PART II

PRE-CONFEDERATION CLAIMS AND FEDERAL AND PROVINCIAL OBLIGATIONS: A SURVEY OF THE APPLICABLE LAW

prepared for the Indian Claims Commission
(Revised version)

David Schulze
with Peter W. Hutchins and Jameela Jeeroburkhan

Hutchins Grant & Associés
11 November 2005

I. The Indian Claims Commission's jurisdiction

A. Commission jurisdiction generally

Under the federal policy, specific claims give rise to negotiation and compensation on the following grounds:

> 1) LAWFUL OBLIGATION
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> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
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> A lawful obligation may arise in any of the following circumstances:
>
> I) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
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> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.
>
> 2) BEYOND LAWFUL OBLIGATION
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> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> I) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[1]

In addition, the federal government has argued and the Commission has accepted that the following provision of the guidelines is relevant to determining what is a specific claim:

> GUIDELINES

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[1] *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1982), as confirmed in *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, 1993) (emphasis added).

> In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While the guidelines form an integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.
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> SUBMISSION AND ASSESSMENT OF SPECIFIC CLAIMS
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> Guidelines for the submission and assessment of specific claims may be summarized as follows:
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> ...
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> 7) Claims based on unextinguished native title shall not be dealt with under the specific claims policy.

In its decisions, the Commission has ruled that "a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy."[2]

The Commission has pointed out that "the *principal* – but by no means the *only* – categories of Indian assets falling under the Specific Claims Policy are Indian *reserve lands* and Indian band funds" because "the words of the Introduction contain no language limiting the scope of specific claims to matters arising under the *Indian Act* and no wording restricting 'claims that relate to the administration of land' to reserve lands." Moreover, where the Specific Claims Policy "establishes the concept of 'lawful obligation,' [it] makes no mention of reserves at all...."[3]

The Commission has found in favour of a broad interpretation of the categories of "breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy." More particularly, it was enough that a First

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[2] *Kluane First Nation (Kluane Game Sanctuary and Kluane National Park Reserve Creation) – Interim Ruling (December 2000)*, [2003] 16 ICCP 75 at 104.

[3] *Id.*at 95-96 (emphasis in the original).

Nation's "claim involves an allegation of a breach of an obligation in a statute pertaining to Indians" for it to be admissible. Since the instrument in question imposed particular conditions in relation to "the claims of the Indian tribes to compensation for lands required for purposes of settlement," the Commission held that it had to "be considered a statute pertaining to Indians within the meaning of the second category of lawful obligation in *Outstanding Business*."[4]

B. Jurisdiction over pre-Confederation claims

The federal policy on specific claims of 1982 provided: "No claim shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor." This restriction was revoked in 1990 though with the proviso that a claim still had to "demonstrate a lawful obligation of the government."[5] Since that time, claims raising pre-Confederation issues have come before the Indian Claims Commission but a surprisingly large number were subsequently the subject of agreements by the parties to negotiate, before any decision by the Commission was necessary.[6]

The Commission has held that a post-Confederation breach of the Crown's obligations arising out of pre-Confederation legislation can give rise to a specific claim within its jurisdiction, including when the alleged breach involves an infringement on Aboriginal rights and title. In the Kluane First Nation's claim, the Crown's alleged breach arose after Confederation but the legislation at issue preceded the entry into Confederation of what is now the Yukon Territory. The *Rupert's Land and North-Western Territory Order* was enacted by the

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[4] *Id.*at 97, 99.

[5] *Outstanding Business* (1982), as am. by *Federal Policy for the Settlement of Native Claims* (1993); "A Fair and Equitable Process: A Discussion Paper on Land Claim Reform", [1995] 2 ICCP 3 at 14.

[6] *Micmacs of Gesgapegiag Inquiry, Claim to Horse Island*, [1995] 3 ICCP 253; *Chippewas of the Thames Inquiry, Muncey Land Claim*, [1995] 3 ICCP 285; *Chippewa Tri-Council Inquiry / Chippewas of Beausoleil First Nation / Chippewas of Georgina Island First Nation / Chippewas of Rama First Nation, Collins Treaty Claim*, [1998] 10 ICCP 31; *Chippewas of the Thames First Nation Inquiry, Clench Defalcation Claim*, [2002] 15 ICCP 307; *Mississaugas of the New Credit First Nation Inquiry, Toronto Purchase Claim*, [2004] 17 ICCP 227.

Imperial government in 1870 and imposed the condition that "upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[7] The First Nation alleged that the Crown's creation of national parks in the 1940s denied its members access to part of their traditional territory and adversely affected their livelihood in breach of the *Rupert's Land and North-Western Territory Order*.[8]

Canada's objection to the Kluane First Nation's claim was not the date of the statute relied upon, but rather that it was "based on traditional native use and occupancy of lands [it] accordingly falls within the scope of the Comprehensive Claims Policy and beyond the mandate of the Commission."[9] The Commission rejected this narrow interpretation on a number of grounds, including that it was enough that a First Nation's "claim involves an allegation of a breach of an obligation in a statute pertaining to Indians – namely, the *Rupert's Land and North-Western Territory Order*" for it to be admissible. Since that imperial instrument imposed particular conditions in relation to "the claims of the Indian tribes to compensation for lands required for purposes of settlement," the Commission held that it had to "be considered a statute pertaining to Indians within the meaning of the second category of lawful obligation in *Outstanding Business*."[10]

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[7] *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App., No. 9. The Order is discussed in more detail below.

[8] *Kluane First Nation– Interim Ruling*, *supra* at 79.

[9] *Id.* at 89.

[10] *Id.* at 97, 99.

II. Provincial liability for pre-Confederation claims under statute and before the courts

A. The constitutional division of liability

Section 111 of the *Constitution Act, 1867* sets out the federal government's liability for the debts and claims incurred by Nova Scotia, New Brunswick, Quebec and Ontario at the time of Confederation as the basic principle: "Canada shall be liable for the Debts and Liabilities of each Province existing at the Union."

The English jurist and legal historian Frederic Maitland praised this provision but criticized the details of its application:

> In the *British North America Act, 1867*, there are courageous words. "Canada shall be liable for the debts and liabilities of each Province existing at the Union. Ontario and Quebec conjointly shall be liable to Canada... [...]" This is the language of statesmanship, of the statute book, and of daily life. But then comes the lawyer with theories in his head, and begins by placing legal estate in what he calls the Crown or Her Majesty. [...] And so we have to distinguish the lands vested in the Crown "for" or "in right of" Canada from the lands vested in the Crown "for" or "in right of" Quebec or Ontario or British Columbia, or between lands "vested in the Crown as represented by the Dominion" and lands "vested in the Crown as represented by a Province."[11]

In fact, as the Court of Appeal of Alberta explained over a century later, the details of Part VIII of the *Constitution Act, 1867* (ss.102 to 126) were necessary in order to conclude certain affairs of the old provinces and launch the new federation:

> Part VIII of the British North America Act which is entitled "Revenues, Debts, Assets, Taxation" deals with the relationships of the founding Provinces and Canada in the ownership of property. It is useful as a starting point to consider their relative positions as the new nation came into existence. At Confederation all public property had been owned by the founding Provinces. Canada, like a natural person, came into the world possessing nothing; all the assets and power it needed to carry out its functions were derived from the Act of Confederation itself. Thus Section 102 gave to Canada "all

[11]F. Maitland, "The Crown as Corporation" (1901), 17 Law Quarterly Rev. 131. Maitland's concern was that the Crown should be seen as having the same rights as a corporation to sue and be sued.

> duties and revenues" over which the founding Provinces had jurisdiction except those specifically reserved to the Provinces. These formed the Consolidated Revenue Fund of Canada. Since Canada assumed the public debts of the Provinces (sec. 111) subject to adjustments, it also received from them (Sec. 107) "all stocks, cash, banker's balance, and securities for money" which they possessed, except those specifically reserved. Various provisions were made to equalize the debts.[12]

More particularly, the federal government's constitutional assumption "of the burden of the public debts of the several Provinces" was not absolute but subject to "limits designated by the Act for each Province [in ss.112, 114 and 115] and for the payment, by the Dominion according to a prescribed scale of an annual grant to each of the Provinces; which grants by s. 118 were to be 'in full settlement of all future demands on Canada.'"[13]

The settlement of the debts, liabilities and other outstanding claims as between Quebec, Ontario and Canada could be referred to arbitration pursuant to s.142 of the *Constitution Act, 1867*. In the late nineteenth century, this provision was used to settle liability for payments promised in the 1850 Robinson-Huron and Robinson-Superior treaties, under which certain Ojibway peoples around the Great Lakes had surrendered their land in exchange for annuities and other benefits. As the treaty annuities began to increase following Confederation, the federal government wanted Ontario to pay for them. Canada relied upon s.109 of the *Constitution Act, 1867* which provides that the provinces hold all lands and minerals but "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same" and alleged that the treaty annuities were a charge on provincial Crown title.

However the Privy Council ultimately upheld a decision of the Supreme Court of Canada which rejected this argument and held the annuities were a federal liability, reversing the arbitrators' ruling. Lord Watson explained that ss.109, 111, 112 and 142 "distribute these debts

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[12] *Reference re Questions set out in O.C. 1079/80, Concerning Tax Proposed by Parliament of Canada on Exported Natural Gas*, (1981) 122 D.L.R. 42 (Alta. C.A.) at pp. 58-59 (emphasis added).

[13] *Reference re Waters & Water-Powers*, [1929] S.C.R. 200 at p. 211 *per* Duff J.

and liabilities [of the old provinces] into two classes, the one being payable in the first instance by the Dominion, with a right of indemnity against Ontario and Quebec, and the other being directly chargeable to Ontario or to Quebec."[14] The treaty annuities fell into the first class. Subsequently, the Supreme Court of Canada added that the meaning of the Privy Council's decision was that the fact a debt "was not a presently payable liability at the date of the passing of the *British North America Act* can make no difference" and "that contingent and deferred as well as present liabilities come within the 111th section."[15]

Claims by First Nations against the Crown for breach of pre-Confederation liabilities are therefore presumptively claims against the Crown in right of Canada. While the federal government may have a right of indemnity as against the province, that remains a secondary consideration.

B. The *Specific Claims Resolution Act*

Once it is proclaimed, the *Specific Claims Resolution Act*[16] (which is not yet in force) would allow for an optional role for provinces affected by claims. Canada will be able to indicate to the Commission that a province "might be significantly affected by the claim," in which case the province must be notified (s.36). In addition, Canada and the First Nation as parties jointly may request that a province "be consulted during a dispute resolution process" or "participate as a party" (s.37). Finally, the Tribunal must "grant status as a party in a specific

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[14] *A.G. Canada v. A.G. Ontario*, [1897] A.C. 199 (P.C.) at 205-206, 3 C.N.L.C. 483, aff'g. (1895), 25 S. C. R. 434 at 534-35, 3 C.N.L.C. 365.

[15] *R. v. Yule* (1899), 30 S.C.R. 24 at p. 33. Half a century later, the Supreme Court of Canada suggested that by s.111, the federal government did not assume liability for the debts of the older provinces of Upper Canada and Lower Canada dating from before the *Act of Union* of 1840: *Miller v. The King*, [1950] S.C.R. 168, 5 C.N.L.C. 291. This analysis seems inconsistent with the purpose of Part VIII of the *Constitution Act, 1867* as a whole since its logical consequence would be that Canada was liable for only 27 years of Quebec's and Ontario's debts but for all of Nova Scotia's and New Brunswick's debts since the creation of these colonies in 1714 and 1784 respectively.

[16] *Specific Claims Resolution Act*, S.C. 2003, c. 23.

claim to a province that has agreed to submit to the jurisdiction of the Tribunal for that claim" (s.60).

It has never actually been clear whether the provinces sought any role in specific claims which the federal government undertakes to settle in general, still less in the case of pre-Confederation claims in general. At the same time, it is clear that the coordination of federal and provincial responses has the potential to delay significantly the settlement of a claim. A recent analysis explains:

> What is required, where both governments are negotiating the same claim, is that their policies and processes be compatible. At present, insofar as both are generally prepared to negotiate compensation on the basis of Canadian legal principles, it is possible to take a consistent approach in tripartite settlement negotiations. However, a major concern arises for First Nations when the governments disagree as to their respective legal responsibilities based on the facts of the claim. Not infrequently each take conflicting positions about the share of settlement that should be contributed by the other. In such cases, the result is that negotiations do not progress although all parties agree that the Crown owes an outstanding obligation to the First Nation.[17]

C. Canada's position before the courts

When a claim is before the courts, on the other hand, the federal government has taken the position that it is either not liable for pre-Confederation obligations to First Nations, or else that it is has a right of indemnification from the provinces if it is liable.

Canada made this position clear in the latest installment of a dispute which has been litigated at least since an award was issued by arbitrators in 1895. The Red Rock and Whitesand First Nations of Ontario have sued Canada concerning the Robinson Superior Treaty of 1850: they claim the increased annuities promised by the treaty "in case the territory hereby ceded by

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[17]Michael Coyle, "Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future", research paper prepared for the Ipperwash Inquiry, 31 March 2005, at 60-61 <http://www.ipperwashinquiry.ca/policy_part/land/pdf/Coyle.pdf>.

the parties of the second part shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, derived from a share of the revenues produced from the lands that were surrendered under the Treaty."[18]

The Ontario Superior Court of Justice recently dismissed a motion by Canada to determine in its favour certain questions of law which it alleged made it "plain and obvious" that the province was liable to reimburse the federal government for obligations to Indians arising from before Confederation.

> Section 91(24)
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> [118] Canada moved to strike Ontario's pleading that Canada was liable to pay the augmented annuities by virtue of a general fiduciary obligation imposed by section 91(24) of the *Constitution Act, 1867* stating that section 91(24) does nothing but confer upon Parliament the right to exercise legislative and administrative jurisdiction over "Indians, and Lands reserved for the Indians".
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> [119] Canada supported its argument by reference to the *Constitution Act, 1867* which distinguishes between the distribution of legislative jurisdiction in Part VI and the allocation of assets, debts and liabilities in Part VIII. This distinction, it submits, reinforces the argument that section 91(24) has nothing to do with responsibility for debts and liabilities of the Province of Canada that are entirely governed by sections 109, 111, 112 and 142 of the *Constitution Act, 1867*.
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> [120] Canada also maintained that there cannot be a pre-confederation damage claim against it for breach of fiduciary duty based upon section 91(24) because the pleadings do not contain the basic hallmark of fiduciary duty namely, that Canada has discretionary power or control over the surrendered land in question.
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> [121] This argument is premised, in part, upon the assertion that Ontario received its territories subject to a section 109 trust to pay treaty annuity payments so that Canada could not possibly have any discretion over the proceeds of lands totally allocated in the Constitution to Ontario through section 109.
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> [122] For the reasons already stated, I do not accept that it is plain and

[18] *Red Rock First Nation v. Canada (Attorney General)*, [2005] O.J. No. 2270 (S.C.J.).

> obvious that Ontario received its territories subject to a trust or obligation or that section 109 applies to the facts of this case.
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> [123] While section 91(24) of the *BNA Act* may provide the Federal Government with the power to legislate in the area of "Indians, and Lands reserved for Indians", the question of the scope of federal and provincial powers and the exclusiveness of those powers was problematic in 1867 and remains problematic today. The issue of where the dividing line is demarking the federal and provincial spheres of influence in Aboriginal issues is far from clear.[19]

Notwithstanding the best efforts of federal government counsel, therefore, the division of federal and provincial liability for pre-Confederation claims remains an unresolved issue.

D. The provinces' obligations

1. Introduction

The claims by a First Nation against the provincial Crown can take many forms. Among those which most closely resemble the claims which fall within the jurisdiction of the Commission are those which relate to reserves – either because reserve lands were lost or because reserves were promised but never created.

In a recent study, Michael Coyle has made the following summary of claims outstanding against Ontario:

> About 118 land claims have been filed against the Ontario government. More than 30 claims allege that a First Nation has not received its proper reserve entitlement under treaty (and thus that Ontario has wrongly received First Nation lands). More than a dozen claims allege that Ontario improperly permitted or caused the flooding and damage of reserve lands through provincially-authorized water projects. At least six claims assert that Ontario built highways across reserves, either without proper legal authority or without paying adequate compensation. A similar number of claims allege that reserve lands that were surrendered for sale are now under Ontario's control and either have not been sold or the proceeds have not been paid to the First Nation.[20]

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[19] *Red Rock First Nation v. Canada (Attorney General)*, [2005] O.J. No. 2770 (S.C.J.).

[20] Coyle, "Addressing Aboriginal Land and Treaty Rights in Ontario" at 3.

Of course, the fact that such claims are advanced does not by itself establish that the provinces have binding legal obligations.

2. Under pre-Confederation treaties

Currently, the clearest role for the provinces in pre-Confederation claims by First Nations arises in the case of treaty land entitlements, most of which have arisen in Ontario. While not all treaty land entitlements in Ontario are based on pre-Confederation treaties, the province has frequently negotiated such claims even if the legal nature of its obligations remains unsettled.

The best-known example of such a claim is probably Temagami, a First Nation which the courts held had adhered to the Robinson-Huron Treaty of 1850, but after Confederation.[21] Based on a framework agreement signed in 2000, the province and Temagami agreed in June 2004 on a proposed settlement and are currently preparing the text for a final agreement to which the federal government will be a party and which will include the creation of a reserve and financial compensation.[22] Also, in August 1991, six First Nations in the area of the Robinson-Superior Treaty of 1850 signed a "Land and Larger Land Base Framework Agreement" with the federal and provincial governments to provide either a reserve land base where none existed or to expand the size of existing reserves.[23]

In at least one other case, however, the federal government alone has negotiated the settlement of a claim based on the failure to create a reserve for the Caldwell First Nation at

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[21] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

[22] Ontario Native Affairs Secretariat, "About the Temagami Land Claim", <http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/temagami/about.htm>

[23] As described in Ontario Native Affairs Secretariat, "Pays Plat First Nation Land and Larger Land Base Negotiation", <http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/paysplat/paysplat.htm>

Point Pelee in southwestern Ontario under a 1790 treaty.[24] Nevertheless the Indian Commissioner of Ontario, who had a tripartite federal-provincial-Aboriginal mandate, had been involved in the early discussions of the claim.[25]

3. **Under the numbered treaties**

The largest number of treaty land entitlements arise under the so-called numbered treaties and particularly in the prairie provinces.[26] While these claims do not predate Confederation strictly speaking, they pre-date the creation of those provinces. More importantly, they arise from the process by which the territory now included in the three prairie provinces became part of Canada, since the *Rupert's Land and North-Western Territory Order* of 1870 transferred the lands to the federal government on the condition that "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[27]

From the time Rupert's Land and the North-Western Territory entered into Confederation, and even after the creation of Manitoba in 1870 and Saskatchewan and Alberta in 1905, the federal government controlled all public lands in what are now the prairie provinces and was therefore able both to negotiate treaties and create reserves. Nevertheless, Canada had not created all the reserves it promised by the time the prairie provinces acquired control of public lands in 1930.

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[24]*Municipality of Chatham Kent v. The Queen* (2001), [2002] 1 C.N.L.R. 103 (F.C.T.D.). See also: Department of Indian and Northern Affairs Canada, "The Caldwell First Nation Claim: Summary", 1 March 1999, <http://www.ainc-inac.gc.ca/ps/clm/cld/sum_e.html>

[25]*Randall v. Caldwell First Nation of Point Pelee*, [2001] F.C.J. No. 335 (QL) (T.D.) at para. 3.

[26]See generally: Donna Gordon, "Treaty Land Entitlement: A History", [1996] 5 ICCP 339.

[27]*Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App., No. 9.

The constitutional instruments referred to as the Natural Resource Transfer Agreements obliged Manitoba, Saskatchewan and Alberta "from time to time, upon the request of the Superintendent General of Indian Affairs, [to] set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province....[28]

Notwithstanding the undertaking in the Natural Resource Transfer Agreements, treaty land entitlements were still not honoured in the prairie provinces and the process of creating reserves in order to fulfill the entitlements has continued up to the present day.[29] Currently, reciprocal federal and provincial legislation or tripartite federal-provincial-aboriginal agreements provide for how this still-unfinished process will take place.[30]

Other land entitlements under the numbered treaties exist in British Columbia under Treaty 8[31] and in Ontario under Treaty 3, but they do not arise from before those provinces' entry into Confederation.

In particular, at the time Treaty 3 was negotiated in 1873, the federal government took the position that the all the lands concerned were part of the Northwest Territories but in 1884,

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[28]*Constitution Act, 1930*, Schedule 1 (Manitoba) at para. 11, Schedule 2 (Alberta) at para. 10, Schedule 3 (Saskatchewan) at para. 1.

[29]Donna Gordon, "Treaty Land Entitlement: A History", *supra* at 395-429. See also, for example, the facts set out in *Lac La Ronge Indian Band v. Canada* (1999), [2000] 188 Sask. R. 1 at para. 171-190, 202-215, judgment rev'd. on the merits [2001] 4 C.N.L.R. 120 (Sask. C.A.).

[30]*Claim Settlements (Alberta and Saskatchewan) Implementation Act*, S.C. 2002, c. 3; *Saskatchewan Treaty Land Entitlement Act*, S.S. 1993, c. 11; Manitoba Framework Agreement Treaty Land Entitlement executed on May 29, 1997, by Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of Manitoba and the Treaty Land Entitlement Committee of Manitoba Inc.

[31]See: A. J. Ray, "Treaty 8: An Anomaly of the First Nations History of British Columbia" (1999) 123 *BC Studies* 5.

the Judicial Committee of the Privy Council determined that most belonged to Ontario,[32] with the result that reserves had been illegally created on provincial Crown lands by federal treaty-making.[33] As part of the settlement of this federal-provincial dispute, the province agreed that it would review "the reserves heretofore laid out in the territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course." At the same time, the federal government agreed that Ontario's consent would be required before any more lands could be selected for reserves under Treaty 3 but that the two governments could refer any disputes to a joint commission.[34]

The *Rupert's Land and North-Western Territory Order* also applied in that part of northern Ontario which only became part of Ontario in 1912[35] but which was affected by Treaty 9 negotiated as of 1905 (with adhesions taken up until 1930). Since Treaty 9 was meant to cover both the District of Keewatin under federal administration[36] and also the northern parts of Ontario, before beginning negotiations Canada had already obtained the province's agreement to "the setting apart and location of reserves within any part of the said territory [in the province] at points to be chosen by the commissioners negotiating the said treaty." The condition, however, was not only that one of the commissioners would be appointed by the province, but

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[32]Gordon, "Treaty Land Entitlement: A History", *supra* at 347-48; *Canada (Ontario) Boundary Act*, 52 & 53 Vict. (1889), U.K., c.28. A small part of Treaty 3 territory is in present-day Manitoba.

[33]*Ontario Mining Company Limited v. Seybold,* [1903] A. C. 73 (P.C.), 3 C.N.L.C. 203.

[34]*An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, c. 5, Schedule, para. 1, 2, and S.O. 1891, c. 3, Schedule, para. 1, 2.

[35]*Ontario Boundaries Extension Act*, S.C. 1912, c. 40. Quebec received its northern territory subject to the same obligations to Indians, pursuant to the *Quebec Boundaries Extension Act*, S.C. 1912, c. 45, s.2, but no treaty was signed in that province until the *James Bay and Northern Quebec Agreement* and the *Northeastern Quebec Agreement* in 1975. See: *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32.

[36]James Morrison*, Treaty Research Report: Treaty No. 9 (1905-1906)*, Indian and Northern Affairs Canada, 1986, "The Adhesion Period, 1907-1930", text corresponding to fn. 13.

also that the final reserve selection would be approved by the province.[37] Presumably the agreement also applied to the northern party of Treaty 9 territory once the 1912 boundary extension placed all of it within Ontario.

4. Special statutes

a. Quebec's 1851 statute

In the mid-nineteenth century, even as the negotiation of land cession treaties was well under way in present-day southern Ontario (then known as Upper Canada or Canada West),[38] no treaties were being negotiated in present-day southern Quebec (then known as Lower Canada or Canada East).

In its 1844 report, the commission of inquiry established by Governor General Sir Charles Bagot distinguished between Upper Canada where the Crown took surrender of the Indians' "right of occupancy upon their old hunting grounds" through treaty and Lower Canada, "where settlement had made considerable progress before the Conquest." The commission made the extraordinary suggestion under the French regime the Indians' "Territorial Possessions had at that time become circumscribed within defined limits, and in many instances were held by Patents under the French Crown" and it was only "on the Ottawa, in which the Indians have been dispossessed of their ancient hunting grounds without compensation."[39]

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[37]"Agreement Between the Dominion of Canada and the Province of Ontario", July 3, 1905, in *The James Bay Treaty Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930*, Ottawa, 1931. The federal government had agreed in 1891 that "any future treaties with the Indians in respect of territory in Ontario... shall be deemed to require the concurrence of Ontario": *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, Schedule, para. 6.

[38]Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, Chapter 6, "3. Treaty Making in Ontario, the West and the North".

[39]Province of Canada, Legislative Assembly of Canada, *Journals*, 1847, Appendix (T.), "Report on the affairs of the Indians in Canada" at folio 5.

In fact, the very next year, the Commissioner of Crown Lands reported to the Governor General that for instance, in the Saguenay and Lac St-Jean region, the Innu (or Montagnais) were rapidly losing their hunting grounds to logging and settlement. In 1845, Commissioner Denis-Benjamin Papineau recommended the creation of reserves in the Témiscamingue and Upper Gatineau regions and on the Lower North Shore of the St. Lawrence River.[40] The Innu themselves sent petitions to the colonial government as of 1844 and a delegation in 1848.[41]

These efforts bore fruit in 1851 when the Legislative Assembly of the colony adopted *An Act to Authorise the Setting Apart of Lands for the Use of Certain Indian Tribes in Lower Canada*,[42] on the grounds "that the Indians of Lower Canada had not received the same aid that those of Upper Canada had, and they were in [a] state of distress."[43]

A total of 230,000 acres were to be set aside, divided among the different "Indian tribes" according to the terms of an Order in Council adopted on 9 August 1853.[44] The instrument gave the most detail for the nations whom the colonial authorities knew best so that, for instance, the Mohawks of Kanesatake and Kahnawake were jointly given a reserve of 16,000 acres in a particular township (now the Doncaster reserve in the Laurentians[45]). By contrast, the very

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[40]Gérard L. Fortin et Jacques Frenette, "L'acte de 1851 et la création de nouvelles réserves indiennes au Bas-Canada en 1853" (1989) 19:1 *Recherches amérindiennes au Québec* 31 at 32.

[41]José Mailhot, "La marginalisation des Montagnais" in Pierre Frenette, ed., *Histoire de la Côte-Nord* (Québec: Presses de l'Université Laval, 1997) 323 at 332-334.

[42]*An Act to Authorise the Setting Apart of Lands for the Use of Certain Indian Tribes in Lower Canada*, S.C. 1851, c.106.

[43]Elizabeth Gibbs, ed., *Debates of the Legislative Assembly of United Canada, 1841-1867*, vol. 10, part 1, *1851* (Montreal: Centre de recherche en histoire économique du Canada franais) at 199.

[44]The substance of the Order in Council of 9 August 1853 was published as "Schedule of Lands Appropriated to the Indians of Lower Canada under Act 14 and 15 V. c. 106", signed for the Commissioner of Crown Lands and dated 8 June 1854, in Province of Canada, Legislative Assembly, *Journals*, 1858, Vol. 16, App. (No. 21), Appendix No. 34.

[45]Jacqueline Beaulieu, *Localization of the Aboriginal Nations in Québec - Land Transactions* (Québec: Ministère des ressources naturelles, 1998) at 120.

imprecisely described group made up of the "Montagnais, Tadoussacs, Papinachois, Nauthapi and other Nomadic Tribes in the interior of the King's Post"[46] were given 70,000 acres in the undefined "locality" of Manicouagan.[47]

For some communities, the 1851 statute resulted very quickly in the creation of reserves: for instance, at Mashteuiastsh (or Pointe-Bleue), a reserve of 23,040 acres for the Innu (Montagnais) was surveyed in 1858. Other communities, however, waited for another half-century: for instance, it was only in 1906 that a reserve of 91.3 acres was created for the Innu of Uashat (Sept-Îles), two decades after they had first asked for it.[48] Other communities also waited decades: the Abenaki received a reserve on the nearest Crown land still available in the 1890s but which was hundreds of miles from their existing reserves,[49] while the more remote Attikamekw received reserves in the early twentieth century on the lands not yet granted to private interests.[50]

It is difficult to trace the exact progress of reserve creation based on the 1851 statute[51] but it is clear that the promise remains unfulfilled. While the statute undertook to set aside 230,000 acres, the nations listed in the 1853 order in council (the Abenaki, Algonquin, Attikamekw,

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[46]The King's Posts was a large region, extending north from the St. Lawrence River, roughly from Île aux Coudres in the west to the Moisie River near Sept-Îles in the east: Pierre Dufour, "De la Traite de Tadoussac aux King's Posts" in Frenette, ed., *Histoire de la Côte-Nord* 181 at 184.

[47]There was no Township of Manicouagan until 1866: Clément E. Deschamps, *Municipalités et paroisses dans la province de Québec* (n.p., 1896) at 986.

[48]Beaulieu, *Localization of the Aboriginal Nations in Québec* at 144, 154; Mailhot, "La marginalisation des Montagnais" in Frenette, ed., *Histoire de la Côte-Nord* 321 at 334-35, 355.

[49]Jacques Frenette, "Crespieul, ancienne réserve abénaquise (1851-1911)", (2003) 33:2 *Recherches amérindiennes au Québec* 57.

[50]Claude Gélinas, "La création des réserves atikamekw (1895-1950), ou quand l'Indien était vraiment un Indien" (2002), 32:2 *Recherches amérindiennes au Québec* 35.

[51]*An Act respecting Indians and Indian Lands*, C.S.L.C. 1861, c.14, s.12, provided that grants should be by Order in Council and the lands should vest in the Commissioner of Indian Lands for Lower Canada.

Huron-Wendat, Innu, Malecite, Micmac, and Mohawk) together had reserves and settlements on Crown land totalling only 184,472.3 acres as of 1998.[52] Professor Richard Bartlett calculated that only 151,592 acres were ever set aside under the 1851 statute.[53]

It should also be noted that the reserves were the subject of surrenders almost as soon as they were created. For instance, the Algonquin of Kitigan Zibi made the first surrender of reserve land at Maniwaki in 1868 and made ten more surrenders totalling hundreds of acres before the turn of the century.[54]

In the early twentieth century, a judicial decision made clear that while a surrender could only be made to the federal Crown,[55] the lands contained in an 1851 reserve had to revert to the provincial Crown. In the *Star Chrome Mining* case, a dispute arose over whether the federal government or the province had the authority to dispose of land contained in a reserve created under the 1851 statute, once the reserve lands had been surrendered. The Privy Council agreed with the province and ruled in 1920 "that upon the surrender... of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest."[56] The creation of new reserves in Québec had now become more complex because of the precariousness of the federal legal title.

The result was a new provincial statute which in 1922 allowed for "public lands [which]

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[52]Beaulieu, *Localization of the Aboriginal Nations in Québec* at 164. Indian settlements are Crown land occupied by a band but which are not *Indian Act* reserves.

[53]Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 87.

[54]Beaulieu, *Localization of the Aboriginal Nations in Québec* at 16-17.

[55]Earlier, three justices of the Supreme Court of Canada had concluded that title to an 1851 reserve passed to the federal Crown at Confederation: *Attorney-General for Canada v. Giroux* (1916), 30 D.L.R. 123, 4 C.N.L.C. 147 (S.C.C.), *per* Duff J. at 137-40 and *per* Idington J. at 132-33.

[56]*Attorney-General for Quebec v. Attorney-General for Canada. Re Indian Lands* (sub nom. *Star Chrome Mining*) (1920), 56 D.L.R. 373 (P.C.) at 375, 4 C.N.L.C. 238 at 240.

shall not exceed, in all, three hundred and thirty thousand acres in superficies" to be "set apart, for the benefit of the various Indian tribes of this Province" through a transfer "in trust" to the federal government. The Indians' title was to be usufructuary and inalienable and the lands were to "return to the Government of the Province, without formality whatsoever" if the Indians ceased to occupy them. Moreover, Québec carefully excluded mining rights from the grant.[57]

Professor Richard Bartlett calculates that between 1925 and 1968, only 14,000 acres were set aside under the 1922 statute. Of the communities affected, some had clearly been considered the intended beneficiaries of the 1851 statute, such as the Innu of Uashat or Sept-Îles. Others, however, received reserves lands which were not even included within the province's boundaries before 1912, such as the Cree of Waswanipi or the Innu of Schefferville or Matimekosh-Lac John.[58]

b. British Columbia *Terms of Union* of 1871

(1) The terms and the pre-Confederation reality

The Terms of Union by which British Columbia entered Confederation provided that Indians and their lands came under federal jurisdiction, as in the rest of Canada,[59] and required the new province to convey land to the federal government "in trust for the use and benefit of the Indians on application of the Dominion Government":

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued

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[57] *An Act respecting lands set apart for Indians*, S.Q. 1922, c.37, s.1.

[58] Richard H. Bartlett, *Indian Reserves in Quebec* (Saskatoon: Native Law Centre, 1984) at 33. Only 7,651 acres were set aside under the 1922 statute within Quebec's 1851 boundaries: Bartlett, *Indian Reserves and Aboriginal Lands in Canada* at 87.

[59] *Constitution Act, 1867*, s.91(24).

by the Dominion Government after the Union.

> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[60]

Considerable disagreement subsequently arose over the exact nature of "a policy as liberal as that hitherto pursued by the British Columbia Government". A year before British Columbia joined Confederation, the following explanation of the colony's policy was given by Joseph Trutch, then serving both as Commissioner of Lands and Works and Surveyor-General and also as the colony's negotiator for the Terms of Union:

> The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has, in all cases where it has been desirable for the interests of the Indians, set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each tribe; and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.
>
> But the title of the Indians in the fee of the public lands, or of any portion thereof, has never been acknowledged by Government, but, on the contrary, is distinctly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing to each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes.[61]

Before Confederation, at least 76 reserves had been created in British Columbia, including not just those created by the Douglas Treaties of the 1850s on Vancouver Island, but

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[60] *British Columbia Terms of Union*, R.S.C. 1985, App. II, Articles 10 and 13.

[61] Trutch to Musgrave, 28 January 1870, "Report on Indian Reserves", as cited in *Calder v. Attorney-General of British Columbia* (1970), 13 D.L.R. (3d) 64 (B.C.C.A.) at 97-98, 7 C.N.L.C. 43 at 77-78.

also dozens more created pursuant to surveys by colonial officials.[62] Joseph Trutch reported in 1870 that "these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon."[63] There would therefore seem to be little doubt that the lands were definitively set aside as reserves during the colonial period under Imperial law.[64] As a result, legal jurisdiction over colonial reserves passed to the Crown in right of Canada by operation of British Columbia's entry into Confederation in 1871.[65]

(2) The dysfunctional reserve creation process after Confederation

The provincial legislature formalized its power to honour the Terms of Union through an amendment to the *Lands Act*.[66] But actually setting aside new reserves aroused almost immediate disagreement between the provincial and federal governments. For instance, in 1873, the federal government proposed that "each family be assigned a location of eighty acres of land

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[62]Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974) at 170-82, 189-90, 294-96. The pre-Confederation reserves were extremely small and averaged less than one acre per Indian: *Id.* at 190.

[63]*Id.* at 183, citing Trutch to Musgrave, 28 January 1870, "Report on Indian Reserves", in "Papers Connected with the Indian Land Question", British Columbia, *Sessional Papers*, 2d Parl., 1st Sess., 1876 at 68.

[64]*Jules v. Harper Ranch Ltd.*, [1989] 3 C.N.L.R. 67 (B.C.S.C.) at 91-94, leave to appeal refused (1990), [1991] 1 C.N.L.R. vi (B.C.C.A.), aff'd. on other grounds (1991), 81 D.L.R. (4th) 323 (B.C.C.A.).

[65]*British Columbia Terms of Union*, No. 10 and 13. Note that the Provincial Secretary reported to the federal Superintendent for Indian Affairs that the lease fund of the pre-Confederation Songhees Indian Reserve had become a federal asset as of 1871: Cail, *Land, Man, and the Law* , *supra* at 193-94. On the other hand, the trial judge in *Squamish Indian Band v. Canada*, [2000] QL F.C.J. No. 1568 (T.D.) explicitly concluded at para. 337 that for pre-Confederation reserves as much as for those created after 1871, only jurisdiction and not title vested in the federal Crown before a formal transfer by the provincial government. She described colonial reserves after 1871 as lands over which "federal legislative authority over lands reserved for Indians was validly exercised... even though they were provincial public lands which had not yet been conveyed to the Federal Government." This is probably incorrect since in *Attorney-General for Canada v. Giroux* (S.C.C.) at 132-33 and 137-40, three justices of the Supreme Court of Canada concluded that title to a colonial reserve in Quebec passed to the federal Crown at Confederation.

[66]*Land Act*, S.B.C. 1875, c.5, s.60. Note however that the Chief Justice of the Supreme Court of British Columbia held in 1912 that reserve lands were "segregated under the *Terms of Union*" and not by virtue of the *Land Act*: *Gosnell v. British Columbia (Minister of Lands*), B.C. Supreme Court, 26 February 1912, aff'd. [1913] S.C.J. No. 1 (QL). On the background to this case, see: Hamar Foster, "Roadblocks and Legal History" Parts I and II (1996), 54 The Advocate 355 and 531.

of average quality" but the province responded with an offer of only "twenty acres for each head of a family of five persons." The two governments finally agreed not to adopt any fixed acreage.[67] The so-called Joint Indian Reserve Commission, named by both governments, and the single commissioner who succeeded it after 1877 allotted reserves across the province between 1876 and 1908 on the authority of federal Order-in-Council 1088 of 1875 and the subsequent acceptance of its terms by a provincial Minute in Council of 1876.[68]

By the turn of the century, economic development had created a market for reserve land which the province could not benefit from so long as the federal government controlled the sale of surrendered lands.[69] The provincial government insisted that "in case such lands at any time ceased to be used by such Indians" they should be returned to the province. Not only did the province adopt legislation to assert a right to sell its reversionary interest in Indian reserves in 1908,[70] but it prohibited registration of federal patents to surrendered reserve land in 1910, except by permission of the Lieutenant Governor in Council,[71] thereby stymying federal sales. In 1911, the province went so far as to reserve to itself the right to sell the reversionary interest in Indian reserves even while the Indian still occupied them.[72]

At the same time, the province pressed for a "re-adjustment" of Indian reserves it considered too large.[73] No Indian Reserve Commissioner was appointed as of 1908, because the

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[67]As cited in the Introduction to the *Report of the Royal Commission on Indian Affairs in British Columbia*, 1916, reproduced in part in Cail, *Land, Man, and the Law*, Appendix, Item 6, at 311.

[68]Cail, *Land, Man, and the Law*, *supra* at 203-208, 215-218, 228-29.

[69]*Id.* at 227-231.

[70]*Land Act*, S.B.C. 1908, c.30.

[71]*Land Registry Amendment Act, 1910*, S.B.C. 1910, c.27, s.2.

[72]Introduction to the *Report of the Royal Commission on Indian Affairs in British Columbia*, 1916, reproduced in part in Cail, *Land, Man, and the Law*, Appendix, Item 6, at 311.

[73]Cail, *Land, Man and the Law* at 231; Order-in-Council 125/1907 as cited in *A.G.B.C. v. Andrews*, [1991] 4 C.N.L.R. 2 (B.C.C.A.) at 65.

provincial Chief Commissioner of Lands announced that no more land would be allotted, "[o]wing to the unsatisfactory state of affairs between the Dominion and the Province in relation to the question of Indian Reserves."[74]

The joint federal-provincial McKenna-McBride Commission was appointed in 1912, in its own words, "to remove the administrative entanglement thus occasioned, and to provide for the final and complete allotment of lands for Indians in British Columbia...."[75] The Commission considered the size and number of Indian reserves, creating some new reserves but reducing or disposing of others.[76]

In particular, the McKenna-McBride Agreement granted the Commission the power was either to create, reduce or enlarge reserves:

> 2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:--
>
> (a) At such places as the Commissioners are satisfied that more land is included in any particular reserve as now defined, than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonable sufficient for the purposes of such Indians.
>
> (b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.
>
> 3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

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[74]Cail, *Land, Man, and the Law* at 227.

[75]Introduction to the *Report of the Royal Commission on Indian Affairs in British Columbia*, 1916, reproduced in part in Cail, *Land, Man, and the Law*, Appendix, Item 6, at 312.

[76]Cail, *Land, Man, and the Law* at 227-31, 233-37.

> 4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.[77]

When the two governments signed the McKenna-McBride Agreement in 1912, the terms confirmed that both governments recognized that Indian reserves already existed in B.C. and were subject to the surrender requirement in the *Indian Act*. However in 1920, the federal government chose to implement the McKenna-McBride Commission's recommendations unilaterally by waiving the surrender requirement through special legislation designed to override the *Indian Act* in order to adjust or confirm the cut-offs the commissioners proposed:

> 3. For the purpose of adjusting, readjusting or confirming the reductions or cutoffs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the Indian Act to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.[78]

At the same time, Canada and British Columbia gave themselves statutory power to implement the Commission's report "according to its true intent" and "for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province."[79]

Subsequently, the McKenna-McBride Commission's recommendations were subject to further review between 1920 and 1923 by a joint federal-provincial board of investigation known as Ditchburn-Clark (for its two members) and which made further reductions, cut-offs and

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[77]McKenna-McBride Agreement as reproduced in *Moses et al. v. The Queen,* [1977] 4 W.W.R. 474, 9 C.N.L.C. 244 (B.C.C.A.) at 255-56.

[78]*British Columbia Indian Lands Settlement Act*, S.C. 1920, c.51, s.3.

[79]*British Columbia Indian Lands Settlement Act*, s.2; *Indian Affairs Settlement Act*, S.B.C. 1919, c.32, s.2.

additions. Finally, in 1923, British Columbia "approved and confirmed" the McKenna-McBride schedule of reserves as modified by Ditchburn-Clark through its Order-in-Council 911, as did Canada in 1924 under Order-in-Council 1265.[80]

Both the federal and provincial governments approved Ditchburn-Clark's modified list of reserves "as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the said [McKenna-McBride] Agreement of the 24th day of September, 1912, and also of Section 13 of the Terms of Union."[81] Thus at least the additions to reserve were meant to be in fulfilment of the constitutional obligation assumed by the province in 1871 to convey lands "in trust for the use and benefit of the Indians."[82]

Three-quarters of a century later, both the federal and provincial governments acknowledged that the cut-offs effected in the 1920s were a breach of vested rights. Parliament adopted a statute to provide for compensation for the loss of "land referred to in section 2(a) of the McKenna-McBride Agreement that had before 1916 been set aside for the use and benefit of Indians."[83] The province has not just acknowledged the loss suffered through reserve cut-offs but adopted a statutory mechanism for reaching agreements which may include either the transfer of land or the payment of money to compensate Bands.[84]

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[80] *Esketemc First Nation Inquiry, IR 15, 17, and 18 Claim*, [2002] 15 ICCP 3 at 94-118.

[81] *Id.* at 115, 120. The situation is somewhat different in the Railway Belt and the Peace River Block, however, because for these regions the federal government explicitly declined to adopt the list Indian reserves contained in provincial O.C. 911, on the grounds it already had full title to them: Order-in-Council P.C. 1265 as cited in *A.G.B.C. v. Andrews* [1991] 4 C.N.L.R. 3 (B.C.C.A.) at 11.

[82] *British Columbia Terms of Union*, R.S.C. 1985, App. II, Article 13.

[83] *British Columbia Indian Cut-off Lands Settlement Act*, S.C. 1984, c.2, s.2. This description of the land lost tracks the definition of reserve in the *Indian Act* at the time. R.S.C. 1906, c.81, s.2(I).

[84] *Indian Cut-off Lands Disputes Act*, R.S.B.C. 1996, c.218 (S.B.C. 1982, c.50).

The Indian Claims Commission has already held that the McKenna-McBride Commission was a "negotiated settlement" of the obligations set out in Article 13 of the Terms of Union.[85] In that regard, the contemporary settlement of cut-off claims in British Columbia is the further continuation of the process by which the province completes its obligation to create reserves under the *Terms of Union* of 1871.

III. General sources of pre-Confederation obligations

A. Pre-Confederation reserves

A large number of pre-Confederation reserves existed in the existing colonies which came to form Canada and these were created through a variety of instruments. At least once the reserves existed, the Crown was obliged to protect them from trespass and encroachment, something both imperial instruments and colonial legislation empowered the government to do, as discussed below.

While it is tempting to divide colonial reserves between those created by treaty and those created by imperial grant, the distinction is not always clear. Many reserves created by imperial grant were the continuation of imperial policies of friendship and alliance: for instance, the creation of a reserve for the Six Nations at present-day Brantford, Ontario, by Governor Haldimand was in recognition for their contribution to the unsuccessful British war effort in the American Revolution and the deed has been referred to as the Haldimand Treaty.[86]

In British Columbia, colonial treaty-making and colonial reserve creation were two overlapping phases of relations with Aboriginal peoples. The treaties entered into by Governor James Douglas between 1850 and 1852 on Vancouver Island purported to obtain surrenders of title in return for hunting and fishing rights and the creation of reserves consisting of "village

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[85] *Esketemc First Nation Inquiry, IR 15, 17, and 18 Claim* at 252-53.

[86] *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) at 419-420; *Isaac et al. v. Davey et al.* (1974), 51 D.L.R. (3d) 170 (Ont. C.A.) at 174, aff'd. [1977] 2 S.C.R. 897.

sites and enclosed fields." In the 1860s, Governor Douglas directed the creation of reserves consisting of ten acres per family throughout the mainland as a matter of land policy, rather than treaty-making. However this directive was far from fully implemented when British Columbia joined Confederation in 1871: it could report only 76 reserves in total, averaging less than an acre per Indian.[87]

Before Confederation, the forms of imperial grant also varied widely. The grant to the Six Nations in 1784 took the form of a direct "grant to the chiefs, warriors, women and people of the said Six Nations and their heirs forever" from land first ceded to the Crown by the Mississauga [88] Lands were also granted lands to religious orders in trust for Indians, not only by the French Crown to Roman Catholic orders in present-day southern Quebec,[89] but also by the British Crown to Protestant missionary societies in present-day southern Ontario.[90] In Prince Edward Island, a reserve was created when private land was bought with funds raised by the Aborigines' Protection Society in London and vested in a board of trustees which included society members in Britain and the colony's Lieutenant Governor and Indian Commissioner.[91]

Reserve creation in the Maritimes was generally conducted on an *ad hoc* basis using Crown lands: in both Nova Scotia and in New Brunswick, the colonial government generally issued licences of occupation.[92] While Nova Scotia's Lieutenant Governor Lord Dalhousie

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[87]Cail, *Land, Man, and the Law* at 171-77, 190.

[88]Deed as cited in *Isaac v. Davey* (1973), 38 D.L.R. (3d) 23 (Ont. H.C.) at 27, aff'd. (1974), 51 D.L.R. (3d) 170 (Ont. C.A.),[1977] 2 S.C.R. 897.

[89]Bartlett, *Indian Reserves in Quebec* at 2-3.

[90]Richard H. Bartlett, "Mineral Rights on Indian Reserves in Ontario" (1983), 3 *Canadian Journal of Native Studies* 245 at 248.

[91]L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979) at 120-21.

[92]Richard H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (Saskatoon: Native Law Centre, 1986) at 9-10, 14-15

proposed in 1820 that there should be a reserve in each county to a maximum size of 1,000 acres, this does not appear to have resulted in any systematic program of adding to existing reserves, many of which in any case still needed to be surveyed.[93] Only in 1843 did the colony establish a statutory basis for reserve creation by allowing the Governor on the advice of the Executive Council "to set apart and reserve for the use and benefit of the Indians of this Province, such portions of such Lands as may be deemed advisable and proper, and from time to time to make a free Grant or Grants of such Land to and for the purposes for which they were so reserved."[94]

B. Treaties with Aboriginal peoples

1. Treaties of peace and friendship

As the Royal Commission on Aboriginal Peoples has explained, the first treaties between Europeans and Aboriginal peoples "addressed matters of economic and military alliance" and "were signed in the interests of making or renewing peace between nations at war."[95]

In the period immediately before and after the conquest of New France in 1760, treaties were made primarily to ensure peace and friendship, as Justice Lamer explained in the *Sioui* case.

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. [...]
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> Further, both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the

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[93]Upton, *Micmacs and Colonists* at 87.

[94]*An Act to continue and amend the Act to establish sundry regulations for the future disposal of Crown Lands within the Province of Nova Scotia*, S.N.S. 1843, c.45, s.6.

[95]Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at 123.

war between them and the security of the North American colonies.

...

> England also wished to secure the friendship of the Indian nations by treating them with generosity and respect for fear that the safety and development of the colonies and their inhabitants would be compromised by Indians with feelings of hostility. [...]
>
> This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.[96]

At the same time, the early treaty process was fraught with misunderstanding and contradictions. The Royal Commission on Aboriginal peoples has identified the two principal misunderstandings as being those which concerned "possessory rights to the land and the authority of European monarchs or their representatives over Aboriginal peoples." While the European powers assumed "that the monarch had, or acquired through treaty or alliance, sovereignty over the land and the people on it," the Aboriginal peoples recognized neither.[97]

2. Land cession treaties

It would be dangerous to divide all treaties between those which, on the one hand, result in peace and friendship and, on the other, those ceding land to the Crown.[98] Nevertheless, during the nineteenth century, obtaining land rather than peace became a ever-greater preoccupation for the colonial government, as both imperial rivalries in North American and the military power of Aboriginal peoples diminished.

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[96]*R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1053, 1054-1055.

[97]Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at 124-125.

[98]See: Renée Dupuis, "Les origines et les justifications des traités conclus entre la Couronne et les peoples autochtones au Canada" in Ghislain Otis, ed., *Droit, territoire et gouvernance des peuples autochtones* (Ste-Foy: Presses de l'Université Laval, 2005), 31.

The Royal Commission on Aboriginal Peoples has offered the following summary of events after 1800:

> In Canada, the period saw the end of most aspects of the formal nation-to-nation relationship of rough equality that had developed in the earlier stage of relations. Paradoxically, however, the negotiation of treaties continued, but side by side with legislated dispossession, through the *Indian Act*. Aboriginal peoples lost control and management of their own lands and resources, and their traditional customs and forms of organization were interfered with in the interest of remaking Aboriginal people in the image of the newcomers. This did not occur all at once across the country, but gradually even western and northern First Nations came under the influence of the new regime.[99]

With respect to treaty-making, the model was set in Upper Canada by the time of the Manitoulin and Saugeen Treaties in 1836 and the Robinson-Huron and Robinson-Superior Treaties of 1850.

> After the War of 1812, colonial powers no longer felt the need to maintain their treaties and alliances as they had formerly, and instead they turned their attention to obtaining Indian lands for settlers, particularly agricultural land for the United Empire Loyalists in southern Ontario. So began a new and intensive policy of purchasing Indian lands. From 1815 to the 1850s, there were literally hundreds of land transactions, whereby First Nations, many of which had previously made treaties of alliance, peace and friendship with the Crown, transferred their land to the Crown.
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> In all these land transactions, the Crown's purpose was to secure First Nations lands for settlement and development. In some, and perhaps many, of these transactions, the Indian nations thought they were conveying their land to the Crown for the limited purpose of authorizing the Crown to 'protect' their lands from incoming settlement [...].
>
> The documents that conveyed Indian title to the Crown for specific land areas became standardized over time, although they were sometimes inaccurate. Typically the Crown paid for these lands in goods delivered at the time the agreement or treaty was made, in the form of 'annuities' (presents). Revenues from the surrender and sale of Indian lands paid for education, health, housing and other services received by Indian nations, as well as making a substantial contribution to general government revenues [...].
>
> After the initial purchase of land, there were invariably second or third purchases, and gradually, as the sale of their lands progressed, First Nations were confined to

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[99]Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at Chapter 6, p. 140.

> smaller and smaller tracts, typically in areas that were least suited to European settlement, agriculture or resource extraction. At the same time, the economies and resource use patterns of First Nations were undermined.[100]

On their face, these treaties created substantially different obligations by the Crown to their Aboriginal signatories including specific obligations to create reserves and provide other material benefits.

C. Treaties between European powers

1. The Articles of the Capitulation

The Articles of the Capitulation of Montreal, signed 1760 in the name of the British Crown, provided the following protection to the Indians who had formerly been allied with France:

> The savages, or Indian allies of His Most Christian Majesty [the King of France] shall be maintained in the lands they inhabit, if they choose to remain there; they shall not be molested on any pretence whatsoever for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion and shall keep their missionaries.[101]

According to a late nineteenth-century judgment, this provision guaranteed to the Indians who were domiciled in the Saint Lawrence Valley the protection of their mission settlements:

> At the time of the conquest, the Indian population of Lower Canada was, as a body, Christianized, and in possession of villages and settlements, known as the "Indian Country." By the terms of capitulation they were guaranteed the enjoyment of these territorial rights in such lands which, in course of time, became distinctively and

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[100]Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 1, *Looking Forward Looking Back*, Part One, *The Relationship in Historical Perspective*, at Chapter 6, "3. Treaty Making in Ontario, the West and the North", text corresponding to fn. 24 to 29.

[101]Articles of the Capitulation of Montreal, 1760, art. 40, in A. Shortt and A.G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, 2nd ed., Ottawa, King's Printer, 1918 at 33.

technically called "Reserves."[102]

The mission settlements in the St. Lawrence Valley in 1760 consisted of the present-day Mohawk communities of Akwesasne (St. Regis), Kanesatake (Oka), and Kahnawake, the Abenaki communities of Odanak (St. François) and Wôlinak (Bécancour), and the Huron-Wendat community of Wendake (Lorette).[103]

2. The Treaty of Paris of 1763

The Articles of the Capitulation had already provided in 1760 that "the French settled, or trading, in the whole extent of the Colony of Canada, and all other persons whatosever, shall preserve the entire peacable property and possession of their goods, noble and ignoble, moveable and immoveable."[104] This constitutes a protection for all valid titles granted under the rules in force under the French regime.

Protection for title to land issued under the French regime is also implicit in the Treaty of Paris of 1763 by which "His Britannic Majesty further agrees that the French inhabitants, or others, who have been subjects of the Most Christian King in Canada, may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to the subjects of His Britannic Majesty...."[105] According to Justice Cannon of the Supreme Court of Canada: "Respect of their property and civil rights was guaranteed by the British Crown to the

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[102]*R. v. St. Catharine's Milling Co.* (1885), 10 O.R. 196 (Ch. Div.) at 210, 2 C.N.L.C. 374 at 389. Similarly, Judge Gagnon of the Provincial Court of Québec held that this text could be interpreted as recognizing the rights of the Indians to the lands occupied as permanent settlements within the colony's boundaries: *Procureur-général du Québec c. Paul*, [1977] C.S.P. 1054 at 1056.

[103]Bartlett, *Indian Reserves and Aboriginal Lands in Canada* at 8.

[104]Articles of the Capitulation of Montreal, 1760, art. 37, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, 2nd ed., at 32.

[105]Treaty of Paris, 1763, art. IV, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, 2nd ed., at 115-116.

inhabitants of the original provinces as far back as the treaty of Paris in 1763."[106]

The effect of this protection on the title held by Aboriginal communities should be interpreted in light of the judgment rendered March 22, 1762 by General Gage in a dispute between the Mohawks of Kahnawake and the Jesuit priests who held the legal rights to the seigneury of Sault-Saint-Louis. General Gage dismissed claims by the Jesuits that in the 17th century, the French Crown had granted them a seigneurial title which included the right to grant concessions to French-Canadian settlers. Instead, he held, "the grant of the lands of Sault St. Louis was made to the R.R. Jesuit Fathers with the sole intention of settling there Iroquois and other Indians."[107]

Significantly, in the preamble to his disposition of the case, General Gage assumed the responsibility of the new British Crown for seeing to the implementation of the French Crown's intentions of almost a century before:

> It seems to us absurd to have recourse to His Most Christian Majesty Louis XVI, in order that he may be willing to have explained to us the meaning and the object of a concession granted in America eighty-two years ago and wisely and distinctly made by His Grandfather Louis XIV, and it is with the purpose of realizing good intentions with all justice and equity that we in the name of His Britannic Majesty, who alone is Sovereign and has a right to cause justice to be administered in his Province of Canada,
>
> ...
>
> ...[We] order that the said Indians of the Sault be put in possession of and do enjoy peaceably for themselves[,] their heirs and other Indians who would like to join them, the whole land and revenue which the said concession can produce.
>
> And being of opinion that nothing contributes more efficaciously to civilize and enlighten the Indian Nations than by scrupulously keeping the pledges which are made

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[106] *Reference Re: Weekly Rest in Industrial Undertakings Act (Canada)*, [1936] S.C.R. 461 at 520, aff'd. [1937] A.C. 326 (P.C.)

[107] "General Gage's judgment, 27th March 1762, Indians *vs.* Jesuits", in Canada, *Indian Treaties and Surrenders*, vol. II (Ottawa, Queen's Printer, 1891), Appendix, "Deeds respecting the Seigniory of Sault St. Louis and the Caughnawaga Reserve", at 301 (the original version of this judgment was rendered in French).

> with them, and by preventing all caus of disagreement between them, and the inhabitants settled in their neighbourhood.
>
> ...
>
> And as we are obliged to see that the Iroquois and Indians of the Sault do possess and peaceably and in full the favors granted to them by His Most Christian Majesty [the King of France]....[108]

After his judgment, General Gage issued an order that the inhabitants who had settled on the basis of concessions granted illegally by the Jesuits should henceforth pay their rents to the official appointed by him as "receiver of the said rents in the name of the said Indians."[109]

Thus, even before the *Royal Proclamation* of 1763[110] was adopted, the imperial British Crown considered itself legally bound to protect the titles granted by the French Crown to missionaries on behalf of the Indians.

D. Imperial legislation

1. The *Royal Proclamation* of 1763

The *Royal Proclamation* of 1763 was the only constitution of Canada under the British regime from 1763 to 1774.[111] It contains several provisions concerning Indian lands, beginning with a general prohibition on settling outside of the established colonies, thereby creating a territory reserved for the Indians.

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded

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[108] *Id*. at 303.

[109] Ordinance of 24 December 1762, reproduced in Canada, *Report of the Public Archives for the Year 1918* (Ottawa: King's Printer, Ottawa, 1920) at 65.

[110] R.S.C. 1985, App. II, no. 1.

[111] *R. v. White and Bob*, [1965] 2 W.W.R. 193 (B.C.C.A.) at 218.

> to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.
>
> And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.[112]

Another provision protected Indian lands within the colonies, where settlement was allowed:

> And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those

[112]The citation is from the original text of the Proclamation printed by the King's Printer in London in 1763 as reproduced in Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward Looking Back*, Appendix D at 793.

> Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: [...][113]

A difficult issue is raised by the application of the *Royal Proclamation* to lands in the settled colonies held under Aboriginal title but not set aside for Indians under European law. Two separate panels of the Quebec Court of Appeal held that within Quebec, the *Royal Proclamation* clearly protected Indian lands at their mission sites,[114] but differed on its application to other lands. In *Adams*, Beauregard J.A. for the majority took for granted that the *Royal Proclamation* protected all lands "occupied" by the Indians within the Province of Quebec[115]. In *Côté*, Baudoin J.A. held that only "terres de mission (regroupant parfois plusieurs bandes) et les villages indiens créés ou autorisés par les autorités françaises" were protected by the *Royal Proclamation*.[116]

The Supreme Court of Canada held in *Marshall & Bernard* that the Royal Proclamation "applied to the former colony of Nova Scotia" including present-day New Brunswick, but "it did

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[113] *Id.*

[114] *R. c. Adams*, [1993] R.J.Q. 1011 (C.A.) and *R. c. Côté*, [1993] R.J.Q. 1350 (C.A.), rev'd. in both cases on other grounds by the Supreme Court of Canada, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139. Note that in 1767, for example, Governor Carleton declared explicitly that the Abenaki at Saint-François or Odanak were under the protection of the *Royal Proclamation* when he published a notice forbidding anyone from "molesting" them and followed this in 1769 with a prohibition on troubling them in the "peaceful possession and enjoyment" of their lands: Archives du Séminaire de Trois-Rivières, cote 0535, "Avertissement concernant les Sauvages Abénakis de St. François" issued by Governor Guy Carleton, 28 February 1767; National Archives of Canada, RG 10, A9, vol. 14, and Archives du Séminaire de Trois-Rivières, cote 0535, Proclamation issued by Governor Guy Carleton, 20 April 1769.

[115] *R. c. Adams* (C.A.), *supra* at 1020-1021, 1022.

[116] *R. c. Côté* (C.A.), *supra* at 1361-1363.

not grant the Mi'kmaq title to all the territories of the former colony of Nova Scotia."[117] Instead, the Court held: "The Royal Proclamation sought to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions."[118]

The Supreme Court of Canada has therefore confirmed that in the old settled colonies, the *Royal Proclamation* "does not create new rights in land."[119] But having held that the Mi'kmaq did not have title to the lands at issue, the Supreme Court did not offer any detailed guidance as to what the "existing Indian territories" were which the *Royal Proclamation* did protect.

In the same case, the Nova Scotia Court of Appeal held that in the colony, the *Royal Proclamation* only "reserved newly reserved land or previously reserved land."[120] On the other hand, the New Brunswick Court of Appeal warned against "confusing the notion of occupied lands being reserved to the Indians with the concept of Indian reserves as they exist in Canada today" and held that the Proclamation "reserves unto the Indians lands that they had historically occupied and which had not been ceded to nor purchased by the British at the time the Proclamation issued."[121] In the final analysis, however, Robertson J.A. of New Brunswick concluded that "it makes no difference whether or not the Royal Proclamation applies to old Nova Scotia" because "[i]n either case, it is necessary for an aboriginal community to establish exclusive occupation when asserting aboriginal title, under either the Proclamation or at common law."[122]

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[117] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 87, 88.

[118] *Id.* at para. 92.

[119] *Id.*

[120] *R. v. Marshall*, [2004] 1 C.N.L.R. 211 (N.S.C.A.) at para. 221 *per* Cromwell J.A. In this regard, the Nova Scotia Court of Appeal expressly followed the Quebec Court of Appeal in *R. v. Côté*, *supra*.

[121] *R. v. Bernard*, [2003] 4 C.N.L.R. 48 (N.B.C.A.) at para. 81, 90, *per* Robertson J.A.

[122] *Id.* at para. 95.

The Supreme Court of Canada's judgment in *Marshall & Bernard* therefore stands for the proposition that European settlement in colonies such as Nova Scotia was not *prima facie* illegal (as it would have been outside the settled colonies). Its result is certainly consistent with Robertson J.A.'s conclusion that the *Royal Proclamation* cannot eliminate the burden of proving Aboriginal title to the lands at issue.[123] Finally, it explicitly allows that the "existing Indian territories" which the *Royal Proclamation* was meant to protect includes lands held pursuant to Aboriginal title,[124] where that title can be proven.

Another controversial issue has been the application after 1774 of the Royal Proclamation's surrender requirements to land in the settled colonies which were owned by the Crown or that owned by some other party on behalf of Indians.[125] The Ontario Court of Appeal has twice held that the *Royal Proclamation*'s procedural requirement that the purchase of Indian lands be "at some publick Meeting or Assembly of the said Indians to be held for that Purpose" was implicitly repealed by the *Quebec Act* of 1774.[126]

The Indian Claims Commission has declined to follow the Ontario Court of Appeal's

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[123]Earlier the Court had held "that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 114.

[124]This was the conclusion of the Privy Council in 1767 when it interpreted judicially the instrument it had adopted only four years earlier: David Schulze, "The Privy Council Decision Concerning George Allsopp's Petition, 1767: An Imperial Precedent on the Application of the Royal Proclamation to the Old Province of Quebec", [1995] 2 C.N.L.R. 1.

[125]There can therefore be no distinction made between lands granted directly to the Indians, those granted to a third party on their behalf or lands held directly by the Crown for the benefit of the Indians. The Ontario Court of Appeal held that grants of land by the Crown directly to an Indian band must be presumed to have been made in conformity with the policy established in the *Royal Proclamation*: *Issac v. Davey* (Ont. C.A.) at 181. Similarly, the United States Supreme Court held there was no contradiction between the rights of an Indian Pueblo in what was formerly Mexico to federal government protection and its full title to the lands it occupied by virtue of a grant made by the Spanish Crown: *U.S. v. Sandoval*, 231 U.S. 28 (1913); *U.S. v. Candelaria*, 271 U.S. 432 (1926).

[126]*Ontario (Attorney-General) v. Bear Island Foundation*, (1989), 58 D.L.R. (4th) 117 (Ont. C.A.) at 133, aff'd. on other grounds [1991] 2 S.C.R. 570; *Chippewas of Sarnia Band v. Canada (Attorney-General)*, [2001] 1 C.N.L.R. 56 (Ont. C.A.) at para. 206 to 208.

analysis and has held that the *Royal Proclamation* continued to have a binding effect in the Province of Quebec after 1774.[127] The Commission cited among other things a letter of 1784 signed by Governor Haldimand in which he emphasized that "the claims of individuals, without distinction, upon Indian Lands at Detroit, or any other part of the Province are INVALID" and that "no Purchase of Lands belonging to the Indians, whether in the name or for the use of the Crown, or in the name or for the use of Proprietaries of Colonies be made, but at some general meeting at which the Principal Chiefs of each Tribe claiming a proportion in such lands are present...."[128]

The Commission concluded:

> The provisions of the *Royal Proclamation*, then, formed the policy that governed surrenders of land by aboriginal peoples to the Crown at the time [i.e., 1786]. Any failure to comply with its provisions rendered surrenders invalid. Specifically, while it does not appear that His Majesty's permission, or leave and licence, to achieve surrenders meant that permission had to be obtained directly from the King, it does seem that such instructions were required to be obtained at least from the Governor or the Superintendent of Indian Affairs. Once instructions to obtain a surrender were received, it was necessary to hold a general assembly or "publick meeting" of the principal chiefs of each tribe claiming an interest in the subject lands, at which time lands could be purchased. The Governor, the Superintendent of Indian Affairs, or the Commander in Chief were required to be present at the assembly.[129]

Similarly, the argument of implied repeal of the Royal Proclamation by the *Quebec Act* of 1774 which the Ontario Court of Appeal accepted had been rejected by two judges of the Supreme Court of Canada in concurring judgments a century earlier:

> [...] The proclamation had made provision for the civil government of the Province of Quebec, which was created by it, and it had defined the boundaries of that Province; and it was these provisions, and these only, which were repealed, altered, or in any way

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[127] *Walpole Island First Nation Inquiry, Boblo Island* (2000), 13 I.C.C.P. 117 at 176-179.

[128] *Id.* at 202.

[129] *Id.* at 181.

> affected by the act of 1774. [...] From the wording of this section, as well that portion of it which consists of preamble as the enacting clause itself, it is plain that the intention was only to revoke so much of the proclamation as had relation to the civil government, the powers given to the governor, and other civil officers, and to the administration of justice in the Province. [...]
>
> It is nowhere suggested that anything connected with the questions of Indians or Indian rights led to this enactment. None of the changes in the terms of the proclamation which were introduced by the act have the most remote bearing on Indian land rights or Indian affairs. Neither the establishment of French instead of English law, nor the substitution of a council for an assembly, nor the enlargement of the Provincial boundaries, can by implication have any such effect, and the act does not contain a word expressly referring to the Indians. Further, the third section of the act contains an express saving of titles to land, in words sufficiently comprehensive to include the Indian title recognized by the proclamation. Its words are:
>
> > Nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title of possession derived under any grant, conveyance or otherwise howsoever, of or to any lands within the said province or the provinces thereto adjoining; but that the same shall remain and be in force and have effect as if this act had never been made.
>
> The words "right," "title" and "possession" are all applicable to the rights which the crown had conceded to the Indians by the proclamation, and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away by the statute. I must therefore hold, that the *Quebec Act* had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the crown, than it had in repealing it as a royal ordinance for the government of the Floridas and Granada.[130]

In any case, the question is largely academic in Ontario and Québec given the clear language of Governor Carleton's instructions of 1775 and of Governor Dorchester's regulation of 1794, discussed in more detail below.

2. Instructions to governors

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[130] *St.Catherines Milling & Lumber Co.* (1887), 13 S.C.R. 577 at 629-632 *per* Strong J.; see also the same judgment at 648 *per* Taschereau J.

a. Introduction

An officer's commission as governor was part of the constitution of the colony he governed[131] and his commission obliged him to follow the instructions he received from the Privy Council in London[132]. The instructions therefore formed part of the binding law of the colony.

b. Royal Instructions for Nova Scotia and Newfoundland

The preservation of peace and the pursuit of trade remained longstanding preoccupations in the instructions to governors. In Newfoundland in the 1770s, the Governor was instructed to make peace with the Indians and maintain a British monopoly on trade with them: "not to permit the Subjects of any foreign Prince or State whatever, to carry on any Commerce with the said Indians, and to use your best endeavours to conciliate their Affections and to induce them to Trade with our Subjects...."[133] Over three decades later, the Imperial government's concern for Newfoundland and Labrador continued to be that the governor "encourage a Friendly Intercourse with the Indians residing in Our Island of Newfoundland or resorting thither using your best endeavours to conciliate their Affections so as to induce them to trade with Our Subjects And in order to prevent any improper Conduct towards them...."[134]

Shortly after the British took possession of the territory of Acadia from the French in

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[131] *Campbell v. Hall* (1774), 1 Cowp. 204 at 212.

[132] Commission to the Captain General and Governor in Chief of the Province of Quebec, 4 November 1763, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, 2nd ed., at 171-72.

[133] "Remarks &c. Made in Obedience to His Majesty's Instructions to Governor Shuldham Relative to the Trade, Fishery &c. of Newfoundland in the Years 1772 & 1773", *In the Matter of the Boundary Between The Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, 1927, Vol. III, at 1085-86.

[134] "Instructions Passed under the Royal Sign Manual and Signet for John Holloway as Governor and Commander-in-chief in and over the Island of Newfoundland," May 7, 1807, *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula*, 1927, Vol. II, p.629.

1714 and renamed it Nova Scotia, the governor received instructions which were so concerned with maintaining peace that they recommended intermarriage.[135] However as the ensuing decades brought more settlers, the land issue became more important.

Early in 1762 the Governor of Nova Scotia received the same instructions from London as for all other colonies in British North America, entitled "Incroachments upon the Possessions and Territories of the Indians in the American Colonies".

> Draft of an Instruction for the Governors of Nova Scotia New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia forbidding them to Grant Lands or make Settlements which may interfere with the Indians bordering on those Colonies.
>
> WHEREAS the peace and security of our Colonies and plantations upon the Continent of North America does greatly depend upon the Amity and Alliances of the several Nations or Tribes of Indians bordering upon the said Colonies and upon a just and faithful Observance of those Treaties and Compacts which have been heretofore solemnly entered into with the said Indians by Our Royal Predecessors Kings & Queens of this Realm,
>
> And whereas notwithstanding the repeated Instructions which have been from time to time given by Our Royal Grandfather to the Governor of Our several Colonies upon this head the said Indians have made and so still continue to make great complaints that Settlements have been made and possession taken of Lands, the property of which they have by Treaties reserved to themselves by persons claiming the said lands under pretence of deeds of Sale and Conveyance illegally, fraudulently and surreptitiously obtained of the said Indians;
>
> And Whereas it has likewise been represented unto Us that some of Our Governors or other Chiefs Officers of Our said Colonies regardless of the Duty they owe to Us and of the Welfare and Security of our Colonies have countenanced such unjust claims and pretensions by passing Grants of the Land so pretended to have been purchased of the Indians.
>
> We therefor taking this matter into Our Royal Consideration, as also the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their

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[135]W.E. Daugherty, *Maritime Indian Treaties In Historical Perspective* (Ottawa: Indian and Northern Affairs Canada, 1983), “The British Administration in Nova Scotia: 1714-1739”, text corresponding to fn. 11.

just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into them,

Do hereby strictly enjoin & Command that neither yourself nor any Lieutenant Governor, President of the Council or Commander in Chief of Our said Colony/Province of do upon any pretence whatever upon pain of Our highest Displeasure and of being forthwith removed from your or his office, pass any Grant or Grants to any persons whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them.

And it is Our further Will and Pleasure that you do publish a proclamation in Our Name strictly enjoining and requiring all persons whatever who may either wilfully or inadvertently have seated themselves on any lands so reserved to or claimed by the said Indians without any lawful Authority for so doing forthwith to remove therefrom

And in case you shall find upon strict enquiry to be made for that purpose that any person or persons do claim to hold or possess any lands within Our said Province/Colony upon pretence of purpose made of the said Indians without proper licence first had and obtained either from Us or any of Our Royal Predecessors or any other person acting under Our or their Authority you are forthwith to cause a prosecution to be carried on against such person or persons who shall have made such fraudulent purchases to the end that the land may be recovered by due course of Law

And whereas the wholesome Laws that have at different times been passed in several of our said Colonies and the instructions which have been given by Our Royal Predecessors for restraining persons from purchasing lands of the Indians without a License for that purpose and for regulating the proceedings upon such purchases have not been duly observed,

It is therefore Our express Will and Pleasure that when any application shall be made to you for license to purchase lands of the Indians you do forebear to grant such License until you shall have first transmitted to Us by Our Commissioners for Trade and Plantations the particulars of such applications as well as in respect to the situation as the extent of the lands so proposed to be purchased and shall have received Our further directions therein;

And it is Our further Will and Pleasure that you do forthwith cause this Our Instruction to you to be made public not only within all parts of your said Province/Colony inhabited by Our Subjects, but also amongst the several Tribes of Indians living within the same to the end that Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprised of Our determined Resolution to support them in their just

Right, and inviolably to observe Our Engagements with them.[136]

Governor Belcher attempted to comply with these instructions by issuing a proclamation in 1762, "strictly injoining and requiring all Persons whatever, who may either willfully or inadvertently have seated themselves upon any Lands so reserved to or claimed by the said Indians without any lawful Authority for so doing, forth with to remove therefrom" and "to avoid all molestation of the said Indians in their claims, till His Majesty's pleasure in this behalf shall be signified."[137]

The Supreme Court of Canada has noted that "[o]n December 3, 1762, the Lords of Trade responded in a strongly-worded letter condemning Belcher's Proclamation and instructing that the Royal Instruction referred only to 'Claims of the Indians, as heretofore of long usage admitted and allowed on the part of the Government and Confirmed to them by solemn Compacts'." In 1764, the Lords of Trade informed Belcher's successor that the proclamation was disallowed though it does not appear to have been formally revoked.[138]

Without disposing of the issue, the Supreme Court of Canada has therefore also noted that the legal argument that Belcher's Proclamation is an independent source of right "faces formidable hurdles" because the instrument's validity remains in doubt. In any case, the Supreme Court held, "it seems that it was intended to apply only to certain coastal areas and to 'hunting, fowling and fishing'".[139]

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[136]Royal Instruction of 9 December 1761, as cited in P. Cumming and N. Mickenberg, *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada in association with General Pub. Co., 1972) at 285-86.

[137]As cited in *R. v. Bernard* (N.B.C.A.) at para. 52, 53, *per* Robertson J.A. For the legal and historical background to Belcher's Proclamation of 1762, see: Eric Adams, "Ghosts in the Court: Jonathan Belcher and the Proclamation of 1762" (2004), 27 Dal. L.J. 321.

[138]*R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 102, 103.

[139]*R. v. Marshall; R. v. Bernard* (S.C.C.) at para. 105.

Nevertheless Governor Belcher's stated goal in his proclamation was to protect for the Indians those same "Lands, the Property of which they have by Treaties reserved to themselves" referred to in the Royal Instruction of 1761, even if there was apparently some debate as to whether this should have included all the "points on the east coast from Canso to Bay de Chaleur" which Belcher referred to in his 1762 order.[140] The illegality of Euro-Canadian possession of Indian lands reserved by treaty therefore appears clear pursuant to the Royal Instruction of 1761, which constituted valid and paramount imperial law. In addition, "purchasing lands of the Indians" was illegal if the instructions "for regulating the proceedings upon such purchases have not been duly observed," instructions which were clarified two years later in the *Royal Proclamation* of 1763.

c. The instructions to Governor Murray and Governor Carleton of Quebec

Among the instructions given by the Crown to Governor Murray in December 1763, the following concerned the Indians :

> 60. And whereas Our Province of Quebec is in part in habited and possessed by several Nations and Tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict Friendship and good Correspondence so that they may be induced by Degrees, not only to be good Neighbours to Our Subjects, but likewise themselves to become good Subjects to Us; You are therefore, as soon as you conveniently can, to appoint a proper Person or Persons to assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship on Our part, and delivering them such Presents, as shall be sent to you for that purpose.
>
> 61. And you are to inform yourself with the greatest Exactness of the Number, Nature and disposition of the several bodies or Tribes of Indians, of the manner of their Lives, and the Rules and Constitutions, by which they are governed or regulated. And You are upon no Account to molest or disturb them in the Possession of such Parts of the said Province, as they are present occupy or possess; but to use the best means You can for conciliating their Affections, and uniting them to Our Government, reporting to Us, by our Commissioners for Trade and Plantations, whatever Information you can collect with respect to these People, and the whole of your Proceedings with them.

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[140] *R. v. Marshall; R. v. Bernard* (S.C.C.) at para. 98-104.

> 62. Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from making any purchases or Settlements whatever, or taking possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner, and under the Regulations prescribed in our said Proclamation.[141]

The instructions given to Governor Carleton in 1768 were similar.[142]

In summary, the instructions given to governors of the province of Quebec demonstrate that the *Royal Proclamation* created not only a policy which governed the surrender of Aboriginal lands but also an obligation for the colonial government to protect those lands from trespassers.

d. The instructions to Governor Carleton of Quebec in 1775 and the Plan for the Future Management of Indian Affairs

The instructions to Governor Carleton in 1775 incorporate by reference (at art. 32) a "Plan for the Future Management of Indian Affairs" prepared in 1764 and under which the governor was instructed to apply certain measures "incident to the nature and purpose of the Peltry Trade in the interior Country."[143] These rules clearly applied to Indian reserves throughout the colony, despite the reference in the instructions to the "Peltry Trade in the interior Country", because Appendix A to the plan contained a "List of Indian Tribes in the northern District of North America" which included nations such as the Abenaki, the Huron and the

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[141]Instructions to Governor Murray, 7 December 1763, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, 2nd ed., at 199-200 (emphasis added).

[142]Instructions to Governor Carleton, 1768, art. 59-61, in *Id.* at 319-20.

[143]Instructions to Governor Carleton, 3 January 1775, in A. Shortt and A.G. Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part II, 2nd ed., Ottawa, King's Printer, 1918 at 607.

Micmac, who were established near settlements and not in the unsettled interior.[144]

The plan once again set out the prohibition on selling Indian lands except to the Crown (or to the proprietors of a colony, an exception which did not apply to the province of Quebec) and except with the permission of the Indians given at a general meeting.

> 14. That the said Agents or Superintendants shall by themselves, or sufficient Deputies visit the several Posts or Tribes of Indians within their respective Districts once in every year, or oftener, as Occasion shall require, to enquire into, and take an Account of the Conduct and Behaviour of the subordinate Officers at the said Posts, and in the Country belonging to the said Tribes; to hear Appeals; and redress all Complaints of the Indians; make the proper Presents; and transact all Affairs relative to the said Indians.
>
> ...
>
> 41. That no private person, Society, Corporation, or Colony be capable of acquiring any Property in Lands belonging to the Indians, either by purchase of, or Grant, or Conveyance from the said Indians, excepting only where the Lands lye within the Limits of any Colony, the soil of which has been vested in proprietors, or Corporations by Grants from the Crown; in which Cases such Proprietaries or Corporations only shall be capable of acquiring such property by purchase or Grant from the Indians.
>
> 42. That proper Measures be taken, with the Consent and Concurrence of the Indians, to ascertain and define the precise and exact Boundary and Limits of the Lands, which it may be proper to reserve to them, and where no Settlement whatever shall be allowed.
>
> 43. That no purchases of Lands belonging to the Indians, whether in the Name and for the Use of the Crown, or in the Name and for the Use of proprietaries of Colonies be made but at some general Meeting, at which the principal Chiefs of each Tribe, claiming a property in such Lands, are present; and all Tracts, so purchased, shall be regularly surveyed by a Sworn Surveyor in the presence and with the Assistance of a person deputed by the Indians to attend such Survey; and the said Surveyor shall make an accurate Map of such Tract, describing the Limits, which Map shall be entered upon Record, with the Deed of Conveyance from the Indians.[145]

The same nations were listed again as "Tribes of Indians in North America under the protection

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[144] *Id.* at 619-20.

[145] "Plan for the Future Management of Indian Affairs, Referred to in the Thirty-second Article of the Foregoing Instructions" in *Id.* at 614-619.

of His Majesty" within the meaning of s. 1 of the "Plan for the Future Management of Indian Affairs" when it was incorporated by reference into Governor Carleton's instructions of 1775. The instructions to Governor Haldimand in 1777 were almost identical.[146]

e. Governor Dorchester's regulation of 1794

In 1794, Governor Dorchester issued instructions to the Department of Indian Affairs which once again repeated the prohibition on selling Indian lands to anyone other than the Crown:

> Art. 1st. It having been thought advisable for the King's Interest that the system of Indian Affairs should be managed by Superintendents under the direction of the Commander in Chief of His Majesty's Forces in North America; no Lands, therefore, are to be purchased of the Indians but by the Superintendent General and Inspector General of Indian Affairs, or in his absence the Deputy Superintendent General or a Person specially commissioned for that purpose by the Commander in Chief.

In addition, his regulation set out the procedure to be followed for a surrender.[147] The same instructions were revised and issued again in 1812.[148]

The Dorchester regulation has been characterized as an "Imperial instrument" by the case law because it was not issued by the legislative branch of the colony's government but directly by the Governor in his capacity as representative of the imperial Crown.[149]

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[146]Instructions to Governor Haldimand, 15 April 1778, in *Id.* at 696.

[147]Cited in Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, part 2, Chapter 4, "4. How Losses Occurred" at 468. The original of the "Additional Instructions, Indian Department" addressed by Lord Dorchester to Sir John Johnson, the Superintendent General and Inspector General of Indian Affairs, dated 26 December 1794, is reproduced in *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents relating to His Administration of the Government of Upper Canada*, Brigadier General E.A. Cruikshank, ed., vol. III (Toronto: Ontario Historical Society, 1925), pp. 241-242.

[148]*Chippewas of Sarnia v. Canada (Attorney General)*, [1999] O.J. No. 1406 (QL) (Ont. S.C.J.) at para. 355, rev'd. on other grounds, [2001] 1 C.N.L.R. 56 (Ont. C.A.).

[149]*Id.* at para. 345 et 355.

3. The *Rupert's Land and North-Western Territory Order* of 1870

a. The two territories governed by the *Rupert's Land and North-Western Territory Order*

The Royal Charter incorporating the Hudson's Bay Company in 1670 had made the governors of the company "the true and absolute lords and proprietors" of a territory known as Rupert's Land and which consisted of all rivers and streams flowing into Hudson Bay.[150] However no boundary was ever delimited between Rupert's Land and the North-Western Territory, that is, the remaining possessions of the British Crown which were not included in the Upper or Lower Canada or in the part of Labrador which belonged to Newfoundland. As the Privy Council noted, the distinction between the two territories "was not well defined" and in practice, the governors of the Hudson's Bay Company "extended their jurisdiction into the North-Western Territory."[151]

Nevertheless, the imperial Crown was authorized by s.146 of the *Constitution Act, 1867*, to admit the two distinct territories of "Rupert's Land and the North-western Territory, or either of them, into the Union." The instrument by which the imperial Crown did so also refers to two territories, as the name of the *Rupert's Land and North-Western Territory Order* indicates.

The new federal Parliament of Canada did not seem to see any great importance in this distinction, since on December 17, 1867 it requested that the Crown "unite Rupert's Land and the North-western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good Government."[152] The only provision of 1867 address which referred to the Hudson's Bay Company in those territories was the undertaking by

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[150]"The Royal Charter incorporating the Hudson's Bay Company, 1670", in E.H. Oliver, ed., *The Canadian North-West: Its Early Development and Legislative Records*, vol. 1 (Ottawa: Archives Publications, 1914), 135 at 143-44.

[151]*In re Natural Resources (Saskatchewan)* (1931), [1932] A.C. 28 (P.C.) at 33.

[152]R.S.C. 1985, App., No. 9, Schedule A, at 8-9.

the Canadian government "to provide that the legal rights of any corporation, company or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction."[153]

But for the imperial government, the rights which the Hudson's Bay Company might be able to claim pursuant to its charter of 1670 remained important. The Secretary of State for the Colonies in London responded that "Her Majesty's Government will be willing to recommend a compliance with the prayer of the Address so soon as they shall be empowered to do so with a just regard to the rights and interests of Her Majesty's subjects interested in those territories," by which he meant the rights of the company under its charter.[154].

The imperial Parliament therefore adopted the *Rupert's Land Act, 1868*, which allowed the imperial Crown to accept the surrender "of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities" of the Hudson's Bay Company in Rupert's Land, but only once "the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved of by Her Majesty, and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada."[155] At the same time, the imperial government's Under-Secretary for the Colonies reminded the Hudson's Bay Company of the weaknesses of its legal position and particularly the doubt as to the boundaries of its possessions.[156] This pressure proved effective since both the company and the Canadian government accepted a compromise proposal by the Under-Secretary a few months later.[157]

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[153]R.S.C. 1985, App., No. 9, Schedule A, at 8-9.

[154]Despatch from the Duke of Buckingham and Chandos to Viscount Monk, 23 April 1868 in *British Parliamentary Papers; Colonies: Canada*, vol. 27, *Reports, Correspondence and Other Papers Relating to Canada, 1867-74*, "Correspondence Relating to the Surrender of Rupert's Land", p.22.

[155]R.S.C. 1985, App., No. 6.

[156]Sir Frederic Rogers, Bart., to Sir Stafford H. Northcote, Bart., 9 March 1869 in Canada, Parliament, *Sessional Papers*, 1869, vol. 5, No. 25, "Rupert's Land and North-West Territory", at 31-32.

[157]R.S.C. 1985, App., No. 9, Schedule B, at 15.

However the territory which the company ceded and which the imperial Crown accepted into the Canadian union was not Rupert's Land in the strict sense of the 1670 charter. On the contrary, the *Rupert's Land Act, 1868*, explicitly provided:

> 2. For the Purposes of this Act the Term "Rupert's Land" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

The Hudson's Bay Company itself recognized the uncertainty concerning its rights and title in the deed of surrender which referred not only to its rights under the 1670 charter but also admitted that "the said Governor and Company may have exercised or assumed rights of Government in other parts of British North America not forming part of Rupert's Land, or of Canada, or of British Columbia."[158]

b. Are two different conditions imposed on two different territories?

After the *Rupert's Land Act, 1868* and the negotiations between the government of Canada and the Hudson's Bay Company had led to an agreement[159], the federal Parliament made a new address to the imperial Crown 1869 asking it to accept the surrender of the company's land rights in Rupert's Land or elsewhere.[160] Moreover, by a resolution appended to the address, the federal Parliament formally requested the admission of Rupert's Land into the union on the same terms as the North-Western Territory.[161]

But the Order in Council adopted by the imperial Crown in 1870 pursuant to s.146 of the *Constitution Act, 1867* to admit the two territories into the Canadian union stated that they were not admitted on the same terms:

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[158]R.S.C. 1985, App., No. 9, Schedule C, 1., p. 20.

[159]R.S.C. 1985, App., No. 9, Schedule B, 2., pp. 10-13, 16-23.

[160]R.S.C. 1985, App., No. 9, Schedule B, 2., p.15.

[161]R.S.C. 1985, App., No. 9, Schedule B, 2., p. 16

- "the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address," that is, the address of 1867; and

- "Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid," that is, once the Crown had accepted the surrender of June 22, 1870.[162]

The potential importance of the distinction is as follows:

- for the North-Western Territory, the Order in Council clearly repeats the terms and conditions set out in the first address of 1867, including the seventh resolution by which the Parliament of Canada promised that "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines";[163]

- on the other hand, for Rupert's Land, the Order in Council noted that certain conditions for its surrender had already been completed and only imposed those terms and conditions which it explicitly repeated from the second address by Parliament in 1869, including the 14th term which freed the Hudson's Bay Company of any liability in case of "any claims of Indians to compensation for lands required for purposes of settlement [which] shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in

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[162]R.S.C. 1985, App., No. 9, p. 4 (emphasis added)

[163]R.S.C. 1985, App., No. 9, Schedule A, p. 9.

respect of them";[164]

– the Order in Council does not repeat as a term and condition for the admission of Rupert's Land each of the resolutions adopted by the federal Parliament and appended to its second address in 1869 and particularly not the term which provided "That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."[165]

If the Aboriginal peoples of the old North-Western Territory benefited from protection of their rights guaranteed by the terms of an imperial Order in Council with the force of constitutional law, those who were in Rupert's Land may have been merely the beneficiaries of an unenforceable moral obligation.[166]

The extent of the rights guaranteed to the Indians by the seventh resolution of the address of 1867 was clearly indicated for the federal government by William McDougall, the Minister of Public Works, during the parliamentary debate on those resolutions:

> The Seventh Resolution referred to the Indian inhabitants, of whom there were large numbers, though not so large as formerly, scattered over the whole territory. It had been the practice of our Government to recognize some rights as belonging to the aborigines of the country, making treaties with them, and giving them compensation for their lands – dealing with them in a measure as with minors incapable of the management of their own affairs, but always acting generously towards them. The Company had never pretended to extinguish these aboriginal rights which had preceded theirs. A settlement must be come to with the Indians for the sake of the protection of the Colonists.[167]

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[164]R.S.C. 1985, App., No. 9, p. 6.

[165]R.S.C. 1985, App., No. 9, Schedule B, p. 13.

[166]Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: Native Law Centre, 1982) at 25.

[167]Canada, *House of Commons Debates*, 1st Session, 1st Legislature, pp. 181-182 (4 December 1867).

Term 14 of the *Rupert's Land Order* provides:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.[168]

Thus, it might have been that in Rupert's Land, the Order in Council had no other effect than to free the Hudson's Bay Company from any obligation for payment, if any, and that in Rupert's Land, the Crown had no obligation to settle "the claims of the Indian tribes to compensation for lands required for purposes of settlement" as in the North-Western Territory.

This was the interpretation given to Term 14 by Justice Mahoney in the *Baker Lake* case:

> I therefore find that the Royal Charter of May 2, 1670, did not extinguish aboriginal title in Rupert's Land. Nothing in the 1690 Act of Parliament that confirmed the Charter had any bearing on this question. Likewise, I find nothing in the Imperial Order in Council of June 23, 1870, whereby Rupert's Land was admitted to Canada that had any effect on aboriginal title.
>
> In the latter respect, the plaintiffs urged that paragraph 14 of the Order in Council is a term which must be fulfilled before the Parliament of Canada will have the legislative jurisdiction to extinguish aboriginal title in Rupert's Land.
>
> > 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.
>
> I disagree. The provision neither created nor extinguished rights or obligations vis-à-vis the aborigines, nor did it, through section 146 of *The British North America Act, 1867*, limit the legislative competence of Parliament. It merely transferred existing obligations from the Company to Canada.[169]

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[168]R.S.C. 1985, App. II, No. 6.

[169]*Hamlet of Baker Lake v. Canada*, [1980] 1 F.C. 518 (T.D.) at 565. The Attorney General of Quebec made the same argument in *S.D.B.J. c. Kanatewat*, [1975] C.A. 166 at 173.

For his part, however, Justice Morrow saw no significant distinction between the federal government's obligations in Rupert's Land or in the North-Western Territory and he suggested in *Re Paulette* that in both cases, Aboriginal title had acquired a constitutional protection:

> It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respect thereto did by virtue of s. 146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have.
>
> ...
>
> Unless, therefore, the negotiation of Treaty 8 and Treaty 11 legally terminated or extinguished the Indian land rights or aboriginal rights, it would appear that there was a clear constitutional obligation to protect the legal rights of the indigenous people in the area covered by the proposed caveat, and a clear recognition of such rights. indigenous people in the area covered by the proposed caveat, and a clear recognition of such rights.[170]

According to the Supreme Court of Canada, the negotiation of Treaty 3 — during which the treaty commissioners believed themselves to be in either Rupert's Land or the North-western Territories, though they were later held to be in Ontario — was result of the obligations assumed by Parliament in the *Rupert's Land Order* :

> In the first session of the first Parliament of the Dominion the Senate and Commons of Canada adopted an address to Her late Majesty praying that she would be graciously pleased by and with the advice of Her Most Honourable Privy Council under the section 146 I have already referred to of the "British North America Act," to unite Rupert's Land and the North-West Territory with the Dominion and to grant to the Parliament of Canada authority to legislate for their future welfare and good government, and assuring Her Majesty of the willingness of the Parliament of Canada to assume the duties and obligations of government and legislation as regarded those territories.
>
> In that address a special paragraph relative to the Indians was inserted as follows:
>
> And furthermore, that, upon the transference of the territories in question to the

[170] *Re Paulette et al. and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T. S.C.) at 29-30, rev'd. on other grounds (1975), 63 D.L.R. (3d) 1 (N.W.T. C.A.) and [1977] 2 S.C.R. 628.

> Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
>
> In pursuance of this address and the agreement of the Dominion with the Hudson Bay Company, arrived at with the concurrence of the British Government, for the surrender of those territories to Her Majesty, upon the understanding that upon their transfer to the Dominion the latter should pay the company 300,000 pounds, and also of an Act of the Imperial Parliament assented to on the 31st of July, 1868, they were transferred by an order in council on the 23rd June, 1870, to come into force on the then ensuing 15th of July.
>
> It was supposed by many concerned in these proceedings that these territories extended over a very large part if not all of those lands now in the Province of Ontario and in part respect of which the treaty now in question was arrived at.[171]

Justice Idington added an explanation of the equitable principles which, in his view, were the same found in the Royal Proclamation of 1763 and which inspired the treaty.[172]

Similarly, Alberta Court of Appeal held that the Crown's negotiation of the numbered treaties in the territories governed by the Order in Council constituted a recognition of the title held by the Aboriginal peoples who adhered to the treaties:

> Whatever the rights of the Stoney and other Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the Treaty to which I shall next allude, the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the *St. Catherine's Milling* case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title.[173]

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[171] *Province of Ontario v. Dominion of Canada* (1908), 42 S.C.R. 1 at 105-106 (emphasis added), aff'd. [1910] A.C. 637 (P.C.).

[172] *Ibid.* at 103-104.

[173] *Rex v. Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.) at 787.

c. Government conduct after 1870: no distinction

Once the *Rupert's Land and North-Western Territory Order* of 1870 was in force, the federal government showed no distinction in its treatment of what had once been either Rupert's Land or the North-Western Territory. On the contrary, the lands of the new territory were governed by the *Dominion Lands Act* of 1872, which forbade agricultural settlement, timber leases and sales of minerals on any "territory the Indian title to which shall not at the time have been extinguished."[174]

The instructions communicated to the Lieutenant Governor of the new North-West Territories in August 1870 distinguished only between those regions where the claims of Aboriginal peoples should be dealt with as a priority due to impending settlement or railway construction:

> 1. You will, with as little delay as possible, open communication with the Indian Bands occupying the country lying between Lake Superior and the Province of Manitoba, with a view to the establishment of such friendly relations as may make the route from Thunder Bay to Fort Garry secure at all season of the year, and facilitate the settlement of such portion of the country as it may be practicable to improve.
>
> 2. You will also turn you attention promptly to the condition of the country outside the province of Manitoba, on the North and West; and while assuring the Indians of your desire to establish friendly relations with them, you will ascertain and report to His Excellency the course you may think most advisable to pursue, whether by treaty or otherwise, for the removal of any obstructions that may be presented to the flow of population into the fertile lands that lie between Manitoba and the Rocky Mountains.
>
> ...
>
> 5. You will also make a full report upon the state of the Indian Tribes now in the Territories; their numbers, wants and claims, the system heretofore pursued by the Hudson`s Bay Company in dealing with them, accompanied by any suggestions you may desire to offer with reference to their protection, and to the improvement of their

[174] *Dominion Lands Act*, S.C. 1872, c.23, s. 42, cont'd. S.C. 1883, c.17, s. 3, and S.C. 1886, c.54, s. 4.

condition.[175]

The fifth instruction suggests that the Hudson's Bay Company had pursued the same system with respect to the Indians in the two territories and that the Lieutenant Governor would be responsible for "their protection, and to the improvement of their condition" equally in the two former territories which were now united.

If the language of the *Rupert's Land and North-Western Territory Order* seems to allow for different treatment of the Indians depending on whether they are in one or the other territory, there was no practical effect because the federal government made no such distinction when it negotiated treaties. In 1873, the Indian Commissioner for the North-West Territories, Joseph-Albert-Norbert Provencher, provided a description of the conduct of treaty negotiations which seems to reflect "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

> ...[T]he procedure adopted by every Government which has found itself in the same position, and has to dispose of allowances of this nature.
>
> The Indians of this Continent have always been considered, if not as proprietors, at least as occupants of the soil. It was always understood that they had rights as owners, and that the Crown would first have to extinguish those rights to afterwards assume full possession of the land. From this point of view there is a double right and a double interest which cannot be settled without the free consent of those interested.
>
> It is as an act of indemnity for these rights, resulting from possession, that the Government pays the annuities to the Indians, and in return these latter limit their rights exclusively to the concessions preserved to them.
>
> Their right in the Reserve is precisely of the same nature as that which they had before the treaty over the whole territory, a right of undivided possession without the power of selling or ceding it in any manner whatever. It requires special legislation to clothe them with the rights of full property, being that which usually accompanies the act

[175]Instructions issued to Lieutenant Governor Archibald, 4 August 1870, in E.H. Oliver, ed., *The Canadian North-West: Its Early Development and Legislative Records*, vol. 2, Ottawa: Archives Publications No. 9, 1915, at 974-75.

of emancipation.[176]

This interpretation was completely consistent with the explanation of the seventh resolution in the 1867 address provided by William McDougall.[177]

Moreover, there is a clear continuity between the analysis by McDougall in 1867 and that of Provencher in 1873, both of whom were lawyers and both of whom played an important role in the development of the policies they described. Not only had McDougall presented the 1867 address to the House of Commons in 1867, but he was the delegate to London with George Etienne Cartier in 1868-1869 assigned to negociate the surrender of Rupert's Land by the Hudson's Bay Company. Before Confederation, as Commissioner of Crown Lands, McDougall had negotiated a treaty with the Indians of Manitoulin Island;[178] after the negotiations with the Hudson's Bay Company were completed in 1869, McDougall was named the first Lieutenant Governor of the North-West Territories.[179] For his part, Provencher was secretary to Lieutenant Governor McDougall in 1869 and after the rebellion, he returned to Winnipeg in 1873 as Indian Commissioner and participated in the negotiation of several treaties between 1873 and 1876.[180]

d. **Conclusion: All the Indian provisions apply**

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[176]J.A.N. Provencher to the Minister of the Interior, 31 December 1873, in Canada, Parliament, *Sessional Papers*, 1875, vol. 7, No. 8, *Annual Report of the Department of the Interior for the year ended 30th June 1874; Report of the Deputy Superintendent General of Indian Affair*, App. No. 27 at 54 (the original of this letter was in French).

[177]Canada, *House of Commons Debates*, 1st Session, 1st Legislature, p. 182 (4 December 1867).

[178]James Morrison with Bob Beal, "Shaking the Monarch's Hand : The Crown and the Early Numbered Treaties, 1867-1880 ; A Research Paper", prepared for the Department of Indian and Northern Affairs Canada, 10 February 1999, text corresponding to notes 141 to 158.

[179]Suzanne Zeller, "William McDougall" in *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1994), vol. 13.

[180]Kenneth Landry, "Joseph-Albert-Norbert Provencher" in *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1982), vol. 11.

The imperial Order in Council of 1870 made all the terms and conditions of the address by the federal Parliament in 1867 applicable to the North-Western Territory. However only certain conditions contained in the resolution appended to the address of 1869 were declared to apply to Rupert's Land. More particularly, the order does not mention the resolution by the Parliament to the effect that "That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."[181]

But before setting out the terms and conditions which applied to Rupert's Land, the order specified that it was dealing only with those "terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid."[182] The second address explicitly provided:

> That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.[183]

If this condition was not included in the terms set on in the text of the order itself, the reason is that the imperial government did not believe that it remained to be performed. It cannot be that the order meant that "the protection of the Indian tribes whose interests and well-being are involved in the transfer" had already been ensured by the federal government, since Canada did not yet even know the identity of all the affected Aboriginal peoples.

The only meaning which can therefore be given to the exclusion of this condition from those "still remaining to be performed" is that the imperial government understood that the government of Canada had definitively assumed responsibility for the "the protection of the

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[181]R.S.C. 1985, App., No. 9, Schedule B, p.13.

[182]R.S.C. 1985, App., No. 9, p.4.

[183]R.S.C. 1985, App., No. 9, Schedule B., p.16.

Indian tribes " in question.

Extrinsic evidence exists as to the imperial government's understanding on this subject. When Lord Granville, the Colonial Secretary, informed the Governor General of Canada that the Hudson's Bay Company had accepted the terms for the surrender, he wrote:

> On one point, which has not been hitherto touched upon, I am anxious to express to you the expectations of Her Majesty's Government. They believe that, whatever may have been the policy of the Company and the effects of their chartered rights upon the progress of settlement, the Indian tribes who form the existing population of this part of America have profited by the Company's rule.
>
> They have been protected from some of the vices of civilization; they have been taught, to some appreciable extent, to respect the laws and rely on the justice of the white man, and they do not appear to have suffered from many causes of extinction beyond those which are inseparable from their habits and their climate. I am sure that your Government will not forget the care which is due to those who must soon be exposed to new dangers, and, in the course of settlement, be dispossessed of their lands, which they are use to enjoy as their own, or be confined within unwontedly narrow limits.
>
> This question had not escaped my notice while framing the proposals which I laid before the Canadian Delegates and the Governor of the Hudson' Bay Company. I did not, however, then allude to it, because I felt the difficulty of insisting on any definite conditions without the possibility of foreseeing the circumstances under which those conditions would be applied, and because it appeared to me wiser and more expedient to rely on the sense of duty and responsibility belonging to the Government and people of such a country as Canada.
>
> That Government, I believe, has never sought to evade its obligations to those whose uncertain rights and rude means of living are contracted by the advance of civilized man. I am sure that they will not do so in the present case, but that the old inhabitants of the country will be treated with such forethought and consideration as may preserve them for the dangers of the approaching change, and satisfy them of the friendly interest which their new Governors feel in their welfare.[184]

It might be possible to conclude that since the Secretary for the Colonies had deliberately

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[184]Earl Granville to the Hon. Sir John Young, Bart., 10 April 1869, in Canada, Parliament, *Sessional Papers*, 1869, vol. 5, No. 25, "Rupert's Land and North-West Territory", at 38.

omitted this same responsibility by the government of Canada towards Aboriginal peoples from the binding conditions set out in the order, the imperial government was merely imposing a moral obligation.

However it would be at least as logical to conclude that the Secretary took care took not to insist on "any definite conditions without the possibility of foreseeing the circumstances under which those conditions would be applied" precisely because he took it for granted that "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled [by the government of Canada] in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines,"[185] as the seventh resolution to Parliament's address of 1867 promised.

Under the circumstances, Term 14 concerning Rupert's Land should be interpreted according to the case law which holds it had the same effect as the term applicable to the Indians of the old North-Western Territory[186] so as to conclude that in these two territories at least, the federal government's constitutional jurisdiction before 1982 was subject to the obligation to obtain a surrender of Aboriginal title before allowing settlement.

Any other conclusion would mean that the Hudson's Bay Company's entitlement to compensation for surrender of rights which were in large part contested by the government of Canada nevertheless acquired constitutional protection through the *Rupert's Land and North-Western Territory Order*, while Canada had no legal obligation to protect the Aboriginal title whose protection the imperial government had expressly confided in Parliament.

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[185]R.S.C. 1985, App., No. 9, Schedule A, p. 9.

[186]*Province of Ontario v. Dominion of Canada* (1908), 42 S.C.R. 1 at 103-104.

E. Colonial legislation

1. Introduction

At the beginning of British administration in North America, Indian affairs were under Imperial control and were the responsibility of the governor. While the colonial assemblies could legislate on the matter, colonial legislation was restricted to implementing imperial orders and, in fact, largely served to protect Indian lands from those with designs on them.[187]

When the Legislative Assembly of Lower Canada attempted in 1819 to inquire into the rights of the Hurons over the seigneury of Sillery, now administered by the Crown and formerly held for them by the Jesuits,[188] the Governor put an abrupt halt to the effort. Governor Richmond informed the Assembly that while the land titles were matters of public record, for the rest, the issue did not concern the elected officials.

> Being, however, apprized by the Journals of the Assembly, of the circumstances which have led to the present application, I think it necessary on this occasion to acquaint the House, that the several Tribes of Indians residing within the Province of Lower-Canada, are, for weighty reasons of state, under the immediate superintendance and protection of the Crown, and that their respective claims to lands heretofore held by the late Order of Jesuits in this Province, have long since been fully investigated and determined upon, by Tribunals appointed under the Royal authority for that purpose.
>
> Should circumstances at any time occur, to render legislative interference necessary, of which His Majesty must be the judge, due information will be given thereof to both House of the Provincial Parliament.[189]

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[187] *Chippewas of Sarnia v. Canada* (Ont. S.C.J.) at para. 356; see also at para. 597.

[188] After the death of the last member of the Jesuit order living in Quebec in 1800, the Crown took over the direct management of Jesuit property through specially-appointed Commissioners: Roy C. Dalton, *The Jesuits' Estate Question, 1760-1888; A Study of the Background for the Agitation of 1889*, Toronto: University of Toronto Press, 1968 at 57-58.

[189] Richmond to the Legislative Assembly of Lower Canada, 2 February 1819, in A.G. Doughty and N. Story, *Documents Relating to the Constitutional History of Canada, 1819-1828* (Ottawa: King's Printer, 1935) at 18-19 (emphasis added). Governor Richmond seems to have been referring either to the Commissioners or to General Gage's decision of 1762 concerning the seigneury of Sault Saint-Louis, discussed above. since there was no judicial decision concerning the seigneury of Sillery: Marguerite Vincent, "Un siècle de réclamations de la

In Upper and Lower Canada, the imperial responsibility for Indian affairs meant that it was one of the civil secretaries of the Governor General of the colony who occupied the position of the Superintendent General of Indian Affairs.[190] It was only in 1860 the united Province of Canada obtained full jurisdiction over Indian affairs when the locally-appointed Commissioner of Crown Lands also became the Chief Superintendent of Indian Affairs for the colony.[191] The transfer took place by means of a colonial statute but only after the Governor General had "reserved the Bill for the signification of Her Majesty's pleasure thereon,"[192] meaning that he had awaited the explicit permission of the imperial government in London.

As of 1860, therefore, colonial laws could replace rather than supplement the instructions to the governors of Canada and the regulations they imposed. For instance, as of 1860, a colonial statute implicitly replaced the Dorchester regulations by imposing more detailed conditions for the validity of a surrender.[193] However the Legislative Assembly could neither repeal nor amend the provisions of the *Royal Proclamation* which as an imperial order or

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Seigneurie de Sillery par les Hurons (1791- 1896)", (1978) 7:3-4 *Recherches amérindiennes au Québec*

[190]*Chippewas of Sarnia v. Canada* (Ont. S.C.J.) at para. 345 and note 89. See also the "Additional Instruction relating to Indian Affairs, Lower Canada" 12 July 1800, in Arthur G. Doughty and Duncan A. McArthur, eds., *Documents relating to the Constitutional History of Canada, 1791-1818* (Ottawa: King's Printer, 1914) at 244-45.

[191]*Act respecting the management of the Indian Lands and Property*, S.C. 1860, c.151, s.1; *Chippewas of Sarnia v. Canada* (Ont. S.C.J.) at para. 345. The Imperial government's principal concern appears to have been to eliminate its responsibility for paying the costs of the Indian Department. See: Irish University Press Series of British Parliamentary Papers, *Colonies: Canada*, vol. 23, *Correspondence and Other Papers Relating to Captain Palliser's Expedition and Other Affairs in Canada, 1860*, "Copies or Extracts of Correspondence between the Secretary of State for the Colonies and the Governor General of Canada respecting Alterations in the Organization of the Indian Department in Canada" at 41-45.

[192]Province of Canada, Legislative Assembly, *Journals*, 1860, at 471. The Governor General's royal assent actually invokes his power under the *Act of Union* (the *Act to reunite the Provinces of Upper and Lower Canada, and for the Government of Canada*, 3 & 4 Vict. (1840), U.K., c. 35., s.34) to reserve colonial legislation pending imperial approval: *Canada Gazette*, 13 October 1860.

[193]*Id.*, s.4.

regulation was paramount over any colonial legislation.[194]

In the Maritimes, the chief preoccupation with respect to Indian affairs appears to have been the payment of the expenses and the administration of reserves,[195] issues governed by local statute by the middle of the nineteenth century. In 1842, Nova Scotia enacted a statute to allow for the appointment of a Commissioner for Indian Affairs "to take the supervision and management" of lands "set apart as Indian Reservations, or for the use of Indians,"as well as to make arrangements for their education.[196] This legislation was adopted at the suggestion of the Lieutenant-Governor after the Colonial Office in London had made inquiries as to the condition of the Indians.[197] In 1844, New Brunswick's House of Assembly enacted a statute allowing for the appointment of Indian Commissioners "for the purpose of after the Reserves," but the legislation only came into force upon approval by the imperial Crown in London.[198]

2. The prohibition on settling on Indian land

During the late eighteenth century, colonial governors issued orders prohibiting trespass or encroachment on lands set aside for Indians.[199] In the Maritimes, the frequency with which

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[194]*Colonial Laws Validity Act* (1865), 28 et 29 Vic. V, U.K., c. 63, ss. 2, 3.

[195]Upton, *Micmacs and Colonists*, Chapters 6 and 7.

[196]*An Act to provide for the Instruction and Permanent Settlement of the Indians*, S.N.S. 1842, c.16, ss.1, 3.

[197]Upton, *Micmacs and Colonists* at 89-90.

[198]*An Act to Regulate the Management and Disposal of the Indian Reserves in this Province*, S.N.B. 1844, c.47, ss.3 and 13. The statute was "ratified and confirmed by Order of Her Majesty in Council, dated 3rd September, 1844, and published and declared in the Province on the 25th day of September, 1844": *Warman v. Francis et Al.* (1958), 20 D.L.R. (2d) 627 (N.B.Q.B.) at 638, 5 C.N.L.C. 624. A major motivation for the legislation had been to sell to squatters the reserve lands they occupied but in 1842 the Attorney General's opinion was that the colonial executive had no power to sell Indian lands without approval from London: Upton, *Micmacs and Colonists* at 106.

[199]See for example: University of New Brunswick, Harriet Irving Library Archives, Beaverbrook Papers, Indian Affairs Collection, Box 41(b), #25274-25280, Item 1a, Prohibition to settle or occupy lands without the authority of the government or consent of the Native inhabitants in the village at Richibucto, issued by Lieutenant

these orders were made well into the nineteenth century is chiefly as a testimony to the large number of settlers squatting on reserves.[200]

In Quebec, the Legislative Assembly established a statutory prohibition in 1777 that made it unlawful "for any person to settle in any Indian village or in any Indian country within this Province, without a Licence in writing from the Governor."[201] In Upper Canada, legislation was passed in 1839 "to provide by law for the summary removal of persons unlawfully occupying" the "lands appropriated for the residence of certain Indian Tribes in this Province."[202] In 1840, the Governor of Lower Canada (formerly Quebec) acquired a similar power to issue an order those resident in an "Indian village" to remove on pain of fine or imprisonment[203] and these same powers were continued in the consolidation of 1860 and remained in effect until Confederation.[204]

Similarly, in both Nova Scotia and Prince Edward Island, by the mid-nineteenth century,

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Governor Thomas Carleton, 28 June 1788, <http://www.lib.unb.ca/archives/ia/ia_1a.jpg>, and Item 4, Proclamation that the Natives on Inman's Island not be disturbed, by order of the Lieutenant Governor, signed by Jon[athan] Odell, Provincial Secretary, 9 May 1793, <http://www.lib.unb.ca/archives/ia/ia_4.html>; Archives du Séminaire de Trois-Rivières, cote 0535, "Avertissement concernant les Sauvages Abénakis de St. François" issued by Governor Guy Carleton, 28 February 1767; National Archives of Canada, RG 10, A9, vol. 14, and Archives du Séminaire de Trois-Rivières, cote 0535, Proclamation issued by Governor Guy Carleton, 20 April 1769.

[200]Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* at 22-23, 30-31; Upton, *Micmacs and Colonists* at 102.

[201]*An Ordinance to prevent the selling of strong Liquors to the Indians in the Province of Quebec, etc.*, S.Q. 1777, c.7, s.3, cont'd. C.S.L.C. 1861, c.14, s.3.

[202]*An Act for the protection of the Lands of the Crown in this Province, from trespass and injury*, S.U.C.1839, c.15, cont'd. S.C. 1850, c.74, s.10, C.S.U.C. 1859, c.81, s.26.

[203]*An Ordinance to repeal certain parts of an Ordinance therein-mentioned, and to amend certain other parts of the said Ordinance, and to provide for the further protection of the Indians in this Province*, S.L.C. 1840, c.44, s.2.

[204]*An Act respecting Indians and Indian Lands*, C.S.L.C. 1860, c.14, ss.3 and 4 (am. S.C. 1860, c.38).

the Commissioners for Indian Affairs could prosecute intruders "by information",[205] that is, on summary conviction rather than by indictment. In colonial British Columbia, the task was assigned to the Stipendiary Magistrates (or police court) who could hear "disputes among Indians and Settlers, as to the right to lands used by Indians" and issue orders to remove trespassers.[206]

3. **The powers of the Commissioners**

The position of Commissioner for Indians had existed in Upper Canada since 1839, but only with the function of enforcing the prohibition on unlawful possession of Indian lands.

In Lower Canada, the position of Commissioner of Indian Lands was created by statute in 1850: in him were vested "all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians" (other than those held in trust by religious corporations). He had the power to lease reserve lands but subject to instructions from the governor and the right "to receive or recover the rent, issues and profits of such lands and property." Since in Lower Canada, the Commissioner had the right to "exercise and defend all or any of the rights lawfully appertaining to the proprietor, " he also had the right to defend the lands from trespass through civil suits in court.[207]

The position of Commissioner for Indian Affairs was created in Nova Scotia in 1842 with "supervision and management of all Lands that now are, or may hereafter be, set apart as Indian Reservations, or for use of the Indians" and with the duty "generally, to protect the said Lands

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[205] *An Act to provide for the Instruction and Permanent Settlement of the Indians*, S.N.S. 1842, c.16, s.5 cont'd. R.S.N.S. 1851, c.58, s.5*; An Act Relating to the Indians of Prince Edward Island*, S.P.E.I. 1856, c.10, s.4.

[206] *Indian Reserve Ordinance, 1869*, R.S.B.C. 1871, c.125.

[207] *An Act for the better protection of the Lands and Property of Indians in Lower Canada*, S.C. 1850, c.42, ss.1, 3, cont'd. C.S.L.C. 1861, c.14, ss.1-9.

from encroachment and alienation, and preserve them for the use of the Indians,"[208] and in 1856, Prince Edward Island enacted almost identical legislation.[209] New Brunswick created the office of Commissioner in 1844, "for the purpose of looking after the reserves."[210]

However none of the Maritime colonies gave their Commissioners explicit power to protect Indian reserves other than by quasi-criminal prosecutions of trespassers until in 1859, Nova Scotia's Commissioner was given the right to obtain a warrant from Justices of the Peace for the summary removal of those entering Indian reserves without permission.[211] On the contrary, the Maritime legislatures were concerned with settling disputes with squatters who had settled on Indian reserves and gave their commissioners the power to sell or lease reserves lands to those who were in possession of them.[212]

In 1851, Nova Scotia's legislature adopted a statute allowing it not only to vest in the Commissioner of Crown Land the lands reserved "the use of the Indian", but also to vest in him "the duty of protecting the rights of the Aborigines who are disposed to settle thereupon."[213] In 1864, the consolidated statute on Crown lands simply provided that reserve lands were vested in the Commissioner.[214] If it can be assumed that by virtue of this change, Indian reserves were governed by the same rules as other Crown lands, not only was greater recourse for prosecutions against trespass created, but the sheriff and chief surveyor of the county now had the power to

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[208]*An Act to provide for the Instruction and Permanent Settlement of the Indians*, S.N.S. 1842, c.16, s.3, cont'd. R.S.N.S. 1851, c.58, s.3, and R.S.N.S. 1859, c.58, s.3.

[209]*An Act Relating to the Indians of Prince Edward Island*, S.P.E.I. 1856, c.10, s.3.

[210]*An Act to Regulate the Management and Disposal of the Indian Reserves in this Province*, S.N.B. 1844, c.47, s.3.

[211]*An Act concerning Indian Reserves*, S.N.S. 1859, c.14, s.10.

[212]*An Act to Regulate the Management and Disposal of the Indian Reserves in this Province*, S.N.B. 1844, c.47, ss.2, 9; *Of Indians*, R.S.N.S. 1851, c.58, s.4, cont'd. R.S.N.S. 1864, c.57, s.11.

[213]S.N.S. 1851, c.4, s.11, cont'd. *Of the Crown Lands*, R.S.N.S. 1851, c.28, s.12.

[214]*Of the Crown Lands*, R.S.N.S. 1864, c.26, s.17.

seize timber and minerals illegally cut or removed.[215]

In the Province of Canada, as of 1859, the Governor in Council had the power to declare that the provisions of the *Public Lands Act* applied to lands under the management of the Chief Superintendent of Indian Affairs and to grant him the same powers as the Commissioner of Crown Lands.[216] After 1860, the Commissioner of Crown Lands was also Chief Superintendent of Indian Affairs: while reserve lands in the Canadas did not thereby vest in the Commissioner, the Governor was again empowered to declare that the statutes governing public lands extended to reserves.[217]

The application of the *Public Lands Act* to Indian reserves in the Canadas would have given the Superintendent powers including in particular that of cancelling erroneous or defective land patents.[218] This is substantially the same power found in post-Confederation versions of the *Indian Act*[219] and which the Supreme Court of Canada held imposed a duty on the Minister "to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians."[220] The application of the *Public Lands Act* to Indian reserves would have also given the Commissioner of Crown Lands the power to seize timber which had been cut without a licence,[221] a power added to the *Indian Act* after Confederation and which

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[215] *Of Trespasses to Crown Property*, R.S.N.S. 1864, c.27, ss.1-3.

[216] *Act Respecting the Sale and Management of the Public Lands*, R.S.C. 1859, c.22, ss. 6, 25.

[217] *Act respecting the management of the Indian Lands and Property*, S.C. 1860, c.151, ss.1, 2, 7.

[218] *Act Respecting the Sale and Management of the Public Lands*, R.S.C. 1859, c.22, ss. 22-25.

[219] *Indian Act, 1876*, S.C. 1876, c.18, s.42; this provision is continued by the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, s.21, as am..

[220] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 115.

[221] *Act Respecting the Sale and Management of Timber on Public Lands*, R.S.C. 1859, c.23, ss.7-11.

continues to this day.[222]

4. The transition to post-Confederation legislation

With Confederation, the federal government acquired exclusive jurisdiction over "Indians, and Lands reserved for the Indians"by virtue of s.91(24) de la *Constitution Act, 1867*. In 1868, Parliament adopted a statute providing that the Secretary of State would be the Superintendent General of Indian Affairs "and shall as such have the control and management of the lands and property of the Indians in Canada." The lands in question were all those reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefits."[223]

As a general rule, the new federal legislation did not make radical changes to the regime created by the last statutes adopted in the Province of Canada: reserve lands continued to be "held for the same purposes as before the passing of this Act, but subject to its provisions" and the sale or lease of reserve lands continued to be illegal unless it was to the Crown.[224] In particular, the prohibition on living on lands reserved for Indians remained in place.[225]

IV. Post-Confederation case law

A. Liability for Ontario treaty annuities

Under the 1850 Robinson treaties, certain Ojibway peoples around the Great Lakes had surrendered their land in exchange for annuities and other benefits. As the annuities began to

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[222] *Indian Act, 1876*, S.C. 1876, c.18, ss.52-54; *Indian Timber Regulations*, C.R.C. 1978, c. 961, ss. 22-29.

[223] *An Act providing for the Organization of the Department of the Secretary of State of Canada*, S.C. 1868, c.42, ss.5, 6. The responsibility was transferred to the Department of the Interior in 1873: *Department of the Interior Act*, S.C. 1873, c.4, s.3; am. S.C. 1883, c.6.

[224] *An Act providing for the Organization of the Department of the Secretary of State of Canada*, s.6; *Indian Act, 1876*, S.C. 1876, c.18, s.25; *Indian Act, 1880*, S.C. 1880, c.28, s.36; *Indian Act*, S.C. 1886, c.43, s.38.

[225] *An Act providing for the Organization of the Department of the Secretary of State of Canada*, s.17; *Indian Act, 1876*, s.11; *Indian Act, 1880*, s.23; *Indian Act* (1886), s.21.

increase following Confederation, the federal government claimed that the Ontario government should have to pay them. In the 1890s, the federal government and the Ontario government went to court over these annuities.[226] The federal government argued that since s.109 of the *Constitution Act, 1867* assigned lands and mineral right to the provinces subject "to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same," the annuities owed under the treaties formed a "trust" or an "interest" burdening the land and payable by the province.

The Judicial Committee of the Privy Council unanimously held that the annuities were simply a "personal obligation of its governor, as representing the old province, that the latter should pay the annuities as and when they became due," which could not be considered "trusts" or "interests" within the meaning of s.109. Constitutional ownership or jurisdiction over the lands referred to in the treaty therefore had no effect on the federal government's obligation to pay the annuities.[227]

A more interesting point for the purposes of determining liability to the Indians is the one made by Sedgewick J. of the Supreme Court of Canada, namely, that the federal government could not invoke the interests of the Indians in order to escape liability for payment:

> Another consideration has a bearing on the matter. The contest in this case is not between the Indians on the one hand and the Government on the other; it is in its last analysis a contest between Ontario and Quebec. The principle of generous construction so ably and correctly pointed out by the learned Chancellor would very properly be applicable were it a case of the former kind. Had the rights of the Indians' been in question here -- were their claims to the increased annuity disputed -- did that depend upon some difficult question of construction or upon some ambiguity of language -- courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law -- the governing motive being that

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[226] *A.G. Canada v. A.G. Ontario*, [1897] A.C. 199 (P.C.).

[227] *Id.* at 210. It is worth noting, however, that the Privy Council left open the possibility that Aboriginal claims could place burdens on the provinces' property rights.

> in all questions between Her Majesty and " Her faithful Indian allies " there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.
>
> But I do not see that where the question is solely between the two provinces there high ethical doctrines should have weight. It is one thing from motives of grace or from a sense of moral obligation to do more than justice to the Indian races. It is quite another thing in the construction of a legal instrument to give weight to these motives in favour of one province at the expense of another, especially when these races are in no way benefited thereby.[228]

Thus, the federal government's understandable desire to seek contribution from the provinces for pre-Confederation obligations to Indians can in no way affect its direct liability.

B. The ownership of Quebec reserves

In addition to disputes over who would pay treaty annuities, in the decades following Confederation the federal and provincial governments went to court over who had the power to collect rent paid on Indian lands. In *Mowatt v. Casgrain*,[229] the Quebec Court of Queen's Bench (the provincial appellate court) held that the Attorney-General of Canada retained the right to administer and collect arrears on the Seigneury of Sault St-Louis at Kahnawake, which had been decreed in 1762 to be lands held by the Crown for the Mohawks.[230]

Again, the courts were faced with how to interpret s. 109 of the *BNA Act*. Whereas the Province of Quebec in *Mowatt* argued that it should collect unpaid rents as owner of the seigneurial lands, subject to a trust in favour of the Indians for whose benefit the rents were collected, the Dominion Government argued that its legislative and administrative power over

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[228] *The Province of Ontario v. The Dominion of Canada and the Province of Quebec; In re Indian Claims* (1895), 25 S. C. R. 434 at 534-35, 3 C.N.L.C. 365 at 466-467.

[229] (1897), 6 Que. Q.B. 12, 3 C.N.L.C. 10.

[230] *Id*. at 20-21.

"Indians and lands reserved for Indians" under s. 91(24) required it to administer the seigneurial lands the Crown held in trust for the Mohawk, including collecting rents for their benefit. The Court found in favour of the Attorney-General of Canada, who was found to be the proper party to collect arrears on rent due for lands held for the Indians.

The Court distinguished between bare ownership of the lands, which was found to be held by the province, and the administration of Indian interests in the land, which was the responsibility of federal government. Wurtele J. concluded:

> The question to be decided does not relate to the ownership of these constituted Seigniorial rents but is as to whom it appertains to sue for, recover, and collect the arrears? By the *Union Act*, the Government of the Dominion is entrusted with the administration of the affairs and property of the Indians in Canada, and under the *Indian Act* the control and management of their lands and property is confided to the department of Indian affairs, under the charge and direction of the Superintendent General of Indian affairs, who is authorized, as was the Commissioner of Indian lands before Confederation, to collect and receive the rents, issues and profits of the lands and property appropriated for Indians and to apply the same to their use. The Government to which such control and management is entrusted must necessarily have as a corollary the right to sue whenever the affairs of the trust require such action.[231]

Thus, the Court of Queen's Bench found continuity between the responsibilities of the Commissioner of Indian Lands for Lower Canada, named by the Governor prior to Confederation, and the federal government's post-Confederation responsibility for the administration of Indians lands and monies arising from Indian interests in those lands.

A subsequent case arose out of a sale of land in the Saguenay-Lac St. Jean region of Quebec.[232] The land in question had formerly been part of a reserve set aside for an Innu (Montagnais) band in 1853, which the band had ceded in 1869 in exchange for an alternative reserve. In 1878, a federal Indian agent sold a piece of this former reserve land to David

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[231] *Id.* at 26.

[232] *A.G. Canada v. Giroux* (1916), 53 S.C.R. 172.

Philippe, an individual member of the band. Philippe later became insolvent, and the land was seized and sold at public auction to pay his debts.

The federal Crown brought an action against Pierre Giroux, the purchaser of the land. The Crown alleged that Philippe, as an Indian, lacked the capacity to have purchased the land in the first place, and so title remained with the federal Crown. The Supreme Court of Canada was unanimous in rejecting the Crown's appeal, but divided in its reasons. The most interesting judgment with respect to the survival of pre-Confederation obligations is that of Duff J., who sought to discover whether the federal Crown had held title to the land after it was ceded in 1869.

Justice Duff began by holding that the reserve had been validly constituted in 1853, and that it had thereby become the property of the Commissioner of Indian Lands for Lower Canada, who held it for the benefit of the Indians. His analysis of the impact of Confederation was that s.91(24) of the *Constitution Act, 1867*, gave the federal Parliament the authority to legislate with respect to the ownership of Indian lands. When it created the office of the Superintendent General of Indian Affairs, the federal Crown retained this ownership and attached it to this new office.[233]

Justice Duff's judgment in *Giroux* therefore supports the view that s. 91(24) gave the federal government both a legislative power and a proprietary interest in Indian lands, from which it follows that dispositions of the land created obligations for the federal government.

C. *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*

In the early 1980s, as Prime Minister Pierre Trudeau embarked on his program of constitutional reform and patriation, several Aboriginal organizations brought an application to

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[233] *Id.* at 196-197.

stop the bill from proceeding through the British House of Commons.[234] The applicants argued that such a bill would interfere with their rights under the 1763 *Royal Proclamation* and under various treaties. They claimed that the British Crown had assumed obligations under these instruments and that these obligations had not been transferred to Canada.

The English Court of Appeal held that Canada had achieved its independence in the early 20th century, a fact which was recognized at the Imperial Conference of 1926 and formalized in the *Statute of Westminster, 1931*.[235] As a result, the Crown was no longer "one and indivisible." The Crown's obligations only bound the Crown in right of the territory concerned: "the effect of the Act of 1867 and of its successors was to transfer to Canada, as between the governments of the Dominion and of the Provinces, every aspect of legislative and executive power in relation to Canada's internal affairs."[236]

While the English Court of Appeal was primarily concerned with the independence of Canada from the United Kingdom, it offered several comments relevant to the federal-provincial division of powers. Lord Denning M.R. emphasized that the *Constitution Act, 1867* gave the federal government not only legislative but also executive power over Aboriginal peoples:

> The Act contained nothing specific about the executive power, but I think it mirrored the legislative division so that the executive power in regard to the "Indians, and Lands reserved for the Indians" was vested in the Governor-General of the Dominion, acting through his representative, and he in turn represented the Queen of England, that is, the Crown – which, as I have said, was in our constitutional law at that time regarded as one and indivisible.[237]

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[234] *The Queen v. Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (Eng. C.A.).

[235] *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.), R.S.C. 1985, App., No. 17.

[236] *Id.* at 106 *per* Kerr L.J.

[237] *Id.* at 93.

Indeed, throughout the decision, Lord Denning M.R., Kerr L.J. and May L.J. consistently referred to Aboriginal issues as being a responsibility of "the Crown in right of Canada" rather than the provincial governments. After examining the *Constitution Act, 1867* and other developments in Canada's constitutional history, May L.J. wrote that "any treaty or other obligations which the Crown had entered into with the Indian peoples of Canada in right of the United Kingdom had become the responsibility of the Government of Canada with the attainment of independence…."[238]

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[238] *Id.* at 115 *per* May L.J.