



# **The Role of the Natural Resources Regulatory Regime in Aboriginal Rights disputes in Ontario**

**Prepared for The Ipperwash Inquiry**

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## Part One Executive Summary<sup>1</sup>

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The quest was to look at the role of the natural resources regulatory regime in Aboriginal rights disputes in Ontario. The fact that there are Aboriginal disputes is, to put it quite simply, indisputable. The fact that such disputes have been a feature of the history of Ontario from its inception, is also indisputable. The reason for these Aboriginal rights disputes is simple to identify. Aboriginal peoples resist dispossession from their lands and resources.

This paper sets out several examples of these Aboriginal rights disputes. The examples cover almost two hundred and fifty years, from the late 1700s to the events of this past year - 2004. The examples cover the entire geography of Ontario and they represent all of the Aboriginal peoples who live in Ontario. The examples show how and where the disputes are fought – in courts, on blockades, in parks, on roads and in the political back rooms of the Province.

The natural resources regulatory regime plays a significant role in Aboriginal rights disputes because it functions as the many-armed mechanism by which Ontario, at the expense of Aboriginal peoples, originally settled the Province and now implements its development. The norm is that the natural resources regulatory regime is applied with full force and vigour to Aboriginal peoples without accommodation of their Aboriginal rights. There are however, some unique exceptions, most of which have resulted from Aboriginal rights disputes. The fact that the way forward is growing out of such disputes is illuminating. The result of each of these disputes was a negotiated agreement that accommodates the Aboriginal people. These negotiated agreements determine the applicability of the natural resources regulatory regime. They need to become the norm with every Aboriginal people for all lands and resource issues, not an exception that only results reluctantly and after a long and hard fought dispute.

The most recent cases of *Taku River* and *Haida Nation* have opened up a new door and shed new light. There is a ray of hope that these new decisions will provide the catalyst for real and substantial change in the natural resources regulatory regime in Ontario. The cases make the ‘honour of the Crown’ a positive constitutional duty that attaches to all Aboriginal rights, including asserted rights and treaty rights. This is a fundamental shift in the status quo.

What is to be done? The parties – Ontario, the federal government and Aboriginal peoples - must sit down and re-work the natural resources regulatory regime so that Aboriginal peoples are part of the regime and part of the resolution. The regime needs to be re-worked so that development can occur – but not at the expense of Aboriginal peoples. This kind of re-working cannot be done unilaterally by the regime. All parties have to work together. If not, then Aboriginal rights disputes will continue and likely increase.

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<sup>1</sup> This paper could not have been completed without the support, advice and assistance of Arthur Pape, Richard B. Salter, and the contributions of Randall Kahgee. The archival research and the historical analysis of Ontario’s regulatory regime is the work of Dr. Frank Tough, who co-authored the section of the paper entitled: “Aboriginal Harvesting: The 19<sup>th</sup> and 20<sup>th</sup> Century Battle for Access to Fish and Wildlife”.

## Part Two Introduction

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In the beginning Ontario was theirs. Aboriginal peoples made the first maps of Ontario.<sup>2</sup> It was their story based on their land, their resources, their history, culture and life.<sup>3</sup> Thus, Aboriginal history was woven into the geography of Ontario. Their long and continuous connection with their lands created deep roots of identification with their place and with each other.

That connection to the land began to change with the arrival of Europeans in Ontario. After contact, the Aboriginal story is largely one of progressive and cumulative dispossession. When Aboriginal peoples are dispossessed from their lands and resources, their connections with people, spirit and culture are eroded. No peoples acquiesce to such dispossession and cultural erosion. Therefore, it should not surprise anyone that there are ‘Aboriginal rights disputes’ that arise because Aboriginal people resist dispossession and struggle to maintain their connections with their lands and resources. Nor should it surprise us if the struggle itself becomes a source of cultural identification or a strategy for survival. Yet Ontario’s Aboriginal peoples have survived as “peoples” into the 21<sup>st</sup> Century. Their very survival is a testimony to their enduring ingenuity, strength and passionate resolve to endure. They refuse to be “wiped off the map of history”.<sup>4</sup>

The story of the dispossession of Aboriginal peoples in North America is by no means unknown. Thousands of books, several commissions of inquiry, and hundreds of learned texts and articles have documented this story. And it is not only past history. The dispossession is not finished. It continues every day in Ontario as majoritarian interests authorize the allocation of lands and resources for their satisfaction. Geoffrey York puts the matter succinctly and eloquently:

The stories of the people [fill in the name of any Aboriginal people in Ontario] ... are unique in their own ways, but each is an example of the physical and cultural dislocations that have devastated native communities across Canada. In the second half of the twentieth century – hundreds of years after the arrival of Europeans in North America – white society is continuing to devise new ways to strip Aboriginal people of their land, their culture, their spiritual beliefs, and their way of life.

Strangely, most Canadians are better acquainted with the history of native people in the eighteenth and nineteenth centuries than they are with the unsavoury realities of recent years. Canadians know that the early settlers and governments took land from the Indians, but it is easy to feel detached from those events of long ago. It is more difficult to deny responsibility for the misguided policies of the twentieth century. And so the ugly events of recent history are buried behind a wall of illusion – the illusion that progressive thinking and

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<sup>2</sup> For an example of an aboriginal map of the area west of Lake Superior see Olive Patricia Dickason, *Canada’s First Nations: A History of founding Peoples from Earliest Times* (Toronto: McClelland & Stewart Inc., 1992) at p. 140. [hereinafter *Dickason (1992)*].

<sup>3</sup> For some history of Aboriginal peoples in Ontario prior to contact with Europeans see *Dickason (1992)*, *supra* note 2 at pps. 20-83; and see Arthur J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada’s Native People* (Toronto: Lester Publishing, Key Porter Books, 1996) at pps. 1-45 [hereinafter *Ray (1996)*]; and see also *The Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communication Group, 1996) at Vol. 1, pps. 43-90. [hereinafter *RCAP Report*].

<sup>4</sup> Steve Pile and Michael Keith, eds., *Geographies of Resistance* (New York: Routledge, 1997), xi.



improved attitudes have brought fair treatment to Canada's native people.

Occasionally, a twentieth-century tragedy – a Grassy Narrows or a Lubicon Lake – is revealed and debated. Yet it is treated as an isolated event, a curious aberration, a temporary lapse in the judgment of the administrators and leaders of our civilized society. There is rarely any understanding of the sheer number of similar events taking place in Aboriginal communities across the country. And few Canadians realize the connections between all these stories – the recurring pattern of the disintegration of entire communities as a direct consequence of assaults made by the institutions of modern Canadian society.<sup>5</sup>

We cannot, in the course of this paper, reiterate the full story of this ongoing dispossession and its resultant resistance. However, it is necessary to emphasize that “Aboriginal rights disputes” are anything but new. This is an old story. They have occurred in practically every part of Ontario. We will illustrate the story with a few key examples spanning two hundred years of Ontario's history: the Six Nations lands disputes (1784-1860); Mica Bay (1849-1854); the Temagami blockades (1988-89); the ongoing story of harvesting rights disputes (1830-1982) including the Saugeen Ojibway Nation fishing disputes (1980s-2004) and the Métis hunting disputes (2001-2004); and Nibinamik First Nation's struggles with the new diamond exploration in northern Ontario (2000-2005). Each one is a story of dispossession from lands or resources.

Each one is also a story of resistance. Despite shrinking access to lands and resources Aboriginal peoples remain deeply attached to their traditional lands. This has never changed. Despite their losses, Aboriginal peoples have continued to exercise their traditional values and culture. The Royal Commission on Aboriginal Peoples has mapped some of these losses. According to the Commission Report, “the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation and on-reserve resources have largely vanished.”<sup>6</sup>

I have been asked to look at the role of regulatory agencies in Aboriginal rights disputes in Ontario. Before looking at the role of regulatory agencies, it is useful to look at what constitutes an Aboriginal “dispute”. The *Oxford Dictionary of Current English* defines a “dispute” as follows:

... debate, argue ... discuss, esp. heatedly; quarrel ... question the truth or validity of (a statement etc) ... contend for (disputed territory) ... resist, oppose ...<sup>7</sup>

These definitions align with the thesis of this paper. It is the thesis of this paper that “Aboriginal rights disputes in Ontario” are always about dispossession from lands or resources. Aboriginal rights, as asserted by Aboriginal peoples, are by definition, an assertion of ownership, access, use and occupation to land and resources. The regulatory regime has played a role in that dispossession because it is the multi-faceted mechanism that enforces state policies with respect to lands and resources. The regulatory regime was developed and is implemented without any understanding, inclusion or accommodation of Aboriginal history, land-based values or culture. The facts of history show that Aboriginal peoples have always asserted their rights to use,

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<sup>5</sup> Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (London: Vintage UK, 1990) at xii-xiii.

<sup>6</sup> *RCAP Report, supra* note 3 at Vol. 2, Part 2, p. 425. For a map that shows the original reserves of the bands on the north shore of Lake Huron see p. 455. For a map that shows the current size of reserves in Ontario see p. 474.

<sup>7</sup> *The Oxford Dictionary of Current English* (Oxford: Oxford University Press, 1996) at p. 249

occupy and access their traditional lands and exercise their traditional lifestyle. Yet, the regulatory regime, with all the attendant mechanisms of the state for enforcement, does not take any of this into account. Orders and discretionary decisions, combined with enforcement powers, make traditional land use, occupancy and access unlawful and result in dispossession. The regulatory regime has been the agent for the steady erosion of Aboriginal peoples' access to the lands and resources they have traditionally used and occupied. It is this single overriding factor that has led to most, if not all of the occupations, stand-offs and confrontations in Ontario.

In particular, this paper will focus on the allocation and management of lands and resources - the natural resources regulatory regime - as it affects Aboriginal peoples and as seen in the case law that deals with Aboriginal rights. The regime is complex and many-faceted and is authorized and enforced by statute, policy and regulations. It is composed of several Ministries of both the federal and provincial governments and includes many advisory, regulatory or operational agencies created by those several Ministries of both governments.

The natural resource management regime in Ontario has old roots. It begins prior to Confederation. By 1821, there were federal laws enacted with respect to management of fish in Upper Canada.<sup>8</sup> In the 1840s, mining leases were issued on the north shores of the Upper Great Lakes. By the 1890s, the provincial government had established game laws and a Game and Fish Commission.<sup>9</sup> Since then, the natural resource management regime in Ontario has grown. Today it can be said to encompass at least three federal departments,<sup>10</sup> four provincial ministries,<sup>11</sup> and well over a dozen agencies. These bodies deal with the allocation and management of public lands, and renewable and non-renewable resources.

The natural resource regulatory regime in Ontario was developed to support and serve the economy and interests of the citizens of Ontario. However, it has never supported or served the interests of *all the people* in Ontario. The Ontario polity is not now and never has been a monolithic entity and the Ontario economy is also more complicated than the standard indicators show. Part of Ontario's polity and economic complexity is the existence of Aboriginal peoples and an Aboriginal economy. The Aboriginal economy, which has evolved over thousands of years is, for the most part, an unrecognized economy in the south of Canada. Despite hundreds of years of pressure and lack of visibility, the traditional values and economy continue to shape the culture and lives of Aboriginal peoples and have not been assimilated into mainstream values and culture,

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<sup>8</sup> *Upper Canada. An act to repeal the laws now in force in relative to the preservation of salmon, and to make further provisions respecting the fisheries in certain parts of this province, and also to prevent accidents by fire, from persons fishing by torch or fire light* (1821) 2 George IV c. 10, Canada (province). For other early fisheries laws see: *Fishery Act* (1857), 20 Vict., c. 21. Canada (province). *Fisheries Act* (1858), 22 Vict., c. 86. Canada (province). *Fisheries Act* (1865), 29 Vict., c. 11. *Fisheries Act*, S.C. 1868, c.60.

<sup>9</sup> *The Ontario Game Protection Act*, 1893, S.O. 1893, c. 49. See s. 27(1) for protection of Indian resource rights.

<sup>10</sup> Including but not limited to: Department of Fisheries & Oceans, Indian Affairs and Northern Development, Natural Resources Canada.

<sup>11</sup> Including but not limited to: Natural Resources; Environment; Energy; Northern Development & Mines; and the Office of the Attorney General, which includes responsibility for Aboriginal Affairs in Ontario and houses the Ontario Native Affairs Secretariat.

The history of the natural resource regulatory regime in Ontario shows that there has always been a conflict between the recognized users protected by the natural resource regulatory regime and the Aboriginal lands and economy protected by Aboriginal rights. Indeed, for the most part, Aboriginal rights have been either ignored or seen as irreconcilable with conservation and management imperatives. The history of the regulatory regime shows an awareness of Aboriginal rights. That same history also shows a denial by the regulatory regime that Aboriginal rights actually protected Aboriginal peoples land related interests. From the beginning of the natural resource regulatory regime, majoritarian interests consistently prevailed over Aboriginal rights. This was the state of affairs up until 1982.

After the entrenchment of Aboriginal and treaty rights in the *Constitution Act, 1982* it seemed that the natural resource regulatory regime would have to be adjusted to reconcile Aboriginal resource rights.<sup>12</sup> No such reconciliation occurred. Again, after *Sparrow*<sup>13</sup> in 1990, it seemed that the regime would have to make significant space for recognition and affirmation of Aboriginal rights. Unfortunately, the record shows that only minimal and discretionary adjustments have been made to the natural resource management regime and that Aboriginal land related interests continue to be unrecognized, unprotected and vulnerable to majority interests.

Since the *Mackenzie Valley Pipeline Inquiry*<sup>14</sup> in the 1970s, academics and economists now recognize that Aboriginal culture and the values attached to their lands and economy are still alive and well north of 60° in Canada. The thoughtful words of Justice Berger over thirty years ago are worth reproducing in part:

Euro-Canadian society has refused to take native culture seriously. European institutions, values and use of land were seen as the basis of culture. Native institutions, values and language were rejected, ignored or misunderstood and – given the native people’s use of land – the Europeans had no difficulty in supposing that native people possessed no real culture at all. Education was perceived as the most effective instrument of cultural change: so, educational systems were introduced that were intended to provide the native people with a useful and meaningful cultural inheritance, since their own ancestors had left them none.

The culture, values and traditions of the native people amount to a great deal more than crafts and carvings. Their respect for the wisdom of the elders, their concept of family responsibilities, their willingness to share, their special relationship with the land – all of these values persist today, although native people have been under almost unremitting pressure to abandon them.

Native society is not static. The things the native people have said to this Inquiry should not

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<sup>12</sup> 35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

<sup>13</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]

<sup>14</sup> Justice Thomas R. Berger, *Northern Frontier, Northern Homeland: An inquiry into Mackenzie Valley Pipeline*. (Toronto: James Lorimer & Company, 1977) [hereinafter *Berger Inquiry*].

be regarded as a lament for a lost way of life, but as a plea for an opportunity to shape their own future, out of their own past. They are not seeking to entrench the past, but to build on it.

...

So the future of the North ought not to be determined only by our own southern ideas of frontier development. It should also reflect the ideas of the people who call it their homeland.

...

We have been committed to the view that the economic future of the North lay in large-scale industrial development. We have generated, especially in northern business, an atmosphere of expectancy about industrial development. Although there has always been a native economy in the North, based on the bush and the barrens, we have for a decade or more followed policies by which it could only be weakened or depreciated. We have assumed that the native economy is moribund and that the native people should therefore be induced to enter industrial wage employment. But I have found that income in kind from hunting, fishing and trapping is a far more important element in the northern economy than we had thought.

...

The real economic problems in the North will be solved only when we accept the view the native people themselves expressed so often to the Inquiry: that is, the strengthening of the native economy. We must look at forms of economic development that really do accord with native values and preferences...

...

The native people of the North now insist that the settlement of native claims must be seen as a fundamental re-ordering of their relationship with the rest of us. Their claims must be seen as the means to establishing a social contract based on a clear understanding that they are distinct peoples in history. They insist upon the right to determine their own future, to ensure their place, but not their assimilation, in Canadian Life.<sup>15</sup>

In 2005, the general public perception is that, particularly in the more southerly parts of Ontario, the values and culture associated with Aboriginal people's lands and economy are a thing of the past.

The hunting societies of the world have been sentenced to death. They have been condemned, not in any one verdict, but by a process, an accumulation, of judgements [sic] ... Would-be civilizers concluded that hunters never had, or had lost, the means to achieve a decent way of life; should welcome the benefits of trade, wage employment, and proper religion; should allow their lands to be differently used; and must accept whatever changes are brought to them, however the changes are brought. That is the death sentence.

..

How strange it is, then, to find that the condemned have somehow repeatedly escaped their execution. Are the hunters of the world still caged in some benign death row, sustained there by sympathetic or merciful administrators? Or are their economies effectively deceased and the peoples now able to live thanks to handouts or a degree of participation in

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<sup>15</sup> *Berger Inquiry*, *supra* note 14 at p. xviii-xxiii.



our real economy?<sup>16</sup>

The thesis of this paper is that the values and culture of Aboriginal peoples, especially as they relate to lands and resources, are still alive. Until the regulatory regime begins to fully understand, respect and accommodate the lands, resources and traditional economy of Aboriginal peoples, there will continue to be disputes over Aboriginal rights in Ontario.

### ***A. The Scope of this Paper***

There are several caveats with respect to the scope of this paper. The first is the use of the terms ‘regulatory regime’ and ‘regulatory agencies’. The original assignment was to examine the role of regulatory agencies in Aboriginal rights disputes in Ontario. The examples given were the Department of Fisheries and Oceans, and the Ontario Ministry of Natural Resources. However, the examples are not regulatory agencies. An agency is, by definition, not a ministry or department of government. Further, some of the most important agencies that are at issue in Aboriginal rights disputes are not “regulatory” agencies. Rather, they are advisory bodies. In light of this, the author has taken a broad understanding of the assignment and this paper will use the language of “regulatory regime”, a term which, for the purposes of this paper, includes ministries and departments of government as well as relevant agencies that deal with the allocation and management of natural resources, whether advisory, regulatory, operational or adjudicatory.

The second caveat is that legal events have added to the original thesis. In November of 2004, the Supreme Court of Canada handed down two new judgments in *Taku River Tlingit First Nation v. British Columbia*<sup>17</sup> and *Haida Nation v. British Columbia*.<sup>18</sup> These two judgments set out a constitutional framework for consultation and accommodation with respect to Aboriginal rights that have been asserted but not proven in court or articulated by treaty. These judgments will affect regulatory regimes and Crown activity as it applies to Aboriginal peoples and resource use in Ontario. Because the judgments are so new, there is little opportunity to examine their application. Therefore, this paper will look to the prospective application of this new and important law. This paper anticipates that the net result of these two judgments will be that the regulatory regime, because it exercises authority on behalf of the Crown, will have to reconcile the Crown’s new constitutional duty with its actions in allocating and managing lands and resources in Ontario. Because these institutions were not designed with this in mind, implementation of the judgments will require fundamental innovation and renovation of the natural resources regulatory regime.

Until Aboriginal peoples themselves are included in the creation, implementation and enforcement of a regulatory regime that truly protects their ancient values and economies, there will continue to be Aboriginal rights disputes in Ontario.

Other caveats define the limits of this paper. The term “Aboriginal rights” as it is used in this paper includes rights that are protected by treaty. Also, this paper focuses specifically on

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<sup>16</sup> Hugh Brody, *Maps and Dreams* (Vancouver: Douglas & McIntyre Ltd, 1981) at pp. xi-xii.

<sup>17</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 [hereinafter *Taku River*]

<sup>18</sup> *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73. [hereinafter *Haida Nation*]

Aboriginal rights disputes in Ontario with respect to lands and resources. It does not deal with Aboriginal rights or claims that are not specifically related to land or natural resources. Therefore, this paper does not deal with such things as residential schools, gaming, child custody, education or social services.

Finally, while it might be possible in the context of a multi-year research project to examine every part of the natural resources regulatory regime in Ontario, this paper takes the view that such a detailed analysis, while academically interesting, would not ultimately assist the Commission in understanding the general role that the natural resources regulatory regime has played in Aboriginal rights disputes in Ontario. Rather, it seems to us that the Commission would be better served by focusing more generally on Aboriginal people's relationship with that regime. We choose this focus, because it will illustrate forcefully, not the theory of government allocation and management, but the application of that regime on the ground. It will also serve to show how the law has always played a role in this issue. Selected examples will be reviewed to show the story.

## Part Three

### Aboriginal Rights Disputes Pre-Confederation: Protection from the Selfish, the Thoughtless and the Ruthless

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#### *A. Introduction*

Before looking at examples of Aboriginal rights disputes in Ontario, it would be useful to briefly set out the foundation and principles of the law of Aboriginal rights. In saying this, I note that the law has, at least since 1763, supported the perspective of Aboriginal peoples – that they have legal rights to their land and resources and that the government has lawful obligations to protect those rights.

Why do we have a law of Aboriginal rights? The starting point is to remember what dozens of cases have emphasized – that Aboriginal peoples were here, living in organized societies and enjoying the fruits of the land and resources before Europeans arrived in North America.

The doctrine of Aboriginal rights is a basic principle of Canadian common law that defines the constitutional links between the Crown and Aboriginal peoples, and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions. It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories ...

...

The Crown's historical dealings with Indian peoples were based on legal principles suggested by the actual circumstances of life in North America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy. Those principles gradually crystallized as part of the special branch of British law that governed the Crown's relations with its overseas dominions, commonly termed "colonial law", or more accurately, "imperial constitutional law.

...

The doctrine of Aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired... it also supplied the presumptive legal structure governing the position of native peoples ...<sup>19</sup>

On the arrival of Europeans a relationship was established. Lord Denning of the British House of Lords characterized the relationship as follows:

The Indian peoples of Canada have been there from the beginning of time.

...

... Their solitude was disturbed by the coming of the English from across the seas ... Whenever the English came, they came as representatives of the Crown of England. They carried with them the rights of Englishmen. They were loyal to the Crown and acted under the direct authority of the Crown under royal charter.

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<sup>19</sup> Slattery B., "Understanding Aboriginal Rights" (1983) 66 C.B.R. 727 at 732 and 736-7; see also *RCAP Report, supra*, note 3 at Vol. 2, Part 2, p. 559.

...

Our long experience of these matters taught us how to treat the indigenous peoples. As a matter of public policy, it was of the first importance to pay great respect to their laws and customs, and never to interfere with them except when necessary in the interests of peace and good order.

... In exercising these powers, it was the obligation of the Crown (through its representatives on the spot) to take steps to ensure that the original inhabitants of the country were accorded their rights and privileges according to the customs coming down the centuries, except in so far as these conflicted with the peace and good order of the country or the proper settlement of it. This obligation is evidenced most strikingly in the case of Canada by the royal proclamation of 1763.<sup>20</sup> [emphasis added]

Those original terms and that ‘presumptive legal structure’ were not temporary measures that could be abandoned by the Crown. In fact the Crown agreed to be bound, by its “honour”, to give effect to these terms. As McLachlin J (as she then was) explained in *Van der Peet*,

These arrangements [in the *Royal Proclamation*] bear testimony to the acceptance by the colonizers of the principle that the Aboriginal peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding – the *grundnorm* of settlement in Canada – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them ...<sup>21</sup>

That is the context for understanding the enactment of the other provisions - sections 91(24) and 109 of the *Constitution Act, 1867* - that have given constitutional force to the obligations that were accepted by the Crown. A major focus of both provisions was the protection of the interests of the Aboriginal people. Section 91(24), gave Parliament exclusive legislative authority for “Indians and Lands Reserved for the Indians,” primarily to protect Indian land-related interests from the competing interests of local majorities. Section 109 made provincial title to lands and resources subject to “any Trusts existing in respect thereof, and to any Interests other than that of the Province in the same.” This gave constitutional force to the principles in the *Royal Proclamation*, by making Crown title expressly subject to land-related Aboriginal

“It was the responsibility of the Crown of England, and those representing the Crown, to see that the rights of the indigenous people were secured to them, and that they were not imposed on by the selfish or the thoughtless or the ruthless.”  
- Lord Denning in *R. v. Secretary of State* [1982]

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<sup>20</sup> *R. v. Secretary of State*, 1982] 2 All ER 118 (CA), per Lord Denning, as cited in Bruce H. Wildsmith, “Pre-Confederation Treaties” in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, (Ottawa: Carleton University Press, 1985) at pp. 152-155. [hereinafter *Morse (1985)*]. Just prior to the implementation of the *Constitution Act, 1982*, the parties brought two questions before the court; (1) whether treaty obligations passed to the government of Canada with the attainment of Canadian independence or with the Statute of Westminster 1931; and (2) whether treaty and other obligations were still owed by Britain.

<sup>21</sup> *R. v Van der Peet*, [1996] 2 S.C.R. 507 at par. 272 (per McLachlin J, as she then was, dissenting on other grounds.)

rights.<sup>22</sup>

It is from this foundation that the doctrine of Aboriginal rights has evolved, a legal doctrine designed to protect Aboriginal peoples. However, what we can also clearly see from Lord Denning's judgment is that this protection, in the minds of government, has limits - when it conflicts "with the peace and good order of the country or the proper settlement of it." And surely this is the nub of the problem. The conflict between what the government perceives as its obligations to assist with the orderly settlement (and development) of Canada and its obligations to protect Aboriginal peoples. History shows us that the Crown has accepted its protective obligations only when it had to, in order to quell discontent, outright dissent or violence. History also shows us that when push comes to shove, it is the land related interests of Aboriginal peoples that are sacrificed to majority interests in settlement or development.

### ***B. The Royal Proclamation, 1763***

The British Crown accepted its obligations to Canada's Aboriginal peoples publicly in 1763. The event followed the end of the Seven Years War, when New France was ceded to the British Crown in the Treaty of Paris. With the formal capitulation by France, Britain inherited a growing discontent among the Aboriginal peoples of the Great Lakes, some of it fuelled by the fact that Britain had discontinued the French practice of reaffirming peaceful relations with the Aboriginal peoples by means of the symbolic giving of presents. In particular they had discontinued giving guns and ammunition. This withdrawal of weapons fed suspicions among the Aboriginal peoples that the British were about to implement a military takeover and that Aboriginal peoples would lose their lands.<sup>23</sup> In order to quell the discontent, the British called a meeting at the Crooked Place (Niagara) in the summer of 1764, which was intended to secure peace, friendship and trust with the Aboriginal people and in particular with France's former Aboriginal allies. The meeting was also intended to impress the Aboriginal people with an unprecedented show of wealth. The Crown distributed over £20,000 worth of presents. Over 2,000 Aboriginal people, many from thousands of miles away, attended the meeting that summer.<sup>24</sup>

It was at the Niagara meeting that the British 'proclaimed' the policy with respect to Aboriginal people in the *Royal Proclamation*. The policy recognized Aboriginal peoples as autonomous political units capable of entering into negotiations and agreements with the Crown. It also

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<sup>22</sup> Hogg, Peter, *Constitutional Law of Canada*, (Loose-leaf ed.) 27.1(a); *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at par. 175-6; Slattery, Brian, "First Nations and the Constitution: A Question of Trust" (1992) 71 CBR 261 at 292; and see *Calder v. Attorney General of B.C.*, [1973] S.C.R. 316 at 378-9: "[sections] 91(24), 109 and 92(5) must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments" (per Hall, J.). [hereinafter *Calder*]

<sup>23</sup> *RCAP Report*, *supra* note 3 at Vol. 1, pp. 113-114; Brian Slattery, "Hidden Constitution" in Menno Boldt and Anthony Long, eds., *Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: U of T Press, 1995) at p. 120.

<sup>24</sup> John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) at pp. 155-172 [hereinafter *Wampum at Niagara*]; and see also Brian Slattery, "Understanding Aboriginal Rights", *supra* note 19 at pp. 733-734.



recognized that Aboriginal peoples were entitled to continue in possession of their territories, including their hunting and fishing grounds, unless or until they ceded them to the Crown. The *Royal Proclamation* clearly distinguished between Crown/Aboriginal relations and Crown/settler relations. The settler colonies were governed by explicit grants. In contrast, Aboriginal peoples were recognized as distinct political entities whose rights did not arise from Crown grants.<sup>25</sup>

The *Royal Proclamation* and the Royal Instructions that followed set out the equitable principles under which Aboriginal territories could be ceded. Thereafter these equitable principles guided treaty making.<sup>26</sup> But the equitable principles in the *Royal Proclamation* were not new. They were the consolidation of previous British and French practices. The meeting at Niagara was simply the occasion for the official announcement of the policy to the Aboriginal peoples.<sup>27</sup> However, the *Royal Proclamation* itself and the meeting at Niagara were important from the perspective of Aboriginal peoples,

The royal proclamation of 1763 had great impact throughout Canada. It was regarded as of high constitutional importance. It was ranked by the Indian peoples as their Bill of Rights...

...

... the royal proclamation of 1763 was equivalent to an entrenched provision in the constitution of the colonies in North America. It was binding on the Crown "so long as the sun rises and the river flows".<sup>28</sup>

### ***C. Aboriginal Rights - Pre-confederation***<sup>29</sup>

The first application of the Crown's *Royal Proclamation* obligations was in the lower Great Lakes area for the purchase of the right of passage over the Niagara Portage. Then, between 1764 and 1850, a series of land surrenders were entered into over most of southern Ontario. The Crown did not implement its *Royal Proclamation* obligations in the Upper Great Lakes area until the late 1840s. Until that time the British had discouraged any land transfers to settlers in the northern and northwestern parts of the Province in an attempt to quell the Aboriginal fears with respect to their lands in the Upper Great Lakes.

After 1763, only partly as a response to the regionwide resistance movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.

Thus, in contrast to the rapid growth of a white agricultural population along the eastern

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<sup>25</sup> Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-government, and the Constitution* (Ottawa: Canada Communication Group, 1993) at pp. 18-19. [hereinafter *Partners in Confederation*]

<sup>26</sup> For legal status of *Royal Proclamation* see *Calder* at pp. 394-395; *Hidden Constitution*, *supra* note 23 at p. 120; *Understanding Aboriginal Rights*, *supra* note 19 at p. 736; *Partners in Confederation*, *supra* note 25 at pp. 13-18.

<sup>27</sup> *Wampum at Niagara*, *supra* note 24 at p. 155; *Partners in Confederation*, *supra* note 25 at pp. 18-19.

<sup>28</sup> *R. v. Secretary of State*, at p. 154.

<sup>29</sup> Pre-Confederation treaties were made with the Crown acting through representatives of the British government; post-Confederation treaties were made with the Crown acting through representatives of the Canadian government.

seaboard after 1680, actually a repopulation of native lands “widowed” by epidemic diseases, the Great Lakes region remained under tribal domination.<sup>30</sup>

By the 1840s, millions of acres of land in southern Ontario had been surrendered. The surrender process was supposed to be orderly. The idea was that Indians would willingly give up their lands. Reserves would be created. Aboriginal peoples would settle down, adopt a civilized, sedentary (Christian) lifestyle, and cease their wandering habit. Yet despite these surrenders, the traditional Aboriginal culture, lifestyle, practices and land use continued as before. Despite the intentions of government officials and missionaries, and the creation of reserves, Aboriginal people continued their seasonal lifestyle.<sup>31</sup> Settlers arrived and took up (either lawfully or unlawfully) the Aboriginal lands. Still, it took several decades for the Aboriginal peoples to actually settle on the reserves. Even after they ‘settled’, they continued their traditional lifestyle of gathering, hunting, fishing and trapping on the reserves and on the lands surrendered.

While this process of ‘settling’ Aboriginal peoples on reserves was taking place - a process that took place over a hundred years - it was clear that the process was anything but orderly. Indians complained about squatters on their lands, loss of their resources and the inability to continue their lifestyle. There were also problems internally with the administration of Indian affairs.<sup>32</sup> By 1860, these complaints and problems initiated a series of reports and commissions to investigate the problems and make recommendations.<sup>33</sup> All of these commissions and reports showed that squatters were gradually taking up Aboriginal lands and resources. Some of these reports also showed that there was corruption in the Crown’s dealings with Indians. In response the Crown authorities enacted the earliest statutory protections of Indian lands (precursors to the federal *Indian Act of 1876*). Unfortunately, in a pattern that would be repeated for the next 150 years, enforcement was more apparent than real.

#### ***D. Six Nations of Grand River: Land Losses and Litigation***

In 1784, Lieutenant Governor Frederick Haldimand, granted Six Nations 160,000 acres of land along the Grand River to “take possession of and settle upon ... which them & their posterity are to enjoy forever.”<sup>34</sup> By 1840, squatters occupied approximately 45,000 acres of that land. There were 400 squatter families (about 2000 individuals). The squatters were roughly equal in number to the Indian population at Grand River at the time and occupied approximately 20% of

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<sup>30</sup> For note of policies that discouraged settlers in the Upper Great Lakes see Jacqueline Peterson, “Many Roads to Red River: Métis genesis in the Great Lakes Region, 1680-1815”, in eds., Jacqueline Peterson and Jennifer S.H. Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg, University of Manitoba Press, 1985) at p. 40.

<sup>31</sup> Darlene Johnston, *Connecting People to Place: Great Lakes Aboriginal History in Cultural Context*, (Toronto: unpublished, 2004).

<sup>32</sup> The *Goderich Inquiry* investigated fraud and misappropriation of funds within the department.

<sup>33</sup> Sidney L. Haring, *Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) [hereinafter *Haring*] at pp. 29-32, notes that the following reports and inquiries were made between 1828 and 1860: the *Goderich Inquiry* (1828); the *Parliamentary Select Committee on Aborigines Report* (1836); *Sir Francis Bond Head’s Report* (1836)<sup>33</sup>; *Justice James Macaulay’s Report*; *Judge Robert Jameson’s Report* (1840); the *Bagot Commission Report* (1844); and the *Pennefather Commission Report* (1856).

<sup>34</sup> *Haring*, *supra* note 33 at p. 36.

the land.<sup>35</sup> Six Nations protested vigorously and often. Yet despite these protests and its lawful obligations, the government protected the squatters, not the Indians. Squatters were not removed and there was no available remedy to the Six Nations for these losses. In 1844, the Crown announced that it would not protect Indian lands from squatters. Legislation was enacted with the apparent purpose of stemming squatter encroachment - the *Gradual Civilization Act of 1857*<sup>36</sup> - but failed to meaningfully enforce any protection. The result was fifty years of uncertainty, litigation and investigations, especially with respect to the Six Nations lands.<sup>37</sup>

There are several cases that document the long and sorry history of the gradual appropriation of Six Nations lands.<sup>38</sup> The government viewed the squatters as innocent settlers deserving Crown consideration and protection, which it subsequently implemented by proposing to Six Nations that it surrender most of its lands. When Six Nations refused, the government demanded the surrender.

In case any further division should take place in Council and by declining amicably to meet their views of Government, the Indians should continue to thwart the measure devised as most conducive to their interests, I am apprehensive that the Government will be compelled, however, reluctantly, to take into their own hands the exclusive management of their affairs ...<sup>39</sup>

The chiefs were forced to surrender their lands. They were permitted to keep only 20,000 acres. Jarvis, reported the complaints of the Six Nations Chiefs in his 1840 report,

The evils complained of, are: First, the unauthorized destruction of Game within the Indian reserves by the surrounding inhabitants. Secondly, the cutting and lawless removal of Timber; and Thirdly, the illegal occupation of lands by trespassers, under pretended sales or licenses from some individual Indians, or under no title whatever.<sup>40</sup>

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<sup>35</sup> Figures are from the *Report of Committee no. 4, on Indian Department* 1 Feb 1840, as cited in *Harring supra* note 33 at p. 41-42.

<sup>36</sup> *The Gradual Civilization Act*, S.C., 20 Vict., c. 26, 10 June 1857.

<sup>37</sup> For more on this ongoing dispute *Harring, supra* note 33 at pp. 35-61.

<sup>38</sup> *Doe Ex. Dem. Jackson v. Wilkes* (1835) 4 U.C. K. B (O.S.) 142; *Sheldon ex rel. Doe v. Ramsay* (1852) 9 U.C.Q.B. 105; *R. v. Hagar* (1857) 7 U.C.C.P 380; *Doe D. Wilkes and Babcock*, (1853) 1 U.C.C.P. 388. The history of the Six Nations land dispute has also been set out by several learned legal historians including: Darlene Johnston, 'The Quest of the Six Nations Confederacy for Self-Determination,' in *University of Toronto Faculty of Law Review*, vol. 44 (1986), 1-32; Malcolm Montgomery, 'The Legal Status of the Six nations Indians in Canada', in *Ontario History*, vol. 55 (1963), 93-105; Donald J. Bourgeois, 'The Six Nations: A Neglected Aspect of Canadian Legal History', in *Canadian Journal of Native Studies* vol. 6, no. 2 (1986), 253-70; and see *Harring supra* note 34 at p. 35-61.

<sup>39</sup> 'Report of the Commissioners', 1844 appendix 16, Samuel P. Jarvis, Indian Office, Toronto, January 5, 1841, as cited in *Harring, supra* note 33 at pp. 52-53.

<sup>40</sup> *Harring, supra* note 33 at p. 55. Timber rights were also the subject of dispute and there are several cases that show that the Indian Department's control over Indians' use of their resources – hay and timber – were the subject of constant tension. This tension resulted, in large part, because of the dual role played by the Indian agents. They were also magistrates and had the discretion as to whether or not to prosecute in order to enforce their authority. See *Feagan v. McLean* 29 U.C.R. 202 (1869). Feagan was arrested by an Indian commissioner and charged with criminal trespass for purchasing cordwood from an Indian on the Grand River reserve. The wood had been cut from land he legally occupied. The Federal Crown prosecutor argued that,

Indians on reserve lands have no interest in the soil. They have the right of occupation and cultivation, and of clearing their land for cultivation, and of taking their necessary firewood; but not the right of cutting and selling the timber without regard to cultivation.

Jarvis went on to state that the Crown had no intention of acting to support the Indians in any of their complaints. To add insult to injury, the Indian Department then proceeded to use Six Nations annuities to finance a scheme that, according to Six Nations, would ruin their fishery, flood their lands and bring more settlers into the valley. The scheme was to open a system of locks on the Grand River. The Six Nations protested vigorously and asked repeatedly why their annuities were financing a scheme that was contrary to their interests. In the end the scheme failed, the company went bankrupt and virtually all of the Six Nations annuity money was lost.<sup>41</sup>

### ***E. The Course is Set: The Crown will not Act to Protect Aboriginal Lands***

The story of the annuity, land and resources losses by Six Nations is not unique. The only unusual thing about it is that it is so well documented because it was the subject of so much litigation. In fact, the Six Nations story is an illustration of the land and resources losses of all Aboriginal peoples in Ontario. The circumstances differ in detail, but the outline is the same. The land is lost in southern Ontario primarily because of pressures by settlement, and the government, despite its obligations pursuant to the *Royal Proclamation of 1763* did not protect, and actually encouraged this wholesale appropriation of Indian lands and resources.

It is worth noting that there has been no reconciliation of these matters with Six Nations despite the fact that these events occurred over 150 years ago. In the 1990s, there was a general public objection to the possibility that Six Nations might obtain a larger land base. In October of 1993, the Township of Onondaga passed a resolution protesting that purchases of land might become reserve lands. The resolution engendered press and fairly widespread support among municipalities, all of which saw potential loss of municipal tax revenues.<sup>42</sup> Finally, in 1995, Six Nations of Grand River filed a statement of claim in the Ontario Court of Justice, General Division. The claim seeks resolution of many issues including breaches of treaty obligations that stem from the events of the land losses in the early 1800s.<sup>43</sup>

As early as the 1840s the course for the next 150 years was clearly set out. The Crown would not act to protect Indian annuities, lands or resources - it was not politic then, and it rarely would

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The case went to the Court of Queen's Bench, which ruled against the Crown. Judge Wilson held that the land in question, even though unsundered, "either belongs to or is held by the Crown in trust for the Indians". The judge found no statute that prohibited cutting and selling timber and so the Indians must have the right to do so. Judge Morrison, concurred in the result, but held that there was no evidence to show that the wood was not cut in clearing the land. Essentially that the Prosecutor had not made out his case. And see also *Regina v. Fearman* (1886) 10 O.R. 660, where an Indian sold wood without a licence. The wood had been seized by the Indian Department. Fearman and others entered the property, took the wood and were subsequently convicted. On appeal they argued that the wood had not been properly seized because the statute stated that seizures had to be ordered by a justice of the peace upon affidavit. The Department had not done this. The appeal court reversed Fearman's conviction, despite the fact that he had clearly stolen the wood. And see *Hunter v. Gilkison* (1885) 7 O.R. 735, where Hunter was arrested and jailed by the Indian Agent/Magistrate for selling cordwood, and subsequently tried by the Indian superintendent. He was sentenced to a fine or thirty days in jail. After serving seven days he was freed on a writ of habeas corpus based on wrongful imprisonment and subsequently charged the Superintendent with assault and imprisonment without authority. Hunter lost.

<sup>41</sup> *Harring*, *supra* note 33 at p. 58.

<sup>42</sup> *RCAP*, *supra* note 3, Vol. 2, Part 2, p. 626-627.

<sup>43</sup> *Six Nations of the Grand River Band v. AG (Canada) and Ontario*. The claim was filed in the Ontario Court of Justice, General Division, at Brantford, Ontario, File no. 406/95, April 26, 1995.

be politic in the future, to enforce the law of Aboriginal rights in Ontario.<sup>44</sup>

### ***F. No Treaty, no Mining: Ojibway and Métis in the Upper Great Lakes***

All of the treaties in Ontario prior to 1850 reflect this story of dispossession. The early treaties are essentially land surrender agreements that contain no consideration with respect to harvesting or other resource rights.<sup>45</sup> They had the primary purpose of providing agricultural land for settlers. With the Robinson Superior and Robinson Huron Treaties, however, the government's purpose for entering into treaty begins to change. The impetus for the Robinson Treaties was the discovery of minerals along the north shores of Lake Huron and Superior. The Robinson Treaties thus represent the first of the so called 'development treaties.'

By 1845, mining licenses had been issued at sixty-four locations on Lake Huron and Superior.<sup>46</sup> Recall, as noted above, that following the *Royal Proclamation of 1763*, the government policy was to discourage settlement and development in the Upper Great Lakes. By the 1840s, the government had forgotten the *Royal Proclamation* promise that it would not use Aboriginal lands without treaty. However, the Aboriginal peoples of the Upper Great Lakes had not forgotten. The Ojibway and Métis sent many petitions and demanded that the government keep its promises, which would mean that there would be no mining until after a treaty was made. They complained that the mining operations were a threat to their traditional practices.<sup>47</sup> Further, the Ojibway laid claim to the minerals themselves and wanted their fair share of any revenues realized by the exploitation of the resources.

Despite these objections, the Crown continued to ignore its lawful obligations to the Aboriginal peoples. It issued leases and sent a survey team up to survey mining locations. In answer to the increasing Aboriginal demands, the government tried to remove the Indians. However, the relocation to Manitoulin Island plan failed and tensions continued to grow. In 1848, Chief Shingwaukonse led a group to Montreal to plead their case. Obtaining no satisfaction, the delegation returned home only to find the government had sold their Village of Garden River as a mining location. That event was the catalyst for future violence. It was then that the Aboriginal peoples began to speak of using force to retain their lands. They complained that their hunting was destroyed, that the mining licenses covered their villages, and that they were forbidden to cut timber and hay.<sup>48</sup> By 1849, the Ojibway were threatening to drive the miners away. They sent another deputation to Montreal to press their case. While the Garden River

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<sup>44</sup> *Harring, supra* note 33 at p. 58.

<sup>45</sup> For more on Pre-confederation treaties see, Bruce H. Wildsmith, "Pre-Confederation Treaties" in *Morse (1985)*, *supra* note 20 at pps. 123-271.

<sup>46</sup> Rhonda Telford, "Aboriginal Resistance in the Mid-Nineteenth Century", [hereinafter *Telford (2003)*] in *Blockades & Resistance: Studies in Actions of Peace and the Temagami Blockades of 1988-89*, Bruce W. Hodgins, Ute Lischke, David T. McNab eds. (Waterloo: Wilfred Laurier University Press, 2003), at p. 72. [hereinafter *Blockades & Resistance*] Telford states that the sixty-four leases yielded \$400,000 to the government, payable over five years, and that of the first leases, six went to Tory executive councillors.

<sup>47</sup> Norman K. Zlotkin, "Post-confederation Treaties" in *Morse (1985) supra* note 20 at p. 273; and see also *Telford (2003) supra* note 45 at p. 73, that there were at least fourteen such petitions.

<sup>48</sup> The Ojibway and Métis leaders of the Mica Bay incident included the great grand uncle of Steve Powley. For more on Shingwaukonse and the story of the Robinson Treaties see Janet Chute, *The Legacy of Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998)



Ojibway were in Montreal, the Lake Superior Ojibway confronted the miners in Mica Bay with the following demand – no treaty; no mining. Instead of sending a treaty commissioner, the government sent investigators – Vidal and Anderson – who succeeded only in inflaming the situation. A few days after the investigators left, several hundred Métis and Ojibway occupied Mica Bay, held the miners hostage, and shut down the Quebec Mining Company. The government response was swift. Troops were sent in and warrants were issued. The leaders were transported to Toronto. The investigators report, issued one month after the Mica Bay occupation, claimed that the opposition could be overcome if the government took immediate action to “intimidate the Indians and half-breeds”.<sup>49</sup> Finally, Robinson was dispatched to make a treaty with the Ojibway, with instructions to acquire the lands “required for mining purposes”.<sup>50</sup>

The contentious issues during the negotiations of the Robinson Treaties revolved squarely around land and resource rights. Robinson initially offered a one-time amount of \$32,000 or half of this with an annuity of \$4000. The Ojibway rejected this low-ball offer. They were well aware that the government was in a position to collect over \$400,000 from the mining leases and more revenue in the future. To settle the matter Robinson added an escalator clause, which would increase the annuity payments from the proceeds of future mining.

The said William Benjamin Robinson, on behalf of Her majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees, that should the territory hereby ceded by the parties of the second part [the Ojibway] at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time ...

This escalator clause in turn, led to the beginnings of litigation between the Province and the federal government. It is well to recall at this point that the Robinson Treaties are pre-Confederation treaties. After Confederation, the federal government had the cost and responsibility for Indians, while the Province would claim any profit from the ceded territories. Eventually the parties – the Province and the federal government - settled the matter to their satisfaction. In the result, despite the words of the treaty, there were no increased annuities that accrued to the Indians. The law upheld this impoverished view of the treaties and the rights of Indians to their annuities, when the Privy Council held that,

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.<sup>51</sup>

The solemn promise of the treaty with respect to annuities was not honoured by the Crown. The

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<sup>49</sup> *Telford (2003) supra* note 46 at p. 78 citing a letter from Anderson (one of the investigators) to Robert Baldwin, dated November 16, 1849.

<sup>50</sup> *Telford (2003) supra* note 46 at p. 79.

<sup>51</sup> For more on the treaty annuities case see *Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199, 66 LPJC 11 (PC) [hereinafter *Treaty Annuities Case*]

solemn promise of the treaty with respect to reserve lands was also not honoured by the Crown. Surveys carried out immediately after the treaty signing ensured that lands, which the treaty expressly set aside for inclusion in the reserves, remained outside reserves and were subsequently staked. To add insult to injury, mining operations in Garden River itself continued.

The Métis, who protested the mining leases alongside the Ojibway, and likewise asked for treaty protection of their lands, were shut out of the treaty process entirely. Robinson, however, promised to protect their lands, a promise that failed to materialize. Within a few years of the Treaty, most Métis were not in possession of their lands. The facts seem also to indicate that Robinson himself was speculating and profiting from sale of the lands in Sault Ste Marie.<sup>52</sup> Ojibway anger boiled over again and resulted in another occupation of the Quebec Mining Company on Michipicoten Island in 1854. It was the second time in five years that the Ojibway brought mining operations to a standstill.

This then was the state of the nation on the eve of Confederation. These examples, from Six Nations and the Robinson Treaties, show a pattern of government behaviour that was well established by then. Aboriginal peoples and their lands would be sacrificed for the sake of settlement and development. The Crown would use policy, statute, the troops and the courts to enforce its will. The law and policy set out by the *Royal Proclamation* was not enough to protect Indians and their lands and resources. The Crown had conveniently forgotten its solemn commitment made in 1763 and its responsibilities to secure the rights of the Aboriginal peoples of Canada. In the 104 years following the *Royal Proclamation*, the Crown had made a 180-degree change in direction. The Crown, the former protector of Aboriginal peoples was now the promoter and the protector of “the selfish, the thoughtless and the ruthless.”<sup>53</sup>

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<sup>52</sup> For more on the Mica Bay Incident and the Métis participation in that event and in the Robinson Treaty negotiations, see Trial Transcripts of Dr. Victor Lytwyn from the trial of *R. v. Powley* at <http://www.metisnation.org/harvesting/Powley/court.html>, Vol. 3, pps. 80-83.

<sup>53</sup> *R. v. Secretary of State*, per Lord Denning, *supra* at note 20.

## Part Four

### Aboriginal Rights Disputes Post-Confederation: “No right which gave them any interest in the territory”<sup>54</sup>

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#### A. The Status of “Indian Lands”: Aboriginal Title After Confederation

Despite the disparity between Crown obligations, as set out in the *Royal Proclamation*, and the on-the-ground reality of Crown decision-making, the new Canadian constitution in 1867 expressly included additional protections for Aboriginal rights and title. The *Constitution Act, 1867*, in s. 91(24) provided that “Indians, and Lands reserved for the Indians” were a federal responsibility. Section 109 of the *Constitution Act, 1867* was another constitutional provision that protected land-related Aboriginal rights and interests. It qualified provincial ownership by making it subject to “any Interest other than that of the Province in the same”.

As noted above, the purpose of the *Royal Proclamation of 1763* was to protect Aboriginal peoples from frauds and abuses, speculation and theft – especially with respect to their lands. Settlers were not to have direct access to Indian lands. But the many land surrenders in the early 1800s - concluded after settlers had taken up Indian lands in southern Ontario - show that settlers did have direct access to Indian lands. Nearly twenty cases report the difficulties with land surrenders and while they raise the issues of Indian title, they are actually about competing settler claims for land that was formerly held by Indians.<sup>55</sup>

In light of the voluminous 19<sup>th</sup> Century Indian land-related litigation, it is not surprising that the status of Indian title was a subject much debated before the courts. There are several early cases that hold that Indian lands in Ontario were held ‘in trust’ for Indian tribes after surrender of that land. The *Bagot Report* in 1844 had also noted that certain Indian lands were held in trust.<sup>56</sup> Later cases indicate that the trust relationship with respect to surrendered lands was applied to all Indian lands, including Six Nations lands and that it was based on the Indian’s relationship with

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<sup>54</sup> *Treaty Annuities Case*, *supra* note 51 at p. 213. (A.C.)

<sup>55</sup> *Harring*, *supra* note 33 at p. 92. Harring conducted a search of Ontario’s seven major reporting systems for the early 19<sup>th</sup> Century. He reports that there are fifty-two reported cases concerning Indian rights. Four were appealed to a higher Ontario court and three were appealed to the Supreme Court of Canada. Two were further appealed to the Privy Council. Two more cases, both between Ontario and Canada were filed as original cases in the Supreme Court of Canada. The total is therefore, sixty-three reported cases involving Indians and Indian rights. Most of these cases deal with Indian land title, which had been acquired one way or another by settlers. These are not Indian title cases. In fact, in the majority of cases no Indians were even parties. Most arose from the ongoing legal disputes involving the Six Nations’ Grand River lands, which were granted and not, therefore, held pursuant to Indian title. Harring also notes that not all cases are reported and that the total number is likely higher than the reported cases indicate.

<sup>56</sup> ‘Report of the Commissioners, 1844’ (1847) s. 3, ‘Lands: 1. Title to Lands’, as cited in *Harring*, *supra*, note 33 at p. 127. However, this was not, at that time, applied to Six Nations lands, which were held, according to Chief Justice Robinson, only by a promise of the government that it would not grant the lands to others. See *Doe d. Sheldon v. Ramsay*, (1852) U.C.Q.B. 105 at 122-123. In *R. v. The Great Western Railway Company*, (1862) 21 U.C.Q.B. 555 at 577, the question was with respect to surrendered Indian title lands for a right of way in Sarnia. The Chief Justice found that there was a trust relationship, because there was an express statement in the surrender that the ‘land was to be disposed of for their [the Indian’s] benefit

the Crown.<sup>57</sup>

Prior to *St. Catharine's Milling*, the most important case about Indian title was *Church v. Fenton*.<sup>58</sup> The issue was this – when exactly did “Indian land” stop being “Indian land”? Was it when it was sold, when it was fully paid for, or when the patent was issued? The case dealt with “Indian lands” that were sold to settlers. The settlers were to pay for the lands in instalments. Patents were issued and then the land was sold for taxes due. The owner argued that until the land was patented, it was still “Indian lands” and not subject to provincial tax. The issue was important because much Indian land was being sold in this manner and the instalments and taxes paid for the expensive Indian policy. Judge Gwynne (later on the Supreme Court of Canada when *St. Catharine's Milling* was heard) held that Indian lands were a subcategory of Crown land and were thus subject to provincial statutory taxes. The Crown had, according to Judge Gwynne, a right by conquest, but had waived that and chosen to extinguish title by surrender.<sup>59</sup>

All of these early cases dealt with surrendered Indian lands. Until the end of the 19<sup>th</sup> Century there was no law with respect to the legal status of unsurrendered Indian lands, although the status had been debated on several fronts. It is of interest to note that the 1856 report [later echoed by Lord Denning in *R. v. Secretary of State*<sup>60</sup>] stated that the duty was to act by ‘so managing the Indian property as to secure its full benefit to the Indians, without impeding the Settlement of the Country.’<sup>61</sup>

This was the situation with respect to Indian lands by the turn of the 19<sup>th</sup>/20<sup>th</sup> Century, at which time one of the most significant cases defining the nature of Aboriginal land rights came before the courts – *Attorney General of Ontario v. St. Catharine's Milling and Lumber Company*. The case is still referred to with approval by the Supreme Court of Canada.<sup>62</sup> While it forms a foundational legal basis for our current understanding of Aboriginal land rights, no Aboriginal peoples were a party to the action.

The core of the dispute was control of Ontario's north. Under s. 91(24), “Indians and lands reserved for the Indians” were dominion jurisdiction. Crown lands within the existing provinces were under provincial ownership and control. The tension between Indians and Indian lands on one hand, and provincial control of most other crown lands on the other, was a core precept upon which the political foundation of Canada rested. The legal question of who held the underlying title to Indian lands was not clear and was claimed by both governments.<sup>63</sup>

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<sup>57</sup> *Mutchmore v. Davis* (1868), 14 Gr. 346

<sup>58</sup> *Church v. Fenton* (1878) 28 C.P. 384, 395-401

<sup>59</sup> This same argument later formed the basis of Ontario's case in *St. Catharine's Milling and Lumber Company v. the Queen* (1889) 14 App. Cas. 46 (JCPC), aff'd (1887) 13 SCR 577 (SCC); which aff'd (1887) 13 O.A.R. 148 (OCA); which aff'd (1886) 10 OR 196 (Chancery Div.)

<sup>60</sup> *Secretary of State*, *supra* at note 20.

<sup>61</sup> Journals of the Legislative Assembly, 1858, appendix 16, ‘Report of the Special Commissioners to Investigate Indian Affairs in Canada’ Introduction (unpaginated), as cited in *Harring*, *supra* note 33 at p. 129

<sup>62</sup> See *Delgamuukw*, *supra* at note 22; and see *Haida Nation*, *supra* at note 18.

<sup>63</sup> The issue had arisen before, but because it had come up in the context of Six Nations lands, which were not held pursuant to Indian title, but lands held pursuant to a deed, the earlier case law had no precedent value when the issue came up again in *St. Catharine's Milling*. See *Bown v. West*, (1845) II Grants Chancery 639, which was about breach of contract to sell Indian lands at Grand River.

The lands in question in *St. Catharine's Milling* were situated in North-western Ontario and were part of the territory covered by a treaty with the Saulteaux Indians - Treaty Three. A spokesman for the Saulteaux, early in the treaty negotiations, left no uncertainty as to the Indian perspective on their ownership of their lands. In exchange for the surrendered lands, they initially demanded large reserves and the right to dispose of tracts of the forest, adjacent waters and underlying mineral rights. The Saulteaux had no doubt about the value of their lands and they knew that Canada wanted a route to the west through their lands.<sup>64</sup>

"All this is our property where you have come ... This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property and belongs to them."

- Chief Mawedopenais, 1873

Yet the Indian perspective, despite the fact that it was their lands at issue, was not before the court. Much has been written about *St. Catharine's Milling* and in particular, about the opposing claims to title to these Indian lands. Ontario took the position that Indians had no legal title to their land and had only a lesser right to occupy and use the lands and that the treaty was solely for political purposes and did not give the federal government a proprietary interest in the land. Ontario further argued that the reference to "Indian lands" in s. 91(24) referred only to Indian reserves and not to all unoccupied land in Canada. The federal government took the position that the lands were Indian lands, held pursuant to Indian title, until ceded to the dominion government by treaty.

The case is not about the nature and scope of Indian title. Rather, it is about the extent to which a provincial or federal legal right could derive from that Indian title. The federal government was not interested in robustly promoting Indian title. It was simply a legal argument used to promote the underlying political battle respecting the power balance between the federal and provincial governments.

Chancellor Boyd's trial judgment is based squarely on the issue of Indian title and contains extremely racist language, a type of language not previously seen in Canadian jurisprudence. Boyd referred to the Indians as "rude red-men", 'heathens and barbarians' and 'a more than unusually degraded Indian type'.<sup>65</sup> It may be relevant to note that the trial took place in May of 1885, during the height of the Northwest Rebellion in Saskatchewan, and passions in the country, on both Indian/Métis and settler side, were running high.

The Supreme Court of Canada, in a split decision, founded its judgment, not on Indian title, but on a division of powers argument, holding that the Indians had a legal right of occupancy, but that the Crown had legal title in the land. The case was then appealed to the Privy Council. The Privy Council held that the Indians had a legal right of occupancy – a usufructuary right - but not ownership. The Province owned Indian lands through crown title but could not take beneficial ownership of those lands until the Indian interest was surrendered. Undeveloped lands within Ontario belonged to the province not to the federal government.

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<sup>64</sup> Alexander Morris, *Treaties of Canada with the Indians* (Toronto: Coles Publishing, 1971) at 59 and 62.

<sup>65</sup> *Harring*, *supra* note 33 at pp. 137-138.



The battle for control and ownership of lands and resources continued long after *St. Catharine's Milling*. The issue was so confused that at times both the Province and the federal government issued separate leases for the same resource.<sup>66</sup> We can get a view of the situation in *Attorney General of Ontario v. Francis*,<sup>67</sup> where a timber lease issued by the federal government on reserve lands within the Robinson Huron Treaty territory. The timber was sold in 1886, for the benefit of the Indians and the money was held in trust. Ontario had also sold the same timber in 1872. When the matter came to court, Ontario argued that the surrendered Indian lands were no longer "Indian Lands" under s. 91(24) and had reverted to the Province. The trial judge rejected this argument because the land in question was reserve land.<sup>68</sup>

Finally, after years of litigation and dispute the two governments reached an agreement that effectively settled their differences. Legislation was passed by both Ontario<sup>69</sup> and Canada<sup>70</sup> in 1891. The act was entitled *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands*. Then in 1894, Canada and Ontario further agreed that,

any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of Ontario.<sup>71</sup>

The issue of provincial versus federal control of Indian lands and resources however, was still not settled. The matter came up again in *Ontario Mining Company v. Seybold*.<sup>72</sup> In this case, Ontario sought to curtail federal power with respect to Indian lands. Chancellor Boyd, the same judge who sat on the trial in *St. Catharine's Milling*, held that while the federal government had the right to grant reserves to Indians and to sell those lands and hold the monies in trust, this power was limited. If the lands ever stopped being used to benefit Indians, it reverted to the Province because it was the province that held title. Indians had no interest in minerals at all, and never had, so the ownership of the minerals had been held by the Province since Confederation. Both the Ontario Court of Appeal and the Supreme Court of Canada upheld Boyd's judgment. Another agreement between Ontario and Canada then followed in 1902, wherein both parties agreed that with respect to all reserves established pursuant to the 1894 agreement, Ontario would confirm title made by Canada and that Canada would retain,

... full power and authority to sell or lease and convey title in the fee simple or for any lesser

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<sup>66</sup> *Calder v. Fraser* (unreported) involved two parties who held title to the same land. One held it pursuant to federal lease, the other under an Ontario lease. The judge held that the federal government had no right at all to sell or lease lands for the benefit of the Indians. *Harring, supra* note 33 at p. 146 citing a reprint of the judgment in William David McPherson and John Murray Clark, *the Law of Mines in Canada* (Toronto: Carswell, 1898), 15-23.

<sup>67</sup> *Attorney General of Ontario v. Francis* (1887) 2 C.N.L.C. 6 (unreported until 1980)

<sup>68</sup> *Harring, supra* note 33 at p. 144, notes that the federal government, while claiming that the timber came from reserve lands, did not even have a record of the existence of the reserve and had to call the chief of the Ojibwa band that lived on the reserve to testify as to its existence.

<sup>69</sup> 1891, 54-55 Vic., c. 3

<sup>70</sup> 1891, 54-55 Vic. C. 5

<sup>71</sup> Norman K. Zlotkin, "Post-Confederation Treaties" in *Morse* (1985) *supra* note 20 at p. 277; see also Patrick Macklem, "Impact of Treaty 9 on Natural Resource Development" at p. 107 in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada, Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997).

<sup>72</sup> *Ontario Mining Company v. Seybold* (1899) 31 O.R. 386.

estate...The question as to whether other reserves in Ontario include precious metals to depend on the instruments and circumstances and law affecting each case respectively.

After this, any land set aside for Indian reserves had to be with the consent of Ontario. It is on this basis that the federal government entered into negotiations for Treaty Nine, one of the northern resource development treaties.<sup>73</sup> Treaty Nine follows the standard model of the other numbered treaties, except that the Province appointed one of the treaty commissioners. The Province only participated in the treaty negotiations towards the end and then was primarily concerned that reserve lands not be located at sites that were suitable for hydro development. The Province and Canada duly signed an agreement in 1905 that cleared the way for the negotiation of the treaty. The text of the agreement forms part of, and makes Treaty Nine subject to, that agreement.<sup>74</sup> In subsequent years requests for reserve locations were vetoed by Ontario if they were suitable for hydro development.

The historical fact is that, with the sterling exception of a few of the Six Nations cases, no Indians were involved in the litigation that ‘decided’ the legal status of their Indian title. The result of all of these cases was dissatisfaction on all sides. The Indians continued to press for access to their lands and resources and the government adopted an increasingly restrictive analysis of Indian rights and title. Gradually, the issue of Indian land rights moved out of the courtroom and into the political arena, where Indians fared no better than they had in the courts. Other than harvesting rights, the case law is virtually silent on Aboriginal lands and resources until the 1960s.

### ***B. Aboriginal Harvesting: The 19<sup>th</sup> and 20<sup>th</sup> Century Battle for Access to Fish and Wildlife*** **(co-authored with Dr. Frank Tough)**<sup>75</sup>

The idea of a regulatory regime for harvesting is ancient and comes to North America from the laws established in 1079 when William the Conqueror “afforested” England and Wales and imposed a Forest Law. “Forests” in that day did not correspond to our modern understanding of the term.<sup>76</sup> At the time, forests were considered land that was subject to special laws designed to protect deer and other animals of the hunt. Such laws governed hunting, fishing and timber cutting and grazing rights. In essence, a forest was a place to keep deer and other animals and

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<sup>73</sup> Norman K. Zlotkin, “Post-Confederation Treaties” in *Morse (1985)*, *supra* note 20 at p. 275.

<sup>74</sup> *Ibid*, at p. 294.

<sup>75</sup> This section of the paper has been co-authored with Dr. Frank Tough. The research on the 19<sup>th</sup> and early 20<sup>th</sup> Century harvesting regime in Ontario is a summary of an extremely complicated archival record and is entirely the work of Dr. Tough. This section is largely a condensed version of work previously done by Dr. Tough - *A Review of the History of Indian Resource Rights and Conservation Regulations in Ontario ca. 1880-1945*, (unpublished, 1995), which had its origin in Frank Tough, “*Ontario’s Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal Treaty Rights, ca. 1892-1930*,” a report for the Ontario Native Affairs Secretariat (January 1991). Dr. Tough’s 1991 report and sources were heavily relied on in the *RCAP Report*, *supra* note 3, Vol. 2, Part 2 at pp. 496-498, 509-511.

<sup>76</sup> The word ‘forest’ comes from the Latin *fera statio* or ‘abode of wild things’. The origin of the word forest is usually explained as coming from a late-Latin phrase *forestis silva*, which was apparently applied to areas of land used by the Emperor Charlemagne for hunting. Here, *silva* meant “woodland” (as in “sylvan” and “silviculture”) and *forestis* meant “outdoor, outside” (apparently related to the Latin *fores*, “door”), so that *forestis silva* meant something like “beyond the main or central area of administration; outside the common law”. In time, the phrase became shortened to forest, but retained a sense of separateness and exclusion.

Forest Law had one purpose - to preserve ‘the venison’<sup>77</sup> and ‘the vert’<sup>78</sup> for the King’s pleasure.<sup>79</sup> The *Magna Carta*, which was signed and sealed in 1215, contained the substance for the first written game law in the English-speaking world. In 1217, clauses from the *Magna Carta* relating to the forests were transferred to a separate *Forest Charter*.<sup>80</sup> As the centuries wore on, hunting became an exercise in privilege with a life of its own. These hunting traditions were then carried to other countries, including North America.<sup>81</sup>

As early as 1760, Pennsylvania had a game law that required landlords to preserve wildlife on their property. The Hudson’s Bay Company had management restrictions on “ruined fur ground” as early as 1822.<sup>82</sup> In 1864, Prince Edward Island had a law that protected grouse. In New York, certain counties were closed to moose hunting in 1868 for five years and by 1870, British Columbia and Newfoundland had closed seasons on deer. In 1877, the Northwest Territories government enacted the *Ordinance for the Protection of the Buffalo*. The Ordinance included seasonal limits on harvesting female and immature buffalo, and search and seizure powers similar to English anti-poaching laws of the period. The Ordinance made little dent in the decline of the buffalo. However, the vanishing buffalo profoundly influenced public awareness of what has now come to be seen as ‘conservation’.

Since that time the conservation ethic has been the underlying philosophy or moral purpose behind the game laws of most jurisdictions. This new ethic soon combined with the democratic notion of universal access for all. By 1900, a political movement had been born with the purpose of conserving wildlife, of which the buffalo was the symbol. The public mind became engaged in wilderness and its preservation. The idea of hunting for pleasure and experiencing the wilderness gained public support in the early part of the 20<sup>th</sup> Century. Yet these new ideas - access for all, conservation and the growing public support for sport hunting - came at the expense of Aboriginal peoples’ harvesting, because their harvesting performed a different function in their economy and culture than harvesting does for non-aboriginal people.

By the end of the 19<sup>th</sup> Century, Ontario’s Aboriginal peoples had practiced their traditional lifestyle, accessed their lands and exercised their rights amidst an unaccommodating regulatory

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<sup>77</sup> The four beasts of the Forest were red deer, fallow deer, roe and wild pig, together called ‘the venison’.

<sup>78</sup> Green undergrowth for feeding the venison.

<sup>79</sup> United States Environmental Law Institute, *The Evolution of National Wildlife Law* (Washington, D.C.: U.S. Superintendent of Documents, 1977), p.8.

<sup>80</sup> See *Halsbury’s Laws of England*, 3<sup>rd</sup> ed. Vol. 17, p. 608 at 1171 “State forests for the production of timber are a recent creature of statute. Since very early times there have been royal forests, the purpose of which was to provide hunting and relaxation for the Monarch. These forests had their own officers, their own courts and their own system of law but by the sixteenth century the forest organization was in decay. Parts, however, of the old system which still survive are now regulated by statute.” [footnote references omitted]

<sup>81</sup> For more on the English origins that gives an appreciation of our early game protection repressive qualities see P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831* (Cambridge: Cambridge University Press, 1981).

<sup>82</sup> Arthur J. Ray, *Indians in the Fur Trade: Their Role as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay 1660-1870* (Toronto: University of Toronto Press, 1974) at pps. 198-203. The Company could limit the use of steel traps, closed seasons and refuse to purchase undersized animals. It even relocated posts to give an area a chance to recover. And see also Arthur J. Ray, “Some Conservation Schemes of the Hudson’s Bay Company, 1821-50: An Examination of the Problems of Resource Management in the Fur Trade,” *Journal of Historical Geography* 1, 1 (1975) pp. 49-68.

environment for over one hundred years. Emerging conservation policies and regulations at first used non-applicability as the means of dealing with Aboriginal harvesting rights. This was the practice of exempting Aboriginal peoples from the application of the regulatory regime.<sup>83</sup> Jurisdictional questions further complicated disputes that arose between the resource rights of Aboriginal peoples and the natural resources regulatory regime enforced by the Ontario government. The nexus point where federal jurisdiction and provincial jurisdiction met was exaggerated by aggressive provincial policies, ambiguous policies, and as time wore on, a progressive ‘forgetting’ that Indian resource rights were legal rights.

In the early days of the development of the natural resources regulatory regime in Ontario, provincial efforts to regulate Indian harvesting were constrained to a certain degree by the interventions of the federal government. Prior to Confederation, the federal *Game Act* of 1860 expressly exempted Indians. After Confederation, in the 1880s, Ontario legislation also provided an exemption for Indians for subsistence harvesting. It expressly did not apply to treaty rights or “regulations in that behalf made by the government of the Dominion of Canada”.<sup>84</sup> The Act also expressly stated that it did not “apply to Indians hunting in any portion of the Provincial territory as to which their claims have not been surrendered or extinguished.”<sup>85</sup>

In the late 19<sup>th</sup> Century both federal and provincial governments agreed that Indians were entitled to access game for subsistence purposes and without fees. The provincial part of the natural resources regulatory regime avoided conflict with the federal jurisdiction for Indians. The policies show that there was only room in the natural resources regulatory regime for the official view of the Indian economy - that it was subsistence oriented. Despite the close involvement of Aboriginal peoples in the fur trade for centuries, there was no awareness or inclusion of any Aboriginal commercial economy. The natural resources regulatory regime at the time was strictly concerned with preserving resources for non-Aboriginal access and with grudgingly continuing to preserve Aboriginal and treaty subsistence harvesting rights. The delineation between government policy in the north vs. its settlement/agrarian policy for the south was also well established by that time. In this respect the regulatory regime was applied more aggressively in the south because settlement made it harder for the system to ignore Aboriginal practices. In a process that continues today, as settlement and development move further north and west, the north/south policy line also shifts.

Arthur Ray has noted, in another jurisdiction where the economic conditions are similar, that the assumptions embedded in the natural resources regulatory regime - that subsistence and commercial harvesting are separate and distinct activities - does not accord with the reality of the traditional Aboriginal economy where both domestic and commercial sectors are closely

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<sup>83</sup> For example see s. 12 of *An Act to Amend the Act for the Protection of Game and Fur-bearing Animals*, S.O., 1892, c. 58.

<sup>84</sup> *An Act to Amend the Act for the Protection of Game and Fur-bearing Animals*, S.O., 1892, c. 58, s. 12. The exemptions were removed in 1913.

<sup>85</sup> At the time there were several areas of the Province where the status of aboriginal title was unresolved including Manitoulin Island, the Algonquin territories, the area that what would later become Treaty Nine, and the territory later ceded by the 1923 Williams Treaty.

connected.<sup>86</sup> . For example, trapped animals provided food for consumption and pelts for sale. Also, there was a strong exchange aspect to the Aboriginal economy. Aboriginal people sold game and fish to traders in order to obtain the necessary gear for subsistence fishing and hunting. Aside from the fur trade, Aboriginal peoples had an intra-Aboriginal trade in subsistence goods and food. The natural resources regulatory regime, from its inception, evinced no understanding of the existence of, or complexities within, the Aboriginal economy.

The natural resources regulatory regime became substantially more entrenched in 1890s with the creation of the Ontario Game and Fish Commission and the legislation that resulted from its recommendations.<sup>87</sup> It is at this time that Ontario established the system of enforcement that is still familiar to us. The system was enforced through the use of wardens who benefited financially from convictions because the Act provided that half of the fines went to the person upon whose evidence a conviction was made. Big game hunting was licensed, bag limits were set for deer, deer seasons were shortened, bans were set on hunting elk, moose and caribou, and procedures for conviction and punishment were strengthened. There was also a ban on trapping beaver and otter. Officials could arrest without due process and many provincial officials were given the powers of deputy wardens.<sup>88</sup>

Throughout the 1890s there was a discrepancy between prosecutions that resulted from the discretionary actions of the enforcement arm, and the express natural resources regulatory regime. Policy makers in the Ontario government believed in assimilation. They firmly believed that it was in the Indians' best interests to abandon their traditional lifestyle. Indeed, in another jurisdiction it has been argued that conservation regulations are a form of social control.<sup>89</sup> Officials also exhibited a willingness to make examples of some Indians to prove their point:

I have always endeavoured to avoid taking any course that could be considered antagonistic to the true interests of the Indians ... What is wanted is co-operation between your Department and our Government in the matter of having the Indians taught that their true and permanent interests are to protect the deer and moose. Bye and bye they will get good wages as licensed guides if they will only turn in and respect the law and help to protect these game animals. It is necessary that we should make an example of some of them who really know better than to openly violate the law as they do.<sup>90</sup>

This was the official attitude at the end of the 19<sup>th</sup> Century – a professed understanding, support and leniency that conflicted with the practice. Statutory inapplicability did not protect Aboriginal harvesting rights, because in practice, Indians were expected to abide by provincial game laws.

The provincial game laws were set up to protect the interests of sport hunters and fishermen. In fact, Ontario was re-allocating the resources away from traditional Aboriginal uses and diverting

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<sup>86</sup> Arthur J Ray, "Commentary on the Economic History of the Treaty 8 Area," *Native Studies Review* vol. 10, no. 2 (1995) pp. 169-195.

<sup>87</sup> *The Ontario Game Protection Act, 1893*, S.O. 1893, c. 49, ss. 27(1).

<sup>88</sup> *The Ontario Game Protection Act, supra* at note 21, ss. 16, 18, 21, 22, and 23.

<sup>89</sup> Peter J. Usher, "Caribou Crisis or Administrative Crisis? Wildlife and Aboriginal Policies on the Barren Grounds of Canada, 1947-60," in *Cultivating Arctic Landscape: Knowing and Managing Animals in the Circumpolar North* David G. Anderson and Mark Nuttall, eds. (New York: Berghahn Books, 2004) pp. 172-199.

<sup>90</sup> Ontario Commissioner of Crown Lands, Gibson, NAC, RG 10, Vol. 2405, File 84041 pt. 1 (27 April 1899).



those resources to sportsmen and the growing tourist industry. Indians were to be placated for the loss of their traditional livelihood with the prospect that “bye and bye” they would get jobs as guides to those same sports hunters and fishermen.

The sport and tourist industry influenced the natural resources regulatory regime in Ontario from the creation of the Ontario Game and Fish Commission in 1892. Sportsmen did volunteer work for the Commission and the individual views of prominent sportsmen of the day were attached to the Commission’s report.<sup>91</sup> These sportsmen were called “the better men of the country” and they were seen as “lovers of nature” with conservation values that deserved the support of the provincial government. Other harvesters, including Aboriginal harvesters, were seen as destructive, wasteful and ‘evil’. In 1911, the Game Commissioner wrote that,

The value of the sporting fish in the rivers and lakes is so great to the Province that to kill them off by persistent netting is nothing short of an economic crime ... it is difficult to determine a means of remedying this evil, but one solution, at least, is to be found in the education of the residents in these country districts to the value of the sporting fishes to themselves as a means of attracting to their vicinity the sportsman-tourist who must inevitably enrich them to the extent of the money he is bound to spend in the district. Once residents fully appreciate the economic benefits of a regular summer tourist traffic, care would assuredly be taken by them to place their nets in such places where the least possible harm would be done to the sporting fish. In any case, if deliberate netting of sporting fish can be proved against the holders of a domestic license, the punishment should plainly be severe.<sup>92</sup>

The influence of recreational sport hunters and fishers in turn led the province to argue that the natural resources of the province should be allocated for tourism and used to attract foreign investment.

It is certain that by rendering the fish and game of our country more plentiful we increase vastly the number of those foreigners [Americans] and others who annually spend a large portion of each season in our country, to our great advantage. Not only do we gain by the money left by them in our country, but often the visits of monied men is followed by large investments in mining or timber properties or other industries. So that through the influence of our game interests vast good may accrue to the country. Each year that tide of health and pleasure seekers is increasing, and will increase, and there is no reason whatever why our Province should not receive as large a share as any State on the continent; in fact, we should have every inducement for those to the south of us to spend their holidays in our country.<sup>93</sup>

By the turn of the 19<sup>th</sup>/20<sup>th</sup> Century, Ontario’s natural resources were not allocated as an objective, scientific approach to resource management. Classifying certain species as “sport” fish or game is not a scientific classification and has nothing to do with conservation. Such interests do, however, establish priorities for the natural resources regulatory regime.

Sportsmen and their organizations were encouraged in “every town and village ... to aid in moulding public sentiment, the import of which is absolutely essential to a proper enforcement

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<sup>91</sup> Ontario, *Sessional Papers*, 1893, No. 76, Report of the Ontario Game and Fish Commissioners, (1892) p. 4.

<sup>92</sup> Ontario Game and Fisheries Commission, *Final Report, 1909-1911*, Kelly Evans, Commissioner (Toronto: L.K. Cameron, 1911), p. 72.

<sup>93</sup> Ontario, *Sessional Papers*, 1899, No. 33, Report of the Ontario Game and Fish Commissioners, (1898) p. 6-7.

and observance of the law.”<sup>94</sup> The interests of recreational users, tourists and sportsmen were not only inseparable from government natural resource management, but formed the major policy, allocation and goal of the management regime. The allocation was, by virtue of these policies, directed away from traditional resource users. In contrast to these policies, the use of those same resources by Aboriginal people was seen as a conflict with the appropriate allocation. The Game and Fisheries Branch stated in 1907 that “the Indians are very destructive of game and fish, and settlers would like to see greater restrictions placed on the Indians, preventing indiscriminate slaughtering of game ...” because “tourists are coming ... in greater numbers each year.”<sup>95</sup>

How did these policies play out in the courts with respect to Aboriginal harvesting in the early part of the 20<sup>th</sup> Century? As with Indian title, after Confederation, the issue of harvesting rights was defended under the rubric of ‘division of powers arguments’. Arguments as to how the natural resources regulatory regime was to apply to Indian harvesting were raised, but the courts would not even answer the question for decades. The Province’s argument was simple – it could be summed up as follows – “this being our land we are entitled to say what shall be done upon it.”<sup>96</sup>

Some few examples will suffice to show the state of affairs. In *Rex v. Train*, a Hudson’s Bay Company employee was convicted for possession of beaver pelts in a closed season purchased from Indians. Train was a post manager in the Robinson Huron Treaty territory. He was convicted in 1910 and fined \$6,393.35 or 20 years and 6 months in jail. The matter then moved, as a stated case – *Re: Ontario Game and Fisheries Act*, to the appellate Division of the Supreme Court of Ontario with the following questions:

1. Is the Ontario Game Act within the legislative jurisdiction of the Legislature of Ontario?
2. Is that Act applicable to Indians?
3. If so, having regard to the Treaty, what are the rights reserved to the Indians by s. 8 of the said Act?
4. Is the said Act applicable to the Hudson’s Bay Company.

The case was heard in 1913 and the judges reserved their opinion. The Company argued that the Act was *ultra vires* because it dealt with criminal law, a matter strictly reserved to the Dominion under s. 91(27). Section 109 was also argued along with support for treaty resource rights. The Company argued that the right to hunt included the right to sell, because the treaty had preserved the right to hunt as they had previously practiced. Although it was a trial of a Hudson’s Bay Company official, the case was about treaty rights.<sup>97</sup>

Ontario argued that the primary purpose of the Act was conservation not punishment and that game in Ontario was the property of the Crown. The Province argued that Indian treaty rights did not give Indians the freedom to disobey game laws and that Indians were subject to the same

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<sup>94</sup> Ontario, *Sessional Papers*, 1905, No. 31, Annual Report of the Department of Fisheries of the Province of Ontario, (1904) p. 12-13.

<sup>95</sup> Ontario, *Sessional Papers*, 1908, No. 76, Annual Report of the Game and Fisheries Branch of the Province of Ontario, (1907) p. 19.

<sup>96</sup> *Rex v. Train*, (1912) unreported.

<sup>97</sup> McCarthy also argued that wild animals were *ferae naturae* and not property and that hunting was not a civil right. Finally he argued, on behalf of the Company that the fur trade was of national not local importance.

laws as others. The Province took the position that the treaties were not as valid as legislation and finally that in the end the Act was for the benefit of the Indians themselves.

By June of 1914, Chief Justice William Meredith made it clear that he would not render a judgment on the stated case. This seems to be highly irregular. After all, when one goes to court the one thing one may be assured of, usually, is a judgment. Yet no judgment issued in this case. The Province appears to have taken the silence of the court as confirmation of its policies. It proceeded to implement increasingly restrictive measures to ensure that Indians abided by game laws.

The issue of treaty rights resurfaced again in 1930 in the case of *Rex v Padjena and Quesawa*,<sup>98</sup> who were convicted by a magistrate for possession of two beaver pelts. A Judge later quashed the conviction, holding that the Indians were entitled to exercise their treaty rights and that the act and regulations did not apply to them. The Crown appealed and the case was brought before the Chief Justice of Ontario in October of 1930. It was adjourned with no hearing and as in *Re: Ontario Game and Fish Act* no judgment ever came from the appeal judges. According to a newspaper report, the Chief Justice stated that,

This was argued fourteen years ago and no decision was given. It was a large question and one in which the public faith is involved. I think the court of today should hold, as it did that of fourteen years ago, that it is inexpedient that this question be further litigated. [emphasis added]<sup>99</sup>

Again the silence of the court permitted the Province to continue to enforce laws that did not include consideration or recognition of Aboriginal harvesting.

The court did not break its silence until 1939 in *Rex v. Commanda*.<sup>100</sup> The case was an appeal by way of stated case from the conviction of an Ojibway Indian for unlawful possession of game during the closed season on lands. The defendant was charged under the *Game and Fisheries Act*.<sup>101</sup> The offence took place on lands ceded by the Robinson Treaty of 1850. The Act specifically brought Indians within its scope by defining the word "person" as including Indians.

Mr. Commanda argued that the legislation was *ultra vires* of the Province in so far as it included Indians referred to in the Robinson Treaty who were hunting within the territories defined by the Treaty. Mr. Commanda argued that the reservation in s. 109 as to existing Trusts and any Interest other than that of the Province, includes the right reserved to the Indians under the Robinson Treaty to hunt and fish over the ceded lands as before the treaty. He then cited s. 91(24). Mr. Commanda took the position that with respect to the interest in lands reserved to the Indians in 1867, (or a trust created in respect thereof) that interest or trust could only be interfered with or taken away by the Parliament of Canada.

The first question on the stated case then was whether, within the meaning of s. 109 there was a Trust in favour of the Indians, or whether they had an interest in the lands other than that of the

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<sup>98</sup> *Rex v Padjena and Quesawa*, 4 CNLC (1930) at 411-414 (Ont. Division Court).

<sup>99</sup> NAC, RG 10, Vol. 6747, File 420-8X pt 1, copy of a newspaper report.

<sup>100</sup> *Rex v. Commanda*, (1939) CNLC, Vol. 5, 367.

<sup>101</sup> *Game and Fisheries Act*, R.S.O. 1937, c. 353.

Province. The judge noted that the Robinson Treaty was considered in *AG Can. v. AG Ont.*, as follows:

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.

...

In view of the foregoing I am constrained to hold that in regard to the land ceded by the Indians there was no trust existing in respect thereof in their favour, nor did they have any interest other than that of the Province in the same ... I cannot agree that the *Game and Fisheries Act* is legislation "relating to" Indians or Lands reserved for the Indians, and consequently *ultra vires* of the Province.<sup>102</sup>

The judge held that the *Game and Fisheries Act* was a law of general application, that its primary object was protection of game and fish within the Province, and that the jurisdiction of the Province was exclusive under s. 92(13), "Property and Civil Rights in the Province"; and s. 92(16), "Generally all Matters of a merely local or private nature in the Province". Finally the judge cited *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick* and held that,

The legislative authority of the Province is, "as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."<sup>103</sup>

Justice Greene held that the whole question was a narrow issue - whether the Act was void because it related to Indians or Indian lands. Since he held that the provincial Act was not void, he came to the conclusion that it did not matter whether the Indians had any treaty rights because such "rights (if any) may be taken away by the Ontario Legislature without any compensation." The judgment was not appealed.

### **1. The Decline of Aboriginal Access to Fish and Wildlife**

The decline in official recognition of Aboriginal rights was incremental. It occurred over many decades and through dozens of policies, regulations, Orders-in-Council and statutes, each of which progressively and cumulatively affected the legal framework for recognition and affirmation of Aboriginal resource rights. The federal inclination to protect Aboriginal resource rights diminished exponentially in relation to the province's increasingly stringent protection and conservation laws. Aboriginal access declined as other users gained influence over the creation of the natural resources regulatory regime in Ontario.

In 1900, 1913 and 1914 the statutory exemption for Aboriginal harvesting was amended. This set the pattern for complete withdrawal of protection. By the end of the first two decades of the

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<sup>102</sup> *Treaty Annuities Case*, *supra* note 50 at p. 213. (A.C.)

<sup>103</sup> *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 at p. 442.

20<sup>th</sup> Century there was no statutory protection for Aboriginal harvesting. The conflict between Indian resource use (guaranteed by treaty) and pragmatic problems of perception by the general public appeared to have been resolved to the satisfaction of the Province. This resolution was not by recognizing and affirming treaty or Aboriginal rights, rather the conflict was resolved by diminishing recognition of Indian resource rights (other than on reserve) in favour of sport and tourist usage.

After 1907, Indian subsistence hunting was regulated by Order-in-Council and was separated from the previous legislative provision that recognized subsistence hunting.<sup>104</sup> Any recognition of Aboriginal harvesting rights was now discretionary. The Department of Indian Affairs conceded defeat. It ceased to defend Aboriginal and treaty resource rights and also ceased to even plead with the Ontario provincial officials for leniency on behalf of Indians.

In view of the position taken by the Provincial Government, the Department is convinced that no good would result from bringing this matter again to its attention, even if satisfied – which it by no means is – that the privileges asked for would be in the interest of the Indians, and can, therefore, only urge them to observe the game laws, as otherwise they will leave themselves open to prosecution and punishment.<sup>105</sup>

In response to requests for assistance from Indians in Ontario who were charged with harvesting offences, Indian Affairs stated that it could do nothing and was “powerless to protect them from the consequences even if it thought it right to do so.”<sup>106</sup>

From this point on, the federal officials view of their obligations with respect to Indians is startling. It is a complete reversal of their stance in the late 1800s. Federal officials begin to believe that Ontario’s exercise of regulatory authority overrides treaty rights and indeed advise Indians that the only protection for their harvesting is within express provincial legislation. The previous unconditional defence of treaty rights by the federal government is reduced to a “claim” and assertions of rights by Indians are minimized as “what may be thought by the Indians to be their Treaty rights.”<sup>107</sup>

In 1912, the Superintendent of Game and Fisheries, Edward Tinsley wrote to the federal Department of Indian Affairs that,

I have taken the stand that Indians, when off their respective Reserves, have no more rights than other people. ... It has long since been decided that all residents of the Province are amenable to the same laws, and they are not friends to the Indians who try to make them believe otherwise. ... [Tinsley had] endeavoured to be lenient with the Indians of the Province, but forbearance has ceased to be a virtue.<sup>108</sup>

The reaction from Aboriginal people to this shift in provincial and federal recognition of their resource rights was predictable and consistent. The archival record shows considerable political

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<sup>104</sup> *The Ontario Game Protection Act*, S.O. 1900, c. 49, s. 32; and *The Ontario Game and Fisheries Act*, S.O., 1907, c. 49, s. 8 and s. 9(j).

<sup>105</sup> NAC, RG 10, Vol. 2405, File 84041 pt. 1 (Jan 17, 1901).

<sup>106</sup> NAC, RG 10, Vol. 6743, File 420-8 pt 1 [Ontario Game Laws (Government Publication) 1903-1912] (July 23, 1906).

<sup>107</sup> NAC, RG 10, Vol. 6743, File 420-8 pt 1 (March 15, 1910).

<sup>108</sup> NAC, RG 10, Vol. 6743, file 420-8 pt 1 (April 12, 1912).



activity on this question. In 1909, Chief Moses McCoy petitioned the Department:

I have the honor to bring before your attention the hardships which are imposed upon the Indians, at the Robinson-Superior Treaty, by the present game laws in the Province in Ontario.

For some years past the killing of certain animals has been prohibited and of late the Indians of lake Nepigon, have been prevented from catching and selling fish to the contractors of the Trans-continental Railway. As the majority of Indians, resident on the north shore of Lake Superior, live by the chase, this prohibition is taking their means of livelihood from them.

Recently one of our Band was fined \$27.50 by magistrate O'Brien, of Fort William, for killing a moose, and not having taken out a Provincial license. We have had several meetings and have decided to place the matter before you as we consider that our Treaty rights have been interfered [sic] with ...

We have no money to appeal the case above spoken of and would respectfully ask that your department take this matter up and also have the game law restriction taken off so that we can hunt for a living as we have heretofore been in the habit of doing and so promised in our Treaty.<sup>109</sup>

In 1909 the Rama, Georgian and Christian Island Indians wrote in a similar vein:

Upon the discussion with the interference with our hunting fishing and trapping rights preserved to us and our people by our treaties it was moved that to protect and have restored to us and our people the hunting fishing and trapping rights that have been interfered with By the Whites lately...<sup>110</sup>

Another 1911 petition from the Robinson-Huron and Manitoulin Island bands is consistent:

Whereas all the Chiefs residing under the Robinson-Huron Treaty and the Chiefs on the Manitoulin Island together with their respective people do claim with One Voice as being deprived of their privileges of fishing, hunting, and trapping rights, according to the understanding under the Robinson-Huron Treaty and Treaties of earlier dates thus taking away the means of their livelihood.  
*-1911 Petition*

As the consequences of the prohibition law many of our people have suffered the penalty thereof not only in fines but also in imprisonments ...

We therefore, humbly submit our grievance to your Government as Guardians and trustees of the Indians for redress.<sup>111</sup> [emphasis in original]

Thus Aboriginal opposition to the incremental encroachment on their Aboriginal harvest rights was a continuing voice. There is never a time when Aboriginal people were not disputing the failure of the Crown to recognize and protect their Aboriginal rights. The history shows that, despite the fact that Indians were not able to seek legal counsel assistance for their grievances against the government until after 1951, Aboriginal peoples continued to press through political action, civil disobedience or the courts for continued access to lands and resources in order to exercise their harvesting rights.

Not only did the federal Department of Indian Affairs fail to act to protect Aboriginal harvesting

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<sup>109</sup> NAC, RG 10, Vol. 6743, File 420-8 pt. 1 (December 29, 1909).

<sup>110</sup> NAC, RG 10, Vol. 6743, File 420-8 pt. 1 (January 15, 1910). The petition is dated September 15, 1909,

<sup>111</sup> NAC, RG 10, Vol. 6743, File 420-8 pt. 1 (March 22, 1911).

rights, they disparaged any legal counsel who was engaged to act for these bands. Such counsel were said to be acting “for their own ends” and “endeavouring to mislead the Indians” with intervention that “can lead to no good results.”<sup>112</sup> The Federal government itself also actively prosecuted Indians for harvesting.

By the 1960s, even hunting on reserve was restricted. In *R. v. George*, the issue was whether an Indian who was a member of the Kettle Point Reserve could hunt ducks on his reserve.<sup>113</sup> A Magistrate for the Province of Ontario acquitted Calvin George in 1962 against a charge of unlawfully hunting a migratory bird in a closed season contrary to the *Migratory Birds Convention Act*.<sup>114</sup> An appeal then went, by way of stated case, to the Ontario High Court, where McRuer CJHC found that unless there were express words in the act that infringed the hunting rights of Indians, the Act could not apply. The majority of the Court of Appeal for Ontario dismissed a further appeal. On appeal to the Supreme Court of Canada, it was held that federal legislation applied to Indians on reserve. It was a new low. Thereafter, the *Migratory Birds Convention Act* could be, and subsequently was used, to stop hunting, even on reserve.<sup>115</sup>

This brief review of the case law in the 19<sup>th</sup> and 20<sup>th</sup> centuries shows several illuminating points.

First, Aboriginal peoples have always believed and stated that they owned the lands and resources of their traditional territories.

Second, Aboriginal peoples have always disputed the dispossession of their lands and resources. They fought politically, by petition, by occupation, and in the courts to retain their lands and their access to their resources.

Third, the initial position taken by the British Crown, and the understanding that led to the *Royal Proclamation of 1763*, has been proven prophetic. Aboriginal lands and resources require protection that is not forthcoming from local [provincial] governments. The above shows that, from Confederation on, Ontario never did, and never intended to respect, recognize or protect Aboriginal lands and resources. Indeed, the Province took control of Aboriginal lands and resources, by every available means, including the use of policy, force, settlement, public opinion, and in the courts.

Fourth, the conflict between Aboriginal rights and the jurisdiction of the Province with respect to lands and resources have been at issue since Confederation. Prior to 1982, the disputes were resolved largely in favour of the Province.

Finally, the case law shows that the *Royal Proclamation*, treaties and the constitutional protections in s. 91(24) and s. 109 were not sufficient to protect vulnerable Aboriginal land related interests. Something more was needed. It was this situation then, that led the country, in 1982, to make a fundamental shift in the law with respect to Aboriginal rights in Canada.

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<sup>112</sup> NAC, RG 10, Vol. 6743, File 420-8 pt. 1 (February 8, 1910).

<sup>113</sup> *R. v. George* (1963) CNLC, vol. 6, 339 (Ont. High Court), rev'd by (1966) CNLC vol. 6, 360 (S.C.C.)

<sup>114</sup> *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

<sup>115</sup> See also *R. v. Wesley* (1975) CNLC, vol. 8, 572 which held that Indians could not hunt in another treaty area. And see *R. v. Moses* (1969) CNLC, vol. 6, 480, which upheld the right to hunt under the Robinson Treaty because, while federal legislation might be able to derogate from the treaty, provincial legislation could not do so.

## Part Five

### Section 35 of the Constitution Act, 1982: Aboriginal Rights Gain Constitutional Protection

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#### A. Purpose of Section 35 of the Constitution Act, 1982<sup>116</sup>

In 1982, Canada took the unique and unprecedented step of giving constitutional protection to the Aboriginal and treaty rights of the “Aboriginal peoples of Canada” in section 35. Section 35 of the *Constitution Act, 1982* is unprecedented in two ways. First, it gives constitutional protection to Aboriginal and treaty rights. Second, it includes a mixed-blood people, the Métis, within the definition of the “Aboriginal peoples of Canada”. There is no other country in the world that has taken either step.

It has been noted by the Supreme Court of Canada that the inclusion of section 35 in the *Constitution Act, 1982* was the culmination of a long and arduous struggle by all the Aboriginal peoples of Canada.<sup>117</sup> Indeed, the three national Aboriginal organizations of the day, the National Indian Brotherhood, the Native Council of Canada and the Inuit Tapirisat, worked together to

1982 - The debates in both the House of Commons and the Senate reflected a unanimous recognition that government had ancient legal obligations to Aboriginal peoples and that the relationship with the Crown and that the practices of the past needed to change.

achieve the entrenchment of Aboriginal and treaty rights in the Constitution.<sup>118</sup> At the same time, several non-Aboriginal bodies were also calling for constitutional reform that included protection for Aboriginal peoples.

By the fall of 1980, there was public support for the idea of entrenching Aboriginal rights in the Constitution. The Canadian Bar Association, the Pepin-Robarts Task Force on Canadian Unity, a Joint Senate-House of Commons Committee on the Constitution, and several church groups all called for the constitutional protection of Aboriginal rights.<sup>119</sup>

The political debates in both the House of Commons and in the Senate calling for constitutional protection for Aboriginal peoples and their rights are illuminating. There was a consensus that the Aboriginal peoples of Canada had “old and difficult grievances” that required

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<sup>116</sup> Some parts of this section have been previously published in Jean Teillet, “Old and Difficult Grievances: Examining the Relationship Between the Métis and the Crown,” (2004) *SCLR* at 291.

<sup>117</sup> *Sparrow*, at p. 1105.

<sup>118</sup> Note that these three groups represented the Indians, Inuit and Métis peoples of Canada in the constitutional negotiations of the late 1970s and early 1980s. The national bodies that represent these three distinct Aboriginal peoples in 2004 are the Assembly of First Nations, the Métis National Council, and the Inuit Tapiriit Kanatami. The former Native Council of Canada is now known as the Congress of Aboriginal Peoples, which claims to represent a mixture of off-reserve, status, and non-status Aboriginal individuals. This claim is disputed by the Assembly of First Nation, which claims to represent all Indians whether on or off reserve, and by the Métis National Council which claims to represent all members of the Métis Nation.

<sup>119</sup> Peter Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 1-3, 69 and 81-83; Donald Purich, *The Metis* (Toronto: James Lorimer and Co, 1988) at 167-169; Roy Romanow, “Aboriginal Rights in the Constitutional Process” in Boldt and Long (eds.), *Quest for Justice* (Toronto: University of Toronto Press, 1985) at 73-74.

reconciliation.<sup>120</sup>

The move to give the rights of Aboriginal peoples constitutional protection was clearly intended to be a substantive change in the relationship between Aboriginal peoples and the Crown. Section 35 was to be “a turning point in the status of native peoples in this country”, “a renewal of our commitment to the native peoples”, an “historic recommendation of equality of constitutional standing of the Aboriginal peoples with other communities in Canada” and “a political watershed in the lives of the Aboriginal people in Canada”. Finally, including section 35 in the Constitution would mean that, “no government or individual will again be able to put aside or disregard the rights of Canada’s original peoples” because Parliament has taken the “opportunity of redressing their claims in the Constitution and to provide a legal basis for it.”<sup>121</sup>

That was 1982. It is now twenty-five years since that monumental constitutional change was made. Since 1982, the Supreme Court of Canada has brought down approximately 40 judgments with respect to the Aboriginal and treaty rights of Indians. The first judgment of the Supreme Court of Canada on Métis rights was handed down in 2003 in *R. v. Powley*.<sup>122</sup> As of the writing of this paper, in early 2005, we now have a substantial body of law that sets out the principles of section 35.

The old and difficult grievances all stem from the problematic relationship between Aboriginal peoples and the Crown. What was the relationship just prior to 1982? From the above we can see that it was unbalanced, to say the least. The Crown held the power, the lands, the resources, the courts, the law enforcement and the money. By 1982, Aboriginal peoples rights were, for the most part, simply ignored.

The inclusion of section 35 in the *Constitution Act, 1982* was intended to even out the power relationship. But perhaps with the hindsight of twenty-five years we can see that, in 1982, little thought appears to have been given as to exactly how section 35 would restrain the powers of the Crown. The Courts have assumed that government would take their judgments to heart and act on them. Yet, the examples set out below, that have all taken place since 1982, show that the natural resources regulatory regime has not done so.

In argument before the Supreme Court of Canada from 1984 to 2004, Ontario and the federal government have both consistently resisted the conclusion that constitutional space for Aboriginal peoples means any restraint on Crown jurisdiction or authority.<sup>123</sup> This attitude has been described elsewhere as “caution and a reluctance to move decisively on Aboriginal issues on the part of the Province; frustration by Aboriginal peoples at the glacial pace of change.”<sup>124</sup>

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<sup>120</sup> Hansard of the House of Commons and Senate of Canada 1980-1982 re inclusion of s. 35, Statement by Senator Austin in Senate Debates at 3317.

<sup>121</sup> Hansard, Senate Debates at 1921-1922 and 3318; and see H.C. Debates at 3889, 4044-4045, 7448, 7519-7521, 9403, 13276 and 13280.

<sup>122</sup> *R. v. Powley* (2003), S.C.C. 43 (QL) [hereinafter *Powley*]

<sup>123</sup> In particular see Crown arguments as set out in *Guerin v. Canada* [1984] 2 S.C.R. 335 (QL) [hereinafter *Guerin*]; *Sparrow*; *Delgamuukw*; and *Powley*.

<sup>124</sup> *Report of the Task Force on Aboriginal Issues*, 1999 (Re New Brunswick Forestry) at <http://www.gnb.ca/0016/task/task.htm#anchor284429>.

However, that seems to characterize the attitude as passive but willing. The facts, at least in Ontario, do not support that characterization. In the courts, the space where many Aboriginal disputes are fought partially or wholly, the Crown has consistently argued that there was no legal framework, presumptive or otherwise, that restricted its authority. This limited interpretation of Crown duty certainly does not reflect the Crown's protective obligations as set out in the words "recognize and affirm" in s. 35.

The ultimate purpose of s. 35 is to facilitate the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. This purpose had not been achieved by the obligations set out on the Crown under the *Royal Proclamation*. The purpose had not been achieved by s. 91(24) and s. 109 in the *Constitution Act, 1867*. With the hindsight of 25 years, we can also see that this purpose is not being readily achieved by s. 35 either. Indeed, it seems obvious now that this objective cannot be achieved by court rulings. Nor can it be achieved simply or immediately. Although it seems to be axiomatic that reconciliation must ultimately be achieved by negotiation, progress is difficult because of the current imbalance of power between Aboriginal peoples and the Crown. Yet reconciliation is the basis of all s. 35 cases to date. As the Court held in *Sparrow* – s. 35 was to serve as a call for a just settlement for Aboriginal peoples, to provide a solid basis for negotiations, and to establish a general constraint on the exercise of governmental power:

Our history has shown, unfortunately all too well, that Canada's Aboriginal people are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of Aboriginal rights and interests. By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected...

The constitutional recognition afforded by [s. 35] therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation...it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any Aboriginal right protected under s. 35(1).<sup>125</sup>

The question is how are those purposes to be achieved? Section 35 did not give Aboriginal peoples the authority to protect their rights and interests themselves, because it did not alter the distribution of legislative powers. Nor did it insulate Aboriginal peoples from governmental actions by giving absolute status to Aboriginal and treaty rights. However, the Supreme Court of Canada has begun to carve out some mechanisms for achieving the necessary constitutional restraint on the Crown's exercise of its legislative and administrative powers. The first mechanisms are embedded in the constitutional phrase "recognized and affirmed". In order to give effect to this purpose, the Court applied two blunt tools - fiduciary law and justifiable infringement. These were limited mechanisms with a limited capacity for restraint on government powers.

### ***B. Fiduciary Law***

The use of fiduciary law was explained in *Guerin*, which was one of the first s. 35 judgments

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<sup>125</sup> *Sparrow*, at p. 1010.



from the Supreme Court of Canada:

[where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion<sup>126</sup>

*Guerin* dealt with surrendered interests in an Indian Reserve. Six years later, the Supreme Court of Canada, in *Sparrow*, described the historic relationship of Aboriginal peoples to the Crown, as fiduciary relationship:

... The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constitute the source of such a fiduciary obligation ... the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.<sup>127</sup>

Provincial and federal governments resisted the suggestion that all lands and resource decisions made by the Crown must be considered in light of its fiduciary relationship with Aboriginal peoples. They argued, and the Supreme Court of Canada later agreed in *Wewaykum*, that fiduciary obligations arose only with respect to specific interests:

It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.<sup>128</sup>

Since *Sparrow*, it has become clear that the fiduciary relationship with Aboriginal peoples did not necessarily trigger fiduciary duties for each and every action government undertook. However, the idea that the Crown had fiduciary duties in respect of Indian lands, had long been recognized. From the beginnings of European colonial ventures in North America, the Crown offered to protect the indigenous peoples "from the uncontrolled inroads of settlers, traders, miners and speculators". As noted above, those protocols evolved into imperial legal rules and principles that were given formal expression in the *Royal Proclamation of 1763*. They were also the basis for the common law doctrine of Aboriginal rights, in which the Crown's protective obligations were always central.

The Crown has a general fiduciary duty towards native people to protect them in the enjoyment of their Aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects ... The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people ... but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-

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<sup>126</sup> *Guerin*, at 384; *Wewaykum Indian Band v. Canada* [2002] SCC 79 at par. 80 [hereinafter *Wewaykum*].

<sup>127</sup> *Sparrow*, at 1108; See also *Wewaykum*, at par. 74-79.

<sup>128</sup> *Wewaykum*, at par. 83.

help.<sup>129</sup>

The underlying purpose of the fiduciary obligation has been to protect Aboriginal peoples' opportunities to continue to sustain themselves as distinct peoples, by among other things, their reliance on the lands and resources of their traditional territories. The general relationship between the Crown and Aboriginal peoples is described as fiduciary, and while that relationship may not always trigger a fiduciary duty, it does mean that governments must act in a trust-like rather than adversarial manner when dealing with Aboriginal peoples.

### ***C. Justifiable Infringement is not the purpose of s. 35***

The other restraint on Crown activity – justifiable infringement - was initially set out in *Sparrow*. The idea was that Aboriginal rights were to be recognized and affirmed by the regulatory regime. If the government infringed on those rights, it had to justify its actions. The justifiable infringement doctrine reflected one simple fact – that no rights are absolute. Federal and provincial legislative powers continued, but these powers must now be read together with s. 35(1). This was the fundamental change that s. 35 was meant to bring about. Prior to 1982, federal and provincial legislative powers were largely unrestrained with respect to Aboriginal rights. After 1982 however, the situation was to be different. Legislative powers were to be reconciled with Crown duty. In the circumstances of the application of game and fish laws, as in *Sparrow*, the government was not supposed to infringe Aboriginal rights, but if it did so inadvertently or unavoidably, it had to justify that infringement. The general intention of s. 35 is protection. Yet the Crown appears to forget this and acts as if infringement is the general intention of the rule. Infringement should happen only in exceptional circumstances.

The need to justify any infringement was a restraint on the Crown that addressed the question of what constitutes legitimate regulation of a constitutional Aboriginal right. Some things, the court dismissed immediately. For example, it is not open to the Crown to argue that it can limit Aboriginal rights because it is acting in the public interest. Such ideas cannot justify the limitation on constitutionally protected Aboriginal rights.

Repeating the admonitions it had previously set out in *Guerin*, the Court in *Sparrow* reiterated that the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. The Court recognized that constitutional recognition and affirmation of Aboriginal rights might give rise to conflict with the interests of others given the limited nature of the resource. However, the answer to this dilemma, the Court held, was a need for clear guidelines that will resolve allocation problems. That task requires equally meaningful guidelines responsive to the constitutional priority accorded Aboriginal rights. The Court stated that,

To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an Aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This

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<sup>129</sup> Brian Slattery, "Understanding Aboriginal Rights", *supra* note 19 at 733 and 753; and see *Wewaykum*, at par. 79

constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

The Court opined at the time (1990) that the ‘recognition and affirmation’ standard might place a heavy burden on the Crown. The Court stated that this was not intended to undermine government’s ability and responsibility to create and administer overall conservation and management plans. On the contrary, ‘recognition and affirmation’ was intended to guarantee that those plans treated Aboriginal peoples in a way that ensured that their rights would be taken seriously. The idea that any infringement of Aboriginal rights must be justified was specifically intended as a restraint on government powers.

Governments across the country then interpreted these doctrines narrowly. Yes, they understood they were in a fiduciary relationship to status Indians (but not to non-status Indians and certainly not to Métis) but the only way governments understood that their powers were restrained was via the need to justify infringement. They now knew that they had to state that they were acting in a non-adversarial way as they pursued their majoritarian objectives. They simply had to justify their actions, after the fact. By 1990, s. 35 seemed to be little more than a procedural speed bump that government had to manoeuvre after it had made a unilateral decision and implemented it.

In 1996, the Supreme Court of Canada released a series of harvesting cases.<sup>130</sup> The restraints on government were further delineated with respect to harvesting. But all these cases had dealt only with restraints on government with respect to *proven* rights. The growing body of s. 35 case law gave rise to questions as to whether there was any substantive duty that was triggered by the mere assertion of Aboriginal rights or by the fact of the fiduciary relationship with Aboriginal peoples, or whether a duty was only triggered by adjudication of particular s. 35 rights on a case-by-case basis. The Crown interpreted these cases as permission to act as if there were no constraints on the exercise of its authority except where specific Aboriginal rights had been determined to exist, presumably by treaty or judicial determination.

Legally and practically speaking, if the Crown has no substantive obligations until specific rights are adjudicated, Aboriginal peoples would have no constitutional protection in the absence of court declarations. Go to court! That was the message because it was the only way to stop Crown officials from alienating Crown lands and resources or authorizing development that would impact land-related Aboriginal interests. In fact, going to court for a declaration of rights was the only way to stop the Crown from acting as if s. 35 had not been added to the constitution.

That was not the legal or pragmatic reason for the agreement of Canadian governments to enact s. 35. Such a stance would not resolve the “old and difficult grievances”. And it was a sorry result of the “long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal rights.”<sup>131</sup> Indeed, under this result if Aboriginal peoples regarded the inclusion of s. 35 in the *Constitution Act, 1982* as a victory, they would not be able

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<sup>130</sup> *R. v. Adams* [1996] 4 C.N.L.R. 1 (S.C.C.), *R. v. Van der Peet*; *R. v. Gladstone* [1996] 4 C.N.L.R. 65 (S.C.C.), and *R. v. Côté*, [1996] 4 C.N.L.R. 26 (S.C.C.)

<sup>131</sup> *Sparrow*.

to afford any more such “victories”.

The idea that rights had to be defined by treaty or proven in court before the Crown had any substantive duties to Aboriginal peoples has created serious problems and is now held to be wrong in law. The theory arose from the fact that the case law was largely focused on defending Aboriginal rights that were infringed by legislation. The defence sought to prove an existing Aboriginal right and the government tried to justify its activity under the *Sparrow* justification test. Such an approach focused primarily on the Crown’s ability to infringe, rather than its obligation to recognize and affirm. It also confused the time when constitutional duties arise with justification. Finally, it assumed that the Crown’s duty under s. 35 can only be defined and enforced by reference to the unjustifiable infringement of rights.

In the same way that s. 1 of the Charter does not define the nature of governments’ obligations, the Crown’s obligations pursuant to s. 35 cannot be defined solely through the lens of the justification analysis in *Sparrow*.

Such a conclusion effectively authorized governments to continue business as per their pre-1982 practices, thereby legitimizing the same practices that s. 35 was enacted to end, by which the rights of the Aboriginal peoples were so often “honoured in the breach.” The justifiable infringement doctrine was not intended to renew governments’ authority to ignore or infringe Aboriginal or treaty rights when politically or economically convenient, so long as that might arguably be justified.

The Supreme Court of Canada also said in *Adams*<sup>132</sup> that it is unconstitutional for the Crown to adopt an unstructured discretionary regime that risks infringing Aboriginal rights in a substantial number of applications. This means that there is an affirmative duty in respect of s. 35 that arises without a requirement to adjudicate particular rights. The Court discussed the Crown’s duty in *Delgamuukw*:

... [The discretionary component of Aboriginal title] suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in those rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal people whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.<sup>133</sup>

The law, therefore, did not achieve reconciliation of the Crown’s duties with its actions. The Crown’s limited application of the law, as can be seen from the next section, was not recognition and affirmation. In fact, Ontario, with the exception of its minimal recognition of food harvesting rights, continued on with business as usual.

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<sup>132</sup> *Adams*, at par. 54.

<sup>133</sup> *Delgamuukw*, at par. 186.

## **Part Six**

### **Timorous Tinkering: Aboriginal Rights Disputes After 1982**

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After 1982, the law changed. The rules of the game including the implementation of the natural resources regulatory regime, were also supposed to change. Indeed, the courts interpreted s. 35 as a clear call for change, which they called ‘reconciliation’. What happened? Was there any substantive change that would reflect the new law? The facts, for the most part, indicate no substantive change.

This is not to say that there has been no movement. But movement is not always forward, and does not always mean substantive change. In fact, some private sector companies and associations have changed. They have sought to form alliances with Aboriginal peoples in order to mutually benefit from the resources. Some Aboriginal companies are also joining in this development. This is hopeful because Aboriginal peoples need to form relationships with the non-Aboriginal business community. But the question for this examination is whether there has been substantial movement or change in the natural resources regulatory regime.

Any movement within the natural resources regulatory regime since 1982 can be called ‘timorous tinkering.’ I call it that because it does not address the main problems; it does not fundamentally realign the relationship between Aboriginal peoples and Ontario; and because it still does not accord Aboriginal peoples any space for full participation in our society. While Aboriginal peoples have moved from a place where they were largely ignored to the dubious status of a ‘stakeholder’ or an ‘interest group’, and this is seen by some to be substantial progress, the truth is that there has been very little substantial change since 1982. Having said this, I note below that there have been significant exceptions to this pattern.

To illustrate this Ontario attitude, this section will examine some specific examples of Aboriginal disputes since 1982. It is impossible to examine each and every situation – there are dozens – which in and of itself, speaks volumes about the failure of the natural resources regulatory regime to meaningfully address Aboriginal rights. It also seems impractical to look at each and every resource sector. In the end, I have chosen to provide some examples of Aboriginal disputes in detail, while noting other disputes that are in process. In making this choice I note that it is somewhat arbitrary. Each example shows one Aboriginal group with one Aboriginal rights dispute. Yet it is clear that many communities have one or more Aboriginal disputes with different origins and may suffer from the cumulative effects of several developments over long periods of time. An example of this can be seen with the Wabaseemoon Independent Nations. In the 1950s, two Ontario Hydro dams flooded the Band lands. Then in the 1970s, Reed Paper Company emitted vast amounts of mercury into the English River system, which affected Band members’ health and access to food fishing.<sup>134</sup>

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<sup>134</sup> The Province entered into negotiations reluctantly in the late 1970s and an agreement was reached and ratified in 1985. The agreement included compensation, remedial measures and social and economic initiatives. It also included a review every five years. As a result of the 1990 review, new negotiations were established to deal with outstanding problems. A Whitedog Committee was established to develop and design a co-management arrangement to govern activities in the traditional land use area. The area is approximately 672, 000 hectares



However, the main point remains the same. The lands and resources that fuel the development of Canada come from traditional Aboriginal territories. This continues to take place while for the most part, Aboriginal and treaty rights have been ignored. Even recent mechanisms such as environmental assessment have functioned without substantial reference to Aboriginal rights.<sup>135</sup>

For the purposes of this paper, I have not delved into environmental assessment issues. I made this choice not because the issue of environmental assessment is not important for Aboriginal peoples, and not because it cannot be done. I chose not to use environmental assessment as an example because the fact is that environmental assessment is simply another mechanism by which government dispossesses Aboriginal peoples from their lands and resources. Having said this, I note that environmental assessment has some unique and positive features, most of which stem from the fact that an environmental assessment sometimes creates a public forum for discussion of the project.

For Aboriginal peoples, environmental assessment provides a vehicle to bring their lands and resource rights forward. Unfortunately, while the assessment supplies the forum, it does not always provide sufficient resources for full Aboriginal participation from all of the Aboriginal peoples affected. Note that Métis peoples, south of 60°, are almost always excluded from notice, participation and funding on environmental assessments. Further, Aboriginal issues, are raised at environmental assessments before panellists and board members who are usually ill equipped in their mandates to deal with Aboriginal rights issues. Environmental assessments are strictly carried out within their statutory frameworks and those frameworks may or may not demand consideration of Aboriginal rights. Thus, despite the opportunity to fully involve Aboriginal peoples, the environmental assessment process usually provides a speaking space to debate the details of the proposed project without the requirement that development will not take place if it substantially damages Aboriginal peoples.

One of the main examples I have chosen to illustrate how the natural resources regulatory regime has dealt with Aboriginal rights disputes in the period after 1982 is the Temagami Blockades. The way the natural resources regulatory regime dealt with the issues in that situation is indicative of its handling of other disputes in other resource sectors. Again, the story shows that little had changed after 1982. Ontario still attempted the exploitation of forests, (and mines, hydro<sup>136</sup>, and oil and gas) at the expense of the displacement, assimilation and dispossession of Aboriginal peoples.

#### ***A. Aboriginal Forest Access: The Temagami Blockades***

While Aboriginal peoples use the forests for a wide variety of practical purposes, such as

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surrounding three reserves. To date the Committee has focused on preparing a resource inventory of the traditional land use area, which will support the development of a sustainable economic development plan in the area.

<sup>135</sup> Prior to the Supreme Court of Canada judgment in *Haida and Taku River* in 2004, Ontario did not take the position that projects had to substantially address Aboriginal concerns.

<sup>136</sup> For an example of an Aboriginal dispute with respect to hydro, see Susan Campbell, “White Gold” versus Aboriginal Rights: A Longlac Ojibwa Claim against Damages Caused by the 1937 Diversion of the Kenogami River into Lake Superior” in *Blockades and Resistance*, *supra* note 46 at pp. 127-143.

firewood and timber, the forests of Ontario carry a greater meaning for them.

Our songs, our spirits, and our identities are written on this land, and the future of our peoples is tied to it. It is not a possession or a commodity for us. It is the heart of our nations. In our traditional spirituality it is our mother.<sup>137</sup>

Clearly, for Aboriginal peoples, the commercial exploitation of the forests is not the only lens they use to understand their relationship with the forest.<sup>138</sup> It is in light of the importance of the forests to Aboriginal peoples therefore, that I have chosen to examine the Temagami Blockades as an example of another Aboriginal dispute over natural resources, a dispute in which the natural resources regulatory regime played an important and disturbing role.<sup>139</sup>

In the late 1980s, Temagami became a center of conflict over the proposed logging of one of the world's largest old-growth red and white pine forests.<sup>140</sup> The Teme-Augama Anishinabai, environmentalists and politicians all became embroiled in a public protest.<sup>141</sup> The Temagami dispute had its genesis over 150 years ago. Ontario refused to acknowledge the Aboriginal rights and title of the Tema-Augama Anishinaibai. The Teme-Augama Anishinaibai stubbornly refused to give in. They sought to protect their traditional territory, which they know as the N'Daki Menan.

In 1973, the Tema-Augama Anishinaibai place land cautions, under the *Land Titles Act*, on approximately four thousand square miles of the land. Thirteen years of litigation followed. These land cautions were not respected by the Ontario Ministry of Natural Resources, which took the position that the caution did not apply to forestry. Ontario narrowly interpreted the cautions as applying only to first registration of Crown patents or leases, or staking and recording of mining claims. The litigation ended in 1991 with mixed results:

It does not necessarily follow, however, that we agree with all the legal findings based on

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<sup>137</sup> Grand Chief Anthony Mercredi, Assembly of First Nations, Ottawa, Ontario, November 5<sup>th</sup> 1993, as cited in *RCAP Report*, *supra* note 3 at Vol., 2, Part 2, p. 465.

<sup>138</sup> Lands subject to Aboriginal title and resource rights in Ontario total approximately 703,735 hectares of which, 450,390 hectares (64%) are productive forest. In southern Ontario some Indian lands (Six Nations and Walpole Island) contain some of the only remaining undisturbed natural woodlands. Walpole Island for example contains one of the last remaining sizable tracts of Canada's Carolinian forests. These statistics are from Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus University Publications, 1994) at p. 93 [hereinafter *Notzke (1994)*] Notzke points to a study published in 1987, which showed that there were approximately 93 Indian operated businesses in the forestry sector. In particular she notes that in Treaty Three, Aboriginal peoples have long been involved in this industry. In 1962 an Indian Logging Program was established to assist bands in obtaining Crown timber licences. By the late 1970s the program shifted to the provision of management and silviculture plans with a focus on reforestation rather than logging. In the mid 1980s the Mitigonaabe Forestry Resources Management Inc was established as a forest management advisory group to some 25 bands on 62 reserves in Treaty Three. The area under management is approximately 1/3 of the productive Indian forest in the province.

<sup>139</sup> There are several other examples of Aboriginal involvement in forest issues. For example in 1992, the Province accepted proposals for community forest pilot projects from the Wikwemikong First Nation on Manitoulin Island.

<sup>140</sup> For more on the Temagami story see: Bruce W. Hodgins and Jamie Benidickson, *The Temagami Experience: Recreation, Resources, and Aboriginal Rights in the Northern Ontario Wilderness* (Toronto: University of Toronto Press, 1989); *RCAP Report*, *supra* note 3 at Vol. 2, part 2, p. 753-756; and see *Blockades & Resistance*, *supra* note 46.

<sup>141</sup> Bob Rae, then leader of the provincial opposition, was arrested at an environmental blockade on the Red Squirrel Road.

those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right ...

It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians.<sup>142</sup>

The issues remained unresolved.<sup>143</sup>

The dispute then moved in and out of the courts and captured public attention in the press and political arena. In 1988, the Minister of the Environment signed an order allowing construction of an extension to the Red Squirrel Road. No major environmental assessment had been done despite the fact that roads have significant environmental impacts that stretch far beyond the narrow confines of the road itself. The order only looked at the environmental impacts on the actual right of way itself.

David McNab, an official within the Ontario Native Affairs Secretariat at the time, has written an interesting account of the actions taken by the Minister of Natural Resources with respect to this issue. His account shows that the Minister of Natural Resources acted in defiance of the Attorney General (who also had the portfolio for Native Affairs) and succeeded in getting Cabinet approval without consultation or the advice of the Ontario Native Affairs Secretariat.<sup>144</sup> The road was pushed through. Its purpose was to open up the last remaining stands of old red and white pine forest for access by lumber companies. A secondary purpose was to break the development freeze that resulted from the land cautions and thereby undermine the land claim. Millions of dollars were spent on constructing a road that was the subject of two six-month blockades and cost four million dollars. It has never been used.

The Tema-Augama Anishinaibai immediately set up a blockade on the north end of Lake Temagami and proceeded to hold the province at bay for two years. There was also an outcry from environmentalists, who supported the blockades, although the Tema-Augama Anishinaibai kept their land rights blockade separate from the environmental lobby. Because the Tema-Augama Anishinaibai were not blockading a road, only camping on Crown lands, they could not be arrested. They weren't doing anything illegal. The province did not send in the Ontario Provincial Police, thereby exhibiting a caution that was not exercised at Ipperwash in 1995. The government feared a public outcry. Also, the Ontario Provincial Police was urging caution and refused to arrest the Tema-Augama Anishinaibi when they were doing nothing illegal. According to McNab, the Deputy Solicitor General at the time acted on the advice of the Ontario

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<sup>142</sup> *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570

<sup>143</sup> During the course of this dispute the federal government made an abrupt change. Initially the federal government had supported the Tema-Augama Anishinaibai with loans and grants that funded the litigation. However, after 1982, the federal government abandoned its support.

<sup>144</sup> For more on the maneuverings within government see David T. McNab, "Remembering an Intellectual Wilderness: A Captivity narrative at Queen's Park in 1988-89" in *Blockades & Resistance*, *supra* note 46 at pps. 34-35.

Provincial Police, who were urging moderation.<sup>145</sup>

By March of 1989, all sides were stalemated. The offer on the table from the Province at the time was to cover the Wakimika triangle area, approximately two hundred square miles, by means of a Wakimika Stewardship Council. The Tema-Augama Anishinaibai wanted the Council to cover the entire four thousand square miles. No one could agree on this interim measures proposal. Nothing moved forward. Despite a string of losses in the courts, the Tema-Augama Anishinaibai did not give up. The Province continued to stall negotiations on land claims, while opening a competition for tenders to cut the forest off the Red Squirrel Road extension. Fears abounded that either the Tema-Augama Anishinaibai or the environmental groups would take actions such as tree-spiking to protect the old growth forest.

By the fall of 1989, things were much worse. Construction on the road began. The Supreme Court of Canada was scheduled to hear the claim in October. The Ontario High Court refused a Tema-Augama Anishinaibai injunction to stop the road construction, but granted Ontario an injunction to stop the blockade. The Ontario Provincial Police again acted cautiously, but still removed and arrested the Tema-Augama Anishinaibai. The court declined to fine or jail the Tema-Augama Anishinaibai because they had an interest in the land. The court did fine or jail environmentalists. In 1990, the Tema-Augama Anishinaibai again blockaded the road. This time they went to jail. The issue seemed incapable of resolution.

Finally, in the spring of 1990, the Tema-Augama Anishinaibai and Ontario signed a memorandum of understanding on a treaty of co-existence<sup>146</sup> and an agreement to guarantee the Tema-Augama Anishinaibai an advisory role in the timber management planning process for the Temagami district. An addendum to the memorandum of understanding was signed in 1991 that brought into existence the Wendaban Stewardship Authority.<sup>147</sup> Half of the members of the council were to be appointed by the Province and half by the Tema-Augama Anishinaibai. No timber licences were to be issued in the townships covered by the agreement (which included the Wakimak Triangle where so much of the old growth forest is located and the extension to the controversial Red Squirrel road) without the approval of a majority of the council's members. This effectively gave the Tema-Augama Anishinaibai a veto over logging in this area.<sup>148</sup> It also meant that the Red Squirrel Road could never be used to destroy the last old red and white pine

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<sup>145</sup> *Blockades & Resistance*, *supra* note 46 at p. 36. It may be useful to note an incident where the Ontario Provincial Police themselves were manipulated by the Ministry of Natural Resources. In November of 2003, the Ministry carried out a 'sting' operation against Métis fishermen in Georgian Bay. Immediately afterwards, the Ministry issued a press release stating that they had carried out this action with the Ontario Provincial Police. The Press Release went out on Ontario Provincial Police letterhead. Upon investigation however, it turned out that the Ministry had issued the press release unilaterally. The Police were extremely displeased. (From a private conversation with Gary Lipinski, Chair of the Métis Nation of Ontario).

<sup>146</sup> The memorandum of understanding also established negotiations for a treaty covering 10,000 square kilometres of land, an area that had long been the centre of the Tema-Augama Anishinaibai's Aboriginal title dispute.

<sup>147</sup> *RCAP Report*, *supra* note 3 at Vol. 2, Part 2, p. 753-756. According to the *RCAP Report*, the Agreement is named after the head of the principal Aboriginal family that traditionally occupied the stewardship area. *Wendaban* means 'whence the dawn comes'.

<sup>148</sup> The agreement has been criticized by environmentalists because it protects only 18% of the forests. Environmentalists have also criticized the government for issuing nine logging permits for large areas of the Temagami area outside the areas included in the stewardship agreement.

timber stands in the Lake Temagami area.

The 1990 Stewardship Agreement was achieved outside the land claims process, which meant that the Tema-Augama Anishinaibai did not have to surrender anything to gain substantial control over a significant part of their traditional territory, the N'Daki Medan. There were some problems in ensuring that the decisions of the Wendaban Authority were respected. Some district staff of the Ministry of Natural Resources challenged the Authority's decisions because they were contrary to the policies of the local planning board. The authority was set up as a decision-making body rather than an advisory body, but there was no legislative authority to support the structure. The political level has worked to ensure that despite the lack of legislative authority, the decisions of the Wendaban Stewardship Authority's have been implemented.<sup>149</sup>

What has happened since? There have been ongoing negotiations. Offers have been made and rejected. An agreement in principle was signed that involved the transfer of 112 square miles of land on the eastern and northern shores of Lake Temagami. The land would be held as unalienable, private, freehold land. But the agreement was never ratified and as a result of the impasse Ontario removed the agreement from the table. In 1999, Ontario reluctantly agreed to restart negotiations. In the Spring of 2001, federal representatives came to the table for the first time and observed that if Ontario agreed, the 112 square miles could become reserve lands. Since the Spring of 2004, the parties have begun drafting the legal text of a settlement agreement.<sup>150</sup> Ratification by all parties is currently scheduled for 2005-2006, with an anticipated signing in the summer of 2006.

And events had also proceeded outside the small negotiations table. The municipality of Temagami had expanded to encircle the lake and now stretches west and south as well. Whereas, the previous offer concerned private freehold lands that would be subject to municipal taxation and planning, the prospect of those same lands held as reserve lands (and consequently not subject to municipal taxation and planning) raised concern and alarm among cottage owners and the local population. In addition, in 2003, the Town of Temagami and Bear Island entered into discussions with Ontario towards a jointly administered community forest agreement that would cover part of the area.

What can we learn from this long-standing dispute? There are several lessons. First and foremost, this story shows us that resistance by Aboriginal peoples can be successful. After all, development in Temagami was stalled for almost thirty years as a result of the actions of the Tema-Augama Anishinaibai. While, in the end there has been some logging, at least part of the N'Daki Menan has been preserved.

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<sup>149</sup> *RCAP Report*, *supra* note 3 at Vol. 2, Part 2, p. 753-756.

<sup>150</sup> The terms of the agreement are the creation of an Indian Reserve of 127 square miles located within 149 square miles of land set aside for settlement purposes. An additional three square miles will be set aside for the use of traditional families. Protection for certain areas will be achieved by the creation of a Provincial Park. A new Aboriginal community will be developed at Shiningwood Bay. There will be \$20 million in compensation and a mix of land and money for economic development. A Memorandum of Understanding will address Aboriginal participation, consultation and coordination of land use and resource management issues across all of the N'Daki Menan. In addition, the Temagami Aboriginal community will have the opportunity to harvest timber on the settlement lands.



Although one pickup truck did drive the Red Squirrel Road extension in late December of that year [1989], it was the only vehicle ever to do so except ATVs and snow-mobiles. Then the snows came. The spring breakup washed out the hastily constructed culverts and ditches. The extension was never used for access to logging the old-growth pine, nor for anything else. The millions of dollars spent to construct the road and to arrest the blockaders was all wasted. All three Ontario political parties, including the Liberals who had issued the contract, admitted that it had been a serious mistake. In this sense, the blockades were a success.<sup>151</sup>

Secondly, this story shows us that when Aboriginal disputes arise with respect to lands and resources, Ontario deals with these issues largely by means of crisis management.

Third, the story shows that Ontario initially rejected its protective obligations towards the Tema-Augama Anishinaibai and the N'Daki Menan. Finally, however, Ontario by working with the Tema-Augama Anishinaibai through negotiations, established the integration of this Aboriginal people into the resource management of their traditional territory. And it seems to be working. Despite difficulties from lack of stable funding and changes in government, the Authority operated well. It operated on a consensus basis and even developed a 20-year forest stewardship plan. Wendaban worked because Aboriginal peoples were involved in the development of the Authority and in the implementation of the work. Because they were inside the process from the beginning, they believed in it and they made it their own.<sup>152</sup>

It is a lesson. It shows us that Aboriginal and non-Aboriginal people can work together on issues of land and resource management in a way that recognizes and respects Aboriginal rights.

### ***B. Involving Aboriginal Peoples in Management***

Since the establishment of the Wendaban Stewardship Authority, there have been other attempts to accomplish the task of bringing Aboriginal peoples into the management of the existing natural resources regulatory regime. They are known under various names – co-management, joint management, stewardship, or partnerships. Each really stands for an institutional arrangement whereby government and Aboriginal peoples, by means of a formal agreement, set out their respective rights, powers and obligations with respect to the management of specific resources in a particular area. Such arrangements include consultation processes on matters of resource allocation and management, administrative authority and decision-making ability. Such co-management arrangements are, in essence, a form of power sharing. Final decision-making in the absence of consensus varies with each situation.

One example of this kind of arrangement is the Anishinabek/Ontario Resource Management Council, which was established in November of 2000 through the signing of a Memorandum of

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<sup>151</sup> Bruce W. Hodgins, 'The Struggle Continues' in *Blockades & Resistance*, *supra* note 46 at p. 229-230.

<sup>152</sup> For a contrary example of how things usually work, in 1994, the Ontario environmental assessment board ordered the Ministry of Natural Resources to implement a special Aboriginal consultation process in timber management planning throughout the province. Unfortunately, this 'consultation order' simply permits Aboriginal peoples to comment on existing plans. They are not involved in the development of the plans.

Understanding.<sup>153</sup> The intention was to create increased dialogue and understanding between the provincial government and First Nations with regard to natural resource management in Ontario. It is an advisory body to the Minister of Natural Resources and the Grand Council Chief. To date the Council has facilitated discussions between Anishinabek Nation stakeholders and Ministry of Natural Resources personnel in the areas of enforcement policy, forestry, lands, water-power management, and fish and wildlife. In December of 2003, the parties renewed the agreement.

Another example is the Wikwemikong Community Forestry Management Agreement. Wikwemikong Unceded Indian Reserve is on Manitoulin Island. A 20-year forestry management plan has been developed and approved. The plan encourages long-term production of timber products, silviculture practices, and suitable policies and regulations to control timber harvesting. The Wikwemikong Band planted 500,000 trees in less than four years, trained 35 silviculture workers, managed a wood supply that supports a forest products company which in turn provides year-round and seasonal jobs, and created a forest fire fighting service that employs 130 workers on a seasonal basis.<sup>154</sup>

These examples show that some co-management agreements that have been developed with Aboriginal peoples are in place in Ontario. Unfortunately, these appear to be exceptions rather than the rule. Indeed, some very large recent initiatives do not make partners of Aboriginal peoples. An example of this is the *1999 Ontario Forest Accord*, which is an agreement that arose out of the conclusion of Ontario's Living Legacy policy.<sup>155</sup> The Living Legacy is Ontario's land use strategy for 39 million hectares of public lands and waters in the central and northern parts of the Province.<sup>156</sup> The *Forest Accord*, which was seen as "a breakthrough for its signatories and for the people of Ontario" is an agreement between environmentalists, the Ministry of Natural Resources and the forest industry.<sup>157</sup> No Aboriginal peoples are a party to the *Forest Accord*.

However, out of the *Forest Accord*, the Ministry of Natural Resources established a new Northern Boreal Initiative, which will open vast areas of far Northern Ontario to forestry, increased mining exploration, hydro dams and road development.<sup>158</sup> The area covered is one of the world's last great intact forests. It is also home to 26 First Nation communities. The Ontario Ministry of Natural Resources (MNR) established the Northern Boreal Initiative to prepare for forestry development in the traditional lands of several First Nations in the Far North. The

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<sup>153</sup> The Anishinabek Nation and the Ministry of Natural Resources also collaborated on another initiative, the Anishinabek/Ontario Fisheries Resource Centre, which is an independent source of information on fisheries conservation and management.

<sup>154</sup> For an example see *Wikwemikong Community Forestry Management: W.I.K.Y. – Woodlands in Keeping for our Youth* at [http://www.ainc-inac.gc.ca/pr/pub/ep/profil\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/ep/profil_e.html).

<sup>155</sup> The full Accord can be found at <http://www.mnr.gov.on.ca/MNR/oll/ofaab/accord.html>.

<sup>156</sup> The Living Legacy project itself had many consultations across the province where Aboriginal peoples were one of the many stakeholders being consulted.

<sup>157</sup> Ontario Forest Accord Advisory Board, *State of the Ontario Forest Accord: Interim Report 2001*, letter to the Minister dated March 6<sup>th</sup> 2001, which can be found at <http://www.mnr.gov.on.ca/MNR/oll/ofaab/accord.html>.

<sup>158</sup> For more on the Whitefeather Forest Initiative including a copy of the letter of agreement see [http://www.whitefeatherforest.com/the\\_initiative/i-provincial.html](http://www.whitefeatherforest.com/the_initiative/i-provincial.html).

Northern Boreal Initiative establishes that the environmental partner to the *Forest Accord*, a consortium of environmental entities, will work with each First Nation to develop community based land use plans. The communities of Pikangikum, Moose Cree, Cat Lake and Slate Falls, Eabametoong and Constance Lake have all expressed interest in starting commercial logging in their traditional-use areas. In August of 2003, Pikangikum First Nation signed a Letter of Agreement, under the Northern Boreal Initiative, to begin a community-based land use plan that “will be completed prior to any development activities, including the establishment of protected areas and the commencement of commercial forestry...”.

Thus, despite the fact that the natural resources regulatory regime has been forced into co-management with Aboriginal peoples by the courts and by resistance, these examples show positive steps in the right direction.<sup>159</sup>

### ***C. Commercial Fishing: The Saugeen Ojibway Nation***

A considerable proportion of Ontario’s Aboriginal peoples are involved in fishing in one way or another – either in the food fishery, the commercial fishery or the recreational fishery. In the decade since *Sparrow* there has been an increase in user-group conflicts over fisheries. While these conflicts are evident in most Ontario lakes as between the sports fishery and the Aboriginal fishery, on the Great Lakes there is also considerable conflict between the non-Aboriginal fishery and the Aboriginal commercial fishery. This has been exacerbated by a stubborn refusal on the part of the Ontario government to recognize that Aboriginal peoples in Ontario possess treaty or Aboriginal rights to the commercial fisheries. All of this is further aggravated by pollution stress on the Great Lakes fisheries.

Prior to the 19<sup>th</sup> Century, Aboriginal people were the users of the fisheries in the Great Lakes. The end use was largely for food. However, Aboriginal people had inter-Aboriginal trade activity and also supplied the fur trade with fish. With the advent of settlers, a large-scale commercial fish market developed and the over-exploitation of the Great Lakes fishery began. Over the years several species disappeared. Pollution (from mercury and other toxic substances such as PCBs) was recognized as a culprit. Additional stresses on the fisheries came from increased traffic on the lakes, dams, loss of spawning grounds, and the introduction of exotic species. The efforts of many peoples since the 1960s have succeeded in reinvigorating the fishery.

Today the Great Lakes fishery retains sport/recreational, commercial fisheries and Aboriginal fisheries (which includes both food and commercial fishing). Of the three, sport fishing brings in the most cash – approximately \$4 billion a year. Because of the economic value, and because of the historic relationship between the sport lobby and the Ministry of Natural Resources, the sport

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<sup>159</sup> An example of this is the *James Bay and Northern Quebec Agreement*, which resulted from Cree protests with respect to hydro development. For another example: the Algonquins of Barriere Lake blockaded forest access roads and filed a court injunction against the logging. The result was a trilateral agreement. This might be called results-oriented crisis management. Another community that did not take political or legal action, would not get such an agreement. (for example the Algonquins of Grand Lac, neighbours to Barriere Lake).

fishery has a considerable voice in the natural resources regulatory regime in Ontario.<sup>160</sup> It is represented by the Ontario Federation of Anglers and Hunters, which gets involved in all conflicts that arise between sport fishers and other users. Lately, the Federation has become intensely involved in the conflict between sport and Aboriginal fishers. Witness the following recent letter from the Bruce Peninsula Sportsmen's Association to the Minister of Natural Resources, which can be found on the Federation's website:<sup>161</sup>

On behalf of the hundreds of BPSA members and the thousands of sports anglers who visit this area I must vigorously protest your ministry's intention of allowing native commercial fishing in Colpoj and Owen Sound Bays.

There is no justification other than perhaps political for such a move to extend or eliminate the existing demarcation lines.

I further protest your total lack of fisheries enforcement in the Great Lakes pertaining to the Indian Fishing. The Fairgrieve decision placed conservation as the primary responsibility even before native rights, you will be abdicating your responsibility if you proceed in this direction. At no time did Fairgrieve give the natives exclusive right to the fishery.

And this media release from the Ontario Federation of Anglers and Hunters:<sup>162</sup>

Under the agreement currently being negotiated with the M.N.R., it's our understanding that the Chippewas of Nawash will be receiving additional commercial fishing opportunities in the area. It defies belief that the Ontario Government would also give them permission to take fish from the very same recreational fishery that so many local clubs and volunteers have spent years rebuilding.

Aboriginal commercial fisheries on the Great Lakes are mostly concentrated around eastern Lake Superior and Lake Huron's Bruce Peninsula. Management of the Great Lakes fisheries spans several agencies including, the International Joint Commission, the Great Lakes Fishery commission, the Department of Fisheries and Oceans, and the Ontario Ministry of Natural Resources. The Department of Fisheries and Oceans is the federal institution with primary responsibility over Canada's fishery resources. However, management of the Great Lakes fishery is under the Ontario Ministry of Natural Resources. This Ministry plays the principal role in mediating conflicts, enforcement and generally managing the resource.

Aboriginal commercial fishing is regulated by the Ministry of Natural Resources under the *Aboriginal Communal Fishing Licences Regulations*.<sup>163</sup> First authorized under the federal *Fisheries Act*<sup>164</sup> in 1993, the regulations originally applied only to federally managed fisheries. In 1994, they were expanded to Ontario fisheries. The communal fishing licence requires designation of any persons or vessels to fish under the licence, obligates the licence holder to

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<sup>160</sup> The Ontario Federation of Anglers and Hunters (OFAH) has, since 1988, begun to assume some administration on harvesting in Ontario. In 1988, OFAH and MNR jointly introduced a Wild Turkey Education Program. In 1998 OFAH began to administer Hunter Education Exams. MNR continued to direct policy and appoint new instructors. In 2004, the agreement was renewed for another five-year term.

<sup>161</sup> <http://www.ofah.org/news/index.cfm?ID=10>.

<sup>162</sup> <http://www.ofah.org/News/index.cfm?ID=9>.

<sup>163</sup> *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332

<sup>164</sup> *Fisheries Act*, R.S. 1985, c. F-14.

report catches, and authorizes sales of fish harvested under the licence.<sup>165</sup> The regulations state, in s. 2, that:

"Aboriginal organization" includes an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based Aboriginal community;<sup>166</sup>

On the Great Lakes the Aboriginal Communal Fishing Licences are controversial. The Ministry of Natural Resources takes the position that such communal use sufficiently recognizes Aboriginal collective fishing rights, while at the same time retaining, with the Ministry, all of the management and control of the fishery. Needless to say, the Aboriginal perspective differs.

Collectively, the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation are referred to as the Saugeen Ojibway Nation. The Nawash and Saugeen communities share traditional territories in southwestern Ontario. The Saugeen Ojibway Nation has been engaged in an ongoing battle to protect its rights and interests in its traditional territory for generations. A good portion of this struggle has been against the regulatory regimes that have been unilaterally imposed by the Ontario Ministry of Natural Resources.

In the summer of 1989, two members of the Chippewas of Nawash Unceded First Nation, one of which was the Chief, were charged with offences - taking more lake trout than permitted by the First Nation's commercial fishing license, contrary to *Ontario Fishery Regulations*. At their trial, Howard Jones and Francis Nadjiwon argued that the quota imposed by the Band's license constituted an unjustified interference with the exercise of its constitutionally protected Aboriginal and Treaty rights to engage in commercial fishing.

Historically, commercial licenses were issued by the MNR to the Chief of the respective First Nation. Under the terms of the license, Band fishermen could fish as designates. Originally, the terms of these licenses were not subject to quota restrictions. In 1984, the MNR unilaterally, without any consultation with the Saugeen Ojibway Nation, imposed quotas on the First Nation's license. The First Nation objected, stating that the quotas were inadequate for the number of Band members who came under the license.

The facts are as follows: in 1990, the entire Nawash commercial harvest amounted to only one percent (1%) of the entire non-Native commercial catch. The commercial value of the entire commercial harvest was roughly \$1.5 million a year; however, Nawash fishermen could only catch \$17,000 worth, and that had to be shared among 12 families. At the time, the Chippewas of Saugeen held no license at all.<sup>167</sup>

On April 26, 1993, Justice David Fairgrieve released his ruling.<sup>168</sup> He dismissed all charges against Jones and Nadjiwon and concluded that the Saugeen Ojibway Nation had an Aboriginal and Treaty Right to fish for commercial purposes, "which includes a right of access to, and use

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<sup>165</sup> Regulatory Impact Analysis Statement re: Aboriginal Communal Fishing Licences Regulations, amendment, *Canada Gazette Part II*, 129, no. 5 (August 3, 1995), 522-525.

<sup>166</sup> I have been unable to find a single circumstance where an Aboriginal communal fishing licence in Ontario has been issued to a Métis community. They are usually issued to a Band.

<sup>167</sup> Numbers based on Saugeen Ojibway Nation statistics.

<sup>168</sup> *R v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.) [hereinafter *Jones and Nadjiwon*]



of, their traditional fishing grounds”.<sup>169</sup> Furthermore, he held that the quota imposed by the MNR in its licensing schemes infringed this right. In reference to the impacts of the MNR regulatory scheme on the First Nations’ exercise of the right, he stated the following:

More limited access to the resource caused by the quota produced greater deprivation and, predictably, contributed to the negative consequences of increased unemployment and poverty on both an individual and communal level. ... There can be no doubt that the quota had a serious adverse restriction on the exercise of the band's right and, as such, constituted an infringement of s.3 5(1).<sup>170</sup>

Finally, Mr. Justice Fairgrieve concluded that the Ministry of Natural Resources could not justify this infringement. He made it abundantly clear that the regulatory scheme imposed by the Ministry made no attempt to extend priority to the Saugeen Ojibway Nation. Specifically he stated that,

anglers and non-Native commercial fishermen have in fact been favoured, and that the allocation of quotas to the Chippewas of Nawash, much less the Saugeen Ojibway as a whole, did not reflect any recognition of their constitutional entitlement to priority over other competing user groups.<sup>171</sup>

The Judge also had negative comments on the attitude of the Ministry.

What should be stated, however, is that the high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirement with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the *Constitution Act, 1982*, particularly after the judgment of the Supreme Court of Canada in *Sparrow*, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement.<sup>172</sup>

Soon after *R v. Jones and Nadjiwon*, the Saugeen Ojibway Nation took steps to manage and protect its fishery. For instance, it began to scientifically assess its fishermen’s catches and to evaluate the Ministry’s management of the commercial fisheries. One study, conducted by Professor Stephen Scott Crawford on behalf of the Saugeen Ojibway Nation, concluded that there were serious flaws in the Ministry’s commercial fisheries management program and that it could not be repaired in its existing form.<sup>173</sup> The First Nations’ assessment has now broadened to include research partnerships with several universities.

The Province did not appeal Justice Fairgrieve’s ruling and in June of 1993, the Saugeen Ojibway offered to negotiate a co-management agreement with the Ministry. A year after the First Nations’ request, the Province eventually agreed to negotiate.

This entire period was marked by public protests and violence against Saugeen Ojibway Nation. Non-Native anglers and commercial fishermen, with the support of the local MPP Bill Murdoch

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<sup>169</sup> *Ibid.*, at p. 197.

<sup>170</sup> *Ibid.*, at p. 199.

<sup>171</sup> *Ibid.*, at p. 205.

<sup>172</sup> *Ibid.*, at p. 208.

<sup>173</sup> Stephen Scot Crawford, *A Biological Review and Evaluation of the Ontario Ministry of Natural Resources Lake Huron Management Unit Commercial Fisheries Management Program: A Report for the Chippewas of Nawash First Nation*, 1996.

and groups such as the Ontario Federation of Anglers and Hunters, were very vocal in their opposition to any mechanism that might recognize the Saugeen Ojibway Nation's right to fish commercially. This was evidenced by, among other things, a march of nearly 100 anglers, led by Mr. Murdock, on a lone Native woman selling fish at the Owen Sound market in the summer of 1995.

In August of 1995, the new Conservative government under Premier Harris came to power. The new Minister of Natural Resources met with the Saugeen Ojibway Nation and informed the leadership that the new Conservative government had no interest in discussing co-management. In late October of the same year the Ministry informed the First Nations that it planned to issue a license under the *Aboriginal Communal Fishing Regulations*. The First Nations requested further clarification regarding the terms and conditions of the proposed license.<sup>174</sup> However, the Province made it clear that it intended to unilaterally impose the conditions of the license.

Meanwhile, racial tensions between the Saugeen Ojibway Nation and the surrounding non-Native communities escalated to disturbing heights. In the span of three months, fishing tugs and nets were vandalized and destroyed. The image of a First Nation owned fishing tug burning in a local harbour was captured by a number of local and national newspapers and newscasts. Several band members, from both communities, were the victims of violence.

The Chippewas of Nawash and Saugeen, like the Mi'kmaq of the East Coast, had their priority treaty right to fish commercially in a seven mile area around the Bruce Peninsula of Ontario recognized by a court ruling in 1993. The response from the non-Aboriginal community, which until then had exercised exclusivity over the multi-million dollar fishery was equally violent. It included a "swarming" of Nawash youths, two of whom was stabbed and one beaten; setting a Nawash boat on fire and later sinking it; damaging and cutting Aboriginal fishing nets, and a march led by the local Member of Legislative Assembly on a fishing stall where an Aboriginal woman selling fish legally had fish blood and guts thrown at her and her 12 year old daughter. Intensive efforts to educate the non-Aboriginal community as to the nature of the treaty rights had little effect, thus exposing the racism at the root of the activity. Despite education programs, workshops and meetings, local community leaders and sportsmen's organizations expressed negative and often inflammatory views against the Chippewas of Nawash and Saugeen.<sup>175</sup>

In the spring of 1996, the Chippewas of Nawash passed by-law 13-96 which provided for the strict regulation of First Nation fishermen and managers. The Province in June of 1996 and again in February of 1997, tried to unilaterally impose new regulatory schemes under the *Aboriginal Communal Fishing Licence Regulations*. Saugeen Ojibway Nation ultimately rejected them both. In reaction, the Ministry stepped up its enforcement. In August of 1996, conservation officers seized Nawash fishermen nets as a "warning". In June of 1997, on the eve of discussions with the Saugeen Ojibway Nation, conservation officers charged three Saugeen Ojibway Nation fishermen for not adhering to the unilaterally imposed communal licenses.

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<sup>174</sup> Ontario Ministry of Natural Resources, "MNR Moves to Conserve Fisheries Resource," *MNR News*, June 25, 1996, in which the Ministry announced that it had re-allocated approximately 540,000 kilograms of fish from non-Aboriginal fishers and re-allocated it to the Nawash and Saugeen First Nations

<sup>175</sup> Canadian Race Relations Foundation, "Aboriginal Rights are Human Rights", in preparation for the UN World Conference Against Racism Background, October 2000 at [http://www.crr.ca/EN/WhatsNewEvents/Events/WCAR/eWhaNew\\_EventsAboriginal.htm](http://www.crr.ca/EN/WhatsNewEvents/Events/WCAR/eWhaNew_EventsAboriginal.htm).

In March of 1996, the federal Minister of Indian Affairs intervened in an attempt to find a resolution. The Hon. Ron Irwin, offered to facilitate negotiations between the Chippewas of Nawash and the Ministry of Natural Resources, but the Province did not respond to the offer. Then, in June of 1997, the Federal Government appointed Judge Steven Hunter to mediate the dispute. The Saugeen Ojibway Nation publicly welcomed the appointment. Over the course of the next two years, while talks continued, the Ministry continued its adversarial approach to the Saugeen Ojibway Nation's commercial fishery. For instance, in November of 1999, the MNR banned the purchase of all fish, except chub, effectively bringing the First Nation fishery to a complete stand still.

Finally, the parties reached an agreement. On June 20, 2000, the Saugeen Ojibway Nation, Ministry of Natural Resources and the Department of Indian Affairs and Northern Development Canada, signed a co-management agreement. The agreement sets out protocols by which the partners will arrive at total allowable catches. Protocols were established for dealing with issues that might require enforcement by the Bands or by the Ministry. It was agreed the parties would exchange information on the fishery in order to better manage the fishery together. The agreement was for a four-year term and committed the parties to negotiate a long-term agreement. More importantly, the agreement was deemed to be a license for the purposes of the provincial *Fish and Wildlife Conservation Act*, and as such, no separate license was required. Under the terms of the agreement, the Saugeen Ojibway Nation provided fishing authorization to its members.

The Saugeen Ojibway nation is currently in the process of negotiating a new agreement.

In other parts of the Province, notably in Treaty Three, the Ontario Ministry of Natural Resources has been implementing a plan to allocate the commercial fishery to First Nations. While, on the surface this plan seems worthwhile, it has divested Métis of their commercial fisheries, because the Crown calls them 'non-Aboriginal' users. There is significant resentment building up in the Métis community as a result of this re-allocation that sets up a hierarchy of rights as between the Aboriginal peoples within s. 35.<sup>176</sup>

These are only two examples of Aboriginal rights disputes with respect to Aboriginal fisheries in Ontario. The disputes, in some areas are about the re-allocations. However, the Saugeen story shows that Aboriginal peoples want a role in the management of the fisheries. It is to be hoped that the experience of integrating one aboriginal people into the management of the fishery can built on for the benefit of other groups in the future.<sup>177</sup>

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<sup>176</sup> Two pieces of litigation deal with this exclusion of the Métis. *Tucker & O'Conner v. MNR* is a judicial review. The case stems around the Ministry's forced buy out of Mr. O'Conner's commercial fishery on Lake of the Woods. In another case, *R. v. Stone*, the matter concerns a Métis commercial fisherman who was forced to sell his fishery for the benefit of First Nation's on Lake of the Woods. He ended up fishing, as an employee, for one of the First Nations, and was charged for fishing without a licence.

<sup>177</sup> David McNab, a former official in the Ontario Native Affairs Secretariat, writes that "... in 1986-87 Kerrio [former Minister of Natural Resources], perhaps unaware of what his senior officials were doing, allowed the OMNR senior bureaucracy to ditch the proposed Ontario-wide fishing negotiations by artificially creating a racist backlash led by Ontario's negotiator, and other senior officials. The same results can be seen, in terms of the racist

#### ***D. The Métis Hunt for Justice***

Since 1982, there are numerous examples within Ontario of how the natural resources regulatory regime deals with Aboriginal access to fish and wildlife. One example that seems to be yielding positive results is the *Interim Hunting Agreement* between the Algonquins of Golden Lake and Ontario.<sup>178</sup>

This agreement is “interim” because it is an interim measure within the Algonquin’s land claim negotiations. Their claim covers 8.5 million acres of land in eastern Ontario including Algonquin Park. The issue of hunting in the Park is particularly controversial. Interim hunting agreements with the Algonquins have been negotiated on a year-by-year basis, since 1991. The agreements establish a co-ordinating committee made up of three Algonquins and three Ontario representatives. The committee does the implementation of the agreement including planning, reporting, monitoring and data collection and maintenance. The committee also makes recommendations respecting conservation measures and tables an annual report outlining biological data on the harvest.

The *RCAP Report* notes that one of the major achievements of the agreement was the relationship that developed between ministry officials and the community. An additional benefit was the development of reliable information with respect to Algonquin harvesting. Here is another example that shows that if Aboriginal people are involved directly in the management of the harvest, it benefits the Aboriginal community, the non-Aboriginal community and the resource.

Another very recent example that has yielded bitterness on all sides is the July 2004 *Four Point Harvesting Agreement* between the Métis Nation of Ontario and the Ministry of Natural Resources. The agreement is the direct result of the Métis harvesting dispute that was litigated in the case of *R. v. Powley*. The litigation took ten years and the Métis won at all levels of court. Fourteen judges (with no dissents) agreed that Métis were “rights bearing peoples”, that they existed “as a peoples” in Ontario, and that they have harvesting rights. While *Powley* itself dealt with the Métis community of Sault Ste Marie, like *Sparrow*, it set a precedent and its repercussions were felt across Canada.

Despite the clear string of court wins, the Ministry of Natural Resources has taken a narrow and adversarial approach to negotiations. The Ontario Court of Appeal decision in 2001 found that the Métis in Sault Ste Marie had an Aboriginal right to hunt, but stayed the application of their decision for one year to give the parties time to negotiate an agreement. The Métis Nation of

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reaction to the Algonquins of Golden Lake land claim in 1990-91, as well as to fishing. The aftermath of the failed fishing negotiations with the Chippewas of Saugeen and Nawash, the litigation, and the court judgment in favour of the Chippewas, also fuelled the reaction of white racists. The fishing negotiations failed and the local ones with the Chippewas of Saugeen and Nawash resulted in a negative court decision for Ontario. The OMNR bureaucracy and its authoritarian methods have not changed regardless of which government has been in power at Queen’s Park.” in *Blockades and Resistance*, *supra* note 46 at p. 238, fn. 10.

<sup>178</sup> Except 2001 when the Algonquin hunt was conducted without a formal agreement. The agreement also provided for a community-based justice system to resolve charges against Algonquin offenders. *RCAP Report*, *supra* note 3 at Vol. 2, Part 2, pps. 761-753.

Ontario understood this to be an opportunity for the parties to sit down and work out an arrangement that would respect Métis harvesting rights. The Ministry took the position that the stay meant that they could not negotiate an agreement that allocated to the Métis any part of the harvest because that would violate the stay and the law. To add insult to injury, after the Court of Appeal decision came down in January of 2001, in May, the Ministry allocated the entire moose harvest in Ontario with no accommodation whatsoever for Métis moose harvesting. The effect of the stay was exactly the opposite of what the Court of Appeal envisioned.

In the face of the intractable position taken by the Ministry at the negotiation table, the best the Métis could negotiate in 2001 was a *Protocol Agreement*, which implemented a “screening process”. At the table, Ministry officials assured the Métis negotiators that Métis who were harvesting for food within their traditional territory, would be screened, but that no charges would result. They would not write the “no charges would result” into the *Protocol Agreement*, because they could not interfere with prosecutorial discretion. The law gives the Ministry two years to lay charges. In the result, two years later, many, if not all of those screened were charged.

The bitterness within the Métis community was profound. Métis had just had their harvesting rights confirmed by the highest court in Ontario, yet the Ministry was charging them for hunting. The discontent in the Métis community was tempered only by the fact that in September of 2003, the Supreme Court of Canada firmly upheld the lower court decisions. The Métis Nation of Ontario had hopes of a new arrangement and relationship with the Ministry of Natural Resources. This was not to be.

The Ministry did come to the table. But two big issues kept the parties far apart from any agreement. The first was the outstanding charges from the *Protocol Agreement*. The Ministry denied, again under the guise that they could not interfere with prosecutorial discretion, that it had any ability to deal with those charges.<sup>179</sup> The second big issue, was that the Ministry was imposing an arbitrary north/south line. Métis harvesters who lived north of the line would be able to harvest, but Métis who lived south of the line would be “screened” as they were under the *Protocol Agreement*. The line cut off the huge Métis community in the Penetanguishene area on Georgian Bay as well as all of the eastern and southern parts of the Province. The Ministry put a “draft” agreement on the table, but then refused to negotiate any part of the “draft”. The “draft” was an ultimatum, which the Métis Nation of Ontario refused to sign.

By way of breaking the sticking points in the negotiations, the Métis proposed to limit the number of harvest card holders to 1250 per year as the *quid pro quo* for having the agreement apply throughout Ontario. Political pressure mounted on all sides. Finally, at the last minute, on July 7<sup>th</sup> 2004, with the Métis Nation of Ontario threatening to stage a huge public protest (with the support of First Nations and the Métis National Council), the Minister agreed to the *Four*

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<sup>179</sup> This is contrary to the position taken in Alberta. There the existing charges were always part of the negotiation. It was understood from the beginning that the charges would be stayed pursuant to a negotiated agreement. Far from using ‘prosecutorial discretion’ as a bar to agreement, the Alberta officials included the prosecutors in the ongoing negotiations. The result has been a negotiated agreement that recognizes that Métis who are members of the Métis Nation of Alberta, or eligible to be members, can harvest for food on all unoccupied lands throughout Alberta.



*Point Agreement.* The main elements of the two-year agreement were as follows: it would recognize the harvesting rights of the 1250 harvester card holders that year (2004-05) with a process to change the number in the following year. The Ministry would apply its *Interim Enforcement Policy* to those Métis Nation of Ontario harvest card holders, which would put Métis harvesters on equal par with First Nations in Ontario. An independent evaluation of the Métis Nation of Ontario's harvest card registry would be undertaken. In accepting the limitation on card holders at 1250, the Minister was accepting the Métis proposal that the Agreement would apply throughout Ontario. In addition, the Minister promised that he would urge prosecutors to drop the existing charges.

Almost immediately, officials began to backtrack from the Minister's agreement. They issued letters stating that the agreement would have to be implemented "lawfully". Ministry officials put forward another agreement and an ultimatum - the Métis Nation of Ontario was given 24 hours to sign it. The ultimatum agreement re-instated the north/south line. The threat from the Ministry was clearly stated. If the Métis Nation of Ontario did not sign it within 24 hours, the Ministry would move the line even farther north and west.

The Métis Nation of Ontario refused to negotiate down from the agreement they had already made with the Minister. A stalemate now exists. The Ministry has indicated that they are now applying the ultimatum agreement. The one positive thing that has resulted is that the charges against all but one of the harvesters have been stayed. However, given the two-year lapse before new charges come to light, it is unknown how many potential charges the Métis Nation of Ontario harvesters now face.

In the fall of 2004, by way of protest at the Ministry's high-handed actions, the Métis Nation of Ontario staged a 'ceremonial hunt' on the banks of the French River. Nine hunters who participated have been served with notices that they are being "screened" and are anticipating charges.

There is a bitter non-relationship now between the Métis Nation of Ontario and the Ministry of Natural Resources. This bitterness is the result of winning in Court against the Ontario Ministry of Natural Resources. Further litigation seems unavoidable unless a way is found to complete the negotiations.

#### ***E. Mining: Nibinamik First Nation and Wunnumin Lake First Nation***

The Ministry is authorizing diamond exploration in northern Ontario. Permits have been granted to DeBeers to explore for diamonds in the traditional territories of Nibinamik First Nation and Wunnumin Lake First Nation.<sup>180</sup>

Hunting, fishing and trapping is still the dominant way of life for both First Nations. There are several registered trap lines throughout the traditional territories of the First Nations. Families own the trap lines with a head trapper who manages his respective family's trap line(s). Staking and/or drilling, according to Elders and trappers from both First Nations, has had a negative

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<sup>180</sup> These First Nation are located approximately 500 miles north of Thunder Bay.

impact on trappers' abilities to utilize their trap lines. For instance, some trappers have reported a serious decline in the amount of moose in areas of their trap line(s) in which mining and/or resource companies have been or are active.

To date there has been no consultation with Aboriginal peoples by the Province in its decision to grant permits to mining and resource companies wishing to conduct activities on the traditional territories of these First Nations.

This is the same pattern that we have seen in the previous examples – Mica Bay and Temagami. In both of those situations the Province authorized developments (mining and forestry) without recognizing that the land related interests of the Aboriginal peoples. Mica Bay eventually led to petitions, delegations, protests, occupation and arrests. Temagami led to blockades, litigation, and arrests.

In the absence of any response from the Province, the dialogue has been primarily with De Beers, which is currently in the exploration phase. The First Nations entered into a Memorandum of Understanding (MOU) with De Beers in the summer of 2000.

The absence of the Province from all of these discussions is notable. The First Nations and the company have tried to resolve the issues themselves, but the duty of consultation and accommodation rests the Crown. To date it is not being fulfilled.

## Part Seven

### *Taku River & Haida Nation: The Honour of the Crown*

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Two new cases from the Supreme Court of Canada, have articulated a new duty on the Crown – the constitutional duty to implement the honour of the Crown. It applies both before and after proof of asserted Aboriginal rights and title. Resting on its previous judgments in *Delgamuukw*, *Sparrow* and *Van der Peet*, the Court held that the Crown has substantive duties that derive from its assertion of sovereignty in the face of prior Aboriginal occupation. This duty is not to be interpreted narrowly or technically. The Court reiterated that the purpose of s. 35 is reconciliation and that the duty is grounded in the honour of the Crown.

These cases were heard together because the fundamental issue is the same in both cases – the Crown is authorizing activities that threaten the sustainability of the Aboriginal peoples. While, the fundamental issue is the same in both cases, the facts in each are quite distinct. In *Haida Nation* the issue was about the replacement and transfer of a Tree Farm Licence to Weyerhaeuser. The Haida challenged both the replacement and the transfer because both were done without Haida consent and over their objections. The chambers judge found that the government had a moral, but no legal duty to negotiate with the Haida. The Court of Appeal overturned the decision and declared that both the government and Weyerhaeuser have a duty to consult and accommodate the Haida. The Crown and Weyerhaeuser appealed. In the result, the Supreme Court of Canada dismissed the Crowns appeal and upheld Weyerhaeuser's.

In *Taku River*, the issue was about a road that would go through the Tlingit's traditional territory. The road was part of a proposal to re-open an old mine. An environmental assessment process ensued and upon completion of the process, the Province approved the company's proposal. The Taku River Tlingit First Nation brought a petition to quash the decision based on administrative law and on its Aboriginal rights and title. The chambers judge severed the Aboriginal rights and title issues from the petition and subsequently ordered a reconsideration because the Province had failed to meaningfully consider the Tlingit concerns. The Court of Appeal upheld the decision and found that the Province had failed to consult with and accommodate the Tlingits. The Supreme Court of Canada reversed the Court of Appeal and found that the Province had fulfilled its duty, at the project approval stage, and that there was no duty to reach agreement. However, the Court stated that it expected that the Crown would continue to fulfill its honourable duty throughout the process of permitting, approval and licensing as well as in the development of a land use strategy.

The new duty described by the Supreme Court of Canada in these two cases is described as a duty to consult and accommodate. The Court stated that the duty is grounded in the honour of the Crown and emphasized that this principle is always at stake in its dealings with Aboriginal peoples. The Court held that,

It [the honour of the Crown] is not a mere incantation, but rather a core precept that finds its application in concrete practices.  
- *Haida Nation*  
at par. 16

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all

its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”.<sup>181</sup>

It should be noted that the duty to consult is not actually a newly articulated duty. It was recognized and discussed in *Sparrow*<sup>182</sup>, *Nikal*<sup>183</sup>, *Gladstone*<sup>184</sup> and *Delgamuukw*<sup>185</sup>. However, in *Haida Nation* the Supreme Court, for the first time, held that the duty applies “as much to unresolved claims as to intrusions on settled claims.”<sup>186</sup>

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.<sup>187</sup> [emphasis added]

The idea that “potential rights” are protected by s. 35 is a new and fundamentally important idea. It requires that the Crown take a new approach to asserted aboriginal rights.

The Court held that the honour of the Crown will give rise to different duties in different circumstances. What the court did not say was that there was never a duty. Where Aboriginal rights and title have been asserted but have not been defined or proven, the Aboriginal interest does not give rise to fiduciary duty. The court stated that, while the Crown stands in a fiduciary relationship to Aboriginal peoples, that does not give rise to a fiduciary duty that requires the Crown to act in the Aboriginal group’s best interest in all aspects of the relationship. The fiduciary duty exists in the Crown’s exercise of discretionary control over specific Aboriginal interests.

Where rights and title are not proven the honour of the Crown gives rise to other duties. In the process of treaty making or treaty interpretation, the honour of the Crown means that the Crown must avoid “even the appearance” of sharp dealing.<sup>188</sup> And where treaties remain to be concluded, the honour of the Crown “requires negotiations leading to a just settlement of Aboriginal claims”.<sup>189</sup>

Section 35 represents a promise of rights recognition, which are realized and sovereignty claims reconciled through negotiations. “It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and

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<sup>181</sup> *Haida Nation*, at par. 17.

<sup>182</sup> *Sparrow*, at p. 1119.

<sup>183</sup> *R. v. Nikal*, [1996] 1 SCR 1013 at par. 110.

<sup>184</sup> *Gladstone*, at par. 64.

<sup>185</sup> *Delgamuukw*, at par. 168.

<sup>186</sup> *Haida Nation*, at par. 24.

<sup>187</sup> *Haida Nation*, at par. 25.

<sup>188</sup> *Haida Nation*, at par. 19.

<sup>189</sup> *Haida Nation*, at par. 20.

interests.”<sup>190</sup>

In these cases the Court directly addressed the question of whether the Crown is entitled to use resources as it chooses, pending proof of an Aboriginal claim or whether it must adjust its conduct to reflect these asserted claims. The Court said that the Crown cannot “cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.” The Crown must respect potential but unproven claims and interests. The Court held that to “unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource would deprive the Aboriginal claimants of some or all of the benefit of that resource. That, said the Supreme Court, was not honourable.

In answer to the government’s argument that it was under no obligation, beyond administrative law obligations, with respect to unproven claims, the Court held that these arguments do not withstand scrutiny and stated that this was an “impoverished vision of the honour of the Crown and all that it implies.”<sup>191</sup> A proven right is not the only trigger for the legal duty to consult or accommodate and reconciliation is not limited to proven rights or title.

The duty to consult and accommodate arises when the Crown has knowledge of an Aboriginal rights or title claim and is considering actions that might negatively affect those claimed rights or title. The court was careful to distinguish between the trigger for the duty and the content of the duty. Knowledge of a credible claim is sufficient to trigger the duty, the content of which will depend on an assessment of the seriousness of the potentially adverse effects.

The nature of the duty varies with the circumstances. The minimal version of the duty is a mere duty to discuss important decisions. Even here the Crown must approach the consultation in good faith and “with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue”. The Court noted that in the context of established claims, the duty will be significantly deeper than mere consultation and may require consent “particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.”<sup>192</sup>

The court described the circumstances that would lead to the duty of consultation as a spectrum, at one end of which were cases where the claim to title is weak, the Aboriginal rights limited, or the potential for infringement minor. Here the duty on the Crown may be notice, information disclosure and a willingness to discuss issues raised in response to the notice. At the other end of the spectrum, the Court described cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples and the risk of non-compensable damage is high. In such cases, the court held, deep consultation, aimed at finding a satisfactory interim solution may be required. In these circumstances, consultation may require formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. And while there is no duty to agree, there must be a commitment to a meaningful process.

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<sup>190</sup> *Haida Nation*, at par. 20.

<sup>191</sup> *Taku River*, at par. 23.

<sup>192</sup> *Haida Nation*, at par. 40, quoting Lamer C.J in *Delgamuukw*



Maintaining the honour of the Crown requires an ongoing relationship that is fulfilled by “assigning appropriate content to the duty, not by denying the existence of a duty.”  
- *Haida Nation* at par. 37

The court went on to suggest that new measures may be required – such as dispute resolution procedures like mediation or administrative regimes with impartial decision-makers. The government could adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases. The controlling question in all situations is what is required to maintain the honour of the Crown and to achieve

Between these two extremes, other situations will have to be approached flexibly. The court noted that the level of consultation may change as the process goes on and new information comes to light, that there is always a duty of some kind, and that the government must be prepared that the results of meaningful consultation may oblige it to make changes to its

proposed action based on information obtained through consultations.

It is at this stage – when the government must make changes - that a duty of accommodation arises. Accommodation arises where a strong *prima facie* case exists for the claim, and the consequences of the government’s proposed decision may adversely affect it in a significant way. The resolution may require interim measures to avoid irreparable harm or to minimize the effects of infringement pending final resolution of the underlying claim. This duty of accommodation applies to treaty rights as well as claims to Aboriginal rights.<sup>193</sup>

The court reiterated its admonition in *Adams* that governments “may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance.”<sup>194</sup> The court also suggested that an appropriate means of addressing the procedural requirements of consultation might be accomplished if government set up regulatory schemes.

The court rejected the Province of British Columbia’s argument that any duty to consult or accommodate rested solely with the federal government. The Court reiterated its conclusion from *Delgamuukw*, that “the Provinces took their interest in land subject to “any Interest other than that of the Province in the same”. Since the duty to consult and accommodate flows from the assertion of Crown sovereignty, which pre-dates the Union, the Province took its lands subject to this duty, and cannot now claim that s. 35 deprives it of powers it would otherwise have enjoyed. Citing *St. Catherine’s Milling*<sup>195</sup> the Court stated that the Province would have lands available to it “as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title”<sup>196</sup>

The Province also argued that general consultations with respect to forest development plans and cutting permits satisfied its duties. The Court held that these general measures did not amount

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<sup>193</sup> *Haida Nation*, at par. 47

<sup>194</sup> *Haida Nation*, at par. 51, quoting *Adams*, at par. 54.

<sup>195</sup> *St. Catherine’s Milling*, *supra* note 59.

<sup>196</sup> *Haida Nation*, at par. 59, citing Lamer C.J. from *Delgamuukw*, at par. 175.

to, or substitute for, consultation on the specific activity at issue.

This is the latest law in Canada. It is through this new lens that the Crown in Ontario will have to revisit its natural resources regulatory regime. Ontario's interest in the land is subject to the Aboriginal rights of the Aboriginal peoples who live here. These duties are not limited to the situations in *Haida Nation* and *Taku River* where there are no treaties. Indeed, the Court held that on proven rights, the duty has the higher duty of a fiduciary. So the duties on the Crown in Ontario will vary according to the areas of the province and the Aboriginal peoples who assert their claims.

The Crown has a duty, whenever it seeks to take action that stands to affect Aboriginal interests in a substantial way. That duty may be a duty to consult. It may be a duty to accommodate. It may be a fiduciary duty. There will always be a duty of some kind.

## **Part Eight**

### **Where Do We Go From Here?**

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#### ***A. Where we are now?***

The law, prior to 1982, heavily influenced how the distributed constitutional powers were understood. That distribution and analysis left little or no room for Aboriginal title or jurisdiction with respect to lands and resources. More often than not, the institutional interests of the natural resources regulatory regime have acted to make it difficult, if not impossible, for Aboriginal peoples to keep and exercise their rights, title and jurisdiction.

Resource policies, based on government management and public access, have never effectively respected Aboriginal rights and have almost always functioned to exclude Aboriginal people from their traditional territories. These policies reflect the general attitude of the dominant society, an attitude that has a long history in western European society – that fish, wildlife and Crown lands are common property resources belonging equally to all Canadians. Since the early part of the 19<sup>th</sup> century in Ontario it has been government policy to confine Aboriginal peoples to reserves, and since Confederation, the Province has assumed control over most of the land and resources.

Aboriginal peoples have always had traditional territories. They have always accessed (or tried to access) those territories in order to use the natural resources. The greater Canadian public sees these same lands as ‘public lands’. The fundamental difference between these two positions should not be underestimated. Unfortunately, the natural resources regulatory regime that has evolved to serve the needs of the non-Aboriginal Canadian perspective does not work to protect and respect Aboriginal rights.

The Supreme Court of Canada’s work since 1973, and more particularly since 1982, is the impetus for the necessary change to the natural resources regulatory regime. The Court has set out positive obligations to enact fair and effective processes concerning the recognition and protection of Aboriginal rights to lands and resources. It is to the implementation of those fair and effective processes that the natural resources regulatory regime must turn its attention. It should be understood that charting a new direction for the natural resources regulatory regime is not simply a means of addressing past wrongs. Nor should it be seen as a moral debt to Aboriginal peoples. Our democracy in Canada is based on consensus. Yet Aboriginal peoples have never been included in this consensus. They must be included in the consensual foundation of the country. Inclusion means that the consensus must include Aboriginal values and their deep attachment to their lands and resources. Only when Aboriginal peoples are meaningfully included, and when they themselves believe they are included, will there be reconciliation.

#### ***B. Where do we go from here?***

We begin with the most basic of theories – that Aboriginal rights law needs to be ‘living law’. Aboriginal peoples have been here since before the first explorers and settlers arrived. They have never left. With no other type of constitutional law do we act under the assumption that laws passed over 200 years ago work well in our complicated modern lives. Generally we don’t

assume that statutes passed in the 1800s are applicable today. Most of our statute law is under constant revision, indeed that is the job of Parliament – to make our law relevant. Yet the natural resources regulatory regime understands treaties and Aboriginal rights as a sort of legal museum.

With the exceptions that were noted above, the natural resources regulatory regime in Ontario is still implemented largely as it was prior to 1982 – government management and control and open access. While there has been some movement (largely as a direct result of Aboriginal rights disputes or court judgments), and there are some policies that give government officials discretion with respect to Aboriginal rights, by and large the natural resources regulatory regime still does not recognize, respect or understand Aboriginal rights and does not include the meaningful participation of Aboriginal peoples. In general, the regime operates as if this crucial element – Aboriginal rights - is the same as every other part of the regulatory regime.

The reasons underlying policies that have historically failed to preserve or respect Aboriginal lands and resources have been fully canvassed by the Royal Commission on Aboriginal Peoples.

The federal assimilation policy ... explains, at least in part, the extraordinary pressures placed on Indian nations over the past century to surrender or sell their reserve lands and resources. If reserves were simply a temporary expedient – a way station en route to assimilation - then there was no particular reason to treat their natural assets with respect. At the same time, the departmental focus on reserves, even in a negative sense, had profound consequences for all Aboriginal peoples. First Nations have had every aspect of daily life regulated while Métis people and non-status Indians have been neglected completely.<sup>197</sup>

No fundamental change has brought any breath of the 21<sup>st</sup> century or the constitutional values now protecting Aboriginal rights and title into the natural resources regulatory regime in Ontario. This observation is not new. It was noted by Mr. Justice Hamilton in his *Inquiry into Aboriginal Peoples and the Justice System in Manitoba*<sup>198</sup> and reiterated by the Royal Commission on Aboriginal Peoples.

The statement appears to reflect the extent to which current departmental thinking is influenced by the existing policy, even though the paper purports to advance alternatives to it. I believe this statement represents a belief by some departmental officials that the present policy and its wordings are quite appropriate and are merely misunderstood. If so, that attitude fails to appreciate the strength of the Aboriginal opposition to giving up, surrendering or exchanging Aboriginal rights, even for the limited purpose the present practice requires.<sup>199</sup>

The natural resources regulatory regime is an institution and like all institutions, has its own culture. As the Royal Commission on Aboriginal Peoples observed,

All institutions, if they are in existence long enough, develop a corporate memory. Policies may change over time, but ... practices – the mix of training and inherited ways of doing things that govern how employees work – do not change nearly so quickly. Government institutions are not simply neutral bodies carrying out policies in a balanced fashion on behalf of the public; they have interests of their own. We have seen how lands and resources

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<sup>197</sup> *RCAP Report*, supra note 3 at Vol. 2, Part 2, p. 554.

<sup>198</sup> See *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991)

<sup>199</sup> Hamilton, *Canada and Aboriginal Peoples: A New Partnership* (Ottawa: DIAND, 1995) at p. 84, as cited in *RCAP Report*, supra note 3 at p. 556.

management agencies have tended to limit Aboriginal participation...

Government employees are also members of the general public. As learned during our hearings, many people have deeply held beliefs about property rights and resources that often conflict with those of Aboriginal people. At least some of this conflict stems from the negative ways Canadians have been conditioned to see Aboriginal people, particularly during the past century [20<sup>th</sup> century]. These conditioning factors need to be understood if there is ever to be a new relationship.<sup>200</sup>

The Supreme Court of Canada has, since 1982, provided an increasingly detailed guideline for the Province with respect to Aboriginal rights. Each case reveals that the natural resources regulatory regime must change. The first was *Calder* in 1973, which affirmed that Aboriginal title was legal title. The next was *Sparrow* in 1990, when it became clear that the fish and wildlife regulatory regime would not apply to Aboriginal and treaty rights. In 2003, with *Powley*, it became clear that there were unextinguished Aboriginal rights for the Métis, perhaps throughout the Ontario, regardless of the existence of treaties with Indians. The concept that the treaties did not extinguish all Aboriginal rights had not previously been thought possible in Ontario. Now there is another new law that should lead to fundamental change - *Haida Nation* and *Taku River* hold that the Province always has ongoing constitutional obligations to Aboriginal peoples, those with mere assertions as well as those with proven claims or treaties.

So all of this begs the big question – where do we go from here? The problem can be readily identified - dispossession from lands, resources and any participation in the control or management of traditional territories. Identifying the ultimate resolution to the problem is also fairly clear – Aboriginal peoples must be allowed into the natural resources regulatory regime in a way that allows meaningful participation and in a way that allows them to feel that they are able to protect their lands and resources. How we get to the ultimate resolution is the question.

Below, I set out my proposal for how to go forward. I, note first that I am far from the first to make such suggestions. Indeed the *RCAP Report*, to cite simply one of those urging fundamental change, noted the following in 1996,

The current situation cannot endure. Fundamental change is urgent. But change requires mutual respect and reconciliation between Aboriginal peoples and other Canadians, not a return to failed policies of assimilation based on surrender or extinguishment of Aboriginal title. In the next section, we develop the outline of a new deal for Aboriginal nations, one that will structure all claims issues within the context of the treaty relationship ... That such ... was first proposed well over 30 years ago is in itself sad testimony to the continuing need for change.<sup>201</sup>

Having noted that such suggestions have been made repeatedly in the past, I nevertheless must join that queue and say that it is also my suggestion that there is an imperative need to change the mechanisms and institutions - in effect to give new direction to the natural resources regulatory regime - to implement the government's obligations with respect to Aboriginal peoples.

This may be easier said than done. There are many obstacles in the way including the existing

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<sup>200</sup> *RCAP Report*, *supra* note 3 at Vol. 2, Part 2, p. 553.

<sup>201</sup> *RCAP Report*, *supra* note 3 at Vol. 2, Part 2, p. 556-7.



culture of the regime, the lack of financial and human resources, and finally, on the part of Aboriginal peoples, the problems of trust and capacity. Yet lands and resource problems are unrelenting. They are not going to go away. If the new duties set out by the Court in *Haida Nation* and *Taku River* mean that all Aboriginal peoples are going to be consulted on everything, they will soon be buried. They have neither the resources nor the people to even begin to deal with these issues.

But unilateral action by government cannot accomplish this ambitious program. Although it is the Crown that bears these enhanced duties, fulfilling them requires the cooperation and participation of Aboriginal peoples. Neither party can do this alone. The current practice of government, which is to develop and manage the natural resources regulatory regime unilaterally, must change. I pause to note that a most unfortunate example of this unilateral culture within government can be seen when even its consultation policies with respect to Aboriginal peoples were developed unilaterally.<sup>202</sup>

Such an ambitious program requires both parties to opt in and take ownership of the process and the results. This will only work if Aboriginal people believe, truly believe, that such mechanisms and institutions will fully consider and incorporate their values, needs and objectives, not just give lip service to them.

Since 1982, tensions between Aboriginal peoples and the natural resources regulatory regime have increased. In part this is because the expectations of Aboriginal peoples have dramatically increased. There is a firm belief on the part of Aboriginal peoples that the law is on their side, that their rights must mean something real. They no longer accept that their rights can be affected without their participation, agreement or consent.

On a practical level, it is important to identify how the natural resources regulatory regime can effect this change. In this regard it may be helpful to look at its reaction to the past large legal changes. When *Calder* came down in 1973, the uncertainties that resulted were addressed by the implementation of a long-term plan. The result was the creation of the Comprehensive Claims process. While there are implementation problems with this process, it has met with some successes including the *Nisga'a Agreement*, the *Yukon Agreements*, the *Sahtu and Gwich'in Agreements* and now most recently the *Tlicho Agreement*. Each of these agreements sets out detailed ways for the First Nation to meaningfully participate in the management and control of its traditional territory. Each of these agreements also sets out the full application, non-application or varied application of each part of the natural resources regulatory regime to that Aboriginal people.

When *Sparrow* came down in 1990, the uncertainties that resulted were addressed differently than after *Calder*. This time the provinces simply stopped applying the harvesting regulatory regime to First Nation food harvesters. The supplementary cases that recognized possible commercial rights, then gave rise to another solution, partial reallocation of the fisheries to Aboriginal commercial fishermen.

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<sup>202</sup> The Province of British Columbia, in fact established its consultation policy without consultation with Aboriginal peoples and indeed declared that it did not think it appropriate to

Then *Powley* set out a new challenge. Resorting to the mechanism developed pursuant to *Sparrow*, Ontario has implemented, in part of the Province, a non-applicability policy.

Now, there is another new challenge brought forward in *Taku River* and *Haida*. The new constitutional duty set out in those cases requires government to consult Aboriginal peoples and accommodate their vulnerable interests whenever a Crown actor considers conduct that might adversely affect Aboriginal rights intended for protection by the constitution. The duty applies whether the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title that may be at risk from a course of action being contemplated by the Crown. Aboriginal peoples do not have to get a judicial determination of their collective right before the duty is invoked.

We are at a new nexus point. The new constitutional duty is far-reaching. It requires both procedural and substantive changes to the existing natural resources regulatory regime. It also requires the participation and co-operation of Aboriginal peoples. I suggest therefore, that this situation requires a long-term solution if we are to avoid legal and economic uncertainty. There is a need for a new ‘orderly’ process to implement this duty. Indeed the Supreme Court of Canada suggested that new mechanisms and institutions might be appropriate for the implementation of this duty. It seems unlikely that this duty can even begin to be implemented without such changes. And there is urgency here. The duty is going to be triggered in a wide variety of statutory and policy contexts. While the need is for a long-term solution – it cannot be long in the coming.

What sort of mechanisms or approaches would work? It is my suggestion that it is necessary to ask first, who needs to be involved in considering this question. Some players are obvious, Aboriginal peoples must be there; the federal and provincial governments must be there too. None of this can be done unilaterally, it must be considered jointly, in a collaborative way, by the parties. In order for this to begin however, both the federal government and Ontario need to recognize that a profound change in their natural resources regulatory regime is called for and that new mechanisms to give effect to this duty must be worked out collaboratively with Aboriginal peoples. This requires a trust-like, rather than an adversarial approach.

With respect to the development of mechanisms – I suggest that we already have the answer – non-applicability. The natural resources regulatory regime must ask a fundamental preliminary question. In each situation it must ask first whether the natural resources regulatory regime applies to the Aboriginal peoples in the same way it is applied to everyone else. The answer to the question can only be arrived at through consultation with the Aboriginal people affected. There appear to be three general options – applicability, varied applicability or total non-applicability. While the long-term solution is to generally implement this doctrine. In fact it will likely need to be carried out with respect to each Aboriginal people on a case-by-case basis.

The examples noted above show where accommodation has been carved out of the system, some variation on non-applicability of the natural resources regulatory regime was negotiated. The examples show that these accommodations happened as a result of the resistance of aboriginal peoples. When their resistance was strong enough they brought the Crown to do the honorable

thing. Regardless of whether the source of the accommodations was in resistance, these examples do show us something valuable. When government was finally willing to move in the right direction, it was possible to effect resolution. But such accommodations are not the norm yet. When government is not willing, we see continued dispossession and the resulting Aboriginal rights disputes. The theory of applicability provides a possible solution. The natural resources regulatory regime must change its normal assumption that it always applies with full force and effect to Aboriginal peoples. It is this assumption that leads to death by a thousand cuts - a process that Aboriginal peoples will no longer stand for.

There are enough stories here to show us that some members of the public and some government servants will fight against this approach. There are also stories that show that there are members of the public and civil servants who will try to find resolution in a way that protects and respects Aboriginal rights. In large part it depends on whether the Crown has the will to do the honorable thing and the strength to stay the course.

All of which is to say this. We have an opportunity. An opportunity that will only be realized if the government players in the natural resources regulatory regime are willing to admit the need for substantive change. If the policy response is not forthcoming, we can expect a substantial increase in Aboriginal resistance to economic developments, and a corresponding increase in the unrest and uncertainty - more "Aboriginal rights disputes" that will play out in economic and political institutions as well as in the courts.

### ***C. Addendum***

In March of 2005, two new court developments in British Columbia have pushed these issues even further. Both decisions have applied the *Taku River* and *Haida Nation* decisions.

In *Musqueam*<sup>203</sup> the issue was whether a conveyance of the University Golf Course from the Province of British Columbia to the University breached the duty to consult and accommodate the Musqueam First Nation, and, if so, what remedy should be given for that breach. The British Columbia Court of Appeal interpreted *Haida Nation* and *Taku River*, as follows:

[92] ... What I take from these judgments is the principle that the duty of government to consult and in appropriate cases to accommodate "is part of a process of fair dealing and reconciliation" with an affected First Nation where aboriginal rights or title are in play. The honour of the Crown mandates such an approach. There is a legal duty cast on government to consult prior to an aboriginal group proving its claim, which duty is conditioned and informed by the nature and strength of any claims of the First Nation advancing such claims.

The court went on to state that it is only fair that the consultation process seeking to find proper accommodation should be open, transparent and timely and that did not happen in this case because the sale was virtually concluded before any real consultation occurred. The court ordered the suspension of the operation of the Order in Council, which authorized the sale, for two years, which provided the parties opportunity to seek to reach some agreement.

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<sup>203</sup> *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128

In *Blaney*,<sup>204</sup> the Homalco First Nation sought a judicial review of the decision to approve an amendment to an existing fish farm licence. Marine Harvest has a licence to operate a fish farm and raise Chinook salmon at this facility. They applied to amend that licence in April of 2004 to allow them to raise Atlantic salmon. The amendment was granted effective December 8, 2004. The Homalco say the approval of the amendment was done without proper consultation and accommodation of their concerns, as required by law. In the result the Judge found as follows:

I find that the Ministry has erred in failing to consult to the extent necessary in these particular circumstances. The Ministry believed that the change of species from Chinook to Atlantic salmon was not a significant amendment, and did not have any different impact on the claims or rights of the Homalco than the original licence. Based on that starting point, they believed that the level of consultation required was not great. Their approach also was that it was only with regard to the effect of the amendment itself that they were required to consult. They believed that the matter would proceed fairly quickly, and when correspondence continued until late 2004, found themselves in a situation where Marine Harvest was making inquiries as to when the amendment might be granted, because they had been raising smolts and needed to place them somewhere. This combination of circumstances led the Ministry to proceed with the final approval of the amendment before there was an opportunity for them to meet with the Homalco, discuss their concerns and the Ministry's response. The concerns raised by the Homalco were not frivolous or vexatious. The Ministry does not agree with the scientific opinions presented by the Homalco, and the response required was significantly more than that contained in the letter of November 22, 2004. The letter of January 18, 2005 is a good foundation for the face to face meetings that consultation requires. Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment to the existing licence was approved.

...

Therefore, I make the following orders:

1. I adjourn the application for judicial review generally;
2. I declare that the Minister had, and continues to have, a legally enforceable duty to the Homalco to consult with them in good faith, and to endeavour to seek workable accommodation between their interests and the long-term objectives of the Crown and Marine Harvest, and the public interest, both Aboriginal and non-Aboriginal. This includes issues surrounding the location and management of the Church House fish farm and the amendment to the existing licence to allow the introduction of Atlantic salmon;
3. The parties are at liberty to apply for further directions if they are unable to agree on a schedule for consultation;
4. Marine Harvest is to participate in an appropriate way in the consultation;
5. Marine Harvest will provide information subject to protection of confidentiality with respect to the fish health management plan and the best management plan. The parties have liberty to apply if they are unable to agree under the specific terms

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<sup>204</sup> *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283, par 108 and 127.

- required to protect the confidentiality of the information;
6. Marine Harvest will not add any more Atlantic salmon to the Church House site until the process of consultation and potential accommodation has been completed, and the Ministry confirms the amendment of the licence, if it does so;
  7. The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable compensation, it determines that it is necessary to do so, or add whatever conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco;
  8. The parties have leave to apply for further directions;
  9. The Homalco have leave to bring the matter back before the court in the event that they are of the view that further consultation and accommodation are inadequate.

Both of these cases are illuminating. The courts are clearly prepared to determine whether or not appropriate consultation and accommodation has occurred. Indeed, they are prepared to suspend court actions, licences and Order-in-Council authorizing Crown activity. They are prepared to send the parties back to negotiate. In this sense, it seems that at least the attempt to negotiate a solution has become a pre-requisite to a judicial determination with respect to consultation. It is also interesting to note that the court has retained jurisdiction with respect to the progress of such negotiations. With this in mind, it seems hopeful that governments will have to meaningfully implement the decisions in *Taku River* and *Haida Nation*.



## **Part Nine**

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