PRE-CONFEDERATION CROW RESPONSIBILITIES

A PRELIMINARY HISTORICAL OVERVIEW

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Introduction

The subject of pre-Confederation Crown responsibilities to Indians is immense. It covers the entire period of Indian-British relations from earliest contact to the modern era. To be understood and appreciated the subject must be researched over a 400-year period, and the historical paradigms of cultural contact in the political, social and economic areas must be developed and illustrated. This must be done using the documentary record, but it should be complemented by an examination of the Indian oral tradition regarding treaties, agreements, promises, traditions, understandings and expectations.

The subject is complex because of the changing socio-political environment over the period in question and the changing needs of the parties involved. The spirit and intent of British-Indian relations must be understood within their historical context before specific Crown responsibilities to Indians can be analyzed. It is likewise important to record the spirit and intent of treaties and other relations from both the British and Indian perspectives. Discrepancies in these two traditions are alarming but can be accounted for in the historical need.

The present study is a first effort to uncover as much material as possible in a brief period of time. The sixty days allotted to the project would not permit a comprehensive study but the author could not justify a study of legislative developments in the modern period that would stand alone and apparently outside the larger historical context that gave birth to the modern predicament. Consequently a risk was taken. The result is a rapid sketch of the overall

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historical context with illustrations of as many aspects of the study as possible. In the author's opinion this has been a success. While time to reflect on the myriad themes touched on in the following pages is necessary, the study has cast light on many areas for further study. A comprehensive history needs to be written for the benefit of scholars in the field, students and researchers, politicians, lawyers and policy makers, judges and Indian leadership alike. The benefits to constitutional talks, Indian government development, land and rights claims, education and Indian heritage are evident. It is hoped that some of the readers of this paper will continue the research and in time contribute to a definitive work on pre-Confederation Crown responsibilities to Indian people.

CHAPTER ONE

The Nature of the Crown in Canada

To examine the question of Crown responsibilities to Indian people in Canada it is first necessary to understand the Crown in the British political system and its changing role in the Canadian political system and in Canadian affairs. It is important to understand the distinctions between the Crown and the government and the relationship between the two. The fact that the Crown and the government are distinguishable and yet integrally related must be recognized by researchers attempting to identify specific Crown responsibilities. These problems are more legal than historical. The historical problem is that the Crown that entered into treaties with Indian nations is no longer the executive power in Canada. From the Indian perspective, the Crown is responsible for treaty obligations as well as other types of obligations. Indians identify the Crown in right of Britian or the Crown in right of Canada as their treaty allies, but the Crown in both instances claims that the Canadian government has taken on the responsibilities of the Crown to Indians. The Canadian government denies any responsibility for Crown obligations arising out of events prior to 1867. It remains to examine this situation in its historical context.

The responsibilities of the Crown toward Indian people in Canada arise from the history of relations between the British and Canadian governments and Indian nations. These relations often took the form of treaties, but in the pre-Confederation period there were also many less formal agreements and understandings. The Indian nations that took part in those relations still exist in much the same political form as they did at the time of the treaties and agreements, making it relatively easy to identify who is responsible for Indian obligations

to the Crown. On the other hand, the British and Canadian governments have undergone substantial changes in political form. Nevertheless, the Crown continues to exist and is responsible for obligations to Indians arising from pre-Confederation treaties and agreements.

In Britain, an absolute monarchy evolved into a constitutional monarchy. The range of authority of the British government also changed, particularly with respect to British colonies. Within the British Commonwealth, Canada paved the way for the development of colonial self-government. It is necessary to examine the Crown in relation to these changes so that Crown responsibilities to Indian people can be better understood.

"The role of a constitutional monarchy is to personify the democratic state."[1] This is how Queen Elizabeth II described Canada's system of government in 1964. Vincent Massey took the analogy a step further when he said, "[The Crown] represents equally all the elements which make up the state."[2] The Crown is the state. But how does the state differ from the government?

The difference is stated clearly in Canada's Constitution. The state is the nation or political community called Canada. The government is that democratically elected authoritative body called Parliament which administers the affairs of the nation. The Prime Minister is the head of the government which rules the nation. The Governor General, who is the representative of the Crown, is the head of state. The power of government emanates and remains with the Crown, while the government has the authority to dictate the use of that power.

The creation of a constitutional monarchy in Canada was deliberate. During the Confederation debates George Etienne Cartier stated: "Our purpose in forming a federation is to perpetuate the monarchical element. In our federation the monarchical principle will form the leading feature..."[3] Sir John A. Macdonald confirmed this intention:

> By adhering to the monarchical principle, we avoid one defect inherent in the Constitution of the United States. By the election of the President by a majority and for a short period, he never is the Sovereign and the Chief of the nation. He is never looked up to by the whole people as the head and front of the nation. He is at best the successful leader of a party...This defect is all the greater because of the practice of re-election. During his first term of office, he is employed in taking steps to secure his own re-election, and for his party a continuance of power. We avoid this by adhering to the monarchical principle--the Sovereign whom you respect and love. I believe that it is of the utmost importance to have that principle recognized, so that we shall have a Sovereign who is placed above the region of party--to whom all parties look up--who is not elevated by the action of one party nor depressed by the action of another, who is the common head and sovereign of all.[4]

Section 9 of the British North America Act states: "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."[5] But as Macdonald explained, "We provide that the Executive authority shall be administered by the Sovereign personally or by the representative of the Sovereign duly authorized...The Executive authority must therefore be administered by Her Majesty's representative."[6]

In Canada this representative is the Governor General. The office of Governor General is the only Canadian political institution that is an uninterrupted link with the political origins of the country. Governors General have been the senior resident representatives of the

Crown continuously since Samuel de Champlain took the office under the French administration in 1601. Governor Pierre de Vaudreuil passed this responsibility on to the first British Governor in 1760 when Sir Jeffrey Amherst established his military governorship. Vaudreuil also passed on his responsibilities for civil, military and Indian affairs, including responsibility for the 1701 Treaty of Montreal, where the Governor General was recognized as the arbiter and protector of all Native people. Some thirty Indian nations between the Atlantic and the Mississippi agreed to the treaty.

The political power of the Crown in Great Britain passed gradually to the British Prime Minister under the reigns of George IV (1820-1830) and William IV (1830-1837). At the same time, the distinction between the powers of the head of government and those of the head of state grew more marked.

A similar process took place in Canada. The highpoint of its development occurred when Lord Elgin agreed to follow the advice of the Canadian Prime Minister in local matters in 1848. After that the Governor General began to assume a role that paralleled the new role of the King in England: he presided more that ruled, a development that was tied closely to the evolution of responsible government in Canada. The aim was to make the government more responsible to the people and their elected legislature. It also meant responsibility for the interests of the nation.

This evolution in the role of the Crown in Canada was the backdrop to the constitutional debates of the 1860s. There was a clear undertaking to preserve the British system of constitutional monarchy. Eugene Forsey addressed the subject in a 1972 Senate speech:

The first thing I want to say about the existing monarchy in this country is the fact that it exists is once again our own decision. It is not something which was adopted in a fit of absent-mindedness by the Fathers of Confederation or because they were stupid or because they were ignorant. It was deliberately adopted by the Fathers of Confederation, unanimously and with their eyes wide open.

Here is what Sir John A. Macdonald had to say on the subject:

"If therefore at the Conference, we had arrived at the conclusion, that it was for the interest --"

And observe the word "interest", not "sentiment", not "tradition" -- "interest"

" -- of these provinces that a severance should take place -- "

A severance, of course from the United Kingdom, the British Crown --

"--I am sure that Her Majesty and the Imperial Parliament would have sanctioned that severance...That resolution [on the Executive authority] met with the unanimous assent of the Conference. The desire...to retain our allegiance to Her Majesty was unanimous. Not a single question was made, that it could, by any possibility, be for the interest -- "

Observe the word "interest" again.

" -- of the colonies or of any section or portion of them, that there should be a severance of our connection."[7]

No significant change occurred in the relationship of the Crown to Canada until the Imperial Conference of 1926, where the question of the Crown's relationship to the British government, and thus of the Imperial government to the Dominion government, was raised. The

result was the 1931 Statute of Westminster, which established Canada's sovereignty; the Governor General was no longer to be seen as a representative of the British government.

> ...in all essential respects the same position in relation to the administration of public affairs in the dominion as is held by the King in Great Britain...he is not the representative or agent of His Majesty's government in Great Britain or any Department...Future recommendations to this office should be a matter for the sovereign on the one side and His Majesty's privy council for Canada on the other.[3]

Thereafter the Governor General was to preside as the King's representative. Viscount Willingdon (1926-1931) was the first Governor General to assume the new role. Nevertheless, the British connection was maintained, and some business continued to be referred to the King for approval.

One of the powers remaining to the Crown was the royal prerogative. This has bearing on the question of pre-Confederation Crown responsibilities, because the right to ownerless property or Crown land is a prerogative of the Crown.

Views on this question differ, however. Prime Minister Trudeau voiced a restrictive view of Crown authority in Canada when he quoted Walter Bagehot on the role of the Crown:

> In his classical work on the English constitution, Walter Bagehot defined the position of the Crown in the following words: "The Sovereign has three rights: the right to be consulted, the right to encourage and the right to warn, and a king of great sense and sagacity would want no others."[9]

It is important to note that the Crown in Canada is divisible. That is, there is a federal Crown and a provincial Crown, represented by the Governor General and the Lieutenant Governors respectively. Each position has its own sphere of influence, but the Lieutenant Governors enjoy only those powers that devolve from the Governor General. As to how this division affects relations with Indian people and their rights, there is an ongoing federal-provincial debate. The issue has significant ramifications for Crown responsibilities to Indians and will be dealt with in detail in this paper.

To provide a preliminary historical sketch of pre-Confederation Crown responsibilities, it is also necessary to examine the context in which Crown obligations arose.

The transfer of responsibility to Canada for pre-Confederation Crown obligations poses broad and complex questions spanning over 200 years of history. Clear statements on the subject appear infrequently, and statutes or policy statements often raise more questions than they answer, although politicians have been anything but silent on the issue. Differences of opinion on the question of Imperial as opposed to colonial control of Indian affairs, Indian lands and Indian resources predate the Royal Proclamation of 1763 and continue to the present day.

The question is more complicated -- and at once more interesting -- because of its close relationship with other issues. The growing tension between Imperial strategic interests and colonial settlement pressures, for example, provided the backdrop for the debate on responsible government. By the nineteenth century, Britain had realized that keeping a colonial empire was too expensive. Had it not been for the military threat from the south, the Canadas might have gained greater local autonomy at an earlier date. As it was, Britain

maintained a substantial military force in North America, which included alliances with several Indian nations through to the end of the war of 1812, until 1971. Among other things, these alliances entailed the provision of social and medical services to Indians as well as presents for services rendered. By the 1830s military priorities had been firmly displaced by settlement interests, and Indian people rapidly lost their former value as "protectors" and came to be regarded as obstacles to progress.*

The struggle for responsible government was another manifestation of this trend. Lieutenant Governor John Graves Simcoe was the first real proponent of greater autonomy for Upper Canada. His recommendations for greater local control of Upper Canada's affairs included recommendations for civilian control of the Indian Department. Simcoe was awarded that control in 1795.

The push toward political independence was also tied closely to the development of the colonial economy, which in turn was based on lands and resources originally owned by Indians. The treaty process in Upper Canada, which began in 1764 and culminated with the Robinson Treaties in 1850, served to alienate lands and resources from the Indians to the Crown. Much of the land in the western portion of the province was placed in the care of the Canada Company, a major land-holding enterprise designed to encourage settlement and generate

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*The provision of services and distribution of presents in the form of education, agricultural implements, seeds, clothing, and other items continued throughout this period. This was another manifestation of the shift from military to settlement priorities.

income to finance the government through the sale of the lands. Large portions of land also became the Clergy Reserves, initially for the use of the Anglican Church, but later for the protestant clergy in general.

Industrial development placed increasing pressures on Indian lands. The staples industries negotiated the right to extract lumber, minerals, gravel and other resources from former Indian lands. The Robinson Treaties were premised largely on this development. The accompanying growth in population put further pressures on Indian lands and resources, giving rise to land surrenders, expropriation and theft. Government policies encouraging detribalization, enfranchisement, isolation and assimilation were accompanied by a general decline in the social, cultural, environmental, medical and economic conditions of Indian people.

In this context, the question of Crown responsibility is a difficult one. Central to the issue is the fact of Crown divisibility mentioned earlier. The Imperial Crown had made the pre-Confederation treaties; pre-Confederation promises and obligations flow from this fact, and some responsibilities and obligations of the Imperial Crown to Indian people can be identified.

Because Canada retained British parliamentary democracy as its form of government after attaining self-government, the British Crown became the Canadian Crown as well. After the 1931 Statute of Westminster, Canada was no longer bound by British parliamentary decisions. Many responsibilities and obligations of the federal Crown to Indian people can be identified, but the question this study addresses is whether the federal Crown in Canada is also responsible for Imperial Crown obligations to Indians. (The provincial Crown devolves from the federal Crown, but whether the provincial Crown has any responsibility to Indians is not the issue in this study.)

With regard to Indian-British relations, clear statements on Indian title to their territories were made in the Royal Proclamations of 1761 and 1763, and rights were addressed in the Articles of Capitulation at Quebec and in the Treaty of Paris. The terms of the Royal Proclamation were guaranteed to Indian nations in the Treaty of Niagara in 1764. The British Lords of Trade and Plantations, under Royal direction, issued regulations for the acquisition of Indian lands in 1764 and enclosed them in instructions to Governors Murray and Carleton in 1764 and 1775 respectively. Sir Guy Carleton distributed those instructions to the Indian Department and added another forty-three regulations of his own. In 1794, Carleton, now Lord Dorchester, issued a further twenty-one directives to overcome irregularities in the purchase of Indian lands. (Lord Dorchester's directives were a direct result of the embarrassments caused to the Crown through the abuses encountered in the early Mississauga Treaties. It was also because of these abuses and irregularities that Lieutenant Governor Simcoe wanted to gain control of Indian affairs for Upper Canada. He had several plans dealing with the treaties and with questions of presents, hunting, fishing and land use.)

The treaty process, government policies, legislation and official attitudes remained unchanged from about 1818 until 1867 and after. Under the influence of civil settlement interests, isolationist and assimilationist policies were reflected in treaties and legislation aimed at detribalization. Canadian control over Indian affairs expanded, and Canadian interests were expressed in all dealings with Indians. In fact, after 1800, all legislation dealing with Indians was passed with the "advise and consent of the Legislative Council and Assembly of the province of Upper Canada" or, after 1840, the "... Assembly of Canada." British involvement waned correspondingly. The only contentious issue at the time was who was responsible for covering the cost of operating the Indian Department. This question is central to the issue of who had responsibility.

Footnotes: Chapter 1

1. Jacques Monet, The Canadian Crown (Toronto, 1979), p.17.

2. Vincent Massey, On Being Canadian (Toronto, 1948), p.60.

3. Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, (Quebec, 1865), p.62, (hereafter cited as Confederation Debates).

4. Confederation Debates, p.33.

5. Eugene Forsey, "The Monarchy In Canada" in F. Vaughan et al., Contemporary Issues in Canadian Politics (Scarborough, 1970), p. 142.

6. Confederation Debates, p.34.

7. Senate Debates, March 29, 1972, p.278.

8. Imperial Conference, 1926, Summary of Proceedings (Canada, Sessional Papers 10, 1926-1927, Part vi, Inter-Imperial Relations).

9. Notes for a speech by Pierre Trudeau at the installation of Governor General Leger (January 14, 1974).

CHAPTER TWO

The Historical Background to Crown Responsibilities

The question of the origin and nature of Crown responsibilities to Indians lies in the historical and philosophical roots of British-Indian relations. Britain inherited a great deal of intellectual baggage concerning Indians when entering the period of North American colonization. Trade and settlement interests were affected by preconceptions of Indians drawn largely from Spanish and Portugese accounts. Modern historical issues, legal problems and political positions on Crown responsibilities can be understood more fully through a study of these historical roots. It was during the formative years of the seventeenth and eighteenth centuries that the parameters of Crown relations with Indian nations were established and the various types of responsibilities initiated. Without a comprehensive historical understanding of the development of Indian-European relations in British tradition, Crown responsibilities to Indians cannot be fully appreciated.

In the age of European expansion into the New World, differing views of indigenous peoples and their civilizations developed. Between the fifteenth and seventeenth centuries--the early contact period--these conceptions varied widely, prompted by cultural differences, tensions between church and state, and whether the Europeans were motivated by economic or settlement interests.

Many early views originated with the Roman Catholic Church. They ranged from attempts to rationalize the existence of new, non-Christian civilizations to efforts to justify the economic designs

of European explorers. In the mid-1400s, for example, Pope Nicholas V, in the papal decree, Romanus Pontifex, authorized the King of Portugal to "invade, search out, capture, vanquish, and subdue all Saracens and Pagans whatsoever, and other enemies of Crist wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all moveable and immovable goods whatsoever held and possessed by them, and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors their kingdoms, dukedoms, counties, principalities, dominions, possessions and goods, and to convert them to his and their use and profit."[1]

By contrast, Pope Paul III issued the papal bull Sublimas Deus Sic Dilexit in 1537 which stated:

> ...notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[2]

Bartolome de las Casas, a Dominican priest, argued for the protection of the rights of Native people in the New World before Emperor Charles V early in the sixteenth century. This argument was made in the secular world as well. Franciscus de Vittoria, a Spanish lawyer and theologian, delivered two lectures at the University of Salamanca on the rights of Indians in North America.

In light of the sixteenth century belief that all men were created in the image of God and equal in their liberty and possession of property, it is not surprising that theologians and philosophers made

considerable efforts to integrate Indians into the Christian ontological hierarchy.[3] Because of the growing separation of church and state, however, these theories soon became a backdrop for more secular ideas. The seventeenth century social contract theorists rejected the church and developed an alternative theory of property based on evolutionary hypotheses.[4] These ideas were directed at the speculative acquisition of lands and resources in the New World.

In the early history of contact between Europeans and the Indian nations in the St. Lawrence lowlands, the French brought a distinctly religious outlook to their official dealings. Professor Marcel Trudel has suggested that this overtly religious approach was in fact prompted by political motives. He cites 1540 as the date for the emergence of this political motive as an explanation for the ideas of Francis I. In this analysis Professor Trudel takes into account the fact that the Pope had divided the world between Spain and Portugal in 1493, and France's only claim to intervention in the New World was a commitment to religious mission in its colonial activities.[5]

European efforts at settlement in North America met with little lasting success before the seventeenth century. Temporary Norse settlements existed along the coast of what is now Newfoundland around 1000 A.D, but it appears that the Viking adventurers did not travel into the interior. They must have met Inuit, Beothuk or Montagnais, and, word of these fair-skinned, bearded men would have spread through the Algonkian-speaking world and perhaps further.

It is also recorded that Portuguese fishermen frequented the Grand Banks of the St. Lawrence estuary to reap bountiful harvests of fish. These fishermen may have visited what are now the maritime provinces to salt their catch or repair their gear as early as the twelfth century. Once again, Beothuk, Micmac or Malecite who encountered the foreigners would have spread the word inland.

After the exploratory voyages of John Cabot in 1497 and Jacques Cartier in 1535, several ill-prepared and ill-fated attempts at settlement occurred. Sir Walter Raleigh attempted to start a settlement at Roanoke Island, and Sieur de Roberval tried the St. Lawrence Valley, but both met with failure during the arduous winter.

This changed in 1608 when Samuel de Champlain founded Quebec under the auspices of the trading monopolist, Sieur de Monts. Champlain formed trade alliances with the Huron and Algonkin nations, alliances that drew the unwitting French into the existing political struggle in the Lower Great Lakes-St. Lawrence Valley. By aligning himself with the Huron and Algonkin nations, he embarked on a course of alienating the Haudenosaunee (Five Nations or Iroquois) Confederacy. Cartier had encountered the Haudenosaunee in the St. Lawrence Valley in 1535, but 70 years later they had returned close to the heart of their aboriginal territories south of the Valley.

In an attempt to secure a trapping area for the fur trade, Champlain entered into open conflict with the Haudenosaunee by attacking them at Lake Champlain with the aid of his new allies. The resulting hostility of the Haudenosaunee toward the French, and their political treaties of peace and friendship with the English in the Thirteen Colonies, were among the major factors influencing the course of colonial history.

The development of the French fur trade has been studied at length, but it is important to remember that it put great pressure on traditional societies, causing changes in every aspect of tribal life. It had a dramatic effect on the indigenous nations in the north-east, where the increasing demand for furs caused a reorganization of society. More time was put into trapping and less

time into other vital activities. As a result, dependence on European foodstuffs grew. Another result was the development of the notion of private property, an idea previously foreign to Indian nations. The fur trade made family hunting territories more valuable to individuals because they were directly connected with a family's welfare.

New leadership traits also evolved. Negotiating and management skills became important for Indian people dealing with the French. A group of men known as River Chiefs emerged — men who were capable of demanding and getting a good price for furs and able to defend them against thieves. Bands from the surrounding area would bring furs to the River Chief, who would transport them to a trading post for exchange. This was a boom period in Anishinabek history, but it was followed closely by a low period as the fur trade moved further west, and the Anishinabek tried to return to their traditional livelihood suffering from inflated expectations and depleted resources.

The success of Champlain's small trading community at Quebec, coupled with the changes in France brought about by the Counter-Reformation, opened the door for France to extend its missionary enterprise to North America. The enterprise also provided an expedient cloak with which to mask an economic interest in the fur trade. King Louis XIV articulated this dual interest in his instructions to the Governor of New France, Daniel de Remy de Courielle, in 1665.

> The King has two principal objects with respect to the native Indians. The first is to achieve their conversion to the Christian and Catholic faith as quickly as will be possible, and to serve these ends, besides the instructions which will be given them by the missionaries that His Majesty is supporting for this purpose under the direction of Mgr. de Petree, his intention is that the officers, soldiers, and all his adult subjects treat the

> Indians with kindness, justice and equity, never resorting to violence against them, nor will anyone take the lands on which they are living under the pretext that it would be better and more suitable if they were French.
>
> The second subject of His Majesty is to have these Indians, his subjects, work usefully towards the increase of trade which will become established little by little in Canada, until it will become well established; but his intention is that this will be carried out with good will and that the Indians will be spurred on by their own self interest.[6]

The Recollet fathers were the first to come to New France under this commission to convert the indigenous peoples to Christianity. They found the commission too expensive, however, and were forced by 1625 to request the assistance of the wealthy and politically powerful Society of Jesus. The Jesuits who came to New France left an indelible mark on the development of the country. They represented an ideological attack on indigenous civilization that was to have far-reaching affects. New concepts of social structure, justice, morality and religion were presented without the underlying socio-economic relations that had spawned them.

With the arrival of the missionaries a dual image of the indigenous population developed. The fur traders or coureurs de bois saw the Indians in an economic context, but many of them preferred Native society to the colonial society of New France. By contrast, the missionaries viewed Indians as something less than human and desperately in need of the salve of French-Catholic civilization. The French had no interest in Indian lands and made no attempt to gain ownership of Indian territories by treaties. From an indigenous perspective, however, the Jesuits obtained large land grants within the colony where Indians were to be settled for purposes of proselytizing and developing pastoral interests. Many of these tracts were granted to the Society of Jesus in trust for the Indians.

In 1760 the French lost the Seven Years' War to the British, and the colony of Quebec was ceded to the British as part of the terms of peace three years later. It is interesting to note that at the time of transfer the French insisted that the Indians were an independent people who must be dealt with separately by the British. In the Articles of Capitulation drawn up at Montréal in 1760, Indian sovereignty and independence, including their territorial right to their lands, were recognized in article 40.

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chose to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries.[7]

Despite this, the British attempted to deal with Indian nations in terms of the policies they had developed in the Thirteen Colonies. Chief Justice Marshall of the United States Supreme Court set out what was to become the accepted analysis of the settlement of North America by Europeans.

> The great maritime powers of Europe discovered and visited different parts of this continent, at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was 'that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.' This principle, acknowledged by all Europeans, because it was the interest of all to

> acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase but did not found that right on a denial of the right of the possessor to sell.[8]

In the Maritimes, this policy was articulated in the Royal Proclamation of 1762 which recognized Indian shore rights and enjoined people not to infringe on those rights "till His Majesty's pleasure in this behalf shall be signified".[9]

British Indian policy throughout North America had always been preoccupied with the question of aboriginal rights. As early as 1629, Governor Endicott of the Massachusetts Bay colony received instructions requiring him to purchase title to the lands from the Indians.[10] In 1670 the British passed legislation placing the conduct of relations with the Indians in the hands of the colonial governors and establishing the principles of British policy, which included Crown protection of Indian rights and proselytization.[11]

Indian ownership of land was again recognized in 1683 when Colonel Thomas Dongan, Governor of New York, was instructed explicity "to take all opportunities to gain and procure from the Indians upon reasonable rates and terms such tracts and quantities of ground as are contiguous to any other lands or convenient for any territories in trade, either separate or others thereby to enlarge and secure any territories."[12]

A justice of the United States Supreme Court commented on this early policy.

> [O]ur ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration. This policy has obtained from the earliest white settlements in this country, down to the present time.[13]

This evaluation illustrates accurately the intent of policy, though it may overstate the extent to which the policy was implemented.

In the seventeenth century Indian affairs were not co-ordinated centrally within the British colonies. As a result, many frauds involving Indian lands were perpetrated, and many irregularities developed.[14] In addition, westward settlement into Indian territories progressed unimpeded, despite political treaties designed to honour the rights of Indian nations living between the Alleghanies and the Ohio River. Much resentment arose between the Indians and the settlers as a result. It was for this reason that the western Indian nations aligned themselves with the French in the Seven Years' War against Britain. This was due largely to the fact that French settlement did not threaten Indian territories. In an attempt to alleviate the growing tension in relations with the Indians, the British convened the Albany Conference in 1754. At the conference one Mohawk Chief articulated clearly the cause of Indian discontent when he stated:

> We told you a while ago that we had an uneasiness on our minds, and we shall now tell you what it is; it is concerning our land.[16]

One result of the Albany Conference was an attempt to centralize and regularize Indian affairs. Up to this point each of the colonies had managed its own relations with Indian nations. The Albany Conference was an attempt to establish joint management of Indian affairs, but the goal was not realized. The Indian Department was created in 1755 with a northern and a southern superintendency under British control. Edward Atkin was appointed to the southern nations while Sir William Johnson was appointed to the northern nations under order of General Braddock. Their responsibilities included control of political relations between the British and the Indian nations, the protection of Indian rights against fur trade and settlement interests, the negotiation of boundary lines, and the enlistment of Indian military support in colonial wars.[17]

One early result of this centralization was an attempt to secure Indian lands in the name of the Crown and to discourage private transactions. As early as 1753, the Governor of New York, Sir Danvers Osborne, was told that no private land transactions with Indians were to be allowed but that, "when the Indians are disposed to sell any of their lands the purchase ought to be made in his Majesty's name at the publick charge".[18]

The British Secretary of Indian Affairs addressed the issue with Sir William Johnson in 1756:

> That memorable and important act by which the Indians put their Patrimonial and conquered Lands under the protection of the King of Great Britain their Father against the encroachments or invasions of the French is not understood by them as a cession or Surrender as it seems to have been ignorantly or willfully supposed by some. They intended to look upon it as reserving the Property and Possession of the Soil to themselves and their Heirs. This property the Six Nations are by no means willing to part with and are equally averse and jealous that any Forts or Settlements should be made thereon either by us or the French.[19]

The Secretary also made recommendations as to the administration of Indian Affairs:

> That the Indians be remedied and satisfied with regard to their complaints about their Lands particularly those Grants and Patents mentioned in the former part of these Papers, and that no Patents for Lands be hereafter Granted but for such as shall be bought in the presence of the superintendant at public meetings and the sale recorded by His Majesty's Secretary for Indian Affairs.[20]

Faced with increasing pressure for settlement land west of the Alleghanies and with the threat of the Ohio Valley nations joining the Seven Years' War against Britain, the English were forced to deal legislatively with the threats to Indian lands.

The Treaty of Easton in 1758 recognized this threat by promising that the colony of Pennsylvania would not permit settlement west of the Alleghanies.[21]

The Privy Council Proclamation of 1761 recognized the "Property Possession" of Indians in their lands and instructed governors of British colonies, prohibiting them from issuing land grants and discouraging settlement on lands "which may interfere with the Indians bordering on those colonies."[22] Any applications to purchase Indian lands were henceforth to be sent to England for consideration. Furthermore, the governors were instructed to "publish a proclamation in Our Name strictly enjoining and requiring all persons whatever who may either willfully or inadvertently have seated themselves on any lands...reserved to or claimed by the said Indians without any lawful authority for so doing forthwith to remove therefrom."[23]

This was the state of British Indian policy at the fall of Quebec in 1760. It was not until the Treaty of Paris in 1763 and the subsequent Royal Proclamation of George III that policy was again articulated clearly.

Relations between the British and the Indian nations were tenuous at this time. Settlement had crossed the Susquehanna, extended into the Alleghanies and would soon threaten the Ohio River Valley. As the French fur trade had expanded west through the Great Lakes and down the Ohio Valley from the north, forts had been established and economic relations with the western tribes secured. Thus strong allegiances to the French existed at the change of government in 1763, and animosity toward the British, who were encroaching on Indian lands from the east with designs clearly different from those of the French, was growing.

Pontiac, the Ottawa war chief, gave voice to these apprehensions when he declared war on the British. It was Pontiac's goal to drive the British out of Indian territory on behalf of his French allies and with their support. Pontiac and his followers refused to recognize the right of the British to take over Spanish and French holdings that the tribes had never ceded. In the north, George Croghan, deputy to Sir William Johnson, related a similar attitude: the Indians were complaining that the French had no right "to give away their country".[24]

By 1763 Pontiac was sufficiently angry to call a council with the chiefs of the Ottawa nation to formulate a plan of action to remove the British threat. He was able to rally the immediate support of the Ottawa, Chippewa, Huron and Pottawatomi nations in the vicinity of Fort Detroit. He also knew that he could rely on the French to lend support, as required, in the immediate area as well as in the south.

Consequently the council decided to call the western nations to war to expel the British. War belts were sent by runners from Pontiac's council to the Ottawa, Chippewa, Huron, Mississauga, Delaware, Shawnee, Miami, Pottawatomi, Kickapoo, Sauk and Seneca nations. The response was overwhelming; within five weeks of the May attack on Fort Detroit, the only British stronghold remaining in the western Great Lakes region was the beseiged Fort Detroit. Between Fort Niagara and Fort Detroit travel was treacherous, and south of Fort Niagara no travel was possible as far as Fort Pitt.[25]

It was essential that Britain resolve this problem. The Royal Proclamation was designed to deal with it. For the most part the Proclamation was a concise statement on British policies in effect since 1754. The only new aspect of the document concerned Indian territories not previously under British control.

The correspondence between the British Secretary of State and the Lords of Trade shed light on the intent of the Royal Proclamation. Lord Egremont wrote to the Lords of Trade in May 1763:

> The Second Question, which relates to the Security of North America, seems to include Two Objects to be provided for; The first is, the Security of the whole against any European Power; The next is the Preservation of internal Peace and Tranquility of the Country against any Indian Disturbances. Of these Two Objects, the latter appears to call more immediately for such Regulations and Precautions as Your Lordships shall think Proper to suggest, etc.
>
> Tho' in order to succeed effectually in this point, it may become necessary to erect some Forts in the Indian Country, with their Consent, yet His Majesty's Justice and Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons and Property and securing to them all the Possessions, Rights and Privileges they have hitherto enjoyed, and are

> entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair purchase only; and it has been thought so highly expedient to give them the earliest and most convincing Proofs of His Majesty's Gracious and Friendly Intentions on this Head, that I have already received and transmitted the King's Commands to this Purpose to the Governors of Virginia, the Two Carolinas and Georgia, and to the Agent for Indian Affairs in the Southern Department...[26]

It is important to note that Egremont acknowledges the aboriginal nature of Indian rights.

In June of the same year the Lords of Trade responded to Egremont with their policy recommendations. They proposed a territory around the Great Lakes as "Indian Country" under regulations to ensure free trade.

> ...if Your Majesty shall be pleased to adopt the general proposition of leaving a large Tract of Country round the great Lakes as an Indian Country, open to Trade, but not to Grants and Settlements, the Limits of such Territory will be sufficiently ascertained by the Bounds to be given to the Governors of Canada and Florida on the North and South, and the Mississippi on the West; and by the strict Directions to be given to Your Majesty's several Governors of Your ancient Colonies for preventing their making any new Grants of Lands beyond certain fixed Limits to be laid down in the Instructions for that purpose.[27]

The Lords of Trade also commented on the boundaries between the Colony of Quebec and Indian territory.

> ...We should humbly propose to Your Majesty that the new Government of Canada should be restricted, so as to leave on the one hand, all the Lands lying about the Great Lakes and beyond the Sources of the Rivers which fall

> into the River St. Lawrence from the North, to be thrown into the Indian Country, and on the other hand, all the Lands from Cape Roziere to Lake Champlain, along the Heights where the Sources of the Rivers rise, which fall into the Bay of Fundy and Atlantic Ocean, to be annexed to Nova Scotia and New England in such a manner as open any future directions after particular Surveys have been made shall appear most proper...[29]

This placed the boundaries of Indian Country between the colonies and the Hudson's Bay Company territory.

Lord Egremont replied with approval for the plan, but with one exception; he recommended that some colonial government should have civil jurisdiction over Indian territory. He proposed that it be the government of Canada.

> The King therefore is of Opinion, that, in the Commission for the Governor of Canada, all the Lakes, viz., Ontario, Erie, Huron, Michigan, and Superior, should be included with all the Country, as far North, and West, as the Limits of the Hudsons Bay Company and the Mississippi; And also that all Lands whatsoever, ceded by the late Treaty, and which are not already included within the Limits of His Majesty's ancient Colonies, or intended to form the Governments of East and West Florida, as described in your Lordships Report, be assigned to the Government of Canada, unless your Lordships should suggest any other distribution, which might answer the purpose more effectively...[29]

The Lords of Trade, however, thought that it was not the time to involve civil jurisdiction in Indian affairs, although they did believe that separate jurisdiction was a possibility for the future. This advice was accepted by Lord Egremont's successor, Lord Halifax, and the Lords of Trade were instructed to draft the Proclamation.

The Royal Proclamation paid particular attention to colonial relations with Indian nations. The borders of the colonies were established, and all territories outside these borders were reserved for the Indians.

However Lord Shelburne, President of the Lords of Trade,

> was persuaded that some of the colonies were already in need of land, not so much because of overpopulation as because large tracts were held for speculative purposes. The consequence of this was the encroachment of the pioneers upon the Indian hunting grounds and the resulting disturbances. To relieve this condition, three remedies should be applied. First, permission should be granted the Indians to sell their lands, situated within the settled area, directly to the crown acting through the governor. This would prevent the frauds which had been practiced on the Indians by private persons...[30]

The other two remedies were to allow settlement west to the Ohio Valley and to encourage settlement in the Floridas and Nova Scotia. Shelbourne also felt that there should be

> [a] definite boundary, which should be established between the western-most settled parts of the colonies and the hunting grounds of the Indians; and future settlement in this region, reserved for the Indians, should be directed by the British government, and, therefore, the colonial governments and private persons must be forbidden to make purchases or settlements beyond this line until treaties have been made with the various tribes, and satisfaction has been given them for their land...[31]

Under the terms of the Royal Proclamation of 1763, the Indians were not to be interfered with "in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by

us, are reserved to them or any of them." All British citizens were enjoined "from making any Purchases or Settlements whatever, or taking Possession of any of the lands above reserved, without our special leave and Licence for the Purpose first obtained."[33]

The Royal Proclamation did make provision for the possible future acquisition of Indian lands. The territories were restricted from access "until our further pleasure be known."[34] The Lords of Trade commented "in the case of that Territory in North America which...is proposed to be left...to the Indian Tribes for their hunting grounds; there no settlement by planning is intended, immediately at least, to be attempted..."[35] "[t]here could be no definite statements concerning anticipated future settlements in the Indian reservation; for that would have defeated the purpose of the proclamation [which was to reassure the Indians]. Therefore, all we can expect to find in the document, or those connected with it, are reservations that would not be prohibitory of a policy that might appear at first sight contrary to the obvious declarations."[36]

Allen G. Harper has argued that the Royal Proclamation

> ...laid the foundations of four great principles which became embedded in Canada's treaty system: that the Indians possess occupancy rights to all land which they have not formally surrendered: that no land claimed by Indians may be granted to whites until formally surrendered; that the government answer the responsibility of evicting all persons unlawfully occupying Indian lands; and that surrenders of Indian land may be made only to the crown, and for a consideration.[37]

This clearly established the precedent that in all relations with Indians, the Crown was to be intermediary. Only the Crown could extinguish aboriginal title to land, and aboriginal title was the only encumbrance on full Crown title to lands in British North America.

These policy directions, affirmed by the Royal Proclamation, recognizing the aboriginal rights of Indian nations remained to be worked out in detail. This was evident in several instances. One observer commented on the establishment of the Indian boundary line:

> The Appalachian boundary line proclaimed in 1763 was provisional, occasioned by the war whoop of the Indians in the West. The Lords of Trade realized that the ordinary process of Instructions to the governors was too slow for a time a crisis. They knew, too, that it was impossible during an Indian war (especially as one as serious as the uprising of Pontiac) to proceed with the detailed surveying necessary for laying out the line itself. But the point-by-point negotiation with the Indians over the location of the line was not abandoned, only postponed.[38]

Responsibility for negotiating peace and surveying the exact boundary line was delegated to Sir William Johnson. To fulfil his commission, Sir William held many meetings with the chiefs of the Indian nations within his superintendency, where he delivered the terms of the Royal Proclamation of 1763 and called for a treaty of peace and friendship between the Indian nations and the British. This was accomplished by the Treaty of Niagara in 1764. At Niagara the terms of the Royal Proclamation were exchanged for the cessation of hostilities, the return of prisoners, and the peaceful alliance of the various nations to Britain across the boundary line. With regard to the boundary line, Johnson wrote to the Lords of Trade:

> The ascertaining and defining of the precise and exact boundaries of Indian Lands is a very necessary, but a delicate point...I must beg leave to observe, that the Six Nations, Western Indians etc., having never been conquered, either by the English or French, nor subject to the Laws, consider induced to think it will require a good deal of caution to point out any boundary, that shall appear to circumscribe their limits too far.[39]

Johnson continued negotiations with the Haudenosaunee in this spirit and concluded the Fort Stanwix Treaty of 1768. In the interim he had managed, with the aid of the Haudenosaunee, to convince the recalcitrant Pontiac to enter into the treaty of peace and friendship with the British in 1766.

The borders established by the Royal Proclamation did not reflect the actual extent of settlement in British North America. Many settlers living within Indian territory south of the St. Lawrence River had been granted patents to their land prior to the Proclamation. According to the Proclamation they were required to leave this territory and re-establish themselves within colonial boundaries, but the situation was not policed. Even the government's position on the subject was inconsistent. Professor J. Sosin points out that "By the terms of the Royal Proclamation of 1763 [the Imperial government] denied [settlers'] claims, but as late as 1766, the Auditor General for the Plantations, Robert Chalmandeley, insisted that they pay quit-rents for the same lands."[40]

In addition, more territory was being occupied illegally by settlers and speculators. George Washington mapped out lands beyond the Proclamation boundary for his personal use, dismissing the policy as nothing more than a "temporary expedient to quiet the minds of the Indians."[41] The terms of the Proclamation were disregarded openly because of the inability of the colonial governors to enforce them. Sosin commented on correspondence between General Gage, the British Military Commander in North America at the time, and the Home Ministry:

> The inability of the government to punish the 'lawless Ruffians' merely encouraged other frontiersmen 'to every Excess'. Tried in one colony, they escaped to another, and 'If by chance apprehended', they were either rescued from the law or faced an inconsequential trial, for 'No Jury wou'd condemn them for murdering or ill-treating an Indian'. Gage concluded that the 'Reins of Government are too loose to enforce an Obedience to the Laws...'[42]

These recurring contraventions of the policies articulated in the Proclamation caused tension and hostility among Indian leaders and frustration on the part of some colonial and Imperial officials. In 1773, Lord Dartmouth, the Secretary of State for the colonies, wrote: "There is no longer any hope of perfecting that plan of policy in respect to the interior country, which was in contemplation when the Proclamation of 1763 was issued."[43]

With the first rumblings of discontent in the Thirteen Colonies growing into threatened revolution, and with discontent among the Indian nations once again reaching critical proportions, it was clear that a new approach was required.

The British Lords of Trade and Plantations attempted to resolve the problem of Indian-British relations by developing regulations for the acquisition of Indian lands based on the general policies articulated in the Royal Proclamation. These regulations were a direct attempt to standardize relations with Indian nations and stop further irregularities and violations of aboriginal rights. Even the Indian Department was not innocent of these abuses. Sir William Johnson, for example, acquired his New York estate in the following manner:

> Sir William Johnson, sitting in council with a party of Mohawks, the head chief told him, he had dreamed last night, that he had given him a fine laced coat, and he believed it was the same he then wore; Sir William smiled, and asked the Chief if he really dreamed it; the Indian immediately answered in the affirmative, well then says Sir William, you must have it; and instantly pulled it off, and desiring the Chief to strip himself, put on him the fine coat. The Indian was highly delighted, and when the council broke up, departed in great good humour, crying out, Who-ah! which is an expression of great satisfaction among them.

> The next council which was held, Sir William told the chief that he was not accustomed to dream, but that since he met him in council, he had dreamed a very surprising dream; the Indian wished to know it; Sir William, with some hesitation, told him he had dreamed that he had given him a tract of land on the Mohawk River to build a house on, and make a settlement, extending about nine miles in length along the banks; the Chief smiled, and looking very cheerfully at Sir William, told him, if he really dreamed it he should have it; but that he would never dream again with him, for he had only got a laced coat, whereas Sir William was now entitled to a large bed, on which his ancestors had frequently slept. Sir William took possession of the land by virtue of an Indian deed signed by the chiefs, and gave them some rum to finish the business. It is now a considerable estate...[44]

Although steps were taken to prevent this kind of abuse, individuals within the British Indian Department continued to exploit the Indians for personal gain.

Matthew Elliott, Indian Agent at Amhurstburgh, perpetrated a fraud involving the annual distribution of presents. Indian agents often had a great deal of discretion because communication among a small staff covering a huge territory was difficult. Elliott falsified reports on the Indian population in his area, claiming that there were 547 Indians requiring presents, although only 167 had been reported at the Fort. Captain Hector McLean, the newly appointed commanding officer at Amhurstburgh, complained about Elliott's situation:

> He [Elliott] lives as I am informed in the greatest affluence at an expense of above a thousand [pounds sterling] a year. He possesses an extensive farm not far from the garrison stock'd with about six or seven hundred head of cattle & I am told employs fifty or sixty persons constantly about his house & farm, chiefly slaves. If the question should be asked "how these people are fed and cloathed & how his wealth has been accumulated", I shall not undertake to give a positive answer, but the general opinion of people better acquainted with these matters is well known...[45]

Considering that Elliott's salary was only 200 pounds per year, it seems reasonable to assume that he was selling the surplus presents, the cost of which was high as 20,000 pounds per year in his district. This was an amount no colonial official would pay to Indians. One rationalization offered for this behaviour was as follows:

> In considering the lack of proper business management, the same remarks apply as in the case of the Crown Lands generally save that a large part of the blame attached directly to the Home Government through the Military Department. But in the matter of corruption and dishonest practices generally, it should be remembered that the opportunities and inducements created by the peculiar nature of the Indian Lands themselves and the unsophisticated character of the owners were both numerous and powerful, while the chances of detection were comparatively slight.[46]

It was to remedy this situation that the Royal Proclamation was issued. It set out clearly the principles for all future political relations and land transactions with Indian nations. The western boundaries of the colonies were established, and title to all lands beyond those boundaries was reserved to the Indian nations. Any British subjects settled outside the colonial boundaries were ordered "to remove themselves from such settlements".[47] Civilian governors and military commanders-in-chief were ordered not to "presume, under any pretense whatever",[48] to allow surveys of land grants beyond those boundaries unless previously purchased or ceded to the Crown, and no private individual was permitted to buy land from the Indians.

These directions were entrenched to prevent any repetition of the "great frauds and abuses [which] have been committed in the purchasing of the lands of the Indians, to the great prejudice of our interest, and to the great dissatisfaction of the...Indians."[49] Strict procedures were laid out for buying Indian land. "If at any time, any

of the said Indians should be inclined to dispose of the said lands, they shall be purchased only for us [the Crown] in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief."[50]

The Lords of Trade issued detailed regulations regarding British conduct in relation to the Indians in their instructions to Governor Murray in 1764. These instructions dealt specifically with the necessity of maintaining peace with the Indians and leaving their territories untouched except in accordance with the Royal Proclamation policies. They also called for a treaty with the Indians to ensure peace and frienship. To this effect Sir William Johnson invited the Indian nations to Niagara where the Treaty of Niagara was signed in 1764.

Political relations between Indians and the colonists remained stable until 1774, when the Imperial government passed the Quebec Act. The Act transferred jurisdiction over Indians and their lands to the colonial government and extended the colonial boundary south to the Ohio River, west to the Mississippi and north to the Hudson's Bay Company grant. This was a clear attempt to keep American colonists out of Indian country and preserve the fur trade for Britian. Britian had no intention of settling Indian country at this time. In fact Lord Dartmouth stated emphatically that this was the most effective means of discouraging settlement.

> The extension of the Province to the Ohio and the Mississippi is an essential and very useful part of the bill; it provided for the establishment of civil government over many numerous settlements of French subjects, but does by no means imply an intention of further settling the lands included within this extention, and if it is not wished that British subjects should settle that country nothing can more effectively tend to discourage such subjects which in the present state of that country, your Lordship knows very well, it is impossible to prevent.[51]

The further centralization of Indian affairs did not negate the policies outlined in the Royal Proclamation. In fact they were given fuller weight in the instructions issued to Governor Carleton in 1775, which emphasized the requirement that Indian lands be purchased only by the government at a public meeting with the principal chiefs of the nations governing the territory in question.

The Quebec Act may well have been the last straw for the Thirteen Colonies. The ensuing American Revolution had repercussions for British relations with Indian nations. Of immediate concern was the predicament of British allies whose territories lay within the new Republic. Most notably this meant the Haudenosaunee Confederacy, which was concerned to protect its political relations with Britian and its territorial rights.

Britain did not offer much by way of protection to her allies. In agreements with the Americans, no guarantees were made, but the Haudenosaunee were offered an opportunity to move into British North America along with the United Empire Loyalists. The positive response to this offer by Joseph Brant, John Deseronto and a significant band of Mohawks, as well as the arrival of 10,000 United Empire Loyalists, meant that settlement land had to be found. This in turn required the acquisition of land from the Mississauga nation.

Commercial interests were affected by the war as well. The merchants and fur traders of London and Montreal put great pressure on England not to abandon the rich fur trading areas of the Ohio and Mississippi Valleys, at least not until they had had a chance to withdraw their investments. This demand was satisfied partially by the fact that England, seizing the excuse that the Americans had failed to fulfil their obligations with regard to the indemnification of seized and destroyed loyalist property, refused to give up control

of the Ohio, Michigan and Illinois regions. Although the refusal to withdraw satisfied the merchants temporarily, it meant that hostilities continued with the United States until 1796, when the territory was finally surrendered.

The result of heavy British involvement in international affairs (the French Revolution was another contemporary preoccupation) was that the Indian Department received inadequate and often conflicting advice. Local officials found themselves largely autonomous; whatever direction they did receive from their superiors lacked coherence and consistency. This caused erratic development in the colonies and strained relations with Indian nations. The events surrounding the Mississauga treaties between 1784 and 1806 were to reflect all these contradictions and uncertainties, as well as the chaos and inefficiency of the Indian Department itself.

As Governor Haldimand contemplated the colony's difficult military situation in 1783, two things were of deep concern: first, there was fear of an Indian uprising against the British by Britain's former allies, the Haudenosaunee, who had been betrayed by the signing away of their lands in the treaty ending the Revolutionary war; the second concern was resettling the Loyalists. To deal with both problems, Haldimand decided to create two military settlements -- one around Detroit to be responsible for peaceful relations with the western nations and to raise grain and cattle to feed the upper lakes posts, the other around Cataraqui to anchor the defence of the St. Lawrence and lower lakes. Almost immediately, failure to follow the regulations for acquiring Indian lands began to cause problems.

In anticipation of the Detroit settlement, several Detroit merchants, including Sarah Ainse, Charles Gouin, Garrett Teller and William Park, had persuaded the Chippewas in 1780 and 1781 to grant

them the entire Thames River Valley as far inland as Chatham. Although this grant was rejected, similar deals by agents of the Indian Department in Essex County placed Governor Haldimand in a dilemma. He decided to allow the agents to retain their lands, but made it clear that future transactions of this sort would not be tolerated. On April 26, 1784, in a letter to Lieutenant Governor Hay, Haldimand reiterated, almost word for word, the instructions given to Governor Carleton some nine years earlier:

> I have to acquaint you that the claims of individuals, without distinction, upon Indian lands at Detroit, or any other part of the province are INVALID, and the mode of acquiring lands by what is called Deeds of Gift, is to be entirely discountenanced, for by the King's instructions, no private Person, Society, Corporation, or Colony, is capable of acquiring any property in lands belonging to the Indians, either by purchase of, or grant of conveyance from the said Indians, excepting only where the lands lye within the limits of any colony, the soil of which has been vested in Proprietaries, or corporations only shall be capable of acquiring such property by purchase, or grants from the Indians. It is also necessary to observe to you that by the King's instructions, no Purchase of Lands belonging to the Indians, whether in the name or for the use of the Crown, or in the name or for the use of the Proprietaries of the Colonies be made, but at some general meeting at which the Principal Chiefs of each Tribe claiming a proportion in such lands are present; and all tracts so purchased must be regularly Surveyed by a Sworn Surveyor in the presence and with the assistance of a Person deputed by the Indians to attend such Survey, and the said Surveyor shall make an accurate Map of such Tract, describing the Limits, which map shall be entered upon the Record with the Deed of Conveyance from the Indians.[52]

Despite this recognition of Indian sovereignty and independence, Britain promoted emigration to North America. This meant that the British needed the Indians and their lands to satisfy three needs: military protection, the fur trade and settlement. All of these worked against the interests of Indian nations.

Even Sir William Johnson realized before his death that relations with Britain's North American allies would dissolve in the face of increasing pressure from colonial expansion. This changing attitude was reflected in Indian Department attitudes at the turn of the century:

> [The Indians] desire to be considered as Allies and friends, and such we may make them at a reasonable expense and thereby occupy our outposts, and carry on a trade in safety, until in a few years we shall become so formidable throughout the country as to be able to protect ourselves and abate of that change...[53]

To facilitate the sham, Indian agents were instructed to attempt to persuade Indian people that British culture was to be preferred to their own civilization:

> This would soon provide most salutary effects; their Apprehensions removed, their attachment to us would acquire a solidarity not to be shaken, whilst time, intercourse with us and instruction in religion and learning would create such change in their manners and sentiments as the present generation might live to see; together with an end to the expense and attention which are as yet so indispensibly necessary to attain these great purposes and to promote the safety, extend the settlements and increase the commerce of the country.[54]

Duncan Campbell Scott, commenting on colonial attitudes toward the Indians in the late eighteenth century, said:

> To keep the Indians at bay by friendship, to distrust them profoundly while cementing treaties with them, to heal each treachery with the salve of presents, to be ready with ample rewards for negative services - these were to be the actuating principles until the increase of population should abate the terror of the savage, and the pressure of civilization should turn him into a peaceful subject.[55]

In the 1830s civilian control over the Indian Department was re-established. This meant that the policy emphasis was on isolating and assimilating Indians and on settling Indian lands. Sir Francis Bond Head initiated a plan designed to move all Indians in Upper Canada to Manitoulin Island. This attempt to secure Indian lands in the western part of the colony for settlement was cloaked in the humanitarian garb of nineteenth-century England.

Lord Glenelg, the British Colonial Secretary, established a British Indian policy in 1838, with "civilization" and protection as its guiding principles. He stated that the goal of British policy was "to protect and cherish this helpless race... and raise them in the Scale of Humanity".[56] This paternalistic policy has remained in effect, without significant change, for over one hundred years. Policies established subsequent to 1838 were designed to control the contact between Indians and settlers, but all embodied the paternalistic view of Indian people, and all were directed at the eventual assimilation of Indians into Canadian society.

The administration of Indian affairs remained largely unchanged until 1860, but the basis of a Canadian legislative framework was put in place during this period. In 1850 Canada passed its first legislation to protect Indian lands from trespass. Indian lands and property came under the direct control of the Commissioner of Indian Lands. In 1851 the first legislation was passed that dealt with Indian status, thus laying the basis for the status/non-status issue in the 1876 Indian Act.

The colonial government appointed two commissioners in 1856 to report on the objectives of Indian policy: "...the best means of securing the future progress and civilization of the Indian Tribes in Canada" and "...the best mode of so managing the Indian property as to

secure its full benefit to the Indians, without impeding the settlement of the country."[57] These statements reflect clearly the paternalism of nineteenth-century policy, but settlement interests are also articulated. The commissioners were optimistic that the Indian population would eventually be assimilated. To accelerate assimilation they recommended a number of economic development initiatives.

In 1857 the Canadian government introduced legislation that set out public policy unequivocally. The preamble to the Act for the Gradual Civilization of the Indian Tribes in Canada stated:

> Whereas it is desirable to encourage the progress of civilization among the Indian Tribes in this Province, the gradual removal of all legal distinctions between them and her Majesty's other Canadian subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it...[58]

The Act offered financial, property and citizenship inducements to Indians who would cut their ties with their nations.

Indians lands remained the focus of Indian policy in Canada. Policy was consistently directed at protecting the Crown's interest in Indian land in the acquisition process. Settlement was the real objective of this policy. For example, in 1860 the government passed the Management of Indian Lands and Property Act, which dealt primarily with surrender procedures. In recognition of earlier practices, the distribution of liquor at treaty meetings was prohibited.

In 1860, legislative responsibility for Indians was transferred from the Imperial government to the Canadian government. In response, the Province of Canada passed legislation empowering the Commissioner

of Crown Lands to be Chief Superintendent of Indian Affairs. Following this, the British North America Act of 1867 gave the federal government responsibility for enacting legislation regarding "Indians, and Lands Reserved for the Indians". The Secretary of State for the Provinces was made Superintendent-General of Indian Affairs.

There was an historical concern that Indian Affairs be controlled centrally.

> A Committee of the English House of Commons in 1837 stressed the need to keep Indian affairs under strict Imperial control. They observed that the chief exploitation of Indians came from neighbouring land-hungry colonists who also controlled local and provincial governments. Only an Imperial intervention in favour of the Indians could help maintain the balance and keep the peace.[59]

The assignment of responsibility to the federal government had consequences for provincial relations with Indians. Section 91(24) of the BNA Act had given the federal government exclusive responsibility for Indian matters, but provincial governments have interpreted the section much more loosely.

> ...the withholding of provincial services from Indians on reserves has never been dictated by constitutional necessity, and that whatever justification existed for such provincial policy must be found in historical and political - not constitutional considerations.[60]

Paternalistic legislation continued in the immediate post-Confederation period with the Enfranchisement Act of 1869. Assimilationist policy remained the cornerstone of relations between Canadian governments and Indian people.

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28. Ibid., p.103.

29. Ibid., July 14, 1763, p.108.

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37. Allen G. Harper, p.129-140.

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55. Ibid., p.699.

56. L.F.S. Upton, "The Origins of Canadian Indian Policy", Journal of Canadian Studies 9/4 (1973), p.58-59.

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CHAPTER THREE

Aboriginal Rights and Aboriginal Title

Indian political leaders have expressed their views of Crown responsibilities to Indians. These views vary widely and sometimes indicate fundamental differences in perspective. Before examining the nature of the treaty system in Canada, it is essential to have some appreciation of Indian views on the subject. In this chapter, a position held widely by Indian people in Ontario and British Columbia is expressed. This position states that Indian First Nations have aboriginal title and aboriginal rights as sovereign nations unless specific rights or title have been surrendered under treaty. The position is consistent with the historical patterns illustrated in the preceding chapter.

Crown obligations arise out of historical relations between Indian nations and the British Imperial and colonial governments. These obligations are usually associated with Indian lands and rights. They are derived from and based on formal relations between the British and Indian nations, relations that were predicated on the sovereignty and independence of Indian nations. It is important to understand two concepts -- aboriginal rights and aboriginal title -- before these historical relations and Crown responsibilities can be explored further.

In statements on the subject of aboriginal rights, Indian political leaders have interpreted their aboriginal rights as those rights enjoyed by any independent and sovereign people. They derive

from the political reality of independence. They include economic, cultural and spiritual rights as well as domestic and interrelated political rights.

Aboriginal rights generally are seen to include the right to self-determination; the right to maintain and develop their own forms of government; the right to control their lands, waters and resources; the right to use their own languages, to practise their religions and to maintain their cultures; and the right to determine their own citizenship.

Native political leaders do not accept the assumption on the part of Canadian society that aboriginal rights can be affected by unilateral action. They have stated that their rights cannot be simply 'superseded by law', either federal or provincial. Where no formal agreement exists specifically reducing an aboriginal right to land or otherwise altering rights, the rights continue to exist. That is, aboriginal rights cannot be removed by indirect action or by implication.

In colonial times many arguments were developed to justify the abrogation of aboriginal rights. The most common argument was to assume Indians to be British subjects. An interesting illustration of this attitude involved the Mohawk, the French and the British.

The French and the English had complex diplomatic relations in the seventeenth and eighteenth centuries involving the Haudenosaunee Confederacy. The question was which of the European nations would gain the allegiance of the Confederacy. Since the Haudenosaunee already had agreements of peace and friendship with the British, the French sought to use the Confederacy to embarass the British.

Prior to the defeat of the French in the Seven Years' War, a small band of Mohawk warriors attacked Montreal and were captured. Several Chiefs came to Quebec to negotiate the return of the prisoners. The Governor of Massachusetts, Governor Shirley, denounced this action in a letter to the Governor of New France, La Galissonière.

> As to insisting upon the Indians of Six Nations coming in person to Canada to treat with his most Christian Majesty's Governor there for the Redemption of their brethren..as has been represented to Mr. Clinton and me, I can't but think, Sir, you will be of opinion that as those Indians are the King our Master's Vassalls, engaged in his war, it belongs to him to treat for their release & yet is contrary to the Custom of Nations for one Prince to require the Subjects & Vassalls of another Prince to come into his Territories to treat for the Redemption of their Brethren taken Prisoners in Warr.[1]

The French Governor responded:

> I beg to permit me to answer: First, That the Indians are not subject of Great Britain. Second, That we have not, nor had any warr with the Six Nations of Iroquois, who have continued to live in terms of friendship with us for forty-five years, with the exception of the small party of Mohawks whom the other Cantons disavow. Third, That the Nations can come as they promised, to negotiate for the restoration of those prisoners, but this in no way concerns the English.[2]

When the British continued, in a letter from Governor Clinton of New York, to press their claims of sovereignty over the Haudenosaunee by virtue of the Treaty of Utrecht, La Galissonière told them, "...neither the Treaty of Utrecht nor any similar one can make the Iroquois subjects of Great Britain."[3] He stated further that for the "one hundred and fifty years" since contact the Haudenosaunee had

been in control of their own affairs "independent of you, and often in opposition to you, without your having ever attempted to force them to obey you."[4] The Treaty of Utrecht "could not, then, legitimately subject them to you,"[5] he argued. "The English are too well read in the Law of Nations," he added, "not to appreciate this truth."[6]

This interchange clearly articulates the sovereignty and independence of the Haudenosaunee and has implications for all indigenous nations. The question of whether Indians were British subjects eventually went to the Court of Commissioners for decision. The Court concluded that:

> The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a policy of their own, they make peace and war with any nation of Indians, when they think fit, without control from the English. It is apparent the crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and his present majesty's commissions by which we now sit. And it is as plain, in my conception, that the crown looks upon the Indians as having the property of the soil of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby inpropriated in his subject till they have made fair and honest purchases of the natives... So that from hence I draw this consequence, that a matter of property in lands in dispute between the Indians as a distinct people (for no act has been shown whereby they became subjects) and the English subjects, cannot be determined by the law of our land, but by a law equal to both parties, which is the law of nature and nations; and upon this foundation, as I take it these commissions have most properly issued...And now to maintain that the tenants in possession of the land in controversy are not bound to answer the complaint before this court, is to endeavour to defeat the very end and design of our commission; for surely it would be a very lame and defective execution of it, to hear only the matter of complaint between the tribe of Indians and this government.[7]

This decision was upheld by the British Privy Council. It clearly confirms tribal sovereignty, aboriginal title, and the application of international law to disputes between Indians and the colonies, and supports the concept of fair and honest purchases of land.

This is not how aboriginal rights have always been interpreted, however. Aboriginal rights have usually been interpreted more narrowly and more restrictively. Chief Justice Marshall of the United States Supreme Court laid the foundations of modern North America interpretations of aboriginal title by defending the concept of acquired rights through discovery. Marshall argued that European nations that 'discovered' North America had either to claim title to the land and defend it or abandon their designs on the land. By asserting their sovereignty, European nations could establish relations among themselves and make land available to settlers. Chief Justice Marshall clearly held personal reservations about this theory, but he felt compelled to enforce it.

> We will not enter into the controversy, whether agriculturists, merchants and manufacturers, have a right, on abstract principles to expel hunters from the territory they possess or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[8]

The Chief Justice argued that discovery gave title "to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession."[9] This title was not recognized as full title, however. Marshall also recognized and validated aboriginal title in his argument. "In the establishment of these relations,"

Indians were recognized "to be the rightful occupants of the soil, with a legal as well as a just claim to retaining possession of it."[10] He went on to say that Indian nations had the right to 'regulate' their relations with European nations. This meant that Marshall was approving the concept of a European interest in the land, but that title was subject to the aboriginal title, which could be extinguished only through rules prescribed by Indian nations.

This argument illustrates the depth of the eurocentric assumptions pervading the issue of Indian lands. In the nineteenth century Jeremy Bentham argued that "Property and law are born together and die together. Before laws were made there was not property; take away the law and property ceases."[11] Bentham and Marshall articulated the fundamental principles of modern liberalism in North America. However they ignored or failed to acknowledge the fact that land was recognized and its uses governed by the laws of the first nations in North America and that these laws were ignored deliberately in British theories of land acquisition to facilitate the process.

Aboriginal title was recognized as the sole obstacle to full European entitlement. In addition, the federal government was given the exclusive right to extinguish aboriginal title through a formally articulated process. Only through a proper extinguishment of aboriginal title could the European title gain full recognition.

An even stronger affirmation of aboriginal title was given in the U.S. Northwest Ordinance of 1787.

> The utmost faith shall always be observed toward the Indians, their land and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress...[12]

This has significance for Canada because of the common legal and historical heritage of Canada and the United States. It also has significance because American legal opinions and historical developments have often been raised by Canadian courts in their deliberations about aboriginal rights.

Similarily, Chief Justice Marshall had recourse to the Royal Proclamation of 1763, a seminal document in the history of aboriginal rights in Canada, in reaching some of his decisions. The Royal Proclamation of 1763 recognized aboriginal rights to land outside the colonies. It also established quite clearly the principles by which surrenders of Indian land could be made. The Royal Proclamation has paramount significance from both an historical and a legal perspective.

> This proclamation has been spoken of as the "Charter of Indian Rights". Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimo had their aboriginal rights and English law has always recognized these rights.[13]

Although the Royal Proclamation has usually been interpreted to have geographical limits (that is, that it excluded the far west and the far north), this has not always been the case. "That fact is not important" because the government of Canada has always recognized the aboriginal rights of "all Indians across Canada". [14] In any event, Russian fur traders were travelling the northwest coast of British Columbia before the Royal Proclamation, and Captain James Cook visited the B.C. coast shortly thereafter in the service of Great Britain.

Aboriginal rights do not depend exclusively on the Royal Proclamation for recognition in European law. As pointed out earlier, the law of nations has been cited as a source for aboriginal rights. This fact has been assimilated into the common law in Canada and been confirmed by Canadian executive and legislative action.

> Therefore when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this ruse as an express positive law [i.e., the Royal Proclamation of 1763], we ought just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such.[15]

Recognition of aboriginal title in the British legal tradition can be traced through other colonial situations as well. A British court ruled on a land cession in Nigeria that aboriginal title must be honoured. "This cession [of the fee] appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place."[16] The court also ruled that the property rights of indigenous people must be presumed in the absence of a proper surrender. "It is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners...".[17]

Unquestionably the strongest and clearest statements on the subject of aboriginal title have come from the American courts. In addition to the Marshall decisions, the one other principle articulated by U.S. courts is found in the case United States v. Santa

Unquestionably the strongest and clearest statements on the subject of aboriginal title have come from the American courts. In addition to the Marshall decisions, the one other principle articulated by U.S. courts is found in the case United States v. Santa Fe Pacific Railroad. The court stated: "Nor is it true, as the respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action."[18] It is important to remember that American and Canadian law have developed historically out of the British common law tradition. It is also important to note the frequency with which Canadian courts have turned to American decisions for guidance in aboriginal rights cases.

Finally, in 1957 the International Labor Organization addressed the issue of the exploitation of Native peoples. At its conference in Geneva that year, the ILO adopted a Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. The convention dealt specifically with indigenous populations who were socially and economically disadvantaged by comparison with the national community of which they were a part. Articles XI to XIII of the convention read as follows:

> The right of ownership, collective or individual of the members of the population concerned, over the lands which those populations traditionally occupy shall be recognized.
>
> The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
>
> When in such case removal of those populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to the lands previously occupied by them, suitable to provide for their present needs and future development...

> Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned, shall be respected, within the framework of national laws and regulations, insofar as they satisfy the needs of these populations and do not hinder their economic and social development.[19]

This convention is indicative of the climate of international opinion on the subject of the rights of indigenous peoples. Interestingly, the Canadian government representatives at the conference questioned the competence of the International Labor Organization to deal with issues of aboriginal rights. They also stated that indigenous peoples in Canada had progressed beyond the state of development addressed by the convention. When a vote was called, the Canadian government representatives abstained, but the Canadian labour representatives voted in favour of adopting the convention.

Footnotes: Chapter 3

1. New York Colonial Documents (vi, p. 489). Governor Shirley to Governor La Galissonière, July 29, 1748.

2. Ibid., La Galissonière to Shirley, August 25, 1748.

3. Ibid., (vi, p. 496-97). La Galissonière to Governor Clinton, December 29, 1748.

4. Ibid.

5. Ibid.

6. Ibid.

7. James Youngblood Henderson, "Unraveling the Riddle of Aboriginal Title" American Indian Law Review Volume V, No. 1, (1977).

9. Johnson v. McIntosh, 21 U.S. (8. Wheat p. 259-60).

9. Henderson, p. 91.

10. Ibid.

11. Ibid., p. 80.

12. U.S. Congress, The North West Ordinance, 1 Stat. 50, (1789).

13. Regina v. Koonungrak, 42 C-R 143, (1964:160).

14. Regina v. Sikyea, 43 D.L.R. (2d), (1964:152).

15. Justice Strong, St. Catherine's Milling, 13 S.C.R. (1887:607-8).

16. Amodu Tijani v. The Secretary, 2 App. Cas. 399, (1921:407).

17. Ibid.

18. United States v. Santa Fe Pacific Railroad, 314 U.S. (1941:347).

19. International Labour Conference, Record of Proceedings, 40th Session, (Geneva, 1957), p.810.

CHAPTER FOUR

The Nature of Treaties

Many responsibilities of the Crown to Indians in Canada arise out of treaty relations. Different types of treaties were signed before Confederation; some were primarily political, while others were economic. These types of treaties were common between Indian First Nations prior to the arrival of Europeans, but treaties designed to acquire land rights were a post-contact phenomenon. Many questions arise from differing cultural interpretations of the treaty process and of the political significance of specific treaties. From the non-Indian perspective, the design and intent of treaties changed over time. It is essential to examine these issues and reach an understanding of the nature of treaties before Crown responsibilities arising out of treaties can be appreciated.

The settlement of North America by Europeans necessitated the establishment of formal relations with the Indian nations of the eastern seaboard. The Europeans required land, resources, protection and staples to exist in North America. To secure these requirements they entered into treaties involving the acquisition of land and trade agreements. Political treaties were also signed to guarantee peaceful co-existence and military alliance.

The treaty process in Canada can be divided into two periods. The Robinson Treaties of 1850 were drawn up in a manner substantially different from earlier treaties and were the precursors of the later

numbered treaties. The Robinson Treaties were the first to include lump sum payments, annuities, the establishment of reserves and the guarantee of aboriginal rights. No previous treaty had contained all of these factors, but every treaty subsequent to 1850 did.

In what is now Ontario, several different kinds of treaties were signed in the pre-Confederation period--treaties between Indian nations and with European nations. Each has been recorded and preserved by signatory nations in the traditional manner of wampum belts as well as in written form. There is also substantial variation in the terms and interpretation of various treaties.

Pre-Confederation treaties invariably recognized the sovereignty and independence of Indian nations in the Great Lakes region. Their intent was to protect aboriginal rights, to provide occupation rights of various sorts to Europeans, and to establish guides for future political relations.

Like the Royal Proclamation of 1763, the treaties did not grant rights. They recognized and affirmed aboriginal rights as well as establishing the right to various forms of compensation for lands surrendered. In other cases they established service-related rights in return for military aid.

The Royal Proclamation laid the rules for the orderly extinguishment of aboriginal title. Prior to 1763 land surrenders were inadequately regulated, often resulting in explosive relations on the colonial frontier. The Royal Proclamation was an attempt to remedy this situation. In turn, the policy inherent in the Royal Proclamation is the basis for many complaints about the treaty process.

The Royal Proclamation laid the foundations for the four principles of the pre-Confederation treaty system. First it guaranteed Indian rights to lands that had not been properly surrendered. It also established the clear understanding that no non-Indian could occupy Indian lands or use Indian resources until a proper surrender took place. The Proclamation signalled the government's responsibility to evict non-Indians living on Indian land. Finally, it established the Crown as the sole agent authorized to enter into treaties for the extinguishment of aboriginal title.

The process was not followed with any uniformity, however. Under the instructions issued by the Lords of Trade and Plantations to the colonial governors, only the Governor or the Superintendent of Indian Affairs could enter into treaties on behalf of the Crown. In the treaties signed during the late eighteenth and early nineteenth centuries, this rarely occurred. Furthermore, there are doubts as to the authority of some Indian treaty signatories, despite the Royal Proclamation instructions specifying the form of land surrenders. In addition, the negotiation of most of these treaties was accompanied by the distribution of ample quantities of rum to Indian participants. The validity of treaties signed in such circumstances could arguably be attacked. The liberal distribution of liquor may well have interfered with, if not prevented, a clear understanding on the part of the Indians as to what was transpiring during the negotiations. This, in addition to the cultural and linguistic obstacles, created a formidable barrier to communication.

On the other hand, the Privy Council determined that responsibility for compensation under a treaty was the "personal obligation" of the Governor who initiated the treaty.

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor as representing the old province, that the latter should pay the annuities as and when they become due.[1]

The court reasoned that since treaties were entered into under executive or prerogative power, the legislative government could not be held responsible for payment. The court determined that the obligation was personal but that the old province of Canada was obligated to pay. From one perspective this appears to make the Crown directly responsible through its legislative representative. From another, it appears to contradict of the Royal Proclamation and subsequent instructions from the Lords of Trade.

It has become common, both in law and in history, to use related historical materials to assist in the interpretation of treaties. This is necessary because of differences of opinion as to what treaties were designed for. Complaints by Indians over the years have acted as a catalyst. Research into the documentation surrounding a treaty often shows that surprisingly little of the negotiation and agreements actually find their way into the treaty itself. Recognizing this fact, the courts have looked to documents other than the treaties themselves in interpreting them.

> In the interpretations of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is both proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty.[2]

Since that decision was made, it has become acceptable to review the oral tradition surrounding treaties as well.

Another court decision stated that, "the language used in treaties with the Indians should never be construed to their prejudice."[3] Thus the interpretive process to some extent recognizes the possibility that participants in the treaty process were on an unequal footing.

The question of what constitutes a treaty has also been raised. Several types of documents and proceedings can be recognized as legally binding treaties, as treaties are understood to be defined by section 88 of the Indian Act.

> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of section 88 of the Indian Act, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term 'the word of the white man'.[4]

This is a liberal interpretation of the nature of treaties.

In addition, it is understood and accepted that treaties are legally enforceable obligations on the part of the Crown. The terms of treaties are legally binding, and abrogations or derogations from treaty terms can be challenged in the courts. Compensation for such transgressions of Crown responsibilities follows no clear pattern, but

if the courts were to follow the same principles in compensation as they have in interpretation, compensation would likely be generous, especially considering that many Crown responsibilities through treaties involve the livelihood and resource base of Indian peoples.

Interpretation depends to some extent on the intention of the parties that entered the agreements. It would appear that both the Indians and the governments involved intended these agreements to be mutually binding and permanent. Thus it is reasonable to assume that both parties are bound by the terms of such agreements:

> What is important in cases of this kind is the intention of the parties at the date of the agreement, the recognition that they and others give to their agreement, and the legal consequences that they afford it during the years following its signature. In so far as the Indian treaties are concerned, there is little doubt that, at the time of signing, both parties were using terms that they thought covered their relationship, that both intended to create legal obligations of a permanent character and that both carried out the terms of the agreement for many years. These practices confirm that, whether or not they are treaties, they constitute mutually binding arrangements which have hardened in to commitments that neither side can evade unilaterally.[5]

It is important to note that this analysis is meant to apply both to formal treaties and to less formal agreements. The abrogation of a treaty on the part of the Crown cannot be defended by arguing that an 'agreement' was not a 'treaty'.

> Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty.[6]

It would appear from this statement that the legal rule of 'estoppel' would likely apply in such cases and would perhaps extend to other kinds of Crown obligations as well.

Treaties are usually considered to be one of two types--international compacts and contracts. Treaties with Indian nations fall into both categories and sometimes contain elements of each. Political treaties and treaties of military alliance with Indian nations are clearly of the international type; that is, they are compacts between independent nations. Some land surrenders fit this description as well. Other land surrenders look more like contractual arrangements. In other instances Indians and Indian rights are the subject of international agreements to which Indian people were not signatories.

It has been argued that treaties are not binding on Canada unless they have been ratified by Parliament through legislative action. This argument has been used with regard to the Jay Treaty.

> The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation.[7]

If all Indian treaties were considered to be international in nature this argument could have serious effects.

On the other hand, all Indian treaties arguably have been given legislative recognition through section 88 of the Indian Act which provides that "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to

time in force in any province are applicable to and in respect of Indians in the province...".[8] This would mean that the Indian Act has implicity ratified all Indian treaties.

In any event, Indian treaties have been regarded as analogous to legislation, particularly during the early contact period. In the United States, where the treaties made with nations along the eastern seaboard paralleled those north of the St. Lawrence River, a congressional committee has described those early treaties as "...a mode of government, and a substitute for ordinary legislation...".[9] An American scholar of Indian law has written:

> It is thus evident that the term "treaty" as applied to an agreement between a civilized state and an aboriginal tribe is misleading, and that such an agreement is, according to the law of nations, a legislative act on the part of the civilized state, made upon conditions which it is bound to fulfill since it insists that the aboriginal tribes shall be bound in its part.[10]

In Canada this conclusion has also been reached, but in slightly different terms. In 1932 the Privy Council ruled that "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements."[11] Nevertheless, the court concluded that the government's obligations were in no way reduced even if the treaties constituted "mere promises and agreements".[12]

> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.[13]

One final aspect of treaties deserves mention. It is the specific Crown obligations that derive from the terms of treaties. Certainly with respect to specific terms, the obligations of the Crown are obvious. However, in the case of pre-Confederation treaties, many terms were general in nature, and the obligations that the Crown accepted often were not included in actual treaty documents. Instead they appear in correspondence surrounding the treaties and in subsequent complaints by the Indian leadership when obligations were not met. These Crown responsibilities include economic development and technical training, housing and roads, health and education services, legal representation, capital funds and equipment, land and resources, cash and annuities, hunting, fishing, trapping and gathering rights, and land use and occupancy rights.

An important aspect of this issue is the historical context in which terms were reached. What was appropriate in the nineteenth century may be inadequate or inappropriate in a modern setting. As the Dorion Commission in Quebec pointed out over a decade ago, the means for subsistence change over time, as do culture and society in general. The Dorion Commission recommended that Indian title to land be expanded to include all the benefits of ownership. They also urged that Indian rights and claims be satisfied. It is appropriate that Crown responsibilities be viewed in this manner if the intrinsic obligation of the government to Indians is to be met--that is, the obligation to replace, equitably, the lost potential of Indian nations to develop through time, uninterrupted.

Indian political leaders have argued this same principle. Reserves were situated in remote areas close to fishing grounds, hunting and trapping territories and gathering areas. This was based on the assumption that Native economies would remain unchanged or would be assimilated into the national plan. Because the Canadian

government has not managed Indian resources properly, there are critical resource scarcities today. Broader interpretations of treaties and more generous and timely consideration of Crown obligations are the only means of rectifying the situation. A reminder of the intent of treaties is the key. If the Crown had the best interests of Indians at heart at the time of signing a treaty, then contemporary interpretations of treaty terms must ensure the development of self-sufficiency under Indian control of Indian lands and resources and the equitable settlement of claims and rights issues.

Footnotes: Chapter 4

1. Attorney General for Canada v. Attorney General for Ontario, App. Car. 199 (P.C.). (1897).

2. Regina v. Johnston, 56 D.L.R. (2d), 749 (Sask. C.A.) (1966).

3. Regina v. White and Bob, 50 D.L.R. (2d), 613, (1965) and Worchester v. Georgia, 31 U.S. (6 Pet.) 350 (1832:393).

4. Regina v. White and Bob, p. 648-49.

5. Green, "Canada's Indians: Federal Policy, International and Constitutional Law" 4 Ottawa Law Review 101, (1970:115).

6. Rex v. Syliby, 1 D:L.R. (1929:314).

7. Francis v. The Queen, S.C.R. (1956:621).

8. Indian Act, section 88, R.S.C. (1970:C.1-6).

9. Committee on Indian Affairs of the United States House of Representatives, H.R. Report No. 227, 21st. Congress, 1st. Session (1830).

10. A.H. Snow, The Question of Aborigines in the Law and Practice of Nations (New York, 1921), p.191.

11. Rex v. Wesley, 4 D.L.R. (1932:788).

12. Ibid.

13. Ibid.

CHAPTER FIVE

A Documentary Bibliography to Pre-Confederation Crown Responsibilities

This chapter is primarily a bibliographical listing of documents relevant to pre-Confederation Crown responsibilities. It aims toward being much more specific than the preceding chapters and should provide the historical information required to outline responsibilities as they appear in the documentary record. Coupled with the historical background it will illustrate Crown responsibilities to Indians from the European record. The following is a sketch of what this chapter would look like after the research had been completed.

Certainly the Royal Proclamation of 1763 must be considered of seminal importance in this area. No other single document has as much significance to the topic.

The 1860 "Act Respecting Indians and Indian Lands" is the document representing the formal transfer of authority over Indian affairs to Canada. When coupled with section 91(24) of the BNA Act, it shows clear federal responsibility in this area.

Section 132 of the BNA Act clearly represents Canadian responsibility for treaties; this responsibility gains international recognition through the Geneva Convention.

These key documents, and related materials, should be analyzed in full to provide a more precise understanding of the nature of Crown responsibilities and the mechanics of the transfer process.

Legislation, orders in council, notices, proclamations, statutes and Royal Commissions dealing with the administration of Indians, Indian lands and Indian assets must be examined fully for their contributions to our understanding of pre-Confederation Crown responsibilities. Rather than focusing on broad historical developments, this chapter should be restricted to the legislative development of policy dealing with Indian affairs. This would serve as a companion chapter to the chapter on the general history of British policy.

The chapter would begin with the Articles of Capitulation in 1760 which address the subject of Indian rights and Crown obligations to Indians. The Royal Proclamations of 1761 and 1762 would be presented complete with the full correspondence surrounding the Royal Proclamation of 1763.

These proclamations would be analyzed briefly for their relevance to subsequent legislation dealing with Indians and Indian lands. The 'instructions' from the Lords of Trade to Governors Murray, Carleton and Haldimand would be introduced for their particular significance to Crown responsibilities arising out of these instructions. The instructions clearly articulate a policy toward Indian lands complete with the accepted framework for the extinguishment of aboriginal title. This has particular significance for a discussion of the early treaty process.

Documents pertaining to the transfer of control over the Indian Department from the military to the civil government would also be analyzed. In turn, colonial legislation dealing with Indians, Indian lands and Indian resources would be analyzed for their significance to the larger issue of Crown responsibility.

The section would focus on nineteenth-century legislation and royal commissions dealing with Indian lands and resources. While the entire century could be covered, the 1840s, 1850s and 1860s would receive greatest attention. This was the period when most activity concerning Indians and their lands took place. Documents concerning the control and responsibility for Indian affairs would be given special attention.

The 1856 "Report of the Special Commissioners to Investigate Indian Affairs in Canada", the 1859 order in council dealing with responsibility for Indian funds, the 1860 "Act Respecting Indians and Indian Lands", the 1861 order in council regarding the "Report of a Meeting of the Board of Audit", the 1867 British North America Act, and the 1868 "Act Providing for the Organization of the Department of Secretary of State" would be analyzed in full for their significance to the transfer of Crown responsibilities.

When these documents are analyzed together, the issue of pre-Confederation Crown responsibilities can be seen as an historical development. When the broader legislative setting is added, many of the historical developments apparent in the documents cited can be traced and their particular significance and meaning deciphered.

Finally, this chapter would deal with the question of dominion-provincial relations as they arise out of and affect Indians and Indian lands. Given the nature of the Crown in Canada and the theory of crown divisibility, this issue has great bearing on the question of Crown responsibility.

Several documents are of particular importance. The 1891 "Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands", the McKenna and Rimmer Commission into "Matters in Dispute Between the Dominion and Ontario"

at the turn of the century, the 1910 Dominion of Canada v. Province of Ontario court decision, and the 1912 "Ontario Boundaries Extension Act" would be discussed. This is one area that certainly calls for further investigation, with particular emphasis on unsold surrendered lands and Indian resources.

The bibliographical listing follows.

Articles of Capitulation, Montreal, General Amherst to Pitt, September 8, 1760, Vol. 93, papers relating to "America and the West Indies" in Public Records Office.

Papers Relating to the Establishment of Civil Government in the Territories Ceded to Britain by the Treaty of 1763, Egremont to the Lords of Trade, Whitehall, May 5, 1763. (A. WI, vol. 268, p. 93).

Egremont to Lords of Trade, June 8, 1763, (A. WI).

Ibid., July 14, 1763.

Lords of Trade to George III, August 5, 1763.

Halifax to Lords of Trade, September 19, 1763. (A. WI vol. 268, p. 217).

Royal Proclamation, 1763.

Treaty of Niagara, 1764.

Instructions to Governor Murray, Colonial Office, Plantations, 1763-1766, December 7, 1763. (M230, p. 1).

Instructions to Governor Carleton, 1768 (M230, p. 61).

Dartmouth to Cramahe, December 1, 1773. (Q9, p. 157).

Instructions to Governor Carleton, January 3, 1775, Order in Council, December 28, 1774. (M230, p. 116).

Carleton to Gage, February 4, 1775.

Additional Instructions to Governor Haldimand, July 16, 1783. (Q26B, p. 221).

Petition of Sir John Johnson and Loyalists, April 11, 1785. (Q62 A-2, p. 339).

Sydney to Hope, April 6, 1786. (Q26-1, p. 73).

Report of the Committee of the Council Upon Population, Agriculture and the Settlement of Crown Lands, 1786-1787, February 13, 1787. (Journals of the Legislative Council, Vol. E, p. 311).

Discussion of Petitions and Counter Petitions Re: Changes of Government in Canada, Vol. 21, p. 55.

Proclamation, "Papers Relative to the Province of Quebec", 1791. (Q62, A, pt. 1, p. 114).

Simcoe to Portland, February 17, 1795. (Q281, pt.1 p. 273).

Simcoe to Dorchester, March 9, 1795. (Q281 pt.2, p. 341).

Portland to Simcoe, September 3, 1795, (Q281, pt.2, p. 376).

Instructions to Governors, Upper Canada, 1791-1839. (M232, p. 47).

Simcoe to Portland, October 30, 1795. (Q282, pt.1, p. 6).

Portland to Duke of York, February 21, 1800. (G539, p. 367).

Additional Instructions Relating to Indian Affairs, Lower Canada, July 12, 1800. (M231, p. 74).

Saturday, 1 January 1803 - Notice: "No leases which have been granted by or under the authority of any Indian nation will be admitted or allowed of." (The Upper Canada Gazette, Vol. XII, #86, P.A.C., Microfilm: N-10190).

Thursday, 29 June 1820 - Proclamation Re: "Breaches of the peace in Indian territories." "Whereas diverse breaches of the peace having been committed..." (Upper Canada Gazette, Vol. IV, No. 26. P.A.C., Newspaper section, Microfilm No. N-10192).

Thursday, 7 September 1820 - Order in Council Re: Indian land and road allowances. "His Excellency Lt. Governor in Council is pleased to direct that a location of 100 acres..." (Upper Canada Gazette, Vol. IV, No. 30. P.A.C., Newspaper Section, Microfilm No. N-10192).

Proclamation on Civil Jurisdiction, 1820. (Quebec Gazette, May 18, 1820).

Imperial Statutes, July 2, 1821. (Statutes at Large, G.B. 6 Geo. IV, pp. 422-424).

Maitland to Bathurst, February 14, 1823. (Q333-1, pp. 32-35).

24 February 1825 - Article 'Indian Tribes' - "It is impossible to read Mr. Buchanan's Plan for the amelioration and civilization of the British North American Indians...". (Weekly Register Vol. IV, No. 6 P.A.C., Newpaper Section, Microfilm No. N-10193).

"An Act the Better to Protect the Mississauga Tribes...", March 29, 1829, 10 George IV, Cap. 3, (Upper Canada) in Statutes of the Province of Canada.

Thursday, 5 July 1832 - Notice - Commissioner of Crown Lands Office. York, 1st December, 1831. "The following summary of the rules established by H.M. Government for regulating the disposal of lands...(Reel No. N-10196, January 5, 1832 - December 25, 1834).

October 17, 1835, Minute concerning location tickets for United Empire Loyalists and militia claimants for Indian lands (RG10, Vol. 119, p. 36-38).

7 May 1835 - Act: - "An Act the better to protect the Mississagua Tribe." (Upper Canada Gazette, Vol. IX, No. 51, Reel No. N-10197).

October 15, 1836 - Proclamation "Whereas depredations having been heretofore frequently committed on the Indian Reservation..." (Upper Canada Gazette, Vol. XI, No. 22, Reel No. N-10197).

November 24, 1836 Order denying an Indian the right to sell a tract of land in payment of a debt to a white settler. (RG10, Vol. 711, p. 96).

April 5, 1837, Minute: That Indians should be paid for their improvements on surrendered lands from the money raised in the sale. (Individuals should be paid and not the tribe.) (RG10, Vol. 119, p. 73-74).

Thursday, 26 July 1838, Act: "Whereas it is highly expedient and desirable that the disposal of the extensive tracts of Waste Lands, the property of the Crown..." (Upper Canada Gazette, Vol. XIII, No. 11, Reel No. 10198).

1839 "Report on Indian Affairs", (P.A.C., RG10, vol. 718).

June 22, 1839 Order in Council: The Executive Council of Upper Canada stated its objection to independent investment schemes such as the Grand River Navigation Company. In future, the Government would manage all Indian funds. Since the Six Nations had accrued their debt through a previous trustee's investment, they had to pay a debt of some L1,836 out of their own funds. (RG10, Vol. 119, p. 149-51).

June 27, 1839, Order in Council: This Order in Council stated that no further debts would be paid from Indian funds for investments made without the approval of the Governor in Council. (RG10, Vol. 119, p. 160).

May 11, 1839, An Act for the Protection of the lands of the Crown in this Province, from Trespass and Injury. S.U.C. 1839, c. 15 (2 Vict.).

March 2, 1840, Minute discussing a petition for non-surrendered lands. States that no land should be alienated without Indian consent. (RG10, Vol. 119, p. 523, Microfilm C-11-480).

November 27, 1840, A submission concerning the sale of surrendered lands with a series of recommendations about valuation of improvements, squatters etc. (RG10, Vol. 710, p. 30-35).

Act of Union, 1840.

1840, "Commission appointed to investigate into the business, conduct, and organization of the various public Departments of the Province of Upper Canada", (P.A.C., RG10, Vol. 720-721).

1842, "Royal Commission appointed to report on the Affairs of the Indians in Canada". (Journals of the Legislative Assembly, Province of Canada, 1845 and 1847).

February 3, 1843, Minute concerning the payment of Indian annuities by the new Union colonial government. (RG10, Vol. 710, p. 7-9).

February 7, 1843, Order in Council: Since the Act of Union (1841) had failed to make provision for funds to operate the Indian Department, this Order in Council was designed to fill the void. Indian annuity payments were considered not to be in any way connected with the Commissioner of Crown Lands Office. These annuities were not placed in accounts at the Office of the Receiver General. These accounts were to be reviewed twice a year and reported on by the Receiver General and the Inspector General. In this way annuity payments were separated from those expenses associated with the Crown Lands Office. (RG10, Vol. 710, p. 7-9).

September 27, 1844, Minute of Council concerning instructions for the management of sales of Indian lands. (RG10, Vol. 710, p. 3-4).

April 5, 1845, Minute concerning the management of Indian lands. The rights of Indians to sell or lease land denied. The obligation of the home government to administer Indians discussed. Establishment of a provincial department for Indian Affairs. (RG10, Vol. 710, p. 14-15).

January 9, 1846, Order in Council: By this Order in Council, the previous reports of Col. Jarvis concerning the "...necessity of certain amendments to the 1836 Act...for the protection of Indian lands, were forwarded to: ...the Commission of Enquiry respecting Public Lands, with a suggestion to report, in any Act improving the present system, clauses for the protection of all ungranted lands and the timber growing therein, and for the summary punishment of offenders". (RG10, Vol. 119, Part 2, p. 1-2).

April 25, 1849, An Act to explain and Amend an Act of the Parliament of the late Province of Upper Canada passed in the second year of Her Majesty's reign entitled "An Act for the protection of the Lands of the Crown in the Province from Trespass and Injury" and to make further provision for the purpose. S.C. 1849, c. 9, (12 Vict.).

August 10, 1850, An Act for the Protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury. S.C. 1850, c. 74 (13 and 14 Vict.).

Saturday, 16 November 1850, - Proclamation Re: Indian Lands. "Whereas in and by an Act...An Act for the protection of the Indians in Upper Canada." (No. 491, Microfilm: 35 COPS G-25, March 30, 1850-March 29, 1851).

"An Act to Consolidate and Regulate the General Clauses..." 14 and 15 Victoria (1851) Cap. 59 in ibid.

June 14, 1853, An Act to Amend the Law for the Sale and Settlement of the Public Lands. S.C. 1853, c. 159 (16 Vict.).

April 28, 1854, Memorandum advising that the sections of "the Act to amend the law for the sale and settlement of Public Lands" are applicable to Indian land sales. (RG10, Vol. 711, p. 150).

February 21, 1856, Letter from Home government to governor Sir Edmund Head Re: Imperial policy towards Indians and decision to cease payments of annuities after 1858. (RG10, Vol. 711, p. 151-56).

November 22, 1851, Order in Council: (2) This Order in Council set up the Indian Land Management Fund "...to defray the future expenses of management and control of the lands and other property held by the Crown in trust for the Indians." A "percentage on sales" would be charged and invested to the credit of the fund. Lands not on the market for sale would be charged a percentage in proportion of its probable value".The percentage charge was set at 10% on all revenues from land sales. This money would then be invested "in provincial debentures at 6%." A record would be kept of each sale and of each charge to such revenues for the Land Management Fund. The total "principal and interest" of the fund would be used "... to defray the general cost of management of Indian property in Canada, whether Upper or Lower".

Indian Lands protected by the Crown but not for sale would be charged once every seven years "at 12 per cent on the capital supposed to be represented by such actual proceeds..." The Order in Council concluded by stating "That any arrears due on account of a particular Tribe would be charged at the same rate". (RG10, Vol. 10020, p. 220-221).

September 8, 1856, "Report of the Special Commissioners to Investigate Indian Affairs in Canada". (Journals of the Legislative Assembly, Province of Canada, 1858).

June 10, 1857, An Act to encourage the gradual civilizaton of the Indian tribes in this province and to amend the laws respecting Indians. S.C. 1857, c. 26 (20 Vict.).

Saturday, 27 June 1857, "An Act to encourage the gradual civilization of the Indian Tribes in this Province and to amend laws respecting Indians." (p. 1606-9, Microfilm: 35 COPS G-32, January 10, 1857 - September 9, 1857).

1859, An Act respecting the sale and management of the Public Lands. S.C. 1859, c. 22 (22 Vict.).

November 22, 1859, Order in Council: To complete the process of the provincial government assuming direction and management of all Indian affairs accounts, the provincial Receiver General was instructed to take over the responsibility of accounting for all Indian funds. Accounts would be kept separately by fund and by band, and all investments of these funds would be at 6% per annum in provincial banks. (RG10, Vol. 2498, File 102, 986-6).

April 23, 1859, Order in Council: After receiving a letter from P.M. Vankoughnet, the Commissioner of Crown Lands, with information as to "...placing the collection of the Indian Timber Revenue and the management of the Woods and Forest Branch of the Crown Lands Department", this Order in Council stated that the Indian Department was "...too small as at present constituted to grant licenses to protect the Timber on the several classes of Reserves and collect dues for Timber which may be cut thereon".

This is noteworthy because in the "Annual Reports of Indian Affairs", after 1868, such dues and rents for Timber are recorded as revenue of the Indian Land Management Fund. By this Order in Council this revenue is placed directly in the hands of the Receiver General, with the Crown Lands Office retaining "...six per cent out of all amounts collected for the Indian Revenue", part of which was to cover the expense of the Woods and Forest Branch. (RG10, Vol. 711, p. 362-5).

May 14, 1859, Order in Council: This Order in Council gave further details explaining the purpose for the Transfer of Timber licensing and collection of such "rents and dues" to the Woods and Forests Branch, Crown Lands Department. (RG10, Vol. 711, p. 388-9).

1859, An Act respecting joint Stock Companies for the Construction of Roads and other Works in Upper Canada. C.S.U.C. 1859, c. 49 (22 Vict.).

1859, An Act to prevent trespasses to Public and Indian Lands. C.S.U.C. 1859, c. 81 (22 Vict).

1859, An Act respecting the administration of justice in unorganized tracts. C.S.U.C. 1859, c. 128.

April 25, 1860, An Act respecting the Sale and Management of the Public Lands. S.C. 1860, C. 2 (25 Vict.).

May 19, 1860, An Act to amend the ninth Chapter of the consolidated statutes of Canada, entitled "An Act Respecting the Civilization and Enfranchisement of certain Indians". S.C. 1860, C. 38 (23 Vict.).

1860, An Act Respecting the Management of the Indian Lands and Property. S.C. 1860, C. 151 (23 Vict.).

Thursday, October, 1860, Royal Proclamation proclaiming that the bill "An Act respecting the management of the Indian Lands and Property" received special confirmation from the Queen-in-Council. Journals of the Legislative Assembly of Upper Canada.

Saturday, 13 October, 1860, Proclamation Re: An Act respecting the management of Indian lands and property." (Canada Gazette No. 41, Vol. XIX, p. 308, Microfilm: 35 COPS G-38, June 2, 1860-December 1, 1860).

September 12, 1861, Order in Council Re: Report of a Meeting of the Board of Audit - this Executive Council Report adopted a Board of Audit Memorandum, "containing certain suggestions respecting the future method of keeping the books of the Indian Funds and property; and rendering accounts of receipts of expenditures... in consequence of the assumption of the management of the Indian Funds by the Province." The Board of Audit decided that the Crown Lands Department would "...assume the management of the lands and of the fund generally". Payment of expenses would be made only "...upon special warrants upon the

application of the Commissioner of Crown Lands." In the case of the Land Management Fund, it was decided: The present Management Fund - to be retained to the end of the year, as one of the Subsidiary Accounts, for the purpose of ascertaining how far it meets those expenses, the same expenses to be charged against it as heretofore but the interest on the whole of the cash balances to be credited to the several tribes and other special accounts. (RG10, Vol. 7, p. 216-18).

August 15, 1866, An Act to confirm the Title to Lands held in trust for certain of the Indians resident in this province. S.C. 1866, C. 20 (29 & 30 Vict.).

May 23, 1866, Legal opinion Re: recommendations concerning patents for Indian lands adjoining Public Waters. These patents should reserve a free access. (RG10, Vol. 711, p. 415).

"An Act for the Union of Canada, Nova Scotia, and NB..." 30 Victoria (1867) Cap. 3 U.K. in Revised Statutes of Canada, 1952 & 1970.

"An Act Providing for the Organization of the Dept. of Sec. of State..." 31 Victoria (1868) Cap. 42, in Statutes of Canada, 1868.

"An Act for the Gradual Enfranchisement of Indians,...", 32 and 33 Victoria (1869) Cap. 6 in Statutes of Canada, 1869.

"Order of Her Majesty in Council Admitting Rupert's Land..." June 23, 1870, in Consolidated Orders in Council of Canada, 1889.

An Act to amend and Consolidate the Laws Respecting Indians, 39 Victoria (1876) Cap. 18 in Statutes of Canada, 1876.

"An Act for the Settlement of Questions between the Governments of Canada and Ontario...", 54 Victoria, (1891) Cap. 3, in Statutes of Ontario, 1891.

"Matters in Dispute Between the Dominion and Ontario..." by McKenna and Rimmer, (Ottawa, 1901).

Conclusion

It is apparent that much more work is required to complete this study. Chapter 5 needs to be researched and written. Many topics and themes have been introduced that will require more in-depth analysis.

The paper has taken the question of pre-Confederation Crown responsibilities and set it within its historical context. This has been necessary to illustrate the complexities of the issue and the fact that it rests on a continuum of changes in British-Indian relations that stretches across centuries of history. The treaty process has been identified as the central development in the history of Crown responsibilities. As well, the acute need to understand the Indian perspective on this subject to gain a full appreciation of the topic has been illustrated through the discussion of aboriginal rights in Chapter 3. A comprehensive bibliography of documents relevant to the subject has been included in Chapter 5 in the hope that this study will be completed with the help of those working in areas where these documents will prove useful.