ATTORNEY GENERAL FOR ONTARIO V. BEAR ISLAND FOUNDATION ET AL.

Ontario Supreme Court, Steele J., December 11, 1984

Blenus Wright and J.T.S. McCabe, for the plaintiff
Bruce A. Clark, for the defendants
W.J.A. Hobson and Carolyn Kobernick, for the Attorney General of Canada

Ontario brought an action for a declaration, inter alia, that all unpatented lands in the Land Claim Area are public lands within the meaning of the Public Lands Act, R.S.O. 1970, c.380 (now R.S.O. 1980, c.413) and that the Indian defendants have no right, title or interest therein. By way of counterclaim, the defendants sought a declaration that they have not less than the equitable fee simple subject only to the qualification that the Crown alone can acquire such title from them by cession or purchase, or a declaration that they have a better right to possession of the lands than Ontario. The basic issue is whether Ontario is the owner of these lands, free of any aboriginal rights claimed by the defendants, or whether the Indians have aboriginal rights in the lands which prevent Ontario from dealing with the lands until those rights are properly extinguished. The defendants rely on their aboriginal rights or title as well as rights reserved to them under the Royal Proclamation of 1763. They allege that the lands, being lands reserved for Indians, are within the exclusive jurisdiction of Canada and as such cannot be dealt with by Ontario as public lands within the meaning of the Public Lands Act. Ontario alleges that any rights which the band had in the Land Claim Area were surrendered by the Robinson-Huron Treaty of 1850, or by Treaty 9 of 1905 and 1906, or were taken away or lost by virtue of legislation and administrative acts authorized by such legislation of the Province of Canada (prior to 1867) and Ontario, or by operation of limitation periods or the doctrine of estoppel.

Held: (Steele J.)

1. The plaintiff's argument that only "Indians" as defined in the Indian Act, R.S.C. 1970, c.I-6, can claim aboriginal rights was rejected on the ground that there may be claims for aboriginal rights in areas where there are no "Indians" or "bands" or "reserves" within the meaning of the Act, and yet there is a recognized aboriginal group. Such aboriginal group must have a remedy and a means of asserting those rights.

2. The onus is on the defendants to prove on a balance of probabilities: (i) the nature of the aboriginal rights enjoyed at the relevant dates; (ii) the existence of an organized society or social organization and that it exercised exclusive occupation of the Land Claim Area, thereby exercising its aboriginal rights (included would be proof that there was an organized system of land-holding and a system of social rules and customs distinct to the band); and (iii) the continuity of the exclusive occupation to the date of the commencement of the action. On the other hand, the onus is on the plaintiff to prove that the aboriginal rights have been extinguished by treaty, or by the statutes or physical acts of the Province of Canada, Canada or Ontario.

3. The presumption that ambiguity in words and phrases in treaties should not be construed to the prejudice of Indians is not relevant to the issue of onus in the broader sense. However, such words and phrases must be interpreted in light of the understanding of their meaning at the time that the documents were entered into, rather than their modern meaning.

4. In considering evidence of facts as opposed to interpreting treaties, all factors must be determined in accordance with the standard of proof in civil cases, that is, on the balance of probabilities, rather than with any bias in favour of Indians.

5. Indian oral history is admissible in aboriginal land claim cases where their history was never recorded in writing. However, this does not detract from the basic principle that the court should always be given the best evidence. Oral history may be contradicted by available factual records.

6. If a non-Indian gives evidence as to oral tradition, this testimony is admissible generally where the declarants are dead.

7. That part of the Land Claim Area south of the Height of Land is governed by the Royal Proclamation of 1763, the intent and effect of which is to create aboriginal rights that are personal and usufructuary and dependent upon the pleasure of the Crown. There is no

independent interest in unsurrendered lands. The limited dependent nature of aboriginal title is not altered by the fact that the Crown may, as a matter of expediency or goodwill, have chosen to enter into treaties with the Indians. The relevant date for determining aboriginal rights is 1763.

8. That part of the Land Claim Area north of the Height of Land is not covered by the Royal Proclamation of 1763. Nevertheless the rights of the Indians and Crown at common law are in all ways the same as in Proclamation lands, except that the relevant date for determining aboriginal rights is the coming of settlement.

9. The Royal Proclamation and common law gave the Indians the aboriginal right to continue using the lands only for the purposes and in the manner enjoyed in 1763, and not the right to any new uses to which they might subsequently put the land.

10. The defendants have failed to prove: that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date of commencement of the action. The historical facts indicate much stronger individual family control over hunting territories than band control.

11. The Constitution Act, 1867 did not give the Indians any independent rights of self-government. It clearly provided, under s.91(24), that Indians and lands reserved for the Indians were under federal jurisdiction. No residue was left to the independent jurisdiction of Indian bands or nations.

12. At all times the Crown has had a right to extinguish aboriginal rights by legislation, administrative action or treaty. The intent to extinguish must be "clear and plain", but not necessarily express. Such clear and plain intention may be found in laws of general application and in administrative action pursuant to such legislation, where such legislation and administrative action have the effect of extinguishing aboriginal title.

13. Section 35 of the Constitution Act, 1982 does not resurrect aboriginal rights which were extinguished prior to its passage. If it was intended to reinstate aboriginal rights as they were enjoyed in 1763, the Parliaments would have clearly said so, rather than inserting the word "existing" in s.35.

14. Section 25 of the Constitution Act, 1982 means that the rights and freedoms stated generally in the Charter shall not be construed so as to override aboriginal rights. It has nothing to do with the question of which aboriginal and treaty rights are protected by the Constitution Act, 1982, that question being specifically dealt with in s.35.

15. The Robinson-Huron Treaty of 1850 is valid; its effect was to extinguish aboriginal rights in the Land Claim Area.

16. Ancestors of the defendants with proper authority were party to the Robinson-Huron Treaty of 1850 or adhered to it in 1883.

17. The Province of Canada (prior to Confederation), and in particular Ontario (after Confederation), enacted legislation the intent and effect of which was to open up the Land Claim Area to settlement and extinguish aboriginal rights therein. Ontario also issued patents and took administrative measures which had the same intent and effect.

18. The Province of Canada, prior to 1867, was constitutionally competent to enact legislation and enter into treaties which had the effect of extinguishing aboriginal rights in the Land Claim Area.

19. Prior to the passage of the Constitution Act, 1982, Ontario was constitutionally competent to enact general legislation within its area of legislative competence which had the effect of extinguishing aboriginal rights in the Land Claim Area.

20. The limitation period began to run against Ontario only in 1973, when the defendants asserted title. In any event, Ontario has asserted title since at least 1870. Therefore, Ontario's action is not statute-barred.

21. However the defendants' counterclaim is statute-barred by either the Limitations Act, R.S.O. 1970, c.246 (now R.S.O. 1980, c.240) or the Real Property Limitations Act, C.S.U.C. 1859, c.88. At the latest, Ontario first asserted title in 1883. The defendants brought their action in 1973 or 1978.

22. The defendants' counterclaim is barred also by the doctrines of laches, estoppel and acquiescence.

23. **Ontario is entitled to a declaration that all unpatented lands in the Land Claim Area are public lands within the meaning of the Public Lands Act and that the defendants have no right, title or interest therein.**

24. The reasons in Guerin v. The Queen (reported infra at p.120) were considered in an addendum. Guerin dealt only with damages for breach of a fiduciary relationship and not the extinguishment of Indian rights. If Dickson J. meant that the Crown could not unilaterally extinguish Indian title in traditional tribal lands, this could not be correct, as it would mean (assuming the Robinson-Huron Treaty is invalid) that every grant of land made by the Crown since 1850 was either invalid or was made on behalf of whatever Indian bands may have been living in that large area in 1763 or at the time of the coming of settlement, and that the Crown is accountable to them if such bands continue to exist today.

    Even if aboriginal title in Royal Proclamation lands pre-dates and survives the Proclamation, this does not alter the proposition that aboriginal title exists at the pleasure of the Crown, and is subject to extinguishment by treaty, legislation or other clear intention of the Crown. Furthermore the relevant date for determining entitlement to and the nature of aboriginal rights may also pre-date the Proclamation and thus cause insurmountable problems of proof.

    Both Guerin and Calder v. A.G. B.C., [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145, relate to British Columbia. Although Dickson J. indicated that the Royal Proclamation of 1763 applied to British Columbia, he spoke for only four members of the court. From both decisions, it is not clear whether or not the Proclamation applies to that province. In any event the defendants conceded that the Proclamation applied and that the defendants' rights in that portion of the Land Claim Area south of the Height of Land were derived from it.

Editor's Note: Variant spelling of personal names, group, tribe or band names, and place names has been retained from the original text.

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I N D E X

STEELE J.:

I

INTRODUCTION

The defendants, Gary Potts, William Twain and Maurice McKenzie Jr. act on behalf of themselves and on behalf of:

(1) all other members of the Teme-agama Anishnabay, an association recognized by the Indians themselves and referred to by them as the "Tribe"; and

(2) the members of the Temagami Band of Indians, the registered band pursuant to the Indian Act, R.S.C. 1970, c.I-6, which the Indians referred to as the “Band”.

Neither in evidence nor in argument was any distinction made between the band and tribe level of social organization, and so, for the purposes of this judgment, I assume they are indistinguishable. For purposesof clarity, I will refer to the Teme-agama Anishnabay as the "band", and the Temagami Band of Indians as the "registered band". I will refer to the Bear Island Foundation as the "Foundation".

The basic dispute is whether Ontario is the owner of certain lands, free of any aboriginal rights claim by the Indians, or whether the band or registered band has aboriginal rights in the lands that prevent Ontario from dealing with the lands until those rights are properly extinguished.

The defendants referred to the land claim area as "Ndaki Menan". I refer to it as the "Land Claim Area". The pleadings specify a large number of townships in the Districts of Temiskaming, Sudbury and Nipissing as being included in the Land Claim Area. Exhibit D, filed at trial by the defendants, more particularly sets out the Land Claim Area. Suffice it to say that the Land Claim Area comprises approximately 4,000 square miles in northern Ontario, and the defendants claim rights only in the unpatented lands therein. Territorially, the lands include the Towns of Temagami, Elk Lake and Goganda, the Lake Temagami and Lady Evelyn Lake areas, and other areas located between the Montreal River on the east and the Sturgeon River on the west.

The dispute first arose on February 1, 1973, when counsel for the defendants was consulted in contemplation of litigation. Commencing on August 7, 1973, three cautions were filed by the Foundation in the Land Titles Offices for the Land Titles Divisions of Temiskaming, Nipissing and Sudbury, respectively, pursuant to section 48(1) [am. S.O. 1979, c.93, s.51; now s.44(1)] of the Land Titles Act, R.S.O. 1970, c.234 [now R.S.O. 1980, c.230], and amendments thereto. On motion during trial, I found that the Foundation was merely the alter ego of the other defendants. For that reason, I granted the relief claimed against the Foundation, declared that it had no interest in the lands, restrained it from bringing or continuing with any proceedings to prevent Ontario from issuing letters patent, and restrained it from continuing any proceedings in which it asserted any rights in the Land Claim Area. This relief was granted on condition that the cautions filed by the Foundation against the lands remain on the registers until the final disposition by this judgment of the issues in this action as if the cautions had been registered by the other defendants in the action. I did not grant an injunction that would continue beyond this judgment. The plaintiff has urged me to declare that the cautions should be removed from the record. I think it appropriate that the question of their removal should be dealt with in the stayed proceedings under the Land Titles Act after considering my reasons herein.

As a result of the cautions filed by the Foundation, a ruling was made by the Director of Titles which was appealed to the District Court Judge. During that appeal, the Honourable Judge made a ruling which he urged be appealed to the Divisional Court. On April 6, 1978, the latter court dismissed the appeal on the grounds that the lower court had not made a final disposition of the matter and that therefore there was no proper order from which an appeal could be taken. The plaintiff issued the writ in the present action on May 8, 1978, claiming as follows:

> 6.
> (a) a declaration that all unpatented lands in the townships hereinbefore set out and all other townships in the Districts of Timiskaming, Sudbury and Nipissing are public lands within the meaning of The Public Lands Act, R.S.O. 1970, c.380 [now R.S.O. 1980, c.413].
>
> (b) a declaration that Her Majesty the Queen in right of the Province of Ontario or a person so authorized by a statute of Ontario has the right to issue letters patent for or grant, sell, lease or otherwise convey or dispose of said lands or any of them without the consent of the defendants or any of them and whether or not the defendants or any of them object;
>
> (c) a declaration that the defendants or any of them have no right, title or interest in said lands or any of them or, in the alternative, a declaration as to the nature and character of any right, title or interest of the defendants or any of them in said lands or any of them and as to the particular rights, if any, which such right, title or interest entitles the defendants to exercise in said lands or any of them;
>
> (d) an injunction restraining the defendants or any of them from bringing or continuing any proceedings to attempt to prevent Her Majesty the Queen in

> right of the Province of Ontario or any person so authorized by a statute of Ontario from issuing letters patent for or granting, selling, leasing or otherwise conveying or disposing of said lands or any of them;
>
> (e) an injunction restraining the defendants or any of them from taking or continuing any proceedings in which they assert any right, title or interest in said lands or any of them other than a right, title or interest which this court declares the defendants or any of them to have.

The defendants claim that they are entitled to all of the lands, including the waters and lands under the waters, by virtue of their aboriginal (or Indian or native or indigenous) rights (or title), as well as by virtue of the rights reserved to them under the Royal Proclamation of 1763. They allege that the lands, being lands reserved for Indians, are within the exclusive jurisdiction of Canada and as such cannot be dealt with by Ontario as public lands within the meaning of the Public Lands Act of Ontario. By way of counterclaim, the defendants claim as follows:

> 1.
> (a) a declaration quieting their title to the aforesaid lands, and in particular holding that they have not less than the equitable fee simple subject only to the qualification that the Crown alone can acquire such title from them by cession or purchase,
>
> (b) a declaration that the plaintiffs by counterclaim have a better right to possession of the aforesaid lands than the defendant by counterclaim.

By way of defence to this counterclaim, Ontario alleges that any rights that the band had in the Land Claim Area were surrendered by the Robinson-Huron Treaty of 1850, or by Treaty Number 9 of 1905 and 1906, or were taken away or lost by virtue of estoppel or limitation periods, or by various acts and statutes of Canada and Ontario. Because the issue of the constitutional validity of the Public Lands Act and other Acts of Ontario was raised, and because of the effect of sections 25, 35 and 52 of the Constitution Act, 1982, I directed that notice of a constitutional issue be given to Canada. As a result, Canada has been represented throughout the entire trial, although not as a party.

I intend to deal with the issues raised at trial in the following manner. I will deal with certain preliminary issues; the standing of the various defendants such as the band and registered band; the onus of proof in an action for a declaration in an aboriginal rights land claim case; and the evidentiary issues raised in respect of oral history and ancient documents.

Next, I will state my overall finding or conclusion.

Then, I will deal with the issues raised which led me to my conclusion. First, I will examine the origins of aboriginal rights, both in terms of the Royal Proclamation of 1763 and its effects, and also in terms of the common law as it applies to aboriginal rights on non-Proclamation lands. I will also determine the relevant dates for establishing entitlement to aboriginal rights. Second, I will determine the nature of aboriginal rights in the Land Claim Area, examining the types of aboriginal possession and use which were proven to have existed in the Land Claim Area. Third, I will look at the evidence establishing entitlement to aboriginal rights in the Land Claim Area. I will determine who has historically been entitled to these rights, a question which, in essence, relates to the nature of Indian social organization, in particular the band and family. I will also determine where, in the Land Claim Area, these aboriginal rights can be proven to have attached, a question which, in essence, relates to the extent of territorial occupation by the unit of Indian social organization, be it family or band.

Fourth, I will deal with the right of the Crown to extinguish aboriginal rights by legislation or treaty. I will examine the existence of the right to extinguish, the method by which it may be exercised, and the effect of the Constitution Act, 1982 on aboriginal rights, legislation and treaties existing prior to April 17, 1982.

Fifth, I will examine the Robinson-Huron Treaty of 1850. I will determine whether it was valid, whether it applied to the Land Claim Area, whether the defendants' ancestors were party to it in 1850 or adhered to it in 1883, and whether by its terms it extinguished, or the Indians surrendered, their aboriginal rights in the Land Claim Area.

Sixth, I will determine whether the defendants' aboriginal rights in the Land Claim Area were extinguished by legislation enacted by the Province of Canada, Canada or Ontario. Seventh, I will examine the constitutional validity of the legislation and treaties that have had the effect of extinguishing aboriginal rights. In particular, I will examine the competence of the Province of Canada and Ontario to extinguish aboriginal rights. Again, I will look at the applicability of the Constitution Act, 1982 to this issue.

Finally, I will deal with the bar raised by the Limitations Act, R.S.O. 1970, c.246 [now R.S.O. 1980, c.240], as well as the various common law bars.

The claim before me relates only to the rights in or ownership of the Land Claim Area. It is tempting to make broad statements as to the nature of Indian rights generally, but, where possible, I have endeavoured to restrict my views to the issues directly before the court. The reason I do so is because the facts relating to other Indian interests in other parts of Ontario or Canada may differ from the evidence before me. I say this with great trepidation because the evidence in this trial covered territories from as far afield as West Florida, Manitoba, Quebec, Nova Scotia and many of the former thirteen American colonies. There are, no doubt, similarities in all Indian land claims, but, wherever possible, I have tried to restrict my findings to the Land Claim Area or its immediate vicinity, and to groups that have some inter-relationship with the defendants.

I am of the opinion that the wording of agreements made between Indians and the Crown should be given a free and liberal interpretation in favour of the Indians, but that other issues should be dealt with on the basis of the evidence presented.

The evidence called at trial was extremely lengthy, far-ranging and comprehensive. The trial lasted almost 120 days and well over 3,000 exhibits were filed. The defendants seemed to have had unlimited research resources and advanced even the most marginally relevant evidence, to the extent that they swamped the court with material. At the conclusion of the evidence, all counsel stated that they desired to file written argument. At my insistence, oral argument was also presented thereafter. The plaintiff's lengthy written argument referred in the usual manner to decided cases, exhibits, and parts of the transcript of evidence. Unfortunately, the defendants chose in their written argument not to refer to any of the specific oral evidence and to almost none of the exhibits, instead relying entirely on an extremely lengthy three-volume manuscript on aboriginal rights. This treatise was prepared no later than 1982 and could have related to almost any Indian land claim in eastern North America. Fortunately, in the oral argument, the defendants did refer to some of the evidence. The Attorney General of Canada submitted a most helpful, clear and concise argument.

II

STANDING TO SUE

An aboriginal rights claim is not a claim to the legal title to land but a claim to an equitable interest therein. it is based on aboriginal rights, which rights I will define later. Any such rights are communal rights in the band or tribe or nation. They are not individual or family rights.

The term "Indians" under section 91(24) of the Constitution Act, 1867 includes all aboriginal peoples in Canada (see Reference re Term "Indians", [1939] S.C.R. 104).

Parliament has exclusive power to define who are Indians (see Attorney General of Canada v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349). Canada has done so in the Indian Act but, in so doing, has chosen to define Indians in so far as they relate to the reserves set up thereunder, bands or treaties. Other government statutes make reference to "Indians" for their particular purposes. However, Parliament has not attempted to define who Indians as a general group are, or to define who are Indians with respect to aboriginal rights. It has also not defined "Eskimo" or "Inuit" for any purpose. It has defined "band", "Council of the band" and "Indian" in such a way that it is clear that it applies only to registered Indians, persons entitled to be registered as Indians under the Act, and bands for whom lands are specifically vested in the Crown for that band's use. The definitions do not apply to Indians generally.

The present action has been defended by, and the counterclaim brought by, three persons who represent themselves to be members of the Teme-agama Anishnabay, on behalf of that group. They also are registered members of the Temagami (registered) band of Indians. Gary Potts is the chief of the registered band. There is no dispute that they are proper representatives of the

registered band. However, at the opening of the trial, the plaintiff moved, under [Ontario Rules of Practice] Rule 136, for an order adding as defendants the names of all persons actually claiming any interest in the lands who were also registered Indians, on the grounds that only registered Indians could claim aboriginal rights. The plaintiff also moved for an order under Rule 75 authorizing representatives to defend on behalf of the registered band. I dismissed the motion, without prejudice, on the basis that the registered Temagami Indians were properly a party, and that to make any ruling as to the Teme-agama Anishnabay would be premature, there being no prejudice to the plaintiff because of an apparent close association between the band and the registered band. I must now make a final determination of the issue.

I believe the action is properly styled. The registered band is not an incorporated body and is properly a party represented by its chief and other members. It is relatively easy to determine who are members of the registered band because they are on the band list in accordance with the Indian Act. Their rights are communal and, while the members of the registered band may vary from time to time, the Act governs the membership. I do not believe it is really necessary to determine who the members of the registered band were at any given time, but, upon counsels' urgings, I have attached as Schedule A [omitted] a list of those who I find were members at the time of discovery for trial.

Now, I must turn to unregistered bands and Indians. It is trite law that aboriginal rights pre-date any treaty or the setting up of reserves. Hence, if there are persons who are recognized by native Indian groups as being Indians and members of their group, but who are not able to be registered under the Act, then there must be a method whereby their rights can be, asserted**.** In Calder et al. v. Attorney General of British Columbia., [1973]

S.C.R. 313, representatives of the Nishga Indian tribe brought an action with respect to aboriginal rights covering a much larger area than that included in the small reserves held for four registered bands. No question was raised as to their status. If there are aboriginal claims for rights in areas where there are no "Indians" or "bands" or "reserves" within the meaning of the Act, and yet there is a group recognized by the native society as being aboriginal, there must be a remedy and a means of asserting those rights. The only way this can be done is by allowing a representative action on behalf of the band. In my opinion, to be entitled to share in aboriginal rights, a person must be recognized by a band as an Indian, but need not be a registered Indian as defined in the Act. There is no claim in the present case to aboriginal rights on the basis of being a Metis.

The band is not an incorporated group and can only be represented by persons alleging themselves to be members thereof. Counsel for the band argued that, because there was a grant to a collective group of Indians under the Royal Proclamation, by implication they were incorporated for the purpose of this action. I reject this argument on two grounds. First, the Royal Proclamation did not make a grant to anyone, it merely reserved certain lands for the use of Indians; secondly, even if there was a grant, there was no specific grant to this or any other band of Indians. Whether there is a band, and who its members are, is a matter to be determined in the action upon the evidence.

To conclude, the registered band is recognized under the Act and its rights are in the Bear Island reserve, as well as any other rights it may have under the provisions of the Robinson-Huron Treaty. If the defendants were party to a valid treaty, their aboriginal rights have been extinguished and they must look to their treaty rights. However, one of their claims is that they were never a party to a treaty. If so, then their claim relates to aboriginal rights of the group that is entitled to them, that is, the band, which it is alleged is a much larger group than the registered band. Again, whatever rights the band has are communal. The membership and territory of the band are much more difficult to determine. In this case, if there are valid aboriginal claims, then they belong to the band and not the registered band. Therefore, any declaration should be in favour of the named defendants on behalf of themselves and all other members of the Teme-agama Anishnabay.

III

ONUS OF PROOF

I have been unable to find any case law directly relating to the onus of proof in an action for a declaration as to rights where the Crown is plaintiff and an Indian group is defendant. The onus of proof is the duty to establish a case, or to establish the facts upon a particular issue (Phipson on Evidence, 13th ed. (1982), at 44). In the present case there are claims, counterclaims and disclaimers by the parties.

The statement of claim sets out certain purported claims of the plaintiff and then asserts that the lands have never been the subject of letters patent or any grant, sale, lease or other conveyance from the Crown. The plaintiff seeks a declaration: that all unpatented lands are public lands within the meaning of the Public Lands Act, supra, and the Mining Act, R.S.O. 1970, c.274 [now R.S.O. 1980, c.268]; that the Ontario Crown has the right to issue letters patent for those lands; and that the defendants have no right in the lands or, in the alternative, a declaration as to the nature and character of any right that the defendants may have in the lands. It is not disputed that formal letters patent have not been issued by the Crown with respect to the lands in dispute but many patents have been granted within the outer limits of the Land Claim Area. The statement of defence raises the issue that the Royal Proclamation of 1763 in itself constitutes letters patent upon which the defendants rely. In addition, the defendants state that they are a sovereign nation or tribe and descendants of the Indian people, and as such have aboriginal rights in the lands. They rely on the Royal Proclamation and Article 40 of the Articles of Capitulation of Montreal, 1760, to the effect that their indigenous rights must be acknowledged and respected. In the alternative, the defendants claimed prescriptive title to the lands, but they subsequently acknowledged that they could have none. In reply, Ontario alternatively states that: any rights that the defendants had or may have had in the lands were surrendered by the treaties themselves, entered into by the defendants, or as a result of the defendants' conduct subsequent to the signing of the treaties; that the defendants have failed to exercise their rights under the Royal Proclamation; or that the defendants' rights have been extinguished by various statutes and physical affirmative acts of Ontario.

Further in reply, the defendants state that, even if they were not connected by blood with the original occupants, and the occupants as of 1763, they would nevertheless be the Indian successors to the right of possession and occupancy recognized or created by the Royal Proclamation in 1763. Both parties have raised many other issues, legal and factual, but they are not as basic as the ones that I have referred to.

Though the usual rule is that the onus of proof rests on the plaintiff to prove all of the issues in order to succeed, there is no principle or set of harmonious principles which afford a sure and universal test, particularly in an action as complex as this. For example, generally speaking, he who asserts the positive must prove it, not he who denies it. (Phipson and Elliott: Manual of the Law of Evidence, 11th ed. (1980), at 53). The rationale is that it is easier to prove a positive than a negative. The plaintiff need not disprove what the defendant alleges. Furthermore, the party, whether plaintiff or defendant, who in substance and not grammatical form, asserts the affirmative of the issue, bears the burden. Hence, the pleadings on their face are not determinative since substance not form is relevant (Phipson on Evidence, supra, at 43-45).

However, where a given allegation, whether positive or negative, forms an essential part of a party's case, the proof of such allegation rests on him (Phipson, supra, at 45; Cross on Evidence, 5th ed. (1979), at 97). In particular, where the subject matter of a positive or negative allegation lies within the knowledge of one of the parties, that party must prove it (Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), at 395; Wigmore on Evidence in Trials at Common Law, Chadbourn rev. ed. (1981), Vol.IX, at 290). I believe that Wigmore, at p.291, states the proposition properly as follows:

> It is merely a question of policy and fairness based on experience in the different situations.

For these reasons, I am of the opinion that, in this case, the burden with respect to the various issues should fall on the shoulders of more than one party.

The Australian court, in Milirrpum et al. v. Nabalco Property Ltd. et al. (1971), 17 F.L.R. 141, held that the aboriginal claimants had to satisfy the court on the balance of probabilities that their predecessors had the same links to the same areas of land as those they now claimed. In Calder, supra, the question of onus was not specifically discussed, but in dissent Hall J. stated at p.404 that to extinguish Indian title the Sovereign must show such an intention clearly and plainly. In other words, once aboriginal title is established it is presumed to continue until the contrary is proven. At p.354, he stated that Indian title is to be made out as a matter of fact. Hall J.'s comments with respect to the extinguishment of title have been followed in various Canadian cases (see Re Paulette's Application To File a Caveat, [1973] 6 W.W.R. 97, at 143; R. v. Taylor and Williams (1979), 55 C.C.C. (2d) 172 (Div.Ct.) [[1980] 1 C.N.L.R. 83]).

In Baker Lake (Hamlet) et al. v. Minister of Indian Affairs and Northern Development, [1980] 1 F.C. 518 [[1979] 3 C.N.L.R. 17], Mahoney J. said, at pp.557-558 [p.45 C.N.L.R.], that the onus was upon the Indian claimants to establish aboriginal title by proving the following four elements:

> (1) That they and their ancestors were members of an organized society.
>
> (2) That the organized society occupied the specific territory over which they assert the aboriginal title.
>
> (3) That the occupation was to the exclusion of other organized societies.
>
> (4) That the occupation was an established fact at the time sovereignty was asserted by England.

Hence, the onus is on the defendants to adduce evidence to prove on a balance of probabilities: (1) the nature of the aboriginal rights enjoyed at the relevant dates (1763 or the coming of settlement); (2) the existence of an organized society or social organization and the fact that it exercised exclusive occupation of the Land Claim Area, thereby exercising its aboriginal rights. Included would be proof that there was an organized system of landholding and a system of social rules and customs distinct to the band; (3) the continuity of the exclusive occupation to the date of the commencement of the action.

On the other hand, the plaintiffs bear the onus of proving that the aboriginal rights have been extinguished by treaty, or by the statutes or physical acts of the Province of Canada, Canada or Ontario.

The presumption that ambiguity in words and phrases in treaties should not be construed to the prejudice of Indians (R. v. Taylor and Williams (1981), 34 O.R. (2d) 360 (C.A.), at 367 [[1981] 3 C.N.L.R. 114, at 123]) is not relevant to the issue of onus in the broader sense. However, such words and phrases must be interpreted in light of the understanding of the meaning of the words at the time that the documents were entered into, rather than today's meaning.

In addition, I am of the opinion that there is no legal trust relationship between the Crown and Indians. There may well be a high moral trust but this is not one that is recognized at law. In considering evidence of facts as opposed to interpreting contracts or treaties, all factors must be determined in accordance with the standard of proof in civil cases, that is the balance of probabilities rather than with any particular slant or bias in favour of Indians. In particular, findings of fact should be based upon probabilities and not upon speculation or possibilities.

IV

EVIDENTIARY ISSUES: ORAL HISTORY AND ANCIENT DOCUMENTS

Indian oral history is admissible in aboriginal land claim cases where their history was never recorded in writing. However, this does not detract from the basic principle that the court should always be given the best evidence. The court has an obligation, first, to weigh the evidence and consider what evidence is the best evidence and, second, if such best evidence is not introduced, to consider making an adverse finding against the person who has failed to produce it.

Like other evidence, oral evidence is not always accurate. For example, the evidence relating to the names and dates of the chiefs of the defendants that were given to Speck in 1913, by Dokis in 1888 and by Chief Potts at trial do not all agree, though this is not of particular significance other than that I find that Nebenegwune was chief in 1850. Furthermore, Dr. Rogers, in his study of the Crane Indians, stated that present-day bands, whom he believes can be proven to be descendants from a common ancestor, deny any connection between themselves. Oral history may also be contradicted by available factual records. The same is true of the Temagami area. This shows that while oral evidence must be weighed like other evidence, consideration must be given to the faultiness of human memory.

I feel obliged to comment on how disappointed I was that there was so little evidence given by Indians themselves. Chief Potts was the principal Indian witness to give oral history. There were a few other Indians who gave minimal amounts of oral history, some of which conflicted with that given by Chief Potts. Furthermore, they did so only as a condition of my allowing hearsay evidence to be introduced by Mr. Conway with respect to alleged Iroquois battle sites. The

evidence that they gave in chief was restricted to that issue, plus statements to the effect that they knew of no treaty and that they believed that their ancestors had always lived on the Land Claim Area. In cross-examination, they stuck to the proposition of ancestral residence, even when some of the evidence, such as that presented to William Twain, indicated that some of his ancestors had moved onto the land or were white people. The knowledge of these Indian witnesses was generally limited in time to their immediate grandparents.

In a matter of this importance I expected that all of the older people in the Temagami band who were able to give useful evidence would have been called. Throughout the trial I had an uncomfortable feeling that the defendants, in presenting their case, did not want the evidence of the Indians themselves to be given, except through the mouth of Chief Potts. Chief Potts stated that the oldest person best able to recount oral tradition was George Peshabo. Mr. Peshabo did not give evidence and no reason for this was given. Chief Potts also stated that oral history was normally handed down from father to son. The two sons of Donald McKenzie were not called to give evidence even though Donald McKenzie was one of the principal sources of Chief Potts' evidence. I also note that practically all of the evidence of place names, canoe routes, folklore sites, rock art, settlements and canoe styles came from non-Indians rather than from Chief Potts or any other Indian. The acknowledged "old people" who knew the most about the oral history were inexplicably not called to give any such evidence.

Unlike many other Indian land claim cases, the present case has not been presented through a concurrence of many voices with respect to the oral tradition of the band. There has really been only one voice, that of Chief Potts. Obviously, even in the context of oral history, the best evidence rule permits the court to seriously consider the weight to be given to the evidence of Chief Potts under these circumstances.

Chief Potts, who is thirty-eight years old, has a white mother and a father who is not of pure Indian ancestry, and whose Indian ancestry descended from persons who arrived on the lands about 1901, long after most of the issues in dispute had occurred. It could not be said that his own ancestors had any direct oral knowledge of the events in question. He was therefore merely giving evidence of oral history he had accumulated from other members of the band. He cannot speak the native language and therefore has difficulty in communicating fully with some of the oldest members, although they speak English.

Chief Potts acknowledged that he knew little about the band's history until the late nineteen sixties when he read Dr. Frank Speck's Memoirs of 1913 (see Exhibit 1-41: Speck's Memoir 70: Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley, (1915)). He then commenced asking questions of the older people for the first time and started to learn the history of the band. He first discussed the land claim with his father in 1970 or 1972. His was obviously not oral tradition in the normal sense. His evidence must also be considered in light of his admitted statement that he considers government bureaucrats as imbeciles and that he doesn't trust anyone at the Department of Indian Affairs, because, in his words, "There is a war going on." He speculated that government officials in the eighteen fifties and eighteen eighties were dishonest. In addition, Chief Potts acknowledged that, for a number of years, he had been receiving government cheques which had, on their face, Robinson-Huron Treaty annuities, but he testified that he had not known what the money was for. For an intelligent man, I find this incredible. He also gave evidence without having seen and reviewed some of the most important documents connecting a former chief with the Robinson-Huron Treaty of 1850, because he had not been shown the documents by the research assistant engaged by the registered band.

If a white person, or non-Indian, gives evidence as to oral tradition, this testimony is admissible generally only where the declarants are dead. In the present case, Mr. Conway, Mr. Morrison and Mr. Macdonald gave evidence as to what they had been told by Indians. In many cases, the supplier of such information is still alive and in other cases is not identified. This must be borne in mind in determining the credibility and weight of the evidence. I make this comment notwithstanding that to a degree all three of these gentlemen are experts in their own particular fields.

Where the facts relating to the current social organization, language and general way of life of a band, the antiquity and lineal descent of the claimants to membership in a band, and the definition of the present boundaries of occupation of a band are in dispute, then the findings of fact must be based on weighty evidence from a number of Indians who can speak to these matters from their own knowledge and experience. The facts concerning these matters should be supported by historical, anthropological and other expert evidence, but the defendants should not rely entirely on non-Indian historical, anthropological or other evidence when Indian evidence is available. .

I am not so concerned about the credibility and weight to be given to the expert testimony of persons such as Dr. Rogers or Dr. Nichols, who are acknowledged experts in their general fields. Dr. Rogers is an ethnologist and any opinions that he may formulate based on information received from living Indians as to their oral traditions are admissible in court. Unfortunately, in the present case he had made no study of the Temagami Indians, and his evidence relates to other groups and bands. He expressed opinions about the defendants primarily by analogy. If his study had been of the Temagami Indians directly, his evidence would be clearly admissible and of considerable weight. As it is, it must be considered in the context in which it was given.

Ancient documents are producible as evidence about occurrences when no living person can give direct evidence of these occurrences, provided such documents are of a general public nature. Most of the written evidence that was introduced at this trial is in this latter category. Although any of the exhibits filed would not technically comply with the rule, both parties agreed that such documentary evidence could be introduced. I am only aware of one document in this category that was withheld on the ground of privilege, that being a tape recording of a conversation with Donald McKenzie, now deceased, as to the oral traditions of the band. Donald McKenzie's father was of the North Temiskaming Band (Exhibits 1-59) and his mother was a daughter of a Temagami ancestor. He was added to he Temagami registered list in 1933 by a vote of the registered band. Such a tape recording would have been admissible if privilege had not been claimed. Chief Potts gave evidence with respect to much of what as likely in the tape, but I place less weight on that evidence than I would have if the original tape had been introduced. Obviously, any statements made subsequent to the commencement of litigation should be considered only in that light.

In the present case, an exhibit was filed of a concordance between the defendants and the surrounding Indian bands setting out the boundaries of their lands. No witnesses were called from the surrounding bands to support the concordance. They may also be badly informed about their ancestry. In any event, it appears that all of those bands have either entered into treaties or, in the alternative, are in areas in which, presumably, treaties are not required. In other words, they had little to lose by supporting the concordance. I find that it was agreed that at least one of them was to have hunting and fishing rights within the Land Claim Area if their own territories and reserves became crowded. Again, the only evidence came from Chief Potts. I therefore do not consider that the concordance can be given great weight.

In summary, I believe that a small, dedicated and well meaning group of white people, in order to meet the aspirations of the current Indian defendants, has pieced together a history from written documents, archaeology and analogy to other bands, and then added to that history a study of physical features and other items, together with limited pieces of oral tradition. Even the name Teme-agama Anishnabay was not used in any printed form or record of the band or registered band until 1976. This leads me to doubt the credibility of the oral evidence introduced, and affects the weight to be given to the evidence of non-Indian witnesses.

V

OVERALL FINDINGS

In my opinion the plaintiff is entitled to the relief claimed and the defendants' counterclaim fails. There are several grounds upon which this result can be reached. I have decided to deal with all of the grounds, rather than base my decision on one ground alone, because of the exhaustive nature of the evidence and argument submitted on all of the issues, and because of the importance of the case, and thus the likelihood of appellate review. I wish any appellate court to have my findings of fact relating to all issues raised at trial, as well as my reasons thereon.

A summary of my findings on each issue follows, after which I will deal with each issue individually.

First, I will deal with the origins of aboriginal rights. With respect to the area south of the Height of Land, I find that the land is governed by the Royal Proclamation of 1763. I find that the intent and effect of that Proclamation is to create aboriginal rights that are personal and usufructuary and dependent upon the pleasure of the Crown. The limited dependent nature of these rights is not altered by the fact that the Crown may, as a matter of expediency or goodwill, have chosen to enter into treaties with the Indians. The relevant date for determining aboriginal rights is 1763. With respect to the small area north of the Height of Land, I find that the land was not covered by the Royal Proclamation of 1763 but that the rights of the Indians and Crown at common law are in

all ways the same as in Proclamation lands, except that the relevant date for determining aboriginal rights is the coming of settlement.

Second, I will deal with the nature of the aboriginal rights exercised in the area south of the Height of Land in 1763, and in the area north of the Height of Land at the same time, though I need not and cannot determine, for the latter, the actual time of the coming of settlement. I conclude that the Royal Proclamation and common law gave to the Indians only the aboriginal right to continue using the lands for the purposes and in the manner enjoyed in 1763, and not the right to any new uses to which they might subsequently put the land. I list the traditional uses for basic survival and personal ornamentation existing as of 1763.

Third, I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim area from 1763 or the time of coming of settlement to the date the action was commenced.

Fourth, I find that the Constitution Act, 1867 did not give to the Indians any independent rights of self-government. I find that at all times the Crown has had a right to extinguish aboriginal rights by legislation, administrative action or treaty, and that the intent to extinguish must be "clear and plain", but not necessarily express. I believe that such clear and plain intention may be found in laws of general application that apply to all persons or property, and in administrative action pursuant to such legislation, where such legislation and administrative action has the effect of extinguishing aboriginal title. I find that the Constitution Act, 1982 does not resurrect aboriginal rights which were extinguished prior to the passage of the Act.

Fifth, I find that the effect of the Robinson-Huron Treaty of 1850 was to extinguish aboriginal rights in the Land Claim Area, and that these ancestors of the defendants who had the authority to do so were party to the treaty in 1850, and if not in 1850, certainly adhered to it in 1883.

Sixth, I find that the Province of Canada (prior to Confederation), and in particular Ontario (after Confederation), enacted legislation the intent and effect of which was to open up the Land Claim Area to settlement and extinguish aboriginal rights therein. Ontario also issued patents and took administrative measures which had the same intent and effect.

Seventh, I find that the Province of Canada, prior to 1867, was constitutionally competent to enact legislation and enter into treaties which had the effect of extinguishing aboriginal rights in the Land Claim Area. I also find that Ontario was constitutionally competent to enact general legislation within its area of legislative competence which had the effect of extinguishing aboriginal rights in the Land Claim Area. My conclusions as to constitutional competence refer only to the period prior to the passage of the Constitution Act, 1982. I was not referred to any legislation passed since that Act and hence make no comment on the effects of that Act on constitutional competence to extinguish aboriginal rights.

Finally, I will deal with the limitations period. With respect to the Crown's claim, I find that the limitation period began to run against the Crown only in 1973, when the defendants asserted title. In any event the Crown has asserted title since at least 1870. Therefore, the Crown's action is not statute-barred. With respect to the defendants' counterclaim the Crown first asserted title at the latest in 1883. The defendant brought their action in 1973 or 1978. Therefore, the defendants counterclaim is statute-barred. Though I find that the applicable statute is the Limitations Act, supra, if I am wrong and the Real Property Limitations Act, C.S.U.C. 1859, c.88 is applicable, the results would be the same. I also find that the defendants' counterclaim is barred by the doctrines of laches, estoppel and acquiescence.

VI

THE ORIGINS OF ABORIGINAL RIGHTS

A. The Historical Context of the Royal Proclamation of 1763

A great many historical documents concerning the first explorations of the English and the French regime in Canada were introduced in evidence by the defendants. This evidence covered a period from the Charter of 1542, issued by King Henry VII of England to John Cabot, to the Article of

Capitulation of Montreal in 1760. At the time, I questioned the relevance of these exhibits but was assured by the defendants that these were necessary to show the flavour of how the French dealt with the Indians. I am now convinced that while they may be of great academic interest, they have little bearing on this case.

Defence counsel argued that some clauses of the Articles of Capitulation of Montreal (Exhibit D.1-49) are still effective. I do not agree. Even if they were still effective, I do not agree with his arguments relative thereto. He argued that Article 37, which provided that the Lords, the Manors, the officers, the Canadians and the French, "and all other persons whatsoever" might maintain the entire peaceable property and possession of their goods, including furs, by referring to "persons included the Indians and therefore, at that time, gave them equal right with all Canadians. Considering the overall concept of the Articles of Capitulation of Montreal, and the fact that both the French and the English treated Indians as unequal to Europeans and dealt with them separately in Article 40 as they dealt with Negroes separately in Article 47, I am of the opinion that this clause, at that time, was not meant to include Indians. All rights that the Indians had under the Articles of Capitulation of Montreal are contained in Article 40. Article 40 provided that savages or Indian allies of the French King should be maintained in lands they inhabited, if they chose to remain there, and that they should not be molested for having carried arms and served the French. The Indians living in Temagami were allies of the French but there is no evidence that they carried arms.

In any event, the British and French signed the Treaty of Paris in 1763, ceding to the British all French rights in North America in the areas with which we are concerned. In the same year, there was the Pontiac rebellion (sometimes referred to as the Great Ojibwa War) by the Indians against the British, which rebellion was suppressed. Dr. Eccles stated that the Indians considered this to be their war against the English and that they laid down their arms when the French stopped supporting them. This was before they knew of the Royal Proclamation. There is no evidence to indicate that the Indians residing in the Land Claim Area were actively involved in that rebellion, but the defeat and surrender of the French, and the suppression of the rebellion, indicated a clear sovereignty by the British Crown over the majority of North America, including the lands with which we are concerned. The British Crown did not merely take on what the French Crown had but took total sovereignty. Notwithstanding the arguments that were advanced by counsel for the defendants, and the lengthy evidence that he introduced, in his final argument he admitted that all rights were in the British Crown and that the only rights that the defendants might have stemmed from the Royal Proclamation of 1763. I believe that this is the correct proposition which is supported, not only by the evidence, but by previous court decisions.

Before examining the Royal Proclamation of 1763, I note that by the Quebec Act, 1774, 14 Geo. III, c.83 (U.K.) (R.S.C. 1970, Appendix II, No.2), the Royal Proclamation, including all ordinances made thereunder, was revoked, annulled and made void so far as it applied to the enlarged Province of Quebec, which included the lands with which we are concerned. Therefore, whatever effect the Royal Proclamation, or any ordinances or directions made under it, had was nullified upon revocation. However, clause 3 of the Quebec Act, 1774 in effect continued the Royal Proclamation itself with respect to Indians, because the Indians had been given a right of possession in their lands by the Royal Proclamation. I am of the opinion that such right continued after the Quebec Act, 1774, but that any procedural regulations that related to that right were terminated. In other words, the Indians had the right contained in the Royal Proclamation and nothing more. The lands with which we are concerned no longer remain in the Province of Quebec but that is immaterial to the legal consequences that flow from the Royal Proclamation.

The Royal Proclamation of 1763 granted the Governors and Councils of the new colonies, including Quebec, the power to settle and agree with the inhabitants, or with any persons who should come there, for such land, tenements and hereditaments, as might be in the King's power to dispose, and to grant them to any such persons. It is clear that the words of the Proclamation make a distinction between Indians and subjects or persons. The words show that the Crown considered that it was necessary for the security of the colony that the "several Nations or Tribes of Indians" who are connected with the British or live under British 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...". The Proclamation then prohibited the Governors of the colonies from allowing surveys or granting patents for lands beyond the bounds of their respective jurisdictions as described in their commissions, and prohibited the Governors "for the present, and until Our further Pleasure be known" from granting patents in any such lands. It also required all "Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which not having been ceded to, or purchased by Us, are still

reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements." Still later, there is the prohibition that "no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians...". Later, the Proclamation refers to trade with the Indians being "free and open /to all our Subjects." From all of these it is clear that Indians were being dealt with not as regular persons or subjects but as a group apart.

The Proclamation prohibited any private person from buying lands from the Indians or settling on Indian lands at any time, and provided as follows:

> ... but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colonies respectively, within which they shall lie: ...

These are the only clauses that give any rights to Indians in the area under consideration. I interpret these words as reserving the lands as their hunting grounds, but not as a grant of any title therein to them or to any particular band. I also interpret them as prohibiting surveys and grants of Indian lands until the Crown or, in more modern parlance, the government has decided otherwise by properly enacted legislation.

I do not read the provision concerning purchase of the lands in the Crown's name as setting out any more formal procedures than that, if the Indians wished to dispose of their lands, then there shall be a public meeting held by the Governor for that purpose in such manner as the Governor chooses. The intent of the Proclamation was, first, to prevent private purchases from Indians and, second, to make certain that the process of Crown acquisition was public.

The Royal Proclamation sought to preclude fraudulent, private dealings between individual white colonists or other persons and Indians, whereby the former acquired Indian lands either from individual Indians or from chiefs or groups of Indians. The Royal Proclamation also sought to avoid the development of a feeling amongst the Indians that they were being defrauded of their rights. It was clear that the white colonists intended to occupy the lands. The problem was how to make certain that the Indians accepted this with good grace and without bloodshed. By preventing private purchases of land or acquisition of land and requiring that all lands would be dealt with by the Crown, the Indians would be given a claim against the Crown if the Crown so wished to recognize it. By making the acquisition process public, with as many Indians present as possible, misunderstanding and dissatisfaction would be minimized.

However, at the time of the Proclamation, there was a general belief that in most areas the Indians were nomadic and wanderers. Hence, I do not believe that there was any intention on the part of the Crown to be more formal than to say that it would deal with whatever Indians alleged that they resided in the territories that were to be acquired at the time of prospective acquisition. The document did not require the Crown in every instance to first determine what group was an Indian band, and then to determine that the band itself had formally authorized its chief or head man to enter into a treaty, and to ensure that the meeting was open, that all details of the negotiated treaty were subsequently approved by the band, and that the specific limits of each individual band were defined in the treaty. There was nothing in the document to indicate that all lands in the Indian territories were occupied totally by definable Indian bands because the Crown believed them to be nomadic. Even today the Indian Act does not provide any procedure for entering into a treaty with Indians on Royal Proclamation lands. The Act defines a band and a reserve. The surrender provisions therein are clearly attributable to surrenders by a particular registered band of the whole or any part of a reserve that has been specifically set aside for that registered band.

The Crown has stood in a position of trust for the Indians but that trust is a moral obligation and not a legal one.

There was a great deal of evidence introduced relating to the Crown's policy of enforcement of the Royal Proclamation in the early years after its proclamation. This evidence shows that the Crown had a policy of leaning over backwards to accommodate the Indians so as to prevent any misunderstandings. For example, with respect to the treaties in the Niagara Peninsula and southwestern Ontario, where errors in description were found, the Crown went back and made a new treaty. I am of the opinion that this was done primarily because the Crown did not want to have another Pontiac rebellion on its hands, and therefore it was prudent policy to act in this manner. It is also clear that, where there was no concern about an Indian insurrection, the Crown did not enter into treaties and paid no attention to any aboriginal rights. In a letter dated March 7,

1768, the Lords of Trade on Indian Affairs stated that "the necessity which appeared in the then state of our interest caused the Royal Proclamation." In other words, wherever the Crown felt that it could defend its white citizens, it did not provide for treaties with the Indians. Where it had a doubt, it did so provide. Evidence of this is the fact that there are no treaties in the Province of Quebec or the Provinces of Nova Scotia or New Brunswick. At that time, those provinces were to a great extent settled. Certainly, where Indian rights had long since ceased to be pursued, the Crown's policy was to ignore them. In later decades or centuries, the Crown has taken a different approach, such as the Williams Treaty of 1923 which settled with the Mississaugas Indians in central Ontario. However, all of these are matters of policy and not of law.

B. The Effect of the Royal Proclamation of 1763 on Aboriginal Rights

It is clear that in the eyes of eighteenth and nineteenth century Europeans, the Indians in the Canadian Shield, of which the Land Claim Area is a part, were wanderers who had no fixed place of abode. This point should be remembered when dealing with documents of that time period, such as the Royal Proclamation. That assumption has been prevalent amongst almost all scholars until the last ten to twenty years. The principal witness for the defendants with respect to the permanence of Indian tribes in fixed locations was Dr. E.S. Rogers, a prominent ethnologist. In his own works published prior to the last ten to fifteen years, he often referred to the wandering nature of the Indians in the Shield area. It is only recently that he has changed his opinion to the belief that all Indians have a place of permanent residence until it is proven to the contrary. I will deal with his opinion later.

The wording of the Royal Proclamation:

(1) declares that it is the King's "Royal Will and Pleasure" that the governors and commanders in chief of the British colonies and plantations in North America refrain "for the present, and until Our further Pleasure be known" from granting warrants of survey or passing patents for any lands that have not "been ceded to, or purchased by Us"; and,

(2) declares that it is the King's "Royal Will and Pleasure, for the present as aforesaid" that the lands be reserved "under Our Sovereignty, Protection and Dominion, for the Use" of the Indians and forbids all subjects from “making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained."

In R. v. St. Catherine's Milling and Lumber Company (1885), 10 O.R. 196, the courts faced two issues: (1) the existence and nature of aboriginal title; and (2) the nature of federal as opposed to provincial proprietary interests and legislative competence. The second issue will he dealt with in a section on constitutional questions. On the first issue of the existence and nature of aboriginal rights, at trial Chancellor Boyd said, at pp. 229-230;

> Again: The relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state[,] they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse[,] the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them. If, however, they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage, and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: Bastien v. Hoffman, 17 L.C.R. 238. Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands. (Emphasis added)

And after dealing with certain transactions that had occurred in British Columbia, he said, at p.234:

> … underlying the whole there is an affirmance of the constitutional propositions that the claim of the Indians by virtue of their original occupation is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the Government upon their displacement; that the

> surrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount .... (Emphasis added)

On appeal to the Privy Council, Lord Watson stated the following, in a speech found in (1888), 14 App. Cas. 46, at 54-55:

> The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be “parts of Our dominion and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished. (Emphasis added)

The Privy Council made it clear, at p.58, that the Indians were not, prior to surrender, owners in fee simple of the territories, and that a fee simple interest was not the character of the Indian interest:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.

To summarize, the St. Catherine's Milling case stands for the proposition that, as a result of conquest, on Proclamation lands aboriginal title is personal and usufructuary only, and exists solely at the pleasure of the Crown. The right of use and occupation is not akin to a fee simple interest but one subject to an obligation to convey only to the Crown. The fact that the Crown, as a matter of policy and expediency, has entered into treaties with the Indians whereby presents were given in exchange for the formal surrender of land does not alter the limited dependent nature of aboriginal rights.
Thus, on the nature of aboriginal rights, Chancellor Boyd and the Privy Council were in agreement. Chancellor Boyd was also upheld by majorities in the Court of Appeal and Supreme Court of Canada.

The decision of the Privy Council did alter the decision of Chancellor Boyd in so far as he had determined that the Constitution Act, 1867, s.91(24) applied only to lands that had been specifically set aside by the Crown for individual bands of Indians.

The St. Catherine's Milling case has been cited by many courts over the last one hundred years. In Ontario Mining Company Limited et al. v. Seybold et al., [1903] A.C. 73, at 79, the Privy Council stated as follows:

> It was decided by this Board in St. Catherine's Milling Co.'s Case that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s.109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject

only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. (Emphasis added)

In Isaac et al. v. Davey et al. (1974), 5 O.R. (2d) 610, at 620, Arnup J.A. stated as follows:

> The nature of Indian title in Ontario, and the policy of the British Crown in relation to Indians and their rights has been authoritatively determined in a series of cases, in which much of the historical background is recounted, particularly in those cases decided when the events of the last 15 years of the 18th century were still present in the minds of living persons in the middle of the 19th century, and were recorded in documents available to the Judges of that time. As Osler J., did, I find the judgment at trial of Chancellor Boyd --a most learned, accurate and respected Judge -- in R. v. St. Catharine's Milling & Lumber Co., to be of great assistance. It is reported in (1885), 10 O.R. 196. The history of public lands is dealt with at pp.203-6, and the colonial policy of Great Britain concerning the aboriginal populations in America is dealt with at length commencing at p.206. The judgment was affirmed, 13 O.A.R. 148, 13 S.C.R. 577, and by the Privy Council, 14 App. Cas. 46. (Emphasis added)

I agree with Arnup J.A.'s assessment of the judgment of Chancellor Boyd, and I agree with Chancellor Boyd, except where he decided that federal jurisdiction under section 91(24) was restricted to ceded lands or reserves.

In The Province of Ontario v. The Dominion of Canada and the Province of Quebec (In re Indian Claims) (1895), 25 S.C.R. 434, at 511-512, Gwynne J., who had dissented in the St. Catherine's Milling case, again dissented, but in his reasons he accepted the St. Catherine's Milling decision as being the proper interpretation of Indian rights and the Crown's attitude towards them:

> The first point presented for our consideration is the construction of the above clause which is common to both of the treaties, and in the consideration of it is altogether beside the question to insist that the title of Her Majesty to the lands mentioned in the treaties as being surrendered by the Indians were vested in Her Majesty in right of Her Crown to the fullest extent independently of the treaties and that the execution of those instruments neither added to, nor detracted from Her Majesty's title to the ceded territories. It is not contended that Her Majesty's title to the lands was not perfect, independently of the treaties, or that Her Majesty derived title to the lands in virtue of the surrender by the Indians mentioned in the treaties; what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown. (Emphasis added)

It is interesting that this Re Indian Claims case dealt with lands covered by the Robinson treaties, one of which is the same treaty that is before the court in this case.

The position of Chancellor Boyd in the St. Catherine's Milling case also was basically reaffirmed by the Supreme Court of Canada in the decision of The Province of Ontario v. The Dominion of Canada (1908), 42 S.C.R. 1, at 104, where Idington J. stated as follows:

> That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.
>
> In these surrendering treaties there generally were reserves provided for Indians making such surrenders to enter into or be confined to for purposes of residence

> The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of The Queen v. The St. Catharine's Milling Co.

The fact that the Proclamation was the unilateral act of the Crown offering rights and protections to the Indians dependent upon the goodwill of the Sovereign was further affirmed in Attorney General of Canada v. George, [1964] 2 O.R. 429 (C.A.), at 433; in R. v. Smith, [1981] 1 F.C. 346, at 378-380 [[1980] 4 C.N.L.R. 29, at 56-7]; and in R. v. Tennisco (1981), 64 C.C.C. (2d) 315, at 322-324 [[1981] 4 C.N.L.R. 138, at 145-8].

In the recent case of Smith v. The Queen et al., [1983] 1 S.C.R. 554 [[1983] 3 C.N.L.R. 161], Estey J., speaking for the court, at pp.568-569 [p.172 C.N.L.R.], stated:

> The right of the Indians to the lands in question was described by Lord Watson in St. Catherine's at p.54 as yea personal and usufructuary right". The latter term is defined as follows:
>
> > Usufruct
> >
> > 1. Law. The right of temporary possession, use or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
> >
> > 2. Use, enjoyment, or profitable possession (of something) 1811.
> >
> > Usufructuary
> >
> > 1. Law. One who enjoys the usufruct of a property etc.
> >
> > (The Shorter Oxford English Dictionary, 1959, p.2326)

Item 1 under "Usufruct" is substantially the same as what Chief Potts described as the rights of use from one generation to the next.

In my opinion, that finding in the Smith case shows that the aboriginal land rights consisted of the rights of temporary possession, use or enjoyment of the advantages of the property belonging to the Crown, so far as may be had without causing damage or prejudice to the property, which rights could be given up or taken away at any time. They are personal rights that disappear on surrender and cannot be transferred either by operation of law or express transfer.

Furthermore, the Royal Proclamation indicates that whatever personal and usufructuary rights there were communal in nature to the bands of Indians. There was no recognition of any individual interest.

It is interesting that in reports of Commissioners in 1839 and 1842, which latter report was laid before the Legislative Assembly of Canada in 1845, reference was made to the Government making arrangements for voluntary surrenders of lands to prevent the white settlers from gradually taking possession of them without offering any compensation, and to provide offers of compensation to Indians to induce them to move quietly to more distant hunting grounds, or to confine themselves within the more limited reserves. In that report, reference was made to Vattel on the Law of Nations indicating that the Commissioners considered that the Indians did not have any proprietary right in the lands, that the Indian occupation could not be considered as a true and legal habitation, and that the Europeans were lawfully entitled to take possession of the land and to settle it with colonies. Whether or not this was proper law or a proper view, it was the view in 1845 of persons in what is now Ontario, and it must be borne in mind in interpreting any legislation or contracts or treaties made at that time. This view is consistent with my interpretation of the meaning of the Royal Proclamation itself.

C. Aboriginal Rights in Land Not Covered by the Royal Proclamation of 1763

The Royal Proclamation applies to that portion of the Land Claim Area south of the Height of Land dividing the Hudson's Bay watershed from the Great Lakes watershed. The small portion of land to the north of the Height of Land located within the Land Claim Area is not subject to the Royal

Proclamation because such lands were in Rupert's Land at that time, and did not become part of Canada until 1870. The law applicable to the northern lands is set out in the Baker Lake case, supra, and the Calder case, supra, where it is stated that aboriginal rights exist at common law independent of the Royal Proclamation, and are personal and usufructuary and dependent upon the pleasure of the Crown. The only difference between the common law and the Royal Proclamation is that under the Royal Proclamation the relevant date for determining aboriginal rights is 1763, whereas at common law the relevant date for determining aboriginal rights is the coming of settlement. In all other respects, the aboriginal rights of the Indians and the Crown is the same.

In the Calder case, Judson J. stated, at p.328:

> There can be no question that this right was "dependent on the goodwill of the Sovereign."

And in Isaac, supra, Arnup J.A., at p.620, stated:

> For the purposes of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the goodwill of the Sovereign". Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (per Lord Watson) in St. Catharine's Milling & Lumber Co. v. The Queen, at pp.54-5, and this statement of the legal position has been followed ever since. (Emphasis added)

In the Baker Lake case, supra, Mahoney J. stated, at p.577 [pp.62-3 C.N.L.R.]:

> Canadian courts have, to date, successfully avoided the necessity of defining just what an aboriginal title is. It is, however, clear that the aboriginal title that arises from The Royal Proclamation is not a proprietary right: St. Catherine's Milling & Lumber Co. v. The Queen (1888), 14 App. Cas. 46 at p.54 ff. If the aboriginal title that arose in Rupert's Land independent of The Royal Proclamation were a proprietary right then it would necessarily have been extinguished by the Royal Charter of May 2, 1670, which granted the Hudson's Bay Company ownership of the entire colony. Their aboriginal title does not make the Inuit "holders of surface rights" for the purposes of the section. (Emphasis added)

D. Conclusion

To conclude, in 1763, George III, with the advice of his United Kingdom ministers, did not grant ownership of vast tracts of lands to Indian bands subject to a limited right of repossession by repurchase, surrender or conquest when a war had just been fought to acquire those lands. At that time, Europeans did not consider Indians to be equal to themselves and it is inconceivable that the King would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense.

The question remains, of what did the aboriginal right of use and occupation consist, and how could it be extinguished?

VII

THE NATURE OF ABORIGINAL RIGHTS IN THE LAND CLAIM AREA

I am not aware of any court having determined in detail what are aboriginal rights, and I myself am reluctant to do so. However, not only does the statement of claim ask for such a declaration but counsel for both parties have urged me to do so. I accept the proposition in Kruger and Manuel v. The Queen [1978] 1 S.C.R. 104 that any determination should be restricted to the specific area and not be made on a global basis. A great deal of evidence was presented by counsel, most relating to the lands south of the Height of Land and therefore in the Royal Proclamation area. There was little specific evidence for the very small area of the lands north of the Height of Land and I would have had great difficulty in determining the actual time when the land was opened to

survey and settlement. However, making such a determination is not necessary because I have concluded elsewhere in these reasons that the defendants have not proved entitlement to aboriginal rights in the northern area.

Assuming for the moment that the ancestors of the defendants were entitled to aboriginal rights in the Land Claim Area in 1763, of what did those rights consist? The Royal Proclamation reserves the lands to those persons for their hunting grounds. Such rights are only usufructuary and possessory.

I do not accept the defendants' argument that a broad and liberal interpretation of the Royal Proclamation gives the Indians the right to use the lands for any purpose that they may choose over the succeeding centuries. The essence of aboriginal rights is the right of Indians to continue to live on their lands as their forefathers lived. It is nothing more and nothing less than that. This contradicts Chief Potts' statement that they could use the land for any purpose that they wished, but is consistent with another statement he made that, traditionally, no living person could use the land in such a way as to hurt his children's right to use the land. I conclude that the Royal Proclamation gave to the Indians only the right to continue using the lands for the purposes and in the manner enjoyed in 1763. It is therefore necessary to review the evidence of possession and use of the land in the Land Claim Area at that particular time.

The Province of Canada in 1850 indicated its perception of aboriginal rights by using the words in the Robinson-Huron Treaty, (words similar to those used in other treaties) "allow the Chiefs and tribes to hunt and fish in waters as they have been in the habit heretofore." In 1870, the Imperial Government referred to aboriginal rights in the Rupert's Land and North-Western Territory Order, R.S.C. 1970, Appendix II, No.9 (Exhibit 10-4), stating that the claims of Indians for compensation for lands required for the purposes of settlement were to be considered and settled in equity as always.

In George, supra, Roach J.A. stated, at p.432, as follows:

> All our Indian lore tells us of the use to which the Indians had been accustomed to put those lands. They used them primarily---to adopt the language in the recital--"as their Hunting Grounds". They lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food supplemented only by what, in accordance with their primitive knowledge they were able to grow on the land. These were the essentials that were secured to them, not alone for their security but also as being essential to the "Interest" of the Crown.

This indicates the basic rights of the Indians. In Tennisco, supra, Griffiths J. held that a broad and liberal interpretation of the Royal Proclamation suggests that the Proclamation included the right not just to take game or hunt, but also the right to fish. I agree with that proposition.

Dr. J.V. Wright, an eminent archaeologist, gave evidence in which he referred to his book Six Chapters of Canada's Pre-History (1976) (Exhibit 16-9). He made no specific study of the Temagami area but gave extensive evidence of the general Indian way of life in the Canadian Shield, and some of the evidence related to the Land Claim Area. He stated that the Algonkian way of life (which covers people in the Land Claim Area) had not changed significantly for more than seven thousand years prior to European contact, and that it involved a combination of big game hunting and fishing and, inferentially, the use of the bark canoe and the snowshoe. Dr. Rogers stated that the Indians in the area were hunter-gatherers. I accept these views. Dr. Wright also stated that Indians in many areas had been farmers. However, I accept his opinion that there was no farming in the Land Claim Area in prehistoric times. I also find that there was none in 1763.

Dr. Wright then referred to tool making, trading and housing. He outlined generally that flint, quartzite and other rocks were used for tools, such as arrowheads, lances, scrapers, knives and axes, and that bones were also used for many of these purposes. He pointed out that clay was used for pottery, pipes and ornaments. He stated that the tools that were made were necessary, either for survival or to create luxury goods. The only source of flint (more properly described as chert) used for arrowheads lies to the west of the Land Claim Area. There is evidence of isolated areas where there was some limited surface quarrying of rocks and other non-metallic minerals for the making of other types of primitive tools and ornaments. There is also evidence that there were isolated areas in which clay could have been obtained to make pottery or pipes, but there is no archaeological evidence that any of the potsherds or clay pipes found in sites in the Land

Claim Area were in fact made on the Land Claim Area. However, I am of the opinion that limited use was made of clay or rocks to meet the basic needs for survival and personal ornamentation of the inhabitants, and that this use was an aboriginal use of this land.

The discovery of silver and copper goods is evidence that there was trade in the area in prehistoric times. However, there is no evidence that these metallic trade articles were from any source within the Land Claim Area. In fact, it is likely that the copper came from the north shore of Lake Superior and the silver from an area to the east. I find that there was no metallurgical mining taking place in the Land Claim Area prehistorically or in 1763. The only other evidence of prehistoric trade in the area was that of the export of fish and furs south to the Hurons. This had ceased by 1763.

The aboriginal people had housing and the evidence from Dr. Wright and others indicates that, in this area, houses were likely made of wooden poles covered with bark or furs. There is no evidence of any lumbering to the extent that other kinds of housing were made. Obviously, the aboriginal people used wood for making fires. There is evidence that canoes were made in the area which would require the use of gum as well as birch bark and some small amount of branches or trees for the ribbing. There is no evidence that, prehistorically, the Indians in this area made canoes for export or for anyone else's use than their own. There is evidence that some Indians made canoes for the fur trade prior to 1763, but I find that these were Nipissing Indians. There is evidence that there was berry picking and maple sugar making on the lands after 1763, and I accept that this was very likely a use prior to that time.

In 1848 and 1849, Shinguaekonce, an Indian in the Sault Ste. Marie area, speaking generally, stated that before the white man came the Indians used animals for food and their skins for clothing; that the bones were used for spears and that the clay was used for pipes, kettles and ornaments. This is consistent with what Dr. Wright has said. Shinguaekonce further stated that he believed the mines were placed there for future use after the subsistence of the forests and lakes had disappeared. This clearly indicates that in his opinion the mines were not used by the Indians prior to the coming of the white man, although it obviously overlooks the other evidence that there was some copper mining activity in the Lake Superior area in prehistoric times. Perhaps Shinguackonce was not aware of it.

In 1884 (Exhibit 2-109) it was reported that the Temagami band lived almost entirely by hunting, trapping and fishing. In 1913, Alec Paul reported to Speck (Exhibit 12-91) that each family had its own district where it belonged, that it owned the game therein, and that such division of land started in the beginning of time. Also he said that an owner could give permission for strangers to hunt. He made no reference to band ownership. These statements are consistent with aboriginal use of lands as I find them but also indicate strong family rights as opposed to band rights. Prior to the coming of the Europeans, it is improbable that there were family hunting territories in the Land Claim Area such that any family had the exclusive right to take fur-bearing animals. I believe that that exclusive right, held by the individual family and not the band, occurred as a result of the fur trade. Regardless of this opinion, I conclude that in 1763, after many years of fur trading in the area, the exclusive right to take fur-bearing animals existed in this area and was an aboriginal right of individual families within the meaning of the Royal Proclamation.

Craig Macdonald was a witness who has done extensive work on canoe routes and recreational matters, as well as having general knowledge of biology and fish and game maintenance. While he is very familiar with the Temagami area in general, it was obvious from his comments that he viewed the court process as being rigged against the Indians and that, from his two references to "we" in the context of being part of the defendants' team, he was biased in favour of the defendants. He, Thor Conway and James Morrison were typical of persons who have worked closely with Indians for so many years that they have lost their objectivity when giving opinion evidence.

I accept from Mr. Macdonald's evidence that maple sugar was a resource used by the Indians in more than one location in the Land Claim Area, and that there were herbs and berries in various places. This indicates that the Indians probably used them as a resource. His evidence also shows that the Indians used sleighs and snowshoes. This shows that they used the forest products and animals to manufacture them. I find that there was no distinctive style of sleigh or snowshoes in the Land Claim Area. His evidence also indicated that birch bark canoes were built.

The great bulk of his evidence was hearsay and much of it was obtained from Donald MacKenzie who died after the commencement of this action but before the trial. Mr. MacKenzie was one of the old people of the defendants and it is clear that an electronic tape recording was made of

interviews with him. These tapes were not produced by the defendants because they claimed privilege in them. It would appear that Macdonald's evidence is not the best evidence available and therefore I discount his hearsay evidence to a great extent. For instance, when he referred to one site as a quartzite mountain, he made no reference to any mining of it. In another location he referred to vermilion but not to any removal thereof. However, in his hearsay evidence he indicated that pipestone had been quarried at one location in the south end and vermilion at another. It may well be that the aboriginal Indians did quarry pipestone or take vermilion but this would be in limited quantities and would be for their own use, and therefore usufructuary as defined in the Smith case, supra.

Thor Conway, a regional archaeologist and anthropologist employed by the Ontario Government, gave extensive evidence about the Land Claim Area. I found Mr. Conway to be the most biased and unreliable witness called at the trial. He exaggerated his archaeological knowledge of the area. He gave me the impression that he would accept as correct any hearsay told to him by a living Indian, regardless of whether or not it contradicted prior recorded statements by Indians to Dr. Speck in 1913, or to others. He would then endeavour to subjectively interpret and distort his own findings to confirm what he was told. He drew conclusions based on minimal or no facts. Most of his archaeological evidence relating to hard facts was proven to be incorrectly interpreted. Also, he was shown in reply evidence to be clearly wrong on the very simple matter relating to an alleged bottle glass scraper. I had concluded that his evidence was biased, confusing, inaccurate and unreliable, and that it should be given little or no weight, even before Dr. Noble's reply evidence demolished it. However, he gave evidence with respect to aboriginal uses and I must consider it and weigh it appropriately.

His principal thesis was that the Indians enjoyed continuity and adaptability on the lands from prehistoric times to the present. The Indians did not use the lands at all times for all modern-day purposes, but this was because they, of necessity, changed their lifestyle to adapt to the requirements of the twentieth century. While I accept his view that Indians are as adaptable as anyone else, I do not accept that aboriginal rights include any use whatsoever, including all present uses. I am of the opinion that aboriginal rights are limited by the wording of the Royal Proclamation and by decided court cases to the uses to which the Indians put the lands in 1763. I find his evidence of continuity as shown in Exhibit 17-53 basically inaccurate or unsupported, and of little value. Conway's evidence indicates that in northeastern Ontario, which includes this area, the Indians had a seasonal cycle and temporary residences. I find no archaeological evidence of permanent aboriginal settlement in the Land Claim Area, except at the mouth of the Montreal River.

His evidence included references to a flint quarry in one location and a plant source for food and tools in another location. He mentioned certain trade articles such as copper knives, pottery, slate tools, flint and quarry flakes, red ochre, arrowheads, pipes, stone axes and canoes, and also indicated that rocks and plant life were used by the Indians. All of this is consistent with what the other witnesses have said about aboriginal use of the land. In addition, he stressed subsurface mining and gave examples of locations for ochre, flint, and rock sources, but none of these examples were in the Land Claim Area. His reference to a green flint source at Smoothwater Lake was four thousand years old, and it was not proved that this source was ever used by the ancestors of the defendants. He gave evidence of prehistoric workshops (not mines) at the mouth of the Montreal River and at Witch Point, and of an ochre bed at Yorkston River and a pipe quarry at Cross Lake. In my opinion, this is not evidence of extensive mining but only of the limited use of some of the natural resources for their own day-to-day life.

He also strongly stressed personal landscapes and spiritual and mythological connections to the land as constituting a use of the land, and gave many examples. I find that such connections are subjective and emotional and are not an aboriginal use. A person or group at no time has a right in land merely because it has a feeling for the land.

Bearing in mind the decisions in the Calder and Smith cases I find that the aboriginal rights in these lands existing at the relevant date are as follows:

1) to hunt all animals for food, clothing and personal use and adornment;

2) to exclusively trap fur bearers, which right was enjoyed by the individual family, and to sell the furs;

3) to fish;

4) to use herbs, berries, roots, maple sugar and other natural products for food, medicines and dyes;

5) to use ochre or vermilion for dyes;

6) to use chert, quartzite and stones for tools and other implements (but not extensive mining);

7) to use clay for pottery, pipes and ornaments;

8) to use trees, bark and furs for housing (but not lumbering); and

9) to use trees and bark for fires, canoes, sleighs and snowshoes.

All of the above are traditional uses for basic survival and personal ornamentation existing as of 1763.

GOLD AND SILVER

There is no evidence that there was any aboriginal mining of gold or silver in the Land Claim Area. Even if there was, the defendants, being subjects of the Crown, have no right therein. Unless there is an express grant of the gold or silver, these precious minerals and the right to extract them belong to the Crown (see The Attorney General of British Columbia v. The Attorney General of Canada (1889), 14 App. Cas. 295, at 302; The Ontario Mining Co. v. Seybold (1899), 31 O.R. 386, at 399, affirmed by the Supreme Court of Canada (1901), 32 S.C.R. 1, at 2; Hudson's Bay Co. v. Attorney General for Canada et al. , [1929] A.C. 285, at 293). The defendants rely on the decision of Hall J. in Calder, supra, where, at p.223, he stated that the Indians were entitled to enjoy the fruits of the soil, of the forest and of the rivers and streams. This statement is of no application in this context. The Calder case did not deal with the rights to gold or silver, and fruits of the soil do not include the use of the soil itself.

ROADS, BRIDGES AND ROAD ALLOWANCES

In 1810, the Parliament of Upper Canada enacted legislation for the laying out and repairing of public highways. That Act provided that roads, including those passing through Indians lands, were common public highways. The last confirmation of that by the Province of Canada, prior to Confederation, was in 1866. The provision is still in force under section 257 of the Municipal Act, R.S.O. 1980, c.302, for two reasons. First, it is a provincial power under section 92 of the Constitution Act, 1867, and, second, no federal law has repealed, abolished or altered it (see section 129, Constitution Act, 1867). Therefore, regardless of what rights the defendants may have, the laying out and repair of public highways are paramount to them.

NAVIGABLE WATERS

The public has a right to the use of navigable waters which is paramount to the owner of the bed of the stream or lake (see La Forest, Water Law in Canada, (1973), at 179 and 185). The defendants would not be the owners of the beds if they had aboriginal rights. Even if they were owners of the beds, they could not prevent the public from navigation.

VIII

THE ENTITLEMENT TO ABORIGINAL RIGHTS IN THE LAND CLAIM AREA

Having concluded that the relevant date for determining aboriginal rights is 1763 (with respect to the area south of the Height of Land), and the time of the coming of settlement (with respect to the area north of the Height of Land), and having made findings as to the nature of these aboriginal rights, it now becomes necessary to review the evidence as to who has historically been entitled to these rights and as to where they have enjoyed them. The first question relates to the nature of Indian social organization. The second question relates to the extent of territorial occupation by that social organization (see Baker Lake, supra). The two questions are conceptually distinct, though the nature of the evidence will require that they be dealt with together.

On the first question as to the nature of Indian social organization, the defendants must prove that their ancestors were at the relevant date members of an organized society, and they must show specifically who were its members. They must also show who are the present members, and must

trace links between the members of the two organized societies over time. I do not accept the proposition that, merely because some members of the present band are descendant from ancestors who occupied individual family hunting territories in 1763, the existence of a band in 1763 occupying any specific territory can be assumed without proof.

Despite what I will later find to be the predominance of family hunting territories, aboriginal rights in land must be held by a band. The Crown has never considered it necessary to obtain cessions of territories from individual families, as opposed to bands. Therefore, the defendants must show that the band was in occupation of the lands in 1763. Hence, a present-day band whose member families had their ancestral family hunting territories on the same lands as the band holds today can only claim those lands to the extent that their ancestors held the lands in 1763 as a band, not as individual families. No aboriginal title to land which originated after 1763 can be claimed.

On the second question as to the extent of territorial occupation, the defendants must prove that, as an organized society, their ancestors occupied the specific territory over which the defendants assert aboriginal title to the exclusion of other organized societies, at the relevant date and down to the commencement of this action. The fact that many treaties were entered into after 1763 with bands that had moved to new land does not detract from this basic proposition of law.

In dealing with Indians, the Crown was generous in recognizing and paying compensation for practically all claims that were brought forward by Indians in what is now Ontario. Sometimes compensation was paid to two different groups relating to the same lands. This was done because the boundaries or claims of various Indian bands could not be determined with great certainty by the Crown. Hence such recognition and payment is only one factor to be taken into account. in determining who was the recognized occupant of a given area of land at a given point in time.

As a preliminary issue to question two, I must refer to Exhibit II, Tab A, filed at trial, which contains a declaration, signed by the chief and councillors of the Teme-agama Anishnabay in 1981, to the effect that, in accordance with the customary law of the Teme-agama Anishnabay on membership and control of land, certain propositions were confirmed. There follows a list stating that the full council controls the land and such council consists of persons inhabiting and claiming the land. It also states that the members of the Teme-agama Anishnabay are those accepted by the full council as members, and that land may not be disposed of except where the full council agrees on full consensus. While Chief Potts stated that this has always been the custom, it is clear from the minutes of council meetings in 1974, 1978, 1979 and 1980 that there was not an immediate acknowledgement of all of the items in the declaration. In fact, it took several meetings to clarify what the custom with respect to voting rights on land matters was, and what the residence requirements were.

It is also clear from Chief Potts' evidence that it is ultimately a subjective matter as to who may become a member of the band, and that in the past even white men have been accepted as members of the band if they have married female band members. However, though it is normal for the wife of a male member to become a member of the band, the husband of a female member may or may not be accepted. It is also possible for members of the band to adopt children, whether Indian or non-Indian, which children appear to be accepted as members of the band without any formal approval. According to Chief Potts, where Indian women of the band marry white or other Indian persons and remain on the lands, it is normal custom for their children to be considered members of the band. I find that the illegitimate children of women members are also automatically considered to be members, although Chief Potts refused to answer questions as to who was illegitimate. Of course, it is a subjective decision as to whether a person of the band's blood descent wishes to remain or claim to be a member of the band.

A large number of the defendants shown on Schedules A and B [omitted] are descendants of non-Indian servants of the Hudson's Bay Company. The patrilineal ancestors of many of them are Philip McKenzie, Sr., John Turner, Sr., William Petrant and Malcolm McLean. These persons were halfbreeds or whites who worked for the Hudson's Bay Company, or whose fathers worked for the company, and who came to the lands in question. In addition, George Potts, John (or James) Friday, Charles Moore, Sr., and William Moore, were Cree Indians from James Bay who had worked for the Hudson' s Bay Company in the vicinity of Temagami, and who came (or whose children came) to reside at Temagami.

From Schedules A and B [omitted] , which list registered and unregistered Indians respectively, it is clear that of the 108 defendants who were registered Indians and who had reached the age of majority at the time of discovery in this action, concerning place of residence, 54 (or exactly one-half) reside in locations other than the Land Claim Area.

In addition, of the 203 defendants who were not registered Indians and who had reached the age of majority at the time the questions were answered at the examination for discovery, 142 reside in locations other than the Land Claim Area.

There are only 17 Indians who are of continuous patrilineal descent from 1850 Temagami Indians and who still reside on the Land Claim Area. if you add to this the Peshabo family, who resided on the Land Claim Area but were not members of the Temagami band at that time, there are an additional three.

On the evidence of Chief Potts, if a member of the Teme-agama Anishnabay does not reside on the lands, he or she may share in the aboriginal rights, but can have no say in whether such rights are to be disposed of. This appears to be substantiated by the minutes and resolutions of the council that have been passed since these proceedings commenced in 1973. There is no recorded evidence prior to that time as to what the custom or policy was, other than the evidence of Dr. Speck. Chief Potts' evidence and the recent resolutions and minutes are very suspect evidence, likely produced to unify the present members and bolster their case.

Historically, customs of this band differ from the norm in that descent in the male line has not been necessary to be considered a member. These customs also differ from the provisions of the Indian Act that deal with who are entitled to be registered Indians. They also conflict with the evidence of all the experts that there was usually patrilineal descent in Algonkian tribes such as the defendants, and that where a woman married a non-member she was deemed to move to that person's band.

Any band can set whatever internal rules it wishes as to membership, voting and rights to share in compensation paid for the surrender of a land claim. I find that if a person is recognized by the band as being a member of it (through descent or adoption) that person may, as between the band members, obtain a share of whatever aboriginal rights the band possesses. That person need not be a member of the registered band under the Indian Act. Furthermore, that person need not currently reside on the lands in order to be able to similarly claim a share in the band's aboriginal rights. For reasons stated elsewhere relating to Canada's power to define who is an Indian, and its right to unilaterally extinguish rights, Canada can totally ignore the band's internal rules as to who its members are, if Canada so chooses, and can deal only with those Indians or groups of Indians with which it wishes to deal.

Dr. Rogers defined an Indian band as follows:

> Each traditional band had its own area and it was composed of extended family hunting groups. All the people were closely related ... [through blood]. The size of the traditional band will range we will say, from maybe several thousand square miles to a much larger territory, as you move north in the boreal forest area.

He found that the Ojibwa, at least, treated the family unit as the most important unit of social organization. Dr. Heidenreich defined an Indian band as follows:

> A band is composed of a number of extended family groups who are to some extent, inter-married. It is a band that comes together in the summer, sometimes joined by neighbouring bands who are all, as well, socially united; that is, they are connected-a number of large, extended families connected through intermarriage...a single band usually has a very long common history; they usually travel together. Now, in the winter, the bands tend to split up, as I testified before, into hunting groups. The hunting group is composed of more than one extended family; two, three large extended families, perhaps more. When things get tough in the winter, those larger groups, those conglomerates of extended families which are part of the band, will split up into smaller units to do their hunting.

The defendants claim that they have always occupied the Land Claim Area as a band. First, I will deal with the archaeological evidence. Dr. Bishop, an eminent ethnologist, acknowledged by Dr. Rogers as being one of the persons most knowledgeable about the Indians of northeastern Ontario, propounded a theory that the people living in the Temagami Land Claim Area were not the original inhabitants thereof but constituted an expansion into the area by Ojibwa from the north shore of Lake Huron, either en masse, or in a gradual transition as individual families or small groups of families moved in over a period of time. As part of that theory, he stated that the

archaeological evidence supported this proposition. I have been unable to find any such archaeological evidence.

Archaeologically, we have the evidence of Dr. James V. Wright, Dr. William C. Noble and Mr. Thor Conway. Dr. Wright and Dr. Noble are eminently qualified authorities.

Dr. Wright's evidence related to the Canadian Shield and showed Indian continuity in the broad general area. I do not take his evidence to show direct continuity of any particular band in the Land Claim Area because he had made no study thereof. He stated that the transition from Ojibwa to Algonquin is not clear, there being amorphous boundaries between the two with even individual families going on their own way. He could not identify individual bands from archaeology because there was a general cultural homogeneity of the Ojibwa, Cree and other Algonkian people. His opinion was that there was not sufficient archaeological data in general to prove continuity or otherwise. He believed that there was a tendency for the males to be more stable in a region, and that familiarity with a region and its resources was helpful to them. However, he believed that the Ojibwa were not a unified single unit but that bands, and even families, would go on their own way. He felt that the family hunting territory had predated European contact because of lack of food in winter. He believed that there was extreme mobility of people because of European diseases, European intrigue and the fur trade. From his evidence I find that it cannot be proven or disproven that the ancestors of the defendant band had lived on these lands continuously since prehistoric times. Unfortunately, his evidence was given before that of Mr. Conway and he could not be asked his views on Mr. Conway's evidence. Moreover, I accept Dr. Noble's evidence that Conway's findings at Witch Point and Sand Point do not prove continuity of any particular tribe.

Dr. Noble's evidence is that pictographs have not yet been identified in any time frame. In addition, Mr. Conway's evidence itself was conflicting as to the uniqueness of pictographs to the Temagami area. He stated that the upright canoe pictograph was distinctive to the area, but he gave more examples of upright canoes from outside the area than from inside it. His evidence about other unique pictographs was not supported archaeologically. The oral Indian evidence is conflicting as to who made the pictographs. Some Indian witnesses believe they were made by the Iroquois. Others say they were made by their ancestors. Two Indians who were called made no reference to rock art having any relation to folklore. Michael Paul stated that he had been told by his father that his people had painted some of the pictographs and that, even now, some old people know the meaning of them but will not tell. The only “old person" called was William Twain and he gave no evidence relating to rock art. Mr. Conway, in an article written in 1974, stated that he had been told that rock art was made by the Iroquois during the Iroquois wars. Now he says that they were made by Algonquins. However, he also stated that the oral traditions of the defendants had not changed from 1913 to today because even now Chief Potts believed them to be painted by the Iroquois, while others believed them to be malevolent to the Iroquois. Chief Potts' evidence was that all except one had been painted by his own people. Alex Misabi said they were made by the Iroquois. Michael Paul, Sr. said some were made by each group. I find that the pictographs have not been proven to show any continuity between the defendants and whoever made them, or that any conclusions can be drawn from them.

I accept the evidence of Dr. Noble over that of Mr. Conway and find that side-notched arrowheads were not distinctive to the area. I also accept Dr. Noble's evidence that neither the pottery, the bottle scraper, the copper kettle fragment, nor any other artifact referred to by Mr. Conway proves any continuity of any Indian band in the area, let alone continuity of the defendants. The only other archaeological evidence given by Mr. Conway related to the so-called Iroquois pits and their relationship to oral history of the Iroquois wars. I find that all of these sites or references relate to areas on or south of Lady Evelyn Lake. In any event, none of them are located in territories 26, 29, 30 or 31, as referred to in Frank Speck's Memoir #70, hereinafter referred to, other than possibly the "Round Lake" story.

In an article written by Mr. Conway, based on information obtained after the commencement of the trial, he concluded that the present oral traditions of the tribe concerning fights with the Iroquois are proven by archaeological findings, and that those fights took place in the latter half of the 17th century. His article is written in an almost fictional manner, making it difficult to distinguish between the oral history and his own imagination. There are several incidents referred to. I will not detail them but merely state that there does appear to be evidence to support some of the stories. There has been no proper archaeological study made of the sites, so it is impossible to fix the date of the stories on this basis. The oral history given by William Twain, Michael Paul, Sr., Chief Potts and Alex Misabi confirmed some of the incidents, although not universally, and not without some conflicting versions of them. The oral evidence indicated that the incidents were a long time ago. I

find that in most cases the memory or knowledge span of the Indian witnesses was only three generations.

Documentary evidence was filed indicating that, about 1820-1830, the Iroquois believed that they had the right to take furs in this and other areas and that in fact they made raids to Steal furs in Mattawagami and elsewhere in the general vicinity of Temiskaming. Similar information of fur stealing was given by Alex Paul to Frank Speck in 1913 (Exhibit 11-2). In addition, Archie Bellaney (Grey Owl) in Exhibit 22-24a wrote that Temagami Ned (a member of the Whitebear family) told him that he had witnessed the Iroquois raids of about 1835. Grey Owl also wrote that an old woman stated that she had hidden in the fields during a raid about 70 years previously. This would have been about 1835 and 1840.

Based on the above, I find that there is no evidence connecting the Iroquois pits to the 17th century, but that the pits confirm that there were Iroquois raids to steal furs in about 1820-1830. Therefore, I find that there is probable continuity of some of the Indians in the southern part of the Land Claim Area from the eighteen twenties to the present time.

The archaeological evidence fails to prove any connection between the present defendants and any persons or groups on specific territory prior to 1820.

With respect to the historical evidence, the first reference to any Indians living in the general vicinity of the Land Claim Area is in the Jesuit Relations of 1640, where reference is made to a group called the Outemagami. The defendants' position is that they are direct descendants of this group. However, there is no further reference to the name Outemagami throughout the centuries, and there is no reference to a Temagami band or tribe until approximately 1848. Throughout that period of time, there were many references to Temiskamings and Nipissings, as well as other groups, such as Abitibis, Gens des Terre, Mattagamis, and one reference to Chouchouagamis. The evidence indicates that the word Outemagami and the word Temagami are really base words meaning "Deep Water Lake", both of which could be descriptive of Lake Temagami itself. In referring to the Temiskaming people, Speck reported that they said that the name Temiskaming was a corruption of the word "Temia'gamin" which meant "deep lake". However, in the Jesuit Relations of 1640, the Outemagami and Temiskaming people were referred to as separate groups. There was a reference in one early map to another Temagami Lake in northern Quebec which has no bearing on this case. From the early seventeen hundreds, reference has been made to the place name of Lake Temagami, but not to a group or tribe or band by that name.

On examination for discovery. the Indians stated that they were not aware of any other name than Temagami or Outemagami for their tribe. At trial, evidence was introduced that there was a group referred to as Chouchouagamis in a 1722 or 1723 document (Exhibit 1-75), which group the defendants claim as their ancestors. There is no oral tradition naming their chief. This group was referred to as having come from the Height of Land in a discussion between the French and Indians at the fur trade post at Fort Temiskaming, which was located on the east shore of Lake Temiskaming, not far from the easterly boundary of the Land Claim Area. There had been a fur trade post established in 1679 at the mouth of the Montreal River at the eastern limit of the Land Claim Area that had been abandoned due to the Iroquois wars and a glut of furs on the fur market in about 1690. In 1708, reference was made to the fact that the Indians who traded at the post were wanderers and were named as Abitibis, Monsonis (which I find came from the Moose River area). Tetes des Boule, and a few Cristinaux (Exhibit 1-72). I find the latter were Crees, perhaps from as far away as James Bay. I find the reference to Tetes des Boule was a broad term which would include any Indians living in the general Temagami area and Temiskaming area. In 1723, reference was made to the nation of Temiskamings. Also, in that year, there was the reference to the Chouchouagamis in a report which also referred to Indians generally who lived to the north of Temiskaming, and others at Lake Mattawagami.

It is clear that the French knew the names of general locations in the area and the names of bands generally. In 1723, the trading permit allowing trade at Fort Temiskaming prohibited trade at Lake Huron, Lake Nipissing and the Ottawa River, and restricted the trade to Temiskaming, Abitibi, Temagami and their dependencies. It made no references to bands but only places. In 1686, Chevalier de Troyes, the leader of a French military expedition, stopped at Fort Temiskaming, then located at the mouth of the Montreal River (Exhibit 23-12). He mentioned the Indians of that area and also sending persons to the Nipissings to buy canoes for Montreal (Exhibit 23-11). These people were likely referred to as Temiskamings, but with the post being located on an island at the eastern limit of the Land Claim Area, likely also included persons living on lands within the Land Claim Area. No distinction was made between bands.

Historians differ as to the French reference to Indian groups in this area. Dr. Zoltvany stated that the French knew the Indians well and would not have subsumed an identifiable Temagami group within the general term of Temiskamings. He believed no Temagami group existed apart from the Temiskamings. Dr. Smith believed that the Temagami and Temiskaming people were the same, and that in 1701 Temagamis may have been included in the name Temiskamings or Gens des Terre. He did not know but speculated that the Outemagami were Gens des Terre. Dr. Eccles stated that the French often used generic terms to lump local bands. As a result, he believed that at varying times the Temagamis were included in the names Nipissing, Temiskaming and Gens des Terre.

James Morrison, a researcher for the defendants, gave evidence that Chouchouagamis was the same word as "Smooth Water", and speculated that it referred to Scatchamisse's band (sometimes called Susagamie) mentioned in the Hudson Bay journals of the James Bay posts located at Albany River and Moose River about the same time. Mr. Morrison did a superb research job. He stated that he had a strong commitment to the defendants and that it would be up to the court to separate his sympathies and biases from the use of his actual material. Unfortunately, I find that I must reject many of his conclusions because they are either sheer speculation or because they are interpretations of documents that I find unreasonable. This does not detract from my respect for his technical research.

Smooth Water Lake is within the Land Claim Area. While it is possible that the Temiskaming records and the Hudson Bay records relate to the same people, I find that this conclusion is not probable because of the inadequate proof of individual Indian name connections, and also because of the frequency of the visits of Scatchamisse's Indians to the Hudson Bay posts, and their early spring arrivals. It is highly unlikely that persons from Smooth Water Lake could arrive at James Bay as early in the year as Scatchamisse's people did. It is not necessary to determine exactly where Scatchamisse's people lived, but I find that it was closer to James Bay than Smooth Water Lake.

The only historic reference to Chouchouagamis was in 1723 (Exhibit 1-75), where they were referred to as being from the Height of Land. That term was understood by the French then (as it is now) to mean the watershed between the Great Lakes and Hudson Bay. Smooth Water Lake is over 30 miles south of the Height of Land and about 60 miles from Fort Temiskaming post. Lake Temagami is about 30 miles from the post. Bearing in mind that the post was very close to the southeastern limit of the Land Claim Area and that the present defendants say that they have always occupied the entire lands, including Smooth Water Lake, it is strange that, if they were an organized band in 1723, they would then refer to themselves as being from 60 miles or more away rather than from the immediate area. I am not satisfied that the reference to Chouchouagamis shows that they came from Smooth Water Lake or that they were part of the ancestors of the defendants, or that as such the defendants are a continuing band.

In addition, Dr. Heidenreich, an eminent historical cartographer, gave an opinion, which I accept, that the Outemagami were likely one of the four bands of Nipissing Indians centered on Lake Nipissing. I believe that, in the earliest historic times (about 1640 onwards), whoever lived in the southern part of the Land Claim Area were associated with the Nipissings, but that by 1750 those people living in the vicinity of Lake Temagami and Mountain Lake were associated more closely with the Temiskamings. They may or may not have been the same people. In the northern part it is not clear with whom the people were associated in the early days, but in later times it is probable that the majority of them were associated with the Mattawagamis or Mattachewans. The problem of identification is that there are few if any basic cultural differences between the Ojibwa and Algonquin nations or between the Temiskamings, Nipissings, Mattawagami, Mattachewan or Temagami Indians.

Dr. Bishop advanced the theory that none of the persons residing in the area in 1640 would have descendants living there at the present time, because the Indians would have left due to the Iroquois raids or wars, European diseases, famine, and the intrigue of the fur trade. He speculated that the area became substantially vacant and that the Ojibwa moved in from Lake Huron and the Sault Ste. Marie area. If this was his opinion, the evidence does not support it. I accept Dr. Eccles' opinion that there was no substantial drop in the total fur trade, and that therefore there was no mass movement out. However, I believe Dr. Bishop's opinion that, if the Outemagami were a band of the Nipissings in 1640, they had, by 1763, ceased to be an organized group for his stated reasons. He felt that some individual families may have emigrated with additional new families moving in, but that overall they were not an organized group.

Dr. Rogers and Dr. Eccles basically advanced the very recent theory that Indian bands remained in a constant location over time. I am of the opinion that the mists of history make any statement as to the Outemagami or Chouchouagamis being the ancestors of the defendants sheer speculation. While it is not the only evidence to rely on, the linguistic evidence indicates that a core group of people living at Bear Island had separated from the Ojibwa of Sault Ste. Marie about 500 years ago and, at a still later time, became separated from the persons living at Lake Nipissing, and are more closely associated with the Temiskaming, Matawagami and Mattachewan people. Language can change in two or three generations and therefore any specific language does not specifically prove a connection to others. However, it tends to disprove a direct connection in recent times to the Ojibwa and Nipissing people. This is consistent with the historical evidence.

While the term Ojibwa is used with reference to the Temagami band, and they have often used it themselves in the past, I find that the present band is a mixed group of Ojibwa and Algonquins and that the name is more related to a change in description rather than a total band migration.

I find that the defendants have not proved that they, as a collective group, are descendants of either the Outemagamis or the Chouchouagamis.

However, this has no direct bearing on my final decision because the defendants need not trace their ancestry to an earlier date than the Royal Proclamation of 1763.

While trading post records are not all available, particularly for the Nipissing posts, there are early records from the Temiskaming, Mattawagami and Mattachewan posts, as well as other posts in the general area. No reference is contained in them to a Temagami band, though reference is made to the Abitibis, Monsonis, Tetes des Boule, Cristinaux, Temiskamings, Chouchouagamis, Mattawigamaes, Nipissings, and Namcosakios. There is a reference in the Temiskaming post journal of 1822 to an American fur trade company post on Lake Temagami during that year. The Temiskaming post, from 1679 to 1689, had been located on the Land Claim Area at the mouth of the Montreal River. After it had closed, it was relocated in 1720 to the eastern shore of Lake Temiskaming some ten miles north of the Montreal River. The 1822 reference mentioned the fact that the American post was interfering with trade to the various named surrounding posts, but there is no mention of Temagami Indians, although obviously the reference was to Indians who were hunting in that general area. In 1823, a reference in the Temiskaming report indicated that the Temiskaming Indians possessed lands to the south and southwest of the lake, abutting onto the lands of the Nipissing Indians. As a trader, he was probably referring to the Indians as a trading post band rather than an aboriginal band. There is no reference to any other bands of Indians or any inference that there was a special group of Indians in the Temagami area. Whoever the Indians in the Temagami area were, they traded in at least three directions, namely Nipissing, Mattawagami and Temiskaming.

In 1834, the Hudson's Bay Company established a post on Lake Temagami to collect furs from a group they referred to as Lake Nipissing Indians. Again, there is no specific group of Temagamis mentioned. This post was not permanently established until 1857. In 1835, it is clear that at least some Indians who can be identified as being from the Temagami area were trading at the Temiskaming post. However, not all of these Indians appear on the genealogical charts filed in this trial.

Until approximately the last ten to fifteen years, Dr. Rogers and most other anthropologists believed that Indians living in the Canadian Shield area were nomadic and had no fixed place of abode or territory. While Dr. Rogers had made no study in the Temagami area, he had studied the Crane Indians in north western Ontario and the Mistassini Indians in Quebec. Both of these studies related to post-contact periods, subsequent to the fur trade. As a result of these studies, Dr. Rogers is now of the opinion that Indians in the Canadian Shield, as families, had relatively permanent hunting territories. He also believes that this continuity of location predated contact with the European fur trade. For the purpose of this case, it is not necessary to agree or disagree with that latter proposition because in 1763, the relevant date, the fur trade was well established in the Land Claim Area. Though there is no evidence to establish the identity and residence of any particular Indian in 1763, I conclude from the evidence of Dr. Heidenreich and Dr. Rogers on Indian bands, and in particular Dr. Rogers' evidence on continuity of location, that some persons present in 1913 had ancestors on some of the lands in 1763.

From the evidence of numerous witnesses such as Dr. Rogers, Dr. Wright and Dr. Bishop, as well as Dr. Frank Speck's Memoir #70, all of which will be reviewed in detail below, I find that it was the general rule for Indians in the Algonquian Shield, which includes the Crees, Algonquins and

Ojibwa (a mixture of the latter two of whom were ancestors of the Temagami Indians), to trace their ancestry through their fathers. It was also most common for the males to remain in their hunting areas bringing in females as wives. I also found earlier in this decision that the evidence showed the male descent practice seemed to have been regularly breached in the Temagami area.

Some daughters of persons resident in the Land Claim Area married and brought in their husbands from other areas. In some cases, a widow would marry again and bring her new husband onto her former husband's lands, and their children would inherit the use of the lands. In many cases, there is a total change of families using lands. Chief Potts gave evidence as to the requirement of approval of the chief to the allocation of land within the band's territory. I find that there is no documentary evidence, or oral evidence other than his own, to support this. In fact, the evidence shows that the land often passed to whomever was there, male or female, and in the case of vacant land even to a member of another band who moved in. Chief Potts' statements were made to try to justify his position of band control over family hunting territories. The historical facts in this area indicate much stronger individual family control over the hunting territory than band control. Where lands became vacant due to death or migration, other persons moved onto them and subsequently became acknowledged as members of the band. I find that there is no evidence that these new migrants required the approval of the band as opposed to the family before they moved in. The Indians had a very generous loose attitude in this regard. Persons of different bands in this area were basically of the same racial stock, and there was little difference between them that would prevent intermarriage and easy assimilation. There was no rigid structure in the early days. There was either a very weak or non-existent band control in this area. It is only recently, after the many debates of the defendants' council, that a formal, rigid structure has been evolved. Hence I find that there is no evidence of the existence of a band or of its control over allocation of land in family hunting territories in 1763 or until, at the earliest, 1850. There is no evidence that there was an organized society in 1763 encompassing all the families on the charts.

After trading posts were established, the most one can say is that a small, loose, flexible and fluid band came into being, never covering all of the Land Claim Area. This continued until the late eighteen hundreds. The territory of the band changed depending upon the families who were members of the band. If new families chose to associate themselves with the band and be accepted by it, the territory expanded. If families by marriage or otherwise chose to associate themselves with neighbouring bands, the territory contracted. There was no central control group that governed a fixed band territory over a long period of time or that had the power to refuse to allow a family hunting group to change its allegiance, thereby forcing the family hunting group's lands to remain part of the band's lands. The family controlled the land and decided which band it wished to belong to. If a band did not want a person or family to become part of it, it could refuse membership, but, if so, the family remained part of its former band in name, even if in practice it became bandless. Because of the generous nature of the Indians, this rarely happened.

This fluidity of membership explains why at one point in time, for example 1850, the band was composed of one group, while in 1880 it was composed of a different group covering different lands, and while still later, at the time of trial, the claim is that the band's lands cover a much larger territory.

I will now review the evidence in order to trace the ancestry of each family and to determine what were their family hunting territories. Having done so, I will determine what connection the families had to each other or to any particular band at a particular time.

The most helpful reference point for evidence in determining occupancy is contained in Dr. Frank Speck's Memoir #70 (Exhibit 1-41), based on information obtained in 1913. It relates to families and territories in a period commencing no earlier than about 1850. He deals only with families who were alleged to be members of the band in 1913. Except where I otherwise expressly state, I accept Dr. Speck's Memoir #70 as being the best evidence as to family groups. His information was obtained long before the present controversy arose and was much closer in time to many events. It was obtained over a two-week period of study of the Temagami people, the study being a part of a much larger study of people in the area. It is not tainted with the partisanship shown by many of the witnesses at this trial. Dr. Speck indicated that he had spoken to practically all of the heads of families of the Temagami band at Bear Island, and obtained from them information concerning what they claimed to be their family hunting territories. This information included the identity and membership of the early families of the then band and the location of their territories. When this basic information is added to the excellent research work of James Morrison on genealogies and fur trade records, and the Indian present lists and/or census lists, and annuity lists, in the era from 1848 to 1854, and to the information that the Indian agent Skene obtained

from Chief Tonene, Jocko Tagawanini and others in 1882 and 1883, a picture evolves as to who was living in what areas at the relevant times.

The families and hunting territories recorded by Dr. Speck that are within the present Land Claim Area are as follows:

# 8	Kanecjc
# 9	Kabimigwune
#10	Wabimakwa
#21	Nebenegwune
#22	Cumcackiwe
#23	Cayagwogzi
#24	Wendaban
#25	Ayandackwe
#26	Kaminockama
#27	Kekek
#27a	Misabi
#28	Kohoje
#29	Menitouwac
#30	Djakwunigan
#31	Pawagidakwe

The genealogical charts set out in Exhibit 11, Tab D, accurately set out the family members, subject only to the corrections made in evidence by Chief Potts and James Morrison, with the specific current names being set out in Schedules A and B [omitted] . My acceptance of the charts is subject to the following express findings:

A. The charts themselves do not prove any band association between the families shown thereon.

B. Findings regarding specific charts:

Chart 1
(a) It has not been proven that Otchiboy was the father of Wabicou on charts 1, 7 and 8.

(b) Tonene was born in 1836.

Chart 2
(a) Enene was the father of Peter Nebenegwune.

(b) There is no evidence that Nebenegwune was married to Susan Oweskokwe.

Chart 3
(a) It has not been proven that Pashquince was the father of Mozinosowai (Old Barbu).

(b) It has not been proven that Ayandackwe had a sister who married Roderick McKenzie.

Chart 4
The first connection between persons on this chart and any Indian group was when the children of John and Mary Turner married and moved onto the lands in the eighteen hundreds.

Chart 5
(a) It has not been proven that Quitchitch (Sabourin) was the father of Wabigan.

Chart 6
There are no living persons on this chart who are members of the defendants.

Chart 9
Francois Twain moved onto the lands in the eighteen hundreds.

Chart 10
George Potts and his wife had no connection with the tribe and never lived in the area, and their children were brought onto the lands in 1901.

Chart 11

Persons on this chart were not connected to the tribe or lands until 1891, when those persons moved onto the lands.

Chart 12
The first connection between anyone from this chart and the lands was when William Petrant married Angela White Bear in or after 1876.

Chart 13
The MacKenzie family first came to the lands in about 1880.

Chart 14
(a) It has not been proven that Pashquince was the father of Naokijick.

(b) It has not been proven that Kishesusiquay was the wife of Naokijick.

(c) It has not been proven that Naokijick was the father of Kaminochama (or of Endiconigan-not shown on chart).

(d) Kaminochama was not the father of Big "Ponee" Paul.

(e) It has not been proven that Djakwunigan was the father of Pawagidakwe.

(f) It has not been proven that Pawagidakwe was the same person as Sam Pierce.

I find that there is no oral or historical evidence showing any blood relationship between Otchiboy (Charts 1, 7 and 8), Enene (Chart 2), Pashquince (Charts 3 and 14) and Poutance (Charts 5 and 6). In other words, as of about 1800, there is no evidence of any blood relationship between any of the then known principal occupants of the lands.

I find that there was no strong legal or spiritual attachment to the lands. There is evidence of Tonene (a chief) leaving the lands by marrying into another band. Also, Joseph Mattias (Chart 2) left the lands and, when he returned to marry, he used his wife's land and not his own family lands. There is no oral evidence relating to Old Barbu, or to Ayandackwe being his son, other than that there was an Ayandackwe near Kippawa (outside the Land Claim Area). There are no descendants of Ayandachwe in the present band. Wendaban married a Nipissing woman and lived there many years in the winters, rather than hunt his lands. Francois Twain, whose brother Baptiste's family is the main family of the Mattachewan band, left his lands outside the area to marry into a family in the area. In 1841, reference was made at Temiskaming to Provencal (who was not a claimed ancestor of the defendants) moving to new lands. Chief Potts did not answer when asked about spiritual attachment to the land in the case of Tonene, who left the lands in 1888. Dr. Rogers stated that if an Indian moved he formed a new spiritual attachment to the new area.

Schedule A [omitted] shows the "Registered Indians" and indicates, by the symbol "*1850", those who are descendants in the male line from an Indian who inhabited the lands in question before 1850. Those adults shown with the symbol “NR” beside their names live elsewhere than on the Land Claim Area. I believe all of those residing on the lands now live on the reserve at Bear Island. They have abandoned or moved from the balance of the area, except for trapping under licence from Ontario.

I also find that the Teme-agama Anishnabay, at the time of discovery for trial, were those persons listed in Schedule A [omitted], plus the unregistered Indians listed in Schedule B [omitted] attached hereto. Schedule B [omitted] has been prepared from Exhibit (ii) Tab B, as amended by undertaking No.1, with the addition of those persons shown at Tab G-1 of Exhibit (ii). The only exception to these is that I find that Eva Couchie, Angelique Missabie and Linda Faubert are either not or no longer members of the band. Again, those who are descendants in the male line from an Indian who inhabited the lands before 1850 are designated by the symbol "*1850", and those who reside off the lands by the symbol "NR".

For the sake of completeness, of those people shown in the genealogical charts who were in any way connected with the Land Claim Area, I find the following were alive in 1850, with their approximate age where known shown as at that time. Some persons such as Peter Nebenegwune's stepsons may have been alive at that time, but I find no connection proven with

the land because he did not marry their mother until 1860. I have also ignored all persons under the age of 14 with the exception of Ayandackwe:

Chart 1
Wabbacou (also known as Wabimakwa), age 70.

Kabimigwune and wife, age 34.
Tonene, age 14.

Chart 2
Nebenegwune, adult.
William "Jean George" Tcanizute, age 16.

Chart 3
Ayandackwe, age 12.
Likely Old Barbu, his father, age unknown.

Chart 5
Wendaban, age 30.
Tebundo, age unknown.
Kekek, age unknown.
Zabewens, age 15.

Chart 6
Capimweywitan, age 50.
Kohoje, age 20.
Pikudjick, age 40.

Chart 7
Kanecjc, age unknown but likely about age 30.

Chart 8
Cayagwogzi, age 32.

Chart 9
Francois Twain, age 19, but he had not yet come to the lands.

Chart 14
Kaminockama, age 50.
Djakwunigan, age 45.
Tebanajisi, age unknown.
Pawagidakwe, age 14.
Menitouwac, age 70.

I have ignored the women's names because they rarely appear on any of the historical lists.

The evidence is unclear as to whether all of the territories shown in Dr. Speck's Memoir #70 were occupied by Temagami Indians at or prior to the 1850 Treaty. The earliest historical evidence of persons listed on the genealogical charts being found or located on the lands also shows that other persons who cannot be identified on the genealogical charts also hunted on those lands. We are in a vague and misty area, but I have concluded that there were family hunting territories created by the fur trade and therefore it is likely that persons who are defined in Dr. Speck's Memoir #70 were trapping on their territories. It may be that others also trapped either as trespassers or by invitation. However, Exhibit 111 shows locations where persons were found historically but does not define their hunting territories. I co-relate the findings on Exhibit 111 to the genealogical charts as follows:

Chart 1
There is historical evidence that persons from this chart occupied Territories Nos. 9 and 10 prior to 1850.

Chart 2
There is historical evidence that persons on this chart occupied Territory No.21 prior to 1850.

Chart 3

There is historical evidence that a person on this chart occupied Territory No.35 (outside the Land Claim Area) prior to 1850, but no evidence of occupation of Territory No.25. However, because I find at one time that the band included persons living as far away as Lake Wanapitae, I feel that this is immaterial.

Chart 4
There is no historical evidence that any person on this chart occupied any territory prior to 1850.

Chart 5
There is historical evidence that a person on this chart occupied Territory No.24, and perhaps Territory No.27, prior to 1850.

Chart 6
There is no historical evidence that any person on this chart occupied Territories Nos.27 or 27A prior to 1850. There is historical evidence of persons on this chart occupying Territory No.28 prior to 1850, but there are no living descendants of those persons in the band at the present time.

Chart 7
There is no historical evidence of any person on this chart occupying Territory No.8 prior to 1850, and there is also no direct historical evidence of occupation of Territory No.10 prior to 1850, although Territory No.10 is, in all likelihood, a subdivision of what formerly included Territories Nos.9 and 10.

Chart 8
There is no historical evidence of anyone on this chart occupying either Territories Nos.10 or 23 prior to 1850.

Chart 9
There is no evidence of occupation of Territory No.23 prior to 1850 by anyone on this chart.

Chart 10
The only evidence of occupation of Territory No.22 prior to 1850 was by a person not shown on this chart, and it is acknowledged that the persons on the chart never lived on the land but came to the Temagami territory in 1901.

Chart 11
Relates to persons who moved into the territory in 1891.

Chart 12
Relates to Territory No.28, and there is no evidence of anyone on this chart residing in the territory prior to 1850.

Chart 13
Relates to Territory No.21. The second wife of the first person on the chart is related to persons who resided on the territory prior to 1850.

Chart 14
Relates to Territories Nos.26, 29, 30 and 31. There is no evidence of anyone on this chart living in Territory No.26, but there is evidence of persons named thereon living in Territories Nos.30 and 31 prior to 1850. There is also evidence of one person residing in Territory No.29 prior to 1850, but there are no living descendants of his in the chart.

Based on all of the above, I find that persons in the families set out in Charts 1, 2, 3, 5, 6, 7, 8 and 14 of Exhibit II were Indians who probably resided on the Land Claim Area in or about the time 1800, or even earlier. Of these, there are no living descendants known for Chart 3. Based on Dr. Rogers' evidence of work done elsewhere in Ontario, and the fact that the fur trade was well established in the area in question by 1763**, I** accept that the families represented on the named charts probably resided in the area prior to 1800, and as early as 1763. These families occupied the family-hunting territories in the areas indicated in Dr. Speck's Memoir #70 of 1913.

Therefore, I find from the charts and post records that in 1850 there were ancestors of persons now living and claiming to be Temagami Indians in Territories Nos.8, 9, 10, 21, 27 and 30. While I do not consider it important, I find that there are descendants of these in the male line covering Territories Nos.21, 27 and 30 only.

In 1913, Dr. Speck made a census of the Temagami band and its territorial affiliation, the results of which are as follows:

# 8	- 4	persons
#10	- 24	persons
#21	- 15	persons
#23	- 1	woman by marriage
#25	- 5	persons (all of the MacKenzie family that had arrived since1850)
#26	- 6	persons (all of the Paul family who had arrived since 1850 and were hunting in Territory No.22)
#27	- 17	persons
#27a	- 5	persons
#30	- 1	person whose father was a deceased Whitefish band Indian, plus the wife of a member of the Paul family
Total	- 79	persons

In addition, there were two persons not directly associated with a territory. One was of the "Twin" family, and the other a person named Cat who was stated as being connected to a Temiskaming family.

This census probably refers to the registered Indians, although it is not absolutely clear. If it is, then it may not include all of the Indians who lived at Bear Island or considered themselves part of the band at that time. But there is little evidence of others living or trapping in areas not mentioned. From his census, it would appear that there was no one listed in 1913 as being descendants of or representing his Territories Nos.22, 24, 28, 29 and 31.

However, there were obviously other persons there at the time that were not on the registered band lists. From the genealogy charts and oral evidence the Moores, Turners, Twains, Potts, Fridays and Petrants were there. The areas shown on the genealogy charts as being the territories with which they were connected were Territories Nos.25, 26, 23, 22, 10, 8 and 21 respectively. This indicates that in 1913 there were no persons in the group interviewed by Dr. Speck from Territories Nos. 9, 24, 28, 29 or 31.

I will now deal with some of the territories individually.

Territory No.8: This land was occupied through the female line from Kanecjc, but her husband, William Tebanajisi, may have been from Territory No.30. They were married in 1865. It is not known when he was born but their child, William Peshabo, resided in Territory No.8 from at least 1899 as did his stepfather, Malcolm McLean. William Petrant and his family, who came to the land about 1876, occupied other parts of the lands.

Furthermore, in this territory, Antoine Peciw died and Michael Kat and his brothers and their father-in-law and brothers-in-law moved into the territory. There is no reference to any band approval and it appears that it was merely considered to be family land, because the people who moved in basically had been trapping and were formerly considered as part of the Temiskaming band.

Based on information from the Temiskaming Indians, Dr. Speck, at page 7, referred to Kanecjc (Territory No.8), Kabimigwune (Territory No.9) and Wabimakwa (Territory No.10) as encroaching Temagami families associated with the Temiskaming band. It indicates that the Temiskamings considered them as encroaching on Temiskaming lands, and shows the vagueness of band boundaries.

In dealing with information from the Temiskaming Indians, Dr. Speck referred to Kanecic as being the brother of Wabimakwa, and Kabimigwune as being the son-in-law of Wabimakwa, to whom Territory No.9 originally belonged. Based on information from the Temagami Indians, he refers to Kabimigwune, at page 13, as being the brother of Wabimakwa, and that Kabimigwune had married into the Temiskaming band. At page 16, Dr. Speck referred to Wabimakwa, Cayagwogzi and Kanecjc as brothers. I find that Dr. Speck was in error with respect to the relationship of these persons. I accept Morrison's evidence that Wabimakwa was the father of Kabimigwune, Cayagwogzi and Kanecjc. However, Dr. Speck's information came from members of the two tribes and shows their own confusion even 43 years after Wabimakwa had died. Also, in 1913 the only reference to Territories Nos.8 and 9 was under the discussion of Temiskaming. There is no reference to the Territories Nos.8 and 9 under the family hunting territories of the Temagami band.

There is only a reference to Territory No.10 of Wabimakwa. However, Dr. Speck indicated that at least Territories Nos.8 and 23 had previously been occupied by their father.

Also, in 1913, Dr. Speck did not show any persons on the Temagami census as claiming descent from Kabimigwune (Territory No.9). Obviously, in so far as the census was concerned, the persons occupying Territory No.9 were considered as being Temiskaming. However, in listing the Temiskaming band hunting territories in his chapter relating to Temagami, he does not mention Territories Nos.8 and 19.

Based on the above and the oral evidence of Chief Potts, I conclude that the Territories Nos.8, 9 and 10 originally were occupied by Wabimakwa who was a member of the Temagami band at the time of his death in 1870. It also shows that the lands were basically considered family lands and not band lands. This created confusion as to where band boundaries were at any given time. I find that in 1850 the lands known as Territories Nos.8, 9 and 10 were occupied by a person who was a member of the Temagami band. By 1913 there was considerable doubt. However, it must be borne in mind that by 1913 the railway had been built through these lands and towns had sprung up, resulting in an exodus of Indians.

I find that there has been no Indian of this band who has occupied Territories Nos.9 and 10 since at least 1931, with the exception of the western portion of Territory No.10, where Gus Friday gets a personal licence to trap from the Ministry of Natural Resources. However, he does not trap it as part of the Bear Island Co-operative or the band. Gus Friday is not a descendant of an aboriginal Indian from this area.

I find that the McKenzies have occupied part of Territory No.21 as a result of Philip McKenzie marrying the widow of Mattias and moving onto the lands with her.

Territory No.22: It would appear from the genealogical charts that there are no descendants of Cumcackiwe, the ancestral family. Big Paul utilized this territory. He was a stranger to the band. He brought the Potts children onto these lands. According to Chief Potts' evidence, in approximately the early nineteen fifties, the area was divided by the government into smaller watershed boundaries and the Potts' family retained the area, but approximately twelve to fifteen years ago the smaller portion of the territory was taken from his brother Brian and given to a white man.

Territory No. 23: was not occupied by any descendants of Temagami Ned, nor by his sister Juliet, who had left the lands, nor by his other sister Angelique or her husband Charles Yellowhead, who left the land in 1886. After Charlie Yellowhead left, the Twains, the Potts and the Turners, who are all persons from outside the Land Claim Area, moved onto the lands and have used them since. Francois Twain came to the lands no earlier than 1865. He married a daughter of Cayagwogzi in 1870. Therefore, it could be argued that the Twains are descendants through the female line of the original occupant of this territory.

Territory No.24: was the territory of Wendaban. He frequently considered himself to be a Nipissing and not a Temagami Indian because of his winter residence in Nipissing. Though I have concluded that Territory No.24 is part of the territorial lands of the defendants, the looseness of the association between families is evident in Wendaban's case. Also, from other evidence, it is likely that members of the Temagami band hunted in the Lady Evelyn Lake area, which would include Territory No.24.

With respect to Territory No.25, it is doubtful if Ayandackwe received this property from his father, Old Barbu, but in any event, he moved out of the area in the late eighteen seventies, and Philip McKenzie, who had moved in with him in 1868, later moved away. His son, Philip McKenzie, Jr., left the lands and went to trap Territory No.21. In the late eighteen eighties, Charles and William Moore, who were Crees from James Bay, moved to Temagami and commenced to trap these lands. They had no blood relationship with any Temagami Indians.

Territory No.26: Kaminockama died in 1865 without any known descendants. I find that Big Pawnee Paul was not his son. There is not even oral evidence to this effect. There is evidence that at a date later than 1883, Big Ponee Paul looked after an old man at Stull Lake within Territory No.26. That man could not have been Kaminockama because he had died in 1865. Big Ponee Paul became recognized as a member of the Temagami band by 1887, but this later affiliation or connection with the band cannot be considered as giving the band any aboriginal rights to Territory No.26. Hence, even if Big Ponee Paul occupied Territory 26, he was not a descendant of a Temagami Indian. In any event, he probably used Territory No.22 and not

Territory No.26. John and Mary Turner had no connection with the defendants, but moved to the lands in the latter half of the nineteenth century. Therefore, the defendants have failed to prove on a balance of probabilities that they have any aboriginal title as a band to Territory No.26.

Territories Nos.27 and 27-A: is reputed to be Misabi's territory. Misabi came to the area sometime in the eighteen fifties and married Kekek's daughter and used part of Kekek's territory. Territory No.27 is part of the lands of Kekek and his descendants.

Territories Nos.28 and 29: With respect to Territory No.28, there are no living members who can claim the right to this territory. I note that the Wabi family was a Temiskaming family, and that there have been no Temagami Indians in this territory since 1909. William Wabi, who married a Temagami female descendant, the daughter of Kohoje, lived there until 1950. He was considered a Mattachewan Indian.

With respect to Territory No.29, it would appear that the family was extinct, or had moved elsewhere.

Territory No.30: The Paul family is listed on Dr. Speck's census. There was a Paul woman whose family had no earlier connection with the band. The other woman was described as being an orphan whose father had been a White Fish band Indian.

It is indicative of the lack of cohesion of the northern group, in particular, that Jimmy Pierce, who is alleged to have been a Temagami Indian and whose territory in the north is alleged to have been Temagami lands, signed Treaty No.9 as a head man of the Mattachewan band in 1906. Chief Potts said this was only to please the whites, but Pierce also signed a Mattachewan band resolution in 1922 (Exhibit 1-113G) which requested he be transferred from the Moose Factory Band (Treaty No.9) to the Mattachewan band. I also observe, on Exhibit 17-8, that the Mattachewan Reserve is almost immediately adjacent to the northeastern boundary of the Land Claim Area. I find that Jimmy Pierce and his family were Moose Factory or Mattachewan, and never Temagami, band members.

Territory No.31: Although Jimmy Pierce had, prior to his death, applied for a transfer from the Mattachewan band to the Temagami band, he was never accepted and, historically, his lands were not part of the Temagami lands, even though in 1913 Indians in the Temagami area indicated to Dr. Speck that the lands were considered to be Temagami lands. The Land Claim Area itself does not include the northern part of Territory No.31, but does include extensive lands north of those referred to by Dr. Speck. I do not accept the evidence of Chief Potts as to the northern limits of the Land Claim Area because it was hearsay evidence and because no one from the Pierce family or from any of the surrounding bands was called to justify the location of the boundaries. In this regard, I consider that Dr. Speck's information was inaccurate. The Indians said the various northern lands were band lands. In fact, they were family hunting territories and, in earlier times, the families had not been part of the band. Nor were they in 1913.

I find that in 1850 the territories included within Dr. Speck's Territories Nos.29, 30 and 31, and the lands to the north that are included within the Land Claim Area, were not part of the lands occupied by recognized members of the Temagami or Nebenegwune band. Therefore, assuming that the Temagami Indians signed or are bound by the Robinson-Huron Treaty, these lands were not included within any land they had to cede, nor are they territories in which I believe the defendants have any aboriginal rights, because the occupants thereof were not part of an organized band at any time prior to 1848. It is interesting to note that Dr. Speck refers to the Twain family as coming from Territory No.38, which is east of the Land Claim Area, although at that time the Twains were living in Temagami and were presumably on the Temagami band list.

There is no oral tradition recalling the names of the heads of families on the older genealogical charts or referring to them as being related. Their names were not mentioned to Dr. Speck in 1913. There is no oral or historical record of any intermarriage or blood relationship between any persons on the charts prior to 1860, even though the four families had different totems and they could have intermarried if they wished. According to the evidence of Dr. Rogers, a traditional band has somewhere between 75 and 150 persons, with the minimum as low as 50 in some parts of the world. Nowhere in Dr. Rogers' evidence did he relate his views of a traditional band to the Temagami facts; he simply assumed that there had always been a traditional band in the area. He did not attempt to tie in or explain away the Indians who appear to be members of the Mattawagami and Temiskaming bands. He did not consider the actual families or people in this area, or define them as a band. He made no study of the area, and he merely made assumptions based on his studies elsewhere and on the fact that he had been told and believed the band had

always existed. Chief Potts stated that he believed that there were about 80 to 120 persons in the band in 1800, and Mr. Morrison stated that he thought in 1763 they numbered between 100 and 125. Chief Potts could not explain how he derived the number, and Mr. Morrison was going from genealogical charts for the entire Land Claim Area.

According to the 1848 government present list, the families of seven Temagami Indians, totalling 32 persons, were recorded as having a place of residence at Nipissing. The 1849 present list records six Temagami Indians residing with their families at Temagami, with a total of 22 persons. The 1850 present list records three Temagami Indians residing with their families at Temagami, totalling only 16. In the treaty list of 1850 (Exhibit 2-39) only 24 Temagami Indians in total were included. While all of this may indicate that only those members of the group known at that time as Temagami Indians who showed up to receive presents were recorded on the lists, I find that it shows either a small number of people or a lack of cohesiveness amongst the people. It must be borne in mind that there are three forms of bands, the traditional band, the trading post band and the government or registered band. The trading post band was not a socio-political entity in the early days, although it may have become one later, and the government or registered band is one that is arbitrarily created by the Indian Act. From the genealogical charts, there were four families that probably were located within or near the Land Claim Area, but there is no evidence of any collateral ties between the four families. In 1840, reference is made in the Mattawagami journal to Kaminockama as belonging to that place. He was shown on the Onebing list in 1849 and on the Nebenegwune list in 1852. He was not shown on any other lists. From the genealogical chart, he died in 1865. The only evidence of his genealogy is on Chart 14. 1 have found many of the early associations thereon have not been proven but the only tie that is even indicated is to persons in the north that are unrelated to the Nebenegwune or Temagami group in the south. I find that Kaminockama was not a member of the Nebenegwune or Temagami band in 1850.

In Temiskaming, in 1840, reference is made to furs from the Lac Ronde (or Mountain Lake) and Temagami Indians, as if they were separate groups. In 1841 a reference is made in the Temiskaming journal to various Temagami groups. In 1844, reference is made in Mattawagami to the traders going to visit their Indians at Lac Ronde. I conclude from this that there were Indians around Lake Temagami, there were Indians around Lac Ronde, and there were Indians in the north, but there is nothing to indicate that they were associated as part of one band. Mr. Morrison concluded that they were three extended hunting groups: one at Lac Ronde, another at Temagami, and a third around Smooth Water Lake. He considered that they were at least three of the family hunting groups within the extended Temagami band. The only evidence to support such a proposition is in Dr. Speck's Memoir #70, where the oral tradition is recorded as referring to Nebenegwune as the first chief, and Kekek as the second chief. This indicates a tie between the Temagami area Indians (Territory No.21) and Indians in Territories Nos.27 and perhaps 24 and 27a, but not a tie with the Lac Ronde Indians. With respect to one family in the northern area, there is evidence that in 1848 and 1850 there was starvation amongst some members thereof, while other members were reasonably well off. Yet there is no evidence that the ones who were well off assisted those who were not. This shows a lack of any concerted family organization, let alone a band organization.

Angus Cameron spent 35 years between 1801 and 1843 on the borders of the Temagami Land Claim Area, and wrote extensively, but never once referred to the Temagamis as a band with a chief called Nebenegwune or called by any other name. In 1848 James Cameron referred to the Nipissing and Lac Ronde Indians but made no reference to Temagami Indians. In 1849 at Temiskaming, reference was made to a number of Indians or groups of Indians, including many who are now alleged to have been part of the ancestral Temagami band. The reference in no way indicates that they were a recognized collective group. There are a number of references in the early eighteen hundreds to individuals and their bands. Some of these include persons who the defendants say are Temagami Indians. Some are referred to as chiefs of particular bands, but there is no reference until after 1850 of a chief of a Temagami band. The list of such references is attached as Schedule C [omitted]. The list indicates that the Loon (Enene) (Territory No.21), Wabigan (Territory No.24) and Old Barbu (Territory No.26) were considered to be separate groups.

Dr. Wright believed that both the Ojibwa and Algonquin tribes lived up to six to seven months a year in villages. Archaeologically and historically, there are few locations within the Land Claim Area that indicate permanent habitation of a band as opposed to individuals or families. At the mouth of the Montreal River where the original Fort Temiskaming was located, there is archaeological evidence of a large Indian settlement. It is probable that there was also an Indian settlement there at the time that the Fort was constructed, but, even if there was not, there was a settlement there after the Fort was constructed. This settlement, however, could be attributable to

the Temiskaming Indians, as well as the Temagami Indians, or to a group larger than both, and therefore does not give any indication of a Temagami band separate from other groups.

There is no real oral tradition about any village sites of the Temagami band. Chief Potts could remember only four community locations: Austin Bay, Bear Island, the White Bear Lake and Temagami Island. He stated that the Pierce family cabin was at the south end of Duncan Lake and was for seasonal use only. I find this is at the extreme northern limit of the area covered by Dr. Speck, although it is well within the lands now claimed. He also referred to a location at the outlet of Lady Evelyn Lake. He was not sure about Wabacon Village on Temagami Island but I find that it has not been proven to have existed prior to the Hudson Bay post. All of these named locations are of recent origin.

Alec Misabi gave evidence of a possible Wabacon Village on Temagami Island but Michael Paul had never heard of it. Both were aware of a burial ground on Temagami Island that I find goes back in time only to the Hudson Bay post. William Twain had heard of Wabacon Village but he related it only to Chief Tonene and the Hudson Bay post. The only other villages he knew of were Rabbit Lake which was the home of the White Bear family and Round Lake where the Twains and Michael Paul lived when they trapped up north. Michael Paul was aware of the Austin Bay site which commenced about 1900.

Alec Paul, when speaking to Dr. Speck, referred to various locations elsewhere, but I find that Langue de Terre was a northwest company trading post and not an aboriginal settlement. Dokis, the chief of the Nipissing band, referred to Nebenegwune and his people coming to Sturgeon Falls (outside the Land Claim Area) in the summer. In addition, Conway referred to the Florence Lake area as a major archaeological settlement, and a recent settlement of one family on Mikobe Lake. Conway commented that, in his opinion, it would not be very many times in the year when all the Temagami Indians would gather at one spot; that normally there would only be a couple of families gathering. This shows the looseness of the association of families in this area. Even the references in the geological surveys of Canada refer to individual houses or farms, but not to any larger group. I find that the archaeological and historical references to sites show individual or extended families and nothing that indicates a collective group or any central village, other than at Fort Temiskaming.

Even in 1894, Alec Dokis, who had a trading post in the area of Lake Temagami for many years from 1865 on, referred only to members of Nebenegwune's family and the White Bear family as being from Territories Nos.9, 10 and 21, and he specifically referred to Kanecjc (or Cheechee) and his brother as being from Abitibi. These were the persons who are traditionally known to have occupied Territory No.8. He referred to members of the Paul family and Friday family as being from Mattawagami.

In 1938, Mrs. John Turner, who was said to have been resident on Bear Island for 63 years (which would take her knowledge back to 1875), stated that the Katts family were from Temiskaming; that the Equena and Mattias families were from Abitibi, that the Twain, Peshabo, Paul and Friday families were from Mattachewan, that the McKenzies were not Indians, and that Charles Moore, Jr. was an adopted white child (see Exhibit 1-96). This again indicates a very loose organization and shows a very weak band grouping. Clearly, in 1850 and even later, there was no strong band as there is today.

I am of the opinion that the persons identified by the defendants as Temagami Indians and as a part of the Temagami band were simply heads of families and did not, as families themselves, form an organized Temagami band with a chief. The first reference in the trading post journals to a Temagami who was a chief is in 1874. This was after the 1850 treaty. While the trading post records do not show it, I find that Nebenegwune was a headman and represented the Temagami Indians with respect to the Robinson-Huron Treaty. Because Kekek also is referred to in the Robinson-Huron Treaty, I accept that he was a headman of that family and, because the two of them were, in the oral tradition reported to Dr. Speck, referred to as being chief and second chief, I accept that there was some association between those two groups which probably occurred prior to 1850, but not as far back as 1763. In addition, the White Bear or Wabbacou/Wabbigan family only became closely associated to Nebengwune and Kekek by intermarriage after 1860. Their names are clearly listed in the early Robinson-Huron Treaty pay lists as associated with Nebenegwune, and therefore I accept that there was some socio-political relationship with that band at that time. There is no direct evidence of any other inter-relationship of families at that time.

There are numerous government lists referring to the Temagami area or to persons who can be associated with that area. An 1848 list showed the following persons, who can reasonably be

identified with the Temagami area, as being resident at Nipissing: Nebenegwune, Cayagwogzi, Kanecjc, Wabbacou and Tebundo, as well as Ionondance and Michuckwonanwan.

The first five of these can be identified with Dr. Speck's Territories Nos.8, 10, 21, 23 and 24, while the latter two cannot be specifically identified with a territory. In 1849, for the first time, the Temagami group was indicated separately from others. They were listed as Kanecjc, Michaquanaham, Wabbacou, Cayagwogzi, Kabimigwune, as well as Sanitee. Four of the first five can be identified with Territories Nos.8, 9, 10 and 23. In 1850, the Robinson-Huron Treaty annuity pay list shows Nebenegwune, Kekek (therein named as Cogakeshick), and Ionondance as being from Nebenegwune's band, with Nebenegwune being shown as a "head man" rather than "chief". The first two can be identified with Territories Nos.21 and 27. The 1850 present list indicates a total of 16 persons, including four warriors and three wives, but doesn't show any chief as being paid. Nebenegwune is shown under a heading of "Chiefs and Headmen", but it appears that he did not attend to obtain presents in August of 1850.

In 1851 a census list of Indians was taken that showed under the heading of Temagamis, the following persons: Kekek, Kabimigwune, Cheechinc, Ollowish's wife, Wabbacou and Wiagodanooquee. The total of individuals was 21 (excluding children four years and under), and of these, persons can be identified relating to Territories Nos.8, 9, 10 and 27, and possibly 21.

A receipt was signed in August of 1851 (Exhibit 2-53) by Nebenegwune and other chiefs acknowledging receipt of annuities for the current year. It does not show a specific number of Indians but shows Nebenegwune, Tawgaiwenene and Maisquawzo as chiefs or headmen. It shows goods paid amounting to £38.8. This is separate from the present lists earlier in the same year.

The 1852 present list (Exhibit 2-44) shows the Temagami band being represented by Kekek with a total number of 35 persons. Exhibit 2-60 is another 1852 present list indicating 35 persons in the Temagami band. Exhibit 2-58 is the census of Indians taken in 1852 which shows 35 Temagami Indians, including Kekek, Kabimigwune, Kanecjc, Nebenegwune, Wabbacou, Mozinosowai, Ayandackwe, Socksai (likely Cayagwogzi), and Kaminockama. This includes persons from Territories Nos.8, 9, 10, 21, 23, 25 and 27, as well as Ayandackwe's father Mozinosowai (or Old Barbu). It would be surprising if Dr. Speck would refer to Territory No.25 by tradition as Ayandackwe's if he was referring to the 1850 period when Ayandackwe's father was still alive. Therefore, Dr. Speck's reference must be to a later date. I have already found that Kaminockama was not a member of the band. In 1850, Mozinosowai had been shown on the Nipissing list. It is interesting to note that in the same census, Tebundo is shown as having settled on Manitoulin Island and is included as a White Fish Lake Indian.

There is no record of any presents or lists for the Temagamis in the year 1853, but in the year 1854 the requisition estimates for the Temagami Indians totalled 32 Indians. However, Exhibit 2-67 is the requisition for the treaty payment for 1855 signed by Tawgaiwenene and Nebenegwune, both shown as "of Wanapitei." The dollar amount is similar to the years 1853 and 1854 for Tawgaiwenene and Maisquawzo, who had signed for Wanapitei. This requisition of 1855 specifically refers to the treaty of September 9, 1850, and was explained to the parties. Exhibit 2-69 indicates that the money was in fact paid, with Tawgaiwenene signing on behalf of Nebenegwune. There is no record of any money having been paid to the Temagami Indians thereafter until 1883, although lists were kept each year showing who the government believed were the Temagami Indians. Exhibit 2-72 is the 1856 list of such annuities, which indicates in the list of names Nebenegwune, Ionodance, Kekek, Wabbacou, Michaquanaham, Wendaban, Tebenajisi, Kabimagwane, Kanecjc, Minukamwa, Tebundo, Neginosh and Tahbainac. Many of these names are difficult to read and I cannot relate some of them to a definite location. Those that I can identify relate to Territories Nos.8, 9, 10, 21, 24, 27 and 30, and possibly 25 or 35, assuming that Ionodance may be the same as Iondeque. In any event, all of the areas are around Lake Temagami, or to the east thereof, as well as north to include Lady Evelyn Lake and probably Mikobe Lake, but they do not include Lac Ronde (Territory No.28) or areas to the northwest or west. Only one person on the list, namely Tebanajisi, was a person who came from any of the Territories Nos.29, 30 and 31. No one knows where Tebanajisi was hunting at the time. In 1865, he married a daughter of Kanecjc of Territory No.8, and it may be that he was hunting in that territory.

There was no tie by blood or oral history between Nebenegwune's group and Iondeque from Territory No.25, nor with Kohoje or Pikodjick in Territory No.28, the latter persons being clearly known as Lac Ronde or Mountain Lake Indians, separate from the Temagami Indians. Ancestrally, there may have been a family tie (as brothers) between Wabigan in Territory No.24 and

Capimweywitan in Territory No.28, but this did not mean that they were associated in the same band. In fact, it indicates to me that the families hunting in Territories Nos.24, 27 and 27A were more properly considered as Lac Ronde rather than Temagami Indians, because it was only in the next generation that Kekek is shown as a second chief of the Temagami band. Territories Nos.24, 27 and 27A are fuzzy in their association, but because of the early treaty lists and records, I am willing to accept that, about 1850, these territories probably belonged to a larger group of Temagami Indians. I also include Ayandackwe from Territory No.25 for the same reason. There being no connection in 1850 between Territory No.28 and the Temagami, 1 find that, in 1850, the territory east of the Sturgeon River, occupied by the Temagami Indians, did not include Territory No.28. The territory of the band east of the Sturgeon River in 1850 included Territories Nos.8, 9, 10, 21, 22, 23, 24, 25, 27 and 27a.

The total number of persons on the 1856 annuity list (Exhibit 2-72) seems to be approximately 41 persons. That number is not sufficiently large to comprise a traditional band, as defined by Dr. Rogers and others, numbering approximately 50-120 persons. The changing numbers also show that, around 1850, there seems to have been a great amount of change of allegiance from group to group. George Ironside, who was a knowledgeable and well regarded Indian agent, would in all probability have recorded a person as part of a group based on what he was told by the Indians themselves. I do not accept the speculative proposition that he might have recorded the name with a different group for some special government reasons.

Craig Macdonald gave extensive evidence with respect to the Indian names for a large number of minor and major geographical locations within the Land Claim Area. He stated that he started amassing this information prior to this litigation, and that he believed that the information was accurate. The information came from local Indians, but none of the latter were called to give evidence to support him. I believe that Mr. Macdonald has done an extremely capable comprehensive documentation of these names, but I am of the opinion that the evidence is of little value to this trial. Mr. Macdonald himself indicated that the oldest of the names, which he sometimes expressed as "a long time ago", dated from the eighteen hundreds and, in light of his answers, probably from no earlier than 1850. From this, it is clear that most names are of more recent origin, and clearly could be names passed from grandfather to father to son, and do not indicate long-time occupancy of the land. The evidence indicated that most of the names were obtained from Indians who knew the local territories, and that only some of the names were generally known by all of the Indians. This is not unusual or exceptional, but it does not help in defining the lands occupied at any particular time by a band as opposed to individual persons or families. Mr. Macdonald indicated that the Indians have become more centralized since 1900, and particularly since the establishment of schools about 1950.

The evidence of Professor Wipper with respect to canoes supports the proposition that there was no mass exodus of Algonquin people from the Land Claim Area followed by a mass influx of Ojibwa. The canoes from the Land Claim Area exhibited to a high degree the Algonquin style, such as high ends. However, it is interesting to note that Exhibits 20-10 and 20-11 were both built by people from the same family in the White Bear Lake area and are somewhat similar in design. Exhibit 20-9 came from the northwestern portion of the Land Claim Area and, while it has Algonkian characteristics, it is much more Ojibwa in style. There was no homogeneous style within the entire band, but rather different family styles depended upon each family's orientation. This finding is consistent with my conclusion that in the early days there was no direct connection between the persons living in the northern portion of the Land Claim Area and those in the Lake Temagami area. Exhibit 20-4 was built in the Lake Temagami area about the same time that Exhibit 20-10 was built in the Rabbit Lake area, and yet it again is different. It shows a different family or builder. There was no oral evidence by an Indian as to canoe styles. I do not believe that the canoe exhibits or evidence are conclusive of anything other than the fact that there was no mass migration of a new Ojibwa band into the area after the original inhabitants had moved out or disappeared.

Macdonald also gave extensive evidence as to the canoe routes within the Land Claim Area, and stated that in his opinion the Land Claim Area formed a natural geographical area that was consistent with the position that there was one group of people living within the area. I do not agree. I felt Mr. Macdonald was extremely biased in favour of the Indians. Most of his evidence-in-chief was given from notes, which is understandable because of its detailed nature. However, in cross-examination, he appeared to have difficulty following the documents put to him to be considered. When asked about the Nipissings that he interviewed in the nineteen seventies with respect to territories and canoe route access to the Wanapitei area, without any apparent reason he exploded and stated that the court rules were loaded against the Indians. At another, time, he mentioned that he was so worked up that he could not remember a persons name. Still later, when

questioned about names of old geographical points, he stated that many informants of Bear Island can give the name of why Rabbit Lake was so named, and then stated, "This will become more evident when we start pouring in the documents." All of this indicates that he was clearly emotionally involved and a partisan witness.

He referred to numerous entry points into the Land Claim Area and referred to two or three alternate routes going to the north out of the Land Claim Area. However, concerning the westerly side where the defendants do not want to show any connection with the Wanapitei area, Mr. Macdonald, having indicated that there were perhaps five or six accesses, in my opinion wrongly concluded that all the accesses were bad. He also said that the routes in that direction were not clearly inter-connected like veins or arteries, whereas inside the Land Claim Area they were, and in support he presented a water-fill map, Exhibit 19-7, which he said showed the absence of lakes between Wanapitei and Temagami. In my opinion, it also basically shows the absence of lakes between the northern part of the Land Claim Area and the southern part.

He also gave evidence with respect to Kelly's portage, which was a two and a half mile portage over some high ground that he said would be the best access point between Lake Wanapitei, and the Sturgeon River and general Temagami area, but he said that this was very difficult and would not have been used as a normal route. From other evidence, it is clear that this is the very area or portage that was used by one of the claimed ancestors of the Temagami band, Old Barbu, who was found hunting there in 1839. It is also clear that Indians in those days would not have considered a portage of two miles or two and a half miles a major portage. From Exhibits 19-1 and 19-2, prepared by Mr. Macdonald, one can see that there were many portages within the Land Claim Area that are of that length or longer. In particular, evidence was given from historical documents of a portage between Lake Mattawagami and Sinclair's Lake to the north of the Land Claim Area that was some seven miles or more in length and over which old women regularly passed. While a flat portage is obviously easier than a high portage, there is no question in my mind but that Mr. Macdonald was being highly defensive of the Indians' position, over-emphasizing certain factors to make certain that there was no connection between Lake Temagami and Lake Wanapitei. He exhibited extreme bias in refusing to acknowledge the obvious with respect to the Skene map based on information obtained from Chief Tonene of the Temagami band in 1883, and in particular in stating that the lake shown on the Skene map was likely Lake Wawiagama, thus rendering his position ludicrous and of no use. He admitted that his evidence with respect to snowshoes and toboggans failed to accomplish his goal of indicating some special band difference from other bands. I find that his evidence does not prove the existence of a unified band nor determine the area covered by any such band.

I am giving the benefit of the doubt to the defendants by concluding that they were, in 1850, a band rather than just a group of families, in Territories Nos.8, 9, 10, 21, 22, 23, 24, 25, 27 and 27a. I believe that they were a very loosely-knit organization without any strong or real central leadership. In fact, the Temagami band was merely beginning to emerge as a cohesive and increasingly larger group around the Nebenegwune family because of the treaty-making process and the present-giving process. This formalization process became firmer at a later date after the Hudson Bay post was established on a permanent basis on Temagami Island in 1857. The looseness of the band around 1850 indicates why the group was represented by Tagawanini at the treaty process. Tagawanini was the spokesman for all of the Indians in this area, as well as in the area of Lake Nipissing and the French River. The Nebenegwune group was small, loosely associated and insignificant compared to the whole group represented at the treaty-signing.
In the trading post records, many of the persons in the families were referred to loosely as bands and there is no reference to any of them having a chief. The only reference to a chief of a group that included the Nebenegwune family is in Dr. Speck's Memoir No.70 to the effect that Nebengwune's father (whom I have found to be Enene, or the Loon) was reputed to have been chief before him. From the present lists, about 1850, it is clear that Nebenegwune had brothers and sisters. They are not shown on the genealogical charts. It may be that his father also had brothers and sisters who had families of which he was chief. I find that there was a degree of fluidity between bands, no family had allegiance to any particular band or, if it did, the allegiance was not constant.

With regard to the Mistassini band in Quebec, Dr. Rogers stated that people followed a charismatic leader and that, on occasion, people on the edges of a band territory would switch allegiance. I find such fluidity here. It would be sheer speculation to say who was a member of an organized band in 1763. I am of the opinion that the present band gradually established itself around the nucleus of Nebenegwune's, Kekek's and Wabacou's families some time after 1763. The first intermarriage was in 1860. Prior to that time the individual families were probably separate groups, forming a band at the earliest around 1850. Even in the late eighteen hundreds,

the Temagami band was growing by the addition of extra family groups through adoption of Indians who had moved onto the lands.

Having found that there was a band level of organization after 1850, I now look to the issue of territorial occupation.

In 1877, three Indians at Nipissing told Mr. Skene, the Indian agent, that they belonged to a band living north of Lake Nipissing, which band had received both money and presents at Manitoulin Island. They wished to know if he would pay them. (In 1875, the annuity had been raised from $1 per person to $4 per person.) In 1878, the chief of the same band met Mr. Skene and told him the same thing. In 1879, the same chief told him that he had not gone to see the other Indian agent at Manitoulin because it was too far to go. He stated that one time the annuity had been paid at Manitoulin to Kekek, at the time their chief, on their behalf. One of the Indians (not the chief) told him that he had been there with Kekek, and that Kekek had paid him and one or two others, but had not accounted for the rest of the money to the band, and for that reason they never went again to Manitoulin. Reference was made to the fact that the band was from Temagami and numbered approximately 90 persons. The Indians also told him that no reserve had been set aside for them, that the lumbermen were now coming close to them, and that therefore they wanted a reserve. Skene reported that the Indians stated that they had never ceded their lands and knew nothing about the Robinson-Huron Treaty. When Skene asked how. in that case, the Indians could have received the money and presents at Manitoulin Island, the Indians merely replied that Chief Kekek received money on account of the band and also presents, and even gave details as to what the gifts were.

In August, 1882, the Temagami Indians, through Jocko Tawgaiwene of the Wanapitei band (son of Tawgawenene), applied to be placed on the list of annuitants under the Robinson-Huron Treaty. Jocko Tawgaiwenene gave a list (Exhibit 2-95) of those who were members of the Temagami band. It included Tonene as chief, Nebenegwune, Kabimigwune, Mattias, Wasakejik, Kohoje, Kone (likely Egona), Kanecjc, Cayagwogzi, Basil, Ayandackwe, Capimweywitam and Pikudjick, as well as five other persons whose names cannot be identified, plus three additional families that should be added.

The list totalled 89, and the addition of three families would bring the number to approximately 104. The persons named can be reasonably associated with Territories Nos.9, 10, 21, 23, 25 and perhaps 28. On this list, there were six persons whom Chief Potts could not identify, either from oral tradition or the genealogical charts.

In 1883, Exhibit 2-104, the pay list of the Robinson-Huron Treaty for the band, showed the same names as on Exhibit 2-95, plus three additional names: Anias Twain, Charlie Yellowhead and Thomas Paul. These three new names can be associated with persons who had been living in Territories Nos.9 or 10, plus Territory No.23. Charlie Yellowhead came from outside and married a daughter of Cayagwogzi in 1878. He left the area in 1886. While this list is certified as being paid by the Indian Agent, it is not clear from the exhibit whether or not it was acknowledged and signed by the chief or councillor of the band.

From those names that can be identified on Exhibit 2-104, it would appear that those persons represented Territories Nos.8, 9, 10, 21, 23, 25 and 28. Thomas Paul, who is on the list, is not the same as Pawnee Paul, who appears on later lists. Thomas Paul had married a woman from Territories Nos.9 and 10, although the treaty list does not show him having a family. There are two persons on the list that could not be identified.

From the genealogical charts, there were at least three families in the southern portion of the Land Claim Area that are not on the 1882 or 1883 lists, and that can easily explain the footnote to Jocko Tawgaiwene's list. The fact that there are names that cannot be identified from the genealogical charts, or Dr. Speck's charts, or by the present chief, is some evidence to indicate that there were people living west of the Sturgeon River towards Lake Wanapitei that were part of the band at that time and are no longer considered to be members. This is consistent with my interpretation of Skene's map, Exhibit 1-84, prepared from information given by Chief Tonene in 1880, that he considered areas west of the Sturgeon River to Lake Wanapitei as being included within the Temagami band, and the fact that Jocko Tawgaiwene, of the Wanapitei band, was the spokesman for the Temagami group who applied to have the Temagami group added to the treaty list.

Exhibit No.1-98 is the 1884 pay list for the band and it includes substantially the same names as in the previous list, but with one new name. This list was certified by Chief Tonene and Mattias, a councillor. It is interesting to note that both in the 1883 and 1884 lists, Nebenegwune is listed as

one of the members. The 1887 pay list indicates substantially the same persons but, for the first time, Big Paul appears as a member of the band. On the 1883 list, some of the names from Jocko Tawgaiwene's 1882 list do not appear. Many of these omitted names are ones that Chief Potts said that he did not recognize. On the 1883, 1884 and 1887 lists, there are no names connected to territories west of the Sturgeon River. I assume that the unidentified names on the 1882 list were considered to be members of the band who lived west of the river, but who severed their association in 1883. This shows a state of flux in the band.

On the west, the defendants claim aboriginal title only to the Sturgeon River. They may well have claimed further west than that, but elected not to do so.

The defendants' witnesses deny any geographic connection between the Land Claim Area and lands west of the Sturgeon River, including Lake Wanapitei. In my opinion, their motive is to avoid any connection between Tawgaiwene and Nebenegwune at the signing of the Robinson-Huron Treaty in 1850. Chief Tonene, a former chief of the defendant band, after seeing a larger map of Ontario (Exhibit 13-190), prepared by the Ontario Crown Lands Department, which clearly showed major geographical features, including Lake Huron, Lake Temiskaming, Lake Nipissing, Lake Temagami, Lake Wanapitei and the French and Wanapitei Rivers, gave information as to his bands' territory in 1880, from which information Skene prepared his map (Exhibit 1-84). The Skene map shows a large lake in the western area with a river running out of it to the French River and Lake Huron. It also shows lakes that obviously include at least Lake Temagami, although the area south of Cross Lake does not appear to be included. No names were placed on the map. The map, in so far as its major items are concerned, coincides with Exhibit 13-190, even to the extent of showing the grid pattern thereon. There is an error on it regarding the location of the Sturgeon River and this was pointed out by Tonene at the time. Other Indians, at that time, confirmed the basic accuracy of the Skene map. Witnesses for the defendants tried to identify the large lake as Lake Wawiagoma within the Land Claim Area, cast of the Sturgeon River. Such an attempt is absurd bearing in mind the relatively small size of Lake Wawiagoma, as shown on the Water Map, Exhibit 19-7 and Exhibit D17-9, and the fact that no river runs out of it directly to Lake Huron and that the map shows the same grid pattern in the vicinity of Lake Wanapitei, as shown on Exhibit 13-190. I find that the large westerly lake on Exhibit 1-84 is Lake Wanapitei. Furthermore, the fact that the map has straight lines on it does not defeat its obvious purport. Many treaties contained straight line maps.

There are many historical and geographic ties of the Temagami area to Lake Wanapitei:

(1) In 1790, the Temiskaming Journal (Exhibit 12-325 and Exhibit 87), referred to a trader going to Lake Wanapitei. I find that it is probable that he took two different routes; one being through the Land Claim Area.

(2) In 1827 (Exhibit 12-63), there is reference to a trader wintering at Lake Wanapitei and being considered in the Temiskaming trade territory as opposed to the LaCloche territory to the west.

(3) Old Barbu**,** a claimed ancestor of the defendant tribe was found, in 1839, hunting in an area between the Sturgeon River and Lake Wanapitei at a place beyond what McDonald called a difficult portage.

(4) In 1850 Nebenegwune was grouped with Tawgaiwene in the Robinson-Huron Treaty with a reserve being set up for Tawgaiwene's band at Lake Wanapitei.

(5) In 1850, the White Fish band who are located west of Lake Wanapitei did not claim Lake Wanapitei. In 1880, Skene was under the impression from some Indians that perhaps the White Fish band may have ceded some of the Temagami lands in the 1850 Treaty. Other than Tawgaiwene and the Temagami people, there were no bands located between the Temagami area and the White Fish band. It shows a close proximity between the two. Dr. Speck, in 1913, referred to some White Fish women who were allowed to hunt on Nebenegwune's lands.

(6) In 1882, Jocko Tawgaiwene, of the Wanapitei band, the son of Tawgaiwene, gave a list of Temagami Indians to Skene and, on their behalf, asked to have them added to the Robinson-Huron Treaty list.

(7) The fact that Skene included Lake Wanapitei on the map he drew from Chief Tonene's information indicates a close association between Tawgaiwene, Nebenegwune and the Temagami Indians.

(8) In 1885, the Geological Survey (Exhibit 13-66) refers to a four to five day journey from Lake Temagami to Lake Wanapitei. (This should be compared to Morrison's evidence of two to three days from Lake Temagami to Smoothwater Lake, which is well within the Land Claim Area.)

(9) In the 1899 Geological Survey (Exhibit 2-130), reference is made to two easily accessible routes from Lake Temagami to Lake Wanapitei. One of them, the Gull Lake route, appears to be on the exact line of where Old Barbu trapped.

(10) Notwithstanding Macdonald's comments, the Water Map (Exhibit 19-7) indicates water connection to Lake Wanapitei easier than to many areas between Smoothwater Lake and Lake Gowganda in the north.

Placed against these facts, I do not accept Chief Potts' position that there was never any Temagami connection west of the Sturgeon River, or the obviously biased evidence of MacDonald and Morrison with respect to Exhibit 1-84. The fact that the defendants introduced Exhibit D 17-9, a map of lakes and rivers in the general area, but placed an identification label blocking out this key area, makes me suspicious of their motives, notwithstanding that it was stated that new dams would distort the picture from earlier times.

I find that in 1880 the lands to the west of the Sturgeon River, including Lake Wanapitei and the Indian reserve at that location, were considered by the Temagami Indians to be included in their hunting grounds. I find that there was ready access between Wanapitei and Temagami.

The Skene map indicates that the Indians' hunting territories did not include the land along the Montreal River, where obviously timbering had commenced. I am satisfied that in 1877, prior to the timbering, their territories did extend to the Montreal River. With respect to the southern boundary, it would appear from the Skene map that the lands did not extend as far south as all of Dr. Speck's Territories Nos.21 and 22, but, bearing in mind Nebonagonai's own traditional hunting territory, Territory No.22 to the west, and Tonene's comment that the Sturgeon River was not properly located, I am prepared to accept that these lands were included in the hunting territories at that time. While it could be interpreted that the northern limit went only to the northern extremity of Lake Temagami, in view of the reference to the various persons who were members of the band in 1883, and the oral traditions of the Indians themselves, and the difficulty in proving with absolute certainty where the boundaries were, I find that it is more likely that the Skene map was meant to include Lady Evelyn Lake as well.

I find that the northern boundary of the Temagami band, east of the Sturgeon River, in 1883, was the northerly, northwesterly and westerly limits of Territories Nos.28, 27, 27A and 25. In 1850, I find that the northerly limit of the Temagami band's lands east of the Sturgeon River was the northerly, northwesterly and westerly limits of Territories Nos.24, 27, 27A and 25.

To summarize, there are minor differences between the Land Claim Area and Dr. Speck's territories with respect to the easterly and southerly boundaries, but I do not consider that they are of such significance that I should deviate from Chief Potts' evidence. I accept the evidence of Chief Potts that the boundaries set out in the Land Claim Area are a more exacting and logical boundary in these areas than those vaguely described in Dr. Speck's map.

It is of particular interest to note that there is no one on the Jocko Tawgaiwene list of 1882 or the 1883 payment list from Territories Nos.29, 30 or 31, or to the north, within the Land Claim Area. There are names on both these lists that cannot be identified.

Having concluded this, it is obvious that both in 1850 and in 1883, the Temagami band territories did not include Smooth Water Lake. Therefore, they could not be said to be the same persons as the Chouchouagamis. The oral traditions explained to Dr. Speck concerning ancestral connection to Nanabush were the traditions of the Kingfisher totem, which includes the families that occupied the Territories Nos.26, 29, 30 and 31. Therefore, the Nanabush ancestry is not necessarily part of the oral traditions of the original Temagami or Nebenegwune band, and may well have been incorporated by Dr. Speck because his major informant was Alec Paul, who was a son of Big Ponee Paul. I find that, in 1883, the lands in Territories Nos.29, 30 and 31, and to the north in the Land Claim Area, were not occupied by Indians who associated themselves with, or, in my opinion,

were part of the Temagami or Nebenegwune bands. The evidence is not clear as to with what band, if any, the Indians who inhabited those lands were affiliated. It is likely that in Territories Nos.29, 30 and 31, they were affiliated with the Mattawagami or Mattachewan bands. I am satisfied that Territory No.39 was affiliated at all times with the Mattachewan band, as indicated by Dr. Speck's comments that the occupant thereof was a kind of trespasser upon the Temiskaming lands. According to Dr. Speck's 1913 census, there was no one then occupying or descendant from persons once occupying Territories Nos.28, 29, 30 or 31 who were considered members of the band.

To conclude, I find that the eastern, western and southern boundaries of the Land Claim Area, as shown on Exhibit 2-9 are correct (as of 1850), and that the northern limits are as specified above.

Finally, from the coming of the railway in 1905, major changes in location of the defendants have taken place, and the evidence indicates that, since approximately 1950, the defendants reside either outside the Land Claim Area, or within the Land Claim Area, on Bear Island or in established white settlements such as the Town of Temagami. The last person to live in the Land Claim Area, other than on Bear Island or in established white communities, lived at Obabika Lake, in 1962, although it is possible Jack Pierce seasonally occupied a cabin on Duncan Lake until 1963 or 1964. Under these circumstances, even if it were found that the Province of Canada, and subsequently Ontario, exercised complete dominion over the lands in issue and enacted legislation allowing for settlement but erred in law in failing to expressly state its intention to extinguish aboriginal title, I find that such title was in fact extinguished because the Indians have abandoned their traditional use and occupation of the Land Claim Area. In other words, there is no evidence of exclusive aboriginal use of any of the lands except the Bear Island Reserve continuing to the date of the commencement of the action.

IX

THE RIGHT OF THE CROWN TO EXTINGUISH ABORIGINAL RIGHTS BY LEGISLATION OR TREATY

A. The Existence of the Right to Extinguish

In a previous section on the nature of aboriginal rights, I determined that St. Catherine's Milling case stood for the proposition that aboriginal rights exist at the pleasure of the Sovereign. An obvious corollary to this proposition is that aboriginal rights may be unilaterally extinguished by the Crown. This corollary is inherent in the St. Catherine's Milling case (with respect to Proclamation lands) and the Calder and Baker Lake cases (with respect to unceded Crown lands not covered by the Proclamation). Of course, the issue of extinguishment only arises if I assume, contrary to my previous finding, supra, that valid aboriginal title otherwise exists.

The Constitution Act, 1867 allocated jurisdiction over all matters respecting Canada to the federal and provincial governments. It did not leave Indian bands with any direct jurisdiction over themselves. It was submitted by the defendants that, because the Act did not specifically take away internal self-government from the Indians, therefore the Indians had the right of self-determination within their own areas, subject only to the over-all sovereignty of the Crown. I disagree. The Act clearly provided, under section 91(24), that Indians and lands reserved for the Indians were under federal jurisdiction, just as municipal institutions in the province were clearly under provincial jurisdiction, by virtue of section 92(8). There was no residue left to the independent jurisdiction of Indian bands or nations. In considering the clause "and to any Interest other than that of the Province in the same" in section 109 of the Constitution Act, 1867, Lord Watson stated with respect to lands, in Attorney General for the Dominion of Canada v. Attorney-General for Ontario (Indian Annuities), [1897] A.C. 199, at 219, that there was no independent interest conferred by treaties upon Indian communities. There is also no independent interest in lands not so surrendered, merely a limited dependent interest, that is, aboriginal title.

There is no doubt that aboriginal rights can be surrendered by treaty. In accordance with the decision of Judson J. in the Calder case, supra. I am of the opinion that aboriginal title in unsurrendered lands can be extinguished by "operation of law", notwithstanding the absence of a treaty. In Calder, Judson J. , at p.333, accepted the statement at trial by Gould J. that proclamations and ordinances made by the colonial government revealed:

> ... a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with

> any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title"....

Later, Judson J., at p.344, stated as follows:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

In Baker Lake, supra, Mahoney J., at p.576 [pp.61-2 C.N.L.R.], stated in effect that the aboriginal rights could be diminished or extinguished by the Public Lands Grants Act and the Canada Mining Regulations, and merely left open the question as to whether or not the Inuit might be entitled to compensation. Even Hall J. , in his dissent in the Calder case, acknowledged that Canada could extinguish aboriginal rights by competent legislative authority. There was no difference between the judges as to the Crown's right to unilaterally extinguish aboriginal rights. The judges differed merely concerning the method by which extinguishment was to be accomplished.

In Calder, Judson J. referred to various American cases, including Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). The principle enunciated in that case is applicable to the whole of the United States (see United States v. Sioux Nation of Indians et al., 448 U.S. 371 (1980), at 415). He referred to the American court's opinion to the effect that Indians do not have property rights but only a right of occupancy which the Sovereign grants and protects against intrusion by third parties, but which right may be terminated, and the lands fully disposed of, by the Sovereign itself without any legally enforceable obligation to compensate the Indians.

In State v. Coffee, 556 P. (2d) 1185 (1976), at pp.1191-1192, the Supreme Court of Idaho, in following the Tee-Hit-Ton case, stated as follows:

> Part of the land ceded by the Indians and accepted by the Senate did not belong to the signatories and was not theirs to give. If the effect of the treaty was merely to accept the land from the Indians, then no extinguishment could be implied from the ratification to establish a governmental right in land invalidly ceded. However, ratification of a treaty has more effect than mere acceptance.
>
> [6-8] It is apparent that the government intended by the 1859 treaty ratification to pay a certain sum of money and assume other obligations, and in return to receive specified lands, including the Kootenai River drainage system occupied by the Idaho Kootenai. Whether the Indians signing the treaty had the power to give the land away is not relevant. The United States did have the power to take the land, and when it said it was receiving the land, the effect was that the land was taken. Remembering that the Indian title is only a revocable right of occupancy granted by the United States, it is inferable in any Indian treaty that the government intends to take the land ceded in the treaty. A treaty, when made effectual, becomes the law of the land as much as any legislation. U.S. Const. Art.6. By ratifying the treaty and terms of the treaty by which the United States took possession of the relevant land, the Senate put the force of law into the taking of the land. Thus, Indian title was extinguished on July 16, 1859, when the treaty ratification expressed the congressional intent to take possession of the land.

Although it was the Custom in Canada not to interfere with the internal affairs of a local band or to extinguish aboriginal rights except by treaties, there was no legal right of internal administration or self-government by the local band. It was purely at the sufferance of the Crown, or, to use the words of the Royal Proclamation, "at the pleasure of the Crown." it is clear that, prior to the Constitution Act, 1982, Canada could have given Indians internal self-government, and in fact by the Indian Act it did give them limited rights. Just as a province could take away municipal rights, Canada could also have unilaterally taken away aboriginal rights. (There may be some question as to Canada's unilateral power to do so now in view of section 35 of the Constitution Act, 1982.) Hence, the Indian nations or bands were not sovereign and their aboriginal rights could be extinguished unilaterally by validly enacted legislation or treaties.

This operation of law may be effected by legislation (see Jack et al. v. The Queen (1979), 100 D.L.R. (3d) 193, at 196 [[1979] 2 C.N.L.R. 25, at 27-8], and R. v. Adolph et al. (1983), 8 C.C.C.

(3d) 45 [[1984] 2 C.N.L.R. 961). Any treaty rights of the aboriginal peoples of Canada were clearly subject to federal legislation.

B. The Method of Extinguishment

In Calder, supra, it was held by Judson J. that, though the British Columbia government had not made land surveys of the area, nevertheless, it had made alienations in the area inconsistent with the existence of an aboriginal title. Hall J., when dissenting in Calder, appears to have stated at p.402 that Indian title may only be extinguished by surrender to the Crown or by competent legislative authority, and then only by “specific legislation”, and that the intention to extinguish must be “clear and plain”. He did not go so far as to say that there must be legislation stating that its express intent is to extinguish aboriginal title. I have reviewed the decision of Mahoney J. in the Baker Lake case, supra. I agree with him that there is no Canadian statute that requires that legislative extinguishment of aboriginal rights (as opposed to extinguishment of rights in reserves established under the Indian Act) be effected in a particular way. I also agree with him when he said, at p.568 [p.55 C.N.L.R.]:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the Courts must give it. That is as true of an aboriginal title as of any other common law right.

and also his statement at p.569 [p.56 C.N.L.R]:

> To say that the necessary result of legislation is. adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy. Justices Hall and Judson were, I think, in agreement on the law, if not its application in the particular circumstances. (Emphasis added)

In the Baker Lake case, notwithstanding that it was found that there was no intention to open up the lands in question for settlement, it was held that, where there had been grants of interest in the lands by the Crown pursuant to legislation, these grants prevailed over the aboriginal title of the plaintiffs. In our case, there is a clear intent by the Crown to open the lands for settlement.

The opening up of land to settlement pursuant to such legislation (or even in the absence of legislation) is sufficient to extinguish aboriginal rights.

C. The Effect of the Constitution Act, 1982 on Aboriginal Rights

I disagree with the defendants' contention that the Constitution Act, 1982 protects the aboriginal and treaty rights of the aboriginal peoples of Canada as these rights existed in 1763. This totally ignores the wording of section 35(1) which provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." (Emphasis added). It is only those rights that still survived at the time of proclamation of the Constitution Act, 1982 that are protected, and no others (see R. v. Eninew (1984), 12 C.C.C. (3d) 365 [[1984] 2 C.N.L.R. 126]).

Section 25 of the Constitution Act, 1982 provides that no guarantee of rights and freedoms set out in the Charter shall be construed so as to abrogate or derogate from any aboriginal, treaty or other rights that pertain to the aboriginal peoples of Canada, including any rights or freedoms that have been recognized by the Royal Proclamation and any rights or freedoms that may have been acquired by way of land claims settlements. Obviously, this section means that the rights and freedoms given generally to the people of Canada shall not be construed so as to override aboriginal rights. It has nothing to do with the question of what aboriginal and treaty rights are protected by the Constitution Act, 1982, that question being specifically dealt with in section 35. I cannot interpret section 25 to be a limitation upon what was dealt with in section 35. The Parliaments of the United Kingdom and Canada knew full well that many aboriginal rights that existed in 1763 had been interfered with over the centuries by the statutes and actions of the United Kingdom, Canada and Ontario. If the Parliaments had intended to reverse all of those encroachments and reinstate aboriginal rights to the state they were in when enjoyed in 1763, the Parliaments would have clearly said so, rather than inserting the word "existing" in the Constitution Act, 1982. The reference in section 25 cannot, by inference, move the clock back over 200 years, nor was it intended so to do.

Section 52 of the Constitution Act, 1982 provides that it is the supreme law of Canada, and that any law that is inconsistent with the Constitution, to the extent of the inconsistency, shall be of no force or effect. There is no evidence in the present case as to new facts or altered facts that have occurred since the coming into force of the Constitution Act, 1982, nor of any legislation enacted either by Canada or Ontario since that date. Therefore, it is not necessary to express my opinion as to the effect of the Constitution Act, 1982 on the Crown's right of extinguishment after 1982.

It is not necessary for me to comment on section 92A of the Constitution Act, 1867 [am. by Constitution Act, 1982, s.50], which section deals with the exclusive authority of the province over natural resources because there is no evidence of any legislation or dealings having taken place since the commencement of the action which would fall under that head, and also because this action was commenced prior to the passage of the Constitution Act, 1982.

X

EXTINGUISHMENT AND SURRENDER OF ABORIGINAL RIGHTS IN THE LAND CLAIM AREA BY THE ROBINSON-RURON TREATY OF 1850

A. Parties to the Treaty in 1850

I will now deal with the Robinson-Huron Treaty, the existence, validity and effects (re extinguishment of aboriginal rights) of which must be proved on a balance of probabilities by the Crown.

A treaty is not a conveyance of title because title is already in the Crown. A treaty is merely a simple acknowledgement that may be formal or informal in nature.

In the eighteen forties, iron ore was discovered on the north shore of Lake Huron and in the general area of Sault Ste. Marie. Mining companies were formed with government approval which commenced to extract the ore. This created unrest among the Indians inhabiting those areas, and led to a minor insurrection, which was suppressed by the government.

After receiving requests from Indian groups to enter into a treaty, the government of the Province of Canada, in 1849, appointed the Vidal-Anderson Commission to investigate. The Temagami, French River and Nipissing Indians were not among the groups that requested the treaty in the first instance, but they asked to be included at its signing. The Commission reported in December, 1849 (Exhibit 2-19), referring primarily to the north shores of Lakes Huron and Superior. At that time, many Indians lived on Manitoulin Island or on the shores of the lakes, but hunted inland. The Commissioners met with 16 of the 22 chiefs, among whose lands the entire territory was stated to be divided. The Commissioners reported that the lands were bounded on the north by the Hudson's Bay Company territories (which was the Height of Land), and on the east by the Ottawa River and the surveyed lands of the province, and were the only lands in Canada West (now Ontario) to which Indian title had not been extinguished or specially reserved to the Indians by treaty. They further reported that the Indians did not wish to cede only a strip of land along the shores of the lakes, but to cede all of the lands except for small reservations. One of the maps attached to the report shows Lake Temagami on it and certainly includes the lands Dr. Speck has attributed to Nebenegwune.

By order-in-council the government appointed Mr. W.B. Robinson to negotiate a treaty for the "Extinction of the Indian Title to the Whole Territory on the North and Northeastern coast of Lakes Huron and Superior, and in case that be unobtainable he should obtain a cession of the territory as many miles inland from the coast as possible." There is no evidence that there was any dispute as to a cession going as far inland as contemplated. In other words, there is nothing to indicate that he was unable, due to the reluctance of the Indians, to obtain cession of all the lands of which he was authorized to obtain cession.

He was unable to attend to the treaty-making as early in the year as he wished because not all the Indians had been notified, but the Indians insisted on dealing with him rather than a substitute. He met with their chiefs or headmen in the vicinity of Sault Ste. Marie on September 9, 1850. Immediately prior to the signing of the treaty, Lord Elgin, the Governor of the Province of Canada, was present at Sault Ste. Marie, and approved what Mr. Robinson intended to do. Robinson met with the Indians in open council and explained what was to be done. His diaries indicate the entire outline of the proceedings.

The defendants argued strenuously that, even though the chiefs from the French River and Nipissing areas signed the treaty, they could not have been properly instructed and authorized by their bands so to do, because there was no evidence that their bands had met to authorize the chiefs to execute the agreement. Although there is no obligation upon the government to follow any particular set form in entering into treaties, as a matter of policy, it endeavoured to meet publicly in order to alleviate any misunderstanding or misconception. It would have been impossible for all the members of all the bands to have been present at a treaty-making of this nature, and the fact that their chiefs were present and executed the agreement in the presence of so many other chiefs indicates that there was a general intention of all the Indians to cede all lands in the area in question. It is clear that there were three principal spokesmen for the Indians, one from Lake Superior, one from Lake Huron, and one from Lake Nipissing and the French River. The latter spokesman was Tawgaiwene, who in fact met with Lord Elgin and expressed his confidence in Mr. Robinson. Other chiefs from the area who are named in the treaty and who signed it are Shabokeshick and Dokis. The treaty was with the chiefs and principal men. It is clear that women did not negotiate treaties at that time. None of the treaties in Ontario to which I have been referred make reference to women. Also, the chiefs themselves believed that chiefs had authority to sign and that all members were not required to sign. (See Mr. Robinson's diary, Exhibit 9-49).

On the treaty pay lists and vouchers (Exhibit 2-39 and 2-42), Tawgaiwene, Maisquawzo and Dokis signed the treaty. In the treaty, reservations were only named for Tawgaiwene and Dokis. I find that the reserve at Lake Wanapitei was intended to be for the Tawgaiwene and Nebenegwune bands. While Tawgaiwene signed the treaty at Sault Ste. Marie, he, like Nebenegwune, was paid, along with the other members of the band, at Manitowaning. For reasons that I have given elsewhere, Nebenegwune was the headman of a group of Indians later known as the Temagami band, but the Temagami band was a very insignificant group that was subsumed under the larger band or group headed by the spokesman Tawgaiwene. I find that Tawgaiwene represented Nebenegwune and that his signature bound Nebenegwune and his group. Nebenegwune acknowledged this by accepting payment under the treaty as shown by Voucher 11 (Exhibit 2-41).

From present lists made for the year 1848, it is clear that Mr. Ironside, who was the principal assistant to Mr. Robinson, was aware of Nebenegwune and persons residing in the Temagami community, although he listed all of the persons who might be identified with the Temagami area under the heading of Nipissing Indians and mixed them with persons who can be identified with Chief Dokis and others. Nebenegwune did not sign the treaty, but I find that he was not of sufficient importance as a chief or headman to warrant his signing. The government was well aware of the persons who resided in the general area of Lake Temagami, as indicated by the present lists and the fact that, at the time of the signing of the treaty, Nebenegwune and at least two others were paid treaty money.

It is clear that the intention of the government was to include the Temagami area in the treaty and to bind by the treaty the persons from that area. When Mr. Robinson paid the treaty money at Manitoulin to Dokis, Tawgaiwene, Maisquawzo and others, including Nebenegwune, the Indians acknowledged that they knew of no other families than those on the list that Mr. Robinson prepared in August of 1850. Nebenegwune was called a headman on the 1850 pay list (Exhibit 2-40) under "Chief Tawgaiwene, Dokis and Nebenegwune's band as given in at the Treaty of 1850." He was also referred to as headman on Voucher 11 of the payments made with respect to negotiating the treaty.

Mr. Robinson had refused to enter into a treaty earlier in 1850, because all the interested chiefs were not present. He subsequently entered into a treaty in September of 1850 and was obviously of the view that all of the Indians were represented by someone who was present at the time. George Ironside also witnessed the payments to Nebenegwune and others of the Temagami group on September 13, 1850. The other Indians who were present would have objected if Nebenegwune and his people were not entitled to be paid, because every payment could have had the effect of reducing the amount available to those who were entitled. I find that Nebenegwune was paid. This was originally acknowledged by Mr. Morrison. Later, he gave extensive evidence of his analysis of numerous vouchers and documents. He said that they suggested to him that Nebenegwune had not been paid. I have reviewed this evidence and am of the opinion that it is pure speculation on Mr. Morrison's part, and again shows his attempts to argue the defendants' cause rather than allowing the documents to speak for themselves. I find that the documents on their face show that Nebenegwune was paid, they were properly certified by George Ironside and I have no reason to believe that he was not paid. I reject Mr. Morrison's thesis.

In 1850, Nebenegwune accepted the initial cash payment for becoming a party to the treaty, and in 1851 he acknowledged his interest in the treaty. In 1855, he signed a document which supported a claim to annuity money on the basis of the specified treaty of 9th September, 1850. Mr. Morrison attempted to argue from various exhibits that Nebenegwune was not present at the time indicated on the exhibits. This is clearly contrary to what the exhibits say on their face. Also, George Ironside clearly stated in other documents that moneys were not paid if the persons did not receive them. That is what happened with respect to Nebenegwune and the Temagami group after 1856. In view of my findings that Tawgaiwene represented Nebenegwune and the Temagami group, even if I am wrong and Nebenegwune was not present, I find that the money was received on his behalf, and that he was aware of it. Notwithstanding the statements in 1883 by Tonene to the effect that the Temagami Indians had never signed a treaty at that time, they did not repudiate the Robinson-Huron Treaty and did everything possible to make sure that they were acknowledged as part of it.

After the treaty was signed, it was approved by order- in-council, which approval included the Governor's signature.

The treaty includes a cession by:

> ... the Ojibewa Indians, inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie and thence to Batchewanaung Bay on the northern shore of Lake Superior together with the islands in the said lakes opposite to the shores thereof, and inland to the Height of Land which separates the territory covered by the Charter of the Honourable Hudson Bay Company from Canada as well as all unceded lands within the limits of Canada West to which they have any just claim.

In my opinion, the northern portion of the eastern boundary of the lands is that which separates Canada West and Canada East, south from the point where it intersects the Height of Land. Also, the treaty includes all lands in Canada West in the vicinity, which includes the lands in the French River and Lake Nipissing areas, as well as the Temagami area, as far north as the Height of Land. Even if the wording of the treaty could be argued to not include lands easterly, as far as the Temagami lands, the inclusion of the words at the bottom of the treaty, which refer to payment of additional moneys to the Indians inhabiting the French River and Lake Nipissing because they had become parties to the treaty, indicates clearly that the eastern boundary can be no further west than the eastern limit of Lake Nipissing. A line drawn north from the eastern boundary of Lake Nipissing encompasses the Temagami lands. This is clear from practically all maps prepared by provincial and Canadian governments in subsequent times. I make this finding notwithstanding Mr. Morrison's opinion that the Temagami lands would not be included within this. In my mind, it is another example of Mr. Morrison's bias in clearly refusing to accept the obvious. The Canadian government believed that the treaty covered the Temagami lands to the Height of Land because, in the James Bay Treaty, No.9, of 1905-1906, at p.19 (Exhibit 2-131), the description refers to lands in the Province of Ontario bounded on the south by the Height of Land and the northern boundaries of the territory ceded by the Robinson-Huron Treaty of 1850, and bounded on the east by the provincial boundary. The Province of Canada, and later Ontario, obviously believed the lands were included because surveys were made in 1865 and 1867 which were otherwise prohibited by the Royal Proclamation.

The bulk of the lands claimed by the defendants is south of the Height of Land. However, there is a small portion lying north of the Height of Land. In my opinion, the portion north of the Height of Land was ceded to the government by Treaty No.9. I have found elsewhere that the lands in that area were never occupied by persons who were part of the Temagami band at any time. Treaty 9 was signed by Jimmy Pierce as a chief or headman of the Mattachewan band. Pierce was an occupant of lands north of Territories Nos.29, 30 and 31 or, at best, on the very northern limit of Territory No.31. He was not a member of the defendants.

With respect to the Robinson-Huron Treaty, I find that there was an intention on the part of the government to take a surrender from the Indians of all lands in Upper Canada south of the Height of Land, which would include the major portion of the Temagami Land Claim Area.

Mr. Morrison advanced the theory that, because the insurrection of the Indians over the mining claims had been suppressed, charges had been laid against some Indians in connection therewith, and troops had been present at the signing of the treaty, therefore, the Indians were under duress and did not sign freely. After considering Exhibit 9-9 and 9-50, as well as Mr. Robinson's diary (Exhibit 9-49) and the Vidal-Anderson Report, and the facts relating to the

Indians wanting Mr. Robinson to negotiate for the Crown**,** I find that Indians in the general Lake Superior and Lake Huron area had been inclined to sell their rights since 1841. It had been usual since the seventeen hundreds for troops to be present at the signing of all treaties. I find that the Indians were not under duress to sign. In particular, the Lake Nipissing and French River Indians (including the Temagami Indians) came forward voluntarily in 1850 requesting to be included.

The defendants also introduced evidence to endeavour to impeach the credibility or honesty of Mr. Robinson and Mr. Ironside, as well as some of the other witnesses, to the treaty. I do not accept such allegations. Mr. Robinson was highly regarded by the Indians themselves and Mr. Ironside had been involved in treaty-making since at least 1827. Even if there was any merit in this argument, the treaty was also witnessed by Mr. Allan MacDonell, a person who endeavoured to negotiate for the Sault Ste. Marie Indians without success. The defendants suggested that Mr. MacDonell was a more credible witness than the persons who had treated on behalf of the government. I find that Mr. MacDonell had a very strong personal interest in the mining rights in the area and was far less credible than the government officials.

The defendants also questioned the validity of the signatures to the treaty and receipts and vouchers, and called a handwriting expert in this respect. I find that that evidence was inconclusive other than to show that some documents may have merely been copies. In 1850, the only way to obtain a copy was to write one, and they were the best evidence available. The treaty has been in existence for well over a hundred years without any question as to the credibility of the parties thereto. I refuse to set it aside on the basis of mere speculation without clear and cogent evidence. There is no such evidence in the present case.

At pp.1059-1060 of Mr. Clark's treatise, he lists the requirements that he says are needed for a valid treaty. In my opinion, he has misunderstood the relevant documents and placed such a narrow legalistic interpretation upon them that no treaty, except treaties made with formally registered bands under modern, fully recorded circumstances, could comply with the requirements he lists. In some instances, for example, his item 8 requiring the Great Seal prior to delivery of the deed, he is clearly wrong. In any event, other than the requirements that a treaty be dealt with openly at a public meeting, be in writing, and be signed both by Indians known to represent their bands for that purpose and by authorized Crown agents, and the requirement that consideration be paid publicly where possible, I do not agree that his itemized requirements are in fact required. Chief Potts' evidence as to the signing of a treaty seems to coincide with the Indian Act surrender of reserves established thereunder rather than any historical method. As stated elsewhere, aboriginal rights could be unilaterally terminated by the Crown without a treaty, if the Crown so desired. I further find that Mr. Robinson was validly commissioned both by the Governor and by the government of the day to enter into the treaty, and that he did so in a fair and open manner. Subsequent to the signing of the treaty, Mr. Robinson paid most of the Indians at Sault Ste. Marie, and others at Manitowaning, while still others were paid at Penetanguishene. Lord Elgin, the Governor in 1850, approved the signing of the treaty and the method by which it was to be signed.

The Royal Proclamation of 1763 had the status of legislation. Subsequently, various ordinances and regulations were issued. In 1794, Lord Dorchester issued regulations to Sir John Johnson concerning how Indian treaties were to be entered into. The defendants take the position that such regulations were within the authority of the Royal Instructions to Lord Dorchester, as Governor, and that, therefore, the regulations constituted subordinate legislation having the effect of law which could only be changed by subsequent valid legislation. While I agree that the regulations in question were within the authority of the Royal Instructions given to Lord Dorchester, I do not agree that they were legislation that could only be changed by subsequent legislative acts. The fact that the Governor promulgated regulations which were directives to subordinates did not preclude subsequent governors, who had also received Royal Instructions, from themselves decreeing in what manner treaties were to be entered into. They were not bound by regulations made by earlier governors.

In particular, in 1850, Lord Elgin, who had the same powers as Lord Dorchester, specifically authorized the entering into of the Robinson-Huron Treaty in the manner proposed. He was not inhibited in any way by the Dorchester Regulations. If the Dorchester Regulations had any effect in law, they were specifically superseded by the directions given by Lord Elgin to Mr. W.B. Robinson in 1850 at Sault Ste. Marie. Mr. Clark, in argument, acknowledged that even under the provisions The Colonial Laws Validity Act, 1865, 28 and 29 Vict., c.63 (Imp.), if, prior to 1931, the Dorchester Regulations had been in conflict with any Act of the legislature of Upper Canada, the Province of Canada, or the Dominion of Canada, the legislation would have prevailed. There was no express legislation, but the Dorchester Regulations were not law and cannot be placed on any

higher plane than the Elgin Instructions. Hence the 1850 treaty resulted in a valid and binding treaty, even if the 1794 regulations were not complied with.

Although a reserve has subsequently been set up for the Temagami band, I am of the opinion that, at the time of the treaty, it was intended that Nebenegwune and his band were to occupy and share, along with Maisquawzo and Tawgaiwene, the reserve allocated to Tawgaiwene at Lake Wanapitei. Exhibit 2-39 is a list, prepared by Mr. Robinson and signed by Mr. Ironside as witness, which shows a list of Chief Tawgaiwene, Dokis and Nebenegwune's band as given in the treaty of 1850. This document was dated September 13, 1850, the same date that payments were made to Nebenegwune and others at Manitoulin Island. It included a statement that it was the list of Indians owning two reserves near Lake Nipissing and entitled under the Robinson-Huron Treaty to share in the annuity and to occupy the reserves.

The only two reserves that could have been referred to are the Dokis reserve and the Wanapitei reserve. In the schedule of reservations under the Robinson-Huron Treaty, only a chief's name was listed for each reserve, and there was no mention of the names of principal men. In my opinion, Tawgaiwene was the overall chief, and Nebenegwune was merely a principal man or headman. As evidenced at pp.7 and 16 of the report relating to Treaty 9 made in 1905, the government representatives did not find it necessary to have all the groups of Indians sign where it was obvious that they belonged to a larger or more important group. Obviously, this practice was also followed in 1850 for Nebenegwune and the Temagami Indians where they were included as part of Tawgaiwene's band.

There is no evidence as to where any of the Temagami Indians resided in 1850, as opposed to where their hunting territories were. There was a serious fire around Lake Temagami in the year 1846, although its extent is not known. Other documents refer to fires over much of the area, including one in 1855 in the Lady Evelyn Lake area. Based on the evidence of Professor C.A. Benson, I find that forest fires are a natural occurrence and that none entirely eliminated all game from the area. They would only disrupt the game and it would take five to ten years for the animals to come back in sufficient numbers so that people would be able to use them for food and furs. In 1848, the recognizable Temagami Indians were recorded as being at Nipissing, and in 1850 Wanapitei, with its close connection to Temagami, could have been a very logical and desirable spot for the Temagami Indians to consider as their reserve. In addition, in 1849 and 1850, there was serious illness throughout much of the area, which I find did not exterminate the entire band. In the 1849, 1850 and 1851 present lists, persons are noted as being from Temagami. In 1851 and 1852, Tebundo is shown with a place of residence at White Fish Lake. Through most of these years, at least a token staff was present at the Hudson's Bay post in Temagami. There were undoubtedly some Indians living and trading in the general area.

When the treaty was signed and the reserve set up, the Wanapitei reserve was established for Tawgaiwene and, in my opinion, Nebenegwune. It was not established for the White Fish Lake Indians, who did not claim the lands around Lake Wanapitei, and the latter made no objection to the reserve being set up for Tawgaiwene. There were no other Indians than Tawgaiwene and the Temagami area Indians for whom the reserve could have been established. The Nipissing Indians had their reserves on Lake Nipissing and the French River, and the White Fish Indians had their reserve further to the west. As I have stated elsewhere, in 1880 the Temagami Indians considered that Lake Wanapitei was part of their hunting grounds. It is clear that Tawgaiwene and his band were not in occupation of the Wanapitei reserve because, in 1879, they were stated to have been all resident on Manitoulin Island.

The requisition lists submitted by Mr. George Ironside in the year 1851 show that Tawgaiwene, Maisquawzo and Nebenegwune were listed among the names of chiefs, and Mr. Ironside referred to their collective group as a band comprised of 96 persons, with the amount due to the band being £38, 8 shillings. The receipts for the payments in that year were signed by the marks of those three people and were duly witnessed. In my opinion, Nebenegwune was one of the leaders of an officially acknowledged group comprised of three smaller bands or groups which was entitled to the Wanapitei reserve and which had signed the Robinson-Huron Treaty. The requisition list for 1852 was also made on behalf of the group of three bands, totalling 80 persons, of which I find that Nebenegwune's band composed 24.

In the year 1853 and 1854, Nebenegwune's name did not appear on the requisition order, but the amount of money for the collective group was approximately the same as for the year 1852. This indicates that Nebenegwune's band was still included in the group. In 1855, Nebenegwune signed a requisition form for Robinson-Huron Treaty money and acknowledged that he had entered into the treaty in 1850. In view of the way the headings are set out, I find that the Temagami band,

under Nebenegwune's leadership, was part of a larger group comprised of three bands and that the association continued until at least 1855. A requisition signed in 1855 by Tawgaiwene and Nebenegwune for treaty payments for the year 1856 shows both of them to be from Wanapitei, and that the money was paid to them on the 8th of July, 1856. From 1857 until 1882, Nebenegwune's band did not receive payments under the treaty, but this is likely because they did not wish to travel the long distance to receive the small payment. After a period of over 20 years, a new generation evolved who were not as familiar with the details of the payment as the previous generation had been. Also, it was during this same period that the Temagami band itself was becoming a stronger political unit, rather than remaining, as previously, a loose fragmented group. They were finding their own identity as a band around the Hudson Bay post, as opposed to being merely a small group of families that were part of a larger loosely associated band.

In the initial Robinson-Huron Treaty, Jocko Tawgaiwene was paid. In 1882, when he submitted the names of the Temagami Indians to be added to the list, he did not indicate that they had not previously participated in the treaty.

The Temagami Indians have received treaty payments since 1883. I find it incredible that Chief Potts would say that he knew the words Robinson-Huron Treaty were on the cheques but that he did not know why they were receiving the money until recently when they stopped taking it. He is an intelligent man and it is not until the last ten years, at about the time of the commencement of this action, that all of these matters have come to a head. I strongly suspect that it is not the Indians themselves who first thought that they did not sign the treaty, but rather that it is the wishful thinking of a few well-meaning white people. Based on evidence set out elsewhere, I am of the opinion that the members of the Temagami band knew, over the years, that they were receiving treaty payments**.** It is interesting to note that Dr. Speck, having spent two weeks with the Indians requesting detailed information, did not make any comment in his work of any complaint that they were not parties to the Robinson-Huron Treaty or that they had never surrendered their lands.

I do not accept the evidence of Michael Paul, Bill Twain and Chief Potts that the band did not surrender their lands and never entered into a treaty. Chief Potts had never seen the documents of 1850 that were introduced in this trial on behalf of the defendants at the time that he answered his questions on discovery. The other two had not seen documents signed by their father or uncle and cousin acknowledging that the treaty had been signed. I find Chief Potts' evidence with respect to why Jocko Tawgaiwene had acted on behalf of the Temagami Indians as being unusually evasive. In addition, George Peshabo, who was not called on to give evidence, signed a petition in 1935 acknowledging that they had received treaty money, but complaining that they had not received, as had the other bands, the reserve promised by the Robinson-Huron Treaty. That same petition was signed by the uncle and two great-uncles of Chief Potts.

As indicated, there was a very loose association of some of the members of the Temagami band. I find that Kinisse, from Chart 6, Exhibit III, who had some connection to Territory No.28, received treaty moneys with the Lake Nipissing band, for the years 1850, 1856 to 1862, 1864 to 1865, 1867 to 1871, 1873 to 1877, and 1879 to 1883. Also, Wendaban, of Chart 5, Territory No.24, collected moneys with the Nipissing band for the years 1856 to 1862, 1864 to 1865, 1867 to 1871, 1874 to 1877, and 1879 to 1883. Also, Mazinosowai, Chart 3, Territory No.25, collected moneys with the Nipissing band in 1850. In addition, Tebundo, on Chart 5, Territory No.27A, collected moneys with the White Fish band in 1850, and other years.

Even if Nebenegwune ought to have been the one to sign the Robinson-Huron Treaty on behalf of the Temagamis, independent of Tawgaiwene, nevertheless he and the members of whatever band or group he represented have taken the benefit of that treaty over the years. The Temagami registered band has received treaty payments since 1883 and has received a reserve. While it is the registered band and its members that have taken the benefits of the treaty, it is the band which inhabited the area which is covered by the obligations and surrender. I do not believe that the Teme-agama Anishnabay, as a formal organization, existed as such until after the commencement of this action in 1973. The mere statement by Chief Potts that it has always existed is not borne out by the facts. Lawsuits are not decided on trust alone.

Since 1850, when the people in the area first received the benefit of the Robinson-Huron Treaty, the subsequent receipt of treaty payments and a reserve can only relate to the Robinson-Huron Treaty or a contract of similar terms.

I do not believe that the Statute of Frauds, R.S.O. 1970, c.444 [now R.S.O. 1980, c.481] is applicable to the extinguishment of aboriginal rights but if it is, I find as a matter of equity that

there has been part performance of the contract so as to extinguish those rights in this instance. There is no need in law for there to be a written agreement between the Indians and the government for them to lose or give up their rights in the lands.

For these reasons I find that the Robinson-Huron Treaty was validly entered into on behalf of the defendants' predecessors covering all of the Land Claim Area south of the northern limit of the area that I have found to have been occupied by them in 1850. I also find that, even though there is no evidence of a band living in the area south of the Height of Land and north of the territory occupied by the defendants in 1850, nevertheless such area was effectively ceded by the treaty.

B. Adhesion to the Treaty After 1850

If I am wrong and the Temagami Indians were not a party to the Robinson-Huron Treaty in 1850, the question arises as to whether they adhered to the treaty at some date after 1850.

As discussed in Chapter 8, between 1877 and 1880, a number of members from a band north of Lake Nipissing told Mr. Skene that they were not receiving treaty money and presents, in part because Kekek had not accounted to them for the money. In February of 1880, Chief Tonene wrote to Mr. Skene saying that he believed that Old Dokis had received money for the Temagami band under the treaty but had not given it to them. In August of 1880, it was reported that Chief Tonene was persisting in saying that Chief Dokis had got money for them and had kept it. He had been told so by one of Dokis' sons. Three of the Lake Nipissing Indians stated that Dokis himself had told them that he had received the money and kept it. In February of 1881, it was reported that Chief Tonene was saying that timber was being taken, and that he wanted a meeting with the band in council with respect to negotiating a treaty for the surrender of their lands. In June of 1881, Skene asked Chief Tonene for his terms for a surrender. In August of that year, Chief Tonene advised Skene that he wanted money and suggested $4 per person annually, plus a reserve. On August 26, 1882, Jocko Tawgaiwene applied to Canada to have the Temagami Indians placed on the Robinson-Huron Treaty annuity list.

In May of 1883, the Deputy Superintendent of Indian Affairs reported to the Superintendent General that the Indians were saying that they had not been represented at the Robinson-Huron Treaty, and that they were not parties to the treaty. He pointed out that, in his mind, there was no doubt that the lands fell within the limits of the treaty, and that the Temagami Indians were willing to become party to the treaty upon being included on the pay lists. He suggested that this was the easiest solution to the problem and his suggestion was acted upon. From 1884 on, there were numerous requests by the chiefs of the Temagami band for a reserve to be set aside for them. A survey of Austin Bay in the southern part of Lake Temagami for a possible reserve was made. However, no reserve was in fact set aside at that time. This state of affairs persisted until 1907, during which time there was an arbitration between Canada and Ontario as to the obligations of the respective parties to provide a reserve to the Temagami Indians. The position of Canada was that the Indians were entitled to a reserve and wished to see one established at Austin Bay. Ontario's position was that they were not prepared to grant a reserve in that location at that time.

In 1907, more than 50 persons petitioned for a reserve. These persons were Temagami band members, only some of whom were members of the registered band. There was no reference in the petition to a treaty. It merely pointed out that Indians to the north had received reserves the year before, that they had been promised one and had not received one. Subsequently, there were a series of requests for reserves from the chiefs. In 1910, the chief asked for a reserve because the band was not allowed to cut timber for building, and even needed approval to cut firewood. In 1911, the Indian agent met with the chief and members of the band and was asked for a reserve at Austin Bay, and that the band be given hunting and fishing rights, as stated in "their Robinson Treaty." In 1912, the chief indicated that the Fire Ranger would not allow them to build small shacks for their own use on Bear Island, and that a reserve was needed. In 1913, Chief Alec Paul referred Dr. Speck to a 60-year old treaty in which the government had said the Indians owned the game (Exhibit 12-91 at p.43). In 1917, the chief of the band again asked for a reserve, at the Austin Bay site, stating that he felt they were as much entitled to a reserve as were other bands in the district. He stated that the Indians had been there before there was any government in the country. In 1929, the Indians again requested the reserve that was due to them under the Robinson Treaty.

In 1930, Chief William Peshabo wrote objecting to the fact that, as treaty Indians, they had to pay rent to lease lots. In 1932, the chief wrote referring to the band as treaty Indians, and objecting to having to pay taxes. In 1935, the chief and many members of the band signed a petition again requesting a reserve at Austin Bay. In it, they referred to the fact that they had received treaty

money as promised, but that they had not received a reserve as promised under the Robinson Treaty. This petition was signed by, among others, George Peshabo, who is still alive today but was not called to give evidence, and by John Twain, an uncle of one of the witnesses, who was called. In 1939, Chief Alex Mattias, after a band meeting, wrote to the local member of Parliament indicating that the band was willing to go to Austin Bay as soon as a suitable reserve was set up, but that they would consider abandoning that claim if exclusive hunting and trapping rights were given to them over certain townships.

In 1943, Ontario passed an order-in-council, with conditions, setting aside a reserve for the band on Bear Island. In 1946, the North American Indian Brotherhood wrote to the Director of Indian Affairs on behalf of Chief Twain requesting the establishment of the reserve which had been surveyed for them in the year 1884. In 1947, the band passed a formal resolution, at a meeting at which Chief John Twain presided, to the effect that the Temagami band, originally of Austin Bay and now residing on Bear Island, did thereby declare that Austin Bay was never surrendered by the band, nor was the band a party to any treaty-making convention. They also declared that their forefathers were not a party to the Robinson-Huron Treaty and that their band had never consented to a surrender nor ceded any tract of land or lands which they had occupied from time immemorial. In 1954, Chief John Twain wrote to Canada, again stating that the Temagami Indians had never signed any treaty nor had they ever surrendered any lands. Neither the resolution of 1947 nor the 1954 letter were sent to Ontario. The February, 1964, minutes of the Temagami band contained a resolution in which they requested that Bear Island be officially made a reserve, and in which they stated that the stipulations contained in the provincial agreement were acceptable (Exhibit 13-299). In November of 1970, Ontario released the conditions that it had imposed in its 1943 order-in- council, and authorized the transfer of the Bear Island lands to Canada as a reserve for the Temagami Indians. In June, 1971, Canada established Bear Island as a reserve. The order- in-council establishing the reserve referred to a resolution of the Temagami band council, dated 14th May, 1968, requesting the reserve.

The band minutes of 1973 indicated that Chief Potts had informed the band that he had a lawyer making enquiries into a land claim, that the Temagami band had never signed a treaty, and that a map of the outline of the area would be prepared showing what ground had originally been held by the Temagami band. In 1979, after this action was commenced, the band passed a resolution asking that the Robinson-Huron Treaty cheques be sent to the Temagami band for processing and, in March of 1980, the band rejected the Robinson-Huron Treaty cheques. These treaty annuity payments had been made throughout the entire period from 1883 until 1979.

There are a long series of exhibits dating from 1883 until at least 1973 which show the chief of the band, band resolutions, or individual Indians petitioning to have new members added to the Temagami band under the Robinson-Huron Treaty, or asking for identification certificates under the Robinson-Huron Treaty.

While there have been two or three occasions during the period from 1883 to date when the band, or the chief on its behalf, have denied that they ever entered into any treaty or surrendered their lands, the overwhelming majority of the documents indicates an acknowledgement and acceptance of the treaty. I am of the opinion that those documents that denied the treaty, in the years prior to the 1973 minutes indicating that a lawyer had been retained, were merely a bargaining ploy in the negotiation attempts to obtain the reserve at Austin Bay and later at Bear Island that had been promised to them. I believe these documents originated from a sense of frustration, and reflected a hope of expediting the establishment of a reserve. Notwithstanding their wording, when seen in their historical context, I do not interpret them as being a denial of the fact that there was a treaty to which the band had been properly bound.

The conduct of the band over the years indicates acknowledgement of the existence of a treaty signed in 1850 on their behalf and covering their lands. It also supports my conclusions concerning the documents denying existence of a treaty. In 1883, the various members of the band talked of receiving treaty moneys at an earlier time, and complained that they had not received all that they should have received. This was the basis upon which they wished to be added to the list. They were willing to surrender their lands even if they had not been party to the treaty initially. In later years, they objected to paying taxes or rent, on the grounds that they were treaty Indians. Even if the treaty was not properly signed in 1850 on their behalf, I find that their conduct in requesting to be added to the list in 1882, and their subsequent conduct in receiving payments and requesting and receiving a reserve, makes their action an adhesion to the treaty. It also constitutes a separate treaty in itself. The treaty is therefore binding upon the band on either of these counts.

Throughout the period of 1883 to the date of trial, Canada has consistently taken the position that the Temagami Indians did not sign the treaty and that their Indian title has not been extinguished, while Ontario consistently has taken the position that the Temagami Indians were party to the treaty and that their title has been extinguished. Ontario's actions over the years confirm its position. At trial, Canada, though represented only with respect to the constitutional issue, has through its counsel now taken the position that the Indians have adhered to the treaty and are bound by it. Canada's previous position is somewhat suspect because, if the Indians were not party to the treaty, why were they admitted to the Robinson-Huron pay list in 1883, and why has Canada consistently argued for a reserve for the Indians? I note that, with one minor exception, Canada has always agreed that the Land Claim Area falls within the territorial limits of the Robinson-Huron Treaty, and I find that it does.

Note that in this section, I purposely use the word "band" without differentiating between the registered and non-registered band because of the overlap and confusion between the two.

XI

EXTINGUISHMENT OF ABORIGINAL RIGHTS IN THE LAND CLAIM AREA BY LEGISLATION

The next issue is whether or not aboriginal rights in the Land Claim Area have been extinguished by legislation or by administrative actions pursuant to legislation. Assuming the existence of valid aboriginal title, the onus rests on the Crown to prove extinguishment of aboriginal title. I also assume that each level of government, in enacting its legislation, acted in what would be its area of legislative competence, aside from its effect upon aboriginal title.

The pleadings are framed to relate to unpatented lands only. However, the inter-relationship between aboriginal rights and patented land, cannot he ignored. The issuing of a patent in the past is an indication that the crown intended to terminate aboriginal rights. Furthermore, the plaintiff claims a declaration that it has a right to issue further patents on its unpatented lands. Finally, if Ontario never had a right to issue patents, it is highly doubtful that the defendants' waiver of claims against all patented lands gives rights to the holders of patents under illegal legislation.

Commencing in 1777, in Quebec, there were various ordinances prohibiting any person from settling in an Indian village or in Indian country, unless he had a license. This indicates that in so far as ordinances were concerned, Indians were, at law, not considered to he the same as other persons. In 1791, by the Constitutional Act, 1791, 31 Geo. III, c.31 (U.K.) (R.S.C. 1970, Appendix II, No.3), the two provinces of Upper Canada and Lower Canada were created out of what had been the Province of Quebec. By 1840, there was a well-known distinction between lands originally occupied by Indians, and lands reserved for specific band, of Indians (see the Macauley Report of 1839). In 1839, by R.S.U.C. 1840, vol.1 (2 Vict.) c.15, the Province of Upper Canada enacted legislation with respect to trespass upon lands of Indians and upon other lands, and the removal of persons therefrom. The Union Act, 1840, 3-4 Vict., c.35 (U.K.) (R.S.C. 1970, Appendix II, No.4) reunited Upper Canada and Lower Canada into the Province of Canada. In 1849, by S.C. 1849, c.9, the Province of Canada amended the Upper Canada trespass legislation to make it applicable to all lands whether they were known as Crown reserves, clergy reserves, school lands or Indian lands, and whether the lands were held in trust for Indians or others. This legislation was considered in The Queen v. Strong (1850), 1 Gr. 392.

In 1849, by S.C. 1849, c.84, the legislature of the province of Canada enacted legislation authorizing joint stock companies to construct roads. It required them to pay compensation to Indians if the road passed through land or property belonging to or in the possession of a band, but the payment was to be made to the Indian Department for the use of the band. In my opinion, this reinforces the view that the intent and effect of the legislation was that the Crown could take away or could authorize others to take away Indian lands if the Crown so desired.

To protect the Indians from other inhabitants, the Province of Canada, by S.C. 1850, c.74, passed legislation effective August 10, 1850, which precluded purchases of land from Indians unless the purchases were made with the consent of the Crown, authorized under the great seal of the Province or the Privy Seal of the Governor. It also provided that no taxes in respect of Indian lands would be levied on Indians or persons married to Indians, nor would any taxes be levied on Indians or persons married to Indians, so long as they resided on unceded Crown lands or reserves. This statute was considered in R. v. Baby (1855), 12 U.C.Q.B. 346, a case relating to a purported purchase of lands by a private individual from an Indian without the prior approval of the

Crown, and not an acquisition by the Crown . There is nothing in the statute that indicates that it applied to the Crown. If the statute had applied to the Crown, it would have been surprising for Lord Elgin, in September of 1850, or less than one month after he had given Royal Assent to the Act in question, to have specifically authorized Mr. W.B. Robinson to proceed with the treaty without complying with the statute. The Act applied only to lands that were declared so covered by proclamation of the Governor.

In 1857, legislation was enacted to clarify the 1850 Act with respect to plot to trespass, so that the Act only applied to Indians or persons of Indian blood or inter-married with Indians who were acknowledged to be members of Indian tribes or bands which resided upon lands that had never been surrendered to the Crown (or which, having been so surrendered had been set apart, or were then reserved for use in common by any band of Indians), and who were themselves resident upon such lands. (See S.C. 1857, c.26.) The Act further provided that the definition of Indians was to apply, not only to that Act, but to all other Acts where there was a legal distinction between the rights and liabilities of Indians and those of other subjects. There is no evidence that there was ever a proclamation with respect to any lands other than those lands which were specifically set up as reserves for particular bands of Indians.

In 1853, the Province of Canada passed An Act to Amend the Law for the Sale of the Public Lands, S.C. 1853, c.159. Section 15 provided that the Governor in Council could declare that the Act applied to Indian lands under the management of the Chief Superintendent of Indian Affairs, who was to have the same powers as the Commissioner of Crown lands. Indian lands were not defined. Similar legislation was enacted in 1859 and 1860. In 1860, the Act was amended, the effect of which was to allow for the sale of timber on Indian lands.

In Church v. Fenton (1879), 4 O.A.R. 159, at 163, it was held that Indian lands, once surrendered to the Crown, became unpatented lands vested in or held by Her Majesty. I am of the opinion that the legislation went further and made them subject to the same statutory scheme for the granting of Crown lands as any other Crown lands, and effectively severed any residual power that there had been in the Imperial Crown with respect to dealing with Indian lands. The 1860 Act was expressly reserved for and given Imperial royal assent.

In 1860, An Act Respecting The Management of the Indian Lands and Property, S.C. 1860, c.151, s.7 provided that the Governor in Council from time to time could declare that the Act Respecting the Sale and Management of Timber on Publics Lands, C.S.C. 1859, c.23, and the Act Respecting the Sale and Management of the Public Lands, S.C. 1860, c.2, could apply to Indian lands, or the timber on them. The latter Act specifically provided that the Chief Superintendent of Indian Affairs had the same powers as the Commissioner of Crown lands. If it had not been obvious before, it was obvious in 1860 that, subject to the approval of the Governor, and subject to any reservation provisions that had previously been referred to, the legislature of the Province of Canada had control over all Indian affairs. In 1857, The Temporary Judicial Districts Act, S.C. 1857 c.60 was passed. 0n April 12, 1858, the Districts of Nipissing and Algoma were created encompassing all of the Land Claim Area lying within the Province of Canada. In 1868 (after Confederation) the legislature of the Province of Ontario opened the area for settlement by authorizing free grants to settlers under The Free Grants and Homestead Act, S.0. 1868, c.8. Similar provisions were made in subsequent Acts during the latter half of the 19th century.

The legislature also authorized land surveys to he made. In fact, surveys were made in 1865 from Lake Temiskaming to both Cooper Lake and the Montreal River (Exhibit 0). Another survey was made in 1867 from the east branch of the Montreal River to Mattagami Lake (Exhibit 19-25). Other surveys were not made until approximately 1880, but this fact does not detract from the effect of the legislative enactment by Ontario authorizing such surveys. Subsequent to 1880, Ontario issued patents to individual owners, pursuant to which extensive development took place throughout the entire area.

As of today, patents have been issued under the Public Lands Act, supra, for approximately 28 square miles, scattered throughout the area. They are issued for residential, commercial and recreational lands. There are approximately 3800 patented cottage lots of which 746 are on Lake Temagami itself. There si a continuing demand for them, but none have been available since the cautions were registered by the defendants in 1973.

Land use permits under the Public Lands Act have been issued since at least 1909. These are annual permits for specific purposes, generally for hunting camps, tourist outfitters, garbage dumps and maple tree tapping. There are approximately 288 such land use permits currently in force.

Timber berths were granted to various lumber companies a early as 1865, and the boundaries of those berths were surveyed by the province. The earliest surveys of specific township lines occurred in 1881, and all the township survey lines ware completed by 1911, except for three which were completed by 1929. The Land Claim Area encompasses all or part of 130 townships laid out by Crown surveys.

Commercial lumbering commenced in the area in the eighteen sixties, prior to Confederation, and, under the predecessors to the Crown Timber Act, lumbermen were granted the right to cut timber. In the eighteen eighties, fire rangers were employed in the area. In the eighteen nineties, concepts of scientific forestry began to be applied by the Crown in the area. In 1901, the Temagami forest reserve was established under the Forest Reserves Act, S.O. 1898, c.10, covering 2200 square miles initially, but increased in 1903 to 5900 square miles. Under that Act, the Crown made regulations for the protection and regulation of all land uses in the Temagami forest reserve. From 1901 to 1924, the area was closed to lumbering, but in the latter year it was again opened.

Today, approximately 750 square miles, or almost 20 percent of the land in the area, are covered by timber licences. Volume agreements, issued under the Crown Timber Act, R.S.O. 1970, c.102 [now R.S.O. 1980, c.109], cover 3260 square miles, or approximately 85 percent of the lands in question. In addition, the Crown has created a number of wood lots in which individuals are granted fuel wood permits under the Act for the use of the holder himself. Under the Act, Ontario has collected stumpage fees for many years. In the year 1981-82, the amount as $1,054,253.

From 1867 to 1900, there were numerous geological surveys made by Canada. Reports from the geological survey of Canada, from 1887 to 1910, indicated that the area was very rich in mineral resources, especially gold, silver, copper and iron. Commencing in 1887, mining claims were staked and excavated under the General Mining Act, R.S.O. 1887, c.31. The opening of the railway in 1905 brought many prospectors into the area, and in 1906 major mineral strikes occurred at Maple Mountain, Elk Lake and Gowganda, in the Land Claim Area. In 1909, over 9,000 mining claims bed been staked around Gowganda alone. About 1912, gold was discovered at West Shining Tree Lake, west of Gowganda. Mining activity in the general area of the Land Claim Area has continued to the present.

Today, in addition to the patented land, approximately 14 square miles, scattered throughout the lands, are the subject of mining patents issued under the Mining Act (see the Mining Act of 1970, supra), and an additional 100 square miles are the subject of mining leases under the same Act. In addition, approximately 81 square miles of land in 48 townships are active mining claims and have been staked and recorded under the Act. Six square miles are the subject of quarry permits issued under the Act.

The Temiskaming and Northern Ontario Railway was completed in 1904 and opened for regular traffic in 1905. This railway runs through the southeastern portion of the leads, through the Town of Temagami, which owes its origin to the railway, and north to Latchford and beyond. This railway enabled access to the lands by prospectors, developers and tourists. Today, there are approximately 98 miles of Ontario Northland Railway line on the lands.

There are approximately 100 miles of paved highways on the lands in question, including Provincial Highways 11 and 560. There are approximately 520 miles of main gravel roads in the area, and there are many other roads built primarily for timber extraction purposes. It is not clear whether major provincial highways and other roads are patented or not.

There are three hydro-electric power generating dams on the lands, and there are 14 water control dams maintained either by the Ministry of Natural Resources or Ontario Hydro. Some power dams were constructed in 1912 and in the nineteen twenties which flooded extensive areas. There are eight communication towers, five of them owned and maintained by the Ontario Northland Transportation Commission, and one each by the Canadian Broadcasting Corporation, Bell Canada and the Department of National Defence.

There are 178 miles of hydro-electric power transmission lines and 38 miles of cable onthe lands, excluding lines for local distribution. There are approximately 60 miles of natural gas pipe-line owned and maintained by Trans-Canada Pipelines. It is not clear whether power corridors, dams and other projects are on patented or unpatented land.

Though some areas in the Land Claim Area are in a wilderness state, same are fully built up as towns and villages. The urban areas of Temagami, Elk Lake and Gowganda were settled in 1904

and 1905. They include a total permanent population of approximately 2,000 people. There are many other individual homes and settlements in the area, mostly on the east side of the Highway 11 corridor.

Tourism has been carried on as a commercial activity in the Land Claim Area since the late eighteen nineties, encouraged by the advertising of the Canadian Pacific Railway. Hotels, tourist outfitting enterprises and a steamer on Lake Temagami were established in the early nineteen hundreds. There was a great demand for cottage lots in the early nineteen hundreds and, in 1905, a new policy of leasing cottage lots for periods of 21 years, with rights of renewal, was established. In 1912, the Ontario Government withdrew the islands in Lake Temagami from prospecting primarily to protect the tourist trade. The activities of tourists were regulated under the Forest Reserves Act, R.S.O. 1914, c.30 and The Game and Fisheries Act, R.S.O. 1914, c.262, now the Game and Fish Act, R.S.O. 1970, c.186 [now R.S.O. 1980, c.182], and tourism has been a major economic factor in the area since the early nineteen hundreds.

Recreational fishing is a major component of the tourist activity and, according to surveys, Lake Temagami receives approximately 102,245 angler hours per year, or 20,449 angler days per year. Other lakes throughout the territory are extensively fished as well. Many lakes are also fished in winter. All recreational fishing is regulated by Ontario Came and Fish Act Regulations, and licences are issued to non-residents.

Approximately 4,625 persons hunted moose on the lands in 1980, of which 85 percent were non-local hunters. This hunting covers almost all of the townships in the land in question. Hunting is regulated by the Game and Fish Act of Ontario, and all hunters except members of the defendants and other Indians considered to be Robinson-Huron Treaty Indians are required to obtain licences under the Act.

There are approximately 100 miles of groomed cross-country ski trails, mainly on Crown lands. They are maintained primarily by private individuals in order to attract tourists, and there are a number of hiking trails maintained by the Ministry of Natural Resources, as well as 1261 miles of canoe routes designated and maintained by the same Ministry. In 1981, there were approximately 65,000 user days of canoeing in the area, an increase of approximately 66.7 percent since 1975-76.

There are 101 commercial lodges on the lands in question with a rental revenue of approximately $2.2 million in 1981.

There are three provincial parks in the area, one of 92 acres established in 1936, one of 1,034 acres established in 1956, and the Lady Evelyn Waterway Park of 6,088 acres, established in 1937. All such parks are designated and regulated by regulations under the Provincial Parks Act, R.S. 0 . 1970, c.371 [now R.S.O. 1980, c.401]. In addition, there are approximately 23,000 acres set aside by regulation under the Provincial Parks Act for future park use.

There are a number of roads upon which the Ministry of Natural Resources has established gates for the purpose of restricting access, which gates are administered by the logging companies at the request of the Ministry.

There are registered trap lines licensed under the Game and Fish Act, supra, for the harvesting of fur-bearing animals. Trapping licences over most of the Land Claim Area were issued to persons who are not members of the defendants. 1,131 square miles, or 29 percent of the lands in question, were licensed by the provincial government to the Bear Island Co-operative for exclusive trapping by members of the defendants, although the Co-operative permits one non-Indian trapper to trap within its licensed area because no member of the defendants was interested in that particular area. The government also issued a trapping licence directly to one of the members of the defendants who chose not to be part of the Co-operative. The Co-operative trapping extend, to the north end of Makobe Lake and includes the west part of Lady Evelyn Lake. It extends as far west as Florence Lake, Yorkston Lake and Obabika Lake, and far south as Hobbs Township and part of McCallum Township. It does not include the easterly arm of Lake Temagami.

In 1868, the Dominion Of Ca-do enacted legislation providing "…for the management of Indian and Ordnance Lands." (See S.C. 1868 c.42.) The Act provided that all lands reserved for Indians or for any tribe, band or body of Indians, were deemed to be reserved and held for the same - purposes as prior to the passing of the Act. Section 6 prohibited the sale or lease of such lands prior to their having been released or surrendered to the Crown for the purposes of the Act. The Act also prohibited persons other than Indians from residing on the lands and provided that all

leases, contracts and agreements between Indians and non-Indians which purported to permit non-Indians to reside upon such lands were absolutely void. The broad wording of this Act indicated that it applied both to land specifically reserved for Indians and to unceded lands under the Royal Proclamation. Section 42 repealed all previous Acts that were inconsistent therewith, "except only as to things done, obligations contracted, or penalties incurred before the coming into force of this Act."

In 1876, section 6 of the 1868 Act was repealed by the Indian Act, S.C. 1876, c.18. The new section prohibiting sale or lease of unsurrendered or unceded lands referred to “reserves”.

The Act defined a "reserve" as being land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians. This wording indicates that the Act was not intended to apply to unceded Royal Proclamation lands. It was therefore only between the years 1868 and 1876 that there was ever any legislative prohibition of the sale or lease of unsurrendered or unceded Indian lands. By implication, before 1868 and after 1876, there was no restriction upon the Crown granting lands prior to obtaining a surrender or cession from the Indians. For the purposes of this case, I find that there was no such prohibition, either in 1850 or 1883, from entering into a valid treaty or from granting lands. Section 99 of the 1876 Act, which repealed pacts of the 1868 Act, contained the saving provision that inconsistent laws were repealed "except only as to things done, rights acquired, obligations contracted, or penalties incurred before the coming into force of this act.

Mr. Clark's position is that the Temagami Indians were continuously in occupation of the lands in question throughout the entire period, and that therefore they had acquired vested rights, thus falling within the saving provision of the 1876 and 1880 Indian Acts, particularly because they had complained in 1877 about timber crews coming into the area. In my opinion, there was nothing done, no rights acquired, no obligations contracted, nor penalties incurred, by the Temgami Indians, such as would trigger the saving provision. The fact that the Indians were there is immaterial to the interpretation of the statute. If the Indians had any rights, they had them before any of the legislation in question was passed. If they had no rights, the legislation did not create rights for them. The legislation is in general terms and the saving provision cannot be read so as to continue any previous general legislation. The exceptions apply only to specific acts or thing or matters that have occurred under the previous legislation, but not to the general law itself. To interpret the saving provision otherwise would have rendered the new legislation totally ineffective.

All of the legislation in the Indian Acts of 1859, 1868, 1876 and 1880 was repealed by the Indian Act, R.S.C. 1886, c.43 which, itself, had a saving provision with respect to any transaction, matter or thing anterior to the repeal. Sections 7 and 8 of the 1886 statute specifically dealt with some anterior matters by spelling out in detail what was to continue and remain in force. Clearly, the saving provisions were to apply to specific matters and not to the general law. Therefore, all prior general saving provisions were repealed and the defendants can claim no rights thereunder.

To conclude, in my opinion, by passing legislation with respect to surveys and issuing patents which fostered settlement and development of the Land Claim Area, development which has severely interfered with the hunting and fishing rights of the Indians thereon, the Crown, and in particular, Ontario has indicated an intention to exercise complete dominion over the Land Claim Area. The result has been that the defendants' aboriginal right to use or occupy or possess the lands, as did their forefathers, has been extinguished. The legislation also clearly shows that it was
the intention and understanding of the Province of Canada, and later Ontario, that the Robinson-Huron Treaty covered all the lands in that part of Ontario, including the Land Claim Area south of the Height of Land.

XII

THE CONSTITUTIONAL VALIDITY OF LEGISLATION AND TREATIES WHICH HAVE HAD THE EFFECT OF EXTINGUISHING ABORIGINAL RIGHTS

While the Attorney General of Canada has been present throughout the hearings, on notice of a constitutional issue, that notice related to the Ontario Public Lands Act, supra, and the Constitution Act of 1867 and 1982. The constitutional issues were never specifically spelled out at any time during the trial. In an attempt to define them, Ontario suggested that the question should be:

> If the lands in question are “Lands reserved for the Indians” under section 91(24) of the Constitution Act,1867, do the Public Lands Act, Mining Act, Limitations Act, Municipal Act or any other provincial Act apply thereto.

The defendants never defined any specific issues. They merely opposed Ontario's position and suggested that the Constitution Act, 1982 revived the Royal Proclamation, and that neither Canada nor Ontario could now alter any of the aboriginal rights without an amendment to the Constitution. Canada also did not specifically define the issues other than to rebut the Indian position and to refer specifically to the Ontario Public Lands Act. I was most appreciative of the help given throughout the trial by counsel for the Attorney General of Canada.

The constitutional attack by the defendants was so broad-ranging and so vague as to render the constitutional issues incomprehensible. My view of the constitutional issues raised in the action can be summarized as follows. I have already concluded that aboriginal rights exist at the pleasure of the Crown, and that they can be extinguished by treaty, legislation, or administrative acts pursuant to legislation. I have also concluded that the Constitution Act, 1867, in its division of powers, did not leave to the Indians any independent rights or area of competence. Therefore, only two questions remain. First, prior to Confederation, did the legislature of the Province of Canada have the competence to extinguish aboriginal rights? Second, after Confederation, did the legislature of the Province of Ontario have the competence to extinguish aboriginal rights, at least prior to the passage of the Constitution Act, 1982. It is clear that after 1867, and at least prior to 1982, Canada could extinguish such rights.

A. The Competence of the Province of Canada to Extinguish Aboriginal Rights

The first issue is the constitutional competence of the Province of Canada before Confederation to extinguish aboriginal rights. With respect to legislation, Mr. Clark argued that all power relating to the granting of Indian lands, the extinguishment of Indian rights preserved under the Proclamation, and the declassification of lands reserved for Indians as such, vested in the Imperial Crown, not the Province of Canada. I disagree. It was within the competence of the Crown, acting upon the advice of the colonial legislature, to take away aboriginal rights if it so wished. The Union Act, 1840, supra, provided that the Governor of Canada could assent to all Acts unless he expressly reserved them for the Imperial Crown, and that the Imperial Crown could disallow any legislation that referred to its prerogative, within two years of the enactment of the colonial legislation. In the present case, there is no evidence of any disallowance of any of the statutes in question, and those that were reserved were approved. Therefore those Acts enacted by the Province of Canada from 1840 to 1867 were valid. In addition, the Union Act, 1840 also provided that, where any Act affected the Royal prerogative with respect to the granting of waste lands, such Act was to be sent and placed before the United Kingdom Parliament for thirty days prior to the Crown giving any consent. In 1854, the clause in the Union Act,1840 that required tabling before the United Kingdom Parliament was repealed, and a provision enacted that read that no prior Act should be deemed to be invalid because the tabling requirement had not been complied with. It is therefore my opinion that, as of 1840, the Crown, acting upon the advice of the provincial legislature, had full power to grant unceded lands if it so desired. Other than the Royal Proclamation, there was no legislation prior to 1868 that affected the Crown in Canada's right to grant unceded Indian lands.

With respect to treaties, the defendants argued that in 1850 there was no authority in the Province of Canada or the Governor to enter into treaties, but rather the authority remained with the Imperial Crown. I reject this argument. As a result of the Union Act, 1840, and the Territorial Revenue Act of 1847, there was authority for the Governor (i.e. the Crown), with the advice of the colonial legislature, to enter into treaties. The Imperial Crown had the right to review or repudiate acts of the colonial legislature, including treaties entered into, but there is no evidence that that was done in the present case. I find that the Governor, Lord Elgin, did or exceed his authority when he approved the signing of the Robinson-Huron Treaty of 1850.

Prior to Confederation in 1867, the Crown in the Right of the Province of Canada had full power, by legislation, administrative acts and treaties, to unilaterally revoke Indian rights.

B. The Competence of Ontario to Extinguish Aboriginal Rights

The second issue is whether or not Ontario has the legislative competence to unilaterally extinguish aboriginal rights. Obviously, it can continue to act under valid pre-Confederation legislation and implement such legislation unless it is in direct conflict with legislation of Canada.

Indians are subjects of the Crown and, like all other subjects, are governed by laws enacted or legal acts done in the name of the Crown or on behalf of the Crown. In Canada the Crown is represented by both the federal government and the provincial governments within their respective legislative spheres. Indians are therefore subject to the valid exercise of power by both governments. Therefore, the issue is a question of the division of powers under the Constitution Act, 1867. I will examine Ontario's constitutional competence under two assumptions:

(1) that there was a valid treaty prior to 1867 and that therefore the lands were ceded Proclamation lands; and

(2) that there was not a valid treaty prior to 1867 and that therefore at least some Ontario legislation purported to deal with unceded Proclamation lands.

The relevant provisions of the Constitution Act, 1867 are:

> 91. …the exclusive Legislative Authority of the Parliament of Canada extends to...
> (24) Indians, and Lands reserved for the Indians.
>
> 92. In each Province the Legislature may exclusively make Laws in relation to...
> (5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
> …
>
> (13) Property and Civil Rights in the Province.
>
> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
> . . .
>
> 117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

I have already held that, according to St. Catherine's Milling case, aboriginal rights are personal and usufructuary and held at the pleasure of the Crown. That case also dealt with the rights and powers of Canada and Ontario over Proclamation lands. In particular, the court dealt with the interpretation of section 91(24) of the Constitution Act, 1867, which assigned exclusive legislative authority over "Indians, and Lands reserved for the Indians" to Canada, and the interrelationship of section 91(24) with section 109. The issue before the court in St. Catherine's Milling was whether or not certain lands in Ontario, in effect unceded Crown lands reserved for Indians by the Proclamation of 1763, upon surrender by the Indians to Canada by a treaty in 1873, belonged to the Crown in Right of Canada or Ontario.

The Privy Council held at p.55 that the nature of the Crown's interest was as follows:

> ... there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, ...

and at p.58:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mete burden. The ceded territory [that is, ceded after Confederation] was at the time of the union [1867] land vested in the Crown.... (My explanation in brackets)

That is, after 1763 (or the coming of settlement), the Crown had a proprietary interest in the unceded Proclamation lands.

Between 1840 and 1867, the "Sovereign" retained legal title but the Province of Canada, by virtue of the Union Act, 1840, obtained a beneficial interest in the lands. The Privy Council stated at p.55:

> There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown . That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada.

After 1867, the legal title to the land remained vested in the Crown. Lord Watson stated, at p.56,that the expressions "the property of" and “belonging to” in the Constitution Act, 1867, used with respect to public lands, merely imported that “the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province,.... and is subject to the control of its legislature...".

The Privy Council then looked to section 109 and held, at pp.57-58:

> The enactments of sect.109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the crown, with the exception of such lands as the Dominion acquired right to under sect.108,
> or might assume for the purposes specified in sect.117.

Th unceded Proclamation lands fell within section 109 because, as the Privy Council stated at pp . 58 –59, prior to cession:

> The ceded territory was at the time of the union, land vested in the Crown , subject to "an interest other than that of the Province in the same," within the meaning of sect.109; and must now belong to Ontario in terms of that clause, unless its rights have been take, away by some provision of the Act of 1867 other than those already noticed.

In other words, the ceded lands in dispute were, at the time of Confederation, unceded Proclamation lands which were vested in the Crown as of 1763, and the beneficial interest in which was transferred in 1867 from the Province of Canada to Ontario by section 109. Of course, since the lands were unceded in 1867, the transfer was of a beneficial interest "subject to....any Interest other than that of the Province”, that is, subject to whatever aboriginal rights still existed. (See Attorney-General for the Dominion of Canada v. Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia, [1898] A.C. 700 (the Fisheries case).) That transfer of beneficial interest precludes Canada from, for example, unilaterally creating an Indian reserve under the Indian Act without obtaining the concurrence of the province as well. (See the Privy Council decision in Seybold's case at pp.82-83.)

The Dominion then argued that section 91(24), by its express terms, conferred upon the Dominion the exclusive power of legislation and administration which carried with it, by necessary implication, any patrimonial or proprietary interest which the Crown might have had in the "Lands reserved for the Indians.” Ontario argued that the expression “Lands reserved for the Indians” was limited to “Indian reserves" established by treaty or otherwise and in which the Indians had a special interest. The Privy Council held, at p.59, that:

> …the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, In order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority,

The Privy Council thus rejected Ontario's argument and concluded that “Lands reserved for the Indians” were not synonymous with “Indian reserves” under the Indian Act, but included unceded Proclamation lands as well as Indian Act reserves. Nevertheless, the Privy Council also rejected the Dominion's argument that section 91(24) deprived Ontario of its proprietary interest; Lord Watson stating at p.59:

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands....

To summarize, prior to Confederation, the crown had legal title to unceded Proclamation lands. The Province of Canada had a beneficial interest in and legislative competence over such lands. After Confederation and prior to cession, the Crown still had legal title, but the Province of Ontario now has a beneficial interest in the lands. It is true that the Privy Council, at p.59, characterized Ontario’s right as:

> ... the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

I do not read the Privy Council as holding that Ontario could not itself disencumber its title by legislation, but merely as stating that Ontario's beneficial interest was subject to such aboriginal rights as were not extinguished by treaty or legislation. Of course, Ontario could not itself enter into treaties with the Indians, but it could, by legislation, deal with and even alienate or dispose of its beneficial interest, for example, by the issuance of patents. The right of alienation was inherent in the beneficial interest itself. This paint was confirmed by Lord Davey in Seybold, supra, where he stated, at p.79:

> Their Lordships think that it should be added that the right of disposing of the land can only be can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

The inevitable effect of alienation would, of course, be to extinguish aboriginal interest in the patented land. In my opinion, Ontario, after 1867, had, in respect of unceded Crown lands, a beneficial interest subject to aboriginal rights, which rights were held at the pleasure of the Crown and which could be extinguished by Ontario legislation.

The only limitation on Ontario's power to extinguish aboriginal rights is that the Ontario legislation use fall under a head of general provincial legislative power and competence and not purport specifically to extinguish aboriginal rights.

As to Canada's legislative jurisdiction to preserve or extinguish aboriginal rights on unceded Proclamation lands, the Privy Council in the St. Catherine's Milling case made no adverse comment concerning Canadian administration of these lands up to 1873, held that section 91(24) included unceded Proclamation lands, and stated, at p.59:

> It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

I therefore conclude that, after Confederation, Canada had the specific power to legislate in respect of aboriginal rights on unceded Proclamation lands. In the case at bar, there is no inconsistent federal and provincial legislation affecting the Land Claim Area. Laws are presumed constitutionally valid unless the contrary is proved. (See Hogg, Constitutional Law of Canada, (1977), at 88.)

In the St. Catherine's Milling case, the Indians, by treaty, ceded their lands to the Crown, retaining certain treaty rights to hunt and fish. There was no dispute as to whether the treaty did in fact do what it purported to do, that is, extinguish aboriginal title and therefore disencumber Ontario's beneficial interest (for example, see p.53 of the judgment).

The effect of the cession upon Canada's continuing interest under the "Lands reserved for the Indians" subclause of section 91(24) seems to have been left undecided. The Privy Council stated, at p.60:

> There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these question, are raised for decision in the present suit.

Whatever question remained in the minds of the Privy Council as to Canada's legislative competence under the subclause "Lands reserved for the Indians" over Proclamation lands ceded to the Crown by treaty was answered by Estey J. in Gilbert Smith's case, supra. In that case the lands had been reserved to the Indians in 1783 by a grant of occupation. In 1895, the Indians surrendered the lands to the Crown pursuant to the provisions of the Indian Act.

At p.564 [p.169 C.N.L.R.], Estey J. quoted the Divisional Court judgment of Street J. in Seybold, supra, that:

> The Dominion government, in fact, in selling the land in question, was not selling "lands reserved for Indians", but was selling lands belonging to the Province of Ontario.

Then, at p.569 [pp.172-3 C.N.L.R.], Estey J. stated:

> The release, therefore, is of a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process of the release, and a release couched in terms inferring a transfer cannot operate effectively in law on the personal right any more than an express transfer could. In either process the right disappears. This is a surrender of rights in the broad sense of the common law. Whatever "surrender" may mean in the Indian Act, a surrender in law has the immediate result of extinguishing the personal right of the Indians to which federal jurisdiction attaches under s.91(24).
> …
>
> ... it should be noted that the release in the St. Catherine's case was… [determined to be] absolute and relieved the provincial title of the burden of the Indian rights under a s.91(24).

Therefore, after cession, the Proclamation lands ceased to be "Lands reserved for the Indians", and became Ontario public lands. Hence, I conclude that Ontario, since Confederation, has had the right to enact general legislation which can, in effect, extinguish aboriginal rights on ceded Proclamation lands. The only limitation on Ontario's power to extinguish aboriginal rights is that the legislation must fall under a head of general provincial legislative power and competence. For example, Ontario could enact legislation under section 92(5) or (13) (see Seybold, supra; the Fisheries case, supra; and Reference re Saskatchewan Natural Resources, [1931] S.C.R. 263). Absent an area of legislative competence, Ontario could not purport to specifically extinguish aboriginal rights because they are personal and usufructuary and Ontario has no legislative competence over "Indians".

All my conclusions are, of course, subject to the Constitution Act, 1982.

Therefore, in the case at bar, whether or not the defendants were Party to the Robinson-Huron Treaty in 1850 or adhered to it in 1883, Ontario had the legislative competence to enact otherwise valid, general legislation which, in affect, extinguished the defendants' aboriginal rights.

If I am wrong, and St. Catherine's Milling case does not stand for the proposition that Ontario can enact legislation within its area of general legislative competence which has the effect of extinguishing aboriginal rights, then I must consider whether or not a provincial law of general application which has the effect of extinguishing aboriginal rights is constitutionally valid.

It is clear that Canada has jurisdiction over "Indians" and "Lands reserved for the Indians", the latter including needed Proclamation lands (see Gilbert Smith's case, supra). It is also trite law that

provincial laws, no matter how valid their objectives, cannot sterilize a matter of federal jurisdiction.

In Kruger and Manuel, supra, the appellant non-treaty Indians were convicted under provincial game laws for hunting without a permit in their traditional hunting grounds, which were on unoccupied Crown lands (not Indian Act reserve lands). In dismissing the appeal, Dickson J. stated that the appellants failed, whether provincial laws of general application applied to Indians of their own force or by virtue of referential incorporation as federal legislation under s.88 of the Indian Act. That section reads:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision for any matter for which provision is made by or under this Act.

Though the issue of aboriginal title was not directly before the court, Dickson J. did state, at p.116:

> ... it has been conclusively decided that such title, as any other, is subject to regulations imposed by validly enacted federal laws ....

He then referred to R. v. Derriksan (1976), 71 D.L.R. (3d) 159, at 160, where Laskin C.J.C. stated that an aboriginal right to fish, arising out of Indian occupation and subsequently enforced by treaty, was still subject to valid federal legislation. Federal legislation can abridge aboriginal rights (Kruger and Manuel, supra, at p.116; Derriksan, supra, at p.160) and treaty rights (see R. v. Sikyea, [1964] 2 C.C.C. 325 (N.W.T.C.A.), aff'd [1964] The Queen v. George, [1966] S.C.R. 267; and Daniels v. White and The Queen, [1968] S.C.R. 517). By the term, of section 88, provincial law is subject to treaty rights and inconsistent federal legislation. A province cannot enact legislation in relation to "Lands reserved for the Indians" or "Indians", but this does not mean that either
Indians, Indian Act reserves or unceded Proclamation lands reserved for Indians become federal enclaves immune from the operation of valid provincial law. (With respect to Indian Act reserves, see Cardinal v. The Attorney General of Alberta, [1974] S.C.R. 695; Four B Manufacturing Limited v. United Garment Workers of America et al., [1980] 1 S.C.R. 1031 [[1979] 4 C.N.L.R. 21); and Sandy v. Sandy (1980), 27 O.R. (2d) 248 [[1980] 2 C.N.L.R. 101]). Provincial legislation applies unless there is valid federal legislation which is inconsistent and paramount.

Therefore, I conclude that a valid provincial law of general application and administrative acts thereunder, both independently and as a function of section 88 of the Indian Act, operate de facto to limit, restrict, exclude or abrogate the exercise of aboriginal rights.

In the present case, Canada has never enacted any legislation dealing specifically with any of the land in question, other than establishing Bear Island Reserve and entering into Treaty 9. Therefore, it is only the general laws of Canada and Ontario that need to be considered.

I am of the opinion that the Ontario laws in question were laws of general application, validly enacted within Ontario's area of general legislative competence, not inconsistent with valid Canadian laws, and therefore able, from a constitutional point of view, to extinguish aboriginal rights In the Land Claim Area. This is true whether or not the lands were ceded or unceded Proclamation lands at the time the laws in question were passed.

I do not consider it an issue, no, was it argued, whether or not the Municipal Act, supra, applies to Indian lands. It is an Act of general application but it can only be enforced where a municipality has been erected by provincial authority. I make no finding in this respect.

Of course, my conclusions in this subsection as to legislative competence are, once again, subject to the Constitution Act, 1982. None of the legislation in question post-dates that Act.

XIII

LIMITATIONS ACT

The first issue I will deal with is whether or not the action and counterclaim have each been brought in time pursuant to the provisions of the Limitations Act, supra. The Act and its predecessors are Ontario laws of general application. There is no Canadian legislation, pursuant to section 91(24) of the Constitution Act, 1867 which infringe upon or interferes with the Limitations Act. The issue of whether or not a statute such as the Limitations Act, from a division of powers point of view, can validly extinguish aboriginal title, has been dealt with elsewhere. If I am wrong in my interpretation of section 91(24) of the Constitution Act, 1867, and section 88 of the Indian Act, with respect to the applicability of the current Ontario Limitations Act, then the defendants, but not the Crown, are affected by the limitation period contained in sections 1 and 16 of the Real Property Limitations Act, C.S.U.C. 1859, c. 88. These sections of the Real Property Limitations Act were preserved by section 129 of the Constitution Act, 1867. There has been no legislation by the federal government repealing, abolishing or altering section 129 in so far as it applies to aboriginal rights. (See Mastini v. Bell Telephone Co. of Canada, at al. (1971), 18 D.L.R. (3d) 215.)

The relevant provisions of the Ontario Limitations Act are as follows:

> 1. In this Act,
>
> …
>
> (c) "land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency;
>
> …
>
> 3. (1) No entry, distress, or action shall he made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty.
>
> …
>
> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
>
> …
>
> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.
>
> 16. Nothing in actions 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest at acquired by any person before the 13th day of June, 1922.

Though there is no case law on point, I find that an action dealing with the existence, extinguishment or surrender of aboriginal title is an action in respect of land as defined in section 1(c), since aboriginal title, whatever else it may be, is incorporeal hereditament, a thing capable of being inherited communally by the band. If it could not be inherited communally, then the rights granted by the Royal Proclamation of 1763 would have ceased when the Indians then alive died.

Furthermore, in Pawis v. The Queen, [1980] 2 F.C. 18 [[1979] 2 C.N.L.R. 52], the court dealt with an alleged breach of contract under the Robinson-Huron Treaty of 1850, which is the same treaty that is the subject matter of the present action. In that case, the court held that the Limitations Act applied and that, after so many years, the Indian who was charged was prohibited from commencing an action where the alleged breach took place long before he was born. The present action relates to a declaration in part that the defendants did not enter into the Robinson-Huron Treaty. However, from the evidence it is clear that the ancestors of the defendants, from at least 1883, i f not 1850, were aware of the provisions of the treaty. In my opinion, the Limitations Act is applicable to aboriginal rights or any other rights that Indians wish to assert in court.

The relevant limitation period facing the Crown can be found in section 3(1) of the Ontario Act; that is, the Crown must bring an action respecting land against any person within sixty years after the right to bring such action first accrued to the Crown. The relevant limitation period facing the defendants can be found in section 4; that is, the defendants must bring an action to recover land against the crown or anyone else within ten years after the right to bring such action first accrued. The limitation period contained in the Real Property Limitations Act is twenty years from the date that the right of action first accrued, but it applies only to the defendants.

The first question is whether or not the Crown's action is statute barred. Section 16 provides that the limitation period in section 3(1) does not apply to any waste or vacant land of the Crown, provided that this does not affect or prejudice any right or interest acquired by any person before the 13th day of June, 1922. I am of the opinion that "person" includes the defendants and that the Land Claim Area is waste or vacant land. Therefore, the Crown may bring an action unless it is barred by the sixty-year period referred to in section 3(1) having occurred prior to June 13, 1922. Therefore, the defendants' claim would have to have commenced at the latest on June 13, 1862, and been consistently adverse to the Crown from then until 1922. It is quite clear that the Crown has asserted full title since at least 1870 when lumbering first took place. The defendants first notified the Ontario Crown of their claim in 1973 when they registered the cautions. Hence, no limitation period has occurred to bar the plaintiff's action.

The defendants, in their counterclaim, claim that they enjoy an equitable fee simple, subject to the qualification that the Crown alone can acquire such title from them by cession or purchase, and that they have a better right to possession than the Crown. The issue is, again, whether or not aboriginal title exists, and, if so, whether it has been surrendered by treaty or extinguished by legislative acts and subsequent development. The relevant date for determining the existence of aboriginal title is 1763 or the coming of settlement. The relevant dates with respect to whether the Indians were party to the treaty are 1850 and 1883. The relevant legislation and development occurred in the nineteenth and early twentieth centuries.

The defendants were well aware of the Crown's active assertion of title by legislation and by action; for example, the surveying of land, the opening of the land for settlement; the granting of land; the establishment of forest reserves; the beginning of lumbering in 1870; and the building of highways and other works. Other examples of the Indians' knowledge of acts allegedly contrary to their rights are the long series of claims and correspondence that I have set out elsewhere with respect to the petitions to Canada for a reserve in 1916, and the band resolution in 1947 saying that there had been no surrender and no treaty and that they were not part of the Robinson-Huron Treaty. Notwithstanding this knowledge, they failed to assert their claim or to communicate its existence to the Crown in the Right of Ontario until 1973 when they filed the caution in the Land Titles Office.

The evidence indicates that the Crown actively asserted its title prior to 1963 or 1968 (or 1953 or 1958 if the Real Property Limitations Act applies). Therefore, I find that the defendants' counterclaim is barred by section 4 of the Limitations Act. I express no opinion as to when a limitation period would begin to run against an aboriginal rights claim where the Crown never actively asserted title.

Although it is not necessary to decide, I would conclude that the counterclaim is also barred by laches, estoppel and acquiescence. All incidents of the test in Willmott v. Barber (1880), 15 Ch. 96 (cited with approval In Anderson v. The Municipality of South Vancouver et al. (1911), 45 S.C.R. 425) have been met.

Section 35 of the Constitution Act, 1282, does not aid the defendants. It recognizes and affirms only existing aboriginal rights (see R. v. Eninew (1983), 7 C.C.C. (3d) 443 [[1984] 2 C.N.L.R. 122], aff'd on appeal (1984), 12 C.C.C. (3d) 365 [[1984] 2 C.N.L.R. 126]). If the Indians had any right to

bring an action, such right was expressly extinguished by section 15 of the Limitations Act before the enactment of the Constitution Act, 1982. There was therefore no existing right.

The defendants also claim prescriptive rights in the land. The Indians have not and could not have acquired prescriptive rights against the Crown. Their right of occupation, aboriginal though it may be, was dependent upon the Royal Proclamation of 1763. The Crown was sovereign and the Indians were there with its permission. Under these circumstances, no prescription can run against the Crown. In any event, other than with respect to Bear Island, which has been set aside as a reserve, there is not sufficient evidence of the required actual, constant, open, visible, and notorious occupation continuing to the commencement of this action to extinguish the title of the true owner. Although it may not have been for the above reasons, counsel for the defendants, in argument, conceded that there could be no prescriptive title in favour of the Indians in the lands in question.

Section 44 of the Land Titles Act, supra, permits a person claiming an interest in land to object to any disposition thereof and to register a caution. In Re Clagstone and Hammond (1897), 28 O.R. 409, at 411, Chancellor Boyd, in referring to the interest necessary to file a caution, said:

> Whatever dealing gives a valid claim to call for or to receive a conveyance of land is an interest.

The interest intended by the section mar be a proprietary interest. In Re Smyth and Smyth, [1969] 1 O.R. 617, Pennell J. held that a right in personam (that is, the deserted wife's right to continue to occupy the matrimonial home) is not any title to or interest in land within the meaning of section 41(1) of The Judicature Act, R.S.O. 1970, c.228, and therefore a person having such a right is not entitled to register a certificate of lis pendens. There is a close similarity between the requirements for a lis pendens and a right to file a caution under the Land Titles Act.

The aboriginal rights of Indians are personal and usufructuary. They are a right of possession only. In the present case, the lands are unpatented and therefore the title is vested in the Crown .

While the personal or aboriginal right or interest of the Indians comes within the extended definition of "land" in the Limitations Act, it is not such an interest in land that gives a right to file a caution against the Crown's title pursuant to the Land Titles Act.

XIV

CONCLUSION

In conclusion, the plaintiff is entitled to a declaration for the relief claimed in paragraphs 6(a) , to (e) inclusive of the statement of claim. This relief is set out in the Introduction to these reasons. The counterclaim of the defendants is dismissed.

I my be spoken to with respect to costs.

ADDENDUM

Since drafting the above reasons, I have read the reasons in Delbert Guerin et al. and The Queen and the National Indian Brotherhood (Supreme Court of Canada, released November 1, 1984) [reported infra at p.120]. That case related to the propriety of Crown dealings on behalf of a registered Indian Act band with reference to Indian Act reserve lands specifically held for their benefit under the Act. The band, the reserve and the lands in question were all well defined. All eight judges rejected the concept that the Crown merely had a political trust in such circumstances. Any dicta in my reasons as to there being only a political trust with respect to defined reserves under the Indian Act is in error. I have not re-written my reasons because this error does not change my conclusions.

The Guerin case dealt only with damages for the breach of a fiduciary relationship and not the extinguishment of Indian rights. Dickson J. (now C.J.C.), speaking for himself and three other members of the court, stated that the Indian interest in reserves under section 18 of the Indian Act was the same as in traditional tribal lands. I do not read the reasons of the other members of the court as going that far. I do not feel that I am bound by the reasons of Dickson J.

Dickson J. concluded at p.30 [p.136, infra] as follows:

> The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

If he meant that the Crown could not unilaterally extinguish Indian title in traditional tribal lands, I respectfully disagree. I. accede to that proposition in the Robinson-Huron Treaty area (assuming that the treaty was invalid) would mean that every grant of land made by the Crown since 1850 was either invalid or was made on behalf of whatever Indian bands (as opposed to registered bands) may have been living in that large area in 1763 or at the time of the coming of settlement, and that the Crown is accountable to them if such bands continue to exist today.

I agree with Dickson J., where he stated at p.22 [p.132, infra], that the Proclamation of 1763 was not the sole source of Indian title according to Calder. If he means that aboriginal title in Proclamation lands pre-dates and survives the Proclamation, I am of the view that this does not alter the proposition that aboriginal title exists at the pleasure of the Crown, and is subject to extinguishment by treaty, legislation or other clear intention of the Crown. Furthermore, if aboriginal title pre-dates the Proclamation and is not affected by it, the relevant date for determining entitlement to and the nature of aboriginal rights of use and possession in particular lands may also pre-date the Proclamation. I have already set out the difficulty in determining Indian social organization and territorial occupation in the Land Claim Area in 1850 and my attempt to follow it back to 1763. To attempt to penetrate the mists of an indefinite past before 1763 would be nigh impossible for the defendants, as well as the court.

Furthermore, both the Guerin and Calder cases related to British Columbia. Although Dickson J. indicated that the Royal Proclamation applied to British Columbia, he spoke for only four members of the court. From both decisions, it is not clear whether or not the Royal Proclamation of 1763 applies to that province.

In any event, counsel for the defendants, in his argument, conceded that the Royal Proclamation applied and that the defendants' rights in that portion of the Land Claim Area south of the Height of Land war, derived from it. I therefore do not feel it proper for me to alter my reasons in this regard.