"THE SOUND OF THE RUSTLING OF THE GOLD IS UNDER MY FEET WHERE I STAND; WE HAVE A RICH COUNTRY":
A HISTORY OF ABORIGINAL MINERAL RESOURCES IN ONTARIO

by

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A thesis submitted in conformity with the requirements for the Degree of Doctor of Philosophy, Graduate Department of History, in the University of Toronto

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0-612-41579-1
This dissertation analyzes the inherent Aboriginal Title to mineral resources, including oil and gas, under the land and land under water in the context of a long and continuous Native knowledge and use of these resources, which were never relinquished by First Nations in Ontario. Some individual Natives shared their mineral knowledge with the newcomers entering their lands. Non-Aboriginal mining activities eventually led to disputes between First Nations and the outsiders who, in many cases, attempted to remove minerals without Aboriginal consent and without paying compensation.

Under these circumstances, First Nations vigorously petitioned and visited the colonial and settler governments for redress and the negotiation of Treaties, which the governments were reluctant to make. Government inaction prompted numerous Chiefs, First Nation citizens and their allies into disrupting, blocking or otherwise stopping non-Native mining operations in the province thus, precipitating the Treaties which they had demanded. This was the context in which the largest Treaties in Ontario were concluded. First Nations negotiated strong, open-ended Treaties which protected their rights and provided for future economic development and sovereignty. But, because the government unilaterally added and deleted provisions in its printed Treaties, the actual Treaties which First Nations had orally negotiated and agreed to have been obscured.

This appears to have been deliberate because the settler government and its successors wanted control of and beneficial
interest in the same resources which Native Peoples had retained as the base of their economy: minerals, timber, game, fish, water etc. Following the Confederation of Canada in 1867, Ontario fought to gain control of this largesse. Federal/provincial disputes over ownership and monetary interest in minerals led to numerous court battles, legislation and agreements which upheld the provincial position at the expense of First Nations and Canada.

This study demonstrates that First Nations have an inherent Title to minerals, that they have never yielded this and that this Title continues to this day. First Nations have acted consistently to protect and develop these resources which are a part of their birthright. The colonial government and its successors, including Ontario, have behaved inconsistently both admitting and denying Aboriginal ownership and beneficial interest in minerals. These governments have consistently failed to respect Treaty promises. Canada, in particular, has badly mismanaged mineral development on Reserves in Ontario.

Rhonda Telford, Ph.D., 1996
"The Sound of the Rustling of the Gold is Under my feet where I stand; We Have a Rich Country": A History of Aboriginal Mineral Resources in Ontario

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ACKNOWLEDGEMENTS

Many scholars have helped and encouraged me in my research and writing of this thesis. I am particularly grateful to Dr. Sylvia Van Kirk of the History Department who has supervised this work from the beginning, patiently commenting on my writing and ideas. Similarly I am thankful for the time and suggestions offered by Dr. Krystyna Sieciechowicz of the Anthropology Department.

I am most indebted to Dr. David McNab whose friendship and unwavering support, encouragement and interest in my research and ideas, for more than a decade, I greatly value.

Many historians and researchers have read and commented on various issues or chapters in this dissertation, including David McNab, historical consultant to First Nations; Paul Williams, counsel to First Nations; Mike Sherry, counsel for the Chiefs of Ontario; and Jim Wells, formerly of INAC, who also allowed me to have access to invaluable documents which I otherwise would not have seen.

I am grateful to a number of other historians and researchers who have shared their time and expertise with me in numerous informal encounters, including Dean Jacobs, Victor Lytwyn, Jim Morrison, Joan Lovisek and Leo Waisberg.

I am especially indebted to Bernita and Simpson Brigham, descendants of the Reverend Simpson Brigham for freely sharing their family history and other insights with me. I am grateful to Nora Boswell, formerly with the Union of Ontario Indians, who generously shared internal material on the renegotiations of the
1924 Lands Agreement and allowed me to roam freely through the research centre in North Bay.
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LIST OF ABBREVIATIONS APPEARING IN TEXT

AC - Appeal Cases
AG - Attorney General
BNA - British North America Act
CCL - Commissioner of Crown Lands
CJNS - Canadian Journal of Native Studies
CLD - Crown Land Department
CLR - Crown Land Registry
CPR - Canadian Pacific Railway
CSP - Canada Sessional Papers
DCB - Dictionary of Canadian Biography
DIA - Department of Indian Affairs
DIAND - Department of Indian Affairs and Northern Development
DLR - Dominion Law Reports
GSC - Geological Survey of Canada
HBC - Hudson Bay Company
IAB - Indian Affairs Branch
INAC - Indian and Northern Affairs Canada
IP - Irving Papers
JLAC - Journals of the Legislative Assembly, Canada
MNR - Ministry of Natural Resources
MR-BR - Metro Reference Library, Baldwin Room
M! - Manuscript
OHS - Ontario Historical Society
OIC - order-in-council
ONAS - Ontario Native Affairs Secretariat
OAR - Ontario Appeal Reports
OR - Ontario Reports
OSP - Ontario Sessional Papers
PAC - Public Archives of Canada
PAO - Provincial Archives of Ontario
RG - Record Group
SCR - Supreme Court Reports
UOI - Union of Ontario Indians
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INTRODUCTION

This thesis can be viewed as a synthesis of Aboriginal knowledge and use of minerals, as far as it is possible for a non-Native person to do this and a history of Aboriginal-government relations dealing with the ownership and beneficial interest in minerals. To date, the governments of Canada and Ontario have chosen to ignore, forget or obscure the rich history of First Nations and their minerals in Ontario.

This work studies the sub-surface and sub-marine rights of First Nations in their Reserves, surrendered Reserve areas, shared/Treaty Territories in Ontario. First Nations did not relinquish mineral rights, including oil and gas rights, in these areas under Treaties or other agreements.

Canada and Ontario have misled not only themselves, but also the public by using words such as "ceded" or "surrendered" to refer to the status of "Treated" Aboriginal lands. First Nations agreed only to share the surface of the land - they did not 'cede' their Aboriginal Title to the Crown. In return, First Nations were paid in annuities, goods or services (perpetual education and health care, for example), which constituted a rent, toll or tribute from the Crown. First Nations also retained numerous rights and resources including, but not limited to sovereignty and self-determination, timber, fish, animals and water. The belief that First Nations 'ceded Title' to the Crown has been primarily perpetuated by successive governments, the courts and, unfortunately, by some academics and commentators - it is
erroneous. My work tries to reflect the Aboriginal perspective, except where the government perspective is being discussed.

Aboriginal knowledge and use of minerals in Ontario extends at least 7,000 years into the past. After contact in the 15th century, some Aboriginal People shared their knowledge of mineral locations with Europeans. They had distinct reasons for doing so and maintained control over the process of sharing information and exacting compensation. This situation persisted into the 18th century in 'Ontario.' But, during the 19th century significant disputes about mineral ownership and use occurred between First Nations on the one hand, and mining promoters and the settler government on the other. These disputes triggered the three largest Treaties in Ontario, the federal/provincial battle over Ontario’s western and northern boundaries, several legal battles and numerous pieces of legislation between 1845 and 1924. By this latter date, Ontario claimed and had obtained a half interest in all monies generated from mineral development on Reserves and had appropriated a full interest in unrelinquished Aboriginal subsurface rights in the shared/Treaty areas. How did Ontario apparently gain control over Aboriginal subsurface rights? Can such an appropriation be legal when what was taken are unrelinquished Aboriginal property rights?

First Nations have had a longstanding interest in their minerals. But, this association is largely unknown although pre-historic Aboriginal mining is covered in archaeological
literature.¹ These sources, however, are generally not consulted by historians, ethnohistorians or anthropologists writing about Native history. Such academics appear to be unaware of widespread Aboriginal mineral use and the actions which First Nations have engaged in to safeguard their sub-surface rights. Thus, this part of Aboriginal history and resource use has not been documented or even commented upon in most historical literature or in works dealing with First Nations in spite of the existence of some excellent first-hand accounts from early explorers and developers.² Even when academics have combed through such early accounts, they fail to see evidence of Aboriginal knowledge and use of minerals because this does not exist in the historiography.³

The very fact that commentators have largely not consulted archaeological accounts of pre-historic Aboriginal mining activities serves to perpetuate misconceptions that Native People were not miners, that they have no interest in or knowledge of the


³ See for example, Germaine Warkentin, *Canadian Exploration Literature*, (Toronto: Oxford University Press, 1995).
sub-surface and, most erroneously of all, that they have no sub-
surface rights. These omissions promote the idea that Native
mining interests are only pre-historic and do not continue into
the 'proto-historic,' historic, present and future periods.¹

Isolated reports of Aboriginal knowledge of mineral locations
and involvement in the discovery and staking of mines do occur in
old and new mining histories and in specialized northern
studies.² These accounts, however, perpetuate the myth that First
Nations did not have an extensive knowledge of mineral resources.
Although valuable when examined together, alone, these accounts
leave one with the impression Aboriginal knowledge and use of
minerals were uncommon. There has been no attempt to document
traditional Native knowledge and use of minerals.

These misconceptions are addressed in Chapter 1 which
considers Aboriginal knowledge and use of minerals, giving

¹ Some anthropologists have examined the ancient Copper People, but do not carry
Aboriginal mining forward into the historic period. See for instance: George Quimby,
p. 52-63. R.L. Packard, "Pre-Columbian Mining in North America," Smithsonian Report,
Anthropologist Paul Tacon has written a very perceptive article on landscape and
culture some of which touches on Aboriginal beliefs about minerals: "The Power of
Place: Cross-Cultural Response to Natural and Cultural Landscapes of Stone and
Earth," in Joan Vastokas, ed., Perspectives of Canadian Landscape: Native Traditions,
(Toronto: York University, May, 1990).

² See for example: George Cassidy, Arrow North, (New Liskeard: Highway Book Shop,
1976); Arnold Hoffman, Free Gold, (Toronto: Rinehart & Co., 1947); Philip Smith, A
History of Mining in Ontario, (Toronto: Macmillan, 1966); S.A. Pain, The Way North,
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(Toronto: Mclllland and Stewart, 1946); Thomas Gibson Mining in Ontario, (Toronto:
T.E. Bowman, 1937); Marian Henderson, The McKellar Story, (Thunder Bay, 1981);
Matthew Hart, Golden Giant, (Vancouver: Douglas & McIntyre, 1985); and Donald
abundant evidence that Native People were responsible for virtually all of the major mineral discoveries in Ontario or, at the very least, for the initial mineral finds which led to rushes. This information is organized geographically on the basis of the future major Treaty regions in Ontario in order to show that Native Peoples in every Treaty region had widespread knowledge of mineral locations in their Territories and also that such knowledge was the rule and not the exception. Aboriginal People were often paid for their disclosures and promoters bought out their interest in these mines. The dollar value of minerals produced from many of these mines attests that the locations exposed by Native People were not insignificant - in fact Aboriginal revelations led to the opening of some of the richest mines in Ontario.

In addition to giving scant attention to the existence and extent of Aboriginal mineral knowledge and use, current academic writing has paid little attention to the importance of minerals in the pre-Treaty, Treaty and post-Treaty periods in Ontario. Thus, there is no comprehensive understanding of the meaning and value of minerals for First Nations in these same periods.

In Ontario all of the major Treaties occurred because of conflict over Aboriginal minerals. Other striking similarities also exist and are discussed in Chapters 2 and 4. This 'big picture' has not been addressed in the historical or ethno-historical writing to date. Yet, it is central to the Treaty-making process in Ontario after 1849. If it had not been for
Aboriginal insistence on compensation for the use of their land and minerals, the Crown (and then Canada) would not have negotiated the extensive Treaties it did after 1849. Mining conflicts between First Nations and developers forced the government to agree to Treaties which primarily allowed land to become safely available for mining purposes. This point is in contrast to the bulk of writing which suggests that Treaties freed land for settlement and agricultural purposes.

Little has been written on the early Treaty process in Ontario outside of Robert Surtees' lengthy work ending with the second Manitoulin Treaty in 1862 and an article by Donald Smith on the dispossession of the Mississauga. Both authors paint this period darkly without accounting for significant Aboriginal agency and rights retained under these Treaties, including sub-surface rights. Some useful published primary accounts exist for the larger Treaties after 1850, notably Alexander Morris's book on the Treaty negotiations and Canada's Treaties and Surrenders. But, as David McNab has emphasized, these accounts are merely official propaganda for a Treaty process which was and is much more complex and much less cut and dried than Canada would have us believe.7

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Not a lot of academic work has been done on these Treaties even as separate entities. The importance of minerals is much better documented in the Robinson Treaties area than in Treaty Nos. 3 or 9. Doug Leighton's conference paper on the Robinson Treaties made a constructive beginning toward the examination of minerals in the Robinson Treaties area. Leighton deals with the conflicts between Aboriginal Peoples and miners on the north shores of Lakes Superior and Huron, opening with an account of the Vidal/Anderson Report and a discussion of the written Treaty terms. Chapter 2 of this dissertation adds to Leighton's work by examining the mining conflicts which pre-dated the visit by Vidal and Anderson by at least five years. It provides a critical analysis of their Report, the negotiations leading to the Treaty, and emphasizes discrepancies between what was orally agreed to and what appeared in the written Treaties. As we shall see, mineral conflicts did not end with the Treaty.

Janet Chute's Ph.D thesis on Chief Shinguacouse and Jim Morrison's forthcoming study of the Robinson Treaties document how the conflict over minerals along the Upper Lakes directly precipitated the Robinson Treaties of 1850. However, the main focus of Chute's dissertation is not minerals or Aboriginal

The Canadian Historical Association, Native History Study Group, Newsletter: 1994).


mineral rights and interests and she deals mainly with one Reserve. Morrison's study is much more broadly based and deals with some of the mining activities in the area to 1850, but not afterward. Both of these sources are invaluable. Chapter 2 expands on these works by stressing other mineral conflicts outside of Mica Bay, both before and after 1849, and provides a different analysis of the meaning and purpose of the Vidal/Anderson Report and the Treaty negotiations.

The circumstances behind the signing of Treaty Nos. 3 and 9 were similar to the Robinson Treaties. Indian and Northern Affairs Canada [INAC] researcher Wayne Daugherty's work on Treaty No. 3 emphasizes how and why federal officials acquired a full surrender of Ojibwa Territory rather than just a right-of-way over their land. He discusses the protracted negotiations leading up to the Treaty and its immediate negotiation, considering some of the differences between the oral and the written Treaties. ¹⁰

Chapter 2 also offers a significantly different treatment of these points by stressing the significance of minerals in the precipitation, nature and scope of the Treaty. Particular attention is given to the extensive, and obviously conflicting, mining interests of Simon Dawson (a Treaty commissioner) in the area. Additionally, this Chapter emphasizes Aboriginal knowledge of and concern for their mineral rights: the Ojibwa used their knowledge of mineral (particularly gold) locations to insist that Ottawa increase compensation - a point which they constantly

argued between 1870 and 1873. Except for one research paper by Jim Morrison for INAC, the fact that conflict over minerals also precipitated Treaty No. 9 has largely gone unnoticed. But, in this area as well, conflict over minerals between the Crane Chief and explorers led to Treaty.

First Nations which had negotiated Treaties to share surface rights only were in for a rude surprise when they discovered that as a result of Confederation in 1867 and the creation of a new level of government they suddenly and allegedly had no sub-surface rights in either their Reserves or shared Territories. This situation, addressed in Chapter 3, was the outcome of the long boundary dispute between Canada and Ontario over the northwestern provincial boundaries. The central issue in the dispute was which level of government had control over mineral and timber resources and which level had beneficial interest in such resources. This dispute, which started over gold, determined the nature and scope of Treaty No. 3, precipitated a number of legal cases and led to numerous pieces of legislation including the Act of 1891, the Agreement of 1894, the Agreement of 1902, Ontario's 1915 confirmation legislation and the 1924 Land Agreement. All of these things had to do with the settlement of the question of which government was going to appropriate Aboriginal minerals and

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12 Richard Bartlett has discussed the judicial decisions and legislation discussed in this Chapter from a legal perspective only, highlighting certain features (but does not discuss Caldwell v. Fraser) and acts. But, none of these subjects are examined in their historical context. See "Mineral Rights on Indian Reserves in Ontario," The Canadian Journal of Native Studies, Vol. 3, 1983.
Aboriginal beneficial interest in minerals. The boundary dispute has not been addressed from this perspective before.

There is a small historiography written by historians and lawyers about certain aspects of these topics. J.C. Morrison's account of the boundary dispute does not consider how Treaty No. 3 was connected to this dispute, but, he does argue that the St. Catherine's case was an extension of the boundary dispute and asserts the Judicial Committee of the Privy Council (JCPC) ruling meant that "land, minerals, and timber in dispute belonged to the Province." However, his discussion of the case is so brief that he never explains how a case about trees specifically came to encompass minerals. Morris Zaslow's short discussion of the dispute barely mentions the St. Catherine's case, but he does recognize the connection between Treaty No. 3 and the resources of the disputed area - if only after 1882.13 Daugherty's work on Treaty No. 3 brings the boundary dispute in as a factor, but only in the administration of the Reserves. He argues the dispute was a factor while the Reserves were being selected during 1874 and 1875, but does not mention its relevance prior to this time.

Donald Smith's short article on the St. Catherine's case is the only one to date which emphasizes the fact that the first trial arose during Riel's second rebellion in the North West in 1885. Smith demonstrates how Justice Boyd (who delivered the first

St. Catherine's ruling) and counsel for both sides made monetary contributions to support the troops against Riel and the Metis. Underlying all this is Smith's point that it is not surprising four courts ruled against the primacy of Aboriginal Title in Ontario (and part of Manitoba) given the obvious anti-Aboriginal views which both judges and lawyers displayed concerning the Riel situation. These colonial actors were predisposed toward a ruling in favour of the Crown because of their own racist assumptions and biases. Smith links the case to the boundary dispute and provides a short discussion on Treaty No. 3. Like Zaslow, he mentions the Treaty only after 1882. Again, there is no indication that minerals prompted both the dispute and the Treaty.14

David McNab’s article on the administration of Treaty No. 3 Reserves is one of the few to emphasize that the boundary dispute both pre- and post-dated the signing of the Treaty. Of the previous writers on the boundary/Treaty/St. Catherine's case, McNab alone explicitly notes Canada's interest in the minerals in the disputed and Treaty area: "From 1870-1873 the government of Ontario was consulted by the government of Canada concerning minerals lands in the area that was to be covered..."

McNab also focuses on the importance of the St. Catherine’s case for reducing Aboriginal rights to land and resources, but his main concern is to show that both the disputed and Treaty areas

were not included in the boundaries of Ontario until after Canada lost the case. McNab documents the effects of this case on the administration of the Treaty No. 3 Reserves. Namely, that after Canada lost the case, it required Ontario's concurrence in the Reserves it had already confirmed, set aside and surveyed. This led to the Act of 1891 and the Agreement of 1894 which set out the method by which Ontario would concur and finally led to Ontario's Act of 1915 which did confirm the Reserves.¹⁵

Chapter 3 adds to this discussion by addressing the significance of minerals in this period in the headland and Reserve areas and includes an examination of Caldwell, Seybold and the Agreement of 1902. The Chapter emphasizes the fact that the confirmation of the Reserves was delayed by a dispute between the governments over which one would control Aboriginal minerals and Aboriginal beneficial interest.

Richard Bartlett contends that in order to determine Aboriginal mineral rights on Reserves one must look at how each was established. Thus, he examines various Treaties and granting instruments of Reserves. He looks at Ontario's claims during the St. Catherine's, Seybold and Star Chrome Mining cases.¹⁶ A more recent effort by Paul Romney links the boundary dispute and the St. Catherine's case, but does not mention the Treaty. Romney notes the case was about the ownership of land and timber, but


nowhere mentions the importance of minerals in its arguments. 17

Chapter 3 adds to these legalistic interpretations by putting the various court cases in their historical context, particularly in the context of the boundary dispute. The specific importance of minerals in the St. Catherine's case is also addressed. Additionally, none of these authors appear to be aware of the unreported Caldwell v. Fraser. This thesis argues that disputes over minerals precipitated the boundary dispute and Treaty No. 3 and that both of these precipitated the St. Catherine's case and the other legal cases to 1920.

In his M.A. thesis, Barry Cottam claims that "the boundary dispute ultimately became a contest over the ownership of the physical resources" in the disputed territory, later stating that Aboriginal Title became a significant issue "after ownership of resource lands in the disputed territory became a specific issue in its own right." [my emphasis] Thus, he misses the point that the dispute had always been about the ownership of resources and the beneficial interest in them. A disproportionate amount of Cottam's interpretation of the boundary dispute comes from J.C. Morrison's 1961 work (40 out of 94 notes). Thus, Cottam merely regurgitates Morrison's old views on the subject which, as Cottam himself admits, were darkly coloured by Morrison's own political biases. Cottam fails to emphasize the importance of Treaty No. 3 both in the boundary dispute and in the St. Catherine's case as

17 Paul Romney, Mr. Attorney, (Toronto: University of Toronto Press, 1986) p. 258.
did Morrison. One is left with the impression the Treaty had nothing to do with the boundary dispute although all of the Treaty area (and its minerals and timber) fell within the disputed tract.

Cottam also maintains Macdonald's decision not to implement the 1878 boundary award "prompted" Mowat to launch the suit against St. Catherine's, implying that Mowat had been thinking of launching this particular suit for a long time. Elsewhere he gives the impression that the choice of company to sue was well thought out and politically motivated. But, as we shall see in Chapter 3, Mowat had no intention whatsoever of suing the St. Catherine's Company until he realized Macdonald would not implement the 1884 boundary award. Mowat had no choice but to sue that particular Company if he was to have a test suit at all because this was the only company actually cutting timber in the disputed area. His decision was not motivated by political factors, was made in a great hurry and did not meet any of the criteria which Cottam sets out as necessary earlier in his thesis.

Finally, Cottam assumes without proof that the test suit would be about timber. There is no understanding that it could equally have been about minerals or any of the other issues in the boundary dispute. Cottam does not see the importance of minerals in the precipitation of the dispute, its continuance and the very prominent role minerals played in the actual arguments in the St. Catherine's case.18

The above mentioned commentators do not link the inception of the boundary dispute to the location of gold in the as-yet unTreated Ojibwa area north and west of the Robinson Superior Treaty - and thus, the federal expansion of Treaty No. 3 from a right-of-way Treaty to the full-fledged land cession it became. Dawson’s prominent role in this is not addressed. None discuss the role that conflict over minerals played in the precipitation of the Treaty and none specifically document the centrality of minerals in the actual arguments in the St. Catherine’s case.

Historians have also not acknowledged Aboriginal knowledge and use of oil and gas, nor their actions to control the development of these minerals on their Reserves. Isolated references occur in a few places but, there is no widespread understanding that First Nations had extensive appreciation for these minerals, nor that oil was sold commercially as a medicine.

Most Ontarians do not know that Canada’s oil boom, centred in southwestern Ontario during the late 1850s and 1860s, partially rested on the illegal government appropriation of oil lands at Petrolia which belonged to the Walpole Island, Sarnia, Kettle Point and Stony Point First Nations. Similarly, it is not widely understood that several First Nations vigorously directed the

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2 One of few sources to mention this fact is Elma Gray and Leslie Robb Gray, Wilderness Christians, (Toronto: Macmillan, 1956). They cite primary sources indicating the amounts charged by the Delaware-Moravian First Nation for their medicine.
development of their oil and gas resources throughout the 19th and 20th centuries. Most people do not realize First Nations have any interest in, or rights, to oil and gas. But, oil and gas, as well as all other minerals, were never relinquished by First Nations in any Treaty - they remain Aboriginal property.

Some older local studies on the Delaware-Moravian First Nation make reference to oil and gas leasing during the 1860s, but do not get into the details of negotiating Aboriginal oil interests or the illegal activities of the government in authorizing oil leases without Aboriginal consent or similar illegal actions which changed leasing terms without Aboriginal consent.21 This information comes from archival sources untapped to date by historians.

Some work on oil and gas leasing on Manitoulin Island in the 19th century has been carried out by the geographer Robert Wightman.22 But, his work does not accurately reflect the fact of Aboriginal sovereignty in oil and gas leasing and especially does not mention illegal provincial and later federal activities in authorizing oil leases to developers without Aboriginal consent. Wightman's work, which ignores available archival evidence, makes it seem that all the leases issued by the government were legitimate and this is simply not true.

Almost nothing has been written about Aboriginal oil and gas

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22 R. Wightman, Forever on the Fringe, (Toronto: University of Toronto, 1982).
development in the twentieth century. Again Wightman makes passing reference to this on Manitoulin Island, but fails to document federal irregularities including the patenting of land and oil and gas to a company and again to another individual in fee simple even though the Wikwemikong First Nation did not cede their land and did not agree to relinquish their oil and gas rights in perpetuity. As we shall see in Chapter 5, Canada has orchestrated equally disturbing instances of mismanagement on several other oil bearing Reserves.

Finally, Chapter 6, dealing with the attempted renegotiation of the 1924 Agreement, is based on documents still in the possession of Ontario and Canada. These documents remain largely untapped because the negotiations, spanning more than 30 years, were not generally discussed in public. Practically no newspaper coverage existed, except two grossly misinformed articles which appeared in the Toronto Sun. First Nations certainly knew such negotiations were going on but, because the media have taken little interest until recently in Aboriginal People, it is not surprising that news coverage was erroneous or non-existent.

The most daunting problem in trying to unravel what happened in those 30 years and why the final 1986 Agreement looked much different than it was supposed to have is in gaining access to the documents. Any researcher working in the recent past will have to deal with this problem. Nevertheless, the documents have been fleshed out with comments from some people who were involved in the negotiating process from the Aboriginal, federal and
provincial sides.

The history of Aboriginal knowledge and use of minerals in Ontario provides evidence of Aboriginal Rights and Title to subsurface resources which have not been relinquished and which exist to this day. Canada and Ontario are currently dealing with this reality as First Nations across the province assert their ownership of sub-surface and sub-marine mineral resources through direct action, through Treaties, through specific and comprehensive claims, and under the 1986 Lands Agreement.

Certainly, one purpose of this study is to make the reader aware that the bulk of evidence supporting Aboriginal knowledge and use and Title to minerals in Ontario is not in the printed government record. This is important because when First Nations challenge the status-quo, the governments and the courts both turn to the printed Treaties to determine what First Nations retained and what they relinquished. This work provides overwhelming evidence that this is the wrong way to find the answer. In fact, the answer will never be found in the printed Treaties because these simply did not reflect what First Nations and Treaty commissioners verbally agreed to. The governments and the courts must expand their limited vision so that discussions concerning the ownership of resources in Ontario place equal or more weight on the historical context of use and knowledge, oral history and oral negotiations than on the printed Treaties which First Nations could not and did not read and which did not reflect the Treaties which they did agree to.
EXPLANATION OF TERMS

In this dissertation, the terms "First Nation," "Aboriginal," and "Native People" are used interchangeably and the term "Indian" has been avoided except where it appears in quotation or in the name of a government office (such as the Department of Indian Affairs or the Indian Affairs Branch). These terms are capitalized to signify First Nations' equality with, and government to government relationship with Canada and Ontario. Land terms such as "Reserve" and "Territory" have been capitalized to underscore the presence of remaining and unrelinquished Aboriginal interests. The word "Treaty" is also capitalized because it is a binding contract between sovereign entities - First Nations and the Crown.

The author is well aware that broad European terms such as "Algonkian," "Ojibwa" and "Cree," to name but a few, do not do justice to the number of different peoples which have been subsumed under them. In spite of this, I have chosen to rely heavily on references to the "Ojibwa" or "Chippewa" for the sake of brevity. However, the reader should be aware that most "Ojibwa/Chippewa" First Nations include a number of other peoples as well, particularly Pottowatomi and Ottawa Peoples. References to Aboriginal "sub-surface and sub-marine Title or Rights" means that First Nations have the right to determine and profit from all uses of these areas.

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The word "untreated" is occasionally used in this work to refer to what is commonly called 'unceded' or 'unsurrendered' land. These words are problematic, leading the reader to assume that 'cession' and 'surrender' of such lands followed.

The reader should keep in mind that definitions of the word "mineral" are flexible and can be politically motivated. In older definitions and government regulations the word "mine" or "mineral" is usually only associated with metallic ores. Oil and gas are not mentioned and their recovery was governed under separate regulations. In 1924 when Ontario took half of the Aboriginal interest in mineral development only metallic (precious and base) metals were specifically referred to. Since that time, Ontario has claimed that oil and gas were included in the Agreement and are covered under the word "mineral;" Canada has disagreed with this interpretation.
CHAPTER ONE  
ABORIGINAL KNOWLEDGE AND USE OF MINERALS IN ONTARIO

INTRODUCTION

The tendency to associate Aboriginal Peoples and mineral riches conjures up images of Incas, Aztecs and Mayans, or leads one to ponder the elusive existence of an El Dorado. While the association of Mexican or South American First Nations with gold and silver is understandable, it has long overshadowed Aboriginal knowledge and use of minerals in North America, particularly in Canada.

This chapter will illustrate the existence of a long-standing relationship between Aboriginal Peoples in Ontario and their mineral resources ranging from pre-historic times to the present. First Nations viewed and used minerals differently than Europeans. Minerals were intimately connected to the spirit world, especially the underwater panthers and fishes in the form of men, and thus dreaming, medicine and health.1 (See Figure 1) Olive Dickason has emphasized that minerals had an "other-worldly" quality and Native People "...used them mainly to express their sense of cosmological order, as well as for personal adornment and to denote status."2

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Figure 1
Michipichieu, the Great Linx or underwater panther,
Keeper of the sub-surface and sub-marine
This world view was reflected in their mining methods which did not harm the environment. Here was an example of mineral development which promoted a sustainable environment; this was, and is still, in sharp contrast to destructive modern science based mining techniques. First Nations continue to conduct their resource development with respect for the environment and could bring fresh ideas and sustainable development to the realm of subsurface resources, should Ontario decide to respect unrelinquished Aboriginal control and management of the sub-surface and submarine.

It is estimated that Native Peoples in present-day Ontario have utilized copper since about 7000 B.P. [Before Present] and silver since 5000 B.P. Some, but not all, mineral locations were considered sacred places with spiritual significance. There were certain taboos against visiting, disturbing or revealing these locations. The successors of these ancient miners, the Upper Great Lakes Algonkian and later, Ojibwa, of historical times, continued to keep knowledge of sacred deposits secret following contact. However, although Aboriginal reluctance to reveal deposits persisted late into the nineteenth century, since at least the time of contact with Cartier, many individuals shared the location

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of non-sacred sites with prospectors for their own reasons and on
their own terms. However, minerals were rarely, if ever, traded
with Europeans. Native People bestowed metals on Europeans as
gifts, apparently to solidify trade or military alliances.
Aboriginal People exchanged metals and other exotic goods among
themselves - but, unlike the Europeans, First Nations had similar
understandings about the sacredness of minerals.

THE PRE-HISTORIC MINERS

Long before Europeans knew of 'Canada,' Native People in
present-day Ontario knew the location of, and made use of copper,
gold, silver, coal, oil and other minerals. Anthropologist George
Quimby asserts the Old Copper Peoples mined copper in the Lake
Superior basin from 7000 B.P. Copper was "cold hammered and
annealed" to make tools, implements, weapons and ornaments.
Weapons and tools continued to be fashioned from copper between
3500 to 2200 B.P. By about 2100 B.P. copper was used extensively
for ornamentation and ceremonial purposes by the Hopewells who
obtained it through trade likely from the Laurel People.5

Archaeologist Bruce Trigger maintains that between 3500 to
600 B.P. (the Woodland to Historic Period) Aboriginal Peoples in
the Upper Great Lakes carried on a considerable copper trade,
extending over most of eastern North America. Copper, among other
exotic items including silver, galena, obsidian, stone pipes and
jewellery, was circulated through diplomatic gift exchanges in

5 George Quimby, Indian Life in the Upper Great Lakes, 11,000 B.C. to A.D.
1800, (Illinois: University of Chicago Press, 1960), pp. 52-63; Cleland, Rites of
Conquest... , pp. 18-19 and 22. Wright, Ontario Prehistory... , pp. 61-62.
present-day southern Ontario. Archaeologist David Arthurs argues this trade ranged westward to the foothills of the Rocky Mountains (see Map 1). Although Trigger cuts the copper trade off at about 1395 A.D., there is significant evidence that it continued after contact. Tim Holzkamm points to the discovery of a "cache containing both stone and copper arrowheads and European trade goods" at Rainy River in 1898.

Archaeologists emphasize a continuity of mining experience in the Great Lakes area, many believing the Algonkian and Iroquois of Lakes Superior and Huron are directly descended from the ancient miners. James Griffin argues continuity is evident from the similarity of copper artifacts in late pre-historic and early historical Aboriginal sites on both sides of the lakes and in the Michigan basin. One result of contact, he mentions, was the loss of important "markets" for copper, like the Mississippi Valley, because of disease and European commercial and military influence. By the 1630s these factors led to reduced mining activity on the Upper Great Lakes. This may explain why French accounts...

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Map 1
Sketch of the principal copper and silver trade routes in the Woodland period
emphasize Native knowledge of mineral deposits, but do not refer to them as miners. However, because mining was connected with the spirit world, dreaming, medicine and health, contact with missionaries may have disrupted, to some extent, or pushed underground traditional connections with minerals. Aboriginal mining for spiritual/medicinal reasons may have become less obvious to white commentators; it was competing with Aboriginal mining for cash compensation and it did not subside. Anthropologist R.L. Packard argued, in 1892, that copper was continuously mined from the time of the ancients to the present. Emphasizing that the Ojibwa knew the specific locations where copper was mined in the past and where it could currently be obtained, he concluded: "...that Indians still visited the old diggings [pits and trenches] and carried away such pieces of copper as they could find."10

Many pre-historic mining pits existed on the north shore of Lake Superior. Thousands were found on the Keweenaw Peninsula in

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Archaeology, No. 36, 1981, Dawson argues that Laurel Peoples (possibly with "remnant Archaic Peoples") at the site since 4000 to 1500 B.P. eventually amalgamated with a "new but related" group from the south which quickly expanded over northwestern Ontario between 1500 to 800 B.P. These people became a "...distinct group of Algonkian-speakers in historic times [known as the] Northern Ojibwa." Several copper artifacts were associated with the site (pp. 3, 6-7, 30, and 42.)

Thor Conway has similarly demonstrated cultural links between the peoples of the Late Archaic and Late Woodland periods for an arc of sites extending from the Pic River on the north shore of Lake Superior to the Straits of Mackinac in Michigan. Laurel remains are also found on many of these sites in conjunction with later occupations extending into the historic period. On the Canadian side, the Black Thistle site at Sault Ste. Marie contained numerous copper artifacts. Thor Conway, "Point Aux Pins Archaeology...," in Melvin, ed., Collected Archaeological Papers, pp. 30, 43, and 44-45.

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Upper Michigan and Isle Royale in Lake Superior. (Refer to Map 1) Paul Fountain, a nineteenth-century adventurer, reported the Peninsula was "...a solid mass of copper ore...which is, roughly, ninety miles long by more than a hundred broad, [and] seems to be nearly pure copper." He pointed to other reports emphasizing sightings of pure copper masses weighing six or seven hundred tons and maintained Aboriginal Peoples had obtained copper from the Peninsula since

...time immemorial. Many vestiges of their old mines still remain, and they came from immense distances to obtain the metal for making knives, heads to their spears, and a hundred different purposes. They, of course, worked only the masses which they found at the surface of the ground, but the traces of ancient smelting works of rude construction still remain, showing that the Indians had probably arrived at some degree of skill in working the metal.

Fountain's account is important not only because it attests to "traces of ancient smelting works," indicating First Nations transformed the raw material, but also because it acknowledged their sophistication in metal-working. As we shall see, Fountain was mistaken when he claimed Native Peoples only mined surface metals.

The prehistoric mining pits on southwestern Lake Superior were rediscovered by early American mining companies. Some of the earliest accounts (1850 and 1863) come from records left by such

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11 The existence of these pits or trenches was discussed by the nineteenth century ethnographer Daniel Wilson. See his Prehistoric Man, (London: Macmillan, 2nd. ed., 1865), pp. 155-157. Some additional commentary may be found in the Daniel Wilson Papers at the PAO, MU 3184.

companies. It is noteworthy that the American miners exploring the pits had great respect for the ability of the ancient miners to locate profitable veins (including those not visible from the surface), for their proficiency in discerning and abandoning unprofitable veins, for their skill in fabricating the implements which allowed them to remove the copper and for their ingenuity in creating drainage troughs. Indeed the ancient miners were so knowledgeable that many of the first American companies opened mines on Aboriginal pits which proved to be the best sites. The Americans purposely looked for evidence of ancient tools because they knew a pit would be close by. They also compared ancient mining methods and concerns with their own. For instance, the discovery of ancient shovels led Dr. Blake from the Waterbury Company to note "...the blades are more worn on the under side than the upper, as if the mineral had been scraped together and then shovelled out, as is the practice of the miners of the present day."

In stark contrast to the first assessments of the modern miners on-the-spot was that of several nineteenth-century academics. The University of Toronto ethnographer, Daniel Wilson, (1968), pp. 342-343.

1 In addition to battering-rams, stone mauls, wooden shovels and many wrought copper implements were found: axes, gads, chisels, gouges, knives, and spear heads. Wilson, Prehistoric Man..., pp. 156, 160, and 162.


mistakenly argued that the Ancient Miners were a different and extinct race of people from those inhabiting the Great Lakes area at contact. He wrongly maintained the ancient Copper-Miners were linked to the Mound-Builders of the Mississippi and that the current Aboriginal population was not related to them since they had no oral tradition of mining. Wilson viewed the Ancient Miners as an advanced race relative to the Native Peoples of historic times whom he viewed as primitive. He visited the ancient mining pits only once and did no field work among Upper Canada’s Aboriginal populations. He having no conception of the Great Lakes Native Peoples as miners, he constantly tried to belittle their current connection to minerals in the area, erroneously stating that First Nations were merely "...gathering chance masses, or hewing off pieces from the exposed copper lodes" at contact. He incorrectly estimated the antiquity of the ancient miners to be five or six hundred years. In 1892, Packard argued Wilson’s conclusions were flawed because other comparable Aboriginal mining sites existed like the copper pits in Minnesota and a pipestone quarry and mica mines in North Carolina. But, Packard also denigrated contemporary Aboriginal mining activity, claiming that Wilson over-emphasised the French word "mine" used to describe the activities of the ancient copper workers, stating the word was generally

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associate[d] with...shafts or tunnels and under-ground workings, none of which ever existed on the Lake. The ancients...were not miners in the proper sense of the word...they were...only surface prospectors...They had no idea corresponding to the word mine. Hence there is no apparent reason why there should have been much of a distinction in the minds of people who were not miners between places where they dug copper out of the gravel ...and places where they were obliged to dig around rocks to obtain it.\(^i\)

Packard's argument ignored the fact Wilson had actually viewed "...extensive traces of trenches and other mining operations," reporting some of the trenches to be 18 to 30 feet deep; one contained a "detached mass of native copper...resting on an artificial cradle of black oak." While a trench is not the same thing as a tunnel, it is certainly more than Packard's reduction of activity to "digging copper out of the gravel." Both accounts attempt to diminish Aboriginal exploitation of the metal. Both authors, ranking Aboriginal metal use against early metal use by Europeans, find the former inferior to European usages during the same 'stage of civilization.' Wilson also resorted to the concept of a "lost race" to account for the earlier and seemingly more sophisticated mining activities. The unspoken purpose of such ranking was to imply the newcomers were justified in taking over the mining sites because they would put them to better or more profitable use.

Ancient copper pits also existed on the eastern side of Lake

\(^i\) To his credit, however, Packard stressed that all the old accounts, from Cartier to the Jesuit Relations confirmed the continuity between the past and present mining operations as discussed above. Since contact, the French and British had been repeatedly informed that copper was located on the shores of Lake Superior, "and Indian guides finally took them to the precise localities where the metal had formerly been mined, and whence it was still occasionally obtained..." Packard, "Pre-Colombian Mining....," pp. 191-192, and 190.
Superior in a 20 mile band from the north side of Hibbard (Sand) Bay to the south side of Mica Bay (see Map 2). As in the American case, these were rediscovered by mining companies. At least three ancient pits were in the area staked by the Montreal Mining Company around Sand Bay and three were known to exist on the north shore of Lake Huron.

Archaic and Woodland peoples (7000 to 250 B.P.) quarried other kinds of minerals in Ontario including quartzite, chert, rhyolite, ore containing red ochre and taconite. One of the most significant quarries, La Porte De l'Enfer, located on the Mattawa River, consists of a man-made red ochre mine with a refinery overhead where the ochre was separated from the rock and reduced to powder. A second quarry existed on the upper refinery level which included a mechanism to raise ore from below by means of rope and birch bark buckets.

Because red ochre and clay were easily obtainable along the Mattawa and Ottawa Rivers, Tyyska and Burns suggested the site may have had ceremonial significance, emphasizing the Aboriginal belief that rocks were the homes of spirits. Thus Porte De l'Enfer

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17 Griffin and Quimby, "Prehistoric Copper Pits on the Eastern Side of Lake Superior," in Griffin, ed., Lake Superior Copper and the Indians..., pp. 77-79 and 91.

20 There are several quartzite quarries at the Sheguiandah site on Manitoulin Island. Some of the man-made objects date to about 9130 (+/- 250) years ago. Experts agreed that some components in the site are pre-glacial dating back to at least 30,000 B.P. Thomas Lee, "The Antiquity of the Sheguiandah Site," Canadian Field Naturalists, Vol. 71, No. 3, July-September 1957, pp. 117, 125-126, and 144. Harris, Historical Atlas of Canada, Volume 1..., Plate 6, pp. 18-19, "Cultural Sequences, 8000-4000 B.C." Sheguiandah is shown as the only area in Ontario where late Palaeo-Indian and Early Archaic sites are in direct association, 7000-6000 B.C. However, Late Palaeo and Early Archaic artifacts have been found in association with others on Archaic sites. Also Lee, "Northern Survey," Ontario History, Vol. 50, No. 1, 1958, p. 44.
Map 2
Sketch of mining locations along part of the eastern coast of Lake Superior
may have been connected with a "spirit whose blood or ochre was particularly appropriate to the uses this ochre would serve."

While the authors contend that the refinery is "unique," they erroneously claim this site to be the only prehistoric man-made mine cave discovered to date in Ontario.\textsuperscript{21}

Charles Whittlesey's first-hand account of the 'discovery' of the operations of the ancient miners includes several references to such caves. Whittlesey stated that at the Waterbury Mine, an American mining venture in the 1850s, there was a vertical bluff in which an "ancient artificial recess or cavern" 25 feet wide, 15 feet high and 12 feet deep had been created. The size of trees growing on a mound of carved-out rock in front of the cave, which Whittlesey believed had been removed with levers, attested to its antiquity. The ancients had also constructed a drainage trough, the remains of which were still evident under the surface debris.\textsuperscript{22} At the Aztec, Ohio, Adventure and Ridge locations, Whittlesey saw other man-made caves from which copper was obtained. Some of the bluffs in which these caverns were found were 300 feet above the ground.\textsuperscript{23}

As we have seen, Aboriginal mining encompassed a variety of

\textsuperscript{21} Allen Edwin Tyyska and James A. Burns, "Archaeology from North Bay to Mattawa," Part 1, No. 2, (Toronto: MNR, April 1973), pp. 32-48. Another reason why the people at La Porte De L'Enfer may not have exploited the other ochre locations was that they were controlled by another group (Personal Communication: Krystina Sieciechowicz, 28 February 1994).

\textsuperscript{22} Excerpts from Charles Whittlesey's account are reprinted in Griffin, "Early American Mining in the Upper Peninsula," Lake Superior Copper..., p. 52.

\textsuperscript{23} Whittlesey in Griffin, "Early American Mining...", Lake Superior Copper..., p. 65.
methods including the collection of surface metal, the digging of holes, large pits and trenches and the creation of caves. These methods, except the first, were extractive and most would have created mining debris. But, this debris was not environmentally polluting; nothing was added or subtracted from the metal and no chemicals were used to separate precious or other metals from the copper. Even when the metal was heated to soften or strengthen it, the environment suffered no adverse effects.24

**ABORIGINAL KNOWLEDGE AND USE OF MINERALS**

Metals, rocks, stones, crystals and sand all possessed sacred significance for the Ojibwa. These materials were valued for their spiritual and healing powers. Before any metal was disturbed or harvested, the ancient miners and their successors would have first appeased the spirit-keepers of the minerals with gifts. Anthropologist Paul Tacon asserts the Ojibwa considered rocky terrain to be filled with supernatural power and energy. Tacon cites the work of Joan and Romas Vastokas who draw attention to the connection between minerals, the spirit world and dreaming:

"all the remarkable spots in the country" were considered the favourite haunt of the spirits, especially "rocky cliffs" and "the clefts of craggy mounts," while waterfalls were thought to be their "sporting scenes." Rocky hills were particularly charged with holiness and the most appropriate places to seek visions...direct association is made between rocky hills, pictographs, and the guiding hand of the manitou in the creation of the images. [Any]...boulders, rocky hills, and outcroppings with unusual dimensions or character, such as clefts, holes, or crevices, were

24 Personal communication: David McNab and Victor Lytwyn, 24 August; Dr. Colin Bray, 8 September and Dr. Ed Spooner, (both of the University of Toronto’s Geology Department) 12 September 1994.
especially charged with Manitou and often conceived as
the dwelling places of mythological creatures.\textsuperscript{25}

Ojibwa historian Basil Johnston refers to one such spirit,
Missabikong or Missabikum, the Little Man of Iron. He was able to
"...image the character and nature of rock, solid, abiding,
strong. He inhabited grottoes and unique formations, deep chasms
or wherever there was a place suitable for visions. Seldom seen,
Missabikong is very obscure."\textsuperscript{26} More recently, Johnston has
written about "the mizauwabeekumoowuk, the copper manitous, who
kept to themselves on the mountainsides and descended from time to
time to cut some overbearing human or supernatural beings down to
size."\textsuperscript{27} The Ojibwa and Cree in north eastern Ontario had similar
legends concerning rock-dwelling Manitou's. In the early 1900s,
the anthropologist Frank Speck recorded some legends and myths of
the Timiskaming Algonquin and Temagami Ojibwa, noting that the
name for Obabika Lake was Ma'nutu pi-pa'gi or 'Spirit Lake.' The
Ojibwa told him a "great rock" in which a Manitou lived was
located on the eastern shore. The Manitou was said to become
annoyed and "growl" when loud noises were created so the Ojibwa
avoided the area. Speck was also told about rock creatures called

\textsuperscript{25} Paul Tacon, "The Power of Place: Cross-Cultural Response to Natural and
Cultural Landscapes of Stone and Earth," in Joan Vastokas, ed., Perspectives of
Canadian Landscape, (Toronto: Robarts Centre, University, May, 1990), pp. 22-23.

\textsuperscript{26} Johnston, Ojibway Heritage..., p. 168. J.G. Kohl, Kittchi-Gami..., (Minneapolis: Ross and Haines, Inc., 1956), pp. 360-362, provides another account
of "Missabikongs: The Man of Iron," this version does not identify Missabikongs as
a being inhabiting rocks or crevices.

\textsuperscript{27} Johnston, The Manitou, p. 151.
These little spirits are probably similar to the ones discussed above by Johnston and Tacon. Similarly, the Temec-Augama Anishnabai believe that Maple Mountain, a sacred place and part of their traditional Territory, now in Lady Evelyn Park, is inhabited by spirits.  

Ojibwa and Iroquois mythology have in common a strong reverence for the Turtle who held the world on its back and represented the earth, a primordial womb or peculiar rocks.  

Sister Bernard Coleman notes the Turtle was honoured for "...his resourcefulness in gathering wood and in catching the red iron (or copper)." According to Coleman such legends were indicative of the ability of the early Ojibwa to temper copper.  

Since at least their arrival at Lake Superior, the Ojibwa used copper plates to record their history and other events of a sacred nature. Europeans understood this by at least 1610 when Champlain was told by an Algonkian Chief that copper was melted and formed into sheets. This tradition, continued for more than

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Bruce Hodgins and Jamie Benidickson, The Temagami Experience, (Toronto: University of Toronto Press), 1989. NOTE: In the early 1970s, Ontario was going to fund the development of a year-round resort on Maple Mountain which it claimed was Crown Ontario land. This action, in part, sparked the Temagami court case.


200 years, was discussed by Ojibwa historians George Copway and William Warren in the nineteenth century\(^\text{13}\) and, more recently by Midewiwin spiritual leader Edward Benton-Banai who described the making of one such plate following the arrival of the Ojibwa on Madeline Island, in about 1394, after their long migration from the Atlantic ocean:

One of the chiefs on Madeline Island kept a special o-za-wa-bikt (copper medallion) in his sacred Mide bundle. The medallion was carefully made by his grandfathers from a copper deposit found on the shore of Lake Superior. His grandfathers had carved a notch on the edge of the medallion when the Ojibway first settled on Madeline Island. The medallion was then kept by a member of the family until he or she passed into the Spirit World. Then the medallion was handed down to one of the members of the younger generation. A new notch was carved on the medallion and it was carried again for another lifetime. In this way a record was kept of the generations of Ojibway that lived on Madeline Island. By the third notch carved on the copper disc was also inscribed the figure of a man wearing a large hat. It is believed that this represents the time in which the Ojibway of Madeline Island first heard of the arrival of the long-awaited Light-skinned Race.\(^\text{14}\)

Note the connection between the Midewiwin and the sacred bundles which were connected with dreaming and metal.

Warren asserted that he and his parents were the last of his Nation to see this particular sacred plate.\(^\text{15}\) Writing about Warren and the copper plate, Chippewa historian Gerald Vizenor emphasizes the sacred and secret nature of some metal deposits:


The plate was made from copper mined near the island. The tribes did not mine the mineral as a source of private wealth; the copper was used in sacred rites and ceremonies. White men made it their official business to locate minerals, but tribal people were secretive about the places copper could be found. Centuries before white people arrived on the island, the tribes mined copper. Some of the mines and open sites were identified on tribal maps, and others were told and remembered in the oral tradition, but most of the sites were sacred places on the earth. At some of these places, huge chunks of copper were exposed. There were several copper sites on the Ontonagan River, but not all of them were sacred. For example, the location of a five hundred ton nugget of copper in the river was no secret, but other sites on the river were sacred, where shamans and healers came to dream and seek their visions. Anishinaabeg elders came to the sacred copper sites in the late spring to heal their bones. Copper held healing spirits, the best energies of the earth. Some healers prescribed the cold river water that ran through the exposed copper stone as a source of health and mythic dreams.\[my emphasis\]

Again, we see that minerals, the spirit world, water and health were elaborately intertwined. Copway, similarly indicated his Nation wrote its history on various natural materials including slate, copper, lead and birch bark, maintaining these were kept in three separate locations in the vicinity of Lake Superior.\[my emphasis\]

In addition to metals and rocks, the Ojibwa also made use of coloured sand. For Europeans sand was an industrial mineral; for Native People it held value as a curing agent and had other uses. Ojibwa artist Norval Morriseau explains the origin of the sand and emphasizes its sacred healing properties:

The red onaman sand, which is the colour of darkish blood found in iron rust, has a legend that tells how at one time when the world was young there lived a huge

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Dorothy Reid, Tales of Nanabozho, (Toronto: Oxford University Press, 1963), pp. 97-98.
beaver in a great pond. Maybe the pond was Lake Superior. One day when the great beaver came to the top of the water the thunderbirds were up above. A thunderbird...came swooping down and seized it and flew up into the air to feast on its flesh. The claws of the thunderbird went deep into the beaver's hide and flesh. From the beaver's wounds sprang blood that fell all over the earth. From that blood was formed the sacred medicine sand called onaman.\textsuperscript{18}

Morriseau contends various coloured sands were used for medicinal and magical purposes. The Ojibwa mixed a light red sand with bear grease to produce a "medicine rub." Treated white sand cured headaches and a white liquid was used as a painkiller. Love potions were made from red sand and there was a blue sand which protected against conjuring.\textsuperscript{19} The red onaman sand, sometimes referred to as red ochre sand or red ochre was also used in rock paintings.\textsuperscript{20} According to Dorothy Reid, this method of expression originated with Nanabozho (the trickster/transfomer in Ojibwa and Cree mythology) who realized the "streaks of red" (iron oxide) in the rocks could be scraped off and ground into a powder. This was mixed with the liquid inside bird eggs to form a paste which was applied to the rock face to record all he saw.\textsuperscript{21} Dewdney asserts both Cree and Ojibwa traditions indicate Aboriginal People used


\textsuperscript{19} Morriseau, \textit{Legende of My People...}, p. 53.


\textsuperscript{21} Dorothy Reid, \textit{Tales of Nanabozho}, (Toronto: Oxford University Press, 1963), pp. 97-98.
"...heat to convert the hydrous yellow ochre into the anhydrous red oxide."

Wunnumin Lake, also known as Red Ochre or Red Earth Lake, obtained its name and significance from the trickster who threw Big Beaver against a rock spilling his blood over it. The huge rock is situated in the Reserve which was specifically chosen to protect this sacred spot. There are likely many other sites like the ones at Obabika and Wunnumin Lakes in Ontario.

Copper was not the only metal known to Aboriginal People in Ontario, gold and silver were also of significance. The Ojibwa in the north east, particularly those around Lake Temiskaming, carried on a considerable trade in silver. J.V. Wright maintains this trade extended back to the Initial Woodland Period. Aboriginal knowledge regarding the location of silver chunks and veins continued into the historic period. Early Ojibwa in the vicinity of present-day Cobalt mined pieces of silver and traded widely with their neighbours to the north and south. George Cassidy argues native silver from the Cobalt area was extensively harvested and traded. He emphasizes the existence and antiquity of Aboriginal trails throughout the Cobalt mining area and asserts "...that many surface finds of silver in its pure form were found

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44 Wright, Ontario Prehistory..., pp. 48-49. Also refer back to Map No. 1.
and used in [Aboriginal] trade." Some time during the mid-1790s, Captain John Meyers, founder of Belleville, was shown a cave near Bon Echo, rich in native silver, by his Aboriginal guides. According to historian Gerald Boyce, on the trip back, the guides repudiated their disclosure and tossed Meyers from the canoe, leading him to contract pneumonia and later die.  

Although little has been recorded about ancient usage of gold in Ontario, it is evident First Nations knew about this mineral as well. First Nations told the Jesuits about gold, but were not taken seriously. Yet, as we shall see, some Native People possessed quite impressive gold chunks, while others had extensive knowledge of gold deposits in their Territories. Aboriginal People collected surface nuggets of gold and knew the exact locations of many gold veins in their Territories. Gold, like copper, may have been mined from pits or trenches. It is a 'soft' metal which could be hammered out like copper. It is likely that Aboriginal People also knew about and frequented the gold location in the cave on what later became the Richardson farm in Madoc where the first

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46 Thanks to Ellen Kellaway for bringing this story to my attention. Gerald Boyce, Historic Hastinus, (Belleville: Ontario Intelligencer Limited, 1967), p. 34.

gold discovery in the Canadian Shield was made in 1866. Non-Natives eagerly exploited gold locations which Aboriginal People showed them, turning them into lucrative commercial ventures. As we shall see, Ojibwa in northeastern and northwestern Ontario possessed gold nuggets; those around Lake of the Woods, Shoal Lake, Lake Superior and Larder Lake led various mining promoters to gold deposits or located them themselves. Certainly the Ojibwa in the Treaty No. 3 area knew that gold abounded in their lands.

In addition to metals, Native People collected and utilized a variety of minerals from the surface of the water and the land under water, including seepage oil, pipestone and metallic ore. Aboriginal People probably knew about and collected oil from the time they first encountered seepages from the earth and on the surface of the water. In 1861, Charles Robb, a geologist and engineer for the Montreal Mining Company, maintained that Native People in present-day Pennsylvania in the U.S. and in Enniskillen Township in south-western Ontario had tapped oil from wells, noting the existence of ancient wells:

The early French settlers, and the Indians of western Pennsylvania, were aware of their [petroleum springs] existence, and made use of their products. Old oil vats and oil wells have been discovered, affording undoubted evidence of human works of great antiquity; and in Enniskillen, the great centre of the oil spring region in Canada, deers' horns, and pieces of timber bearing the marks of the axe, have been dug up from considerable depths below the surface, in what appear to have been

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48 Of several secondary sources on the Madoc area and the 1866 gold strike at the Richardson farm, only Philip Smith states that the gold deposit was in a cave. A History of Mining in Ontario, (Toronto: Macmillan, 1986), p. 31.
old wells." Robb, unfortunately, did not estimate the antiquity of these wells. But, Aboriginal People have refined and sold oil to whites since at least the 1600s. The Seneca, for example, were selling oil-medicine to the whites at exorbitant prices by 1627.50

Ottawa, Ojibwa and Delaware had longstanding knowledge and use of such oil which they collected from pools on Manitoulin Island, along the Thames River near Moraviantown in Zone Township and the Bear and Black Creeks in Enniskillen Township.51 This knowledge was shared with missionaries and settlers by the Ojibwa and Delaware who valued oil for its healing properties, selling it as medicine.52

The Ottawa on Manitoulin Island told the Jesuits of two oil springs on Wikwemikong in the vicinity of Smith's Point. According to F.W. Major, a later commentator, the Ottawa believed the sticky black substance came "...from the entrails of the Great Manitou in which 'rock oil' was found that cured all human diseases." These

Reference to Charles Robb work located in unpublished manuscript of R.B. Harkness, Regional Collection, Weldon Library, University of Western Ontario, Introduction pp. 3-4; Petrolia pp. 1-2. For Robb's original paper see, "On the Petroleum Springs of Western Canada," The Canadian Journal, New Series, No. XXXIV, July 1861, pp. 314-315. Similar information was printed in The Daily Globe, 12 September 1861, also referred to by Harkness.


51 The development of oil is discussed below in Chapter 6. Note: Oil is rarely found free of natural gas. This was the case in southern Ontario. Canadians, however, never thought of using gas as a fuel until the 1890s. See Fourth Report of the Bureau of Mines, 1894, pp. 25-26. "Petroleum and Natural Gas," by Arthur, S. Hardy, Commissioner of Crown Lands.

Native disclosures led to the first oil boom on Manitoulin in the mid-1860s. William Baby, who received the first government license near Smith's Point, acknowledged prior Aboriginal knowledge and use of the oil.  

NonNatives further south and west had also been told of the highly valuable substance. In February 1793 while hunting and policing in their Territory, Bear clan members from the Ojibwa settlement at Bear Creek informed Lieutenant Governor Simcoe of an oil seepage on the Thames River in their hunting grounds. Benton-Banai, asserts that the Bear clan was also responsible for making medicine for the community because of its extensive botanical knowledge gained while policing. One such medicine was that made from oil, collected by placing a blanket over the surface of the water. After the water and oil were absorbed, the blanket was wrung into a bowl and the oil skimmed, bottled and sold as a medicine. This was likely one of the first occasions that Aboriginal People shared the location of oil, a sacred medicine, with the English.

The Ojibwa around Black Creek shared their oil-medicine and


Map 3
Sketch of the oil locations on Wikwemikong known to the Great Manitoulin Oil Co. by 1865
its location with the first settlers arriving in the early 1830s.\footnote{Michael O’Meara, \textit{Oil Springs}, (Oil Springs: 1958), p. 45; and Gray, \textit{The Great Canadian Oil Patch}, p. 34.} This information led provincial authorities to examine Enniskillen Township in 1832, but they did not discover the gum beds which stretched over half an acre in a densely treed swamp.\footnote{Edward Phelps, "Foundations of the Canadian Oil Industry, 1850-1866," in Firth, ed., \textit{Profiles of a Province}, (Toronto: OHS, 1967), p. 157.} Later investigation led to the oil boom which occurred at Oil Springs in 1857 and 1858, the first in the world for commercial purposes. That boom was eclipsed by a second at Petrolia, partially fuelled when colonial authorities illegally authorized developers to remove oil from the Enniskillen Reserve belonging to the Walpole Island, Sarnia, Kettle Point and Stony Point First Nations.

The Moravian-Delaware Nation on the Thames River had medicinal use for seepage oil which they collected and sold. The Delaware preserved and retailed such oil in the United States prior to their arrival in Canada about 1800. On the Muskingum River, in Pennsylvania, white consumers paid four guineas (or at least $20) a quart for the Aboriginal medicine. In 1844, at Fairfield on the Thames, the Moravian mission in Canada, they sold it at three dollars a gallon (or .75 cents a quart). Seepage oil and water were collected in kettles and the water boiled off. The oil was "preserved" and used externally for a variety of ailments including: sprains, rheumatic pains, toothaches and headaches. The
medicine was also taken internally.\textsuperscript{18}

Oil was a sacred medicine for Aboriginal People in south western Ontario. The waters and lands from which it sprang commanded respect and protection. It was the southwestern Ojibwa and Delaware who first drew the attention of the whites to the oil and gas potential under Aboriginal Territory. Aboriginal revelations of the precise locations of oil seepages on land and water led the whites to "discover" the vast oil and gas fields of southwestern Ontario. But, Native People had been the original discoverers of this oil and gas and the first Nation to have sacred and commercial uses for the substance.

The Native Peoples of south-western Ontario also mined pipestone and metallic ore from the land under the water. While attached to an official government party delivering the annual presents at Sarnia, in 1849, Major John Richardson, an Aboriginal person himself,

...obtained a very handsome stone pipe, inlaid with that particular metal in which so large a portion of silver is found, and which, had at the Riviere au Sable, is smelted by the Indians themselves. No white man knows the locale of this, for from a strange superstition that prevails among their race, that it is unlucky to impart the secret of the existence of a mine, and that speedy death will overtake the imprudent party who makes the disclosure, they have hitherto religiously withheld all knowledge on the subject. The pipe itself is made of a beautiful dark stone, which is taken from the bed of the river, and so soft, when newly removed, as to be easily cut with a knife, into any shape that may be desired. A few hours after it has left its native bed, it becomes perfectly indurated. To this very handsome pipe,

ingeniously and tastefully inlaid with the ore I have described, was appended a stem some two feet and a half in length..."\n
While Aboriginal knowledge and use of sub-marine minerals was linked to the spirit world and health, they were also an important part of the Native economy.

Native Peoples in north-eastern Ontario near the Opazatika or Poplar River had frequented a phenomena they called the 'Bubbling Waters' since time immemorial. Large quantities of gas rose from beneath the river and the location was an important spiritual site. Some Aboriginal People shared this information with Robert Bell and Edward Barnes Borron. Thus, Aboriginal People were also responsible for the earliest locations of natural gas in north-eastern Ontario.\n
Non-Aboriginal oil recovery and processing practices were environmentally damaging, often leading to uncontrollable gushes which were not cleaned up by the companies. Because Ontario oil and gas was high in sulphur, sulphurous fumes were released into the air when the gushes caught on fire, which returned to the earth as acid rain. Other problems resulted from leaking or corroded containers. During the refining process sulphuric acid and caustic soda were added to the oil to enhance, deodorize and lighten it. These additives were flushed into local rivers,

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59 John Richardson, "A Trip to Walpole Island and Port Sarnia," Literary Garland, Vol. 7, p. 23. NOTE: article is unsigned, but author's identity is given in An Index to the Literary Garland, by Mary Markham Brown, (Toronto: Bibliographical Society of Canada, 1962, p. 34.)

killing vegetation and fish. Aboriginal mining was environmentally friendly, not destructive or pollutive. In keeping with their instructions from the Creator, Native People did not harvest minerals in such a way that the "natural Creation" would be disturbed.61

As we have seen First Nations used minerals for a variety of purposes, some secular and some sacred. The extent to which they would share this information with non-Natives varied. As George Vizenor makes clear, not all mineral locations were considered sacred. Since contact, some Native People had been willing to reveal the locations of some deposits to Europeans if this fulfilled their own agendas. The locations of sacred deposits, however, were kept secret and First Nations believed negative consequences would ensue if these were revealed. Such beliefs existed prior to and after contact. The Ojibwa thought malevolent forces were concentrated around Lake Superior and on its islands. They knew that copper, gold and silver veins existed around Lake Superior. Some copper locations were sacred places and the Ojibwa held them in great reverence. Paul Fountain claimed the Keewenaw Peninsula "...was a place of superstitious dread to them, as they believed it, like innumerable other points round the lakes, to be

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the haunt of an evil spirit."42

First Nations on the north side were reported to avoid a particular copper mine on an island (probably Michipicoten) opposite the place where the Michipicoten River entered Lake Superior. The island was associated with evil and mystery due to its heavy fogs and thunderstorms. Several old accounts make reference to the fate of four Ojibwa who were forced to stay on the island as a result of a storm. Intendant Antoine Raudot related how stones, including metallic ones, were superheated and put into bark containers for cooking purposes. After the meal the group continued on its way taking the stones with them. Three shortly died, as did the fourth man who survived only long enough to tell the story. Raudot speculated that some of the cooking stones contained copper which is very toxic and likely caused food poisoning. Following this incident, the Ojibwa avoided the place which they believed to be haunted by the evil spirit Michibichy.

Raudot said the Ojibwa believed Michibichy was the keeper of the mines: they "...say that they have seen around it fishes with the form of a man, which they call Memogoissiouis; so when they pass that place and likewise others where they know there are mines, they address Michibichy and these monsters, whom they apparently think are appointed to guard the mines in order that they do not destroy them as they pass, and they throw tobacco into the water for them to smoke." Because of the deaths and constant presence of Michibichy, the Ojibwa believed negative consequences

would follow disruption of the copper sites. Raudot maintained "All Indians believe that, if they were to point out a mine to anyone else, they would die within the year; they are so convinced of this that it is almost impossible to get them to reveal where they are." Significantly, he emphasized the injurious effect such fears had on French mineral explorations: the French were only able to locate exposed deposits. Raudot's statement that "...this is why we know only those the knowledge of which they cannot possibly conceal" implies the First Nations around Michipicoten had an extensive knowledge of copper deposits and furthermore that they purposely obscured some locations to prevent the French finding them. The statement also indicates the French were not capable of locating veins unless they broke the surface.

These references to water and underwater spirits and minerals are significant, providing, from the Aboriginal perspective, another link between the sub-marine and minerals. In an account of his travels between 1766 to 1769, explorer Jonathan Carver emphasized Ojibwa knowledge of gold locations:

One of the Chipeway chiefs told me, that some of their people being once driven on the island of Maurepas, which lies towards the north-east part of the lake, found on it large quantities of heavy, shining, yellow sand, that from their description must have been gold dust. Being struck with the beautiful appearance of it

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...they attempted to bring some away; but a spirit of an amazing size, according to their account, sixty feet in height, strode in the water after them, and commanded them to deliver back what they had taken away. Terrified at his gigantic stature, and seeing that he had nearly overtaken them, they were glad to restore their shining treasure; on which they were suffered to depart without further molestation. Since this incident no Indian that has ever heard of it will venture near the same haunted coast.64

Native People were wary of disclosing mineral locations even into the last decades of the nineteenth century. In 1881 or 1882, an Ojibwa named Louis Bokachanini (also known as Weisaw or Weesaw) told mining developer Oliver Daunais the location of a very significant silver mine on the north shore of Lake Superior (discussed below). However, according to Thomas Keefer, one of Daunais’ associates, Weisaw refused to go to the mine himself although he described its location to Daunais who followed it up.65 Keefer continued,

It is a fact of common knowledge in this and other mining districts of the northwest that the Indians as a rule have a superstitious objection to making known the locations of mines and while some of the most valuable ones in the district, except Silver Islet, were pointed out by half-civilized Indians, yet, at first, none of them could be induced to tell where they were situated or to take white men near them...This trait of the Indian is ascribed to his idea that these deposits are of a sacred character, the making known of which will

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65 Thomas Keefer, "An account of the development of mining for precious metals on the north shore of Lake Superior, 1845-1885," reprinted in Kevin Burley, The Development of Canada’s Staples, (Toronto: McClelland and Stewart, 1970), p. 287. A similar story was reported by B.F. Townsley, Mine Finders, (Toronto: Saturday Night Press, 1935), p. 85. Townsley identified the Native Person as Tchiatang, Daunais’ father-in-law. However, the account is virtually identical to Keefer’s and must be the same person as Weisaw. Tchiatang was said to have revealed many other silver deposits in the area.
cause him trouble or an early death."

Yet, taboos regarding the revelation of mineral deposits did not preclude some Ojibwa from taking an interest in the development of these resources. Aboriginal interest in metal primarily, but not exclusively, as a means of making money began to underlie motives for disclosing mineral locations, as early as the 1840s. Native lifeways were not static; ways of doing and perceiving things changed over time and new usages were incorporated. This fact militates against apparent contradictions between spiritual 'taboos' concerning metals and their gradual incorporation as an economic commodity.

NATIVE PEOPLE AND THE REVELATION OF MINERAL LOCATIONS TO THE FRENCH

Early encounters between the Iroquois and French set the tenor of subsequent relations concerning mineral resources. In 1534 and 1535, at Stadacona (Quebec), Cartier met Chief Donnacosa who told him about Saguenay, a city to the west, full of gold and silver. The geographer Richard Hakluyt asserted that the Iroquois at Hochelaga (Montreal) informed the French about the precise water route to Saguenay and the copper deposits, describing rivers leading to the Great Lakes, particularly into Lake Superior. Then "...they tooke the chayne of our Captaines whistle which was of silver, and the dagger-haft of one of our

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Keefer, "An account of the development of mining for precious metals..." p. 287.

fellow Mariners, hanging on his side being of yellow copper gilt, and shewed us that such stuffe came from the said River.‘" To confirm the information, the French pointed in another direction asking if the "redde copper" came from there. The Iroquois replied it did not, "'but they shewed us that it came from Saguenay.'" The people of Saguenay were reputed to have an abundance of gold and red copper.

Trigger argues Donnacona’s tales of Saguenay are consistent with known "archaeological data" confirming ancient copper pits on Lake Superior, the existence of which were known to the Iroquois. However, he does not believe Donnacona used the word gold to describe the mineral resources, claiming instead that the French either embellished or misunderstood the stories. Trigger contends the French created these exaggerated visions because Native People put excessive value on European trade goods."

Perhaps Cartier’s men did misunderstand, or perhaps they understood only too well. Donnacona likely had his own reasons for telling such stories, namely to ensure the return of the French the following year - with an abundance of presents. If such was the plan it took an unforeseen turn when Cartier forcibly brought Donnacona and two headmen to France in 1534 so they could personally inform the King of Saguenay’s riches. Cartier believed

"" Excerpts from Richard Hakluyt’s account are reprinted and discussed in Packard, "Pre-Columbian Mining...," p. 189.

"" Trigger, The Children of Aataenteic, pp. 196-200. Trigger contends that Aboriginal People knew only of copper before contact, although this claim is inconsistent with assertions he makes elsewhere and contradicts statements attributed to Donnacona by the French. Contrast his comment on page 196 with earlier ones on pp. 117 and 118.
this would ensure financial support for more voyages" and indeed
the entire purpose of his third voyage in 1541 was to locate and
exploit the Saguenay location." Donnacona was returned to his
homeland and controlled French entry into the Saguenay region.
Aboriginal insistence on controlling European access to mineral
sites continued to be an important aspect in their relations with
Europeans.

According to Trigger, European designs on Aboriginal metals
appeared to be a leading reason why Champlain attached himself to
the Algonkian military cause. In the summer of 1610, an Algonkian
Chief and Montagnais man presented Champlain with a gift of pure
copper about a foot in length while on his way to rendezvous with
an Algonkian war party. The Chief said the metal was "taken out in
pieces, and when melted was made into sheets and smoothed out with
stones." The Chief told Champlain the metal was plentiful and
could be found "on the bank of a river near a large lake." This
appears to have been a reference to Lake Huron. Champlain's map of
1632 shows the site of a copper mine on the north east side of the
Lake" (see Map 4).

In 1623, Etienne Brule, whom Champlain sent to live among the

\[ \text{References:} \]

70 Biggar, The Voyages of Jacques Cartier, p. 221; and A Collection of
Documents Relating to Jacques Cartier and the Sieur de Roberval. (Ottawa: PAC 14,
1930). Letter, 22 January 1539, from Lagarto to John the Third, King of Portugal,
pp. 77-78.

71 Biggar, The Voyages of Jacques Cartier..., pp. 221 and 250.


73 Suzanne Gjos and Lorna Iles, "Lure of Copper to 1846," in The Call of
Huron, showed the Recollets a large piece of native copper he had received from neighbours of the Huron. Brule, likely the first white man taken to the copper deposits on Lake Superior by the Native People, was supposed to have wintered with the Beaver First Nation near what would later be known as the Bruce Mines on the north shore of Lake Huron.74

Trigger observes that the military pact between the Algonkian and Champlain included the promise that, following the raids, they would show Champlain the land of the Hurons. More significantly, he would be shown the location of copper mines lying north of their country. Trigger suggests such opportunities "...must have greatly encouraged Champlain and justified the policy of personal involvement in Indian wars."75 In forging this alliance, the Algonkians showed themselves to be superior negotiators, controlling everything from the French entrance into Huron country to the disclosure of mineral deposits. The French would risk their lives in battle with the Iroquois and in return the Algonkians would take them to copper mines outside their Territory.

The explorers Cartier and Champlain were not the only Frenchmen to express an interest in metal. In 1653, Father Bressani commented on several pure masses of copper which he and others saw in the possession of Native People on the north shores. He had never been to the copper sites himself, but noted their


75 Trigger, *Children of Aataentsic*, p. 254. This point is also discussed by Gjos and Iles, "Lure of Copper...", p. 2.
distance and the transportation difficulties this would pose."

In 1659 or 1660, an unidentified priest emphasized the mineral potential of the area reporting the "...entire circumference [of the lake to be] enriched...with mines of lead in a nearly pure state; with copper of such excellence that pieces as large as one's fist are found, all refined; and with rocks, having whole veins of turquoise."  

Several Frenchmen, including Father Menard, saw a mass of copper in excess of 800 pounds on the south shore of Lake Superior. The Ojibwa "...make fires on top of it, and then hew pieces out with their axes." According to the Ojibwa, as we shall see below, this mass was not located at a sacred place.  

Father Allouez was instructed to examine the copper around Lake Superior and assess the feasibility of its exploitation in 1865. But, First Nations would not reveal the copper locations to him because it would displease the spirit keepers. Persevering, he eventually secured several sizable specimens as well as details about where to obtain more. He also examined Isle Royale, the Ontonagon River and the Keewenaw Peninsula where he was informed that many other deposits lay in the interior.  

In the Relations for 1669-1670, Father Dablon listed several  

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copper sites which the Ojibwa had disclosed to him. Among them were Michipicoten Island, St. Ignace, Isle Royale and the Ontonagon River. Emphasizing the role of Aboriginal women in the discovery of copper, he noted they often found ten to twenty pound chunks while digging holes to plant corn. Dablon received differing opinions on the source of the copper, asserting it was not an easy matter to persuade the Ojibwa to reveal information which "...they wished to conceal." The Jesuits also lamented their lack of "definite knowledge" about the copper because no proper surveys existed. According to their report substantial masses were observed on the sand. For example,

...slabs and huge lumps of this metal which we have seen, each weighing 100 or 200 livres, and much more, that great rock of copper, seven or eight hundred livres in weight seen near the head of the Lake by all who pass; and furthermore, the numerous pieces found at the waters edge in various places -- all seem to force upon us the conviction that somewhere there are parent mines which have not yet been discovered. A similar conclusion was reached by Intendant Jean Talon in late 1671. Writing to Colbert in Paris, he said: "The copper which I sent from Lake Superior and the River Ontonagon, proves that there is a mine on the border of some stream. More than 20 frenchmen have seen a lump at the lake which they estimate weighs more than 800 pounds." All these sources indicate the inability of the French to find all but the most obvious surface masses therefore

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45 Packard, "Pre-Columbian Copper Mining...," p. 191.

41 Thwaites, Jesuit Relations, Part Three, "Relations of the Missions to the Outouacs during the years 1670-1671," Vol. 55, p. 99.

42 Henry, Travels and Adventures, see Bain's footnote 3, p. 196.
underlining the necessity and importance of their reliance on Aboriginal knowledge.

Historian Louise Kellogg argues that although the French knew the locations of the principal copper deposits on the lake by the end of their first decade there, little could be done to develop the metal. While serious transportation problems existed, the biggest obstruction came from the Native Peoples. The Iroquois wars were responsible for the disappearance of a mining party commissioned by an Intendent in the late 1680s. The wars continued for two decades. By the late 1680s, these wars brought prospecting in the Great Lakes area to an end. Le Sueur attempted to gain French backing for his mining operations in 1698, but Talon's successor was reported to have been more interested in "mines of beaver skins" than in mines of metal.\textsuperscript{43} French interest in mining resumed in 1710 under the Intendant Raudot. The presence of metal on Lake Superior was obvious. Chunks could be found on beaches and verdigris colours were visible in the rock face.\textsuperscript{44} It was widely believed a mine existed on Isle Royale and other small islands in its vicinity.\textsuperscript{45} Raudot also thought there was a mine on an island in the Michipicoten River. The Fox wars in the first decade of the eighteenth century ensured these mines would not be accessible.\textsuperscript{46}

\textsuperscript{41} Kellogg, The French Regime..., p. 350.

\textsuperscript{44} Note: verdigris is the greeny-turquoise colour which occurs when copper is exposed to oxygen.

\textsuperscript{45} Letter 48, Raudot, in Kinietz, The Indians of the Western Great Lakes..., p. 374.

\textsuperscript{46} Kellogg, The French Regime..., p. 350.
Throughout the late 1720s and '30s, Louis Denis, Sieur de la Ronde mined copper and other metals, near Sault Ste. Marie, on information from Native Peoples. He built a ship near Point aux Pins to transport his metal, but abandoned operation when the Sioux-Chippewa war erupted. He hoped to influence the Chippewa toward peace, but died in the 1740s before doing so. Kellogg maintains there were no further French attempts to exploit the copper.  

Native People also told the French about extensive prehistoric lead mines in present-day Wisconsin. A Miami Chief gave Indian agent Nicolas Perrot samples in 1690, refusing to reveal the source of the lead until a fort was constructed near the mine. Perrot instructed the Miami in rudimentary European mining techniques. Kellogg emphasizes extensive deep mining operations in which Miami men extracted lead and women transported and processed ore in furnaces making hundreds of tons of 30 to 70 pound lead bars. Other Frenchmen also mined lead but these activities came to a virtual halt until the end of the Fox wars about 1733. Kellogg asserts Aboriginal People were reluctant to disclose the location of mines after the French left so that Dubuque was the last French trader to mine the lead on Native


"The mine in question was likely at present-day Dubuque and the fort in the vicinity of Dunleith, Illinois. Kellogg does not describe the nature of these techniques."
information. The Miami used the bars to trade for goods from the white settlers. To date this is the only reference I have found where Native People traded metal with Europeans for other products. As such, it seems to be the exception; Aboriginal People generally did not trade metals with non-Natives.

Because the mineral economy was centred more strongly in the Superior-Huron area than other areas in present-day Ontario, there was more opportunity for Native People to share their mineral knowledge with Europeans. One result is a relative abundance of written information about Aboriginal mineral knowledge in this area as opposed to others. As we have already seen, Native People from Lakes Abitibi to Cobalt had a wide knowledge of silver locations and utilized the metal in extensive trade networks. As early as 1686, the French relied on Aboriginal knowledge to locate a mine in north-eastern Ontario in the rich gold and silver-bearing area. In the course of the fur trade wars between the French and the Hudson’s Bay Company, the governor, Marquis de Denonville, dispatched troops under Chevalier Pierre de Troyes in 1686, to seize the British forts on James Bay. De Troyes travelled by way of the Ottawa River and Lake Temiskaming.

Before leaving Temiskaming, de Troyes was told of a metal-carrying vein on the eastern shore of Lake Temiskaming. The vein, about 100 feet in length, on Isle de College in Lake Temiskaming

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7 Kellogg, The French Regime... pp. 359-363.

was shown to de Troyes' by his Native guide, Cognac who already knew the location of the mine. With difficulty de Troyes obtained samples and word was relayed to Quebec through Cognac.

The Chevalier de Tonty was sent out that fall to further examine the mine which he believed carried lead or tin. The deposit actually held galena and some silver. This was the first mine to be detected in the "north country." Bellin referred to this location as "Anse a la Mine" on his 1755 map; it was reputed to contain silver-lead ores. (See Map 5.) The mine was reopened during the 1870s by W. Wright. It is significant because of the prominent role a Native Person played in its discovery and because it created an awareness of the potential of the area being only nine miles east of present-day Cobalt where the first great silver strike of the area occurred in 1903.

NATIVE PEOPLE AND THE REVELATION OF MINERAL LOCATIONS TO THE ENGLISH


Pain, The Way North, p. 25; Mitchell, Fort Timiskaming, p. 227; Cassidy, Arrow North, p. 133.

Map 5
Bellin’s Map of 1755 showing Ace a la Mine on an Island in Lake Temiskaming
an early North West Company trader and likely the first Englishman to work the copper mines on Lake Superior, had been interested in minerals since at least the mid-1760s, undertaking extensive explorations with his Ojibwa guides who showed him rich veins. In 1765, on the Ontonagon River, emptying into Lake Superior in Michigan, he noted extensive deposits of virgin copper on the shores and surrounding area which, he claimed, were fashioned into bracelets and spoons by the Ojibwa. One Ojibwa man showed him a 20 pound piece of copper."

Henry continued his travels and in April 1766, his guides took him to a mass of copper on the south side which he estimated at five tons. By 1767, he knew from his Aboriginal sources that the area around Point Mamance on the northeast shore was full of minerals and he eventually built two ships at Pointe aux Pins to transport the metal.

Indian Superintendent Sir William Johnson, soon to be Henry's business partner, indicated in a letter dated 1768 that First Nations around Lake Superior had sub-surface rights and that these might someday be purchased from them. Johnson stressed that Englishmen should make no use of Aboriginal lands unless they first obtained Aboriginal consent:

the Indians may be reconciled to the opening & working those mines, and that if strict care be taken to do them

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45 Henry, Travels and Adventures, pp. 195-196. Bain contends that Natives of the area had long known about this mass of copper and that it was the same one seen by Father Menard in the 1650s or 1660s. The copper mass, 95% pure, was transported to the Smithsonian Institute. Bain footnote 3, pp. 196-197.
justice in the manner I have already proposed, without any attempts to private settlements, or insisting upon charter rights as conveying property of soil, there is a prospect of its being enjoyed in security: [emphasis added] and that to obtain their Consents the Chiefs of those Nats [Nations] interested shod be assembled, when the whole shod be laid before them without Disguise, or making any promises but such as could and would be fully performed, and that on giving them a present & obtaining their Consent some persons of Interest amongst them shod accompany those who are to prosecute the design and carry the plan into execution, the future Success of which must depend upon the manner in which it is conducted, and upon the Tamper not only of those Inds whose property it is, but of any other nations. 36

Such an admission is very significant considering Johnson made it shortly after he concluded the Treaty at Fort Stanwix. As we shall see in Chapter 2 below, this admission, that mineral resources are the "property" of the First Nations, is in keeping with the Ojibwa oral tradition that First Nations retained Aboriginal Title to minerals at the Treaty of Montreal of 1760. 37

Henry and others, including Sir William, established the first British mining company in Canada in the early 1770s. From the beginning, the company was plagued with bad luck: three of Henry's men were killed in a landslide while attempting to raise the great mass of copper in the Ontonogan River. Referring to this mass and Henry's operations, Chief Shingabaossin (Spirit Stone), speaking in 1823, emphasized communal Native ownership of the copper and warned the British not to tamper with Aboriginal property:


This, Fathers, is the property of no one man. It belongs alike to us. It was put there by the Great Spirit, and it is ours. In the life of my father, the British were busy working it. It was then big like that table. They tried to raise it to the top of the hill and they failed. They then said the copper was not in the rock, but in the banks of the river. They dug for it by a light working under the ground. The earth fell in and killed three men. It was then left till now.98

Shortly after this tragedy Henry moved to the north shore.99

Henry continued to find indications of copper, but discovered no deposits of commercial significance. By 1774, he followed, then abandoned, copper traces 30 feet into a cave he dug. Soon after, his company went bankrupt.100 This type of mine is similar to the ancient mine at La Porte de L'Enfer discussed above and shows that in 1774, the British had not advanced much beyond the 'stage' of mining methods of some of the ancient miners. No further mining operations were undertaken on the north shores of the upper Great Lakes until the 1840s when the Bruce Mine opened.101

Sustained interest in the development of metals in Canada

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98 Henry, Travels and Adventures, see again Bain's footnote 3, p. 196. NOTE: English meaning of Shingabaossin's name is from Cleland, Rites of Conquest, p. 183.

99 NOTE: Henry's accounts of his adventures might lead one to think he was an exception to the pre-1850 pattern of Native People disclosing mineral locations to cement trade or military alliances or to exact support for land rights. However, it is just as likely that these were indeed the motivations leading Aboriginal People to reveal such locations, but that Henry either did not understand them or ignored them, or that the Native People did not tell him what they expected. One could argue that the numerous misfortunes and failures attending Henry's mining operations were the result of conjuring against him for failing to provide an expected compensation. For further discussion on the obligations of those who receive gifts from Aboriginal People see Cleland, Rites of Conquest, 1992, pp. 54-57.


101 Gjos and Iles, "Lure of Copper," p. 3.
West was largely spurred by the exploitation of great copper bodies on the American side during the first half of the nineteenth century. The Ojibwa largely refused to reveal the location of sacred mines to the Americans. The 1826 Fond du Lac Treaty in Michigan Territory was the first to be made in the copper region around Lake Superior. George Vizenor records what an old "mixedblood" at the American Fur Company store told him about Governor and Indian agent Lewis Cass and geologist and Indian agent Henry Rowe Schoolcraft, two of the Treaty Commissioners. Both came to examine "the sacred copper regions of the tribes." Schoolcraft was married to a mixed-blood woman and attempted to use this connection to obtain information about the location of sacred copper sites from the Chippewa and mixedbloods who held him in very low esteem for this reason, calling him a "...copper hunter [who] learned all he knew about tribal people from his mixedblood relatives, but he gives them no credit for his discoveries." The old man told Vizenor that Schoolcraft erroneously thought he had found a sacred copper site on the Ontonagon River, but "the shamans planted a chunk of mined copper

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102 Charles J. Kappler, Indian Affairs: Laws & Treaties, Vol. 2, (Washington, D.C.: Government Printing Office, 1904), "Treaty with the Chippewa, [5 August] 1826," at Fond du Lac, pp. 268-273. The minerals clause is found on p. 269, as is as follows: "ARTICLE 3: The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. But this grant is not to affect the title of the land, nor the existing jurisdiction over it."

103 Vizenor, The People Named the Chippewa, p. 42.

NOTE: Both Cass and Schoolcraft were totally unscrupulous men in the habit of using alcohol to intoxicate Native People during Treaty negotiations, especially those refusing to surrender their land, and who ensured themselves, their trader friends and their largely fictitious métis off-spring large tracts of land separately reserved or cash in lieu of reservations. See Cleland, Rites of Conquest, pp. 212-218 and 225-230.
there" as a deception.  

During the negotiation of the Fond du Lac Treaty the Ojibwa made certain significant statements regarding minerals. According to William Warren, Shig-ga-ba-ossin from Sault Saint Marie...made a speech to his fellows, wherein he urged them to discover to the whites their knowledge of minerals which abounded in their country. This however was meant more to tickle the ears of the commissioners and to obtain their favour, than as an earnest appeal to his people, for the old Chieftain was too much imbued with the superstition among the Indians which prevents them from discovering their knowledge of mineral and copper boulders to the whites.

Vizenor explains that in spite of these attitudes, the Chiefs signed the Treaty, in which their Aboriginal mineral rights were expressly relinquished to the U.S., because they believed their sacred sub-surface places and resources would remain undisturbed. They retained a strong belief "...in the spiritual power of secrets, the unspoken in the oral tradition, because what is held in secrets cannot be discovered and removed. Copper was located in sacred places, the metal had not been used in the secular production of material possessions. The elders signed an agreement on paper, through a translator, but did not tell the white men where the copper could be found." Here again we see the connection

104 Vizenor, The People Named the Chippewa, pp. 41-42. This statement clearly indicates, among other things that the Ojibwa were presently mining the copper.

105 Warren, History of the Ojibwa People, pp. 392-393. This point is also made by George Vizenor in his history of the Chippewa People. Vizenor contends that Warren "...wrote that Shingabaossin did not mean what was attributed to him in translation." Vizenor, The People Named the Chippewa..., p. 51.

between the spirit world, shamans and minerals.

Vizenor emphasizes one result of the Treaties was the separation, by at least the 1850s, of the Chippewa "from their sacred places on earth." But, by refusing to tell the Americans where the sacred copper deposits were, the Chippewa (who had ceded their land at Fond du Lac) were able to maintain a degree of control over some of their sacred places although these were now alienated from them. As we shall see, this control was partly sustained by their revelation to the Americans of non-sacred copper deposits.

Four days before the Treaty was signed, George Porter set out for the Ontonagon River to locate and remove a huge mass of copper. In a letter to one of the Treaty commissioners he stated the copper was visible above the water on the west bank of the river approximately 35 miles from its source in Lake Superior. Vizenor maintains this mass was not located at a sacred place but, was situated in a conspicuous spot in the river and had been "...presented to white men in tribal stories, [and on]...tribal maps as a distraction so that white men would not seek the sacred copper sites on other parts of the river."107 This might leave the reader with the impression this chunk of copper was of little importance except as a means to hide greater secrets. This view is incorrect. Shingabaossin unequivocally stated the Ojibwa owned the mass and by extension all minerals in their Territory.108

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108 Henry, Travels and Adventures, see Bain's footnote 3, p. 196.
Although the Chief did not refer to the mass as sacred, his words indicated the high regard the Ojibwa had for their minerals and warned that death would be the consequence of disturbing the mass. Such a warning would certainly be in keeping with the intent behind the deceptions about which Viznor was told.

Geologist Douglas Houghton examined the area in 1830, 1837 and 1841. Expanding American interest in the copper and silver deposits around Lake Superior precipitated other Treaties with the Chippewa in July 1837 and October 1842. Michigan authorities granted the first mining licenses in 1844 touching off a copper boom lasting into the 1850s.\(^\text{[10]}\)

The potential wealth to be made from the mineral region drew George Johnston, a mixed-blood fur trader and Schoolcraft's brother-in-law, back to Lake Superior in 1846. Like Schoolcraft before him, he used his Aboriginal connections to obtain information about, and samples of the silver and copper. In his dealings with American and Canadian businessmen, Johnston stressed his advantage in being born and raised by the Chippewa, believing this allowed him to induce them to inform him of mineral deposits despite their spiritual reservations.\(^\text{[10]}\)


\(^{[10]}\) PAO, George Johnston Letterbook, MU 4642, Misc. Indians, MSS #3, 1830-1853, 10 July 1845, Johnston to Messrs. Grant & Barton, New York, p. 40. Johnston's Aboriginal name was "Kah me no tay ay." 30 June 1847, Johnston to the Principal Chief Eshkebuggekooske and other head men of the Village Band of Chippewas, Leech Lake (whom Johnston refers to as) My Elder Brother & relatives," p. 43. Also, 12 December 1847, p. 51; and 29 August 1851, Johnston to the Hon. Truman Smith, SSM, pp. 78.
In October 1847, Johnston reported his failure to purchase specimens and information pertaining to the location of a mass of copper discovered by Antoine Gendron, a mixed-blood. That same month, Johnston informed Mr. Balantine, of the Montreal Mining Company at the Sault, that two American Chiefs knew the location of a silver vein on the British side of Pigeon River. Johnston agreed to help them in land dealings with either government in return for samples and information. Johnstof sold this information to interested developers or used it to gain a partnership with a company, indiscriminately sharing it and never ceasing to brag about his so-called Native 'connections.' In November 1849, he informed A.B. Dibble of Detroit of Aboriginal knowledge of copper deposits. Johnston had apparently mentioned this situation to Dibble in the past because he asserted the Chiefs who knew the copper locations "were conditionally promised one thousand dollars, for their two localities...I have again questioned my Indian friends, and they again repeat that the native copper exists abundantly." He cautioned that secrecy was essential because these deposits lay outside known mineral lands.

Johnston often attempted to ensure his Native sources were paid for their information - as we shall see below, he probably had little choice in this matter. Johnston's "Indian friends" informed him of additional mineral locations - probably copper -

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111 PAO, Johnston Letterbook, MU 4642, 6 October 1847, Johnston to General E.J. Roberts and Col. W. Porter Taylor, SSM., p. 49; 19 October 1847, Johnston to Balantine, pp. 48-47 [sic]. Note: Johnston refers to Balantine only once as an agent of Montreal Mining, on other occasions he is referred to as a member of the HBC.
and he attempted to sell the information, with specimens, to John Greenfield of the Bruce Mines. Johnston did not reveal the exact location of the deposit - this would depend on Greenfield's assent to a number of conditions including an "equal interest" for Johnston and "ample provision for our Indian friends who placed the discovery into my hands for action."\textsuperscript{112}

Johnston appeared to be using his background and upbringing among the Chippewa to take advantage of their mineral knowledge. But, as we have seen above in the case of Schoolcraft, Native People were aware of this kind of behaviour. Johnston described the process of securing information:

To obtain the Indians confidence, it is necessary to possess means to buy up such information upon their producing good specimens, and pointing out good veins, and good localities, and to insure the Indians confidence, liberal action and not stintedness is the essential trait needed.\textsuperscript{113}

Obviously, Native People were demanding cash compensation for their knowledge of mineral deposits. Johnston's primary motive, however, in securing payment to Aboriginal People was his own enrichment.\textsuperscript{114}

Aboriginal mineral knowledge went far beyond copper and silver in the Lake Superior area. Johnston discussed their knowledge of salt, coal, iron and other "precious minerals" on

\textsuperscript{112} PAO, Johnston Letterbook, MU 4642, 13 November 1849, Johnston to Dibble, pp. 66-67; 23 July 1850, Johnston to John Greenfield, Bruce Mines, p. 72.

\textsuperscript{113} PAO, Johnston's Letterbook, MU 4642, 29 July 1851, p. 78.

\textsuperscript{114} PAO, Johnston's Letterbook, MU 4642, 29 July 1851, Johnston to the Hon. Truman Smith, SSM., p. 79.
both sides of the international boundary. He called for "caution, secrecy, and liberal action" to facilitate mineral development in both countries. American copper obtained on the Keweenaw peninsula often contained over 90% pure metal. Many developers believed these deposits existed on the Canadian side where they would be promoted by W.E. Logan of the Canadian Geological Survey.

The Ojibwa had always been aware of the existence of copper in their Territories and aided or hindered miners in locating and developing it. As a result, extensive surface veins were found on the north shores at various localities including the one which would become the Montreal Mining Company’s Bruce Mine in 1848. The search for copper eventually expanded to include other metals, especially silver and gold. The following review of the role of Native People in the discovery of mines in Ontario is organized on the basis of the future Treaty regions starting with the 1850 Robinson Huron Treaty area where the first commercial copper mines were located. Succeeding this are discussions on the Robinson Superior Treaty region (1850), the Treaty No. 3 region (1873) and the Treaty No. 9 area. (See Maps 6, 7 and 8.)

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115 PAO, Johnston’s Letterbook, MU 4642, Johnston to Smith, pp. 78-79.
118 Examples of Aboriginal mineral disclosures in this part of the chapter are organized geographically around federal interpretations of the future Treaty boundaries. This type of organization is not meant to endorse Canada’s often erroneous renditions of the Treaty boundaries. Treaty boundaries have been drawn to cover all of Ontario when in fact several large areas are unceded. This all
Map 6
(Federal) outline of the boundaries of the Robinson Treaties prepared for (or by) J.A. MacRae, Inspector of Indian Agencies, indicating that the eastern boundary of the Robinson Huron Treaty did not extend to the Quebec border and that the southern boundary was Moose Deer Point.
Map 7
(Federal) Map showing colour block of the area shared under Treaty No. 9 of 1905/6 and an outline of the boundaries of the Robinson Treaties, indicating that the eastern boundary of the Huron Treaty did not extend to the Quebec border and that the southern boundary was Moose Deer Point (north of Midland on Georgian Bay)
Index to Numbered Treaty areas shown in Inset on Map 8:

<table>
<thead>
<tr>
<th>NO.</th>
<th>INDIANS</th>
<th>TREATY</th>
<th>AREA/ACRES</th>
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<tr>
<td>1</td>
<td>Ojibwa</td>
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<td>Huron-Simcoe</td>
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<td>Do</td>
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<td>1818</td>
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<td>Rice, Mud &amp;</td>
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<td>Scugogg</td>
<td>1818</td>
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<td>6</td>
<td>Alnwick</td>
<td>28 November</td>
<td>2,748,000</td>
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<td>1822</td>
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<td>Saugeen</td>
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| 8   | Ojibwa        | 9 September | N & E water-
|     |               | 1850      | shed of the  |
|     |               |           | Georgian Bay|

The purchase of 1785, No. 1 is also embraced in this Treaty

NOTE:
Green.............Height of Land [shown as eastern boundary of
the Robinson Huron Treaty]
Red................Boundaries of Treaties 1-7
Yellow.............Boundaries of Treaty No. 8
Thin Blue Line.....Limits of Tripartite claim
NATIVE PEOPLE AND THE REVELATION OF MINERALS IN THE ROBINSON HURON TREATY AREA

During the 1840s some north shore Ojibwa, especially Chief Shinguacouse of Garden River, aided certain mining promoters in their quest for metals. This was a significant departure from the secretive attitude displayed by the Crane Chief Shingabaossin at Fond du Lac only 20 years before, but as we shall see, Shinguacouse believed by sharing this knowledge with the mining promoters he was moving toward the realization of his dream.

Shinguacouse or Little Pine was the Great Chief of the Ojibwa (Chippewa) at Upper Great Lakes and the principal Chief at Garden River. He was between 75 and 78 years old in the late 1840s. Having supported the British in the War of 1812, his actions were recognized by King George III who presented him with a silver medal for his actions at Queenston Heights.

In the early 1840s, Shinguacouse had a dream directing him to open his homeland at the Sault to American Native refugees. By mid-decade he realized this vision would not emerge as long as Native People were denied secure attachment to their land and its resources. But rather than lose sight of his dream, Shiguacouse looked for new ways to make it happen.\textsuperscript{119}

One opportunity appeared to present itself in the form of mining promoters who came to the north shores with explorational mining licenses issued to them by the colonial government in 1845. Three of these were issued to Allan Macdonell, a Toronto lawyer and businessman and later an ally of the Ojibwa and Metis in their rebellion at Mica Bay (see Chapter 2).\textsuperscript{120} Macdonell may have been accompanied by John Keating, a disgraced former Indian agent, when he arrived on the north eastern shores of Lake Superior looking for metals.\textsuperscript{121} Macdonell was met by some unidentified Indian Chiefs, who objected to our occupying their lands without first obtaining their consent. I explained the object of our expedition and soon became [sic] upon friendly terms. I stated that they would be paid for their lands: the explorers paid the Government, -- the Government must pay them. I received from them such information as led us to those localities which we afterwards selected; the very locality...[at Mica Bay]...was shown us by an Indian.\textsuperscript{122}

\textsuperscript{120} In 1837, Macdonell became the sheriff of Gore District. Arthur, Thunder Bay District, p. xi. The records contain various spellings for "Macdonell" which I use throughout the text, but alternative spellings appear in footnote citations as in the original documents.

\textsuperscript{121} Keating, a provincial land surveyor and the former Indian agent at Walpole Island, was removed from office in 1845 for fraudulently obtaining Aboriginal signatures for use on an equally fraudulent Treaty document and unauthorized use and appropriation of Walpole Island First Nation annuity monies. See RG 10, Vol. 114, pt. 2, "Commissions of Inquiry, 1839," pp. 167108-167132. Less than one year later, he was looking for minerals on the north shore of Lake Superior.

\textsuperscript{122} Allan Macdonell, 18 December 1849, British Colonist, "The Indian Troubles-Letter from Mr. Allan Macdonell," p. 2. Macdonell claimed he located the copper mines from Native information. However, Allan Knight in his Ph.D. paper, "Allan Macdonell and the Pointe Aux Mines-Mica Bay Affair," (Sault Ste. Marie Museum, 1982), asserts that Keating first located the copper outcroppings on Aboriginal information (p. 32). Knight fails to reference this contention and I have been unable to find an unequivocal assertion by Keating that this was the case. It is known that Ojibwa accompanied Keating in his explorations of the area in 1845, see for instance PAC, RG 1-360-0-73, Box 6, "Report of J.W. Keating on the Exploration of Northern Shores of Lakes Huron and Superior for Mining Purposes," pp. 1-3. In the following year Keating states that "copper was discovered upon it [Lake Superior] by the explorers of the Montreal Mining Company on the twelfth of June 1846." Janet Chute believes that Macdonell and Keating were initially working together. A Century of Native Leadership..., pp. 223-224.
Shinguacoue was likely present among those Chiefs, realizing that some whites could be useful allies in helping him obtain his ultimate goal, part of which rested on the creation of a diversified economic base including, but not limited to, the exploitation of fish, game, agriculture, lumber and minerals. Revenues generated from this base would be used to support an influx of two thousand or more Native People from the United States who, it was hoped, would move to the Sault. The Chief believed the Ojibwa could obtain a great deal of the revenues needed to finance such a venture from the controlled exploitation of their mineral lands. On this basis, he agreed to share the location of copper, silver and gold mines in his land along the northeastern shore of Lake Superior and on Michipicoten Island with Macdonell and Keating. In return, the promoters were to aid the Ojibwa in gaining government protection for their land and resources.

The Ojibwa also told HBC employees and mining promoters about copper deposits on the north shore of Georgian Bay (Lake Huron), later known as the Bruce Mine as early as 1842. The original

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123 Due to the artificiality of the Treaty boundaries which were later established, Shinguacoue was designated a Robinson Huron Chief, but he had knowledge of, and interests in mines on Lake Superior especially at Mica Bay.


125 Department of Travel and Publicity, Press release, 11 August 1961, "Canada’s First Copper Mine," p. 2. The name ‘Bruce Mines’ came into existence after 1853 when the Montreal Mining Company leased part of its land to the West Canada Mining Company which started the Wellington and Copper Bay Mines. These properties together with the original Bruce Mine were identified as the Bruce Mines. The Bruce Mine was named after Governor General James Bruce, Earl of Elgin and Kincardine.
holder of the Bruce Mine was James Cuthbertson whose family had extensive trade connections, dating back to 1763, with the Ojibwa who divulged the location of these copper deposits. Acting on this information, Cuthbertson obtained the location in September 1846 and sold it to the Montreal Mining Company a year later. This was the first modern commercial copper mine. Canada’s first mining boom rested solidly on Aboriginal knowledge and willingness to share this information with the newcomers in their lands.

Seventeenth and eighteenth century Native People had shared their mineral knowledge and expertise with Europeans largely, it would appear, as a gift meant to cement alliances for trade and military purposes. During the nineteenth century, Native People used their mineral knowledge to elicit non-Native support for their land rights. As early as the 1840s, but more particularly since the 1860s, some Native People revealed mineral locations primarily for cash compensation. Some of these latter mine finders became entrepreneurs in their own right. This new breed of Aboriginal developer was responsible for many of the major mineral finds in the Robinson Treaty areas.

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12" McClelland, "Mining from 1845 to 1870," in Hornick, The Call of Copper..., p. 5.

Since 12 October 1846, Cuthbertson had demanded the government recognize him as the original mine finder. Since then, however, Keating had applied for patent to the same location. PAO, RG 1-360-0-17, Box 3, "James Cuthbertson," Memorial, and also "Abstract of Report Furnished James Cuthbertson by R.J. Gravert(?), Geologist and T.W. Bistol, Surveyor at SSM, 19 September 1846. Cuthbertson was issued "Draft Letters of Patent from the Crown -- Province of Canada," signed by the Commissioner of Crown Lands on 3 September 1852 (same file). Keating obtained the location immediately left of Cuthbertson’s at the Bruce Mine. See Map No. 19 in Chapter 3.

127 Department of Travel and Publicity, Press Release 11 August 1961, "Canada’s First Copper Mine to be Commemorated," p. 2.
Aboriginal mining entrepreneurs opened the nickel riches in the Sudbury basin. Two Ojibwa employed by mining promoter Rinaldo McConnell discovered ore in Levack Township near Sudbury in 1888 or 1889. Another Aboriginal prospector, whose rights were purchased by McConnell, made the initial nickel discovery at Clear Lake. This was an important discovery, drawing capital and labour to the area.

Between 1903 and 1911 several economically important silver and gold mines opened at Cobalt, Gowganda, Larder Lake, Swastika and Kirkland Lake. Aboriginal People had long known about the silver of this area. Writing in 1908, Anson Gard maintained Native People around Cobalt possessed chunks of silver which they had obtained from the bed of a Lake. However, they refused to disclose the location of the deposit believing death or calamity would ensue. This is not the first reference to Aboriginal knowledge and use of sub-marine minerals we have seen. These kinds of references are very significant for First Nations' headland to headland claims (discussed in Chapters 3 to 5) and more general

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124 Born in 1852 in the Ottawa Valley, McConnell came to Sudbury as a mining promoter and was instrumental in attracting capital to the area. Charles Dorion, The First 75 Years, (Ilfracombe: Arthur Stockwell Ltd., 1963), pp. 15-19.


claims to water and the lands under water in Ontario. Canadian prospectors did not generally look for silver and other minerals in the land under the water in this area until after 1900.132

Gard related another story concerning a party of prospectors travelling up the Montreal River to Fort Matchewan.133 Before arriving at their destination, the party met Aeneas Twain, an "Indian guide" and a member of the Teme-Augama Anishnabai. After discovering what the travellers were doing in his Territory, Twain disclosed the location of a closer silver deposit. The miners followed his directions and struck silver. These were rich silver finds; Gard noted "of these claims they have already sold enough to make them well-to-do, and have enough left to make of them rich men."134

J.B. MacDougall, writing about mining in northeastern Ontario in 1946, asserted early settlers in Simcoe County were told by their parents that Native People coming south to trade showed them chunks of silver which they removed from exposed veins. The Native People did not reveal the source of their silver to the whites who vainly resorted to following the Ojibwa around to discover the location of the deposits.135 In addition, Chief Tonene (also Tournene) of the Temagami First Nation staked the first claim for

132 Gibson, Mining in Ontario, p. 62.
133 The prospectors were identified as Toronto-based J.W. Sanderson, a fruit dealer, who was leader of the party and George Duncan and H. Peters.
gold at Larder Lake, touching off the rush there in 1906.136

**NATIVE PEOPLE AND THE REVELATION OF MINERALS IN THE ROBINSON SUPERIOR TREATY AREA**

During the 1860s transportation costs decreased, the Crown removed its exclusive right to precious metals and began to deter the rampant purchase of mining locations for speculation. These factors drew attention back to Lake Superior not for copper, but for gold and silver.137 (See Map 9). Many such mines were known to Native People who informed individual miners with whom they were allied as prospectors, partners and guides. However, continuous silver mining did not commence until 1866 with Peter McKellar's discovery of the Thunder Bay mine and the opening of the Shuniah (or Duncan) mine in 1867. One year later, the spectacular Silver Islet mine opened.

Several notable nineteenth century mining promoters commented on the role of Aboriginal People in early silver and gold discoveries on Lake Superior including Walpole Roland,138 Peter McKellar and Thomas Keefer. Keefer attested to the extensive and superior Aboriginal knowledge regarding gold deposits including their possession of "richer specimens of gold than any hitherto

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1. Upper Great Lakes District (silver, copper)
2. Southeastern District (iron, gold, lead, mica, apatite)
3. Western Peninsula District (petroleum, salt)
obtained by white men in this district."139

Roland asserted that the earliest silver discovery around Pigeon River was made by American mining promoter W.A. Kindred and his Aboriginal guide during the 1860s. Roland claimed this was the earliest silver discovery in the area. In 1869, an Ojibwa named Moses Pee Kongay (also Moss Pe-kong-gay) discovered the "famous Heron Bay lode" containing silver. In 1872, he showed miners Ambrose Cyrette and W. Pritchard two veins containing a mix of gold and silver near the Pic River.140

Gold was discovered around Michipicoten by an Aboriginal woman. Will Teddy and his wife were camping on the south shore of Wawa Lake when Ms. Teddy noticed shiny yellow traces in the quartz along the bank. Securing specimens for the local merchant, which proved to be gold, the Teddys put their own price on their knowledge and refused to divulge its location until paid $1,000. Their price was met by promoter Jack McKay of Sudbury. Thus, they had maintained control over the location until their monetary demands were satisfied. Although this discovery did not lead to the establishment of a mine on the site, it triggered a rush into the area the following year.141

Present-day commentators including Marion Henderson and

139 Keefer, "An account of the development of mining for precious metals..." p. 287.

140 Roland, Algoma West..., pp. 180-181. Cyrette may have been a Native Person or fathered children (who remained on the Reserve) with a Native woman. There was a constable Ambrose Cerrette in the Fort William First Nation in 1904. PAO, A.E. Williams/United Indian Bands of the Chippewas and the Mississaugas Papers, F 4337-4-0-3, Fort William, Minutes of a Special Council, 1 June 1904; and 6 June 1904.

Robert Surtees argue the establishment of railways led to the location and opening of the mineral wealth in northern Ontario. Although there was a proliferation of mining claims following the initial survey and clearing of timber operations preceding the coming of the railway lines, this kind of argument merely serves to obscure the fact that Aboriginal People knew the location of copper, gold and silver mines and the vital role they played in the 'discovery' of such mines. Henderson, for example, maintains that once the Canadian Pacific Railway (CPR) was completed from Montreal to Winnipeg, there was a significant increase in gold and silver staking. Referring to silver, she states "No longer was it Nanabozho's 'Shuniah,' known only to the Ojibways; for the lid of the treasure had been pried open to display rich contents, and within the white man's grasp were fine veins of silver, Queen of Metals," implying the Ojibwa lost control of their mineral wealth after the CPR crossed through their Territory.

In contrast, Thomas Keefer, writing in the nineteenth century after the CPR had passed through the north western mineral lands, emphasized a number of significant pre-CPR mineral discoveries based on Aboriginal knowledge and assistance. One of these was the Rabbit Mountain Mine which Weisaw told Oliver Daunais about in 1881. Weisaw, a member of the Fort William First Nation, lived

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143 Oliver Daunais was born in Lower Canada in 1836. Originally a trapper, he became a successful miner operating in the area from Lake Nipigon to the Minnesota boundary. Arthur, Thunder Bay District, footnote #32, p. 161. By 1887, Daunais was believed to be one of the most successful men in Port Arthur. Nicknamed the "Silver King," he found, owned and exploited most of the mines in the Thunder Bay District on information from Weisaw. Daunais, the prospector, was aided in mining
around the Grand Portage on Pigeon River and had a summer camp at the upper end of Whitefish Lake. His Territory and the area he crossed from Grand Portage to Whitefish Lake contained silver. Weisaw knew the location of many deposits but, like other Native People, he was initially reluctant to disclose them. In spite of this, he became a very successful prospector and entrepreneur, appearing to have overcome his reluctance in stages. In 1881, although he would not go to the mine site himself, "...he gave such a perfect description of it as enabled his white trapper friend to find it readily."144 This was likely the first step Weisaw took to test the ancient taboos against revealing mineral locations. Because no evil befell him following the disclosure, he became bolder and began to lead Daunais to the mineral deposits.

It was Weisaw's knowledge of mineral locations and his willingness to share this information with Daunais which led to other significant silver finds. Indeed, the discovery of the Rabbit Mountain mine, and not the completion of the CPR, set the stage for intense activity in the area, being only the second successful operating silver mine there. Then, in 1883, Weisaw, Daunais and Captain Dan McPhee discovered the Rabbit Mountain Jr., Silver Creek, Twin City or Porcupine and Beaver Mines. Following this, a Native man known as Chedan discovered silver at mining locations R48, 140T, 143T and 144T. The next year, Weisaw located ventures by his associates: surveyor, W.H. Furlonge; lawyer, Thomas Keefer; and miner, Dan McPhee. See Keith Denis, "Oliver Daunais, the 'Silver King,' Thunder Bay Historical Museum Society, Papers and Records, Vol. 2, 1974, pp. 12 and 14.

144 Keefer, "An account of the development of mining...." p. 287.
exceedingly rich native silver deposits at the east and west ends of Silver Mountain. 

(See Map 10.) Far from having lost control of their minerals because of the CPR, the Ojibwa controlled and regulated white access much as their ancestors had done.

Walpole Roland discussed many of these discoveries in greater detail and his account of the discovery of the Palisades R97 and R98 locations provides new insight into Daunais and Weisaw. During the winter of 1883 and 1884, Roland hoped to induce a group of Fort William Ojibwa to lead him to a silver mine. But, Chief Peter Crow refused to disclose its location, because of a bad dream in which he was cautioned not to show the whites the location of the "mountain of Shuniah" for at least several months or he would die. Crow feigned illness, but Roland stayed, hoping the Chief would soon "have better dreams." Crow was obviously reluctant to share the information with Roland and this sentiment increased the following day when Weisaw, also of the Fort William First Nation, arrived and played on the Chief's fears, upsetting Crow so much that he left. Next, Weisaw tried to convince Roland that the Chief spoke nonsense. It appears that Weisaw had attempted to use his influence as a Native Person to block Roland from discovering the location of the mine. But, Roland did not give up and eventually found and applied for the Palisade lode. When he failed to have the location surveyed, his application lapsed and was soon surveyed and patented to Daunais. Although Roland found the vein, it would appear Weisaw, either on his own initiative or under

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Sketch showing some of the mines discovered by Weisaw in the Upper Great Lakes Mining District

Upper Great Lakes District

1. Prince's Mine
2. Bruce Mines (Copper Bay, Wellington, Taylor, Bruce)
3. Wallace
4. Quebec
5. Enterprise
6. Thunder Bay Mine
7. JA Mine
8. Beck
9. Silver Islet
10. Shumah (Duncan)
11. Beaver
12. Rabbit Mountain
13. Silver Mountain
14. Sadger
15. Caribou
16. Sultana
17. Cascade & Victoria
18. Murray
19. Frood
20. Copper Cliff
21. Sibbe
22. Evans
23. Creighton
24. Vermilion
25. Garson
Daunais' instructions, tried to impede the attempts of other miners in locating veins. Roland noted Daunais and Weisaw continued their explorations in spite of possible repercussions from the spirit world and that they went on to discover silver in the East and West end mines and the Medicine Bluffs of White Fish Lake. Shortly after Weisaw's discovery of the Silver Mountain mines, an unidentified Aboriginal Person informed Daunais of a silver location which became the Little Pig Mine.

Weisaw's knowledge and ability to locate mines for Daunais and his associates did not go unrewarded. In 1884, Francis Keefer bought out Weisaw's interest in T39 and T40 (the Rabbit Mountain Mine) for $1000.00. Daunais paid Weisaw a finder's fee of $10,000 for revealing the location of the Silver Mountain east end mine and $15,000 for the west end mine. In addition, he accepted $5,000.00 to abandon his interests in the Silver Mountain mine in 1886. Clearly, Aboriginal People who were willing and

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147 Blue, Annual Reports... 1886, (Keefer) p. 408.
148 Weisaw's mines proved very lucrative; the following are low output estimates for the group of mines by Weisaw while they were in operation: Silver Mountain $600,000; Beaver $50,000; Badger and Porcupine $300,000; and Rabbit Mountain $50,000. Gibson, Mining in Ontario, pp. 43-44.
149 Blue, Annual Report..., 1886, p. 376.
150 Denis, "Oliver Daunais, the 'Silver King," pp. 15 and 17. It is not known whether Weisaw determined the amount he was paid for his interest in these locations but, he appears not to have been taken advantage of. For further information on transfers of mining claims between whites see LeBourdais, Men and Metals, pp. 29, 129-130 and 134. Additional 'buy-out' figures are also given on pp. 156-157 and 182.

Aboriginal prospectors were, however, not always treated with such respect. Rene Fumoleau, in his study of Treaties 8 and 11, has documented one particularly obnoxious case of white abuse. In discussing mining activities around Great Slave Lake and the treatment of Natives, Fumoleau emphasizes the behaviour of Ed Nagle, a Fort Resolution trader, who admitted that "...prospectors examined samples of
able to locate mineral deposits were important to promoters because of the knowledge they possessed. But, Weisaw and other Aboriginal People like him were not selling the collective subsurface interests of the First Nation. As these Aboriginal mining entrepreneurs well knew an individual could not sell such rights. Nevertheless, Weisaw and other Aboriginal mine finders accepted cash or other compensation as individuals for their knowledge and expertise in locating particular deposits.

Some time prior to 1885, an unidentified Native Person discovered zinc north of Nipigon Bay and informed the McKellars and W. Pritchard of the location which eventually became the Zenith Zinc Mine on location 30 T. Thomas Keefer recovered about 1000 tons of zincblende from the mine in 1885.\textsuperscript{151}

During the summer of 1930, James Thomson was appointed to investigate the minerals near Heron Bay on Lake Superior. He and his party were told by some Ojibwa from the Pic River Reserve about Lake Manitouwadge which means 'the cave of the great spirit.' The Ojibwa informed Thomson of a "greenstone belt in the Manitouwadge country with 'many little burns' -- rust-coloured 'gossans.'" Thomson pursued this information to no avail the following summer with Moses Fisher, his Aboriginal guide. Thomson's samples showed no gold and the area remained undeveloped until after the Depression. Then, in 1943, Moses Fisher returned ore shown to them by an Indian and then 'ridiculed the native and told him it was valueless, but made certain to find out where he had found it. They then sneaked off to stake the area.'" \textit{As Long As This Land Shall Last}, (Toronto: McClelland and Stewart Limited, 1973), p. 48.

\textsuperscript{151} Blue, \textit{Annual Report...}, 1886, p. 402.
to the area and staked the claim of a very rich copper deposit eventually known as the Geco mine which during the 1950s occasioned a massive rush involving more than 10,000 claims in the course of one winter.\footnote{Smith, \textit{Harvest from the Rock}, pp. 310-313. Geco, now owned by Noranda, had produced metals valued in excess of \$1.6 million by 1984.}

In 1944, Peter Moses from the Heron Bay First Nation discovered gold in what is now the western sector of the Hemlo gold zone on Highway 17 at the Black River a few miles east of the Reserve. Moses showed the location to a Mr. Ollmann of Heron Bay, who with Dr. J.K. Williams of Maryland staked the property in the fall of 1945. Williams staked eleven locations which still remain in the family and are set "...in the heart of the present strike zone."\footnote{Matthew Hart, \textit{Golden Giant: Hemlo and the Rush for Canada's Gold}, (Vancouver/Toronto: Douglas & McIntyre, 1985), p. 26 and "Hemlo Timetable," n.p.} The gold field is within an area of land claimed by several First Nations, including Pic Mobert (i.e. Heron Bay), who were not signatories to the Robinson Superior Treaty.\footnote{Lise Hansen, "Research Report: The Anishinabek Land Claim and the Participation of the Indian People Living on the North Shore of Lake Superior in the Robinson Superior Treaty, 1850," ONAS, 1985.} (See Maps 11 and 12.)

**NATIVE PEOPLE AND THE REVELATION OF MINERALS IN THE TREATY NO. 3 AREA**

The Treaty No. 3 area of northwestern Ontario likewise contained a wealth of minerals, especially gold. Although Marian Henderson maintains gold mining was not important in northern Ontario until about 1900, there were several significant early
Map 11
Map showing unceded area in Robinson Superior Treaty Area

Legend

- Area covered by the Anishinabek Land Claim, Nov. 7, 1984
- Boundary of the area covered by the Robinson Superior Treaty, 1850
- Boundary of the area covered by Treaty 9 (1905 and 1906)
  and its Adhesions (1929 and 1930)

ORPP #44 (revised)
MHR
Nov., 1984
Map 12
Map showing the location of the Hemlo gold mines in the unceded area in the Robinson Superior Treaty area.
Native People led the whites to 'discover' gold near Shebandowan Lake, the Seinne and Rainy Rivers, Lake of the Woods and at Rat Portage, as well as further north at Red Lake.

In 1870, Ojibwa Jean Baptist and Michael Puchot discovered gold near Jackfish Lake, west of Shebandowan, and informed Peter McKellar, one of Daunais's associates. McKellar located the vein in 1872 and began operations, but was stopped by Chief Blackstone and others who refused to allow the removal of their minerals without compensation and a Treaty (see Chapter 2). In the same year, Mamabia discovered gold in a vein on Partridge Lake, passing this information to Archibald McKeller, Peter's brother. The discovery of these mines led to the opening of the area further west with additional finds in the Lake of the Woods, especially at Rat Portage (Sultana Island).

Sometime during the 1870s, Chief Kebaquin informed white prospectors of a valuable gold vein in his Territory. This disclosure must have taken place prior to the signing of Treaty No. 3 because in that Treaty Commissioner Simon Dawson identified Ke-ba-quin's Territory as gold-bearing. The richness of this vein, known as the Mammoth Gold Lode, was evident by the early 1880s. In March 1881, W.H. Furlonge and others got lost enroute to survey the location. About 30 miles from Lac Des Mille Lac they

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155 Henderson, _The McKellar Story..._, p. 37.

156 Townsley, _Mine Finders_, pp. 87-88. See also Roland, _Algoma West_, p. 179.

ran into Chief Blackstone who agreed to guide them to the gold vein over 60 miles away. According to an editorial in the Thunder Bay Sentinel, Blackstone took the party to Kebaquin's unconfirmed Treaty No. 3 Reserve, #24C, at the north end of Lake Konipi. Because the party did not know where it was going anyway, the information that it was on the Reserve must have come from the Chiefs. The editorial makes it clear that the party never left the Reserve to carry out its survey of the exceptionally rich and highly visible vein.\(^{158}\)

It is significant that the gold was described as being in Kaba-quin's Reserve in 1881 because this gold was the subject of a second survey in November 1896, when Alexander Lord Russell laid out mining locations R136, R137 and R138 outside of the Reserve.\(^{159}\) As we shall see in Chapter 2, this discrepancy was symptomatic of government directions explicitly instructing surveyors to exclude known gold/mineral locations from Reserves.

The traditional mineral knowledge of the Treaty No. 3 Ojibwa led Dawson to report in 1874, that they "...have among them specimens of native gold and silver ore, which they affirm is to be found in places known to them in abundance, and the rock


\(^{159}\) MNR, Surveys Branch, Tp. - McKenzie Lake, BMA 484911 (2), Russell, "Mining Locations R 136 & 7...," see notation on Map.
Several people claimed responsibility for the discovery of X42, a gold mine on Sultana Island, part of the unconfirmed Rat Portage Reserve #38B (See Map 13). The dispute came to a head in 1886 when Canada allegedly secured a surrender for the part of the Island containing the mine. Canada agreed to hear witnesses for the two major claimants: Joe Capistran, a French Canadian, and Jacob Henessey, a resident of Rat Portage.

Henessey, who had the property surveyed in June 1881 and had applied for patent, claimed to be the discoverer. But, he did not obtain the land because it was part of an unsurrendered Reserve belonging to the Rat Portage First Nation. Henessey produced several witnesses who supported his claim with precise dates. In contrast, Capistran asserted that he had been shown the location of the gold vein which later became X42, in 1876 or 1877, by Keeshekonse (The Little Sky) who also testified on his behalf, but was uncertain about dates. Keeshekonse maintained that other Ojibwa had told him the location of the gold deposit years before. The Ojibwa were very aware of the resource potential of the island and others in its vicinity above and beyond the

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161 Additional problems resulting from this and related actions are discussed in Chapter 4.

Map 13
Map showing position of Mining Location X42 on Sultana Island, part of Reserve #38B
minerals which they knew existed there.

Capistran brought forth a number of other Aboriginal witnesses and two whites all of whom identified him as the mine finder. However, their testimonies were wholly lacking in exact dates. This was viewed as a problem by those assessing their statements and was one of the reasons why Henessey was declared to be the original discoverer. Such a bias, however, was unfair because it did not take into account the nature of oral tradition where 'dates' and other European linear concepts have little relevance. Because this kind of evidence was viewed as 'vague,' testimony for Capistran was dismissed as inconsistent.\textsuperscript{163} Regardless of the federal 'investigation' into the matter, it is clear the Ojibwa of Rat Portage knew and had known about the location of gold deposits in their Territory. Currently, Sultana Island among others is the subject of a long-standing and unresolved land claim.

In 1882, Native trapper Jim Shogonosh discovered iron ore at Atikokan, north of present-day Quetico Provincial Park. This find led to the opening of the Atikokoan and Helen mines.\textsuperscript{164} Gold was discovered about a mile and one half north of the Seine River by an Aboriginal Person. In 1889, an Ojibwa man was employed by the Wiley Brothers of Port Arthur to locate iron ore in this area. His

\textsuperscript{163} Two other claimants appeared in the following year, but they will not be considered in this discussion. One, however, gave evidence which indicated that Henessey had not discovered the mine by himself. Thus, Henessey had obscured the truth in order to make himself appear as the sole discoverer. While Capistran's Aboriginal witnesses were discounted because of the lack of precise dates in their testimony, no penalty was brought against Henessey for his misinformation.

\textsuperscript{164} Townsley, \textit{Mine Finders}, p. 64.
samples from the west side of Lake Harold were initially deemed worthless, but later were found to contain gold. By 1894, the Wileys were committed to the extensive development of the location.\footnote{Fifth Report of the Bureau of Mines, 1895. Section III, "A Tour of Inspection in Northwestern Ontario: Windsor to Fort William," see "Lake Harold Gold Mine," pp. 145-146. Note: it is not known if the initial assessment was made in order to defraud the Ojibwa of any claim of compensation.}

The Ojibwa continued to share their mineral knowledge with the whites, leading to the development of significant gold locations. During the 1890s, Ojibwa at Shoal Lake located several mines (see Map 14). In 1894, an unidentified Aboriginal person informed Mr. Bunn of the HBC at Rat Portage about the ore deposit which later became the site of the Mikado Mine.\footnote{Sixth Report of the Inspector of Mines, 1896. Section 2, "Third Report on the West Ontario Gold Region," p. 105.} An unidentified Native man discovered the rich gold location at Bag Bay in the summer of 1895, sharing samples with Bunn.\footnote{Fifth Report of the Bureau of Mines, 1895, Section II, "Second Report on the Gold Fields of Western Ontario," A.P. Coleman, p. 49-50. Bun, eventually acquired the location at Bag Bay with Dr. Scovil of Rat Portage.} It is not known whether these Native People were compensated for their knowledge. During the summer of 1896, "Indian Joe" discovered free gold on the location which soon became vein No. 1 of the Yum-Yum Gold Mining Company. "Indian Joe" sold his interest to Dr. Edmisou of Rat Portage who in turn sold to the Yum-Yum Company that fall. One of the veins at the Yum-Yum was called the "Indian Joe" vein.\footnote{Report of the Bureau of Mines, Vol. 7, First Part, 1898; "Mines in Northwestern Ontario," James Bow, Inspector, p. 49 and Report..., for 1899, "Mines of Northwestern Ontario," Bow, p. 58.}

In June 1895, a Native Person discovered the gold location
Map 14
Map showing locations of some of the mines discovered by Aboriginal People on Shoal Lake
which became McKellar's Empress mine near Jackfish Bay. The man took samples to the McKellars and the family purchased his rights for an undisclosed amount. Peter McKellar informed mining inspector A. Slaught that these gold discoveries were "one of the most valuable finds in the district." When gold production peaked at $424,568.00, in 1899, output from three Lake of the Woods mines was largely responsible: the Sultana, Mikado and Regina. Native People had discovered the first two and had drawn attention to the mineral wealth of the area in general.

The Red Lake gold rush proper did not start until 1926 but Ojibwa residing close by first pointed out the mineral potential of the area to a survey party in 1872. Canada dispatched A.R.C. Selwyn of the Geological Survey of Canada (GSC) to examine the area near Lac Seul. While there the Ojibwa told him of 'Slatey' rocks at Red Paint Lake. Although he did not visit Red Lake, Selwyn included the words of the Ojibwa in his report. This area became part of Treaty No. 3 in 1874 when the Ojibwa signed an adhesion. Between 1883 and 1924, other survey parties explored the area.

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172 Donald Parrott, The Red Lake Gold Rush, (no publisher, 1964), p. 13. Parrott states that Red Paint Lake was also called Onimini Sagaigan. In notations at the foot of the page he defines 'onimini,' "literally [as] Vermilion or Red Ochre. Parrott notes that there is a Red Paint rock in the middle of Red or 'Sagaigan' Lake. Portions of this rock were "crushed into a powder and mixed with oil or grease and used for war paint by the early Indians." Also L. Carson Brown,
The North Western Ontario Exploration Company was the first to mine the area for gold, but had to abandon operations because of transportation difficulties. The real break-through came after 1918 when George Swain and Findlay McCallum began to investigate several potential silver sites disclosed to them by the Ojibwa. At first they found only iron ore which they staked and patented. Then, Swain informed McCallum of "...some rusty mineralized quartz veins which the Indians had shown him on the west of East Bay in Red Lake which he thought might contain lead ore." These veins were staked in 1922 and seven of nine samples indicated gold. Eighteen additional claims were staked and from these 20 samples were taken, 11 of which showed gold. Between 1922 and 1925, McCallum and others including Joe Red-Sky, a Native Person, carried out assessments on the various claims. These 26 claims were the foundation of the McCallum Red Lake Mines Ltd. 173

Although most sources give the start-date of the gold rush as 1925 and credit it to nonNatives, 174 it is clear the Ojibwa had a prior and very significant place in events leading to the discovery of gold in this area.

NATIVE PEOPLE AND THE REVELATION OF MINERALS IN THE TREATY NO. 9 AREA

Aboriginal People in northeastern Ontario both collected and


prized gold. A Native man, jailed at Mattawa for the murder of the Chief of the Night Hawk people in 1878, was discovered to be in possession of two gold nuggets. While being interrogated by his jailer, the prisoner refused to state how and where he had come into possession of the gold: "Unsmiling and morose, he would only reply to questioners 'Shoniah' - gold in his tongue.'" The man died in jail and took the secret to his grave. The Porcupine gold rush of 1907 involved several locations on the shores of Night Hawk Lake and on nearby Pearl Lake. Native People had long been aware of this gold even if they did not reveal its locations to the whites.

One of the first surveyors to examine the resources of northeastern Ontario and the area which would become Treaty No. 9 was Robert Bell of the GSC. His reports are impersonal and it is not always possible to determine from whom he received information and specimens. However, it is clear Bell obtained a great deal of both from Native People and furthermore that Natives had earlier educated officers of the HBC in these matters as well. Regarding mineral samples given to him by Captain Taylor of the HBC, Bell asserted:

The specimens were obtained by an Indian from Long Island, south of Great Whale River [in Quebec]. I was told by Mr. James L. Cotter, of the Hudson's Bay Company, to whose intelligent observations I am indebted for much valuable information, that a similar mineral

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175 Townsley, Mine Finders, p. 45; LeBourdais, Men and Metals, pp. 150-153.

was reported by the Indians as occurring some miles inland from Little Whale River. I could ascertain nothing in regard to its mode of occurrence, further than that the Indian who brought the specimens from Long Island stated that there was plenty of it there. It is not clear what motivated this unidentified Aboriginal person to bring samples to the geologists, but he was willing to aid the whites only so far. While he brought samples, he refused to disclose the precise location of the deposit(s).

In the late 1870s, during the course of the dispute over Ontario's boundaries, the province despatched two stipendiary magistrates to the contested areas. Borron was sent to northeastern Ontario, the area of the 'second' boundary dispute. Beginning in 1880, he produced annual reports on the resources of the area including minerals, timber, fish, and soil. Borron's reports indicate his extensive reliance on Aboriginal knowledge not only to get around the country, but also to discover its mineral potential. He also relied on Bell's 1875 report which as we have seen, and will see through Borron's reports, was based on Aboriginal knowledge.

While returning from Moose Factory in 1880, Borron emphasized the existence of "...a fine bed of gypsum, known to the natives as the 'White Rocks,' ...in the banks of the main Moose River, about thirty-five miles above Moose Factory." This was the

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177 Bell, "Report on an Exploration...," p. 325.
178 Cartographer Louis Gentilcore identifies and defines this other boundary dispute area as including the land and resources north and east of the height of land and the Albany River. See Chapter 4.
179 Borron, "Reports...," 1880, pp. 25.
only significant deposit he noted. Bell's 1875 report had referred to the "White, or Gypsum, Banks," on the Moose River but did not mention Aboriginal knowledge of them.\(^{180}\) Borron's report makes clear that Bell's knowledge had come from Native People.

Borron emphasized Bell's previous examination of brown coal (lignite) on the banks of Coal Brook, located about 100 miles from Moose Factory on the Missinabi River. Bell credited HBC employees with knowledge of the location, but according to Borron's account Native People in the area had long-standing knowledge of such deposits. Borron reported another bed of lignite specifically known to Native People, nine miles above the mouth of the Opazatika or Poplar River which emitted large quantities of gas. Borron noted that "this phenomenon has been observed by the Indians from time immemorial, and the locality has received the name of the 'Bubbling Water.'"\(^{181}\) Both Borron and Bell believed this location contained coal, but it was later identified as a natural gas deposit,\(^{182}\) making Native People responsible for the first 'discovery' of natural gas in north-eastern Ontario.\(^{183}\) (See Map 15.)

Borron's 1881 report indicated that he returned to the

\(^{180}\) Bell, "Report on an Exploration...," p. 321.


\(^{183}\) Bell's 1875 report also makes note of the lignite or coal in this location. He states that it "...is said to be seen in situ during very low water in the mouth of Coal Brook." This, however, is one of the many occasions where Bell does not state who "said." See p. 326.
Map 15

Map showing some of the mineral locations pointed out to Robert Bell and Edward
Opazatika River where his Aboriginal guide was responsible for the discovery of a new and important location:

Emichoo, my bowsman, brought me a piece of lignite, which he had found in the bank of the river, a short distance above our camp, and about midway up the rapids...I brought away several specimens of the lignite, or coal, from this bed.\textsuperscript{184}

Borron also obtained information on the location of gypsum deposits near the "White Rocks" in 1882. After collecting pieces of surface gypsum on the coast about mid way between Moose Factory and Albany, Borron "...was informed by one of my Indians from that part of the country that it could be seen in place at the bottom of a bay not far off when the tide was out."\textsuperscript{185} This provides more evidence that Native People were aware of mineral locations in the land under water. This reference is particularly significant because it indicates Aboriginal knowledge of minerals in the lands under Hudson's Bay. Borron also agreed with Aboriginal assertions that metallic ores similar to those found around Lake Superior existed near Lac Seul although he did not personally examine them.\textsuperscript{186}

On more than one occasion Borron lamented the fact that the mineral potential of the Hudson's Bay basin as a whole was difficult to assess because very little rock was exposed at the surface. He noted the absence of significant mineral veins in

\textsuperscript{184} Borron, "Reports....," 1881, OSP, No. 44, p.12.

\textsuperscript{185} Borron, "Reports....," 1882, OSP No. 53, p. 12. This information is repeated on pp. 43-44 where the location is identified as half way between Moose and Albany at Cock Point.

\textsuperscript{186} Borron, "Reports....," 1882, OSP No. 53, p. 12.
virtually all parts of the territory. This explains why Borron's reports on minerals are repetitive and underlines the importance of his Aboriginal guides and sources.

Borron's 1888 report reflects this view and identified only a small area as having any significant mineral potential. That area commenced a little above and extended about thirty miles below the long portages on the Abittibi, Mattagamik and Missinabi branches of Moose river. This was the area of the white rocks and bubbling water. Borron reported the area contained iron ore, lignite coal, china clay, ochres and sands of "economic importance and value."

In 1890, Borron again returned to Coal Brook where he and others, including an Aboriginal voyageur, attempted to sample the coal suspected to be on the bottom of the river. Over 20 series of holes were sunk. By the end of the 1880s, then, there was not much Borron knew about the mineral potential of the Hudson's Bay basin which Native People had not told him.

Perhaps because the mineral potential of the area was still virtually unknown by the end of the 1880s, except for those areas disclosed by Native People, GSC men, particularly Robert Bell, looked forward to the coming of railways. Bell believed that any of the various projected lines would open up the mineral wealth of

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the north. His sentiments were quite timely since by 1889, part of the Canadian Pacific Railway crossed through the Aboriginal hunting grounds of the northern Ojibwa. This attracted prospectors and others to the area and intensified the demands of the Ojibwa and Cree for a Treaty. The proliferation of prospectors and survey parties displeased the Aboriginal People who generally did not continue to share their mineral knowledge with the newcomers after 1890. As we shall see in Chapter 4, Native anger came to a head in 1903 and 1904 when the Crane Chief stopped two provincial mineral exploration parties.

No one individual in the Treaty No. 9 area emerged as an entrepreneur similar to Weisaw and no one Chief seemed to view mineral development as part of a larger vision like Shinguacouse. But, Native guides, packers and others were employed by surveyors and paid by the GSC or Ontario for their mineral knowledge and labour. Others who contributed information to the surveyors were likely given something in return, such as provisions or tobacco.

CONCLUSION

First Nations have continued, to this day, their long reverence for and protection of mineral resources. This flows naturally from the Aboriginal world view in which minerals were connected, on a sacred level, to the spirit world and water (particularly Michipicheu), dreaming and well-being. On a secular level, minerals were used in the manufacture of tools, weapons,
ornaments, art and trade. Unless nonNative commentators understand that minerals are animate and imbued with spirits, thus demanding one's awe and respect, and that some minerals are sacred, thus demanding protection, they will not understand the continuing importance First Nations place on their unrelinquished mineral resources and they will not perceive the basis for the inherent Aboriginal Title and Rights to such resources. Indeed, they will see only a fragmented portion of the connection between Aboriginal Peoples and their minerals. Because most nonNative historians have paid so little attention to the Aboriginal spiritual world, they have missed the basis for the links between Native Peoples and their minerals.\(^1\)

First Nations perceived almost from the beginning of contact that Europeans desired metals including copper, gold and silver. It was clear that Aboriginal People as far away from Lakes Superior and Huron as the Atlantic ocean and present-day Montreal knew copper came from the west in the vicinity of a great lake.

Many Aboriginal People agreed to share information concerning the mineral locations with the newcomers. Such information, however, was divulged on their terms. Part of the First Nation agenda in the seventeenth and eighteenth centuries was to control white access to non-sacred mineral deposits until a suitable trade and/or military alliance could be arranged. In order to ensure this outcome, it appears that metals were sometimes given to

\[^1\] Johnston, *The Manitou*; and *Ojibway Heritage*; also Vizenor, *The People Named the Chippewa*. 
nonNatives as gifts. This was the case with the St. Lawrence Iroquois, the Algonkians and the Miami in their respective dealings with Cartier and Champlain and Perrot. In the nineteenth century, Native People used gifts of metal to gain nonNative support for their land rights. This was the case with some of the Chippewa dealing with George Johnston and Shinguacouse. In this same period, Native People began to have direct dealings with the numerous prospectors entering their Territories, who largely offered cash compensation. This was the case with some of the Chippewa who had dealings with George Johnston and was primarily, so it would seem, the case with Weisaw, the Teddys and numerous other Native People from the 1860s onward. But, as the actions of Blackstone and Kitchipines show, First Nations also continued to emphasize their ownership of the minerals, refusing to allow white exploration or development until a Treaty could be arranged. Non-Natives were anxious to employ Aboriginal prospectors because they already knew where the minerals were, thus saving the promoters enormous amounts of time and money. As we have seen, some of these Aboriginal discoverers were paid very well for their knowledge and some, like Weisaw, became mining entrepreneurs themselves.

First Nation control of their minerals did not preclude the English settler government and its successors from trying to appropriate and control Aboriginal minerals in their Territories. Both the Crown and settler governments failed to uphold the laws of the land when they allowed mining promoters and survey parties to enter these Territories in advance of Treaties. The interests
of mining companies and their agents clashed with prior Aboriginal interests and this provided the leading reason for the conclusion of several of the largest Treaties in Ontario, including the Robinson Treaties of 1850, Treaty No. 3 in 1873 and Treaty No. 9 in 1905/6 and 1929/30.
CHAPTER TWO

TREATIES AND MINERALS IN ONTARIO:
THE EARLY TREATIES, THE ROBINSON TREATIES,
AND TREATY NO. 3

INTRODUCTION

Treaties in Ontario can generally be divided chronologically into two groups - those made prior to the Robinson Treaties of 1850 and those which followed until Treaty No. 3 was signed in 1873. The former were largely initiated by the Crown's representatives to cement peace and friendship after 1760 and to open the areas adjacent to, and north of Lakes Ontario and Erie and their back areas for settlement during the 1780s and thereafter. The latter were generally initiated by First Nations demanding compensation for the use of their lands and resources and resisting the illegal incursions of miners in their Territories. The British Imperial and then the Canadian government concluded these latter Treaties to ensure the safety of miners, mining and related activities. First Nations specifically retained sub-surface and sub-marine mineral rights and the Crown recognized and affirmed this fact.

The written government versions of the Treaty terms do not accurately reflect what First Nations retained and what they actually agreed to share. For this reason a Treaty cannot simply be what the government prints on paper; a Treaty must include the historical context, oral traditions, negotiations and the Aboriginal understanding of the negotiations. This has been recognized in some, but not all, judgments of the Supreme Court of
Canada.  

EARLY TREATIES AND SETTLEMENT

Following the British victory over the French in North America, British officials negotiated several Treaties with the First Nations who had been French allies. According to wampum in the possession of the Rama First Nation the Treaty of Montreal in 1760, reaffirmed the Nation to Nation relationship between the First Nations and the Crown and confirmed inherent Aboriginal Title and sovereignty and continuing self-determination for the present and the future.¹

Under this Treaty, also remembered in the oral tradition of the Miskokomon family of the Walpole Island First Nation, First Nations retained among other things explicit rights to water and minerals. In part, this tradition asserts:

Then followed the French and English war which ended in 1759, and a short time later a treaty of peace was concluded at Montreal. This treaty provided for the French occupancy of the Province of Quebec, and the English occupancy of the occupancy of Ontario, reserving to the Three Tribes a strip of ground, 66 ft. wide on each side of all rivers, 16 ft. wide on each side of all creeks and 99 feet wide along the shores of all lakes and around all lands entirely surrounded by water, also the use of all lands not fit for cultivation, and the right to hunt and sell timber in any forest, and to fish in any waters, also reserving to the Indians all stone, precious stones, and minerals. These strips of land

¹ For example, see Taylor and Williams (also known as the Bullfrog case), R. v. Taylor and Williams, (1981), 34 OR (2d) 360 (CA) and Sioui, R. v. Sioui, (1990) 70 DLR (4th) 427. However, other Supreme Court judgments have failed to place as much weight on such issues, such as Temagami, "Reasons for Judgment," Bear Island v. The Attorney General for the Province of Ontario, 15 August 1991 and the very recent Howard decision.

were intended as a permanent inheritance to the Three
Tribes, where they could camp and abide while fishing
and trapping and cultivating the soil.\(^3\) [emphasis
added]

These solemn promises were re-affirmed in subsequent Treaties
between the First Nations and the British Crown.\(^4\)

Following the British Crown's issuance of the Royal
Proclamation of 1763, the Crown was required to conclude Treaties
with First Nations. Land and resources rested with Aboriginal
People until shared with the Crown at a "Public meeting or
assembly" by the First Nation concerned.\(^5\) First Nations began
formally sharing their Territories under Treaties following the
influx of refugees after the American Revolutionary War. The
British erroneously considered such Treaties to be land cessions
after the fact (see Map 16). Much of the secondary literature on
the Treaties reflects this basic misunderstanding; it does not
consider the oral tradition discussed above. For example, the work
of Donald Smith and Robert Surtees paints a dismal picture of
Aboriginal alternatives and does not consider the rights and
resources retained by First Nations.\(^6\) Mineral resources were not

\(^1\) Oral tradition provided to the Walpole Island First Nation Heritage Centre
by Norm Miskokomon of the Walpole Island First Nation in the Fall of 1994.

\(^2\) See Treaties of 1760 at Detroit, 1761 at Detroit and 1764 at Niagara.
Milton W. Hamilton, ed., The Papers of Sir William Johnson, Vols. III and XI,
(Albany: University of the State of New York, 1953).

\(^3\) See text of Proclamation in Ian Getty and A.L. Lussier, eds., As Long As
the Sun Shines and Water Flows (Vancouver: University of British Columbia, 1983),
appendix.

\(^4\) For example, under Treaties 12 and 13a (1787 and 1806 respectively), the
Mississauga shared certain lands, but retained the fisheries at the Rivers
Stobicoke and Credit for their exclusive use. In 1793, the Crown conveyed two
tracts of land to the Six Nations under Grants 3 1/2 and 4, the wording of
relinquished because they were not open for negotiation in the early Treaties. Thus, the Treaties are silent on such rights, which were retained.

Native People wanted to control traditional activities while making provision for another way of life, and they took an active part in setting the terms of transition. First Nations seemed to be willing to share some land with the English for settlement purposes, but continued to retain the most valuable areas. Under the Gun Shot Treaties, according to the oral tradition of the Paudash family, the Anishinabe retained ownership, control of, and beneficial interest in all waters, shorelines, peninsulas and islands. These Treaties were also a re-affirmation of the Treaty of Montreal of 1760 which specifically included minerals.

First Nations in Ontario continued to exhibit a strong and purposeful negotiating style in their dealings with British Imperial officials over land and resource issues especially in areas where settlement had not yet descended upon them.

ILLEGITIMATE MINING ACTIVITIES AND THE ROBINSON TREATIES

The Robinson Treaties of 1850 were the first in which


Present academic writings on the subject of the Gun Shot Treaty by Don Smith and Robert Surtees treat it purely as a 'land surrender' Treaty, stressing that no written document exists. However, a new collection of papers obtained by the PAO contains a transcription of the Gun Shot Treaties in Ojibwa and an anonymous (and suspect) translation in English. These documents were 'discovered' by David McNab who has generously shared them with the author. PAO, United Chippewas Councils...; and McNab, article forthcoming.
Aboriginal rights to minerals were of paramount and explicit concern. The geographic areas covered by these Treaties were north of Lakes Huron and Superior (blocks "Y" and "Z" on Map 16). By the 1830s, these Ojibwa had experienced uneven encounters with various white fur traders, trappers, squatters, whisky sellers and missionaries. Miners followed in the 1840s. These encounters with the resource developers were belligerent. During the 1830s, Chief Shinguacouse complained bitterly about Canadian and American timber and hay thieves removing Aboriginal property to the American side for sale. By August 1840, he petitioned the government complaining about the effects of white resource use and emphasizing his Nation's ownership of the land:

Already...the white man...had...licked clean up from our lands the whole means of our subsistence, and now they commence to make us worse off. They take everything away from us...you who sit on high place at Montreal are he [sic] who helps those who are wronged...I...say that it is false that the land is not ours, it is ours. [my emphasis]

4 Some communities had more contact with whites than others. For example, the Lieutenant Governor had sent Rev. Wm. McMurray to live at Garden River with Shinguacouse and his people around 1832. At the time that Shinguacouse adopted this religion, he obtained a promise from L.G. John Colborne to build 30 warm houses; this promise was not kept. He also demanded a blacksmith. See, MR-Br, James Givins Papers, S 20, Box 1, "First Speech of Chinguakose," and "Answer to Chinguakose first speech" [1837?]; also, S.P. Jarvis Indian Papers, S 125, B57, "Speech of Shingwaukonce 27th May 1835," pp. 33-34; "Speech of the Chippewa Chief Shinguacose at Council held before Colonel Jarvis at Manitowaning, August 10th 1839," pp. 313-320; "Address of Chinghacose to Colonel Jarvis on the subject of building houses at the Sault," and reply, pp. 363-366.


10 See letter of 20 August 1840, Shinguacouse et. al. to "Father." UOI, "Robinson Huron Treaty 1850, Historical/Contemporary Documents, P. Williams." The spelling "Shinguacouse" is maintained throughout the text, but other spellings appear in footnote citations as they were in the original documents.
Although this petition does not mention minerals, it indicates that already there were problems regarding Euro-Canadian use of food and timber resources. (See Figure 2: Shinguacouse.)

Europeans had made scattered but unsuccessful attempts to extract copper, lead and silver in the vicinity of Lakes Huron and Superior. After the findings of the Geological Survey of Canada (GSC) were made known, much attention was given to the mineral potential in this area. On 21 October 1843, Shinguacouse arrived at the house of the new customs officer for the Sault, Major Joseph Wilson, to discuss matters of concern to himself and his people finally dictating a three page letter to be sent to the Governor General the next day. This was followed subsequently by many more complaints regarding what the Ojibwa viewed as the unauthorized use of their resources, especially metals.

A copper boom on the American side also created renewed interest in mining. Much of the initial work was carried out by the Quebec and Lake Superior Company which obtained about 19,200 acres at 80 cents/acre and the Montreal Mining Company holding around 107,156 acres at 42/5 cents/acre.

In 1845, Allan and Angus Macdonell among others established

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Figure 2
Chief Shinguacouse of Garden River
the Lake Superior Company, which received three licenses for mineral exploration along the north shore of Lake Superior. Shinguacouse stated that the miners, first entering his land in 1845, "...came stealing along our shores...to look for metals which they heard were to be found in our land and asked us to shew them the copper but this we refused." The miners persisted until the summer of 1846, when they told the Chief that the government had already sold their land as mining locations. Macdonell was informed of the locations of several mines by some Ojibwa Chiefs after assuring them the government was bound to compensate them. But, it was soon clear the government had no plan to do so. Macdonell, already tied to the Ojibwa because of their revelation of mineral deposits, felt obligated to stay and ensure they received compensation. He employed several Ojibwa in his mining operations clearing land, driving drills and fishing.

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1 Elizabeth Arthur, ed., Thunder Bay District, 1831-1852, (Toronto: Champlain Society, 1973), p. xi. References to "Macdonell" in this chapter refer only to Allan Macdonell. Angus Macdonell will be referred to in full.

2 PAC, RG 10, Vol. 123, pp. 6192-6198, petition No. 225. 5 July 1847, "Memorial: Indians at the Sault Ste. Marie praying that they may receive compensation for their lands now occupied by the whites." The first mining location appears to have been issued to John Prince, who applied for Spar Island on 1 July 1845. ...Royal Commission, p. 255.

3 British Colonist, 18 December 1849, "The Indian Troubles--Letter from Mr. Allan Macdonell," p. 2. Shinguacouee' speech discussed above might have been referring to Allan Macdonell as one of those who came "stealing" along the shores in 1845, but more likely to John Prince who obtained the first location. By at least 1846, Shinguacouee decided to trust Macdonell, sharing with him the location of some mines.

4 Use of Native labour was widespread. Macdonell asserts that "wherever mines were opened upon Lake Superior the Indians found employment in some capacity of other," Journals of the Legislative Assembly Canada (henceforth JLAC), App. No. 17, 1857, "Report: The Select Committee appointed to receive and collect evidence and information as to the rights of the HBC," see Macdonell's report, n.p. Peter McKellar, hired Native People as labourers to carry out dangerous and labour intensive activities essential to mine operation such as bailing, blasting and packing. Wages appeared to be $1/day. See "Diary of Peter McKellar, 1874-5," and
First and foremost Allan Macdonell acted on behalf of Shinguacoue who had, since 1845, formed an alliance with him. This commitment pre-dated Macdonell's problems with the company which did not begin until July 1847 when the Quebec elements were taken in. The future actions of the Macdonells were the result of the above factors; namely, a prior and genuine desire to help the Ojibwa obtain compensation for their land and minerals and a desire to avenge a company which thwarted their interests.

Colonial authorities made no attempt to stop the miners from trespassing on Ojibwa Territory and removing their copper, but rather tried to placate the mining companies. The Provincial Secretary's Office, which had handled mining applications prior to late 1846, knew nothing about Aboriginal Rights and the Crown Lands Department (CLD), which assumed this task, knew little about these "northern" Ojibwa and had no set policy for dealing with Aboriginal Title or land rights. Nevertheless, the Crown continued


" After running into financial difficulties, Allan and Angus Macdonell and Wharton Metcalfe, the original directors of the Lake Superior Company brought in new associates in July 1847, forming a new company called the Quebec and Lake Superior Mining Association. The Macdonells lost control of the company, however, after transferring all their mining locations to the trustees who shortly advertised locations on Michipicoten Island for sale. Tempers flared as one trustee, John Bonner, later the company's man-on-the-spot at Mica Bay, assumed control of these locations, originally worked by the Macdonells. See, PAO, RG 1-360-0-56, "Articles of Association of the Quebec and Lake Superior Mining Association," 1846, container 6; also RG 1-360-0-61.2, "Montreal Mining Company," letter, 25 October 1847, A.H. Campbell, Secretary of MMC to Papineau, the Commissioner of Crown Lands -- Map attached; letter, 28 October 1847, Campbell to Papineau; and Allan Knight, "Allan Macdonell and the Pointe Aux Mines--Mica Bay Affair," (Department of History, Yale University, PhD II Research Paper, 1982), Sault Ste. Marie Museum, pp. 11-13.
to reserve gold and silver from the patents it issued. The CLD received no help from the politicians. The Draper Ministry ignored Aboriginal Rights and used mining licenses for patronage purposes; six of the first licenses went to other Tory executive councillors. Civil Secretary J.M. Higginson knew nothing about Native People.

Commissioner of Crown Lands Dennis Papineau lacked useful precedents for dealing with mining applications in 1845 when issuing licenses to a few applicants. By May 1846, he had issued these same individuals with exploration licenses, putting them in a truly "advantageous position." The Lake Superior Journal stated that 37 mining locations were granted on Lake Superior and 27 on Lake Huron at the sum of $400,000 payable over a five year period. At least $60,000 had already been received, but "not one shilling ... has been paid to the Indians." Provincial Geologist

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5. Lake Superior Journal, "British Justice," 8 November 1849, p. 2. Also "List of Mining Locations Granted on Lake Superior, 1846," (see Logan's Report to CCL, 1847) in Arthur, Thunder Bay District, pp. 49-50. NOTE: Many more mining applications were received than locations granted. The Royal Commission indicates that 30 applications were received for locations on Lake Superior in 1845, increasing to 100 the following year; 1 application was received for Lake Huron in 1845 and 33 the following year, p. 255.
William Logan was authorized to settle all contested claims despite the fact he was in a conflict of interest position, as both Logan and John McNaughton, his surveyor, held shares in the Montreal Mining Company. In the spring of 1846, Logan submitted a report on his investigations to a Committee of the Executive Council. Following this report, mentioning manganese, copper, zinc, lead, iron and silver, the north shores were opened for sale by OIC.

In 1846, Crown Lands authorized surveyor Alexander Vidal to survey mining locations at the Sault. The CLD exacerbated the situation, ignoring First Nation Title and land rights thereby creating the basis for more grievances. While performing his duties, Vidal was advised by Shinguacouse, Nabenagogching and others that they owned the land...

...the government have never purchased the land from them, and [they] expressed their indignation at my having been sent to survey it, and more particularly at the government having licensed parties to explore the mineral region on the north shore of Lake Superior without consulting with them or in any way acquainting them with their intentions regarding it; indeed the old chief said that had they not been too few in number they would have prevented a party which has just gone off to...

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24 PAO, AG 1-360-0-61.1 to 61.4, "Montreal Mining Company," 1846-1870; letter, 9 April 1846, D. Daly to Papineau. These files contain information about contested locations. Knight. "...Mica Bay Affair," p. 34.

explore.26
Although Vidal informed Papineau of Ojibwa land rights, nothing was done to address the issues raised in the petition.27

The DIA knew that the CLD was selling Aboriginal land and issuing mining licenses in advance of a Treaty,28 thus breaching British Policy. Native response to these provocations was swift. First Nations viewed the miners incursions as trespass and their activities as theft.

On 10 June 1846, Shinguacouese petitioned the "Great Father" in Montreal through George Ironside, Superintendent on Manitoulin Island, wanting the government to halt the operations of mining companies which threatened traditional lifeways and infringed on Ojibwa land rights. Shinguacouese said, "...great things have been found in these places. I see Men with hammers coming to break open my treasury to make themselves rich and I want to stay and watch and get my share."29 He insisted on compensation for the use of his lands and minerals, both he and his people wished "a share of what is found in my lands."30 This was a significant petition, the first of at least 14, emphasizing Aboriginal knowledge and

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26 PAO, RG 1, Crown Lands, A-1-6, Vol. 25, #4, file #2120, pp. 21675-21677, letter 27 April 1846, Alexander Vidal to Dennis B. Papineau Commissioner of Crown Lands, "Respecting Claim of Indians to the Lands at Sault Saint Marie which he was ordered to survey," pp. 21675-21677.
27 PAO, RG 1, Crown Lands, A-1-6, Vol. 25, #4, file #2120, p. 21677.
29 PAC, RG 10, Vol. 612, letter, 10 June 1846, Chinquak to Ironside, pp. 116-117.
30 PAC, RG 10, Vol. 612, 10 June 1846, Chinquak to Ironside, p. 117.
ownership of minerals. This petition was ignored.

Janet Chute maintains Native People on Manitoulin Island were influenced by the actions of the Ojibwa at the Sault. In the fall of 1846, some Ottawa near Manitowaning showed Ironside several mineral samples including copper, iron and coal. He was so impressed with the commercial potential of the several mineral sites he visited that he recommended a provincial examination of the Island's minerals. The Ojibwa demanded protection for their rights telling Ironside there would be no mineral exploitation without compensation. The CLD followed Ironside's advice and dispatched PLS A. Murray between 1847 and 1849.

On 5 July 1847, Shinguacouse, Nabenagoching, Piabetassung and Kabaoosasa, representing Ojibwa from Michipicoten River to Thessalon Point, addressed the Governor General through a petition written on their behalf by Reverend Fred A. O'Meara, reminding the government of their loyalty to the British during the War of 1812-1814. The Chiefs had offered to sell their lands to Governor General Metcalfe, but were informed the Crown did not want to buy the land "just then." They noted that until 1845, almost no one had entered their Territory. At that time, "whitemen came stealing along our shores...to look for metals which they heard were to be

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found in our land and asked us to shew them the copper but this we refused; this went on for some time...till last summer when we heard several persons say that some of land had been already sold to those explorers." But, the Ojibwa did not believe the government would unilaterally sell their land. 34

Next, the Ojibwa discussed Vidal’s surveying activities at their village in the fall of 1846. They had asked him to "...desist as that was our land, he did so and left," but reappeared that spring when he was again asked to leave, which he did, returning within days. The Ojibwa "were astonished to see him come up again accompanied by...[Ironside] who told us that he had come up to tell us that it is the wish of the Government that these persons should occupy our land." Vidal laid out more locations in 1847 and 1848 including ones for George Desbarats, Francis Hincks, J.W. Keating and John Cuthbertson (see Map 17). His Reports emphasized that Shinguacouets’s village at Garden River had been included in the mining location issued to B.H. Lemoine. 15

The Ojibwa heard rumours the Crown would ignore their claims in spite of the fact British policy was to treat for Aboriginal land prior to occupation. They warned if no Treaty commissioner was sent, they would go to the Governor General themselves to


settle their claims. Civil Secretary Major Campbell advised the Executive Council that Ojibwa land rights should be obtained prior to the issuance of mining patents. Obviously Campbell did not concur with the licensing policy pursued by the CLD.

Neither the Chief's request for Treaty, nor Campbell's agreement with this proposition, persuaded the Crown to act. Instead, that same July, the DIA instructed Ironside to convince Shinguacoucse and his people to relocate on Manitoulin Island because Governor General Elgin did not want them to stay at the Sault. Rather than leave, Shinguacoucse confronted George Desbarats asking him to end his mining activities on Aboriginal Territory. Desbarats was now personally aware of the precarious ground on which he stood and encouraged Elgin to make a Treaty with the Ojibwa because he believed their unsettled claims would result in violence and bloodshed. Although warned by a man-on-the-spot, colonial authorities took no action.

Under daily pressure from his people for news of a settlement Shinguacoucse called on Ironside in August 1847 to find out what had been done about O'Meara's earlier petition, demanding "consideration" and "justice...in the promises" which had been

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made. The Chief also petitioned the Superintendent General, indicating that earlier petitions sent to local magistrate William Mourse regarding depredations on timber and minerals remained unsatisfied. The Superintendent passed the petition to Reverend William McMurray in 1847, but the depredations continued.

In November, Papineau reported on these and other Aboriginal claims arising from the mining agitation. His report denied Ojibwa claims to the land and by extension, the minerals. However, Papineau had a multitude of personal reasons for his position including anger that Native People had not joined the rebel cause in 1837, instead aiding the authorities in capturing insurgents; sympathy for the French Canadian and métis squatters at the Sault; and resentment that title to his family's estate on the Ottawa River was in doubt due to Aboriginal land claims. Papineau's views clashed with those in Vidal's earlier report which Elgin had just received and passed to Chief Clerk William Spragge, who advised that a Treaty be signed before any mining patents were authorized. Elgin, however, did not act.

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10 PAC, RG 10, Vol. 572, letter, 25 August 1847, Ironside to (?). Also Vol. 612, letter 1847, George Ironside, Superintendent of the Northern Superintendency to Major Campbell, Civil Secretary, 1847, pp. 159-160.


43 Morrison, "The Robinson Treaties of 1850...", p. 52.

44 Note: Spragge's letter went out under the name of J.H. Price, Papineau's successor. Morrison, "The Robinson Treaties...", pp. 53-54.
Obtaining no satisfactory response to his petition, Chief Shinguacouse "again" led a deputation to Montreal in June 1848, to plead their case "for justice [but] they received again promises similar to many already broken." As a result, Elgin instructed T.G. Anderson, in July, to look into their claims. After their return Ojibwa dissatisfaction increased when they discovered the CLD had sold their village of Garden River as a mining location. Vidal had laid out six mining locations at Garden River and its vicinity (see Map 18). About 200 Ojibwa people lived in this village; they had livestock, hundreds of cultivated acres and substantial log-homes. Following this disclosure, the Chiefs were very angry and "spoke openly of resorting to force." In July 1848, Campbell informed Anderson that Ojibwa "hunting is entirely destroyed," that mining licenses have been issued which cover their "villages and that...[they] are forbidden to cut timber either for building purposes or for fuel." Campbell told Anderson to investigate their claims and propose compensation.

On 18 August, Shinguacouse informed Anderson that the Ojibwa owned the land and sub-surface rights, asserting he and his people

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15 *British Colonist*, 18 December 1849, "The Indian Troubles...." This is the only reference to a prior deputation having gone to Montreal, unless Macdonell meant the earlier deputation to Toronto to see McMurray.

16 *British Colonist*, 18 December 1849, "The Indian Troubles...."


Map 18
Map showing the mining locations which covered the unceded Territory of the Garden River First Nation by 1848

LEGEND
LOCATION OF PRESENT BOUNDARY OF RESERVE
LOCATION OF ORIGINAL BOUNDARIES OF
GARDEN RIVER INDIAN RESERVE # 14,
ACCORDING TO PLAN OF J.DENNIS, 1833.
MINING LOCATIONS SURVEYED BY A.VIDAL,
P.L.S., 1848

SKETCH TO ILLUSTRATE THE LOCATION OF THE
ORIGINAL BOUNDARIES OF GARDEN RIVER
INDIAN RESERVE # 14
AND THE LOCATION OF
MINING LOCATIONS
SURVEYED BY A.VIDAL, P.L.S., 1848
...were not a little astonished to find that the money (Mineral) on our lands has been taken possession of by the White Children of our Great Mother the Queen, without consulting us. We rested on the belief that it was only a preparatory step taken by the Governor to Fix a value on it, and then purchase from us.

The Chief complained that Ojibwa property was being unfairly appropriated by the miners and stated,

Father, You ask what proof there is of our farms and Houses having been taken possession of by the Whites. My answer is, this man (pointing to John Bell) was informed (when building a house on a piece of land I gave him) by the Custom House Officer that the land on which he was about to build was taken up by some White people looking after money (Metal) and that he would most likely have his labour lost if he went on to build. Mr. Cuthbertson and Mr. Elliot forbade any people to cut timber on any pieces of land occupied by the Miners, and you on your way up examined the posts that are planted, securing to the money seekers &c. &c. John Bell was prohibited cutting Hay by an American who Mr. Cuthbertson had placed in charge of his location.

Additionally, he deplored the destruction of our hunting grounds the Miners set fire to the bush which runs for many miles--and the bursting of the rock drives the Game from our hunting grounds and we are left to starve."

Recalling that it was government custom to call a council and negotiate for lands which it wanted, he demanded this practice be followed now. He would not relinquish land or resources "without payment." This was a particularly important speech indicating the Ojibwa had been led to believe a Treaty was both necessary and imminent and further emphasizing First Nation resentment over the removal of minerals and high-handed trespasser commands.

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The following day, Anderson met with the Fort William Chiefs from Lake Superior where grievances continued to be expressed against the miners. Chief Joseph Peau-de-Chat charged they burned the land and destroyed wildlife and timber, asserting that

When they [ie. the Miners] find Mineral they cover it over with clay so that the Indians may not see it and I now begin to think that the white man wishes to take away and to steal my land, I will let it go, and perhaps I will accomplish it. I wish to let the Governor have both land and mineral, I expect him to ask me for it, and this is what would be for one good. I do not wish to pass any reflections on the conduct of the whites. Ask me there, send someone to ask for my land, my Mineral &c. I won’t be unwilling to let it go, the Government shall have it if they give us good pay...The Indians are uneasy seeing their lands occupied by the Whites, taking away the Mineral, and they wish that our Great Father would at once settle the matter. Come and ask me for my land and mineral that there by no bad feelings left...A great deal of our Mineral has been taken away. I must have something for it. I reflect upon it, as well as upon that which still remains.50

Following this conference, Peau-de-chat gave Anderson a petition to take to the Governor General. The Ojibwa would not stand to see their resources wasted or stolen; they demanded compensation for both the soil and minerals.

Anderson reported there was little doubt that the Ojibwa were the "...proprietors of the vast mineral beds and unceded forests from Grand Bature near Mississauga River on Lake Huron to the Boundary Line at Pigeon River on Lake Superior." However, he also suggested that First Nations were "incapable of opposing the forced occupation" of their land by the miners, but would cause

50 UOI, "Robinson Huron Treaty 1850, Historical/Contemporary Documents, P. Williams." Transcript of Peau-de-Chat’s reply to questions by government representatives, 19 August 1848, pp. 2-3.
"serious annoyance" if their claims were not settled. Anderson recommended that after the Ojibwa identified areas they wished to reserve, the rest of their Territory be ceded.51

Before leaving, Anderson instructed his son, Gustavus, the Anglican missionary at Garden River, to encourage the Ojibwa to adopt "civilization." This likely meant he hoped his son would be able to secure a reduction in Ojibwa demands, but this did not happen. Instead Shinguacoues instructed Macdonell (also a lawyer and now officially the Chief's legal advisor) to inform the miners through public notice not to cut any more timber. As well, the American press printed a copy of Shinguacoues's 18 August speech, obtained from interpreter Louis Cadotte, varying widely from the version Anderson submitted to the government.52 As we shall see, this would not be the last time Anderson falsified a report. According to the American account, Shinguacoues categorically demanded to be paid for all past and future mineral development:

...the miners are intruding upon our lands, without securing us a compensation. The Great Spirit, we think, placed these rich mines on our lands for the benefit of his red children so that their rising generation might get support from them when the animals of the woods should have grown too scarce for our subsistence. We will carry out, therefore, the good object of our Father, the Great Spirit. We will sell you lands if you will give us what is right and at the same time we want pay for every pound of mineral that has been taken off our lands, as well as for that which may hereafter be

51 PAC, RG 10, Vol. 534, letter, 20 August 1848, Anderson to Major Campbell, pp. 255-258. NOTE: Anderson identified the proposed Treaty area as a block extending northward from the edge of Lake Huron to the height of land and west to the mouth of the Pigeon River. Thus, only the area containing the mining locations was to be included.

Petitions, speeches and deputations were not the only means the Ojibwa used to express their anger. They were aided and encouraged in their quest for compensation against illegal mining ventures by Allan Macdonell. In the spring of 1849, Macdonell himself went to Montreal to see the Governor General and find out what had been done about their claims. Prior to his return in May, Macdonell had raised the question of the validity of the mining leases whose terms had not been fulfilled. For example, both Lemoine and Simpson had failed to commence operations within the specified period of time. When he returned in May without a settlement, the Ojibwa had already lost all patience and were openly "...proposing to drive the miners out of the country." Macdonell said he had to promise to escort another deputation to the Governor General in order "...to prevent a resort to force." According to Janet Chute, Macdonell had, by this time, put his personal business ventures on a "secondary" plane to "...his conviction that he had a duty to 'his band' to fulfil in return for the trust they had vested in him." Only one month after Macdonell's return to Garden River, he convened a council in June 1849 where his activities were reported


54 British Colonist, 18 December 1849, "The Indian Troubles..." Reference to Macdonell's queries about the validity of the location tickets is from Morrison, "The Robinson Treaties...," p. 64. Macdonell raised the issue in a letter to Campbell 21 April 1849. NOTE: A deputation did go to Montreal in July 1849.

by James Cameron, a missionary at the Sault, who had been invited to the council by Waubimmama, a young Chief. According to Cameron, Macdonell secured the signatures of several Chiefs for a variety of leases. One involved a location on Michipicoten Island, another near Pointe aux Mines and a third, adjacent to this last, was said to be a grant from the Chiefs "as a commemoration for his services to the Indians." Macdonell obtained a final lease for "the islands in the falls of St. Mary's for the purpose of cutting of making a [rail]road...from the foot up to the head of the said falls." Cameron reported that Macdonell told the Ojibwa he would return all leases if the government offered a better deal. Macdonell would reiterate this promise to Shinguacouse in front of commissioners Vidal and Anderson in October 1849.

Cameron pronounced these actions "illegal" and identified Shinguacouse, Nabenagoching, Puk-yak-pi-tak-sung, Ka-ba-o-sa and Mee-shuk-kee-yahsh as the signatories. Cameron reported that Reverend Anderson encouraged the Chiefs to sign a lease for a parcel of land west of the mouth of Garden River that would "...almost take up the whole Indian village. Of this the Indians do not suspect, and very likely the Reverend takes advantage of their ignorance to effect his own purposes and intentions." It was ludicrous for Cameron to imply the Ojibwa did not know what

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lands they were leasing. They were likely only too aware of this area because it was their village and would have included part, if not all, of the area previously sold as a mining location by Crown Lands. In fact, their lease may have been intended to supersede those of the CLD. Furthermore, the lease was witnessed by Macdonell and Joseph Wilson, the customs clerk,59 thus adding to the credibility of the document.

According to Cameron, Macdonell volunteered to accompany the Chiefs on a visit to Lord Elgin to impress upon him the urgent need for a Treaty.60 Cameron emphasized Macdonell's assertion that the Ojibwa did not need an interpreter other than himself, erroneously implying that Macdonell wanted to take advantage of them. But, Macdonell was not in charge; the Chiefs were setting their own agenda and Shinguacouesse himself invited Macdonell to attend.61 Immediately after Macdonell returned in May, the Ojibwa had advocated the use of force to remove the miners from their Territory. The Ojibwa were in control. This is evident from Cameron's own words when he notes Macdonell informed them

that a large sum of money was now in the hands of Government. Money that Government received for the various and numerous mining locations on the north shore of Lakes Huron and Lake Superior. This money was said to be in the possession of the Government was openly stated to them as belonging to the Indians. It is not improbable that this deputation above mentioned, will

59 PAO, Henry Blanchard Papers, MU 275.


61 Chute, "A Century of Native Leadership...," p. 244.
make a demand for it. [sic] Cameron told James Price, the Commissioner of Crown Lands, that a Treaty should be concluded as soon as possible.

Cameron probably framed his account of the council against the actions of the old Chiefs and their white allies (Macdonell and Rev. Anderson) on purpose. Macdonell and Cameron catered to different "factions" of the Ojibwa. The younger men appeared to adopt Methodism; the older Chiefs and more traditional people did not.

In July 1849, Shinguacouse, Nabenagoching (The Eclipse) and Menissinowennin (The Great Warrior), accompanied by Macdonell and Anderson, went to Montreal to speak with Elgin about their land and resources (see Figure 3: the deputation). Angered by the illegal sale of their land to the mining companies, they declared they "will this winter drive off the obnoxious miners" if their claim remained unaddressed. This was the last time the Ojibwa would speak personally with the Governor General before forcibly

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63 Chute, "A Century of Native Leadership....," p. 222

64 Nebenagoching, Chief of the Batchawana First Nation, was Shinguacouse's son-in-law and played a prominent role in protecting Ojibwa minerals. British Colonist, 14 December 1849, "The Proceedings against the Indians;" also The Illustrated London News, 15 September 1849, "The Chippewa Indians and the Mining Companies," pp. 179-180. Nebenagoching, an hereditary Ojibwa Chief, was displaced by Indian Department officials around the 1830s because he was seen to impede Department plans: Personal Communication: Karl Hele of the Garden River First Nation, 2 March 1994. To date I have been unable to determine if the Chief had a role in the "deceptions" practised on the American side during the 1830s and whether this led to his demotion on the Canadian side.

Figure 3
Shinguacouse, Nebenagoching and Minisainoweninne
at Montreal in 1849
taking over the mining operations at Mica Bay. The words spoken by the Ojibwa were the absolute truth: they said, if there was no Treaty they would forcibly remove the miners.

The government moved slowly. Instead of sending Treaty commissioners, they sent Alexander Vidal and Captain Thomas Gummersall Anderson to investigate. According to Jim Morrison, the only reason these two were sent at all was because both the Solicitor General, William Blake, and the Attorney General, Robert Baldwin, refused to sign patents for the mining locations. Had the Reform Council been able to obtain signed patents it would have continued to ignore Aboriginal Rights. Morrison emphasizes that the president of the Reform-dominated Council, William Merritt, was one of the original license holders in the Montreal Mining Company. Also strongly tied to the Upper Lakes mining community was finance minister Francis Hincks.66

While the Garden River deputation was in Montreal, the Fort William Ojibwa made a strong demonstration of their anger and rights. In July, Peau-de-chat

...arrived at Mica Bay with a large band of his people, and told the parties in charge [that is, John Bonner] and also the miners there, that unless a settlement was made with them for their lands, they (the miners,) must leave the country.67 [emphasis in original]

Following his return, Macdonell reported he received word from Peau-de-chat that the Chief was waiting to hear from him at a place 40 miles up the Lake. Macdonell sent a message to Peau-de-

66 Morrison, "The Robinson Treaties...," p. 78.
67 Toronto Patriot, 19 December 1849. (Macdonell to editor.)
chat stating that a Treaty would soon be concluded and Peau-de-chat returned to Fort William. Macdonell's message may have been overly optimistic, but he and Shinguacouose likely believed a Treaty was imminent. Macdonell may also have made the statement to avert violence. He asserted Bonner told neither the Company nor the government about this incident. Peau-de-chat's actions clearly indicate that the First Nations and not Macdonell or other whites were in control. Peau-de-chat acted on his own and did not inform Macdonell of his actions until the latter had returned.

Thus a clash at Mica Bay was only narrowly avoided in July 1849, before the commissioners were sent out to address Ojibwa claims. The Fort William and Garden River First Nations had demanded a Treaty and believed they would get one; instead they got Vidal and Anderson. Neither one was a particularly prudent choice. Anderson must have felt considerable antipathy toward the Ojibwa, especially Shinguacouose, because the Chief had earlier thwarted Anderson's efforts to establish a mission on Manitoulin Island and because he relentlessly pursued his vision despite Anderson's schemes (involving his son) to destroy it. Furthermore, Anderson was demoted to junior commissioner under the younger Vidal because the DIA had recently discovered that his son had signed a 900 year lease with Shinguacouose. Anderson had much more

"Toronto Patriot, 19 December 1849.

"This incident refutes the arguments of the Wightmans that Macdonell was in control and caused the Mica Bay incident for his own reasons. "The Mica Bay Affair: Conflict on the Upper-Lakes Mining Frontier, 1840-1850," Ontario History, Vol. 83, 1991."
contact with Native People than Vidal.\textsuperscript{70} Vidal had studied American Native policy and was determined to undermine group integrity. He was impressed with American negotiators who had used sub-Chiefs to "coerce" the head Chief to sign a Treaty near Lake Superior. On the basis of "ambiguous American legal precedents," Vidal asserted that First Nations had no title to land or resources.\textsuperscript{71}

The commissioners arrived without notice in August to inform the First Nations of their object and immediately called a council for the following day. No sooner had this been arranged than it was cancelled because the commissioners decided to talk to the Lake Superior Nations first, although they had been warned that these peoples had already left for their hunting grounds. Predictably, they met few people.\textsuperscript{72} During the fall, Vidal and Anderson would meet and talk with 16 of 22 Chiefs regarding their claims. Taking the propeller, 'Napoleon,' it took the commissioners nine days (from the 17th to the 25th), travelling along the south shore, to reach Fort William. Anderson's Diary was full of comments about mining, mining fever, the ancient mines and mining stock payouts. The commissioners made an extensive tour of the

\textsuperscript{70} Although Vidal likely had extensive contact with Aboriginal children as he was growing up along the St. Clair River near the Lower Indian Reserve and the Sarnia Reserve, there is little evidence he interacted with Native Peoples as an adult. See Alexander Vidal Family Papers, University of Western Ontario, Regional History Collection. Vidal likely obtained information on American Treaties around Lake Superior from George Johnston. Personal communication: Jim Morrison, August 1994. Also, Morrison, "The Robinson Treaties..." p. 71.

\textsuperscript{71} Chute, "A Century of Native Leadership..." comments on Anderson, pp. 235-236 and pp. 239-240; comments on Vidal, pp. 247-249.

mine operations at Carp River and the abandoned works at the
Princess Mine." On reaching Fort William some days later the
commissioners saw only 25 Native People. Macdonell had already
been there to advise the Ojibwa in their claims prior to the
commissioners' arrival.

Vidal and Anderson were not well received at Fort William.
Peau-de-chat did not trust them and they did not want to recognize
him as Chief. When Peau-de-chat realized they lacked authority
to conclude a Treaty, he requested an audience with the Governor
General in Montreal. The commissioners said if the Chief did not
talk to them now, the Governor would not talk to him later. Peau-
de-Chat responded to this threat with a speech expressing his
concern for the future and demanded $30 for each man, woman and
child in perpetuity. A strong negotiator, he was determined to
obtain the highest compensation for his people and would not back
down in the face of threats from Vidal and Anderson.

The following day, 26 September, Peau-de-Chat informed the
commissioners he distrusted them because Anderson had not taken
their petition of the previous year to the Governor General.
According to the Vidal-Anderson report, the Chief had now revised
his opinion and was prepared to make an immediate Treaty. Although
the commissioners could not do this, they claimed the meeting
ended with mutual "expressions of confidence and goodwill and

73 MR-BR, T.G. Anderson Papers, Box 1, folder 3, Journals, see entries for 18,
19, 21 and 25 September, pp. 6-10.

74 "Chief Peau-de-Chat's Report on His Interrogation by Visiting Indian
Agents," also "Father Premiot's Report to his Superior in New York," 18 October
1849, Arthur, Thunder Bay District, pp. 17 and 15.
desire to see us next year to finish the negotiations." But, this statement contradicted the one they made elsewhere; namely, that the Lake Superior First Nations were more difficult to deal with than those of Lake Huron (with the exception of Garden River). Part of the explanation likely lies in the fact that more mining activity had occurred on Lake Superior than on Huron.

It is clear that instead of leaving on friendly terms, the commissioners antagonized the Fort William First Nation with blatant threats. A journalist from the British Colonist reported:

...these Commissioners then informed the Indians that their presents should be stopped, and that they should receive no pay for their lands; and when this last mentioned threat was held out by Mr. Vidal before he left the Sault for Garden River, the reply to which was if we will not receive pay for our lands we will take them and keep them ourselves...Can there be anything more disgraceful or dishonest in a government, then [sic] instructing its servants to hold out threats like the above, and particularly so when it had actually received in cash, for these very lands, near ten thousand pounds. What has become of that money, or how has it been accounted for?"

Not only does this account indicate that the commissioners viewed the use of threats as an acceptable negotiating tool, it also, and most significantly, indicates that they purposely falsified at least some of the events in their "Report." As we have seen, Anderson was already in the habit of doing this.

Two days after leaving Fort William, the commissioners toured a mining location belonging to Mr. Smith, where they obtained fish

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75 RG 10, Vol. 266, Vidal/Anderson Report (handwritten) 5 December 1849, pp. 163140-163141. For a typed report see PAO, Irving Papers, MU 1464, 26/31/04. This copy is incomplete. The demand for $30 is also reported by Father Fremiot Arthur, Thunder Bay District, pp. 15-16.

76 British Colonist, 3 December 1849, "The Indian Difficulties."
and specimens for assaying. Anderson commented on the number of abandoned mining locations they passed. The commissioners visited Painted Rocks on the mainland somewhere after passing Michipicoten Island and toured Bonner's mining location at Point Eaux Mine."

The Garden River First Nation refused to deal directly with either Vidal or Anderson when they met on 15 October, instead hoping to negotiate through their friend Allan Macdonell. The commissioners stated they were sent to talk with the Ojibwa not with white men. After being asked a question about a Treaty, Shinguacouse said he had not made a final decision on the matter and wished for another day to consider it.

The overall question of a Treaty was left undetermined, but the Chief did discuss several areas of previously leased land which his Nation wanted re-affirmed as Reserve land in any future Treaty. The first area was near Fort William on Lake Superior where a tract had been granted to the North West Company in 1798. Vidal and Anderson appended a copy of the deed to the conclusion of their Report. Another tract had been granted to the HBC near Sault Ste. Marie on Lake Huron (n.d.). However, no deed existed to verify the extent or location of its boundaries. A third tract was granted around the mouth of the Mississaugi River where it ran into Lake Huron. Shinguacouse wanted this area confirmed to Mr. Sawyer, even though it was located within a potential Reserve area and in the vicinity of the HBC's post.

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77 MR-BR, Anderson's Journal, see entries on 29 September, 4, 7 and 11 October, pp. 11-14.
Vidal and Anderson reported difficulties with two of these reservations. The tract claimed by the HBC overlapped somewhat with the proposed Sault townsite. There was some disagreement between the Ojibwa and the Company regarding the fulfilment of the lease. The last tract, which Shinguacouse wished confirmed to Mr. Sawyer, had recently been applied for by the HBC.

In addition to these tracts, Shinguacouse had also "lent the Island of Michipicoten to a white man for some time, and I intend to reserve it [that is, to have its leased status recognized] in the Treaty with the Governments." [my emphasis] This 'white man' was Allan Macdonell." The terms appeared to be that the lease would last for 900 years, but if work on the mines was not commenced within five years it would be void. The Chief told Vidal and Anderson that other tracts were lent to Macdonell including "a piece of land near Pointe aux Mines, Lake Superior, and...the mine now worked by the Quebec Mining Company." The commissioners also reported that 200 acres were "lent" to Rev. Anderson to establish a mission. [my emphasis] The leased status of this area was also to be recognized under any subsequent Treaty.

The Ojibwa selected Reserves based on proximity to traditional fishing stations, their hunting and trapping territories and their gardens. However, the area retained by Shinguacouse was viewed by the commissioners as problematic, encompassing "...no less than nineteen of the Mining locations for which the Govern-

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7 PAO, RG 1-360-0-52, "Michipicoten Island," 1852-1853, letters, 12 January 1852, illegible to Allan Macdonell; and 29 January 1853, Macdonell to John Rolph, Commissioner of Crown Lands.
The commissioners informed the Ojibwa that the government would not recognize their independent land deals. Except for one case, no attempt was made by the commissioners to address the illegal mining location tickets issued by the government. It was at this moment Macdonell interrupted the meeting haughtily protesting against the influence of the commissioners. Then, the meeting seems to have ended and the Ojibwa held their own council overnight.

Vidal and Anderson reported that the Garden River First Nation had one legitimate grievance: the mining location covering their village. Although this matter had, several times, been brought to the attention of the government, the commissioners reported that nothing had been done. 

The second day of the meeting (16 October) did not start much better. A journalist at the council reported:

Mr. Commissioner Vidal, instead of opening the Council by explaining to the Indians the object of his errand and for what purpose the Council had been requested, as is usual upon all such occasions, he commenced his proceedings by asking [a number?] of most absurd and childish questions, to which the Chiefs replied with a great deal of good humour and much patience, at every question expecting that the following one would tend to enlighten them as to what was the actual object of the gentlemen's mission. At length came some two or three questions which might be said to have some reference to their errand.

These questions dealt with several leases which Shinguacouse had

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80 Vidal/Anderson Report, p. 163130.

81 British Colonist, 16 November 1849.
made with Macdonell. Shinguacouse stated "we have lent Macdonell a piece of land for a Rail Road at the Falls...a small piece and for an indefinite period, on condition that the road be not made at our expense, but that we shall receive a toll from all that [use it] when it is made." [my emphasis] Vidal and Anderson implied the Chief knew little about the details of this venture." According to the British Colonist journalist, Shinguacouse declared that it is a question of vast importance to ourselves and to our children's children. Four years have passed since the miners first came among us, prizing our lands and possessing themselves of the mineral which has been placed here for our use; when the time shall have arrived that it would become necessary for our subsistence, that time has now arrived, we have the examples of our brethren upon the other side of the lake to guide us in our transactions, they have sold all their lands, and now they can only behold, but not share in the wealth which their lands produce, they have either been unfortunate or unwise. We do not wish to sell all our lands, we must keep some. When I saw our lands occupied without our consent, when I twice travelled to see our Great Father at Montreal, and asked in vain for justice. We sought assistance from several whom we hoped might aid us in our difficulties, at last we turned to one who had been among the first to come upon our lands, but who always said 'you must be paid for your lands' he became our friend, on him we place our reliance, and we can trust entirely to him, he knows our wants and our wishes, and has full power and authority from us to act and to conclude a bargain with you our whole affairs are now in his hands.'

Shinguacouse and other headmen insisted the commissioners deal with Macdonell and not themselves. The Chief voiced his resentment about the way the Ojibwa had been treated by the commissioners and declared further: "'I knew nothing of the value

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[53] British Colonist, 16 November 1849.
of my lands;--we thought of our ignorance and employed Macdonell;--we wish you to hear him and do not think it right in you to put him aside.'" Macdonell rose and began to speak but, according to the journalist, was interrupted by Vidal who threatened to end the meeting. Vidal persisted

...in a most flurried and nervous manner...saying that if he persisted that the Council should be broken up and that there should be no treaty; [emphasis in original] - To which Mr. Macdonell, replied I will maintain the position in which this people have placed me; it would be base and dishonourable in me to desert it now, and as their agent I tell you, then be the Council dissolved, and let there be no treaty, but upon your head rest the blame."

The Ojibwa were told that unless they dealt directly with the government's representatives the commissioners would dissolve the meeting. The Ojibwa did not comply and Vidal walked out of the meeting while Anderson stayed as a "spectator." Macdonell continued to speak to the Ojibwa in what was described as an "inflammatory style."\(^{85}\)

Later, Macdonell reported Vidal's threats that their land would be taken without compensation. Vidal had told Canoah, a Metis:

...the Indians shall not receive anything for their lands; and this language was used subsequently upon other occasions, by the Commissioners, who likewise stated that the half-breeds should not receive anything. To this the Chiefs replied, --'These people are the children of our sisters, and of our daughters; they are born upon this land, and have equal rights with us; they shall share with us.'

\(^{84}\) British Colonist, 16 November 1849.

\(^{85}\) Vidal/Anderson Report, p.163145.
Macdonell noted at a subsequent meeting at Garden River that John Bell, of that Nation, hired as the commissioners' interpreter, informed Chief Nauquegahao, Louis Cadotte and others that if they continued to follow Macdonell they would receive no presents and that Shinguacouse and other Chiefs would be stripped of their positions." Threats were the basis of the negotiating style of Vidal and Anderson.

It is difficult to determine the aftermath of this stalemate. The silence between the Ojibwa and the commissioners at the Sault was not overcome. Instead, lines of communication reopened at the Garden River village at a meeting on 18 October 1849 which was not attended by Shinguacouse or the traditional Chiefs. This meeting was apparently initiated by Shinguacouse's son, Augustin, and other young men who sought out the commissioners, promising their Nation would forego its hostility and negotiate a settlement with government representatives (see Figure 4: Augustin). The following morning (19 October), the commissioners talked one last time with Augustin and the young men who agreed to have no more dealings with Shinguacouse while he was taking advice from Macdonell. Vidal and Anderson did not use this situation to renew talks with Shinguacouse. Using the tactic of 'divide and conquer,' they decided to leave the matter unfinished while they proceeded to meet the remaining First Nations." Vidal and Anderson mistakenly

"British Colonist, 18 December 1849, "The Indian Troubles--Letter from Mr. Allan Macdonell."

Figure 4
Augustin (Shinguacouse's son)
believed they could use the apparently compliant attitude of the young men to bypass the traditional leadership and the issues at stake. Augustin was likely sent by his father to keep the dialogue open in spite of the failed meeting at the Sault. But when the commissioners declined to use this opportunity to rekindle talks with Shinguacouse, believing they had bypassed him, they continued to alienate him and his followers thereby inflaming an already explosive situation. Leaving Garden River on the 19th, the commissioners toured the mine and smelting works at the Bruce Mines the following day, subsequently investigating water power near La Cloche and "Turtle Head," the site of a sacred rock projection. Vidal and Anderson finished their business with the First Nations on 3 November and parted, the latter going on to Owen Sound to deliver the presents.**

In their "Report," Vidal and Anderson claimed Ojibwa opposition could be easily overcome if it was impressed upon intransigent First Nations they would be shut out of a Treaty generally accepted by the other Nations. The commissioners urged the Crown to initiate negotiations for a Treaty as soon as possible so that current Ojibwa "attachment and confidence" would not dissipate.*** Nevertheless, Vidal and Anderson had left both the Lake Superior and Lake Huron Ojibwa on bad terms.

So bad, in fact, that about five or six days after the

** MR-BR, Anderson’s Journal, see entries for 20, 23 and 31 October, also 3 November, pp. 17-20.

*** Vidal/Anderson Report, pp. 163129-163131.
commissioners left, a party of about 30 to 100 Canadian and American Ojibwa and Metis, led by Shinguacouse and Nebenagoching, travelling in two canoes, landed at Mica Bay and forcibly shut down the operations of the Quebec Mining Company. One of the canoes was allegedly stolen from the HBC and the other was procured on the American side. Press and government accounts all state the Ojibwa were led by Allan Macdonell, his brother Angus Duncan and Wharton Metcalfe. The purpose of the expedition was to force the trespassing mining company from their land.

Note: the article on this event by the Wightmans warrants comment. "The Mica Bay Affair: Conflict on the Upper-Lakes Mining Frontier...." The Wightmans view Mica Bay as a "sharp frontier lesson" for business and government, opening and closing their article with attention on the frontier, the mines and the intruders. This is reminiscent of the 'inevitable clash between civilization and savagery' theory. Here it applied to mining and Native People. While the authors present the Ojibwa as fighting for their just claims, they no where state their opinion on this. They are content to place Macdonell and the other whites in charge of the Mica Bay operation just as most of the newspapers they cite do. There is no recognition that Shinguacouse and the Ojibwa are in control and setting their own agenda. They claim it was Macdonell who formed an alliance with the Ojibwa "as early as 1848," but it was the other way around. Shinguacouse invited Macdonell to ally with him and disclosed mining locations to him in 1846. They state Macdonell suggested the takeover of the mining location after his proposal to be an Indian agent or ombudsman was turned down in October of 1849. This ignores the fact that Shinguacouse himself told Lord Elgin in person in July of 1849, that he would see to the removal of the miners himself if a Treaty was not concluded in the fall. The Wightmans appear to be unaware that Peau-de-chat and others confronted John Bonner in July, while Shinguacouse and Macdonell were in Montreal. Macdonell was not informed of these actions until he returned. Furthermore, they accept the suspect newspaper accounts which claimed Macdonell bribed American Metis to participate in the takeover because the Garden River First Nation was not sufficiently interested. By presenting this version alone, the authors clearly show their lack of understanding of the issues involved for the Ojibwa.

At the time of the Mica Bay Incident, Angus Macdonell was no longer a shareholder in the company having divested himself of all shares in September, Toronto Patriot, 9 March 1850, "Quebec Mining Company's Office." The Patriot does not state the status of Allan Macdonell or Wharton Metcalfe. But, Nancy and Robert Wightman claim they had also sold their shares in September. "The Mica Bay Affair....", p. 200.

RG 10, Vol. 612, letters, 12 November 1849, Rev. Frederick O'Meara to Major Campbell Civil Secretary, pp. 393-97; 14 November 1849, Charles Thompson to Robert Baldwin, pp. 398-400; and The Globe, 23 November 1849, "Disturbances at the Lake Superior Mines." NOTE: Sacred rock paintings are located at Mica Bay and Agawa. The latter site, containing several pictures which Schoolcraft had reproduced on paper from "Chingwauk's recollection on birch bark," was discovered by Selwyn Dewdney from references made to it by Henry Schoolcraft. Dewdney asserts that
Press accounts of the actual event varied widely. Newspapers obtained their initial stories from the whites involved: the Macdonells, Metcalfe and Bonner. Bonner’s versions of the events are not reconcilable with those of the others. In one version, Bonner claims that he descended into his sitting room to find the whites and the Ojibwa there in full war-paint brandishing ‘scalping’ knives and ordering him to shut down the mining operations. But, according to Macdonell, Bonner answered the door and expressed relief that the Macdonells and Metcalfe had accompanied the Ojibwa.” Bonner already knew the Ojibwa were coming and believed Macdonell’s presence would hamper the outbreak of violence. Macdonell introduced the Chiefs to Bonner and told him that they were there to exercise their rights and reclaim their land and minerals. He claimed to have had breakfast with Bonner the next morning and proposed to return full possession of the location if Bonner signed a lease with the Chiefs acknowledging their rights and addressing the issue of rent. Macdonell then left the mining location to secure the Chiefs’ agreement. When he returned to Bonner with the proposal, the latter said he could not

Chingwauk’s identity remains unknown. Although he might have been the warrior in the War of 1812 and thus the same Chingwauk at Mica Bay, he was more likely “Hatcher’s learned Indian, Shingvauk, ‘who understood pictography.’” [Selwyn Dewdney and Kenneth E. Kidd, Indian Rock Paintings of the Great Lakes, 2nd. Ed., (Toronto: Quetico Foundation, by University of Toronto Press, 1967), pp. 1 and 81-83.] The fact that sacred rock painting sites existed close to mining locations being exploited by whites raises some very interesting questions and possibilities concerning Ojibwa motives. Were Native People who took over Mica Bay protecting a sacred place?

"Bonner likely did not relish the thought of having to deal with another large group of Ojibwa as he had had to do when Peau-de-chat and party came calling in July of 1849."
assume responsibility for making such an arrangement." Bonner later said Macdonell warned him if a lease was not signed 1500-2000 Ojibwa would join them immediately. Macdonell denied this, claiming what he had said was that such a force would come in the spring to "maintain their rights...if affairs were suffered to remain as they are."95

The first reports of the incident received by the government place blame on the three whites. Reverend O'Meara described the expedition as "improper," but suggested leniency stating the Ojibwa were "...in all respects children and require to be dealt with as such. I feel assured that His Excellency will on the present occasion [sic] shew them that they have an indulgent father to deal with rather than an unrelenting judge."96

T.G. Anderson definitely knew about the Ojibwa takeover of the mine seven days after it had occurred. It is likely that Vidal also knew. Vidal and Anderson's "Report" discussed above was submitted to the government on 5 December 1849 -- almost one month after the Mica Bay incident occurred. This uncharacteristically long delay was doubtless a result of the Mica Bay takeover. In light of this fact a few additional observations about the nature and purpose of the "Report" must be made. The commissioners used a number of methods to try and discredit the Chiefs and Macdonell.

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95 Macdonell's account: Toronto Patriot.
96 RG 10, Vol. 612, letter, 12 November 1849. Reverend Frederick O'Meara to Major Campbell, Civil Secretary, pp. 393-397.
By drawing attention to the 'ignorance' of the many and the 'extravagance' of Shinguacouse and Peau-de-chat," the commissioners accomplished several things. First, the two Chiefs already had a high profile due to their various petitions, councils and deputations to the Governor General, some of which Macdonell had been involved in. Thus, the Chiefs were portrayed as agitators under Macdonell's spell. Second, the two outspoken Aboriginal leaders could be made to look as though they did not represent the views of the majority. All of this was important because by the time Vidal and Anderson actually submitted their "Report," on 5 December 1849, the Ojibwa, Metis and whites had already (since 9 November 1849) carried out their takeover of the mining location at Mica Bay. Both Vidal and Anderson no doubt consciously used the occasion of that "Report" to highlight Shinguacouse and Allan Macdonell as 'trouble makers' prior to Mica Bay, thus setting them up to take responsibility for what had already happened. In this sense, the Report reflected Mica Bay. Anderson knew of the incident seven days after it had occurred. On 16 November 1849, he wrote to Robert Baldwin: "I further feel it my duty to submit that if immediate steps are not taken to arrest such proceedings and to intimidate the Indians and half-breeds, they will be likely to suppose Mr. McDonell has overawed the Government and the consequences may be most lamentable." Also, 

"Vidal/Anderson Report, pp. 163122, 163123, 163126, 163128 and 163130.

by 5 December, Ironside had issued arrest warrants for the Aboriginal, Metis and white leaders.

The "Report" is also dishonest in another way, namely Vidal and Anderson do not mention Allan Macdonell's involvement at Mica Bay. In fact, there is no mention in the "Report" that the Mica Bay incident had occurred. Not only were Vidal and Anderson bolstering the initial government and press views that Macdonell had led the "simple minded" Ojibwa and Metis into rebellion, they were also covering their own backs. Their bumbling efforts in October did much to cause the Mica Bay incident which might have been avoided if they had made an effort to deal with Shinguacouse on his own terms - namely, by listening to Allan Macdonell whom Shinguacouse had appointed as his spokesman. The attempt to bypass Shinguacouse and the real issues failed miserably and merely accelerated a demonstration of Aboriginal anger. The commissioners' pleas for the government to conclude a Treaty with the Ojibwa were redundant. The Mica Bay incident had made it essential.

Lord Elgin viewed John Bonner's quick surrender to the invading party with suspicion:

The Manager [Bonner] would not allow any resistance to be offered to the small body of Whites & Half Breeds & Indians who attacked them and decamped at once with his gang of miners who greatly outnumbered the assailants. The object seems to have been to raise a claim for compensation against the government."

Colonial reaction to the incident was swift. Elgin dispatched

troops to aid and protect the miners.\textsuperscript{100} He informed the Colonial Secretary, Grey, that "blackguard whites" and "American Indians" were responsible for instigating the attack, stressing that he had been trying to arrange compensation for the Ojibwa since 1847. But, Elgin was also covering his own back. Since coming to the colony on 30 January 1847, he had done absolutely nothing to arrest the chain of events that led to Mica Bay.

Under orders from Major Campbell, the Civil Secretary, Ironside issued an arrest warrant for the three white leaders, Shinguacouse and Nabenagoching, Maquackabo and the Metis: Pierre LeSage, Joseph LeSage and Charles Boyer.\textsuperscript{101} Ironside and Major Campbell arrested all but Metcalfe on 4 December 1849. The troops which accompanied them proceeded on to Mica Bay, finally arriving on the 12th.\textsuperscript{102} Allan Macdonell was transported from the district jail to the residence of the Chief Justice J.B. Robinson in Toronto (a close friend of his family\textsuperscript{103}) on charges of "forcible possession" of the mining location. Also present were Attorney General Robert Baldwin, the Public Prosecutor, the District Sheriff and Macdonell's lawyer, George Phillpots. Robinson

\textsuperscript{100} Doughty, \textit{Elgin-Grey Papers}, Vol. 4, p. 1485; also RG 10, Vol. 612, letter 30 November 1849, Mr. Meredith Assisting Civil Secretary to Ironside, pp. 404-406; and Vol. 572, 11 January 1850, Ironside to Meredith. The troops arrived late due to bad weather, see \textit{British Colonist}, 25 January 1850, "The Troops to the Indian Country."

\textsuperscript{101} PAC, RG 10, Vol. 612, arrest warrant based on John Bonner's sworn statement to George Ironside, 3 December 1849, pp. 420-421.

\textsuperscript{102} PAC, RG 10, Vol. 572, letter, 11 January 1850, Ironside to A.E. Meredith Assistant Secretary.

\textsuperscript{103} Knight, "...Mica Bay Affair," p. 49. Also Robert Saunders, "John Beverley Robinson," \textit{DCB}, Vol. 9, pp. 668-678 for additional information.
rejected the validity of the charge and a new deposition was filed.\textsuperscript{104} Upon release, Macdonell notified Ironside and Campbell of his intention to sue them for libel, false arrest and confinement, demanding L100 in damages against his "character" and "circumstances."\textsuperscript{105} To date, no trial documents dealing with either matter have been found. Allan Knight asserts neither trial occurred, but Ironside attended assizes in 1851 in connection with Mica Bay as he claimed expenses for them and almost L200 were paid out of the Public Accounts for the travelling expenses of various witness and the reimbursement of the Indian Department.\textsuperscript{106}

In December 1849, the Commissioner of Crown Lands received a letter from Mr. Cockburn, the secretary of the Montreal Mining Company. The company enjoyed good relations with Chief Kee-wa-konce at Bruce Mines, but Cockburn was concerned this would not last and warned the government that if it did not act soon to conclude a Treaty "...on Lake Superior before Spring, there may then be a gathering of several thousands of them [Ojibwa], which might have the effect of making the Chief (Kee-wa-konce) change his mind and attempt to recover his lands by force, which might, and probably would be, attended with a melancholy loss of life and

\textsuperscript{104} British Colonist, 14 December 1849, "The Proceedings Against the Indians;" see also Montreal Pilot, 27 December 1849, "The Indian Difficulty."


\textsuperscript{106} PAC, RG 10, Vol. 572, letter, 30 October 1851, Ironside, original statement of expenses sent to Mr. R. Church as per instructions from Col. Bruce, n.p. See also, Public Accounts Canada, 1852, No. 12: General Statement of the Expenditure made by the Receiver General..." pp. 66 and 67.
property." Thus, Colonial authorities had been warned that if they did not act quickly a second 'Mica Bay' would occur on Lake Superior which might have ramifications for the Bruce Mines location on Georgian Bay on Lake Huron.

Shinguacouse and Nabenagoching were transported to Toronto by Joseph Wilson. While detained there, they demanded compensation for the mineral revenue already collected by the government. The Chiefs were not detained long and Elgin pardoned them in May 1851. Macdonell's connections to the Robinsons enabled both himself and his Ojibwa friends to avoid lengthy punishment. Cockburn's above-mentioned warning that another Mica Bay could happen may have hastened the release of the Chiefs as the government realized it could not avoid a settlement. W.B. Robinson, the Chief Justice's brother, recommended Bruce send the Ojibwa home and that he himself be sent to settle their claims. Although he had previous experience dealing with Native People, he was not the best choice, having apparently been removed

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107 PAC, RG 1-360-0-61.1, "Montreal Mining Company," 1846-1851; letter, 31 December 1849, W.D. Cockburn, Secretary, Montreal Mining Company to CCL.

108 Such an outcome to the arrest and supposed upcoming trials was predicted by the Toronto Patriot, which believed the whole proceedings against the Ojibwa Chiefs, the métis, and the whites was a farce and a waste of "public money...resulting in a loss of public character wholly unjustifiable." See 31 May 1850, "Indian Affairs." PAC, RG 10, Vol. 514, letter, 22 May 1851, Col. Bruce to the AG; also Vol. 572, letter, 22 May 1851, Colonel Bruce "To Chiefs Shingwakoose and Neb-ena-goo-ling and to Pierre La Sage and to Charles Boyer." NOTE: This pardon might explain why no trial records seem to exist.

109 In 1846 he became Chief Commissioner of Public Works, a position he held until the entrenchment of Baldwin's Reform Party. Julia Jarvis, "William Benjamin Robinson," DGB, Vol. X, p. 622-624. Jarvis presents incorrect information regarding Mica Bay: on p. 623 she states that the incident occurred in 1848 and that this led to the despatch of Vidal and Anderson. This was, however, the other way around: Mica Bay occurred in November 1849, only a few days after Vidal and Anderson had departed. Furthermore their report was not presented to the government until 5 December 1849, almost a month after the Mica Bay affair.
from office in 1843 during the Bagot Commission’s investigation into fraud and corruption in the DIA and, furthermore having been the former Superintendent in charge of all the affairs of the Montreal Mining Company a few years later.¹¹⁰

The Executive Council accepted this proposal and on 8 January 1850, authorized Robinson to execute a Treaty for Ojibwa lands along Lakes Huron and Superior "...or of such portion of them as may be required for mining purposes." Robinson was to inform the Ojibwa not to demand excessive compensation "...for the partial occupation of the Territories heretofore used as hunting grounds by persons who have been engaged in the development of sources of wealth which they had themselves entirely neglected."¹¹¹ This latter suggestion was false; the Ojibwa had not "neglected" the minerals and neither had their ancient predecessors.

In the spring of 1850, Macdonell sent a rather patronizing letter to Colonel Bruce reminding him that Ojibwa lands on the north shores of Lake Huron and the water ways leading to Superior had never been subject to a Treaty. He also made reference to the recently passed Protection Act of Upper Canada which provided for the appointment of commissioners to protect Aboriginal property from injury and trespass; however, no such persons had arrived

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¹¹⁰ PAO, Jarvis-Powell Papers; letters 2 February 1843, Jarvis to father. Also J.B. Robinson Papers; 24 and two on the 25th of March 1847. Robinson relinquished this position so that he could sit in the legislature. His resignation was accepted on 27 July 1848. PAO, MSS Misc. Coll. 1848, #9, MU 2110, letter, Archibald Campbell (Montreal Mining Company) to W.B. Robinson.

along the north shores. Macdonell emphasized Ojibwa displeasure that miners would return to Mica Bay, but maintained they would not be disrupted.\footnote{12} Although Macdonell's name is not directly mentioned by Alexander Morris in his published record of the negotiations, he was present at the Huron Treaty and signed that document as a witness.\footnote{13}

Bruce would not accept Macdonell in his "assumed capacity of an agent for the Indians" and asserted the government would only accept Aboriginal requests through its agents. Although Bruce stated that no commissioners would be sent to the north shores under the Protection Act, he promised a Treaty commissioner would shortly arrive.\footnote{14} Bruce's letter curtly rejected Macdonell's ideas and was likely designed to ensure that Macdonell would not have a voice in the forthcoming negotiations. It is not surprising the government wanted to deal only with the Ojibwa - not their white allies. Macdonell's loyalty to the Ojibwa and his support of their claims must have embarrassed the settler government since it (not Macdonell) was supposed to safeguard First Nations' rights.

About two weeks later, John Prince received a second letter from Mr. Cockburn of the Montreal Company warning of impending

\footnote{12} PAC, RG 10, Vol. 181, Nos. 4201-4300, see No. 4297, pp. 105297-105300, letter, 14 March 1850, Allan Macdonell to Bruce.


\footnote{14} PAC, RG 10, Vol. 181, Nos. 4201-4300, see No. 4297, pp. 105301-105304, letter, 9 April 1850, Bruce to Macdonell. (This unsigned letter is a rough draft with several phrases/sections scratched out.)
danger in the spring if no Treaty was made.\textsuperscript{115} Shortly thereafter, Robinson met Shinguacouse and Nabenagoching at Garden River promising to conclude a Treaty in the near future and warning them not to cause further disturbances at the mines. Macdonell, also present, cautioned against signing a Treaty until presents were received at Manitowaning.\textsuperscript{116}

Twenty-one Chiefs and approximately the same number of principal men as well as their people from both Lakes participated in the Treaty negotiations. Bruce and Elgin visited the Sault but left before negotiations began. The military, which had been at the Sault since Mica Bay, was also present. Council was held at the HBC warehouse on the St. Mary's River instead of Garden River as initially planned because Peau-de-chat was too sick to make the journey.\textsuperscript{117} Several times during the negotiations, beginning on the 5th, Robinson made excuses for the amount of compensation he offered the Ojibwa and insinuated that Macdonell was responsible for their "extravagant" claims. Robinson also had to combat Ojibwa knowledge that their brothers on the American side and in eastern Canada received higher annuity payments than what he offered. He side-stepped this issue by insisting that "the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies."


\textsuperscript{116} Lake Superior Journal, "Indian Difficulties to be Settled -- Treaty to be Held -- Mining operations to be Renewed," 15 May 1850, p. 2.

\textsuperscript{117} Morrison, "The Robinson Treaties...," pp. 118-121.
Robinson assured the Ojibwa they would retain hunting and fishing rights in the shared area and that miners and their families would buy Aboriginal goods.\textsuperscript{118}

The land, however, was not "barren and sterile," but filled with copper, silver and gold. The Ojibwa knew the value of their mineral wealth and

...asked the amount which the government had received for mining locations, after deducting the expenses attending their sale. That amount was about eight thousand pounds [\$32,000] which the government would pay them without any annuity or certainty of further benefit; or one-half of it down, and an annuity of around one thousand pounds.\textsuperscript{119}

Most of the Ojibwa chose the second option. But neither Shinguacouse nor Nabenagoching viewed this as satisfactory recompense and demanded an additional annuity of \$10 per head.

Robinson ended up making two Treaties with the Ojibwa, alleging the Superior Chiefs had wanted a separate Treaty. Although this was a 'divide and conquer' tactic, it also reflected the fact that Robinson could not initially obtain the consent of the Huron Chiefs. Shinguacouse and Nabenagoching continued to demand more than Robinson was willing to agree to including an annuity of \$10 per head as well as land for the Metis.\textsuperscript{120}

Robinson made a point of portraying these two Chiefs as isolated leaders when he asserted all the other Lake Huron Chiefs came forward to sign the Treaty. He alleged this display prompted the

\textsuperscript{118} Morris, \textit{The Treaties of Canada...}, pp. 17-18.

\textsuperscript{119} Morris, \textit{The Treaties of Canada...}, p. 17.

\textsuperscript{120} Morris, \textit{The Treaties of Canada...}, p. 18.
two to come forward and sign first, with the others following. (See Figure 5: Shinguacous, Nabenagoching and Robinson.)

Jim Morrison indicates that Robinson gave a "fair" copy of the Superior Treaty to Peau-de-chat and the Huron Treaty to Shinguacous, but neither First Nation presently knows where these copies are. Morrison also notes that John Keating kept a record of the speeches made by the Chiefs during the negotiations but that these appear to be lost. In addition, Keating recorded the locations of the Reserves desired by the Chiefs. All of his descriptions were erroneous because they were represented in miles not leagues. This discrepancy, discussed below, remained unknown to the First Nations until their Reserves were surveyed.

Robinson's account of the negotiations is very brief and suspect on a number of counts. First, it is not clear why it was necessary for there to be two separate Treaties and why the idea would have been proposed by the Superior Chiefs. But two Treaties would require an official boundary between them. This boundary has always been vaguely portrayed as somewhere on Batchewana Bay, but it has never been clear which end of the Bay. Why was the Batchewana First Nation included in the Robinson Huron Treaty? Geographically, it was on Lake Superior, not Lake Huron. Although there were family ties between Shinguacous and Nabenagoching, there were far more significant reasons to keep these two Chiefs in the same Treaty area. If Nabenagoching had been considered a 'Superior' Chief, Robinson would not have been able to get that

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121 Morrison, "The Robinson Treaties...," pp. 142 and 125.
Figure 5
William Robinson, Chiefs Shinguacouse and Nebenagoching. 1850
Treaty signed since Nabenagoching refused to agree to the terms and, with Shinguacouse, continued to demand higher monetary compensation. More importantly, both of these Chiefs had very real interests in the minerals at Mica Bay, which was significantly north of Batchewana. Therefore, their interests extended into the Lake Superior area as well. It was no doubt imperative for Robinson to separate these Chiefs from their interests in the mining locations at Mica Bay. To effect such an end, some kind of boundary was necessary. What was originally to have been one Treaty for both Lakes became two Treaties divided by an artificial boundary line.

Next, Robinson was less than truthful when he said that Shinguacouse signed the Treaty first. Although his name appears first, this does not mean he signed first. In fact, early in 1851 Robinson admitted to Colonel Bruce that Shinguacouse had signed "last." Ojibwa discontent with the Treaty was a serious matter by at least December 1850 when Shinguacouse and others threatened to go to England to see the Queen. Robinson now admitted this threat had also been made in the negotiations although he never reported it. Janet Chute directly ties this threat to Robinson's refusal to aid the Ojibwa in their plans for the commercial development of their resources:

The commissioner [Robinson], meanwhile, rejected Native demands for assistance in Indian mining and logging

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122 PAC, RG 10, Vol. 572, letters, 10 January 1850, Ironside to Bruce; and Vol. 185, No. 4767, 27 December 1850, "W.B. Robinson on the alleged dissatisfaction of Chinguakonce with the late Treaty," to Bruce, pp. 107760-107763.
enterprises. When Shinggwaukonse threatened to go to England to complain to the Queen concerning the government's reluctance to even consider his proposals, Robinson retorted that the Chief and his people 'could take such a step if they pleased.' In his report to Bruce, the official suggested that, to quiet the chief, the government should build Shingwaukonse a house.\textsuperscript{133}

Other aspects of the negotiations were also less than satisfactory - particularly the compensation which Robinson offered for the minerals. The sum of $32,000 was far too low. It was no where near what the government had already collected (at least $60,000) or what it was supposed to collect according to the terms of the original leases (at least $400,000), quite independent of the value of the metal itself.\textsuperscript{134}

Not only should the First Nations have received all the revenues collected and due on their minerals, they should also have been paid a fair percentage of the actual value of the metals exploited by the various companies. It is clear from Robinson's account of the negotiations the Ojibwa also thought the sum L8000 too low. This is evident from the demands for annuities by Shinguacouse and Nabenagoching and from the fact that Robinson had to insert an escalator clause into the Treaty. Robinson mentions

\textsuperscript{133} Chute, "A Century of Native Leadership...," p. 272.

\textsuperscript{134} Lake Superior Journal, "British Justice," 8 Nov. 1849, p. 2. Also "List of Mining Locations Granted on Lake Superior, 1846," (see Logan's Report to the Commissioner of Crown Lands, 1847) in Arthur, Thunder Bay District, pp. 49-50. To date it has not been possible to obtain specific figures denoting either profit or production from the Lake Superior mines held by the Montreal Company to 1850. By 1850, that Company alone paid the government at least L3750 or $15,000 in various fees. PAO, RG 1-360-0-61.1, "Montreal Mining Company," 1846-1851. See "Statement shewing the payments made to the Crown Land Department by the Montreal Mining Company - On Lands on Lakes Huron and Superior...," 16 September 1856. By 1870, the Company lost about $400,000 and sold 18 locations on Lake Superior to a group of Americans for $225,000. See Thomas Gibson, Mining in Ontario (Toronto: T.E. Bowman, 1937), p. 46. According to the 1895 report of the Ontario Bureau of Mines, the Bruce Mines on Lake Huron produced three million dollars worth of copper between 1846 and 1876 (p. 122).
this fact in his report, but does not say at whose insistence the clause was inserted, claiming it was added to prevent dissatisfaction from arising later. All Robinson says about this significant clause is:

...I inserted a clause securing to them certain prospective advantages should the lands in question prove sufficiently productive at any future period to enable the Government without loss to increase the annuity. This was so reasonable and just that I had no difficulty in making them comprehend it, and it in a great measure silenced the clamour raised by their evil advisers.\textsuperscript{125}

This was an extra provision and Robinson had not been authorized to make it. It is clear this clause must have been forced out of Robinson during the negotiations by the Chiefs before the Treaty was signed. It is more than likely the Chiefs suggested this clause themselves. In August 1848, they had demanded to be paid for every piece of mineral that was removed from their land in the past and for the future. The escalator clause was a testament to the persistence of Peau-de-chat, Shinguacouse and Nabenagoching in safeguarding the rights and future of their people. The clause appears in both Treaties and must have been a large part of the reason why the Lake Superior Chiefs agreed to sign, explaining Robinson's comments in his report that the Lake Superior Chiefs were eager to sign the Treaty. This was a significant promise not only because of the additional revenue it would produce, but also because the Ojibwa forced Robinson (and by extension the government) to acknowledge

\textsuperscript{125} Morris, \textit{The Treaties of Canada...}, pp. 18-19.
Aboriginal sub-surface rights. First Nations owned the minerals and retained the right to profit from their exploitation in the shared area.

Part of the Ojibwa understanding of the Treaty was that it was to be an open contract susceptible to changes which would bring additional gain to Aboriginal People. In 1990, Elder Fred Pine stated: "An open contract is called Chi-dehbahk-(In)-Nee-Gay-Win or 'A Big Trial' in the Ojibway language. An open contract means we will add something on it. Well the government did not add on it like they were supposed to." The fact that what the Ojibwa agreed to sign was an "open contract" was not reflected in the text of the Treaty. Except for the escalator clause, no other part of the Treaty provided for an augmentation of terms. The settler government and its successors preferred to view the Treaty as a closed document. However, it is clear the government added some things on to it which were never discussed at the negotiations and would not have been agreed to.

According to Morris, the reason for negotiating the Robinson Treaties was due to "...the discovery of minerals." These Treaties, sometimes referred to by their numbers, 60 and 61, differ from all others in that part of their negotiations dealt with the settlement of a claim for compensation regarding unauthorized mining activities. This compensation...was arranged by Mr. Robinson, agreeing to pay them

\[^{126}\text{Morrison, "The Robinson Treaties...," p. 145.}\]
\[^{127}\text{Morris, The Treaties of Canada..., p. 16.}\]
the sum of four thousand pounds [$16,000], and an annuity of about one thousand pounds [or $4,000 to last for four years], thus avoiding any dispute that might arise as to the amounts actually received by the Government.  

This, however, did not work and disputes ensued. The Ojibwa knew all revenues generated from the sale of mining licenses and locations, as well as the value of the metal itself, were their property. The Garden River First Nation has always taken this position. The full amount of money which was due to them as a result of the development of their minerals remains an issue to this day. There is also an issue of fiduciary obligation on the part of the colonial authorities which did not dispose of the pre- or post-Treaty mining locations in such a manner that the greatest revenues would be generated.

The Ojibwa always held the beneficial interest in the mining locations which pre-dated the interest of the government and the mining companies. This fact was clear to the Ojibwa who had been asserting their rights to the minerals against the whites since 1845. The Ojibwa forced Vidal, Anderson, Robinson, the government and the mining companies to recognize their sub-surface interests and this was reflected in the text of the Treaties.

However, the Treaties also claim the Ojibwa "...fully and voluntarily surrender[ed]...all their rights, title and interest"

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28 Morris, The Treaties of Canada..., p. 16.


in their lands. This is at variance with the kind of language used by the Ojibwa themselves in their deeds and the language used by various Europeans to describe Ojibwa land and resource agreements. For example, the missionary James Cameron who recorded the details of the 16 June 1849 council meeting stated the Chiefs "granted" or "leased" certain areas to nonNatives. Vidal and Anderson several times use the word "lent" to denote the nature of land transactions. None of these words carry the connotation of a permanent release of First Nation rights in land or resources. That is, land and resources were not being 'sold' to nonNatives; they were being shared. When the Ojibwa "lent" land to be used for a railroad and demanded payment of a "toll" by all users, they were not selling the land and thereby gaining a right to compensation. They were allowing others to use the land for a stated purpose; the very fact that others passed on their land created their right to collect a toll. Herein lies the fundamental difference between what the Europeans meant to gain by the Treaty and what the Ojibwa meant to exchange: the Europeans wanted ownership, the Ojibwa wanted to share but expected rent.

Under both Treaties, the Ojibwa retained their Reserves as exclusive and unceded Territories. Both Treaties also provided that if the Ojibwa

at any time desire to dispose of any mineral or other valuable productions upon the said reservation, the same will be at their request sold by the order of the Superintendent General of Indian Affairs for the time being, for their sole use and benefit, and to the best
advantage. [my emphasis]\(^\text{131}\)

The Ojibwa controlled the location of their Reserves and retained sole use and benefit of any "mineral or other valuable productions" on their Reserves. These unspecified "other valuable productions" were important because they represent any resource of value in, on, or under the land. By including this clause in the written version, the government recognized that First Nations had full control over minerals on their Reserves.

However, this clause was contradicted by another which alleged the Ojibwa agreed to let the government confirm any mining locations in their Reserves which it sold before the Treaty was signed if the locatees fulfilled the conditions of sale. The revenues arising from these transactions were to accrue to the First Nation concerned. This clause was never discussed in the negotiations. Either Robinson or the government added it without the knowledge or consent of the Ojibwa. It contradicted other terms in the Treaty. Thus, it cannot be a binding part of the Treaty. It was only possible for the government to implement this clause by extending the payment period of the original "conditions of sale."\(^\text{132}\) Shinguacouse in particular would be very angry when

\(^{131}\) Robinson Treaties of 1850. (Roger Duhamel, 1939), pages 3 respectively.

\(^{132}\) The original terms of sale required full payment on each location in six payments at 4 shillings per acre. Most locations contained 6,400 acres. A L150 deposit was also required. One-fifth of the purchase money was to have been paid within 2 years. Not one locatee fulfilled this requirement. The lands should have been forfeited to the government. They were not. Instead, the government extended the payment time on the balance of the first instalment on two occasions. The first extension came into effect on 22 August 1849 and was to last for one year. Thus it expired before the Treaty was signed. The mining locations should have been forfeited. They were not. (NOTE: until the Treaty was signed the government had no legal authority to dispose of Aboriginal Territories as mining locations.) Payment on the locations continued to languish and several companies petitioned
the colonial authorities allowed this clause to be implemented.

Robinson noted the escalator clause showed the commitment of the Crown "to deal liberally and justly with all her subjects." Both Treaties stated that in the "future period" if the shared lands should

...produce such an amount as will enable the government of this Province [Ontario], without incurring loss to increase the annuity hereby secured to them...the same shall be augmented from time to time, provided that the amount paid to such individuals shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order. [my emphasis]

Robinson did not mention a limit on the escalator clause. This was added later without Aboriginal knowledge and consent and is therefore not valid. Nevertheless, the Ojibwa were to have a share in the beneficial interest in the shared lands.

The First Nations retained "full and free privilege to hunt over the territories now ceded by them, and to fish in the waters thereof." This unrestricted right was qualified by the phrase "excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies...with the consent of the provincial government." This qualification was not discussed in the negotiations, nor would the Ojibwa have

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the government to waive continued payment altogether. The companies claimed they had already expended so much and had little in return. On 21 March 1853, the government passed another OIC allowing another extension (still only on the balance of the first instalment) until November 1854. (PAO, RG 1-360-0-49, "Memorandum per Mining Locations Falling Within Indian Reserves," see "Report relative to certain Mining Locations..." Thus, in order to pander to the mining companies the colonial authorities not only broke the Treaty which had been orally negotiated, but also continually broke their own rules.

133 Robinson Treaties, pages 4 respectively.

134 Robinson Superior Treaty, p. 3; Robinson Huron, p. 4.
agreed to it. It was added afterwards and cannot be a binding part of the Treaty. According to the negotiations, the Crown intended hunting and fishing rights to continue for a very long time since Robinson described the land as "barren and sterile," so much so that it would "in all probability never be settled."^{135}

The Ojibwa did not relinquish mineral rights in the shared area. The Treaty merely says they agreed not to molest miners. Because minerals were not expressly surrendered they did not pass to the Crown. In terms of mineral development, both Treaties provided broad and open-ended possibilities. These, however, were shortly curtailed by the colonial government which almost immediately started to break the promises made and continued to allow the mining companies to abuse the Ojibwa.

It is quite clear the Ojibwa were unhappy with the Treaty; discontent centred around the great distance they had to travel to collect their presents (which were independent of the Treaty) and the amount of the annuity payments. Robinson did not address these complaints and felt if the Ojibwa were reminded of the escalator clause, troubles would subside. But dissatisfaction continued.^{136}

Minerals were the most explosive pre- and post-Treaty issue. Shinguacouse continued to be dispossessed of mineral resources and

^{135} Morris, The Treaties of Canada..., p. 17.

was angry that several mining locations in his village had not been cancelled.  

(This can be taken as a sure sign that he never agreed to allow the government to confirm the pre-Treaty mining locations it sold as the Treaty document alleged.)

Janet Chute asserts that John Keating, Arthur Rankin, James Cuthbertson, Arthur Maitland and Wemyss Simpson (George Ironside's son-in-law and later a Treaty No. 3 commissioner) "formed a powerful clique hostile to all organizations, particularly missions and Native bands, who challenged their economic and political hegemony along the north shore of Lakes Huron and Superior. This group sought to force the coastal Indians into a state of economic dependence as wage labourers upon both the Hudson's Bay Company and the mining enterprises."  

Even before the Crown sent out its surveyor to lay out the Reserves under the Robinson Treaties, Keating was living on and exploiting the resources of the projected Reserve at Point Grondine where he and Mr. Davies, an associate, held a timber license and had erected a "settlement" and "sawmill." Keating and Davies had applied for this location in February 1851, five months before surveyor John Stoughton Dennis received his instructions to lay out the Reserves. Dennis arrived in September of that year to

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137 Four 6,400, and one 340 acre mining locations were encompassed in the Reserve. Vidal had surveyed these locations in 1847 and 1848. Shingwacoue was not alone. Many other mining locations were situated on land which the Ojibwa wished for themselves. Two fell within the Thessalon Reserve; one in Mississaugi; two at Serpent River; two at Spanish River; and one at White Fish River. PAO, RG 1-360-0-49, n.d. but at or after 1853. File: "Memorandum for Mining Locations Falling Within Indian Reserves." See, "Report relative to certain Mining Locations upon Lake Huron and its vicinity assigned to the Locatees previously to the Treaty of 9 September 1850 with the Lake Huron and other Indians..." (n.p.) author unknown.

commence his work and frequently visited and stayed in camp with Keating on the 'Reserve' before all the boundaries were laid out.¹³⁹

As instructed, Dennis reported on the mineral potential of the Reserves and outlying areas noting strong indications of iron near Henvey's Inlet Reserve No. 2 and commenting on and camping at the Wallace mine near the White Fish River Reserve No. 4, all of which were surveyed and laid out in 1851. Dennis retained the "Geological specimens" he had collected and would forward them the following season with others he intended to obtain.¹⁴⁰

On 23 November, about ten days after Dennis completed the boundaries of Henvey's Inlet, the last for the 1851 season, Keating applied to Superintendent General Colonel Bruce to aid Dennis in the surveys, suggesting he should have authority to settle all boundary disputes between the surveyors and the Ojibwa. These disputes largely turned on the fact that the Chiefs wanted their Reserves laid out in leagues while Dennis ran the lines in miles according to the descriptions Keating had written at the Treaty. Keating, however, ended up doing more than settling disputes because he assisted Dennis in setting the survey monuments for the Reserves and running some lines.


¹⁴⁰ PAO, RG 1, B-IV, 1851 (2), #10: J. Dennis - Indian Reserves on Lakes Huron & Nipissing, letter, 20 November 1851, Dennis to A. Russell, CCL.
While laying out the Reserves along Lakes Superior and Huron, Keating and Dennis continued to examine the Reserves and the surrounding areas for mineral and timber potential for their own interests and those of the CLD. In May 1852, Keating noted that both minerals and valuable tracts of timber (oak and pine) probably known only to the Indians are to be found which would amply repay the expense and time of examination...This being the case it would be desirable wherever there were sufficient grounds for so doing to make a more extensive exploration than could be effected during the short time we should be in the vicinity of the respective Reserves...

Keating therefore proposed that Dennis merely survey the "outlines" of the Reserves "whilst I made a satisfactory exploration of the adjacent country," looking for the mineral and timber tracts.141 It was precisely this kind of arrangement which led to the ensuing trouble at Garden River.

On 12 August 1852, Keating held a council with Shinguacouse and his sons in which a dispute ensued over the Reserve boundaries. Shinguacouse wanted the western boundary to run due north from Partridge Point.142 Nevertheless, Keating directed Dennis to exclude this area from the Reserve so that the Clark/Rankin mining location would be outside of the Reserve. And, it would have been excluded if Dennis had actually run the line himself in the presence of Keating. However, Dennis moved on to mark more corners and Keating to look for minerals and timber so that the actual

141 PAO, RG 1, B-IV, 1851 (2), # 10, J. Dennis Indian Reserves on Lakes Huron & Nipissing, letter, 13 May 1852, Keating to Sir [Dennis].

line was run by Dennis' assistant, Charles Unwin. When Unwin came to project the western boundary, he discovered that the posts would not meet up in a direct line as they were supposed to. He ran the line due south from the northwest corner, veering southwestward part way down this line so that a small triangular parcel of land in the Clark/Rankin location was located within the boundaries of the Garden River Reserve. This area contained at least 340 acres and is one of the outstanding land issues of the Garden River First Nation (See Map 19.)

Keating and his associates wanted exclusive control of the mineral tracts east of Mica Bay. Keating caused the northern boundary to run south of the known iron and copper deposits, instead of "ten miles throughout the whole" as prescribed by the Treaty, thus excluding these minerals from the Reserve area. His rendering of the northern boundary allowed Rankin and others to stake the copper area to its north. This action deprived the Ojibwa of their land and minerals ensuring Rankin and his group would not have to worry about competition from Allan Macdonell who still obtained mineral information from the Ojibwa.

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144 Personal Communication, Alice Corbiere, Garden River First Nation, 10 June 1996.

145 Chute, "A Century of Native Leadership...," pp. 284-285 and 283. Keating likely carried out similar boundary manipulations at other Reserves because of mineral locations. See for example his Reports on the Reserves along Lake Huron and Superior, 1852 and 1853 respectively. He constantly reports on mineral
Map 19
Map showing boundaries of the Garden River Reserve including part of the Clarke-Rankin Mining Location.

Description
Excerpt from Treaty 1 at Garden River
for Chenguotes and Band.
12 "A District extending from Mackinaw Bay
inclusive to a line drawn from a point on Land Hare on
the Canadian side of Lake Superior in a direct line to the first 
Point on said Island.
The Hon. John Pitch
Commissioner of Crown Lands

Signed John Keating
R.L.D.
May 11, 1803

Note: A.B.C.O represent Potawatomi and other Indian tribes.
Keating was not yet done with Macdonell. He encouraged local authorities to report negatively on Macdonell's support of Ojibwa claims. Janet Chute argues this shortly led Robert Baldwin, the Attorney General, to pass a bill concerning the "administration of justice in the unorganized parts of Upper Canada." The purpose of the bill was to force Macdonell to end his relationship with Shinguacouse. Chute states that George Brown of The Globe mailed a copy of the bill to Macdonell who assessed the bill as an outright attack on himself: "'It appears to me that it would have been appropriately entitled an Act to procure the conviction of Allan Macdonell.'" The bill, which became law in June 1853, allowed a sheriff or magistrate in the unorganized area to choose his own jurors without reference to the rules used elsewhere in Upper Canada and to jail, as a felon for two years, anyone found guilty of disturbing the peace. Thus, if Macdonell did not sever his ties with Shinguacouse, he would be tried as a felon for his part in Mica Bay, never having received a pardon from the Governor General. Chute points out that the day after the bill became law, Macdonell wrote Bruce saying he told Shinguacouse his plan to go to England was "madness." Macdonell was afraid the Indian Department would associate him with this scheme.146

Macdonell's alliance with the Ojibwa did not end and his immediate fears of the law must have passed quickly. Keating and

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Rankin had effectively shut him out of the mining locations east of Mica Bay. Perhaps this was why he now concentrated attention on Michipicoten Island. Macdonell's efforts (since at least 1847) to have his mining locations on the Island confirmed were going nowhere in spite of the fact that Shingwaucoue had made him a present of the Island.

Since the Treaty was signed, the government had consistently failed to deal with Ojibwa dissatisfaction. Indeed, it appears to have consciously allowed adverse mining interests to dispossess the Ojibwa of their mines so that Rankin's group would have a monopoly. All of this must have combined to raise Ojibwa anger to at least the level it had been in November 1849 when they closed down Mica Bay. Part of Michipicoten Island had been patented to John Bonner (Jr.) on 17 June 1854. In late October 1854, the Ojibwa and Macdonell forcibly shut down Bonner's operations on the Island. The following month, the Lake Superior Journal reported

...[that an] Indian 'war' on Michipicoten Island broke out. Some Chippewa Indians attacked workers of the Quebec Mining Company and 'went so far as to fire at the miners and made a very hostile demonstration.' The miners abandoned the island and fled to Sault Ste. 

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148 PAO, RG 1-360-0-41, "List of Mining Locations on the North Shores of Lakes Huron and Superior for which patents have been issued." n.d. The Bonner family continued to hold this location as late as 1898-1899 and possibly longer. RG 1-273-3-9.1, "Island of Michipicoten."
Marie, hoping for legal and military assistance. The aftermath of this action is not presently known.

The known mineral wealth in the Garden River, Batchewana, Goulais Bay and Thessalon Reserves prompted the DIA to attempt, on more than one occasion, to secure a surrender of part, or in the case of the latter three all of the Reserves for sale in 1859.

Several problems arose in connection with the Robinson Superior Treaty. Five First Nations were represented as having signed the Treaty; however, the Chiefs' names which appeared on the final document represented only three Nations: Fort William, Nipigon and Michipicoten. The Chiefs from Pic River and Long Lake did not sign. Although the subject of long debate, this oversight was officially submitted as a land claim by the Pays Plat, Pic Heron, Pic Mobert and Long Lake First Nations on 19 March 1982. On 7 June 1982, three additional Nations joined the original claimants, namely Red Rock, Rocky Bay and Whitesand. On 26 April 1984, these Nations together with the Sand Point First Nation and their legal counsel commenced court proceedings against Ontario for damages in the 24,000 square mile area which they had

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14 Knight, "...Mica Bay Affair," p. 58. Knight credits this information to Chaput who in turn obtained it in the Lake Superior Mining Journal. I was not able to obtain a copy of this. I attempted to find parallel accounts in Canadian newspapers - British Colonist, Globe, Toronto Patriot and the Montreal Pilot. The incident was not reported there nor in the correspondence of the Manitouwahing Superintendency.

15 Canada, Treaties and Surrenders, June 1859, No. 91 (A), (B) and (C), Vol. 1, pp. 227-231. This surrender is also known as the Pennefather surrender.

never agreed to share under any Treaty. Within this claim area are the rich gold deposits of Hemlo. The Aboriginal Title and land rights of the Ojibwa preceded the discovery of the Hemlo gold fields in the early 1980s. Indeed, as we have seen, it was the mineral knowledge of (at least) two Native People which led Canadian miners to this rich area in the first place.

**SURVEYORS, ILLEGAL MINING ACTIVITIES AND TREATY NO. 3**

Upper Canada had been interested in annexing the northwest since the 1840s and Canada West dispatched exploration and survey parties west of the Robinson Treaty area in the 1850s. Members of the Palliser expedition were told by the Ojibwa not to take astrological observations or to remove botanical and mineral specimens from their Territory. The government did not conclude a Treaty although the Ojibwa there sought compensation for the use of their land and resources. Mining interests continued to expand their search for minerals north and west of Lakes Huron and Superior in advance of Treaties during the 1860s and early 1870s. These incursions into Aboriginal Territory again distressed and angered the Ojibwa, especially Chief Blackstone, who put a stop to them. Similar to the situation in 1849/1850, the disputes led to the negotiation of a Treaty in which minerals, specifically gold, were a very visible issue.

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152 Hansen, "...Anishinabek Land Claim...," p. 9.

According to Dawson, later a Treaty No. 3 commissioner, the Ojibwa spoke of their desire to have a Treaty as early as 1857, when he began exploring and surveying the area between Lake Superior and the Red River Settlement.\textsuperscript{154} Describing these events in 1858, Dawson stated that upon arrival at Fort Frances he was met by about 20 Chiefs who requested his presence at a council to explain the object of his survey party. The next day, he reported that the Chiefs agreed not to obstruct his party, but stated they would not tolerate the intrusion of settlers on their Territories and requested an agent to be sent to them the following June to conclude a Treaty for part of their land.\textsuperscript{155}

Dawson had, however, presented these events differently in his first account of them in an 1857 letter, maintaining that while he and his party were delayed on Garden Island in Lake of the Woods, his Ojibwa guide left to inform other Ojibwa of their arrival. This resulted in the arrival of 16 "painted warriors" at Dawson's camp in the morning demanding he meet them on their Island. Dawson refused and the warriors remained. That afternoon, 13 Ojibwa canoes landed on the Island to explain to Dawson the significance of their land. An unidentified Chief revealed that his great ancestor had conquered the area and "...left them the

\textsuperscript{154} Dawson was a civil engineer by profession. He, George Gladman, and Henry Hind, participated in a government backed expedition to explore the territory north west of Lake Superior. Between 1857-1859 Dawson surveyed "a line of road" from Thunder Bay to Fort Garry (Winnipeg). Department of Travel and Publicity, Press Release, 14 October 1959, "Historical Plaques to be Unveiled in Fort William and Fort Arthur, pp. 3-4.

\textsuperscript{155} See copy of a letter 21 August 1858, Dawson to Provincial Secretary, in "Report on the Exploration of the Country between Lake Superior and the Red River Settlement and between the latter place and...Saskatchewan," (Toronto: John Lovell, Printer, 1859), pp. 8-9.
woods and rivers as an inheritance which they would sooner lose their lives than relinquish." The Chief demanded to know why Dawson's men had crossed "...through their territory without even so much as coming to consult them or ask their consent and concluded by saying that we must go by the old route." The Ojibwa refused to let the survey party continue, arguing that after the surveyors would come others and after them others with the result that the Ojibwa would lose their land. Dawson said he tried to give the Ojibwa presents but "this was haughtily refused."

However, the Ojibwa provided the party with two guides to show them the old route to the Winnipeg River. Dawson noted that it "...seemed to afford the whole party the greatest pleasure to have it in their power to oblige us in one way after having thwarted us in another." There is no mention in this letter that the Ojibwa asked for a Treaty. Instead Dawson suggested a cession of 10 miles in depth on either side of the proposed route with annuities and presents.156 This was an attempt to negotiate a right-of-way through Aboriginal Territory.

Dawson commented on the strength and self-sufficiency of these Ojibwa, asserting they were "saucy and independent of the HBC" due to the abundant supply of sturgeon and wild rice in their Territories which constituted an independent food supply. They maintained strong traditional spiritual beliefs and practices in spite of the missionaries who tried to convert them. Dawson could

156 PAO, RG 1-369-0-1, Box 1, "Red River Settlement, 17 December 1857, Mr. Dawson's Second Report to the Commissioner of Crown Lands, Toronto," not all pages are numbered, see pp. 24-29.
foresee a "great deal of trouble" in the future among settlers, labourers and the Ojibwa if a Treaty was not concluded.\textsuperscript{157}

Dawson's first statements regarding minerals in the area date from 1868 when, in preparation for the dominion purchase of the HBC's land, he returned to ensure his previous survey line would facilitate a route west.\textsuperscript{158} Commenting on the gold potential in the Lake of the Woods area due to "schists on Rainy Lake...[which are] intersected with lodes of quartz," Dawson noted that he had been shown samples of gold quartz from Rainy River the previous summer. He again emphasized Ojibwa strength: "they are very intelligent and are extremely jealous as to their right of soil and authority over the country which they occupy." Their relatives on the American side were familiar with the Treaty process and had not failed to make them fully aware of the value of the Territory which lay on the route to Red River. Dawson stressed that Native rights should be addressed through a Treaty.\textsuperscript{159}

His 1869 "Report" repeated the need for a Treaty and con-

\textsuperscript{157} Dawson, "Report..." 1859, pp. 26-27.

\textsuperscript{158} PAO, 14 October 1959, "Historical Plaques to be Unveiled in Fort William and Port Arthur," pp. 3-4. The Dawson Route traced "the old canoe route northwest from Lake Superior to Fort Garry. A road ninety miles long would have to be built at the Fort Garry end of the route and one of forty-five miles at the Lake Superior end. Between lay over three hundred miles of rivers and lakes broken by nine portages." See Irene Dawson, "The Dawson Route 1857-1883: A Selected Bibliography with Annotations," \textit{Ontario History}, Vol. 59, 1967, p. 47. Dawson remained in this area throughout the 1860s, but his early papers and reports make few references to the mineral potential of the area. He was instructed to keep a diary of the soil, agricultural potential and the minerals in 1860, but no such diary has been found in his personal or published papers at the PAO. Similarly, Canada, more concerned with the annexation of the Hudson's Bay Company [HBC] lands, made no sustained effort to examine the mineral wealth of this area. No Geological Survey parties were dispatched prior to 1870.

tained the first description of what this should encompass; namely, a "...distinct understanding as to right of way...without reference to lands for settlement, and other questions" which could be settled subsequent to the opening of the route west. For the next four years the Ojibwa sought to treat for right-of-way only, much to the dismay of Canada, thereby indicating they did not want to cede their land or minerals, but merely collect a rent or toll for their temporary use.

In January 1869, the Ojibwa presented Canada with a list of 20 demands constituting their terms for Treaty which was an arrangement pertaining to compensation for a right-of-way through their land. The first five demands dealt with money: all Chiefs were to receive $50 per year; each councillor $20 per year; both first and second soldiers of every Chief, $15 per year; each man, woman and child was to receive $15 as well. Demands six to eight concerned clothing, guns and powder. The remaining demands, to nineteen, included foodstuffs, goods and livestock to facilitate agriculture and hunting and fishing. Finally, the agreement was to last "forever." Canada did not respond.

When Canada assumed control of the HBC lands in 1869 without consulting the Native People or Metis inhabitants of the area, the Red River Resistance, led by Louis Riel, ensued. Fearing that a Native-Metis alliance in the northwest would block, for months or

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years, military movement between Lake Superior and Red River, Canada quickly realized the importance of obtaining a safe military route to the west.\textsuperscript{162}

Wemyss Simpson (previously involved in mining with Rankin and Keating on Lake Huron and soon to be a Treaty Commissioner) was sent west in advance of Colonel Garnet Wolseley's expeditionary force destined for Manitoba to secure a right-of-way "and to allay Indian feelings." Meeting about 1500 Ojibwa at Fort Frances on 20 June 1870, in what may be viewed as the first federal attempt to secure their rights, Simpson offered them presents which they refused.\textsuperscript{163} He informed the Secretary of State that the Ojibwa had no intention of stopping the troops because they had already been paid for passage over their Territory by Dawson who had effected a right-of-way from Chief Blackstone at Thunder Bay earlier in the year. Blackstone was paid flour, pork, tea, tobacco and clothing in exchange for the right-of-way, but Dawson had not settled for his road through their Territory and the Ojibwa now demanded that Simpson pay them for this, asserting they would not allow settlers on their lands.\textsuperscript{164} Blackstone later stopped and questioned Wolseley's troops before letting them pass.


\textsuperscript{163} PAO, Irving Papers (hereinafter cited as: IP), MU 1468, 30/36/07, Irving identified this in his notes as the "First Indian Meeting at Fort Francis 20 June 1870."

The Territory between Lake Superior and the Red River was described as "uninhabited except by wandering Tribes of Indians" by an Officer of the Expeditionary Force who left a "Narrative." Referring to the Ojibwa, that Officer stated: "...they might cause endless trouble and great loss to any military force seeking to push its way through the country without their permission." Neither Canada nor Ontario controlled the area west and north of Lake Superior.

In August 1870, the first Treaty instructions were sent to the Manitoba Lieutenant Governor, Adams Archibald. In part they stated that "...you will...open communication with the Indian bands occupying the country lying between Lake Superior and... Manitoba, with a view to the establishment of such friendly relations as may make the route from Thunder Bay to Fort Gary secure at all seasons." These instructions were for a right-of-way only, not a cession of land and resources. This would be in keeping with what the Ojibwa wanted - namely a toll or rental agreement on the right-of-way issue. But, military imperative did not long remain the only reason Ottawa wanted a Treaty.

Only a few months later, in the winter of 1870-1871, two Ojibwa men discovered gold. This factor largely accounts for the

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change in federal policy. Right-of-way was no longer satisfactory; the Dominion wanted to claim the mineral wealth of the area. This fact was recognized by Ontario. Aemilius Irving, later legal counsel for the province, emphasized Edward Borron's assessment that: "The first difficulty about the Boundary arose about 1870 in consequence of a gold mining location granted by Ontario west of the height of land to McIntyre, Captain Frue and others." (The location was issued to Peter McKellar who in turn sold to Frue.) Borron continued, saying that Simon Dawson, and others with mining interests in the area, found themselves shut out and encouraged Canada to claim the land and resources. Canada had been willing to treat for only a right-of-way, but changed its position after gold was discovered. If Borron is correct and Dawson encouraged Ottawa "to set up claims," because of his interests in gold, then he betrayed the Ojibwa. His

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Wayne Daugherty argues that three Reports written by federal officials, namely Simpson, Archibald Adams and Simon Dawson, accounted for the change in federal policy. These Reports, argued among other things, that the amount of compensation demanded by the Ojibwa would pay for all the Territory and not just a right-of-way. Thus, Canada should effect a full cession. PAM, MG12, A1, 19 August 1870, Simpson to Howe; 12 November 1870, Lieutenant-Governor of Manitoba, A.G. Archibald to Howe; and 19 December 1870, Dawson to Minister of Public Works, H.L. Langevin. Cited in "...Treaty No. 3," pp. 6-15. However, there was still no imperative reason for Canada to do this. It had already obtained a right-of-way for the troops and it was building the Dawson route regardless of Ojibwa obstructions and demands for compensation. It was not until gold was discovered that Canada's policy changed. It cannot be emphasized enough that Dawson had substantial mining interests in the area. Gold was the imperative. It should be remembered that Simpson had past mining interests with Rankin on Lake Superior.

The significance of this argument is discussed in greater detail in Chapter 4. PAO, IP, MU 1468, 30/36/6(1).

This was not the end of Dawson's ambiguous relationship with the Treaty No. 3 Ojibwa. During the 1880s, he and his business partner Hugh Sutherland illegally cut and removed about $30,000 worth of timber from the Eagle Lake Reserve. See MU 1476, 38/37F/4, letter 15 August 1883, George Burden, Ontario Commissioner in disputed area to T.B. Pardee, CCL, pp. 3-4.
"claims" not only precipitated the boundary dispute, but also caused Ottawa to enlarge its agenda from a right-of-way only.

According to Port Arthur mining promoter Thomas Keefer, two Ojibwa, Jean Baptist and Michael Puchot, employed by Neil Whyte at the Beau-Blanc HBC post, discovered the vein. McKellar received samples containing both gold and silver. While prospecting along Whitefish River during the summer of 1871, McKellar recalled that the two Ojibwa had told him the precise location of gold deposits at Jackfish Lake, west of Shebandowan. McKellar had entered the non-Treaty area under the pretended authority of the Ontario Crown Lands Department.

Negotiations opened between the Dominion and Ontario for the resolution of the province's northern and western boundaries in 1871. A Treaty encompassing land and resources in the disputed area meant Ottawa could claim title to a large portion of the expanse in dispute. Most of the Treaty area was in Ontario, the remainder in Manitoba. Ontario was neither invited to participate in the Treaty negotiations which began in 1870 nor to concur in the terms of 1873. But, Ontario knew negotiations were afoot and Canada consulted it on more than one occasion about mineral

170 Discussed below in Chapter 4.

locations in the area between 1870-1873.\textsuperscript{172}

On 25 April 1871, the Privy Council appointed a joint commission to Treat with the Ojibwa. Commissioners Simpson, Dawson and Robert Pither were authorized to Treat for lands "...from the watershed of Lake Superior to the angle of the Lake of the Woods, and from the American border to the height of land from which the streams flow toward the Hudson's Bay."\textsuperscript{173} Canada, no longer viewing right-of-way as its goal, now sought a "surrender of lands" over a very large area.

In June 1871, before Wolseley's troops departed from Prince Arthur's Landing, a party of Ojibwa including Blackstone of Shebandowan Lake, requested information concerning the activities and intentions of the troops. Later Blackstone and his friends were given an interview with Wolseley at which

They expressed astonishment at finding us making a road through their country without having previously made any treaty for their lands, and were very anxious to enter upon the subject of the terms we intended proposing for the extinction of their territorial rights.

Blackstone and his party were told the Queen's soldiers merely sought a "right-of-way" through their land, and that no other form of "occupation" was intended. This was no longer true; since the previous month the government had sought a "surrender of lands." Blackstone and his party were sent away with promises they would


\textsuperscript{173} Morris, The Treaties of Canada, p. 44. Dawson was named commissioner after the original appointee Lindsay Russell had declined the position.
receive presents the following year. Wolseley appears not to have been subjected to further interviews (like the one with Blackstone). But his journey certainly had the potential to become explosive because his force was not merely crossing over Ojibwa land, it was also laying out parts of the yet-unfinished, and much hated, Dawson Road. These road building activities must have infuriated the Ojibwa west of Fort Frances as much as they infuriated Blackstone.

On 11 July 1871, the commission met with the Ojibwa at Shebandowan and Fort Frances for the second time. They were instructed "to pay them a small amount in money as an equivalent for all past claims whatsoever." The Ojibwa did not agree to this and refused to surrender their Territorial rights, instead demanding compensation for the road through their Territory. The Ojibwa did not want to relinquish control of their resources, particularly minerals. This was clear to Peter McKellar who returned to Jackfish Lake early in 1872 with his partners and workers only to be stopped by several Ojibwa. Blackstone and others angrily informed McKellar that no Treaty had been made with them and demanded the developers respect the rights of his Nation.

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174 "Narrative of the Red River Expedition," p. 58. Blackstone's behaviour casts some doubt on Simpson's earlier assertion that Dawson had obtained a right-of-way for the troops.

175 PAO, IP, MU 1468, 30/36/07, notes in possession of Aemilius Irving identified this as "The Second Indian Meeting at Shebandowan and Fort Francis, July 1871."

176 Morris, The Treaties of Canada..., p. 44.

177 By this time, McKellar had sold his interest in the mine to Captain William Frue.
According to a report from Edward Borron, the Thunder Bay Mining Inspector, Blackstone "...plainly told them [the miners] that if they did not leave he could and would collect an overwhelming force and compel them to do so." McKellar ceased work and removed his men and tools. Borron had several times warned the Crown Lands Department that its mining patents in Ojibwa Territory would prove troublesome.178

On 4 April 1872, William Frue, now McKellar's employer, reported that:

The work on the gold mine was unexpectedly stopped two days after I left the diggings owing to the Indian Chief Blackstone putting in an appearance and ordering the men to discontinue their work. Had it occurred a month earlier I would have undoubtedly sent back another party of men well armed so that they would have been able to have protection against any raids Mr. Blackstone saw fit (illegible) all for the best as the Government will undoubtedly perfect the treaty early in the summer... [Regarding the Treaty Commissioner Mr. Simpson], Blackstone protests in the strongest possible way against Mr. Simpson's return. He says that he will not treat with him but will treat with any other man the Government will send up.179

In her overview of Frue's letters, historian Elizabeth Arthur emphasizes Frue's suspicions of Dawson. Arthur claims "there is

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178 PAO, RG 1-360-0-7.2, "E.B. Borron, Mining Inspector, Thunder Bay District," 1869-1873. See letter, 5 April 1872, Borron to R. Scott, CCL. This incident is also discussed in Henderson, p. 38. Keefer in his address of 1885. (Burley, p. 284) and Roland, Algoma West..., p. 179.

179 Letter, 4 April 1872, Frue to Sibley, from the Algoma Silver Mining Company Papers, in Arthur, Thunder Bay District, pp. 148-149. She gives another date for this incident in Simon J. Dawson, p. 18 and footnote # 59, citing a letter, 4 April 1871, Frue to Cumberland, discussing the incident. The date is probably 1872 since this is the date also mentioned by Keefer, Roland and Henderson. Roland sets the date more precisely as "the end of March." Algoma West..., p. 179. Frue also hinted in his letter that there was some kind of problem between Simpson and a woman which may have been the reason why Chief Blackstone did not want to deal with him: "There is something connected with Blackstone's sister-in-law and Mr. Simpson that the former is exasperated about."
at least an implication in Frue’s letters that it was Dawson who encouraged Blackstone to take his dramatic action.140 Frue’s assessment was erroneous and similar to that made by government officials and others about Shinguacouse. But Blackstone was in control and had his own agenda. Frue angrily wrote the provincial assembly about Dawson, suggesting that legal action be taken under the BNA Act.141 Dawson was on good terms with the Shebandowan Chiefs and his influence would later count for much in securing signatures from this area for the Treaty.

There was no doubt that gold was all around the Shebandowan area. According to Keefer it was located "...in veins traversing different Islands in Lake Shebandowan and on the lands surrounding near there, and Kashabowie Lake." Ojibwa from the area continued to share their knowledge of mineral deposits with the miners. In 1872, "an Indian named Mamabia discovered and pointed out to Archibald McKellar on Partridge Lake a vein carrying free milling [sic] gold ore."142 At the same time some Ojibwa were attempting to gain just compensation and protection for Aboriginal resources under a Treaty, other Aboriginal mining entrepreneurs were helping the white man locate gold and silver deposits. The Ojibwa were not opposed to mineral (or other) development as long as they continued their control and received compensation.

The third unsuccessful meeting between the commissioners and

140 Arthur, Thunder Bay District, p. lxxiii.

141 Arthur, Simon J. Dawson, p. 18.

142 Keefer’s address (Burley, p. 285); and Roland, Algoma West..., p. 179.
the Ojibwa occurred at Fort Frances on 17 July 1872. On the same day the commissioners sent a report to Joseph Howe, Secretary of State for the Provinces, detailing the rejection of current Treaty proposals and noted the Ojibwa "...have advanced the most extravagant demands for roads made on their lands and wood taken for steamers and buildings." In addition, the commissioners cited other reasons why the negotiations had failed; namely

the fact that they are well informed as to the discovery of gold and silver to the west of the watershed, and have not been slow to give us their views as to the value of that discovery. 'You offer us,' said they '$3. per head and you have only to pick up gold and silver from our rocks to pay it many times over.' The Chief of the section where the discoveries have taken place was emphatic in expressing his determination to keep miners from his country until he had been paid for the land.

These talks lasted 17 days. Much of this time must have been taken up with Ojibwa demands to be paid a reasonable sum for their mineral wealth. The Ojibwa obviously did not urgently need a Treaty since they refused to agree to the government's unsatisfactory terms. Further, the Chief (likely Blackstone) threatened to expel the miners unless compensated. Blackstone had already carried out such a threat. At least one reason why it took Canada four years to conclude a Treaty with these Ojibwa was

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161 PAO, IP, MU 1468, 30/36/07, notes in possession of Aemilius Irving give details of "The Third Indian Meeting at Fort Frances, 17 July 1872."

164 PAO, IP, MU 1468, 30/36/1-4, see No. 1, letter 17 July 1872, signed by Simpson, Dawson and Pither Indian Commissioners to Joseph Howe, provincial Secretary of State, pp. 1-3.

because of a dispute over the value of their minerals.

The commissioners noted the Ojibwa were split between those who wished a Treaty and those who did not. As well, they were influenced by the American Ojibwa among them who were accustomed to receiving much higher payments and presents than what had been offered to the British Ojibwa.

A federal OIC dated 16 October 1872, approved modifications to the Treaty proposals. The commissioners suggested a military force be moved into the area whether or not they secured a Treaty ostensibly to protect settlers and miners from the Ojibwa although the latter were stated to "have behaved themselves" except on a few occasions. In concluding their report the three maintained the Ojibwa were very aware of their interests and evinced great sagacity in asserting their position.186

In October, William Spragge, the Deputy Superintendent General, submitted a report detailing the failure to obtain a Treaty. The terms offered to the Ojibwa were flatly "refused." Spragge commented on Simpson's belief that the Ojibwa were holding out for better terms because of their "...valuable discoveries of the precious metals within their territory." Spragge pointed out that the Ojibwa sought to "expel the miners" and reflected on the actions of Shinguacouse prior to the conclusion of the Robinson Treaties. He felt that the Ojibwa in the Fort Frances/Lake of the Woods area had a parallel right to compensation for minerals and

186 PAO, IP, MU 1468, 30/36/1-4, No. 1, letter 17 July 1872, Simpson, Dawson Pither to Howe, pp. 1-3.
also a right to Reserves. Spragge believed if the Ojibwa chose Reserves that overlapped with federal patents, the patents would have to be sacrificed.

Spragge’s remaining comments dealt with financial considerations. He suggested Reserves of equal size to those sanctioned under Treaty No. 1 be allowed. In order to augment the position of Chiefs and Councillors yearly salaries were to be paid. The Head Chief was to receive $25 and Councillors $15. Annuities might have to be raised to $4 per head from $3 per head as the Ojibwa refused to accept the latter sum. Spragge argued such an annuity was not outrageous because it was the sum paid under the Robinson Treaties. Beyond these considerations the First Nations were to receive farming implements and clothing. Again the precedent for this was Treaty No. 1. Finally, Spragge implored Canada to compensate the Ojibwa for the use of their timber and suggested the amount be left to the discretion of Simpson. Ojibwa claims were to be addressed so that additional "disturbances" would not arise.  

On 17 October, Simpson reported he had informed Blackstone that any Treaty made would be carried out by the government’s authorized commissioners, that is himself, Dawson and Pither. Simpson told the Chief that Reserves would be granted and hunting and fishing rights would not be lost in the shared Treaty area. Blackstone was also told Canada would not authorize an annuity at

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187 PAC, RG 2, Series 1, see copy of OIC PC 821 and report of Wm. Spragge, Deputy Superintendent General, pp. 1-2, and 1-11, both dated 16 October 1872.
$20 per head for every individual.168

Negotiations, now conducted by Morris, Provencher169 (replacing Simpson) and Dawson continued to be "protracted and difficult."170 On at least three occasions Canada had to revise Treaty terms; this was a testament to the shrewdness of the Ojibwa. On 31 May 1873, Spragge outlined new terms which appeared in OIC #705, dated 16 June 1873.

Disagreeing with the Ojibwa contention that the incidence of gold, silver and other metals in their hunting grounds ought to bring them a very high annuity, Spragge sanctioned only a one dollar increase in the annuity to $5 per head. Unlike the Ojibwa, he believed $5 was fair because of the large area under consideration. The Ojibwa were to receive 160 acres per family of five as a land entitlement. After signing, Spragge suggested the First Nations receive a gratuity of $3/head with presents and provisions. The Head Chief was to receive $25 and the "inferior Chiefs"


169 J.A.N. Provencher was a lawyer, journalist and public servant. He went to the Red River settlement with Lieu. Governor William McDougall to declare Dominion title and was briefly captured by Louis Riel. He acted as a commissioner for Indian Affairs until 1876 when he was investigated by the DIA for a number of irregularities involving the delivery of harrows, ploys and wild cattle to the Treaty No. 3 Ojibwa (PAC, RG 10, Vols. 995-996); Kenneth Landry, "Joseph Albert Norbert Provencher," DCB, Vol. 11, pp. 716-717; and PAC, RG 2, Series 1, Vol. 75, OIC PC 229, 25 February 1873.

170 Morris, The Treaties of Canada..., p. 45. NOTE: Most of the correspondence indicates Dawson was on good terms with Blackstone. However, there was a fraudulent petition against Dawson supposedly signed by Blackstone accusing him of threatening to murder the Native People if they did not sign a Treaty and emphasized Dawson's self-interest in Ojibwa minerals. Blackstone later denied having said anything which appeared in the petition which had been written by someone else and signed by him. Correspondence on this matter may be found in RG 10, Vol. 1872, F. 747, some mention is also made in PAC, RG 2, Series 1, OIC PC 821.)
$15 each. He believed it would only be "wasting time" to resume negotiations on old terms which had already been rejected.\textsuperscript{131} These terms, however, were not final and on 6 August, the Privy Council again authorized new terms under OIC #902. An "immediate present" of $15 per head was to be paid to all signatories upon conclusion of the Treaty. Additional annual payments were to be left to the discretion of the commissioners, but were not to exceed $7 per head. It was believed that without such discretionary powers the successful conclusion of a Treaty would be impossible.\textsuperscript{132} These monetary terms were much less than what the Ojibwa demanded in 1869 and certainly did not reflect the value of their land.

But, the Ojibwa had their own reasons for finally entering into Treaty. They wanted compensation for right-of-way across their land and protection for natural resources including the minerals and fisheries.\textsuperscript{133} The Ojibwa demanded compensation for wood used by the Treaty party and asked for agricultural aid, livestock and a teacher. On 3 October they insisted that councillors be paid $20 per head, warriors $15, and the general population $15. Morris and the commissioners refused. In total such a payment would have cost the government $125,000\textsuperscript{134} - a

\textsuperscript{131} PAC, RG 2, Series 1, Vol. 311, see memo 31 May 1873, Spragge to Indian Office and OIC PC #705, 16 June 1873. Also PAO, IP, MU 1468, 30/36/2, same memo and map of 'half breed' lands at Rainy River.

\textsuperscript{132} PAC RG 2, Vol. 313, OIC PC #902, 6 August 1873.

\textsuperscript{133} Muirhead, p. 3.

\textsuperscript{134} Morris, The Treaties of Canada..., pp. 48 and 60.
small amount indeed considering the value of the gold alone.

The statements of Chief Mawedopenais of Fort Francis, a spokesman during the Treaty, indicate that the Ojibwa had earlier selected their Reserves. These Reserves were already theirs; they were not obtained from the government and were excepted from the shared 55,000 square miles. Mawedopenais told Governor Morris: "All of us--those behind us--wish to have their reserves marked out, which they will point out, when the time comes. There is not one tribe here who has not laid it out...We do not want anybody to mark out our reserves, we have already marked them out." In spite of such statements, Canada has tended to view the Treaty No. 3 Reserves as included in the 'surrender.'

With regard to minerals Mawedopenais stated: "...the sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them." Chief Powhassan, another spokesman, also asked about minerals saying "...Should we discover any metal that was of use, could we have the privilege of putting our own price on it?" (See Figure 6: Powhassan.) Morris' answer was significant and ambiguous. Unlike Morris, the Ojibwa Chiefs made no distinction between on or off Reserve minerals. Morris stated:

If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other

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Figure 6
Chief Powhassan
man. He can sell his information if he can find a purchaser. 196

Minerals on Reserves clearly belonged to the First Nations. The position of minerals off Reserves, however, was more difficult to discern - especially in terms of how the Native Peoples would have understood the answer. Morris made a distinction between the collective monetary interest of First Nations in Reserve minerals and the individual Ojibwa monetary interest in off-Reserve minerals.

Dawson, also present, wrote down Morris' minerals promise in different words. According to Dawson, Morris said: "If minerals were found on the Reserve the mine would be administered for their benefit, otherwise, the Indians could not claim it." 197 This is a substantially different promise, recognizing only the collective interest on-Reserve. It clearly contradicts what Morris did in fact say about individual compensation off-Reserve. Dawson's account is also contradicted by two additional Aboriginal sources - Joseph Nolin and the Paypom Treaty. Nolin, a Metis retained by the Chiefs to record the negotiations, recorded the minerals promise as follows: "If some gold or silver mines be found in their reserves it will be to the benefit of the Indians, but if the Indians find any gold or silver mines out of their reserves they will only be paid the finding of the mines." Morris obtained

196 Morris, The Treaties of Canada..., p. 70.

197 Grand Council Treaty #3, "We have kept our part of the Treaty:" The Anishinabe Understanding of Treaty #3, (Kenora: 1995), p. 21. Thanks to Joan Lovisek for sharing this document with me.
a copy of Nolin’s notes, attaching them to the official report. Morris gave another set of notes to Chief Powhassan when the Treaty was signed. These notes eventually came to be in the possession of Chief Alan Paypom of Washagamis Bay First Nation. The minerals promise in the Paypom Treaty is the same, except for a minor punctuation detail, as in Nolin’s notes.198 These promises reflect the distinction between collective and individual interest on and off the Reserves as does Morris’ statement above; they do not reflect Morris’ uncertain promise of compensation for individuals locating minerals off-Reserve. Nolin’s notes and the Paypom Treaty are definite on the fact of compensation for the individual finding minerals off-Reserve, indicating that the Crown itself was responsible to pay this. The Crown could only promise that it would pay individual Ojibwa, it could not promise that private companies would pay.

The Ojibwa did not say they relinquished their mineral rights and Morris did not say the Crown claimed them. Aboriginal People could not have thought otherwise: the promise of a finder’s fee in the Treaty area, where only the surface of the land was shared, meant that the minerals were still a part of First Nations’ economies - as they had been before the signing of the Treaty.

After the Treaty commissioners finished the main negotiations at the north-west angle of the Lake of the Woods on 3 October,
Dawson went on, by himself, to Shebandowan to obtain the adhesion of the remaining Chiefs there.\textsuperscript{199} This adhesion, concluded on 13 October, requires further comment. One of the earliest known maps showing the western boundary of the Robinson Superior Treaty and thus the eastern boundary of Treaty No. 3, indicates that Shebandowan was in the former Treaty area. This unofficial map dates from the 1890s; no earlier maps are known to show the boundary in question.\textsuperscript{200} If Shebandowan had indeed been in the Robinson Superior Treaty why did Dawson meet Chiefs Paybamachas, Kebaquin and Metassoqueneshauk, whom he identified as Shebandowan Chiefs, at Shebandowan in 1873? Why did government officials, including Dawson, refer to the area and the Chiefs around Shebandowan as lands and peoples within the purview of Treaty No. 3 on several occasions?\textsuperscript{201} Furthermore, in 1872, Canada had suggested that both Ontario and itself refrain from issuing mining licenses at Shebandowan and its environs. If Canada believed the Crown had obtained the Shebandowan area under the Robinson

\textsuperscript{199} Note: two additional adhesions, not discussed in this dissertation, occurred under Treaty No. 3, namely the Lac Seul adhesion of 9 June 1874 and the "Halfbreeds" of Rainy River and Lake adhesion of 12 September 1875.

\textsuperscript{200} See Map 7 (NB. unfortunately the Shebandowan area did not reproduce clearly on this map. But, Canada and Ontario have continued to produce maps showing the Shebandowan Lakes in the Robinson Huron Treaty area, see for example J.L. Morris' Treaty boundaries maps at the PAC. Jim Morrison asserts that he has never seen an earlier map depicting this boundary. Personal communication, 18 November 1994. Joan Lovisek concurs with this statement and adds that defining the northern boundary of Treaty No. 3 was not an issue until the early 1900s when Treaty No. 9 became an issue.

\textsuperscript{201} Morris, The Treaties of Canada..., pp. 54, 64, and 327-328. Also PAC, IP, MU 1469, 31/36/24(2), notes re. Treaty events in 1873. Notes in the possession of Irving refer to the adhesion obtained by Dawson at Shebandowan.
Superior Treaty it would not have made such a suggestion.202

If Shebandowan was a shared Territory, then the Robinson Superior Treaty was not sufficient to transfer it to the Crown; if it was an exclusive Territory, then that Treaty definitely did not transfer it. Either way, Ontario had no right to issue mining licenses in that area or to its west.203 These were the licenses which angered Blackstone and caused him to shut down mining operations at Jackfish Lake. The government did not know what lands it had Treated for either in 1850 or in 1873.204

The Treaty facilitated the transfer of an estimated 55,000 square miles of land from the Ojibwa to Canada (See Map 20). This was a transfer of surface rights only. The Treaty stated that Canada would lay out Reserves for farming and "other Reserves" for "farming or other purposes." This did not reflect the Aboriginal understanding of the Reserves which were to have been exempted from Treaty in the same way Reserves under the Robinson Treaties were. Furthermore, the Ojibwa clearly had not intended their

202 PAO, IP, MU 1469, 31/36/24(2), notes in the possession of Irving dealing with events in 1872.

203 As we shall see in Chapter 3, Ontario did not really care where the boundary was anyway and ordered its mining inspector to issue mining licenses in an area it knew to be outside of the Treaty area in the early 1870s. The Robinson Superior Treaty states that the western boundary is the height of land along Pigeon River, but does not state which height of land. In fact, there are several different heights of land in this area. Ontario would of course wish the boundary to be the height furthest west since this would expand the area in which it believed it had the legal right to issue mining licenses. Canada, on the other hand, would want the boundary to be based on a more eastern height of land (ie east of Shebandowan) because this would increase the area in dispute between the two governments also the area in which Canada claimed it owned all timber and minerals.

204 Canada also believed it had Treated for the area north of Lac Seul, but it was mistaken and had to make an adhesion to Treaty No. 3 a year later for this area.
Map 20
Map showing boundaries of Treaty No. 3
Reserves to be limited to farming alone.

The monetary terms provided every person a present of $12. Additionally, each Chief received a yearly salary of $25 and each subordinate officer $15. These officials were to be supplied with one suit of clothes every three years, a flag and medal. Other terms stipulated that Canada would expend $1500 per year on a variety of goods including ammunition and twine. Much agricultural aid was also to be supplied.

The Treaty recognized the Aboriginal right to hunt (including trapping) and fish in the shared territory. However, this could be restricted by federal regulations made in connection with settlement, mining, lumbering or other purposes. This qualification was not raised in the negotiations, nor would it have been agreed to. It was added by Canada without First Nation knowledge or consent.

The Ojibwa never shared or surrendered their islands which had been retained for a multitude of purposes including gardens, fishing, ricing and burial grounds. The written Treaty is silent on the question of islands (except for the Reserves). The Ojibwa did not relinquish them and they did not pass to the Crown under the Treaty. However, Ontario has behaved as if the islands were surrendered and has sold many of them as Crown lands. Many of these sales are disputed by the First Nations.

The written Treaty did not reflect the Aboriginal position on minerals, nor did it contain Morris' promise about minerals. After the Treaty, Native People like Blackstone, Kabequin, Keeshekonse, Weisaw and many others continued to locate mineral deposits on and
off their Reserves. However, immediately following the Treaty, Canada instructed its agents to exclude known mineral lands from the Reserves. This was contrary to strong First Nation assertions during the negotiations that they had already chosen Reserves and that no one was to interfere in these locations. As early as June 1874, however, Superintendent General David Laird directed among other things, that the Reserves "should not be taken from the most valuable portion of the Territory." An 8 July 1874 OIC stated that Reserves "should not include any lands known to the Commissioners to be mineral lands or any lands for which a mineral lands bona fide applications have been filed with either the Dominion or Ontario Governments." On 28 July, Dawson was told to lay out the Reserves as per the 8 July order. He was given two maps from the Dominion Land office showing mineral lands in the Treaty area as then known as well as a list of all mining applications held in the office for minerals lands between Thunder Bay and Manitoba. At the end of July, T.B. Pardee, provincial commissioner of Crown Lands sent Laird a map showing Ontario's patented and applied for mineral lands. This was passed to the commissioners and "no lands known to be mineral lands or applied for as such, within the area east of the conventional line, or south or southerly of the wa[...cut off in original] shown on the plan marked M have been included in the Reserves." In January 1875, Dawson reported to Meredith on the Reserves he had laid out, saying they were "removed as much as possible from the probable line of future
settlement and do not include areas known to be mineral lands."^{205}

This official policy was likely the reason why Kabequin's Sturgeon Lake First Nation ended up with a Reserve containing "principly [sic] burnt land and rocks."^{206} As we have seen before, Kabequin led a provincial survey party to a rich gold vein on his Reserve, #24C. When the location of this vein is compared to the boundaries of his Reserve, it is clear that the gold was excluded from the Reserve. An 1874 federal OIC provisionally confirmed and described #24C as containing nine square miles to be laid off in a rectangular form so as to embrace the point at which the Ka-wa-wi-agamok River enters Konipi Lake. If the point where the River enters the Lake was taken as the eastern boundary, the rest of the Reserve would be comprised of the land falling in between the two arms of Lake Konipi - which would have included all three gold locations. When Dominion Land Surveyor R.I. Ross surveyed the Reserve in 1877, he discussed the location of the boundaries with the Sturgeon Lake First Nation and a Native 'messenger' was sent with him while he ran the lines. But, this does not mean Ross ran the lines as he was told. Ross ran the lines so as to exclude the gold, but left Kabequin with the impression that his wishes had been followed. No copy of the survey was ever left with the Sturgeon Lake First Nation and no posts or other marks remain to indicate the corners of the

^{205} PAO, IP, MU 1479, 41/39/1(5), notes in possession of Irving dated 16 January 1896, pp. 4, 5 and 6; also notes dated Ottawa, 18 January 1896, p. 2.

^{206} Kabequin joined the Treaty as one of the Shebandowan Chiefs in Dawson's adhesion.
Reserve.

By the time Ross surveyed the Reserve, gold was known to exist in that area. And, it is clear that Chief Ka-be-quin knew where it was. Considering Aboriginal concern for their gold during the Treaty negotiations, it seems natural that Ka-be-quin would have wanted the gold included in his Reserve. Furthermore, the Reserve which Ross laid out was in an odd place: the alleged southwest corner ended in a bay in the middle of a drowned wild rice field. That is, the boundary had no reference to the natural features of the land and no reference to the location of the food resources. Usually Native People sought to maximize their water frontage. If the place where the Ka-wa-wi-aga-mok River enters Konipi Lake was taken as the eastern boundary then not only would the gold locations be included, but the Reserve itself would have had water boundaries on three sides and on the land (or east) side would have had access to two rivers. (See Map 21.)

Morris had appended a copy of Joseph Nolint's notes of the Treaty negotiations to the back of one of his reports to Laird. These notes contained reference to the outside promises, including the one regarding minerals. Furthermore, Morris informed Laird as early as 23 October 1873, of the great importance First Nations

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207 Personal communication: David McNab, 19 September 1994. McNab visited the Reserve on 28 October 1982 and walked along part of the southern land boundary to the alleged southwest corner with Elders Henry Ottertail and John Boshey Sr. of the Lac La Croix First Nation. The Elders knew exactly where they were going and had obviously been there before. They had likely lived on the cancelled Reserve after 1913 since there were still several families there even into the 1920s.

208 An 1887 map locates #24C much closer to the gold locations than other maps. If the Reserve was made to follow the natural water boundaries, as was the Aboriginal custom, then the gold would have been included in the Reserve boundaries.
Map 21
Map showing mining locations at Reserve #24C in Quetico Park

**LEGEND**

- Present boundaries of Quetico Provincial Park.
- Alternate location of Reserve #24C based on its location on P.C. A-17, 1859, "part of the district of Thunder Bay showing recent surveys..."
- Bosede location of Reserve #24C based on natural water boundaries. This area would include the three gold locations as marked.
put on all of the outside promises.\textsuperscript{209}

\textbf{CONCLUSION}

Oral tradition concerning the period after the Seven Years War, particularly under the Covenant Chain in the Treaty of Montreal in 1760, the Gun Shot Treaty of 1792, the pre-1850 land Treaties and the oral negotiations of the terms of the Robinson Treaties and Treaty No. 3 indicate that First Nations retained ownership and control over their mineral resources. In most cases, nonNative written versions of these Treaties did not offer fair representations of the circumstances surrounding them or their negotiation. Even so, none of these Treaties, particularly after 1849, specifically stated that First Nations relinquished mineral rights; they are silent. Under English common law this means such rights did not pass to the Crown; Aboriginal People understand that they retained sub-surface rights on their Reserves and in the shared areas.

The Robinson Treaties of 1850 are often viewed as a precursor to the later Treaties of the 1870s in terms of the breadth of land involved and some of the provisions. This chapter has drawn attention to several additional and even more striking similarities. These include early and persistent First Nation demands for Treaties; illegal mining and surveying incursions sanctioned by the colonial government and its successors; Aboriginal resistance to such encroachments; the attempt of the settler and Dominion

governments to treat initially for a small area only; the expansion from this position into treating for much larger areas so that mining operations could be augmented or safeguarded; the self-interest of numerous government officials involved in mining ventures; the power of the Ojibwa to force the government to augment Treaty terms; the importance of minerals in determining the location and extent of Reserve areas and government failure to protect First Nation mineral rights in their Reserves and shared lands. First Nations understood the Treaties to be open-ended arrangements which safeguarded and retained Aboriginal Title and rights while allowing others to share the surface of the land. The Treaties were also open-ended in terms of future economic development, including mineral development to be pursued by the First Nations. All of this, however, was to change abruptly upon the decision in the St. Catherine’s Milling and Lumber Company Case.
CHAPTER THREE
MINERALS IN JEOPARDY

INTRODUCTION

Treaty No. 3, the boundary dispute and the St. Catherine's Milling and Lumber Co. case concerned the beneficial interest in minerals, particularly gold, and timber in northern Ontario. Canada took the position that, through Treaty No. 3, it had secured the ownership and beneficial interest in the resources of northwestern Ontario. Ontario objected to this interpretation, relying on section 109 of the British North America Act [BNA] which stated that a province had beneficial interest in lands within its boundaries. Thus, the key issue of beneficial interest remained undetermined and Ontario would have to approach the matter from a different angle to obtain satisfaction. The issue of boundaries was dropped because Canada had twice refused to recognize any connection between boundaries and beneficial interest in resources. Instead, Ontario sued the St. Catherine's Company over the issue of whether the province or Canada had the right to issue it patent for a timber location in the Treaty and disputed areas. This question, which proceeded through four levels of court, eventually drew Canada into the fray on the Company's side. The case, however, was about more than just trees - a remarkable amount of time was spent discussing Aboriginal ownership of minerals.

Both governments were fighting to control resources and monetary interests in lands (both shared/Treaty areas and Reserve
areas) which First Nations never relinquished under the Treaty. Ironically, the battle was waged without reference to First Nations. No Aboriginal persons were consulted about their rights, nor invited to participate in arguments at court. Yet, as a result of these legal battles and conflicting legislation Aboriginal People had limited or no rights to resources and beneficial interest in shared and Reserve areas. These rights allegedly belonged to the province under section 109 of the BNA Act.

PART A:
THE DISPUTE OVER ONTARIO'S BOUNDARIES AND THE ST. CATHERINE'S MILLING CASE, 1867-1889

The root of the problem lay in the BNA Act, which set out the division of powers between the governments. Canada and the provinces effectively had overlapping areas of jurisdiction. Section 109 purported to give each province control over all lands and resources situated within its boundaries. Section 91(24) allegedly gave Ottawa exclusive legislative authority over "Indians and lands reserved for Indians."¹ There was enormous potential for both governments to claim control over the same lands, including unsurrendered Aboriginal lands and natural resources. According to the Treaties, First Nations had agreed to share only the surface of the land; they had not ‘sold’ full title, nor had they relinquished ownership, control or beneficial interest in game, fish, timber or minerals. Canada should only have assumed the

¹ The BNA Act, Imperial, 30-31 Victoria, Chapter 3, 29 March 1867, pp. 38 and 33. For additional commentary on the constitution and the sections related to this issue see G. LaForest, Natural Resources and Public Property under the Canadian Constitution, (Toronto: University of Toronto Press, 1969), pp. 113-114.
administration of Reserve lands and fiduciary responsibilities for the land sales. When Canada and Ontario began selling licenses to exploit the resources noted above, each appropriated a large part of the Aboriginal economy. In spite of these pretensions, natural resources on and under the land and water remain Aboriginal property.

Part of the federal administrative structure was particularly conducive to the disposal of Aboriginal property as opposed to its protection. The fact that successive Secretaries of State and Ministers of the Interior were also the Superintendent General goes a long way to explain why nonNative land and resource interests were upheld at the expense of Aboriginal ones. This situation had existed prior to Confederation. In the summer of 1860, the Colonial Office, a branch of the British Imperial government, finally succeeded in forcing the settler government to assume some responsibility for the day-to-day administration of Native Affairs. Administrative Historian J.E. Hodgetts asserts that "The Commissioner of Crown Lands became Superintendent General of Indian Affairs on July 1, 1860..." That is, these two positions were held by the same man. Thus, the same official who oversaw the disposal of lands and resources to nonNatives was now also the same man who was supposed to safeguard the rights and interests of First Nations in their lands and resources, including unrelinquished minerals. Obviously, this situation had the

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potential to become a massive conflict of interest.

The Commissioner of Crown Lands was the Superintendent General for a full 7 years.\(^3\) Because of this dual responsibility, these years had the potential to be formative ones for the development of legislation and a lands and resources policy which would take into account the ancient, inherent Aboriginal and Treaty Rights of First Nations. The unique opportunity to do this was present between 1860 and 1867, because of the double responsibility of the Commissioner of Crown Lands and Superintendent General. This opportunity was ignored. Indeed, the Commissioner of Crown Lands/Superintendent General did nothing to ensure that Aboriginal and Treaty Rights were respected or fulfilled in this period (---a point made particularly clear in Chapter 5).

With the Confederation of Canada in July 1867, new arrangements were made to house the Indian Affairs Department, which was transferred from Crown Lands to the Department of the Secretary of State. The same arrangement prevailed here as had been the case before. That is, the Secretary of State was the same man as the Superintendent General.\(^4\) Control of lands and resources in Ontario largely passed to that province under the Crown Lands Department, but because of the federal position on the boundary dispute, many lands and resources decisions and policies were

\(^1\) The persons holding this dual responsibility are the following: Hon. Philip Vankoughnet - 1 July 1860 to 7 March 1862; Hon. George Sherwood - 7 March 1862 to 21 May 1862; Hon. William McDougall - 21 May 1862 to 30 March 1864; and Hon. Alexander Campbell - 30 March 1864 to 30 June 1867. Source: Jim Wells, "Indian Affairs," 1990.

\(^2\) Hodgetts, Pioneer Public Service, refer again to chart in appendix.
authorized by the Secretary of State who was now in exactly the same conflict of interest position as had been the Commissioner of Crown Lands. That is, the same man who confirmed various land transfers, squatters rights, mineral permits, leases or patents for the benefit of the public was also bound by fiduciary obligation to protect the Aboriginal Rights of First Nations, often in the same lands and resources. The Secretary of State/Superintendent General was in this conflict of interest position from 1 July 1867 to 30 June 1873. These were the formative years of the boundary dispute between Canada and Ontario and the negotiations of Treaty No. 3 between Canada and the Ojibwa. Thus, instead of acting to safeguard Aboriginal mineral Rights in the disputed area, Tory Superintendent Generals Langevin, Howe, Aikins and Gibbs presided over the actions of various Treaty commissioners to take away lands and minerals, among other resources from the Ojibwa, while, Secretaries of State Langevin, Howe, Aikins and Gibbs waited in vain (since the Treaty did not come in until August 1873) for the Treaty’s conclusion so that they could dispose of the same lands and resources.

On 1 July 1873, the Department of the Secretary of the State and the Indian Department, among others, were placed under the new Department of the Interior. The Minister of the Interior was also the Superintendent General. This situation remained in force even

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3 The persons holding this dual responsibility were the following: Hon. Sir Hector Langevin - 1 July 1867 to 7 December 1869; Hon. Joseph Howe, 8 December 1869 to 6 May 1873; Hon. James Cox Aikins (Acting) - 7 May 1873 to 13 June 1873; Hon. Thomas Gibbs - 14 June 1873 to 30 June 1873. Source: Jim Wells, "Indian Agents," 1990.
after 1880 when an independent Department of Indian Affairs was established. The Minister of the Interior continued as the Superintendent General until at least the end of the boundary dispute in 1889, which is the critical date for the purposes of this study. With the fall of the Tories destined to come in November 1873 over the Pacific Scandal, there was little or no time for federal disposal of minerals believed to have been obtained under the Treaty. The federal Liberals, who agreed with their provincial counter-parts that the latter owned the minerals in the disputed and Treaty No. 3 areas, made no move to dispose of any such resources. However, from the Fall of 1878, when the Tories returned to power in Ottawa to almost the end of the boundary dispute and the St. Catherine's cases in the courts, Macdonald and his successors as Minister of the Interior/ Superintendent General lost little time in disposing of hundreds of mining locations in the disputed and Treaty areas.'

The Superintendent General (first as the Commissioner of Crown Lands, then as the Secretary of State, and finally as the Minister of the Interior) had a clear succession of 31 years (from 1860 to 1892) to revise and reform lands and resources legislation

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"Hodgetts, The Canadian Public Service..., p. 105; Wells, "Indian Affairs," p. 7. See also Donald Creighton, John A. Macdonald: The Old Chieftain, Vol. 2, pp. 245-246, 504 and 523. Wells, indicates that the men who held the dual position of Minister of the Interior and Superintendent General between 1873 and 1892 were the following: Alexander Campbell - 1 July to 6 November 1873; David Laird - 7 November 1873 to 6 October 1876; Richard Scott (Acting) - 7 October to 23 October 1876; David Mills, 24 October 1876 to 16 October 1878; John A. Macdonald, 17 October 1878 to 2 October 1887; Thomas White - 3 October 1887 to 21 April 1888; Vacant - 22 April to 7 May 1888; John A. Macdonald (Acting), 8 May to 24 September 1888; Edgar Dewdney, 3 August 1888 to 16 October 1892.

and policy so that the ancient, inherent Aboriginal and Treaty Rights to minerals (and other resources) of First Nations would be honoured and protected. Clearly, this was not done and the Commissioners consistently resolved the conflict of interest inherent in their position in favour of white prospectors, squatters and the public.

As noted above, the dual responsibilities of the Superintendents General were complicated by the boundary dispute between Canada and Ontario. When Ontario joined Confederation, Article 6 of the BNA Act determined it would encompass the same area as Canada West, but no boundaries were defined. The exact location of Ontario's northern and western boundaries was contested until 1889. The disputed area can be divided into a western part situated west and north of the Robinson Superior Treaty, including the Lake of the Woods area (discussed below), and an eastern part comprising the region north of the height of land to the Albany River (discussed in Chapter 4.)

Ontario was asserting itself in the western part of the disputed land even before the conclusion of Treaty No. 3. As First Nations had not yet treated with the Crown, these incursions by Ontario were illegal. The province issued a substantial number

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5 R.L. Gentilcore, C.G. Head and Joan Winearls, Ontario's History in Maps, (Toronto: OHS, University of Toronto Press, 1984), plates 42 & 43. See Map No. 22.

of mining patents for locations on or near Jack Fish and Shebandowan Lakes between November 1871 and August 1873. Among them were the ones issued to Peter McKellar whom Blackstone stopped from removing gold. These areas were not only encompassed in the boundary dispute, they also fell within the area that would become Treaty No. 3, concluded on 3 October 1873. Ontario knew the land was Aboriginal and was advised by its Thunder Bay Mining Inspector, Edward Borron, against issuing such patents.

According to provincial counsel, Aemilius Irving, Borron identified these patents, particularly the one issued to McKellar and eventually taken over by Frue, as the "first difficulty about the Boundary." Borron maintained that (future Treaty commissioner) Simon Dawson and his associates had been "shut out" of mining in the area and encouraged Canada to claim that it owned the minerals. Thus the immediate cause of the boundary dispute between Ontario and Canada was control over and beneficial

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11 At least 72 such locations have been uncovered to date, see PAO, Crown Lands Records, RG 1, G-1, Vol. 3 + G-4, Vol. 2. Also Irving Papers (hereinafter PAO, IP), MU 1478, 40/38/22, letter, 26 January 1906, Aubrey White, Deputy Minister of Lands and Mines to Aemilius Irving, provincial counsel, p. 2.


13 NOTE: Irving was related to the Jarvis family through the marriage of his sister, Diana to William D.P. Jarvis. See J. Ross Robertson, The Diary of Mr. John Graves Simcoe, (Toronto: William Briggs, 1911), pp. 311-312.

14 PAO, IP, MU 1468, 30/36/6(1), see notes in Irving's possession on Borron's October 1891 Report. Between 1867 and 1869, Dawson had been similarly shut out of mining in the area immediately to the east of the height of land, north of Thunder Bay by the CLD which denied him and his associates patents for numerous mining locations. RG 49-19, 1868-9, Ontario Legislative Assembly Records, "Return ordered of all applications made to the CLD for the purchase of Mining Lands in the Lake Superior District." This same pattern appeared to be happening in the disputed territory. (Patents for some of the locations north of Thunder Bay may have been granted in between 1870 to 1873.)
interest in minerals, specifically gold. Canada wanted to collect
the fees from the leasing, surveying and patenting of mining
locations. It is no coincidence that the immediate cause of the
expansion of the federal right-of-way over Ojibwa lands west of
Lake Superior into a full-fledged Treaty was also caused by the
discovery of gold. Indeed, the prolongation of the boundary
dispute and the conclusion of Treaty No. 3 were inter-related.

When Canada informed Ontario, between 1870 and 1873, that it
was negotiating a Treaty in the disputed territory, the province
indicated that Canada must not establish any Reserves on mineral
lands.  

But, Ontario did not understand Canada’s intentions for
obtaining Treaty at that time. Canada argued, on the basis of
Treaty No 3, that it owned a large part of the disputed territory
and used this argument to substantiate its claims to mineral
ownership. Aemilius Irving later believed that Canada had
"purposely delayed the settlement of the Boundary until they got
in the Indian Title."  

Boundary negotiations starting in 1871 between Premier Edward
Blake and Prime Minister John A. Macdonald were difficult, and
already failing by 1872, when Oliver Mowat became Premier. When
Canada suggested the question be referred to the Judicial

\[\text{PAO, IP, MU 1469, 31/36/24(1), notes in Irving's possession on Annuities}
\text{case, 1 December 1908, and on Ritchie's decision, p. 2.}\]
Committee of the Privy Council [JCPC], Ontario refused. More than a decade would pass before Ottawa again agreed to put the boundary question before the JCPC. Macdonald believed that disputes would arise over minerals:

...the mineral wealth of the North West country is likely to attract a large emigration into these parts and with a view to its development as well as to prevent confusion & strife that is certain to arise and continue among the miners and other settlers so long as the uncertainty as to the boundary exists the undersigned takes leave to recommend that the Government of Ontario be urged to arrange with that of the Dominion for some joint course of action as to the granting of land & mining licenses &c..."18

Following the conclusion of Treaty No. 3 in 1873 and the adhesion of Lac Seul in 1874, Canada agreed to arbitration and the establishment of a provisional boundary19 under the new Liberal Prime Minister Alexander Mackenzie. (See Map 22.) Under this arrangement Ottawa issued patents north and west of the temporary line and the province south and east of it. Both governments agreed not to dispute the validity of patents issued by the other

17 PAO, IP, MU 1473, 35/37C/3, 27 January 1882, "Despatch from...the Secretary of State of Canada [J.A. Mousseau] to...the Lieutenant Governor of Ontario," p. 7. While Mousseau categorically stated Ontario would refuse the JCPC reference, Canada was equally reticent. The Minister of the Interior (also Superintendent General until 1883) asserted that Sir John's suggestion be postponed because Aboriginal Title in the disputed area was not extinguished. MU 1480, 42/41/6(1), "High Court of Justice. Chancery Division. Queen v. St. Catharines. Memo of Points. Blake, Kerr, Lash & Cassels," p. 4.

18 PAO, IP, MU 1480, 42/41/6(1), "High Court Justice/Memo of Points" p. 3.

19 INAC, "Indian Land Agreement, 1874-1969." "Copy of an OIC approved by...the Lieutenant Governor on the 19th of July 1874," and attached "Joint memo" 26 June 1874, signed D. Laird, Minister of the Interior and the T.B. Pardee, CCL. NOTE: Canada instructed its commissioner to run the line along the height of land, but Ontario refused to be hemmed into such a small area; see PAO, IP, MU 1468, 30/36/6(1), Irving's comments on Borron's Report of October, 1891.
Map 22
Map showing the territory north and west of the Height of Land and south of the Albany River in dispute between Canada and Ontario.
in the event the final boundary agreement might be different.  

A panel of three arbitrators, established to effect a settlement of the boundaries upheld provincial claims in 1878 but produced no report to substantiate its conclusions.  

Macdonald viewed the collusion of the arbitrators with the Liberal governments as a "solemn farce." The federal election of that year swept the Liberals from power and returned Macdonald who did not pass legislation upholding the award.  

The dispute remained unresolved.

The (1874) arrangement regarding the issuing of patents in the disputed territory did not long survive Macdonald's decision. Ontario annulled the agreement on 19 December 1879, dispatching two stipendiary magistrates to exert provincial presence in the extended boundary areas. Borron was assigned to the District of Nipissing in north-eastern Ontario and W.D. Lyon to the District of Thunder Bay in north-western Ontario.

The sale or potential sale of mining locations was of fore-

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20 PAO, Crown Land, RG 1-273-4-2, "Surveys Mining Lands." 26 June 1874, "Memorandum of Agreement for Provincial Boundaries in Respect of Patents of Lands," signed, Laird and Pardee; and OIC, 9 July 1874.


most concern to both governments. Canada continued to claim jurisdiction west of the 1874 line both within and outside of the CPR belt, especially timber privileges extending twenty miles on each side of the line of track. Along with the limited presence of Ontario, Lyon drew attention to the mineral and timber resources (among others) through an 1879 booster pamphlet. He reported a large population in the Lake of the Woods "looking for precious metals" in 1880, noting at least 20 surveyed mining locations (probably under federal authority) and daily discoveries.

In March of 1881, Macdonald unilaterally allocated the disputed area to Manitoba so that Canada would control natural resources. Although of questionable legality, Ottawa used this action to justify its continued disposal of minerals (and timber). Literally hundreds of mining applications were accepted by the Interior Department between 1879 to 1888 for locations in Lake of the Woods, Keewatin and Rat Portage.

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25 PAO, IP, MU 1473, 35/37C/4, "Further Correspondence and Papers Respecting the Disputed Territory on the Northerly and Westerly sides of Ontario;..." pp. 22-23, "Despatch, 18 February 1882, Robinson to Mousseau.


27 PAO, IP, MU 1476, 38/37P/6-1, letter, 17 January 1880, Lyon to J.S. Scott, Deputy AG.


During the latter half of the 1890s Ontario sued Canada for the amount of revenues it had collected under illegal fishing licenses. Canada had also received monies from the disputed territory, including "...large revenues from lands, timber limits and minerals, and when we are able to get at the particulars we
Federal actions led to problems between Ontario and Manitoba. By the fall of 1881, Manitoba "demand[ed] the mines and forests in its extended territory or an increased subsidy or both."30 Ontario officials likewise noted mineral potential in the area, particularly gold along the height of land.31

Mowat protested the federal scheme, arguing it would cause the loss of valuable mineral resources.32 Throughout 1881, Lyon sent Mowat regular reports about timbering activities carried out under federal licenses. He was discouraged by his lack of power to arrest offending parties. But Ontario shied from open conflict with Ottawa and Manitoba and Lyon was explicitly told to "remain entirely passive...The position of this government will be clearly placed upon record and settled otherwise than by a collision between your court and its process and the Dominion officials." He was ordered to "guard against continuing any overt act or taking any step which may in any way provoke a [law suit] or any similar difficulty."33 Ontario indicated that it wanted settlement to come from a more substantial arena - like the JCPC.

shall have a large claim against the Dominion for these revenues." IP, MU 1470, 32/37/21(1), "North West Angle Treaty," undated (≈1896) and untitled except for a "C" in the margin.

10 PAO, IP, MU 1476, 38/37F/8, letter, 30 September 1881, Lyon to Alex McKenzie.

11 PAO, IP, MU 1473, 35/37C/3, letter, late 1881, W. Kinlock to [unidentified].


13 PAO, IP, MU 1477, 39/37F/9, letter, 12 July 1881, unsigned, "Proposed draft to W.D. Lyon..."
By the fall, Lyon noted, for the first time, that Canada was not issuing as many timber licenses as it had and had even refused to grant limits, preferring to wait for a settlement with Ontario in the boundary dispute.\(^4\) This behaviour continued in an uneven fashion and was important in narrowing Ontario's choices for a test suit later. Mowat, however, was unconcerned. As early as December of 1881, he had already determined on a course to have the boundary settled by the JCPC once and for all.\(^5\)

In January 1882, federal/provincial relations were strained at the highest levels. Secretary of State J.A. Mousseau warned Lieutenant Governor J.B. Robinson that "the question of the title to the land in the disputed territory should not be confused or mixed up with that relating to the boundaries."\(^6\) [my emphasis] This was an announcement of the federal position, soon publicly championed by Macdonald, that beneficial interest in minerals and timber would not belong to Ontario even if the disputed area was determined to be within its boundaries. Canada claimed ownership of the minerals under Treaty No. 3.

Robinson repudiated Mousseau's statements and argued that despite repeated solicitation, Canada had refused to divulge

\(^4\) PAO, IP, MU 1476, 38/37P/8, letter, 30 September 1881, Lyon to Alex McKenzie.

\(^5\) PAO, IP, MU 1478, 40/37G/7, letter, 26 December 1881, Campbell to Mowat.

\(^6\) PAO, IP, MU 1473, 35/37C/4, 29 January 1882, Despatch, Mousseau to Robinson, p. 7. Following the 1884 JCPC boundary award, the Tory press made much of Mowat's failure to accept a JCPC reference in 1872. See for example, Oliver Mowat Family Papers, MU 2175, F 3-2-0-11, Scrapbook: Boundary Award, The Mail, 19 July 1884, "Sir John Macdonald and the Award;" also 24 July 1884, "The Dominion Government and the Boundary Question."
information about its activities in the disputed area, including the railway belt. He was particularly disturbed at Mousseau's assertion that if the 1874 line was no longer valid, each government would "assert their own rights in reference to all questions involved" and maintained that there were provincial interests in the mines and timber.\(^7\)

Ottawa continued to make large claims concerning its ownership of the resources in the area. Macdonald declared in a May election speech that "'Even if all the territory Mr. Mowat asks for were awarded to Ontario, there is not one stick of timber, one acre of land or one lump of lead, iron or gold that does not belong to the Dominion or to the people who have purchased from the Dominion Government.'"\(^8\) This statement was anchored in Canada's erroneous understanding of what it had acquired through Treaty from First Nations.\(^9\)

In the fall of 1882 when Robinson received a House of Commons resolution to settle the boundary issue by joint commission it did not mean, as Mowat was later to contend, that "title to the lands depended on the question of the Provincial boundary."\(^10\) Ottawa's position was clear: the location of the boundaries would not affect beneficial interest or ownership of the resources.

\(^7\) PAO, IP, MU 1473, 35/37C/4, "Despatch...," Robinson, to Mousseau, pp. 20 and 23.

\(^8\) Zaslow, "The Ontario Boundary Question," p. 114.

\(^9\) PAO, IP, MU 1457, 19/24/9-11, draft letter, 21 October 1885, Mowat to Campbell, p. 10.

\(^10\) PAO, IP, MU 1457, 19/24/9-11, 21 Oct. 1885, Mowat to Campbell, pp. 10-11.
Ontario received reports on the mining situation in the disputed area throughout the remainder of 1882. In September, John Cameron, of the Daily and Weekly Advertiser, emphasized that "evidences of mines crop out all around" the Lake of the Woods. In October, Commissioner George Burden informed Mowat that "there is almost certain to be a big boom in mining next spring...," later claiming that the mineral and timber speculators in the area were Manitoba-sympathizing "transients." For the second time, Lyon noted that Ottawa was declining to issue timber permits in the disputed area and advised Mowat that if Ontario decided "to have a case of jurisdiction argued in the courts it would be better to test a case of some importance than a whisky case or some trifling matter." Lyon thought the seizure of timber would precipitate such a case, but noted it was not Ontario's policy to enter into conflict with Ottawa. The province took no action although potential cases involving liquor licenses, jurisdiction, land, timber and mineral leases and patents were plentiful.

Ontario continued to monitor federal actions in the disputed area. Although Ontario claimed to have abrogated the temporary arrangement of 1874 in December 1879, Ottawa did not officially agree until January 1883 when Mousseau formally stated his acquiescence. Even so, Canada continued to issue timber and

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41 PAO, IP, MU 1473, 35/37C/4, letters, 5 September 1882, John Cameron to Mowat. MU 1475, 37/37F/2, 11 October 1882, Burden to Mowat; and 21 November 1882, Burden to Mowat.

42 PAO, IP, MU 1476, 38/37F/8, letters, 13 October 1882, Lyon to Mowat; and 7 December 1882, Lyon to Mowat.

43 PAO, IP, MU 1477, 39/37F/11, letter, 21 November 1880, White to Burgess.
mineral licenses in the area. In March, it tabled a return in the House of Commons concerning its authorization of timber and mineral licenses.** Borron suggested that Ontario notify Ottawa it would not recognize federal timber and mineral sales, leases or licenses and emphasized that timber resources were most open to depredation.**

In May of 1883, Ottawa amended its Dominion Lands Act so that all timber leases granted since 1867 concerning federal land now excluded minerals. Canada was free to lease precious and base metals as well as coal, lessees having authority to enter, occupy, construct roads and remove minerals in their location which might overlap timber locations. Timber lessees would be compensated for the removed timber. This Act had direct bearing in the disputed territory, particularly on the extensive rights of the Keewatin Lumbering Co. in the islands of the Lake of the Woods.**

By the end of May 1883, a potential boundary test case arose around the issue of jurisdiction.** Canada was set to support plaintiffs, Macdonald and Shields, against defendants, Marks and

** PAO, IP, MU 1480, 42/42/10-12, "1st Session, 5th Parliament, 46 Victoria, 1883. Return (118) To an Address of the House of Commons dated 15th March, 1883; -- For Copies of all Correspondence, OIC and Papers not already brought down, relating to the grant of permission to cut Timber or to mine on lands within the territory now in dispute with Ontario, &c."

** PAO, IP, MU 1473, 35/37C/5, letter, 12 April 1883, Borron to Mowat.

** PAO, IP, MU 1480, 42/42/1(2), 10 April 1889, J.P. Macdonell: extensive report on the leases of the Keewatin Lumbering Company with reference at end to Sultana Island, part of Reserve 38B, pp. 1-50.

** Barry Cottam deals with this case from the federal perspective only and fails to appreciate Ontario's side which presents a different picture. See "An Historical Background of the St. Catherine's Milling and Lumber Co. Case," M.A. Thesis, (London: University of Western Ontario, 1987), pp. 41-42.
Burke whom Ontario refused to support without complete control of the case at the JCPC level. The plaintiffs alleged they had entered into partnership with Marks & Burke at Prince Arthur's Landing for the purpose of importing coal from the U.S. for sale in Winnipeg. A dispute arose, however, after Marks sold Manning and McLaren all coal then held by the company. Macdonald and Shields wanted the sale "declared fraudulent."

Defence lawyer John Ewart wanted the case, originally destined for the Manitoba Court of Queen's Bench, to be tried in Ontario as a test case for the boundary issue. As well, all parties were Ontario citizens and the sale had occurred in that province. On 19 May, Ewart reported that the plaintiffs, represented by McArthur, Dexter, Hugh Macdonald [John A.'s son] & Tupper, were going to ask Ottawa to intervene and take the suit to the JCPC. But, Ewart's clients, concerned about escalating financial costs, would not allow the case to turn on the jurisdictional issue which was not pivotal to their claim. Deputy Attorney General Scott informed Ewart that he could not guarantee provincial financial aid, but that if the case was in good "shape"

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"This coal was imported either from the United States or Cape Breton. Manning and others, including J.B. Robinson, had a lease on coal fields in Cape Breton owned by Alexander Campbell. PAO, Alexander Campbell Papers, MU 472, see for example letters dated: 6 October 1873, 22 December 1873, 13 October 1874 (2) and 30 October 1876. MU 474: 14 January 1880. MU 476: 14 April 1884, 19 April 1884 (refers to Manning's lack of trust in Robinson's "speculations.") Other references in MU 477, 478 and 479. Campbell was the Minister of Justice and Attorney General from May of 1881 to September of 1885.

"PAO, IP, MU 1478, 40/37G/6, letter, 15 May 1883, John Ewart of Ewart, Bodwell & Wilson to J.G. Scott, Deputy Attorney General, Ontario. NOTE: this case appears not to have been heard since there is no such case listed in the Consolidated index of Canadian cases.
to be argued before the JCPC, Ontario might agree to intervene.  

On 28 May, Ewart informed Scott that according to Hugh Macdonald, John A. would definitely support the case. Ewart wanted a firm interventionist commitment from Ontario or his clients would not agree to test the jurisdictional issue. On 31 May, Scott said Ontario would not agree to Ewart's proposals.

Shortly before the province concluded this matter with Ewart, Mowat was manoeuvring in another direction which would give him the control he demanded. In June, he embarked on a campaign to form an alliance with Manitoba by preparing a "short bill which, if [Tory Premier] Norquay would adopt and get passed, would enable the territory so to be governed peaceably." Mowat did not want to present the bill to Norquay himself. Instead he enlisted the aid of his friend Colonel Walker and instructed him to submit the bill as a "friendly suggestion." Eventually this strategy of wooing Manitoba to a common cause would pay off.

Ontario kept a close eye on timber and mineral development in the disputed territory throughout 1883, but found few examples of federal abuse. Under directions from T.B. Pardee in June, Aubrey White began investigating and reporting on lumber companies, particularly those operating outside the CPR belt, and was authorized to seize all cut timber. White soon had to report that

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50 PAO, IP, MU 1478, 40/37G/6, letters, 19 May 1883, Ewart to Scott; and 23 May 1883, Scott to Ewart.

51 PAO, IP, MU 1478, 40/37G/6, letters 28 May 1883, Ewart to Scott; and 18 June 1883, Ewart to Scott.

52 PAO, IP, MU 1477, 39/37F/9, letter, 11 June 1883, Mowat to Col. Walker.
Pardee had seriously over-estimated the situation. Only two companies were operating outside the belt under federal licences. He did not seize their harvest because he discovered "a number of our Ontario friends were interested in the timber in various ways...".

Pardee assigned other officials to investigate minerals. John Mark was instructed to inspect and value the gold at Rat Portage while special commissioners George Burden and George Pattullo investigated claims in the disputed area. Between 11 July and 15 October they heard 32 cases, 4 of which dealt with minerals.

These were not about conflicting or overlapping sites, rather claimants sought provincial recognition for their locations. These claims indicate that Ontario had accepted payment from miners for mineral exploration or development thus, signifying it had issued licenses in the disputed territory in spite of later...
assertions it had not.\textsuperscript{57}

Even though few companies could be found cutting timber outside the railway belt and there were few conflicts over the mines, Ontario retained the legal firm of Blake, Kerr, Lash and Cassels to deal with possible cases arising from the boundary dispute.\textsuperscript{58} A test case in the disputed tract over timber was not a foregone conclusion, as Barry Cottam assumes. He also argues that the province wanted a test suit which would limit the parties involved to itself, a company and Canada; it did not want to deal with Manitoba or the railway Syndicate. Thus, Cottam concludes, the test case needed to involve a company whose licence was outside the railway belt.\textsuperscript{59} These may have been ideal circumstances for the testing of such a case, but because Ontario put most of its faith in the outcome of the JCPC's decision on the western boundary, many opportunities had passed. Its selection of a test case was made in haste and not all the criteria were met.\textsuperscript{60}

Whether Manitoba was included was not an issue for Ontario as long

\textsuperscript{57} Other provincial officials also acknowledged this. Mowat claimed prior to 1881, that Ontario had authorized grants and licenses for lands, timber and mines in the area. Similar admissions were made by Burden in 1882 when he reported on the dissatisfaction of Ontario's clients who had paid application "fees" to the province for lumbering and mining, but who found their interests unprotected by Ontario. Burden noted that upon payment of a fee, Ontario issued permits to cut cordwood anywhere in the territory. PAO, IP, MU 1477, 39/37P/12, 29 September 1883, unbound, printed document, Mowat, p. 3. MU 1475, 37/37P/2, letter, 21 November 1882, Burden to Mowat, p. 16.

\textsuperscript{58} PAO, IP, MU 1476, 38/37P/4, letter, 10 August 1883, Blake, Kerr, Lash and Cassels to Pardee.

\textsuperscript{59} Cottam, "...St. Catherine's Milling...," pp. 41-43.

\textsuperscript{60} In fact, any hopes of having the case meet some kind of ideal criteria went by the wayside. Ottawa officially refused to participate in the defence. The Company cut less than 15 miles from the line of track on the south side, well inside the CPR belt. This, however, did not lead to Syndicate involvement.
as Mowat could have complete control on appeal to the JCPC.

By September, Mowat was openly courting Manitoba, arguing it received no benefit from the territory Ottawa added to it because Canada retained control of timber and mines. He suggested the two provinces had much to gain by upholding the 1878 award which not only affirmed Mowat's position on the boundaries of Ontario, but also awarded Manitoba 91,000 square miles of territory formerly claimed by Ontario. These advances were leading toward Mowat's ultimate goal, namely Manitoba's agreement to put the boundary issue before the JCPC.

Mowat and J.A. Miller, Manitoba's attorney-general, agreed in December to let the boundary between their provinces be decided by the JCPC. This arrangement was, however, conditional on the question being determined during that court's summer sitting. Ottawa agreed to be party to the hearing as well. Although Mowat and Miller had agreed to test the western boundary, Mowat soon sought to extend the reference to Ontario's northern boundary. Knowing he needed Macdonald's agreement, Mowat arranged a brief on a "Special Case" on the northern boundary to be heard at the same time as the western boundary. But, Macdonald refused to agree and the question of the western boundary alone went before the JCPC in July of 1884.62

61 PAO, IP, MU 1477, 29 September 1883, printed document, Mowat, p. 7.

62 PAO, IP, MU 1473, 35/37C/9, letter, 1 July 1884, Freshfields and Williams (Ontario's legal advisers in England) to Mowat. 35/37C/8, letters, 16 May, 1884 J.G. Scott, Deputy AG, Ontario to Freshfields; and 26 June 1884, Freshfields to Mowat. See also MU 1475, 37/37E/12-13, unsigned draft information on boundaries, n.d.
Mowat formulated the specific legal questions to be considered by the JCPC. This was later viewed as a considerable advantage for Ontario's position, lending credibility to the 1878 Liberal award which the Conservatives had rejected. In July 1884, the Privy Council agreed that Ontario's boundaries were those set out in 1878. Britain issued an OIC confirming the award on 11 August 1884, delineating only the southwest point of the western boundary. It did not specifically state that beneficial interest in land, timber and minerals rested solely with Ontario.

Decision or no decision, the province had argued in vain. Unless Canada confirmed the JCPC boundary judgment with a federal OIC, it was meaningless. Mowat did not contemplate the possibility that Canada would again fail to accept outside judgment. Mowat had put all his faith in the JCPC for a favourable outcome to the boundary question, expecting Canada to implement the boundaries and allow the province beneficial interest in the resources, particularly the minerals and timber. But, he quickly realized

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2 See "Imperial OIC Embodying Her Majesty's Decision," 11 August 1884; and *Ontario Boundary Before the Privy Council 1884...* (Toronto: Warwick and Sons, 1889), Appendix "C," pp. 416-418.

3 PAO, Oliver Mowat Family Papers, MU 2175, F 3-2-0-11, Scrapbook: Boundary Award, *The Mail*, 23 July 1884, "The Latest Phase of the Boundary Question."

4 See for example PAO, IP, MU 1473, 35/37C/10, letters, 2 July 1884, unidentified to unidentified; and 30 July 1884, Freshfields to Mowat. Also, Oliver Mowat Family Papers, MU 2175, F 3-2-0-11, *The Evening Mail*, 23 July 1884, "Ontario's Victory;" and *The Mail*, 24 July 1884, "The Value of the Disputed Territory."
that this was not going to happen. Canada continued issuing licenses in the area.

In August 1883, Pardee received reports that mining companies could obtain no capital until the question of whether they owned their mines was settled. Trading in mining stock was at a "standstill." This reduced mineral production and meant that it might prove easier to find, on short notice, an individual or company removing timber (rather than minerals) under a federal license issued after January 1883, when Ottawa acquiesced in the abrogation of the 1874 line.

Ontario had to act quickly. Lyon had reported at least twice before 1883 that Canada periodically refused to issue timber licenses in the disputed area. Furthermore, under the licenses it had issued after January 1883, virtually no cutting was carried out, therefore the companies were doing nothing illegal.

Ontario had very little room to manoeuvre. In fact, the St.

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Notes:

7 With no immediate federal move to confirm the award in Canada, Mowat would quickly have realized that Ottawa was reverting to tactics it had used in 1878. For example, in 1881, J.B. Robinson, the Lieutenant Governor of Ontario, asserted that since the 1878 Award, the Dominion "has made no official communication to the Government of this Province of their intention to reject the award, but my government has been left to gather this intention from the omission of the Federal Government for the first two sessions of parliament to being any measure for the recognition or confirmation of the award." Ontario had no intention of sitting around for a few more years after the August 1884 award. PAO, IP, MU 1473, 35/37C/3, 31 December 1881, "Despatch from His Honor the Lieutenant Governor to the Secretary of State." p. 48. This point that Canada would have to pass legislation to make the 1884 award binding was also emphasized in the press, see for example, Oliver Mowat Family Papers, MU 2175, F 3-2-0-11, The Evening Times, 25 July 1884, "The Boundary Award."

8 PAO, IP, MU 1476, 38/37F/4, letter, 6 August 1883, Thomas Scoble (Manitoba JP) to Pardee.

9 Ottawa issued at least 55 timber licenses from May 1883 to May 1884. PAO, IP, MU 1477, 39/37F/11, OSP No. 73, "Correspondence Respecting the Land and Timber in the recently Disputed Territory of the Province of Ontario..., 20 March 1888." See "List of names of the Persons to whom the Minister of the Interior has been authorized by Council to issue licenses to cut timber..."
Catherine's Milling and Lumber Company was virtually the only company which Ontario could pursue. Attorney General Gibson later commented: "As to licenses issued after the abrogation of the provisional agreement or the decision of the Privy Council, a great number were issued, but except in very few instances and to a very small extent, no timber was taken off under such licenses apart of course from the timber taken by the St. Catherine's Lumber Co., which was seized and sold."[70] [my emphasis] Two and one-half months after England's boundary judgment, Ontario took legal action against the St. Catherine's Company. This was a counter-move against federal silence and inaction in recognizing the August award.

The St. Catherine's Company was initially incorporated by Canada in February 1883.[71] It applied for a timber license in April; under federal license of 1 May, it was formally authorized to cut and James Murray, its president, had made partial payments to Ottawa for this privilege. Final payment was made by Oliver Latour, a Company director, on 27 December 1883.[72] Although not noted in White's report, the Company had cut and removed trees during the 1883 and 1884 lumbering seasons west of the convention-

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[72] PAO, IP, MU 1479, 41/41/1, "In the Court of Appeal. Between the Queen, on the information of the AG for the Province of Ontario, and The St. Catharines Milling...Appeal from Chancery Division...Statement of Case," pp. 13-15.
al line" and within 15 miles of the CPR line (see Map 23).

In order to sue the St. Catherine's Company, Ontario had to renege on its stance concerning the CPR. In Manitoba, the NWT and B.C., Canada appropriated a long belt of land, extending 20 miles on each side of the line of track including stone, timber and gravel, to build the CPR. No formal agreement was ever reached with Ontario, although upwards of 600 miles of track passed through it. This unofficial acceptance continued until at least March of 1884 when Ontario acknowledged Canada's right to make railways, and laws in connection with railways, for the national interest while protesting federal attempts to appropriate local provincial rail lines. But, within 7 months, Ontario changed its position and sued the St. Catherine's Company which had been harvesting timber in the railway belt for the purposes of making railway ties. This change occurred only after Ontario determined to put the issue of beneficial interest in the disputed territory before the courts and after it realized that St. Catherine's was the only company cutting in that territory even though it was in the railway belt. Ontario's desperate need for a company to sue probably led it to repudiate its former stance of not speaking out.

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71 PAO, IP, MU 1473, 35/37C/12, letter, 27 October 1884, Walter Cassels (of the firm retained by Ontario to handle cases coming out of the boundary dispute since August of 1883) to Pardee.

74 For information on the course Canada was to follow in obtaining land in Ontario see the Journals of the House of Commons of Canada & Sessional Papers of Parliament, 35 Vic., 7 May 1872; for the federal appropriation of resources in the belt see, An Act to Incorporate the Canada Pacific Railway Company, 35 Vic., Cap. 73, 14 June 1872. For Ontario’s refusal to grant land for the CPR see, PAO, IP, MU 1469, 31/36/24 (2).

75 Ontario, Journals of the Legislative Assembly - Debates. 47 Vic., 13 March 1884.
Map 23
Map showing the location of the timber limit held by the St. Catherine's Milling and Lumber Co.
publicly about the federal appropriation of the CPR belt. The fact that the Company's timber limit was in the CPR belt appears not to have been raised during the court battles between 1885-1888.

Ontario chose St. Catherine's as the test case in a great hurry. There is no evidence that either Mowat or Blake, Cassels et. al., ever collected information about the Company prior to October 1884, that is, until after Canada failed to implement the 1884 award.7 By the time Pardee sent White out to investigate timbering activities in the disputed territory in June and July 1883, the St. Catherine's Company was incorporated and licensed. However, it never appeared in either Pardee's list of companies to investigate or in White's report. Furthermore, neither Burden nor Lyon mention its name in their reports. This omission, especially from Lyon, is significant: he reported endlessly on companies and individuals in the area that Ontario could pursue.77

7 The earliest references to the case are in two letters of 27 October 1884, where it was referred to as The Queen v. Latour. PAO, IP, MU 1473, 35/37C/12, letters, 27 October 1884, Cassels to Pardee. Latour had paid the final instalment of the Company's timber lease on 27 December 1883. PAO, IP, MU 1479, 41/41/1, In the Court of Appeal. Between...Ontario and the St. Catharines Company. Appeal from...Chancery Division of the High Court of Justice. (Toronto: Dudley & Burns, 1885), p. 15. see Exhibit "Z."

77 See for example the extensive correspondence of Burden and Lyon in PAO, IP, MU 1476 and 1477. NOTE: in his M.A. thesis, "An Historical Background of the St. Catherine's...Case," Cottam argues Ontario chose St. Catherine's as a "test case to decide ownership of the resources in the disputed territory" while insisting that "the chance to shake up the Lincoln County Conservatives could not have escaped Mowat's attention." (pp. 45-46) Although he admits the resources issue was the "far larger object," Cottam immediately launches into a fifteen page discussion on Tory scandal and corruption (pp. 44-59) none of which had blown up before 1886 and therefore could not have been a factor in Ontario's choice of the St. Catherine's Company as a test case. Ontario made its decision to pursue that Company largely between 11 August and 29 October 1884. In these two and one-half months, Ontario realized Canada was not going to implement the 1884 award and launched St. Catherine's as its test case (specifically on Aboriginal Title and beneficial interest) on 30 October 1884. Ontario did not have time to ferret out all the political affiliations and intricate business connections between the president of the Company, its directors and its other allies as Cottam implies nor were the implications of such affiliations and connections known before October of 1884. In fact none of the scandals he refers to became issues for the
Ontario filed its statement of claim against the Company on 9 January 1885. On 20 January, Ontario was granted an injunction barring St. Catherine’s from harvesting more pine or removing pine already cut. On 16 February, the Company filed its defence. The case was heard before Chancellor Boyd in the Chancery Division in 1885. Boyd was unfamiliar with Aboriginal issues prior to this case. But he was unsympathetic with First Nations who forcibly asserted their Aboriginal Title to land and resources and had financially supported Canada in its efforts to end Riel’s second resistance in the same year. He was not alone, most of the other lawyers, on both sides of the case, had also done the same.

At issue were Ojibwa rights in their land (including shared/Treaty, Reserve and unsold or conditionally surrendered lands) and the even larger question of the nature of Aboriginal Title and the basis of Crown Title. Aboriginal People did not participate in the decision. The governments expanded their arguments into the meaning of the constitutional division of Liberal party until after the case was already before the court. The man Cottam spends most time discussing, J.C. Rykert, long-time Lambton County Tory, is not publicly linked to the St. Catherine’s Company by the Liberals until May of 1886 as Cottam himself shows (p. 46). Thus, the scandal and corruption which tainted some Tory Company members by their association to J.C. Rykert was icing on the cake for Ontario, but could not have been a motivating factor when Ontario chose St. Catherine’s as the test case. See Cottam’s Chapter 2, pp. 41-59. See also one of Cottam’s sources, P. Baskerville, “J.C. Rykert and the Conservative Party, 1882-92: Study of a Scandal,” CHR, Vol. 52, No. 2, June 1971, pp. 144-164. Baskerville’s text and footnotes provide precise dates for when scandal erupted and indicates that scandals surrounding Rykert did not flare until 1887.

78 In the Privy Council, In appeal from the Supreme Court of Canada, Return: The St. Catherine’s Milling and Lumber Company...and Ontario...” Company’s Petition, p. 1.

79 Smith, "St. Catherine’s...,” pp. 5-10.
power. If what Canada obtained from the Ojibwa in 1873 was actual ownership of the shared area then Aboriginal Title had to be viewed as actual ownership. This meant the Crown did not have any right or title until it received such from First Nations through Treaty. It could not receive what was not expressly transferred, including sub-surface rights. Native People had always owned the land, the Treaty merely transferred administration of the surface of the land to the DIA.

In the 1880s, Mowat, Blake and particularly David Mills took the position, pursuing it to the highest court, that First Nations did not own their land. In 1888, this position was enshrined in the St. Catherine's decision. On the surface this case appears to be about trees, but both the defence and prosecution teams also argued about ownership and beneficial interest in minerals. In 1885, Mowat argued there was no legal basis for Aboriginal Title because Native People never owned the land. They were merely 'nomads' roaming around on it. The Crown acquired Title by discovery and subsequent settlement. He claimed the Proclamation was no evidence of Aboriginal Title because it was "provisional," limited Aboriginal ability to dispose of land and was obsolete after the Quebec Act of 1774. Whatever federal obligations existed toward Native People were only moral ones.

The role of David Mills in the formulation of the Ontario government's position is hinted at by Don Smith in his article, "The St. Catherine's Milling Case..." p. 5. Cottam, "Historical Background of...St. Catherine's..." Also, Cottam, "Indian Title as a 'Celestial Institution': David Mills and the St. Catherine's Milling Case," in Kerry Abel and Jean Friesen, eds., Aboriginal Resource Use In Canada (Winnipeg: University of Manitoba Press, 1991), pp. 247-265.
McCarthy and A.R. Creelman, for the Company, responded that the Proclamation was not a dead letter: the sections dealing with Aboriginal People were never abandoned, regardless of the Quebec Act. First Nations retained an immutable stake in the area's renewable and non-renewable resources, including minerals. McCarthy maintained Native People owned the timber and minerals in their land in the first day of arguments before the court.

Boyd's judgment of 10 June involved narrow interpretations of the evidence, many of which were repeated in higher courts. He agreed with Mowat on the Proclamation. After presenting a short constitutional history of Canada, Boyd claimed Crown recognition of Aboriginal occupation was expedient and lacked legal sanction. He asserted Americans had purchased Aboriginal Title in the Thirteen Colonies only to facilitate trade and christianity and to avoid conflict, denying that any purchase was necessary. He rejected the premise that Aboriginal Title could be affirmed through English common law.

In arguing for the primacy of discovery, Boyd merely reiterated the earlier arguments of Chief Justice Marshall of the United States Supreme Court in 1832 in his landmark Aboriginal

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61 "Regina vs. The St. Catharines Milling and Lumber Company," 1885, 10 OR, 196, see pp. 199-201 for Mowat's argument and pp. 201-203 for McCarthy's.

62 The Mail, 19 May 1885.

63 St. Catherine's, 1885, 10 OR 196, pp. 204, 225 and 227.

64 St. Catherine's, 1885, 10 OR 196, pp. 206-207.
Title decision, Johnson v. McIntosh. In addition to relying on earlier American case law, Boyd introduced his own arguments, contending that when the BNA Act referred to "lands reserved to the Indians" it alluded to Reserves and not the broad areas referred to as the "Indian Territory" in the Proclamation.

Boyd denied the Ojibwa any rights at all: they could not have transferred a 'Title' to the Dominion since they did not have a 'Title' in the first place. Canada had illegally granted a timber license to the Company. Boyd summed up his position on the Treaty declaring it to be an empty gesture. Even if Canada had failed to secure it, First Nations could not have stopped the advancement of the country. He asserted that Canada had "...perfect liberty to proceed with the settlement and development of the country, and so sooner or later, to displace..." Aboriginal People. But, after Canada did so, Boyd argued, thus ruling in favour of Ontario, the land and resources belonged to Ontario which also had beneficial interest in them under section 109 of the BNA Act. In closing, he suggested that it was unfair for Canada to shoulder the whole expense of the Treaty "without having a sufficiency of land to answer...," but no attempt was made to address this suggestion.

Marshall argued the United States "shared Title" with First Nations. But the latter lost sovereignty and their right to alienate land independently. This was a limited conception of Aboriginal Rights. Marshall acknowledged the arrogance of "converting" discovery into conquest. However, he maintained this was how Americans obtained title to their property and believed it was too late to change the balance of power. (Johnson & Graham's Lessee v. M'Intosh), 1823, 8 Wheaton, p. 591. It was by such typically self-serving rationalizations and arguments created in hindsight that the United States and Canada justified their questionable dispossession of the continent's Native Peoples.

St. Catherine's, 1885, 10 OR, 196, pp. 228-230.

St. Catherine's, 1885, 10 OR 196, pp. 229-230.
Boyd's interpretation was not based on critical historical analysis or, indeed, on any historical analysis at all. His positions were inconsistent with the documentation. The British Crown had already re-affirmed Aboriginal Title and the de facto legal possession of First Nations in their lands under the English common law when they purchased such Title from First Nations in the Thirteen Colonies. 48 Boyd, however, was not interested in admitting any kind of substantial Aboriginal land Title. This was evident in his unwarranted claim that the Proclamation protected Reserves but not unceded land. The Proclamation did use the phrase "Indian Territory" (ie. unceded land) to identify what it referred to as "lands reserved to the Indians." Further, in 1763, few, if any, such "Reserves" as Boyd referred to existed, making it highly unlikely that this was the meaning of the Proclamation. 49 None of the higher courts upheld Boyd's argument on the scope of the Proclamation and Boyd himself later supported the opposite contention. 50

Boyd's argument denied Aboriginal Rights to land and resources, implying that First Nations never owned the areas they shared through Treaties and that they had no interest in timber or minerals either in these areas or on their Reserves. This position was erroneous and denied the reality of events at Mica Bay,

48 This kind of argument would be made by the dissenting Judge Strong in the Supreme Court of Canada.

49 Pugh, "Are Northern Lands Reserved...." pp. 37 and 38.

50 Pugh, "Are Northern Lands Reserved...." p. 39. See also Seybold, 31 OR 386, p. 395 where Boyd repudiates his earlier view.
Michipicoten and Jackfish Lake which had led, in part, to the conclusion of the Robinson Treaties and Treaty No. 3. Both Shinguacouse and Blackstone could and would have gathered large forces (perhaps 2000 people) to enforce their wishes. Boyd made no specific reference to the negotiations of Treaty No. 3 in his statement and did not consider that the Ojibwa had not relinquished mineral rights anywhere in their Territory. His ignorance of history led to the denial of Aboriginal Rights.

At the end of this trial Mowat worried that unless Ottawa was directly involved, the decision would not be binding on it. Mowat insisted on immediate federal intervention so the issue of ownership could be "...set forth in a special case for the immediate consideration of the Privy Council" but, Canada refused. It would not allow Ontario to go to the JCPC with Boyd's favourable judgment2 and instead encouraged the Company to appeal the decision. Mowat asserted that federal procrastination clouded provincial title to land and resources in the northwest and slowed mineral, timber and agricultural development.3

The Company appealed Boyd's decision, but Chief Justice Hagarty of the Appeal Court, upheld it virtually intact, agreeing with Ontario that ownership and interest in shared land passed to

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1 PAO, IP, MU 1457, 19/24/9-11, letters, 26 August 1885, Mowat to Campbell, Justice Minister; and 21 October 1885, Mowat to Campbell, p. 13.

2 PAO, IP, MU 1457, 19/24/9-11, letter, 17 September 1885, Campbell to Mowat.

3 PAO, IP, MU 1457, 19/24/9-11, draft letter, 21 October 1885, Mowat to Campbell, p. 6.
the province under sections 109 and 117. His colleague, Judge Patterson, added that the federal timber license to St. Catherine's had nothing to do with "administration of Indian Affairs," nor with "lands reserved for Indians," but with the "production of] revenue." This court, as well as the ones above it, refused to admit Boyd's claim that the Proclamation protected only Reserve land. Although his report indicated that the Appeals Court had referred to the Treaty negotiations, there was no recognition that the Ojibwa retained beneficial interest in mineral rights on their Reserves and had not given up mineral rights in the shared area. Instead, the negotiations and Treaty text were of interest due to the "outlay" of cash it entailed and the "burdens" which Canada assumed as a result of its conclusion. Patterson closed with a remark similar to Boyd's, querying whether these obligations would "...give rise to any claims or equities between the Dominion and the Province..." Ottawa did not address this possibility.

Early in 1887, Ontario's Attorney General asserted that Canada was infringing on provincial rights in the disputed territory, noting an earlier despatch of the Secretary of State

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5 Alexander Morris testified on the extent of the boundaries for Treaty Nos. 1-7, but did not go into the circumstances surrounding the negotiation of Treaty No. 3 per se. He said nothing about mining or mineral rights. PAO, IP, MU 1479, 41/41/1, In the Court of Appeal Between...Ontario and the St. Catherine's Milling and Lumber Company -- Appeal from the Judgment of the...Chancery Division of the High Court of Justice -- Appeal Book, (Toronto: Dudley & Burns, 1885), pp. 10-12.

6 St. Catherine's, 1886, 13 OAR 148, p. 173.
which recognized the

...'inconvenience and loss arising to settlers and to others engaged in the developing of the great mining interests... [which resulted from] the illegal claims made by the Dominion; first, the claim that our Province did not include this territory; and, then, the claim that though within our Province the lands, timber, and mines, do not belong to the Province, but belong to the Dominion...''

This statement indicates a direct link from the St. Catherine's case to the boundary dispute through the issue of the beneficial interest in resources.

The Company appealed to the Supreme Court of Canada where the case was heard by Chief Justice Ritchie in 1887. The court report opened with defence arguments from McCarthy and Creelman emphasizing that the Proclamation and Treaties acknowledged prior and present Aboriginal Rights.97

Ritchie, and the other majority judges, like Boyd and Hagerty before them, stated that the lands always "belong[ed] to the Crown,"99 thus denying Aboriginal Title. Justices Strong, whose arguments are considered here, and Gwynne dissented, supporting federal arguments. Strong encouraged Canada to follow the U.S. example of acknowledging Aboriginal Title as part of the common law so that Aboriginal Rights "were strictly legal rights which had to be taken into account and dealt with in distribution of


99 St. Catherine's, 1887, 13 SCR 577, pp. 599 + 601.
property and proprietary rights made upon confederation" between the governments. He argued that Aboriginal property and resources in the disputed area were unceded and did not pass to either government in 1867. Had this view prevailed, Ontario could not have gained rights to shared or unsurrendered land, timber and minerals under section 109. Mineral rights had not passed to the Crown (either the colonial authorities, Ottawa or Ontario) under the Treaties.

Unlike the majority of the Supreme Court, Strong asserted that once First Nations shared land, ultimate title remained with Ottawa. He refused to believe the BNA Act intended to break the long accepted practice of recognizing Aboriginal Rights in their land through the operation of sections 109 and 117, also arguing that the meaning of section 91(24) must refer to "all lands reserved for the Indians and not merely [to] a particular class of such lands." Although Strong's argument offered a viable alternative to the majority view, it did not prevail. As a result, the nature of Aboriginal Title was diminished -- at least in the eyes of the courts and politicians.

Having lost at the Supreme Court, the Company's last chance

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100 St. Catherine's, 1887, 13 SCR 577, p. 613. Although cited in the earliest St. Catherine's decision American case law was not extensively quoted. See for instance 10 OR 196, 1885, pp. 199, 202 and 209. Strong was the first Canadian judge to lean heavily on preceding American judgments which had upheld federal power at the expense of state rights. In particular he quoted long passages from Worcester vs. State of Georgia and shorter passages from Johnson vs. McIntosh and Cherokee Nation vs. State of Georgia. For an overview of these American cases see, Charles Wilkinson, "Indian Tribes and the American Constitution," and Walter Williams "American Imperialism and the Indians," both in Frederick Hoxie, ed., Indians in American History: An Introduction (Illinois: Newberry Library, 1988.)

101 St. Catherine's, 1887, 13 SCR 577, pp. 619-623.
for appeal was with the JCPC. It was at this level that Canada officially allied itself with the Company and its defence.\textsuperscript{102}

While trying to convince the JCPC to accept the Company's appeal, McCarthy emphasized the dissenting views of the two Supreme Court judges and maintained that the majority decision "...ignores the Indian title completely." He ardently argued that First Nations owned the minerals and that after the Treaty, they passed to Canada. McCarthy, however, was only half correct. First Nations did indeed own the minerals, but they did not relinquish them when they agreed to share the surface of the land. Thus, minerals did not pass to the Crown either in right of Canada or Ontario. A First Nation would have to expressly surrender its mineral rights in a separate agreement before Canada could dispose of them.

McCarthy particularly stressed Strong's dissenting view and used Strong's arguments to show that the precedent from Mercer, that the province had the right to appropriate the property of the intestate, did not apply. Mercer established that the right of escheat passed to the province under the word "royalties" in section 109, but no blanket passage of land occurred. The only land obtained by Ontario under section 109 was public property. Later, McCarthy asserted "...it is quite clear that the public lands do not mean the Indian Lands..." To further this position, he asserted that Aboriginal Territories were not the only category

of land which did not pass to Ontario in 1867. Private land had also not passed. McCarthy held that land, timber and minerals remained in the possession of First Nations until surrendered (shared), whereupon they passed to Canada.\textsuperscript{103}

McCarthy successfully encouraged the JCPC to accept the appeal because the issue of which government held the beneficial interest in resources would arise again.\textsuperscript{104} The Attorney General, R.E. Webster and his assistant, Mr. Gore, joined the Company’s defence team while Mowat, Blake and others continued to represent Ontario. Familiar arguments based on the Proclamation, Quebec Act, Treaties and the BNA Act were argued back and forth.\textsuperscript{105}

In addition, McCarthy and Blake spent a great deal of time arguing over Aboriginal ownership of minerals. While this fact is not evident in the printed Appeal Case transcript of 1888, it is evident in Blake’s printed argument book which maintained the case was about "timber and minerals." Much of his discourse attempted to establish the limited nature of Aboriginal interest in the lands they agreed to share. He argued there were three possible views. First, Native People held full beneficial interest in such lands. Second, he proposed a "middle view" based on American judgments and involving legal recognition that First Nations were protected in their occupation of the land for traditional

\textsuperscript{103} Mercer, JCPC, July 1883. PAO, IP, MU 1480, 42/41/6(2), "JCPC...July 22nd, 1887...The St. Catherine’s Milling and Lumber Company v. The Queen." pp. 3-24.

\textsuperscript{104} PAO, IP, MU 1480, 42/41/6(2), "JCPC, Council Chamber..."

\textsuperscript{105} St. Catherine’s, 1888, 14 AC 46, pp. 47-51.
purposes. Land could only be transferred to the government. The third view was that Aboriginal Title was not an absolute right, but rested on "grace and policy." \(^{106}\)

Although he preferred the last view, Blake often stated he could accept the moderate middle view. Lord Watson asked him if it was necessary to specify the extent of Aboriginal Title so long as a paramount Title was acknowledged for the Crown. \(^{107}\) Blake admitted this made no difference as long as Ontario had beneficial interest in resources under section 109. This argument required surrender of Title to be "complete and absolute;" it was used to show the Ojibwa never owned their land and that at Confederation this land, whether the subject of a Treaty or not, passed to Ontario.

Next Blake dealt with McCarthy's assertions that First Nations owned the minerals based on arguments in the State of Georgia v. Conatos, in which a Cherokee man was "brought up on habeas corpus." During that case Justice Clayton asserted that "...the right and title to land included a right to all the mines and minerals therein, unless they were separated from the lands by positive grant or exception...they had as good a right to the use

\(^{106}\) The Ontario Lands Case: Argument of Mr. Blake, Q.C., Before the Privy Council, (Toronto: Press of The Budget, 1888), 'Prefatory Note,' n.p., and p. 5. Blake also contended that christian nations had the right to take over heathen lands; upon takeover the "christian state [held] the soil absolutely." But Blake noted Lord Watson had previously stated such an argument "...would not apply very happily if the Indians had come over and found out England." Following a statement by the Earl of Selborne that the strong had a right to dispossess the weak Blake noted this argument ought not to be operational "at the present day."(see pp. 45-46) likely because of Prussian aggression. Such arguments only serve to underline the ephemeral and self-serving nature of the doctrine of discovery.

\(^{107}\) Ontario Lands Case...Blake, p. 45.
of the mines and minerals as to the use of the land and its products in any other respect." The Privy Council did not accept this contention because, it was alleged, the argument had been inserted into the court report by someone other than Justice Clayton. Blake argued the Cherokees were more civilized than the Ojibwa and that the position of the former could not affect the title in Proclamation land.\(^\text{108}\)

Lord Watson's judgment favoured Ontario's position. While he accepted federal arguments on the validity of the Proclamation, he upheld Ontario's view that the nature of Aboriginal Title under that Proclamation was usufructuary and temporary;" underlying title had always resided with the Crown. Beyond this, he took great care not to define the content of Aboriginal Title or rights saying: "...their Lordships do not consider it necessary to express any opinion upon the point."

On the basis of this ruling, Ontario had won the legal and constitutional right to the Treaty No. 3 area and its resources. Canada had to remit all timber revenue gained under the St. Catherine's license to Ontario. At Confederation the province assumed a beneficial interest in its lands encumbered by an Aboriginal interest which ceased to exist once First Nations signed a Treaty. The beneficial interest of the province was "not in the least degree inconsistent with...the power of...the Dominion to...legislate for the Indians."\(^\text{109}\) In essence the JCPC

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\(^{108}\) *Ontario Lands Case...Blake*, pp. 42-44.

\(^{109}\) *St. Catherine's*, 1888, 14 *AC* 46, pp. 53-59.
upheld the original judgment of Chancellor Boyd.

The St. Catherine's decision established a provincial interest in shared/surrendered land respecting all resources including minerals even though these were never expressly relinquished under Treaty No. 3. More significantly it became the foundation for Ontario’s "claim...to minerals on Indian Reserves" even when a First Nation had conditionally surrendered these minerals in trust to Canada by separate arrangement.¹¹ This judgment has had an extremely important impact on First Nations: Ontario obtained the beneficial interest in all lands including Aboriginal lands, while Canada, as the chief caretaker of the First Nations, retained only an administrative interest.

In October 1888, while waiting for the final decision of the JCPC, Canada attempted to dictate to Ontario the terms under which it would confirm provincial boundaries. Canada sent the Lieutenant Governor its conditions for agreeing to run the westerly boundary as decided in August of 1884 and to run the northerly boundary along the middle of the Albany River to James Bay. Canada would forego all claims to legislate and issue licenses or patents in the area except in established Reserves, Treaty No. 3 Reserves and future Reserves. Ontario would have to confirm federal timber licenses to Bulmer & Company. Canada recognized Aboriginal hunting and fishing rights in the shared areas, but also acknowledged a provincial right to sell or legislate all shared lands for

¹¹ PAC, Rs. 10, Vol. 2524, F. 111834, pt. 2, letter, 29 March 1898, Hardy, Department of the AG to Clifford Sifton, 29 March 1898.
settlement, mining, lumbering or other purposes. However, this right was not to extend onto Reserve land. Ontario was to assume the full cost of all future Treaties. Such Treaties would be negotiated and concluded by both governments.  

Several of these issues were addressed in a conference at Quebec City in 1890 between Attorney General John Thompson and Mowat which led to the Act of 1891 and the Agreement of 1894. Except for Ontario's notes on the conference, little else has been discovered or is extant which sheds light on the origins of the 1891 Act. Significantly, this "Suggestion" document, however, indicates that Canada originally tried to make its passage of boundary legislation contingent on provincial recognition of Aboriginal hunting and fishing rights and full federal retention of all rights in Reserve land. No provincial response has been located. But, Ontario did not accept these terms - they are not the ones embodied in the 1889 Boundary Act.  

In December 1888, the JCPC decided once and for all in Ontario's favour. Ottawa implemented the 1884 boundary award without condition, less than a year later. But, it did not drop the issues of Aboriginal rights and federal control of Reserves.

PART B:  
FEDERAL, PROVINCIAL AND ABORIGINAL RESPONSES TO THE ST. CATHERINE'S MILLING CASE, 1888-1930

One of the first federal responses to the St. Catherine's...
decision was to ignore it. Even before the final decision came
down from the JCPC, Canada issued a patent for gold on Sultana
Island. This area, part of the unconfirmed Treaty No. 3 Reserve
#38B belonging to the Rat Portage First Nation, was actually a
peninsula attached to the mainland by marshy ground which became
an island due to the rising water levels in the Lake of the Woods
largely caused by the Rollerway dam.\(^\text{113}\) (See Map 24.) In October
1886, the Rat Portage First Nation allegedly surrendered 600 acres
in Sultana Island.\(^\text{114}\) In July 1888, Aubrey White warned Canada
not to dispose of any interest in Sultana Island until it was
determined which level of government had the right to do so. Later
that month, the DIA informed White that Sultana was part of #38B
and that it had been surrendered in trust to the DIA.\(^\text{115}\) On 27
November 1888, Canada issued patent for mining location X42 on
Sultana Island to Henry Bulmer and others. In 1889 and 1890,
Canada issued four additional mining patents on Sultana Island and
after the original patentees, McMicken, Heenan and McMicken
released their rights in the locations, Ottawa transferred these
to the Ontario Mining Company which also received the "balance" of

\(^\text{113}\) McNab, "Research Report on "JES" 22," ONAS, 1980; also personal
communication. NOTE: The Rat Portage First Nation had three additional Reserve
areas: #38A, #38C and #38D.

\(^\text{114}\) PAC, IP, MU 1479, 41/40/2-3, 5 January 1899, "Mr. Robinson's Opinion re.
Ontario Mining Company," p. 1; Seybold, OSP 1904, p. 4; and Bradford Morse. ed.,
NOTE: In 1979 Canada rescinded, by OIC, this (1886) and all subsequent surrenders
of #38B without provincial knowledge or consent. Personal Communication: David
McNab, 5 April 1995.

November 1923 agreement," 4th page.
Map 24
Vaughan's Plan of Indian Reserve No. 38B in the Lake of the Woods indicating that Sultana was a peninsula attached to the mainland.
land in the Island excluding Caldwell's locations. In addition to his federal patents which Ontario did not recognize, Caldwell received provincial patents for X42 and X43 in March 1897, subject to the limits of a provincial patent issued to A.F. Fraser in November 1896. The ground-work was laid for the next big legal battle.

Ottawa and Ontario had to decide on a method to confirm the Treaty No. 3 Reserves. This arrangement in itself encompassed additional issues, one of which came to impinge on minerals in the land under water. By the end of the decade, minerals on Reserves and minerals under water had become inextricably linked to the confirmation of Treaty No. 3 Reserves for both governments. During the 1890s, arbitration over annuities started for the Robinson Treaties and Treaty No. 3. While some provincial officials tried to deny the mineral wealth of the shared area in an effort to reduce the amount of compensation Ontario might have to pay Ottawa in the Treaty No. 3 annuities dispute, others were busy issuing patents for gold bearing areas in Treaty No. 3 Reserves.

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117 PAO, IP, MU 1479, 41/39/1(5), undated, unsigned notes in Irving's possession: "Mr. Justice Rose decided."

118 Borron prepared three preliminary Reports for Ontario between 1891 and 1893, claiming that Canada had over-rated the mineral potential in the area. PAO, IP, MU 1468, 30/36/06, "Report by Mr. Borron on the North West Angle Treaty No. 3, as Affecting the Rights and Interests of the Province of Ontario," 9 October 1891. 31/37/10, "North West Angle or No. 3 Indian Treaty. Outstanding Accounts. Claims of the Dominion on the Province of Ontario in Respect Thereof," 25 March 1893. 30/36/06, "Report...", December 1893.

Borron's assessment was unwarranted. By the 1890s, Ontario was only too aware of the area's mineral potential due to gold rushes at Shebandowan and Shoal Lakes, Lake of the Woods and along the Seine River. And, as discussed in the text below, the CLD continued to issue gold patents on Reserves including two owned by the Rat Portage (now Wauzhushk Onigum) First Nation and on Islands in the North West Angle No. 37 Reserve.
METALS: THE HIDDEN AGENDA OF THE 1890s

By the end of the 1890s, Ontario had taken more than a few steps to appropriate all the minerals in the province -- not just the unrelinquished Aboriginal minerals in the shared areas, but also the precious metals on Reserve land. This massive resource grab, amounting to a provincial appropriation of a large part of the Aboriginal economy, was largely accomplished behind closed doors on the basis of memoranda and legal opinions. Canada, aware of the direction Ontario was taking, continued to dispose of mineral locations much the same as it had before the ruling in St. Catherine's. This was in spite of the fact that Canada's right to issue such locations in provincial lands had also been under judicial review in British Columbia since 1883.

Canada had been in dispute with B.C. over ownership of gold in the CPR lands, claiming beneficial interest in precious metals extending 20 miles on each side of the track, which B.C. had transferred to it for railway purposes. The case went to the JCPC and the judgment was delivered in April 1889, by Lord Watson - who had also delivered the St. Catherine's decision a year earlier.

Not surprisingly, the court held "precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown and under section 109 of the BNA Act, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied."¹¹⁹ This conclusion also extended to

¹¹⁹ The Attorney-General of British Columbia and The Attorney-General of Canada, 14 AC 295.
Ontario. The St. Catherine’s case and the B.C. case together clearly established provincial rights to minerals, at least to the satisfaction of Ontario and the courts. Canada, however, continued issuing patents for gold on Sultana Island.

Nevertheless, the situation regarding precious and base metals in the shared area was far from clear. Although Canada lost its case in B.C., it was able to make an arrangement with that province the following year modifying the effects of the judgment on Reserve land. The B.C. government entered into an Agreement with Canada contrary to its victory. In part, the agreement, authorized by joint OICs dated the 11th and 28th of February 1890, provided that most minerals in the CPR belt would be administered under provincial mining laws; that B.C. could buy federal lands containing minerals in the belt, with the exception of Reserves, for $5 per acre; that either government could end the arrangement at any time; and, most importantly that "...all minerals, including gold and silver, within Indian reserves, shall be administered by the Department of Indian Affairs."120

Perhaps Canada thought it would be able to come to a similar arrangement with Ontario. If so, it was mistaken. Ontario wanted control of all minerals in its boundaries - even those located on Reserve land. This position had been made clear in 1889 when the CLD issued formal protest against the federal patents about to be issued to the Ontario Mining Company.

The province was anxious to ensure Ottawa could not conclude

120 PAO, IP, MU 1479, 41/40/11, "Interior Annual Report, CSP No. 14, 1890."
other Treaties in Ontario without its concurrence, so disturbed was it about the extent and location of Reserves which Canada had already set aside in Treaty No. 3. When Ontario called for an investigation into all matters surrounding the Reserves, including their effects on agriculture, timber and mining, Canada complied, keenly aware of its precarious position in light of the St. Catherine's decision: all land within provincial borders belonged to Ontario whether or not there had been a Treaty.

These issues, and others, were addressed at a conference in Quebec City in November 1890 by federal and provincial officials from Ontario and Quebec. Mowat played a leading role, insisting on provincial participation in all future Treaties in Ontario and demanding that the land entitlement in the Treaty be strictly followed so that disagreements over the extent of Reserves would not arise. Mowat claimed Ontario's policy would be to confirm the Reserves "...unless some good reason presents itself for a different course" because the Ojibwa had shared their land in good faith, selecting their Reserves with the expectation they would not be moved. Significantly, Mowat agreed to the passage of an OIC which would end provincial control over fishing in waters adjacent to Treaty No. 3 Reserves.121

In 1891, Canada and Ontario passed legislation requiring provincial participation in future Treaties and embodying Mowat's

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121 PAO, IP, MU 1457, 19/25/2-6, 28 November 1890, "Memo as to matters which were considered in the interview to-day between Sir John Thompson and Mr. Courtney on behalf of the Dominion Government, Mr. Langelier and Mr. Machin, on behalf of the Government of Quebec, and Mr. Mowat and other Ministers on behalf of the Government of Ontario," pp. 1-2.
earlier formula for confirming the Reserves. Significantly, Ontario agreed that

...waters within the lands of an Indian Reserve including the land covered with water lying between the projecting headlands of any lake or sheet of water not wholly surrounded by an Indian Reserve or Reserves, shall be deemed to form part of such reserve, including islands wholly within such headlands."\(^{122}\)

Designed to protect Ojibwa fishing, hunting and wild rice harvesting,\(^ {123} \) this provision was consistent with the terms of Treaty No. 3. It also had implications for mineral rights in land under water and islands in the headlands. The 1891 legislation provided no definition of headland areas. The headland clause merely specified the exclusion of non-Natives from fishing in such areas.

This legislation allowed each government to enter into a future agreement with the other to confirm the Treaty No. 3 Reserves.\(^ {124} \) Such an agreement, including the same clauses as the earlier Act, was made in 1894, which was confirmed by reciprocal

\(^{122}\) Statutes of the Province of Ontario, 54 Vic., Cap. 3, 4 May 1891, "An Act for the settlement of Questions between the Governments of Canada and Ontario respecting Indian lands" (hereinafter: Act of 1891).


OIC, but not Statute.\textsuperscript{125} No Reserves were confirmed. But, for the second time in four years, Ontario agreed to Reserve boundaries with headland areas.

Ontario's policy was that Reserves were to be confirmed as laid out unless a "good reason" presented itself.\textsuperscript{126} But, long delays occurred in the implementation of the Agreement's provisions as they pertained to the confirmation of Reserves, in part, because of the dispute between the governments over Treaty No. 3 annuities and over which level of government had beneficial interest in minerals.

Ottawa was not at all positive Ontario would confirm every Reserve in Treaty No. 3, most of which were located in that province on navigable waters. Although Ontario feared the impediment of development and settlement, it would confirm most Reserves if "suitable compensation" from Ottawa could be arranged. Ontario did not immediately identify which Reserves it would acquiesce in, or what form compensation should take. Mowat immediately instructed Aubrey White to examine the issue of compensation\textsuperscript{127} but, Ontario waited another 10 years before identifying the Reserves it would confirm.


\textsuperscript{126} ONAS, North West Angle Treaty 3, ILF #186214, Vol. 1, Agreement of 1894, 16 April 1894, p. 4. Copy in PAO, IP, MU 1468, 30/36/18.

\textsuperscript{127} PAO, IP, MU 1468, 30/36/18, letters, 7 February 1896, Hayter Reed to White, in "Abstract of Correspondence Relating to Confirmation of the Reserves under Treaty 3," dated 7 March 1898; 27 February 1896, Reed to White; and 3 March 1896, Irving to White.
Within months of the making of the 1894 Agreement, White instructed William Margach, Crown timber agent in the formerly disputed territory, to report on resources in the Treaty No. 3 area, particularly the timber and minerals. Margach's February 1895 Report claimed that the location of the Rainy River Reserves, numbered 10-15, would deter settlement and suggested that the Native People there be moved north to inland lakes. The remainder of his report dealt with timber and minerals. Margach identified a number of Reserves in gold or potential gold bearing areas. These Reserves included #s 38B and 38A belonging to the Rat Portage First Nation; 32A belonging to the White Fish Bay First Nation; 26A belonging to the Nicickousemenecaning First Nation on the Seine River; and 23A (Potato Lake) and 23B (Grassy Lake) belonging to the Seine River First Nation. Margach asserted that Ontario could sell Reserve 38B in its entirety as mining lands at $3 per acre and that part of 38A could be sold as well. He asserted that 26A showed "indications of mineral quartz rock...in many places" and emphasized that south of this Reserve Ontario had sold thousands of acres as mining lands at $2 per acre. Margach also discovered "indications of mineral" on 23B and noted that Ontario had sold mining lands to its north and east at $2 per acre and other lands to the north, east and west of 23A. Almost half of Margach's report concentrated on his observations about gold.

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129 PAO, IP, MU 1469, 31/37/18-19, Report, 20 February 1895, Margach to White.
Ontario's Bureau of Mines also conducted an extensive minerals survey in the south eastern Rainy River area in 1895, including several of the Reserves described by Margach. The Bureau exhibited its results on a map indicating that many of the Reserves in this area boasted very promising potential for precious and other minerals.\textsuperscript{130}

Ontario authorized mining locations on several islands, comprising two distinct Reserves, in the Lake of the Woods which it had not yet confirmed. Evidence for this assertion comes from a hearing in 1895 at which Margach testified:

Down here at Chabeycoyne Bay there have been a number of Islands sold for mining purposes -- Right in front of this reserve 38B there have been locations under the Mining Act sold to the north and to the east of 38B. To the west here Clear Water Bay (38A) numerous surveys have been made under the mining Act and lands purchased from the Province to the north and west of this reserve, and Island lying in Clear Water Bay inside of said reserve -- there are Islands in the middle which have been sold as mining lands -- Those red dots indicate Reserves which don't show here but it is on the ground (38D and I have reported it...\textsuperscript{131} [my emphasis]

Ontario did indeed sell an island belonging to #38D and other islands in White Partridge Bay in the headlands of #38A as mining lands.\textsuperscript{132} (See Map 25). It also sold five mining locations on

\textsuperscript{130} PAO, Map Collection: G and A-17.

\textsuperscript{131} PAO, IF, MU 1469, 31/37/18-19, #18, "Case Re. Indian Claims Arising out of North-West Anglo [sic] Treaty No. 3, Statement of Mr. Margach taken in the presence of Aemilius Irving, Q.C., Mr. J.M. Clark, Mr. Forsyth, 14 January 1895," p. 4. NOTE: Margach's comments must pertain to the period after 1889 or 1890 because he remarks on federal mining sales occurring in those years at Sultana Island.

\textsuperscript{132} Ontario sold P102 and P103 in the headlands of Reserve #38A and P104, part of Reserve #38D. As a result the Waushushk Onigum First Nation never received these areas as part of its land base in 1915 when Ontario confirmed the Treaty No. 3 Reserves. No mining lands appear to have been sold on the other four islands comprising #38D, marked on the map west of Corkscrew Island.
Map 25
Map showing Islands in the Rat Portage Reserves #38D and #38A, improperly patented as mining locations by Ontario.
Windfall and Windigo Islands in the Lake of the Woods in November 1897, even though these islands were identified, on provincial maps, as part of Reserve #37 (See Map 26) and issued several patents for gold on Sultana Island between 1896 and 1899. These actions clearly ignored the rights of the Ojibwa under the Royal Proclamation not to be "molested" in their lands, as well as the spirit and intent of Ontario's promise to confirm the Treaty No. 3 Reserves and clouded the spirit and intent of the arrangements worked out in 1891 and 1894.

Because the CLD knew that several Reserves had almost certain gold potential, it aggressively pursued the position that it owned minerals in Reserves. According to an 1897 mineral's memo, base metals located on Reserves which were properly set aside since 1867 were deemed "incident thereto." The DIA held beneficial interest in such metals in trust for Native People. In Reserves properly set aside prior to 1867, First Nations retained their interest in base but not precious metals by virtue of the BNA Act. When properly constituted Reserves were surrendered to Canada in trust for a First Nation, it could grant the land and or base metals, but not the precious metals, for Native benefit. If the precious metals were granted benefit would accrue to Ontario.

Ontario issued patents on Sultana Island for the following locations: D193 on 18 November 1896 to A.W. Fraser; X42 and X43 on 5 March 1897, to J.F. Caldwell (subject to the limits of Fraser's patent); (two patents issued for) A20 on 16 and 24 January 1899 to Seybold, et. al.; and D193 on 26 May 1899 to the Bald Indian Bay Mining and Investment Co. Ltd. Personal Communication: Vic Prasaud, MNR, CLR, 13 June 1994.

Note the islands sold as mining lands by Ontario could not have been those associated with Reserve 388 because Ontario's first patents for these were not issued until 1899.
Map 26
Map showing Islands in Reserve #37 in Sabaskong Bay, improperly patented as mining locations by Ontario.
Canada had no rights at all in Reserves which it set aside but which remained unconfirmed by Ontario. Both precious and base metals remained the property of the province and Canada had no right to collect beneficial interest on such land even when a First Nation surrendered it in trust. This would include all the unconfirmed Treaty No. 3 Reserves.

After receiving legal advice on Ontario's ownership of all timber and other "property" in the unconfirmed Treaty No. 3 Reserves, Premier Hardy declared provincial rights to "Precious Metals and Other Minerals in, and Timber On, Indian lands and Reserves," making no distinction between precious and base metals or indeed any other type of mineral. This position was communicated to the Minister of the Interior, also Superintendent General, who acknowledged receipt in August, but made no further comment. The memo was an announcement that Ontario intended to have all minerals in the province even those in Reserve land. This was the complete opposite of what had been done in B.C. and indicated provincial designs on two of the most commercially

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135 PAO, IP, MU 1479, 41/40/2-3, 8 June 1897 "Memo Re. Precious Metals and Other Minerals on Indian Lands and Indian Reserves." Author unknown.

136 PAO, IP, MU 1479, 41/40/2-3, letter, 11 June 1897, unsigned (advice is from unsigned and Aemilius Irving) to A.S. Hardy. Other advice which appears to predate Hardy's memo (although it is undated) may be found in 41/40/11-13, "Re. Indian Claims. Get up memorandum for Ottawa; showing the rights of the Province to minerals or precious metals in Indian lands generally. In those surrendered to the Crown. ...To the minerals in Reserves which have not yet been approved." See page numbered "5." The writer makes argument that because Ottawa had sold provincial metals in Reserves, "Ontario is therefore entitled to claim as against the Dominion the value of all such precious metals dealt with under the pretended authority of the Dominion." PAO, RG 10, Vol. 2314, F. 62509-4, pt. 1, "Memo by the Attorney General of Ontario Re. Precious Metals and Other Minerals In, and Timber On, Indian Lands and Reserves," enclosed with letter from Hardy to Sifton, 28 July 1897. Also MU 1478, 40/38/12, last page of document or envelope: "Treaty No. 3, Indian Reserves, draft of letter AG Hardy to Minister of the Interior, March 1898, Mr. Hardy changed this draft very much and I ought to get a copy of it."
important resources on Reserves - minerals and timber. These actions left Treaty No. 3 Reserves in a very unclear position. What would be the point of confirming the Reserves if the province intended to appropriate the most valuable resources which had been retained by First Nations as part of their economic base?

During the 1890s, Ontario authorized upwards of 6,414 mining locations, more than at any time in the past. The peak years of activity were between 1 January 1896 and 31 December 1897 when at least 3,474 locations were laid out; it was no coincidence that during this same period Ontario claimed to own all minerals in the province, including those on Reserves.

THE MINERALS CASES AND THE COUNSEL'S AGREEMENT OF 1902

During the late 1890s disputes arose between the governments over the validity of patents each had issued between 1888 and 1899 for mining locations in the land under water adjacent to Sultana Island and overlapping locations on the Island itself. The dispute between Caldwell and Fraser over their respective locations was about precious metals in land under the water in the headlands of the unconfirmed Reserve #38B. Caldwell, the

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117 Personal Communication: Al Day, Surveys Branch, MNR, July, 1994. Mr. Day provided the following statistics: between 1 Jan. 1840 to 31 Dec. 1880, Ontario authorized 663 mining locations; between 1 Jan. 1881 to 31 Dec. 1885, it authorized 482 locations; between 1 Jan. 1886 to 31 Dec. 1890, 690 locations; between 1 Jan. 1891 to 31 Dec. 1895, 1,511 locations; between 1 Jan. 1896 to 31 Dec. 1897, 3,474 locations; and between 1 Jan. 1898 to 31 Dec. 1899, 1,431 locations. These figures are conservative because each entry shows up as single even though it may represent more than one mining location.

118 A gold rush had occurred in the early 1880s at Rat Portage and both governments were anxious to issue licenses and collect dues. "Return of a Copy of the Judgment of the JCPC in the case of the Ontario Mining Company et.al., vs. Seybold, et.al.," OSP No. 93, 1904 (henceforth: Seybold, OSP 1904). Also David McNab, "Research Report on Mining Location "JES" 22 in Lake of the Woods and Rat Portage Indian Reserve #38B," ONAS, 1980.
plaintiff, holding federal and provincial patents for X42, wanted the court to declare Fraser’s patent (D193A) for "the adjoining land covered by water" void. He argued the underwater location was an extension of his X42 by riparian right and further was land included in Reserve #38B either by virtue of the description of the Reserve or by virtue of the headlands clause in the Agreement of 1894. Fraser, however, contended that the land under water had been surrendered under Treaty No. 3 so it was not part of 38B and that Ontario never confirmed the Reserve so the headlands clause did not apply (see Map 27). Ontario had no involvement in the case: it would be safer to rest on its laurels from the St. Catherine’s case than risk losing ground by becoming involved in another test case. The case was heard in the High Court of Justice before Rose J. who delivered his ruling on 31 January 1898.

Rose argued that the Treaty No. 3 First Nations had exempted their Reserves from the Treaty area, maintaining the same were unceded pockets of Proclamation lands. Part of one such pocket, Sultana Island, was allegedly surrendered by the Rat Portage First Nation in October 1886. One condition of surrender was that monies from the sale of the minerals accrue to the First Nation. Rose ruled that Ontario would have to honor this condition

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141 PAG, IP, MU 1469, Caldwell v. Fraser, p. 10. McPherson and Clark, Law of Mines..., p. 21; MU 1479, 41/39/1(5), note in Irving’s possession: "Has the Indian Title been surrendered..." Also undated notes: "The points to consider are...;" and 41/40/11-13, undated note: "as to the effect of the surrender."
Map 27
Map showing mining locations on and around Sultana Island including those in the land under water considered in Caldwell v. Fraser

INDIAN RESERVE
38 B
and pay the proceeds of the mineral monies to the First Nation, thus relieving Canada of its obligation. Referring to the St. Catherine's decision, Rose argued Ottawa had no right to sell the land or grant the precious metals, also noting that Ontario had not yet confirmed the Reserve.\

The central question raised by the plaintiff was not addressed by Rose who asserted that it was unnecessary to decide whether the land under water in the headland was included in 38B. Rose argued that First Nations surrendered only the surface of the land in 1886; that the cession did not go beyond the waters edge; and that the land covered with water in front of Caldwell's X42, that is Fraser's D193A, had not been surrendered and therefore neither government could dispose of minerals in the land under water. Because the 1886 surrender did not include land under the water, that surrender could not be relevant to the land in dispute in the present action (that is, the minerals in land under water in D193A). Rose concluded Ottawa had no power to sell either 'ceded' (ie. shared) or unceded Aboriginal land. Even if it could sell ceded land, it had no right to sell precious metals so that its patent to the plaintiff was void. Ontario had the right to sell locations X42 and X43 since they were surrendered land, but had no right to sell the minerals in the land under water if these were unsurrendered. Provincial grants of the minerals in the land

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142 PAO, IP, MU 1469, Caldwell v. Fraser, pp. 3-7. McPherson and Clark, Law of Mines..., pp. 17-18; also, MU 1479, 41/39/1(5), "Mr. Justice Rose decided --", 41/39/1(8), notes in Irving's possession dated 13 March 1898; and "The points to consider are..."
under the water, "if valid at all," were subject to Aboriginal interest and Ontario could only grant the precious metals on condition that surface rights remain intact; the province or its grantee could not go onto unceded Territory or an unsurrendered Reserve and begin extracting precious metals." Rose contended that Caldwell had no right to take issue with Fraser's underwater patent D193A because he had no interest in it. Rose asserted Caldwell's claim that the description of Ontario's patent to Fraser overlapped with his was invalid.

Rose clearly believed that Aboriginal People had not surrendered water or the land under water including minerals in front of their Reserves - and by extension, the whole of the Treaty area. Therefore, the Treaty was a contract to share the surface of the land only for certain considerations; the First Nations did not relinquish water, sub-surface or sub-marine mineral rights, among others, to the Crown. Rose made a definite assertion that First Nations have unrelinquished sub-marine and sub-surface rights, stating

if I am correct in the view, that the Province had no power to make a grant of any present right to the unsurrendered lands under the water and if Fraser or the defendant company is interfering with such lands without right, then, in my opinion, on the facts of this case, the plaintiff is not in a position to raise any such question. The only ones that can complain are the Indians or the Dominion Government as having control of

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143 PAO, IP, MU 1479, 41/39/1(5), "Mr. Justice Rose decided-

144 PAO, IP, MU 1469, Caldwell v. Fraser, pp. 24-25. McPherson and Clark, Law of Mines ..., pp. 22-23. Also, MU 1479, 41/39/1(5), "Mr. Justice Rose decided -;
and 41/39/1(8), notes dated 13 March 1898.
Indian Affairs.\textsuperscript{145} [emphasis in original]
This was, clearly, not good news for the province which had issued hundreds of mining locations in land under water in the headlands of Treaty No. 3 Reserves as well as in such areas outside the headlands.\textsuperscript{146}

This was a mixed victory, if any at all, for Ontario. While provincial patents were upheld, they were valid to the water's edge only. Ontario was told it had no right to the water or land and minerals under water. Caldwell unsuccessfully attempted to appeal the decision.\textsuperscript{147}

Rose's statements on the nature and extent of Treaty No. 3 were of great importance, leading Ontario into confusion over its rights in the Island. Provincial lawyers queried whether Sultana was Aboriginal property. If not, it was suggested that Ontario "...counter claim for whatever value we can make and either the money realized from its sale and the value of the minerals which have been obtained thereon." Provincial lawyers argued that minerals do not belong to First Nations whatever the Treaty

\textsuperscript{145} PAO, IP, MU 1469, 39/37/17, Caldwell v. Fraser, p. 25.
\textsuperscript{146} PAO, R-L, "Map of the North Part of the Lake of the Woods, Shoal Lake, Rainy River District. Exhibiting the country in the vicinity of Rat Portage," Ontario, Crown Lands Department, 1897. Also: B-74, "Plan of Lake of the Woods and Surrounding Region," 1890; and R-R(U), "Rainy Lake R22-3," 1890.
\textsuperscript{147} PAO, IP, MU 1468, 31/37/17 (2), "In the High Court of Justice, Between John F. Caldwell (Plaintiff) and Angus William Fraser and The Burley Gold Mining Company of Ottawa (Limited), (Defendants), Notice of Appeal," 5 February 1898, scheduled to be heard 7 March 1898.

NOTE: This decision has never been overturned. When questions about mineral ownership were subsequently argued in Seybold and Star Chrome, the specific arguments expressed by Rose concerning the nature and scope of Aboriginal mineral and water rights were not tampered with, possibly because these later decisions concerned minerals under land and not minerals in the land under water.
stated. Such statements demonstrate that Ontario's primary concern was to deny Aboriginal Rights in order to make money from mineral development.

Ontario had no policy regarding minerals in land under water. Provincial lawyers feared Rose's assertion that First Nations had not surrendered the beds of lakes and rivers and asked whether the province owned the rivers, lakes and fisheries. In March 1898, a provincial lawyer argued that precious metals were unaffected by the Agreement of 1894. Ontario was afraid of losing mineral rights in Reserve headlands, particularly at Sultana Island due to Rose's decision. The lawyer then asked: "What compensation does the Dominion propose to allow for the Reserves -- what in respect of the Wat. [Water] lots between the Headland - what is Ontario to get?"

Less than two months after Rose's decision, Ontario was scrambling to circumvent its meaning: water, land under water and minerals were unsurrendered Aboriginal property. Until Rose's arguments in Caldwell v. Fraser, Ontario did not understand the implications of the headland clause for minerals.

Later in March 1898, Hardy reminded the Minister of the Interior he had never responded to the former's memo of 1897 in
which Ontario claimed all timber and minerals on Reserves. However, Ottawa had twice asked the province about confirming the Treaty No. 3 Reserves. Hardy had noted that Treaty No. 3 did not extinguish Aboriginal Title in the Reserves. The basis of this statement must have been Justice Rose’s arguments in *Caldwell v. Fraser*. As a result, Hardy asserted federal claims for compensation regarding annuities could not be dealt with, noting that Ontario had received few benefits under the Treaty because Ottawa had disputed provincial title to the area for almost two decades and now claimed ownership of fish and the beds of all waters (including the minerals) in Treaty No. 3. Hardy had no intention of confirming the Reserves under these circumstances and suggested "negotiation on a broad basis."  

Ontario was indeed worried about the possibility that Treaty No. 3 had not surrendered Aboriginal Title in the Reserves. As one provincial lawyer pointed out this would be undesirable: "The reason why it is important to Ontario that the Indian Title should be extinguished as to the Reserves is, that Ontario cannot dispose of the precious metals in the Reserves until the Indian Title is extinguished."  

If Ontario repudiated the Treaty and refused to recognize the Reserves, then it could not pursue mineral development -- anywhere.

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151 PAO, IP, MU 1478, 40/38/12, "Treaty No. 3, Indian Reserves, draft letter...Hardy to Minister of the Interior ....," pp. 1-5.

152 PAO, IP, MU 1479, 41/39/1(8), notes dated 13 March 1898, "Treaty No. 3."

A provincial lawyer advised that it confirm most of the Reserves, but keep precious metals for itself, then Ontario could claim compensation against Canada for the surface value of the Reserves "and can propose to the Dominion to purchase the precious metals rights."¹⁵⁴ [my emphasis] These legal notes indicate that Ontario was trying to establish a position vis-a-vis minerals in Reserves, headlands, islands and land under water which would bypass Justice Rose's statements.

Less than one year after the Caldwell case, another precious metals case occurred as a result of federal patents issued for Sultana Island between March 1889 and July 1890 to McMicken, Heenan and McMicken. In September 1889, McMicken et al. transferred their rights in the entire location to the Ontario Mining Company except for the Sultana mine. Ontario had known of federal actions regarding the first of these by at least April 1889. During the course of his research in DIA records, provincial lawyer J.P. Macdonell noted the Department received applications for gold on Sultana Island and concluded that Ontario had no jurisdiction in the matter because the island had been surveyed as part of Reserve 38B in 1879 and surrendered by the First Nation for its own benefit.¹⁵⁵ Ontario disagreed, officially denouncing federal intentions prior to the issuance of patents by the

¹⁵⁴ See for instance PAO, IP, MU 1479, 41/39/1(8), unsigned notes in Irving's possession, dated 12 March 1898, "Treaty No. 3."

¹⁵⁵ PAO, IP, MU 1480, 42/42/2(2), 4 January 1886, "Memo for AG. Re. Fuller's lease;" and 42/42/1(2), 10 April 1889, Macdonell's Report on the Keewatin Lumber Company’s leases.
Considering the recent statements of Justice Rose, Ontario was not anxious to have this matter tested again in court. Although the validity of the provincial patent was upheld, Rose’s other statements were distressing. Ontario’s initial protest against federal patents on Sultana had little effect - Ottawa issued them anyway. In 1894, the Ontario Mining Company attempted to secure provincial patent for the same location, petitioning again in June of 1897. By this time, however, Seybold et. al. had already applied for this area as a mining location. The commissioner of Crown Lands did not rule on the matter until 22 November 1898, upholding a 2/3 interest for Seybold and a 1/3 interest for Ontario Mining. The latter company refused to accept these terms because it would lose its title in the 2/3 area. This situation led Ontario Mining to lodge a caution against Seybold and attempt to have the High Court of Justice bar it from the entire area. Following this action, the commissioner withdrew his ruling that Ontario Mining could have the 1/3 area. Ontario issued patents to Seybold on 16 and 24 January 1899.

The commissioner received a second request for confirmation only three months after his Department issued patent to Caldwell for X42. It is significant he did not reply until well after the decision in that case came down. If Ontario viewed Caldwell as a

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157 Seybold, 31 OR 386, p. 388.
victory over Ottawa, why did it give in to the Ontario Mining Company even to the extent of a 1/3 interest? This concession was made in hope that Ontario Mining would accept the compromise. Ontario was not looking to have the issue tested in court again. Initially, neither government was involved in the case.

The Ontario Mining Company charged Seybold with trespass and further sought to have the provincial patents declared void. In a counter-move Seybold applied to have a writ issued against Ontario Mining barring it from the area. On 15 February 1899, the High Court of Justice issued writ in favour of Seybold. Counsel for Ontario Mining argued that the Ojibwa owned minerals on their Reserves which passed to Canada upon surrender. Seybold's lawyers counted that precious metals in all lands belonged beneficially to Ontario and that upon surrender, passed to the province under section 109.154

Not surprisingly, the decision delivered by Chancellor Boyd, who had previously brought down the first ruling in the St. Catherine's decisions, denied the position of Ontario Mining and upheld the arguments of Seybold. Boyd noted Canada had issued the patents under authority of the Indian Act which allowed it to dispose of "public lands belonging to [it, but did] not seem to provide for cases like the present where the territory is the property of Ontario." He argued that precious metals belonged to the Crown in right of the provinces prior to confederation "by the

transactions relating to the civil list which took place between the Province and Her Majesty..." in 1846. In 1867, the beneficial interest in precious metals passed to Canada and by virtue of section 109 to Ontario.\textsuperscript{159} The provincial, not federal, patents were valid. Canada had no right to issue patents for precious metals in surrendered land which according to the St. Catherine's judgment belonged to Ontario.\textsuperscript{160} Appeals to the Divisional Court in June 1900 and the Supreme Court in June 1901, reaffirmed decisions in favour of Seybold (and Ontario).\textsuperscript{161}

Before the decision was appealed to the JCPC, the governments reached an agreement on the disposition of Reserve lands to reduce the likelihood of a similar case arising in the future. Under these arrangements, sometimes referred to as the Blake-Newcombe Agreement (after the provincial and federal negotiators) and sometimes as the Counsel's Agreement of 1902,\textsuperscript{162} Ontario agreed to confirm all Treaty Reserves in its borders "...which have been or shall be duly surrendered by the Indians to sell or lease for their benefit...and...the Dominion shall have full power and

\begin{footnotes}
\textsuperscript{159} PAO, IP, MU 1479, 41/40/5, "Ontario Mining Co. vs. Seybold...Copy of Judgment of Boyd, C., Delivered December 1899," pp. 8-9 (hereinafter: Boyd's 1899 Seybold Judgment).

\textsuperscript{160} Boyd's 1899 Seybold Judgment, p. 4.

\textsuperscript{161} PAO, IP, MU 1479, 41/40/6, "Ontario Mining vs. Seybold, Copy Judgment of Divisional Court delivered 12th December 1900," and 41/40/9, "In the Supreme Court of Canada, Ontario Mining Co...vs. Seybold..." This document is a dissenting view and notes the deal with regard to metals in the Treaty negotiations, the 1886 Indian Act definition of a 'reserve' as including the minerals and metals, and contends that a surrender is only valid if its conditions are met. One of the conditions of the Rat Portage First Nation surrender was that the benefit accrue to themselves, pp. 10-13.

\textsuperscript{162} Boyd's 1899 Seybold Judgment, see pp. 6-7 for copy of the Agreement.
\end{footnotes}
authority to sell or lease and convey title in fee simple or for any less estate." This allowed Canada to administer those lands and to accept First Nation surrenders without fear of forfeiting their beneficial interest. This 'concession' was based on the Treaty negotiations.\(^{163}\) The Agreement set aside Ontario’s interest in shared land and allowed Canada to dispose of such land and minerals for the benefit of Treaty No. 3 First Nations. It did not confirm Treaty No. 3 Reserves.\(^{164}\) It was put before the Legislative Assembly on 23 April 1904, but for some unknown reason was never submitted to the Lieutenant Governor for approval.\(^{165}\)

Under the early Treaties, the Robinson Treaties (none of which were a subject of consideration in \textit{Seybold}) and Treaty No. 3, First Nation interest in minerals was retained. The Counsel’s Agreement acknowledged only the rights of the Treaty No. 3 Ojibwa stating that the rights of other First Nations to minerals in their Reserves and shared land would be determined on a case by case basis. This concession was made in spite of the outcome of legal decisions because there was no doubt the Treaty No. 3 Ojibwa refused to relinquish precious metals in the negotiations and the commissioners had told them they would retain such interests. This


\(^{164}\) Regarding non-confirmation of reserves through the Agreement of 1902 see PAO, IP, MU 1469, 31/36/23, undated Gibson memo (likely 1904), also 31/36/20, 14 June 1910, Opinion - Indian Question," Irving, p. 5.

\(^{165}\) PAO, IP, MU 1469, 31/36/21, memo...25 May 1910.
concession was to "extend no further" than Treaty No. 3.\textsuperscript{166}

While the status of the precious metals was dealt with to some extent, that of the base metals was not. The language of the Agreement was ambiguous on this point, allowing Canada to administer the surrendered 'lands' for the benefit of First Nations, but did not state whether 'lands' entailed rights to base metals. However, based on correspondence from the late 1890s it was evident that base metals belonged to the land in which they occurred. It was also unclear whether the word 'lands' included headlands. These troublesome issues would be dealt with in the legislation of 1915 and 1924 against the best interests of First Nations and more seriously against Treaty rights.\textsuperscript{167}

Shortly after the Counsel's Agreement was reached, both governments were invited to intervene at the JCPC on behalf of their respective interests: Canada for Ontario Mining and Ontario for Seybold. The judgment, stated to be "...a corollary from that of the St. Catherine's Milling [Case]," favouring Seybold and Ontario was delivered on 12 November 1902. The JCPC ruled that although the lands had been surrendered to Canada, they were provincial property under section 109.\textsuperscript{168} Federal patents were void and Canada had sold provincial property.

Similar to the St. Catherine's decision, the legal battle

\textsuperscript{166} Boyd's 1899 Seybold Judgment," p. 7; and PAO, IP, MU 1469, 31/36/21, memo...25 May 1910.


\textsuperscript{168} Boyd's 1899 Seybold Judgment, p 5.
over precious metals had been fought without reference to Aboriginal history, resource use or unsurrendered rights. No Native person had been invited to the proceedings to record his or her views. Unrelinquished Aboriginal mineral rights were not affected: the governments had again been fighting over resources which neither owned.

The appeal to the JCPC went in Ontario's favour in spite of the spirit and intent of the Counsel's Agreement. Although the Agreement allowed Canada to administer Treaty No. 3 Reserve lands, Ontario had not confirmed any Reserves. Under the 1902 Agreement Ontario relinquished rights it had acquired in the St. Catherine's and Seybold cases, establishing its rights to precious metals on all land within its borders. It had little choice in this matter because those rights were clearly unpracticable: Ontario could not lawfully enter a Reserve and take the precious metals unless a First Nation agreed to surrender the surface rights and grant access rights. The point is that these legal decisions were unrealistic and both Ontario and the Dominion knew this. This is why Ontario participated in the Agreement of 1902 even though legally it owned the minerals in shared and Reserve land. Ontario, with the full knowledge and connivance of Canada, would shortly

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169 This point had been recognized by the court as early as 1899, when Boyd concluded that "the Indians are not in any way represented in this litigation, and I do not and could not prejudice their claims against any government by what I now decide." Seybold, 31 OR 386, p. 400.

170 This long-standing practice resulted from the Royal Proclamation, Treaties and the Indian Act of 1876 as well as those which followed. In addition to this, precious metals usually occurred with base metals which legally were the property of First Nations. Ontario could not remove the precious metal without also removing something that did not belong to it.
remedy these obstructions, again to the detriment of First Nations.

THE "CONFIRMATION" OF TREATY NO. 3 RESERVES, 1898-1915

As we have seen, since at least 1898, Ontario linked the confirmation of Reserves with precious metals and headlands as it had done at Sultana Island. As we will see, even after Ontario confirmed the Reserves in 1915 (unilaterally rescinding the headlands clause) First Nation rights to minerals in their Reserves continued to disturb the province.

Ontario continued to address the confirmation question in the midst of the legal dispute over minerals. In a memo of August 1900, Ontario’s Attorney General Gibson submitted the following questions to Clifford Sifton, Superintendent General and Minister of the Interior, on the following questions:

1. Does he deem it important that the Reserves should be confirmed as at present located.
2. Does he admit that more acreage has been taken for these proposed Reserves in Ontario than justifiable.
3. Does he concede that Ontario should be compensated for such excessive deprivations of Ontario lands, and for the precious metals not only
   a. for the precious metals in respect of the excess
   b. but for all precious metals in the Reserves, as the Title could not apply with the allowance of any interest in the precious metals, to the Indians [my emphasis]

Ontario was particularly concerned about compensation for minerals in the unconfirmed Reserves. The governments continued debate on these and other unsettled questions the following month,

[171] PAO, IP, MU 1468, 30/36/15, 8 August 1900, "Treaty No. 3..."
Gibson/Irving, 20 August 1900, pp. 25-26. Point 3b, was reiterated on p. 27.
including: annuities, provincial claims under the provisional boundary agreement, confirmation and adjustment of Treaty No. 3 Reserves, minerals in the Reserves, ownership of islands in Lake Huron and future terms for a Treaty in the Hudson Bay area.\textsuperscript{172}

The question of mineral ownership was one of the main reasons why the Reserves had not yet been confirmed. Even though the courts consistently upheld the validity of provincial patents in \textit{Caldwell} and in \textit{Seybold}, it would appear Ontario was giving some thought to reneging on its promise to confirm the Reserves. In 1901, Gibson obtained legal advice on a variety of matters including whether the province had to confirm the Reserves. Blake's opinion was that as a result of the position he had taken in \textit{St. Catherines's} before the JCPC, Ontario could not now refuse to confirm. During that trial, Blake asserted Treaty No. 3 was of little avail since the province had not consented and that Aboriginal rights were not extinguished. This was qualified, however, with the statement that "'Ontario has always been and now is willing to validate this treaty.'"\textsuperscript{173} This was important because, as Ontario well knew, it could not dispose of precious metals in Reserves if they remained unconfirmed.\textsuperscript{174} Even after Ontario's final 1902 \textit{Seybold} victory, both governments continued to connect the issue of minerals and confirmation.

\textsuperscript{172} PAO, MU 1478, 40/38/1-10, letter, [?] September 1900, unsigned (in Irving's files) to David Mills, federal Justice Minister.

\textsuperscript{173} PAO, IP, MU 1479, 41/41/5, unsigned, undated notes: "Mr. Blake's paragraph II," and "Memorandum for the AG..." re letter, 14 November 1901."

\textsuperscript{174} PAO, IP, MU 1479, 41/39/1(8), 13 March 1898, unsigned notes in Irving's possession: "Treaty No. 3."
In 1903 and 1904, Ontario received complaints from Rainy River settlers regarding a shortage of available land for settlement.\textsuperscript{175} Ontario's main interest, however, was in the development of mineral and timber locations. It began to formulate the conditions under which it would confirm Treaty No. 3 Reserves. Part of its agreement would be based on Canada's willingness to cancel most of the Rainy River Reserves.

In 1904, Gibson sent the DIA a draft OIC, based on the Agreements of 1894 and 1902, stating the conditions under which Ontario would confirm the Reserves. This draft specifically stated that Ontario would confirm all the Treaty No. 3 Reserves and referred to Canada's right to sell and lease such lands for the sole benefit of the First Nations. Gibson also affirmed that precious metals formed part of the Treaty No. 3 Reserves only and that Canada could dispose of these for Aboriginal benefit.\textsuperscript{176}

Frank Pedley, Deputy Superintendent of Indian Affairs addressed Gibson's draft OIC in June 1905 when he submitted a draft OIC of his own to J.J. Foy (Gibson's successor), purporting to clarify or re-interpret some of the clauses in Gibson's draft. Pedley agreed with Ontario that the Reserves should be confirmed according to the 1894 Agreement, but insisted on having it ratify the 1902 Agreement subject to the following conditions: first that the clause about "Indian extinction" whereby Aboriginal interests

\textsuperscript{175} ONAS, ILP #186214, Treaty No. 3 File, letters, 7 October 1903, T.P. Morton, Clerk, Atwood Tp., Rainy River to Crown Lands; and 4 July and 14 September 1904, Morton to Minister of Crown Lands and G.B. Kirkpatrick, DIA respectively.

\textsuperscript{176} PAO, 1P, MU 1469, 31/36/21, letter, 4 May 1904, Gibson to Newcombe, also Draft OIC beginning..."The Honourable The Attorney General reports,..."
became subject to the rights of Ontario be changed; second, that federal control over the proceeds from land, timber and mineral sales be explicitly acknowledged. Pedley also wanted Ontario to establish and confirm Reserves within two years for some Robinson Treaty First Nations which lack them.¹⁷⁷

There was no provincial response. Six months later, Pedley met Matheson in his Toronto office to discuss the confirmation matter and handed the Treasurer another draft OIC, substantially adding to the first and continuing to diverge from Gibson’s 4 May draft. According to Matheson’s record of the meeting, Pedley’s draft insisted that the provision allowing Canada to sell Aboriginal land, timber and minerals and to keep the proceeds in trust for Treaty No. 3 First Nations be extended to all other Treaty lands. This would have allowed First Nations to claim all minerals, including precious metals in all Reserve land.

Matheson informed Pedley that Ottawa would have to build roads through large Reserves and arrange for the surrender and sale of Reserve land adjacent to highways. Ontario insisted on complete control over waterpower on Reserves and urged that the

¹⁷⁷ Pedley’s 16 June 1905 covering letter does not appear to be in either federal or provincial correspondence. However, his draft OIC is in RG 10, Vol. 2314, P. 62,509-4, pt. 1 (undated, unsigned). There is little doubt that this was the first draft OIC when its provisions are compared with a later letter from Matheson partially describing the contents of that draft. PAO, IP, MU 1478, 40/39/16, undated, unsigned handwritten draft and also typed letter. The top margin contains the following: "Colonel Matheson to F. Pedley - Draft which I proposed to Col. Matheson as a statement of the positions of the negotiations for confirming the Reserves in Treaty No. 3." This draft was either written by Matheson and revised by Irving, or was completely written by Irving and given to Matheson to go out under his name. See pp. 4-5 of the typed letter.

NOTE: Had Newcombe agreed to the arrangements laid out Gibson’s first draft (and argued about its meaning later) it appears that all of the Treaty No. 3 Reserves would have been officially confirmed - including the Rainy River Reserves and #24C.
excess acreage in Ontario Reserves not be used to assess provincial liability in the annuities dispute. Matheson wanted Canada to obtain the complete cancellation and sale of the Rainy River Reserves.

This was the beginning of Ontario's value for value policy, the object of which was to obtain certain Aboriginal interests from Canada in exchange for either recognizing or returning other Aboriginal interests. Canada was asked to consent to certain provincial wishes in return for Ontario's confirmation of all the rest of the Treaty No. 3 Reserves. So far, this involved the sale of all of the Rainy River Reserves, roads and water power.

Ontario's position on the confirmation issue was based on Gibson's 4 May 1905 draft OIC which was to form the basis of a joint OIC to be ratified by both governments. The joint OIC also required that Canada sell the Wild Lands Reserve within a year and construct roads through it; that it build and maintain other roads in the remaining Rainy River Reserves; that Ontario control all waterpower; and that the excess Reserve acreage in Ontario not be used to measure provincial liability for Treaty No. 3 annuities. Ontario agreed to confirm the Reserves as laid out unless "good reason presented itself." Within days, however, Canada was informed that it would have to sell all seven Rainy River Reserves.

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178 PAO, IP, MU 1478, 40/39/16, undated, unsigned, "Memo...15 Nov. 1905 - between...Matheson and Pedley...relating to OICs...confirming Reserves for Indians in NWA Treaty No. 3," pp. 1-2. NOTE: Pedley's second draft OIC was reconstructed.

179 PAO, IP, MU 1478, 40/39/1(3), "Memo...22 Nov. 1905...[re. Irving's] instructions in the matter of confirming the Reserves Treaty No. 3."
and not just the Wild Lands.\textsuperscript{180} Ontario wanted to deny First Nations access to the lucrative fisheries and timber along the Rainy River which it was already exploiting.

Pedley was not sympathetic to Ontario's new position, accusing it of repudiating "compacts" between the governments and Treaty No. 3 First Nations. He clearly wanted Ontario to approve all the Reserves per the 1894 arrangement and recognize Aboriginal rights to precious metals per the 1902 Agreement. Re-iterating that Canada's position on Reserves and resources was based on the Treaty, the Indian Act and the Agreement of 1894, Pedley refused to accept the provincial demands in Matheson's 28 November memo, stressing they were contrary to previous negotiations, the Treaties and federal fiduciary obligations.\textsuperscript{181}

Matheson, alarmed by Pedley's position, sent the confirmation correspondence to Irving for a legal opinion, complaining that:

I can hardly understand Mr. Pedley's letter, unless it means that he wishes the entire interest of Ontario in the Reserves to be assigned to the Dominion, so that they shall not in future be accountable to us in any way for the proceeds of the lands in case of the extinction of the Indians.\textsuperscript{182}

This is, of course, exactly what Pedley wanted - not only for the Treaty No. 3 Reserves, but for all Reserves in Ontario.

While Matheson acknowledged federal responsibility for Native People, he insisted that the Rainy River Reserves were an "incubus

\textsuperscript{180} PAC, RG 10, Vol. 2314, F. 62,509-4, pt. 1, letter, 28 November 1905, Matheson to Pedley.


\textsuperscript{182} PAO, IP, MU 1478, 40/39/16, letter, 5 December 1905, Matheson to Irving.
upon the territory." He rejected the federal draft OICs and Pedley's enlarged interpretation of the Agreement of 1902 which attempted to extend Treaty No. 3 rights to precious metals across the board. Matheson stated Ontario would "adhere...strictly" to the Agreements of 1894 and 1902 in the confirmation of Reserves and labelled Pedley's new interpretations "unnecessary," claiming they would lead to conflict. Thus, differing government positions on Aboriginal minerals continued to delay confirmation.

Disagreements continued as Pedley doggedly maintained his draft orders were designed to protect Aboriginal interests and Matheson that they infringed on the rights of Ontario. Pedley promised to examine the cancellation of Reserves #35E2, Oak Island and Pither's Point #41, but refused to cancel all of the Rainy River Reserves which would require Aboriginal consent.

Shortly thereafter, Ontario demanded the cancellation and sale of all the Rainy River Reserves and #37 or Big Island. Ottawa attempted to secure a surrender of the two Long Sault Reserves on Rainy River, but the Ojibwa refused. In July 1907, Minister

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182 PAC, RG 10, Vol. 2314, F. 62,509-4 pt. 1, letter, 13 January 1906, Pedley to Matheson. Note: Oak Island is in the U.S. Parts of Reserve #35E2, and #35E1, had been patented by Ontario even though it knew Canada confirmed Reserves there. This is likely why Ontario sought their cancellation.

183 PAC, RG 10, Vol. 2314, F. 62,509-4, pt. 1, letters: 6 February and 6 March 1906, both Newcombe to Pedley.

Frank Cochrane reiterated this demand, also suggesting that Canada discontinue Pither's Point (#41 the Agency Reserve), 16A and 16D (See Map 28). Again, the Ojibwa refused to agree.

Significantly, Reserve #37 was composed of several islands in addition to Big Island including Centre, Cyclone, Windfall and Windigo. As we have seen, Ontario had covered the last two in mining patents since 1897. This may have been why it sought (but never obtained) the cancellation of the entire Reserve. Reserve #s 41, 16A and 16D had been included in Ontario's mineralogical survey of the eastern Rainy River area.187

In 1910, provincial counsel George Lynch-Staunton argued that Ontario would disentitle itself to the beneficial interest in minerals and timber on Treaty No. 3 Reserves if it ratified the 1902 Agreement and, in fact, may already have done so because of its inclusion in the 1905 Treaty No. 9 (discussed in Chapter 4). Indeed, the inclusion of both the 1894 and 1902 Agreements in Treaty No. 9 meant that both the headlands and mineral clauses were no longer limited to the Treaty No. 3 area and would "seem to apply to all cases in the future." Both Irving and Lynch-Staunton feared this possibility and suggested Cochrane arrive at a new understanding with Ottawa so that the latter would not have such rights in Treaty No. 9 or other areas.188 Ontario also wanted a new settlement on the proceeds of mineral sales and sought to bar

187 PAO, Maps Collection, G.

188 PAO, MU 1479, 41/40/7-9, envelope, unsigned and undated.
Map 28
Map showing the six cancelled Rainy River Reserves and remaining Reserve #11
Canada from selling islands around Manitoulin and Georgian Bay. But, nothing definite was decided.

By the end of 1910 then, Ontario's value for value policy encompassed a multitude of issues including: the cancellation of certain Reserves, water power, roads, the division of monies and islands and the reworking of the 1902 Agreement. It would confirm the Reserves if Canada agreed to settle the side issues as it wished. Canada really had no recourse but to acquiesce because it was imperative Ontario confirm the remaining Treaty No. 3 Reserves. The province would get at least seven things, Canada only one. This kind of bargaining tactic would be used repeatedly by Ontario. Every time it activated this policy Canada had to settle the side issues in Ontario's favour because of the nature of what Canada sought from it. Nevertheless, Canada was not completely adverse to these kinds of sweeping agreements: it had been a long-standing federal goal to facilitate total assimilation of Aboriginal Peoples so that there would be "no Indian question and no Indian Department." This kind of mentality predisposed the DIA to agree to sweeping 'clean-up' legislation in 1915 and 1924.

Ontario's preoccupation with minerals and confirmation of

\[16^{10}\] PAO, IP, MU 1478, 40/38/13-15, letters 24 November 1910, Lynch-Staunton to Irving; 20 January 1911, Lynch-Staunton to Irving and enclosed letter of same date, Lynch-Staunton to Cochrane. Also INAC, "ILA 74-69," 20 January 1911, unsigned [Staunton] to Cochrane. NOTE: Staunton had been collecting information on Treaty No. 3 for use in the annuities case and was giving opinions on the confirmation of the Reserves. Irving obtained similar information from counsel Hogg between 28 May 1904 and 20 January 1911.

Reserves, evident as late as 1910, was soon, however, to take a back seat. The federal election of 1911, fought on the issue of reciprocity, pushed the Liberals from power and returned the Conservatives. The confirmation issue was not revived until 1913.

Minerals issues, however, did not vanish from provincial consciousness. In 1913, Premier Whitney revised the Public Lands Act so that all unstaked mines and minerals, including the precious metals and oil and gas, previously reserved from patents prior to 6 May now belonged to the patentees.\(^1\) Ontario had no right to give away such unrelinquished Aboriginal property. The Act did apply to minerals on Reserves.

In December 1913, Ottawa reopened communication with Ontario on the side issues. Approaching the province about the Georgian Bay Islands, it wanted to know if the DIA

...would be justified to arrive at a settlement with Ontario by abandoning its claim to the group of Islands between Greater Manitoulin and the mainland, maintaining however its claim on behalf of the Indians to such islands as can properly be claimed as appurtenant to Greater Manitoulin Island.\(^2\)

Canada was beginning to give in to Ontario on at least one side issue to speed up the latter’s confirmation of Reserves.

Shortly following this entreaty, the governments held a joint ministerial conference at Ottawa on 13 December 1913. Ostensibly designed to clear up "...all outstanding and unsettled Indian

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\(^1\) Statutes of Ontario, 1913. "Public Lands Act." Cap. 6, 3-4 Geo. V. p. 49, sections 51 and 53-54.

\(^2\) INAC, "Indian Land Agreement, 1874-1969," letter 2 December 1913, Newcombe to DIA.
matters," including islands, confirmation and cancellation of Reserves and the excess acreage, the meeting resulted in a secret deal between Ontario and Canada that the former would only confirm the Treaty No. 3 Reserves if the latter agreed outright to abandon Reserve #24C and to obtain surrenders of the six Rainy River Reserves. Canada doggedly adhered to this deal, bribing and threatening the Rainy River First Nations into submission and further conducting improper votes to obtain the desired surrenders. According to oral testimony from Elder Jim Leonard, born on Long Sault #13, his father told the Indian agent, J.P. Wright, he did not want to move from his lot. Wright stated if he did not remove himself and his family to Manitou Rapids, he would lose all of his lot except the place where his house stood. Each member of the Long Sault First Nation received $50 after they removed; however, they were promised additional monies if timber was cut or minerals found on their former Reserve. They never received any other money.

The Rainy River Ojibwa did not surrender sub-surface rights either under Treaty No. 3 or the alleged 1915 Rainy River surrenders. During the 1980s, Ontario's MNR wanted to sell mining

173 INAC, "Indian Land Agreement, 1874-1969," "Minutes of the Conference between...Roche...and...Hearst,...December 9, at Ottawa, on the subject of outstanding and unsettled Indian matters between the Dominion and the Province." This is also in RG 10, Vol. 2314, F. 62,509-5, pt. 1. ONAS, ILF #186214, Vol. 2, Aubrey White's "Memo of what was agreed to at Conference by Minister of Lands Forests and Mines, and myself with Minister of the Interior on 9 December 1913."


rights in the unsold 'surrendered' Rainy River Reserves. The Ojibwa protested, arguing they never surrendered mineral rights and asserting ownership of and beneficial interest in all minerals in the unsold 'surrendered' areas and the beds of all lakes and rivers.

At the same time that the DIA was endeavouring to obtain a surrender of the Rainy River Reserves, it was working on the matter of excess acreage. Ontario clearly viewed many Reserves as superfluous to Aboriginal needs. The province protested it bore a much greater burden with regard to the Treaty area than Manitoba. Beyond this Canada had in fact laid out too much Reserve land for the Ojibwa. Based on population and on land entitlement in the Treaty, the Ojibwa had received an excessive amount of land. Ontario claimed and demanded compensation for those "excess acres." The governments calculated a "different figure for the amount of acreage which had been given in excess of the entitlement, but reached a compromise figure of 20,672 acres. Canada paid $1 for each acre in excess, thereby paying Ontario a total of $20,672.

Shortly after the arrangement concerning the excess acreage, in December of 1914, Aubrey White became very apprehensive over

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196 Personal communication: David McNab, 17 June 1994.


198 ONAS, II F #185245, "Memo of Proposed Settlement between the Dominion and Ontario with reference to Treaty 3 Reserves," signed by White and Scott; also David McNab, "Research Report on Land Identified as Indian Reserves #35E, #35E1, and #35E2, on Lake of the Woods, and the Assabaska Land Claim," ONAS, 1980, p. i0.
the implications of the headlands clause in the Agreement of 1894. White thought clause 4 was "very far reaching and left much room for future trouble." The Deputy Minister was clearly worried the clause might be interpreted to mean that "lands under a river should belong to the Indians." White felt this possibility would occur in many Reserves thus allowing for "large additional areas beyond that surveyed and covered by us in our estimate of the total areas taken for reserves." However, this is exactly what Ontario had agreed to do when it ratified the 1891 Act and signed the Agreement of 1894. Now it wanted to limit the extent of Reserve land to that which had been specifically allotted in the land entitlement section of the Treaty. Ontario did not want to recognize Aboriginal ownership of land under water although this had been recognized in *Caldwell v. Fraser*.

The DIA did not agree with Ontario's contention that headlands should now be denied. In a memo to his Minister, written after he received White's letter, Scott stated if the Reserves were to be confirmed as surveyed then the 1894 "statute" would have to be repealed. This was because both Ontario and Canada had agreed in 1891 and 1894 that the Reserves were in fact to be augmented. More importantly, Scott asserted: "It is my conviction

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19 White had worked in the Crown Lands Department since 1882. He was Assistant Commissioner of Crown Lands from 1887 to 1905 and Deputy Minister of Lands and Forests from 1905 to 1915. It is not known why he did not notice the implications of the 1894 Agreement prior to this time since he authorized hundreds of mining leases and patents in land under the water in the Rainy River Mining District. Many of these leases and patents fell within the headlands of the Treaty No. 3 Reserves (discussed in text below).

200 ONAS, #185245, Vol. 1, letter, Deputy Minister to Scott, Deputy Superintendent, 14 December 1914.
that we should say nothing about water or fisheries, but leave those questions to be decided as the cases arise by the existing law and usage."[my emphasis] Thus, it was Scott's position that headland boundaries should not be addressed in the proposed legislation at all. But, Ontario did address headlands to the detriment of Treaty No. 3 First Nations.

Provincial concerns over headlands, as well as the agreement over the excess land were quickly translated into unilateral legislation in April 1915. Clause 2 of Ontario's Act stated:

All water powers...and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly within such headlands shall NOT be deemed to be the property of the reserve but shall continue to be the property of the Province [of Ontario]... [my emphasis]202

While Ottawa had to have Ontario's concurrence in the Reserves, there appeared to be a discrepancy between the two governments over the extent of land confirmed: Canada wanted headlands to be part of the Reserve boundaries as evidenced by Scott's memo, but Ontario confirmed them without headlands in 1915.

On one level, Ottawa had no choice but to agree to this change in policy if Ontario was to confirm the Treaty No. 3 Reserves. This was another part of the price Canada paid for confirmation. It was part of Ontario's value for value tactic.


But, on another level, Ottawa clearly had reservations about completely accepting Ontario's 1915 legislation because it was passed by the province only. The federal government never passed similar legislation.

This fact raises an important legal question. Namely, what was the constitutional authority under which Ontario passed its 1915 legislation. The Act itself cites none and Ontario could not presume to pass legislation affecting Aboriginal land under section 109 or its Public Lands Act. Had the province induced Canada into a joint OIC, as it had suggested on more than one occasion, the authority for the Act would not be an issue. Ontario 1915 legislation is likely ultra vires.  

In spite of its obsessive demands to have the DIA cancel the six Rainy River Reserves, Ontario's 1915 legislation not only confirmed, but also transferred these Reserves to Canada. Reserve #24C is the only one specifically stated to have been cancelled; there is no reference to the 'surrendered' Rainy River Reserves. The legislation states that all Treaty No. 3 Reserves shown on plans deposited in the Department of Lands and Forests by Canada, except for #24C, were confirmed by Ontario which also transferred title to Canada. These plans, deposited in 1890, 1904 and again between 1913 and 1915, included the allegedly surrendered Rainy River Reserves which were therefore confirmed and

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103 Personal Communication: David McNab. 10 April 1995. This information was a verbal provincial legal opinion obtained by McNab while he was employed by the MNR. McNab is now an independent land claims consultant to First Nations.

104 "An Act to confirm the title of the Government of Canada to certain lands and Indian Lands."
transferred to Canada.\textsuperscript{205} The 1915 legislation, which did not mention mineral rights, left the unrelinquished sub-surface and sub-marine minerals rights of First Nations in their Reserves and in the shared Territory untouched.

Negotiations between the two governments for the settlement of the Reserve issue had been underway since at least 1891, becoming more concrete by 1913, but still the issues dragged out. It was the headlands issue which finally pushed Ontario into a speedy settlement with Ottawa. Only four months elapsed between the time Aubrey White realized the implications of the headlands clause and the passage of the legislation rescinding that clause. Minerals in or adjacent to Reserves (in the headlands) were not dealt with and it was likely the hasty settlement of the legislation caused Ontario either to overlook or forego these issues. As we have seen, Ontario claimed ownership of minerals on Reserves in 1897 when Arthur Hardy issued a memo on the subject and again in 1900 when precious metals were explicitly linked to the confirmation issue.

White does not expressly mention the significance of the clause for mining claims, but he surely must have been aware of this. As Assistant Commissioner and then Deputy Minister of Lands, Forests and Mines, White had authorized hundreds of mining leases and patents to various individuals and companies for minerals in

\textsuperscript{205} Thanks to Jim Wells for sharing this point of view, 22 September 1994. Also personal communication, David McNab, 26 September 1994. McNab states, on this basis, the Ontario Cabinet validated the Rainy River land claim in 1987. A Minister's letter was then sent to Chief Willie Wilson stating that Ontario was willing to enter into negotiations on this matter.
land under water in the Rainy River and Lake of the Woods areas. Most, if not all, unconfirmed Reserves were in a position to claim headland areas. Many mining leases and patents fell within the headlands of Reserves.\textsuperscript{206}

Canada paid a high price for Ontario's confirmation of the Reserves, forfeiting Aboriginal land and interests through the illegal cancellation of Reserve #24C and the fraudulent surrenders of the Rainy River Reserves. It also sacrificed other First Nation interests in roads, islands, waterpower and (seemingly) headlands. Although Ontario had raised the issues of reworking of the 1902 Agreement and dividing Aboriginal mining monies under that Agreement, nothing was done at this time.

Shortly after this legislation passed, Ontario reactivated its intent to gain control of minerals on Reserves. In December 1915, a mere seven months following the 1915 Act, Thomas Gibson, contacted Scott about mineral deposits on Reserves, emphasizing the necessity of establishing a method to deal with these and proposing provincial ownership. Under such an arrangement a claim-holder would acquire surface rights from the DIA, but the deposits would be worked under the Ontario Mining Act and all revenues would be equally divided between the governments.\textsuperscript{207} In this way,

\textsuperscript{206} PAO, RG 1-360-0-57, "Mining Lands Patented in Rainy River District, 1904," and RG 1-360-0-58, "Mining Lands Patented in Districts of Thunder Bay, Algoma, etc.", n.d. All leases and patents in these areas were authorized by Aubrey White as Assistant Commissioner of Crown Lands. See, for example, PAO: R-L (["Map of the Northern Part of the Lake of the Woods and Shoal Lake, Rainy River District Exhibiting the Country in the vicinity of Rat Portage, Province of Ontario,") CLD, 1897; also B-74 (Plan of Lake of the Woods and Surrounding Region,") 1890.

\textsuperscript{207} INAC, "Natural Resources, Minerals - General," letter 11 December 1915, Thomas Gibson, Deputy Minister, Department Lands, Forests and Mines to Scott.
Ontario could overcome the fact that base and precious metals occur together in the ground. Ontario would control all minerals whether Aboriginal or not and 50% of the revenue generated from their development representing its interest in precious metals. Canada would control the other 50% in trust for First Nations representing the Aboriginal interest in base metals. This rationale did not recognize the fact that under Treaties in Ontario First Nations never relinquished their rights to the base or precious metals.

Gibson’s plan did not impress the DIA whose representative, W.A. Orr, informed him in the Spring that the base metals in all confirmed Reserves in Ontario "...are part and parcel of the reserve, and no relinquishment thereof by this Department could be made without a surrender from the Band in accordance with the provisions of the Indian Act." Orr was not prepared to allow developers on Reserves under the Ontario Mining Act because the DIA would be unable to protect Aboriginal interests. Orr seemed to accept the idea of an equal division of monies for precious metals only, presumably, he wanted First Nations to retain all monies from the development of base metals. Herein lay the seed of the 1924 Lands Agreement, but the federal government was not yet willing to entertain such a deal.

The administration of minerals on Reserves remained difficult although the DIA had made several changes to the Indian Act to

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ease this situation. First, in 1918 section 90 was amended to allow the DIA to lease Reserve land without First Nation consent. Second, in December 1919, under OIC No. 2523, the DIA amended section 48 of the Act so that the Superintendent General could authorize leases for surface rights on Reserves without a surrender from the First Nation. This decision was made not only because of the "divided ownership" of the metals, but also because most First Nations refused to surrender surface rights to allow developers on their land under provincial licenses to mine their minerals. Third, section 49, sometimes referred to as the Oliver Act amendment, allowed the DIA to expropriate Reserves adjacent to cities with populations exceeding 8,000 persons and to relocate the First Nations elsewhere. First Nations viewed this amendment as a violation of Treaty rights. It was particularly significant for the Sarnia First Nation bordering on the City of Sarnia because that City had, on more than one occasion, called for the annexation of the Reserve. As we shall see below, in Chapter 5, the City and the DIA were well aware of the oil and gas potential on the Reserve.

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211 INAC, "Indian Land Agreement, 1874-1969," OIC, 30 December 1919, "At the Government House at Ottawa," signed by Rodolphe Boudreau, Clerk of the Privy Council. Ontario later claimed that "these regulations have not been generally taken advantage of" to divest First Nation control over mineral development. ONAS, "Mining on Indian Lands, 1920-1929," ILF #363, letter, 11 April 1923, Gibson to Goodwin and Carmichael.

212 Vol. 2641, "Council of Ojibwas Ask for recognition as a Nation."

213 Sarnia Canadian Observer, 9 August 1918.
THE STAR CHROME MINING, CASE, 1920

The impasse over the ownership and beneficial interest in minerals on Reserves was destined to end in Ontario’s favour after the decision in the Star Chrome Mining case of 1920. This case gave Ontario the ammunition it needed to force Canada into another value for value situation so that by 1924, in spite of vigorous First Nation protest, Canada passed concurrent legislation allowing Ontario to keep 50% of all Aboriginal mineral development monies.

The case, concerning land set aside (in 1853) for Aboriginal use in Quebec under the 1851 Lower Canadian Protection Act, and then surrendered by the Abenekes [sic] of Becanour First Nation in 1882, centred around which government had title and thus, the right to issue subsequent patents. Canada argued it held title under the 1851 Act, and because Confederation did not yet exist, Quebec could claim nothing under Section 109.

This case might be considered a companion to the 1902 Seybold case, in which the Privy Council considered title to Reserve land surrendered and sold by Canada after 1867. In 1920, Star Chrome decided which government held title to such land set aside before 1867 and sold afterwards by Canada.

The question arose in an action before the Superior Court

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214 This case is properly titled: "Attorney General for the Province of Quebec and Others and Attorney General for the Dominion of Canada and another" (hereinafter: Star Chrome).

215 Morse, Aboriginal People and the Law, p. 480.

216 Star Chrome, 1921, 1 AC; abridged in Morse, pp. 480-485.
when the Star Chrome Mining Company Ltd. sued Dame Thompson who eventually acquired the land. The lands, originally surrendered on 14 February 1882 by the Abenekes of Becanour, were accepted for sale under OIC of 3 April 1882 and patented by Canada on 2 July 1887 to Cyrice Tetu of Montreal. Following his death, interest passed to Dame Caroline Tetu. Then, on 10 April 1893, the land was seized and sold by the Athabaska District Sheriff and eventually acquired by Dame Rosalie Thompson. The Star Chrome Company sued Thompson, claiming that when she sold them the land in February 1910, she did not have title. On 29 June 1912, Canada and Quebec were directed to intervene in the matter to decide which had authority to dispose of the land.\textsuperscript{217} Quebec claimed the federal sale to Cyrice Tetu was illegal while Canada upheld its validity.

As in other cases argued all the way to the JCPC, the Privy Council decided Title and beneficial interest in favour of Quebec based on section 109 and the \textit{St. Catherine's} ruling: while Canada had acted correctly by accepting the surrender, title rested with Quebec.\textsuperscript{218} Native Peoples were deemed to "...have no equitable estate" in the land. Further passages in the judgment claimed Aboriginal Rights were limited by the Proclamation which may have conveyed some 'right' to the land, but "...no right to convert the lands into money." Although the Abenekes had conditionally surrendered the land in trust to be sold for their benefit, the \textit{Star Chrome} decision argued that "such trust does not affect the

\textsuperscript{217} \textit{Star Chrome}, 1921, 1 AC, pp. 404, 407 and 412.

\textsuperscript{218} \textit{Star Chrome}, 1921, 1 AC, pp. 404, 407 and 412.
right of the Province to either lands (including minerals) or timber, nor is the Province bound to carry out the trust." The Act of 1851 was interpreted to have freed Quebec from the "burden" of Aboriginal interest in the land.

The Star Chrome decision of 1920 established that Quebec, and by extension Ontario, was not bound to turn over revenues from the sale of surrendered land to First Nations. An immediate problem arose for Canada which had accepted and disposed of hundreds of surrenders on condition that proceeds would be credited to First Nations. In view of the recent decision, the sales were illegal and the benefits belonged to the provinces.

Every effort was made to correct the situation and have the provinces stand behind the titles already sold by Canada. Quebec refused to confirm such titles and was paid $141,000 as the value of the land which Ottawa had "improperly sold." Indeed Quebec forced Canada "...to pay over every cent [it]...had received from the sale or lease of surrendered Indian lands in Quebec. These...had to be secured from the Receiver General as much of the money had previously been spent by the Bands." However, in Ontario there were a great many more of these "irregular" land transactions than in Quebec. Canada's desire to avoid cash compensation in Ontario led directly to the final piece of legislation under consideration in this period, the 1924 Dominion Lands Agreement.

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Canada was backed into a corner by Ontario because of its illegal land sales both before and after 1867 (Star Chrome and Seybold). Canada could choose among several options, including contesting the provincial position through litigation in the courts, paying the compensation to Ontario, or selling out the interests of First Nations. To extricate itself from this predicament Canada allowed its own interests to override those of First Nations. In the aftermath of the Star Chrome trial, extensive Aboriginal resistance developed, continuing throughout the negotiation and passage of the 1924 Lands Agreement and persisting afterwards.

ABORIGINAL POLITICAL ORGANIZATIONS AND RESISTANCE AFTER STAR CHROME MINING

One of the earliest Aboriginal political organizations in Ontario was the Grand General Indian Council of Ontario and Quebec (henceforth GIC) established in 1870.221 The group, composed almost exclusively of Ojibwa with some Iroquois, held council meeting every two years.222

The DIA adopted a position of "reluctant acceptance" toward the GIC. In the 1890s, "noticeable...restrictions" were placed on First Nation access to their funds, thus limiting the number of delegates each could send to the GICs.223 This was a hindrance of

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221 Minutes of the GIC and general correspondence regarding these from 1892-1920 can be found in PAC, RG 10, Vol. 2639-41, F. #129690-1 to 3A.


some magnitude for, in many cases, it meant Native People could not communicate because they could not afford to assemble.

Between about 1890 and 1903, a DIA representative attended these meetings. Then, in 1903, Secretary J.D. McLean questioned whether this practice should continue, voicing concern that it might compromise Department policy not to fund First Nation investigation into their land claims.

Dozens of Ojibwa First Nations participated in the GICs, among them, the Moravians, Muncee, Walpole Island, Sarnia and Manitoulin Island. The GIC pursued issues involving the Indian Act, enfranchisement and women who married non-Indians and pushed for the recognition of Aboriginal Rights, especially following the election of Henry Jackson as President.

Jackson had previously held positions of Secretary and or Assistant in the GIC and, on one occasion at least, had served as a delegate from Christian Island. Elected President on 2 October 1917, Jackson wanted to force the DIA to address Aboriginal grievances, calling for the repeal of sections 49 and 90 of the Indian Act (discussed above) and demanding that Canada uphold fishing, trapping and hunting rights guaranteed in the Treaties.

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124 PAC, RG 10, Vol. 2639, F. 129690-1, see for example letter, 25 April 1896, Hayter Reed, Deputy Superintendent General to Frederick Lamorandiere, Secretary to Cape Croker First Nation, 25 April 1896.

125 PAC, RG 10, Vol. 2640, F. 129690-2, n.d. memo, J.D. McLean, Secretary of DIA to Pedley.

126 See general correspondence in PAC, RG 10, Vol. 2639, F. 129690-1, for the decade of the 1890s for a more complete list of which First Nations attended the GICs. See Chapter 6 for a detailed discussion of these First Nations.

127 Titley, A Narrow Vision, p. 95.
Jackson wanted a clear federal statement that provincial game regulations did not apply to First Nations. In part, he argued for the settlement of these grievances on the basis of Aboriginal sacrifices during the Great War.\(^\text{224}\)

Since the beginning of the 1920s, Jackson was both vocal and persistent in his efforts to make First Nations aware of the consequences of the Star Chrome decision, rightly identifying it as a "...course of adjustment" between the governments. The GIC passed resolutions calling for the DIA to investigate the origins and title to all Ontario Reserves.\(^\text{225}\) The Council was concerned about the "...precarious effect th[e judgment] may have on property recognized for many years, as indubitably the exclusive possession of the Indian race in the Province of Ontario and Quebec."\(^\text{226}\) First Nations expected the DIA to safeguard their interests in the proceeds of their surrendered lands in the wake of Star Chrome.

D.C. Scott informed Jackson that these issues were "...before the Department of Justice," and were therefore not being dealt with by the DIA. Scott further suggested that Council not take on the "...expense of employing a solicitor when the best legal

\(^{224}\) PAC, RG 10, Vol. 2640, F. 129690-3, Jackson circular of 10 (?) September 1917; letters, 17 September 1917; 18 June 1918, F.W. Jacobs, past President of GIC (Sarnia) to Scott; and Vol. 2641, F. 129690-3A, newspaper article: "Council of Ojibwas Ask for recognition as a Nation," 7 May 1919. Various aspects of Jackson's position on Native rights can be found in this article.

\(^{225}\) This appears to be the first issue related to mineral rights taken up by the GIC. Mineral issues do not appear in any of the minutes of the GIC meetings up to 1920. PAC, RG 10, Vol. 2547, F. 111834-2, A.G. Chisholm (counsel for GIC) to Scott, 16 January 1922 - particularly Resolution No. 4 of 17 and 18 November 1921.

advice attainable is provided by the Crown for the protection of the Indian’s interests." But, the GIC had hired at lease one solicitor, A.G. Chisholm, who advised that unless the Star Chrome decision was modified there was:

... a good deal of ground for the suggestion that the Crown in right of the Dominion is liable to account to the Provinces for a sum which might shock one’s imagination and which unless assumed the burden, would probably, in the event of demand, have to come from the Indian estate.

Under these circumstances Chisholm believed the Department’s suggestion that First Nations forego independent counsel was "... quite unjustifiable and to carry its own refutation..." He recognized that Canada was liable to the provinces for the surrendered land it illegally disposed of and correctly foresaw this would not turn out well for First Nations.

**THE 1924 LANDS AGREEMENT**

From Canada’s point of view, the primary purpose of the Lands Agreement was to have Ontario confirm all irregular federal land sales in surrendered land. This was necessary because of the Star Chrome ruling. If Canada failed to obtain such confirmation, it would have to pay cash compensation to Ontario. Canada needed this agreement more than the province did. As it had done in 1915, Ontario activated its value for value bargaining tactic and exacted a very high price from Ottawa in exchange for its confirm-

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ation of the latter's irregular land patents. As we have seen, shortly after the 1915 legislation, Ontario wanted control of all minerals on Reserves and one-half of all revenue generated as a result of development. This now became part of the 'value' demanded by Ontario.

According to a draft copy of the proposed legislation, the province would have formal control over minerals. The sticky problem of right of way access over Reserves was supposed to be by-passed by the confirmation of the Agreement of 1902. While Ontario would have formal control in theory, Canada was to administer the development of minerals in practice, securing access and minerals surrenders from First Nations. If this failed, it could always use sections 48 and 90 of the Indian Act to gain access to Reserves and to conclude leases without Aboriginal consent. The proposed arrangement was also supposed to settle all remaining points of contention between the governments regarding Reserve and surrendered land which the Agreement of 1902 had left open. However, the 1924 Lands Agreement was worded so vaguely that later provincial legal opinion suggested that it never confirmed the 1902 Agreement.233 In March 1924, Colonel Bigger of the Department of Justice advised the DIA to adopt the proposed Agreement.234

It is important to remember that two very separate interests

233 Interview: David McNab, 2 February 1993.

were at work in the legislation of 1924: the Aboriginal interest in minerals (and other resources and rights) and the federal interest in having its irregular land sales confirmed. This latter problem was upper-most in the Department's mind after Star Chrome Mining since it was highly likely

...that the strictly legal position in relation to reserves in the Province of Ontario is identical with that in Quebec, although practically the situation is altered by Counsel's Agreement. The statutory confirmation of this Agreement could, however be highly convenient both to the Dominion and the Province, and obviously that confirmation should extend to the settlement of the uncertainty in relation to the precious metals.\textsuperscript{235}

Later that month, a Department memo emphasized the administrative problems surrounding mineral development on Reserves. These problems existed in spite of the 1902 Agreement:

...no step has ever been taken to settle the legal position even as to the surface and base metals, and the uncertainty as to the precious metals has stood in the way of the disposition of these, with the result that such precious metals as the reserves may contain have in fact not been dealt with, to the detriment of both the Indians, who would receive the benefit of the deposit, [in truth only half of the benefit], and of the Province, which does not obtain the benefit of any taxation of the output of mines, which it might otherwise do.\textsuperscript{236}

The memo also explained why Ontario wanted control over both precious and base metals:

The geological formations in Ontario are such that precious and base metals ordinarily occur together and are only separated in the course of refinement. To deal with the precious metals consequently involves dealing also with the base metals and the arrangement proposed

\textsuperscript{235} INAC, "Indian Land Agreement, 1874-1969," memo, 25 March 1924, (illegible) to Superintendent General (Scott).

\textsuperscript{236} House of Commons Debates, 7 July 1924, 16 June 1924, p. 3234.
by the present draft...is that upon sale or other
disposition of mineral lands, one-half of the total
proceeds should belong to the Dominion for the benefit
of the Indians, and the other half to the Province.\(^{37}\)

As we have already seen, Ontario made the original proposal to
divide mineral monies with 50% accruing to Ontario and 50%
remaining with the First Nations, eight months after the passage
of the 1915 legislation.

The above memo was presented in full in the House of Commons
in June 1924, by Superintendent General Charles Stewart while
responding to a question from Arthur Meighen concerning "what
designs he [Stewart] has on the Indians?" Stewart denied any
interest, maintaining the subject of mineral rights on Reserves
had always been a contentious issue between the governments. In
response to Mr. Forke's question whether First Nations had
consented to the proposed legislation, Stewart asserted that the
matter did not concern First Nations because it was a question of
final ownership of the land and minerals between the governments -
a point corroborated by Meighen.

Additional questions were raised about other clauses. Forke
wanted to know if First Nations agreed that the "capital sum" from
land and resource development which Canada held for their benefit
would become the property of Ontario upon extinction of Aboriginal
rights in the land. After much delay, Stewart eventually answered
that as long as Native People existed their Reserves and rights in
them were protected. He emphasized the clause was necessary to

\(^{37}\) INAC, "Indian Land Agreement, 1874-1969," memo, 25 March 1924, (illegible)
to the Superintendent General (Scott).
deal with "the case where the Indian has no longer any interest in the land." Forke asked: "Has the Indian agreed to it?" and Stewart commented that "If he is dead you cannot get his agreement. As long as he is alive he has an interest in it." 238

The mineral legislation was debated again on the 7th and 8th of July. The issue of Aboriginal consent was again of primary concern. Stewart lied when he said that many First Nations had been consulted, immediately qualifying this by adding that "to consult them all would be an impossibility." Stewart mentioned that Ontario would obtain 50% of mineral revenues, but concluded the agreement would be beneficial for Aboriginal People. He did not explain how losing 50% of a 100% Aboriginal interest in mineral proceeds could possibly be beneficial for First Nations.

Most significantly, he stated that the whole issue was somewhat complicated because of treaties that were in existence prior to 1873. Those are not included in the bill because in that case the tribes made treaty arrangements whereby they have complete ownership of all minerals that are on their lands.239

This statement indicated that the proposed agreement was not to apply to Treaty No. 3, the Robinson Treaties or any of the early pre-1850 Treaties. According to the date given by Stewart the only Treaties which it could have applied to were those negotiated after 1873 - that is, Treaty No. 9, the adhesions to Treaty No. 5 and the 1923 Williams Treaty. If this was what the governments had

238 House of Commons Debates 1924, Vol. IV, 16 June 1924, pp. 3234-3235. This of course was and is not true, as the experience of the now allegedly extinct Sturgeon Lake First Nation will attest.

239 House of Commons Debates, 7 July 1924, p. 4172.
originally agreed to, it was not reflected in the final 1924 Land Agreement. In fact, it is not known why Stewart made this statement at all since it can be seen from a 1923 draft copy of the proposed agreement that the 50% clause was to apply to all Reserves in Ontario except Treaty No. 3 and those which had been purchased for certain First Nations.

Mr. Garland, representing Bow River, asked if First Nations had legal counsel when agreements were being negotiated which affected their interests. Stewart said they did not, asserting that the DIA protected their interests. He admitted First Nations occasionally felt "what we consider is in their best interest, is really not the thing that should be done for them..." But, First Nations were organized and had their own advisors and lawyers. These, however, did not influence the federal decision because Canada did not consult them.

The following day, Shaw maintained that First Nations had an interest in the base metals and that their consent should be obtained. He further queried the legitimacy of handing over a 50% interest in minerals on Reserves to Ontario, stating: "I do not know how that amount was arrived at-one-half, for instance." Stewart did not address this issue. Instead, he dealt with the issue of Aboriginal consent, claiming that it was not possible to obtain complete consent and that First Nations in the "agricultural area" had no interest in the matter. Stewart stressed the legislation was only to apply to those First Nations

240 *House of Commons Debates*, 7 and 8 July 1924, p. 4173 and 4177.
in the "mineralized area," but never defined its location. This statement conflicted with his previous one that pre-1873 Reserves were excluded. Stewart claimed "it is very difficult to get uneducated Indians to understand a complicated matter of this sort..." This was the reason why it was essential for the DIA to have "arbitrary legislation to deal with matters of this kind."  

Shaw did not accept this reasoning, demanding to know why, if so few Nations were located in the mineralized area, they were not all consulted. He emphasized the "...British principle that any person whose interests are proposed to be affected shall be consulted, and especially so when that person happens to be an Indian who is very probably quite unfamiliar with this complicated problem." Stewart merely reiterated the difficulties involved in getting northern First Nations "to thoroughly grasp the situation, and in many cases they are given bad advice." He clearly believed Aboriginal People were incapable of making their own decisions, asserting that they "are not capable of understanding what is in their best interests, and very frequently our great difficulty is not to preserve what they ought to have, but to keep them from dissipating what is given to them." Stewart gave no examples to back up this incredibly patronizing comment.

In closing, Stewart revealed the federal understanding of the 50-50 division of monies, stating:

We have a division of what was clearly claimed and

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242 *House of Commons Debates*, 8 July 1924, p. 4178.
admitted to be provincial government property, namely, the precious metals, and the mining of gold is carried on to a very considerable extent in that north country. There is not any coal, but there is considerable copper. There is not much of the queried metals which we are claiming in the interest of the Indians, but there is an equal division of gold and silver. 243

This assertion again contradicted his earlier claim that First Nations under pre-1873 Treaties retained "complete ownership of all minerals that are on their lands."

In spite of opposition concerns regarding Aboriginal consent, the legislation was ratified. Aboriginal consent was never sought nor obtained. Later in July, both governments passed "An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands." The Act stated that First Nations had only "personal and usufructuary rights to territories" now in Ontario. 244

This Act would become the most significant piece of legislation dealing with First Nation mineral rights on Reserves in Ontario. It stated that while the precious metals were part of the Treaty No. 3 Reserves, "whether or not they were to form part of other reserves set aside under the treaties...should be expressly left for decision in accordance with the circumstances and the law governing each." 245

With reference to minerals, the Act provided:

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241 House of Commons Debates, 8 July 1924, p. 4178.


one-half of the consideration payable whether by way of purchase money, rent, royalty, or otherwise, in respect of any sale, lease or other disposition or a mining claim staked as aforesaid, and, if in any other sale, lease of other disposition hereafter made on Indian Reserve Lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease, or other disposition ... shall forthwith upon its receipt from time to time, be paid to the Province of Ontario; the other half only shall be dealt with by the Dominion of Canada, for the benefit of the band.244

Thus, Ontario demanded and obtained half of any and all money which First Nations could make from mineral development. Clause 6 was not to be applied to Reserves set aside under Treaty No. 3, nor was it to apply to Reserves falling under the operation of clause 7 which exempted certain unidentified Reserves formally purchased for First Nations by the old province of Canada. These exempted Reserves have been variously identified as Six Nations, Tyendinaga, Gibson, Golden Lake and Walpole Island.247 Clause 7 did not go far enough; the 1924 Agreement ignored the numerous pre-1850 Treaties, the Robinson Treaties and Treaty No. 9, where Native People had "beneficial interest" in all resources and "discoveries" on their Reserves.

The St. Catherine's, Seybold and Star Chrome Mining cases stated that section 109 gave the province beneficial interest in, and control over lands and resources in its boundaries. Ontario's position was that it gave First Nations one-half of a beneficial


247 INAC, "Indian Land Agreement, 1874-1969," letters, 5 May 1939, Deputy Minister Charles Camsell to George Gonthier, Auditor General; and "Natural Resources, Minerals - General." 29 October 1959, Laval Fortier Deputy Minister, Citizenship to H.C. Rickaby Deputy Minister of Mines. In actual practice, these Reserves were not exempted from the effects of the 50% clause.
interest that wholly belonged to it, whereas First Nations believed Ontario confiscated 50% of their interest in minerals. Indeed Ontario was only able to lay claim to its 50% on the basis of self-serving and after-the-fact nonNative judicial decisions which went in its favour. These decisions did not respect any Aboriginal understanding of the Treaties, Aboriginal rights regarding access to their Reserve lands or the geological reality of the intermixture of base and precious metals in the ground.

It is obvious Canada agreed to the legislation because this was in its own interests. Both the draft and the final Agreement considered the question of surrendered land, stating that:

Canada should have full power and authority to sell, lease, and convey title in fee simple or for any less estate, to any lands forming part of any Reserve thereafter surrendered by the Indians, and that...[all such dispositions] should be confirmed by the Province of Ontario.\(^{248}\)

Had Canada not received this 'confirmation,' it is certain that it would have had to compensate the province for the amount of surrendered land improperly sold as it had had to do in Quebec because of the judgment in Star Chrome Mining. Ontario was well aware of this fact. The province saw another chance to settle several side issues and activated its value for value tactic. In exchange for confirming federal land sales, it obtained the right to appropriate Reserve land if a First Nation became extinct, rights to water power over 500 horse power and 50% of mineral revenues.

\(^{248}\) 1924 Lands Agreement, p. 2, statement was in connection with the 1902 Agreement.
It is significant that the Grand Indian Council was also aware Canada would have had to compensate the province since at least 1922 when A.G. Chisholm, their solicitor, declared the "Crown in right of the Dominion is liable to account to the Provinces for a sum which might shock one's imagination and which unless Parliament assumed the burden would probably, in the event of demand, have to come from the Indian estate." Chisholm knew the real casualty under that decision would eventually be the "property recognized for many years as indubitably the exclusive possession of the Indian race in...Ontario..." -- that is, the proceeds from the sale of surrendered lands. The GIC may as well have followed Canada's advice not to waste its money on independent counsel since no one from the DIA or the province consulted either the Native People or their lawyers.

The passage of the 1924 Lands Agreement concerned First Nations outside Ontario as well. This was particularly true of B.C. where a similar situation existed with regard to minerals. As we have seen, that province obtained mineral rights similar to Ontario's under a judicial decision in 1889. British Columbia abrogated its 1890 mineral agreement when it passed analogous legislation to that of the 1924 Lands Agreement in 1912. Ontario's GIC was supported by the Allied Tribes of British Columbia in

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250 This organization developed after a conference organized by Andrew Paull and Peter Kelly in British Columbia in June of 1916. It was attended by 16 major First Nations. The Allied Tribes were an important political pressure group from 1916 to 1927. For additional information see Paul Tennant, Aboriginal Peoples and Politics (Vancouver: University of British Columbia Press, 1990).
their efforts to have the legislation rescinded. The General Council of the Allied Tribes expressed its discontent and concern for the loss of its rights and those of its brothers in Ontario and Quebec, believing the 1924 Agreement "...affects all rights of the Indian Tribes of B.C....[and] is in several aspects similar to [an Agreement] made between the Government of Canada and the Government of British Columbia in the year 1912." The Allied Tribes found fault with the 1924 Agreement because First Nations had not been "party to" it. But more serious than this, "...it is assumed that the Indian Tribes of Canada have not and never had tribal title to their territories. It is assumed that a province has reversionary title to all Indian Reserves."251 The Allied Tribes claimed that arguments from the St. Catherine's case had been quoted out of context in a misleading manner and that court cases in general dealing with Aboriginal Rights from 1888 to 1920 did not deal with the Treaties made between 1780 to 1906 which "...recognize tribal title to Indian territories, and show the intention to have been that lands reserved should be completely, permanently, and beneficially lands of the Indian Tribes."252

Beyond this, the Lands Agreement also appeared to conflict with the Indian Act which defined Reserves in terms of two titles only; namely "...the legal title of the Crown and the beneficial

251 PAC, RG 10, Vol. 2547, F. 111834-3, pt. 1, undated, "Legislation," signed A.E. O'Meara, General Council of the Allied Tribes of British Columbia. Also in ONAS, "Mining on Indian Lands, 1920-1929." ILP #363, 26 March 1924, document was generated within one week of the assent of the 1924 Lands Agreement.

title of the Indian Tribe or Band." The Allied Tribes asserted the Lands Agreement was in conflict with the Petition of the Nishga Tribe and that Parliament ought not to confirm it until all rights of the Indian Tribes of Ontario, B.C. and Canada were determined by the JCPC.

Solicitor A.E. O'Meara, employed by the GIC, argued that by confirming Title in shared lands to the province, Bill 191 (that is the 1924 Agreement) sought to dismantle Treaty Rights to fish, hunt and trap. On the basis of Article 40 of the Articles of Capitulation, the Royal Proclamation, 91(24) of the BNA Act, O'Meara called for action to secure the co-operation of the Tribes of other Provinces especially in bringing Indian rights before Parliament [and stated that]...the General Council of Ontario Indians shall support all intended action, especially applications for disallowance of the law known as Bill 191.

Canada did not respond to these grievances. Five years later, in May 1930, John Daly, the Indian agent at Parry Sound, reported "...rumblings of discontent through my agency." Daly later identified the secretary of the Union Council of Ontario Indians and Aboriginal lawyer Henry K. Abetung as the source of the problem. Daly said "peaceable Indians" told him Abetung was

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255 PAC, RG 10, Vol. 2547, F. 111834-3, pt. 1, letter, 1 May 1930, Daly to A.F. MacKenzie, Secretary, DIA.
"egging the Indians on to contest this Act." 256 Abetung warned the Chief at Lac Seul not to listen to the Indian agents or the Department as they were "foolish." 257 Daly described "...the aims and objects of this organization [as] to look after the Indians and ultimately smash Bill 191." 258 Abetung and the Union Council were trying to make Ottawa recognize Aboriginal Rights. Agents and other Department representatives usually attempted to discredit and ignore pro-First Nation activists.

Other Aboriginal political organizations also protested against the 1924 Lands Agreement. In September 1938, the Amalgamated Organized Indians met at the Couchiching Reserve near Fort Frances, arguing that the Agreement was in violation Treaty hunting and fishing rights. It also questioned Ontario's right to dispose of, and benefit in the Reserve when a First Nation became extinct and raised the issue of clause 6 and the loss of mineral rights. According to the agent, Frank Edwards, the group also complained about

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256 PAC, RG 10, Vol. 2547, F. 111834-3, pt. 1, letter, Daly to MacKenzie, 19 May 1930. Abetung was identified as Chief of the Shawanaga Band in 1912. (Vol. 2640, P. 129690-2, Minutes of the GIC as above.)

As early as 20 June 1918, the Indian agent at Parry Sound, Alexander Logan, identified Abetung as a trouble maker. Logan did not hold Aboriginal political organizations in high regard, arguing that such meetings encouraged rebellious Natives to take advantage of their fellows by collecting money. Vol. 2639, P. 129690-3. Also letters 31 October 1931, Daly to MacKenzie and 7 July 1932, Frank Edward, Indian Agent, Kenora to Assistant Deputy Secretary, DIA, where Abetung and a colleague, J. Roland Hett, are accused of collecting other monies. It was typical for Indian agents to label Aboriginal advisors or lawyers as self-interested or as frauds. By this means potential political leaders and land claims could be crushed or ignored. In 1927, amendments were made to the Indian Act making it illegal to collect monies for the purpose of pursuing land claims.


the Privy Council judgment in 1883, [which] declared that the title to Indian Lands surrendered to the Crown, belong to the Province and not to the Dominion. Mr. Stewart stated according to press reports that he could not say all the Indians agreed to the settlement in 1920, but most of these had. The Indians claim this is not so, and to my knowledge or Mr. Spencer's, none of our Indians had been asked to agree during our terms as agent.  

During the 1920s and '30s, Canada failed to consider and act on First Nation protests concerning legislation purporting to abrogate Treaty rights and federal fiduciary responsibilities to First Nations.

CONCLUSION

The boundary dispute, Treaty No. 3 and the St. Catherine’s case were inextricably linked together, constituting a massive battle between the province and Canada over beneficial interest in minerals and timber. Ontario believed the settlement of its boundaries would suffice to determine which government held beneficial interest, but Canada disagreed and intended to retain such interest regardless of whether the disputed tract fell within provincial boundaries. The federal administrative structure, which allowed successive Secretaries of State and then Ministers of the Interior to also be the Superintendent Generals, was perfectly suited to aid Canada in this regard. It was no surprise therefore that Canada refused to implement the August 1884 boundary award thus, forcing Ontario to renew the fight for beneficial interest.

Two and one-half months later Ontario sued the St. Catherine’s

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259 PAC, RG 10, Vol. 2547, F. 111834-3, pt. 1, letter, 23 September 1938, Frank Edward to the Assistant Deputy Secretary, DIA.
Company, recipient of a federal timber license. But, the case was about more than just trees, a great deal of time was also spent on Aboriginal mineral rights.

Ontario's aggressiveness was finally vindicated in the courts. The St. Catherine's case turned on the nature of Native Title and constitutional interpretation. Once the former was narrowed, and the latter went in Ontario's favour, a provincial right to beneficial interest in timber and minerals in shared land was established. Aboriginal rights to minerals were in jeopardy by 1888, but neither the matter of jurisdiction over Aboriginal land and resources, nor the problems arising from Treaty No. 3 were settled. St Catherine's did not end the battle to control the resources of Ontario, especially the mineral resources.

One result of the St. Catherine's case was that Canada would have to obtain provincial concurrence in the Treaty No. 3 Reserves it had already set out and confirmed. Ontario was not happy with the amount of land reserved by First Nations, but would have to confirm the Reserves in order to authorize the development of minerals in Reserve and shared areas (even though First Nations never relinquished control and beneficial interest in these). Ontario made little effort to settle the matter of confirmation until 1903. That is, until after it won the Seybold case which upheld its contention it owned the precious metals in Reserve land.

Less than two months before the first Seybold case in 1899, Justice Rose had delivered his pivotal decision in Caldwell v.
Fraser, maintaining that Treaty No. 3 Reserves were unsurrendered pockets of Aboriginal Territory, that the Ojibwa surrendered surface land rights only and that they had not surrendered water and land under water anywhere in their Territory. Sub-surface rights were fully Aboriginal. Rose's conclusion were never overturned in subsequent minerals cases, none of which dealt specifically again with minerals in the land under water.

Of the three exclusive minerals cases, Caldwell, Seybold and finally Star Chrome Mining, only the last two are referred to as pivotal and precedent setting. However, Caldwell v. Fraser was, by far, the more important ruling in terms of Aboriginal Rights.

Even though Ontario now legally controlled minerals in the shared land and precious metals in Reserve land, it could not unilaterally develop the latter. There was the question of access and the fact that base and precious metals occurred together. This fact led both governments to reach a compromise arrangement in 1902 (even before the final JCPC Seybold decision) in which Ontario relinquished control of all minerals in Reserve land to the former. This agreement reflected the unrealistic nature of rights which were being bestowed on Ontario in the courts under the St. Catherine's and Seybold decisions. It was in this climate that the confirmation negotiations began in earnest.

However, the governments came to no settlement on confirmation until 1915, largely because disputes over minerals continued. The DIA and Canada tried to force Ontario to recognize full mineral rights for all Reserves in Ontario by expanding the
scope of the 1902 Agreement. This the province refused to do. Instead it pushed its value for value policy and Canada finally gave in on a number of issues including the forced cancellation of several Reserves, thereby abandoning its fiduciary obligation to uphold First Nation interests.

The question of mineral rights in the confirmation issue was dropped after 1910. When negotiations began again in 1913, minerals were not discussed. However, the headland issue (which had always involved Aboriginal mineral rights in the land under water adjacent to Reserves) came to the forefront in December of 1914. Ontario expressly abandoned its former commitment to augment the extent of Reserves by recognizing headland boundaries in 1915, but said nothing about mineral rights in Reserves and in land under water. This oversight was identified by the province shortly thereafter, but it was powerless to extract any more from Canada until the final decision came down in the Star Chrome Mining case in Quebec in 1920. This decision provided Ontario with the leverage it needed to activate another value for value situation, this time centring on Aboriginal mineral rights.

Unless seen in its proper context, Canada’s giving with one hand (that is, the Treaties) while taking away with the other (that is the Indian Act and deals with the province leading to legislation) appears contradictory and irrational. While contradictory it certainly was, irrational it was not. Ontario had two significant embarrassments to hold over Canada. First, it could refuse to confirm the Treaty No. 3 Reserves and second, it
could sue Ottawa for compensation over improper land transactions the latter had carried out in Ontario.

From this position of strength, Ontario was able to implement its value for value negotiating tactic, extracting certain concessions from Canada in return for its 1915 promise to confirm the Treaty No. 3 Reserves and later its promise, in light of the Star Chrome decision, not to pursue compensation from Ottawa. Federal concessions amounted to the abrogation of "compacts" between itself and the First Nations and Ontario. The 1915 legislation took away the headlands clause, originally appearing in the 1891 Act, hence abrogating Ontario’s former promises to augment Reserve areas by including headland areas in their boundaries. The 1924 legislation took away 50% the Aboriginal beneficial interest in mineral development on Reserves with some exceptions. Strong Aboriginal protests had not stopped the passage of this legislation. Canada distinctly chose to sell out First Nation interests.
CHAPTER 4

THE MINERAL WEALTH OF NORTH-EASTERN ONTARIO
AND TREATY NO. 9: THE JAMES BAY TREATY

INTRODUCTION

Both Canada and Ontario were aware that First Nations in north-eastern Ontario had wanted a Treaty since the 1850s. In 1884, E.B. Borron, the stipendiary magistrate in the north-east, reminded Ontario that Aboriginal interests had not been yielded. The incursions of trappers, prospectors and the Canadian Pacific Railway (CPR) tested the patience of the northern Ojibwa and Cree. In 1903, the Chief of the Crane Peoples, Kitchipines, stopped one Geological Survey of Canada (GSC) party and attached a Native "guide" to another in 1904 to watch that it did not remove gold or silver. These incidents hastened the negotiation of a Treaty.

Between 1884 and 1904 there were at least one dozen Aboriginal petitions to the governments for a Treaty. Many of these specifically indicated First Nation concern over the discovery and removal of their minerals.

The Department of Indian Affairs (DIA) began to consider Treaty matters shortly after the turn of the century. Ontario did not consider the matter until Canada raised it in 1904. Why did this Treaty take so long to get off the ground - essentially since the 1880s? Much of the answer may be found in Canada's reluctance

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1 PAC, RG 10, Vol. 3033, F. 235,225, pt. 1 (hereafter: Treaty File), memo, 22 August 1901. S. Stewart, Assistant Secretary, DIA. Chief Louis Espaignol maintained he was told in 1850 that he and his people would receive similar consideration to those south of the height of land.

to raise the subject with Ontario. As we have seen in Chapter 3, between 1888 and 1904 the balance of power between the governments was shifting toward the province. Ontario was fast solidifying its position over Canada and the latter knew it, having lost every case (in the JCPC) against the province dealing with Aboriginal lands, resources and annuities. Ontario did not need to conclude a Treaty having already issued numerous illegal mineral and timber licenses in the unTreated area. It could afford to wait until Canada raised the subject; afterward, the land would fall to Ontario under section 109 of the BNA Act.

In spite of legislation and provincial concerns, the DIA hoped to exclude Ontario from the Treaty altogether, but did not succeed. Although in the perfect position to control Treaty terms because of its court room victories, the evidence indicates that Ontario had a minimal effect on the outcome of the Treaty covering 90,000 square miles of land. This was Ontario’s first Treaty; it let Canada decide the basic terms, only slightly modifying them.

By 1930, when several adhesions to Treaty No. 9 were concluded, Ontario had in fact solidified its position over Canada. Although Aboriginal Peoples retained full and effective control over all developments on their Reserves under the Treaty, including minerals, several First Nations lost control of some of their

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1 See for instance evidence of prospecting in unTreated area in Samuel Stewart's 1906 Diary. Copies of Stewart's 1905 and 1906 diaries transcribed by John Long. Thanks to Jim Morrison for sharing this. Also Morrison, "Treaty Nine...," pp. 15-16; PAC, Treaty File, memo 3 June 1901, MacRae to Sifton; and letter, 12 December 1901, Jabez Williams to Sifton. Stewart's original Diaries are in PAC, Vols. 11398-11399. D.C. Scott also had a Journal, but this, for the most part, is too faint to read see PAC, Vol. 1028.
mineral areas because Ontario had never intended to honour this or other Treaties.

It did not matter to Ontario that First Nations retained mineral rights on their Reserves under the Treaties or that First Nations never agreed to relinquish islands, beds of rivers and lakes, minerals, timber and other resources in the shared areas. The province argued that the St. Catherine’s, Seybold and Star Chrome Mining cases effectively denied the extension of the common law to Treaties by advocating the primacy of provincial rights to land and resources under section 109 of the BNA Act. Beyond this, Ontario consistently and unconscionably used and uses legislation to deny or over-ride Treaty rights. Ontario does not need to worry about keeping Treaty promises. Canada has largely acquiesced in this. Indeed, it was Canada’s weakening position which permitted Ontario to pass much of this kind of legislation in the first place.

PRELUDE TO THE TREATY

As early as 1884, the Cree and Ojibwa petitioned Canada about white trappers who had "stolen all our beaver." Other petitions followed in the period between 1886 and 1889 asking for a Treaty and "financial assistance and protection." In 1890, Borron encouraged Canada to conclude a Treaty with some of the more southerly Native Peoples in the Hudson’s Bay basin, especially those around Missinaibi, Flying Post and Mattawagamingue.

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Asserting that the CPR already passed through their hunting grounds, he stressed the problems which the railway had brought including hunters, squatters and lumbermen. Although the railway might reduce the cost of provisioning Borron argued this would not be adequate compensation for the loss of a way of life based on hunting and trapping.5

Borron believed that it would be in Ontario's interest to conclude a Treaty. If Aboriginal Rights continued to be overlooked, he argued, there would be confrontation with the trespassers and possibly violence, causing the province great expense and retarding "settlement and the development of resources." Borron warned that the northern Ojibwa would not stay "herded together on reserves" as did those in southern and northwestern Ontario so that Ontario would have to protect their hunting and trapping rights with a licensing system designed to keep unauthorized newcomers out. Borron believed if First Nations were "protected in the enjoyment of these, their most valuable rights, they will be easily persuaded...to give their consent to our making such use as we see fit, of the timber and the minerals - if not (to a limited extent) of the soil also."6 This comment is important, indicating Borron's understanding that the Cree and Ojibwa would not agree to a full 'cession' of their land. Despite his urging, neither government attempted to obtain a

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Treaty for many years.

In January 1897, Jabez Williams, a Hudson's Bay Company (HBC) employee, expressed concern to the GSC over the proposed mineral explorations near his Osnaburg post because Aboriginal Title was intact. Williams was motivated by self-interest because, he and others, including his superior, Chief Factor Alex Matheson, had financial interests in mining operations at Michipicoten and Pic.'

Potential incursions also concerned the numerous First Nations trading at Osnaburg who approached Inspector Macrae and D.C. Scott about a Treaty in 1899. They "heard the railroads were projected through their country and that already miners, prospectors, and surveyors were beginning to pass through it is [sic] such largely increased numbers that the game was disturbed, interference with their means of livelihood had commenced and their rights were being trespassed upon." [my emphasis]

Macrae and Scott, however, did not forward this petition to the DIA until June 1901 - almost two years later - rationalizing the delay by claiming Aboriginal Peoples exhibited "the nicest

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'Morrison, "Treaty Nine...," pp. 15-16. Williams' mineral interests were well known to the Ontario Bureau of Mines. In 1898, Dr. Coleman, reported that Williams "...takes much interest in the mineralogy of the region, and especially its gold deposits." Coleman informed the Bureau of Williams' conclusions that Robert Bell had been in error when he previously stated there was gold on Lonely Lake. Williams had, however, discovered gold by panning the quartz from a small lake between Minnie Takie and Lonley Lakes. Williams gave Coleman a sample from a vein on Muskalonge Lake, south of Lonley Lake which contained a trace of gold when tested: Bureau of Mines Report, 1898, pp. 51 and 62.

'PAC, Treaty File, memo 3 June 1901, MacRae to Sifton. Note: Macrae and Scott were paying annuities and investigating and reducing the payees under the Robinson Treaties. Canada having recently (1897) lost the Robinson Treaties annuity case in the courts feared Ontario might also make a legal issue of the fact that a great number of Native Peoples receiving monies under those Treaties were not allegedly entitled to it.
spirit and confidence" after being told the government would deal with their claims. Macrae asserted that no other complaints were made in that period. But, this was highly unlikely, because in the period between 1899 and 1901, white incursions on Aboriginal Territory continued with more frequency.

Macrae urged Canada to dispatch Treaty commissioners to discuss Aboriginal claims, advising that this would "prevent any possible complications arising between the Indians and any persons who may have business within the territory. It may be remembered that such complications led to the making of the Robinson Treaties."\(^9\) This was an obvious reference to the resistance of Shinguacouse, Nabenagoching and others at Mica Bay in 1849, indicating that conflict over mineral ownership and development was very much on the minds of Department agents. It was also on the minds of Aboriginal Peoples. Jim Morrison argues that by 1901, "a band's interest in treaty relations with the government was...generally proportional to its proximity to the railway line and the newcomers who were arriving with it." Morrison asserts that First Nations wanted to control the entry of miners and other outsiders into their Territory.\(^11\)

In June 1901, Secretary J.D. McLean sought legal advice from DIA counsel, Reginald Rimmer, on a number of issues surrounding a partial Treaty. He was particularly interested in the question of

\(^9\) PAC, Treaty File, memo 3 June 1901, Macrae to Superintendent General.

\(^10\) PAC, Treaty File, memo 3 June 1901.

the role to be played by the provinces (Ontario and Quebec) and who would pay for costs surrounding the negotiations, the surveys and the annuities. Rimmer warned against excluding the provinces, stressing their territorial rights under section 109 of the BNA Act and elaborating with examples from the St. Catherine's case. Although Sifton noted this advice, he largely hoped to circumvent it and believed that the provinces should be party to the Treaty - not as full negotiating partners, but as the ones who had to pay the annuities.

In August, McLean's Assistant, Samuel Stewart, later one of the Treaty commissioners, reported on the claims of Chief Louis Espaignol. Stewart was approached by the Chief while paying annuities to First Nations near Biscotasing. Espaignol asserted that he and others had been told, at the time of the Robinson Treaties, they would receive the same consideration as Native Peoples south of the height of land. He wanted to know what the government would do. McLean denied record of any such promise, intimating that Canada would not conclude a Treaty without provincial agreement. Viewing Ontario's involvement as a drawback which he believed would cause much delay, he informed Espaignol that "under the circumstances it will take considerable time before any negotiations could be entered into..."

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14 PAC, Treaty File, memo, 22 August 1901. S. Stewart, Assistant Secretary, DIA; and letter 11 November 1901, McLean to Chief Espaignol.
In December 1901, Williams sent Ottawa a petition from Isaiah Poo-yah-way, George Wahweaishking and others trading at Osnaburg House on Lake St. Joseph. Poo-hay-way emphasized his concern over white intruders and their unauthorized mineral investigations which now extended as far as Lake Babemet along the Albany River. He reported that Native Peoples had already chosen the land they wanted reserved, but that white men were building on it. The Chief informed Sifton that First Nations could meet Department representatives any time the following summer to discuss a Treaty. McLean, however, barely addressed the petition, noting only that it "will receive consideration" and did not respond to the invitation.

Although it would tell Aboriginal Peoples nothing definite about a Treaty, the DIA was exploring the idea internally. Sifton received legal advice on the matter in February 1902 from J.A. McKenna who believed that the differing status of various Metis peoples was problematic, noting that Canada had purchased, for scrip, the territorial rights of some in Keewatin, but would not recognize similar rights for those in Ontario. McKenna advised that the Keewatin Metis be excluded from the negotiations fearing many Ontario Native Peoples would claim Metis status to obtain

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15 Poo-yah-way was identified in the petition as a member of the Lac Seul First Nation and Treaty No. 3. Wahweaishking was a non-Treaty person living at Lake St. Joseph. ("NonTreaty" meaning, in this case, that he had not signed any Treaty as yet.)

16 PAC, Treaty File, letter 12 December 1901, Jabez Williams to Sifton. Williams attached petition.

17 PAC, Treaty File, letter 27 January 1902, McLean to Isaiah Poo-yah-way, George Wah-we-aishking and others, sent c/o Jabez Williams.
script instead of Treaty. The provinces were to be informed of, but not participate in, the Treaty which McKenna suggested should be an adhesion to the Robinson Treaties. Although he stressed federal responsibility for First Nations, Ontario and Quebec were each to bear the same financial liability for these people as they did under the Robinson Treaties.16

Mining incursions by licensed promoters and HBC officials continued in Aboriginal Territory. Jabez Williams asked Robert Bell for all the mineral maps and reports dealing with the area around Lake St. Joseph in the spring of 1902. He also informed Bell that mining exploration was moving toward Osnaburg House and that both the Crane and Fort Hope people had asked for Treaty.

The DIA did not completely ignore Aboriginal petitions and verbal demands for Treaty. In April, McLean asked J.F. Hedder, the Indian agent at Port Arthur, to report on Native populations above the height of land. Hedder gave a conservative estimate of 2,140 people. The DIA continued to receive reports from agents that Native Peoples wanted their claims settled by Treaty. Those at Biscotasing, Missinaibi and others north of the CPR petitioned agent Nichols who emphasized that bushfires, prospectors and fishermen disrupted Aboriginal hunting and trapping so much that Native Peoples were "largely dependent upon" HBC posts for food. The agent at Parry Sound, W.D. MacLean, informed the Secretary that Aboriginal Peoples at Lake Abitibi and Lake Matawagaminque

16 PAC, Treaty File, Report, 22 February 1902, McKenna to Sifton.
desired to be taken into Treaty."

Aboriginal concerns also prompted the DIA to produce several background papers on the need for a Treaty. These papers imply that Canada was not informed of Aboriginal agitation for a Treaty until 1901 and thereafter began looking into the matter. This is a false impression because DIA officials in charge of paying out Robinson Treaty annuities had had contact with Native Peoples north of the height of land and knew they also desired a Treaty.

In the summer of 1903, the Crane Chief Kitchipines stopped a GSC party from exploring north of Osnaburg House. The party was completely turned back and was not allowed to conduct its mineral explorations. Morrison argues this incident "put the lie to Jabez Williams' earlier claim that the Cranes were anxious for treaty."

Williams likely had his own reasons for promoting the idea that the Cranes wanted to cede their land. Precious metals were believed to exist there and, as we have seen, Williams was very interested in mining. Crane actions indicate a strong awareness of and identity with their Territory over which they would not allow trespassers - especially prospectors who came to steal their mineral wealth.

By August 1903, the DIA was advised against seeking an adhesion to the Robinson Treaties and to make a new Treaty in Ontario under the following terms: a maximum annuity and gratuity

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19 PAC, Treaty File, letters, 8 April 1902, McLean to J.F. Hedder; 6 December 1902, Hedder to McLean; 24 July 1902, William Nichols to ? (probably J.D. McLean); and 18 January 1903, W.D. MacLean to J.D. McLean.

of $4; Aboriginal choice of Reserve locations; schools to be financed by Canada; annuities and surveys to be paid for by Ontario which would have no right to timber and mineral resources on Reserves; Metis Territorial claims were to be bought-off with 160 acres in fee simple. In Quebec, which had never recognized Aboriginal Title, the most which could be obtained by the DIA was an "understanding" the province would set land aside at some future date. The role of the provinces was to be minimal, hopefully they would agree to plans already made. Negotiations for the new Treaty, now referred to as Treaty No. 9 or The James Bay Treaty, would begin in September 1904.\textsuperscript{21}

In mid-April, Thomas Irving, a provincial government prospector, informed Prime Minister Wilfrid Laurier that the railway passed through Aboriginal Territory where he had been exploring north of the height of land, asserting the area to be rich in lignite (coal), gypsum and iron. Irving urged Canada to conclude a Treaty in order to "prevent future complications,"\textsuperscript{22} such as the clash between surveyors and the Cranes which had already occurred.

Two weeks later, Pedley sent E.J. Davis, the provincial Commissioner of Crown Lands, notice of Canada's plans to conclude a Treaty in north-eastern Ontario. The notice embodied the same terms first laid out in August 1903 including the provision that

\textsuperscript{21} PAC, Treaty File, memo, 11 August 1903, unsigned.

\textsuperscript{22} PAC, Treaty File, letter, 16 April 1904, Thomas C. Irving (McKinnin Block) to Laurier.
Reserves would be held by Canada for First Nation benefit free of provincial claims to timber, base and precious metals. There was no provision for provincial participation in the Treaty. Pedley merely encouraged Ontario to "review" the question and come to a decision without delay.23

Ontario's response, drawn up by provincial counsel Aemilius Irving emphasized its legal right to be involved in the Treaty, stressing the Agreements of 1894 and 1902 which necessitated provincial concurrence in future Treaties. Ontario warned Canada it would not accept financial responsibility for a Treaty concluded without it. Irving testily asked Pedley whether his letter was an "invitation" to arrange Treaty terms or an "announcement" of terms already set and further informed Canada that Ontario would make no Treaty until the Treaty No. 3 annuities case was settled. Pedley disagreed, stressing the urgent need for a Treaty and attempting to allay provincial feelings by asserting that federal terms were the maximum to be offered.24

At the same time, Pedley informed Sifton that Ontario was setting up "obstacles" to the proposed Treaty and strongly advised against delay, maintaining that a Treaty was urgently needed to smooth the way for "exploration, location of railroad lines and

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23 PAC, Treaty File, letter 30 April 1904, Pedley to Davis. See also PAO, RG 1-273-3-6-1, "Dominion/Provincial Reports on Indian Claims." This file also contains information on Treaty No. 3 and the Williams Treaty.

24 PAC, Treaty File, see covering letter and report, 23 May 1904, Irving to White; letter, 30 May 1904, White to Pedley (note: Ontario's response was written by Irving, but the final letter to Pedley went out under White's name); letter, Pedley to White.
construction.\textsuperscript{25} Significantly, Pedley identified "exploration" as a primary concern even more so than the railway which had initially been advantageous to Aboriginal Peoples.\textsuperscript{26} But, its negative effects soon became apparent and centred around the whites who now came into Aboriginal Territory. The prime offenders were prospectors and surveyors, who, as we have seen, disrupted Aboriginal hunting and trapping and removed metals. Thus, when Pedley said the way for "exploration" had to be smoothed, he was referring to mineral exploration and Ojibwa and Cree anger that this was being carried out without reference Aboriginal Title to land and minerals. In June 1904, R.S. McKenzie, the Indian agent at Rat Portage, informed the DIA that Native Peoples near Osnaburg and Cat Lake were anxious for Treaty. McLean responded there would be no Treaty until arrangements were worked out between the governments.\textsuperscript{27}

The following month, Chief Kitchipines stopped another GSC party, categorically informing Charles Camsell, its head, "...that as long as he was Chief of his band he would not permit any white man in his country, and we would have to go back south in the morning." The surveyors ignored this request, proceeding with their expedition. The Cranes sent an Aboriginal 'guide' to observe and report on the activities of the party which was told

\textsuperscript{25} PAC, Treaty File, memo, 10 June 1904, Pedley to Sifton.

\textsuperscript{26} Morrison, "Treaty Nine...," pp. 3-4.

\textsuperscript{27} PAC, Treaty File, letters, 22 June 1904, McKenzie to DIA; and 30 June 1904, McLean to McKenzie.
to confine itself to the river and not explore outside its main course. Kitchipines informed Camsell that when he returned later in the summer...he intended to search my canoes, open my bags and boxes to see if I had any gold or silver. He wasn't going to allow any of these metals to leave the country, his idea being that if I had found any gold, his country would soon be overrun by white men and the Indian brought to starvation. I couldn't argue with the old man on this point because I knew that was exactly what would happen...[When Camsell returned the following month, the Chief was there] with a large fleet of canoes...he looked casually into my canoe as we floated side by side on the lake, but he made no attempt to carry out his original intention...28

Nevertheless, the incident reveals the Cranes would not relinquish their minerals and would control white access to the same.

On 10 December, Pedley advised White that Canada had still not received a provincial response to the proposed Treaty. But, White did not know what the intentions of his government were. By February 1905, Pedley was no closer to knowing Ontario's position and demanded the province draft its own terms. Scott also pressed Pedley on this matter suggesting that if Ontario would not agree to the terms of April 1904, it might agree to let Canada conclude the Treaty anyway and leave issues of liability to the courts.29

This was the course which Pedley advised Prime Minister Laurier to follow, asserting that in spite of the 1894 Agreement, Ontario "has always shown a reluctance to come to a definite understanding upon this important matter." Canada would lose


29 PAO, RG 1-273-3-6-1, letter, 10 December 1904, Pedley to White; memo, 15 December 1904, White to Commissioner of Crown Lands; and letter, 27 February 1905, Pedley to White. ONAS, ILF #186220, letter, 15 December 1904, White to Pedley. PAC, Treaty File, memo, 18 March 1905, Scott to Deputy Superintendent General.
nothing, he argued, by concluding the Treaty without Ontario and letting the outcome of the annuities case decide the legal financial obligations of the governments. Pedley stated the Treaty was now a "necessity" because of provincial railway incursions and federal "general exploration." Pedley also cautioned Laurier the delay was "not conducive to good Government...as the influx of white men naturally causes uneasiness amongst Indians and leads to extravagant demands." He was likely worried that some Natives, especially the Cranes, might forge an alliance with sympathetic whites as Shinguacousc had done in the 1840s. The potential for Aboriginal Peoples to pursue such a course again was certainly considered by Department officials. As noted above, this possibility was brought to Sifton's attention as early as 1901.

The DIA continued to take steps toward making the Treaty a reality. In May 1905, E.L. Newcombe, Deputy Minister of Justice and the same man who represented Canada in the Agreement of 1902, wanted Pedley to supply him with an account of what Ontario would be liable for under the Treaty. This liability would be specified in joint orders-in-council (OICs) after which the Treaty could be negotiated. Pedley responded that Ontario would bear all financial responsibility and provide the Reserves, noting that it would control the entire Treaty area.

The federal OIC, drafted by 8 May, claimed that a Treaty was

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10 PAC, Treaty File, memo, 27 April 1905, Pedley to Laurier.

11 PAC, Treaty File, letters, 5 May 1905, Newcombe to Pedley; and 5 May 1905, Pedley to Newcombe.
necessary to promote settlement and colonization, railways and highways. It did not explicitly mention mining although this had several times before been identified by the DIA and First Nations as a primary concern. The OIC laid out the maximum terms of Treaty which were identical to those of April 1904. Pedley sent a copy of the draft and a letter explaining the urgency for action to J.J. Foy, provincial Commissioner of Crown Lands (Davis’ successor), warning that Ottawa would unilaterally proceed under its OIC if the province failed to agree. He wanted the Treaty concluded before Native Peoples formed alliances with whites and insisted on "extravagant demands." It is not surprising that Pedley was worried about this; his terms were less generous than those offered to the Treaty No. 3 Ojibwa in 1873, and although he often compared his terms of April 1904 to those of the Robinson Treaties, they were in fact less beneficent - there was no reference to an escalator clause.

As well, the province wanted the Treaty commissioners, not the First Nations, to choose Reserve locations and demanded that one commissioner represent the province. Pedley believed a compromise could be reached on the Reserve issue and did not want First Nations to lose control over the selection of their Reserves. Rather he believed Aboriginal People could choose these as usual, unless the Ontario representative objected. A new

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12 PAC, Treaty File, see undated draft OIC; and letter May 1905, Pedley to J.J. Foy.

13 PAC, Treaty File, memo, 2 June 1905, Pedley to Lieutenant Governor.
draft Treaty reflecting this position was sent to Ontario for comment. Provincial treasurer, A. Matheson, agreed to the terms and suggested a copy of the OIC regarding provincial liability be included in the Treaty.  

Pedley recommended that Canada accept Ontario’s modifications to the OIC and then issue it. The final liability was divided so that Ontario paid the one-time-only gratuity of $8 per head and $4 per head annuity. It would establish Reserves of 1 square mile for each family of five, but all water power sites in excess of 500 horse power would be excluded. Ottawa would pay for the negotiation of the Treaty, the salary of the Ontario commissioner and all survey costs.

THE NEGOTIATIONS OF TREATY NO. 9 IN 1905 AND 1906

During the summer of 1905 and that of 1906, federal commissioners D.C. Scott, Samuel Stewart and provincial commissioner Daniel MacMartin visited fourteen posts and ‘created’ as many First Nations from the plurality of existing groups. Aboriginal Peoples in the Treaty 9 area were loose family groups trading at particular posts. After the Treaty, families trading at the same post were designated as a unit and named after that post - hence the Osnaburgh First Nation etc. This was the first major Treaty in Ontario where virtually all Aboriginal Peoples to be Treated with were not called together to agree to one Treaty.

14 RG 1-273-3-6-1, Draft Treaty, 12 June 1905, Pedley to White. PAC, Treaty File, letter, 23 June 1905, Matheson to Pedley.

15 PAC, Treaty File, memo, 26 June 1905, Pedley to Superintendent General.
In effect, Treaty No. 9 was not one Treaty, but 14 ostensibly
different ones. The 1905/1906 Treaty No. 9 was not well documented
by the commissioners who, in almost every case, did not record the
substance of the negotiations in official reports composed of
extracts from Samuel Stewart’s diaries. Stewart’s 1905 and 1906
diaries, however, contain additional information about the
negotiations, Aboriginal fears and outside promises; these diaries
also contain numerous references to minerals, again, not included
in the official Treaty reports.

Daniel MacMartin’s diary provides the fullest account of what
was actually said to the Native Peoples about the Treaties and
clearly indicates, among other things, that the Treaty area was
not being surrendered, but shared.16 Stewart’s and MacMartin’s
diaries present different accounts of the Treaty negotiations, but
together they present the fullest account possible from the
government perspective. The most important issues, discussed
below, arising from the diaries concern hunting and fishing
rights, the extent and location of Reserves and minerals.

It is certain that all Aboriginal families were concerned
with hunting (including trapping) and fishing rights in the area
they were about to share with the whites. Although this is not
clear from the official Treaty reports, it is clear from both 1905
Treaty diaries. The 1905 report indicates that Chief Missabay at
Osnaburgh House expressed concern about such rights and was

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16 MacMartin’s 1905 diary was recently discovered by Peter Naylor at the Queen’s
University archives. His 1906 diary is in the PAC. Thanks to Janet Armstrong for
sharing this information with me.
informed that his fears were "groundless" because "their present
manner of making their livelihood would in no way be interfered
with." In contrast, MacMartin's account makes no reference to
the issue of hunting and fishing rights at Osnaburgh. He claims
that the Ojibwa had nothing to say prior to signing the Treaty and
that Chief Massabay said "'Whatever you say we will do.'"

Significantly, the commissioners (according to Stewart's
diary) promised that Aboriginal Peoples, at Osnaburgh, would not
have to change their life ways as a result of signing the Treaty.
The Ojibwa were assured their Aboriginal Right to fish and hunt
when, where and how they pleased would not be altered. This was
the Ojibwa understanding of these terms. This understanding was
not reflected in the written Treaty document. Any restrictions on
fishing, hunting and free movement over the shared areas were at
variance with the terms of Treaty as explained by the
commissioners. Such terms are not in keeping with the spirit and
intent of the Treaty which First Nations agreed to and should not
be binding on them.

The commissioners may not have taken a copy of the full
Treaty with them when they left Ottawa for Dinorwic on 30 June,
arriving there on 2 July. According to a clause in the final
Treaty, the OIC on which the Treaty was based was dated 3 July
1905. When the commissioners left on 30 June, this OIC did not

17 The James Bay Treaty, Treaty No. 9, (Made in 1905 and 1906) and Adhesions made
in 1929 and 1930. 6 November 1905 Report of commissioners to Superintendent General,
pp. 4-5.

18 Queen's University Archives, "June 30th 1905, Diary - Notes of D. G.W.
MacMartin," n.p., but see 17th page.
yet exist, therefore, either the finished Treaty did not yet exist or, only a partial or incomplete Treaty was taken. There is no draft copy of a 'full' Treaty in either federal or provincial files, although one letter clearly makes reference to such a "draft." The most substantial document which appears to have been on hand by 30 June was a Memorandum of Treaty terms dated 27 June 1905. This document merely specified the terms already agreed on between the two governments (ie. the amount of the gratuity and annuity, the amount of the land entitlement, and Canada's fiscal responsibility for the making of the Treaty and the expenses of the provincial commissioner) and described the area to be included in the Treaty; this document did not include the restrictions on hunting, fishing or trapping that appeared in the final printed Treaty, nor did it include any provisions for either government to dispose of the mineral or timber resources in the shared area.

If the final Treaty, with all its limitations and qualifications, was not in the possession of the commissioners during part or all of the 1905 round, then the whole validity of the written Treaty is in question.

At Fort Hope, the commissioners informed Yesno that Canada

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17 PAC, Treaty File, letter, 23 June 1905, Matheson to Pedley. It is not clear what "draft treaty" means. Specifically, it is not known whether this refers only to the numerous memos on Treaty terms generated to that date or whether there was a "full" Treaty in draft form. This latter seems unlikely because no such draft has been found in either provincial or federal files.

18 This document also refers to an annexed Memorandum of the Superintendent General. No date is provided, but it seems likely that this was Pedley's Memorandum of 26 June, which, in addition to the provisions listed above in the text, stipulated the non-inclusion of waterpower sites in Reserve boundaries. PAC, Treaty File, "Memorandum: Superintendent General of Indian Affairs," 26 June 1905, signed, Pedley, Deputy Supt; and Draft Report to Council, "Draft. His Excellency the Governor General in Council...," 27 June 1905, signed Frank Oliver, Superintendent General.
would not provide agricultural aid because "...the Band could not hope to depend upon [it]...as a means of subsistence; that hunting and fishing, in which occupations they were not to be interfered with, should for very many years prove lucrative sources of revenue." 41

There are no other comments about hunting and fishing rights in either the 1905 or 1906 reports. Indeed, there are no further comments about any concrete aspect of the negotiations whatsoever in these reports. However, both Stewart’s and MacMartin’s diaries clearly indicate that access to food was of paramount concern to all Native Peoples and that significant outside promises were made by the commissioners which do not appear in the written Treaty.

Stewart recorded that the Ojibwa at Fort Hope were guaranteed unrestricted hunting and fishing rights for both subsistence and commercial purposes and emphasized that they could continue to utilize the "unused lands." 42 Native Peoples at Martin’s Falls, Moose Factory and New Post also raised the issue of hunting and fishing. According to MacMartin’s diary those at Martin’s Falls were informed that "they could hunt and fish as of old and they were not restricted as to territory..." At Moose Factory, MacMartin’s diary indicates that the Cree could "...follow their custom of hunting where they pleased..." Finally, at New Post, Stewart recorded that "As usual the point in which the Indians desired full information was as to the effect the treaty would

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41 The James Bay Treaty..., p. 6.

42 Stewart Diary, 1905, 16th page.
have on their hunting and fishing rights. When assured that these would not be taken from them, they expressed much pleasure and their willingness to sign the treaty which was accordingly done and the signatures duly witnessed." [my emphasis] Similarly, MacMartin noted that the New Post peoples were "allowed as of yore to hunt and fish where they pleased..." These statements regarding hunting and fishing rights constitute several different promises or Treaties.

The various hunting and fishing promises noted in the diaries are significant and had direct bearing on other important issues, such as the extent and location of the Reserves and nature and scope of the Treaty in general. On several occasions, MacMartin indicated that Treaty No. 9 Chiefs wanted much larger Reserves than they ended up with. It is clear that the Native Peoples wanted large Reserves for hunting and fishing purposes. However, the commissioners refused to allow Reserves in excess of the Treaty entitlement, arguing that First Nations would be allowed unrestrained hunting and fishing rights in the land outside their Reserves. This was certainly the implication of statements made to the Fort Hope people when put in the context of the unequivocal statements made by the commissioners at Martin's Falls and Moose Factory. The situation at Martin's Falls is representative:

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43 Stewart Diary, 1905, 37th page.
44 MacMartin Diary, 1905, 55th to 57th pages; 85th to 86th pages and 104th page.
45 MacMartin Diary, 1905, Fort Hope: 38th to 39th pages; Martin’s Falls: 56th to 57th pages; and Moose Factory: 85th to 86th pages.
When it was explained to them that they could hunt and fish as of old and they were not restricted as to territory, the reserve, merely being a home for them wherein which no white man could interfere or trespass upon, that the land was theirs for ever; they gladly accepted the situation...about 9:30 p.m. the chief and his councillors came to our quarters saying that they wanted both banks for 50 miles down river as a hunting reserve, again it was put forcibly before them, that it was a home for them that was being provided and not a hunting reserve and that they could hunt wherever they pleased, they signified their assent... 

Thus, Reserves were places where First Nations did not have to go until they desired and they were places where white men could not enter. Places outside the Reserves, in the Treaty area, were to remain the undisturbed hunting grounds of First Nations and were therefore, to be shared with non-Aboriginal people. The nature and scope of the Treaty were limited: the Treaty area was not ceded to the Crown, but shared with it. This is a significant distinction, not evident in the written version of the Treaty.

That Reserves were limited to the Treaty entitlement of one square mile per family of five was directly related to the promise that unrestricted hunting, trapping and fishing were to continue in the Treaty area, outside the Reserves, forever. This fact is not stated in the written Treaty. Today, in keeping with the spirit and intent of the Treaty, Canada and Ontario should either respect the promise of unfettered Aboriginal hunting, trapping and fishing rights in the shared Treaty area or augment the Reserves to the original areas desired by the First Nations at the time of Treaty.

Aboriginal Peoples and the government do not understand the meaning of Treaty No. 9 in the same way. This is because Native
Peoples did not agree to much of what appeared in the written Treaty. For instance, it is evident that Native Peoples at Fort Hope retained their sovereignty and agreed to share (not cede) the land outside their Reserve from statements made by the interpreter Father Fafard and the commissioners. While addressing the suspicions of Chief Moonias, who wondered why the Treaty seemed to give something for nothing, the commissioners reported that Fafard explained the nature of the Treaty thus:

that by it the Indians were giving their faith and allegiance to the King and for giving up their title to a large area of land of which they could make no use, they received benefits which served to balance anything which they were giving.\^4\n
As the elected Chief, Katchang, was signing the Treaty document, he stated, according to MacMartin, words to the effect that "I will do all in my power to have the band obey the laws and be good Indians."\^4\n\nThe Chief and his people did not believe they were "giving up their title" for ever; they believed they were sharing the surface of the land and its resources as reflected in the hunting and fishing promise. They did not relinquish sovereignty or the right to self-government; they were merely pledging allegiance to the Crown. The Fort Hope First Nation did not expressly surrender sub-surface, water or sub-marine rights.

Other discrepancies exist in addition to the above ones between the Treaty as negotiated and as written. In his 1905 diary, Stewart noted that Native Peoples at Martin's Falls had

\^4\ The James Bay Treaty..., p.6

\^7\ MacMartin Diary, 1905, 41st page.
"fears" about signing the Treaty." In 1906, he emphasized the amount of time spent considering (unidentified) Aboriginal grievances and rights, prior to Treaty negotiations, at New Brunswick House. He also indicates that the commissioners promised medical aid at Long Lake under prompting from Chief Newatchigiswabe. But, official reports made no mention of fear, grievances or a medicine-chest.

Stewart's and MacMartin's diaries also contain numerous comments on the incidence of mineral exploration and development in the Aboriginal Territory as the Treaty was being made. None of these comments, however, were included in official reports. In July 1905, Stewart noted that Jabez Williams showed the commissioners rock samples from the shores of Lake St. Joseph on which Osnaburg House is located. MacMartin's diary indicates that the Osnaburg Native Peoples raised the issue of mineral ownership. Following a description of the location and extent of their Reserve, MacMartin maintained that it "...includ[es] precious metals." This is the only occasion that MacMartin mentioned mineral ownership in his 1905 diary. Nevertheless, it clearly reveals that Ontario confirmed precious metals to the Treaty No. 9 First Nations in their Reserves, whether it recognized the underlying fact of Aboriginal ownership of all

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16 Stewart Diary, 1905, 21st page.
17 Stewart Diary, 1906, 31st and 37th pages.
50 Stewart Diary, 1905, 12th page.
51 MacMartin Diary, 1905, 21st page.
minerals. This would include the minerals in the land under water because First Nations never relinquished their ownership of water or sub-marine rights. This information appears neither in Samuel Stewart's diary, nor the commissioners' official report for 1905.52

On more than a few occasions, it is clear that MacMartin was actively assessing the mineral potential in the area, as he must have been instructed to do, while on Treaty business. He records evidence of "small quartz stringers thru the slate" on the lower Snake portage; some low rocky banks and sandy gravel on the north shore of Lake Makokibaton and "considerable feldspar... crystals" through the rock in portage no. 2 on the route taken out of the said Lake; and white clay sand and gravel on several islands four miles past Bear Bone Island.53 Stewart does not mention similar assessments in his 1905 diary.

On 14 August, after leaving Moose Factory, at the junction of the Moose and Abitibi Rivers, according to Stewart, the Treaty party encountered provincial representatives looking for minerals: the "Gool-men...were sent to inform on the mines, forests and sort of the district." This incident was also reported by MacMartin who did not identify the group as being in provincial employ. The Gool-men consisted of Mr. Sullivan, Dillon Rogers and three

52 This promise was broken by the provincial application of the 1924 Lands Agreement to the Treaty No. 9 area.

53 MacMartin Diary, 1905, 26th to 27th pages; 46th to 49th pages; 70th page.
Mattawa Native People: Jocko, Simon and Joe Leclaire. Thus, MacMartin was not the only provincial representative scouring the region for minerals. This incident also indicates that Ontario was hiring Native Peoples from outside the Treaty No. 9 area to assist it in cataloguing the region’s mineral wealth.

The last Treaty stop in 1905, at Abitibi Post, toward the end of August, was reached too late in the season to obtain agreement. After leaving this Post, but before reaching the height of land, the commissioners encountered two exceedingly unfriendly prospectors (apparently, the Trethways) with no intention of discussing their business. Because they were north of the height of land, they could only have been in the Territory of the Abitibi First Nation. This, of course, supplies more evidence that Ontario was authorizing illegal mining incursions in First Nation Territory prior to, and indeed, during the Treaty negotiations. Numerous other prospectors were met immediately south of the height of land.

The commissioners reported that almost everyone in North Temiskaming was talking about minerals and noted that store owner, Mr. Malone, was greatly interested in a number of mines. They also emphasized the mineral interests of the Indian agent in the district who had made a point of visiting them, during which time they discovered "...he had a pocket full of samples of ore from

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[54] Stewart Diary, 1905, 35th, 95th and 96th pages.

[55] Stewart Diary, 1905, 47th, 49th and 50th pages.
his mines." Although the agent is not identified, the statement indicates his pre-occupation with minerals and apparent ownership of several mines. This is similar to findings in the other Treaty areas where DIA representatives mixed official and private interests.

In 1906, during the second season of Treaty negotiations, the commissioners encountered a profusion of prospectors between North Temiskaming and Abitibi and before reaching Matachewan they encountered an unidentified man with a canoe full of supplies for prospectors working above [that is north of] Fort Matachewan. These prospectors were in the as yet unTreated Territory of the Matachewan First Nation. These illegal prospecting activities had likely been authorized by the Ontario government.

Summing up their work in 1905, the commissioners officially reported they had "carefully guarded against making any promises over and above those written in the Treaty...No outside promises were made." But, as we have seen, several outside promises regarding hunting and fishing were made at Osnaburgh, Fort Hope, Martin's Falls, Moose Factory and New Post. These liberal promises conflict with the wording of the written Treaty which instead purports to limit Aboriginal rights to hunt and fish in the shared territory. The commissioners also made an outside promise at

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56 Stewart Diary, 1905, 50th page.
57 Stewart Diary, 1906; 2nd page.
58 Stewart Diary, 1906, 12th page.
59 The James Bay Treaty..., pp. 110-11.
Osnaburgh regarding the precious metals which does not appear in the written Treaty.

With only two exceptions, (Osnaburgh and Fort Hope) official reports for 1905 and 1906 never record what the commissioners actually said to the various First Nations or what Aboriginal concerns were raised. One is left with the impression that Native Peoples asked no questions and eagerly agreed to Treaty terms. This official impression, however, cannot be sustained once Stewart’s and MacMartin’s diaries are scrutinized. If Native Peoples at Osnaburg and Fort Hope, which were furthest away from "civilization," were concerned about hunting and fishing rights, all closer groups must have been as well. This would be equally true of mineral rights because, as we have seen, miners were active north of the height of land in Aboriginal Territory even as the Treaty was being signed. As we have already seen, Native Peoples protested these kinds of violations prior to the conclusion of the Treaty. The statement by the commissioners that they made "no outside promises" is worth very little not only because the only two cases where a fragment of actual negotiations were reported do in fact involve outside promises, but also because of Aboriginal reactions to white encroachments. Furthermore, one can argue that some, if not all, First Nations were left with the impression that they were merely pledging allegiance to the Crown and agreeing to share, not forever relinquish, the surface of their lands.

The oral testimony of John Fletcher, a Moose Factory elder
who witnessed the signing of the Treaty, is representative. In 1978, at a Royal Commission hearing on the northern environment Fletcher stated through a translator that the Commissioners brought...His Majesty's request to surrender your land, to act as a custodian, and if you respond to this request, you will be given money for every year. You will also be given assistance by His Majesty the King. Your children will be educated. The government will pay all expenses. You will not pay for medication. The government will pay for the treatment of your illnesses. ... hunting right[s] will never be taken away. Do you see this river that never stops flowing? This Treaty will be an example to it...Nothing will ever alter your way of life. We will share this land with your people. You will not lose your culture if you sign this Treaty. [my emphasis]

Fletcher also maintained the commissioners told his people they were entitled to a share of revenues generated by the development of any resources in the Treaty area. This included the shared lands and most definitely included the mineral resources. Fletcher argued that "Although this was not written in the Treaty, these kinds of verbal promises were considered by us before we signed the Treaty...It seems to me, as a witness to the signing of the Treaty, that some of these promises have been forgotten." [my emphasis] This testimony indicates the commissioners did not record the full scope of negotiations and that Native Peoples did not merely assent to Treaty without raising issues beyond what appears in the official written record and without considerable discussion among themselves. For these same reasons, the reports of 1905 and 1906 must be considered an incomplete and unfair representation of the negotiations. The commissioners' lack of

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60 "Nishnawbe-Aski Nation: A History...," p. 36.
concern with officially reporting the content of negotiations is one of the most striking differences between this Treaty and those of 1850 and 1873.

Treaty No. 9 created 14 Reserves for 14 First Nations which were 'created' under the Indian Act including, Osnaburg, Fort Hope, Marten Falls (Ogoki), English River, Fort Albany, Moose Factory, New Post, Abitibi, Matachewan, Mattagami, Flying Post, Chapleau, Moose Factory Crees - Chapleau, New Brunswick House and Long Lake. All of these First Nations selected Reserves and the commissioners attached a schedule, to each report, identifying their locations. (See Maps 7, 16 - block "AE"- and 29.)

THE WRITTEN VERSION OF TREATY NO. 9 OR THE JAMES BAY TREATY

Canada, not Ontario, prepared the text of the final Treaty and included a copy of the 1905 OIC defining provincial liability. The purpose of the Treaty was said to be the opening of 90,000 square miles north of the height of land for settlement, immigration, trade, travel, mining, lumbering and other purposes. This explanation made it seem that these activities would commence after the Treaty was signed. However, as we have seen, all of these activities had already occurred prior to the Treaty. First Nation complaints about these activities, especially mining, led Canada to press Ontario into Treaty. The Treaty in fact opened more than 90,000 square miles; it also included a large strip of land north of the Albany identified as the A-B area. This area encompassed part of the hunting grounds of the First Nations who
Map showing the Treaty No. 9 adhesion area, including the A-B area surrendered in 1905/1906.

Map of Northern Ontario showing Adhesions to Treaty No. 9
Covered by the Report of Commissioners Cain and Awrey, dated Sept. 28th 1930.

Legend:
- Area lying between line A - B and the Albany River sailed in 1906.
- Area lying north of line A - B covered by adhesion of 1919-1920.
- - - Indian reserves.
- - - Posts visited.
- - - Courses taken in 1919.
- - - Courses taken to Trout Lake in 1929.

Treaty No. 9
Treaty No. 5
Treaty No. 7
Treaty No. 8
Treaty No. 9
Tawapiskat
Ogoki
Lansdowne House
Emissary House
Hudson's Bay
Forts
Adhesions
tо
Treaty No. 9

Scale: 25 Miles = 1 inch
signed the Treaty, but most of the area belonged to other First Nations who had not yet signed. Nevertheless, the governments included this area in the Treaty. (Refer to Map 29.)

Native Peoples retained their right to hunt, trap and fish in the shared tract. However, the Treaty document added a limitation to this right which First Nations never discussed nor consented to. Namely, that the right was subject to government legislation and regulations. This qualifying statement was at variance with what Aboriginal Peoples in Treaty No. 9 had agreed to in the negotiations. This restriction was already in the full Treaty which the commissioners were supposed to leave with each group after it signed and ought to be invalid because it is contrary to the spirit and intent of the terms as explained to First Nations in the oral Treaty.

Reserves were to be administered by Canada on behalf of First Nations. With Aboriginal permission, the DIA could dispose of the land and resources "for the use and benefit" of First Nations. This clause implies a full Aboriginal beneficial interest in all resources on Reserves including minerals. This interpretation is substantiated by the outside promise regarding precious metals made at Osnaburgh and is confirmed by reference to the Agreement of 1902, a copy of which was included in the Treaty.61 As well, it is consistent with oral tradition.62

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61 PAC, Treaty File, short copy of Treaty dated 12 July 1905, printed copy, which includes reference to the Agreement of 1902.

The Treaty document indicates First Nations gave up surface rights only. Rights of self-government, resource ownership, management and control in the shared area, including mineral rights and ownership of the land under water was not expressly transferred and therefore did not pass to the province under the Treaty. This view, based on English common law, is also consistent with the Aboriginal understanding of the Treaty that they were "sharing" land and resources. This view is not consistent with the judicial decisions in St. Catherine's or Seybold. It is consistent with the judicial decision in Caldwell v. Fraser which extended the common law to First Nations.

Native Peoples negotiated a Treaty which acknowledged and secured their rights. But, what had been negotiated was not accurately represented in the written version. As was the case in previous Treaties, the problem was what the government added to it by way of limitations and restrictions and subtracted from it by way of omissions in its written form (either before or after it was signed). The written form reflected what the government wanted and not necessarily the terms negotiated by First Nations. This distinction must always be remembered. When Native Peoples signed, they signed agreeing to the verbal terms. Where the written Treaty diverges from these terms, it should be considered invalid because it represents neither the spirit nor intent of what First Nations actually agreed to.

PROBLEMS WITH THE TREATY NO. 9 RESERVES

The Reserves selected under Treaty No. 9 were accepted by the
Minister of Lands, Forests and Mines on 11 February 1907 and ratified under a provincial OIC two days later. Canada carried out surveys and filed copies of plans and field notes between 1907 and 1913, but several problems arose with the location of Reserves both from the perspective of Aboriginal Peoples and Ontario.

The Osnaburg First Nation wanted to relocate its Reserve southwest of Lake St. Joseph because the previously selected location would not sustain the kind of economic activities it hoped to pursue. Such activities were specifically identified as farming, mining and timbering. A similar request had been made by the Ogoki First Nation in the previous year. These were significant requests indicating Aboriginal interest in exploiting a wide variety of resources and not just the game and fish specifically mentioned in the commissioners' reports and the Treaty. Requests such as this provide written support for oral tradition indicating that Native Peoples intended to commercially develop a number of resources. Other First Nations also sought to change the locations of their Reserves but were refused without good reason.

Ontario identified several problems connected with mining and timber patents and the location of Reserve boundaries at Abitibi, Matachewan and Mattagami. In the Schedule of Reserves attached to the 1906 Report, Abitibi Reserve was defined as follows:

1 ONAS, ILF #186220, "Indian Treaty #9" (hereinafter cited as ONAS, Treaty File), see "Copy of an Order-in-Council, approved by His Honour the Lieutenant-Governor, dated the 13th, day of February, A.D., 1907."


3 ONAS, Treaty File, memo, 17 October 1919, L.V. Rorke, Director of Surveys, Department of Lands, Forests and Mines.
beginning at a point on the south shore of Abitibi lake, at the eastern boundary of the township of Milligan projected, thence east following the lake shore to the outlet of Kaquaquakechewaig (Current-running-both-ways) creek, and of sufficient depth between the said creek and the eastern boundaries of the townships of Milligan and McCool to give an area of thirty square miles."

Not only had Ontario participated in and signed the Treaty, its commissioner had also agreed to this location for the Abitibi Reserve. This description is clear and extensive enough that Ontario had no excuse to issue mining locations on the shore of Abitibi where it did— that is on the south shore between Milligan and the Kaquaquakechewaig creek.

On 20 March 1907, the Abitibi Gold Mining Company had several mining locations surveyed. Two of these, TP42 and TP43 containing 39 acres, crossed into the land described above as comprising the Abitibi Reserve. Two other locations surveyed on the same date, TP44 and TP45, were completely in the land under the water within the headlands of the Abitibi Reserve described above."

In November 1907, J.D. McLean informed Aubrey White that Ottawa was about to survey the Reserve at Lake Abitibi. White complied with federal requests for provincial fieldnotes and other survey materials pertaining to the townships Milligan and McCool."

The federal survey of the Reserve was completed on 14 April 1908, by O.L.S., J.H. Shaw who reported that several mining locations

"The James Bay Treaty..." p. 18.


ONAS, ILF #91551, "Abitibi I.R. #70" (hereinafter cited as ONAS, Abitibi File), letters, 19 November 1907, J.D. McLean to Aubrey White; and 26 November 1907, White to McLean.
claims were staked within the boundaries of the Reserve. White was informed of this fact and that "in one case preparations were being made apparently for active work." McLean looked to White for guidance on how to deal with this matter, thus letting control of the matter pass from the DIA to Lands, Forests and Mines."

Subsequent correspondence between Ontario and Ottawa emphasized that surveys for TP42 and TP43 were carried out prior to the federal survey of Reserve boundaries. Nevertheless, Ontario should not have accepted these claims because prior to the surveys, it had already agreed to the location of the boundaries of the Abitibi Reserve. The 1906 description made it clear these claims would breach Reserve boundaries. According to provincial correspondence, the Company applied for patent on 16 September 1908. This was five months after Ottawa had surveyed the official Reserve boundaries. But, Ontario continued to emphasize the prior date of the Company's survey and this became the basis for its decision to remove the mining locations from within Reserve boundaries. The DIA concurred in this and allegedly obtained the consent of the Abitibi First Nation (in July 1909) to agree to give up this parcel of land, containing 39 acres, and accept in lieu of it an equal area on the north east corner of the

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" ONAS, Abitibi File, letters, 29 May 1908, McLean to White; and 19 November 1908, White to McLean.

Reserve.  However, there is no evidence that either a council or vote was held with the Abitibi First Nation to secure a formal surrender of the 39 acres which had been designated and surveyed as part of their Reserve.

The new area to be added into the Reserve on the north west corner was never surveyed by either Canada or Ontario because McLean believed it would be too expensive to dispatch a surveyor specifically for this purpose. McLean suggested that T.W. Gibson, the Deputy Minister of Mines simply draw in the new area on a plan "with sufficient accuracy." The area was to be left unsurveyed until either a federal or provincial surveyor was next in the area. As we shall see, this would cause additional problems with mining claims in the future.

Ontario used the fact of the Company's prior surveys as the basis first to grant the Abitibi Gold Company a license to its mining locations and then a patent. The whole process should not have been allowed to develop to the point where the Company gained patent; it could have been stopped in April 1908 when Shaw informed the DIA that claims had been staked and work was about to be commenced. Ottawa should not have allowed Ontario to dictate

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71 ONAS, Abitibi File, letters, 16 September 1908, McLean to White; 19 November 1908, White to McLean; 13 July 1909, McLean to T.W. Gibson, Deputy Minister of Mines; 29 July 1909, White to McLean; 14 June 1910, McLean to White; 8 August 1910, Gibson to George Smith, Mining Recorder, Haileybury, and 25 November 1910, Cochrane to Lieutenant Governor.

72 ONAS, Abitibi File, letter, 13 July 1909, McLean to Gibson.

73 Although I have been unable to locate a record of the actual license and its date, a license was issued since the Abitibi Gold Mining Company is referred to as "licensees" in provincial correspondence. ONAS, Abitibi File, letter, 25 November 1910. According the MNR's Crown Lands Registry, a patent was issued to the Company on 15 August 1910 (Personal Communication with staff, July 1994).
how the situation was to be resolved. In August 1910, Ontario issued patents for T42 and T43, but had still not confirmed the land exchange. This was finally done in December 1910, when it passed an OIC authorizing 39 acres on the north west side to be given in lieu of the Company's mining location. But, Ontario did not confirm the Abitibi Reserve.\textsuperscript{74} Although the DIA contacted Lands and Forests about this in 1912, nothing further was done until 1913.\textsuperscript{75}

In June 1913, L.V. Rorke, Director of Surveys at Land, Forests and Mines reiterated the sequence of the survey activities of the Company and Ottawa. He also noted the mining claims were intact and that a land exchange had been effected. Rorke advised that the Abitibi Reserve, among several other Treaty No. 9 Reserves, be confirmed by the province.\textsuperscript{76}

During the 1930s there was at least one instance of a trespass on the Reserve for purposes of gold exploration. In 1931, W.G. McDonnell of Toronto, applied to the Ontario Department of Mines to explore for gold along the northern boundary of the Abitibi Reserve. He was angry that no one responded because he had already discovered gold. McDonnell was permitted to commence

\textsuperscript{74} ONAS, Treaty File, memos, 7 June 1913 and 17 June 1919, Rorke.

\textsuperscript{75} ONAS, Abitibi File, letter, 30 May 1913, McLean to White.

\textsuperscript{76} ONAS, Treaty File, memos, 7 June 1913 and 17 October 1919, Rorke; also in ONAS, Abitibi File.
operations in April. He appears to have reapplied for these locations in the fall of 1931. But, before the locations were patented, the Department of Mines realized they lay partially within the Reserve and partially in the land under water. This resulted in the cancellation of both claims by December. The First Nation appears not to have been informed of this breach, nor compensated for land use or the illegal removal of gold, if any. These activities were unlawful and Ontario should not have allowed any mining to occur in advance of McDonnell producing a survey. The Department of Mines recommended authorization for the underwater parts of McDonnell's claims. Correspondence is not sufficient to determine whether this was done, but a similar situation was dealt with this way in the same month.

Neither government had surveyed the 39 acres to be added onto the Abitibi Reserve in lieu of the mining claims TP42 and TP43. No survey had been carried out by 1931 and in December, at the same time it was dealing with the McDonnell situation, the Department of Mines almost patented the entire 39 acres of the land exchange area to two separate claimants. W. Hylands held location T-23583 and Elizabeth Bickford held T-23580. The land portion of

77 PAC, RG 10, Vol. 7632, P. 18074-13, pt. 0, 1922-1946, see letters 3 November 1931, T.F. Sutherland, Acting Deputy Minister, Department of Mines, Ontario to Superintendent General, DIA; and 4 November 1931, A.F. Mackenzie, Secretary DIA to Sutherland.

78 ONAS, Abitibi File, letters, 7 December 1931, Sutherland to N.J. McAulay, Mining Recorder, Haileybury; 7 December 1931, T.R.L. MacInnes, Acting Secretary, DIA, to Sutherland; and 8 and 10 December, McAulay to Sutherland.

79 Ontario mining regulations require that a survey be completed prior to work being carried out and prior to the issuance of a lease or patent.
Bickford’s location was cancelled once it was discovered that it lay within Reserve boundaries. Shortly thereafter, the same fate was recommended for Hyland. However, Thomas Sutherland, the acting Deputy Minister of Mines, advised that the water portions of the claims be recorded.80 As we have seen above, the Abitibi Gold Mining Company also had patented partial claims in land under water and two unpatented claims completely under water, surveyed on the same day as the first two.81 (See Map 30).

All of these claims were within the headlands of Abitibi Reserve. This raises the issue of Aboriginal rights within headland boundaries. Headland claims are an issue in the Treaty No. 9 area. The Agreement of 1894, in which the headlands clause appears, in the context of the Treaty No. 3 Reserves only, was also the authority under which Ontario participated in Treaty No. 9. Because the Agreement was cited in the Treaty No. 9 document (with no exception to any of its clauses) the headlands provision was extended into that Treaty where it affects all Reserves including the Abitibi Reserve.82

The issue of Aboriginal mineral rights in headlands arose

80 ONAS, Abitibi File, letters, 8 and 10 December 1931, McAulay to Sutherland; and 12 and 16 December 1931, Sutherland to McAulay.


82 See The James Bay Treaty..., p. 3. N.B.: This concern was raised by Ontario counsel, Aemilius Irving. An unsigned 1911 memo to the Minister of Lands and Forests and Mines Frank Cochrane notes Irving advised Cochrane in 1910 that "the provisions of the agreement of the 16th April 1894 and of the Newcombe agreement dated the 7th July 1902 shall apply to Treaty No. 9...and he suggests that this agreement [1902] applies "to all cases for the future." [emphasis in original] INAC, "Indian Land Agreement, 1874 - 1969," letter 20 January 1911, unsigned to Cochrane.
Map 30
Plan showing mining locations in the Reserve and Headlands of the Abitibi First Nation

LAKE ABITIBI

Squaw Point

This 36 acres added to I.R. by OC dated 10th Sep. in lieu of these parts of Sq. clms TP 42 43 lying within Res., which were patented by Ont. Gov.
again in the mid-1970s. R.C. Denommee, Regional Mining Lands Administrator, reported that applications for twelve water mining claims had been received by the Kirkland Lake Mining recorder. These had been accepted as "'pending applications'" from Kerr Addison Mines Limited because it was believed that "a certain area of water adjoining Indian Reserves forms part of the Reserve." But, Denommee was advised to record the claims because J. McGinn, Director of Lands, MNR stated that "...the lands under Abitibi Lake were specifically excluded from the Reserve proper." McGinn referred to the 7 December 1931 correspondence noted above.  

However, the Abitibi First Nation had not agreed to give up water or sub-surface rights in either the negotiations or the Treaty and all such rights were retained. The actions of both Ontario and Ottawa ensured that potentially valuable gold bearing land and land under water were removed from the purview of the Abitibi First Nation between 1908 and 1913. Although gold bearing land was not removed again in 1931 or 1974, the Ontario Department of Mines authorized the development of gold in Aboriginal land under the water. Lands and Forests should have been bound to lay out the boundaries of the Abitibi Reserve as it had agreed in 1906 and Mines should have respected Aboriginal headland boundaries.

Similar problems existed at Matachewan Reserve in which the Booth Pulp Limit was located. J.R. Booth had the right, under license, to cut spruce, poplar, whitewood and jack pine of eight

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4) ONAS, Abitibi File, letters, 13 May 1974, R.C. Denommee, Mining Recorder to J.C. Smith, Supervisor, Mining Lands Branch; and 17 May 1974, J.R. McGinn, Director Lands Administration Branch to the Regional Director, MNR, Cochrane.
inches diameter and upward. Ontario claimed the "description given for this Reserve in the schedule is insufficient to definitely define what should be the limits by this Department in the survey of the townships surrounding the same." This point, however, was irrelevant because the Limit had been set apart by an OIC dated 13 June 1906; that is, 7 days before the people at Matachewan even signed the Treaty.

This limit should not have been upheld by Ontario, nor should Canada have agreed to allow its continuance. The description of the pulp limit expressly "excepts all Indian Reserves and all land sold, patented or leased or for which negotiations have been carried on which, in the opinion of the Minister of Lands, Forests and Mines, may be sufficient for such exception." Rorke suggested that the Reserve be confirmed since it "forms an exception" under the pulp grant. However, Rorke also stated that Booth may argue his ownership of the limit gave him a "priority of claim over the Indian Reserve." On 17 June 1913, the Deputy Minister said in memorandum to the Minister:

I do not think the position of the Reserves under that Treaty [No. 9] was as carefully considered as it perhaps should have been, because you will notice that the Reserve at Matachewan, which is No. 3 on the list, covered part of the Booth Pulp Concession in the Temagami [Forest] Reserve. Booth has authority to cut Spruce, Poplar, White wood and Jackpine 8 inches and upwards on the territory set apart as an Indian Reserve. I am afraid there will be trouble with Mr. Booth if

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"ONAS, Treaty File, memo, 7 June 1913, Rorke.


"ONAS, Treaty File, memos, 7 June 1913 and 17 October 1919, Rorke."
we attempt to deprive him of the wood on this portion of his territory."

Ontario preferred to stand behind business interests rather than live up to its commitments to First Nations; Canada, still in a precarious position with Ontario over the Treaty No. 3 confirmation issue, failed to challenge the province on its actions and did nothing.

In error, the Schedule of Reserves stated the Mattagami Reserve was to be established on the west side of Mattagami Lake. In fact the Reserve should have been laid out on the east side. Ontario agreed to amend this, but upheld "a reservation of the pine timber on this Reserve measuring 8 inches in diameter...for a period of ten years" beginning in 1909. Rorke successfully recommended the confirmation of the Reserve "subject to the reservation of the pine timber" which continued until 1919 when an extension of time to cut pine was applied for. However, the DIA refused to sanction this and the Reserve was vested without the pine reservation.88

One additional infringement existed in Reserve boundaries. The Canadian Northern Ontario Railway passed over the northeast portion of the Long Lake Reserve, thus effectively and dangerously destroying the integrity of the land base.

On the basis of L.V. Rorke's 1919 memo, the Minister of Lands, Forests and Mines directed that all Treaty No. 9 Reserves

87 ONAS, Treaty File, 17 June 1913, "Memorandum for the Honorable the Minister of Lands, Forests and Mines," from the Deputy Minister.

88 ONAS, Treaty File, memos, 7 June 1913 and 17 October 1919, Rorke.
be vested except Matachewan which was to be investigated further. The very fact that such problems existed indicates that the province was disposing of Aboriginal property prior to the Treaty and that Ontario, for all its insistence that the commissioners (and not Native Peoples) choose the Reserve locations, was not very vigilant when Reserves were chosen. The problems arising from this lack of vigilance were settled against the best interests of First Nations under Treaty No. 9 causing the loss of valuable mineral and timber resources for which these Nations were never compensated.

NEGOTIATING THE ADHERENCE TO TREATY NO. 9, 1906-1930

Shortly after the Treaty was concluded, other Aboriginal groups signified a desire to be taken into Treaty. The DIA was informed by a trader in October 1906 that the Cranes residing near Cat Lake wanted a Treaty commissioner sent out in July and that they were more open to the idea of a Treaty now that their old Chief was dead. However, such traders likely also had "a personal prospector's interest in [their] unceded lands..."9

It seemed likely the Trout Lake people would also join the Cranes in Treaty. But, the DIA had no intention of entering into another Treaty at this time.90 By 1908, the Cranes asserted they would agree to come into Treaty but, their definition of what this would entail is very significant. Namely, they would only agree to

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97 Mary Black-Rogers. Excerpts from ASE paper. Thanks to Mary Black-Rogers for sharing this with me.

90 PAC, Treaty File, letters, 15 October 1906, Commissioner to Secretary, DIA (McLean); and 15 November 1906, McLean to Commissioner.
share the surface of the land and they insisted on retaining the right to use the shared Territory: they "'requested a separate Agency and wished the money to be paid in a sum total for the release of their lands and to be free to go and come on any part..."'\textsuperscript{9} Sub-surface rights would not be shared. The DIA was advised against broadening the Treaty by its agents in the field. In 1913, the Inspector for Treaty No. 8 informed J.D. McLean that neither settlement nor mining operations extended beyond the Albany. Thus there was "no reason why any immediate steps should be taken to extend treaty to the Indians inhabiting these parts of the country."\textsuperscript{92} Such sentiments indicate that mining incursions had been a very significant factor in the negotiations of the first Treaty and they emphasize the continuing connection between mineral development and the generation of Treaties.

Aboriginal petitions for Treaty continued throughout the 1910s and 1920s. In 1915, James Stoney stated he and his people at Winisk wished to sign Treaty. Stoney asserted that white men and the railway were encroaching on his lands and he feared that "we will be driven from our land." D.C. Scott replied a Treaty would require Ontario's concurrence and that the governments would not likely agree on this matter anytime soon.\textsuperscript{93}

It would appear the DIA did not take up the matter until 1922

\textsuperscript{91} Black-Rogers, ASE paper.

\textsuperscript{92} PAC, Treaty File, pt. 1A, memo, 21 February 1913, M. Cornoy(?), Inspector Treaty No. 8 to the Asst. Deputy & Secretary.

\textsuperscript{93} PAC, Treaty File, pt. 1A, petition of James Stoney, 29 July 1915 to the DIA; letter, 25 September 1915, Scott to Chief James Stoney.
when McLean wrote to provincial Attorney General W.E. Raney, for his opinion on the matter of extending the Treaty north of the Albany. This was raised with Ontario again the following year when Premier Ferguson erroneously stated that the Williams Treaty of 1923 constituted the "last claim of the Indians of the Province." Scott informed Ferguson that a large area north of the Albany had not been treated for, noting that the agent who paid out the Treaty No. 9 annuities had "on several occasions received verbal applications" from Native Peoples to enter the Treaty.

In 1925, the Severn Chief approached the RCMP officer, B. Stangroom, about entry into Treaty. In 1926, Samson Beardy petitioned RCMP Inspector Mead on behalf of his people around Trout Lake to be taken into Treaty. In spite of such requests, the DIA continued to put off the extension of Treaty.

Finally on 1 March 1929, Superintendent General Charles Stewart and Lands and Forests Minister Finlayson agreed to expand Treaty No. 9. The governments would each appoint one commissioner to negotiate the adhesion. Annuities were to be paid by Canada and reimbursed by Ontario as was the case under the original Treaty. Canada would bear all surveying costs for the Reserves which would be confirmed by Ontario as long as water power sites were excluded. Under OIC of 9 April 1929, Ontario approved Treaty terms

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and Finlayson signed the agreement with Canada. 95

Commissioners Walter Cain and Herbert Awrey were appointed to negotiate the adhesion to Treaty No. 9 under OIC dated 30 May 1929. Their 1929 report of the adhesion contains few important details of the negotiations. But, their 1930 report is even more lacking in substantial detail than the 1905/6 reports. During 1929, only two First Nations were added to Treaty - those at Trout Lake (the Cranes) and Lansdowne House.

Both Lansdowne House and a branch of the Crane Peoples around Cat Lake, discussed above, (who eventually obtained a Reserve at Caribou Lake) 96 fell within the boundaries north of the Albany River, marked A-B, which both governments considered to be within the bounds of the original Treaty No. 9. However, neither First Nation had signed the 1905/6 Treaty; the former signed in 1929 and the latter in 1930.

Mining in the area north of the Albany River and north of the A-B line was one of the main reasons for negotiating an adhesion in 1929. The Treaty stated: "The pushing back of the frontier is inevitable due to the spectacular interest and activity in the mining industry with its concomitant development..." 97 The Treaty commissioners would be flown in on planes owned by the Ontario Provincial Air Service (OPAS) and the Royal Canadian Air Force.


96 NOTE: the Caribou Lake Reserve was situated north of the A-B line.

97 Annual Departmental Reports, 1928-1929, DIA, "Report of Commissioners re. Adhesion to Treaty No. 9, For the Year 1929."
Provincial commissioner Cain, the Deputy Minister of Lands, Forests and Mines was flown in by William Roy Maxwell, Director of the OPAS. Both Cain and Maxwell had large interests in mineral locations.

Cain was well acquainted with mining activities in a portion of the proposed Treaty area. Copying the OPAS gas cache map for the adhesion area, Cain added red stars to emphasize the caches, ten of which were circled in red ink, representing those close to HBC posts where the Native Peoples would be met for Treaty. Red dated lines connected the circles and indicated arrivals and departures at each area. However, Cain was using this map as more than an itinerary and gas guide; he had pinpointed several mining locations on it. Cain marked a location east of Favourable Lake and south of Sandy Lake; one was situated south of Windigo Lake; another was noted southeast of Cat Lake or about halfway between Cat and Long Lakes; a mine at Crow River was marked; and another at the west end of Lake Eabemet. (See Map 31) Cain identified no mining locations north of Sandy Lake or above the 53rd parallel (latitude) and none east of Lake Eabemet or the 87th parallel (longitude). Thus he (and/or Ontario) had a rather limited knowledge, basically confined to the southwest quarter, of the adhesion area. Cain would have been interested to mark as many known mining locations on his map prior to making the Treaty

NOTE: location "5" is missing from the 1929 map, but according to a similar 1930 gas cache map (showing no mining locations) location "5" was at Attawapiskat. For this latter see, PAO, RG 1, JA-II, Box 5, 1929-1930, "Authority Flights."

See, W.C. Cain's gas cache and mining map for the adhesion to Treaty No. 9, undated. I am grateful to Janet Armstrong for sharing this map with me.
Map 31
Treaty No. 9 Commissioner Cain's Gas Cache Map showing mineral locations he has marked
because he wanted to ensure that no Reserves were located on known mineral locations. That is, the locations which Ontario had already illegally granted to miners in advance of the adhesion.

Maxwell's mining interests, among others, were problematic and created a large conflict of interest with his position as Director of the OPAS, in part leading to a Royal Commission inquiry into his numerous abuses of authority. In 1925 and 1926, Maxwell had authorized several unrequisitioned flights, at government expense, to Red Lake to stake mining claims in his and others' names. Later, these claims were cashed in and used to finance the establishment of the Patricia Airways Exploration Limited, a mining and rival flying venture. Maxwell's mining interests did not end in 1926, and as we shall see below, came to have some bearing during the Treaty No. 9 negotiations.

Federal commissioner Awrey arrived in the north first, paying annuities to the various First Nations previously established under the Treaty. Then, Cain and Awrey flew north, arriving separately, early in July, to find the Cranes and others gathered at Trout Lake. They emphasized a high degree of Aboriginal

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100. PAO, RG 18-104, Container 1, Proceedings of an Inquiry into the Ontario Provincial Air Service Before: Daniel W. Lang, Esq., K.C., "August - October 1934. Among numerous other abuses Maxwell had knowingly purchased used planes from his former employer while charging Ontario full or over-price for them; he arranged "special" mining and fishing trips for federal officials, friends and business associates free of charge; he misappropriated thousands of dollars from his government warrants, and the warrants of those under him, for personal uses; and he authorized the building of fire screens, among other things, from government supplies for gifts. Maxwell was never fired for these activities, but resigned voluntarily some time after the investigation.

101. PAO, Proceedings of an Inquiry..., "for testimony on these matters see pages 426-428, 672-676, 682-683, 753-759, 1003-1024, 1145-1149, 1171-1172, 1186-1187, 1227-1242, 1337, 1361-1362, 1371-1372 and 1383.
participation in the negotiations: "Every important point in the
treaty proposals from the area involved, which was indicated to
the Indians on a roll map...was carefully considered to the
minutest detail. In this they evinced the keenest interest,
particularly in respect of the detailed obligations of the Crown."
The Cree raised a great many questions concerning hunting, fishing
and trapping. According to the report, they also specifically
raised questions relating to mining, but the commissioners do not
detail what these were. Five hundred and seventy-seven people
signed at Trout Lake; fifty others were added at Lansdowne House a
few days later (totalling 670 persons). Almost 150 others were to
have been present, but for unknown reasons never showed up. In
their report, Cain and Awrey described four Reserves chosen by the
Cree at the following places: Trout, Sachigo and Wunnunmin Lakes.

Both commissioners left Trout Lake on 9 July in their
respective planes and were to rendezvous at Lansdowne House. But,
the Moth plane piloted by Roy Maxwell, carrying Cain, ran out of
gas due to weather conditions and the inability of either man to
locate the gas cache. Both used this opportunity to visit
potentially rich mineral locations and prospectors "at the western
end of the chain of lakes of which Wunnunmin, emptying into the
Winisk River, is the most important..."102 While on the ground,
Cain suffered a severe attack of appendicitis and was flown to a
hospital at Sioux Lookout. Maxwell and/or Cain may have procured

102 Annual Departmental Reports..., "Report of Commissioners...". McNab
emphasizes this incident in "The Professionalization of Historical Research in the
mineral samples from the unidentified prospectors. These prospectors, likely licensed by Ontario, had been in the area before the commissioners arrived to obtain the adhesion. As we have seen above, Maxwell was perfectly capable of mixing personal mining interests with official business.

Significantly, this mine location was not marked on Cain's gas cache/mine map and the nearest actual gas cache was many miles away (south of Lake Eabemet). Thus, it is clear that Cain (and/or Maxwell) was aware of other mining activity in the adhesion area in addition to the mine locations he had drawn on his map. Cain and/or Maxwell obviously knew where the miners were located and how to get there from the spot where the plane landed. This incident again points to the mineral interests of government officials involved in the Treaty and continues to indicate that Canada and Ontario were doing little to either respect or protect Aboriginal mineral rights.

In concluding their Report, the commissioners drew attention to Aboriginal interest in mining issues, noting that Ontario ordered "certain inquiries...in respect of mining claims and the feelings of the Indians regarding fishing, trapping and hunting." They provided no detail on the mining claims. But, it is clear that such claims were a problem at the newly defined Reserves at

^13^ NOTE: I have tried to locate Maxwell's daily flight report for this day to ascertain the exact location the plane went down to determine the distance from the landing to the approximate mine site. But, this cannot be determined from the OPAS records because daily flight returns were culled and there is no list of destroyed files. See PAO, RG 1, JA-IV-1, Provincial Air Service, Operations, Flight Reports. Maxwell did not make either an accident or a forced landing report (JA-II-2), but the fact that the OPAS HQ had lost touch with Maxwell and Cain for a few days, however, is evident from correspondence.
Trout, Wunnummin and Sachigo Lakes since the commissioners recommended that Ontario approve these subject to Aboriginal mineral rights protected under the 1924 Agreement.\textsuperscript{104}

During the 1930 adhesion round, the commissioners paid annuities to all Treaty No. 9 First Nations and authorized the establishment of two new Reserves. The first was for the Sandy Lake First Nation, originally under Treaty No. 5. This First Nation had splintered from the Deer Lake First Nation and received its own Reserve at Sandy Lake Narrows in the Treaty No. 9 area. The second, located at the junction of the Little Eqwan River with the main Eqwan River, was for the Attawapiskat First Nation.\textsuperscript{105}

Three First Nations signed under the Treaty in 1930 including the Cranes at Windigo River/Caribou Lake, that around Fort Severn and that at Winisk. Cain and Awrey note that the Winisk First Nation knew more about the Treaty terms than other signatories, but do not record what the Aboriginal perspective of the Treaty terms was.\textsuperscript{106} Historian John Long asserts that prior to 1930, one fifth of the Native Peoples who traded at Winisk obtained annuities under the Fort Albany Treaty lists. He suggests that "this may explain why the Winisk Cree repeatedly indicated to the treaty commissioners in 1930...that they knew 'perfectly all about

\textsuperscript{104} Annual Departmental Reports..., "Report of the Commissioners...".


\textsuperscript{106} PAC, Adhesion File, "Report of Commissioners...," pp. 15-17.
this treaty.'" But, just what this statement means is unclear. It is clear, however, as both John Long and Jim Morrison show, that the Winisk Peoples did not understand the Treaty as the government later wrote it down. Morrison emphasizes the large discrepancy between Cain and Awrey's statements regarding the alleged superior knowledge of the Winisk people and the words of Michael Patrick, a member of the Winisk First Nation whose brother signed the Treaty. Patrick's assertions clearly indicate the Treaty which the Winisk First Nation agreed to was not either the 1905/6 Treaty or the 1929/30 adhesion. All they agreed to was to allow the government to protect the land from fire - there was no sharing of any other rights or privileges:

Then came another story of another boss who would arrive soon and he would be called the "shonia ogima" ("money boss," i.e. Indian Affairs). This would be a government boss. The mail came through these trading companies, announcing the upcoming arrival of these men and contained within the announcement was a notice to decide about the state of land and payment of four dollars or eight dollars for the land. The person who took the money would in turn receive the laws. That's what the notice said even though nobody really understood what the notice meant. That letter came to my brother Xavier Patrick who understood some English because he had gone to school... These people finally arrived, the Indian Affairs man, one doctor and R.C.M.P. There were no Lands and Forests representative yet. When they arrived, they gave word that three candidates should be selected for the position of chief. One was my brother Xavier, another David Sutherland and John Bird. Xavier was selected over the others because of his knowledge of English. We did not understand English nor did the visitors understand us. Our interpreter also did not speak our dialect. He was brought in from Stranger River. He was a halfbreed... In our discussions, it was stated that anyone who wanted the laws would receive

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money...With the agreement, the government's representative stated that no one wanted to control the lifestyle of the people. The people who relied on the birds would be left in their care and no one else would take them away. The animals who walked also were left in their care and no one else could hunt them. No one could dictate terms which would affect their traditional lifestyle. Food, in the form of birds, animals and fish, could still be used by the people...The people would also control the trees and use them as in the past. Laws were applied to the land however, in order to take care of it, and to avoid destroying it by fire. It was also stated that anyone not interested in making his own living, who was lazy, could not be helped but those who were skilful and had the ambition to run their lives, would be assisted by the government...[my emphasis]

The Winisk First Nation believed the Treaty meant accepting the "laws" and laws were only defined as applying to the land for its protection. There was then, no agreement even to share surface rights. There was certainly no relinquishment of sub-surface or sub-marine rights. Furthermore, the First Nation was told it would be able to continue harvesting its food and timber resources without restriction. If this is how the "Treaty" was explained here, how was it explained elsewhere? How are we to explain the fact that not one of the terms described by Michael Patrick appeared in the written version of Treaty No. 9?

The gulf between the oral and written Treaty at Winisk is only underlined by the fact that the commissioners left no copy with the First Nation. Indeed, some members of the Winisk First Nation told David McNab, then with the MNR, that they had never seen a copy of the actual written Treaty until he brought a copy

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to them, at their request.199

THE ADHESION TO TREATY NO. 9 AND THE COMMON LAW

What did the adhesion bind the signatories to? -- to a collective oral Aboriginal understanding of what had been agreed to by First Nations in 1905 and 1906? -- or to the written Treaty which, as we have seen, could often vary widely from what First Nations had actually agreed to and discussed?

The adhesion to Treaty No. 9 allegedly bound the northern Ojibwa and Cree to the written terms of the 1905/1906 Treaty and allegedly released Aboriginal Rights to 128,320 square miles north of the Albany River in the Patricia portion of Ontario (See Map 29). On the basis of the written texts alone, there was one important difference between what was allegedly surrendered by Aboriginal People under the first Treaty and what was allegedly surrendered under the adhesion. Namely, the written adhesion stated that Native Peoples ceded all rights in the "land and land covered by water" in Ontario. This provision was not discussed during the negotiations. Native Peoples were not informed this clause would appear in the written Treaty, nor did they consent to it. Furthermore, and most significantly, it does not appear in the original 1905/1906 Treaty. The legal implications of this discrepancy have never been considered. Namely, can an adhesion bind the signatories to relinquish rights which they never agreed to and which were not relinquished under the provisions of the prior Treaty? As well, this provision cannot apply to the large A-

B area because this was included in the 1905/1906 Treaty.

Whether the provision is binding or not, it is extremely significant for Aboriginal Rights in shared areas. So far as I have been able to determine, the adhesion to Treaty No. 9 appears to be the only Treaty in Ontario which expressly states land under water was ceded.\(^{110}\) The significance of this cannot be overstated. Under the common law, as has been previously noted, no right or resource passes to the grantee unless expressly stated to have passed in the instrument. Because it was expressly stated that land under water passed to the province in this one case, in all other Treaties where no such stipulation occurs such land remains part of the Aboriginal Territory.\(^{111}\) In fact, as we have seen in Chapter 4, Justice Rose argued that such land had not been surrendered under Treaty No. 3. As we shall see below, this line of argument has wide implications for potential headland claims in the Treaty No. 9 area.

**MINING CLAIMS AND THE UNSURVEYED TREATY NO. 9 RESERVES**

Ontario confirmed eight Reserves under the Treaty by order-in-council of 18 June 1931. The Native Peoples at Trout Lake

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\(^{110}\) Some of the early Treaties in southern Ontario state that First Nations surrendered their land with "woods and waters" or alternately, surrendered land with "watercourses." Native People, however, had not in fact verbally agreed to surrender water. These phrases are part of the legal surrender form which was written prior to negotiation and do not reflect what First Nations agreed to. See for example Indenture #3; Cessions #7, 8, 11 and 12; Indentures #13 and 14; and Cession #15. Even if waters must be ceded under these instruments, although First Nations never consented to this, land under the water and sub-marine rights were not surrendered and remain Aboriginal property.

\(^{111}\) It is not possible to escape the implications of this argument by asserting that the 1911 Beds of Navigable Waters Act or the 1915 Treaty No. 3 legislation was behind the inclusion of this clause in the adhesion to Treaty No. 9. The Williams Treaty of 1923 does not include a similar passage.
comprising three Nations obtained three Reserves at the following locations: Trout, Sachigo and Wunnummin Lakes. The Deer Lake First Nation selected a Reserve at Sandy Lake Narrows. Fort Severn, Winisk and Attawapiskat First Nations also chose Reserves along various waterways. By 1945, only three Reserves (Sachigo Lake, Caribou Lake and Sandy Lake) had actually been surveyed by Canada. A myriad of problems already existed with Reserve boundaries and mining claims at Sandy Lake and Ontario insisted that Canada immediately survey the outstanding Reserves.\textsuperscript{112}

Provincial Surveyor General, C.H. Fullerton, noted several mining claims located within the Sandy Lake Reserve. All except two had lapsed by 1940. A portion of the two active claims (Pa 3158 and Pa 3159), which had been staked in July 1936 by Father Dubeau, fell within Reserve boundaries (see Map 32). In April 1937, C. Stewart purchased an option on Dubeau and J. Dussault's claims. In July, Dubeau obtained another mining claim (Pa 3161) by transfer from R. Nadeau. He had also established a Roman Catholic mission, at a separate location, on Reserve land prior to the survey of the boundaries.\textsuperscript{113} Father Dubeau was looking for gold. In 1937, he wrote to agent McPherson informing him that gold had


\textsuperscript{113} ONAS, ILF #185908, "Indian Reserve #88, Sandy Lake" (hereinafter cited as ONAS, Sandy Lake Pile), letters, 26 September 1940, C.H. Fullerton, Ontario Surveyor General, Lands and Forests to P.H. Peters, Surveyor General and Chief, Hydrographic Service, Department of Mines and Resources. Re. Nadeau transfer see 13 July 1942, Fullerton to Dubeau. Re. optional agreement see, 27 September 1944, J. Work, Chief Clerk Department of Mines to Fullerton.
Map 32
Plan showing mining claims in the Sandy Lake Reserve

SANDY INDIAN LAKE RESERVE
been discovered about one mile south of the proposed Reserve. Dubeau admitted he had already sold his interest in one claim for $5000 which he used to upgrade his mission.\textsuperscript{114} (See Map 33).

In October 1940, Fullerton searched for, but failed to find, evidence that Dubeau had any right to establish the mission on Reserve land. Survey plans showed the mission with surrounding lands south of the southern boundary, which comprised 291 acres. This area was supposed to have been included in the Reserve. Fullerton asked Dubeau to explain under what authority he appropriated the 291 acres. His superior, Vicar Martin Lajeunesse responded that most likely the land had never been formally applied for because it was to be included in the Reserve and alleged the Sandy Lake First Nation had consented to the building of the mission. Maintaining that OLS Currie had suggested the property be filed under the name of the mission, Lajeunesse indicated the Diocese would make a formal application, if need be.\textsuperscript{115} There is no evidence that the Sandy Lake First Nation consented either to the mission or to the appropriation of 291 acres for this, or any other purpose. Fullerton suggested the 291 acres be returned to official Reserve status and that new plans be drawn up. However, even if this was done, the total Reserve area

\textsuperscript{114} NOTE: At some point between 1938, when the Sandy Lake Reserve boundaries were surveyed and 1940, the mission was stated to consist of improvements worth over $12,000 including: a church, school, gardens and sawmill. A wharf was located in front of the sawmill in a bay in Sandy Lake. There is no evidence the Sandy Lake First Nation consented to any of this. Clearly, gold was not the only Aboriginal resource Dubeau sought to exploit. ILP #185908, letter, 7 October 1940, Peters to Fullerton.

\textsuperscript{115} ONAS, Sandy Lake File, letters, 21 October 1940, Fullerton to Peters; 26 November 1940, Fullerton to Dubeau; and 15 May 1941, Vicar Martin Lajeunesse to Fullerton re. alleged Aboriginal consent.
Map showing Dubeau's timber interests in the Sandy Lake Reserve
still fell 71 acres short of the Treaty entitlement.  

Dubeau, or his optionees, had been very conscientious in carrying out work on the mining claims. Indeed considerable assessment work was evident leading Fullerton to conclude the owners intended to acquire patents. He warned that the claims would have to be surveyed before patents were issued and that if they breached Reserve boundaries, "the claims or portions thereof would have to be excluded from the...Reserve." [my emphasis] As we have already seen, this is what happened earlier at Abitibi. Ontario's policy continued to divest First Nations of potentially valuable gold deposits in their Reserves.

In the mean time, Ontario would not confirm the boundaries of the Sandy Lake Reserve as surveyed. Fullerton insisted that either the mining claims lapse or be surveyed. In September 1941, he again commented on the extensive assessment work and stated it was likely the claim holder would apply to Ontario for patents. In the following years, Ontario did everything possible to assist Dubeau, or his optionees, in obtaining patents and thus in dispossessing the Sandy Lake First Nation of potential gold and its right to decide whether to develop this gold.

In July 1942, H.C. Rickaby, Deputy Minister of Mines, reminded Dubeau that survey of claims, application and payment for patents would have to be completed by 14 October 1942 and advised that an extension of time for any of these things could be

\[\text{\textsuperscript{116} ONAS, Sandy Lake File, letter, 27 May 1941, Fullerton to Peters.}\]

\[\text{\textsuperscript{117} ONAS, Sandy Lake File, letter, 26 September 1940, Fullerton to Peters.}\]
obtained by applying to the Mining Court in Toronto. Survey and patents had still not been obtained by February 1944 at which time the Mining Court relieved the claim from forfeiture and extended the deadline for payment and patent another seven months, fully expecting to grant a further extension because of the isolated location and the difficulty in obtaining a surveyor.118

In spite of the problems with Dubeau's claims, the Department of Mines accepted six additional applications for mining claims from P.C. Benedict (represented by Hales & Burt), located "partially in or adjacent to the southwest part of Sandy Lake" Reserve. They were given the status "filed only." Chief mining clerk, J. Work, noted that the 18 June 1931 provincial OIC confirming the adhesion Reserves vested them in the DIA. The order was subject to the 1924 Lands Agreement. This meant that any mining claims staked after the adhesion were void. Rickaby asserted that two of the applications covered land which were without doubt "wholly within" the Reserve and the other four were situated in land under water. He suggested authorization of these claims following the settlement of the southern boundary.119 These claims fell within the headlands of the Reserve.

Here was a chance for the 1924 Lands Agreement to actually work in favour of Native Peoples and to protect the integrity of their land base and mineral resources, but it was not to be. On 2

118 ONAS, Sandy Lake File, letters, 8 September 1941, Fullerton to Peters; and 13 July 1942, Rickaby to Dubeau; and memo, 27 September 1944, J. Work, Chief Clerk, Department of Mines to Fullerton.

119 ONAS, Sandy Lake File, letters, 3 February 1945, A.W. Burt to Fullerton re. application of 1924 Agreement. Also, 27 January 1945, Rickaby to Burt.
March 1945, the Indian Affairs Branch (in the Dept. of Mines) stated it would concur in the exclusion of the mining locations from the Reserve. However, Ontario still could not confirm Reserve boundaries because the claimants had still not yet obtained a survey of their claims. These surveys were only completed sometime between mid-March and mid-June 1945. Ontario confirmed the boundaries of the Sandy Lake Reserve on 31 July 1945, including the 291 acres which had been appropriated by Dubeau for his mission and excluding the now patented claims Pa 3158 (7.52 acres) and Pa 3159 (9.79 acres). In order to facilitate the issue of patents, Ontario extended deadlines under its Mining Act for three years past its initial deadline in 1942. The Reserve was still short 71 acres.120

Ontario has continued to keep a tight rein on land and mineral resources. Even by the 1960s, Canada had not surveyed all of the scheduled Treaty No. 9 Reserves. Several groups of Native Peoples, initially attached to recognized First Nations, split off and established communities on other lands121 which were not recognized as Reserves. In 1968, Ontario’s Lands and Forests agreed to transfer these areas to Indian Affairs so that surveys could be carried out and Reserves established. The province said

120 ONAS, Sandy Lake File, letters, 2 March 1945, Acting Director, IAB, Department of Mines to Rickaby; 12 March 1945, Fullerton to Hales & Burt; 2 June 1945, Fullerton to Acting Director IAB; 14 June 1945, Fullerton to Acting Director IAB; 2 August 1945, Fullerton to Peters; and 2 August 1945, Description of Sandy Lake Indian Reserve No. 88.

121 Eight such settlements existed: Bearskin Lake, Deer Lake, Fort Severn, Kasabonika Lake, Kingfisher Lake, Poplar Hill, Weaganow (Round) Lake and Wunnunmin Lake.
it would transfer full mineral rights to First Nations.

In 1968, it was the stated policy of Ontario's Department of Mines to convey mineral rights to mining enterprises alone. This policy was not followed in the Treaty No. 9 case because Mines possessed geological information which indicated "...the proposed reserves may not be rich in minerals." On the basis of this knowledge, Lands and Forests "...recommended that mineral and forest resources will be included in the transfer. Wherever the reserve land has a water boundary, no land under water will be included as part of the reserve." By 1975, these Aboriginal communities still had no Reserves and Ontario desperately hoped to avoid meeting the commitment it had made seven years previously to provide land for this purpose. Since 1968, Ontario had embarked on a new policy. Its aim was "to preclude expansion of Indian Reserve holdings in the province." Some of these Reserves were finally confirmed with mineral rights in the 1980s.

Outside interest in gold at the southwest corner of Sandy Lake Reserve did not end with World War Two. The original patents apparently lapsed and the land became crown land. During the 1980s, this area was restaked by Blaine Webster, president of JVX Ltd, located near Richmond Hill, Toronto. Sandy Lake Exploration

122 ONAS, Deer Lake File, memo, 20 December 1968, Ontario Lands and Forests, "Re. Indian Reservations in the Patricia Portion of the Kenora Territorial District," anon. This was approved by the Deputy Minister.

121 ONAS, ILF 186892, see memos, 21 March 1975, J.R. Oatway, Regional Director Northwestern Region Kenora, MNR to D.M. Peacock, Executive Director, Division of Lands (the three outstanding Reserves were for Aboriginal communities at North Spirit Lake, Deer Lake and Poplar Hill); 15 July 1975, Peacock to J.W. Giles, Assistant Deputy Minister, Lands and Waters; and 10 October 1975, J.K. Reynolds, MNR, Deputy Minister to Leo Bernier, Minister. See also untitled, unsigned, and undated recommendation paper (2 pages).
Ltd. and Gold Eye Exploration purchased an option on Webster's claims. The companies wanted to engage in diamond drilling through ice into the land under water to determine gold potential. This included the same area which had been removed from the Reserve in the early 1940s. These aspirations brought the companies into direct conflict with the Sandy Lake First Nation which unsuccessfully attempted to stop the MNR from issuing Sandy Lake Explorations a work permit in 1991. Chief and councillors tried to have the work permit revoked and refused to allow the companies to use their airport. While this struggle ensued, the ice on the lake melted and the companies could not drill anyway.\footnote{Personal Communication: Brian Atkinson, Resident Geologist, Red Lake Ontario, March 1994. Also, Wawatay News, 14 July 1994, "Sandy Lake opposes gold exploration on traditional land." Thanks to Mary Black-Rogers for bringing this article to my attention.} The First Nation effectively stopped the unwanted and environmentally damaging diamond drilling.

This issue arose again in 1994 when JVX Ltd. applied for a work permit from the MNR for cutting, trenching and diamond drilling on West Arm Bay of Sandy Lake adjacent to the Reserve (including the area discussed above). The company found evidence of gold mineralization in the Bay and believed it extended into the Reserve. Two other areas in the traditional Territory of the First Nation are also slated for exploration. Chief Eli Sawanis and the First Nation Council passed a resolution opposing the issuance of a work permit to the Company. The Sandy Lake First Nation will protect its traditional lands and is concerned about
the effects of diamond drilling on water quality and fish.

Chief Sawanis asserted that if MNR again issues a work permit in the face of Aboriginal opposition, the First Nation would obstruct company operations:

...if an exploration company visits the sites, first we'll tell them they're not welcome on our land, then we'll probably give them a day to clear out. If they don't clear out, we may have to go back and remove those things (like drilling equipment) that are offensive to the land.\textsuperscript{125}

This was a very clear statement that the First Nation did not want and would not allow gold exploration or development in its lands and waters. Lake Ponask First Nation and Muskrat Dam First Nation are also opposed to mineral exploration near their Reserves and on their traditional lands.\textsuperscript{126}

CONCLUSION

Treaty No. 9 shared many similar features with the other large Treaties previously concluded in Ontario. Illegal surveying, mineral exploration and mining activities were authorized by Ontario and Canada in advance of a Treaty and continued even as the Treaty was being signed in 1905 and 1906. First Nations resisted this activity through petitions and memorials to government representatives and by stopping or watching parties which entered their Territory. Thus, conflict over minerals precipitated Treaty No. 9 as well. Prior to both the Treaty and its adhesion we see the self-interest of numerous government

\textsuperscript{125} Wawatay News, 14 July 1994, "Sandy Lake Opposes gold exploration..."

\textsuperscript{126} Personal Communication: Brian Atkinson, March 1994.
officials in minerals.

As in the other Treaty areas, the location of minerals was important in determining the position and extent of Reserve areas. Ontario consistently cleared the way for the holders of staked claims to obtain patents and then caused these areas to be resurveyed outside of Reserve boundaries. Thus, the governments failed to safeguard Aboriginal mineral rights in Reserve and shared lands in spite of the fact that First Nations never surrendered subsurface or sub-marine rights and that Treaty No. 9 and its adhesion, as orally negotiated and later orally clarified, acknowledged and protected these.

However, significant differences also existed. Unlike the Robinson and Northwest Angle Treaties where it was only intended to take the small strips of land where mining patents had been issued or where the Dawson road passed, the government always intended to secure the cession of a large area in 1905/06 and in 1929/30. But, the slow expansion of mining north of the Albany River was one reason why Canada pro-longed the extension of Treaty No. 9. The commissioners did not hesitate to comment on mineral potential in the area when the adhesions came.

The failure of the Treaty No. 9 commissioners to officially record substantive detail about the negotiations between themselves and the First Nations seems more extreme in this case than others. As in other Treaties, the written record substantiates the facts that on more than one occasion the commissioners made outside promises which were not reflected in the written Treaty.
The most extreme example of this appears to be at Winisk where not one of the oral Treaty terms ended up in the written adhesion.

The James Bay Treaty also differs from all the others under consideration in this dissertation because of the inclusion of the A-B area under the 1905/1906 Treaty and the Adhesion. The water, land under water and minerals of the A-B area, like those in the 90,000 square mile area, were not transferred to the Crown under the 1905/1906 Treaty. As well, this is the only Treaty in Ontario which explicitly reproduces the entire text of the 1894 Agreement within the Treaty itself thus, importing headland boundaries into Treaty No. 9.
CHAPTER FIVE

FIRST NATIONS AND OIL AND GAS DEVELOPMENT:
NEGOTIATION AND RESISTANCE

INTRODUCTION

First Nations on Manitoulin Island and in south-western Ontario, where most of Ontario's oil and gas fields are located (see Map 34), never relinquished sub-surface or sub-marine rights under any Treaties or other agreements with the Crown. Oil, gas and other minerals in the ground and in the land under water, in Reserves and in shared Territories, remain Aboriginal property. These minerals have always been the property of the Ojibwa (Chippewa), Ottawa and Potawatomi Nations of south-western Ontario.

This chapter will examine selected First Nation experiences in negotiating and resisting oil and gas development on their Reserves. Whether Native People agreed to or refused such development, their overall experience with the Department of Indian Affairs (DIA), leases and companies appears to have been very disappointing in the instances explored here.

THE WIKWEMIKONG FIRST NATION AND THE DIA'S MISMANAGEMENT OF OIL AND GAS DEVELOPMENT

The easternmost section of land on Manitoulin Island comprises the Wikwemikong Reserve (Wiki). The Wikwemikong First Nation, which includes Ottawa, Potawatomi and Ojibwa Peoples, did not sign either of the two Treaties concluded on Manitoulin Island

For the locations of all the oil-bearing Reserves discussed in this Chapter, except Wikwemikong, see Map 34. For the Location of Wikwemikong and Manitoulin Island see Map 3 and block "V" on Map 16.
in 1836 or in 1862. Their land is unceded Aboriginal Territory.

Sixteenth century Jesuit missionaries were probably the first white men to learn of the existence of oil on Manitoulin from the Ottawa who showed them two springs at Smith's Point. These springs were of interest to Canadian developers like William Baby in the 1860s. Baby referred to Jesuit knowledge of the springs in his 1865 Report of operations.

Baby claimed to have permission from the Wikwemikong First Nation to explore for and develop oil over its entire Reserve comprising 375,000 acres. It is not known what the First Nation demanded in return for this privilege. The DIA, however, did not recognize leases unilaterally negotiated by Native People. Baby and his associate, Mr. Berthelot, also applied for a government lease in August or September 1864. Although their application did not comprise the entire Reserve, it covered an area 10 miles wide across the waterfront and 7 miles deep.

Although some Native People had made their own arrangements with Baby, the DIA refused to sanction them. Charles Dupont, the Indian agent at Manitouling, who doubted the oil potential of the Island, was instructed to deal with several other oil applications received by the DIA. Deputy Superintendent William Spragge directed Dupont to hold a council and obtain a blanket surrender of

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2 For written terms of these Treaties see Canada, Indian Treaties and Surrenders, Vol. 1, surrender Nos. 45 and 94, pp. 112 and 235 respectively.

1 ONAS, Alderville to Wunnumin Lake, 1991, p. 258.

oil and gas rights from the Chief and councillors. Dupont fixed the date of this council for early in the new year, but held preliminary discussions with various Native People on the issue and already knew they would not agree to conduct business through either himself or the DIA. Based on these early conversations with the First Nation and its priest, Father Stanipeaux, Dupont reported the First Nation viewed itself as sovereign:

...the Indians are a separate and distinct Nation, and very jealous of relinquishing any of their rights, by appearing to consent to the Right of Her Majesty's Govt to exercise any control over the Reserves, in admitting that they cannot directly themselves lease these locations, and giving the Govt the right of doing so.

I am of opinion they will desire permission to treat with Messrs. Baby + Berthelot + others for themselves. A principle which I hope will not be allowed more especially as in this case a large number of the Indians composing this settlement are from the United States, some of them indeed still going there annually to receive treaty money from the American Govt."

Dupont did not like American Native People. It is clear he viewed them as troublesome because many refused to relinquish oil and gas rights to the DIA. They and others wanted to conduct business

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Note: Allan Macdonell, former ally of Shinguacous and Nebenagoching, was advising both the Wikwemikong First Nation and its priests behind the scenes on Aboriginal rights. Personal communication: Jim Morrison, 28 July 1994.

See for example, Vol. 574, letter, 19 January 1866, Dupont to Spragge, pp. 281-282 where the American, Osow wah me meke, refuses to agree to surrender oil rights unless the DIA agrees to sanction the removal of M. Baptiste, a Wikwemikong resident who was forced from his home two or three years earlier for his part in agreeing to the 1862 Treaty. Further references to the Baptiste issue can be found in Dupont's letters and Spragge's replies. See also Doug Leighton's, "The Manitoulin incident of 1863: an Indian-white confrontation in the Province of Ontario," *Ontario History*, (Vol. 69, No. 2, June 1977), pp. 113-124. Numerous other references occur which attest to Dupont's aversion toward American Natives, see: Vol. 574, letter, 27 March 1866, Dupont to Hon. A. Campbell, Supt. General of Indian Affairs, p. 301. Here Dupont stereotypes all Americans at Wikwemikong as "...a source of trouble + ringleaders in every disturbance + by their evil influence have induced a seditious spirit among a portion of our own Indians." The 18 June 1866, petition from the Wiki Indians also indicates that Dupont
for themselves. Dupont did not like any Native People and treated those at Wikwemikong with the greatest "hatred" and disregard. He was removed from office in 1868, because of his behaviour toward the Wikwemikong First Nation, assault on a priest and irregular land dealings. His character and attitudes need to be kept in mind when assessing his account of oil and gas leasing at Wiki.

Dupont was to have held the first vote on oil and gas at the beginning of 1865. Although he posted notices to this effect, the Chiefs and Principal men "declined to attend the council," later submitting a written statement of their position that they would not lease oil through the government. In assessing Aboriginal behaviour, Dupont stated:

their impression is that as owners of the soil they have a right to lease these locations directly from themselves and that if they attend any council or grant any permission to the Government to lease them for them they part with an imaginary title they have to distinct and independent nationality.

Given Dupont’s enormous dislike of Aboriginal People, the opposition and obvious sovereignty of the Wikwemikong First Nation must have annoyed him. Dupont’s comments, here as elsewhere, indicate that Native People viewed control over their minerals as an aspect of their inherent sovereignty. This more than any other reason is why the DIA tried, but failed, to prohibit it.

Dupont informed Baby and Berthelot he had failed to secure

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insulted the Canadian Chiefs by calling them "Americans." Vol. 574, p. 71.

Vol. 574, petition from the Wiki Indians, dated 18 June 1866, pp. 71-73.

oil rights from the First Nation, but hoped to have a surrender by
the winter, advising the applicants that attempting to rush the
Chief and councillors into an agreement would result in failure. However, the point is that the Chief and councillors were more
than ready to negotiate their own deal (and in fact, already had); they did not want the involvement of either Dupont or the DIA. Thus, any official delay in the development of Native oil on Wiki
was due to the efforts of the Department to assert its authority
over the First Nation and not First Nation resistance to
development. DIA posturing over this technicality must have
angered Baby since he had already obtained Aboriginal consent.

Dupont received a draft oil agreement from Spragge which was
to be voted on at another council arranged for 2 May. The date of
this council was carefully selected so Baby and Berthelot could be
on the Reserve and at the vote. Dupont suggested that American
Natives be excluded from voting. He was sceptical of the
chances of obtaining a surrender, emphasizing the First Nation
would readily negotiate its own leases, but still refused to do so
through the DIA. He argued that until Native People were made to
realize there was no other choice but to lease through the DIA,
they would continue to hold out. Dupont stated he would use every
means at his disposal to obtain a surrender.

In addition to running affairs on Manitoulin as a whole,

1 Vol. 574, letter, 13 February 1865, Dupont to J.R. Berthelot, p. 159.
Dupont also had charge over First Nations and their Reserves on the north shore of Lake Huron. He vigorously opposed the idea that the Wikwemikong Nation should act on its own behalf, arguing that other First Nations would also seek this right, particularly the Garden River First Nation which "...have mineral lands on their Reserve, which white men, amongst others, Mr. Keating have been amongst them trying to secure - will claim the same right + much trouble will ensue..."\(^{12}\) If one First Nation was allowed to assert its sovereignty through the negotiation of independent leases (which did not lead to extinguishment of title), others would also do this, thus subverting the purpose of the DIA.

Dupont postponed the vote for three days because Baby and Berthelot could not be present until the 5th. This action was not ethical; none of the developers should have been present at the vote. Dupont commented on the very small number of Native People present for most of the council - only 45 from a total population of about six or seven hundred. Dupont was unable to explain the provisions of the government draft lease because he was constantly interrupted by Father Chone, reportedly speaking for the Native People. Dupont was given a copy of a leasing arrangement which he claimed Chone had written with little or no reference to the wishes of the First Nation. One clause provided Baby and Berthelot with exclusive rights to develop the entire Reserve; another

\(^{12}\) Vol. 574, letter, 25 April 1865, Dupont to ? [Spragge], p. 192. NOTE: this is the same John Keating who, in May 1845, was removed as Indian Agent from Walpole Island in a side investigation into his fraudulent activities by the Bagot Commissioners, and who betrayed Shinguacouese at Garden River shortly afterward or in the following year and who purposely distorted the boundaries of the Robinson Treaties Reserves.
stated all revenues generated would be paid to Chone who would then distribute monies to the First Nation. The first of these provisions did indeed seem to be an Aboriginal term as this is what Baby earlier reported as well. Dupont claimed the Natives agreed to alter the clause concerning the payment of money and allow the revenue to be paid to Dupont and through him to themselves. Dupont maintained that Berthelot and Baby already proposed to amalgamate with other applicants. It is clear he saw this as a threat to DIA rule since the Company would "...actually take the control which the Department should have over the management and leasing of this mineral reserve."^{11}

Although the DIA failed to obtain Aboriginal consent at this vote, Baby and Berthelot were licensed on 10 June 1865, to "begin operations" on 70 square miles of Wikwemikong. This arrangement was authorized under order-in-council (OIC) of 21 June.^{14} This license was not valid; it breached government rules regarding nonNative resource development on Reserve land. The DIA was aware of this fact and continued to instruct Dupont to obtain the consent of the First Nation. Even though some First Nation citizens had negotiated an independent lease with Baby, the DIA could not issue a license because it had not obtained Aboriginal consent to do so. This was a obvious demonstration of Wikwemikong

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sovereignty. This First Nation never did give consent, either at the time or later, for the DIA's license to Baby.

Dupont believed he would obtain a blanket surrender of oil rights in a second vote, stating: "I have hopes of succeeding in procuring their consent altho it will be more difficult to do so now, than it would have been prior to Messrs. Baby & associates being permitted to commence operations." There is no doubt that the DIA was trying to cover its back by continuing attempts to legitimize Baby's illegitimate lease after the fact.

Dupont advised the DIA to pay over all monies to First Nation members instead of investing it and paying only the interest, asserting it preferred this course which might aid the DIA in obtaining a surrender of its oil rights. Dupont would charge $20 to issue a license and $50 for each location allowed. Evidently, Dupont intended to use money from this development to bribe the First Nation into agreement.

After being directed in September to "expedite" the surrender issue, Dupont held a council with Wah Ka Kizhok, the most influential Chief, to arrange a vote date. The Chief replied that people were fishing and would not return by the fall date Dupont desired. As a result, Dupont reported that the council would be held early in the following year and enclosed an annual report from the Great Manitoulin Oil Co. (Baby and associates). Thus,

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the Company was reporting its oil exploits to the DIA which had not yet obtained Aboriginal consent for its license.

It is not known what became of the sums of money previously mentioned by Dupont, but at this time, he noted that $3 had accrued to the First Nation from oil dues. Three dollars was the return on 12 barrels which meant that under the terms set by the DIA, Aboriginal benefit amounted to only .25 cents per barrel. Dupont stated he would take this money to council and pay the First Nation in an effort to gain their consent. This was a very negligible return, amounting to well under one cent for each First Nation member. In this same period, one barrel of oil was worth $12 at the Bothwell oilfields to the south west.\(^{18}\) If Manitoulin oil was worth about the same, the DIA secured dues worth 1/48th the value of a (Bothwell) barrel. Even if a barrel of Manitoulin oil was worth half the Bothwell price, the percentage authorized by the DIA as compensation was too low.

In spite of Dupont's earlier statements regarding fees for licenses and locations, this small rent of 25 cents per barrel appeared to be the only monetary provision made by the DIA for the benefit of the First Nation. Baby describes the terms imposed by the DIA in the following language:

> The license is granted upon the conditions of paying a moderate rent or bounty to the Indian Department, for the benefit of the Indians, to the amount of about one cent per gallon on all Oil obtained in the territory during the term of the lease, and without any further taxes or charges whatsoever. The license also admits of

the use of all building materials, fuel and timber required for the purposes of the Company, subject only to the ordinary trifling Crown dues on timber. [my emphasis]

Later, Baby described the rent to be paid to the Wikwemikong First Nation as "trifling" and noted that the Company would retain all oil produced. There was no provision for a portion of the oil to be returned to the First Nation for lighting or other purposes. Indeed, so pleased was Baby with the extraordinarily good deal the DIA had allowed him that he touted the lack of benefits to the First Nation as one of the great "advantages" of the Company.20

Only a few days later, Dupont received a petition from Baby and associates to obtain two additional oil locations outside of their present license. Dupont advised the DIA to support this expansion21 even though no Aboriginal consent was sought in advance and no consent had yet been obtained for the first area.

In the period between November 1865 and 10 January 1866, when the next vote was scheduled, Dupont continually discussed lease terms and their advantages with various First Nation members and employed Mr. Lamorandiere to help him. Lamorandiere had applied on more than one occasion for oil rights and had earlier been identified as an associate of Baby.22 Dupont cancelled the 10 January

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19 "Prospectus of the Great Manitoulin Oil Company...," p. 18.

20 "Prospectus of the Great Manitoulin Oil Company...," p. 19. Other applicants sought to be granted similar terms. See for example RG 10, Vol. 364, letters of Donald McDonald to Spragge dated, 31 July and 11 September 1865.

21 Vol. 574, letter, 22 November 1865, Dupont to Spragge, p. 263.

22 See for example, Vol. 574, letter, 8 October 1864 Donald McDonald to Dupont, pp. 167-168; and letter, 24 November 1864, Lamorandiere to Dupont, pp. 165-166. For link to Baby see, letter, 6 May 1865, Dupont to Spragge, pp. 199-202.
vote because neither Lamorandiere nor agent Ironside could attend, thus leaving him without an interpreter. Dupont noted that the Chiefs wanted the meeting to occur anyway and would provide their own interpreter. But, Dupont refused to go and proposed a new meeting in three days. Several Wikwemikong citizens found this position unacceptable and held their own Council after unsuccess-fully trying to force Dupont to attend.

The Chiefs and people agreed to meet Dupont on the 19th for a vote on the oil issue. About 200 people of a total of six or seven hundred were present at the council. Dupont attempted to convince them of the advantages of agreeing to a blanket lease for oil and gas purposes and then warned that "...they had not the right or the power to shut up what would be a source of wealth to the whole province - that minerals or petroleum were in a certain sense public property, + while they had a right to claim their fair share of the advantage, the few Indians six or seven hundred who occupied the Reserve would not be allowed to interfere with their own, and the general prosperity of the country." Dupont's

However, Lamorandiere, seemed to be held in esteem by the Native People at Sheguiandah on whose behalf he petitioned the DIA. See Vol. 616, letter, 9 August 1866, Lamorandiers to Spragge, pp. 180-181. This man was probably related to the metis Lamorandieres from Killarny one of whom founded that village in 1820. Jim Morrison, "The Robinson Treaties of 1850: A Case Study," Prepared for the Royal Commission on Aboriginal People, 31 March 1994 (draft), p. 26.

This reference to Ironside appears to be a mistake since he died on 14 July 1863. See Doug Leighton, "George Ironside," DCR, Vol. 9, pp 407-408. Dupont was Ironside's successor.

Vol. 574, letter, 19 January 1866, Dupont to Spragge, p. 278. Dupont enclosed the minutes of this council in his report to Spragge, but no copy remains on file. Neither is there a copy in Spragge's correspondence.

underlying assumption was false because the First Nation was more than willing to develop its oil and gas as long as it was in control of the negotiations and setting the terms.

It is not known if Dupont had been authorized by Spragge to make such a statement which implied the DIA would appropriate the resource. As we have seen, it already did so when it granted a license to Baby and associates. Dupont’s words were not true and constituted a threat. Oil and gas were not royal minerals (like gold or silver) and the basis on which the government tried to appropriate them for public benefit is not clear. More significantly, these sub-surface resources were unrelinquished Aboriginal property.

Dupont utterly failed to gain the consent of any of the people in attendance at the meeting (who, in any case, did not constitute a majority of eligible voters). In spite of this, he told the First Nation that leases would be authorized anyway and reported to Spragge the First Nation would eventually come around:

Finding them obstinate in refusing to consent, after four hours discussion I broke up the Council, informing them that the general issue of licenses was determined upon by the Department + I had no doubt they would soon see that their interests were promoted by this step.

I am happy to say that I do not believe any resistance whatever would be made on their part to this step, but on the contrary a number among whom is the Head Chief, are desirous of concurring + only restrained from fear of the others - but as soon as they saw this measure being carried out they + a number of others would come out boldly in its favor.26

The contradictory nature of this statement is evident and there is

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no prior evidence to suggest that any Chief favoured leasing through the DIA.

Dupont noted that some Native People (which he did not identify) were presently petitioning the governor general on this matter. He suggested Spragge advise the governor not to reply because they had refused to listen to Spragge's answer to an earlier petition. Dupont wanted no action taken on a new petition until the people in question apologized for their behaviour and allowed him to read Spragge's answer. Dupont treated the First Nation like children.

Only three days after this unsuccessful council, Spragge instructed Joseph Wilson, the agent at Sault Ste. Marie, to meet Dupont at Wiki for the purpose of procuring a blanket surrender of oil rights over the entire island. If this could not be done, Spragge suggested proposing a blanket lease over a smaller area. He gave no details of monetary compensation, but maintained each lease be conditional on developers hiring Aboriginal labour, that they assume responsibility for the behaviour of their employees and that liquor was forbidden. Wilson was to be shown a copy of the license issued in June 1865 in favour of Baby and associates. It should be noted that Aboriginal consent for this license had still not been obtained. It is not known whether such a council was held, Dupont certainly does not mention a subsequent one involving Wilson.

PAC, RG 10, Vol. 616, letter, 22 January 1866, Spragge to Dupont, pp. 3-4 and letter, 22 January. 1866, Spragge to Joseph Wilson, pp. 8-10.
In April of 1866, Spragge's assistant, Mr. Walcott, authorized Dupont to secure a surrender of rights and negotiate terms of lease for the Lake Huron Oil Company. It is not known what became of this case, but in May, Dupont reported he obtained Aboriginal consent for William Pristow to explore for and develop oil over 2000 acres. No further details are provided. Unlike all other reports on his attempts to gain First Nation consent, Dupont gave no particulars about arranging the alleged council, the date when it was held, or what transpired there. He did not state whether the First Nation was involved in setting the terms of the lease. It is questionable whether Dupont obtained consent.

In June 1866, the Wikwemikong citizens petitioned the governor general for Dupont's removal. Seventy-two heads of family signed their names in support of the petition which read in part:

Thou Great Chief. We put this our paper in thy presence to make known to thee our grievances how that Agent at Manitowaning who has the care of us treats us. We do not want him, we don't want to have him for Agent (for the following reasons)

1st. When we go to him for business he does not let us enter in his house but sends us somewhere else because he is proud, where shall I learn wisdom? Doubtless he that hates us shall give me wisdom? He, that Agent, who hates and despises the Indians.

2nd. He calls us Americans, this is the name he gives me as an insult.

3rd. The same Agent has sent back to (our village) [?] Balifs [sic] to vex us, also to excite some riot among

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28 Vol. 616, letter, 21 April 1866, Walcott to Dupont, pp. 31-33; and letter, 20 April 1866, Walcott to Ed Chesley, Secretary, Lake Huron Oil Co., p. 34. This Company was also owned by Baby.

us and to have a pretext to send to jail our chiefs. He always works to make us miserable we will never have any more to do with him, He rendered us no service.

We beseech thee to use thy power to remove that Dupont the Agent. This is what we humbly beg of thee.\(^{30}\)

This statement clearly shows that Dupont had his own agenda on the Reserve and did not hesitate to manipulate circumstances to gain his ends. The remainder of the petition indicated that the First Nation viewed the Treaty of 1862 as fraudulent and called for its abrogation.\(^{31}\) Spragge sent this petition to Dupont, for his comments,\(^{32}\) but no response has been located. The DIA appears to have taken no action on these charges for some time.

In spite of the strenuous efforts of Dupont and the DIA to bar Wikwemikong members from negotiating independent oil leases, it is clear that this was still going on. In July, Dupont warned a developer, Mr. Moylan, to cease all private communication with Wikwemikong First Nation citizens, no matter who initiated it.\(^{33}\) Moylan complied with these instructions since the Chiefs were informed of a council arranged for the beginning of August, by

\(^{30}\) Vol. 516, petition from the Wikwemikong Indians, dated 18 June 1866, pp. 70-73.

\(^{31}\) The petition stated that commissioner William McDougall came to ask them for their lands, but this was refused. A few days later, on 6 October, other men came and spoke again to some Native People who were finally intimidated into surrendering their lands. The petitioners maintained that the majority of people were against the surrender and that only a few Chiefs signed. NOTE: The Wikwemikong First Nation were not signatories to the 1862 Treaty which allegedly shared the west half of the Island with the Crown.

\(^{32}\) Vol. 615, letter, 8 August 1866, Spragge to Dupont, pp. 132-133.

Dupont, to secure Aboriginal consent to Moylan's proposals. On 4 August, Dupont reportedly obtained this consent, not only for Moylan and associate, but for others as well including, Berthelot and associates, and Baby and associates. It is not known if the consent to Berthelot and to Baby was for their first location or different ones. Baby had several locations and more than one company operating on Manitoulin. Dupont failed to mention the number of voters, whether they were all eligible voters and whether they constituted a majority of the eligible voting members of the First Nation. He did not specify the terms of leases or whether there had been Aboriginal input in their negotiation.

Shortly thereafter, Spragge authorized licenses to a Mr. Breslow and associates and also to the Hon. Donald McDonald and associates. No separate surrenders appear to have been obtained for these licenses - Dupont reported no council or vote.

By the end of the oil season in 1866, Baby's Company, Great Manitoulin Oil, had produced 62 barrels (at an unknown value). Under the less than beneficial arrangement made by the DIA, the Wikwemikong First Nation was to receive only 25 cents on each barrel. Thus, six or seven hundred people received a mere $15.50, that is, less than 2 1/2 cents each, for the development of their

14 Vol. 574, letter, 31 July 1866, Dupont to Tomah, Head Chief & Other Chiefs + Indians at Wiki, p. 341.


16 Vol. 616, letter, 14 August 1866, Spragge to Dupont, p. 162.
After 1866, Baby abandoned his oil developments for about two and one-half years, thus breaching the terms of his lease. Regardless, he applied for its reactivation. Spragge recommended this be done. It is not known whether the lease was in fact resumed, but Spragge made no mention of obtaining Aboriginal consent. Such a resumption should have required a new council and vote not only because Baby's actions had abrogated it, but also because the DIA never appeared to have obtained consent for the first lease.

As we have seen, the DIA took no action on the petition of the Wikwemikong First Nation charging Dupont with mismanagement of their affairs. This was to change, however, in August 1867, when Dupont assaulted Father Sims so violently that he "bled profusely." An investigator ordered by the governor general to examine Dupont's activities accused the agent of being "tyrannical, overbearing and unjust towards the Indians and with having systematically treated the Indians with contempt and derision..." The investigator also reported "...Dupont has been in the habit of treating the Indians with great harshness and from his whole demeanour during the Investigation I am convinced that so far from having the least sympathy with the unfortunate race over whom he had been placed in authority he entertains for them the greatest


contempt." In addition, Dupont had been speculating in the lands on Manitoulin Island which he was supposed to be managing for the benefit of the First Nations there. He was removed from office some time in the spring of 1868.

Prior to the oil developments of the 1860s, there had been a tendency to concentrate Aboriginal People on the Island at Manitowaning in an agricultural experiment under the policy of civilization. This experiment had failed long before the 1862 Treaty when the Native People of the western portion of the Island allegedly agreed to relinquish their lands. In spite of this, the DIA and Dupont vigorously attempted to cause the relocation of many of the Island's people to this or other locations. At least one reason for this was Dupont's knowledge of mineral deposits at or near the traditional locations of some First Nations.

This was the case at Mitehskewedigang. In May of 1865, Dupont reported that a Mr. D.C. Thompson applied for mining rights to plumbago (lead) on 400 acres near this place. Noting that some Native Peoples wanted to locate their Reserve at Mitehskewedigang,

PAC, RG 10, Vol. 722, "Report of Secretary of State on Mr. C.T. Dupont's conduct towards the Rev. Mr. Sims & Indians generally," n.d. The assault appears to have taken place in August of 1867. This report would have been written shortly thereafter. Dupont was removed from office some time in the first half of 1868. See Vol. 722, Memo, 16 Sept 1868, "Memo by the Deputy Sup. of IA, On application in behalf of the Indians of Point Grondine I.R." Spragge.

Vol. 722, Memo by Spragge, "Memo by the Deputy Superintendent of Indian Affairs relative to complaints against Mr. C.T. Dupont," p. 360-362. See also, "Report of Secretary of State on Mr. C.T. Dupont's conduct towards the Rev. Mr. Sims & Indians generally," pp. 391-393.


Dupont informed Thompson that he would ensure it was situated to exclude the 400 acres.43 A Mr. A. Howland also sought an oil location at this place.44

Dupont strongly encouraged Native People living at Sheguiandah to move from that place to Manitowaning, even though they did not want to, so that the area could be sold as mineral or oil lands.45 In July 1865, he received application from Mr. Isaac Laidlaw for permission to explore for oil or salt wells at several locations including Sheguiandah. In August, a similar application for coal oil was received from Mr. A. Howland.46 When Reverend Sims, the same man whom Dupont would assault in 1866, applied for land for a mission at Sheguiandah, he was told the area, if granted, would exclude mineral and petroleum rights.47

Interest in oil under Wikwemikong was not renewed until the late 1890s, when, according to geographer Robert Wightman, the Island was "subjected to deliberate government search for any new resources that might bear commercial development."48 Because of

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43 Vol. 574, letter, 15 May 1865, Dupont to Spragge, p. 205.
45 Vol. 574, letter, 7 July 1866, Dupont to Spragge, p. 337.
46 Vol. 574, letter, 24 July 1865, Isaac G. Laidlaw to Dupont, p. 228; letter, 19 August 1865, Dupont to A. Howland, Esq., Quebec, p. 229; and letter, 3 August 1865, Isaac P. Howland to Dupont, pp. 232-233. See also letter, 1 April 1867, Dupont to Alfred Boudtler, New Market. The latter applied for oil lands in Shiguiandah as well.
this push, the Wikwemikong First Nation allegedly released oil and gas rights under surrender No. 401 in 1898. This was authorized under OIC of 27 June 1898. The explorations of an American company, which had obtained very favourable DIA leases, caused a short-lived rush on the Treaty side of the Island.49

In about 1904, the DIA granted two leases covering a total of 60,000 acres. Philomen Poirier held 10,000 acres and the Great Northern Oil and Gas Company 50,000 acres.50 There is no evidence the DIA held another council to vote on this surrender of oil and gas rights. The Department either took no surrender at all, or it relied on the 1898 surrender, now seven years old.

On 20 April 1909, very unusual and broad patents issued conveying not only all oil and gas presently known to exist on the Reserve, but also all future deposits which might be discovered. Sixty thousand acres of land with oil and gas rights were confirmed "in fee simple" to the patentees. [my emphasis] The patents were subject to an 8% royalty at the well's mouth and contained three conditions: no surface rights were granted except as expressed; Aboriginal labour was to be used; and timber was not to be wasted.51 The meaning of the first condition is not clear since land and oil were granted, under both patents, in fee simple. That Canada allowed such wording to pass was incredible

49 Wightman, Forever on the Fringe..., p. 145.
and an example of the gross incompetence of the DIA.

Because the Wikwemikong First Nation had refused to sign the 1836 and 1862 Manitoulin Island Treaties, its land was unceded Aboriginal Territory. This status was in jeopardy, however, because of DIA actions. The patents purported to transfer land and oil and gas to non-Natives in fee simple. But, the First Nation had not agreed to a land surrender nor did it sanction the permanent alienation of its oil and gas in 1898. The terms of these patents represented a breach of federal fiduciary obligations.

Philomen Poirier sunk a 500 foot well at Smith's Point near Manitowaning, reportedly striking oil. Operations were suspended and the well was capped during the winter. Spectacular reports of oil were widely circulated in the press after his cap blew. One result was a large influx of American oil speculators to the Island. In December 1917, Poirier "transferred" all his rights under the patent to the Great Northern. By 1938, Canada wanted both patents abrogated because no real development had occurred at Wiki. It was not known if the Great Northern still existed as it had not been in contact with Canada after 1914. The DIA erroneously believed the other patent was held by the widow of Senator Poirier, who, at any rate refused to relinquish it. This situation was rightly diagnosed as a fiasco by the Superintendent of Reserves and Trusts, D.J. Allan, who

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53 Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), 1947-1949, letter 1 February 1948, Deputy Minister (presumably Department of Mines and Resources) to Deputy Minister, Department of Justice.
asserted "...that insofar as His Majesty in the Right of Canada is concerned, the oil and gas rights affected by these two patents are gone beyond recall save some extra-judicial procedure." [my emphasis] He believed the patents had little value until oil was actually discovered and the ownership claimed by whoever held or inherited the original grants. Allan advised Canada to abrogate the grants in order to secure the title.54

In March 1938, the Hon. Beniah Bowman proposed to abrogate the Great Northern patent through legislative action. Some federal officials became upset and refused to violate the sanctity of a contract. For example, Superintendent General Charles Stewart was "mildly horrified at the suggestion" and the Justice Department pronounced an "unequivocal no" to cancellation. In a final attempt to make abrogation look palatable, Allan claimed Canada could legislate "contracts out of existence and by refusing a fiat, deny legal recourse to the representatives of the grantees."55

By 1940, the Department of Justice finally gave tentative support for the cancellation of the patent. Since 1922, the Great Northern had not filed any returns in Ontario. Canada failed to implement Justice's suggestion that the Lieutenant Governor forfeit and revoke the patent under the Ontario Companies Act,56


causing oil and gas rights to revert to Canada.

In June of 1942, steps were still being taken to cancel the Great Northern charter. In that year, the First Nation hired investigators to examine the old leases. According to Indian agent C.R. Johnston, the Wikwemikong council resolved in August, that

"...under war conditions the government could possibly effect a cancellation of the old leases and have new ones made which would be more favourable of the Band, as at present they are deriving no benefit whatever, and other oil companies who are desirous of leasing are excluded from these areas...Some Indians have been agitating for outside legal advice, or assistance and I have advised against it."\(^5\)

The council was correct. As we will see below, Ottawa had been only too anxious to use the previous war as an excuse to expropriate the oil and gas rights of the Sarnia and Walpole Island First Nations. Here was a chance for expropriation to work in favour of a First Nation. Canada could have expropriated the oil and gas rights of the Great Northern in favour of the Wikwemikong First Nation, but it did not. No arguments were made about a national scarcity of oil and the necessity for oil and gas development to fuel the war effort.

In October, R.B. Law, a solicitor representing the Great Northern, communicated the Company's intention of developing oil on Wikwemikong. Law stated that all the original directors were deceased, but the current shareholders had met and decided to regain good standing from the province. Within a month it was evident Ontario had every intention of allowing the Company "to

\(^5\) Vol. 7643, F. 20019-4, pt. 1 (Wikwemikong), letter, 7 August 1942, C.R. Johnston, Indian Agent, to Secretary, IAB, Mines and Resources.
revive its charter." Canada took solace in the knowledge that Wikwemikong would receive royalty as per the terms of the original 1909 agreement.\textsuperscript{58}

It is not known why the DIA allowed the Company to regain standing on the Reserve or why the original patent was to be resurrected. Why was a new patent not negotiated? In addition to the objectionable fee simple clause, the original patent sanctioned an inadequate royalty of 8% of the oil produced and there were no cash rentals. The terms were highly prejudicial to the interests of Wikwemikong considering just slightly southeast of Manitoulin Island much better terms could be had. Indeed Allan himself was attempting to negotiate a far more lucrative deal with the Walpole Island First Nation and the Imperial Oil Company in this period.\textsuperscript{59}

Initial drilling was carried out during the winter of 1943 by the Ivy Drilling Company, now representing the interests of the Great Northern. Work was hampered by adverse weather conditions and no effort was made to resume exploration in the spring or summer. The First Nation could see for themselves that inspite of so-called "progress reports" there was no mineral development. The Ivy Drilling Company ceased operations in the winter amid rumours

\textsuperscript{58} Vol. 7643, F. 20019-4, pt. 1 (Wikwemikong), memo, 13 November 1942, Allan to Jackson.

\textsuperscript{59} PAC, RG 10, Red Series, Vol. 6994, F. 471/20-6-7-46, pt. 1 (Wikwemikong), memo 6 July 1945, Kehoe, IAB, Mines and Resources to Allan; and letter 10 January 1947, Allan to Imperial Oil.
it would not return.\textsuperscript{60} Johnston wanted to prevent the Great Northern from regaining its powers since its activities on the Reserve were deemed "unfair."

Company inactivity continued throughout 1944. Ottawa urged cancellation of the charter and the provincial Deputy Minister of Justice concurred. Under the previous arrangement oil and gas rights reverted to Canada, but this time "oil rights would escheat to the province, and might be conveyed to the Dominion under the Ontario Escheats Act."\textsuperscript{61} The matter remained unresolved.

By 1947, Allan was trying to use the Ontario Oil Wells Act of 1945 to abort the patent. In 1948, the DIA finally discovered that the Poirier family no longer held patent for the 10,000 acres. The entire 60,000 acres were owned by the Great Northern. It now sought to void the total 60,000 acre grant under the 1943 Ontario Gas and Oil Leases Act.\textsuperscript{62} The Deputy Minister of Mines and Resources attempted to regain the mineral rights for the benefit of the First Nation.\textsuperscript{63} Ontario finally cancelled the patent by OIC of 18 November 1948, but Mines and Resources was not informed

\textsuperscript{60} Vol. 7643, F. 20019-4, pt. 1 (Wikwemikong), letter, 11 June 1943, C.R. Johnston, Indian Agent to D.J. Allan.

\textsuperscript{61} Vol. 7643, F. 20019-4, pt. 1 (Wikwemikong), letter, 13 September 1944, Kehoe to Allan.

\textsuperscript{62} Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), 1947-1949, letter, 1 February 1948, Deputy Minister (presumably Mines and Resources) to Deputy Minister of Justice.

\textsuperscript{63} Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), letter, 15 March 1948, Deputy Minister H.L. Keenleyside, (Mines) to Hon. D.R. Michener, Provincial Secretary and Registrar.
for almost a year."

In May, Wiki farmer Andrew Trudeau contacted the DIA about two oil pipes, only one of which was capped, situated in his field and formerly maintained by the Great Northern. He wanted the Company to fix the uncapped pipe, which frequently erupted, scaring his plough horses, or he wanted the DIA to help him recap it. Trudeau complained about the inaction of agent, C.R. Johnston, who had known about the problem for one year. Johnston claimed that he did not know whom to contact, that the Great Northern patent was "quite a sore spot" and that it should be abrogated."

The following month, the DIA and the Wikwemikong First Nation found out that the lease had been cancelled the previous year. This meant the 60,000 acres now lay in provincial hands. Although it would relinquish its rights over the land, certain conditions were attached - namely, the full payment of back taxes owed by the Great Northern."

The DIA wanted the whole matter with Ontario cleared up as quickly as possible, claiming it was impossible to make Council understand the "legal position" of the lands in question. What this likely meant was that Council refused to accept the "legal position" which the DIA had caused its lands and oil to fall into through federal mismanagement.

Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), letters, 14 April 1948, D.R. Michener to Minister J.A. Glen (Mines); and 6 July 1949, R.J. Cudney, Deputy Provincial Secretary to Keenleyside.

Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), letters, 18 May 1949, Andrew Trudeau, Wikwemikong farmer Kaboni Road to IAB (Mines); and 8 June 1949, agent C.R. Johnson to IAB.

Vol. 7643, F. 20019-4, pt. 2 (Wikwemikong), letter, 5 October 1949, J.S. McLaughlin (counsel for unidentified company) to IAB.
The final solution to this problem, arranged by the DIA, merely added insult to injury. J.S. McLaughlin (representing an unidentified company), successfully applied to the DIA for a permit to explore for oil and gas over 68,824 acres of the Wiki Reserve, paying $6,882.40 to the First Nation in rental fees. But, in order to obtain the right to issue such a permit, the DIA had to secure a conveyance of the oil and gas from Ontario which activated its value for value policy, demanding that Ottawa pay the Great Northern’s back taxes amounting to $3000. The DIA told McLaughlin it would pay the back taxes from the permit money it received from his company. These terms were acceptable to McLaughlin whose client eventually filed for rights to explore for oil and gas on the terms noted above.

It is not clear from the records whether the First Nation agreed to lose half its permit money to Ontario for the back taxes of the Great Northern Company. Neither is it clear that the First Nation agreed to the continued development of its oil or the terms offered by McLaughlin. If the DIA really had the best interests of Wikwemikong at heart, it should have paid the back taxes with its own money, or sued the Great Northern and should have asked the First Nation if it wanted to surrender its oil and gas rights again under a new arrangement with McLaughlin. In addition to this, it is not known if the First Nation also had to lose 50% of

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the remaining monies to the suspense account as required by the 1924 Lands Agreement.

DIA actions sacrificed the best interests of the Wikwemikong First Nation to its own and those of Ontario. Instead of being able to benefit fully from the McLaughlin permit, after years of suffering under the federal patents to Poirier and Great Northern, the First Nation would only receive half the rental. In order to recover oil and gas rights over the 60,000 acres it had foolishly granted in fee simple to the Great Northern, Canada paid the back taxes of that Company. First Nation monies should not have been used for this purpose. The DIA did not pay for its mistake with its own money, nor did it make either company pay. Instead, it used the McLaughlin rental money to pay for its error: instead of receiving $6,882.40, only $3,882.40 was put into the general funds of the Wikwemikong First Nation. The DIA proved itself unfit to manage the affairs of Wikwemikong citizens.

THE DELAWARE-MORAVIAN FIRST NATION AND OIL AND GAS DEVELOPMENT

A decade after the American Revolution, some Delaware entered Canada and with their Moravian missionaries established the village of Fairfield on Crown land grants on the Thames River. Following a surrender in 1857, they obtained a new Reserve on the south side of the Thames. Their present Reserve comprises 1,266 hectares. 

A number of oil and gas developments existed in Zone Township in the vicinity of Bothwell since at least the early 1860s. John

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"ONAS, ...Alderville to Wunnumin Lake..., p. 80."
Keating \(^7^0\) reported on several of these including the well belonging to the American John Lick. Oil and gas were first developed in the vicinity of Fairfield by Lick in 1861. His well, near Bothwell, precipitated a rush into the area.\(^7^1\) As we have seen in Chapter 1, both the Chippewa of Bear Creek and the Delaware of Fairfield knew the location of oil seepages near Bothwell and had prior use and appreciation for the substance including its commercial sale as a medicine. The oil boom at Bothwell was short-lived, lasting from 1863 to 1866. During this period the price per barrel reached $12.

Agent Mackenzie allegedly obtained Aboriginal consent to lease oil and gas rights on portions of their lots at a council on 3 March 1865.\(^7^2\) In August of 1865, Mackenzie reported that oil locations would be leased at an unspecified "upset price." He feared most of the locations would fall to a "few wealthy speculators." It is not clear why the sales were "upset," meaning they were set at rates below fair market value. Mackenzie emphasized that Native People who possessed "eligible lots" demanded the right to bargain for their own bonuses and to retain all money themselves. Mackenzie was determined not to allow this;

\(^{70}\) Note again the involvement of Keating, who, as we have already seen, attempted similar activities in 1866 with the Garden River First Nation.

\(^{71}\) The Daily Globe, 27 August 1861. Keating accompanied the Globe's correspondent and gave the latter information about all the recent oil developments. Secondary accounts indicate that Lick started operations around Fairfield in 1863 where he struck oil and started a rush into the area. Gray and Robb Gray, Wilderness Christians, p. 298. For another account of Lick's enterprise see Kentiana, (Summarized from the published records of the Kent Historical Society, 1939), pp. 100-101.

\(^{72}\) RG 10, Vol. 364, 17 June 1866, "Case for the opinion of Mr. Bernard, Solicitor to the Indian Department." See marginal note, p. 3.
he reported: "so far from encouraging them in their expectations, I took pains to shew them that such a course would be at variance with the system of management of their affairs."?

Members of the Moravian First Nation were not allowed to set the terms of the leases. The DIA stipulated leases were to last ten years; that one well only was allowed on each location; that operations had to be started within six months from the date of lease; leases were non-transferable; operators were required to pay dues of 30 cents per gallon and dues on all timber cut; dues would only be recognized as paid if paid directly to the DIA; wells not worked for eight months would be considered abandoned; and oil locations situated on cleared or improved land would require compensation to the occupant. These terms, however, were not as exacting as they appeared because several requirements were qualified by the word "unless." Thus, exceptions to several provisions could be created.4 The only compensation apparently

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3 Vol. 364, letter, 1 August 1865, agent Robert Mackenzie to Wm. Spragge. Note: One reason why both the agent and the DIA were so against First Nations making their own deals was that since the 1840s and the creation of the Land Management Fund, the DIA routinely skimmed 10% off monies received from all sales of Aboriginal land. In addition, the Indian agent received about 5% of the total for procuring the land for sale and the land agent likewise received a percentage for selling it: Personal Communication: Paul Williams, June 1994. If First Nations made their own leases and had all monies paid directly into their own hands, the government would not be able to take Aboriginal monies from their land sale proceeds in this way. Indeed, Aboriginal monies paid for Departmental salaries, pensions and perks, as well as for surveys. It is no wonder that the DIA insisted on receiving all revenue from land and resource development first so that it could apportion the remainder to First Nations. It is not presently known if this practice extended to monies accrued from the leasing of resources, particularly mineral resources.

4 Vol. 364, n.d., "Moravian Reserve Oil lands - Township of Orford - Leases of which are to be offered at auction for a period of ten years on the 9th August next."
provided by the DIA was the very low dues mentioned. The lease did not state that operators had to pay Native People bonuses, royalties, rents or that they had to provide a percentage of oil taken for the use of the First Nation or the individual locatee.

The compensation specified was exceedingly low. According to newspaper accounts from 1861, J.M. Lick had a well on Mr. Allen’s farm between Mosa and Zone Townships. Lick paid Allen a bonus of $30 for rights to five acres (or $6 per acre) and promised him 1/4 of all oil produced. At the same time, Mr. David Allen of Mosa Tp. permitted Mr. Jane to test for oil. Jane sub-leased to Jordan & Co. of Erie on understanding that Allen receive 1/15th of the oil produced until the fifteenths reached $400. It is not known how much land this operation covered, but it could not have been much as only one well was sunk. Oil was struck at 30 feet.\(^\text{75}\) These terms provided much greater profit over a much smaller area of land than was proposed by the DIA. Considering the practically non-existent compensation demanded by the DIA, it is easy to see why developers were anxious to test for oil on Reserves.

Agent Mackenzie reported that only four oil lots in the Moravian Reserve were leased at the auction held in London. Two went for $101 and two for $100. He suggested that more would have been sold, but operators found the conditions of lease too stringent.\(^\text{76}\) Not only was the public disenchanted with the terms,

\(^{75}\) Daily Globe, 27 August 1861, "The Oil Region."

\(^{76}\) Vol. 364, letters, 10 August 1865, Mackenzie to Spragge; and 4 October 1865, Mackenzie to Spragge.
but the Delaware also repudiated their consent and "changed their views in regard to the matter." 77

On 8 October, 1865, 38 Delaware locatees petitioned Spragge to allow them to make their own oil leasing arrangements with John Beverley Robinson, Robert O’Hara and James Metcalfe. These men were represented by John Keating who agitated on their behalf on the Reserve. The group was offering to pay each locatee a $40 bonus for the privilege of entering a 40 acre lot and $200 each when oil was found per 40 acre lot, a 1/10th royalty on all oil produced and $4 compensation for the use of every cultivated acre used. 78 These arrangements were not sanctioned by the DIA which did not want either the First Nation or the speculators to set the terms of lease; it replied that individual Native People could benefit from oil and gas discovered on their property, but all transactions would have to be brokered through the DIA. This issue caused division and resentment in the First Nation. 79

Although the boom was virtually over by 1866, the DIA and its agents continued to attempt to secure oil surrenders from the Delaware. Agent MacKenzie was instructed to obtain their oil rights in March of 1866, but reported that Keating had been on the Reserve a few days before, attempting to make his own oil leases. MacKenzie noted Keating paid a bribe of four dollars to each

77 Vol. 364, 17 June 1866, "Case for the opinion of Mr. Bernard...," marginal note.

78 Vol. 364, 17 June 1866, "Case for the opinion of Mr. Bernard..." p. 3.

Delaware man, and one-quarter of this to each woman, who consented to sign a lease for 20 years. With these tactics, Keating obtained permission from 53 people - twelve others refused. According to Keating, the developers whom he represented (Robinson, O'Hara & Metcalfe) were willing to carry out their operations on the strength of their Aboriginal lease. They received legal advice from John Roaf in Toronto that the Delaware had the right to make such autonomous leases because of the licence of occupation each held. It is easy to see why some Delaware citizens so readily signed these leases. In addition to the upfront bribes, Keating and his associates offered even more lucrative terms than the previous year: $40 for each locatee on whose land ground was broken for oil purposes; and $250 for each locatee on whose land oil was discovered with a monthly royalty of 1/10th. Mackenzie stressed Aboriginal actions were motivated by "a strong desire for independent action and [impatience] for control...".

Keating's contentions so alarmed Spragge that he obtained legal opinion on the subject. The solicitor, Mr. Bernard, maintained Keating was in error and that the licenses of occupation held by Aboriginal People did not allow them to make independent leases. Keating's actions were reviewed by Alexander Campbell, the Chief Superintendent, who suggested legal proceedings under a statute prescribing penalties of fines and imprisonment. It is not

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40 See the Roaf Family Papers at the PAO.
41 Vol. 364, letter, 10 March 1866, Mackenzie to Spragge.
42 Vol. 364, 17 June 1866, "Case for the opinion of Mr. Bernard..."
known if this course was followed."1

The Moravian missionaries reported in 1866 that no significant speculator encroachments had occurred. The oil boom ended abruptly due to the end of the American Civil War, the Fenian Raids of 1866 and the success of the Petrolia oil fields which flooded the market and reduced the price to fifty cents a barrel by 1867."

As unsavoury a character as Keating was, it is clear why some Aboriginal People attempted to make their own deals. Not only was this an issue of sovereignty and control, it could also be very lucrative. In 1869, John Schebosh, a Delaware from Fairfield, residing off-Reserve, was rumoured to have made about $7000 on the sale of his land to oilmen. This report increased on-Reserve Delaware resentment against the DIA."

This example is one of the sale of private land for oil speculation and not the leasing of oil and gas rights. Nevertheless, the point is that First Nations never obtained better terms once the exploration stage was past and oil had actually been struck—they received the same low

1 Vol. 722, Memo, 26 March (and dated 29 March at end) 1866, pp. 280-281. NOTE: no reference to this correspondence with Keating turns up in the Alexander Campbell Papers at the PAO.


Victor Lauriston in his article, "Bothwell and Kent’s First Oil Boom," notes that the American Civil War was responsible for the very high price per barrel of oil. When the War ended, Lauriston states prices dropped from $12 per barrel to $2. During the Fenian raids in 1866, there was an exodus of Americans from Bothwell, all attempting to evade their former countrymen. After the exit of the Americans, who constituted the bulk of the oil developers, the Bothwell boom dissipated. Kentiana, p. 102.

compensation. The sum total of all the developments discussed in this chapter do not nearly approach $7000—a sum which one man alone achieved through his own negotiation.

This experience was not forgotten when renewed interest in oil development resumed in the 1880s. Aspects of the Indian Act also rejuvenated old frustrations and jealousies. DIA issuance of location tickets caused division in the community and arguments over traditional values of sharing vs. personal profit. In the context of mineral development this led to arguments over whether the locatee or the whole community should gain from oil and gas development. This matter continued to be contentious. In 1887, developer Thomas Dillon enlisted the aid of agent John Beattie to secure oil and gas rights over 925 acres on the Reserve. Beattie failed to obtain consent because of disagreements between voters over whether profits should be shared.

Much, but not all, of the Reserve was held under location tickets. Locatees with river lots on the Thames wanted all rental and other monies to accrue to themselves and would not agree to put the money in the general account. This dilemma was created by the contradictory policies of the DIA. Location tickets had

"The DIA first forced location tickets on the Delawares under the 1869 Enfranchisement Act; this continued under the Indian Act of 1876. The DIA believed such tickets, which registered title to an individual, would lead the Delawares to greater improvements of their land. Leslie and Maguire, The Historical Development of the Indian Act, (Ottawa: Treaties and Historical Research Centre, INAC, 1978), p. 62. The tickets were another means of assimilation and created artificial divisions between First Nation members because not all Delawares on the Reserve had tickets.

PAC, RG 10, Red Series, Vol. 7477, F. 20015-1, pt. 1 (Moravian), letters, 31 March 1887, Thomas Dillon to John Beattie; and 25 April 1887, Beattie to Lawrence Vankoughnet, Superintendent of Indian Affairs."
been issued to facilitate a more individualistic ethic and encourage a farming ethos along white lines. But, individualism extended only so far. Superintendent General Lawrence Vankoughnet maintained that monies generated from oil development would have to go in the First Nation fund. Such a policy was more in keeping with traditional sharing values than with the individual ethic the DIA was trying to develop. Thus, the DIA fostered goals and then frustrated them. Although Vankoughnet did say individual members could be compensated through rental fees and royalties offered by Dillon, the river locatees continued to resist surrender in spite of the fact there was "...not much doubt that oil is on the reserve." This was similar to the situation which had existed twenty years before.

Developers continued to show interest in oil and gas on the Moravian Reserve throughout the 1880s and 1890s, but the Delaware would not consent to surrender unless full proceeds were handed over to the river lot locatees. An editorial in *The Bothwell Times*, clipped and filed in DIA correspondence, suggested that First Nations widely believed the surrender of oil and gas rights would lead to the loss of their entire Reserve. But, this

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" Vol. 7477, F. 20015-1, pt. 1 (Moravian), letters, 25 April and 4 May 1887, Vankoughnet to Beattie.

" Vol. 7477, F. 20015-1, pt. 1 (Moravian), see for example statement signed by Chief C.M. Stonefish and councillor John B. Noah of 17 May 1887 and statement signed by Chief Albert Tobias, Washington Jacobs and Munroe Pheasant of 16 April 1896. In both cases, the First Nation voted down any surrender unless individual locatees received the proceeds. RG 10 records do not provide a list, or otherwise identify those individuals who opposed surrender on this basis.

possibility did not seem to have occurred to the Delaware who were primarily concerned with the division of oil and gas monies.

Finally in November of 1896, there was a seeming reversal of policy by the DIA. Deputy Hayter Reed indicated the DIA would allow proceeds to accrue to the locatee and not the common fund in order to promote development. 91 This new position had an immediate effect on the attitude of the Delaware toward surrender. In December, Chief Albert Tobias and others agreed in council to release such rights. But, the surrender was conditional on contractors making separate deals with individual locatees. 92 This surrender did not lead to any leases.

George Mickle, a Ridgetown accountant, obtained signed leases from at least 14 Delaware for oil and gas exploration. Mickle erroneously believed that if he already had Aboriginal consent, the DIA would agree to authorize the leases. Little or no oil and gas exploration or development occurred between 1897 and 1904. 93

Then, in 1914, the DIA repudiated its former policy of allowing individual locatees to prosper at the expense of the whole community. J.D. McLean, Assistant Deputy and Secretary, informed agent Beattie the "Department cannot in any way sanction such a proposal...An individual Indian has no right to the oil on

91 Vol. 7477, F. 20015-1, pt. 1 (Moravian), Reed memo, undated, but stamped received at Lands Branch, on 18 November 1896.


93 There are no records on file between 1904 and 1914.
or under his land, the same being under the control of the band."

The Delaware called for the reinstatement of the previous policy, but McLean adamantly refused.

For well over a decade the Delaware staunchly rejected all proposals to develop their oil. By 1929, they still refused to surrender oil and gas rights if the common fund was credited. But, later that year, for unknown reasons, the council allegedly passed a resolution surrendering oil and gas over the entire Reserve. Two companies were competing for lease. One, the Acme Gas & Oil Co. Ltd. was turned down by the DIA because its application did not meet Department regulations. However, the application of Basic Resources Ltd., for 981 acres, was accepted and an indenture signed on 13 January 1930.

When Basic struck oil, the Acme Company was furious it had not been told why its application was unacceptable, believing it had a prior right to the lease. In February of 1930, the DIA received $500 from Basic. The Company had agreed to pay a rental of 10 cents/acre over 1001 acres. This produced $101 for the Delaware general fund. The balance was also held in the fund as a "guarantee that the Indians will incur an expenditure in the core drilling" for this amount at least. Canada did not retain half of this money for Ontario.

Oil and gas revenues came with a heavy price tag. In February

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74 Vol. 7477, P. 20015-1, pt. 1 (Moravian), letter, 8 April 1914, McLean to Beattie.

75 Vol. 7477, P. 20015-1, pt. 1 (Moravian), letter, 21 September 1914, McLean to Beattie.

76 NOTE: Records are deficient for the period 1914 to 1929.
1930, agent Nelson Stone reported extensive damage to the land caused by Basic's wells. The Company had hauled heavy materials and equipment over the land which "...is of clay texture, splendid soil, but is very easily spoiled for years to come, by trampling over or through it in that wet condition" that is, as it was thawing. Stone believed the Company should pay for all damages or stay operations until ground conditions improved. Perhaps more serious than this, Basic sunk an additional well where a large amount of water had mixed with oil. The Company left the well uncapped and abandoned it. As a result, oil and water ran out over the land. Stone believed such irresponsible behaviour would ruin the agricultural potential of the Reserve for many years.97 It is not known if Basic cleaned up or paid for damages.

On 5 March 1930, the DIA granted an exploration permit to another company, Research Services Limited. An amount of $319 was eventually credited to First Nation funds. This amount included rental and a guaranteed expenditure in the same manner as that paid by Basic Resource. The DIA did not put 50% of this amount in a suspended fund for Ontario. Research Services eventually transferred its lease to the Ajax Oil and Gas Co. Ltd.98 Ajax also caused damages when it abandoned a well without informing the DIA. Agent Mackenzie's summation of the year was not positive: "the preliminary exploratory work conducted on the Moravian Reserve


98 Vol. 7477, F. 20015-1, pt. 1 (Moravian), letters, 14 March and 30 December 1930.
during the past year has not, apparently, been very encouraging, and unless commercial production is brought about there will not be any royalties collected payable to the Band."
So far the only revenues received were those submitted with the original applications for permits by the two companies."
On 17 January 1931, the Ajax Company (formerly Research Services) argued an abundance of snow barred it from dealing with whatever damage had occurred. Records end before it can be determined whether Ajax/Research ever paid for damages.

Throughout the depression and World War Two interest continued in oil and gas development on the Reserve although correspondence is incomplete. During 1940, negotiations were underway between developer, Patrick Fitzpatrick, locatee Walker S. Stonefish and the DIA to conclude a lease. Fitzpatrick was interested in exploring over 156 acres on the Moravian Reserve on which Stonefish, a farmer, held a location ticket. Agreement was reached 19 February 1941. Fitzpatrick attempted to reopen an old well site on the Stonefish farm.

In August or September of 1941, the DIA rejected an attempt by Fitzpatrick to transfer his interest in lot 19 on the Stonefish farm to William Morvitt of Michigan. The question resurfaced two

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2 Previously, Chief C.M. Stonefish had signed a statement in 1887 that the Delawares would not consent to oil development unless the individual locatee was credited.

3 Vol. 7477, F. 20015-1, pt. 2 (Moravia), letter, 4 February 1941, Stuart Spence, Indian Agent at Highgate to T.R.L. MacInnes, Secretary, IAB (Mines). It is not known which company or individual carried out previous work on the site.
months later, when representatives of Imperial Oil, to whom Fitzpatrick and/or Morvitt had sold oil, wanted to know which one should be issued a cheque. Although, the DIA still stood behind the agreement with Fitzpatrick, it eventually acknowledged a transfer to Morvitt.

Morvitt was a constant source of trouble and often refused to pay his rent of $56.00. Then, in 1944, the DIA impounded the equipment he was using which belonged to the original lessee Fitzpatrick. Morvitt's lease was officially cancelled on 1 August 1945, for failure to pay arrears.

In June of 1945, Imperial Oil filed application for a 'permit to prospect' for oil and gas on 3,250 acres of the Moravian Reserve. On 13 August, the council agreed, but imposed its usual stipulation that locatee consent be obtained prior to exploration or drilling operations. Two leases were negotiated with Imperial Oil for 11 years with a cash rental of $330. Mr. Hopkins (lease 61) and Percy Stonefish (lease 62) each received $50 for right of way over their land. Spence reported that Imperial was unable to locate oil in either well. It cleaned up and notified the DIA of its intention to cancel the leases. The DIA did not retain monies for Ontario under the 1924 Agreement.

None of the attempts to develop oil and gas on the Moravian Reserve before the 1950s were successful either for the Delaware

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102 Vol. 7477, F. 20015-1, pt. 2 (Moravian), letter, 12 April 1944, Allan to Spence.

or the developers. Previous to this outside push for ‘development’ the Delaware had collected oil for commercial purposes and controlled its sale into the 1830s. After the DIA stepped in and attempted to wrest control from the First Nation the benefits it received were less than what it could have obtained making its own deals directly with the developers. In spite of the resentment the Moravian-Delaware First Nation felt toward the DIA by 1870, it consented to let that Department direct oil development in the twentieth century. Few benefits accrued to the First Nation. Small companies like Basic and Research/Ajax abandoned operations leaving extensive damages behind. Individual promoters like Fitzpatrick and Morvitt perhaps lacked the finances and good will to pay their rentals when it was obvious success eluded them. Even a large and reputable company like Imperial Oil did not make a success of oil development in this area, but at least it paid its debts. While rental fees accrued to the First Nation and individual locatees received right of way fees, the environmental damage caused was probably not worth it.

THE MUNCEE-DELAWARE AND CHIPPEWA FIRST NATIONS AND OIL AND GAS DEVELOPMENT ON THE CARRADOC RESERVE

The Muncee-Delaware arrived in Canada in 1800 establishing themselves along the Grand River with the Six Nations. Due to the flooding of their village, they relocated to a portion of the unTreated Chippewa tract on the Thames continuous to the Chippewa Reserve. The latter granted the Muncee their own parcel of land in
1840. Their current land base consists of 1,054 hectares in Carradoc Township.

Outsiders hoped to explore for and develop oil and gas under the Muncee-Delaware and Chippewa Reserve in the 1860s. In December 1865, the Muncee and Chippewa signed a petition to be given to their agent, Robert Mackenzie, asking for permission to make an oil lease with Robert Tucker. Tucker, an agent of E. Morris and Company, was a man, according to the petition, whom the First Nations knew and trusted. Morris took this petition to Mackenzie on the 18th hoping to secure consent to develop.\textsuperscript{105}

The DIA must have refused to sanction this arrangement instead authorizing Mackenzie to obtain a surrender of oil rights on the Reserve so it could set the terms of lease and decide who would develop the oil. Mackenzie held a council in January 1866, but the Muncee refused to relinquish oil and gas rights even though they were assured of receiving the highest compensation possible. Mackenzie attributed his failure to Morris' influence. However, it is clear Mackenzie failed because the Muncee and Chippewa refused to allow the DIA to control their affairs and to make leases for them; they had already decided to lease the entire Reserve to Morris.

They are not the only First Nations which desired to deal only with one company. The DIA took a dim view of such arrange-

\textsuperscript{104} ONAS, \textit{...Alderville to Wunnumin Lake...}, p. 150.

\textsuperscript{105} Vol. 364, Muncee/Chippewa petition, 2 December 1865, attached to letter, 23 January 1866.
ments. But, the Muncee and Chippewa believed "one strong Company would be found sufficient for the development thereof, and be also preferable, as being more easily subjected to control than to a host of invaders brought on the ground by rival lessees." There is a lot to be said for the Aboriginal perspective which illustrated their concern with control and compensation.

Spragge’s report on this matter advised against DIA recognition of the arrangement made with Morris. According to Spragge, Morris originally claimed he would pay each person, regardless of age or sex, $200 if oil was obtained on their lot. Morris had, however, reduced this amount to $20. Furthermore, several Native People had complained about the circumstances under which Morris obtained the agreement. One man, completely backed out of the deal and wanted his land exempted. Spragge noted that the Muncee and Chippewa changed their minds and wanted to lease only 5000 acres for oil purposes, not the entire Reserve.

Mackenzie claimed the Muncee and Chippewa unanimously agreed to surrender oil and gas rights over 6,000 acres on the 15 and 16 March 1866. One person, however, Raymond Brant, refused to allow such work on his lot which was exempted. The impetus for this council came from the DIA which had earlier instructed Mackenzie

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107 Vol. 364, 30 January 1866, "Memo from Indian Department on various applications for authority to prospect for Oil in the Carradoc Indian Reserve upon the River Thames." Spragge to A. Campbell, Attorney General.
to obtain oil rights.\footnote{Vol. 722, "Memo relative to the result of a council of the Chippewas and Munsees of the River Thames convened to consider the subject of securing a portion of their Reserve for oil purposes," p. 282. A similar Report may be found in Vol. 364, apparently written by Spragge, the Deputy Superintendent dated 27 March 1866.} The Muncee and Chippewa stated in council that they wanted an increased royalty on renewed leases. They also wanted $15 per acre rental for all improved land used for oil purposes. These were the conditions of their surrender. However, Campbell asserted their demands were excessive and unilaterally reduced the amount of compensation to $5 an acre. There is no evidence the Muncee or Chippewa were consulted, or that a new vote was held to determine whether this reduced compensation was acceptable. Furthermore, Campbell planned on using Muncee bonus money from the oil development to pay for the relocation of any First Nation members who had to be removed from their present homes or farms because of development. For this reason he noted that oil operations would likely not produce a liberal revenue and suggested Mackenzie ensure a high bonus to cover this expense.\footnote{Vol. 722, "Memo relative to the result of a council of the Chippewas and Munsees of the River Thames convened to consider the subject of securing a portion of their Reserve for oil purposes," pp. 282-283.} Again, this provision is surely something which the Muncee and Chippewa never themselves proposed, nor agreed to. If some Native People had to be relocated the money to pay for this should not have been coming from their profits. The developers or the DIA should have paid for this with their own money; Aboriginal funds should not have been used. The DIA was using First Nation profits to finance the development of Aboriginal oil.
Campbell stated each lease would run for twenty years; the first decade was set, the second would be renewed if all fees and dues were paid. The Muncees would receive a royalty of 1/9th; no provision was made for an increase in the second term as stipulated by the Muncee and Chippewa; forfeited improved land was to be compensated at an annual rent of $5 an acre, although the First Nation had demanded $15; and a bonus of $100 per one hundred acres on executing a lease was to be paid as well as an additional $100 per one hundred acres as bonus if oil was struck in paying quantities. These bonuses are very low - only one dollar per acre. As we have seen above in Zone, developers paid whites bonuses of at least $6 per acre. Furthermore the Muncee/Chippewa bonus money was to be used to relocate Native People whose improvements and clearings were forfeited due to oil development. Each such person was to be re-established in a home and provided with enough aid to "prepare land elsewhere." This kind of resettlement was not inexpensive. For example, in the same decade, it cost $250 to build one house in connection with the relocation of only one person from the Chippewa Reserve in Anderdon Township to the Walpole Island Reserve or Bkejwanong, "the place where the waters divide." Under no stretch of the imagination could enough bonus money have been raised to re-establish even one


person. Presently, it is not known if any actual development was carried out under these terms or if any families were removed.

As miserly as this compensation was, it was shortly to get worse. On 11 May 1866, Campbell unilaterally authorized what amounted to a reduction in terms by empowering Vankoughnet to "alter the conditions of lease" so that instead of receiving $1 bonus for each acre on breaking ground, each Native Person would receive only fifty cents and instead of receiving $1 bonus for each acre which contained oil in paying quantities, each person would receive $1.50.\(^{112}\) It is erroneous to think this arrangement amounts to the same thing. By shifting the balance of payment this way, Campbell reduced by half the probable compensation which would be obtained by the Muncee and Chippewa because far more ground would be broken by developers than would be found to contain oil in paying quantities.

There is no evidence that either Campbell or Spragge ever instructed Mackenzie to hold another council so that the Muncee and Chippewa could vote on these new and reduced terms. In addition to these reductions, it will be remembered that Campbell had earlier unilaterally reduced the amount of compensation demanded by the First Nations for forfeited improved land from $15 to $5 and never insisted developers pay an increased royalty in the second term of the lease. By 11 May, a new lease in fact existed which was quite different from either the terms demanded by Muncee and Chippewa or the terms they allegedly agreed to on 15

\(^{112}\) Vol. 364, letter, 11 May 1866, Campbell to Vankoughnet.
and 16 March. The DIA should not have done this; these unilateral actions breached not only the rules of the Royal Proclamation and Departmental policy, but also the fiduciary obligation of the DIA to First Nations.

Renewed interest in oil development occurred just after the turn of the twentieth century and caused a lot of internal division. The predominant reason was inadequate monetary return. A secondary consideration was fear that surrender of such would lead to the loss of their land base. Undoubtedly the previous actions of the DIA which reduced potential and actual compensation were a factor in twentieth century Muncee reticence.

In April 1907, Chief and councillors refused to allow the Leamington Oil Company to carry out oil explorations. Several irregularities were evident in the Company’s dealings with the Muncee. According to a series of personal depositions from several Muncee, the Company came to them in advance of the vote and tried to ‘convince’ them to vote in favour of a surrender of oil and gas rights, promising money or work.\textsuperscript{113} This appears to have been an attempt at bribery.

Agent S. Sutherland, reported in February 1910, that oil and gas rights had been surrendered.\textsuperscript{114} But, by March, the Muncee requested a "full inquiry" into the surrender vote. There were numerous disagreements about what had transpired at the vote. It

\textsuperscript{113} Vol. 7477, F. 20007-2, pt. 1 (Caradoc), although file officially stated to begin in 1910, correspondence dates back to 1907.

\textsuperscript{114} Vol. 7477, F. 20007-2, pt. 1, (Caradoc), letter, 24 February 1910, agent Sutherland to DIA, re. surrender.
is not known whether an investigation was held. But, by July, the Muncee produced a statement of terms under which they would agree to surrender their rights, stipulating ten conditions: a royalty of one of every eight barrels of oil produced; payment of $100 for each well producing marketable gas; an additional royalty of $150 for each locatee per year for every well which produced 25 barrels in a month; and free gas for each locatee’s house, or the money equivalent of this. In addition, there were extensive provisions concerning the rights of locatees and the ultimate responsibility of a company for compensation of any damages it caused. It is evident the Muncee demanded lucrative returns in exchange for a surrender of their rights. No leases seem to have been authorized under these terms.

In 1918, the DIA held several votes on the oil issue. But, the Muncee refused to relinquish their rights for inadequate compensation. In December, Chief Cornelius Logan informed D.C. Scott he desired oil and gas exploration to begin. Apparently, this was hampered by the fear some Muncee harboured about the implication of the term "surrender." The Chief maintained many people believed if they consented to a "surrender" of any sort the DIA would sell their Reserve. In an attempt to overcome such opposition, Logan wanted to restrict the vote on this matter to

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116 Vol. 7477, F. 20007-2, pt. 1, (Caradoc), letters, 16 September 1918, J.D. McLean, Acting Deputy Superintendent to W.A. Orr, Lands and Timber Branch; and 25 September 1918, Orr to McLean. As we shall see, this same tactic was used earlier in the year at Sarnia and Walpole Island. The Muncee votes were held at the same time Ottawa expropriated oil and gas from the Sarnia and Walpole Island First Nations on 19 September, 1918.
World War One veterans alone and exclude others who had left the Reserve.\textsuperscript{117} Regardless of the Chief's sentiments, opposition remained strong throughout the 1920s. In the 1930s, the Muncee turned down an application from the Union Oil and Gas Company.

During the 1860s, the Muncee had consented to the development of their oil, but the DIA unilaterally reduced and changed Muncee terms of compensation. Following a fraudulent vote in 1910, the First Nation categorically stated terms under which they were willing to surrender their oil rights. However, no leases seem to have issued. The DIA failed in all subsequent attempts to gain consent even though the Chief and a minority of others wanted such development in 1918. It is clear that the Munsee-Delaware First Nation wanted full control and generous compensation for any oil development on their land.

\textbf{THE ONEIDA FIRST NATION AND OIL AND GAS DEVELOPMENT}

The Oneidas, part of the Six Nations of Iroquois, came to Canada in the 1780s. Initially obtaining land in Middlesex County in 1842, they relocated to their present location where they obtained official Reserve status in 1856. Their Reserve, #41, contains 2,134 hectares.\textsuperscript{118}

Similar to other south western Ontario Reserves, interest in oil development occurred in the 1860s. In December 1865, agent Robert Mackenzie discussed the terms of a proposed oil lease with

\textsuperscript{117} Vol. 7477, P. 20007-2, pt. 1, (Caradoc), letter, 14 December 1918, Chief Cornelius Logan to D.C. Scott.

\textsuperscript{118} ONAS, Alderville to Wunnumin Lake..., p. 178.
the Oneida. He did not expressly state what the terms were, but indicated the people were pleased. However, he also stated the Oneida would be "willing to approve and abide by such terms as they would make with Mr. Anderson" the lessee." [my emphasis] Thus, the Oneida agreed only to oil development and expected to set all terms themselves. Mackenzie reported that the Oneida signed the lease. But, how well could the concept of a lease have been explained if the Oneida signed, agreeing to certain terms, but then expected to be able to make other terms with Anderson?

Although Mackenzie asserted the Oneida signed the lease, Superintendent Campbell refused to authorize it, arguing it was not signed by a "very large majority" and that he could not sanction such an exclusive lease in Anderson's favour although the terms were "very fair." Mackenzie would therefore have to hold another council and obtain a better vote ratio. In spite of the fact Campbell would not immediately consent to the lease, he appeared to suggest that Anderson could commence prospecting: "As it is I can only propose to Mr. Anderson that he should be permitted to explore for oil all over the tract..."

Mackenzie, holding second council and vote on 11 January 1866, attended by 121 adults, claimed a 3/4 majority to carry out the lease (89 voted in favour and 32 objected). He informed the voters the lease would be confirmed on the strength of this vote. Mackenzie labelled those who said 'no' as a "minority" and

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117 Vol. 364, letter, 7 December 1865, Mackenzie to Spragge.

120 Vol. 364, 14 December 1865, Campbell's answer.
reported they "...said plainly that their objection was to leasing at all, and not specially to Mr. Anderson's lease, although rival claimants were present among them suing for a share of the privilege." Thus the "minority" wanted no oil development no matter who carried it out. This is a much more serious objection than merely objecting to a specific lease.

Sixteen objectors petitioned against the confirmation of the lease. While attempting to read this petition aloud at a special council held on 14 March, Mackenzie was shouted down by some of the objectors who demanded the issue be settled by vote and "all but resolved to refuse leasing at all." What happened next is confusing. Mackenzie stated that one of the objectors, Peter Paulus, proposed to drop the opposition to the lease and that Moses Brown, who signed the initial lease, proposed that Anderson explore the back 500 acres of the Reserve running east from the Thames River. This resolution was unanimously adopted. Mackenzie, however, believed Anderson would not agree to these terms because they were not advantageous, suggesting that the Oneida be forced to abide by the original lease or that the matter be dropped for the present. The outcome of this situation is not known.

Interest in oil and gas development on the Oneida Reserve did not resume until the end of the century. In 1898, the Oneida retained legal counsel, J.M. McEvoy, to find out if they owned sub-surface rights on their Reserve. DIA Secretary, J.D. McLean

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responded positively on this question. During the early 1900s, the Oneida council was allegedly interested in surrendering oil and gas rights, although no surrender was authorized. In 1909, the Essex and Kent Oil and Gas Syndicate of Leamington, applied for rights on several Reserves in south-western Ontario including those of the Munce, Sarnia and Oneida First Nations. The Company agreed to pay royalty and rentals to individual First Nation members, but consent was not obtained. In 1914, there was renewed interest, but no authorization to explore or develop from the First Nation. Information is unavailable for the period 1915 to 1936. But, in that year, Mr. Leach representing the Union Gas Company tried to obtain a "blanket lease" for oil and gas rights on the Reserve. The Oneida refused.

Oneida files do not appear to contain enough information to determine precisely why the First Nation consistently refused to surrender oil rights. But, it is clear that after its initial negative encounter with the DIA on this issue in the 1860s, it never again appeared interested in such development.

THE SIX NATIONS FIRST NATION AND THE DEVELOPMENT OF OIL, GAS AND GYPSUM

The Six Nations First Nation includes the descendants of

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124 Vol. 7477, P. 20007-3, pt. 1, (Caradoc), letters, 23 April 1909, Hugh McSween, representing Essex and Kent Company to DIA; and 27 April 1909, McLean, Asst. Deputy and Secretary, DIA to A.T. Boles (for McSween).

125 Vol. 7477, P. 20007-3, pt. 1, (Caradoc), letter, 30 June 1914, McLean to agent J. James, Delaware, Ontario.
approximately 2000 Aboriginal People who came to Canada with Joseph Brant after the American Revolution. Their land in Tuscarora Township was purchased by the Crown in 1784 from the Mississauga. The original Reserve, near Brantford, contained approximately 675,000 acres, six miles on each side of the Grand River. This area has been substantially reduced through surrenders.\(^{126}\)

The surrender of mineral rights on this Reserve coincided exactly with massive external meddling in the internal politics of the Six Nations. Missionizing had created an artificial split in the community between traditionalists and christians. This fracture had unfortunate implications in the dispute over the "special status" of the Six Nations First Nation which arose after the passage of the Indian Act in 1876. From 1890 until 1925, the hereditary Chiefs forming the council agitated to have Canada, the King and the League of Nations recognize and admit its ultimate and inherent sovereignty. D.C. Scott, and others in the DIA, relentlessly planned the deposition of the hereditary council. In January of 1923, prior to the final decision of the League whether to hear the Six Nations’s case, Charles Stewart, Superintendent General, authorized a detachment of RCMP to commence duty on the Reserve. Aboriginal agitation continued. In October of 1924, while Deskeheh, the principal spokesman for the hereditary Chiefs, was in Europe, Scott planned the council’s demise. His hand-picked agent, Colonel C.E. Morgan, stressed the absolute need to remove

\(^{126}\) ONAS, Alderville to Wunnumin Lake..., p. 218.
the hereditary council in an August 1924 report. Scott used the report to rationalize the passage of an OIC approving the change to an elected council. The order was implemented on 7 October 1924 when Morgan interrupted a council meeting with several RCMP. The order abolishing the hereditary government was announced and those Chiefs were banished.\textsuperscript{127}

Shortly after the hereditary Chiefs were ousted, the elected Chiefs (mostly Christian) voted to release oil and gas rights to Senator Michener. A majority of voting members had not been present at the vote. The surrender was invalid and should not have been accepted. Yet this is exactly what was done because the Senator commenced operations so that by July 1926, over 2,000 feet of work was complete.\textsuperscript{128} The DIA did not retain 50\% of the monies for the province as required by the 1924 Agreement.

Federal imposition of oil development on the Reserve was directly tied to the installation of an elected council. There are no indications that the DIA raised the issue with the hereditary Chiefs earlier in the century or that the Chiefs ever suggested such an enterprise. In 1926, Gilbert Brereton expressed interest in securing rights to develop gypsum (an industrial mineral). A vote held by the agent returned positive results of 41 to 0. Again, this was unacceptable because the assent of a majority of

\textsuperscript{127} E. Brian Titley, \textit{A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada} (Vancouver: University of British Columbia Press, 1986), pp. 112-127.

\textsuperscript{128} PAC, RG 10, Red Series, Vol. 7460, F. 18032-3, pt. 1, (Six Nations) letters, 26 July 1926, Morgan to McLean; and 8 December 1930, Morgan to A.F. Mackenzie.
the voting members was not obtained. A second vote for the same purpose was shortly held and proper assent allegedly acquired. However, when council saw the terms, it refused to accept them. The rental was "too small" and the royalty "inadequate." Remembering the discontent it felt over the Michener leases it was reluctant to accept others. This was a clear indication that the council would resist mineral development unless it could control terms of lease and secure a worthwhile return. This is not the only case of the DIA holding multiple votes on the same proposal in an attempt to gain a release of oil rights. This manipulative strategy, had been used at Wikwemikong and Muncee and, as we shall see below, at Sarnia and Bkejwanong during World War One.

The elected council maintained its interests had not been safeguarded under the Michener leases, arguing that the DIA should not have let it make a decision without prior consultation with a technical expert and claiming inexperience in the protection of its interests in this case. Council demanded the presence and input of such an expert before a decision was made on the Brereton lease proposal which arose again for consideration in 1930. Obviously, council did not trust the DIA to negotiate its affairs. The Six Nations council quickly and aggressively sought to improve the terms under which it would surrender its resources.

On 18 December 1930, council resolved to accept $20,000 from

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27 Vol. 7460, F. 18032-3, pt. 1, (Six Nations), letters, 26 July 1926, Lt. Col. C.E. Morgan, Indian agent to J.D. McLean; 20 July 1926, Morgan to McLean; 24 July 1926, McLean to Morgan; 6 August 1926, A.P. Mackenzie, Acting Asst. Deputy and Secretary to Morgan; and 8 December 1930, Morgan to Mackenzie, now Secretary, DIA.
the Canadian Gypsum Company to develop gypsum "and kindred rock" in a 300 acre area. The Company had to promise half its workforce would be Aboriginal. But, Canadian Gypsum was not willing to meet all of these requirements. Instead of the $20,000 demanded by council, the Company only agreed to pay a set price of $15,000 for the outright purchase of the mining rights. Counsel for Canadian Gypsum, Mr. Spencer, never said the company would pay the additional $5000.

For unknown reasons, D.C. Scott appears to have assumed the Company would pay the full $20,000 and on the strength of this supposition authorized the Company to sink three or four test holes. The elected council found this situation intolerable and unilaterally decided to award development rights to another company. In December 1930 or January 1931, councillors, Archie Lickers and Frank Miller, resolved to grant mining rights to the Gypsum Lime & Alabastine Canada Ltd.. Gypsum Lime would operate the same lots previously held by Canadian Gypsum. This motion was acceptable to other council members and was passed under Resolution No. 3. But, the DIA found it problematic. Because it had allowed Canadian Gypsum to drill, it feared it had created "an option" toward that Company which excluded acceptance of the offer.

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131 Vol. 7460, F. 18032-3, pt. 1, (Six Nations), letter, 10 January 1931, Scott to Mr. Spencer, counsel for Canadian Gypsum; and Resolution No. 3 of 5 March 1931.
made by Gypsum Lime which Council preferred. The Alabastine Company offered a royalty at 5 cents/ton expecting to mine about 11,440 tons for a potential revenue of $171,600.

Scott appears to have overcome his initial reluctance to Alabastine because of Aboriginal insistence that it be authorized to develop and the superior terms offered. Unlike Canadian Gypsum, Alabastine did not ask for outright sale of mining rights and provided a royalty. Under resolution No. 2, of May 1931, the elected council agreed to allow Alabastine a "60 day option...in concessions 4 and 5 for test hole purposes." In June, the council passed resolution No. 6 which bound the Company to erect a plant on the Reserve and begin operations within a year. It is evident the elected council, and not the DIA, was directing the terms and pace of mineral development on the Six Nations Reserve.

Whether or not actual drilling began is unknown, but by October of 1931, the Alabastine Company had failed to develop the deposit. A new and reduced offer of $10,000 was tendered by the Canadian Gypsum Company ($5,000 less than their original offer and $10,000 less than the council initially demanded) for outright sale of mining rights over 304 acres. This diminished offer was made by Spencer, the Company's counsel, who, in part complain-

132 Vol. 7460, F. 18032-3, pt. 1, (Six Nations), letter, 13 March 1931, C.E. Morgan (to DIA?).

133 Vol. 7460, F. 18032-3, pt. 1, (Six Nations), memo, 23 April 1931, Scott to Superintendent General; and Council Resolution numbers 2 and 6, respectively dated 7 May 1931 and 4 June 1931.

ed to D.C. Scott: "Is there no way of getting this Band of Indians to transact business like any ordinary individual?" Scott declined to help Spencer bypass a council vote in favour of a referendum. The Six Nations refused Spencer's offer at a council meeting on 5 November 1931, under Resolution No. 9.

Later that month, A.F. Mackenzie, Secretary of the DIA, claimed the Six Nations council "...acted improperly in refusing to accept this offer," but the DIA had no recourse but to acquiesce in the decision. Throughout the following year the elected council declined to accept all terms offered by Spencer and the Company. Agent Morgan also failed to convince council to accept the $10,000 offer. Archie Lickers was singled out as the leader of a "...minority of the Council [who]...in this instance has obtained support from most of the others" to block gypsum development. Throughout 1933, Spencer and the Company were still unsuccessfully attempting to procure mining rights. The council continued to resist development because the Company failed to offer a fair price. The elected council knew Canadian Gypsum had "paid at least [$15,000]...and in some cases very considerably more, for the mining rights on white lands immediately adjoining ..." the Reserve.\textsuperscript{137}

\textsuperscript{135} Vol. 7460, F. 18032-32, pt. 1, (Six Nations), letters, 9 November 1931, Spencer to Scott; and 9 Nov. 1931, Scott to Spencer.

\textsuperscript{136} Vol. 7460, F. 18032-3, pt. 1, (Six Nations), Resolution Nos. 2 and 40, 4 February and 17 February 1932 respectively; also letter, 9 April 1932, agent Morgan Acting Deputy Superintendent.

\textsuperscript{137} Vol. 7460, F. 18032-3, pt. 1, (Six Nations), memo, 8 March 1933, Scott to Buskard, Minister's Office.
It is not known why the DIA wanted the Six Nations to accept an even lower offer than one previously deemed unsatisfactory. No royalty or rental was provided and the Company still sought to buy the minerals outright for $10,000. After the failure of Alabastine to commence drilling as per the terms of lease, the DIA seemed determined to encourage the Six Nations council to accept diminishing offers from the Canadian Gypsum Company.\(^{138}\) The DIA did not retain 50% of the sums paid by the companies for Ontario as required by the 1924 Lands Agreement.

In 1952, Canadian Gypsum was still trying to convince the Six Nations to relinquish mining rights. The Company would pay $75/acre for outright sale of "gypsum and other mining rights" over a parcel of 318 acres - a total of $23,875. The Company also sought a 99 year lease of surface rights on one acre of land for $500.00. In response to this offer, which seemed "to favour the Company in a rather wide manner," the elected council asked the DIA for a technical expert before rendering its decision.\(^{139}\)

The experts viewed the proposed leasing arrangements as less than ideal asserting that contracts should be based on "a rate/ton with a fixed minimum annual royalty, rather than an outright sale [of rights] as proposed." Further, the reference to "other minerals" beyond gypsum should be removed. Taking issue with the

\(^{138}\) It would be sad indeed if the only reason the DIA now pushed that offer was that no other existed. There is a gap in the RG 10 files for minerals on the Six Nations Reserve between 1933 to 1952.

price, they argued that the $23,875 would amount to "...less than 1 cent/ton for the recoverable gypsum of the top bed as it lies in the ground. This is a low price, particularly so in view of the favourable location of the deposit with regard to important markets." Twice as much gypsum was believed to be in the lower bed. Here the Company's price would amount to "less than 1/3 of a cent, which is very low." 140

In addition, comparisons were made to Nova Scotia which sold gypsum at 6 cents/ton. The experts advised this price ought to prevail on the Six Nations Reserve as well. They also suggested it would take about 25 years to deplete the upper deposit of gypsum on the Reserve if Canadian Gypsum produced it at about the rate of 400 tons/day, as it did at its Hagersville mine. This rate could translate into a minimal annual production of 100 million tons per year which the experts believed would yield royalties of $6,000 per year for the First Nation. 141

Since 1930 the Canadian Gypsum Company had never made the Six Nations an offer which reflected the fair market value of their minerals. Scott was reluctant to recognize this in any consistent manner, even authorizing it to drill without a firm and written commitment that it would pay the $20,000 demanded by the Six Nations. Not only must this have breached DIA leasing procedures, it was also a breach of federal fiduciary responsibility.


Following this display of incompetence, the council authorized the Alabastine Company to commence operations under certain terms. Scott had little recourse but to agree. But, the company failed to drill within the time limits of the lease which was then cancelled. Scott again proceeded to urge new and reduced offers from Canadian Gypsum on the council which was obviously reluctant to accept them and demanded the advice of technical experts. It was only through the strong leadership and actions of the Six Nations council that mineral rights were safeguarded for future generations. Today, the Six Nations has the only commercially producing (gypsum) mine in Ontario.

THE EXPROPRIATION AND ATTEMPTED SALE OF THE OIL AND GAS RIGHTS OF THE SARNIA AND WALPOLE ISLAND FIRST NATIONS

The Walpole Island and Sarnia First Nations are primarily composed of Ojibwa, Ottawa and Potawatomi peoples, longtime inhabitants of the lands and waters surrounding Lake St. Clair. These peoples signed numerous Treaties with the British Crown, beginning in 1760 at Montreal where their inherent sub-surface rights, among others, were recognized and respected. These mineral rights were not relinquished under later, land sharing, Treaties with the British Crown. Nevertheless, on more than one occasion, the government has taken oil bearing lands from the Sarnia and Walpole Island First Nations without their consent.

The oil boom at Oil Springs in 1857 and 1858, the first in the world for commercial purposes, was eclipsed in the early 1860s by the next at Petrolia. This second boom was fuelled, in part, when colonial authorities illegally appropriated and then sold
both oil and land in the Enniskillen Reserve belonging to the Walpole Island, Sarnia, Kettle Point and Stoney Point First Nations.

In 1858, the DIA held a council only with the Sarnia First Nation to obtain its consent to the sale of the oil lands. The council allegedly agreed, but no formal surrender either of oil and gas rights or of the land was ever secured by the Department. None of the other First Nations were consulted or informed at the time. This action is the subject of a long-standing land claim.

The DIA continued to act improperly in connection with the oil and gas resources of these First Nations. During the 1890s, it appears the DIA allowed exploration and possibly testing for oil and gas on the Sarnia Reserve without first obtaining Aboriginal consent. Indeed, there is no express reference to a surrender being sought from that First Nation until 1903.

In 1905, the Sarnia First Nation surrendered oil and gas rights on a portion of its Reserve. Horatio Porter and his associates, E.A. Van Scy and T.L. Kane, received a permit to explore. Porter wanted to expand the permit. The First Nation

142 PAC, RG 10, Red Series, Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letters, 14 December 1891, agent Adam English to Superintendent General; and 13 April 1892, agreement between Judge John Mackenzie and Superintendent General.

143 Vol. 7643, F. 20029-1, pt. 0, (Sarnia) letters 6 March 1903, Frank Pedley, Deputy to T.G. Johnson; 14 November 1904, J.D. McLean, Secretary to English; and 28 December 1904, McLean to Brake.

144 Vol. 7643, F. 20029-1, pt. 0, (Sarnia) letters, 7 May 1906, McLean to English; 23 May 1906, English to McLean; 29 May 1906, McLean to English; and 1 October 1906, McLean to Porter. Note: Porter had concluded at least 9 separate leases with members of the Sarnia First Nation for oil exploration in June of 1896. In spite of Chief Francis W. Jacobs' approval, the DIA refused to sanction them since they did not comply with regulations: letters, 4 July 1896, Francis W. Jacobs, Head Chief to agent English; and 1 September 1896, Hayter Reed, Deputy
agreed to relinquish rights to the additional area, but J.D. McLean would not authorize it. Porter had a permit, not a lease. Under Department regulations, "no lease can issue until after the discovery of oil or gas and compliance with the terms upon which permission to explore has been granted." Porter did comply and petitioned for and received a lease in 1906. The DIA set the terms which included only a 1/10th royalty and a stipulation that Porter had to extract oil and gas in "paying quantities." This was a very low royalty - one which the DIA had included in some of its leases of the 1860s. In 1908, the new agent, William Nisbet, was requested to obtain a surrender for another petition for oil and gas rights. This matter was still unresolved late into the next year.

Porter also attempted to obtain oil and gas rights at Bkejwanong. However, that First Nation was virtually unanimous in rejecting his propositions. Chief and council at Walpole Island further refused to allow the Guelph Oil and Gas Company to prospect for coal on the Island in 1910.

Porter and his associates did discover a small quantity of oil on the Sarnia Reserve. Between March 1910 and April 1911, they

Superintendent to English.

145 Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letters, 7 May 1906, McLean to English; 23 May 1906, English to McLean; 29 May 1906, McLean to English; and 1 October 1906, McLean to Porter.

146 Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letter, 22 October 1909, Kane to agent Nisbet.

produced sixty-one barrels. Kane reported total monies from this development as $106.75. Because the original lease, negotiated by the DIA, allowed for only a 1/10th royalty, the Sarnia First Nation received a mere $10.68 as their share.¹⁴⁸

No doubt due to insufficient returns and general frustration, the First Nation council requested the termination of the lease early in 1914. The council complained Porter had never properly tested any of the 911 acres leased since 1906.¹⁴⁹ Several months later, it discussed surrendering oil and gas rights to Judson Hummel and A.C. McGregor. Part of the area they were interested in was covered under the still extant Porter lease. The Sarnia First Nation wanted that lease cancelled or the DIA to take action to force Porter to comply with its terms. Between 1910 and 1914, the Sarnia First Nation never received more than $15 under this lease.¹⁵⁰ Throughout 1915 and 1916, Van Scoy and Kane insisted they were in compliance with the lease and would continue operations. DIA Secretary J.D. McLean contested the position of the Company arguing that the amount of oil extracted did not meet the requirements of the permit to produce oil and gas in "paying quantities."¹⁵¹ This lease was not cancelled until 1915.

¹⁴⁸ Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letter, 22 October 1909, Kane to Nisbet.

¹⁴⁹ Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letter, 7 January 1914.

¹⁵⁰ Vol. 7643, F. 20029-1, pt. 0, (Sarnia), 12 May 1914 Band Council Statement, signed by First Nation Secretary, F.W. Jacobs; and letter 3 June 1914, agent Maxwell to DIA.

¹⁵¹ Vol. 7643, F. 20029-1, pt. 0, (Sarnia), see for instance contents of letters 2 August 1915; 10 December 1915; and 3 August 1916.
Shortly after the conclusion of the Porter lease, a new crisis involving the Imperial Oil Company was brewing. In February of 1918, Imperial Oil informed the DIA of its desire to explore for oil and gas on the Sarnia and Bkejwanong Reserves. Several irregularities surrounded attempts to acquire such rights for the Company at Sarnia. A.C. Edwards, an independent developer, was interested in re-working the old Porter well, but his work would have overlapped on land desired for lease by Imperial Oil. The latter decided to allow Edwards his small area if the DIA would agree to its having the rest. The first vote held in March of 1918, returned a decisive negative majority. There were loud protests by members of the Sarnia First Nation who were upset that Edwards had been on the Reserve and present at the vote, agitating for its successful conclusion. However, a letter from the lawyers representing Imperial Oil, dated 30 April, informed D.C. Scott a favourable vote had been obtained and that the Company wished to begin operations immediately.

Within a week, Secretary McLean informed Imperial’s lawyers that no surrender was ever attained. Several unidentified members of the Sarnia First Nation explicitly stated their position in a "Memo why Proposed Lease to the Imperial Oil Company of Lands on the Sarnia Indian Reserve for Exploration for Oil and Gas was Unconstitutional." Several unidentified members of the Sarnia First Nation explicitly stated their position in a "Memo why Proposed Lease to the Imperial Oil Company of Lands on the Sarnia Indian Reserve for Exploration for Oil and Gas was Unconstitutional."
Gas should not be sanctioned by the DIA." These people, representing the majority, declared the decisive vote against the surrender was held on 12 March at which the nays outvoted the yeas, 38 to 13. They claimed the Indian agent ignored this vote and held a second one on 24 April resulting in a 23 to 15 negative vote. In spite of this, a third vote was authorized on 26 April at Kettle Point over 30 miles away from the Sarnia Reserve. The Kettle Point First Nation voted 12 to 3 in favour of the surrender. The DIA was trying to use divide-and-conquer tactics to secure oil and gas rights on the Sarnia Reserve regardless of the position of the Sarnia First Nation which was clearly against it. The third vote, held on Kettle Point, was particularly underhanded because the Kettle Point First Nation had no direct interest in the oil and gas under the Sarnia Reserve.

The Sarnia protesters strongly disagreed with these actions further rejecting the scheme whereby individual land owners would benefit at the expense of the First Nation as a whole. They wanted all monies submitted to the general fund. Most significantly, they argued the terms offered by Imperial Oil were inadequate. The Sarnia First Nation would receive only a small royalty of 1/7th of the oil produced and a $15 rental for each well. According to their knowledge of other off-Reserve leases, they argued typical agreements provided for a royalty of 8% of oil produced and a $100 rental per well. The terms offered by Imperial Oil and accepted by

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153 Vol. 7643, P. 20029-1, pt. 0, (Sarnia), letter, 3 June 1918, Parker to Scott.
the Department were highly unsatisfactory.

The Inspector of Indian agencies, C.C. Parker, blamed the negative outcome on certain Native People whom he labelled "non-progressive." But Aboriginal People at Sarnia did not want to relinquish their rights since they believed they would "soon own the land themselves and that they can then set their own terms and sell the oil themselves." Control and adequate compensation were obviously paramount concerns. Parker did not attempt to encourage this individual entrepreneurial ethic, (even though it was one of the goals of the government's assimilation program) instead he claimed the oil was vital for the war effort. The exaggerated nature of such a claim is clear when we remember that the Sarnia First Nation only received $15 from the development of its oil. The 1/10th royalty it had received meant that no more than $150 worth of oil had been extracted from the Reserve.

A similar situation arose at Bkejwanong. In May, shortly after the votes on the Sarnia Reserve, the Reverend Simpson Brigham, one of the earliest Aboriginal People to be ordained an Anglican deacon and then priest, and certainly the first such person from Walpole Island, apparently tried to influence his people to lease oil rights at a vote.155

It is not known what other economic issues Brigham involved himself in since 1899 when he was assigned to the Anglican Church

154 Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letter, 3 June 1918, Parker to Scott.

on Walpole Island.\textsuperscript{156} His reasoning for pushing the surrender of oil and gas rights seems to have been that he anticipated the federal government would take them anyway if First Nation consent was not obtained.\textsuperscript{157}

Simpson Brigham came from a long line of runners stretching back at least to the Treaty of 1827.\textsuperscript{158} As a runner, his duty was to mediate relations between his people and the whites. In order to carry out his responsibilities he had to educate himself. At that time, his only choice was to become a minister although christianity itself was not his primary concern - it was a means by which to gain white respect and would lead the whites to listen to him. Brigham often used his position to explain traditional Ojibwa ways to nonNatives, hoping they would see the intrinsic value in his culture. In this culture, there is no separation between spiritual social and economic realms.\textsuperscript{159} This is a white

\textsuperscript{156} Little is known about Brigham prior to 1917.

\textsuperscript{157} Nin.Da.Waab.Jig., Simpson Brigham Papers, letter, 17 October, 1918, Margaret Brigham (Simpson’s wife) to Mother. See Margaret Brigham’s comments after the expropriation had already taken place. “The Indians are kicking themselves now that they didn’t take Jimmie’s [that is, Rev. Simpson Brigham] advise, and lease the rights while the oil companies were falling all over each other to make concessions to them. Now they’ll get just what the government pays, and I suppose that will be ‘deposited to their credit.’ You what [illegible]...I’m awfully sorry they lose so much, but I’m glad they know that Jimmie was right in his advice. He was very discouraged and disappointed that more of the men couldn’t see far enough ahead to know what would happen.”

\textsuperscript{158} Personal communication on family history: Simpson Brigham (Reverend Simpson Brigham’s son), 13 May 1994.

\textsuperscript{159} Personal communication on family history: Bernita Brigham (grand daughter of the Reverend Simpson Brigham), 13 May 1994. I am indebted to Bernita Brigham for sharing some of the history of her family with me. This information is not in the written record and sheds much light on the motives and actions of her grandfather. Bernita’s comments also underline the significance and importance of an individual’s responsibility to the clan in shaping one’s behaviour. On this point, see also, Charles Cleland, \textit{Rites of Conquest}, (Ann Arbor: University of Michigan Press, 1992).
distinction and an unnatural one for Native People to make. Thus, Brigham did nothing unusual when he mixed spiritual and economic issues.

Brigham’s position as a runner meant he often had to place himself in awkward situations and make difficult decisions. He was obligated to put himself between both worlds to try and bring harmony between the Nations while still upholding the strongest possible position for his people. This is what he tried to do during World War One at the oil and gas vote when he believed the Chief and council would be able to control the terms of lease because "...the oil companies were falling all over each other to make concessions to them." This, however, must not have been the perception of the majority of the First Nation. The outcome of the vote, 105 against and 11 in favour, was definitively negative. In addition, the Chief and councillors were also against such a surrender. The proposition was rejected because the Walpole Island First Nation was unable to adequately control the terms of the lease and did not trust the DIA to conclude a satisfactory arrangement.

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164 Nin.Da.Waab.Jig., Simpson Brigham Papers, letter, 17 October, 1918, Margaret Brigham (Simpson’s wife) to Mother.

165 Nin.Da.Waab.Jig., Simpson Brigham Papers, letters 20 November 1918, Brigham to "My Dear Ogemah;" also, Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), 13 November 1918, solicitors Kerr and McNevin for Walpole Island First Nation to DIA.

166 See for instance the kinds of terms imposed by the Walpole Island First Nation in the leasing of its marshlands since the 1870s. David McNab, "The Walpole Island Indian Band and the Continuity of Indian Claims: An Historical Perspective," in Nin.Da.Waab.Jig., Occasional Papers, 1985. Also, Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 22 November 1918, David Williams, Bishop
Brigham failed to bring a solution to this issue which ended as he predicted it would. Soon after the failed vote, the DIA took extraordinary steps to procure oil and gas rights.

Scott was under pressure from Arthur Meighen, Minister of the Interior (and Superintendent General) to obtain oil and gas surrenders at both Bkejwanong and Sarnia. Imploring Scott to make a "special effort" in the matter, Meighen pointed out that the Dominion Sugar, Dominion Glass and the Imperial Oil Companies were working together to prospect for oil and gas at Bkejwanong.\textsuperscript{144}

Scott took this advice to heart and took the unusual step of using government officials outside the DIA either to procure surrender or to legitimize his unilateral actions. In August, W.A. Orr, of the federal Lands and Timber Branch, under directions from Scott, failed to obtain a surrender from the Sarnia and Kettle Point First Nations for oil and gas on the Sarnia Reserve. Next, he informed Charles McGrath, Fuel Controller for Canada, of the intransigence of the Walpole Island and Sarnia First Nations regarding the issue of surrender. Scott continued:

The claim has been made by the companies -- who are interested... -- that the oil and gas are required in the prosecution of work connected with war activities. It may be that you will consider it essential at the present time to develop the fuel resources in that part of the country. If you can assure me of that fact, I will submit to the Hon. the Superintendent General, whether we should not, under the War Measures Act.

\footnote{Vol. 7643, P. 20029-1, pt. 0, (Sarnia), memo, 26 August 1918, Private Secretary's Office, Minister of the Interior to Scott. Note: Dominion Glass was interested in obtaining sand to make glass, but it was also interested in gas because this was the fuel used to produce the glass.}
permit prospecting and development of these reserves.\[^{165}\] [my emphasis]

This was a reprehensible attempt on the part of the state (as represented by Scott) and white-controlled business to use the war as an excuse to forcibly remove First Nation rights and control of the development of their minerals. The war was almost over. Although no one knew exactly when it would end, all knew Germany's days were numbered.\[^{166}\]

Since at least the beginning of August 1917, Canada knew the war was winding down, yet D.C. Scott took it upon himself to prompt the Fuel Controller to agree to Scott's contention a national scarcity of oil justified the Department in removing Aboriginal control over oil and gas. This was nothing more than a petty abuse of power since prior to this oil had only been developed on the Sarnia Reserve and never amounted to more than $150 for the Company concerned between 1906 and 1915. No oil had ever been found or developed on Bkejwanong. It was not until 1918, when Imperial Oil and two other large concerns indicated interest in obtaining a lease for exploration, that 'oil reserves' at Bkejwanong and Sarnia suddenly became a matter of vital importance for the war effort. By 1890, Canada knew the "North was floating

\[^{165}\] Vol. 7643, P. 20029-1, pt. 0, (Sarnia), letter, 30 August 1918, Scott to Charles McGrath.

in oil," but technology was not advanced enough to remove it and even if it could have been removed there were no transportation systems in the area to move it south. This is why oil in southwestern Ontario was of such importance. The oil gush at Norman Wells in the North West Territory which precipitated Treaty No. 11 did not occur until 1922 when the War was already over.

On 6 September 1918, Scott received the letter he instigated. The Deputy Fuel Controller, Charles Peterson, detailed the necessity of oil and gas development in eastern Canada due to "considerable scarcity of fuel oil owing to the increasing demands for allied shipping and war industries." This situation was allegedly aggravated by American restrictions on coal importation. Peterson said these conditions would continue for some time after the war and urged Meighen to proceed with the expropriation.166

Predictably, Scott brought this to the attention of Meighen who in turn notified the Governor General. On 19 September, the War Measures Act was invoked by OIC to allow the DIA to dispose of the oil and gas on the Walpole Island and Sarnia Reserves as they saw fit, without the consent of either First Nation.169 This was in spite of the fact that between 12 and 14 September, the Germans retreated all along the western front. The fact that this


168 Vol. 7643, F. 20029-1, pt. 0, (Sarnia), letter, 6 September 1918, Deputy Controller to Scott.

information was common knowledge makes the actions of Scott and Canada that much more underhanded. Whatever oil and gas was situated on the Reserves could in no way be developed and processed before the end of the war. Between 4 and 23 October, several requests for an armistice were made by the Germans and Austrians. By the latter date troops had been recalled to Germany. Yet, even after the war ended on 11 November, the War Measures Act was not revoked.

Tenders had been solicited between 22 October to 20 November. On 18 November, Imperial Oil sent D.C. Scott tenders for both Reserves. Different reactions were forthcoming from each First Nation. The response from the Walpole Island First Nation was substantially different from that of the Sarnia First Nation.

Walpole Island immediately hired a solicitor, D.M. Grant, to determine if the DfA leased oil and gas rights without its consent.171 The action was in violation of the Treaty of 1827 which contained a verbal outside promise that the Walpole Island, Sarnia, Kettle Point and Stoney Point First Nations would never be disturbed in their lands again.172

Reverend Simpson Brigham whole-heartedly aided the Walpole Island First Nation in its struggle to reverse the expropriation decision. His prediction that something like this would occur, in

170 Ferrell, Almanac, p. 125.

171 Vol. 7645, P. 20040-1, pt. 0 (Walpole Island), letter, 28 October 1918, D.M Grant for First Nations at Walpole and Sarnia to the Superintendent.

172 Enclosure File B-8260-174 (NS) Vol. 1B), 13 August 1830, William Jones, Assistant Superintendent of Indian Affairs and Indian agent at Sarnia and Walpole Island to Z. Mudge.
the absence of Aboriginal consent, had come true. Again, Brigham had no choice but to take this stand as federal use of the War Measures Act not only violated the outside promise, but also impinged on the sovereignty of the Walpole Island First Nation which had never been relinquished. As a runner, Brigham was obligated to protect the relationship established between his Nation and the whites under the Treaties.

The Walpole Island First Nation sent an official statement of protest to the Superintendent General and hired other lawyers to prepare petitions and inform the DIA of its opposition.173 Both Brigham and Elijah Pennance felt petitions were not enough and appealed to David Williams, the Bishop of Huron, and Dr. Norman Tucker, President of the Social Services Council of Canada. Brigham wanted the matter put before this Council. Pennance and Brigham hoped to place a memorial before the Governor General asking Canada to "reconsider" its recent expropriation of oil and gas rights under the War Measures Act. Brigham eventually did speak before the Council, calling for its aid which was soon brought to bear on the Canadian government.174 (See Figures 7 and 8: Brigham and Pennance)

Scott received a telegram from Williams and Tucker

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173 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 13 November 1918, Kerr and McNevin, Barristers and Solicitors for Walpole Island First Nation to DIA.

Figure 7
Reverend Simpson Brigham
Figure 8
Elijah (Edward) Pinnance
reiterating Aboriginal opposition to Department actions. This was shortly followed by a letter from Williams outlining, in great detail, the Aboriginal opposition. According to Williams, the Walpole Island First Nation viewed Department actions as illegal, and similar to the actions of Germany in Belgium. It was widely believed oil development would ruin their farms. The First Nation also felt the DIA would authorize unsatisfactory terms as it had done in the past in connection with timber resources. Williams implored the Department to act fairly and responsibly.

He argued that because Native People had surrendered large tracts of land to Canada, retaining only small Reserves, they should not be called upon to surrender even more. Williams continued that Native People at Bkejwanong strongly supported the war effort both at home and abroad and that it would be a blot on Canadian honour to proceed with the expropriation. He concluded by noting that if Ottawa wanted to develop oil it should do so on neighbouring land owned by whites and that the federal argument regarding a war necessity was now no longer valid.176

Brigham’s efforts with the Social Service Council were also paying off. That body agreed to accompany a Native delegation to see the Governor General to have the expropriation reversed.177 In addition, it proposed to serve an injunction on the DIA until

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175 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), telegram, 19 November 1918, David Williams, Bishop of Huron and Norman Tucker, President, Council of...Canada.

176 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 22 November 1918, David Williams to D.C. Scott. Also Jacobs, Walpole Island..., p. 74.

another petition was sent to Ottawa.\(^{178}\) It is clear the Walpole Island First Nation sought to utilize all avenues and resources available to it in terms of community support to impress upon the DIA the unwarranted, unfair and unnecessary nature of its actions.

The DIA was no doubt embarrassed by Aboriginal hostility toward the proposed development. At the end of November, Scott sent Meighen a memo outlining how the present situation had come to pass. Scott assigned the "representations of the Fuel Controller" as the causative motive for the DIA's actions.\(^{179}\) What he failed to mention is very significant, namely that he was the one who prompted the Fuel Controller to make such "representations" in the first place.\(^{180}\) Scott was no doubt trying to cover his back. Both he and Meighen knew Scott was responsible for the actions of the Department.

Scott remained unrepentant in replying to David Williams' letters, regurgitating the Fuel Controller's letter as the basis of DIA action and stating that in any case the deal would have been in the interest of the First Nations concerned. He said the DIA considered First Nation protest after the armistice was signed and denied any violation of law or Treaty. Scott pragmatically observed that "...the Indian and his property became subject to

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\(^{178}\) Nin. Da. Waab. Jig., Simpson Brigham Papers, letter, (November, 1918) Margaret Brigham to her mother, p. 5. At present it remains unknown whether these measures were carried out.

\(^{179}\) Vol. 7645, P. 20040-1, pt. 0 (Walpole Island), memo, 26 November 1918, Scott to Meighen.

\(^{180}\) Vol. 7477, P. 20029-1A, pt. 1, (Sarnia), letter, 30 August 1918, Scott to McGrath.
the abnormal conditions of the war," noting that the Indian Act allowed the Department to expropriate First Nation property without their consent. He asserted that without such authority it would be difficult to conduct public business in relation to Indian Affairs. Scott assured the Bishop that no development would proceed at Bkejwanong. Tenders had been solicited between 22 October to 20 November for oil on both Reserves. Only one was received from A.I. McKinley, representing Imperial Oil, for Walpole Island. Vigorous protest emanated from the Walpole Island First Nation and the issue was dropped as Scott promised.

The Sarnia First Nation did not immediately protest the underhanded Departmental actions. Scott authorized Inspector Parker to submit an oil and gas surrender proposal to the council in December. Although the Sarnia First Nation did not lodge a formal complaint it effectively demonstrated its resistance by refusing to attend vote meetings on the surrender. In addition to the expropriation of its oil and gas rights, the Sarnia First Nation had long had to deal with the attempted annexation of its

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181 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 3 December 1918, Scott to Williams. In 1918, section 90 of that Act was amended to allow the DIA "to lease lands in the Indian Reserve without the consent of the Indians." (PAC, RG 10, Vol. 2641, F. 129690-3A; newspaper article: "Council of Ojibwas Ask for recognition as a Nation," 7 May 1919.) In December 1919, under OIC No. 2523 the DIA amended section 48 of the Act so that the Superintendent General could "without [a First Nation] surrender ... issue leases for surface rights of Indian Reserves..." (ONAS, "Mining on Indian Lands, 1920-1929," ILF #363, copy of OIC in file.)

182 See Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), memo, 22 November 1918, W.A. Orr, Officer in Charge, Lands and Timber Branch to Deputy Minister.

183 Vol. 7643, P. 20029-1A, pt. 1, (Sarnia), letters, 6 December 1918, Hanna (of Hanna, LeSueur and McKinley, counsel for Imperial Oil) to McLean, Assistant Deputy; and 8 December 1918, C.C. Parker to Scott.
Reserve by the city of Sarnia - often actively aided by the DIA. Indeed, the most recent call for annexation from the city occurred only seven days after Scott told W.A. Orr to secure a surrender of oil and gas rights from the Sarnia and Kettle Point First Nations for the Sarnia Reserve. On 9 August 1918, an article recommending annexation had appeared in the Sarnia Canadian Observer.

While the matter of a vote was presently abandoned, the possibility of annexation was not. According to Scott, Parker verbally stated

...that he did not think it advisable to submit this surrender to the Indians while he was discussing with them the question of a surrender of their reserve. It also occurs to me that as we are desirous of obtaining a surrender of the reserve, it would be better not to dispose of the oil and gas rights. [my emphasis] 184

Obviously, both Parker and Scott had been contriving to effect a cession of the entire Reserve. This, of course would free oil and gas rights for sale. If such rights could not be obtained through expropriation, other avenues remained open.

So, the matter of oil and gas development on Sarnia Reserve suddenly lost its former urgency. Hanna and the Imperial Oil Company were told in 1919 that "the Department is now considering the larger question of a surrender of part of the Sarnia reserve, and it is felt that this matter should have precedence." 185 This


185 Vol. 7643, F. 20029-1A, pt. 1, (Sarnia), letter, 17 February 1919, Scott to Hanna, et al. Note: Interest in oil and gas development on the Sarnia Reserve appears to have continued throughout the 1920s and 1930s, however, the oil files contain minimal info. One letter of 9 April 1920, indicates agent Thomas Paul held a vote on 7 April, in an attempt to obtain consent for oil development, but failed to obtain a majority. No further correspondence is filed until 1932. The one
was in spite of the fact that an urgent need for oil would "prevail for a considerable time after the war." Thus, Scott's relentless bid to prompt the Fuel Controller to bring the absolute need for oil on Sarnia and Walpole Island to the attention of the Superintendent General and the Governor General was nothing less than a gross abuse of Departmental power, federal emergency powers and an unnecessary imposition on the rights of Aboriginal People. There is no indication that the OIC authorizing the expropriation has ever been cancelled or rescinded.

In a last, almost pathetic, attempt to galvanize the DIA into action the Dominion Glass Company informed Scott that unless additional natural gas could be secured, Ontario would cut off supplies to various companies including theirs. Dominion Glass wanted the DIA to "settle the question of leases with Walpole Island..." Canada was in very rough shape indeed when one of its leading concerns had no where else to turn but the unproven oil reserves of Bkejwanong to stave off alleged industrial doom.

Throughout the 1920s and 1930s, interest in oil continued at Bkejwanong, but that First Nation refused to surrender its rights. During 1936, the council established a committee to deal with this issue. They contacted and visited solicitors to discuss the recent interest of Merritt and associates in oil development on the

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letter which appears for this year is not relevant to this discussion. See Vol. 7477, F. 20029-1A, pt. 1.

186 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 17 February 1919, Dominion Glass to Scott. NOTE: Dominion Glass had been taking sand from Walpole Island for years, without authorization from Chief and Council, to make (some of) its glass; Personal Communication: David T. McNab, June 1994.
Island. The committee was informed that "Merritt had no financial standing" and a lease with him should be avoided.\footnote{Vo1. 7645, F. 20040-1, pt. 0 (Walpole Island), letter, 8 January 1936, (counsel) Pardee, Gurd, Fuller & Taylor to Superintendent.}

Shortly thereafter Merritt complained to the DIA about the rejection of his offer, suggesting that it lease oil and gas rights to him anyway. Merritt believed the council and people were being obstinate and that they would not agree to any proposal. The root of the problem was "...some 8 or 10 Indians who are playing politics and demanding money down [when the]...present condition of the Oil Industry, is difficult." Merritt submitted another lease proposal to council. A vote was held on 13 January, but it was decisively negative, being 128 against and 3 in favour.\footnote{Vo1. 7645, F. 20040-1, pt. 0 (Walpole Island), letters, 16 January 1936, Merritt, Merritt & Meyers, Engineers, Appraisers and Counsellors to DIA; and 15 January 1936, agent to Secretary, DIA.}

Information regarding oil and gas development during World War Two is sketchy. In 1945, Imperial Oil once again applied to develop petroleum and natural gas on Walpole Island. Mr. Kehoe of Indian Affairs encouraged the Walpole Island First Nation to look into the Company’s proposal since he believed there could be substantial monetary returns. Kehoe examined production and revenue figures for 1942 from a nearby oil field in Chatham where twenty wells were spread over 28,393 acres. Imperial’s average annual production for the years 1942 and 1943 was $215,746.50. Kehoe hypothesized that if Imperial leased only half the acreage originally requested and produced at the same rate per acre as in the Chatham fields, its production would total $71,800.00. He
noted that with a 15% royalty, the First Nation would realize $10,770 per year.\textsuperscript{189} It is not known whether Kehoe suggested that Imperial submit a lease proposal which reflected this royalty. If he did, it was ignored. The next proposal from Imperial Oil, in 1946, was very much less generous.

That year, Imperial revised its application to cover rights to the entire area of Walpole Island, approximately 40,000 acres of land.\textsuperscript{190} Their efforts to secure the Island continued in 1947 when they initiated a vigorous advertising campaign. About 13,000 acres of the Reserve were held under location tickets. Since no general surrender was obtained, the company blitzed all members, especially locatees with circulars, booklets and films documenting the work of Imperial Oil in Ontario.\textsuperscript{191} One circular emphasized the consent of the Moravian First Nation to a similar deal. The offer included 10 cents/acre rental, $50 to each locatee and Company responsibility for clean up and damages.\textsuperscript{192}

The Walpole Island First Nation, distrustful of the DIA, "flatly rejected" the proposal. The Department was considered incapable of arranging any good deal where the resources of the

\begin{footnotes}
\footnotetext[189]{189} Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), memo, 6 July 1945, Kehoe, IAB (Mines) to D.J. Allan.

\footnotetext[190]{190} The actual Territory of the Walpole Island First Nation is much larger than the land area of 40,000 acres including extensive marsh lands, waters, islands and land under water in Lakes Erie, St. Clair and Huron, the Detroit River and the River St. Clair.

\footnotetext[191]{191} Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), memo, 18 February 1946, Allan; memo, 29 March 1946, W.S. Arneil (?) to Allan; letters, 7 January 1947; and 10 Jan. 1947, Allan to Imperial Oil.

\footnotetext[192]{192} Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), 14 February Imperial Oil circular to Walpole Island.
\end{footnotes}
First Nation were concerned. The Walpole Island First Nation was very dissatisfied with returns from the shooting leases on St. Anne's Island, part of the Bkejwanong Reserve. Rental returns were considered unacceptably low, and "...until the shooting leases are made adequate according to the Band, it would appear that any proposal from the Department to the Band [regarding surrender of oil rights] would receive scant attention."193 This is significant because it indicated that opposition to the 1924 Lands Agreement was not at the root of Walpole Island First Nation resistance to relinquish rights to oil and gas. This is in contrast to the late 1950s and 1960s when the Agreement was the major impediment to oil and gas exploration.

During 1948, Mr. McClelland, a representative of Imperial Oil, visited the Island to reiterate the Company’s current proposal. McClelland told the Ojibwa in council if they did not agree to surrender, the DIA would go over their heads and secure one anyway. Through their agent, Robert Stallwood, the Walpole Island First Nation demanded to know "how the Department would circumvent Section 50, subsection 2(a) of the Indian Act which

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193 Vol. 7645, F. 20040-1, pt. 0 (Walpole Island), memo, 24 February 1947, Kehoe. The St. Anne Shooting leases were negotiated by the Walpole Island First Nation during the 1870s. Visiting Indian agent at Sarnia, Robert Mackenzie (the brother of prime minister A. Mackenzie) thought the leases were beneficial and pushed them through the DIA while the prime minister, also the Superintendent of Indian Affairs, was away in England. See David McNab, "The Walpole Island Indian Band and the Continuity of Indian Claims: An Historical Perspective, in Nin.Da.Waab.Jig., Occasional Papers, 1985. These leases came up for renewal periodically; during the late 1940s, the Walpole Island First Nation sought either to have the monetary return increased or the leases cancelled. The DIA continued to renew them on terms now objectionable to the First Nation. The issue went to court and the Walpole Island First Nation lost. Personal communication: David McNab, 4 July 1994.
requires a surrender before a lease may be issued." No response is on file.

On 6 January 1949, the Walpole Island First Nation voted on a proposal to release oil rights over the entire Island for a $5000 bonus and a 10 cent/acre rental totalling $4,048. The Company would also spend $2,500 on roads. In addition to this, each lease of surface rights for a well site would bring the locatee $100 rental per year to be paid in advance. The Walpole Island First Nation unanimously rejected the proposal in a 51-0 vote.195

Throughout the early 1950s no surrenders were authorized. The shooting leases may still have been a sore point, but a new issue also arose. This had to do with the deployment of lease money. The Walpole Island First Nation specifically objected to the fact that all lease money was to go into the common fund. Individual members would receive no personal benefit from the development and felt there was "...little value [and]...real interest in compiling large amounts of Band funds to be used of distributed after they have passed on."196

Agent, F.C. Hall, sought and obtained encouraging information about the profit potential for the Walpole Island First Nation if they surrendered their rights. Although the possibilities appeared

194 Vol. 7645, P. 20040-1, pt. 0 (Walpole Island), letter, 7 July 1948, agent Robert Stallwood to IAB.

195 Vol. 7645, P. 20040-1, pt. 0 (Walpole Island), letters, 22 July 1948, Allan to Imperial Oil; 22 December 1948, agent Stallwood to IAB; and 6 January 1949, Stallwood to IAB.

quite lucrative, he informed the DIA that unless it showed the people they can "use the royalties" they will not surrender. The Walpole Island First Nation was not interested in piling up royalties in Ottawa.¹⁹⁷

During the 1850s and 1860s the DIA appropriated and then sold the land and oil and gas in the Enniskilen Reserve, in part, fuelling the oil boom in Canada. Toward the end of the century, outsiders exhibited great interest in the potential oil and gas resources under the Sarnia and Bkejwanong Reserves. The DIA seemed quite willing to ignore its own rules by allowing developers to access the Sarnia Reserve without First Nation consent. Federal actions during World War One were highhanded and unnecessary. D.C. Scott artificially manufactured conditions which allowed Canada to use the federal War Measures Act to expropriate unceded oil and gas resources from the Ojibwa, Ottawa and Potawatomi. The Sarnia and Walpole Island First Nations had good reason to be weary of Scott and his 'narrow vision' as it applied to the development of their resources.¹⁹⁸ But, First Nation protest successfully defeated federal attempts to sell their expropriated oil rights. These deeds shed new light on Aboriginal resistance movements and their leadership. Canada’s actions should give all Canadians cause


¹⁹⁸ See Titley, A Narrow Vision....
for thought; they are a warning, indicating the ease with which Canada can override the inherent rights of citizens through the passage of laws made by order in council. Between 1920 and 1960, the Walpole Island First Nation refused to authorize any oil exploration or development.

CONCLUSION

Sub-surface and sub-marine rights had never been shared or surrendered under any of the early Treaties and minerals remained Aboriginal property. During the 1850s, the DIA began issuing licences to develop unceded Aboriginal oil in the shared areas. In the 1860s it illegitimately appropriated unceded Aboriginal land and oil in the Enniskillen Reserve. In that decade, several First Nations unilaterally made their own oil bargains with individuals and companies. The DIA refused to sanction such independent action because it was a demonstration of inherent Aboriginal sovereignty. In most cases, First Nations refused to surrender their oil rights to the DIA. They insisted on controlling the choice of lessees and terms of compensation. In most cases where the DIA failed to secure Aboriginal consent, it authorized illegal explorations and developments under leases it designed. Lease terms were overwhelmingly advantageous to the developers; little in the way of substantial compensation seemed to be provided for First Nations.

A second wave of interest in oil and gas on Reserves commenced during the late 1890s and continued into the twentieth century. DIA behaviour, however, did not improve. It continued to mismanage oil and gas development on all the Reserves considered
here and most flagrantly at Wikwemikong, Sarnia and Bkejwanong. Efforts to recover Reserve oil continued during the Depression and the Second World War, but many First Nations said 'no.' In light of previous DIA 'management,' it is not surprising that development was negligible. As it had in the past, the DIA continued to authorize permits or leases at rentals and fees far below prevailing commercial rates outside of the Reserves, either through ignorance or negligence. As well, promoters often unilaterally broke agreements and left without paying rentals, or they vacated the Reserve without cleaning up or paying for environmental damages. The development of oil and gas on Reserves in southern Ontario to 1960 does not appear to have gone well for any of the parties concerned.

Little information has been found regarding the effects of the 1924 Agreement on mineral development for the Reserves considered here. Contrary to the Agreement, Canada retained no royalty or "other monies" for Ontario. There does appear to have been one instance where Ottawa held such monies. The following case appears to be the "...only direct payment to Ontario" under the Agreement.19 In 1938, the provincial Department of Mines received $250.00 as its half of the proceeds from mining developments carried out on the Whitefish River and Long Lake

19 INAC, "Indian Lands Agreement, 1874-1969," undated report (probably from the 1970s), "Indian Lands Agreement with Ontario, 1924, Mineral Revenues," M. Cameron, Research Officer, Reserves and Trusts, DIAND.
which had been established pursuant to the Robinson Huron and Superior Treaties respectively. Almost one year later, the Auditor General inquired whether Ontario should have received half the money. He emphasized the Robinson Treaties

...antedate Treaty No. 3 by 23 years and which states that 'should the said Chiefs and their respective tribes at any time desire to dispose of any such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit, and to the best advantage.' It would seem probable that the Province would at that time confirm the title of the Indians in the lands set apart for their use."  

Charles Camsell, the Deputy Minister, replied the only Reserves which could claim an exemption from the 50% clause were those under Treaty No. 3 and Golden Lake, Gibson and Six Nations which had been "purchased" from Ontario. In bold contradiction to the Robinson Treaties, the Ojibwa were not allowed to develop their resources for "their sole benefit." As late as the 1980s, the very existence of the 50% clause served to "discourage mineral development" in general. But, not all Native People gave up in anger and frustration. During the late 1950s and '60s all First Nations discussed in this chapter were still interested in the

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200 INAC, "Indian Land Agreement, 1874-1969," letter, George Gonthier, federal Auditor General to Charles Camsell, Deputy Minister, Mines. Note: This is the same Camsell whom the Crane Chief had stopped in 1903.

201 INAC, "Indian Land Agreement, 1874-1969," letter, Gonthier to Camsell.


economic potential of minerals and some even agreed to allow exploration.
CHAPTER SIX

THE POLITICS OF NEGOTIATING ABORIGINAL INTERESTS:
THE 1986 LANDS AGREEMENT

INTRODUCTION

First Nations pushed the federal and provincial governments to proceed with the 'renegotiation' of the 1924 Lands Agreement and increasingly gained a stronger voice in the discussions. They had every reason to believe they would obtain their objectives. This, however, did not happen because Ontario's negotiating tactics dragged out the talks for more than two decades. Thus, the result of all these discussions, the 1986 Lands Agreement, was much less than what First Nations and Canada had initially demanded.

Aboriginal People refused to develop their minerals if they had to lose 50% of their interest to Ontario. Finally, after years of unsuccessfully attempting to bypass clause 6 of the Lands Agreement, the Indian Affairs Branch (IAB), at the insistence of First Nations, initiated bilateral negotiations with Ontario to amend the Agreement in 1958. Initially the goals for both governments were to confirm Canada's past land transactions in sold surrendered land; to return to Canada administration and control over unsold surrendered lands; and to acquire Ontario's 50% of the mining monies for Aboriginal benefit. But, these goals were complicated from the beginning by provincial Cabinet instructions not to revise unless Canada agreed to settle a number of other outstanding, and unrelated, Aboriginal land and resource 'side issues' in its favour. This reactivation of Ontario's value
for value policy indicates the province never intended to bargain in good faith either with Canada or the First Nations which did not gain a permanent place at the negotiating table until the establishment of a Tripartite Working Group under the Indian Commission of Ontario in 1978. First Nations wanted all unsold surrendered land returned to Reserve status and demanded that Ontario abandon its 50%. These goals, however, conflicted with the underlying policy agendas of both governments.

Canada's policy of downloading responsibility for First Nations on the provinces so that it could get out of Indian Affairs altogether,\(^1\) clashed with the first Aboriginal goal. Far from eliminating the Reserve system, this demand would lead to its perpetuation and augmentation. This fact was not lost on federal policy makers one of whom noted

The irony of our position has to be recognized in that...we must convince Ontario that it should transfer these lands to us in full knowledge that the various Bands want all lands returned to them. The obvious conclusion is that in fact the reserve system in Ontario will be expanded in that it is very doubtful that any Band would surrender their lands for sale in the future.\(^2\) [my emphasis]

The second Aboriginal goal clashed with Ontario's value for value policy. Ontario's attachment to this policy explains why the

\(^1\) For a discussion of this policy see: John Tobias, "Protection, Civilization, Assimilation," in Ian Getty and A. Lussier, As Long as the Sun Shines (Vancouver: University of B.C. Press, 1979), p. 52; see also Sally Weaver, Making Canadian Indian Policy (Toronto: University of Toronto Press, 1981), pp. 27-29; and Olive Dickason, Canada's First Nations (Toronto: McClelland & Stewart, 1992).

\(^2\) INAC, "Indian Land Agreement," 1980-1982 (hereafter: "ILA 80-82"), undated, unsigned, "Discussion Paper for the Development of Policy for Unsold Surrendered Lands in Ontario," p. 2. NOTE: Because this chapter deals with an enormous number of government administrators from several different Ministries, a "name index" has been appended to the back of this chapter for quick reference and convenience.
1924 Lands Agreement took more than one-quarter of a century to negotiate. It is the reason why the 1986 Lands Agreement, the result of the negotiations, which does not replace but stands beside the 1924 Lands Agreement, primarily satisfies Ontario's interests.

**INTERNAL DIFFICULTIES WITH MINERAL DEVELOPMENT: THE PRELUDE TO AMENDMENT, 1930-1957**

During the 1930s, both governments continued to experience difficulties with mineral exploitation in surrendered Reserve land some of which was sold and patented. But, the patents were inconsistent with some reserving precious metals and others base metals, some reserving all minerals and others not referring to minerals at all. This situation became problematic in 1936 when patentees had to forfeit certain (formerly surrendered) land to Ontario for non-payment of taxes.

First Nation interests were at stake where there were mineral reservations in the original patents. Legally there was no such thing as an Aboriginal "interest" in surrendered land, but neither government operated this way. Both believed the 1924 Agreement did what it was supposed to have done. The IAB believed it could dispose of reserved mineral interests, but ran into difficulty because Ontario controlled surface rights in surrendered areas. So, in order to streamline control and administration, Canada allowed the province to regulate mineral rights in certain scheduled lands, subject to clause 6 of the 1924 legislation, under orders-in-council (OICs) P.C. 1958 of 15 May 1940 and P.C. 1958.
However, in 1943 shortly after the first OIC was passed, the Branch attempted to bypass clause 6 while dealing with the surrender, by OIC, of mineral rights on Whitefish Bay Reserve. It may seem contradictory that Canada would grant Ontario control of minerals in certain lands through OIC in 1940 and 1946, while at the same time attempting to find ways to bypass the 1924 Agreement in other lands in 1943. Yet, if one examines the underlying philosophy of the IAB during the 1940s it is possible to at least partially reconcile this apparent contradiction. That is, the Branch was still suffering under the "legacy" of D.C. Scott: it was still widely believed Native People would be assimilated and disappear under policies of decentralization and relocation. Thus it was all right to give away Aboriginal rights in the long run (under OICs) while dealing with immediate complaints in the short run (no mineral development unless First Nations received full benefits).

The IAB continued its attempts to bypass clause 6 in connection with the mineral resources of the Tyendinaga First Nation which refused to relinquish mineral rights if the clause was operative, correctly perceiving "they would be getting nothing definite in return." The IAB concurred and tried to promote

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mineral development outside its own Regulations by repeating what had been done in 1943 on the Whitefish Bay Reserve.  

The question of Aboriginal rights in surrendered lands remained a contentious issue throughout the 1950s. This was particularly so between 1952 and 1954 as the IAB tried to deal with Reserve lands allegedly surrendered by the Garden River, Batchawana and Goulais Bay First Nations in 1859. Superintendent General Pennefather had suggested the surrender, but most of the land remained unsold. Then in 1900, about 30,000 acres were purchased, but the terms of sale placed a reservation on "...all minerals, precious and base...[and] the right to work mines and remove the minerals." The current land owners wanted to know whether they held mineral rights. The Branch was in a quandary over how to deal with the situation because there was no established policy on the disposal of reserved mineral rights after the surface rights had previously been sold. Again it wished to know if it operated outside its Mining Regulations whether clause 6 was applicable.

Departmental solicitor, L.A. Couture, declared that the land sale of 1900 was subsequently confirmed under section 9 of the 1924 Agreement. After this, the disposal of minerals was 

...not subject...to the 1924 Agreement. Thus from a

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5 INAC, "NRM-G," memos, 15 September 1952, Acting Superintendent, Reserves and Trusts, IAB to Cory; and 20 September 1952, Legal Advisor to L.L. Brown, Director, IAB; 17 March 1954, Acting Director IAB to Couture.


7 INAC, "NRM-G," memo 17 March 1954, Acting Director IAB to Couture.
strict legal standpoint, it seems to me that the said Agreement was not intended to regulate matters of this sort... The effect of the confirmation [of the 1900 sale under clause 9] would be that the Crown in right of Canada has full authority to dispose of the property, but not under the Agreement, and consequently, not subject to section 6 of the Agreement.

Nevertheless, Couture advised against unilateral action in order not to provoke Ontario as its position was unknown and "...it would [probably] not easily abandon monies of this sort."¹

Couture later advised the IAB it could not dispose of mineral rights in these lands under the 'Indian Mining Regulations' as they applied only to Reserve and surrendered Reserve land, not to sold surrendered land. If Canada "transferred" such rights to Ontario as it had in 1940 and 1946, Ontario would keep all monies generated.'

While this seems to contradict what the Branch did in the OICs of the 1940s, it must be remembered that its underlying philosophy was still assimilation. This would be achieved by the gradual settlement of outstanding Aboriginal issues between the governments. In the long term, settlement of such issues would lead both to devolution and assimilation, with issues between Ottawa and Aboriginal People simply fading away.¹² But, in the short term it was imperative for the Branch to attempt to escape the negative effects of clause 6 because First Nations refused to

¹ INAC, "NRM-G," memo 20 July 1954, Couture to Brown.


¹ Interview, David McNab: 2 February 1993.
allow mineral development. The tension behind these two realities created no end of contrary posturing on the part of the IAB.

Aside from the minerals clause, other aspects of the 1924 Agreement troubled the IAB. First, it was not clear at what date the Agreement became effective: 1867, 1902, 1924 or at the first surrender of Aboriginal land in Canada. Establishing this was important to determine which government had (and has) the right to sell particular tracts of surrendered land. Canada wanted "sole sale jurisdiction over surrendered lands" no matter when the surrender occurred and provincial confirmation of federal water lot sales around Manitoulin Island and the Bruce Peninsula.¹¹

Second, the 1924 Agreement did not confirm the Agreement of 1902 as had been intended and even if it had, the 1902 clause allowing Canada to administer mineral development on Reserves for the full benefit of First Nations would have been contradicted by clause 6 of the 1924 Agreement. Clause 6 discouraged mineral development on Reserves: First Nations refused to relinquish 50% of their interest to Ontario which refused to abandon the clause. Neither Aboriginal People nor the province benefited under this stalemate. The Agreement

...discouraged large mining concerns, and...some years subsequent to 1924, there was a drastic reversal of policy to the point where no royalty is payable and the province gave to the owners of Crown Lands the mineral rights which had been reserved originally in the Crown grants. If that is an accurate statement of the situation, it appears that the Indians should have received the benefit of a change in policy, to the same

¹¹ INAC, "Indian Land Agreement, 1874-1969" (hereafter: "ILA 74-69," memo, 19 August 1957, Brown to Departmental Legal Advisor.)
extent as all other holders of Crown lands.
As we have already seen, Premier Whitney voided all mineral reservations in Crown patents issued after 1867 and before 6 May 1913. Thus, Ontario gave nonNative land owners previously reserved mineral rights and then freed them from paying royalties while First Nations still suffered under the 1924 Agreement.

The IAB complained the Agreement hindered it in securing deals with major mining companies and was directly "responsible for the fact that today the Indians in Ontario have received virtually no revenue for their mineral resources."\(^{12}\)


In 1958, Ottawa responded to pressure from First Nations to abandon the 50% clause. The Walpole Island First Nation was at the forefront of this pressure; one of the first subjects discussed between Ottawa and Ontario was the disposition of Aboriginal oil and gas in general and at Bkejwanong in particular. Minister Ellen Fairclough wanted Ontario to concede a distinction between precious and base metals and between the latter and oil and gas, insisting that the 50% clause had not been intended to apply to anything but precious metals. Specifically referring to the interest of the Walpole Island First Nation in developing its natural gas, she emphasized that the First Nation considered "...they own such resources outright."\(^{13}\)

\(^{12}\) INAC, "ILA 74-69," memo 19 August 1957, Brown to Departmental Legal Advisor.

\(^{13}\) ONAS, "Indian Land Agreement 1924," ILF #178349 (hereafter: "ILA 1924") Vol. 1, letter of 3 June 1958, Fairclough to Spooner.
In contrast, Minister J.W. Spooner claimed the definition of minerals was all-encompassing. Agreeing with Fairclough, Spooner admitted that "...perhaps it is only equitable that revenues accruing from mining development in Indian Reserves should go in their entirety to the Indians." But, his feelings did not extend to monies obtained from such development in surrendered lands which he believed should belong to Ontario. This was the beginning of a lengthy exchange about the revision of clause 6 and the Agreement in general.

Fairclough protested Spooner's position on surrendered lands claiming that all land was not equally endowed with minerals which might occur mostly or only in the surrendered adjacent lands and not the Reserve. Spooner believed the total area of surrendered land was small, comprising only 1,368 square miles, but Fairclough corrected him on this point arguing that:

A considerably greater area than this had been surrendered by Indians, and in conveying title up to ten years ago or so, it was a common practice to not exclude mines and minerals. It would be very difficult to determine even the approximate area of the lands held where the surface has been disposed of and the underrights retained for the benefit of the Indian Band. Fairclough suggested that First Nations retain all mineral monies from on-Reserve developments and that Ontario take half of such monies from mining developments on surrendered lands.

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14 After several decades of research the current amount of unsold surrendered Native land has been identified as 200,000 acres. ONAS, "Indian Land Agreement - 1986" (hereafter: "ILA 1986"), "Brief on the Ontario Indian Lands Agreement," attached to letter 29 June 1988 from Hubert Ryan Registrar Indian Lands Ottawa to Ted Wilson, Director, OIRP.

In October 1958, Spooner formulated questions dealing with the jurisdiction and administration of surrendered land, the right to tax producing mines on Reserves, which government should bear the cost of servicing mining communities and operations and of building and maintaining infrastructures on Reserves.16

These negotiations also encompassed several provincial side issues unrelated to the 1924 Agreement. They were significant and delayed the acceptance of a new agreement for 29 years. The most important and far reaching of these was the question of headland boundaries17 which remains unresolved in litigation even today. It constituted the primary point delaying all attempts at an amendment well into the 1970s. First Nations have claimed mineral rights, including oil and gas, in land under water in general and also in headland areas.18 Aboriginal claims to sub-marine rights between headlands does not mean that First Nations cannot and will not claim their inherent sub-marine rights outside of headland boundaries and in other unceded waters. The disposition of several

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16 ONAS, "ILA 1924," letter 2 October 1958, Spooner to Fairclough. See INAC, "ILA 74-69," memo, 15 October 1958, F.J. Kehoe to W.C. Bethune, Chief, Reserves and Trusts, for federal suggestions on who should pay these costs.

17 Also at issue was control of fishing, hunting and wild rice harvesting in headland areas. Although First Nations had never relinquished control of these resources, Ontario assumed control through legislation and regulations. INAC, "ILA 74-69," 29 October 1958, N. Ogden, IAB to Bethune.

groups of islands, including those in Georgian Bay, the Severn River and the Kawartha Lakes, were also a contentious issue as was the status of road allowances.

It was of no concern to the province whatsoever that these issues had nothing to do with the 1924 Land Agreement per se. The point, for Ontario, was that if it had to relinquish its 50% under clause 6 then Canada and First Nations had to give Ontario its way on all these issues - otherwise clause 6 would not be changed and mineral monies could stay in suspense forever. This was the revival of Ontario's value for value negotiating tactic.

Lands, Mines and Citizenship held a tripartite meeting to discuss the issues noted above, but no definite position was established on any of them. The IAB did not raise the issue of oil and gas rights while considering a draft amended Agreement dated 12 May 1959, which, among other things, transferred the (assumed) provincial mineral rights in Reserve and surrendered land, including unsold surrendered land up to the date of the agreement to it. Canada would also dispose of land for the sole benefit of First Nations. Thus, Ontario agreed to waive its right to 50% of the minerals' proceeds.

Under the revised Agreement, Reserve land, including subsurface rights, and profits would escheat to Ontario upon the

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1. INAC, "ILA 74-69," memo 29 October 1958, Ogden to Bethune.

2. NOTE: mineral monies belonging to an unidentified Manitoulin Island First Nation (or Nations) were being held in a federal suspense account for Ontario.

"extinction" of a First Nation. Previous federal land transactions would be confirmed and revenues accrue to First Nations. Like its predecessor, the revised Agreement barred Ottawa from disposing of water power over 500 horse-power. Ontario would confirm all federal sales of water lots adjacent to Reserves and in surrendered land. All road allowances were confirmed to the province, but benefits accruing from their sale remained vested in Canada for the benefit of Native People.

The IAB questioned Ontario's plans to tax Aboriginal profits from mining development in lieu of 50% of the proceeds at the second meeting on 22 June 1959. At the very least, it wanted Ontario to share this revenue with First Nations. The IAB itself was modifying its Mining and Oil and Gas Regulations so that Native People could enjoy higher rentals and royalties.

Most importantly the IAB wanted Ontario to forego all revenue under clause 6, maintaining that oil and gas had not been part of the definition of "minerals" in 1924 and emphasizing the different arrangements existing in other provinces and parts of Ontario. In British Columbia, the province administered minerals which were defined to exclude oil, gas and other specific minerals. Thus 100% of oil and gas revenues accrued to Native People, with 50% of some other mining dispositions falling to B.C. In the prairie provinces

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22 Canada has unilaterally declared First Nations to be extinct in the past. For example, according to INAC, the Sturgeon Lake First Nation, Reserve 24C in Quetico Park, is extinct. David McNab, "'Principally Rocks and Burnt Lands:' Crown Reserves and the Tragedy of the Sturgeon Lake First Nation in Northwestern Ontario," in Kerry Abel and Jean Friesen, eds., Aboriginal Resource Use in Canada (Winnipeg: University of Manitoba Press, 1991), pp. 157-171.

and the Treaty No. 3 area, 100% of all mineral revenues belonged to First Nations as they would in Nova Scotia and New Brunswick when the agreements there were ratified in parliament. Every province then, except Ontario and Quebec, allowed Native People full benefit from oil and gas development.

H.M. Jones agreed that oil and gas rights were never intended to come under the purview of the 1924 legislation, arguing that only precious and base metals were covered because of their "intermixture" in the ground. Ontario owned the former and Canada, the latter. Jones concluded oil and gas "were not in the minds of those negotiating the agreement" and charged that Privy Council decisions were responsible for the allotment of minerals to Ontario thereby contradicting provisions in the Robinson Treaties among others.

Provincial Mining Commissioner J.F. McFarland tried to limit the implications of Jones' statements regarding the Robinson Treaties by questioning whether mining rights and beneficial interest had been reserved by First Nations in sold and unsold surrendered lands in about three dozen townships. After much investigation, it was determined that such rights had been reserved under the terms of the Robinson Huron Treaty and the 1859

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24 INAC, "ILA 74-69," memo, 17 June 1959, Jones to Deputy Minister (Laval Fortier).

25 INAC, "NRM-G," memo, 3 July 1959, McFarland to Rickaby. A similar letter was sent to Fortier by Rickaby, 6 July 1959, INAC, "ILA 74-69."
Pennefather agreement.\textsuperscript{26} Ontario had no rights in these areas. Although this issue appeared to be settled, it would return to haunt the IAB throughout the 1960s and 1970s and remains an issue today.

During the July meeting Ontario agreed to refer the matter of waiving its 50\% to Cabinet and to deal with the situation at Walpole Island as a separate issue.\textsuperscript{27} The Department of Mines, in particular, began to recognize the mineral rights of the Walpole Island First Nation. R.V. Scott believed Ontario had no mineral rights whatsoever at either Walpole or Georgina Islands, asserting

\ldots that these and some other reserves are owned by the Indians because they were never surrendered in any of the treaties by which the Indians gave up their title to various parts of the province. If such is the case, it would appear to be quite clear that the lands were NEVER Crown lands in the usual sense and that the Indians, by virtue of being the original owners, would be entitled to the mines and minerals. This of course, is only my own opinion.\textsuperscript{28}

On the eve of the 1960s, the future of mineral development on Reserves appeared destined for change.

Ontario, however, intended to activate its value for value policy; it would not give up its 50\% without having something(s) in return. This was even if the 'value' it demanded had always belonged to the First Nations. This policy became the standard provincial bargaining position for the Department of Mines and the

\textsuperscript{26} INAC, "ILA 74-69," letters, 21 July 1959, Fortier to Rickaby and following record, "Title Search." Dept. of Mines received this information: 26 October 1959, R.V. Scott, Chief Mining Lands Branch to Bethune. Also, INAC, "NRM-G," 29 October 1959, Fortier to Rickaby; and "ILA 74-69," 12 January 1960, Fortier to Rickaby.


\textsuperscript{28} ONAS, "ILA 1924," Vol. 1, letter, 12 November 1959, Scott to Rickaby.
Department of Lands and Forests with the former demanding the right to tax both acreage and profits in mineral developments on Reserves and the latter demanding the settlement of all its side issues. But, it was soon clear that Mines was much less committed to the value for value policy than was Lands and Forests.

By January 1960, Ontario had still not submitted the draft amendment to Cabinet. But, a Cabinet response to the surrender of the 50% clause was becoming necessary. Chief Burton Kewayosh of the Walpole Island First Nation, whose Reserve was specifically discussed for waiver, had been in Ottawa twice since 1960. He was anxious to proceed with oil and gas development and had been led to believe Ontario would send a letter to Fairclough relinquishing its rights to 50% of mineral revenue in his Reserve. But, by the end of the year Ontario had still not acted in this matter.

Amendment negotiations had slowed. Fairclough, stressing the importance of a speedy resolution, was perplexed at the delay because the items to be amended had been agreed on in 1958-1959. She hoped Ontario would waive its 50% at Walpole Island where oil companies were interested in exploration, but the First Nation would not surrender its rights unless it retained all revenue.  

In January 1961, Scott announced if Cabinet consented, his Minister would confirm in writing that Ontario would waive its rights under clause 6 at Walpole Island. But, the Department of

27 INAC, "ILA 74-69," letters, 12 January, Fortier to Rickaby; 10 June, Bethune to Superintendent of Walpole Island; and 15 June 1960, Jones to Rickaby.

10 INAC, "ILA 74-69," letter, 16 December 1960, Fairclough to James Maloney, Minister of Mines.
Mines did not wait for Cabinet consent and unilaterally waived Ontario's 50%, believing the 1924 legislation would be amended in one or two years. This waiver was made without the knowledge or consent of the Department of Lands and Forests. Maloney felt that on the strength of his letter the province was indicating that we are prepared to forego any claim and that we waive the entire amount that might be payable to us under the 1924 Agreement of one-half of the monetary proceeds from any sale, your Department could negotiate and execute any sale or agreement you consider in the best interests... to the Indians on the Walpole Island Reserve. In other words, your Department is free to dispose of the mineral rights on Walpole Island and are assured that no claim to any part of the proceeds from such sale will be made by this Province.\textsuperscript{11}

Although Walpole Island gained this short-term victory, the governments were no closer to effecting an ultimate revision. This inertia was linked to Ontario's 'side issues,' particularly the headlands issue, which now encompassed all Reserves in Ontario. Scott believed Treaty No. 3 was the source of the headlands guarantee. If Aboriginal sub-surface rights were recognized in the headlands, the Department of Mines would lose authority to issue mining patents there. In spite of this, it was negotiating such boundaries on a testcase basis with the Eagle Lake and Yellow Girl Bay First Nations.\textsuperscript{12}

By mid-1961, Fairclough wanted a provincial commitment that

\textsuperscript{11} ONAS, "ILA 1924," Vol. 1, letter 9 January 1961, Maloney to Fairclough.

\textsuperscript{12} ONAS, "ILA 1924," Vol. 1, letters 4 January, Scott to Maloney; 26 April 1961, Scott to ? Identity of First Nations, Personal Communication: David McNab, May 1994. NOTE: Scott was not alone in his assumption. Technically, headland rights were re-affirmed under the 1891 Act and the 1894 Agreement; actually, they arose as an outside promise in Treaty No. 3 because of the promises dealing with hunting, fishing and wild rice.
it would extend waivers to other First Nations including Oneida, Muncey and Sarnia. But, Ontario would not sanction a "piecemeal" approach to the problem; it wanted a new Agreement in place. Without this, further provincial concessions concerning oil and gas would have to receive Cabinet approval. Fairclough disliked this approach, charging, in exaggeration, that negotiations had lasted a decade. The last joint meeting had been in June 1959 and the matter was still before Cabinet. Agreement appeared within grasp, but no formal arrangements were sanctioned and Cabinet did nothing. Lands and Forests' side issues were holding up waivers for other First Nations.

Maloney believed a revised Agreement should be passed before further action was taken. However, he agreed with Fairclough that negotiations were dragging on and admitted he may have set a "precedent" by writing the previous "letter of intent" for Walpole Island. Using this as a model, he agreed to draft other letters for the Oneida, Muncey and Sarnia First Nations when asked.

Shortly after receiving the provincial waiver, the Walpole Island First Nation conditionally "surrendered" its oil and gas rights to Canada which approved the arrangement on 15 November

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16 INAC, "Natural Resources, Oil & Gas" (hereafter: "NR-OG"). Notice of referendum signed by Fred Hall; memo, 26 July 1962, Hall to IAB; Notice of referendum dated 17 September 1962, signed by Hall; statement signed by Hall re. the results of the 18 October referendum.
1962 under P.C. 1962-1618. The following month, Council allowed the IAB to advertise for tenders to explore for oil and gas in five areas of the Reserve, all of which specifically included land covered with water. Area No. 5, comprising the southwest part of Bkejwanong, was primarily composed of lands under water in Lake St. Clair.\(^7\) Texaco obtained lease areas 1, 3 and 5 and Home Oil with Central Del-Rio obtained areas 2 and 4, altogether paying just under $300,000 in bonus and rental monies to the First Nation.\(^8\) By 1972 several test wells had been drilled, including at least one in area 5 in the land under water of Lake St. Clair within an administrative straight line southern boundary.\(^9\) When the provincial Minister of Mines, Allan Lawrence, signed these leases, he was admitting, recognising and respecting the Walpole Island First Nation's ownership and control of the water, land under water and sub-marine mineral Rights on behalf of Ontario.\(^10\)

In 1962 and 1963, six other First Nations requested Ontario waive its 50% under the Lands Agreement. Mines officials complied and penned "letters of intent," again without knowledge or input from Lands and Forests, for the Delaware, Abitibi, Six Nations,

\(^7\) INAC, "NR-OG," See "Oil and Gas Rights Walpole Island Indian Reserve No. 46, Ontario."

\(^8\) INAC, "NR-OG," memo, 19 February 1963, Chief, Economic Development Division to Hall.


Oneida, Muncee and Sarnia First Nations. By issuing the waivers, Mines was admitting not only that First Nations had the right to 100% of the revenue generated from mineral development on their Reserves, but also, and most significantly, that Reserves included sub-surface rights despite past legal decisions.

In contrast to Mines' substantive activities from 1961 to August 1963, the joint committee accomplished nothing, not having met since 1961. Scott identified the high turnover of committee members as a cause of lack of progress. But, new faces can explain only so much. Old issues were still unresolved and very much on the minds of the Ontario committee members. Scott, was much closer to pinpointing the true reason for the breakdown in negotiations when he raised the matter of settling the side issues.

Especially significant were six points, all of which had absolutely nothing to do with the Agreement. Scott admitted that:

...all of these items were raised by the province as a counter to the request of the Federal authorities that the 1924 legislation respecting Indian lands be revised to delete the requirement that 50% of the proceeds from the disposition of mining rights on Indian Land be turned over to Ontario.¹²

¹¹ ONAS, "ILA 1924," Vol. 1, request letters: 4 Dec. 1962, R.A. Bell, Minister of Citizenship and Immigration to George Wardrope, Minister of Mines (Moravian); 8 January 1963, Ball to Wardrope (Abitibi); and 5 August 1963, Jones to D.P. Douglas, Deputy Minister, Mines (Six Nations). Confirmation "letters of intent:" INAC, "ILA 74-69," 7 Dec. 1962, Wardrope to Bell (Moravian); 11 January 1963, Wardrope to Bell (Abitibi); and finally, 13 August 1963, Wardrope to Jones (Six Nations). I have not found specific waivers for the Oneida, Munce, and Sarnia First Nations. Note: The Six Nations was exempt from the 50% clause of the 1924 Agreement under clause 7 which had exempted certain unidentified Reserves previously granted by the province. It did not require a waiver. But, one was prepared since it was believed this would contribute to "...the orderly administration of mineral rights underlying Indian lands..." The Department of Citizenship wanted clarification on other Reserves which fell under clause 7. INAC, "ILA 80-82," Cameron document. This appears not to have been done.

Thus, right from the beginning, Ontario had planned to use its value for value policy as a means to stall the return of full beneficial interest in sub-surface rights to First Nations. Scott followed up with another candid letter condemning the IAB for its lack of action. On 11 October 1963, he informed D.P. Douglas:

> It would now appear that the Indian Affairs Branch are getting a free ride. As long as Ontario will continue releasing one reserve after another, there is no incentive for them to clear up the matters that are of concern to us. The original intention was to use the proposed amendment to the Indian legislation as a lever to force decisions concerning the other problems. Perhaps we should return to basics. [my emphasis] 43

The most significant of these "other problems" was the headlands issue. Scott as much as admitted it did not matter whether First Nations were caught in the middle of a provincial-federal dispute regarding Treaty No. 3 headlands. Minister Wardrope took a similar stance when he vowed "I do not intend to make any further concessions without the approval of Cabinet and until such time as the Department of Immigration and Citizenship shows that they plan to play ball." [my emphasis]44

Finally all the cards were on the table. The future did not look too promising for any, much less a speedy resolution. As things stood, Scott saw little reason to "revive" the joint committee as most of the matters to be settled were within the jurisdiction of provincial Surveyor General R.G. Code and could be

settled between himself and the IAB. Code was apprised of recent developments and on 19 February 1964, met federal representatives to discuss headlands, islands, road allowances and provincial taxing rights. Ottawa agreed to draw headland boundaries on aerial photographs of Treaty No. 3 Reserves and submit these to Ontario for consideration. During the meeting, both sides agreed that Ontario would forfeit its rights under clause 6 because of Treaty rights to minerals. But, the province could not merely agree to right the wrong that was the 1924 Agreement. The whole spate of side issues would also have to be settled in its favour before it gave up the revenues to which it had never had a legitimate right.

Federal representatives such as Jules D'Astous worried that provincial plans to tax mining production on Reserves in lieu of its 50% would reduce Aboriginal desire to proceed with mineral development because attractive financial gains were necessary to overcome fear of surface and environmental damage. D'Astous believed proceeds would drop if acreage and profit taxes were applied to nonNative operations on Reserves because the cost of producing minerals would be too high for operators if they had to pay taxes to Ontario and royalties to the First Nation.

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D'Astous gave several reasons why Aboriginal lands should not be taxed. First, section 125 of the BNA Act barred the taxation of federal and provincial lands. Second, section 86 of the Indian Act exempted taxation of Reserve and surrendered Reserve lands where beneficial interest remained with a First Nation. Finally, the situation in other provinces, noted above, could be considered.

Federal representatives would allow Ontario to recover only the cost of providing services to Reserves in connection with mining development. Scott refused to allow Ontario to reap large profits from Aboriginal mining beyond cost as he had found the province did in other mining situations; for example, in 1961, Ontario had made at least 6 times over what it cost to provide such services. This is why Canada sought provincial agreement that Aboriginal lands would not be subject to an acreage tax and suggested Ontario allow First Nations to subtract any cash bonuses, royalties and rentals from proceeds before a profits tax was applied. Tax from this source alone would be sufficient to cover services provided by Ontario.

More than a year later, the three Departments were no closer to a solution on the side issues with the exception of taxation. Ontario accepted D'Astous' suggestions, agreeing "to designate Indian Land as Crown Land for the purposes of the allowance of royalties paid as a deductible expense under the

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48 INAC, "ILA 74-69," letter, 25 February 1964, D'Astous to Scott. NOTE: cost was $3.2 million; Ontario took in $18.3 million.

Mining Tax Act of Ontario." This proposition, submitted to the Treasury Board, was stayed pending receipt of legal opinion. As part of an "agreement-in-principle" on 8 September 1965, that Board gave its approval to the scheme. This "agreement" covered only the tax issue. No agreement on the other side issues was reached. As a temporary matter of policy it was "verbally agreed" that Ontario's 50% of mineral monies would be held in trust by Ottawa in a suspense account and that once new legislation was passed the money would be returned with interest to the First Nations. After this assurance several First Nations agreed to mineral exploration on their Reserves. But, the Muncey, Chippewa and Oneida First Nations did not approve mineral surrenders.

This was not the first time a suspense account had been discussed. In 1958 Imperial Oil obtained exploration rights over 45,000 acres on Manitoulin Island for $9,502.25, half of which was retained in a suspense account. Although the Minerals Officer asserted that oil revenues were not subject to the 1924 Agreement and recommended their release, Departmental Legal Advisor D.H.

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50 INAC, "ILA 74-69," memos, 29 July 1965, Douglas to Wardrope; 3 September 1965, Secretary of Treasury Board to Douglas (quote is from this latter record); and 10 Sept. 1965, Secretary of Treasury Board to Douglas.


52 INAC, "ILA 80-82," Cameron document, p. 3.

53 INAC, "ILA 80-82," Cameron document, p. 3.
Christie over-ruled him, withholding the money for Ontario.\textsuperscript{94} It would seem unnecessary to create a suspense account when Ontario had already waived its 50% interest in several Reserves. However, conflicting legal opinions on the application of clause 6 prompted caution and after 1965 no other waivers issued following the provincial Auditor's ruling that the Minister had exceeded his authority by unilaterally waiving Ontario's rights.\textsuperscript{95} But, it was understandable why this had happened: no clear policy existed and decisions were executed on an ad hoc basis.

In 1966, when the IAB moved from the Department of Citizenship to a separate and new Department of Indian Affairs and Northern Development (DIAND), another draft agreement was prepared which included the current perspective on provincial taxing rights. Other matters pertaining directly to the Agreement were also considered including waterpower, headlands, road allowances and Ottawa's need for provincial confirmation of its irregular land sales. The Department of Justice maintained the 1924 legislation allowed Canada to dispose of surrendered lands after 1867 but, later claimed the legislation did not allow for disposal of such land prior to 1924.\textsuperscript{96} Canada, however, sought formal

\textsuperscript{94} INAC, "ILA 80-82," Cameron document, pp. 5-6.

\textsuperscript{95} INAC, "ILA 80-82," Cameron document, p. 5.

authority to continue disposing of all such land. 57

The 1967 draft amendment, discussed at the joint committee meeting held in May, where, for the first time, a Native Person was present, covered many of the same points, but did not refer to headlands. Chief Lorenzo Big Canoe of the Indian Advisory Council demanded negotiations resume so that First Nations could benefit from mineral development. 58 DIAND promised to keep the Advisory Council abreast of the negotiations and ensure its representation at future meetings. 59 It did not do so and little substantive Aboriginal consultation or participation existed prior to 1978. 60

Two very different assessments of that meeting arose. Scott was sceptical about Ontario's commitment to effect legislative change to the 1924 Agreement if the headlands issue remained unresolved. Emphasizing outstanding problems concerning road allowances and timber rights in former Reserve areas, he doubted any revision could be carried out in the present legislative session.61 On the other hand, H.T. Vergette concluded the time was ripe for agreement, forecasting a settlement within six

57 INAC, "ILA 74-69," memos, 29 April 1966, T.L. Bonnah, Regional Superintendent of Development to Director of Development, IAB; 17 May 1966, Bonnah to Director; 25 May 1966, Brown to Acting Director, IAB; also "Summary of Problems...", cited above.

58 INAC, "ILA 74-69," memo, 8 June 1967, H.T. Vergette, Head, Land Surveys and Titles Section, IAB to Chief, Lands, Memberships and Estates Division, DIAND, Toronto.

59 INAC, "ILA 74-69," letters, 16 August 1967, Churchman to Assistant Deputy Minister, DIAND; and 23 August 1967, Churchman to the Regional Director of IAB Toronto.

months. Time would tell that Scott was closer to the truth.

According to Scott, most of the jurisdictional issues arising from the original Agreement were settled in theory by the Fall including headland boundaries, although there was no ratification of such water boundaries for even one Reserve. Ontario required a "written commitment" from Ottawa that a full settlement of these boundaries would be carried out by a set date. But, the headlands issue was far from decided. A tentative procedure to settle the matter was established at the 25 September meeting, but by the end of the year, no consensus was reached. This matter was becoming increasingly important; mineral development in the Treaty No. 3 area and Aboriginal fishing rights made settlement imperative.

At a meeting held on 14 March 1968, the governments discussed First Nation 'extinction,' confirmation of all land sales, water power and road allowances. Headlands were considered at length, but Ontario made no firm commitments although it appeared to accept such boundaries in principle. Lands and Forests committed to prepare a definite proposal to deal with the issue within a month. But, no concrete statement was forthcoming. In the end, Minister Brunelle refused to confirm water boundaries between headlands because this, it was alleged, would complicate fishery

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64 INAC, "ILA 74-69," memo, 22 March 1968, Vergette to Chief, Land Membership and Estates Division.
and water fowl management. Much of the argument surrounding the headlands hinged on the extent of water to be included with Ottawa arguing for large expanses and Ontario for insignificant ones. Although Aboriginal People insisted on a solution, the governments failed to reach consensus.

While apprising his new minister of the situation, Scott emphasized the legal effects of past federal/provincial disputes which had allowed Ontario to control natural resources. One unidentified ruling maintained that when First Nations no longer required the land the province was entitled to any revenue from the sale of the mines and minerals. It seems to be the general consensus these days that the decision of the courts was a poor one in that the Indians, who stood the most to gain or lose, were not represented nor heard. It also appears that the decision was made without any reference to the rights guaranteed to the Indians by their Treaties which presumably had some status as legal contracts.

Thus, by the close of the 1960s, it was conceded that earlier precedent-setting decisions, on the basis of which legislation had been passed confirming certain rights to Ontario, had in fact rested on insufficient and biased evidence. These decisions, which allowed the province to diminish or abrogate Aboriginal rights should never have been made.

Ontario would certainly not have made such a statement during the time of Oliver Mowat and for a good many years after. The

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5 INAC, "ILA 74-69," letter, 10 April 1968, Brunelle to Laing.


province, at that time, was too interested in expanding its power and developing resources to be concerned with matters of fair play. Ontario extracted virtually everything it could from Ottawa through the courts and legislation between 1885-1924. But, all blame cannot be put at Ontario's doorstep. Ottawa had failed to act in the best interests of First Nations. It had failed to ensure that Treaties were fully considered in the final St. Catherine's case and that Native Peoples were called to give evidence from their own perspective.

Scott's views, likely also accepted by federal officials, were indeed a sign of the times. They were put forward by a province which had already established its power vis-a-vis Canada, which had already fought for and won the right to develop natural resources and which had very little to lose from its new assumption of insight and generosity. Even the stubborn and ethnocentric Department of Lands and Forests could agree to such a belated interpretation of events. However, it demanded more than the Department of Mines to reverse the injustices of the past. Following Mines' new position on headlands, as we shall see, only Lands and Forests maintained the value for value tactic.

Throughout the remainder of 1968, various DIAND officials attempted to convince the Department of Mines that the headland problem was a separate issue which should not be allowed to hold up the revision of the 1924 Agreement. Specifically, DIAND sought to conclude an immediate and separate Agreement with Mines on minerals and taxation. Lands and Forests was to be left out in the
cold with its everlasting intransigence on the headland issue."*8

DIAND's shrewd attempt to divide and conquer the Ontario Departments did not work. Mines did not support it and Scott viewed the whole idea as legally and politically impossible because Lands and Forests had signed the original 1924 Agreement and would have to sign any modified one. Nevertheless, he knew why such a suggestion had been put forth, stating: "I would hate for this situation to continue for another 10 years as it likely might in view of the response it is getting in certain areas of the Department of Lands and Forests."*9

Scott stated that headlands arose as an issue because Ontario representatives were told by Cabinet to deal with them at the same time as the amendment. Because Scott now accepted the view that the headlands issue had nothing to do with the Treaty, he advised his Department to ratify the Agreement, arguing that this issue could be settled at a future date between Lands and Forests and Ottawa.70 Although Rene Brunelle was asked to respond to this suggestion, he did not. Provincial side issues continued to be divisive at the next meeting between DIAND and Lands and Forests, held on 12 November 1969. Scott, present at the request of federal delegates, had purposely been excluded from an earlier meeting by Lands and Forests officials. Grant Ferguson, the Director of the

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*8 INAC, "ILA 74-69," see for example letters 14 June 1968, J.G. McGilp, Regional Director, Ontario, IAB, DIAND to R.D.K. Acheson, Assistant Deputy Minister, Lands and Forests; 29 October 1968, John Cretien, Minister, DIAND to Lawrence; and 14 November 1968, Cretien to Lawrence.


Lands and Forests' Legal Services Branch, was in charge of Ontario's position. He was hostile and the meeting protracted, with four areas creating disagreement.

Ontario wanted Ottawa to produce maps clearly distinguishing between Reserve, surrendered and other lands. Second, Ferguson wanted the IAB to provide Ontario with the legal status of such lands. This was potentially the most explosive of the issues as it meant that thousands of land grants and the subsequent land transactions of private holders could be illegal if it was established they occurred on "unsold surrendered land to which an Indian Band has a claim." Third, Ferguson wanted an exact accounting of what Aboriginal land Ottawa had sold. Federal representatives believed this to be impossible, but agreed to identify such sales after 1924. Clause 9 of the 1924 Agreement had regularized all grants prior to that date whether problematic or not. This was what DIAND wanted in a revised Agreement, namely the same blanket protection for grants made after 1924. Ontario was also concerned with the effect of the amended Agreement on road allowances.

Scott suggested, among other things, that the problems with Lands and Forests be resolved separately. But, Ferguson would not agree because his Department would lose its "bargaining position." Ferguson clearly understood that Mines had no side issues to resolve. If an agreement was reached with Mines on the minerals

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issues nothing would be left which Lands and Forests could use to force DIAND to settle the side issues, all of which pertained to its own interests. Poupore questioned the basis of this position emphasizing that the governments were not here "to bargain, gain or give up an advantage," but to "resolve" the problems arising from the 1924 Agreement. 73

Although enmity existed between Ferguson and Scott, the latter defended Ferguson's statements regarding the bargaining position, claiming that both Ontario Departments had been instructed by the provincial Cabinet in 1959 "to use...[the 50% clause] as a lever to settle other problems." 74 Lands and Forests continued to refuse to settle the amendment unless all the other side issues it was concerned with were cleared up. Scott had been instructed to be more flexible: "My Minister did not say, give up everything, see if there is a way; if you cannot amend the whole thing, amend it in part. He did not tell me to come and lose my bargaining position." 75 Poupore noted that Lands and Forests believed the scope of the 1924 legislation was insufficient to fix the "problems the province has, and foresees. The 1924 Agreement is effective for Canada, but did not help the province." 76

Toward the end of this heated meeting regrettable comments were made. Omar Peters, Surveyor General of Canada, stated "These

Agreements were made by people who could not even read or write. In another 10 years, write them all off." 77 DIAND's Poupore concluded the meeting with the words: "We are all under pressure to straighten out these very problems. We cannot hand the Indians our mess. Let them make their own mess." 78 However, they all forgot that the "mess" had been created by white settler governments since 1867 - racism and arrogance had been and, obviously, still were factors.

Shortly afterward, Ferguson laid out Lands and Forests' position on headlands: the operative clause in the 1891 Act was "void for uncertainty" and the Act was "merely an agreement to agree." But, even if this was erroneous there was clear provincial intent to abrogate the clause throughout 1914-1915. Ontario's 1915 legislation was valid and had not been repealed. Finally, Ferguson reprimanded Ottawa for misappropriating the headlands since, in his view, they had not been included in the Treaty entitlement." 79 This charge was inaccurate and Canada had not done this. Ontario had agreed to the Act of 1891 and passed it prior to Canada. 80 Negotiations floundered again on the headlands issue.

By the end of the 1960s, the governments were even further

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77 ONAS, "ILA 1924," Vol. 2, "Minutes..." p. 22. Scott, to his credit, stated in objection to this remark that "our whole western civilization is based on the Magna Carta...Not one of the barons who signed the Magna Carta could read and write. Priests signed for them. Do not try to weasel out on the question of reading and writing," p. 23.


80 Ontario passed the Act on 4 May 1891 and the Dominion on 10 July 1891.
from agreement than they had been a decade earlier. First Nations whose interests were at stake, were becoming increasingly impatient with their virtual exclusion from the process and the everlasting delays. The release of the White Paper under the Trudeau Liberals in 1969 created a major uproar among Aboriginal People and spurred them "to organize against the government and to reassert their separateness." No mineral exploration or development on Reserves would occur until First Nations retained all of their mineral monies. DIAND believed the potential for on-Reserve mineral development in Ontario was very high estimating the value of potential production at more than $350 million.

But, Ontario was not interested in allowing the revised legislation to go through without settlement of its side issues. In order to ensure some benefits to Native People as soon as possible, provincial officials at Mines were considering the return of Aboriginal mineral monies in the suspense account by OIC. No immediate action was taken, but the proposal continued to be pursued even though it was disagreeable to Lands and Forests. Several draft amendments were prepared in the early 1970s removing the offending minerals clauses and replacing them with full beneficial interest, tax concessions and provisions for

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42 Weaver, Making Canadian Indian Policy, p. 171.


safety and technical surveys.

At a meeting held on 7 December 1971, between Lands and Forests and DIAND, many of the topics discussed were similar to those at previous meetings. Although, many of the same people attended this meeting (Ferguson, Vergette, and Poupore), Lands and Forests officials were much less hostile to the Agreement then they had been. Ontario was concerned it would be responsible for setting aside additional land for First Nations if Canada settled comprehensive claims and if land entitlement in excess of the Treaties was imported into a revised Agreement. However, Vergette (DIAND) assured Ferguson (L&F) this could not happen because all land covered by the Agreement would have to be identified in attached schedules.85

By now, Ontario realized it had violated the interest of many First Nations. Ferguson, always concerned over the validity of present titles "raised the question of a blanket indemnity and asked if Canada would consider indemnifying Ontario against Indian claims resulting from non-receipt of the proceeds of surrendered land sales." Poupore stated such an action would be a "political decision" and that it was "unlikely Canada would do so."86 Considering that, in the past, it had always been Canada in trouble over irregular land sales in Ontario, it was now fitting to see the province straining under a similar predicament.


86 ONAS, "ILA 1924," Vol. 3, see "Report of a Meeting held in the Board Room..." p. 3.
There were still points to be worked out, but the overall attitude of Lands and Forests appeared to have softened. Even Ferguson - who was so opposed to every compromise suggestion in 1969 for fear of losing Ontario's 'bargaining position' - declared that "conflict" was generally absent regarding the proposals for amendment at the current meeting. Optimistically, the draft legislation was even scheduled for joint parliamentary introduction in the 1972-1973 session. But, it was not to be.

Although the MNR remained concerned about the scheduling of surrendered lands particularly at Garden River and Nipissing, throughout 1973 and 1974 it seemed willing to move forward with final approval for the amendment. The Assistant Deputy Minister of the MNR, Walter Giles, was pushing very hard to have the whole matter settled and an amendment signed. By the fall of 1974, INAC was waiting for the MNR Minister to sign the amendment.7

Unfortunately this momentum was broken because of a decision to accommodate Aboriginal demands to have a direct role in framing the amendment. It is important to recognize that the delays in signing which resulted were not the fault of the First Nations which should have had a direct role in the revision negotiations right from the beginning so that when agreement was finally reached all parties could sign immediately. Because this did not happen at the end of 1974, negotiations continued and Aboriginal

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7 The records which I had access to were deficient for the period between 1972 to 1975. However, Jim Wells generously allowed me to supplement my understanding of this period by viewing documents of this period and by verbally sharing his understanding of the time period with me. Jim Wells was formerly employed by both Ontario's MNR (with Grant Ferguson) until into 1973 and by Canada's INAC until 1994. Personal Communication, 21 June 1995.
concerns were addressed throughout 1975." By the end of 1975, it appeared that an amended proposal was quite close to being sent to the provincial Cabinet.

Just how unfortunate that year of delay (between the end of 1974 and the end of 1975) was, could not have been known. On 28 January 1976, the Minister of Natural Resources put Ted Wilson, a forester, in control of a newly-created Office of Indian Claims (which became the Office of Indian Resource Policy in 1978.) Wilson deadended MNR's recent conciliatory position, replacing it with a very hard line against any agreement unless MNR obtained settlement of its side issues."

At the end of 1975, Native People were promised that they would not be excluded from negotiations and that no amendment would go to Cabinet before they viewed it. Shortly thereafter First Nations charged they were not adequately consulted and wanted copies of all documents surrounding the amended Agreement. Because it would be embarrassing if Cabinet did not agree with the revisions after First Nations had already found them acceptable,

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18 UOI, "1924/1986 Land Agreement," p. 1. In 1975, the Union of Ontario Indians became directly involved in the negotiations. Prior to this, Native People were virtually uninvolved and "...information provided to Indians who inquired was sketchy and incomplete." Other Aboriginal groups participated to a lesser extent. The effect of the 1924 Agreement on both Grand Councils Treaty Nos. 3 and 9 lands and resources was negligible. Treaty No. 3 was exempt from clause 6 and also had little unsold surrendered land. Treaty No. 9 was "...such a recent Treaty that there were almost no pre-1924 surrenders." This was not the case with the First Nations represented by the UOI. For instance the Nipissing and Garden River First Nations have interests in very large areas of unsold surrendered land which amount to "almost entire townships." On Manitoulin Island and the Bruce Peninsula thousands of acres of road and shoreline allowances are claimed and several million dollars were held in the suspense account for the Sarnia First Nation.

19 Personal Communication: Jim Wells, 21 June 1995. Also, David McNab, December 1995: Wilson's position continued until the 1986 Lands Agreement was completed.
Ontario decided to give its Cabinet committee the documentation detailing the "principles upon which proposed changes were based... for information purposes only." In this way the committee could suggest items which might need to be altered because they were likely not to receive Cabinet sanction before Native Peoples saw them and became too attached to them. This incident gives us a good idea of what governments mean when they talk about a 'consultative process' between themselves and First Nations.

The Committee recommended to Cabinet that the MNR launch "tripartite discussions" with Aboriginal People and Ottawa. This was in fact done, but the issue of Aboriginal participation began to be raised by certain First Nations. As of early 1976, the active negotiators in the amendment process were the Indian Association of Ontario and both governments. This left several groups unrepresented, including the Six Nations and New Credit First Nations, neither of which were affiliated with any Aboriginal organization. The Association of Iroquois and Allied Indians (AIAI) and Treaties 9 and 3 were also not direct players, although they were aware of developments in the negotiations.

In the spring of 1976, a Tripartite meeting was held between the governments and the UOI. A new draft agreement included

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10 ONAS, "ILA 1924," Vol. 4, memo, 14 October 1975, Leo Bernier, Minister of Mines and Northern Development to Premier William Davis; and 12 November 1975, Mary Mogford, Director, Policy Co-ordination Secretariat, MAG to Giles.


12 INAC, "ILA 74-69," letters, 19 February 1976, D.J. Borton, Brantford District Supervisor to Director General Ontario Region, DIAND; and 2 March 1976, Paul Williams, Counsel for UOI to Gordon Poupore, Head of Land Management Section, DIAND.
provisions favourable to First Nations regarding mineral rights, proceeds, taxing and services connected with mining. Specifically, Ontario's 50% was to be transferred to Canada. Ontario also confirmed all federal land transactions involving Reserve or unsold surrendered lands.

Both Canada and First Nations had great interest in the last provision - but for different reasons. DIAND was anxious to have irregular land sales confirmed and to regain control and administration of unsold surrendered lands. This was the primary reason for the renegotiation of the Land Agreement from its point of view. Alternatively, Native People hoped this would mean the reinstatement of all unsold surrendered land to Reserve status. DIAND did not support this view and cautioned the return of such lands to Reserve status would not "be an automatic process."

No substantive action was taken on this draft and no further meetings occurred for quite some time. The Department of Justice was examining the wording of the clauses and so delayed the completion of the draft's land schedule." Inaction continued through the summer and fall of 1977 although a new, but similar, draft agreement was circulated. Disagreements over wording persisted, unidentified federal "policy considerations" were involved and arguments ensued over the inclusion or exclusion of

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77 INAC, "ILA 76-79," letter, 11 March 1977, Poupore to the Director General of Indian and Eskimo Affairs, Ontario Regional Office.

certain types of lands from the schedule.\textsuperscript{95}

These problems persisted into the next year, but there was some hope that they might finally be settled in a new arena. In 1978, as a result of the minority government situation in the province, the Ontario Tories established the Indian Commission of Ontario (ICO). The Tories had managed to retain power through a political arrangement with the Ontario NDP. Part of the price of this political bargain was the creation of the ICO and the Royal Commission on Northern Development.\textsuperscript{96} In April, Ontario created a Lands and Resources Tripartite Working Group to act under the direction of the Tripartite Steering Committee of the ICO. DIAND, the Ontario Cabinet and the Chiefs of Ontario could each appoint one delegate to this Group which was to meet at least once a month. One of the responsibilities of the Working Group was the negotiation of a revised Lands Agreement.

The same side issues which concerned Lands and Forests in the early 1970s continued to be important to its successor, the MNR, at Working Group meetings. Namely, road and shore allowances, beds of lakes and rivers, access, hydro development, minerals and patents. In addition, a wide gulf still existed between the

\textsuperscript{95} One such "policy consideration" may have been DIAND's determination to reject the resolution of the side issues because these would result in unnecessary problems in upcoming talks with the Maritime and Prairie provinces where similar agreements to the 1924 one existed. (INAC, "ILA 76-79," Draft Terms of Reference 24 April (?) 1978, for the Land and Resources Tripartite Working Group; and note of 4 May 1978, Poupore to R.B. Kohls, A/Director General of Reserves and Trusts.) This policy could only lead to stalemate because Ontario refused to amend the Agreement if the side issues were not settled in its favour. Also letters, 18 August 1977, Poupore to J.B. Beckett, Assistant Director of Legal Services; 5 October 1977, H.R. Phillips, Chief of Lands Administration to Poupore; Draft Agreement, 17 November 1977.

\textsuperscript{96} Personal communication: David McNab, 20 January 1994.
governments and First Nations regarding the ultimate purpose of revision. Paul Williams, legal counsel for the UOI, indicated that for the Chiefs of Ontario the purpose was to return all unsold surrendered lands to Reserve Status. DIANDs Gordon Poupore disagreed claiming the purpose was to allow Ontario to transfer control, administration and beneficial interest in land to Canada and that this was complicated by a dispute between the governments over what lands would be transferred.”

Fred Plain, representing the Chiefs of Ontario, identified the crux of the current land muddle in Ontario as the illegitimate Colonial assumption of power over First Nations and their land and resources. According to Williams, proper land sale records were never kept and tracts of surrendered land were sold during the 1960s for $1 and $1.25 per acre without "notice" or payment to First Nations. But, this did not seem to bother federal officials who asserted that even if Canada had patented lands in error, the current holder's title had to be respected. Williams was outraged and demanded to know why a "patentee should be secure in his title ...[if] Canada [had] illegally patented a piece of reserve land." Poupore did not answer." But, it was of great concern to the Chiefs of Ontario that any new agreement not allow Ontario to legitimize the Crown's previous illegal land sales.”

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78 INAC, "Verbatim Report...," pp. 5-10.

Poupore was concerned that Williams not take these ideas too far because First Nations would not be allowed to veto a final agreement which was acceptable to Canada. Poupore also maintained that while the present government wished to obtain Aboriginal consent to a new agreement, should the matter drag on, future governments could not be bound to accept it. Williams found this position dishonourable and asserted it was the same policy the Department of Justice had toward the breaking of Treaty promises, namely that Treaties were not binding and if Ottawa had broken Treaty it had done so "with full sovereign power and will continue to do so without any liability." Williams emphasized the underlying "political determination" of the government to abrogate Treaty promises.\textsuperscript{100}

For unknown reasons, there were no Working Group meetings for about a year. Then, in December 1979, the Group, including observers from the AIAI, Six Nations, and Grand Councils Treaty Nos. 3 and 9, met and addressed familiar topics.\textsuperscript{101}

Throughout 1980, neither government was willing to endorse the return of all unsold surrendered land to Reserve status as First Nations demanded. Ottawa feared this would increase the

\textsuperscript{100} INAC, "Verbatim Report...., pp. 20-21.

\textsuperscript{101} Note: the Treaty No. 9 people claimed a revised agreement would not affect its members. This was a curious stance since at least two of the First Nations under that Treaty, namely Abitibi and Fort Hope, had authorized mineral exploration and/or development on their Reserves and Fort Hope had revenues in the suspense account. UOI, "1924 Land Agreement," letter, 11 March 1980, see attached "Draft Interim Report," p. 6. Also INAC, "ILA 76-79." Grand Council Treaty #9 position paper on "The Participation of Nishnawbe-Aski in terms of the 1924 Land Agreement on an Approach that Addresses this issue for Mutual Resolution of all parties concerned, submitted to Land and Resources Working Group Tripartite 3 December 1979."
Aboriginal land base. First Nations insisted that Canada resolve this issue in their favour, "case by case." Needless to say, this was not the position of DIAND which hoped to avoid responsibility for its mismanagement of such land. Paul Williams spelled out the nature and extent of this mismanagement when he emphasized that such lands had been sitting idle for many years: the federal government has taken no steps to manage them, rent them, protect them, or patrol them. The Bands have been deprived of using them. As a trustee for the Bands, the federal government should have done much more than it has.

If compensation for this mismanagement could not be a part of the revised agreement, Williams wanted a statement that future claims would not be nullified. Beckett, however, would not agree and Williams believed the lawyer's intransigence stemmed from his duty "to cover Canada's ass." Williams also took issue with the federal position that upheld the rights of non-Natives occupying such lands on a "long-term" basis. Williams viewed such people as trespassers with no title whom Canada should have evicted. This was related to the previous problem. If Canada had been patrolling and protecting Reserve lands as it was bound to, such trespassers would not have a foothold on unsold surrendered Aboriginal land.

Ontario pledged to return to First Nations all monies in the suspense account controlled by DIAND and to transfer control of surrendered land to Canada minus the numerous interests

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encompassed in its side issues. This unrelenting position angered Williams who questioned the merit of continuing to revise the old Agreement.\textsuperscript{104} He lamented the fact that Ontario consistently refused to identify which lands it would return and which it would keep, concluding "...that Ontario does not want to see returned most of the road allowances, shoreline allowances, and lake beds that are surrounded by non-Indian lands."\textsuperscript{105} He also maintained that Ontario had illegitimately sold Aboriginal land and would not provide a full list of such sales to the UOI. Ontario, and not First Nations, had financially benefited from these sales.\textsuperscript{106} The provincial agenda was rapacious: under its value for value policy, all side issues would be settled in its favour. It would take from the First Nations whatever it could get.

The issue of whether Proclamation land should be included under the new agreement continued to divide Aboriginal and government negotiators. Ted Wilson (and DIAND) insisted that scheduled lands be restricted to "reserves as defined in the Indian Act."\textsuperscript{107} As Beckett emphasized, the reason behind this position was that Proclamation land would be excluded from any new Agreement\textsuperscript{108} - this would include the Anishinabek land claim area

\begin{itemize}
\item \textsuperscript{104} UOI, "1924 Land Agreement," "Draft Interim Report," pp. 6-9; and Draft Minutes, 7 July 1980, "Land and Resources Working Group Meeting," p. 3.
\item \textsuperscript{105} UOI, "1924 Land Agreement," Briefing Notes..., p. 3. Beckett had earlier produced an almost identical statement, see INAC, "ILA 80-82," memo to file 8 July 1980, p. 2.
\item \textsuperscript{106} UOI, "1924 Land Agreement," Briefing Notes..., p. 4.
\item \textsuperscript{107} INAC, "ILA 80-82," memos to file, 23 April and 4 August 1980, Beckett.
\item \textsuperscript{108} INAC, "ILA 80-82," memos to file, 8 July 1980, and 23 April 1980, Beckett.
\end{itemize}
under the Robinson Superior Treaty and the Temagami land claim area and vast amounts of gold and diamonds worth many millions of dollars.\textsuperscript{109} Except for the fact that Ontario wanted to line its coffers with the mega-dollars which have been and will be generated from the development of these areas, there was no reason for Proclamation land to be excluded. Such land had been a subject in the 'recital' section of the 1924 Agreement but, perhaps mistakenly, had been omitted from the 'operative' section.\textsuperscript{110}

By mid-1980, all parties had become quite frustrated with each other. Beckett emphasized the complicated nature of federal and provincial rights in surrendered Reserve land and blamed Aboriginal negotiators for making them more complex by raising new issues without notice.\textsuperscript{111} Yet it should have been no surprise that the interests of Native People and Canada in negotiating revisions were different and would produce different approaches and views on content. Despite the acknowledged complexity of the issues, Ontario held to its value for value policy and did no research on the issues at this time.\textsuperscript{112}

Ontario's plans to develop water power and hydro-electricity on Reserve land were opposed by the UOI which argued that no Treaty allowed the province the right to control or profit from

\textsuperscript{109} In addition to these areas, lands set aside under the Robinson Treaties were also pockets of Proclamation Land which had been 'excepted' from the vast areas surrendered. See for example UOI, "1924 Land Agreement," Briefing Notes: Land and Resources Working Group for the Meeting of 17 October 1980.

\textsuperscript{110} INAC, "ILA80-82," memo, 8 July 1980, Beckett.

\textsuperscript{111} INAC, "ILA 80-82," memo, 8 July 1980, Beckett.

\textsuperscript{112} Personal communication: David McNab, 20 January 1994.
hydro development on a Reserve. The UOI argued that Ontario "should acquire no rights under the 1924 Land Agreement or its amendments." Aboriginal negotiators similarly opposed provincial attempts to control water in Reserves and in scheduled land under the Bed of Navigable Waters Act (BNWA). This position was supported by DIAND, now Indian and Northern Affairs Canada (INAC), which believed First Nations would be less inclined to surrender land "even for leasing" if the Act was included. This assessment outraged Paul Williams who demanded to know "what business it is of the officials of the Department to try to persuade Bands to surrender." Beckett noted this resulted in "embarrassment" for the federal representatives and necessitated a great deal of time to then explain Canada's "real position."

Wilson claimed Ontario would not gain ownership of the beds of Reserve waters if the new agreement was subject to the BNWA, stating the reason it had been included in the 1924 Agreement was to "make the law clear and uniform throughout Ontario" and this would continue under new legislation. This issue was resolved in January 1981, when all parties reached consensus that only section 1 of the BNWA would apply to scheduled lands. The issue of hydro power remained unsettled. Wilson's statement is

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113 INAC, "ILA 80-82," "Land and Resources Working Group: Draft Interim Report," undated, p. 16. Note: Under Treaty No. 9 (1905/6 and 1929/30) Ontario allegedly reserved water rights in excess of 500 horsepower. But, this was never discussed during the negotiations and was not consented to by the First Nations.


significant; it is a provincial admission that land under water within a Reserve is the property of the First Nation and that the BNWA is not sufficient to override this.

During the summer of 1981, the ICO attempted to get all parties concerned to specify their agreement or rejection of each paragraph and section in the 16 February 1981 draft agreement. The results of this procedure were compiled in a "Consolidation of Materials..." Following this, the parties agreed to work toward the creation of a "new agreement" and not a "revised agreement." The object was now to have the proposed 'new agreement' "stand side-by-side with the 1924 Lands Agreement overlapping [it] to some extent and to a considerable extent being different."116 This was an important shift in purpose from the original goal of amending the 1924 Agreement by deleting out of it clauses which were objectionable to First Nations.

In retrospect, three years later in 1989, the Ontario negotiator claimed that it was the province alone that was responsible for this shift:

At the suggestion of Ontario, it was agreed to develop an agreement, to be ratified by Legislation, that would stand beside the 1924...Agreement, that would not by itself amend, alter or otherwise interfere with any interests that were the subject of the 1924...Agreement, and that would provide for the implementation of sub-agreements...that included sections that were at variance with the 1924...Agreement.117 [my emphasis]

As we shall see, Ontario used this arrangement to enforce its


Except for minor language changes, it could be seen, on the basis of the "Consolidation," that two issues largely prevented the signing of a new agreement. The first was a dispute over the identification and status of scheduled lands. The second was the UOI's insistence that the new agreement not affect future land claims. In assessing blame for these stumbling blocks, John Munro, the Liberal Minister of INAC, lay all blame on the UOI.118

Munro's remarks only underline the different interests of Canada and First Nations; namely, that the Reserves of Robinson Treaty First Nations were Proclamation land and when surrendered in trust to Canada were not merely surrendered Reserve land, but surrendered Proclamation land. Canada, however, could not dispose of the transferred land unless it was Reserve land or surrendered Reserve land within the meaning of the Indian Act (which nowhere identifies a Reserve as Proclamation land). But, this was Canada's problem. It had signed the Robinson Treaties, the Indian Act and co-signed the 1924 Agreement. INAC was encouraging the Union to compromise the status of its land so Canada could escape the administrative and legal muddle it had created when it unilaterally and illegitimately overrode the sovereignty of First Nations by creating legislation without the knowledge or consent of those Nations.

The status and scheduling of lands and most of Ontario's side

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118 INAC, "ILA 80-82," undated, John Munro to Justice Hartt of the ICO, pp. 1-2.
issues were still unresolved in March of 1981, when the provincial Tories came to power with a majority government and Alan Pope became Minister of Natural Resources. This did not augur well for First Nations and the negotiations because Pope, an avid sportsman and hard-line lawyer from Timmins, would lead Ontario's withdrawal.

A definition of Reserve land with no reference to the Indian Act had been agreed upon, but defining surrendered lands continued to be problematic for Ontario and eluded the negotiating parties throughout 1982. This stalemate lasted into the early part of 1982, when Ontario began to retreat from negotiations and meetings by requesting time to reassess its position. The province agreed to furnish Cabinet with a submission, but had still not successfully reviewed its position by May 1982. The UOI protested these delays in writing.

Ontario's retreat continued throughout 1982 and well into 1983 with no good reason. The Supreme Court of Canada upheld the judgment of the JCPC in the St. Catherine's Milling case in its ruling in Gilbert Smith on 17 May 1983. The province immediately seized this decision to justify its continuing absence from the negotiating table, claiming it needed time to study the "impact" of the ruling on its position vis-a-vis the new agreement.

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On 9 June, the UOI Chiefs sent both governments a resolution officially protesting the retardation of negotiations. The Cabinet submission, mentioned the previous March, failed to materialize and Minister Norman Sterling, announced, at a Tripartite Council meeting in July 1983, that Ontario would likely require at least four or five months more to consolidate its position. INAC quickly informed the UOI that it could not be held accountable for these delays.

Sterling did promise to orchestrate a meeting between Alan Pope and the Sarnia First Nation which wanted the return of its revenues from the suspense account and a pledge that Ontario would waive its rights under the 1924 Agreement. This meeting did not occur, but by August 1983 the Sarnia First Nation was the official representative of the UOI at Tripartite meetings. Canada believed Sarnia would not pursue UOI concerns over the status of Reserves or the claims clause. Ontario’s position would not be ready until late in the fall.

In the interim, however, Ted Wilson asked for a precise accounting of all mineral revenues connected with the 1924 Agreement. Between 1973 and 1980, and possibly before this, Canada had made several unauthorized minerals money releases to

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122 INAC, "ILA 82>" 1924 Ontario Indian Lands Agreement, p. 3.
123 INAC, "ILA 82>," 13 July 1983, unsigned, "Response to All Chiefs Resolution 83/40, the 1924 Land Agreement."
124 INAC, "NRM-G," letter, stamped 31 August 1983, J.D. Leask to Ian Cowie, Director General, Corporate Policy, INAC.
various First Nations who had persistently demanded the return of their revenues held in suspense. Although First Nations did not directly participate in the negotiating process until 1978, they were not powerless. Instead of waiting for the governments to arrange a new agreement, several First Nations informed the IAB verbally or through Council Resolutions that they wanted the return of mineral revenues. On more than one occasion, the IAB complied with Aboriginal demands without contacting Ontario either to inform it or to obtain its consent.

During the late 1950s, A.B. Irwin indicated Ontario's 50% had not been collected under the following agreements: Six Nations oil and gas lease in 1926; Sheguiandah No. 24 and Bidwell surrendered land leases, about 1950; and Sucker Creek No. 23 about 1950.\textsuperscript{126} As we have seen in the previous chapter, the DIA and its successors to 1958 failed to collect monies for Ontario in several other cases.

Possibly during the late 1960s or early 1970s, the Moravian and Walpole Island First Nations asked an unidentified federal Mines Minister to release their mineral monies held in suspense. The Minister complied and authorized the transfer of $15,816.42 and $387,008.37 to each Nation respectively. These amounts represented proceeds from exploration fees and other dues from the waivers issued during the 1960s or '70s. In addition, the Canadian Gypsum Co. Ltd. had paid royalties directly to the Six Nations. This arrangement seemed to arise from the belief that the Six

\textsuperscript{126} INAC, "ILA 80-82," Cameron document, p. 6.
Nations was exempt from the 1924 Agreement under clause 7.\(^\text{127}\)

In 1973, the Walpole Island, Sarnia, Manitoulin and Garden River First Nations requested the return of their funds from the suspense account. Except in the case of Garden River, these monies apparently pertained exclusively to oil and gas revenues. Proceeds from metallic mineral development were not released. Federal reasoning was that the 1924 legislation was never intended to include oil and gas, only precious and base metals.\(^\text{128}\) On 15 May 1973, the Head of the Minerals Section transferred a total of $12,088.24 in oil and gas proceeds to these First Nations: Walpole Island received $285.56; Sarnia $5,802.60; and Manitoulin Island $6000.08. Similarly gravel and/or uranium proceeds of $33,285.56 and $653.23 were released to the Garden River First Nation after a verbal request.\(^\text{129}\) No waiver for this Reserve has been found; nor was it ever identified as having been waived.

Ontario was angry when it found out, after the fact, about the releases which it never retroactively authorized. Ottawa agreed to make no further releases until the Agreement was amended. The suspense account still contained a total of


\(^{128}\) INAC, "ILA 80-82," Cameron document.

\(^{129}\) Identification of gravel: Personal Communication: David McNab, 2 February 1993. Identification of uranium: Personal Communication: Jim Wells, 21 June 1995 - in INAC Regional Office correspondence (493/20-5-2-14, Letter, 28 December 1973, Howard B. Rodin, Regional Director, Ontario to Dr. M. Foster, House of Commons, Ottawa). Figures from the above statements come from the undated Cameron record. However, a "Memorandum to File," dated 15 May 1973, the day that the monies were released, (according to the Cameron record) say that oil and gas monies were released in July 1972. Later correspondence does not clear up this discrepancy in dates. Also, Singleton's research indicates that the amount released to Manitoulin in 1973 was only $4,741.00.
$21,391.25 belonging to the Garden River, Mississaugi and Fort Hope First Nations.\textsuperscript{130}

First Nations continued to petition Canada for the return of their proceeds. No doubt, as a result of Aboriginal persistence, the question of releasing mining revenues arose again in the fall 1977, when MNR official James McGinn told Irwin that he would draft a letter waiving Ontario's claim to monies held in the suspense account. The letter would be from McGinn's Minister to Irwin's. Subsequent research by Irwin indicated that monies were held for only two First Nations, namely Garden River ($25,183.06) and Fort Hope ($9,197.14). However, an attached sheet listed 10 additional locations where royalties had been generated from metallic mineral development. Such revenues were not held in suspense and the only answer offered by Irwin was that such "...were not retained in suspense for one reason or another, but were transferred to Band funds."\textsuperscript{131} No further information appears to be available in INAC files regarding this matter.

First Nations, particularly Garden River and Fort Hope, continued to send the IAB Council Resolutions demanding the return of their monies. Thus, in 1980, plans to release proceeds to these two First Nations were reactivated. Some time before August (no date given), an agreement-in-principle had been reached between INAC and Frank Miller, the Minister of Natural Resources, INAC, "ILA 82," letter, 18 January 1974, Evan to McGinn.

\textsuperscript{131} INAC, "ILA 76-79," memo 20 September 1977, Irwin. The other locations generating mining revenues were identified as Whitefish River IR#4, Six Nations IR#40, Manitou Rapids IR#11, Rankin Location IR#15D, Shoal Lake IR#39A, Duncan Tp., Kehoe Tp., Yellow Girl Bay, Abitibi IR#70 and Mississaugi IR#8.
concerning the release of revenues from the suspense account to both the Garden River and Fort Hope First Nations. But that agreement was later annulled "by some higher-level authority or committee." However, $14,463.73 was released to the Garden River First Nation. S.A. Crandall sent a similar withdrawal request to Leo Bernier, the Minister of Northern Affairs, under a Fort Hope Council Resolution, but no monies were released. As a result, the Fort Hope First Nation refused to proceed with gold and quartz mining on its Reserve.\textsuperscript{122}

INAC officials at Headquarters, Leask and Crandall, raised concern over the unauthorized release to Garden River and blamed Howard Fanjoy for initiating the request although they alone had the bureaucratic authority either to approve or not to approve the First Nation's initiative. It appears that Leask and Crandall did not read their mail carefully. Leask hoped Ontario would belatedly sanction the action\textsuperscript{13} but, it did not. In explaining how the release occurred Howard Fanjoy, asserted the impetus came from the First Nation which had several times requested the return of mining royalties from suspense through Council Resolutions. On this basis, Lands and Membership completed the usual paperwork and Fanjoy "recommended their release to Band funds. It is apparent that someone in finance in Ottawa proceeded to do so and if they

\textsuperscript{122} INAC, "ILA 80-82," letters, 18 August 1980, Leask to Crandall; and undated, Crandall to Morton.

were not authorized then information stating this should have been
clearly indicated at Ottawa so it could not happen." Fanjoy had
assisted the First Nations and initiated the paperwork, but he
also sought to deflect the criticisms of Leask and Crandall.

He suggested Ontario take control of these funds, but the
province took no action to have the money returned, nor did it
take steps to secure other monies held in suspense. Fanjoy
believed his federal colleagues were over-reacting: "I do not feel
the province could become as upset as Mr. Leask and Mr. Crandall
indicate as I would assume they would not even be aware of the
transaction unless we advise them of same." This was the third
occasion where DIAND had released revenues to the Garden River
First Nation without provincial knowledge or agreement. As well,
Canada had twice released monies to the Walpole Island First
Nation and once to the Moravian First Nation. It also released
$1,486,460.39 to the Sarnia First Nation - likely no later than
1980 - no doubt, at the request of that Nation.

In addition to the above information, not all of which was
made available to Ted Wilson at the time of his request, other
issues were raised. Wilson wanted to know how much money Canada
had paid to Ontario under the 1924 Agreement. In response F.J.
Singleton maintained the only record of such a payment was in 1938
when a cheque for $250.00 was issued to Ontario for development on

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the Whitefish River and Long Lake Reserves.

In 1983, Singleton identified the following suspense account sums: $10,007.24 for Fort Hope First Nation; $2,235,677.28 for Sarnia First Nation; and $1,295.00 for Mississaugi River First Nation. Canada also held additional sums: $1,145.00 for Manitoulin Island (no particular Reserve was identified); $7,788.25 for Sarnia; and $4,5911.11 for Kettle Point.\(^{136}\)

Wilson did not, and could not have, received the precise accounting of these matters which he demanded. Ontario had no records on the federally administered minerals suspense account. Singleton stressed his inability to give a full report due to "file destruction and loss of records."\(^{137}\) In addition to this, DIAND did not retain 50% of monies generated by sand and gravel exploitation on Reserves "except in very large transactions." First Nations had insisted on retaining all their revenues. When this could not be arranged from the outset, it remained a goal to be pursued through Council Resolutions and verbal requests. In a surprising number of cases First Nations received what they asked for; Canada facilitated several unauthorized mining revenue releases without the knowledge or consent of the province.

Between 1973 and 1980, Canada consistently acted to ensure First Nations regained their oil and gas revenues from the

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\(^{136}\) INAC, "NRM-G," letter, 29 September 1983, Singleton to Morton, and attached financial research. NOTE: the Garden River First Nation should have had about $10,719.33 left in the suspense account since in the late 1970s, it was identified as having $25,183.06, but was paid only $14,463.73 in 1980.

\(^{137}\) NOTE: The extent of poor record keeping had been highlighted by Marjorie Cameron in 1980, INAC, "ILA 80-82," Cameron document, pp. 8-9.
suspense account. This was a clear federal acknowledgement that First Nations had sub-surface rights. By returning the monies, Canada explicitly admitted First Nations had a legitimate right to 100% of their oil and gas revenues. Thus, they must have had a prior and equally legitimate right to the oil and gas producing this revenue in the first place. By returning the proceeds, Canada in fact conceded that First Nations have sub-surface rights and that the sub-surface is included in Reserve boundaries. As well, provincial and federal actions at Bkejwanong set a precedent whereby they recognized First Nations' sub-marine mineral rights and that land under water is included in Reserve boundaries.

About a month after Wilson ordered the investigation into the 1924 mining proceeds, Ontario finally submitted a document to Cabinet for its consideration. This submission, dated 26 October 1983, was leaked to the Toronto Sun and became the subject of two rather misinformed articles. Alan Pope apprised Justice E.P. Hartt, of the ICO, that Ontario would be in a position to resume discussions on the new Agreement by early 1984. This marked the end of a 21-month provincial absence from the negotiating table. Pope notified Hartt that Ontario's interests in 8 items would have to be considered in any new arrangements. These items were: road and shoreline allowances; beds of navigable waters; federal reservations in federal patents; the application of

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139 NOTE: Ted Wilson was writing these letters for Allan Pope. Personal Communication: David McNab, December 1995.
provincial legislation to scheduled land patented by Canada; provincial expropriation of scheduled land; the application of the new agreement to all future Reserves; and the identification of the method by which specific agreements under the new agreement would be negotiated.\footnote{INAC, "ILA 82>" letter, 22 December 1983, Pope to Hartt.}

Pope's letter was the basis of Ontario's "new position" which was further elaborated at a Tripartite meeting in January 1984. Shortly thereafter, Paul Williams asserts that Ted Wilson "suggested to me that part of the 'quid pro quo'" (or value for value) that Ontario now wanted was to take Reserve land without having to obtain federal or Aboriginal permission. Wilson claimed Ontario wanted such power because Canada had it. This proposition was completely unacceptable to the First Nations\footnote{Personal communication: Paul Williams, 21 September 1994.} and was never implemented. The new reality, in light of Gilbert Smith, was that "Ontario ha[d] the authority and apparently the will to control the negotiations to its advantage" and this would radically change the nature of future negotiations. Ontario could and would impose its value for value policy on First Nations and continued to push for an "umbrella agreement: to stand beside the 1924 Land Agreement into which a Band could opt, if it so chose."\footnote{INAC, "ILA 82>" (probably January 1984) unsigned, "1924 Land Agreement Negotiations."}

It was also decided that negotiations would resume on the basis of the positions stated in the "Consolidation of
Materials..." document, but Ontario's 8 points would have to be incorporated. All party positions relative to these points were discussed at a tripartite meeting on 1 March 1984. Both Ottawa and the UOI were very concerned about these issues and neither wanted to see Aboriginal rights or interests in road allowances and beds of navigable waters unilaterally fall to the province. A great deal of land was potentially involved in the case of road allowances, namely 90,000 acres on Manitoulin Island alone. An additional 60,000 acres of road allowances likely existed in southern Ontario in surrendered land. Ted Wilson stated that the only road allowances the province were interested in were those in surrendered Reserve land where a current title holder required a guarantee of access to his/her land "over Indian reserve land," but this position did not satisfy Paul Williams now representing the Manitoulin Island First Nations.

Following a discussion of the beds of navigable waters issue, Sarnia First Nation representative, Mr. Degurse, suggested Ontario should begin immediately negotiating a specific agreement with it over the return of mineral monies held in suspense. However, Paul Wyatt, of OIRP/MNR, doubted the province had "legal authority" to arrange a specific agreement because the umbrella agreement under which the specific one would fall had not yet been negotiated. It should be noted that in draft agreements to this time, Ontario

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143 INAC, "ILA 82>" letter, 19 January 1984, Hartt to Members of the Land and Resources Working Group, see attached draft minutes of the 12 January 1984 meeting.

144 This issue was later settled between the province and First Nations when the province agreed to compensate the Band in a $9 million package. See ONAS, "Manitoulin Island Land Claim and Settlement," 7 February 1990, "Agreement-in-Principle reached on Manitoulin Island Land Claim," p. 4.
consistently agreed to return its 50% to First Nations. This would be automatic and First Nations would not have to negotiate for it.

Both Canada and the UOI vigorously opposed Ontario’s desire to retain control and interest in "reservations in patents issued by Canada for scheduled surrendered Indian reserve land." Both objected on the grounds that such patents reserved a variety of items for the benefit of the First Nation and no one else. These reservations had been conditions of surrender and could include mineral rights, surface rights, road allowances, timber, sand and gravel among others. Canada suggested Ontario negotiate with the First Nation in question to obtain these interests instead of unilaterally appropriating them.

Ottawa wanted more detail on Ontario’s interest in water power development on Reserves even though the UOI refused to accept any provincial interest in this area. Ted Wilson claimed the province merely wanted to safeguard "upstream and downstream interests" in the event of Aboriginal on-Reserve power development but, Charles Cornelius, representing the UOI, countered that similar consideration was not given to First Nations when off-Reserve power was developed. Canada and the UOI agreed provincial laws should apply on patented surrendered land, but refused to allow Ontario to obtain automatic powers of expropriation on lands to be included in the schedule to the new agreement.

Canada and the UOI likewise refused to agree with Ontario that all future Reserves would have to come under the agreement. Lastly, Ottawa and the Union supported the idea of "subsidiary
agreements" to be negotiated under the new agreement because it would allow individual First Nation concerns to be addressed. Canada believed the new agreement "would provide the framework and authority for specific agreements [to be negotiated] with Bands. These specific agreements would be implemented and become part of the main agreement through reciprocal OICs."145

In July 1984, the UOI received a detailed analysis concerning the "Legal Status of the Ontario Land Agreement" from Russell Barsh of the University of Washington. Barsh noted that the draft agreement lumped Ontario’s 8 points into one paragraph, namely 14 and that all these items required further negotiation between individual First Nations and the province. It was his opinion that "This merely defers action on the major points of disagreement between Ottawa, the province, and the Bands. It is quite possible Ontario will agree to none of these points when it is dealing with Bands individually." Indeed Barsh saw great potential for First Nations to actually lose ground in the negotiation of specific agreements. He pointed out that First Nations had "little bargaining leverage" and was concerned that some of the items included in paragraph 14, like the application of Ontario mining laws on Reserves, should in fact "be options for the Bands, and

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145 INAC, "ILA 82>" undated, unsigned, untitled, two page document re. the federal position of Pope’s 8 points. UOI, "Discussion Paper re. Ontario’s proposed Amendments to the 1924 Land Agreement;" also "Draft Minutes of Meeting of Committee Responsible for Drafting a New Indian Land Agreement," meeting held on 1 March 1984.
not matters of negotiations." 146

Barsh also considered the impact a new agreement could have on Aboriginal ability to constitutionally challenge the legitimacy of the Agreement. He asserted First Nations never participated nor agreed to the 1924 legislation and could therefore challenge its legality, but cautioned that "This opportunity will be lost if Bands formally ratify the proposed" agreement.

In addition to this, the effects of the St. Catherine's case had to be considered. Following that decision, Canada had no business accepting surrenders of Reserve land for the benefit of a First Nation because full control and benefit passed to Ontario. Barsh pointed out "This meant...Canada had promised Indians something it had no constitutional power to do for them." Under normal circumstances this would lead to the nullification of the original contract, but Canada did not proceed this way - it did not return the surrendered land - and instead encouraged Ontario to give up certain 'rights' which were confirmed to it by the St. Catherine's decision by entering into the 1924 Agreement. 147 This may have been a consideration, but the primary reason the Dominion entered the 1924 agreement was to avoid being sued by Ontario over illegal land sales as we have seen in Chapter 3.

It is significant that Canada was only too aware of its culpability in this situation. An undated federal policy paper

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encouraged DIAND to support the return of all surrendered land to Reserve status once Ontario transferred it to Canada. The document stated: "...this Department [is] in a very difficult position because it actively sought many of these surrenders at a time when its jurisdiction was delimited by judicial decisions." It also raised the pointed question: "What are the ramifications for this Department if it is now powerless in the process of returning such lands to reserve status because of its past imperfect understanding of the effect of continuing to accept and in fact press for such surrenders." [my emphasis]

Barsh argued First Nations could sue Canada for failing to carry out its fiduciary responsibility, and warned that if they signed a new agreement they would in effect "ratify what Canada has done and concede that surrendered lands lawfully belong to Ontario." Finally, he suggested Native People take their case to the United Nations.149

In the fall of 1984, Ted Wilson confirmed Ontario's commitment to conclude land agreements with particular First Nations while continuing to negotiate a new agreement. This policy was already operating with the Nipissing and Serpent River First Nations. Similar negotiations with the Sarnia First Nation,


145 UOI, "1924 Land Agreement," Barsh, pp. 2-4. Barsh noted that arguments mounted by Sandra Lovelace had recently convinced the United Nations' Human Rights Committee that Canada's Indian Act violated the International Covenant on Civil and Political Rights because it stripped Native women of their status and rights when they married non-Native men while Native men were free to marry non-Native women (who then obtained immediate 'Native' status) without penalty. For a full discussion of Lovelace v. Canada, see Janet Silman, Enough is Enough, Aboriginal Women Speak Out, (Toronto: Woman's Press, 1987).
dealing with the return of suspended mineral monies totalling three million dollars and several unsold surrendered lots and road allowances, would serve "as a model for very intricate and technical problems." 

Tripartite meetings continued throughout 1985, but several points remained contentious. Ontario wanted the new agreement to be limited to Reserve land alone and, most importantly, it now refused to automatically return its 50% of mineral monies, claiming this would be negotiated on a Nation by Nation basis. This was a complete reversal of the position Ontario had taken on this matter in prior drafts and constituted a very substantial shift from one of the main purposes of revising the 1924 Agreement. It was a direct result of Ontario's new found power in the wake of the Gilbert Smith decision.

The old problem of identifying in advance the lands which would appear in the schedule was solved. The parties conceded this was no longer necessary because individual First Nations now had to opt in to the new agreement under specific agreements to be funded by both governments.

In April 1985, Grand Council Treaty No. 3 sent its position on the current draft agreement to Justice Hartt. The Council also maintained Ontario had consistently refused to furnish information regarding unsold surrendered land, proceeds from the sale or lease

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150 INAC, "ILA 82x" memos, 7 September, Morton; 19 November 1984, Singleton to General Counsel, Legal Services, p. 2.

151 INAC, "ILA 82x" Minutes, and Draft Minutes 7 March and 26 April 1985 of "Committee Responsible for Drafting a New Indian Land Agreement," pp. 2-3.
of such lands and its position vis-a-vis the Council's claim that minerals were reserved for the sole benefit of all Treaty No. 3 First Nations. The Grand Council reiterated its long-held objection to Ontario's desire to negotiate land issues on a Nation by Nation basis and charged these divide and conquer tactics were "morally and legally indefensible." It indicated that Ted Wilson had defended this position on the grounds that "...without the 'quid pro quo' requirement, there would be no incentive for Bands to resolve issues of concern to the province." It should be of no surprise that Ontario was using a "quid pro quo" or value for value tactic - this is how the province had always operated. It was on a value for value basis that both the 1915 and 1924 Acts had been negotiated.

Ontario's insistence on the resolution of its side issues, constituting the land matters to be negotiated in the specific agreements, had virtually remained unchanged since the revision process began in the late 1950s. No agreement could be reached on these issues between Canada and Ontario or between First Nations and Ontario. Nevertheless, since the Gilbert Smith decision, its position was unshakeable. No agreement would be signed unless Ontario's interests were fully satisfied.

In June/July of 1985, the Ontario Liberals came to power and,

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52 Only in 1991 would Ontario acknowledge that it had no claim or interest in minerals in the Treaty #3 Reserves. (INAC, Indian Land Registry, Registration No. 208386, see attached letter, 25 October 1991, Shelly Martel, Minister of Northern Development and Mines to Grand Chief Steve Pobister and Grand Chief - elect - Peter Kelly, Grand Council Treaty #3.)

53 INAC, "ILA 82>" letter, 26 April 1985, Chief Don Jones, Research Director, Grand Council Treaty #3 to Hartt.
for the second time, political deadlock was removed by a change of
government.\textsuperscript{154} Ian Scott was responsible for pushing the
agreement through that Fall. At the 30 September 1985 Tripartite
Council meeting, all negotiating parties accepted the new
agreement as drafted in May.\textsuperscript{155} Its shape, however, was very
different than ones prepared only six months before. This draft
was the basis for the final agreement. Section 3 listed all issues
to be dealt with in a specific agreement. These were Ontario's
side issues and included the following:

\begin{enumerate}
\item any matter dealt with in the 1924 Land Agreement.
\item administration and control
\item the exercise, allocation or transfer or disposal of
any interests in lands or natural resources
\item minerals, mineral rights and royalties, and the
disposition or taxation of any of them
\item hydro-powers
\item disposition of lands or natural resources
\item consequences of extinction or enfranchisement of a
band
\item disposition of any monies
\item the non-application of any section or sections of the
1924 Agreement
\item any other provision required for the implementation
of a specific agreement\textsuperscript{156}
\end{enumerate}

It should be noted that part 'd' meant mineral monies held in
suspense would not automatically be turned over to First Nations.
These would have to be negotiated for in conjunction with every
other part of section 3. This was classic value for value. Such a
position was also made clear in section 7 which would be very

\textsuperscript{154} NOTE: The first time, as discussed earlier in this chapter, was in 1978
when the Tories held on to power because of their political arrangement with the
NDP. Political blockage was overcome in 1978 because of the creation of the ICO.

\textsuperscript{155} INAC, "ILA 82> Tripartite Council Meeting, 30 September 1985, "Draft
Minutes,", p. 4.

\textsuperscript{156} INAC, May 1985 "Draft: The 1985 Land Agreement."
significant for the Sarnia First Nation and its attempts to regain its oil and gas monies held in suspense for Ontario.

On 26 March 1986, at a meeting chaired by the ICO, several parties agreed on the contents of what would become the 1986 Land Agreement. Each government pledged to ensure the passage and ratification of Acts reflecting the Agreement. Between May 1986 and December 1987, however, several Aboriginal groups revoked support: Chief Garry Potts denied the agreement applied to the Teme-Augama Anishnabi; the Peterborough District Chiefs withdrew support; and Harry Doxtator, President of AIAI announced "province wide discontent" with the agreement.

Nevertheless, Ian Scott ensured the 1986 Lands Agreement would become legislation. On 18 December 1986, Vincent Kerrio, Minister of Natural Resources, introduced the bill for first reading. Early in January 1987, the Chiefs of Peterborough renewed support for the agreement, stating they had previously been "misled" and the Six Nations Council advised Roberta

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157 The parties were: UOI, Grand Council Treaty No. 3 Nation, Nishnawbe-Aski Nation, AIAI, Six Nations, Sarnia First Nation, Canada and Ontario


159 INAC, "ILA 82"> Appendix 1; letter, 10 November 1986, Harry Doxtator to Roberta Jamieson; Peterborough District Chiefs, BCR, 24 September 1986.


161 INAC, "ILA 82"> 6 January 1987, Peterborough District Chiefs Resolution.
First reading of the federal legislation in the House of Commons did not occur until 25 June 1987. In the wake of this, Aboriginal opposition resurfaced and was the subject of vigorous debate at an All Ontario Chiefs' Conference during which Ontario was condemned for its actions following Gilbert Smith when it backed away from the content and form of earlier draft agreements and reimposed its value for value tactic. The Chiefs argued that "...some of the 'doubt' surrounding the 1924 Agreement was created after the fact" and that the original legislation did in fact do what it had been intended to do. If this was the case "the courts have given Ontario a 'windfall' that it now relies on unfairly to compromise the rights of First Nations."164

One option was to have the 1924 Agreement tested in court, especially with respect to what had been intended at the time. The mineral monies question was viewed as a separate legal case in which Canada would be sued for breach of trust. If this succeeded Canada would have to compensate First Nations for all monies held in suspense on behalf of Ontario and for all revenue so suspended in the future.165

162 Six Nations has the only operating underground mine (gypsum) on any Reserve in the province and has always taken the position it owns the minerals outright with all revenues. Interview, David McNab, 2 February 1993.


165 INAC, "ILA 82>" "...Chiefs' Conference...," pp. 2-3.
Legal opinion solicited by the UOI suggested the value for value position of the province would lead to stalemate so that neither mineral nor specific claims could be settled. This was "not speculation" since Ontario had "already advised several Bands of its intent to take such an approach."\(^{166}\) [my emphasis] The lawyers argued that mineral rights were not "directly affected" by the 1986 Land Agreement and would only be changed if a specific agreement was negotiated between a First Nation and the province. With regard to minerals the specific agreement could be used to attain three things. First it could facilitate the return of monies held in suspense. Second, it could secure 100% of future mineral monies to a First Nation. Last, it could serve to resolve all other "issue[s] of lands and resources and the province has [indicated]...that it will see resolution of their issues before waiving its mineral money entitlement."\(^{167}\)

During the bill's second reading in June 1988, Bill McKnight, Minister of Indian and Northern Development, discussed the potential benefits to First Nations in Ontario, emphasizing that not all of the 2.5 million acres of surrendered Reserve land had been sold and that through the negotiation of specific agreements approximately 200,000 acres could revert to Reserve status, thus, increasing the total Aboriginal land base by 12%. Additionally, $4.3 million could be returned to Aboriginal funds if Ontario

\(^{166}\) UOI, "1924/1986 Land Agreement," legal opinion obtained by the Union, 29 December 1987, p. 4.

\(^{167}\) UOI, legal opinion, 29 December 1987, p. 7.
relinquished its rights under clause 6 of the old Agreement. McKnight noted that 16 First Nations were already in the negotiating process and fourteen more would shortly be involved.

McKnight's statements were misleading. First, virtually all of the $4.3 million had accrued due to development on the Sarnia Reserve. Thus the release of this money would benefit only one First Nation. Second, Ottawa already knew the province would not release the money unless the Sarnia First Nation gave up its claims within the city of Sarnia.

Keith Penner, representative for Cochrane-Superior, noted later in the debate that Canada and First Nations would have to beware of Ontario's "quid quo pro" (or value for value) stance and ensure that "no such prerequisite is established." Penner's statement is also misleading, ignoring the fact that Ontario had already told certain First Nations successful negotiations would be contingent upon their relinquishing some other claims and that Ontario had the right and power to enforce such a bargaining position because of the nature of clause three in the 1986 Land Agreement and the Gilbert Smith judgment.

Ontario's legislation lapsed following the 1987 election of the majority Liberal government; it was finally ratified on 20 June 1989; Canada ratified its Act on 1 July 1990.

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169 INAC, "ILA 82>" undated, "1924 Ontario Indian Land Agreement."

The 1986 Land Agreement and the Future View

Most likely it is just too early to assess the significance and effectiveness of the 1986 Land Agreement, however, some evaluation is possible. The new Agreement is extremely important because it is the only mechanism extant to deal with surrendered lands which otherwise were not covered under either the specific or comprehensive claims processes. As well, the new Agreement is very significant because it was reached with the full participation of Aboriginal organizations. This was the first time Native People were given a genuine opportunity to participate in the framing of legislation which would affect them.

It is fair to say that from their entry under the ICO, in 1978, until the Gilbert Smith decision of 1983 Aboriginal People participated virtually as equal partners. Federal drafters considered their concerns and made real attempts to word drafts to address these concerns. However, following that decision the bargaining power of both Aboriginal People and Ottawa was undermined. It is difficult to overestimate the use Ontario made of that decision in the negotiations. Ontario used its new power to impose its will on the drafts so that the final agreement in March of 1986 looked quite different than what it could have. That is, the 1924 Agreement would not be repealed or amended, the new agreement would not identify unsold surrendered land and automatically transfer it to Canada, nor would mining royalties automatically be turned over to First Nations. These more general and non-negotiable provisions were scrapped following Smith.
Ottawa lost its bargaining position after 1983; it did not obtain provincial confirmation for its land transactions in sold surrendered land; it did not receive the right to control and administer unsold surrendered Reserve land for the benefit of First Nations. Canada did, however, gain one significant advantage from the fact that bilateral specific agreements could be made between Ontario and First Nations under the 1986 Agreement — the ability to download all issues arising under the 1924 and 1986 Lands Agreements to Ontario. The new Agreement would do nothing to right the wrong perpetrated against Aboriginal People of the province under the 1924 Agreement.

Ontario was the real winner under the 1986 Agreement. No unsold surrendered lands would have to be immediately identified. This would be a long and slow process because individual First Nations would have to choose to opt-in to the new Agreement under a specific agreement, or remain under the old. Thus either way the province could not lose. Although none of Ontario's side issues were resolved under the 1986 Agreement, they were all identified under clause 3 and would have to be dealt with under specific agreements to Ontario's satisfaction or no agreement would be signed. This was the enforcement of Ontario's value for value policy which was inescapably built in to the new Agreement. The clearest and most unconscionable example of this is Ontario's behaviour at Sarnia.

If the Sarnia First Nation wanted the return of Ontario's 50% of its mining royalties it would have to forego its claims in
other matters. Ontario wanted the Sarnia First Nation to drop its claims for compensation against the province encompassing unsold surrendered tracts within the city of Sarnia.\textsuperscript{171} In general, most claims within the city cover land which is now very expensive and in high demand for development purposes: "Many streets in the city of Sarnia are unsold surrendered - 2 short stretches sold for $150,000 per acre..."\textsuperscript{172}

Thus the Sarnia First Nation would have to choose between about 9 million dollars\textsuperscript{173} in suspense or its claims in the city of Sarnia which conceivably could equal if not surpass the total of mining royalties. It was morally indefensible for Ontario to make the settlement of one Aboriginal issue contingent on a First Nation giving up some other Aboriginal interest. The Sarnia First Nation refused to negotiate under these conditions.

Ontario maintained this position until March, 1994 when it authorized the return the 9 million dollars, held by Canada, in the suspense account to the Sarnia First Nation ostensibly without

\textsuperscript{171} Interview, David McNab, 2 February 1993.

\textsuperscript{172} INAC, "ILA 82," "1924 Ontario Indian Land Agreement."

\textsuperscript{173} This figure represents the 1994 claim of the Sarnia First Nation. It is not known if Indian Affairs or Ontario agreed with this figure. Discrepancies have existed in the past between the three parties and the total of royalties being held. For example in the House of Commons Debates for 2 June 1988, Bill McKnight identified the total amount held as $4.3 million. However, in a House of Commons committee of 27 June 1988, the UOI stated $7 million was being held for the Sarnia First Nation alone. This incongruity is also noted by Keith Penner, the representative for Cochraine-Superior at the same committee hearing. Finally on 18 April 1989, ONAS stated that "about $5 million" was held in suspense by Canada (see "1986 Indian Lands Agreement: Potential Questions and Answer Discussion in the Legislature - Second Reading").
strings. If there really were no strings, this is the only example of Ontario backing down on its value for value policy since the inception of that policy during the Treaty No. 3 Reserves confirmation discussions. Presently, it is not known why the province authorized the return of the money.

If Ontario reactivates its value for value policy with other First Nations in the negotiation of specific agreements, one option remains the legal system. If Ontario thinks it will lose in court, it will negotiate instead. Under such conditions, it would probably negotiate without condition (i.e. value for value) since court action would remain a viable choice for the First Nation. This is what happened at Manitoulin Island where Ontario had also imposed a value for value strategy. On 5 December 1990, several Manitoulin Island First Nations including Sucker Creek, West Bay, Sheshegwaning, Sheguiandah and Cockburn Island concluded a specific agreement under the 1986 Land Agreement with Ontario, represented by the Minister Responsible for Native Affairs. Ratified by the Ontario legislature on 5 December 1990, this is a landmark agreement because it was the first Aboriginal claim settled in the province. While this can and should be viewed as a

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174 ONAS, News Release, 7 March 1994, "First Nation will now Receive all Mineral Revenues From Reserve Land and $9 Million in Royalty Payments Held in Trust." NOTE: the Press Release and a copy of the release agreement make no mention of what Ontario was to "get" for agreeing to return the monies.

175 Provincial officials, Mark Krasnick and Tim McCabe, initially demanded a blanket release of all Aboriginal rights, claims and interests from all of the Manitoulin First Nations, including the Wikwemikong First Nation which was not participating in the claim and did not sign the agreement. This position alienated the Wikwemikong and Birch Island (Whitefish) First Nations. This position was dropped due to the influence of Mark Stevenson and David McNab, the provincial negotiators; it is not in the final agreement. Personal Communication: David McNab, 18 December 1995.
great accomplishment, the settlement of only one claim in almost 125 years is a sad commentary on the intransigence of Ontario to deal fairly with Aboriginal claims in general. At least 79 claims are still back-logged.176

The Manitoulin specific agreement addressed minerals as well as unsold surrendered road and shoreline allowances, including land under water in the shoreline allowance, beds of lakes, as well as some interior town plots and lands totalling some 90,000 acres. The Manitoulin First Nations retained mineral rights under all these areas. A $9 million package was finally concluded after many years of negotiation involving a $4.5 million contribution to a land-acquisition fund, $2.5 million in the form of an economic development fund and $1.74 million in the form of crown lands abutting or enclosed within existing Reserves which will be given Reserve status including sub-surface rights. In addition the United Chiefs and Councils of Manitoulin (UCCM) received $275,000 to cover legal and negotiating fees.177

The fact that Ontario agreed to return and compensate the First Nations for land under water in the shoreline allowances indicates that it recognized water and sub-marine rights belong to First Nations. This is a very significant precedent for other

176 Diane Forrest, "Our Home & Native Land: First Nations land claims are shaking up cottage country. An examination of the issues, the process, and the possible effects on cottagers," Cottage Life, November/December 1994, p. 33. This figure includes only the claims Ontario has agreed to negotiate, not ones which it has not responded to.

First Nations with similar claims and for First Nations claiming mineral rights in land under water.

Ontario settled the claim under the 1986 Land Agreement because the alternative would have been more costly. The UCCM was poised to litigate. A pre-trial hearing was held on 9 November 1989, but, the case went no further because Ontario backed down. It could not afford to lose because of the precedent this would set for other First Nations across the province who also have road and shoreline allowance claims.

Initially the negotiations on the Manitoulin claim were between three parties: Canada, Ontario and the UCCM. But Canada completely removed itself from the negotiations and also refused to contribute to the settlement of the claim. Its position was that it was not responsible for compensating First Nations for land or for loss of use of the land. The UCCM position is that the federal government is responsible for these things and is currently preparing a claim against Canada.

Nevertheless Canada’s early withdrawal from the negotiations emphasizes its underlying attitude, which can be traced back to the 1950s when the policy of devolution was first conceived. It is within this context that Ottawa withdrew. It viewed the settlement of the Manitoulin claims by a specific agreement under the 1986

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79 Interview, David McNab, 2 February 1993.

Agreement as something to be resolved between the province and the First Nations. Canada would not admit it had and has a fiduciary responsibility to First Nations and to its past and present management of Aboriginal land. It viewed the 1986 Agreement as "house cleaning," that is, as a means to settle all outstanding Native issues between itself and Ontario. That agreement provided for bilateral or trilateral settlements. Canada could, if it so chose, avoid obligation for Aboriginal claims under the Agreement and download all responsibility to the province. Canada could refuse to get involved; the settlement of specific agreements could become a provincial responsibility. This desire of Canada to get out of Aboriginal Affairs altogether is the continuing legacy of D.C. Scott to the federal DIA.

Canada has hailed the possibility of the return of unsold surrendered land and mineral royalties under the 1986 Agreement as a way to encourage "...economic development in some communities and...the establishment of infrastructure that is indeed needed to support Indian Government." Perhaps even more important than money already held is money which might be generated in the future: "Over the next 15 years royalties which could be worth several

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181 Interview, David McNab, 2 February 1993.

182 NOTE: Canada has participated in specific agreements with First Nations and Ontario since the Manitoulin Agreement at Garden River and Nipissing. However, it has continued to avoid recognizing and dealing with what it considers to be contentious or objectionable Aboriginal interests under the 1986 Agreement, particularly, but not limited to, the unsold 'surrendered' shoreline interests of the Walpole Island First Nation within the Lower Indian Reserve and elsewhere within the Walpole Island First Nation Territory.
millions of dollars will flow to the Bands in question" – one estimate suggested this could be over $400 million.

This vague statement does not identify the number of First Nations which might benefit. It could leave the reader with the impression that the number of "Bands in question" is quite large. Similarly there is no account of how "several millions" are to be generated. All in all, these statements create a rather over-zealous estimation of the mineral potential in provincial Reserves and the number of First Nations which would profit.

There are a number of Reserves in Ontario with high mineral potential. The main ones include: Sarnia (oil and gas), Walpole Island (oil and gas), Six Nations (gypsum, gravel), Fort Hope (gold) and Garden River (gravel). If the experience of Sarnia is anything to go by, the chances of any of these First Nations, should they decide to develop, getting their hands on substantial royalties seems unlikely – unless they give something else up. This is not a very tempting situation.

In addition, there is high mineral potential and development

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183 House of Commons Debates, 2 June 1988, p. 16081. Although no actual figure is given in the Debates, one can get some idea of the potential revenues involved from a much earlier document. In 1972, DIAND estimated potential petroleum production in the St. Lawrence Lowlands region at $48 million and the development of metals in the Precambrian region $2,057 million. Thus the total mineral value for Ontario was $2,105 million. (See INAC, "NRM-G," December 1972, "Indian Minerals Program," p. B-2.)

184 The fact that Ontario allowed INAC to return the mineral suspense account monies to the Sarnia First Nation is an anomaly and furthermore, Ontario has nowhere made public the specific reasons why it suddenly dropped its value for value tactic in this case, if in fact it did. Ontario has not dropped its value for value policy; it still routinely requires that First Nations promise, in writing, not to pursue spinoff claims before it will agree to enter into negotiations (Personal Communication: David McNab, 29 May 1995). But, as we shall see below, even if Ontario has dropped value for value the evidence indicates that its alternate or its replacement policy is much worse.
within the disputed boundary and headland areas, shared Territories and in unceded Royal Proclamation Territories. This includes the Lake Superior Anishinabek land claim area encompassing the Hemlo gold zone and the Temagami First Nation land claim area encompassing among other minerals, gold and a diamond range. But, Proclamation lands are precisely the areas which Ontario refused to consider for the proposed land schedule to the new agreement throughout the 1970s and 1980s.185

When the value for value policy seems too generous, Ontario activates another policy recognizing no Aboriginal interests whatsoever. Under value for value Ontario would recognize certain Aboriginal interests if a First Nation agreed to relinquish other Aboriginal interests. But, in both the Anishinabek and Temagami land claim areas the province refuses to recognize any Aboriginal interests at all and it refuses to negotiate either one of these claims. In each case, it wants to claim all the interests186 and is especially reluctant to admit that sub-surface rights remain Aboriginal property. Under this bargaining position, there is no First Nation interest in unceded land and resources. Ontario's appetite for Aboriginal mineral wealth, as well as other natural resources, continues to be rapacious. In the end, it is difficult to take a sanguine view of Ontario's position which is to deny Aboriginal Title and land rights, including mineral rights.

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185 Beyond this, no First Nation ever expressly surrendered sub-surface rights in any Treaty; thus all sub-surface rights in Ontario are still Aboriginal property rights.

NAME INDEX FOR CHAPTER SIX

[F] = Federal
[P] = Provincial

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CONCLUSION

Sub-surface and sub-marine areas, including all minerals, remain today, as always, Aboriginal property. Minerals were valued by Native Peoples for their sacred nature and other-worldly connections, both the sub-surface and the sub-marine were inhabited by spirits, the keepers of the minerals. The unwillingness of many academics to understand, as far as it is possible to do so, the links between the Manitous and minerals provides one reason for the dearth of information on Aboriginal knowledge and use of, and Title to minerals. Native Peoples continue to revere and protect their sacred minerals to this day, as well as develop non-sacred mineral locations.

Minerals were traded among First Nations prior to contact, but were rarely traded with Europeans following contact. Instead, Native Peoples initially gave Europeans minerals primarily as gifts to cement trade and military alliances with First Nations. Later, some Native Peoples used their mineral knowledge to encourage Canadian prospectors to support First Nations in their land rights. Other Native People sold their mineral knowledge to prospectors in exchange for cash compensation both before and after Treaties were concluded. As individuals, they were not selling, and could not sell, the collective interest of First Nations in their mineral resources. Native knowledge and use of minerals and their desire to share and then sell this information led to many of the largest and most important rushes, including the oil boom, in Ontario, creating several Aboriginal
entrepreneurs in the process.¹

This thesis underlines and demonstrates the antiquity and continuity of an inherent Aboriginal Title to minerals which was reaffirmed and protected by the British Crown under the Covenant Chain of Silver at least as early as the Treaty of Montreal in 1760, prior to the issuance of the Royal Proclamation of 1763. Aboriginal mineral rights continued to be reaffirmed and protected under the Proclamation and subsequent Treaties in Ontario.

Unfortunately, the settler government, and its successors, ignored the fact that First Nations had retained sub-surface, water and sub-marine rights when it appropriated these resources and disposed of them through permit, license and patent to nonNatives, pocketing the monies which, in fact, belonged to Aboriginal People and were part of their economy. Thus, much of this thesis documents the conflicts which ensued between First Nations and Euro-Canadians and their governments over minerals under earth and water. These conflicts precipitated the major Treaties in Ontario, notably, the Robinson Treaties of 1850, the North West Angle Treaty of 1873 and the James Bay Treaty of 1905/6 and its adhesions in 1929/30.

Regardless of government and Treaty commissioner attempts to either ignore or reduce Aboriginal Title to minerals and other resources, both before and after the negotiation of Treaties, First Nations retained substantial rights. However, the Treaties

¹ While this study has tried to identify as many of these entrepreneurs as possible, many more undoubtedly remain in obscurity, locked in old mining accounts and in the oral traditions of First Nations.
which First Nations negotiated and agreed to are not the Treaties
which the government has adopted and published as "the Treaty." By
subtracting provisions or adding limitations to the printed
Treaty, the governments had already, in effect, broken the
original Treaty. This is something that the courts in Canada have
yet to recognize in any consistent and meaningful way. Yet, it is
possible to reconstruct the Treaties on the basis of the oral
dependencies of the First Nations, the historical circumstances
which surrounded the advent of the Treaties; correspondence,
reports and diaries left by the commissioners; newspaper accounts
of the negotiations; Aboriginal accounts of the negotiations;
subsequent petitions and oral history. These sources indicate that
First Nations agreed to share the surface of the land only, that
they did not relinquish their natural resources or their own laws,
customs and institutions--in short--their capacity for Aboriginal
governance; they viewed their mineral resources as very
significant and did not place these on the negotiating table.
Furthermore, there is incontrovertible evidence that First Nations
considered control over their minerals (and by extension other
natural resources) as an expression and demonstration of their
inherent sovereignty. In spite of these facts, successive
governments from 1850 to the present have purposely tried to
exclude known mineral deposits or claims from inside Reserve
boundaries without the knowledge or consent of First Nations.

Canada and Ontario attempted to appropriate Aboriginal
mineral resources after Aboriginal People led Peter McKellar to
discover gold on Jackfish Lake during the winter of 1871/2. This discovery initiated a long and bitter struggle between the governments over ownership, control of and beneficial interest in minerals. Ontario defined its position on the basis of the location of its boundaries and Canada on the basis of Treaty No. 3. Thus, the boundary dispute and the Treaty were inextricably linked. Canada made little effort to deal with the boundary dispute until it had secured the Treaty which, it erroneously believed, gave it ownership of what, in reality, was a shared area, between the First Nations and the Crown, in the disputed territory. First Nations shared the surface of the land, but retained all natural resources - a point which was upheld in the significant, if obscure, judgment in Caldwell v. Fraser.

This conflict, fuelled by non-Aboriginal governments' greed and desire for power, was reflected in the history of the St. Catherine's Milling case and in Ontario Mining v. Seybold. Both of these cases were about, to differing degrees, minerals, although, on the surface, the former appeared to be about trees. Even though these cases, without reference to Native Peoples or their Title and Rights, determined Ontario to be the owner of all minerals in the province, it could not pursue mineral development on Reserves and reached the Agreement of 1902 with Canada even before the final decision in Seybold was delivered. This Agreement allowed Canada to administer minerals on Reserves and provided that all monies would remain with the First Nations in Treaty No. 3. Nevertheless, both before and after this agreement was reached,
the colonial and then federal governments had badly mismanaged the
development of minerals, including oil and gas, on Reserves across
the province.

One of the intended by-products of this conflict over
ownership and beneficial interest in minerals between Ontario and
Canada was the continuing disempowerment of First Nations which
could not be assimilated if allowed to retain their own govern-
ments and independent sources of wealth based on the control and
management of their natural resources including land and minerals.
This must be an underlying reason why Native People had been
forbidden, under the Royal Proclamation (and later, the Indian
Act), to initiate and maintain their own land and resource
transactions. The Proclamation did not protect First Nations from
the great frauds and abuses of the settlers; it did not protect
them from similar frauds and abuses of the colonial government and
successive settler governments which wanted to subjugate and
dispossess them of traditional sources of wealth and power.

Between 1885 and 1924, Ontario participated in legal battles
and constructed policies and legislation to facilitate its
appropriation of Aboriginal minerals. From at least the 1890s
onward, it released a steady stream of bureaucratic memoranda,
legal opinion, correspondence and finally legislation attempting
to deny Aboriginal interest in minerals. Canada both hindered and
aided the province in its legislative plans. After Ontario
manoeuvred Canada into a difficult position through the activation
of its value for value policy, developed during the federal/
provincial discussions on the Treaty No. 3 Reserves, Canada did not act in the interests of First Nations, acting instead in its own interests.

The apparent confirmation of the Treaty No. 3 Reserves by Ontario between 1891 and 1915 was an unpleasant experience for both governments. If Ontario repudiated this Treaty, most of the disputed area would revert to the First Nations and Ontario would not be able to authorize mineral (or other) development in that area. On the basis of this argument, Ontario assumed that it had to confirm the Reserves. But, it was not going to do so without extracting as much Aboriginal interest as it could from Canada first. Initially, Ottawa did not give in to this tactic and continued to insist that the province recognize Aboriginal interest in minerals on their Reserves. No agreement was reached and the minerals issue delayed confirmation into 1910. Due to political change at the federal level, this issue was not addressed again until 1913. In that year, the two governments made a secret deal in which Canada abandoned numerous Aboriginal interests. Canada paid a high price for Ontario’s confirmation, turning over Aboriginal interests in islands, roads and water power to Ontario, unilaterally cancelling Reserve #24C and obtaining (fraudulent) surrenders of the six Rainy River Reserves.

In 1915, Ontario took the position that it owned the land covered by the six Rainy River Reserves. But, there are several problems with Ontario’s 1915 legislation. First, because Canada did not concurrently or afterward pass similar legislation, it is
not clear under what constitutional authority Ontario passed legislation that substantially affected Aboriginal interests. Second, in spite of Ontario's insistence that the six Reserves be voided, they passed to Canada because Ontario confirmed all Reserves for which it deposited plans in Ottawa. Among these deposited plans are these six Reserves which Canada fraudulently obtained just before the 1915 Ontario legislation was passed. Today these Reserves are the subject of an unresolved land claim.

Although minerals under land and water had been a prominent issue delaying confirmation prior to 1911, they were not expressly considered in the 1915 legislation - thus, they remained Aboriginal.\(^2\) Ontario sought to remedy this oversight shortly after its (unilateral) passage of the 1915 legislation, but was unable to obtain any reduction in Aboriginal mineral interest until after 1920 and the *Star Chrome Mining* case in Quebec. Following this case, Canada gave in to Ontario's value for value tactic and agreed to relinquish half of the Aboriginal interest in minerals (except for Treaty No. 3 and a few other unidentified Reserves) to Ontario.

The value for value tactic worked because Canada readily chose to sacrifice Native interests to avoid unpleasant consequences (typically, cash payment to Ontario or potential court action). This is what happened in 1915 with the confirmation of Reserves, in 1924 with the Land Agreement, in 1949 with the oil

\(^2\) It is now clear that the Ontario legislation of 1915 transferred all mineral rights in the Treaty No. 3 Reserves to the First Nations for their use and benefit.
interests of the Wikwemikong First Nation and provincial back taxes and in the 1980s with the suspense account oil monies of the Sarnia First Nation. The success of Ontario’s value for value policy is indicative of both its and Canada’s lack of respect for Aboriginal Rights. From the provincial perspective, it is all right for Ontario to encourage Canada or the First Nations to bargain with existing Aboriginal interest for other Aboriginal interest which the province has appropriated. Canada has concluded several agreements under these circumstances. First Nations resent having to bargain under such conditions and usually will not do so. While the 1986 Lands Agreement stands as one example where First Nations concluded an agreement under such conditions, they did not give up anything. The 1986 Agreement is an agreement to agree - in one sense, a stalemate. But, it does allow a First Nation to make a specific agreement dealing with surrendered Reserve lands, including sub-surface and sub-marine mineral rights. It is the only existing mechanism to deal with such lands. However, the fact that the 1986 Agreement allows the conclusion of bi- or tri-lateral specific agreements has led Canada, in at least one instance, to pull out of negotiations, leaving Ontario alone to deal with the mess of Aboriginal lands surrendered in trust to the federal government.

It is clear that Ontario never intended to act in good faith while renegotiating the 1924 Lands Agreement. From the beginning the Ontario Cabinet directed the Ontario Departments of Lands and Forests, and Mines to use the renegotiations as a means to extract
favourable solutions to a host of unrelated Aboriginal land and resources issues, mainly of interest to the former Department which doggedly adhered to these instructions to the bitter end. To the extent that Canada has aided Ontario in its assumption of control over Aboriginal resources, it has breached its fiduciary obligations to First Nations.

But, all these colonial, federal and provincial schemes failed to have the desired effect: Aboriginal culture and presence was not eradicated and Native People were not assimilated. They are still sovereign Nations, they still hold inherent Aboriginal Title to the land which they agreed only to share, they still hold inherent Aboriginal Title to the sub-surface, the sub-marine, to water and to minerals despite self-serving government and judicial pretensions to the contrary. Canada and Ontario are still dealing with these realities today.
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Map 3: Sketch of the oil locations on Wikwemikong known to the Great Manitoulin Oil Co. by 1865. Source: Metro Reference Library, Baldwin Room.


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Figure 7: Reverend Simpson Brigham. Courtesy Reverend Jim Miller.

Figure 8: Elijah (Edward) Pinnance. Walpole Island First Nation Heritage Centre. Courtesy Dean Jacobs.
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Victor Lytwyn, historical and geographical consultant and adviser to First Nations

Dean Jacobs, director, Heritage Centre, Walpole Island First Nation

Bernita Brigham, grand-daughter of Rev. Simpson Brigham

Simpson Brigham, son of Rev. Simpson Brigham

Jim Morrison, historical and legal consultant and adviser to First Nations

Jim Wells, former civil servant for Lands and Forests, Ontario as well as for Indian and Northern Affairs, Canada

Paul Williams, counsel to First Nations

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