keen interest in constitutional law. He studied under a leading American constitutional scholar, Thomas McIntyre Cooley. Cooley appears to have had a lasting impact on Mills' understanding of division of powers. In the wake of the American Civil War, the American model of federalism was equated with instability and anarchy in Upper Canada.<sup>9</sup> Cooley was an expert on the

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<sup>4</sup> Robert Vipond and Georgina Feldberg, "The Law of Evolution and the Evolution of the Law: Mills, Darwin, and Late-Nineteenth-Century Legal Thought," in *Essay in the History of Canadian Law: In Honour of R.C.B. Risk*, ed. G.B. Baker and J. Phillips (Toronto: University of Toronto Press, 1999), 563.

<sup>5</sup> *Ibid.*, 563.

<sup>6</sup> *The Honourable Mr. Justice David Mills*, 2004, Supreme Court of Canada, 10 January 2006, <[http://www.scc-csc.gc.ca/aboutcourt/judges/mills/index\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/mills/index_e.asp)>

<sup>7</sup> Vipond, *David Mills*.

<sup>8</sup> Fred Landon, "Story of Indian Days Recalled in Letters of The Late Senator Mills," 1927, in Fred Landon, *The Honourable David Mills; a series of ten articles on the life of the Honorable David Mills, Senator of Canada*, 15.

<sup>9</sup> Vipond, *David Mills*.

theory of classical federalism and showed Mills how legislative power could be constitutionally divided between two levels of government, both of which were ‘sovereign in a qualified sense.’<sup>10</sup> The 1867 BNA Act contained defined spheres of federal and provincial power. Mills cultivated a friendship with Cooley and the two corresponded until Cooley’s death in 1898.<sup>11</sup> Mills graduated from the University of Michigan law school in 1867, the year of Canadian confederation. However, he did not become a member of the Ontario Bar until 1883. He decided first and foremost to pursue politics.<sup>12</sup>

In fact, Mills was elected as a Reformer to the House of Commons in the Dominion’s first election in 1867.<sup>13</sup> As a Member of Parliament in these early days of confederation, he had ample opportunity to use the knowledge of constitutional law he acquired with Cooley at the University of Michigan. International law scholar, Ronald St. John Macdonald said of Mills that “in the field of federalism, [he was] something of the one-eyed man in the kingdom of the blind.”<sup>14</sup> Mills represented the constituency of Bothwell for twenty-seven years. He also worked closely with leading Canadian political figures of his time like Sir John A. Macdonald, Sir Oliver Mowat, Edward Blake, and Sir Wilfrid Laurier. Mills also served as Minister of the Interior in Alexander Mackenzie’s cabinet from 1876-1878. During his political career, he publicly defended minority language rights in the North West, and broke with his own party on

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<sup>10</sup> *Ibid.*

<sup>11</sup> Landon, “Story of Indian Days Recalled in Letters of The Late Senator Mills,” 14-15.

<sup>12</sup> *The Honourable Mr. Justice David Mills*, 2004, Supreme Court of Canada, 10 January 2006, [http://www.scc-csc.gc.ca/aboutcourt/judges/mills/index\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/mills/index_e.asp)>

<sup>13</sup> *David Mills*, Marianopolis College, 10 January 2006, <<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>14</sup> Macdonald, 262.

the Manitoba schools question by asserting that the federal government had a constitutional obligation to provide separate schools in the province.<sup>15</sup>

Mills was perhaps best known as a staunch provincial rights supporter. He frequently represented Ontario before the courts in constitutional matters.<sup>16</sup> Perhaps most notably, in 1884, Mills argued the Ontario boundary case before the Judicial Committee of the Privy Council.<sup>17</sup> Robert C. Vipond asserts that Mills' "elaborate defense of provincial autonomy is arguably unparalleled in English Canada."<sup>18</sup> In 1887, when Edward Blake resigned his leadership of the Liberal Party, many expected that Mills or Sir Richard Cartwright would succeed him; however, Blake selected the lesser known Wilfrid Laurier. Although he may have experienced private disappointment, Mills publicly supported Blake's decision.<sup>19</sup>

Mills' expertise in constitutional law as well as his voracious reading habits earned him the grudging respect of Sir John A. Macdonald, a long standing political opponent, who referred to Mills as his "philosopher friend from Bothwell."<sup>20</sup> This was likely both a compliment and an insult. Fred Landon observed that "[t]he word "philosopher," used in a sort of old-fashioned and familiar manner, was not inappropriate when applied to Mills, for there were times when he seemed to live in air rarer than that in which his associates moved, as there were also times when his course of action seemed to lack that practical character which is associated in the public mind with politics."<sup>21</sup>

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<sup>15</sup> Vipond and Feldberg, 563.

<sup>16</sup> Macdonald, 262.

<sup>17</sup> Vipond and Feldberg, 563. See *St. Catherine's Milling and Lumber Company v. The Queen (1897)* 13 SCR 577

<sup>18</sup> Robert C. Vipond, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* (Albany, N.Y.: State University of New York Press, 1991), 134.

<sup>19</sup> Fred Landon, "The Philosopher from Bothwell," *Willisons Monthly* (September 1929): 4-5.

<sup>20</sup> Vipond, *David Mills*.

<sup>21</sup> Landon, "The Philosopher from Bothwell," at 1.

Mills' academic nature attracted criticism in a reliable way. George Ross, the Minister of Education, and later Premier of Ontario, described Mills as "the best read public man within my experience." However, Ross also stated that Mills "lived too much with his books. He got a reputation of being a doctrinaire, rather than a practical legislator."<sup>22</sup> Historian Lewis Morton supported Ross' assessment, describing Mills as "compulsively pedantic."<sup>23</sup> Many commentators have further noted that Mills lacked the charisma typically associated with political leaders. As Morton put it, Mills "possessed little magnetism, spoke ponderously, [and] tended to theorize at length."<sup>24</sup> Ultimately, as legal historian R.C.B. Risk noted, Mills "has never escaped the reputation of being a pedantic bore, lacking imagination and insight; he was, nonetheless, one of the most learned and intelligent of the lawyers"<sup>25</sup>

Mills had a variety of professional interests in addition to his political career. From 1882 to 1887, Mills was an editorialist for the *London Advertiser*.<sup>26</sup> He criticized the Macdonald government in a series of unsigned editorials written for this publication.<sup>27</sup> Robert C. Vipond called these editorials some of the richest political commentaries of the era.<sup>28</sup> Also in 1883, Mills was finally called to the bar. He practiced law intermittently, at a London, Ontario firm and later with one of his sons.<sup>29</sup> Mills also pursued an academic career. In 1885, he was one of the founders of the London Law School, where he served as chairman of the first curriculum committee and as "Professor of International Law and

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<sup>22</sup> George Ross, quoted in Cottam, 250-251.

<sup>23</sup> Vipond, *David Mills*.

<sup>24</sup> *Ibid.*

<sup>25</sup> R.C.B. Risk, "Constitutional Scholarship in the Late Nineteenth century: Making Federalism Work," *The University of Toronto Law Journal* 46 (1996): 431.

<sup>26</sup> *David Mills*, Marianopolis College, 10 January 2006, <<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>27</sup> Vipond, *David Mills*.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

the Rise of Representative Government.”<sup>30</sup> In 1888, Mills was appointed to the Chair of Constitutional and International law at the University of Toronto, which he continued to hold until 1897.<sup>31</sup>

Mills was appointed to the Supreme Court in 1902 after recommending his own appointment.<sup>32</sup> It is important to note that also Supreme Court of Canada appointments were not the prestigious positions they now are. He was, however, to serve for only one year, since he died suddenly on May 8, 1903.<sup>33</sup> In an obituary published in the *Canadian Law Times*, the author highlighted Mills’ distinguished career and made the comment that “He was undoubtedly well versed in constitutional law; he was an able journalist and writer of graceful verses; above all he was a man of sterling character, respected by everyone, and dearly loved by his friends.” The author was much more critical of Mills’ tenure as a Supreme Court justice, stating that “[h]is appointment was regarded by the Bar as an unsatisfactory one, from his want of experience as a practical lawyer,” and claiming that “he certainly added little to his reputation by his judicial work.” The author went on to comment that “...there is little doubt that he strove hard to master the cases which came before him, and it is not unlikely that excessive application, at his advanced age, was the cause of his sudden death—it was thought from the bursting of a blood-vessel.”<sup>34</sup>

## II. Canada-British Relations

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<sup>30</sup> Macdonald, 262.

<sup>31</sup> *David Mills*, Marianopolis College, 10 January 2006, <<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>32</sup> Vipond and Feldberg, 563

<sup>33</sup> *David Mills*, Marianopolis College, 10 January 2006, <<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>34</sup> Editorial Review, “Sudden Death of Mr. Justice Mills,” *Canadian Law Times* 23 (1903): 219.

David Mills became increasingly involved in international law towards the end of his life. Mills' greatest contributions to international law came after his defeat in the 1896 election. He was appointed to the senate where he served as Minister of Justice from 1897-1902.<sup>35</sup> In this role, Mills became involved in Canadian foreign policy and international law. He also published extensively during this time on international law matters. His educational experience in the United States and his political career gave him a unique outlook on international law. Keeping with those experiences, Mills was primarily interested in international law matters involving Canada, Britain and the United States.

Mills never advocated formal independence from Britain.<sup>36</sup> He had a high opinion of the British parliamentary system and its institutions.<sup>37</sup> Mills greatly admired Queen Victoria, whom he regarded as an "ideal monarch who ruled according to well-settled, constitutional principles."<sup>38</sup> Mills wanted Canada to maintain its connection with Britain out of a sense of loyalty, appreciation of British culture and institutions, and "because he feared that a completely independent Canada would become a simple appendage of the United States."<sup>39</sup> For Mills, loyalty to Britain played a key role in building and maintaining a Canadian identity separate from the United States.<sup>40</sup>

Mills' fondness for British institutions was evident in 1901 when Prime Minister Laurier sent Mills, in his capacity as Minister of Justice, to London to represent Canada

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<sup>35</sup> *David Mills*, Marianopolis College, 10 January 2006,

<<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>36</sup> Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 118.

<sup>37</sup> *Ibid.*

<sup>38</sup> McMurchy, 566.

<sup>39</sup> *Ibid.*, 569.

<sup>40</sup> Sylvie Lacombe, "Imperial Loyalty: the English-Canadian Ideal of Christian Universality," in *Imperial Canada 1867-1917*, ed. C.M. Coates (Edinburgh: University of Edinburgh, 1996), 188.

at the Colonial Conference. At issue was the proposed reorganization of the Judicial Committee of the Privy Council. Until 1949, the Supreme Court of Canada was not the court of last resort for Canadians; litigants could appeal to the Privy Council in London.<sup>41</sup> One matter to be discussed was whether an imperial court of appeal should be established in London.<sup>42</sup> As Minister of Justice of the senior colony, Mills was appointed chairman of the conference.<sup>43</sup> In a detailed memorandum, Mills expressed his vehement opposition to the proposed transfer of the Judicial Committee of the Privy Council's functions to the House of Lords.<sup>44</sup> Mills' opposition was twofold: first, he preferred the status quo and contended that most Canadians were satisfied with the Privy Council, and second, Mills thought it would be inefficient to seat colonial representatives in the House of Lords, as they would have to consider issues that were of interest only to Britain.<sup>45</sup> Mills delivered a speech at the conference in which he reiterated Canada's opposition to any major changes:

That feeling is due to the fact that for a long series of years the decisions of the Judicial Committee of the Privy Council have been eminently satisfactory to the people of Canada, especially as they say in the interpretation of our Constitutional Act. We think that the decisions of the Judicial Committee of the Privy Council have gone a long way to make that Act workable, and the people of Canada are highly satisfied with these decisions not only when examined critically as decisions of law, but they feel the working of the British North America Act as free from friction as the written constitution can be.<sup>46</sup>

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<sup>41</sup> Macdonald, 262.

<sup>42</sup> McMurchy, 599.

<sup>43</sup> *Ibid.*, 599.

<sup>44</sup> *Ibid.*, 600.

<sup>45</sup> *Ibid.*

<sup>46</sup> Public Archives of Canada, Laurier Papers, *Minutes and Proceedings of the Conference on Proposed Final Court of Colonial Appeal*, June 1901, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 600-601.

Upon returning to Canada, Mills was confident that his attempts had been successful and he wrote his friend, Oliver Mowat asserting that “My impression is that no radical change will be made either in the constitution of the House of Lords or with respect to the Judicial Committee.”<sup>47</sup> In the end, Mills’ assessment proved accurate.<sup>48</sup>

While Mills wanted to maintain Canada’s imperial connection to Britain, that did not mean that he was not in favour of increased autonomy for Canada. Indeed, he was an avid supporter of Canada extending its sovereignty into foreign affairs.<sup>49</sup> However, he recognized that there was a tension between increased independence and maintaining the imperial connection. In the Senate, Mills asserted:

If we follow out the doctrine of our constitution to its legitimate conclusion we have this doctrine; that so far as a treaty relates to external matters, the Crown may, by that treaty, bind all the Empire, but when you turn inwards towards the colony itself, or the United Kingdom itself, and undertake to deal with a matter which limits its legislative authority, restrains the one or other from acting as freely as it would have acted if no treaty existed, I take it the sound constitutional doctrine would necessitate the sanction of that by the parliament of the country that is to be so bound.<sup>50</sup>

In this quotation, Mills puts “the colony” on par with the UK itself. He suggests that the parliament of “the colony itself” should give its consent to individual treaties and not be automatically bound by imperial fiat. It seems that he is playing out coordinate federalism he applied to federal/provincial relations but on the imperial/colony relationship. Mills recognized that while Canadian autonomy was a desirable end, Canada was dependent on British political, economic and military support.<sup>51</sup> For instance,

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<sup>47</sup> Mills Papers, *Mills to Mowat*, August 9, 1901, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 601.

<sup>48</sup> McMurchy, 601.

<sup>49</sup> *Ibid.*, at 566.

<sup>50</sup> Debates, July 5, 1900, 902-7. quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 566.

<sup>51</sup> McMurchy, 565

Mills believed that Canada should take greater responsibility for its defence, but he acknowledged that Canada required British protection.<sup>52</sup> Mills wrote that “[i]f Canada were separated to-morrow from the United Kingdom and became an independent state, she would be compelled to incur an enormous expenditure for the maintenance of a force for her protection, both by sea and land, and very imperfect that protection would be compared with that which she now enjoys as a portion of the British Empire.”<sup>53</sup> In a letter to Henri Bourassa, a French-speaking Member of Parliament, Mills emphasized that the movement toward Canadian autonomy should be a gradual process. Mills wrote that “...both power and responsibility must come to every self-governing section of the Empire, until we stand on footing of perfect equality in all things with the United Kingdom. But this must be, to be safe, a matter of growth, and not of artificial contrivance. Time and circumstances, and not the ingenuity of statesman, must determine our Imperial Constitution.”<sup>54</sup>

Mills’ views on imperialism, in many ways, mirrored his views on federalism. In both cases, he advocated home rule, whether that be home rule for the nation, or the province. Mills’ views were not uncommon for a provincial autonomist. Indeed, the nature of imperial and federal issues were so similar that provincial autonomists often used the language of one to describe the other.<sup>55</sup> For example, in an 1882 House of

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<sup>52</sup> McMurchy, 571.

<sup>53</sup> David Mills, “The Unity of the British Empire; Its Helps and Hindrances,” *Empire Review* (September 1901): 141, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 571.

<sup>54</sup> Mills Papers, *Mills to Bourassa*, December 17, 1901, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 569.

<sup>55</sup> Vipond, 91.

Commons debate the imperial Parliament was described as “a federal legislature for the Empire.”<sup>56</sup>

### III. Canadian Imperialism

By the turn of the twentieth century, Canada was a full-fledged participant in British imperialism abroad. In the context of Canadian history, the term imperialism does not simply refer to the practice of dominating and exploiting foreign territories, it more generally refers to the movement for a closer union of Canada with the British Empire through military and economic cooperation.<sup>57</sup>

Imperialist pursuits were popular among English-speaking Canadians, many of whom self-identified as “British.” As Canadian historian Donald Creighton noted, “[t]he imperial connection was not an outworn and tenuous constitutional tie...it was a strong emotional attachment, glowing with new pride and fresh hope and aims, vitalized by important national interests and national ambitions.”<sup>58</sup> Imperialists believed that Canada had a lot to offer the British Empire in regard to trade, military assistance, and common culture and values.<sup>59</sup> Likewise, it was believed that participation in imperialism would help advance Canadian interests.<sup>60</sup> Canadian imperialists believed that participation in the British Empire would help ameliorate economic depression, ethnic tension, provincialism, and threatened American annexation, and thus enable Canada to achieve

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<sup>56</sup> Canada, Parliament, *House of Commons Debates*, 14 April 1882, 910, quoted in Robert C. Vipond, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* (Albany, N.Y.: State University of New York Press, 1991), 91.

<sup>57</sup> Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism* (Toronto: University of Toronto Press, 1969), 3.

<sup>58</sup> Donald Creighton, *Canada's First Century 1867-1967* (Toronto: MacMillan of Canada, Toronto, 1970), 90.

<sup>59</sup> R. Douglas Francis, Richard Jones and Donald B. Smith, *Destinies: Canadian History Since Confederation* (Toronto: Harcourt Bruce Canada, 1992), 107.

<sup>60</sup> Francis, Jones and Smith at 107.

power and respect in the world order.<sup>61</sup> Creighton observed that, “Among Canadians there was now a greater sense of responsibility, a wider knowledge and stronger interest in world affairs, and above all, a greater consciousness of their own energy, power, and ambition. This expanding national outlook, this irrepressible impulse to play some part in international politics, was eager to find an outlet.”<sup>62</sup>

This national turn towards the international matched Mills’ own interests, which also extended beyond the local or provincial, as well as the new nation. Mills had long supported British imperialism, and argued that Britain should continue to extend its empire. He viewed freedom of commerce and political freedom as Britain’s greatest contributions to the empire.<sup>63</sup> Mills ascribed to a liberal form of imperialism under which Britain had a manifest destiny to realize its God-given mission to expand its empire.<sup>64</sup> However, he cautioned that “[t]he acquisition of territories should always have behind it some adequate commercial or political reason, and where the commerce of the Empire is not increased, where its defensive strength is not improved, there can be no proper motive for expansion.”<sup>65</sup> Mills’ views on imperialism were relatively well known throughout Canada, Britain and the United States as a result of a series of articles he wrote for *Canadian Magazine*, the *North American Review*, and the *Empire Review*.<sup>66</sup>

In turn-of- the-century Canada, nationalist and imperialist ideologies were closely intertwined. As historian Carl Berger notes, “imperialism was one form of Canadian

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<sup>61</sup> *Ibid.*

<sup>62</sup> Creighton, 91.

<sup>63</sup> McMurchy, 115.

<sup>64</sup> *Ibid.*

<sup>65</sup> David Mills, “The Unity of the British Empire; Its Helps and Hindrances,” *Empire Review* (September 1901): 143, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 564.

<sup>66</sup> McMurchy, 564.

nationalism.”<sup>67</sup> For a country in a situation in which it would inevitably feel the pull between its old status as a colony and its own new status as a nation state, cooperating with England in her imperial pursuits was a way for Mills and his contemporaries to have it both ways. Canadian imperialism was consistent with both loyalty to Britain and the desire for Canadian nationalism. Indeed, it was commonly believed that Canada would increase its status in the international order through partnership with Britain in imperial matters; this partnership would elevate Canadians from “Little Englanders” to players on the world stage.<sup>68</sup> David Cannadine wrote that for early twentieth century Canadians:

...imperialism was not the denial of Canadian independence: it was something better, something bigger, enabling Canada to participate in the greatest global community the world has ever seen. This was a captivating prospect: as long as Britain remained the greatest power and the greatest empire in the world, most Canadians wanted to belong to it, to be in on the act, and both sentiment and reason urged that they should.<sup>69</sup>

Participating in “something better, something bigger” was an opportunity Canadians wanted to capitalize on. Enthusiasm for the South African or “Boer” War was seen in just that light.

#### **IV. The Boer War**

The Boer War in South Africa was the high water mark for imperial fervor in Canada.<sup>70</sup> In 1899, war was declared between the Britain’s Cape Colony and the two Boer Republics, the Orange Free State and Transvaal. The Boers in those two Republics

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<sup>67</sup> Berger, 259.

<sup>68</sup> Lacombe, 188.

<sup>69</sup> David Cannadine, “Imperial Canada: Old History, New Problems,” in *Imperial Canada 1867-1917*, ed. C.M. Coates (Edinburgh: University of Edinburgh, 1996), 10.

<sup>70</sup> Robert J.D. Page, “The Canadian Response to the “Imperial” Idea during the Boer War Years,” in *Canadian History Since Confederation: Essay and Interpretations*, ed. B. Hodgins and R.J.D. Page (Georgetown, Ontario: Irwin-Dorsey Limited, 1979), 335.

were descendants of the Dutch settlers in South Africa.<sup>71</sup> The discovery of gold and diamonds strained the already tense relationship between the Boer Republic and English colony, both of which wanted control of Southern Africa. The conflict escalated and the British imperialists viewed a war as an opportunity to, once and for all, defeat the Boers and annex their territory into the British Empire.<sup>72</sup>

Almost immediately, the South African War attracted considerable interest in Canada. Toronto and English-language newspapers in Montreal enthusiastically supported the British position.<sup>73</sup> Mills, like most English-speaking Canadians, believed that Britain's actions were justified. The popular belief was that Britain was not motivated solely by conquest, but also by the oppression of British subjects in South Africa, and thus had the right to intervene.<sup>74</sup> In July 1897, after the abortive Jameson Raid and before war was officially declared, Mills wrote his close friend, Edward Blake disclosing that "My sympathy in the Transvaal matter was with the [British] raiders. My dissatisfaction with them is due to their failure. A more illiberal and thoroughly selfish class of men than the Boers of South Africa does not exist."<sup>75</sup> In regard to President Kruger of the Boer Republic, Mills declared that "a more narrow-minded, a more heartless tyrant has not governed a civilized community during the present century."<sup>76</sup>

Canada's entry into the war was politically complex. Lord Minto, the Governor General, and Major General Edward Hutton, commander of the Canadian militia, made

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<sup>71</sup> Francis, Jones and Smith at 111.

<sup>72</sup> *The Junior Encyclopedia of Canada*, Vol. 1, s.v. "South African War."

<sup>73</sup> Francis, Jones and Smith at 111.

<sup>74</sup> McMurchy 573.

<sup>75</sup> Public Archives of Ontario, Blake Papers, Mills to Blake, July 17, 1897, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 572.

<sup>76</sup> Debates, June 8 1900, 585, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 573.

plans for a Canadian contingent to join in the conflict, without informing Prime Minister Laurier. This led to a report in a reputable publication, *Canadian Military Gazette*, that Canada would send troops and a premature statement from British Colonial Secretary Joseph Chamberlain thanking Canada for its contribution.<sup>77</sup> Despite public support for the war, Prime Minister Laurier refused to dispatch troops without Parliament's consent. Mills agreed that the dispatching a contingent required approval of Parliament, but he publicly campaigned for Canada's entry into the war.<sup>78</sup> Mills also reminded his fellow politicians that the *Militia Act* gave Britain the ability to call Canadian militia for service within Canada and abroad.<sup>79</sup> Mills strongly believed that when one part of the British Empire was involved in a war, the whole empire should be involved. To this end, Mills advocated contributions on a voluntary basis.<sup>80</sup> From his perspective, it would be unfair for Canada to refuse assistance to Britain as "[w]e cannot say to the United Kingdom you must join us in conflict when the quarrel is ours, you must fight alone when it is yours."<sup>81</sup> In the end, Laurier announced that the Canadian government would equip and transport a contingent of one thousand volunteers, who would become the British government's responsibility upon their arrival in South Africa.<sup>82</sup>

In a speech, advocating Canada's involvement in the war, Mills declared that: "The Imperial Government ... trust us with the purpose of settling the difficulties of an international character, and we can trust her in determining what is just and fair and right

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<sup>77</sup> Francis, Jones and Smith at 111.

<sup>78</sup> McMurchy, 573.

<sup>79</sup> *Ibid.*, 574.

<sup>80</sup> *Ibid.*, 571.

<sup>81</sup> Mills Papers, Lectures on Behalf of Ridgetown Library Fund, Box 23, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 571-572.

<sup>82</sup> Francis, Jones and Smith at 112.

between the British people of South Africa and the people of the Transvaal.”<sup>83</sup> In fact, Mills’ views on this matter went deeper; he stated:

Let it not then be supposed that such a war is one which but little concerns us, or that we are not called upon to make any sacrifice, from domestic considerations, to uphold the greatness of our motherland. It would once more become a question whether any portion of mankind should possess free institutions. We should be devoted to freedom and to peace; but we must not forget that these are made more secure where it is seen that they are so dearly prized that we are ready to make some sacrifices for their preservation. We cannot stand still. We ought to advance; but we must not forget that increased power and greatness must be accompanied by increased responsibilities, and we would prove ourselves unworthy to share in the sovereign authority of a great Empire, if we attempt to shift to the shoulders of others the burdens which should in justice, rest upon our own.<sup>84</sup>

Mills became a well-known proponent of the South African War and Canada’s involvement in it. Mills publicly stated his views on the war in the Senate, in articles, in interviews and in public speeches.<sup>85</sup> Mills also delivered a series of lectures on the history of British colonialism in South Africa.<sup>86</sup> In the Senate, Mills defended Britain tactics. He adamantly insisted that the British blockade and contraband list constituted justifiable measures under international law.<sup>87</sup>

Mills also expressed his conviction that the Canadian people were in favour of Canada’s involvement, and used this fact to justify Canadian involvement. Publicly Mills stated, “I am an imperialist as I believe every Canadian is.”<sup>88</sup> Privately, he expressed some doubts regarding public opinion among French-Canadians. Writing to Andrew

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<sup>83</sup> untitled, *British Empire Review* (March 1900): 149-150.

<sup>84</sup> David Mills, “The Evolution of Self-Government in the Colonies,” *Canadian Magazine* II (February, 1896): 543, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 572.

<sup>85</sup> McMurchy, 573.

<sup>86</sup> *Ibid.*, 572.

<sup>87</sup> McMurchy, 575.

<sup>88</sup> Mills Papers, Scrapbook IV, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 574.

Pattulo, Member of the Legislative Assembly for Woodstock, Mills wrote that, “[t]here are two things, of course, to be considered- the state of public feeling in all other parts of the Dominion and the state of public feeling in Quebec. The problem presents many difficulties....”<sup>89</sup> Indeed, French-Canadians were strongly opposed to Canada’s involvement.<sup>90</sup>

As the war progressed, English-speaking Canadians enthusiastically celebrated Canadian victories, such as the Battle of Paardeberg.<sup>91</sup> By the end of the war, Canada sent 7300 men to South Africa, 245 of whom died in the war, the majority as a result of disease.<sup>92</sup> In regard to the casualties, Mills, in a letter to the *Globe* stated that:

The burdens that war brings are very great evils, and so are the destruction of life and property which it causes, and can never be lightly regarded. But after war the labour of the husbandman and the artisan go on as before. Society has at times been purified, and the moral health of a nation has been invigorated by war.<sup>93</sup>

Mills also wrote a book entitled, *The English in Africa*, which contained a history of colonial occupation of Africa and a discussion of current conflicts. It attracted considerable interest. For example, even before it was published, *The British Empire Review* anticipated its publication noting that “The Minister of Justice in the Laurier Government, Hon. David Mills, has written and will shortly publish a book entitled *The English in Africa*. It is said to be a strong defence of the position and policy of England in South Africa.”<sup>94</sup> In his book, Mills was preoccupied with the colonial powers and made

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<sup>89</sup> Mills Papers, Scrapbook IV, Mills to Pattulo, January 6, 1900, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 575.

<sup>90</sup> Francis, Jones and Smith at 112.

<sup>91</sup> *The Junior Encyclopedia of Canada*, Vol. 1, s.v. “South African War.”

<sup>92</sup> Francis, Jones and Smith at 112.

<sup>93</sup> Mills Papers, Scrapbook IV, *Globe*, August 11, 1900 quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 585.

<sup>94</sup> “Canadian Letter,” *British Empire Review* 1 (April 1900): 169.

little mention of the indigenous people of Africa. Mills again expressed his support for the British position, writing:

As long as British trade in Africa was not threatened by the hostile policy of other states, there was no special necessity to extend the Empire, or to assume the cost and the responsibility of governing regions outside of the Empire in which British trade had been firmly established; but when it became apparent that the only way the trade could be held was by the acquisition of the country, its also became a commercial defence to extend the Empire into those regions into which British geographers, and merchants and missionaries had gone, and in which large sums of British capital had been invested. I trust that the importance of the acquisitions will be pretty clearly impressed on the mind of the reader, and that the Justice of the English case in the present war will clearly appear.<sup>95</sup>

Mills used his book to further advocate Canadian participation in the war.<sup>96</sup>

*The English in Africa*, written while Mills served as Minister of Justice,<sup>97</sup> was painstakingly researched. Mills purportedly reviewed hundreds of government reports.<sup>98</sup>

According to Mills' private secretary, J.D. Clarke, Mills had a longstanding interest in the English presence in Africa. In a tribute to Mills after his death, Clarke commented that:

Years before, he had read almost all the literature available on the subject of the Dark Continent and he had told me—the declaration proving prophetic---that the fate of Africa could only be decided in one of two ways, and that soon; either Great Britain had to assert herself and become the predominant factor that her territorial occupation warranted, or the nations of the European continent who had made conquests and the Dutch Boers would separately or collectively squeeze the Union Jack.<sup>99</sup>

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<sup>95</sup> David Mills, *The English in Africa* (Toronto: George N. Morang & Company, Limited, 1900), quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 574.

<sup>96</sup> Mills, *The English in Africa*, 353-554.

<sup>97</sup> Landon, "Senator Mills is Remembered for Learning," 32.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

This indicates that Mills' interest in the Boer War was not entirely politically motivated; he had an academic interest in the subject before Canadian political interests became involved.

## V. Social Darwinism

Mills' views on imperialism reflected these deeply ingrained late nineteenth and early twentieth ideologies, particularly Social Darwinism. Social Darwinism applied Charles Darwin's theory of evolution to social and cultural realms. Interestingly, Mills rejected Darwin's theory of natural selection. In his 1894 article "The Missing Link in the Hypothesis of Evolution, or Derivative Creation," published in *The Canadian Monthly*, Mills launched a scathing critique against Darwin's theory, asserting that it was completely without merit.<sup>100</sup>

Despite Mills' explicit rejection of Darwin's theory of evolution, he nonetheless applied Darwinian principles to the social realm. He advocated the popular Social Darwinist belief that the Anglo-Saxons were the 'fittest' race. In 1895, Mills published another article in *Canadian Magazine*, entitled "Saxon or Slav: England or Russia?" in which he contended "that it is not always the best that survives, but the fittest."<sup>101</sup> Mills took this belief a step further. S. Barry Cottam noted that Mills believed that the 'Anglo-Saxon race' was involved in a "struggle against the Slavic race for supremacy, a struggle that would continue, he believed, for the next two centuries before the Anglo-Saxons won

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<sup>100</sup> David Mills, "The Missing Link in the Hypothesis of Evolution, or Derivative Creation," *The Canadian Monthly* 3 (May-October 1894: 297-308), quoted in Robert Vipond and Georgina Feldberg, "The Law of Evolution and the Evolution of the Law: Mills, Darwin, and Late-Nineteenth-Century Legal Thought," in *Essay in the History of Canadian Law: In Honour of R.C.B. Risk*, ed. G.B. Baker and J. Phillips (Toronto: University of Toronto Press, 1999), 561.

<sup>101</sup> David Mills, "Saxon or Slav: England or Russia?" *Canadian Magazine* 4 (November 1884-April 1895): 518-530, quoted in Robert Vipond and Georgina Feldberg, "The Law of Evolution and the Evolution of the Law: Mills, Darwin, and Late-Nineteenth-Century Legal Thought," in *Essay in the History of Canadian Law: In Honour of R.C.B. Risk*, ed. G.B. Baker and J. Phillips (Toronto: University of Toronto Press, 1999), 561.

in the end.”<sup>102</sup> In his speeches and writings, Mills frequently differentiated between *civilized* Anglo-Saxons and *barbaric* indigenous peoples. For example in the *English in Africa*, Mills referred to African nations as barbarous or semi-barbarous.<sup>103</sup> This division of the world into civilized and barbarous peoples shows his acceptance of this racial hierarchy.<sup>104</sup>

Mills used Social Darwinism to justify imperialism. He believed that Anglo-Saxons exceeded other races in terms of customs, values and legal systems.<sup>105</sup> For Mills, the extension of the British Empire was a logical extension of Anglo-Saxon superiority, and the demise and disempowerment of “inferior” indigenous populations was a sad but inevitable part of nature.<sup>106</sup> The emphasis was on the civilizing mission of Anglo-Saxons, the so-called “white man’s burden,” as well as the desirability of Christian civilizations rather than *aggressive* imperialism.<sup>107</sup> In the *English in Africa*, Mills argued that:

English dominion has already extended over the best portions of the African continent. I hope, that at no distant day, British authority will stretch continuously from Alexandria in the north to Cape Town in the south, and from Suakin on the Red Sea to Lake Tchad, and thence to the Atlantic coast. England is marking upon the continent of Africa the cross of St. George as her possession. I say with all my heart may she complete it, and may she be worthy to make it, while the world endures, indelible.....It is to the interest of Africa and its people that she should connect the west with the east; for she is doing more for the Dark Continent, than all the rest of the civilized world besides. It is impossible to read the history of the century now closing, without feeling that our Empire has a destiny that is indeed

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<sup>102</sup> S. Barry Cottam, “Indian Title as a ‘Celestial Institution’: David Mills and the *St. Catherine’s Milling Case*,” in *Aboriginal Resource Use in Canada : Historical and Legal Aspects*, K. M. Abel, ed., (Winnipeg: University of Manitoba Printing Press, 1991), 259.

<sup>103</sup> Mills, *The English in Africa*, 8.

<sup>104</sup> Cottam, 250.

<sup>105</sup> *Ibid.*, 259

<sup>106</sup> *Ibid.*

<sup>107</sup> McMurchy, 6-7.

manifest, if it be adhered to with prudence, and upheld with humanity and courage.<sup>108</sup>

Mills' Social Darwinist views were not restricted to the international sphere; he employed similar arguments in the domestic Aboriginal case *St. Catherine's Milling and Lumber Co. v. The Queen*<sup>109</sup> Mills was the lawyer for the province of Ontario. He, along with Oliver Mowat, Edward Blake and William Cassels, successfully represented the province before the Ontario Court of Appeal and the Supreme Court of Canada. Although Mills did not argue the case before the Privy Council, he is widely credited with formulating Ontario's ultimately successful arguments.<sup>110</sup>

For more than a century, the Privy Council's decision in *St. Catherine's Milling*<sup>111</sup> shaped judicial perceptions of Aboriginal land rights in Canada.<sup>112</sup> In *St. Catherine's Milling*, the Privy Council resolved a jurisdictional dispute between the Province of Ontario and the Dominion, holding that "lands reserved for the Indians" were not transferred to the Dominion by the property provisions of the *Constitutional Act, 1867*. Rather, underlying title to the land remained with the Crown, and therefore belonged to the province.<sup>113</sup> In 1873, the Saulteaux Ojibwa signed Treaty 3 with the federal government surrendering reserve and hunting land in northwestern Ontario. The Dominion then granted a timber lease on these lands to the St. Catherine's Milling

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<sup>108</sup> Mills, *The English in Africa*, 36-37.

<sup>109</sup> *St. Catherine's Milling and Lumber Company v. The Queen* (1897) 13 SCR 577.

<sup>110</sup> Sidney L. Harring, "A More Than Usually Degraded Indian Type: St. Catherine's Milling and Indian Title Cases" in *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, ed. Sidney L. Harring (Toronto: University of Toronto Press, 1998), 135.

<sup>111</sup> *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46.

<sup>112</sup> Cottam, *Indian Title as a 'Celestial Institution'*, 250.

<sup>113</sup> *Ibid.*, 248.

Company.<sup>114</sup> Ontario had recently been awarded the disputed territory in a boundary dispute and argued that this lease was invalid, since the Dominion did not hold the underlying title. At issue for both the province and the Dominion was not Aboriginal rights, but rights to the extinguished Aboriginal claim.<sup>115</sup> Because the land was originally owned by Aboriginals, the case raised the issue of the meaning of s. 91 (24) of the BNA Act which gave the federal government jurisdiction over “land reserved for Indians.”<sup>116</sup> The argument turned on the nature of Aboriginal interests in the lands. The federal government relied on the idea that there was such a thing as Aboriginal title, which could be transferred to the federal government. The province, on the other hand, argued that the land in question was Crown land: Aboriginal peoples did not have title, only a lesser right to “occupy and use the lands.”<sup>117</sup> Furthermore, the province contended that even if the Aboriginal people had at one time possessed title, this title belonged to the Crown as a result of discovery, conquest, and settlement. Any modern Aboriginal land rights were due to the generosity of the Crown.<sup>118</sup> Aboriginals were denied ownership of their lands, and were left with poorly defined usufructuary rights.<sup>119</sup>

Mills, a politician and staunch provincial rights supporter, was one of the few Canadian lawyers with experience in Aboriginal title claims. Mills served as *Minister of the Interior* in the Liberal government of Alexander MacKenzie (1873-78), and Indian Affairs was among his responsibilities. Mills was heavily involved in matters of Indian title in British Columbia. At that time, Mills publicly asserted that the Aboriginal peoples

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<sup>114</sup> Harring, 132.

<sup>115</sup> Cottam, 249.

<sup>116</sup> *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91 (24), reprinted in R.S.C. 1985, App. II, No. 5.

<sup>117</sup> Harring, 132.

<sup>118</sup> Cottam, 248.

<sup>119</sup> Harring, 125.

of British Columbia had a legally recognizable interest in land.<sup>120</sup> In an 1881 parliamentary debate, Mills asserted that “both the British Parliament and American Supreme Court have always recognized a title in the Indians—not a political sovereignty over the country, but a personal right of property in the soil.”<sup>121</sup> However, by the time Mills became involved in the *St. Catherine’s Milling* case, his views on Indian title appear to have changed. His arguments certainly did. Mills now denied that the government’s acknowledgement of “Indian title” meant that the land legally belonged to Aboriginal peoples. He instead contended that this recognition was merely a tool of political expediency, designed to preserve good relations between Aboriginal peoples and the Canadian government.<sup>122</sup> Mills further asserted that Aboriginal peoples were not capable of governing themselves or holding land.

Mills’ shifting views cannot be wholly attributed to the fact that he was a staunch provincial rights supporter who was asked to craft an argument for the province of Ontario denying Indian title. Likewise, these views cannot be solely attributed to the fact that Indian cooperation was no longer regarded as necessary, in the new Canadian political climate where Aboriginal relations were not seen as losing importance. Like his views on imperialism, Mills’ views on Aboriginal property rights, also reflect Social Darwinism and Lockean conceptions of property.

In an 1885 article published in the *London Advertiser*, Mills summarized the provinces’ arguments:

We deny altogether that the Government can acquire any title from the Indians. We say that they have no authority to negotiate with them. The rule recognized by long and well-established usage on the

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<sup>120</sup> *Ibid.*, 135.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

part of the English Government and the law officers of the Crown is this: that the Crown may deal with the Indian title so long as the Crown has the fee in the soil. But when the Crown conveys away lands in fee simple to any of its subjects, the party to whom such conveyance is made are the only parties who can properly deal with the Indians for the extinguishment of the title. In fact, the Indian title is no title at all. It is merely a purchase of a good will of the Indians as a matter of public policy...there is no principle more clearly settled than this: that is the party in whom the fee is that alone can deal with the Indians. As long as the title is in the Crown, the Crown may negotiate with the Indians for the surrender of the Indian title. But when the Crown conveys away its interest its right to deal with the Indians no longer exists. Now, in the case of the Northern part of Ontario, the British North American Act makes a statutory conveyance of the entire country...to the Provincial Legislature, and it is absurd for the Government of Canada to undertake to deal with the Indians for the acquisition of property which...is already declared to be invested in one of the Provinces of the Dominion...<sup>123</sup>

In stating that “Indian title is no title ... merely a purchase of good will of the Indians as a matter of public policy,” Mills ingrained elements of racism and cultural imperialism into the common law that continued to influence Canadian judgments for a century afterward.

Many of Mills’ arguments against Indian title were premised on an ideology of productivity. He was heavily (and conveniently) influenced by John Locke’s writings on labour and property. Mills argued that:

There was no conception of property in land among the North American Indians, until it was suggested by white men. They had expended no labor upon it. The occupant of the cave was undisturbed while in possession; but if he abandoned it, and another found it vacant, he did not think of setting up title based upon previous occupancy. Mr. Locke observes that where human labor is mingled with the soil, the idea of property, at once, arises, just as it does, where a piece of wood is shaped into a bow or arrow, or into a piece of household furniture. The returned hunter

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<sup>123</sup> David Mills, “The Indian Title,” *London Advertiser*, March 24, 1885, quoted in S. Barry Cottam, “An Historical Background of the St. Catherine’s Milling and Lumber Co. Case” (LL.M. diss., University of Western Ontario, 1987), 99.

that makes no claim to the cave which he has abandoned will do so, in case he finds another occupying the hut, which by his labor, he has erected, and which but for that labor would not have existed.<sup>124</sup>

Aboriginal peoples' collective conceptions of property rights were clearly contrary to the Lockean idea of individual property rights that must be "mingled" with human labour in a way that would be visible to European eyes.

Mills asked of collective rights: "Where is the evidence that a collective community are entitled to land, or to mines of gold and silver, as inalienable possessions?" He further argued that an acknowledgment of a collective interest "would lead you a long way back towards barbarism."<sup>125</sup> In a document found among Mills' papers, Mills argued that Aboriginals:

Had not property in [the land]. Nor had they any notions pointing in that direction, until white men by undertaking to deal with them for it, taught them to claim it & to traffic[sic] in it, because it brought them more than the skins of animals which they hunted and bartered away...Civil institutions could not be said to have had an existence amongst them. There were neither laws nor law givers. Those civil institutions without which there can be no real property, had no existence. They had no need of such property. Large parts of the continent were unoccupied. They were so few in numbers, so few that, rude as was their means of subsistence they experienced little want...When an Indian tribe found ample means of subsistence in a particular locality, they usually remained, not because they claimed a property right in the soil, but because no particular motive presented itself for going elsewhere...The conduct of the Indians no less than their social condition negatives the notion of property in the soil.<sup>126</sup>

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<sup>124</sup> Mills Papers, "Henry George's Theory of Property in Land and Taxation," box 4278, quoted in S. Barry Cottam, "An Historical Background of the St. Catherine's Milling and Lumber Co. Case" (LL.M. diss., University of Western Ontario, 1987), 113.

<sup>125</sup> Cottam, *Indian Title as a 'Celestial Institution'*, 260.

<sup>126</sup> Mills Papers, "undated document with first and last pages missing, pg 37-41," box 4279, quoted in S. Barry Cottam, "An Historical Background of the St. Catherine's Milling and Lumber Co. Case" (LL.M. diss., University of Western Ontario, 1987), 110.

These statements show that Mills' refusal to recognize systems of property that were not in accordance with his European assumptions on 'ownership.' In his speeches and writings, Mills frequently differentiated between *civilized* Anglo-Saxons and *barbaric* Aboriginal peoples. *St. Catherine's Milling* entrenched Victorian notions of racial hierarchy into the common law.<sup>127</sup> Ultimately, Mills, like others of his time, expected that Aboriginal peoples would simply disappear, taking their land title concerns with them.<sup>128</sup> The sting of the reality that Canada was itself a colony did not stop Mills from participating in the re-creation of Canada's own version of white man's burden vis-à-vis the colonizing of Canadian Aboriginal peoples.

Mills' arguments in the *St. Catherine's Milling* case shed light on his views on colonialism. Mills viewed Aboriginal Canadians in much the same way that he viewed non-Europeans, and used very similar arguments to justify depriving them of their land, and the right to make decision about their affairs. His views were not unusual for his time. As Martti Koskenniemi, noted that in the late nineteenth century, *civilization* was used for evaluating international law. It was used to justify European expansionism, and the assimilation of Aboriginal peoples.<sup>129</sup> Koskenniemi further observed that the fact "[t]hat "civilization" was not defined beyond the general and was an important aspect of its value. It could be used as shorthand for the qualities that international lawyers valued in their own societies, playing upon its opposites: the uncivilized, barbarian, and the

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<sup>127</sup> Anthony J. Hall, "*The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada*" in Kerry M. Abel, ed., *Aboriginal Resource Use in Canada : Historical and Legal Aspects* (Winnipeg: University of Manitoba Printing Press, 1991), 269.

<sup>128</sup> S. Barry Cottam, "An Historical Background of the St. Catherine's Milling and Lumber Co. Case" (LL.M. diss., University of Western Ontario, 1987), 111.

<sup>129</sup> Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 102.

savage.”<sup>130</sup> As colonialism expanded into Africa, Europeans came into contact with cultures that differed greatly from what they perceived as civilized.<sup>131</sup> The ‘civilizing mission’ and ‘white man’s burden’ were useful ideologies that not only justified colonialism, but added a luster of virtue that the pursuits of garnering natural resources and accessing cheap labour lacked. Thus, it seems that Mills’ views on colonial expansion were very much in line with the dominant Anglo-Canadian mode of thought at the turn of the century.

## **VI. Canadian-American Relations and the Alaska Boundary Dispute**

It is noteworthy that although Mills chose to attend law school in the United States and used ideas he learned at the knee of Thomas M. Cooley in his thinking about coordinate federalism in the ways we have seen, he became decidedly Anti-American towards the end of his life<sup>132</sup> In his writings, Mills frequently compared the American political system with the British and Canadian systems, and believed that where they differed, American-style federalism was inferior.<sup>133</sup> Mills supported the British in conflicts it had with the United States.

So, for instance, when Britain and the United States became involved in disputes in South America, Mills supported Britain.<sup>134</sup> For example, Mills was very interested in international law issues involving the newly constructed Panama Canal, and discussed his views in two articles for the *Empire Review*.<sup>135</sup> Mills believed that the canal would be

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<sup>130</sup> *Ibid.*, 103.

<sup>131</sup> *Ibid.*, 101.

<sup>132</sup> McMurchy, 586.

<sup>133</sup> *Ibid.*, 116.

<sup>134</sup> *Ibid.*, 569.

<sup>135</sup> David Mills, “The Monroe Doctrine and Inter-oceanic Canal,” *Empire Review* Part I (November, 1901) and Part II (December 1901).

advantageous for Canada; however, he wanted the canal's neutrality guaranteed.<sup>136</sup> Mills expressed his concerns, “[i]t is from the United States that the danger proceeds, and the guarantee of neutrality is a guarantee against the danger which she threatens.”<sup>137</sup>

Mills' anti-American sentiments, indeed those of most of his contemporaries, are perhaps best demonstrated in the Alaska Boundary Dispute. John Barlet Brebner, a historian specializing in Canadian-American relations, described the dispute as “the most unfortunate single incident, the worst setback of reasonable understanding of Canadian-American relations since the War of 1812.”<sup>138</sup> The Alaska Boundary Dispute was a disagreement between Canada and the United States over the boundary of the southern strip of Alaska, called the Alaskan Panhandle. The dispute was based on the description of the boundary in the *Anglo-Russian Treaty* of 1825, which established a boundary line between British and Russian territories as running north from Portland Channel “to follow the summit of the mountains situated parallel to the coast,” but not to exceed ten marine leagues from the sea.<sup>139</sup> In 1867, the United States purchased Alaska from Russia. The vague description of the border was sufficient when there was little interest in the region; however, after the Klondike gold rush, both Canada and the United States needed to ascertain the precise boundary. Canada was especially concerned with access to a Pacific port, so that gold miners could bring in supplies without paying American duties.<sup>140</sup> The Canadian interpretation of the boundary would give Canada access to the ocean, while the American interpretation would deny such access.<sup>141</sup>

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Anglo-Russian Treaty*, 1825, quoted in Francis, Jones and Smith at 115.

<sup>139</sup> Francis, Jones and Smith at 115.

<sup>140</sup> *Ibid.*

<sup>141</sup> Creighton, 96.

The Canadian government was determined not to concede to the United States on this matter. This determination was spurred by the success of the Canadian military in the South African War as well as Canada's newfound economic prosperity in the late nineteenth century.<sup>142</sup> Like the Boer War, the Alaska Boundary Dispute incited intense feelings of Canadian nationalism.

Mills became deeply interested in the Alaskan Boundary Dispute.<sup>143</sup> As early as 1879, he recognized the possibility of a dispute over the boundary. He believed that the outcome would depend on the interpretation of the *Anglo-Russian Treaty*.<sup>144</sup> Years later, when the dispute came to a head, Mills sought a more public forum for his views. He gave speeches in the Senate and interviews to Canadian and American newspapers at the turn of the century.<sup>145</sup> It is evident from these materials that he was becoming increasingly frustrated with the United States. For two decades – all of which Mills was actively engaged in debate about the dispute -- Canada and Britain made repeated requests to the United States to have the boundary determined. However, Washington refused to respond to these concerns.<sup>146</sup>

In his interventions on the issue, Mills heavily criticized the ultra patriotic element in the American Senate: “The people of the United States are the most difficult in the world to deal with, and this is particularly due to the fact that they never permit, or permit in but a few instances, both sides of any question to get before the public mind.”<sup>147</sup> Mills abhorred the intimidation tactics used by President Roosevelt against Canada and

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<sup>142</sup> Francis, Jones and Smith at 115.

<sup>143</sup> McMurchy, 588-589.

<sup>144</sup> Debates, March 10, 1879, I, 231-32, quoted in Donald J.A. McMurchy, “David Mills: Nineteenth Century Canadian Liberal” (Ph.D. diss., University of Rochester, 1969), 589.

<sup>145</sup> McMurchy, 589.

<sup>146</sup> Creighton, 93.

<sup>147</sup> *Ibid.*, 590.

Britain. Indeed, Roosevelt went so far as to repeatedly declare that even if Canada succeeded in legal forums regarding its claim on the territory he would ask Congress to fund a war so that the United States could “run the line as we claim it, by our own people, without any further regard to the attitude of England and Canada.”<sup>148</sup> As the dispute escalated, Roosevelt told the British embassy in Washington that it was “going to be ugly.” And he ensured that his statements were reported to Ottawa.<sup>149</sup>

Mills resented the use of these bullying tactics, especially when Canada’s attempts to compromise were rejected outright by the United States. Indeed, his desire for a compromise on the issue was so strong that he suggested that Britain, who technically controlled negotiations with the United States, trade its Panama Canal rights for American concessions on the Alaska boundary.<sup>150</sup> Not surprisingly, neither the Canadian or American sides considered the rights of indigenous peoples to the land. International law did not protect the rights of indigenous peoples at this time.<sup>151</sup>

Mills spoke out on the Alaska Boundary Dispute in a famous newspaper interview with the *Chicago Tribune* on August 14, 1899. His idea was to lay out the Canadian case to the American public. He was motivated by a desire to ensure the American public heard both sides of the issue, Mills had previously given two brief interviews with New York papers, but he told the *Chicago Tribune* interviewer that his “opinions were not very favourably received, or very carefully considered by some of your citizens.”<sup>152</sup> In his interview, Mills mentioned that several Washington correspondents of the New York

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<sup>148</sup> David Orchard, *The Fight for Canada: Four centuries of resistance to American expansionism* (Toronto: Robert Davies Multimedia Publishing, 1999), 94.

<sup>149</sup> *Ibid.*, 95.

<sup>150</sup> McMurchy, 590.

<sup>151</sup> Rob Huebert, “Melting Relations: The Evolving Canadian-American Arctic Partnership—Disputes, Challenges,” *Population Geography* 29, (2005): 127.

<sup>152</sup> David Mills, *The Canadian View of the Alaskan Boundary Dispute as stated by Hon. David Mills, Minister of Justice* (Ottawa: Government Printing Bureau, 1899), 3.

and Philadelphia press wrote that “Mills seemed to be still more ignorant than Sir Charles Tupper,” the leader of the Conservative party.<sup>153</sup>

In response to such aspersion, Mills stated in the *Chicago Tribune* article, speaking directly to the American public:

The natural inference from this kind of criticism is that every opinion at variance with the contentions which have been put forward in your country, and which for the most part meets with favour in your press, is quite undeserving of serious consideration. The impression made upon my mind is that vehement assertions and frequent repetitions, are to supersede careful investigation of the facts and the legitimate conclusions to be drawn from them.<sup>154</sup>

Mills’ statement is vague and round-about; it is rather abstract with little substance and is therefore unlikely to trump feelings of patriotism and national interest Americans would have.

Mills wanted the case to be heard before an International Tribunal. He criticized the US for their refusal to have the matter dealt with in this way.<sup>155</sup> He told the *Chicago Tribune* that “[w]e were of the opinion that there were two ways in which this difference might be amicably adjusted—by compromise, or by reference to a properly constituted tribunal.”<sup>156</sup> Mills outlined the many instances in which the Canadian government was willing to compromise and concede the majority of the disputed territory to the United States.<sup>157</sup> He also looked at Articles of the 1825 Treaty, which, in his view, indicated that the land belonged to Canada.<sup>158</sup> The “properly constituted” tribunal that Mills was recommending would have interpreted the treaty. Mills, who had written extensively on

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<sup>153</sup> *Ibid.*, 5.

<sup>154</sup> *Ibid.*, 4.

<sup>155</sup> *Ibid.*, 6.

<sup>156</sup> *Ibid.*, 8.

<sup>157</sup> *Ibid.*, 10.

<sup>158</sup> *Ibid.*, 18.

boundary disputes, placed great importance on treaty interpretation. For example, in a law school lecture on the Atlantic fisheries disputes between Canada and the United States, Mills spent considerable time discussing the proper interpretation of the *Treaty of 1783*, which he denied gave Americans unchecked liberty to fish in Canadian territories off the Atlantic Coast.<sup>159</sup> The fact that Mills gave such weight to treaty interpretation is interesting given that there was no set international law procedure for resolving boundary disputes at that time.

Mills ended the interview with the *Chicago Tribune* by asking for “a fair consideration of our side of the dispute by the people of the United States, to whom justice is far more important than success.”<sup>160</sup> The Canadian government was so impressed with Mills’ succinct yet powerful characterization of the Canadian side that it was published in pamphlet form by the Government Printing Bureau.<sup>161</sup>

Throughout the Alaska Boundary Dispute, Mills repeatedly warned Prime Minister Laurier and the other Canadian commissioners not to sacrifice Canadian interests. In his letter of January 25, 1899, to Laurier he wrote:

As to the Alaska boundary, it would be little short of a calamity to accept a mere easement, which would give us admission to a harbour on the Lynn Inlet. A concession which falls short of sovereignty is not worth taking. It would simply cripple us for active work elsewhere within our own limits, and would make us helots to the Republic, in building up a town, and investing money which they must ultimately control....

I am sure that in Ontario the public will be much better satisfied if you stand for your rights, than if you make what they regard as undue concessions for the sake of obtaining a treaty. The public will admire your pluck and will defend your action. But it will be a blow to the strong Imperial feeling which has grown up during the past

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<sup>159</sup>Mills, *International Law Lectures*: Lecture 15: Negotiation and Treatises, 543.

<sup>160</sup> *Ibid.*, 23.

<sup>161</sup> *Ibid.*

few years, if a treaty is concluded in which large concessions are made to the United States, especially where those concessions relate to questions of sovereignty. It will be said as it was said after the Washington Treaty was negotiated, that the Government of the United Kingdom are always ready to sacrifice this country at the demand of the United States, and that their protection is a sham; but it will be said that in this matter the Commissioners are, with one exception, Canadians, and they have abandoned the citadel that they were expected to defend.<sup>162</sup>

As Minister of Justice, Mills expected to draft a brief on Canada's legal position for the Canadian representatives on the Joint High Commission. Mills was very disappointed when Sir Louis Davies recommended that the Canadian government, instead, hire a private lawyer to draft the document. Mills wrote Prime Minister Laurier:

Of course, I had no wish to obtrude my services as Minister of Justice in dealing with the legal questions that might arise with respect to the question of the Alaska Boundary, nor to undertake work which the Commissioners desired to have placed in other hands; but I could not regard Sir Louis Davies' telegram as, to say the least, otherwise than highly irregular.<sup>163</sup>

The fact that Mills characterized the decision to consign the drafting to someone else as "highly irregular" shows how displeased he was that he was not authorized to formulate Canada's position before the Joint High Commission.

In the end, the Laurier cabinet, keeping with Mills' advice, continued to hold their position.<sup>164</sup> In 1902, Britain, the United States, and Canada agreed to appoint a six-member tribunal to resolve the issue. The tribunal was composed of three Americans, two

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<sup>162</sup> Public Archives of Canada, Laurier Papers, Mills to Laurier, January 25, 1899, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 591-592.

<sup>163</sup> Public Archives of Canada, Laurier Papers, Mills to Laurier, August 20, 1898, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 591-592.

<sup>164</sup> McMurchy, 592.

Canadians, and a British member, Lord Alverstone. Alverstone, hoping to strengthen Anglo-American relations, sided with the Americans.<sup>165</sup>

After the decision was released, President Roosevelt summed up the dispute in the following way:

I am very pleased over what has just been accomplished in the Alaska Boundary award. I hesitated sometime before I would consent to a commission to decide the case and I declined absolutely to allow any arbitration of the matter. Finally I made up my mind I would appoint three men of such ability and such firmness that I could be certain there would be no possible outcome disadvantageous to us as a nation; and would trust to the absolute justice of our case, as well as to a straight-out declaration to certain high British officials that I meant business, and that if this commission did not decide the case at issue, I would decline all further negotiations and would have the line run on my own hook. I think that both factors were of importance in bringing about the result. That is, I think that the British Commissioner who voted with our men was entitled to great credit, and I also think that the clear understanding the British Government has as to what would follow a disagreement was very important and probably decisive.<sup>166</sup>

Mills was dead by the time that the final decision was reached in the United States' favour in October 1903.<sup>167</sup> In the words of Donald McMurchy: "There is no doubt that he would have been shocked and dismayed at the results."<sup>168</sup> It would have been interesting to see Mills' reaction to the outcome, specifically how it would have impacted Mills' sense of loyalty to Britain.

Mills' letter to Laurier accurately predicted how Canadians would react. As demonstrated in the above letter to Laurier, Mills accurately predicted Canadians reaction if the British sided with the United States. Indeed, the unfavourable resolution of the

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<sup>165</sup> Francis, Jones and Smith at 116.

<sup>166</sup> Roosevelt Papers, Roosevelt to Theodore Roosevelt Jr., October 20, 1903, in Elting E. Morison, *Letters of Theodore Roosevelt Vol. III* (Cambridge: Harvard University Press, 1952), 635.

<sup>167</sup> McMurchy, 592.

<sup>168</sup> *Ibid.*

dispute led to increased cries for Canada to have more control over its foreign affairs.<sup>169</sup>

The decision reinforced the notion that only Canadians would look out for Canadian interests. Canadian nationalism intensified at the perceived ill-treatment by two international powers, a Britain that had failed to protect Canada's interests and a United States determined to advance its own. Nonetheless, Canada continued to negotiate the awkward situation of being caught between its political ties to Britain and its geographical proximity and economic ties to the United States.<sup>170</sup>

Despite the anti-American sentiments created for Mills by the Alaska Boundary Dispute, he ultimately desired cooperation between the United States, Canada, and Britain in international affairs.<sup>171</sup> He saw cooperation as key to progress and the expansion of Christianity. Writing to an American, Mills declared that:

There is no reason why the British Empire and the United States, if they cooperate in the maintenance of what is just and right abroad, if they give their moral support in favor of human progress, should not do a great deal to prevent oppression and misgovernment and to promote the extension over the world of a Christian civilization.<sup>172</sup>

In this Christian progress ideology, Mills assumed that the British Empire and the United States would generally share the same vision "of what is just and right abroad," even when there were competing interests and complications at home over Canadian and American boundaries.

## **VII. Mills and the Teaching of International Law in Canada**

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<sup>169</sup> Francis, Jones and Smith at 118.

<sup>170</sup> Hartwell Bowsfield, *Canadian-American Relations: The Background, 1967-1968*, Manitoba Historical Society, 3 March, 2006, <<http://www.mhs.mb.ca/docs/transactions/3/canadianamerican.shtml>>

<sup>171</sup> McMurchy, 570.

<sup>172</sup> Mills Papers, Letterbooks, Mills to Dr. D.R. Silver of Sydney, Ohio, October, 1898, quoted in Donald J.A. McMurchy, "David Mills: Nineteenth Century Canadian Liberal" (Ph.D. diss., University of Rochester, 1969), 571.

Mills balanced an academic career with his busy political career. In 1885, for instance, Mills was one of the founders of the London Law School (later to become the university law school of Western Ontario) in London, Ontario, serving as chairman of the first curriculum committee. He also taught a course called “International Law and the Rise of Representative Government” in 1885, the first year of the school’s existence.<sup>173</sup> In 1888, Mills was appointed to the “Chair of Constitutional and International Law” at the University of Toronto, a position he continued to hold until 1897.<sup>174</sup> At both schools, his lectures were scheduled so as not to conflict with his parliamentary duties.<sup>175</sup>

International law was taught at Canadian law schools beginning in the mid-nineteenth century.<sup>176</sup> In Ontario, introductory courses in international law were offered at Queen’s University, the University of Ottawa and the University of Toronto in the late 1880s.<sup>177</sup> International law scholar Ronald St. John MacDonal notes that given “that (obviously) there was no career structure for students of international law, it is remarkable that this subject was taught at all.”<sup>178</sup> International law was not perceived as too academic, or non-vocational, and was not marginal to the mainstream curriculum.<sup>179</sup>

In 1888, the year that Mills began his professorship at the University of Toronto, the Law Society of Upper Canada announced that completion of its own school program at Osgoode Hall was obligatory for students seeking admittance to the Ontario Bar.

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<sup>173</sup> Macdonald, *Part II*, 262.

<sup>174</sup> *David Mills*, Marianopolis College, 10 January 2006, <<http://www2.marianopolis.edu/quebechistory/encyclopedia/DavidMills-CanadianHistory.htm>>

<sup>175</sup> Macdonald, *Part II*, 263.

<sup>176</sup> Ronald St. John Macdonald, “A Historical Introduction to the Teaching of International Law in Canada: Part I,” *The Canadian Yearbook of International Law* 12 (1974): 67. MacDonal Part I pg 67

<sup>177</sup> Ronald St. John Macdonald, “A Historical Introduction to the Teaching of International Law in Canada: Part III,” *The Canadian Yearbook of International Law* 14 (1976): 247.

<sup>178</sup> *Ibid.*, 249.

<sup>179</sup> *Ibid.*, 250.

Attendance at the university program alone would not be enough to be admitted to the bar. This was an enormous blow for the Faculty of Law at the University of Toronto, and in 1892, while Mills was teaching, it was absorbed into the political science department.<sup>180</sup> In keeping with the practitioner bar-oriented aims of the school at Osgoode Hall, it did not include international law as part of its curriculum.<sup>181</sup> Given the centrality of Toronto to legal life in the province, this had a detrimental impact on the province-wide study of international law.

A set of Mills' typed lecture notes are located in the *David Mills Collection* at the Archives and Research Collections Centre at the University of Western Ontario.<sup>182</sup> The lecture notes are not dated, and it is not clear if these lectures were delivered at the London Law School, or the University of Toronto, or perhaps both.<sup>183</sup> The *David Mills Collection* contains a bound volume of his lectures on international law. These lecture notes total 755 pages.<sup>184</sup> Judging from them, it appears that Mills employed the "lecture method," which was the predominant teaching method in Ontario during that era.<sup>185</sup>

Mills was very demanding of his students, and he frequently offered advice on how to succeed in the study of law and ultimately in the legal profession. He urged his students to be industrious; according to Mills, "[t]he genius who succeeds in the study of any department of law, is the genius of the lamp;" by which he presumably meant the diligence of late-night study made possible by the use of lamplight. Mills went on to say that "Almost everything depends upon the zeal, the industry, and the perseverance, which

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<sup>180</sup> Macdonald, *Part I*, 103.

<sup>181</sup> Macdonald, *Part II*, 247.

<sup>182</sup> Mills Papers, "International Law Lectures," Box 4282, Archives and Research Collections Centre, D.B. Weldon Library, University of Western Ontario.

<sup>183</sup> Macdonald, *Part II*, 263.

<sup>184</sup> Mills Papers, *International Law Lectures*.

<sup>185</sup> Macdonald, *Part II*, 249.

you bring to the study of the subject”<sup>186</sup> – and how willing a student was to put in the required hours. John M. McEnvoy, Mills’ former student at the University of Toronto, in a tribute to Mills at the time of his death, spoke highly of Mills’ broad range of legal knowledge and characterized his lectures as “clear, precise and forceful.”<sup>187</sup>

In his first lecture on international law, Mills stressed that international law “is one of the few studies, which everyone ambitious to enter public life, should know something about.”<sup>188</sup> Such a statement shows that Mills viewed his course on international law as part of a large and liberal study of the law, which aimed beyond the narrow goal of equipping students to practice law. Mills also advocated an interdisciplinary approach to the study of international law, one that would require a knowledge of topics like history and politics:

The study of International Law is far from being a difficult study; it is closely allied with modern history, International Politics and political ethics. A knowledge of the one will facilitate the study of the other. Indeed, the boundaries which separate them from each other, are not always clearly defined; and so, it will be found, occasionally necessary, to step beyond the limits of law, into each of these departments, in order to make the principle of the law itself clear.<sup>189</sup>

In the same introductory lecture, Mills defined international law as “a body of rules which regulate the conduct and actions of independent states, in their intercourse with each other, and by which their rights and responsibilities are defined and determined.”<sup>190</sup>

This definition is typical of the time period.<sup>191</sup>

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<sup>186</sup> Mills, *International Law Lectures*, 2.

<sup>187</sup> Fred Landon, “Senator Mills is Remembered for Learning,” 1927, in Fred Landon, *The Honorable David Mills; a series of ten articles on the life of the Honorable David Mills, Senator of Canada*, 32.

<sup>188</sup> Mills, *International Law Lectures*, 2.

<sup>189</sup> *Ibid.*, 10-11.

<sup>190</sup> Mills, *International Law Lectures*, 12.

<sup>191</sup> MacDonald, *Part II*, 263.

Mills' lectures were heavily historical. Mills spent the majority of one lecture discussing the history of international law. He traced the origins of international law to ancient law, primarily Roman law.<sup>192</sup> Mills also emphasized the contributions of Grotius (1583-1645), who he called the "the first systematic writer on the subject of international law."<sup>193</sup> Each of Mills' subsequent lectures was also very historically-oriented with comparably little time focused on contemporary issues in international law. For example, the vast majority of his lecture on the Atlantic Fisheries was spent tracing the history of this area of law, and comparatively little attention was paid to contemporary disputes with the United States.<sup>194</sup> Mills' historical approach was not unusual. MacDonald notes that in the pre-first world war period, lectures in international law "tended to be as much descriptive as it was analytical, focusing on the history of the main doctrines and on political science and international relations generally."<sup>195</sup> This made sense given the view of law as a liberal subject and international law as a something "everyone ambitious to enter public life, should know something about." This would include lawyers but would not be exclusive to them, nor was it meant to be thought of as preparation for legal practice, narrowly conceived.

Mills' lecture topics included: the Atlantic Fisheries, territorial properties, rights of legation, war, and the rights and law of war for belligerent and neutral states.<sup>196</sup> In addition to his lectures on international law, Mills delivered four lectures on the Alaska Boundary

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<sup>192</sup> *Ibid.*, 29.

<sup>193</sup> *Ibid.*, 39.

<sup>194</sup> Mills, *International Law Lectures*: Lecture 11: Our Atlantic Fisheries, 443.

<sup>195</sup> MacDonald, *Part III*, 248.

<sup>196</sup> Mills, *International Law Lectures*.

Dispute (or Behring Sea Controversy).<sup>197</sup> The scope of subject matters covered in Mills' lectures represented "an extraordinary sweep in the Canada of 1885."<sup>198</sup>

Mills had a strong interest in international law as it pertained to conflict. He spent five lectures discussing issues related to war.<sup>199</sup> Mills was in favour of war as a method of conflict resolution in certain circumstances. According to Mills:

International Law provides no common arbitrator, no superior tribunal, to which the disputes between nations must be referred, and by which they may be authoritatively decided. Every state has, therefore, a right to have recourse to force to redress those injuries which it has sustained, by the action of other States, and so, though war, may not be looked upon as normal condition, it is a condition that frequently arises, and is subject to regulations as between the belligerents themselves, and as between them and nations that remain at peace.<sup>200</sup>

The fact that there were rules for war that nation states were required to obey meant that those rules needed to be taught and learned.

Despite Mills' approval of a nation state's right to use force and the need to learn the regulations that would apply to both belligerent and neutral states, he had this to say about neutral states:

those who are no parties to a quarrel are entitled to escape the inconveniences and losses of war, except, in so far, as it arises from the direct connection of their intercourse with each of the belligerents; so that, the general rule is-that the belligerents must so pursue their warlike designs, as not to interfere with the rights, the privileges, and advantages of those States that remain at peace.<sup>201</sup>

This position may have been influenced, in part, by the fact that Canada would often be in the neutral-state position.

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<sup>197</sup> Mills Papers, "The Behring Sea Controversy," Box 4280: No's 115,116, 117,118 Archives and Research Collections Centre, D.B. Weldon Library, University of Western Ontario.

<sup>198</sup> MacDonald, *Part II*, 262.

<sup>199</sup> Mills, *International Law Lectures*.

<sup>200</sup> *Ibid.*, 554-555.

<sup>201</sup> *Ibid.*

Mills' inclusion of lectures on war and peace was probably influenced by Hugo Grotius' famous seventeenth-century classic *On the Laws of War and Peace (De Jure Belli ac Pacis)*,<sup>202</sup> which has long been a staple in the international law canon.<sup>203</sup> Grotius belonged to a school of international jurists guided by the philosophy of natural law, which refers to a law whose content is set by nature and thus has validity everywhere.<sup>204</sup> In his works, Grotius distinguished between just and unjust war and discussed the doctrine of qualified neutrality.<sup>205</sup> Mills' reliance on Grotius and emphasis on war and peace was standard nineteenth-century fare. Until the mid-twentieth century, international law textbooks tended to be two volumes, one on war and one on peace. War was really only outlawed in the late 1920s, and earlier textbooks contained rules about the conduct of war and the position of neutrals.

Mills, despite an ornamental Grotian veneer, which would suggest the approach of a natural lawyer, expresses the quintessential positivist concern, namely was international law really law:

All independent states are assumed to stand upon a footing of equality. There are no international courts before which the chief executive may be summoned, and to whose judgment that sovereign state, shall be bound to yield obedience. Each independent state is its own master; it must assume the responsibility of deciding for itself, the extent of its duties, and its obligations, to every other state. The absence of any tribunal to authoritatively determine matters of dispute between sovereign states, shows that there is one essential feature of municipal jurisprudence that is wholly wanting in international law. This has led some writers to deny, altogether, that the term "law" is applicable to that body of rules which regulate the intercourse of states. They say that the rules of right and wrong, as they are applied to political

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<sup>202</sup> Hugo Grotius, *On the Laws of War and Peace* (Indianapolis, IN: Liberty Fund, 2005 (1625)).

<sup>203</sup> Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946), 51.

<sup>204</sup> Lori Fisler Damrosch et al., *International Law: Cases and Materials*, 4<sup>th</sup> ed. (St. Paul, Minn.: West Group, 2001),xxx.

<sup>205</sup> Hersch Lauterpacht, 51.

communities, constitute a system of international morality, but not a system of international law. It is true that if we undertake to apply our definition of Municipal Law to this body of rules and usages, between independent states, they are not properly called laws. There are however several considerations which make the term appropriate; what in my opinion entitles them to the appellation of law, is this—these rules and usages are cast in a legal mould; they possess a truly legal character. The reasoning by which they are supported and explained, is legal reasoning, and the fact that there is no official body to give them an authorized interpretation, and no administrative machinery to carry them into effect, is not sufficient to deny to them the name of laws.<sup>206</sup>

The fact that Mills expresses the worry articulated in positivist terms – no legislative or adjudicative processes in the international system parallel to the domestic legal system – does not mean that he was a positivist. Especially since, as evident in the above quotation, he did think that despite the absence of parallel nation state apparatus international legal processes should not be denied “the name of laws.”

In the lecture notes, Mills quoted extensively from two American international law treatise writers, James Kent and Henry Wheaton.<sup>207</sup> The Register of the London Law School for 1885 lists Kent’s *Commentary on International Law*, first published in 1826 as one of the texts that students were expected to “make themselves thoroughly familiar,” and “upon which they will also be examined.”<sup>208</sup> Mills’ lecture notes reveal that he relied heavily on the eighth edition of Wheaton’s text, *The Elements of International Law*. First published in 1836, Wheaton’s book was the foremost text in international law in the nineteenth century.<sup>209</sup> In fact, Wheaton has been referred to as the “Blackstone of

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<sup>206</sup> Mills, *International Law Lectures*, 15-17.

<sup>207</sup> *Ibid.*

<sup>208</sup> Register of the London Law School, December 7, 1885, quoted in Ronald St. John Macdonald, “A Historical Introduction to the Teaching of International Law in Canada: Part II,” *The Canadian Yearbook of International Law* 13 (1975): 262.

<sup>209</sup> Nicholas Onuf, *Henry Wheaton and “The Golden Age of International Law”*, International Legal Theory, 15 February, 2007, [http://law.ubalt.edu/cicl/ilt/6\\_1\\_2000.doc](http://law.ubalt.edu/cicl/ilt/6_1_2000.doc)

international law.”<sup>210</sup> The eighth edition, which Mills referred to, was published in 1866 well after Wheaton’s death in 1848 and edited by Richard Henry Dana Jr. It was the most frequently cited international law text of the era.<sup>211</sup> Mills agreed with the dominant positivistic conception of states as independent moral beings supreme in their own sphere articulated by Wheaton.<sup>212</sup> Overall, Mills took a fairly mainstream approach to the teaching of international law; this is evident in his choice of texts and use of authorities.

Mills’ lecture notes on international law provide insight into the way international law was taught in turn-of-the-century Canada. Although there were few career opportunities in the field – there was only one Minister of Justice and no department of External or Foreign Affairs -- international law was regarded as core to what every young gentleman, especially those who would play a role in public life, would need to know. According to MacDonald, the reason that international law was required as a prerequisite for a law degree in the late nineteenth century was that law professors “took a wide view of the responsibilities of a law faculty, the practice of law, and the possible future of their young country in the international community. They fully reflected in their professional domain the optimism that was the characteristic and ruling passion of Canada until the end of World War I.”<sup>213</sup>

## VIII. International Law and Self-Interest

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<sup>210</sup> Mortimer Sellers, *Henry Wheaton and “The Golden Age of International Law”*, International Legal Theory, 15 February, 2007, [http://law.ubalt.edu/cicl/ilt/6\\_1\\_2000.doc](http://law.ubalt.edu/cicl/ilt/6_1_2000.doc)

<sup>211</sup> *Ibid.*

<sup>212</sup> Henry Wheaton, *Elements of International Law*,, quoted in Mortimer Sellers, *Henry Wheaton and “The Golden Age of International Law”*, International Legal Theory, 15 February, 2007, [http://law.ubalt.edu/cicl/ilt/6\\_1\\_2000.doc](http://law.ubalt.edu/cicl/ilt/6_1_2000.doc)

<sup>213</sup> *Ibid.*

Strong state sovereignty has been a main obstacle in the development of international law. Often states act in their own self-interest to the detriment of the collective interest.<sup>214</sup> This tension is evident in Mills' approach to international law. In his parliamentary speeches and academic writings, Mills justified his political position by asserting that it was in the interest of "doing what was right." Consider the following poem Mills wrote for his grandchildren:<sup>215</sup>

Be ye courageous, be ye strong  
*In standing always for the right;*  
*Be ready, valiant in the fight*  
And fear not to oppose the wrong.

Stand by *the right*, though it be weak,  
*The right* has in it life at length,  
*The right* will grow and gain in strength.

Will bring the good for which men seek.  
Come to the aid of truth and free  
And men from mean, ignoble strife  
Raise high the object aims of life,  
And so a better time shall be.

In ages after men are gone,  
Who struggle for the true, the good,  
Though baffled oft-misunderstood  
Their thoughts, their deeds, shall still live on.

For here the conflict shall not cease,  
Between the evil and the good,  
Through years of strife, and years of blood  
Till perfect goodness brings us peace.<sup>216</sup>

Mills repeated the message to stand "always for the right" to his law students. One lecture records Mills' advice: "Whether you seek to enter the service of the state, or to engage in professional work, of this you may be assured—that you will find many

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<sup>214</sup> Koskenniemi, 102.

<sup>215</sup> Mills Papers, "untitled newspaper article."

<sup>216</sup> *Ibid* [emphasis added].

instances arising in which the path of duty, deviates from that of seeming interest, and in which, you must have the courage to do right.”<sup>217</sup>

How was one to distinguish between “seeming interest” and “doing right”? Mills presents this as if the difference would simply be self-evident. In reality, however, Mills’ work in international law indicates that he defined doing right as championing what was right for Canada and arguably what was in the nation state’s self interest. In all three examples explored in this paper – the Boer War, extinguishing Aboriginal title in the *St. Catherine’s Milling* case, and the Alaskan Boundary Dispute – Mills’ position lined up with what was in the state’s interest narrowly conceived. For Mills, doing what was right involved supporting the mother country in its overseas exploits, equipping provincial governments to take land free and clear, and vindicate Canada’s territorial integrity in the case of conflict with the United States. That Mills would allow what was right and just to line up with parochial and relatively local interests that were thought to be in Canada’s long-term interests is not surprising for Mills the politician and Mills the constitutional law scholar. However, it does create a tension for Mills the international law scholar.

One conception of international law – a non-state centered positivist conception – the focus is on what is in the world’s best interests independent of the interests of the nation state the international law scholar happens to belong to. However, the Grotian tradition – one that Mills at least ornamentally associate himself with – used such a general notion of what was right and good that it was easy to make what was in the interests of one’s own nation state with what was just or right simpliciter.<sup>218</sup> Mills always had strong academic interests, as evident in his time studying under Cooley and his

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<sup>217</sup> Mills, *International Law Lectures*, 7.

<sup>218</sup> Lauterpacht.

stylized Renaissance man persona as the “philosopher from Boswell”; however, Mills was first and foremost, a politician and so we would not be surprised to find whatever theoretical justifications he provides on various international law issues to line up with Canadian interests understood in a local parochial sense.

## **Conclusion**

For someone involved in nearly all aspects of Canadian political life at a time when Canada was establishing its own identity internationally, David Mills has been largely forgotten by history. In 1927, Fred Landon, a professor at the University of Western Ontario, noted that despite Mills’ lengthy list of achievements “one will search in vain among the printed records of Canadian history for more than mere mention of the life of Mills.”<sup>219</sup> Legal historian R.C.B. Risk supports Landon’s assessment noting that “Little writing has been done about Mills, and much less than he deserves.”<sup>220</sup>

Despite this lack of scholarly attention, Mills’ commentaries on the South African War and the Alaska Boundary Dispute provide insight into Canada’s entrance into international law as well as on one of the most enduring themes in Canadian history—Canada’s place in the North Atlantic Triangle. After the Alaska Boundary Dispute, Canada continued to struggle with the implications of its political ties to Britain; this issue came to the forefront during the First World War. Even today, Canadians struggle with the issue of its political independence from Britain; specifically whether Canada should retain its ties to Britain through a constitutional monarchy. Similarly, like contemporary

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<sup>219</sup> Fred Landon, “*Story of David Mills Tells of Life Crowded with Service to Canada*,” 1927, in Fred Landon, *The Honorable David Mills; a series of ten articles on the life of the Honorable David Mills, Senator of Canada*.

<sup>220</sup> Risk, 432.

Canadians, their turn-of-the-century counterparts found their strongest sense of identity in the disclaimer that they were not Americans.<sup>221</sup> In the end, Canada's propensity to define itself in relation to other countries is indicative of the Canadian approach to international law.

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<sup>221</sup> Scott W. See, *The History of Canada* (Westport, Conn: Greenwood Press, 2001), 19.