

## TREATY RELATIONS IN ONTARIO

The events that led to the death of Dudley George arose from a longstanding dispute about treaty and Aboriginal rights. Occupations of land and blockades of transportation facilities by Aboriginal people occur when members of an Aboriginal community believe that governments are not respecting their treaty or Aboriginal rights, and that effective redress through political or legal means is not available. It is typical of these events that governments have failed to respect the rights at issue or to provide effective redress, for a very long time, and a deep sense of frustration has built up within the Aboriginal community.

Treaty and Aboriginal rights can only be understood in an appropriate historical and legal context. Building a better relationship with Aboriginal peoples requires that governments and citizens recognize that treaties with Aboriginal peoples are the foundation that allowed non-Aboriginal people to settle in Ontario and enjoy its bounty. Nearly all of the lands and inland waters in Ontario are subject to treaties between First Nations and the British and Canadian governments. Beginning in the late 1700s and continuing right up to the 1920s, it was through treaties that the Algonquin, Ojibwe (or Chippewas, to use the British term), Odawa, Cree nations, and the Haudenosaunee (the Six Nation Iroquois Confederacy) and the governments, first of Great Britain and then of Canada, agreed to regulate their relationships and the terms on which land and resources would be shared. These treaties are not, as some people believe, relics of the distant past. They are living agreements, and the understandings on which they are based continue to have the full force of law in Canada today.

The treaty process held out the promise of a relationship based on mutual respect and common interests. However, once the settler population came to outnumber the Aboriginal population, and the Indian nations were no longer needed as military allies to defend the colony, respect for the treaties on the non-Aboriginal side gave way to policies of domination and assimilation. For over a century, governments (both federal and provincial) either ignored treaty obligations or interpreted them unilaterally, while the Aboriginal signatories did not have access to political or legal means of addressing treaty claims. The experience of the Chippewas of Kettle and Stony Point First Nation illustrates the frustration and anger that can arise from the failure of federal and provincial governments to take treaty obligations seriously. It also illustrates how failure to educate Ontario citizens on the treaty relationships that lie at the foundation of their province can

contribute to misunderstanding and conflict. One of the lessons of Ipperwash is the realization that all of us in Ontario, Aboriginal and non-Aboriginal, are treaty people.

Ontario has the largest Aboriginal population of any Canadian province or territory. But it is also the province in which the federal government is least involved in Aboriginal affairs, despite the fact that it is the Crown party to treaties throughout the province and has exclusive jurisdiction over “Indians, and lands reserved for the Indians.”

For over thirty years, Canada has been engaged in a process of reforming law and policy with respect to Aboriginal peoples, aimed at respecting their distinct rights and improving their economic security and opportunities. Though this process has not produced a comprehensive constitutional resolution of Aboriginal issues, it has led to the recognition of Aboriginal and treaty rights in the Constitution of Canada and to articulating these rights in the courts. These developments form an important backdrop for what can and should be done in Ontario to renew and implement treaty relations, and to recognize the rights of all Aboriginal peoples in Ontario and to ensure that they have an appropriate share in the management of the resources of the province and the benefits from them.

There are three areas where reform in Aboriginal relations is most needed in order to prevent the kind of incident that occurred at Ipperwash. The first area is disputes over treaty rights with respect to lands and waters. I believe that unless a fair, expeditious, and adequately supported approach is established, involving both the provincial and federal governments, Ontarians can reasonably expect to see more incidents such as occurred at Ipperwash and Caledonia.

The second area is the regulation and development of natural resources on Aboriginal traditional lands and waters. To avoid future conflicts, provincial management of natural resources must take into account the rights and interests of Aboriginal peoples more effectively. I believe that there are ways of sharing and co-managing natural resources that are consistent with Aboriginal and treaty rights while serving the interests of First Nations and all the people of Ontario.

The third area is the protection of and respect for Aboriginal heritage, burial sites, and other sacred sites. The Inquiry heard evidence that one reason for the occupation of Ipperwash Provincial Park was the disrespect shown for a burial site.

I will propose legal, policy, and institutional reforms in these three areas and in areas of education and provincial leadership and capacity in the chapters that follow. The potential scope for discussion of treaty and Aboriginal rights is very wide. I have confined my recommendations to those I consider essential to preventing future flashpoint events and to building a better relationship with Aboriginal peoples in this province. I believe that these measures are the key to

an honourable and effective partnership with Aboriginal peoples in Ontario which draws upon the best that we have done together in the past and promotes the best that we can achieve together in the future.

### **3.1 Learning from Ipperwash**

Volume 1 of this report contains a detailed history of the Stoney Point and Kettle Point reserves. In this volume, I comment on the lessons to be learned from that history; lessons that point to the need for a new approach to Aboriginal relations in Ontario.

The history of the Kettle and Stony Point First Nation is unique in some respects, but its main contours are common experiences in Ontario. There are moments of joint achievement and agreement, but much of the story is about shifts and reversals in policy, unfulfilled promises by British, Canadian, and Ontario governments, and stress, disappointment, and frustration for First Nations peoples. From the tragedy of Ipperwash, Ontario can learn much about what is needed to forge a respectful and mutually beneficial relationship with Aboriginal peoples in the province.

#### ***3.1.1 The Importance of the Royal Proclamation and the Treaty of Niagara***

The fundamental commitment of the *Royal Proclamation* of 1763 was that First Nations were to be treated with honour and justice. In it, the British government promised to protect Aboriginal lands from encroachment by settlers. Settlers could settle only on land that an Indian nation had ceded to the Crown. A year later, when Sir William Johnson came to Niagara Falls to explain the *Royal Proclamation* to 1,500 Anishnabek chiefs and warriors, he consummated the alliance with the Anishnabek (the Treaty of Niagara) by presenting two magnificent wampum belts, which embodied the promises contained in the Proclamation.

As I explain in more detail in Part 1 of this report, the Treaty of Niagara was entered into in accordance with Aboriginal protocol, including speeches and wampum belts. The British, through their representative Sir William Johnson, gave the Anishnabek two wampum belts, the “Great Covenant Chain Belt,” and the “Twenty-four Nations Belt.” With the Great Covenant Chain Belt, the British promised that the Anishnabek would not become impoverished and their lands would not be taken. The Anishnabek promised in turn to be loyal and to support the King in both peace and war.

The Twenty-Four Nations Belt, also accepted by the Anishnabek, has twenty-four human figures representing the Anishnabek Nations drawing a British

vessel laden with presents from across the Atlantic and anchoring it to North America. This Belt promised that the British would always provide the necessities of life should the Anishnabek find themselves in need.

The *Royal Proclamation* and the Treaty of Niagara are not obsolete relics. The Proclamation remains part of constitutional law in Canada to this day. In 1982, it was incorporated into the *Canadian Charter of Rights and Freedoms*. Section 25 of the Charter states that the rights and freedoms recognized by the *Proclamation* take precedence over other rights and freedoms in the Charter. The promises of protection and sustenance made at Niagara remain the basis for the honourable and beneficial relationship with Aboriginal peoples toward which we should be working.

### 3.1.2 *The Huron Tract Treaty*

Ontario was the first part of Canada in which the British government (and subsequently, the Canadian government) consistently followed the rule, set down in the *Royal Proclamation*, that settlement on Indian lands could take place only on lands that had been ceded or sold to the Crown. Compliance with this rule was certainly an effective means of acquiring First Nations lands in a peaceful manner. Indeed, avoiding war and maintaining peaceful relations was a common interest of the parties to the agreements through which Indian lands were surrendered. But beyond that common interest, the interests of the parties diverged sharply, as did their understanding of these agreements.

Many Indian Nations from the Great Lakes assisted the British against the Americans in the War of 1812. After the War, the British were concerned that the area north of Lake Erie and south of Lake Huron was vulnerable to attack by the Americans. As a result, they wanted to bring settlers into this area, in what is presently southwestern Ontario. The pace of treaty making quickened after the War of 1812 in order to accommodate new settlers in this area. The Huron Tract Treaty of 1827 which resulted in the creation of the Kettle Point and Stoney Point reserves was one of these post-1812 treaties.

The Huron Tract Treaty was similar to other land-surrender treaties entered into in the late 1700s and early 1800s by First Nations in the southern and eastern regions of what is now Ontario.<sup>1</sup> Essentially, the British saw these treaties as real estate transactions through which land needed for incoming settlers could be cleared of native title at minimum cost, with the Indians confined to small reserves. In the worldview of Aboriginal peoples, however, land was not a commercial commodity that could be bought and sold. They knew that an influx of settler farmers was imminent, and they wanted to achieve the best terms they could

to deal with it. In exchange for the goods and money needed for the new economy developing around them, they were prepared to share most of their ancestral lands with the newcomers, providing they could secure some reserve lands for their exclusive use.

The detailed account of the negotiations leading up to the Huron Tract Treaty in Volume 1 of this report shows what a tough bargain the British government struck with the Chippewa chiefs and leaders. The First Nations ended up ceding much more land than originally intended, and for considerably less compensation than their people had hoped to receive. In return for ceding over two million acres of their land, they retained four reserves for their exclusive use and occupation, which constituted less than one percent of their land. Instead of receiving cash compensation, they had to settle for half of this payment in goods. There was provision for reducing the payments if the eligible population declined, but there was no provision for increasing the payments if the population grew. The Chippewa had requested the services of a blacksmith and an agricultural instructor, but the obligation to provide these services was omitted from the treaty.

It is evident from the terms of the Huron Tract Treaty that, at the time it was negotiated, there was no commitment on the part of the settler government to a sustaining and long-term relationship with the Chippewa. The small reserves for their exclusive use were not seen as a basis for self-sustaining and flourishing communities. The First Nations were expected to decline in numbers, and eventually, to disappear. No provision was made for their participation in the economy being developed by the incoming settlers. In the terms of this treaty, and many others like it, lie the seeds of the disappointment and discontent of succeeding generations of First Nations peoples in Ontario.

### ***3.1.3 Control and Reduction of the Kettle Point and Stoney Point Reserves***

In the early 1800s, once peace was secured with the United States and settlers began to pour into British North America, state policy in Canada with respect to Aboriginal peoples shifted away from alliances and covenants of mutual respect toward control and assimilation. Treaty-making with First Nations continued to be the method of acquiring land for settlers and their economic projects, but now the objective of the settler state was not only to gain title to Aboriginal lands, but also to control First Nations societies on their reserve lands and work toward their assimilation into the mainstream European society. This policy, though rejected by Aboriginal peoples, prevailed in all parts of Canada for nearly a century and a half, until the end of the 1960s.<sup>2</sup>

The shift in policy had unfortunate consequences for the communities on

the Kettle Point and Stoney Point reserves, and for other First Nations in the province. The policy of enfranchisement, as incorporated into the *Indian Act*,<sup>3</sup> required Indians who achieved a certain level of education or a professional designation (such as doctors or lawyers) to give up their Indian status and leave the reserve. This meant that members of the Kettle Point and Stoney Point communities had to choose between participating in the prosperous mainstream society developing around their reserves and maintaining their attachment to the society that was so central to their identity. Indian women who married men who were not registered as members of their bands also lost their status. The creation of a class of “non-status” persons caused tension within reserve communities and fragmented many families.

The *Indian Act* regime also meant that the federal government and its locally based Indian Agents exercised a great deal of control over the governance of First Nations, including the power to define the structure and membership of Aboriginal communities. This power significantly undermined the autonomy of the Kettle and Stoney Point people. The British Indian Department administered the communities whose chiefs signed the Huron Tract Treaty as one large band. For many decades after Confederation, the Kettle Point and Stoney Point people pressed the government to treat them as a band separate from the much larger band on the Sarnia reserve. It was not until 1919, when the Department of Indian Affairs concluded that separation would make it easier to obtain lands for the expansion of the city of Sarnia, that the people living on the Kettle Point and Stoney Point reserves were recognized as a separate band (subsequently called the Kettle and Stoney Point First Nation).

Beginning in 1912, the Kettle Point and Stoney Point communities were under pressure to surrender some of their reserve lands to the Crown. The pressure came from the interest of the surrounding community in the commercial and recreational potential of the sandy beaches on the reserve. In 1927, part of the Kettle Point beachfront was surrendered, and in 1928, all of the Stoney Point beachfront was surrendered. Volume 1 of this report provides the details of these land surrenders.

These reductions in the Kettle Point and Stoney Point reserve lands were characteristic of a government approach, both federal and provincial, in which the economic interests of Aboriginal peoples were subordinate to the interests of the non-Aboriginal community. Agents of the federal Crown authorized and then arranged for the sale of the reserve lands to private developers, at extremely low prices. The developers then sold the property at a considerable profit. In the case of the Stoney Point beachfront, it was sold to the Province of Ontario, in 1936, to create Ipperwash Provincial Park. The province paid nearly three times the price

the band had received for it. In these transactions, the federal Crown showed little interest in the economic potential the land represented for Aboriginal peoples, at a time when the Aboriginal people had little knowledge of their legal rights and the *Indian Act* prevented them from obtaining independent legal advice.<sup>4</sup>

It is important to bear in mind the constitutional and legal context in which a sale of Indian lands occurs. Under the *Royal Proclamation* of 1763, a First Nation cannot sell its land directly to private interests. Only the Crown (in post-Confederation Canada, this means the Government of Canada) can arrange for the sale of Indian lands. The *quid pro quo* in denying Aboriginal people the right to sell land directly is the obligation of the Crown to act honourably in such land transactions and in a way that secures the best interests of the Aboriginal people. This obligation is what is referred to in law as the fiduciary duty of the Crown. Looking back on the circumstances of the 1927 and 1928 land surrenders at Kettle Point and Stony Point, it is difficult to see anything honourable in the way the sale was carried out or that the best interests of the First Nation peoples were served by the meagre return they received from the sale of such desirable property.

The failure of the Crown to deal honourably with the Kettle and Stony Point First Nation was not an isolated incident. The Supreme Court decision in the 1984 *Guerin* case<sup>5</sup> was required to remind the Crown of its fiduciary obligation with respect to Aboriginal lands. Notwithstanding that reminder by the Supreme Court, alleged breach of the fiduciary obligation of the Crown remains a central issue in many of the unsettled land claims in Ontario.

In the 1990s, the Chippewas of Kettle and Stony Point First Nation were finally able to challenge the 1927 land surrender in the courts. Although the courts found the surrender of the land legally valid, the judges were disturbed that the transactions had about them “the odour of moral failure.”<sup>6</sup> The Ontario Court of Appeal suggested that the “tainted dealings” might afford grounds for the band to make out a case of breach of fiduciary duty against Canada.<sup>7</sup> In 1997, the Indian Claims Commission, the federal body that deals with Specific Claims, found that in allowing an “exploitive transaction” the Crown did breach its fiduciary obligation. Efforts to reach a mediated settlement of claims arising from the 1927 surrender continue.

### ***3.1.4 Failure to Protect Burial Grounds***

Soon after Ipperwash Provincial Park was created, the band council passed a resolution to request that the federal Indian Affairs department ask Ontario to preserve and protect their old burial site on the park grounds. Nothing had been

done up to the summer of 1995, when Dudley George and others threatened to occupy the park. The federal government never pressed the province, and provincial authorities were never convinced that the burial ground existed, despite the opinions of archaeologists that the human remains found in the park were probably Aboriginal.

In my view, it is striking that the provincial authorities who dealt with this issue over many years showed no respect for the Chippewas' knowledge of their own history. Professor Darlene Johnston's research paper made it clear that this disrespect for the sacred places of Aboriginal peoples goes back to the earliest colonial days.<sup>8</sup> In the 1600s and 1700s, the disrespect arose from rejection of the Aboriginal peoples' spiritual beliefs by Christians. The desecration of Aboriginal sacred sites by Christians was so destructive that the Anishnaabeg people "became reluctant to reveal their sacred places to the newcomers."<sup>9</sup> On occasions when the Anishnaabeg people did inform government officials about the location of their burial sites, as they did in the case of the Ipperwash site, the reaction was dismissive.

The desecration of another burial ground, the cemetery on the Stoney Point reserve taken over by the Canadian military in 1942, was not the result of denying Aboriginal knowledge of the location of their burial sites. This was unmistakably a cemetery, with tombstones. It was (and still is) near the centre of the former Stoney Point reserve, and it was still used by the community. After the military appropriated the reserve and created Camp Ipperwash, almost all of the tombstones were knocked over and some were damaged by bullets. The military did nothing to maintain the cemetery grounds. The area was overgrown with weeds and the fence was left to collapse.

I find it hard to imagine that members of the Canadian military would have shown the same disrespect for a non-Aboriginal cemetery. This desecration continues to be a painful wound. Joan Holmes, our expert witness on Aboriginal rights and Aboriginal ethno-history, told the Inquiry that, for Aboriginal people, the desecration of the burial grounds was "symbolic of their loss of ancestral territory and their inability to maintain connections with their cultural heritage."

### ***3.1.5 The Appropriation of the Stoney Point Reserve and the Failure to Give It Back***

The appropriation of the Stoney Point reserve by the Government of Canada in 1942 was unprecedented in Canadian history. Never before or since has an entire reserve, set aside by treaty for the exclusive use of a First Nation people, been simply taken away from them. The appropriation was contrary to the clearly expressed

wishes of the Chippewas of Kettle and Stony Point First Nation. It was also contrary to the promises in the treaty and the procedures and principles required to be observed by the Crown in its dealings with Aboriginal lands. The appropriation was carried out as an exercise of emergency powers under the *War Measures Act*,<sup>10</sup> which were interpreted such that the government was entitled to override the treaty rights of the Chippewas of Kettle and Stony Point First Nation.

What I find so disturbing in reviewing the evidence of this appropriation is the stark contrast between the ease with which First Nations people gave their loyalty and trust to the government and the ease with which the Government of Canada betrayed that trust. At the time of the appropriation, many of the Kettle and Stony Point men were overseas, serving in the armed forces. The Kettle and Stony Point petitions and letters of protest from that time contain many expressions of commitment to the war effort, and to the “reason our boys enlisted,” namely the protection of home and country. They urge the government to look for other land in the region to serve military training needs. The evidence indicates that the federal Indian Affairs Department saw advantages in having the military take over the Stony Point reserve and in moving the resident families to Kettle Point. Squeezing more people on to the Kettle Point reserve provided the “perfect opportunity” for removing “white people” (their term for Aboriginal people who had lost their Indian status) from that reserve.

The late Mrs. Beattie Greenbird was an elderly resident of Stony Point when she wrote a letter, which I quoted in Volume 1. That poignant quote is worth repeating here, because it expresses so clearly her people’s profound sense of betrayal:

The animal has laws to protect them not to be disturbed or molested on the ground. Us Indians has no law we are classed way down below animal.

When the Department of National Defence appropriated the reserve from the Chippewas of Kettle and Stony Point First Nation in 1942, it promised to return it to them after the war if it was no longer required for military purposes. Today, over sixty years after the end of the war, Camp Ipperwash has not yet been formally handed back.

Three generations of Kettle and Stony Point people testified at the Inquiry. Their testimony showed how harmful the appropriation of their reserve has been for their community. Before they lost their land, the residents were part of a self-sustaining community. The community operated to a great extent through consensus and its members had a deep spiritual attachment to their land. The forced

move to the Kettle Point reserve was devastating for them, emotionally and materially. They were removed from the land they cherished, and which was central to their sense of identity. On the tiny lots at Kettle Point, they could no longer sustain themselves. Adding to demoralization and material loss, the appropriation has been the source of serious tensions between the people living at Kettle Point and the people living at Stoney Point, and within the Kettle and Stony Point First Nation community. These tensions became acute when a group of people, which included Dudley George, decided to occupy the military base. As a result of these tensions, it has been difficult for the Kettle and Stony Point First Nation to develop a common front in negotiating the return of the Stoney Point reserve.

## 3.2 Treaty Relations in Ontario: A Story of Broken Promises

### 3.2.1 Ontario: Home of Canada's Largest Aboriginal Population

As I have mentioned, Ontario has the largest Aboriginal population among the provinces and territories of Canada.<sup>11</sup> The 2001 census reported that 188,315 Ontario residents self-identified as Aboriginal.<sup>12</sup> The Aboriginal population constitutes 1.7% of the population of Ontario. Aboriginal people represent a greater percentage of population in the northern territories and provinces west of Ontario, but Ontario has the largest aggregate number of Aboriginal people.

Despite their numbers, and despite their critical role in the development of the province, the government and the public have failed to appropriately recognize Aboriginal Ontario throughout much of the history of the province. This is a root cause of the large backlog of issues that remain unsettled with First Nations. These unsettled issues generate the conflicts seen in Aboriginal relations in Ontario today.

There are thirteen distinct groups of First Nations peoples in Ontario, each with their own language, customs, and territories: the Algonquin, Mississauga, Ojibwe, Cree, Odawa, Pottowatomie, Delaware, and the Haudenosaunee Six Nations—Mohawk, Onondaga, Onoyota'a:ka, Cayuga, Tuscarora, and Seneca. These are the Nations that entered into treaties, first with Great Britain and later with the governments of Canada and Ontario, which established the terms on which non-Aboriginal settlers and Aboriginal peoples would share the lands and resources of Ontario.

Most Aboriginal people in Ontario belong to one of the founding treaty Nations. Some live in First Nations communities or reserves; some do not. The administrative units of colonial administrators, and after Confederation those under the *Indian Act*, broke up the indigenous nations into smaller units called

bands. Bands are associated with reserves, which are also called “First Nation communities.” The federal government officially recognizes 127 First Nation communities in Ontario. However, the Chiefs of Ontario, which is the most comprehensive coordinating body for Ontario First Nations, recognizes 134.<sup>13</sup> First Nation communities tend to be located in the rural areas of Ontario. Only thirty-two of the 127 First Nations communities recognized by the federal government are within 50 kilometres of a major urban centre. Thirty-one are accessible only by air. In 2004, the Department of Indian and Northern Affairs Canada reported that 79,186 individuals among the registered Indian population in Ontario of 163,654 were living on reserves.<sup>14</sup>

In recent years, rising levels of education and the decline of discrimination in the labour market have greatly increased the number of First Nations people living in cities. Nevertheless, most off-reserve First Nation people retain a strong connection with their First Nation community.

Two other demographic facts about the Aboriginal population of Ontario should be noted: It is growing rapidly, and it is relatively young. Between the 1996 Census and the 2001 Census, the Aboriginal population in Ontario increased by 33.1%. During the same period, the non-Aboriginal population increased by about 5.7%.

Recent developments in the recognition and status of Aboriginal peoples have influenced individuals to self-report as Aboriginal, which accounts for much of the increase in the Aboriginal population as reported in the census.<sup>15</sup> The median age in the Aboriginal population in Ontario is 27.9, compared with 37.1 for the non-Aboriginal population. These demographic features are similar throughout Canada.<sup>16</sup>

So, the Aboriginal population of Ontario is young and growing, and though moving off-reserve in growing numbers, even then continues to identify with Aboriginal heritage and maintain ties to First Nation communities. And most of these First Nation communities are in rural areas, which are the focus for unsettled issues concerning land and treaties. These are also areas where new economic development is growing, much of it on lands in which First Nations have interests. These facts, considered together, indicate significant potential for more situations like Ipperwash.

The reforms I recommend in this report deal mostly with issues concerning the First Nations who were parties to treaties in Ontario. However, my proposals also address the concerns of Métis people in Ontario who have Aboriginal rights relating to resources. A small number of Aboriginal people in Ontario do not belong to a First Nation with treaty rights in Ontario or to a Métis community. Under the Canadian Constitution and the *Indian Act*, they have important

Aboriginal rights, but because they do not relate to the land and resource issues that produce conflicts like Ipperwash, I considered them to be outside my mandate.

### ***3.2.2 Treaties in Ontario and the Failure to Honour Them***

Nearly all of the land in Ontario is subject to treaties entered into by the Crown and First Nations. The treaty-making process, as I have noted, was based on the promises made to First Nations at Niagara Falls in 1764 with respect to following the principles of the 1763 *Royal Proclamation*. The first set of treaties was made in the late 1700s and early 1800s in what is now Southern Ontario.

The written record of these early treaties is extremely sparse. What record exists is beset with uncertainty.<sup>17</sup> For example, the 1783 treaty with Mississaugas in the Bay of Quinte describes the land involved as extending “so far as a man can travel in a day.” Another treaty, negotiated a year later and relating to a large portion of land extending from Lake Ontario to Lake Simcoe, entirely omits any description of the area surrendered.<sup>18</sup> A few years later, the governor, Lord Dorchester, declared the document invalid. The matter lay unresolved for over a century, until the negotiation of the Williams Treaty of 1923 addressed a number of outstanding land cession issues in Southern Ontario. Many other issues stemming from these early land surrender agreements remain unresolved and they are the source of many land claim issues that continue to this day.

The First Nation parties to most of these early land cession agreements were Ojibwe-speaking groups, usually referred to as Mississaugas in southern and central Ontario and as Chippewas farther west.<sup>19</sup> The British wanted these Ojibwe lands for the waves of settlers moving into Upper Canada after the American Revolution and after the War of 1812. The settlers were not all European; some were Aboriginal. In order to obtain land in Canada for its Haudenosaunee (Six Nations) allies in the Anglo-American War, the British negotiated treaties with the Mississaugas. It was through such agreements, in 1783 and 1784, that the British were able to grant land at the eastern end of Lake Ontario to Mohawks led by John Deserontyon, and land along the Grand River to a large group of Six Nations people led by the Mohawk chief, Joseph Brant. The latter was the basis of the “Haldimand Grant” along the Grand River.

From the perspective of the Crown, the land cession treaties negotiated over the seventy-year period from the 1780s to 1854 were a success. They secured for new settlers, through peaceful means and at the lowest possible cost, most of the land in what is now the southern part of Ontario. But for the First Nations left with less than one percent of their original lands, the treaties were a source of

bitterness and disappointment, much of which stemmed from the inability and unwillingness of the colonial government to take the treaties seriously and to be bound by them. Thousands of settlers were squatters on reserve lands and the government took no steps to remove them. In 1840, the Six Nations Grand River reserve alone had, by one count, 2,000 non-Aboriginal settlers occupying over a quarter of the land, without having purchased it, and without the consent of the Iroquois Confederacy representing the Six Nations.<sup>20</sup> And the Crown, under pressure from non-Aboriginal interests, sold off portions of reserves set aside for First Nations, without their consent.

Colonial administrators and legislators were aware of the failure to protect the treaty interests of First Nations. There were numerous inquiries and reports. An 1840 report described “nothing less than the complete political and legal abandonment of Indians in Upper Canada.”<sup>21</sup> An 1844 parliamentary inquiry chaired by Sir Charles Bagot reaffirmed the principles of the *Royal Proclamation* and concluded that Upper Canada’s government “had failed to protect First Nations from widespread theft of their lands, leaving them in poverty.”<sup>22</sup> But nothing was done to redress these abuses, many of which remain in effect to this day.

Poverty in the First Nations stemmed not only from losing lands reserved for them, but also from their exclusion from the economy developing on traditional lands beyond their reserves. Traditional lands are the lands on which the Crown recognized Aboriginal title when it made a treaty with the First Nation owners of those lands. While these off-reserve traditional lands are Crown lands, the control over them by the Crown is burdened by treaty obligations. Virtually all of the treaties were made with the assurance to the First Nation that its people could continue to sustain themselves on their off-reserve traditional lands.<sup>23</sup> This is one reason they were willing to cede such vast areas of land to the Crown for relatively little compensation in goods or money. This condition was rarely set down in the written record of the land cession, but reports by treaty commissioners frequently recorded that a promise of continued access to traditional lands had been made orally.

First Nations continued to have access to their traditional lands, both for economic purposes such as hunting, fishing, and trapping and as places to live, for a considerable number of years after agreeing to land cession treaties. But as the frontier of European settlement steadily advanced, they found themselves pushed onto reserves and excluded, by law and policy, from sharing in their traditional lands. There was no room for an Aboriginal economy in the economy European settlers had begun to develop in Southern Ontario. When First Nations took up farming and became good at it, they were pushed farther north, to less fertile areas, to make way for white farmers.<sup>24</sup> Confining Aboriginal peoples to small,

unproductive reserves was part of a colonial policy which, now that the First Nations lands had been secured, aimed for the disappearance of First Nations as identifiable and self-sustaining societies.

The Robinson Treaties of 1850 marked a turning point in the Ontario treaty-making process. William Robinson negotiated the terms, on behalf of the Crown, with the Ojibwe peoples along the north shore of Lake Superior and the north and east shores of Lake Huron and Georgian Bay. The treaties covered all the lands that drain south into the Great Lakes from the northern Ontario watershed.

The Robinson Treaties differ in two respects from the land cession treaties which, by 1854, covered most of Southern Ontario. First, in negotiating them, the aim of the Crown was not to secure land for settlement, but rather to open up Northern Ontario for mining. The treaties were prompted by the Ojibwes' resistance to the mining licenses issued for locations on Lake Huron and Lake Superior.<sup>25</sup> Second, the Robinson Treaties (one for Lake Superior and the other for Lake Huron) were much more detailed documents than the earlier land cession agreements had been. Among other things, the Robinson Treaties, in addition to identifying the reserves which the Ojibwe would have for their exclusive use, also specifically promised continued hunting and fishing rights in the ceded territories.<sup>26</sup> That promise was William Robinson's rationale for paying less for Indian land than had been paid under previous treaties.<sup>27</sup>

The Robinson Treaties contained more detail, but the colonial government was no more inclined to abide by the terms than it had been in the case of the land cession treaties in the southern part of the province. Its refusal to consider the treaties legally binding was subsequently approved by the courts. In 1897, when litigation arose over the annuities to be paid to First Nations under the Robinson Treaties, the highest court in the Empire had this to say about treaties with Indians:

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 became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province.<sup>28</sup>

Until the 1980s when the Constitution of Canada was amended to recognize and affirm treaty rights, this dismissive treatment of treaties prevailed in Canadian courts. In 1985, the Chief Justice of Canada, Brian Dickson, commenting on

past judicial treatment of Aboriginal treaties, said that it “reflected the biases and prejudices of another era in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.”<sup>29</sup> The fact that prejudice against Aboriginal peoples prevailed in Canadian courts for so long helps to explain why it proved futile for First Nations to challenge breaches of treaty obligations in the courts.

The Robinson Treaties were pre-Confederation treaties, formally entered into by the British Crown, but the obligations and the benefits flowing from them accrue to Canada. They also served as the template for the treaties Canada entered into with First Nations after Confederation—the “numbered treaties.” These treaties, numbered from one to eleven, were made with First Nations in northern and western Canada between 1871 and 1921.

Treaty 3, also known as the Northwest Angle Treaty, was negotiated with Anishinaabe people called the Saulteaux in 1873. It covered 55,000 square miles, north from Thunder Bay to Sioux Lookout, down to the US border, and over to the Manitoba border.

In negotiating Treaty 3, the Saulteaux were well aware of the value of their land and drove a hard bargain with the treaty commissioners from Ottawa. They did not view the treaty process as facilitating a sale of their lands, but rather as a means of controlling the scope of Crown encroachments on them. Fifteen years later, they would be shocked by the decision in *St. Catherine's Milling*,<sup>30</sup> in which the court ruled that once the treaty had been signed, the Saulteaux's traditional lands had become the exclusive property of the provincial government. As a result, the federal government lost its authority to carry out the treaty obligations of the Crown. In 1929, forty-one years after the treaty was signed, Canada and Ontario finally agreed on reserve boundaries. By then, Ontario had leased to private resource companies much of the more valuable land in the reserve locations agreed to by the federal government and the First Nations under the treaty.<sup>31</sup>

Following the ruling in *St. Catherine's Milling* in 1888, the federal and provincial governments passed legislation requiring that future treaties with Indians in Ontario have the concurrence of the province.<sup>32</sup> Thus, in the negotiations that led to Treaty 9 in 1905, one of the commissioners on the Crown side represented Ontario. Treaty 9 covers lands north of the areas covered by the Robinson Treaties, all the way over to the Quebec border in the east, north to James Bay, and over to Treaty 3 lands in the west. Adhesions to Treaty 9 in 1928/29 covered the rest of northern Ontario up to Hudson Bay and over to the Manitoba border.

Ojibwe and Cree peoples requested Treaty 9, seeing it as a means of controlling interference with their traditional economy from the industrial and railway development that was rapidly changing the north.<sup>33</sup> A section of the treaty

includes a clause recognizing the First Nations' right to hunt, trap, and fish throughout the surrendered land, subject to government regulations and outside of areas taken up for settlement, mining, lumbering, trading, and "other purposes." The main contribution from Ontario was to insert a clause in the treaty which prevents reserves from including sites that have a high potential for hydroelectric development. Historically, these sections of Treaty 9 have been applied in ways that exclude First Nations from economic development in the Ontario north. Ontario Natural Resources Minister David Ramsey recognized this on March 19, 2006, when he met with chiefs of forty-nine First Nation communities in northwestern Ontario to open negotiations on a new deal for Aboriginal people in the region. "For the last 100 years, we've let them down," Mr. Ramsey said. "That's our shame as a society. We really have an opportunity now to correct that."<sup>34</sup>

### 3.2.3 *St. Catherine's Milling and Its Legacy*

The *St. Catherine's Milling* case was a crucial turning point in a federal-provincial struggle for control over lands ceded to the Crown by First Nations. The key issue in the case was whether the Crown in the right of Ontario or the Crown in the right of Canada owned the off-reserve lands ceded to the Crown in Treaty 3. The case was heard by three Canadian courts and finally decided by the Judicial Committee of the Privy Council in Great Britain. Ontario won at all levels. The case established that Aboriginal lands ceded to the federal Crown through treaties, and not held as reserves, belong to the provincial Crown.

The legacy of *St. Catherine's Milling* is that it gave the Ontario government a major role in land and resource issues relating to Aboriginal people. This role in Aboriginal relations is unique among the provinces. As the treaty process continued westward from Ontario, the federal government retained ownership of lands ceded to the Crown in Alberta, Manitoba, and Saskatchewan. When it handed these lands over to the provinces in 1930, it inserted a clause in the agreement to protect the Indians' hunting, trapping, and fishing rights on Crown lands.<sup>35</sup> Until the 1970s, when negotiation of treaties on unceded Aboriginal lands resumed, no other province had been as directly involved in treaty implementation and negotiations as Ontario had been from 1850 on.

*St. Catherine's Milling* did not end the struggle between Ontario and Canada for control of natural resources. In one instance in 1886, the federal government sold off timber rights on lands designated as a reserve in the Robinson Lake Superior treaty. The federal government held the money in trust for the First Nation, only to find that, fourteen years earlier, Ontario had sold off the very

same timber rights. The case went to court and was settled in favour of the federal government.<sup>36</sup> In section 91(24) of the Canadian Constitution, reserve lands clearly came under exclusive federal jurisdiction over “Indians, and Lands reserved for the Indians.”

But skirmishing between the two levels of government continued. First Nations were not permitted to sell the land or resources of their reserves directly to private interests. So, when gold was discovered on part of the land reserved for the Wauzhushk Onigum First Nation under Treaty 3, the First Nation sold that part of the reserve to the federal government in return for a promise that royalty payments from mining the gold would be held in trust for the First Nation. In *Ontario Mining Company v. Seybold*,<sup>37</sup> Ontario successfully challenged this arrangement in the courts. The court held that the Indians had no interests in minerals and that mineral rights belonged to the province.

### ***3.2.4 The Exclusion of Aboriginal Peoples from Economic Development in Ontario***

Ontario has developed one of the strongest economies in the world, but its economic development has been, in no small part, at the expense of the First Nations from which it acquired its land and natural resources. Economic policies and priorities in the province have neither protected the traditional Aboriginal economy nor enabled First Nations to participate in the industrial economy built on their traditional lands. From an economic perspective, the land surrender treaties were essentially instruments of dispossession, leaving First Nations with small parcels of relatively unproductive land, and increasingly denying them access to the economic pursuits that had sustained them for centuries.

Historically, there was neither accommodation nor acknowledgement of Aboriginal interests in the regulatory regime the province developed for managing natural resources. This was particularly evident with respect to the regulation of hunting and fishing. There were exemptions in early provincial regulation for Indians to carry on subsistence harvesting.<sup>38</sup> But the relegation of the Aboriginal interest to subsistence harvesting (and thus excluding commercial harvesting) was insensitive to the intertwining of subsistence and trading in the traditional Aboriginal economy. Trapping animals, for instance, provided both food for their own consumption and pelts for trading.

As the province developed a more rigorous scheme of wildlife management, Aboriginal interests were systematically subordinated to hunting and fishing for sport and the tourist industry. The process began in the 1890s with the creation of the Ontario Game and Fish Commission and its system of enforcement, which per-

mitted wardens to keep half of the money collected from the fines they levied. Increasingly, Aboriginal people became the targets of this enforcement. In the first two decades of the twentieth century, statutory exemption for Aboriginal harvesting was withdrawn. Even as Ontario was enforcing its fish and game laws with increasing determination, the federal government was proving less inclined to intervene and protect Aboriginal treaty rights. Federal officials eventually ceased to plead with Ontario officials for leniency on behalf of Indians, and disparaged the efforts of lawyers who might be engaged by bands to defend harvesting rights as “endeavouring to mislead the Indians” by encouraging interventions that “can lead to no good result.”<sup>39</sup>

Aboriginal people continued to petition the Indian Department in Ottawa to protect their hunting, fishing, and trapping rights, but to no avail. The courts were no help. In 1913, the fundamental question of whether the Ontario *Game and Fisheries Act* had to accommodate Indian treaty rights came before the highest court in Ontario. The question arose from a case in which a Hudson Bay Company employee in Robinson Treaty territory was convicted of possession of beaver pelts purchased from Indians during a closed season.<sup>40</sup> After sitting for more than a year on the matter, Chief Justice Meredith simply announced that the court would not render a decision.<sup>41</sup> In 1930, a similar case adjourned without a hearing or judgment.<sup>42</sup> In 1939, when an Ontario court finally made a decision on the extent to which provincial wildlife legislation should accommodate Aboriginal treaty rights, the result was entirely negative. The judge ruled that the question of whether the Indians had any treaty rights was irrelevant because such “rights (if any) may be taken away by the Ontario Legislature without any compensation.”<sup>43</sup> Far from resisting this overriding of treaty rights, the federal government itself actively prosecuted Indians for harvesting. In a case involving the right of Calvin George to hunt ducks on the Kettle Point Reserve, the Supreme Court of Canada held that the federal *Migratory Birds Convention Act* could prevent Indians from hunting, even on a reserve.<sup>44</sup>

This pattern of excluding any consideration of the treaty rights and economic interests of Aboriginal people was by no means confined to fish and game regulation. It was equally evident in the development of natural resource industries in Ontario. Mining and lumbering were permitted on lands which First Nations had ceded to the Crown, without any concern for the impact of the new industries and their infrastructure on the traditional Aboriginal economy. Provincial regulatory authorities likewise showed no concern for the impact of industrial activities on the physical or spiritual wellbeing of the Aboriginal people who continued to live off the lands and waters on which the development was taking place.

Excluding First Nation interests and ignoring treaty rights continued all through the latter half of the twentieth century. There are many examples, but two disputes that carried on for many years and received considerable public attention involved logging projects on the traditional lands of the Teme-Augama Anishinabai in Temagami, and the Saugeen Ojibwe Nation's commercial fishery in the Great Lakes.<sup>45</sup> In both cases, agreements were eventually reached which recognize the interests of the First Nations and give them a role in the resource management of their traditional territory. But these agreements were reached only after years of turmoil and conflict. In both cases, the federal government intervened to assist in bringing about a settlement.

### *3.2.5 The Legacy of Failing to Honour Treaties*

The issues that lead to the kind of confrontation that occurred at Ipperwash, and more recently at Caledonia, can be, in most cases, traced to alleged past failures to honour treaties with First Nations. Many of these breaches of treaty obligations occurred a long time ago, when neither governments, both federal and provincial, nor the judiciary took treaties with First Nations seriously as the basis of rights and mutual obligations. It is often difficult for people today who have no knowledge of the importance of treaties in the development of the province to understand how these historical events bear on present-day justice. Yet all of us enjoy the benefits of the treaties through which Aboriginal peoples ceded their traditional lands to the Crown. Justice requires that in accepting the benefits, we also accept the obligations that came with them. The requirements of justice have not changed, but today there is a greater willingness on the part of the non-Aboriginal beneficiaries of treaties, the governments they elect, and the judges who decide cases arising from treaty issues to take our treaty obligations seriously.

Ontario is unique among the provinces with respect to relations with Aboriginal peoples in that it has the largest Aboriginal population in Canada. And unlike other provinces, Ontario has a foundation of treaty relationships with First Nations in which both the federal and provincial governments are deeply involved. Making those treaty relationships work for us all is the key challenge of the future.

## **3.3 Renewing Treaty Relations and Recognizing Aboriginal Rights**

In this section, I highlight recent developments in Aboriginal law and policy. These developments provide the constitutional foundation for putting Aboriginal relations in Ontario on a footing that will minimize the likelihood of more situations like Ipperwash. The policies actually practiced in Ontario by both the

provincial and federal governments must be improved further to meet the principles and standards now recognized in the constitutional law of Canada. My recommendations for reforming Aboriginal policy in Ontario aim to fulfil the promise of the new path we have been taking toward providing full opportunity for Aboriginal peoples to enjoy the benefits of Ontario, while at the same time renewing and benefiting from our treaty relationships.

### **3.3.1 1969 — *A Turning Point***

To understand the context for Aboriginal relations in Ontario today, it is important to go back to 1969, when a crucial event in relations with Aboriginal peoples in Canada took place. In June of 1969, the federal government issued a White Paper setting out a new “Indian Policy” for Canada.<sup>46</sup> The crux of the new policy was that Indians were to have “full and equal participation in the cultural, social, economic and political life of Canada,” but they would have to give up any claims to special status or rights as Aboriginal peoples.<sup>47</sup> Indians (and presumably Métis and Inuit) were to enjoy the full rights of Canadian citizenship. In return, they would give up all their collective historic rights. The paper rejected Aboriginal title as a basis of claiming land ownership and said that a way of ending treaties equitably would have to be found.

When the White Paper was presented to a large and representative group of Aboriginal leaders in Ottawa, they rejected it as a satisfactory basis for restructuring their relationship with Canada. They welcomed the end of discrimination against Indians and other Aboriginal people, but not at the price of giving up recognition of their historic societies, treaty rights, and Aboriginal rights. The federal government subsequently withdrew the paper. In the years that followed, policy and law in Canada moved away from the objective of total assimilation and the elimination of Aboriginal peoples as political societies and toward recognizing the rights of the Aboriginal peoples and honouring treaties.

### **3.3.2 *First Steps along a New Path***

In 1973, following the decision of the Supreme Court of Canada in the *Calder* case,<sup>48</sup> the federal government changed its position on the recognition of Aboriginal rights. In the *Calder* case, the Nisga’a Nation sought recognition of its Aboriginal title over its traditional lands in the Nass Valley in northern British Columbia. This was the first time in Canadian history that such a claim by an Indian nation had been adjudicated in the highest court. All six of the Supreme Court justices who dealt with the issue agreed on the existence of native title in Canadian law. In the words of Justice Judson,

the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.<sup>49</sup>

Faced with acknowledgement of native title by the Supreme Court, the federal government could no longer ignore claims made on that basis. The change of position on Aboriginal rights under the Liberal government of Prime Minister Trudeau was a non-partisan decision, supported by both the Conservative and New Democratic parties. A few months later, the federal government issued a statement indicating that it would establish policies and procedures for settling land claims and treaty issues.

The federal government subsequently introduced processes for dealing with two kinds of Aboriginal claims. One was a process for negotiating settlements with the Aboriginal groups still living on the traditional lands who had never made a treaty with the Crown. This was called the Comprehensive Claims process.<sup>50</sup> In effect, it renewed the treaty process followed in Canada up to the 1920s. The second, the Specific Claims process,<sup>51</sup> aimed at settling outstanding legal obligations of the Crown, arising out of the failure to fulfill the terms of past treaties, breaches of obligations arising under the *Indian Act*, the administration of funds or other assets, and the illegal disposition of Indian lands. Since nearly all of Ontario is subject to historic treaties, the Specific Claims process has been most germane to Ontario.

During the same period, Ontario also began to move along the path of recognizing treaty and Aboriginal rights and setting up procedures for dealing with them. In 1976, it established a general process for addressing First Nation claims for the first time, which took the form of an Office of Indian Claims within the Ministry of Natural Resources. Although lacking any policy to guide it, this office began to review a few First Nation claims.<sup>52</sup>

In 1977, the Government of Ontario established a Royal Commission, chaired by Justice E.P. Hartt, to inquire into the impact of resource exploitation on the people and environment of Northern Ontario. The tragic effect of mercury poisoning on two First Nations, resulting from the forestry operations of Reed Ltd., was a key focus of Justice Hartt's inquiry. Justice Hartt noted that two-thirds of the people living in the northern half of Ontario were Aboriginal people who depended on the land for their survival. Moreover, he concluded that

[a] major focus of Indian demands involves the use of Crown land, specific land claims and accessibility to resources, all of which are related to the interpretation of the original treaties. To date, Government

seems to have left these matters to be resolved by the courts. I do not believe that this is the most productive course of action to follow.<sup>53</sup>

To oversee and manage the settlement of claims, Justice Hartt recommended establishing a tripartite commission, composed of representatives of the federal and provincial governments and Ontario First Nations.<sup>54</sup>

This recommendation led to the creation of the Indian Commission of Ontario (ICO) in 1978. The mandate of the Commission was based on a resolution of the Chiefs of Ontario and parallel orders-in-council of the governments of Canada and Ontario.<sup>55</sup> The mandate gave the ICO three functions: to be a forum for negotiating self-government issues, to examine and resolve any other issues of mutual concern, and to inform Ontario residents of the matters being dealt with. In effect, the ICO became the main forum for settling land claims in Ontario. Most of the land claim negotiations facilitated by the ICO involved the federal government (under its Specific Claims policy), the provincial government, and one or more First Nations.<sup>56</sup>

As first steps toward renewing treaty relationships and dealing effectively with Aboriginal rights and treaty-based claims, the policies and processes introduced by the federal and Ontario governments left much to be desired. The Specific Claims process and its application in Ontario have proven to be extraordinarily slow and ineffective. Control of the process by the federal and provincial governments and the absence of any capacity for independent decision-making make the process illegitimate in the eyes of many Aboriginal peoples. First Nations and Aboriginal organizations have made their criticisms known, often by refusing to participate in these proceedings.<sup>57</sup> Published reports have also highlighted the inadequacies and failures of these policies and have called for major reforms.<sup>58</sup> Yet, with only slight modifications, the policies and practices instituted thirty years ago are still in place. Failure to reform the land claims process in Ontario means increasingly that the only alternatives for First Nations faced with longstanding disputes about treaty and Aboriginal rights are expensive and time-consuming litigation in the courts or direct action.

### ***3.3.3 Recognizing Aboriginal and Treaty Rights in the Constitution***

During the 1970s, Aboriginal peoples and their leaders saw the major efforts in the field of constitutional reform as an opportunity to secure explicit recognition of their status and rights in the Constitution of Canada.<sup>59</sup> Through the efforts of Canada-wide organizations representing Indians, Inuit, and Métis, a clause was inserted in the *Constitution Act, 1982*, which entrenched Aboriginal and treaty rights in the Constitution. This clause is section 35:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

Another provision of the *Constitution Act, 1982* is section 25 of the *Canadian Charter of Rights and Freedoms*, which states that the rights and freedoms guaranteed in the Charter

shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Recognition of Aboriginal and treaty rights in the Constitution was a major step towards establishing just and mutually beneficial relations with Aboriginal peoples. But the terms set down in the Constitution were very general, leaving much to be done to add substance to these constitutional provisions and to apply them to the ongoing relationships with Aboriginal peoples. Generally speaking, there are two ways to do this: through political negotiations and agreements, or through litigation. Regrettably, to date, little has been achieved through political agreements. This is true as regards both Canada and Ontario.

### ***3.3.4 Failure to Make Progress through Negotiated Political Agreements***

Since 1982, there have been numerous efforts, at both the national and provincial level, to better define and secure Aboriginal and treaty rights. But most of these have failed to produce significant and sustained progress in improving relations with Aboriginal peoples.

On the constitutional front, federal and provincial ministers held four conferences with Aboriginal leaders between 1983 and 1987, but failed to reach agreement on a way of incorporating in the Constitution of Canada the inherent right of Aboriginal people to govern their own societies.<sup>60</sup> Aboriginal peoples were left out of the constitutional negotiations which immediately followed and which produced the Meech Lake Accord. Excluding the concerns of Aboriginal peoples from the Meech Lake Accord turned out to be a crucial factor in its failure

to be adopted. This mistake was not repeated in negotiating the Charlottetown Accord, the focus of the last major effort at reforming the Constitution. The Charlottetown Accord, agreed to by the federal government and all provincial governments, dealt with the rights of Aboriginal peoples and included a large section recognizing the inherent right of Aboriginal peoples to self-government within Canada. It also included a commitment by the federal and provincial governments to a process of treaty implementation and rectification. Although the Charlottetown Accord failed to be adopted in the referendum of October 26, 1992, observers and analysts do not attribute that result to the proposals dealing with Aboriginal peoples.

There have also been less formal political efforts to renew treaty relations and to respect Aboriginal rights. But again, for the most part, these efforts have failed to produce results and have added to what Aboriginal peoples see as a history of unfulfilled promises.

In Ontario, one such effort was the Statement of Political Relationships, agreed to by the then-provincial government and First Nation leaders in 1991. The Statement begins by recognizing the inherent right of First Nations to self-government, which flows from the Creator and from the First Nations' original occupation of the land. It then records the commitment of First Nations and Ontario to implement that right "by respecting treaty relationships, and by using such means as the treaty-making process, constitutional and legislative reforms and agreements acceptable to the First Nations and Ontario."<sup>61</sup> At the time, the Statement seemed to herald a new era in Aboriginal relations in Ontario and a political commitment by the Ontario government to enter into further negotiations. But the Statement was not legally binding, and very soon, it would appear that it was not binding in a political sense either. The then-provincial government did follow it up with some Ontario/Aboriginal Round Table talks, and it established a task force within its Native Affairs Secretariat to work on self-government and land claims. But no structures with real political strength and visibility were put in place to implement the Statement.<sup>62</sup> The new provincial government elected in 1995 subsequently repudiated the Statement.

A lesson to be learned from this episode is that real change in Aboriginal relations in Ontario requires more than a statement of political intent supported by one government. Structures and legislation must be established which provide a solid and enduring foundation for implementing the commitments made.

Another example of an effort at a new relationship whose promise remains largely unfulfilled, this time at the national level, is the Royal Commission on Aboriginal Peoples (RCAP). RCAP was established in response to the crisis at Oka, Quebec, when Canadian soldiers and Mohawk warriors confronted each

other across the barricades throughout the summer of 1990. It was undoubtedly a crucial event in galvanizing Aboriginal peoples in Canada to move to protect their rights and interests. After the Oka crisis, the government under Prime Minister Mulroney established RCAP with a broad mandate to look into virtually all aspects of Aboriginal relations. The six-volume report of the Commission, tabled in 1995, put forward a broad program of reform, including dismantling the *Indian Act* and renewing treaty relations. One of the recommended reforms, which is most pertinent to my mandate, envisaged a fairer and more effective way of dealing with specific land claims.<sup>63</sup>

The official response to RCAP by the federal government was presented in *Gathering Strength: Canada's Aboriginal Action Plan*, which accepted the general idea of building a new relationship with Aboriginal peoples based on self-government and within a treaty framework, but contained few specific measures.<sup>64</sup> With respect to the specific claims proposal, it simply said that “[t]he Government of Canada has been working with First Nations to make recommendations for an independent claims body to render binding decisions on the acceptance or rejection of claims.” This undertaking seemed to be close to being fulfilled in 1998, when a Joint Task Force of the federal and provincial governments and First Nations representatives reached agreement on proposals for a permanent independent body to resolve impasses in land claims negotiations.<sup>65</sup> But the *Specific Claims Resolution Act* enacted by parliament in 2003 to establish a new claims tribunal met with strong opposition from Aboriginal people for its failure to meet key requirements of an acceptable specific claims process, including the objection that the new tribunal lacked independence.<sup>66</sup> The legislation has remained unproclaimed while efforts continue to amend the *Act* to meet those objections.

A final example of a promising reform in Aboriginal relations initiated by a government that later backed away from it involved efforts to improve the land claims process in Ontario.

In 1990, again in the aftermath of Oka, a tripartite council of federal and provincial ministers and Ontario First Nation leaders met to consider improvements in handling specific claims in Ontario.<sup>67</sup> Although not all of the recommendations of the council were adopted (including, notably, its proposal for an independent body to review federal government decisions on claims), the tripartite council did lead to improvements in the specific claims process in Ontario and the operations of the ICO. Through the ICO, the federal and provincial governments and First Nations were able to resolve immediately the situation of six northern First Nations, still on traditional lands and without reserves or essential services. For the first time, the federal government agreed to deal with pre-Confederation claims, so important in Ontario which is the cradle of land cession treaties in

pre-Confederation Canada. Moreover, the ICO encouraged parties to agree to a common historical fact-finding process, thus avoiding expensive and time-consuming “wars of experts.”

By the first half of the 1990s, the annual budget for the ICO had increased from the original \$545,000 to \$1,160,000, enough to support three full-time facilitators and a support person to deal with land claims. This was still far from enough to prevent growth in the backlog of unsettled claims, but at least the ICO process seemed to be heading in the right direction. But in 1996, the provincial government reduced its contribution to the ICO by twenty-five percent. Then, in 1999, even though a steering committee involving all parties recommended renewing the mandate of the ICO for another five years, the federal Minister of Indian Affairs declined to renew the order-in-council. On March 31, 2000 the ICO closed its doors.<sup>68</sup>

Although the ICO was closed down in 2000, that has not meant that the entire process of settling land claims in Ontario has ground to a halt. Under the aegis of the Native Affairs Secretariat (now the Ontario Secretariat for Aboriginal Affairs), there have been efforts to reduce delay and expedite the process of reaching settlement. Bilateral and trilateral discussions directed at improving and restructuring the process have taken place between First Nations and the provincial and/or federal government. And there have been a number of successful negotiations between the province and Ontario First Nations with respect to land and treaty claims and resource development. But, while this is all for the good, much more is needed to provide the solid and enduring foundation for a genuine renewal of treaty relationships in Ontario.

### ***3.3.5 Judicial Decisions on Aboriginal and Treaty Rights***

Lack of progress in clarifying and applying Aboriginal and treaty rights at the political level has meant that the courts have been increasingly called upon to settle disputes about these rights. In doing so, they have developed a significant body of case law on constitutionally protected Aboriginal and treaty rights. The principles in some of the key cases provide the framework of constitutional law on which I have based my assessment of the treatment of Aboriginal and treaty rights in Ontario and my recommendations for reforms to reduce the likelihood of confrontations like Ipperwash.

#### ***3.3.5.1 Fiduciary Obligations***

I have referred to the fiduciary obligation that rests with the Crown as a consequence of its monopoly on purchasing Indian lands. In 1984, *Guerin v. The*

*Queen*<sup>69</sup> reaffirmed that when the Crown is involved in the sale or lease of Indian lands, it has an obligation to act in the best interest of the Indians. “As would be the case with a trust,” Justice Dickson (as he then was) wrote, “the Crown must hold surrendered land for the use and benefit of the surrendering band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach.” Many of the land claims which remain unsettled in the province involve allegations of breaches of the fiduciary obligation of the Crown.

### 3.3.5.2 *Interpreting Treaties*

Beginning with the *Simon* case in 1985, the Supreme Court has set rules for interpreting treaties with First Nations.<sup>70</sup> These rules are directed at respecting treaties and treating First Nations people in a just and honourable way. In 1999, in *R. v Marshall*,<sup>71</sup> Justice McLachlin (as she then was) summarized the principles governing the interpretation of treaties as developed by the Supreme Court in numerous cases:

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one that best reconciles the interests of both parties at the time the treaty was resolved.
- In searching for the common intention of parties, the integrity and honour of the Crown is presumed.
- In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
- The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
- A technical or contractual interpretation of treaty wording should be avoided.
- While construing the language generously, courts cannot alter the terms by exceeding what “is possible on the language” or realistic.

- Treaty rights of aboriginal peoples must not be interpreted in a static way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are incidental to the core treaty right in its modern context.<sup>72</sup>

Justice McLachlin enunciated these principles to guide judges who are called upon to decide disputes about treaties, but these principles also apply to the process of negotiation. Preferably, disputes about treaties should be settled, to the extent possible, through negotiation rather than the very long and expensive process of litigation, and it is essential that governments—federal, provincial, and First Nation—observe these principles in their efforts to negotiate the resolution of treaty disputes.

### 3.3.5.3 *Aboriginal Rights*

In the 1990 *Sparrow* case,<sup>73</sup> the Supreme Court rendered its first decision on the meaning of the “existing Aboriginal rights” which are recognized and affirmed in section 35 of the *Constitution Act, 1982*. The Court made it clear that the insertion of the word “existing” did not mean that this section covered only the rights which Aboriginal people effectively enjoyed in 1982. Constitutionally protected Aboriginal rights extend to activities that have been “an integral part” of an Aboriginal people’s distinctive culture. Given the need to affirm and recognize s. 35 rights, the Court held, in a unanimous opinion written by Chief Justice Dickson, “that a generous, liberal interpretation of the words in the constitutional provision is demanded.”<sup>74</sup> The Court acknowledged that, like all constitutionally protected rights, Aboriginal rights are not absolutes; on occasion, they might have to give way to other important constitutional principles and values.

Since its decision in *Sparrow*, the Supreme Court has dealt with a number of contested claims of Aboriginal rights, upholding some but rejecting others. The key to identifying an Aboriginal right is whether it is a practice or tradition that, in the view of the Court, constitutes an essential element of the distinctive society of an Aboriginal people prior to European contact.<sup>75</sup> In the 1997 *Delgamukw* case, which involved claims of the Gitskan and Wet’suwet’en people to traditional lands which they had not surrendered to the Crown, the Supreme Court recognized native title as an Aboriginal right that stems from the fact that Aboriginal peoples possessed the land before the Crown asserted its sovereignty. Aboriginal title goes beyond the Aboriginal rights to engage in specific activities, in that it includes the right to develop traditional lands in non-traditional ways. This includes the exploitation of mineral resources, provided that such

development does not undermine “the nature of the claimants’ attachments to these lands.” Here again, the Court acknowledged that federal and provincial governments may encroach upon lands subject to native title for “compelling and substantial” legislative objectives, but only after endeavouring, through consultation, to accommodate Aboriginal interests, and, in the case of very serious encroachments, only with the consent of the First Nation.

#### 3.3.5.4 *Métis Rights*

In 2001, for the first time, the Ontario Court of Appeal, in *R. v. Powley*,<sup>76</sup> fully treated the constitutionally recognized Aboriginal rights of Métis peoples in Canada. Without attempting a comprehensive definition of Métis peoples, the court recognized that these were communities of mixed Aboriginal/European heritage with distinct cultures and traditions. Their rights were based on activities integral to the survival and identity of communities they formed after contact with Europeans and before European authorities asserted effective control. In *Powley*, the court upheld the right of the Métis community in the Sault Ste. Marie area to hunt for moose. The Court did not accept that Ontario hunting regulations were justified in not recognizing the Métis right. The Supreme Court of Canada upheld the decision.<sup>77</sup> Thus, *Powley* is an important precedent in establishing the constitutional obligation of provincial regulatory authorities to accommodate the interests of Métis communities.

#### 3.3.5.5 *The Honour of the Crown and the Duty to Consult and Accommodate*

In 2004, the Supreme Court of Canada decided two cases arising in British Columbia, *Haida Nation*<sup>78</sup> and *Taku River*,<sup>79</sup> which involved challenges to provincial government authorization of resource projects which threatened the sustainability of First Nations on traditional lands. In *Haida Nation*, the province was transferring to a forestry company a tree farm license related to lands to which the Haida Nation claimed native title. In *Taku River*, the province planned to build a road to reopen an old mine on land to which the Taku River Tlingit First Nation claimed native title. In both cases, the Court held that the province had a duty to consult with the First Nations with a view to trying to accommodate their interests in the land, and to do so in such a way that while negotiations about their land rights were in process, the spiritual and material value of the land for the Aboriginal peoples was not significantly reduced. The Court made it clear that this duty to consult did not amount to a veto power for First Nations. Rather, it was an obligation on the provincial government to make a good faith effort to ensure that developments on traditional lands accommodated First Nation inter-

ests in those lands. The Court saw this duty as arising from the principle of the “honour of the Crown,” meaning the commitment of the Crown, going back to the 1763 *Royal Proclamation*, to refrain from sharp dealing in relations with Aboriginal peoples and to act in an honourable way.

The following year, in *Mikisew Cree First Nation*,<sup>80</sup> the Supreme Court applied the duty to consult and accommodate in a situation involving First Nation interests in off-reserve treaty lands. In this case, the federal government approved plans to build a winter road through Wood Buffalo National Park in northern Alberta, on lands surrendered to the Crown under Treaty 8. Treaty 8 included a clause similar to clauses in Ontario treaties which recognize the right of Indians to continue their traditional harvesting throughout the tract of land surrendered, except on such tracts that might be taken up for government purposes. The federal government argued that it had no duty to consult with the First Nation signatories of the treaty in the case of surrendered land. The Supreme Court rejected that argument, and held that the principle of the honour of the Crown meant that “[t]he Crown was required to solicit and listen carefully to the Mikisew concerns and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.”<sup>81</sup> In Ontario, where most of the lands are “surrendered” treaty lands, this decision has a very important bearing.

A common theme in all of these judicial decisions is that it is in everyone’s interest that relations with First Nations and other Aboriginal peoples be conducted in a non-adversarial way. A further and related theme is the view expressed in virtually all of these cases that, to the extent possible, matters at issue between Aboriginal peoples and the provincial and federal governments should be dealt with through discussion and negotiated agreements rather than litigated in the courts. I concur with that view, and in the following chapters, I put forward recommendations to facilitate non-adversarial, negotiated agreements.

## Endnotes

- 1 For accounts of these treaties, see Robert J. Surtees, “Land Cessions, 1763-1830,” in Edward S. Rogers and Donald B. Smith, *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994), pp. 93-121.
- 2 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 1: Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996). See generally Part Two for a detailed history of Aboriginal policy in the land now called Canada.
- 3 R.S., 1985, c. I-5.
- 4 RSC 1927, ch. 98, s. 149A. In 1927, the *Indian Act* had been amended to make it an offence, subject to a fine or imprisonment of up to two months, for anyone to solicit funds for Indian legal claims without obtaining a licence from the superintendent of Indian affairs.
- 5 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
- 6 Justice Gordon Killeen, from the judgment at trial in *Chippewas of Kettle and Stony Point v. Attorney General of Canada et al.* (1995) 24 O.R. (3rd) 654, at 690.
- 7 *Chippewas of Kettle and Stony Point v. Attorney General of Canada et al.* (1996) 31 O.R. 3(rd) 97. This decision was upheld by the Supreme Court of Canada, *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1998] 1 S.C.R. 756.
- 8 Darlene Johnston, “Respecting and Protecting the Sacred” (Inquiry research paper).
- 9 Johnston, p. 17.
- 10 Chapter W-2 [Repealed, R.S., 1985, c. 22 (4th Supp.), s. 80].
- 11 Noelle Spotton, “A Profile of Aboriginal Peoples in Ontario” (Inquiry research paper). Ms. Spotton served as a policy counsel with the Inquiry. This section draws on her paper.
- 12 Spotton, p. 9. The 2001 Census reports an “Aboriginal origin” population of 308,105 in Ontario. “Aboriginal origin” refers to persons who reported at least one Aboriginal origin in response to the ethnic origin question (North American Indian, Métis, or Inuit). In this report, I have chosen to use the “Aboriginal identity” data because it refers to people who self-identify as Aboriginal. The 188,315 figure does not include the 14,335 Aboriginal people who, Statistics Canada estimates, were not counted as a result of problems in collecting census data for Aboriginal people.
- 13 Chiefs of Ontario Part 2 submission, para. 1.
- 14 Indian and Northern Affairs Canada. “Registered Indian Population by Sex and Residence, 2004,” <[http://www.ainc-inac.gc.ca/pr/sts/rip/rip04\\_e.html](http://www.ainc-inac.gc.ca/pr/sts/rip/rip04_e.html)>.
- 15 Eric Guimond, “Fuzzy Definitions and Population Explosion: Changing Identities of Aboriginal Groups in Canada,” in David Newhouse and Evelyn Peters, eds., *Not Strangers in These Parts: Urban Aboriginal Peoples* (Ottawa: Policy Research Initiatives, 2003).
- 16 Spotton, p. 17, from Statistics Canada 2001 Census, “Aboriginal Identity Population, Median Age for Canada, Provinces and Territories — 20% Sample Data.”
- 17 Michael Coyle, “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future” (Inquiry research paper).
- 18 Surtees, p. 107.
- 19 Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991).
- 20 Sidney L. Harring, *White Man’s Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: Osgoode Society, 1998), pp. 41-2. The Iroquois Confederacy included the Mohawk, Onondaga, Onoyota’aka, Cayuga, Tuscarora, and Seneca nations.

- 21 Coyle, p. 31.
- 22 Ibid., p. 12.
- 23 Ibid., p. 15.
- 24 This was the policy adopted by Lieutenant-Governor, Sir Francis Bond Head, in 1835.
- 25 Canada. Department of Indian and Northern Affairs. Treaty Research Report, Robert J. Surtees, “The Robinson Treaties” (Ottawa: Department of Indian and Northern Affairs, 1986). See also Janet Chute, *Shingwaukose: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998).
- 26 Alexander Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles Publishing, 1971), pp. 304-9.
- 27 Norman K. Zlotkin, “Post-Confederation Treaties,” in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Toronto: Carleton University Press, 1985), p. 273.
- 28 *A.G. Canada v. A.G. Ontario*, [1897] A.C. 199, 66 LPJC 11 (JCPC).
- 29 *Simon v. The Queen* [1985] 2 S.C.R. 387, at 399.
- 30 *St. Catherine’s Milling & Lumber Co. v. The Queen* (1888), 14 App.Cas. 46 (JCPC).
- 31 Coyle, p. 12.
- 32 1891, 54-55 Vic. c. 5.
- 33 Patrick Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario,” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), ch. 4.
- 34 Kate Harries, “Resources Minister set to negotiate new deal for native bands,” *Globe & Mail*, March 20, 2006.
- 35 *Constitution Act, 1930*. There was also an agreement with British Columbia. It does not include this clause, but there is a clause with respect to Indians in the Terms of Union with British Columbia.
- 36 *Attorney General of Ontario v. Francis* (1887) 2 C.N.L.C 6 (unreported until 1980).
- 37 *Ontario Mining Company v. Seybold* (1899) 31 O.R. 386.
- 38 For a detailed account, see Jean Teillet, “The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario” (Inquiry research paper), pp. 25-36.
- 39 Teillet, p. 35.
- 40 *Rex v. Train*, (1912), unreported.
- 41 Ibid., at 31.
- 42 *Rex v. Padjena and Quesawa*, 4 C.N.L.C. (1930) at 411-414.
- 43 *Rex v. Commanda*, (1939) C.N.L.C., Vol. 5, 367.
- 44 *R. v. George* (1966) C.N.L.C., Vol. 6, 360 (S.C.C.).
- 45 Teillet, pp. 46-51 and 53-8. See generally Jean Teillet’s account of both cases.
- 46 Canada. Department of Indian Affairs and Northern Development, *Statement of the Government of Canada, Statement of the Government of Canada on Indian Policy 1969* (Ottawa: Queen’s Printer, 1969).
- 47 For a discussion of the 1969 White Paper, see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).
- 48 *Calder v. A.G. British Columbia* [1973] SCR 313.

- 49 Ibid., at 328.
- 50 The Comprehensive Claims Process was outlined in a booklet entitled, *In All Fairness: A Native Claims Policy — Comprehensive Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1981; amended 1986).
- 51 The Specific Claims Process was outlined in a booklet entitled, *Outstanding Business: A Native Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1982).
- 52 Coyle, p. 43.
- 53 Ontario. Royal Commission on the Northern Environment. E.P. Hartt, Commissioner, *Report of the Royal Commission on the Northern Environment: Interim Report* (Toronto: Royal Commission, 1978), p. 34.
- 54 Ibid., p. 36.
- 55 Coyle, Appendix 3 (copies of the orders-in-council).
- 56 Ibid., p. 45.
- 57 Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin Books, 1994).
- 58 (i) Canada. Department of Indian Affairs and Northern Development. Gerald V. LaForest, *Report on Administering Processes for the Resolution of Specific Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1978); (ii) Canada. Department of Indian Affairs and Northern Development. *Living Treaties: Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985); (iii) Canadian Bar Association, Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988); (iv) Ontario. Indian Claims Commission of Ontario, “Discussion Paper Regarding First Nation Land Claims: Report of Activities” (Toronto: Indian Commission of Ontario, 1990); (v) Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), pp. 527-56 [RCAP report, vol. 2].
- 59 Douglas Sanders, “The Indian Lobby,” in Keith Banting and Richard Simeon, *And No One Cheered: Federalism, Democracy & The Constitution Act* (Toronto: Methuen, 1983), pp. 301-32. See also Teillet, pp. 37-8.
- 60 David Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1989).
- 61 David Cameron and Jill Wherrett, “New Relationships, New Challenges: Aboriginal Peoples and the Province of Ontario,” Royal Commission on Aboriginal Peoples project on Canadian Governments and Aboriginal Peoples (Ottawa: Supply and Services Canada, November 1993), pp. 33-4. The authors note that exceptions were the Chippewas of Nawash, Saugeen, and Cockburn Island First Nations.
- 62 Ibid., pp. 34-8.
- 63 RCAP report, vol. 2, pp. 545-613.
- 64 Canada. Indian and Northern Affairs Canada. *Gathering Strength: Canada’s Aboriginal Action Plan* (Ottawa: 1997).
- 65 Coyle, p. 39.
- 66 S.C. 2003, c. 23.
- 67 Coyle, p. 45.
- 68 Ibid., p. 46.

69 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

70 *Simon v. The Queen* [1985] 2 S.C.R. 387.

71 *R. v. Marshall* (1999) 3 S.C.R. 456.

72 *Ibid.* Note that case citations for each of the principles have been omitted.

73 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

74 *Ibid.*, at 228.

75 See, for instance, *R. v. Van der Peet* [1996] 2 S.C.R. 507.

76 *R. v. Powley* (2001) 196 DLR (4th) 221.

77 *R. v. Powley*, [2003] 2 S.C.R. 207.

78 *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R.511.

79 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550.

80 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

81 *Ibid.*, at 64.