Aboriginal title, Reserve policy

and Claims in Quebec.

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1. INTRODUCTION.

1.1. Background.

The Algonquin nation (which includes groups known historically as Nipissings) is most closely related to the Ojibway, Odawa and Potawatomi Nations, with whom Algonquins share a common language (anishnabemowin) and many usages and customs.

Today, there are ten Algonquin First Nation communities in Ontario and Quebec who are recognized by the Department of Indian Affairs. Timiskaming, Wolf Lake, Barriere Lake, Long Point (Winneway), Eagle Village (Kipawa), Abitibiwinni (Pikogan), Lac Simon, Grand Lac Victoria (Kitcisakik), and Kitigan Zibi (Maniwaki) are located in Quebec. The Algonquins of Golden Lake First Nation are located in Ontario. Together, their population of registered members numbered 8,705 in 1994.[1]

On the western side of the territory, in Ontario, related Anishnabe communities are located at Nipissing, Temagami, Wagoshig (Abitibi) and Matachewan.

Traditionally, Algonquin nation territory stretched from Trois Rivieres in the east, to Lake Nipissing in the west, south to the Adirondak mountains in New York State and north above Lake Abitibi. Around the fringes there were areas of shared use with other nations. Over the past 200 years, however, the most common description of Algonquin territory has been the lands and waters on both sides of the Ottawa River watershed, from the present day Township of Hawkesbury in the east, to Lake Nipissing in the west.

The Algonquin Nation Secretariat is a tribal council which represents the rights and interests of three Algonquin First Nation communities - Barriere Lake, Wolf Lake and Timiskaming - whose territories lie in northwestern Quebec and northeastern Ontario (see map). These territories are included within the lands reserved by the Royal Proclamation of 1763. We possess Aboriginal title to our traditional territories; we have never signed any land cession treaties surrendering Aboriginal title; nor has our title been extinguished by any other lawful means.

Each of our member communities has a completely different history with respect to reserve lands.

- The Timiskaming reserve was established pursuant to 1851 Pre-Confederation legislation. Originally surveyed at 60,000 acres, today just over 5,000 acres remains. The

[1] Canada, *Indian Register Population by Sex and Residence, 1994* (DIAND, Ottawa, 1994).

other 91% of the reserve was either cut off unilaterally or subject to surrenders which are now the subject of claims under Canada's 'Specific Claims' policy.

- The Algonquins of Wolf Lake are without a recognized reserve, despite over a century of petitions. In the 1960's and 1970's, they were the object of a coordinated federal - provincial strategy to force them out of their settlement at Hunter's Point, in the hope that they would simply disperse and assimilate. Despite these efforts, they have maintained their identity and their connection with the land, and continue to press for a recognized reserve.

- The Algonquins of Barriere Lake were not provided with a reserve until the early 1960's. Even so, at 59 acres (for a population of 500) it cannot meet existing needs for housing and infrastructure, let alone future growth or economic development.

The current circumstances of these communities are the result of a long and convoluted history regarding the definition, creation and dismantling of reserves in the province of Quebec, and the official denial of Aboriginal title. This paper will review some of that history, from the perspective of the Algonquin nation and particularly those communities in northwestern Quebec.

1.2. Quebec is Indian territory.

Québec's distinctiveness in the Canadian federation, it is often claimed, extends to Aboriginal rights. Generations of school children have been taught that, from New France, Québec inherited a pattern of dealing with Aboriginal people that was remarkably different from that followed in the Anglo-American colonies. While the French, it is claimed, enjoyed excellent relations with the Indian Nations - treating them far more honourably than their neighbours to the south - they never recognized Aboriginal title, because the French Crown asserted full dominion over all Indian lands in what is now North America.

This argument, which is still common in Québec[1], has had profound consequences for Aboriginal peoples, because it has been largely accepted by the federal government. In 1906, for example, federal commissioners negotiating Treaty Number Nine at Abitibi Post in northwestern Québec told the assembled Algonquins that they had only been authorized to treat with those who had their hunting grounds in Ontario. The reason, as they explained in their official report, was Québec's distinct history:

> The policy of the province of Ontario has differed very widely from that of Quebec in the matter of the lands occupied by the Indians. In Ontario, formerly Upper Canada, the rule laid down by the British government from the earliest occupancy of the country has been followed, which recognized the title of the Indians to the lands occupied by them as their

[1] See Henri Brun, "Les droits des Indiens sur le territoire du Québec", *Cahiers de Droit* 10 (1969):428-430

hunting grounds, and their right to compensation for such portions as have from time to time been surrendered by them. In addition to an annual payment in perpetuity, care has also been taken to set apart reservations for the exclusive use of the Indians, of sufficient extent to meet their present and future requirements.

Quebec, formerly Lower Canada, on the other hand, has followed the French policy, which did not admit the claims of the Indians to the lands in the province, but they were held to be the lands of the Crown by right of discovery and conquest. Surrenders have not, therefore, been taken from the Indians by the Crown of the lands occupied by them.

The reserves occupied by the Indians within the province of Quebec are those granted by private individuals, or lands granted to religious corporations in trust for certain bands. In addition, land to the extent of 230,000 acres was set apart and appropriated in different parts of Lower Canada under 14 and 15 Vic., chap. 106 [1851], for the benefit of different tribes. Several reserves have also been purchased by the federal government for certain bands desiring to locate in the districts where the purchase was made.[2] (emphasis added)

While the Commissioners' account of reserve creation is correct, there is only one problem with the their analysis of historical Québec Aboriginal policy - it isn't true. Britain did not adopt French policy with regard to Aboriginal land claims in what is now Québec. Nor did the British Crown ever claim unceded Indian lands in that province by virtue of discovery or conquest. Unlike the French-speaking inhabitants of what is now Québec, the Indian Nations were considered allies, not subjects, of the Crown, and their pre-existing land rights were to be respected. When French civil law was reintroduced into an enlarged Province of Quebec in 1774, it was never intended that the Indian Nations would be subject to its provisions.

The modern province of Québec is a creation of British colonial law, not of prior French law or custom. Like Ontario, it has all along been subject to what Professor Brian Slattery calls "common law Aboriginal title". By virtue of the Royal Proclamation of 1763 and subsequent regulations, that Aboriginal title can only be acquired by the Crown through voluntary surrender "taken from the Indians of the lands occupied by them".[3] And as the recent *Delgamuukw* decision of the Supreme Court of Canada has made clear, a provincial Crown (such as Québec) cannot take a surrender of Aboriginal title; only the Crown in right of Canada (the federal government) can do so.

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[2] James Morrison, *The James Bay Treaty: Treaty Number Nine* (Treaties and Historical Research Centre: Indian and Northern Affairs Canada, 1985), Appendix: Commissioner's Report, pp.13-14.

[3]Brian Slattery, "Understanding Aboriginal Rights", *The Canadian Bar Review* (December 1987) 738-739; 768-769.

The fact that land cession treaties were made in Upper Canada (Ontario), but not in Lower Canada (Quebec) has a straightforward explanation. Between 1783 and 1830, when most of those treaties were made, Upper Canada was almost entirely an immigrant colony, while Lower Canada, by and large, was not. The arrival in Upper Canada of so many refugees from the American Revolution and new British immigrants required the opening up of large areas of land for agricultural settlement (hence the use of land treaties). The expansion of farming in what is now Quebec, by contrast, was largely confined to long-settled seigneuries along the St. Lawrence River valley, and most of it was carried out by French-speaking *canadiens* who had been born and raised in the province. Unlike Upper Canada, therefore, there was no comparable pressure on the government in Lower Canada to open new lands for settlement.

It is true that, in the period after 1830, there were still no land cession treaties negotiated with the First Nations of what is now Quebec. But this was not because Imperial officials (who remained responsible for Indian Affairs in the colony) were somehow guided by old French colonial policy. They never referred to it. In fact, officials were well aware that the common law of Aboriginal title required treaties. But they were hindered by powerful economic forces, which were now in the process of opening unceded Indian lands to settlement and resource extraction.

By 1830, an enormous expansion was underway in the square timber trade, as lumbermen entered the Ottawa valley (which had been beyond the line of seigneurial settlement) and began to move up the various tributaries in search of red and white pine. Associated with this, for the first time, was large scale immigration into Lower Canada, much of it from Ireland. At the same time, the huge natural increase of the French-speaking population and general lack of economic opportunities was putting pressure on available land. Over the following decades, this would result in large-scale *canadien* emigration to the northeastern United States.

To counter this trend, particularly after 1837, provincial authorities in Lower Canada, in concert with the Roman Catholic Church, began to develop a programme of internal colonization, centred on the valleys of the Saguenay and the lower Ottawa River. Indian Department officials continued to protest the increasing encroachment on Aboriginal lands, but local politicians in the eastern half of the pre-Confederation Province of Canada - many of them English-speaking timber magnates themselves, or directly connected with the forest industry - believed they could open such unceded Indian lands to settlement and resource extraction without first dealing with Aboriginal title. When Oblate missionaries began lobbying for creation of reserves in the Province, the provincial government saw this as the easiest way to solve the problem and in 1851 the Legislature set aside 230,000 acres of land for the residence of the Indian tribes - including the Algonquin Nation. The Reserves at Timiskaming and River Desert (Maniwaki) were created in 1853 out of this allotment.

This creation of reserves had nothing to do with the extinguishment of Aboriginal title. But after Confederation, in order to justify the ongoing non-recognition of Aboriginal title, nationalist circles in the province of Québec came up with the theory that their predecessors had simply

been following French colonial practice. This is what the Treaty 9 commissioners had reported as historical truth. This self-serving argument was important to Québec, because Canadian boundary extension acts in 1898 and 1912, which incorporated the Abitibi and James Bay regions into that province, implicitly or explicitly recognized pre-existing Aboriginal rights in those same territories.

2. PRE-CONFEDERATION HISTORY.

2.1. The French Regime.

Even the statement that France never admitted Indian claims to land is incorrect. As a number of historians have pointed out, French policy towards Aboriginal people has been frequently misunderstood. It is important, for example, to distinguish between assertions of international and domestic sovereignty.[4] The French Crown never claimed full title to lands occupied by Indian nations within the purported boundaries of Canada, which, after all, covered an enormous part of North America.[5]

This was especially true of the lands north and west of the seigneuries on the St. Lawrence River where, since 1716, settlement and clearing of land had been forbidden without the express authorization of the Crown.[6] Known to the French as the "pays d'enhaut"[7], and to the Anglo-Americans as "Indian country"[8], this was the zone of the fur trade. Effective French sovereignty in these regions extended no further than musket range of their trading posts.[9]

The traditional lands of the Algonquin Nation, which extended up both sides of the Ottawa River and inland towards James Bay, were always considered part of the Indian country. The French

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[4] Cornelius Jaenen, *The French Relationship with the Native Peoples of New France and Acadia* (Research Branch: Indian and Northern Affairs Canada, 1984): 17-47.

[5] Brian Slattery, "Did France Claim Canada upon Discovery?", in J.M. Bumsted (ed.), *Interpreting Canada's Past*, Volume I (1986): 2-26.

[6] Cornelius Jaenen, *The French Relationship with the Native Peoples of New France and Acadia* (Research Branch: Indian and Northern Affairs Canada, 1984): 32.

[7] The Capitulation at Montreal, Articles 37, 39 [French text]. Adam Shortt and Arthur G. Doughty (eds), *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa:King's Printer, 1907) [hereafter CD].

[8] Alexander Henry, *Travels and Adventures in Canada and the Indian Territories between 1760 and 1776.* (James Bain, ed.; Toronto, 1901):3,12,18.

[9] W.J. Eccles, "Sovereignty-Association, 1500-1783", *Canadian Historical Review* (Vol. 65: 1984): 475.

traded with the Algonquins at posts along the Ottawa and its tributaries, with major trading establishments at Abitibi and Témiscamingue.[10]

In the first half of the eighteenth century, some members of the Algonquin Nation (known at the time both as Algonquins and Nipissings) were spending their winters in their homelands and their summers at the Sulpician mission settlement on Lake of Two Mountains, which they called Oka (pickerel).[11] These were the people who hunted along the lower Ottawa River as far as Mattawa and Lake Nipissing.[12]

The Algonquins who remained on their lands year-round were known to the others as *Nopiming daje inini* or inlanders, which the French translated as *gens des terres*. To confuse matters, the French occasionally called them *têtes de boule*, which was a term applied as well to the Atikamekw Nation of the upper St. Maurice region.[13] These were the Algonquins who inhabited the headwaters of the Ottawa, including Long Point (Winneway), Grand Lac, Lac Simon and Barrière Lake, as well as the Kipawa, Abitibi and Témiscamingue regions.[14]

2.2. Nation to Nation relations.

The strategic military importance of the Aboriginal nations during this period was noted by the Supreme Court of Canada in 1990 when it ruled in *Sioui*:

> Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the co-operation of the Indians. Accordingly, from then on they made efforts to ally themselves with as many Indian nations as possible. The French, who had long realized the strategic role of the Indians in the success of any war effort, also did everything they could to secure their alliance or maintain alliances already established.[15]

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[10] "Mémoire d'Antoine de Bougainville...1757", in Pierre Margry (ed), *Relations et Mémoires Inédits pour servir à l'histoire de la France dans les Pays d'Outre-Mer* (Paris, 1867): 52-56.

[11] De Charlevoix, *Journal d'un voyage fait par ordre du roi dans l'Amerique Septentrionale*, Tome 3e (Paris:1744):186-187.

[12] Letter from Daniel Claus, 8 July 1772, in *The Papers of Sir William Johnson* (Albany, 1921-1957), XII:971-72.

[13] Adolph Greenberg and James Morrison, "Group Identities in the Boreal Forest: the Origin of the Northern Ojibwa", *Ethnohistory* Vol 29#2 (1982):85-87, 97n.19

[14] Dénombrement des nations sauvages...1736. Archives Nationales du Canada [ANC] Reel F-66 C11A Tome 66: fo.238

[15] *A.G. for Québec v. Régent Sioui et al*, Supreme Court of Canada, Reasons for Judgement, 24 May 1990, at p. 31.

The Algonquins were famous warriors. As allies of the French, they fought many battles against the British and their Native allies, the Six Nations Iroquois. Without their assistance, and those of other "domiciled" Nations, Montréal and the other tiny French settlements along the St. Lawrence would not have survived the seventeenth century.[16]
But it wasn't just the mission Algonquins who were involved in combat. In the late seventeenth and early eighteenth centuries, warriors from as far away as Abitibi and Témiscamingue joined the French on their expeditions against the Iroquois and the English.[17] During the Seven Years War, inland Algonquins also fought alongside their brethren from Oka until the French alliance was abandoned in the late summer of 1760.[18]

As late as the 1950's, it was still possible for historians to ignore Aboriginal people when writing about the conquest of New France.[19] Such rights as France's former allies had retained under the British, it is usually argued, flowed from Article 40 of the capitulation of Montréal, signed on September 8th, 1760. The capitulation had been drafted by the Marquis de Vaudreuil and his officers:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse 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 [...][20]

But the Indian Nations were not dependent on such agreements between France and Britain to protect their interests. As Mr. Justice (now Chief Justice) Lamer of the Supreme Court pointed out in the *Sioui* decision, the Hurons of Lorette had already made their own treaty with the British two days before the fall of Montréal.[21]

The same was true for other Indian Nations of what is now Québec. In mid-August of 1760, deputies of nine tribes (including representatives of the Algonquin nation) came to meet Sir

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[16] Denys Delâge, "Les Iroquois Chrétiens des 'Réductions, 1667-1770", *Recherches amérindiennes au québec*, XXI:1-2 (1991):62-63.

[17] "Revue faite au fort Frontenac le 17e aoust 1684" ANC C11A t.6 pt1 (transc.):438; lettre de Beauharnois, 21 juillet 1729 ANC C11A t.51 (transc.):129-131

[18] H.R. Casgrain (ed), *Journal du Marquis de Montcalm durant ses campagnes en Canada de 1756 à 1759* (Québec, 1895): 264-267; 352-53; 368-69.

[19] Guy Frégault, *La Guerre de la Conquête* (Montréal:Fides, 1955).

[20] CD, I: 27 [Capitulation, English text].

[21] *A.G. for Québec v. Régent Sioui et al*, Supreme Court of Canada, Reasons for Judgement, 24 May 1990, p.41

William Johnson, the British Superintendent of Indian Affairs, at Fort Lévis in the St. Lawrence River. British forces, beginning their descent on Montréal, had just captured this island stronghold near what is now Prescott, Ontario. There, according to Sir William, the nine Nations ratified a Treaty with the British, "whereby they agreed to remain neuter on condition that we for the future treated them as friends and forgot all our former enmity".[22]
The consequences of that treaty were devastating for the French colony, since the Indian Nations controlled the water routes to Montréal. On the 29th of August, the French commander, the Maréchal de Lévis, called a council with the chiefs and warriors at La Prairie to urge them to stay in the French interest. As he was speaking, the ambassadors who had been sent to Sir William Johnson suddenly returned, interrupting him to announce that they had already made peace with the British. The assembled tribes vanished, leaving Lévis with a belt of wampum dangling uselessly from his hand.[23]

On September 16th, the week after the Marquis de Vaudreuil had signed the Articles of Capitulation, a great council took place at Kahnawake. Sir William Johnson met with the 6 Nations of the Iroquois Confederacy and the Seven Nations of Canada[24] to continue the negotiation of a separate peace with the Aboriginal nations themselves. At the conclusion of this treaty council, the Seven Nations of Canada spoke to Johnson:

> [...] As every matter is now settled to our mutual satisfaction we have one request to make to you who have now the Possession of this Country. That as we have according to your desire kept out of the Way [and been Neuter] of your Army, You will allow us the peaceable Possession of the Spot of Ground we live now upon, and in case we should remove from it, to reserve to us as our own.[25]

Where the French had been negotiating in the shadow of defeat, the Aboriginal nations were negotiating from a position of strength. As we shall demonstrate, subsequent Crown policy and legislation confirms that the Seven Nations' request was agreed to. For example, in July 1761, General Jeffrey Amherst, Commander of the British forces, wrote to Sir William Johnson:

> [...] The Indians may be Assured I will protect them in their Lands; Whether they dispose of them or not, is entirely at their own option, I shall never force them to dispose of any,

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[22] Johnson to William Pitt, 24 October 1760, JP, III:272-273.

[23] *Collection des Manuscrits du Maréchal de Lévis*, t.1: Journal du chevalier de Lévis (Montréal, 1889): 301; James Thomas Flexner, *Mohawk Baronet: A Biography of Sir William Johnson* (Syracuse University Press, 1979): 219

[24] The Seven Nations of Canada were the former allies of the French. They included the Algonquins, Ojibway, Hurons, Innu, and others.

[25] Record of council with the Indians of the Six nations and Seven nations, 16 September 1760: *The Papers of Sir William Johnson*, Vol.13: pp. 160-166.

> but will Secure them in what they have; and no otherwise Interfere with their Lands, than by taking such Posts as I may think necessary, for ensuring the protection of this Country for the King [...][26]

Sir William Johnson used his close contacts with the Six Nations of New York province to cement diplomatic ties with these former Native adversaries. After the capture of New France, the Seven Indian Nations of Canada, along with their allies and dependants, formally united together with the Six Nations to form one large confederacy in the British interest.[27]

Unlike the *canadiens*, the First Nations of Québec were considered allies, not subjects, of the British Crown. Over the years that followed, colonial officials responsible for Indian relations (governors, the military, and officers of the Indian Department) continued to explicitly recognize such domestic sovereignty.

Governor Haldimand of Quebec made this point at the close of the American Revolutionary War in 1783, when he issued instructions to Sir William Johnson's son, John Johnson, as the new Superintendent-General of Indian Affairs. Since the Indian Nations, he wrote, "consider themselves, and in fact are, free and independent, unacquainted with Control and subordination, their Passions and Conduct are alone to be governed by Persuasion and Address".[28]

First Nations from what is now Québec, including warriors of the Algonquin Nation, had fought as allies of the British throughout the American Revolutionary War. They also fought in the War of 1812-15 - helping, for example, to defeat the Americans at the Battle of Chateauguay.[29] The Algonquin Nation remained loyal to the British Crown during the 1837-38 Rebellion in Lower Canada.[30] Algonquins have also, in keeping with this martial tradition, served overseas with Canadian Forces in both World Wars.

2.3. British military rule, 1760-1763.

After the fall of Montreal, Britain never intended that the Aboriginal peoples living within the former boundaries of Canada would be subject to French colonial usages and customs, whatever

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[26] Amherst to Johnson, 11 July 1761: "The Papers of Sir William Johnson" (Albany, University of the State of New York, n.d.) Vol. III: pp. 506-507. See also Amherst to Johnson, 9 August 1761: pp. 514-516.

[27] Daniel Claus to William Johnson, 30 Sept. 1761, JP, III:546-547.

[28] Instructions to Sir John Johnson, 6 February 1783. NAC Reel B-36 CO42/44: 95-97.

[29] John Johnson to Colonel Darling, 9 February 1821. NAC RG1 L3 Vol.110

[30] Fernand Ouellet, *Lower Canada 1791-1840: Social Change and Nationalism* (Toronto: McClelland and Stewart, 1980): 303,307,321.

the application of those laws to Aboriginal people may have been. The continuation of those French laws had been rejected by the British Commander in Chief, General Jeffrey Amherst, under the terms of the Capitulation.[31]

In fact, the British Crown promised equal treatment to both French-speaking *canadiens* and Aboriginal people. As King George III instructed General Jeffrey Amherst in 1760-61, the Indian Nations were to be treated "upon the same principles of humanity & proper indulgence" as the French; and Amherst was to "cultivate the best possible Harmony and Friendship with the Chiefs of the Indian Tribes".[32]

On September 20, 1760, following the Kahnawake treaty, Sir William Johnson had appointed his son-in-law, Daniel Claus, as Deputy Indian Agent at Montreal, in order to extend "the British Indian interest".[33] At a series of council meetings with the Algonquins and other First Nations, Claus assured them that their rights would be respected.[34]

The military government did abolish the former French trade monopolies, which had seen fur trade posts (such as Témiscamingue) either kept for the Governor's profit or sold to the highest bidder. But the three military jurisdictions - Montréal, Québec and Trois Rivières - maintained the French distinction between the settled lands on the St. Lawrence and Indian country. Within the Montreal district, for example, traders needed military permission to pass up the Ottawa River beyond the old seigneurial boundaries west of Lake of Two Mountains.[35]

2.4. The Province of Quebec, 1763-1774.

The Royal Proclamation of October 7, 1763 created the Province of Quebec, though it was a colony with relatively limited boundaries. These encompassed the old French seigneuries and a part of the interior country within a diagonal line drawn from Lac St. Jean southwest to the eastern tip of Lake Nipissing.[36] The Imperial Crown's purpose in doing so was to include the rivers which flowed into the St. Lawrence from the northward, presumably so that the St.

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[31] Article 42. CD, I:27

[32] NAC Reel A-617 Haldimand Papers BL 21697. Instructions to Amherst, 17 December 1760; Earl of Egremont to Amherst, 12 December 1761.

[33] NAC MG19 F1 Vol.20

[34] Daniel Claus to William Johnson, 19 March 1761. JP, III:361-63.

[35] Thomas Gage to Lords of Trade, 20 March 1762, CD, I:70-71.

[36] The Royal Proclamation, 7 October 1763, in C.S. Brigham (ed) *British Royal Proclamations Relating to America, 1603-1783* (Transactions and Collections of the American Antiquarian Society, Vol.12, 1911):212-218.

Lawrence and Ottawa River routes, the main access points to the settled part of the province, would be under the new civil government's control.[37]

Some new settlement was to be permitted in Quebec, particularly for demobilized military officers and their families. Thus, Part II of the Proclamation permitted the Governor of Quebec to "settle and agree" with the inhabitants of the province for such lands as "are now or hereafter shall be in Our power to dispose of". However, the Crown had relatively little land at its disposal, and very few Anglo-American settlers actually arrived in the province.
Apart from the seigneurial grants, the remaining lands in Quebec were in the possession of the Aboriginal peoples. These were protected by the provisions set out in Part IV of the Proclamation:

> 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 to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

Accordingly, the Governors of Quebec and the other colonies were forbidden to pass patents or issue warrants of survey beyond the bounds of their commissions. Private persons were forbidden to settle on unceded Indian lands. When Indian lands were wanted, they were to be purchased for the Crown at a public meeting with the nations or tribes concerned.[38]

When Governor James Murray of Quebec received his commission and instructions from the Crown in December 1763, the terms of the Royal Proclamation were highlighted to him. With respect to the Aboriginal nations, he was told: "[...] you are upon no Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess [...]"[39]

The Royal Proclamation of 1763 was officially promulgated within the new Province of Québec by Governor Murray. This was so that the new and old subjects of the Crown would know the various regulations it contained.[40] The Crown also ordered Sir William Johnson to make the Proclamation known to the Indian Nations within the territories under his jurisdiction.[41]

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[37] Lords of Trade to Earl of Egremont, 8 June 1763, CD, I:103-104.

[38] Royal Proclamation, pp. 215-216.

[39] Instructions to Murray, 7 December 1763: [Canada Parliament, House of Commons Sessional Papers Vol.XLI No.7 Sessional Paper No. 18, 6-7 Edward VII., A 1907].

[40] James Murray to the Lords of Trade, 26 January 1764. NAC MG11 CO42/1:1.

[41] Copy of Proclamation as posted by Sir William Johnson, NAC MG19 F2 Vol.1.

These Indian territories included the lands of the Algonquins. Some of these lands, such as those along the Ottawa River, were now within the Province of Quebec. The remainder were within the great Indian reserve set out in Part IV of the Proclamation. There was to be no settlement at all within the latter territories, without the "leave and licence" of the Crown (and the consent of the Indian Nations).[42]

Sir William Johnson personally delivered a copy of the Royal Proclamation to the Algonquins and Nipissings: in the 1840's, they still had it in their possession, and were using it in their petitions for protection of their traditional territory.[43]

The terms of the Royal Proclamation were formally put to the Aboriginal nations themselves at Niagara in the summer of 1764[44], at a major treaty council which was attended by over twenty Aboriginal nations, including the Algonquins. The Proclamation's terms were accepted by the First Nations, and large wampum belts were made to codify the agreements reached.[45]

The 1971 report of the *Dorion Commission* on the territorial integrity of Québec disputes the applicability of the Proclamation within the boundaries created in 1763. However, it fully accepts that the Proclamation applied to the lands north of Québec's 1763 boundary.[46] This conclusion is supported by a number of decided cases.[47]

Historical evidence, however, shows that the provisions of the Proclamation were also strictly observed within the old province of Quebec. In 1766, for example, His Majesty's Privy Council in London had endorsed a grant of 20,000 acres to a certain Joseph Marie Philibot at a location

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[42] Royal Proclamation, p.216.

[43] Petition to the Governor from the Algonquin and Nipissing Tribes, 1845: NAC RG10 Vol.94: pp. 38451-38459, Reel C-11,469.

[44] William Johnson to General Gage, 19 February 1764: "The Papers of Sir William Johnson" Vol.4 (Albany, Univ of State of NY, 1925).

[45] See Paul Williams and Curtis Nelson, *Kaswentha* (report prepared for the Royal Commission on Aboriginal Peoples, January 1995); also John J. Borrows, *Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island* (North York: thesis submitted to the Graduate Program in Law, Osgoode Hall Law School, York University, 22 September 1994): pp. 64-93.

[46] *Rapport de la Commission d'étude sur l'Integrité du Térritoire du Québec*, 4.1: Le Domaine Indien (Québec, 1971):45; 244-45;389-90.

[47] *A.G. for Quebec v. A.G. for Canada* [1921] 1 App.Cas. 401 (Privy Council).

of his choosing.[48] But when that individual asked for land on the Restigouche River (in Mi'kmaq territory), the Governor and Council of Quebec refused his application - on the grounds that "the lands so prayed to be assigned are, or are claimed to be the property of the Indians and as such by His Majestys express command as set forth in his proclamation in 1763, not within their power to grant".[49]

Lands within the province which the Crown considered in its "power to dispose of" to settlers (to use the wording of the Royal Proclamation) did not include the areas north and west of the Ottawa and St. Lawrence Rivers. As under the military regime, these lands were reserved to Aboriginal peoples and zoned for the fur trade. In April of 1764, it was forbidden for inhabitants of Québec to pass beyond Carillon on the Ottawa without a pass from the Governor.[50]

2.5. The Province of Quebec, 1774-1791.

By the *Quebec Act* of 1774, the province's boundaries were enormously enlarged, extending as far to the westward and southward as the upper Great Lakes and the Mississippi River. This took in much of the territory which had been reserved under the Proclamation for exclusive Indian occupation.[51] Virtually all of the lands of the Algonquin Nation, for example, were now within the bounds of Quebec.

The reason for the boundary extension, as both the Preamble to the Act and subsequent instructions to the Governor make clear, was that many small French interior settlements (such as Detroit, Michilimackinac, Poste Vincennes on the Wabash River and Kaskaskia on the Illinois) had been left by the Proclamation without civil government. Not only would these settlements now be governed from the St. Lawrence, but they would be able to avail themselves of French civil law, which had been reintroduced by the *Act* as well.[52]

It has been asserted (for example, by the Ontario Court of Appeal in the Bear Island decision) that the *Quebec Act* repealed the "Indian provisions" of the Royal Proclamation, making the Indian Nations thenceforth subject to French civil law and allowing the Crown to substitute whatever new provisions it desired. But the new arrangements for the interior country actually had little relevance for the Indian Nations of Quebec. The First Nations, as before, had a direct

[48] [Copy of] Privy Council Minute, 18 June 1766. NAC RG1 L3L Vol. 157

[49] Minute of the Executive Council, 27 December 1766. NAC RG1 E1 Vol. 3 (transc.):292-293.

[50] Proclamation, 13 April, 1764. *Report of the Public Archives for the Year 1918* (Ottawa: King's Printer, 1920): 82-83.

[51] *The Quebec Act*, 1774. 14 George III, c.83 [Imp.]

[52] Instructions to Governor Guy Carleton, 3 January 1775, Article 15. CD, I:423-24.

relationship with the Crown, through the British military and Indian Department. As the Commander in Chief explained to the head of that Department shortly after the passing of the *Quebec Act*, Indian people were ordinarily left to "their own usages and customs" in most things. While they might, said General Thomas Gage, have been informed that, "in cases of murder or robbery", they could be tried according to English criminal law, the "French law of Canada" would have no authority over them.[53]

The settler government in Quebec, which at this time consisted of a Legislative Council, rather than an Assembly, had no constitutional authority over Aboriginal people themselves, though it could and did pass laws to protect them from depradations by whites. One such piece of legislation was a 1777 Ordinance to prevent the selling of liquor to Aboriginal people. Under its terms, inhabitants of Quebec were also forbidden to travel past the foot of the long fall on the Ottawa River (near Carillon) without a pass. Nor was anyone to be allowed to settle "in any Indian village or Indian country within this Province" without a licence in writing from the government.[54]

Within that Indian country, British officials hastened to assure the various Indian Nations, in the years immediately following the Quebec Act, that the provisions of the Royal Proclamation protecting their land rights remained in effect. At Detroit (the interior French enclave which included modern Detroit, Michigan and Windsor, Ontario), Lieutenant-Governor Henry Hamilton met with representatives of the Odawa Nation on 13 June 1776.

> The Ottawa chiefs & the people who had claims on their Lands by Deed or promise being assembled Gov[erno]r Hamilton told them that notwithstanding **they were certainly the proprietors & owners of their Lands as much as of the Skins they hunted for**, and could dispose of them - yet the King with a view to their Interest had Issued orders regarding their property to prevent his Subjects from fraudulently obtaining them - & then explained that part of the King's Proclamation of 1763 and added that it would be impossible for him to act contrary to it.[55] (emphasis added)

Lieutenant-Governor Hamilton was still giving similar assurances two years later. [56]

In any case, there was little settlement pressure within the province of Quebec until the close of the American Revolutionary War, when Britain suddenly had to provide for great numbers of refugee Anglo-American Loyalists. Many of these refugees wanted to settle on Indian lands

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[53] Thomas Gage to Guy Johnson, Sept.18, 1774. JP, VIII.

[54] Quebec Ordinance 17 George III cap.7 [1777]

[55] NAC MG 29 F 35 Johnson Papers Series 1, Lot 687, p.53. Journal of Indian Transactions at Detroit, 13 June 1776.

[56] Lt. Gov. Henry Hamilton to Gov. Haldimand, 9 September 1778. NAC MG21 BL Add.Mss.21,782.

north of the St. Lawrence River and Lakes Erie and Ontario. As a result, beginning in 1781, the Crown acquired various tracts of land from the Indian nations, in keeping with the rules set down in the Royal Proclamation of 1763. One of these purchases, in 1783, of lands in what is now the far corner of eastern Ontario, was made from Mynass, an Algonquin Chief who lived at Oka.

Some Loyalists also settled in what are now the Eastern Townships of Québec. The Crown had purchased the Seigneury of Sorel for them, and, with other seigneurial lands available, there was little need to apply to the Indian nations for more land. Disputes did arise at St. Regis-Akwesasne, much of which was coveted by the settlers. However, settler petitions to the Executive Council, the ultimate land-granting authority were refused, on the grounds that the lands in question, being Indian lands, were "not in the King's power to grant".

2.6. The Province of Lower Canada, 1791-1840.

The Province of Canada was created by Imperial statute in 1791.[57] What had remained of Quebec after the American Revolution was formally divided into Lower and Upper Canada by Imperial Order in Council of 24 August 1791. The boundary between the two provinces was to run along the Ottawa River as far as Lake Témiscamingue and then "due North until it strikes the boundary line of Hudson's Bay".[58] The traditional lands of the Algonquin Nation, therefore, were now both in Upper and Lower Canada.

French civil law was to apply in the lower province, while the English common law was to prevail in the upper. This did not, however, affect common law Aboriginal title, which was to have the same application in both. Shortly after the passing of the 1791 legislation, the King reappointed Sir John Johnson as Superintendent General of Indian Affairs. He was to assure "Our Faithful allies, the Nations inhabiting our provinces of Upper and Lower Canada and the frontiers thereof" of His Majesty's continued concern for their welfare.[59]

These assurances included protection of existing land rights. As Sir John's superior officer - Governor Guy Carleton (Lord Dorchester) - assured the Confederation of Indian Nations at Montréal in 1791, the Crown "never has, and never will, take a foot of land from you without your consent, and without paying you for it".[60]

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[57] *The Constitutional Act of 1791*, 31 George III, C.31 [U.K.]

[58] A.G. Doughty and T. McArthur (eds), *Documents Relating to the Constitutional History of Canada*, Vol.II:1791-1822 (Ottawa, 1913): pp.3-5.

[59] Commission, 16 September 1791. NAC MG11 CO42/316: fo.65

[60] Archives of Ontario. F47 John Graves Simcoe Papers. Letterbook 17-1791.

There were problems, however. As Lord Dorchester explained to the colonial secretary in early 1795, he had been hearing frequent "complaints of the Indians of Lower Canada regarding their Lands", as well as protests from the Indians in Upper Canada that "Persons who have taken possession of Lands which are still claimed by them". These discontents, according to the Governor, "could proceed only from the omission of Form, and want of knowledge in the Persons employed to make Purchases of their Lands". Deciding therefore to expand on the rules originally set out in the Royal Proclamation of 1763, Lord Dorchester had issued a new series of regulations to Sir John Johnson on 24 December 1794.[61]

These regulations clearly applied to Lower Canada, as well as to the upper province. They state that when lands are wanted in "**any of the King's Provinces**" (emphasis added), proper requisitions are to be made to the Commander in Chief. By Article 3, "All purchases are to be made in public Council with great solemnity and ceremony according to the antient [sic] usages and customs of the Indians, the principal Chiefs and Leading Men of the Nation or Nations to whom the lands belong being first assembled". Proper maps of the lands to be acquired were to be made, and copies of the agreements given to the Indian Nations for their records.[62]

Between 1794 and 1830 in Upper Canada, the British Crown entered into a long series of land cession treaties with the First Nations. This was to allow for the settlement of American Loyalists and subsequent British immigrants.[63] Within Lower Canada, on the other hand, there was no sustained pressure on unceded Indian lands before the 1820's. Until that time, settlement had largely been confined within the old seigneurial grants along the St. Lawrence.[64]

When the frontier of settlement did advance into Indian country, Indian Department officials insisted that the Royal Proclamation of 1763 continued to apply. In 1824, the octogenarian Superintendent-General, Sir John Johnson, argued in a letter to the Governor that the lands of the Algonquin Nation were being illegally encroached upon by lumbermen and settlers:

> By His Majesty's Proclamation dated the 7th October 1763, a copy of which is herewith enclosed, you will find that it is expressly provided that the Indians shall not under any Pretence whatever, be deprived of the Lands claimed by them, unless they should be inclined to dispose of them, in which case they are to be Purchased for the Crown only, and at some Public meeting to be held for that purpose.[65]

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[61] Dorchester to the Duke of Portland [No.16], 1 January 1795 (with enclosures). NAC MG11 CO42/101.

[62] NAC RG10 Vol. 789

[63] Robert S. Surtees, *Indian Land Surrenders in Ontario 1763-1867* (Ottawa: Indian and Northern Affairs, 1984)

[64] Gérard Fortin et Jacques Frenette, "L'Acte de 1851 et la création de nouvelles réserves indiennes au Bas-Canada en 1853", *Recherches Amerindiennes au Québec*, Vol.XIX No1 (1989): 31

[65] Johnson to Colonel Darling, 5 Nov.1824. NAC RG10 Vol.494: 31028-29.

As late as 1837, the Executive Council of Lower Canada considered that the Algonquin Nation had established a valid claim to their hunting grounds along the Ottawa River, based on the Royal Proclamation and Lord Dorchester's regulations.[66]

2.7. The Province of Canada, 1841-1867.

By the early 1840's, the Lower Canada forest industry had spread into the Saguenay-Lac St. Jean region and far up the Ottawa River and its tributaries. English-speaking lumbermen like William Price (the "father of the Saguenay") and the Irishman John Egan - who held all the licences around Lake Temiskaming - used their influence with the provincial government to open what had until then been fur trade and Indian country to resource extraction.[67]

At the same time, the Catholic clergy were pressing the government to allow proper colonization of the Saguenay. They were concerned that rural people, faced with a shortage of arable land in the old seigneuries, had been leaving for the towns of Canada and the United States.[68]

As some compensation to Aboriginal peoples who were being displaced, Oblate missionaries petitioned the provincial government to provide Indian reserve lands in the Saguenay and Ottawa regions. These would include a township on the Gatineau River and another large tract at the head of Lake Témiscamingue, both for the Algonquins and their relations. In a report to the government dated August 2nd 1849, the Assistant Commissioner of Crown Lands, Téophile Bouthillier, recommended that the tracts be set apart. He also noted the contrast between the two halves of the province of Canada in their treatment of Indian claims:

> There is this general observation to make in conclusion, that while in Upper Canada the Government have scrupulously paid the actual occupants of the soil for almost every inch of ground taken from them, making fresh purchases as new districts were laid out, they in Lower Canada appear to have been totally regardless of all Indian claims.[69]

The Assistant Commissioner's remark was meant as a criticism, not as a defence, of Lower

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[66] John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858* (Ottawa: Indian and Northern Affairs, 1985): pp. 45,65.

[67] Louise Dechêne, "William Price", *Dictionary of Canadian Biography*, IX (Toronto: University of Toronto Press, 1976): 638-642; Elaine Mitchell, *Fort Temiskaming and the Fur Trade* (Toronto: University of Toronto Press, 1977):162-173; Chad Gaffield (ed), *Histoire de l'Outaouais* (Institut québécois de recherche sur la culture, 1994):166-179.

[68] Fortin et Frenette, "L'Acte de 1851": 31.

[69] NAC RG1 E8 Vol.33

Canada land policy. Nowhere do Bouthillier or any other government officials of this period suggest that the lower province, in disregarding Indian claims, was following old French colonial practice.

The government's response to these petitions was the Lower Canada Statute of 1851, which set apart 230,000 acres of land in Canada East for the use of certain Indian tribes.[70] By Order in Council of 9 August 1853, these lands were formally distributed. The schedule included 38,400 acres at the head of Lake Témiscamingue, and 45,750 at Maniwaki or Rivière Désert for the "nomadic tribes" of the Nepissingue, Algonquin, Outaouais and Têtes de boule.[71]

In effect, then, the creation of reserves in Canada East constituted a degree of compensation for damages caused to Aboriginal hunting grounds by lumbering and settlement.[72] However, none of the official documents, including the 1851 statute, tied reserve creation to the extinguishment of Aboriginal title.[73] This is not surprising, since the Legislative Assembly of Canada had no such constitutional authority.

As the Imperial government slowly devolved self government powers to the colonies, legislation was enacted which extended the policy contained in the Royal Proclamation and subsequent prerogative instructions. A series of statutes from 1850 onwards set certain standards for the management of Indian lands and imposed obligations on the Crown in this respect. The early legislation applied to unceded Aboriginal title lands, and not just reserves as later defined by the *Indian Act*.

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, adopted in 1850[74], was clear and plain in its intention:

> Whereas it is expedient to make better provision for preventing the encroachments upon and injury to the lands appropriated to the use of the several Tribes and Bodies of Indians in Lower Canada, and for the defence of their rights and privileges [...]

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[70] *Acte pour mettre à part certaines étendues de terre pour l'usage de certaines tribus de Sauvages dans le Bas-Canada*. S.C. 14-15 Vic. cap. 106 [1851]

[71] Order in Council, 9 August 1848. NAC RG1 E8 Vol.48.

[72] Fortin et Frenette, p.34

[73] Daniel Francis, *Histoire des Autochtones du Québec, 1760-1867*. (Ottawa: Ministère des Affaires indiennes et du Nord, 1984): 31-34.

[74] *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 10 August 1850. S.C. 1850, c.42 (13 & 14 Vict.)

The defender was to be the "Commissioner of Indian Lands for Lower Canada", in whom was vested, in trust for the tribes,

> all lands [...] which are or shall be set apart or appropriated to or for the use of any [...] Body of Indians, [...] **and who shall be held in law to be in occupation and possession of any Lands in Lower Canada actually occupied or possessed by, any such [...] Body in common** [..]

The statute further states that the Commissioner "[...] shall and may exercise and defend all or any rights lawfully appertaining to the proprietor, possessor or occupant of such land [...]".[75] (emphasis added)

The wording of the legislation suggests that any lands occupied and possessed by Indians come within the Act, and not just lands "set apart or appropriated".[76] It also sets a high standard of conduct on the part of the defender - the Commissioner of Indian Lands for Lower Canada.

In 1860, *An Act respecting Indians and Indian Lands* for Lower Canada continued to view all Aboriginal territories as reserved lands, and established penalties for unlawful settlement. Section 3 stated that:

> **No person shall settle in any Indian Village or in any Indian country**, within Lower Canada, without a license in writing from the Governor, under a penalty of forty dollars for the first offense, and eighty dollars for the second and every other subsequent offence.[77] (emphasis added)

The principle that all Aboriginal territories in Quebec were reserved for the tribes is reinforced by the case law. *St. Catherine's Milling*[78] held that "lands reserved for the Indians" included unceded lands. Furthermore, courts have consistently confirmed that the Indian interest in *Indian Act* reserve lands is the same as the interest in unceded Indian lands (see *Star Chrome*[79],

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[75] *Ibid.*

[76] Walpole Island and Akwesasne are two examples of reserves that were never formally set aside, being simply Aboriginal title lands.

[77] *An Act respecting Indians and Indian Lands* (Lower Canada), CSLC 1860, c.14.

[78] *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46, 60 L.T. 197 (P.C.).

[79] *sub nom. Attorney-General for Quebec v. Attorney-General for Canada. Re Indian Lands* (1920), 56 D.L.R. 373, [1921] 1 A.C. 401 (P.C.).

Guerin[80], and *Delgamuukw)*.[81]

The point of the preceding text is to demonstrate that Algonquin nation territory was reserved for their exclusive use, both through treaty and statute. In this context, all of Algonquin territory is "reserve land". This poses a special problem for researchers involved in preparing the evidence required to pursue claims, and for those concerned with policies that are intended to resolve claims.

[80] *Guerin v. The Queen*, [1985] 1 C.N.L.R. 120 (S.C.C.).

[81] *Delgammukw v. British Columbia* [1997], SCC: at paras. 119-121; 174.

3. AFTER CONFEDERATION.

3.1. Denying history.

The root of the problem is that in the years following Confederation, the province of Quebec took a revisionist approach to history and Aboriginal title. This had a direct impact on reserve policy. The province adopted the position that there was no such thing as Aboriginal title or Aboriginal rights, and that it was not bound by the previous undertakings which we have described. Based on these fictions, successive governments of the province of Quebec have consistently sought to assimilate and marginalize the Aboriginal nations within its borders.

As in other provinces, one part of this strategy has been to take away the land and resources which are the foundation of Aboriginal economy and society. But in Quebec, it goes further: an essential part of the provincial strategy has been to deny Aboriginal people land for community purposes, or when that is not possible, to limit severely the amount and quality of lands made available, and the terms upon which it is granted.

Moreover, the federal government has not acted diligently to protect the rights and interests of the First Nations from Quebec's policies, and has instead deferred to the provincial position in these matters.

So, as settlement and the alienation of lands proceeded there were neither treaty surrenders nor the setting aside of community reserve lands. The result is that since Confederation, the establishment of reserves in Quebec has been reduced to a tug of war between displaced First Nations, an intolerant provincial government, a reluctant federal government, and various wings of the Catholic Church.[82]

3.2. The Province of Quebec after 1867.

The modern province of Québec came into being through the *Canada (British North America) Act* of 1867. Responsibility for "Indians and lands reserved for the Indians" within the province was entrusted to Canada under Section 91(24). Under Section 109 of the Act, Québec was given authority over lands and resources within its boundaries, but that authority was made subject to any "interest other than that of the Province in the same".

It was a commonly held view at the time that Aboriginal title was just such an interest. In 1875,

[82] Ironically, the Roman Catholic Church played a critical role in the direct extension of services to First Nations on the one hand, but also organized and lobbied for the colonization which would ultimately dispossess the First Nations.

Télèsphore Fournier, Minister of Justice in Alexander Mackenzie's Liberal government, argued this point in an opinion involving Aboriginal title in British Columbia. That opinion notes that Aboriginal rights to land had always been respected throughout what was now Canada, including both Ontario and Québec:

> The determination of England as expressed in the Proclamation of 1763, that the Indians should not be molested in the possession of such parts of the dominions and territories of England as not having been ceded to the King are reserved to them, and which extended also to the prohibition of purchase of lands from the Indians except only by the Crown itself at a public meeting or assembly of the said Indians to be held by the Governor or Commander in Chief, has with slight alteration been continued down to the present time, either as the settled policy of Canada or by Legislative provision of Canada to that effect; [...] and in various parts of Canada from the Atlantic to the Rocky Mountains large and valuable tracts of land are now reserved for the Indians as part of the consideration of their ceding and yielding to the Crown their territorial rights in other portions of the Dominion.[83]

In 1867, Québec's boundary only extended as far north as the height of land separating the St. Lawrence watershed from the rivers flowing into Hudson and James Bay. The more northerly territory, which had been part of the lands covered by the Charter of the Hudson's Bay Company, was formally transferred to Canada in 1870, following petitions from the Senate and House of Commons of the new Dominion. The transfer stipulated that the "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".

Most of the Algonquin homelands were within the territorial boundaries of Québec in 1867, though some lands - of the Abitiwinni, for example - remained within what were now the Northwest Territories. In 1898, Canada transferred the southern half of this northern territory to Québec. The remainder was transferred in 1912. Again, there was an express stipulation that Aboriginal title would be dealt with.

Many current problems for Aboriginal people could have been avoided if these regions had remained within the Northwest Territories. The Territories, for example, currently have a Aboriginal majority, one which would be reinforced by the Aboriginal population of what is now northern Québec. Ironically, Sir John A. Macdonald had vehemently opposed expanding the boundaries of Ontario and Québec to the northward. As he explained to the Lieutenant-Governor of Ontario in 1887, he feared for the future of the country if this was done:

> With regard to the Northern Boundary of Ontario, there is this difficulty, that if that

[83] Opinion, 19 January 1875, in Lord Dufferin's Despatch No 1485, 26 January 1876. NAC MG11 CO42/735:111-112.

> Province is to extend to Hudson's Bay, so must Quebec, or I could not get your old colleagues here from Quebec to agree to it. Now if you will look at the map and see the enormous extent of country proposed to be added to the two Provinces, you will see what a vast preponderance it gives to them over the other Provinces of the Dominion. History will repeat itself and posterity will find out that the evils that existed in other federations from the preponderance of one or more members will again happen.[84]

Canada made Treaty N° 9 in 1905-06 and in 1929-30 with the Aboriginal inhabitants of Ontario whose lands had once been part of Rupert's Land. No such treaty was made in Québec. In the decades following Confederation, nationalist circles had begun arguing that the province had inherited French policy with regard to Aboriginal title. In their view, therefore, it was not (and had never been) necessary to negotiate such treaties with the Aboriginal people of Quebec. This argument was adopted by the provincial government, and largely accepted by Canada.

In the period after 1880, Québec began a major expansion of settlement and resource extraction in the traditional homelands of the Algonquin Nation. Continuing their attempts to stem the flood of rural *canadiens* to the New England states, Oblate clergy promoted major colonization schemes at the head of Lake Témiscamingue and in the Abitibi region.

Lumbering remained the major activity up the Gatineau River and around the headwaters of the Ottawa. To aid the lumber industry, Québec permitted the construction of enormous dams and reservoirs throughout the Ottawa River basin, including Baskatong and Cabonga. These dams caused major damage to the homelands of the Algonquin people.

Québec also stepped up prosecution of Algonquin people for supposed violations of provincial game and fish regulations. Between the two world wars, only the Hudson's Bay Company, for their own commercial reasons, were prepared to support the pre-existing rights of Aboriginal peoples to hunt, fish and trap.

Although the Department of Indian Affairs tried, after the 1940's, to have small reserves set apart for the interior Algonquins - at Amos, Lac Barrière, Grand Lac and Lac Simon, for example - these proposals were opposed by the Québec Colonization Department.[85]

3.3. "Reserve" status.

Due to occasional pressure from the federal government, the Catholic Church, and the Aboriginal nations themselves, Quebec has grudgingly set aside reserves at various points in its

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[84] Macdonald to Sir Alexander Campbell, 3 December 1887. Archives of Ontario MU478 Sir Alexander Campbell Papers.

[85] Director to Deputy Minister, 21 February, 1950: DIAND File 371/30-1 Vol.1

history, only to seek their dismemberment once they were established, and, finally, to challenge the right of First Nations to even benefit from them.

One result is that today, you have to deal not only with underlying Aboriginal title, but also a patchwork of Indian reserves overlayed on top of this title, set aside in different ways and at different times. Some examples follow from Algonquin territory.

Timiskaming.

The Timiskaming Reserve set aside pursuant to 1851 Colonial legislation for the "Nipissingues, Algonquins & Outouais, [...] Nomadic Tribes inhabiting the country watered by the Ottawa adjacent to the Hudson's Bay territory".[86] In reality, it was eventually occupied by the Algonquins whose territory included the head of lake Timiskaming. Originally set at 69,120 acres, then reduced to 38,400[87] it was surveyed in 1854 at 60,000 acres. Twenty years later it was re-surveyed and 26,000 acres were arbitrarily cut off without surrender. A resident Indian Agent was not appointed until 1886, and then largely to preside over the dismemberment of what remained. Today, after a series of surrenders which are now the subject of claims under Canada's 'Specific Claims' policy, it measures just over 5,000 acres in size - a reduction of over 91%. What remains is a checkerboard of parcels which coexist with the municipality of Notre Dame du Nord.

Wolf Lake.

The Wolf Lake Algonquins at Grassy Lake began petitioning for reserve lands in the 1880's as a direct result of timber exploitation on their territories and severe economic and social dislocation. After being encouraged by the federal government to settle and cultivate at Grassy Lake, no lands were set aside, and for the next 85 years they were forced into a series of relocations within their territory, dodging development, and ending up at Hunter's Point. In the late 1960's, the federal and provincial governments withdrew service delivery, with the apparent goal of forcing the community leave the land and disperse into the wider society. Although dispersal did occur in the short term, the community has maintained its connection to the land and its efforts to secure a recognized reserve land base. In 1985, Quebec recognized the existence of a "settlement" on 10 acres of land at Hunter's Point, in Atwater Township,[88] but neither Canada

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[86] "Schedule shewing the distribution of the area of land set apart and appropriated under the Statute 14th & 15th Vic Ch.106, for the benefit of the Indian Tribes in Lower Canada", February 1853: NAC RG10 Vol.2457 File 95,452, Reel, C-11,224. The Crown did not have any precise knowledge of the number of Indians in the area, or who they were.

[87] Bruce to Rolph, 12 January 1853: NAC RG10 Vol.515: pp. 297-299.

[88] Beaulieau 1986: pp. 12-13.

nor the Wolf Lake Band holds recognized tenure, and no federal programs or services are currently delivered to members at that location.

Barriere Lake.

By at least 1876, the Algonquins of Barriere Lake were petitioning for reserve lands as a direct result of adverse impacts from timber development.[89] For the next 90 years, the government of Quebec refused to respond to their requests. To meet immediate community needs and to encourage sedentarization, Oblates leased land at Rapid Lake, and entered into an arrangement with the Department of Indians Affairs which allowed the Department to provide housing and medical services at that location. The Rapid Lake reserve (28.3 hectares) was established for the Algonquins of Barriere Lake in 1961 pursuant to the province's *Lands & Forests Act*.[90] The province purports to retain reversionary rights.

Long Point (Winneway).

After at least 50 years of unsuccessful petitions by the Algonquins of Long Point for a community land base, in 1960 Canada entered into agreement with the Oblates[91] to lease 91 acres at Winneway (out of a total of 116 acres which the order had purchased from Quebec in 1959).[92] The Oblates received prior authorization from Government of Quebec to enter into this agreement, which provided Canada with a mechanism to invest capital and program dollars for housing, education, health, etc., and to treat it "as if" it was a reserve. This arrangement continues today.

Kipawa (Eagle Village).

This is another situation where the government of Quebec simply refused to act on petitions for reserve land which had been ongoing for decades. After receiving approval from the government of Quebec, Canada bought 53.12 acres from a third party which it then set aside as a reserve by Order in Council in 1975.[93]

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[89] Patrick Moore, Indian Agent, Maniwaki, to Indian Affairs, 28 July 1876: NAC RG10 Vol.1994 File 6832, Reel C-11,130.

[90] Jacqueline Beaulieu, *Localization of the Aboriginal Nations in Quebec: Land Transactions* (Quebec 1986:Quebec: Ministere de l'Energie et des Ressources du Quebec): pp. 18-19.

[91] DIAND File 371/30-1 Vol. 3 Surveys & Reserves, 1952-1968: Agreement between Canada and the Oblates, 16 June 1960.

[92] Beaulieu., 1986: pp.31-32.

[93] Beaulieu, 1986: pp. 14-15.

Golden Lake.

In 1873, after at least 80 years of petitions, the Golden Lake reserve (1,561 acres) was transferred to Canada from Ontario for $156.00, to be used for the benefit of Algonquins affiliated with Oka whose territory lay in that area. The purchase price was raised and paid by the Algonquins of Golden Lake themselves.[94] Canada drew from the Quebec Indian fund on their behalf for relief, seed grain and implements until at least 1892, since it considered them 'Quebec Indians'.[95]

Kitigan Zibi (Maniwaki).

By 1848, petitions for reserve lands were being received on behalf of Algonquins affiliated with the Lake of Two Mountains (Oka) who wished to settle at River Desert.[96] They had been party to earlier petitions for reserve land beginning at least in the 1790's, and had already begun to settle at River Desert when the Maniwaki Reserve was established pursuant to the 1851 legislation.[97] Originally surveyed at 45,750 acres, subsequent surrenders have reduced the size of the reserve by about 2,500 acres.[98]

Grand Lac Victoria (Kitcisakik).

The Algonquins of Grand Lac were petitioning for protection of their lands from timber operators and big game hunters lands as early as 1876.[99] Repeated efforts to obtain a formal designation of reserve land have been unsuccessful. In 1985 that the government of Quebec recognized the community's occupation of 15 acres of land in Hamon Township.[100] Some federal programs and services are delivered "as if" it were a reserve.

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[94] DIAND, Indian Lands Registry - Golden Lake Reserve General Register: Instrument # X013983D: Letters Patent for Golden Lake Reserve, 22 September 1873.

[95] Canada, Sessional Papers, 1892 vol.10 no.14 Report of Dept of Indian Affairs, Return C, Accounts: p.104: Report on expenditure Quebec Seed & Relief Fund, 181892.

[96] Petition to Lord Elgin from the Bishop of Bytown and Algonquin & Nipissing Indians, 10 October 1848: NAC RG10 Vol.605: pp. 50625-50629 Reel C-13,382.

[97] Bruce to Rolph, 12 January 1853: NAC RG10 Vol.515: pp. 297-299.

[98] Beaulieau 1986: pp. 20-23.

[99] Chief Francois Papettay [Papatie], Grand Lac, to the Minister of the Interior, 8 August 1876: NAC RG10 Vol.1998 File 7208 Reel C-11,131.

[100] Beaulieau 1986: pp. 10-11.

Lac Simon.

Closely associated with the Algonquins of Grand Lac Victoria, the Algonquins at Lac Simon obtained a reserve from Quebec pursuant to the *Lands & Forests Act* in 1962. It now measures just over 791 acres.[101]

Abitibiwinni (Pikogan).

The Algonquins of Abitibiwinni are closely associated with the Anishnabe of Wagoshig (Abitibi) in Ontario. Although initially prevented from participating[102], they purportedly adhered to Treaty N° 9 as 'Quebec Indians' in the years following 1905 and enjoyed a shared interest in the Abitibi I.R. #70, in Ontario.[103] But this did not reflect their settlement patterns, and efforts ensued to obtain reserve lands on the Quebec side near Amos. In 1956, the federal government began purchasing parcels from third parties. Band members contributed a portion of their trust funds (received from timber surrenders on Abitibi IR#70) towards these purchases.[104] In 1958, Quebec set aside 129.39 acres for reserve purposes. Subsequent purchases from third parties have increased the size of the reserve to 223.71 acres.[105]

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From these examples, once can see that in northwestern Quebec, reserves have been established on a case-by-case, *ad hoc* basis, without any apparent consistency. The only thing that links them all is the government of Quebec's long standing hostility to the recognition of Aboriginal rights and title, even for the purposes of community settlements.

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[101] Beaulieau 1986: pp. 18-19.

[102] Memo to Clifford Sifton, 17 August 1903: NAC RG10 Vol.3033 File 235,225 Pt. 1, Reel C-11,314: "So far as the Indians of Quebec are concerned, it is suggested that no treaty should be made with them or that any Quebec Indians living temporarily in Ontario should be included in the Ontario treaty, but we should endeavour to obtain an understanding from the Province of Quebec that as claims are made by the outlying tribes [...] the Province should be willing to set apart at proper times suitable reserves. The Indian title in the Province of Quebec has never been recognized or surrendered as in the Province of Ontario, and, I presume, that it is not proposed to change the policy in that regard."

[103] NAC RG(2)1 Vol.1077: Order-in-Council PC 1593 re: participation of Quebec Abitibi Indians in Treaty #9, 22 July 1908.

[104] See DIAND File 371/1-1 Vol.1 (1942-1969)

[105] Beaulieau 1986: pp. 24-25.

3.4. Aboriginal rights sacrificed to federal-provincial interests.

The federal government, although aware that Quebec's policy was prejudicial and contrary to previous undertakings, did little or nothing to advance First Nation interests, and over time began instead to accommodate the province's position. But federal appeasement simply encouraged the government of Quebec to increase its demands and take a harder line. In 1902, the province of Quebec submitted a claim against Canada, stating that the federal government had no authority to dispose of surrendered reserve lands.[106]

The final blow came in November 1920, with the Judicial Committee of the Privy Council's decision in *Star Chrome*.[107] This case involved a dispute over who had the right to dispose of and benefit from surrendered reserve lands in Quebec. The Judicial Committee ruled that upon surrender, Indian reserve lands and resources within Quebec automatically reverted to the province, with no obligation to provide any benefit to the First Nation on whose behalf the reserve had been set aside.[108] The province immediately requested a complete accounting from Canada for all surrenders and proceeds, and then demanded payment (which it ultimately received[109]).

Of course, it had been the government of Quebec which had been aggressively seeking (and obtaining) large surrenders of reserve land in the first place, as part of its larger programme of internal colonization. But now it went further, insisting that First Nations should not even be able to derive financial benefit from such surrenders.

Capitalizing on this court victory, in 1922 Quebec passed its own legislation governing the establishment of Indian reserves, which was based on the principle that the Province maintained underlying title to all lands set aside for First Nations, and that such lands would automatically revert to the province upon surrender (or even lease), or if they ceased to be used as reserves.[110]

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[106] Memo from R. Rimmer, 1902: NAC RG10 Vol. 2457 File 95,452, Reel C-11,224.

[107] Judgement in Appeal No. 79 of 1919 (Star Chrome): NAC RG10 Vol.2457 File 95,452, Reel C-11,224.

[108] See memo from E L Newcombe, Deputy Minister of Justice, to DC Scott, 7 May 1921:NAC RG10 Vol. 2457 File 95,452-1, Reel C-11,468: "[...] it would seem to follow from the decisions of the Judicial Committee that the surrender of the Indian title, even when in trust for sale, operates to free the surrendered lands from the burthen of the Indian title for the benefit of the Province, without apparently affording the Indians any right of compensation."

[109] See annual report of DSGIA Harold McGill, 31 August 1933: Canada, *Annual Report of the Dept of Indian Affairs*, year ended March 31, 1933 (Ottawa: JO Patenaude, 1933).

[110] *An Act respecting lands set apart for Indians*, 21 March 1922: SQ 12 Geo V, 1922. c.37.

3.5. Province dictates quantum.

Similar to most Pre-Confederation reserves, those set aside in Quebec contain no reference to quantum in the same sense as the prairie treaties. Reserves set aside for the neighbouring Anishnabe pursuant to the Robinson Huron Treaty of 1850 were not based on a quantum formula: instead, locations and size were determined by the communities themselves based on their needs.[111] However, on another level, quantum is a part of the history of reserves in Quebec - not by way of treaty, but as a result of caps dictated unilaterally by the province of Quebec as a matter of policy.

In 1851, the Province of Canada adopted *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*,[112] which provided for the setting aside of reserve lands, but set a cap of 230,000 acres. It was through this legislation that reserves were established for the Algonquin communities of Timiskaming and Kitigan Zibi (Maniwaki).

In 1922 (following the *Star Chrome* decision), the Quebec National Assembly adopted *An Act respecting lands set apart for Indians*,[113] which set a cap of 330,000 acres on reserve lands in the province. This cap has been maintained in subsequent Quebec legislation.[114] Although theoretically this actually increased the amount of land available to be set aside (to 330,000 acres from 230,000), this was a fiction, since the province continued to take an extremely hard line on the establishment of new reserves or any recognition of Aboriginal or treaty rights.

In addition, the government of Quebec has taken the position that if and when it does choose to set aside reserve lands, they must be for settlement purposes only - ie., just enough room for housing and essential services. This was formally articulated in a policy on reserve creation and expansion which was adopted by the Executive Council of the government of Quebec in December, 1982:

> With regard to the creation of new Indian reserves on public land:
> 1) the creation of new Indian reserves must be further to a clearly expressed request by

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[111] See James Morrison, *The Robinson Treaties of 1850: A Case Study* (Haileybury: 31 March 1993 - report prepared for the Royal Commission on Aboriginal Peoples): pp. 183-201.

[112] S.C. 14 & 15 Victoria, Cap.106: pp. 2096-97. The same legislation also provided for an annual appropriation of £1,000 for the purposes of development assistance.

[113] 21 March 1922: SQ 12 Geo V, 1922. c.37.

[114] See *An Act respecting Public Lands and Forests* (Lands & Forests Act), RSQ 15 Geo.V, 1925, c.44.; *Lands and Forests Act* (Quebec), RSQ 1941, c.93; *Lands and Forests Act* (Quebec), RSQ 1964, c.91; *An Act to amend the Lands and Forests Act*, SQ 1974, c.28.

the Indians for a band of at least 200 Indians and **exclusively for residential purposes** [...].[115] (emphasis added)

This same policy sets out a number of conditions (for instance, minimum membership of 200) to be met before a request would even be considered, as well as conditions regarding its tenure and legal status once established. The rights of third parties and neighbouring municipalities are regarded as paramount in any consideration of whether reserve lands should be set aside. In this scheme, the rights and needs of the First Nations are not even a consideration.

3.6. Purpose of reserved lands: protection & development.

The government of Quebec's intolerance towards the First Nations and its steady resistance to the provision of reserved lands has obscured two of the key purposes for which reserves have been set aside in the first place: protection and development.

Protection.

When we speak of protection, we refer to the whole context behind the Royal Proclamation, the Treaties made at Kahnawake in 1760 and Niagara in 1764, and subsequent legislation. The purpose of these agreements, and the Crown's policy, was to ensure that Aboriginal nations would be **protected** - in political, social, economic and cultural terms.

In Algonquin territory, there is a direct correlation between petitions for reserve land and dislocation: the leadership sought reserve lands to protect the people from the suffering that had been brought about by conflicting occupation and use.

Reserved lands are protected zones - where not just the land, but also the culture and health of the community can be safeguarded from adverse developments and interests. It is clear that this is what the leadership was seeking in the 1700's during that turbulent time in North America. This understanding of what reserved lands are supposed to be for was also displayed by both the Crown and Aboriginal nations as the treaty process moved west.

Development.

The other key is **development**: the right not just to exist, but to prosper and grow. Petitions for reserve lands in Algonquin territory have always been connected with an explicit desire to improve the quality of life within the community. This has most often been expressed in terms of access to development assistance: housing, education, health care, economic development, and

[115] Policy on reserve creation and expansion, adopted by the Executive Council of the province of Quebec, 21 December, 1982: DIAND File E5673-0 Vol.2 - Surveys & Reserves - Policy (1982).

income support in times of need.[116]

Federal and provincially designed responses to these needs have become known as "programs & services". The denial of reserve lands also means denial of these entitlements which, though limited, provide at least some cushion while the larger issues are dealt with and resolved.

Entitlements.

If anyone doubts the characterization of programs & services as entitlements, the Department itself provides evidence of its own understanding of the issue. In May 1946, the Acting Deputy Minister of Indian Affairs sent a communication to his counterpart at Quebec's Department of Lands & Forests (Avila Bedard), indicating that the Department wanted to extend educational and medical services to Indians in "the more isolated sections of your province where we have heretofore been prevented from doing so by their inaccessibility". Canada also wanted to begin re-housing Indians where circumstances permitted, "in an effort to better their living conditions".

> To undertake works of this nature it is necessary that the ownership of the land be vested in the Crown in right of the Dominion and we therefore request your consideration of the transfer to this Department in trust for the Indians of the following parcels of land in the Pontiac and Abitibi regions of your province: [...][117]

True to form, the government of Quebec simply declined to respond to this communication. The Acting Minister, C.D. Howe, wrote again on September 1st to further explain the Department's intentions:

> There are, as you are no doubt aware, thousands of Indians in the northern regions of Quebec who depend for their livelihood on hunting and trapping, and who, as a result, are scattered in small bands or groups. These Indians, up to the present, have not lived on regularly constituted Indian reserves, but usually live for a few brief months or weeks on a location or locations, particularly during the summer months. It is the **duty and responsibility of the federal administration to provide for the educational needs of these Indians and to provide the medical services necessary to maintain them in a state of physical well-being. Assistance in the purchase of food and in the construction of houses is also extended.**
>
> [...] Due to the fact that these Indians are so widely scattered, it has been found virtually

[116] For example, petition from F Papino and the principal Chiefs and heads of families of the Algonquins & Nipissings, 9 February 1851: 4th Session, 3rd Parliament, 14 Victoria 1851 M1644 No.77.

[117] DIAND File 371/30-1 Vol.1: A/Deputy Minister, IAB, to Avila Bedard, Deputy Minister, Quebec Dept of Lands & Forests, 6 May 1946. (Id#3056)

impossible to establish the schools and teacherages necessary to promote a worthwhile educational program; indeed, it may be stated that this section of the Indian population are at this date without educational facilities and the nursing services ordinarily provided on Indian reserves.

It would appear that certain community centres have already been established by custom. If such centres could be definitely and legally created and the Indian population established thereon, this administration would then be in a position to provide the services to which the Indians are entitled. [...]

It appears necessary, therefore, that we appeal to the Quebec Government to set aside for the program now under consideration and for Indian occupation, the Crown Lands necessary to carry the program forward to completion. [...][118] (emphasis added)

Despite these and similar overtures, the government of Quebec simply said no, and avoided substantive discussion of the matter. The quality of life and health within the "landless" communities continued to deteriorate significantly throughout the 1940's and 1950's as a direct consequence.

3.7. Quebec policy: dispersal & assimilation.

By the 1960's, it appears that federal officials simply caved in and accepted the province's position. In the years leading up to Jean Chretien's infamous *White Paper* policy of 1969, federal and provincial officials appeared to agree on dispersal and assimilation as the preferred alternative to the establishment of new reserves in the area. This was the consensus at a federal-provincial meeting in 1966 which considered a petition for reserve lands in the Kipawa-Temiscamingue region:

> [...] this is one of the only regions where Indians pay school and municipal taxes like non-Indians. This is the nucleus of the problem because it is highly probably [sic] that this request for land is, as before, a plea for exemption from taxation. To act on this matter [to create a reserve] would be a step backwards and would destroy in a manner that which has already been established. **At this time when every effort is being made to integrate Indians to allow these Indians to segregate would be going against everything that has been done up until now.**[119]

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[118] DIAND File 371/30-1 Vol.1: CD Howe, A/Minister, to M Borque, Minister of Lands & Forests, Quebec, 11 September 1947. [english draft dated Sept 8th]

[119] Summary of meeting, Co-ordinating Committee on Indian Affairs (Canada-Quebec), 10 February 1966: DIAND File 371/30-11-0 Vol.1.

So, Quebec's policy on reserves has not only had an effect on the land rights of the Algonquins - it has also prevented them from taking steps to protect their culture and community identity, and to avail themselves of the right to development (in the context of access to programs & services). From this perspective, the government of Quebec's practises related to reserve lands are evidence of a much larger agenda: the elimination of First Nations as distinct cultural, social and economic entities, and their absorption into the culture and institutions of Quebec.

Since at least the mid-1960's, Canada has been a wilful participant in this policy orientation. In 1969, then Minister of Indian Affairs Jean Chretien endorsed a federal policy on additions to reserves and new reserves. This policy amounted to a prohibition on new reserves, except under a narrow range of circumstances. In the Department's own words, the intent of the policy was "to limit the growth in the area and expansion in numbers of Indian reserves, on the grounds that the failure of the reserve system [... was ...] among the reasons for so much poverty among Indian people."[120] The basis of the prevailing federal policy on additions to reserves and the creation of new reserves (which was introduced in 1987) can be traced directly back to Jean Chretien's policy of 1969.[121]

4. POLICY IMPLICATIONS.

We have tried to show - in summary form (and incomplete at that) - the factual basis for a lawful obligation on the part of the Crown to protect and develop "reserved lands" in Quebec. We have also documented how the federal government stood by in the face of consistent efforts by successive provincial governments to discount the legal nature of these obligations.

There can be no doubt that lawful obligations have been breached. However, many of the "claims" that these breaches give rise to are completely outside of existing federal or provincial policy. This poses problems for the researcher and for those concerned with negotiations.

4.1. Human Rights.

The province of Quebec's conduct in relation to Aboriginal territories, reserve lands and culture, when taken together, represents a form of cultural aggression, since their objective has been to undermine and assimilate Aboriginal societies, including the Algonquins. Many First Nations in Quebec have been denied the right to protection and development, and continue to be denied this right. In this sense, Quebec reserve policy represents a violation of fundamental human rights which are guaranteed to all peoples under international law. Such a violation demands a remedy. Unfortunately, existing federal 'claims' policies and Human Rights processes do not have the

[120] Memo from Lands & Trusts, 21 November 1977: DIAND File E5673-0 Vol.1 - Survey & Reserves Policy.

[121] See DIAND File E5673-0, Vols. 1-3.

capacity to respond effectively to this type of 'claim'.

4.2. Treaty obligations.

Even though the issue of treaty-determined quantum is not at play here, there is a clear treaty basis for reserved lands in Quebec. We have reviewed the understandings upon which the Algonquins and the other nations of Quebec came to terms with the English Crown after the conquest, and some of the key elements in that chain of events, including the 1760 Kahnawake Treaty, and the 1764 Niagara Treaty (which accepted the terms of the Royal Proclamation of 1763).

Taken together, these and related treaties provide a framework for mutual coexistence and security. And yet neither Quebec nor Canada appear prepared to accept that there is a lawful obligation flowing from these treaties and undertakings.

Although the published version of Canada's Specific Claims policy indicates that "non-fulfilment" of treaty terms is a legitimate basis for claims against the federal Crown, the reality is that as a matter of policy, Canada has long refused to entertain treaty-based claims which do not relate directly to land quantum or *Indian Act* surrenders. This is particularly true with Pre-Confederation treaties, because they raise uncomfortable questions about sovereignty and the territorial integrity of tribal lands.

4.3. Bankruptcy of existing 'claims' policies.

We have described how layers of title have built up in Algonquin territory: a variety of different types of "reserves" have been established on top of the underlying Algonquin Aboriginal title. In this fact situation, what is the impact of pursuing a 'Specific' claim related to existing reserves, or for reserve status for landless Bands?

Canada's nebulous category of "Claims of another kind" was supposed to be an attempt at offering a response to unique circumstances, but in real terms it remains so fuzzy in its definition and vulnerable to bureaucratic whim that it offers no practical solution.

The reality is that Canada has no effective policy response to many of the fact situations that exist in Quebec. This in turn has an impact on research strategies, and efforts to reform existing claims policy.

4.4. *Delgamuukw.*

One of the long-standing problems with federal claims policies is that they have not kept pace with domestic case law. This pattern of avoidance takes on special importance in light of the Supreme Court of Canada's ground-breaking decision in *Delgamuukw*. We cannot provide an

exhaustive analysis of *Delgamuukw* and its impact on current federal claims policies, but some observations follow.

- The Court found that provincial governments do not have the power to extinguish Aboriginal rights [at paras. 180-181]. Quebec has long advanced the position that it has the authority to dictate whether or not title exists. This position is no longer tenable.

- The Court also found that there are valid claims related to general Aboriginal rights (for instance the right to harvest) and to site specific rights (for instance a fishing location, a settlement location, or a medicine gathering place) [see paras. 138-139]. These types of claims clearly fall outside of existing federal policy. However, the Court's insistence that these matters be negotiated [see para. 186] requires the existence of a policy framework in which these types of claims can be addressed.

- Canada has long given the excuse that it was "powerless" to protect or secure reserved lands for Algonquins in Quebec because of provincial government policies and Quebec's control over Crown lands within its borders. However the Court found that Canada's s.91(24) responsibilities for "Indians" and "lands reserved for Indians" extend not only to *Indian Act* reserve lands, but also to Aboriginal title lands within provincial borders, and beyond that to Aboriginal rights [paras. 172-177].

  The government of Canada can no longer say that it is "powerless" to advance and protect both Aboriginal title and rights within provincial borders. However, in the 11 months since the *Delgamuukw* decision, there has been no indication from Canada as to how it intends to exercise these responsibilities.

These findings by the Court have significant implications for policy, and for researchers. We have described how many claims in Quebec do not fit into existing policy frameworks, with the result that there are no forums in which to negotiate their resolution, and giving Canada and Quebec ample opportunity to avoid the issue. The Supreme Court has now told Canada in no uncertain terms that there must be effective policies and processes in place to enable negotiated solutions for a variety of claims.

Unfortunately, we have not yet seen any firm indication from the government of Canada that it is serious about reforming its claims policies in such a way that effective remedies are provided. However, First Nations now have a firm legal basis upon which to proceed. In time, this should be of great assistance in finally obtaining justice for the Aboriginal nations of Quebec.

5. CONCLUSIONS.

It is a legal fallacy to suggest that, in terms of Aboriginal rights, modern Québec is the successor to New France. While many aspects of Québec is a successor to British colonies known as Québec (1763-1774; 1774-1791); Lower Canada (1791-1841) and Canada [East] (1841-1867). Owing their existence to British colonial law, all of these jurisdictions have been subject to common law aboriginal title. That is to say, the doctrine of Aboriginal rights, which has passed into Canadian common law, applies equally to modern Québec.

In the same way, Québec's present boundaries are the creature, not of French colonial law, but of various Imperial and Canadian enactments. These include the Royal Proclamation of 1763, the Quebec Act of 1774, the Imperial Order in Council of 1791 dividing Québec into Upper and Lower Canada, the Canada [British North America] Act, 1867, and the boundary extension acts of 1898 and 1912 which added the Abitibi and James Bay regions. All of these enactments either explicitly or implicitly acknowledged pre-existing Aboriginal rights.

It is true that Canada has generally failed to support Aboriginal rights within Québec. Particularly in this century, Canada has permitted Québec to build dams, flood rivers and lakes, and take minerals and timber from unceded Indian lands. Countless Indian people, including many Algonquins, have been prosecuted or jailed for exercising their traditional rights to hunt, fish and trap.

But this behaviour is not the fault of the Algonquins or other First Nations, who have never voluntarily abandoned those rights. Rather, by acquiescing in the face of an aggressive provincial government, Canada has consistently breached its fiduciary obligations to Aboriginal peoples. Recent Supreme Court decisions tend to support this conclusion.

The exact content of Aboriginal title in certain parts of modern Québec, particularly the long-settled lands on the St. Lawrence, may well be different from that applicable to the north and northwest. The traditional homelands of the Algonquin Nation, however, were always in Indian country. It is abundantly clear, therefore, that their common law Aboriginal title to these lands has never been validly extinguished.

When the Anglo-American colonies formally separated from Britain in 1783, they did not thereby extinguish Aboriginal title. The Supreme Court of the United States established this important legal principle in a series of famous nineteenth-century decisions. Thus, whatever territorial form a future Québec may take, the unextinguished Aboriginal rights of the Algonquins to their traditional homelands will continue to exist under both international and domestic law.