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**WHO CONTROLS THE HUNT? ONTARIO'S *GAME ACT*, THE
CANADIAN GOVERNMENT AND THE OJIBWA, 1800-1940.**

by

David Calverley

**Thesis submitted to
the School of Graduate Studies and Research
in partial fulfillment of the requirements for the
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Abstract

In 1892 the Ontario government passed the *Ontario Game and Fisheries Act*. This legislation, designed to conserve wildlife throughout the province, was applied to Native peoples residing in Ontario. This led to conflict between the Ontario government, through its Game Commission, the Dominion government, via Indian Affairs, and Aboriginal peoples throughout the province. Natives, in this thesis the Ojibwa of the Robinson Treaties, were and are a federal responsibility under the constitution. Ontario, however, was acting within its constitutional jurisdiction by regulating a natural resource within its provincial boundaries. The conflict arose over whether provincial legislation can be applied to an area of federal concern, and contrary to promises contained within the Robinson Treaties that the Ojibwa could continue to hunt, trap and fish as they had "heretofore been in the habit of doing." Beyond this constitutional and jurisdictional level, political concerns also played a part. Indian Affairs' bureaucrats were not completely adverse to regulating Ojibwa hunting as a means of hastening its own policy of acculturation, and they were unwilling to openly challenge the Ontario government over Native rights. The Ontario Game Commission, and its later incarnation was unwilling to compromise its control over wildlife which during the twentieth century became an increasingly important resource. The Ojibwa, politically powerless, lost control of the one resource which they were guaranteed access to by the Crown during treaty negotiations in 1850: wildlife. Ojibwa arguments for continued

access were founded almost exclusively on the Robinson Treaties, but these were agreements which neither the Dominion nor the Ontario government were interested in.

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First, I want to thank my parents. My mother never scolded me when I woke her as a young child, sneaking books into my bedroom at 6:00 am, or reading with a flashlight under my blankets until late into the evening. Nor, when other kids were playing road hockey did they push me outside but left me to read.

I want to thank my uncle, Keith Dick, for his intellectual encouragement over the years. Having someone to discuss books, music and politics with gave me an incentive to follow a different path when, during one's teenage years, more mediocre possibilities existed. Later, during my graduate studies, his and my aunt's house in Durham provided a wonderful pastoral retreat for a tired student.

I would like to acknowledge Michael Whatmore for developing my interest in history in high school. Unlike most teachers he wasn't afraid to offer sharp criticism of a student's work, and work habits. The standards he set even then have been used by me ever since.

Dr. Robert Surtees further strengthened this interest, and introduced me to Canadian Native history and the history of Northern Ontario. His comments on earlier drafts of this work, and expertise in the Robinson Treaties and the north have been extremely useful. His comment during my undergraduate training, that the problem faced by the historian is "the problem of selection," recurred to me throughout this thesis.

Last, but certainly not least, I would like to thank my doctoral supervisor, Dr. Michael Behiels, for his comments on earlier drafts of this work. He never pressured when his student became distracted by other commitments, but was always quick with helpful and insightful comments when asked.

Introduction

This thesis is an examination of Ontario's *Game Act*, its application to the Ojibwa residing within the Robinson-Huron and Robinson-Superior Treaties, and the resulting federal-provincial conflict that arose over this. From 1892, when the *Game Act* was created to the *R. v. Commanda* decision of 1939 the matter was not resolved to either Indian Affairs' or the Ojibwas' liking. The Ontario Game Commission, in its various forms between 1892 and 1939, and Indian Affairs could not reach a consensus over the question of Ojibwa treaty hunting rights due to both conflicting and complementary policies. The Ontario government believed granting the Ojibwa unrestricted hunting and trapping rights would result in wide spread slaughter of game animals throughout the province. Furthermore, the province believed that such 'privileges' amounted to federal interference in provincial jurisdiction namely that guaranteed by section 92(16) of the *Constitution Act of 1867*. Indian Affairs, and the Department of Justice when it was involved, was unwilling to court Ontario's anger by pressing the issue. Well aware of the federal government's poor record when challenging Ontario in court, Indian Affairs preferred simply to urge the Game Commission to use leniency when applying the *Game Act* to the Ojibwa. While Department of Indian Affairs' bureaucrats, starting most notably with Duncan Campbell Scott, became more insistent regarding treaty rights during the inter-war years they still remained reluctant to challenge the constitutionality of Ontario's *Game Act* in court. Indian Affairs was further hampered by its own 'civilization'

policy. It too wanted Natives across Canada to abandon the hunt and take up the plough. It too enforced similar game legislation, such as the *Migratory Birds Act*, in the Northwest Territories with exceptions made for the more northern tribes. The Ojibwa, however, wanted complete immunity from Ontario's *Game Act* because they believed the Robinson Treaties provided them this right. From the inception of the legislation until 1939 band chiefs and individuals in both treaty areas pressured Indian Affairs to protect their treaty rights. By the 1920s the Ojibwa began to take matters into their own hands, and several individuals challenged their convictions in court. Despite local allies, such as lawyers who worked *pro bono*, the Ojibwa were unsuccessful. For its part, Indian Affairs preferred political compromise with Ontario rather than conflict.

Ontario had invested a great deal of political capital into the *Game Act* since its creation in 1892. That legislation, the result of a two year inquiry by the provincially appointed Game and Fish Commission, provided for the protection and conservation of all game, fish and non-migratory birds in Ontario.¹ The act, and the several hundred page report that accompanied it, contained numerous provisions to preserve Ontario's wildlife. Quotas, for example, governed the number of animals a hunter could take each season, depending on the species. Likewise, open and closed seasons were outlined in the legislation, and sometimes complete bans were placed on the hunting or trapping of certain animals. The act also included enforcement measures, and resulted in the

establishment of a system of game overseers. They patrolled the province which was divided up into districts. Persons found guilty of breaking the *Game Act* faced fines, confiscation of property (i.e.: guns, traps, or fishing paraphernalia), and/or imprisonment.

Under section 92(16) of the *British North America Act* (BNA) Ontario was acting within its constitutional and legislative jurisdiction.² Wildlife, like minerals and timber, was a natural resource and subject to provincial regulation. Conflict arose when the Ontario government attempted to apply the act to treaty Indians in the province. Natives clearly fell under the purview of the Dominion government, as outlined in section 91(24) of the constitution, which gave the national government control over "Indians and Lands Reserved for Indians." Even though the first *Game Act* contained a clause exempting treaty Indians from the legislation - specifically that treaty rights would not be interfered with - Natives found themselves being arrested and fined, and their guns and traps confiscated for breaching the act. They may have possessed an extraordinary right in writing, but not in practice. Indeed, the province eventually amended the *Game Act* and removed the clause exempting treaty Indians. The treaties, and for the purposes of this thesis, the Robinson-Huron and Robinson-Superior treaties, offered the Ojibwa no protection from provincial enforcement officers.

¹ Birds that cross the boundary between Canada and the United States are protected under the *Migratory Birds Protection Act* (1916).

² Section 92(16) the provinces control over "Generally all Matters of a merely local or private Nature in the Province." Cited in Appendix II of J.L. Finlay and

Several distinct phases emerged in the hunting issue between 1892 and 1940 within which each of the principle players involved, the Ojibwa, provincial government (as represented by the Game Commission/Department of Game and occasionally the Attorney-General's Office) and Indian Affairs acted and reacted differently. Within each phase numerous outside factors, both contemporary to that period and historical, affected each players' actions. The first phase, between 1892 and 1914, saw the first application of Ontario's *Game Act* and the concurrent complaints of the Ojibwa who found their treaty rights violated. They viewed the matter solely within the context of the Robinson Treaties: in 1850 they were promised the continued right to hunt and trap. Bureaucrats at Indian Affairs, however, took no interest in protecting the Ojibwa's subsistence hunting rights. Ontario's Game Commission, which oversaw the management of wildlife within the province, was completely unwilling to exempt any Natives from the *Game Act* even though the legislation itself explicitly stated that no treaty rights would be affected by it:

The provisions of the game laws of this Act shall not apply to Indians or to settlers in the unorganized districts of this Province in regard to any game killed for their own immediate use for food only, and for the reasonable necessities of the person killing the same and his family, and not for the purpose of sale or traffic. And nothing herein contained shall be construed to affect any rights specially reserved to or conferred upon Indians by any treaty or regulation in

that behalf made by the government of the Dominion of Canada...³

This situation continued until 1910 when the Hudson's Bay Company challenged the legality of the *Game Act* in court after some of its posts and warehouses in northern Ontario were raided and considerable fines levied against it. This roused Indian Affairs whose bureaucrats realized that the HBC challenge provided it with an opportunity to settle the hunting issue without openly challenging the authority of the Ontario government.

With the failure of the HBC challenge and the ascension of Duncan Campbell Scott to the position of Deputy Superintendent General of Indian Affairs in 1913 the hunting issue moved into a new phase. Indian Affairs began to take increased interest in securing the Ojibwa's subsistence harvesting rights. This occurred for two complementary reasons. First, Scott was the first Deputy-Superintendent General of Indian Affairs who had first hand experience and knowledge of the northern Ontario Ojibwa. He appreciated the importance of traditional harvesting, and sought to protect this for them. Scott did not abandon Indian Affairs' 'civilization' policy, but his approach to Native issues was more nuanced than simply acculturating Aboriginal peoples. The hunting issue was one area in which Scott acted on this belief. Scott viewed the problem within his concept of the "Transitional Indian:" Indians who had adopted some elements of white culture, but still depended upon traditional pursuits to

³ Statutes of the Province of Ontario, "An Act to amend the Act for the Protection of Game and Fur-Bearing Animals." 56 Vic. (Toronto: L.K. Cameron, 1893): 204.

support themselves. Until such times as the Ojibwa abandoned the hunt completely and took up more 'civilized' occupations Scott wanted Ontario to allow the Ojibwa to support themselves through traditional harvesting practices. This did not necessarily constitute complete hunting rights, but it did call for some measure of leniency on the part of the provincial government when Ojibwa were engaged in subsistence activity.

The second factor which led to this change in Indian Affairs' policy were the efforts of the Ojibwa themselves. By 1917 they began to affect opinions within northern Ontario, and found, as a result, that they possessed a number of allies. Indian Agents, usually depicted as agents of cultural obliteration, began to support the efforts of bands in their agencies to protect their hunting and trapping rights. After almost three decades of complaints, letters and petitions from the Ojibwa many of the agents came to realize that the *Game Act*, when applied to the Ojibwa, was unjust in both a pragmatic and legal sense. First, most Ojibwa families lived a meager and poor existence. The *Game Act* was, quite simply, taking food out of their mouths. Wage labour was not abundant, and most Ojibwa men worked only on a seasonal basis as guides or canoemen. Furthermore, it became apparent to the agents that provincial game wardens were harassing the Ojibwa who were not, in fact, the main conservation threat. The true cause of game depletion, they believed, were Whites. Sportsmen, tourists and poachers took inordinate amounts of game and the Ojibwa, who were merely trying to support themselves, found their traditional hunting and

trapping territories depleted. Indian Agents were among the first to raise strongly the legal and fiduciary elements of the problem with senior bureaucrats in Ottawa. While not couched in such exact legal terms, Indian Agents argued that Indian Affairs, as the Ojibwa's protector, had an obligation to live up to the promises contained in the Robinson Treaties. These agents relayed Ojibwa complaints to headquarters in Ottawa, and often indicated in their own correspondence the poor condition many Ojibwa families lived in. These complaints, in conjunction with Scott's empathetic ear, led to Indian Affairs adopting a more pro-active position in relation to hunting and trapping rights.

The second phase ended, and the third began with the case of *R. v. Padjena*. In 1928 two Pic River Ojibwa, Padjena and Quesawa, were arrested for possessing beaver pelts out of season. Convicted by a local magistrate they appealed the verdict, and were found innocent by a district court judge who also, much to the dismay of Ontario's Department of Game, declared the province's game legislation *ultra vires* of the Legislature. The Department of Game, up until this point, had not changed its position regarding the *Game Act* and its application to Natives: Ontario had constitutional jurisdiction over natural resources and Natives within the province were subject to all legislation that managed them. The Padjena decision changed this. Ontario's Attorney-General's office realized it was in a legal predicament, and appealed the decision. D.C. Scott was now provided his chance to finally solve the hunting issue.

Unfortunately, the appeal came to naught yet it marked a change in Indian Affairs' approach to the subject, and the Department of Game's responsiveness. From 1931 to 1940 Indian Affairs, particularly through the person of T.R.L. MacInnes, the departmental secretary, negotiated with the Department of Game to try and secure concessions for the Ojibwa. Momentarily shaken in their faith by *Padjena*, Department of Game officials likely saw concessions as way to preserve the integrity of the *Game Act*. Trapping territories emerged from this new development although their benefits were negligible. The Department of Game's self-confidence eventually returned, and the same problems emerged. First, Game officials demanded that all restrictions and regulations pertaining to fur-bearing animals apply on trapping territories. Furthermore, Ojibwa would still be subject to the provisions of the *Game Act* when engaged in subsistence hunting. Since subsistence hunting was the crux of the entire problem trapping territories did nothing to solve the issue.

The final phase in the hunting issue came about with *R. v. Commanda*. Indian Affairs realized by the late 1930s that without a court decision as leverage it would never pry concessions out of the Department of Game. Its new director, Harold McGill, began to look for a test case to bring before the Ontario courts, and as far as the Privy Council if necessary, to settle the legal issues. The arrest of Joseph Commanda of the Nipissing Reserve provided this case. After killing two moose and one deer Commanda and his three companions were arrested by a game warden, prosecuted and fined. McGill decided to appeal the decision,

and with the Department of Justice's agreement counsel was retained ostensibly for Commanda but more precisely for Indian Affairs as a means of settling the hunting issue.

Unfortunately the Ontario Court of Appeal upheld the initial conviction. While McGill intended to appeal to the Supreme Court of Canada he was stopped by his minister, Thomas Crerar. Harold Nixon, Ontario's Provincial Secretary, had written to Crerar and Prime Minister King and asked that the appeal be stopped. Nixon stated that the Department of Game was willing to negotiate with Indian Affairs to reach a compromise solution. While ministerial interference stopped the appeal it is likely McGill preferred this route too. The Commanda case was undertaken to squeeze concessions out of the Department of Game, and it worked. However, Nixon's promise of negotiations was merely a ploy. By 1944 it was apparent to the next generation of Indian Affairs bureaucrats that its predecessors had been tricked and the status quo maintained.

Within these stages the Game Commission/Department of Game, Indian Affairs and the Ojibwa had different agendas and perspectives. While there was overlap between some of them they ultimately worked at cross purposes. This did nothing to address the essential question: could the Ontario *Game Act* affect promises made in 1850 to the Ojibwa by William Robinson, and as outlined in both the Robinson-Superior and Robinson-Huron Treaties? The Ojibwa believed that the treaties protected these rights regardless of provincial legislation. The

Ontario government was unwilling to compromise its legislation, and Indian Affairs, initially unwilling to protect Ojibwa treaty rights in any way, eventually sought a compromise with Ontario which did nothing to help the Ojibwa.

This situation contrasts sharply with some of Christopher Armstrong's assertions in his work *The Politics of Federalism* although it should be noted that wildlife is a very different resource than those considered by Armstrong. He outlined how it was officials who were most deeply involved in debates surrounding constitutional jurisdiction, and resisted the loss, real or imagined, of any authority or power. While the former assertion is true, the latter is not entirely applicable to the hunting issue. Federal and provincial politicians certainly took little interest in the debate, and became involved only when high profile incidents, such as the Hudson's Bay Company's appeal in 1910, occurred. Even then ministers, particularly on the federal level, confined their appearances to either a short memoranda or a letter from their private secretary. This is not surprising since there was little at stake in a political sense. There was never any talk of amending the constitution to deal with the problem so the specter of the "Compact Theory of Confederation" never appeared.⁴ Furthermore, there was no possibility of gaining control over political patronage. Battles over tavern licensing and river rights were important because they offered whichever government that controlled them considerable political power on a local level. Similarly, who ever controlled mining and timber rights possessed considerable

political gifts to bestow and, in the case of Ontario, control over taxable revenue and economic development as the provincial government moved to insure mineral and timber processing stayed in Ontario.⁵

Furthermore, there were no competing powerful private interests that courted Ontario or federal politicians for control. While the Hudson's Bay Company turned to Indian Affairs for support during its court appeal there was never any question of the HBC looking to Queen's Park, nor was it trying to compete with a rival fur trading operation.⁶ While it initially sought a compromise with the Department of Crown Lands (which was responsible for the Game Commission in 1910), Company officials turned to the federal government only when it became clear that their efforts were pointless. Furthermore, the HBC was only trying to protect its operations. Indian Affairs, for reasons outlined above, abandoned the HBC during its appeal. In this sense, Armstrong's work provides a framework for considering the influence of private interests on policy issues but is not entirely applicable to the game question.

In terms of 'turf wars' Game officials in Toronto reacted in the manner outlined by Armstrong while Indian Affairs' bureaucrats, apart from field

⁴ Christopher Armstrong: The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942 (Toronto: University of Toronto Press, 1981): 4-5.

⁵ This became particularly true when Ontario began to impose duties on unprocessed mineral ore and timber. Armstrong, 33-53. See also H.V. Nelles, The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941 (Toronto: Macmillan of Canada, 1974): 62-87.

⁶ While there were other trading companies in the north, notably the Revellion Freres, they were not a substantial threat to the HBC and, as outlined in chapter four, had even less success with Ontario's Department of Crown Lands.

agents, showed no anxiety over Ontario's encroachment into their jurisdiction. Unfortunately records of the Game Commission and the Department of Game prior to 1950 do not exist.⁷ This makes it extremely difficult to ascertain the attitude of Game officials. Letters and other documents, however, exist in the records of Indian Affairs. They reveal that Game officials resented Indian Affairs' interference in what they considered a provincial matter. Indian Affairs' bureaucrats, however, initially took little interest in protecting the Ojibwa's treaty rights, and displayed no anger or resentment over this provincial interference. While this changed near the end of World War One, as noted above, Indian Affairs was still willing to compromise its jurisdiction over Native issues.

The reasons for this can be found in the particular context within which the Game Commission/Department of Game and Indian Affairs operated. The Game Commission, and its later incarnation, the Department of Game, sought to regulate and manage wildlife like any other resource in the province. Just as

⁷ The Archives of Ontario contain no files relating the early years of the Commission's/Departments existence. Calls to the Ministry of Natural Resources revealed, at that time, that no documents existed. Several years later, however, the author was informed by an employee of Ontario's Ministry of Natural Resources that a basement full of documents in the basement of the ministry's Toronto Office were thrown out. These pertained to conservation law although the author could not determine specifically what. Similarly Ontario's Attorney-General's office destroyed many of its documents pertaining to Native peoples when it began to transfer its older files to the Archives of Ontario in the 1960s. These files were deemed to be of "little interest" by the individual who sorted the files something the provincial archivist noted with considerable sarcasm in the finding aid for the Attorney-General's records. It should be noted that the MNR employee, Valerie Stankiewicz, managed to save boxes of files

minerals and timber came under increased provincial control in the late nineteenth and early twentieth centuries wildlife also attracted the eyes of bureaucrats who believed that scientific principles could manage and regulate this resource to insure long term economic returns for the province. Indians and treaties were an uncontrollable element in this attempt. The first *Game Act* (1892) stated that its provisions would not affect any treaties within the province, but practice and policy differed considerably. When the Game Commission was initially created in 1890 to investigate the wildlife condition in Ontario it took a dim view of Natives, and cast them as blood thirsty savages who slaughtered animals out of a primal instinct, and constituted a threat to the economic stability of Ontario's wildlife resource. This sentiment continued to inform the Commission's actions after it became the regulatory body responsible for implementation of the *Game Act*.

Such a dim view of Natives, a product of the continuing paternalism that affected Native issues, was not uncommon in the nineteenth century, and it remained the guiding principle of the Department of Game up to the 1940s. Later provincial investigations into the game situation such as Kelly Evan's 1911 report and the Black Committee of 1931 maintained the image of the marauding Indian. While other factors were identified, these Committees maintained that Indians were still largely uncivilized and savage and having a detrimental impact on Ontario's wildlife resource. While this depiction was not juxtaposed

relating to the Great Lakes fishery. They are stored, unexamined, at Trent University.

against the stereotypical defenceless white settlers crossing the American prairies it was held up against the image of innocent deer and other game. Natives became, in many ways, a pest to be regulated and controlled. Only wolves came under such similar and stringent restrictions. In the 1892 Game and Fish Commission Report numerous analogies were drawn between wolves and Indians. Although created to be scientific in its approach to conservation the Game Commission and its later incarnation the Department of Game were completely anecdotal in their attempts to prove the myth of the blood thirsty Indian. Even by the 1930s when biologists and luminologists were being employed to study fish culture in Ontario, Game officials still relied on unsubstantiated reports about Indians massacring deer to formulate their policy regarding Native hunting rights.

Although it eventually attempted to secure greater recognition of Native treaty rights Indian Affairs never really exerted itself in this endeavour. It too was a firm believer in the importance of Native acculturation. Its maintenance of residential schools, both government run and those operated by religious orders, was only one manifestation of its desire to remove Natives from their past lifestyle of hunting and trapping. Furthermore, within the Northwest Territories Indian Affairs was more than willing to ignore Dominion interference in treaty rights when the *Migratory Birds Convention Act* was passed in 1916.⁸ When

⁸ Much like Ontario's *Game Act* the *Migratory Birds Convention Act* of 1916 came about due to a decline in migratory ducks and geese. This troubled sporthunters, such as Jack Miner, who lobbied the Dominion and U.S. governments to protect these animals. Duncan Campbell Scott was involved in

Indian Affairs wrote to the Ontario Game Commission to try and insure that Natives would not be prosecuted for contravening the game laws their letters were often couched in terms of paternalism and acculturation. Indian Affairs rarely questioned the authority of the provincial government in regulating Native hunting, it merely wanted some leniency shown. Initially these letters were rather weak until D.C. Scott became Deputy-Superintendent General, and his department took stronger measures to protect subsistence hunting activity, and pry concessions from the Department of Game. However, even then Scott still looked forward to the day when the "Indian problem" would no longer exist.

Political necessity was another motivating factor behind Indian Affairs' and Ontario's handling of the issue. First, Indians were simply not worth the trouble of challenging Ontario's *Game Act*. Indian Affairs was well aware that in past confrontations with Ontario the federal government had fared poorly. From the boundary dispute to riparian rights the federal government repeatedly lost to 'Empire Ontario.' Successive Dominion governments, usually Conservative, were willing to challenge Ontario's might over important issues, but Indians were not considered vital enough. In past confrontations valuable resources were at stake, and the Dominion or Ontario government had the chance to control them. This was particularly true in northwestern Ontario where governments in Ottawa and Toronto sought to control timber and mineral

the creation of this act. See Arthur Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native People* (Toronto: Key Porter,

resources.⁹ In this instance, however, Ontario had much more at stake.

Although wildlife was not as valuable as minerals or timber it still represented a considerable amount of money in terms of tourism and other businesses, licensing fees and other regulatory charges. Like any other resource at the end of the nineteenth century Queen's Park sought to extend its regulatory arm out towards wildlife. The Dominion government never disputed Ontario's right to pass the *Game Act*, nor did it seek to compete with the provincial government over control of wildlife. The *Game Act* simply impacted on Indian Affairs, but it was not worth souring relations with Queen's Park for the sake of Natives who were destined for eventual acculturation.

Furthermore, even in the realm of Native affairs, clearly a Dominion concern under section 91(24) of the BNA Act, the Ontario government consistently won court decisions. In the *St. Catherine's Milling* decision the provincial government won control over the vast resources of northwestern Ontario. While Ojibwa rights were used by the Dominion government only as an attempt to check the growing power of Ontario the Privy Council's ruling had a detrimental impact on the position of Natives throughout the province in relation to Ontario's growing regulatory grip. The Privy Council also ruled against the Dominion in *Attorney General for the Dominion of Canada v.*

1996): 279-280.

⁹ This is explored in Barry Cottam's doctoral thesis, "Federal/Provincial Disputes, Natural Resources and the Treaty #3 Ojibway, 1867-1924." Ph.D. thesis, Dept. of History, University of Ottawa (1994). Dr. Cottam considered timber and minerals in chapters four, five and six.

Attorney General for Ontario. In this instance it was held that the Dominion was responsible for all annuity payments under the Robinson Treaties while Ontario reaped the benefits of resource development. Ontario's increasing control over Indian affairs was also apparent with the appointment of a provincial observer to accompany the Treaty Nine Commission in 1905 and 1906. Even before the Commission left to negotiate with the Cree and Ojibwa of Ontario's far north it was decided, at the province's insistence, that the bands would not be permitted to select reserve sites that contained, or potentially held, valuable minerals, timber or hydro-producing sites.

All of this meant little to the Ojibwa other than the simple fact that their treaty rights were being violated and Indian Affairs would not do anything to help them. The Ojibwa approached the issue of hunting and trapping from a completely different vantage compared to that of the federal and provincial governments. Prior to the 1890s they had not faced any substantial government interference in their hunting and trapping. Furthermore, they had no real appreciation of the nature of the constitution and confederation. For this reason, the Robinson treaties were the only documents they used to understand their relationship with the Crown. Indeed, the treaties, and the way of life guaranteed therein, were the only documents that the Ojibwa referred to from the first application of the Game Act to the 1940s. When a hunter from Fort William, for example, was arrested for hunting moose or trapping muskrat out of season he appealed to Indian Affairs to protect those rights guaranteed to him under the

Robinson-Superior treaty not section 91(24) of the constitution. When a band, or bands petitioned Indian Affairs it was always within the context of the treaty not an appeal to their continued "interest" in the land as outlined in s.109 of the BNA Act. By the 1920s references to the constitution and case law began to surface, but this occurred as a result of the Ojibwa retaining lawyers to appeal convictions (as in the Padjena case). Their understanding of the hunting issue remained cemented in the Robinson Treaties and the promises made to them by William Benjamin Robinson in 1850, and their perception of these promises within the context of their ancestors hunting and trapping practices.

A Note on Methodology:

An outline of the methodology used in this thesis is in order. The Robinson treaties were chosen to provide the thesis with an area within which to study Native hunting and trapping rights for two reasons: the date of their creation, and the region they cover. The Robinson treaties were created in 1850 when William Benjamin Robinson, acting under the authority of the government of the Province of Canada and the Crown, negotiated with the Ojibwa occupying the northern shores of Lakes Huron and Superior. This treaty was created prior to Confederation, and the constitutional division of powers between the federal government and the provinces. Unlike treaties Three and Nine (created in 1873, and 1905-06 respectively), the Robinson treaties were entered into by the Crown without the necessity of considering the political desires or aspirations of

Ontario. The Ontario government had dealt with the federal government prior to the creation of Treaty Nine to insure that Natives did not choose reserve sites that might contain valuable mineral deposits, timber, or hydro-potential. A provincial observer was part of the Treaty Nine Commissioner's party that traveled north in the summers of 1905 and 1906. Treaty Three had similar stipulations regarding reserve selection. The Robinson treaties were created by the Crown without having to consider competing political interests and jurisdictions; therefore, Queen's Park could not appeal to the federal government that, as a party to the treaties, its interests were being overlooked by unregulated Native hunting.

The regions encompassed by the Robinson treaties are useful for this study as they represent transitional zones between southern and far northern Ontario. Covering an area from the Ontario/Quebec boarder to the north shore of Lake Superior, and from the French River (near North Bay, Ontario) to the height of land, the Robinson treaties comprised the largest land cession to that point. By 1892, Euro-Canadian settlement was firmly entrenched, due to lumbering, mining and limited agriculture, but still scattered and not as dense as in southern Ontario. Settlement increased dramatically during the first two decades of the twentieth century, particularly in northeastern Ontario with the discovery of silver in Cobalt, and gold in Kirkland Lake and the Porcupine.

Despite this increased 'modern' activity the older elements of northern life still existed in the Robinson area. The Hudson's Bay Company still maintained a system of posts throughout the region. While the fur trade was

certainly not the dominant economic activity in the area, it still existed and was substantially more important for the Ojibwa than for Euro-Canadian residents. Traditional employers, such as the HBC offered casual employment, and other opportunities slowly emerged over the course of the period under study. Guiding sports fishermen in the summer, for example, was one such source of employment. Such activity, however, did not interfere with trapping and hunting in the fall and winter. The wage economy may have been making inroads in the Ojibwa economy, but trapping and hunting still played an important role.

Prior to the building of the railways, the CPR in the 1880s and the provincially owned Temiskaming and Northern Ontario (T&NO) Railway starting in 1902, even federal Indian Agents went to more remote Indian reserves only several times a year. The Parry Island Indian Agent, for example, was responsible for the Parry Island Band in the south, and as far north as Temagami. By the end of the nineteenth and beginning of the twentieth century, however, this began to change. With the discovery of nickel in the Sudbury Basin the 1880s and silver at Cobalt in 1905, towns appeared quickly and grew rapidly.¹⁰ Mining, lumbering, farming and sports fishermen and hunters meant increased government activity as regulations were put in place. This had

¹⁰ Silver was discovered at mileage point 103 by Fred LaRose, a T&NO employee. The town of Cobalt sprung up at that point and by 1908 had a population of approximately 7000. Gold was discovered around present day Kirkland Lake in by Bill Wright and Ed Hargreaves in 1911. See Robert J. Surtees, The Northern Connection: Ontario Northland Since 1902 (North York: Captus Press, 1992): 29-45, and 97-113.

already occurred in southern Ontario where the majority of Ontario's Euro-Canadian population lived. North of the height of land, the northern boundary of the Robinson treaties, the opposite was true. While there were Whites in that region, it was primarily untouched by governments until the completion of the Canadian National Railway and the extension of the T&NO to Moose Factory in the 1930s. There were no towns of significant size, and no cities. The Robinson treaties, occupying the middle portion of Ontario, provide a clear transitional zone between the two extremes.

Lastly, the Robinson treaties lend themselves to this study as most of the important incidents surrounding the *Game Act* and Native hunting and trapping rights occurred within these treaty areas. Arrests and prosecutions happened, and court challenges and appeals were brought about, for the most part, by Ojibwa covered by the Robinson treaties. The Commanda family of the Nipissing Reserve figure prominently throughout this thesis. Starting with the arrest of Barnaby Commanda in 1898 for shooting a moose out of season to the *R v. Commanda* decision in 1939, Robinson bands carried on a lengthy battle with the Ontario Game Commission. Again, this is not to say that other treaty Indians were not arrested and didn't appeal their convictions, but Robinson bands figure prominently throughout the dispute surrounding hunting and trapping rights.

Several sources have also been used in an innovative manner in this thesis. Hudson's Bay Company records, particularly post journals and district reports, were scoured to find references to Ojibwa hunters trapping and hunting

in particular areas. This provided an outline of where different groups of Ojibwa hunted, and allowed for some determination of Ojibwa hunting territories in the early nineteenth century.

Post records are often frustratingly imprecise. Often they contain references no more detailed than, for example: "An Indian came today, traded some furs, and left." However, even such statements can be revealing. A post manager may have noted that an Ojibwa left for his hunting grounds which were two days travel inland. If this entry is made in winter it indicates that the hunting grounds are not that far away from the post. Occasionally, post managers wrote much richer accounts, and revealed a hunter's name, exactly where he came from, and where he was going after leaving the post.

Record group ten (Indian Affairs) records were used extensively in this thesis. This was done for several reasons. At some point in the past all the files pertaining to Ontario's game laws were culled from various other files, and grouped together. Examinations of finding aids for the Department of Justice, the Prime Ministers, and other federal agencies revealed no records pertaining to the *Ontario Game Act*, and its application to Native people.

Record group ten also contained, other than the annual reports of the Game Commission, the only indication of Ontario's policy. Game and Fish Commission records, indeed all provincial game records prior to 1950, were destroyed in the 1960s. Provincial officials did not think they were of any historical interest. RG 10 provides some evidence of provincial attitudes either

indirectly as federal officials debated their policy options in light of Ontario's actions, or through copies of correspondence from Ontario's game officials.

The chapters in this thesis detail the several stages of the hunting issue debate in Ontario between 1892 and 1940. Before starting with this, however, background information is provided regarding the Robinson Treaties, and the Ojibwa and government perception of those treaties when they were created in 1850. Chapter one analyses these developments by examining the nature of Ojibwa harvesting on the north shores of Lakes Huron and Superior from the late eighteenth century to the 1840s. It then proceeds to explain why the Robinson Treaties were created, and what the Ojibwa and the Government of the Province of Canada hoped to gain by these treaties.

Chapter two outlines the origins of Ontario's Game and Fish Commission in 1892. It situates wildlife conservation within the interrelated factors of natural resource regulation, the "Empire Ontario" mentality of the late nineteenth century, and trends in conservation during the same period. It explains why the Game Commission was formed, and examines its report in detail, particularly those portions detailing the importance of tourism to Ontario's economy, and its depiction of Natives in relation to hunting.

Chapter three examines the beginning of the first phase in the application of the Ontario *Game Act* to the Ojibwa, their reaction to it as well as the lukewarm response of Indian Affairs. It outlines how Indian Affairs was

unwilling to protect Ojibwa harvesting rights within the broader context of Dominion-Ontario relations. Chapter four continues the analysis of the first phase by describing the Hudson's Bay Company's (HBC) challenge of the *Game Act* between 1910 and 1914, and the impact this process had on Indian Affairs and the Game Commission.

Chapters five and six frame the second phase in which the Ojibwa began to have an increased affect on the hunting debate although primarily on a local level. Chapter five outlines how the Ojibwa gained allies, of sorts, among some of the Indian Agents and newspaper editors in their attempts to protect their treaty rights. Duncan Campbell Scott figures prominently in both chapters as an example of how local Ojibwa circumstances, which Scott was aware of due to his travels in northern Ontario, increasingly impacted on Indian Affairs starting in 1915. Chapter six continues this analysis with the *Padjena v. Rex* case of 1930, and detailing the increasing level of local support the Ojibwa enjoyed as the Department of Game became increasingly strict in the application of the province's game laws.

Chapters seven and eight are concerned with the third phase of the hunting issue. Indian Affairs officials finally realize that seeking a political solution is not viable, particularly after the Black Committee of the 1930s (one of the subjects of chapter seven). Chapter Eight outlines the events surrounding *R. v. Commanda*, and Indian Affairs failed attempt to appeal that decision.

CHAPTER ONE

THE OJIBWA CONTEXT AND THE ROBINSON TREATIES

Both parties to the Robinson Treaties brought a unique perspective to these agreements. The Government of the Province of Canada viewed the Robinson-Superior and Robinson-Huron Treaties from two perspectives. First, as a means of diffusing a hostile situation in the northern region of the colony that erupted when mining leases were let out to private companies to the consternation of the Ojibwa. Second, as a land cession in the same spirit as the Bond-Head purchases and other earlier agreements.¹ In return for providing the Ojibwa with a lump sum payment of £8000, an annual annuity, and continued hunting rights the government received unfettered access to the rich mineral deposits on the north shore of Lake Superior and any future discoveries in the territory extending from Lake Nipissing to the mouth of the Pigeon River and north to the height of land. In the government's opinion, the Ojibwa were an obstacle to the development of the mineral deposits north of the Sault rapids. By agreeing to give them continued use of their interior hunting grounds, reported

¹ The Bond-Head purchases covered the Saugeen Peninsula and Manitoulin Island in 1836, and were named after Lieutenant-Governor Sir Francis Bond Head who conducted the treaty negotiations. The former comprised approximately 1,500,000 acres south of present day Owen Sound. The former saw the Saugeen Ojibwa remove themselves to the Saugeen Peninsula where they would be protected against white settlement (although Bond Head hoped they would eventually move to Manitoulin Island). The latter was intended to make Manitoulin a refuge for all tribes in Upper Canada. Besides being concerned with removing Natives from the unfavourable influence of white settlement, Bond-Head also realized that more land had to be opened for white settlement. See Robert J. Surtees, "Indian Land Cessions in Ontario, 1763-1862:

to be valueless by government investigators, the government could open this northern region up to development.

The Ojibwa saw the treaties not as a land cession, but as an agreement to both settle land disputes that had arisen, and also to allow Whites to settle on their lands and engage in mining and logging. In return they received a lump sum payment, annual annuities in perpetuity, reserve lands, and continued access to their traditional hunting, trapping and fishing grounds. The treaties, when viewed from the Ojibwa perspective, reveals that they surrendered very little. All they permitted was settlement on their lands, and mining and logging. By retaining their traditional lands, and their right to use them as they had "heretofore been in the habit of doing," they believed they retained their hunting and fishing grounds and the right to use them for traditional harvesting purposes.

The land was always important to the Ojibwa, and the treaties heralded the beginning of a period which the Ojibwa began to lose control of it. Change had come before - competition between the Hudson's Bay Company and the North-West Company had resulted in the depletion of certain fur bearing animals and big game, but the Ojibwa had always remained important to the traders. While these newcomers may have misunderstood and denigrated Ojibwa culture they never sought to consciously change it. After 1850 Ojibwa-White relations entered a new era. Government officials saw the Ojibwa as a

barrier to developing the resources of the region. Ojibwa adaptations to the region, such as familial hunting territories, interested colonial officials only insofar as knowledge of them expedited the treaty process. They were concerned only with the lakeshore and the copper deposits located there; the interior held little interest for them. What was important and vital to the Ojibwa - the lakes and rivers of the region and hunting and trapping - were of little consequence to a government that had little knowledge of the land.

The territory covered by the Robinson-Superior and Robinson-Huron treaties extends, in modern terms, from the inter-provincial boarder separating Ontario and Quebec in the east to the Pigeon River near the present day city of Thunder Bay in the west. From north to south, the Robinson treaties stretch from the height of land, the dividing line between rivers that drain either north into Hudson's Bay or south to the Great Lakes, to approximately Parry Sound. It is a land that appears deceptively simple at first as only two geographical phenomena dominate the landscape. the Canadian Shield and Lakes Huron and Superior. While it is possible to define the region simply as cold, rugged, forbidding and extreme this overlooks the interconnectedness of the Shield and the Lakes, the diversity of the climate and environment, and the different ways various cultures adapted to the region.

Jennifer Brown and C. Roderick Wilson described the Canadian Shield as "the single topographic feature that has most influenced the shape of Northern Algonquin life...[it provides] the contours for countless lakes, streams, and swamps - ideal habitat for beaver, muskrat, and other animal species long

important for food and furs.”² While the latter half of their assertion is certainly true they overlooked the interconnected nature of the Shield and the Great Lakes and stressed the former at the expense of the latter. Both features were drawn together by the retreat of the Wisconsin glacier. When the glacier began to retreat over ten thousand years ago it exerted downward pressure of nine billion tons per square mile over the Canadian Shield. Dragging boulders and debris it acted as a massive sheet of sand paper, carving out the Great Lakes and the countless smaller lakes and rivers that flow southward, over the Shield, into Huron and Superior. It also left behind poor soil conditions, as the glacier scoured it off the rocks, which gave rise to the indigenous vegetation that covers the region. The glacier linked elements of the region which, at first sight, seem disparate.

The Shield and the Lakes do possess unique elements, but these must be considered in conjunction to one another. The Shield, for example, does have an important influence over the region. Large cliffs, and exposed portions of the Shield, create a rugged terrain that restricts travel. However, the rivers and lakes of the drainage basin provide a means of travelling this landscape. Flowing south to the Great Lakes, and connecting the countless lakes that dot the landscape, these rivers provided a means of travel far preferable to fighting with thick bush, bogs, swamps and rugged hills. The Shield also affects the climate. Known as a continental climate, temperatures in northern Ontario can easily

² Jennifer Brown and C. Roderick Wilson, “The Eastern Subarctic - A Regional Overview,” Native Peoples: The Canadian Experience, R. Bruce Morrison and

range between minus fifty degrees Celsius in the winter and plus forty degrees in the summer. There are greater extremes of cold, for example, north of Lake Superior than in the Mackenzie Delta.

The Great Lakes can affect this climate. Areas close to the lake shore experience slightly warmer temperatures. This moderating, interactive affect impacts on the vegetation in the region. Closer to the lake shore, and on the southern fringe of the treaty areas a greater variety of deciduous trees exist due to the moderating affect of Superior and Huron. Further inland and north coniferous and hardier trees dominate the landscape. The Robinson treaties cover six different vegetative zone within two larger, more generalized areas: the Boreal Forest and the Great Lakes Forest.³ White and black spruce are the characteristic trees of the boreal forest, with birch and aspen occupying certain portions. The Great Lakes-St. Lawrence Forest extends from the north shore of Georgian Bay to just north of Lake Temagami. It is a mixed forest of conifers such as white and red pine, white spruce, maple, poplar, beech and some oak on the southern fringe.

Within these larger areas more varied micro-vegetative zones exist, reflecting the influence of the Lakes and Shield on the make up of the region. Along the north and northeastern shores of Georgian Bay, extending to the eastern tip of Lake Nipissing, the trees are a mixed deciduous-coniferous forest.

C. Roderick Wilson eds. (Toronto: McClelland and Stewart, 1986): 136.

³ Helen Hornbeck Tanner, et.al., Atlas of Great Lakes Indian History (Norman: University of Oklahoma Press, 1982): 14-15. D.F. Putnam, R.G. Putnam, Canada: A Regional Analysis (Toronto: J.M. Dent and Sons, 1970): 33.

Maple, beech, poplar, pine, tamarack, and hemlock predominate with some oak. North of this portion, extending westward from Lake Timiskaming to the Missasagi River, the forest is primarily coniferous with some of the weedier deciduous trees as well, mainly poplar and birch. Closer to Lake Huron deciduous trees re-appear in greater numbers due to the moderating affect of the lake on the climate. Maple trees cluster along the shoreline. Past the Magpie River, and heading along the north shore of Lake Superior, the vegetation changes again. Coniferous trees, mainly pine, spruce and fir, are hardy enough to withstand the colder climate with some small poplar and birch. Further inland these few deciduous trees thin out as Jack Pine, Tamarack, spruce and balsam trees become dominant.

The First People:

Accommodating oneself to the region occurred from the time people first occupied the land. When the glacier first started retreating, and people began to occupy the land large herding animals roamed the tundra like environment. During this earlier period these people resembled the Folsom and Laurel cultures of the interior plains.⁴ A changing environment forced these first people to adapt. During the late Paleo-Indian (8000-6000 B.C.), and the Archaic Periods (6000-500 B.C.) the people living in the area began to follow a seasonal round of

⁴ Robert Funk, "Post-Pleistocene Adaptations," Handbook of North American Indians. Volume 6: The Northeast, Bruce Trigger, volume editor (Washington: Smithsonian Institution, 1986): 16. See also Liz Bryan, The Buffalo People:

subsistence activity.⁵ The Sheguiandah site on Manitoulin Island, and the Brohm site on the north shore of Lake Superior, show that during the Paleo-Indian period the people were mining quartzite, particularly at Sheguiandah, out of which blades and tools were fashioned to hunt and utilize the diverse animals that existed.⁶ The varied nature of the first peoples' lifestyle became increasingly pronounced during the Archaic period. Site locations of the Archaic cultures on major waterways and islands suggests that these people possessed water craft, and a varied existence that relied on fishing. Moving into the Woodland Period (500-B.C. to the Historic Period) a greater abundance of archaeological evidence provides a more complete picture of subsistence activity. Site excavations reveal the bones of moose, beaver, caribou (which were once abundant in northern Ontario) and muskrat as well as whitefish, sturgeon, northern pike and pickerel.⁷ The site excavations further indicate that people lived in small groups of hunters.⁸

The Ojibwa and the peoples who preceded them inserted themselves into this northern environment.⁹ While they manipulated it to a certain extent, they

Prehistoric Archaeology of the Canadian Plains (Edmonton: University of Alberta Press, 1991).

⁵ Funk, 19.

⁶ Funk, 17-19. See also Thor Conway, Archaeology in Northeastern Ontario: Searching for our Past (Toronto: Ministry of Culture and Recreation, n.d.): 20-23. Also K.C.A. Dawson, Prehistory of Northern Ontario (Thunder Bay: Historical Museum Society, 1983): 4-7.

⁷ Dawson, 15.

⁸ Dawson, 18.

⁹ When exactly the 'Ojibwa' came to be is a matter of debate. Charles Bishop examined this briefly in his article "The Question of Ojibwa Clans." Actes du Vingtième Congrès des Algonquinistes, William Cowan ed. (Ottawa: Carlton

were closely tied to the natural rhythms of the climate, geography and the seasons. Hunting, trapping, fishing, and the gathering of indigenous plants were undertaken at certain times of the year on a cyclical basis. The climate does not permit a long growing season, and the soil is thin and unfavourable to farming. Only those plants and animals indigenous to the region were capable of surviving in this climate. Berries, tree bark (such as the secondary greenish bark of the white birch which was used to cure scurvy), cat-tails (whose roots and pulpy interior can be eaten) and other flora were the only naturally occurring vegetation the Ojibwa could use. These products, such as berries, were also closely tied to the seasons with wild strawberries occurring first, followed by blueberries and raspberries. Knowledge of where such plants grew, and at what time of year was necessary for continued survival.¹⁰ Hunting and trapping was similarly linked to the rhythm of the seasons. While animals can be hunted at any time of the year, to use them for specific purposes requires that they be dispatched at specific times. Furs are good only in the dead of winter. Fish runs occur at certain times of the year. The Ojibwa, accordingly, developed

University Press, 1989): 45-49. He states the confusion began with the first French missionaries and the use of different terms to label the various bands they encountered. The term Ojibwa has, in the last two centuries, been expanded to include more people.

¹⁰ Francis Densmore explored this facet of Ojibwa harvesting in the 1920s in "Uses of Plants by the Chippewa Indians." This work was done for the Bureau of American Ethnology of the Smithsonian Institute. It was reissued in 1974 as How Indians Use Wild Plants for Food, Medicine and Crafts (New York: Dover Publications, 1974). While Densmore was concerned with the Chippewa (the American term for Ojibwa) who lived in Minnesota and Wisconsin her general observations regarding the varied use of plants by the Chippewa can be applied to the north shore of lakes Huron and Superior.

a number of methods to catch animals. The environment did not support a single, large herding animal as on the plains, and this diverse ecology necessitated a varied response. Different means of capture and dispatch were required to take an assortment of animals. Moose, deer, bear, raccoon, porcupine, beaver, muskrat, mink, marten, wolf, fox, lynx, and other animals are all different in their habits. Knowledge of these animals' habits, how to track them, and how to trap or hunt them was essential to a hunter's success. In order to survive, the Ojibwa had to fit into this larger scheme. A varied climate with extremes of temperature and terrain, and a diverse animal and plant ecology tied to this climate made adaptation a necessity - something the Ojibwa accomplished with considerable success.

Similar adaptation was apparent in the Ojibwa's methods of travel. It too was directly dependent on the time of year. Water travel was possible only when the rivers and lakes opened in the spring. The canoe permitted quick travel in the spring and summer, and man made or natural portages allowed hunters to move between lakes and rivers or circumvent rough water. The method of making canoes required substantial knowledge of the land, and the materials it could provide. Birch trees had to be chosen carefully, spruce roots were used to sew the bark together, wood had to be selected for the frame, and tree gum was boiled and used as a sealant. By late November, when ice and snow re-appeared, the canoes became useless. The symbols of northern winter travel, the snowshoe and toboggan, enabled families to travel to their hunting territories and work their trap lines. Even then substantial knowledge was

needed to make these implements. Furthermore, knowledge of winter travelling, particularly ice conditions on lakes, was a vital necessity.

The seasonal lifestyle of the Ojibway was dictated to a large extent by the very environment that they lived in. Hunting, trapping, fishing, the gathering of naturally occurring plants, trading and travelling depended on the seasons. This is not to say that Ojibway culture was pre-determined by the geography; however, to deny the fundamental influence it had on Ojibway society is also an over-exaggeration. The Ojibway, like any other society, developed means of existing in their environment, and these means changed over time as more innovative and effective methods were developed. These methods, however, were created in reaction to the environment. In this way the land and the climate helped mould the Ojibway and their culture.

Family Hunting Territories:

With the arrival of Europeans and the beginnings of the fur trade substantial changes occurred in the Ojibwa's culture. There are academic questions regarding the early fur trade, and its affect on Ojibwa land-use.¹¹ One of the most important is whether family or band hunting territories existed before the fur trade, or arose as a result of it.¹² Charles Bishop argues that the

¹¹ Charles Bishop, The Northern Ojibwa and the Fur Trade (Toronto: Holt, Rinehart and Winston, 1974): 8-11.

¹² E.S. Rogers, "The Northern Ojibwa", The Handbook of North American Indians, vol. 6 (Washington: Smithsonian Institution, 1986). Rogers argues that the band system was pre-Contact in its origins. Charles Bishop argues a contrary opinion. See Bishop, The Northern Ojibway and the Fur Trade. See

system of family hunting territories appeared in the late seventeenth century as a result of the fur trade.¹³ Prior to this families hunted essentially wherever they wanted, with no concept of land or territorial ownership. Furthermore, Bishop does not believe that the totemic clan system of the Ojibwa impacted on family hunting territories. These social structures were important for the manner in which they organized social relations “not in matters that involved production for personal consumption.”¹⁴ Family hunting territories surfaced as HBC post managers and factors assigned lands to specific families more effectively to exploit fur bearing animals around each fort. E.S. Rogers, conversely, believed that the system was pre-historic in origin. Rogers argued that the nature of the environment, and the archaeological record shows that people lived in small groups and that such organization indicates the existence of harvesting territories. Regardless of whether a system of land ownership developed before or prior to the fur trade, with well known boundaries, it is clear that by the beginning of the nineteenth century Ojibwa families owned trap lines and hunting territories, and fur trading posts had become part of the Ojibwa’s lifestyle.

The existence of familial hunting territories also resulted in social sanctions appearing to regulate them. Trespass, for example, became, in some ways, a punishable crime. Charles Bishop noted this in his study of the area

also Bishop, “Northern Algonkian, 1550-1760”, Aboriginal Ontario: Historical Perspectives on the First Nations, E.S. Rogers and Donald Smith eds. (Toronto: Dundurn Press, 1994): 283.

¹³ Bishop, “The Northern Algonkian, 1550-1760”, p. 283.

north of the height of land.¹⁵ Through his study of HBC post records during the mid-nineteenth century Bishop outlined how the northern Ojibwa regarded trespass as unacceptable, and took steps to prevent other hunters from entering their lands to hunt or trap.¹⁶ Bishop speculated that since the Ojibwa population near Lake Superior was more dense and big game animal populations were shrinking that hunting territories may have emerged earlier in the south.¹⁷ As will be outlined later in this chapter instances of trespass appear in the Lake Superior and Lake Huron HBC posts' records. In each instance the family which used the territory in question took offence when someone used their land without permission.

This system of familial hunting territories affected both how the Ojibwa perceived the hunting clause in the Robinson treaties and their later defence of it. The promise that the bands could continue to hunt as they had heretofore been

¹⁴ Bishop, "The Question of Ojibwa Clans," p. 58.

¹⁵ Bishop, "The Emergence of Hunting Territories Among the Northern Ojibwa." p. 9

¹⁶ *Ibid.*, p. 5.

¹⁷ *Ibid.*, p. 12. Tim Holzkam, Leo Waisberg and Joan A. Lovisek disagree with this theory when applied to northwestern Ontario. Both Bishop and Arthur Ray have argued that the Boundary-Waters Region experienced the same game depletion, both Holzkam et.al. say that records reveal big game was not as scarce as Bishop and Ray believe. Their evidence, however, seems anecdotal and often times extended too meet their thesis. They also leap between decades, from the 1840s to 1889, and argue that game was abundant during the intervening period with no supporting evidence. Also, no attempt was made by the authors to discern how much fresh meat was needed to sustain an Ojibwa family over the winter (see chapter seven of this thesis for an example for a Cree family). Their evidence for the continued viability of fur trapping is much stronger. See Tim Holzkam, Leo G. Waisberg and Joan A. Lovisek, "'Stout Athletic Fellow': The Ojibwa During the 'Big Game Collapse' in Northwestern Ontario, 1821-71."

in the habit of doing meant to them that their system of territorial division would be respected. This perception continued after the treaty, and into the next century. Indeed, as noted throughout later chapters hunters were always arrested in the vicinity of their reserves. No records exist of someone from Fort William, for example, being arrested around Sault Ste. Marie. Furthermore, when these hunters appealed to Indian Affairs, or when bands or chiefs petitioned the Crown it was couched in terms of their band affiliation. Band identification, while certainly strengthened by the reserve system, had its origins in the Ojibwa family hunting territory system and the fur trade. This identification of their hunting rights as being linked to traditional territory affected their perception of the treaties, and their later interpretation of it.

Although fort and post journals are often painfully imprecise they can provide information detailing traditional hunting territories if the records are carefully scrutinized. What the fur trade records reveal is that hunters who traded at the forts lived in close proximity to the fort. Post and fort managers were concerned with securing furs and making a profit; therefore, the records are often completely silent as to the comings and goings of Natives. Finding specific references to Native activity can be difficult. A typical entry is: "Three Indians came today. Traded 6 beaver pelts. Took some supplies and left." A careful examination of the post and fort journals, however, reveal that families

stayed around the forts at most times of the year, and often no more than a one week trip away in winter.

Several things were looked for when examining post records. First, there were occasional post managers who kept fairly detailed records. Specific references to hunters by name, where they came from, and where they were going (and for what reason) can sometimes be found in the post records. When hunters or families are not referred to by name, they were sometimes referred to based on their point of origin. Journals might refer to the "French River Indians" coming to trade at La Cloche post. Geographical references, such as this, were taken as inferences of both hunting territory locations, and a closer sense of band identity. Post journals also refer to Ojibwa heading "inland" after trading. While this is an imprecise term it does indicate that they did not spread out along the lake shore during the winter, but went into the interior. Lastly, in the nineteenth century, HBC post managers began to engage in a practice known as "tripping." Tripping was the practice of sending Company employees out to the Native camps to get their furs. This was done to secure the pelts before independent traders did. When trippers were sent out, the manager often noted their destination, and, upon the men's return, noted what families they saw. If men were sent to Lac la Fleche (Arrow Lake) near Fort William, and returned with furs this is likely an indication that Natives trapped in that area.

Recently some have argued that the Ojibwa travelled incredible distances to hunt and fish.¹⁸ While it is true that some Ojibwa did travel from, for example, Sault Ste. Marie to Red River and back, this should not be considered an extension of hunting territories.¹⁹ Trips of this magnitude were often undertaken under the auspices of the HBC, or guiding government surveyors or settlers to other points along the lakes or further west. While it is almost certain that during these trips Native guides fished or hunted to supplement their food supply, it is wrong to see this as an Ojibwa hunter, family or band attempting to expand their hunting territory. Iroquois hunters, for example, were used by the Northwest Company to trap beaver in what is today Saskatchewan and Alberta, but no one would claim that this meant their lands extended from Lake Ontario to Regina. For that reason, an examination of HBC post records must differentiate between Native travel undertaken for purposes of hunting and trapping, and travel undertaken for the Hudson's Bay Company. There follows here some analysis of those posts found within the Robinson Treaties' area.

¹⁸ Opinions of this sort have been stated most often in recent Ontario courts by expert witnesses. See for example the testimony of James Morrison in *R. v. Dwayne D. McCoy*, Ontario Provincial Offences Court, 24 January 1994.

¹⁹ Janet Chute has noted how the Sault Ste. Marie Ojibwa Chief, Shingwaukonce, had traveled extensively throughout Lakes Huron and Superior, and as far west as Red River. She does not, however, contend that this translates into an extension of his hunting territories but as an example of his wide knowledge of the Great Lakes and his attempts to form a larger Ojibwa coalition. See Janet Chute, "A Unifying Vision: Shingwaukonce's Plan for the Future of the Great Lakes Ojibwa." Journal of the Canadian Historical Association, Vol. 7 (Ottawa: Canadian Historical Association, 1997): 55-80.

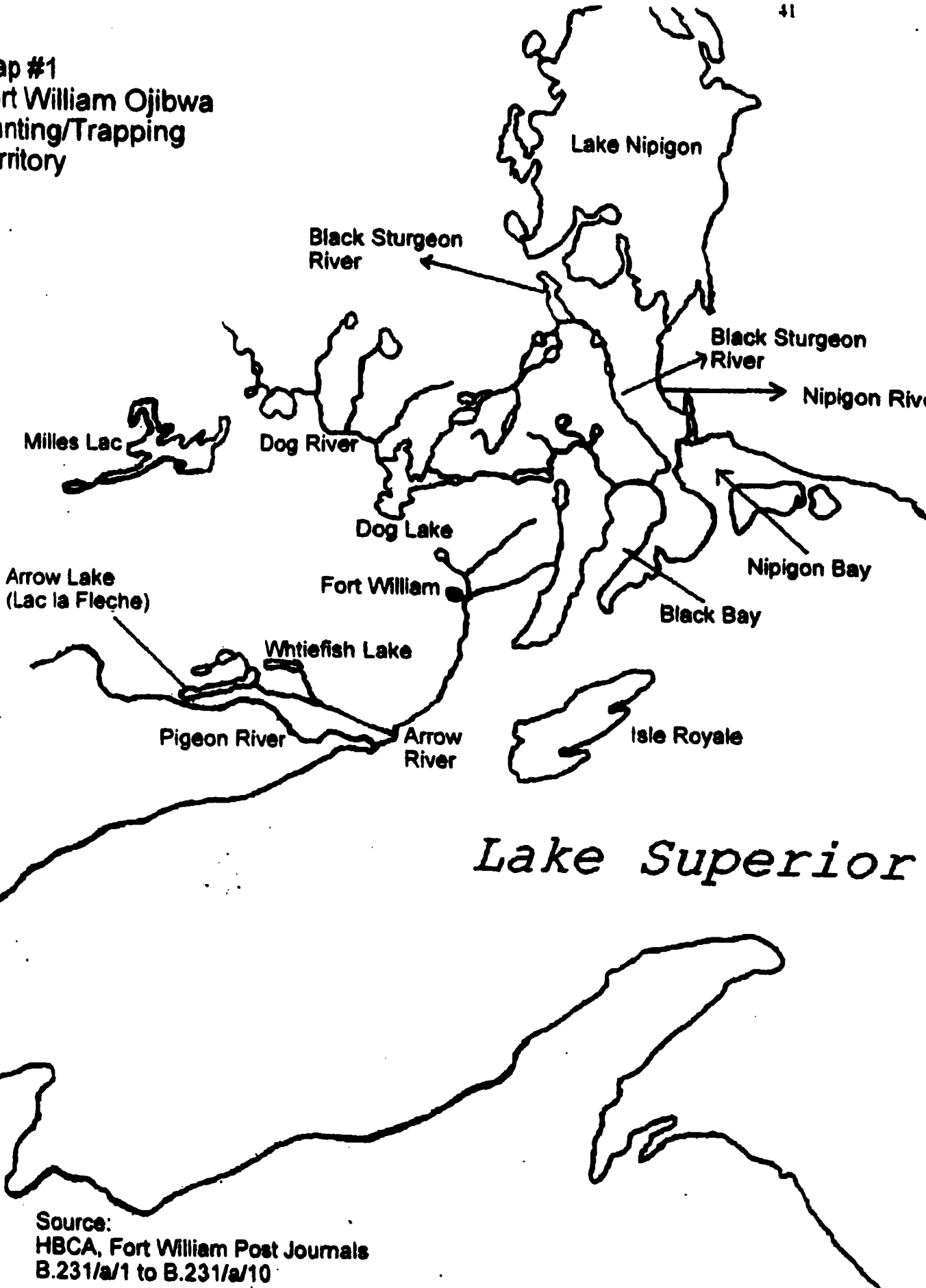
Lake Superior Posts:

Several posts were scattered along the north shore of Lake Superior, and slightly inland: Point Meurion/Fort William, Nipigon House, Pic Post, and Michipicoten Post.²⁰ Journals from these posts show that Ojibwa families operated in the general vicinity around these. Where the journals have references to lakes or rivers, they are often no more than several days travel away by canoe, or more by foot. Furthermore, for those posts whose annual reports have survived, the post manager often outlined the limits of the local band's hunting territory. Post records also indicate that the bands did not interact to any great degree with other bands beyond those in close proximity. If there was contact between distant bands, Fort William and Michipicoten for example, it was often the result of Company boats travelling between the forts with Native men on board as hired hands. Inter-band contact was limited, for the most part, to neighbouring communities: Fort William and Lake Nipigon, Pic and Long Lake.

At the HBC's Fort William Post, families hunted in a rough half circle that extended from Black Bay (northeast of the city of Thunder Bay), north to Lake Nipigon, west as far as Milles Lac, and south to Lac la Fleche (referred to today on maps as Arrow lake) (*see map #1, p. 41*). Throughout the post journal, from approximately 1820 to the 1830s, there are scattered but numerous references to

²⁰ Point Meurion was established by the HBC to oppose Fort William which, prior to 1821, was a North-West Company trading post. It was located three leagues west of Fort William. With the merger of the HBC and NWC in 1821 Point Meurion was abandoned and Fort William was taken over by the HBC.

**Map #1
Fort William Ojibwa
Hunting/Trapping
Territory**



Source:
HBCA, Fort William Post Journals
B.231/a/1 to B.231/a/10

Native hunters, with or without their families, arriving at the post to trade furs and then heading back to their trap lines. The first of such entries is in the Point Meurion 1820 journal. In the beginning of October the post manger noted that “[an] Indian arrived from Dog Lake (about two days journey NW of this place) with a bundle of furs consisting of 2 large beaver, 4 small kitts [baby beaver]...2 minks and 45 muskrats.”²¹

Later post records refer to several other lakes in the region around Fort William. Lake Nipigon, for example, appears in the journal, and indicates that some of the families in each location were related through intermarriage. On 24 June, 1827, an Ojibwa from Lake Nipigon named Qeshquashcon arrived from Fort William to visit his relatives.²² Another man, referred to in the journal as the Illinois, arrived at Fort William from Lake Nipigon a month after Qeshquashcon.²³ Other lakes near Lake Nipigon also surface in the Fort William journal. In the early summer of 1827 hunters arrived from Sturgeon Lake to trade at the fort.²⁴ Mille Lac was also used by Natives. A hunter called “Little Rat” travelled to Fort William in September of 1827 to trade furs and take on supplies for the winter.²⁵ In a later journal for 1830-31, Ojibwa from Mille Lac

²¹ Hudson’s Bay Company Archives (HBCA), B.231/a/5, Fort William/Point Meurion Journal, 1 October 1820.

²² HBCA, B.231/a/7, Fort William Journal, 24 June 1827.

²³ *Ibid.*, 15 July 1827. The Illinois was a trading captain appointed by the Fort William post. See Lise C. Hansen, “The Anishinabek Land Claim and the Participation of the Indian People Living on the North Shore of Lake Superior in the Robinson Superior Treaty of 1850.” (Toronto: Ministry of Natural Resources, Office of Indian Resource Policy, 1985).

²⁴ *Ibid.*, 27 June 1827.

²⁵ *Ibid.*, 15 September 1827.

arrived at the post to trade furs.²⁶ Several Natives arrived at the fort on the 29 December, 1827 “from Black Bay, they brought two skins in martin.”²⁷ These skins were likely payment to let the hunters partake in the post’s New Years celebration. In the spring of 1828 the fort manager sent several employees to Black Bay to meet a hunter named “Temyoe” and collect his skins.²⁸ In early June, 1828, three young hunters arrived from Black Bay with twenty-four skins.²⁹

Different families would also hunt and trap in close vicinity to each other. In early December, 1827, the post factor at Fort William sent several HBC employees to Lac la Fleche (Arrow Lake) to gather furs from Natives residing there (a practice known as tripping). Upon their return the men obviously met some families as they brought furs with them; however, they noted that they “[had] not seen the Spaniard or [his] Band.”³⁰ Clearly there was more than one family hunting around that lake. One such family was Peau de Chat’s, a chief amongst the Fort William Ojibwa.³¹ Shortly after Christmas, 1827, “Peau de Chat and two sons from Lac la Fleche [arrived] with their families.”³² Another family,

²⁶ HBCA, B.231/a/10. Fort William Journal 1830-31. 12 August 1830.

²⁷ HBCA, B.231/a/7. Fort William Journal 1827-1828. 29 December 1827.

²⁸ *Ibid.* 9 April 1828.

²⁹ *Ibid.* 2 June 1828.

³⁰ *Ibid.*, 5 December 1827.

³¹ Peau de Chat signed the Robinson-Superior Treaty on behalf of the Fort William Ojibwa. See Canada: Indian Treaties and Surrenders, from 1680-1902. Treaty Numbers 1 - 138 (Toronto: Coles Publishing Company, 1971): 147-148. Peau de Chat is also noted as being an Ojibwa chief in the 1849 report of Alexander Vidal and Thomas Anderson. See Archives of Ontario (AO), MU 1464, Aemilius Irving Papers 26/31/14. Typescript Copy of Report of Commissioners Vidal and Anderson, 1849. See also Hansen, “The Anishinabek Land Claim...”, 52-53.

³² HBCA, B.231/a/7. 26 December 1827.

that of a hunter referred to as "Petit Corbeau," hunted around Arrow Lake. On 30 December, 1830, he and two of his step sons "arrive from Lac la Fleche with a few skins they hunted there."³³ In the spring of 1828 several men were once again sent to Lac la Fleche to secure furs "from the Indians of that place."³⁴

Similarly more than one family hunted and trapped around White Fish Lake. In the beginning of February, 1828, the post manger noted that "Peau de Chat and band went off they are going to White Fish Lake, [to] hunt rabbits and make martin traps."³⁵ Later that year several HBC employees arrived from White Fish Lake. "They brought two skins in Muskrats from Papamasum who they saw at White Fish Lake."³⁶

Other journal entries indicate that some families hunted, trapped or fished in close proximity to the fort. In mid-July, 1828, for example several hunters ("Petit Oiseau, Netomap, Attmeau, and Cheobitung") arrived at Fort William "from the Petit Marrais, six miles above this Fort..."³⁷ In the winter of 1828 an Ojibwa family left the post after receiving supplies to return to the hunting grounds which were a week away:

All the Indians went off gave about 2 bags rough corn to the whole of them in order to assist them to get to their hunting grounds, which is about six days march from hence.³⁸

³³ HBCA, B.231/a/10. 30 December 1830.

³⁴ HBCA, B.231/a/7. 3 April 1828.

³⁵ Ibid., 1 February 1828.

³⁶ Ibid. 21 August 1828.

³⁷ Ibid. 17 July 1828.

³⁸ HBCA, B.231/a/8. Fort William Post Journal, 1828-1829. 21 February 1829.

Northeast of Fort William lay the HBC's Nipigon House (*see Map #2, p. 46*). There are two useful documents to consider in relation to this post: the journal of Douglas Cameron, and records kept by the HBC's post manager. These sources reveal that in the nineteenth century the Nipigon Ojibwa operated within a fairly well defined territory. Nipigon House's annual reports to the HBC head office in London provide a clear outline of the territory hunted and trapped over by the Ojibwa families in the area. In the report for 1828-29, the post manger wrote:

The limits of this Establishment cannot be exactly ascertained as to the number of miles it extends in different directions from this Lake, the lands which the Indians who reside at this Post claims and hunts upon extends South to the boarders of Lake Superior, North to Sturgeon Lake, west to Lac de Chiens [referred to as Dog Lake on current maps] and East to Long Lake.³⁹ [see map #2]

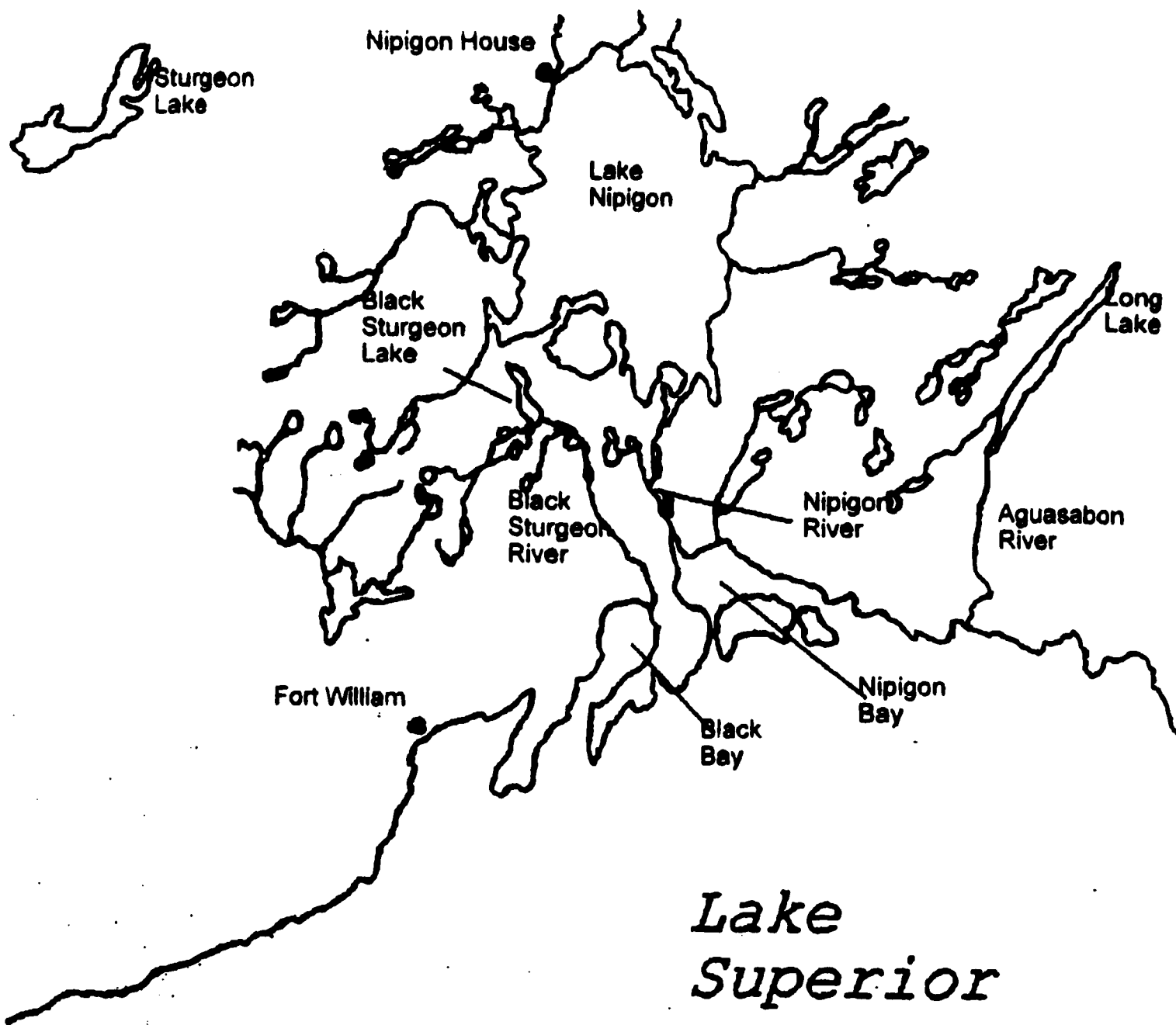
In an earlier district report, the Nipigon House manager estimated that the Natives' hunting territory covered approximately two hundred square miles.⁴⁰ The Ojibwa population around Lake Nipigon was estimated at approximately two hundred and twenty seven people, comprising thirty-four families.⁴¹

Douglas Cameron wrote down his observations regarding the Nipigon Ojibwa in 1804-1805 when he was an employee of the North West Company.

³⁹ HBCA, B.149/e/2. Nipigon Report on District, 1828-1829.

⁴⁰ HBCA, B.149//1. Nipigon Report on District, 1828. The manager might have underestimated the extent of the Nipigon Ojibwa's territory. Frank Speck estimated that an Ojibwa family required approximately fifty square miles to support itself. See Frank Speck, Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley (Ottawa: Department of Mines, Geological Survey, 1915).

**Map #2
Nipigon Ojibwa
Hunting/Trapping
Territory**



**Source:
HBCA, Nipigon Report on District
B.149/e/1 to B.149/e/2**

Cameron estimated that the NWC's Nipigon Department (which extended over a larger area than the HBC's district) contained approximately 820 Ojibwa and Cree.⁴² He said that the Ojibwa around Lake Nipigon were a combination of Ojibwa families from Lake Superior and Cree from Hudson's Bay who migrated northward and southward respectively one hundred and fifty years previous in search of better hunting grounds. He based this assumption on the language spoken around Lake Nipigon which, he claimed, was a combination of both dialects, and after speaking to "every old man with whom I conversed and from whom I made some enquiries [sic.] on this subject."

Cameron also noted that Ojibwa families did not travel a great distance when searching for game in the winter,⁴³ but stayed in the area around Lake Nipigon. Although Cameron did make an erroneous observation, common to all early Europeans, that "all these Indians lead a wandering life both winter and summer" he did provide some detailed information about their movements. When hunting in the winter they would not stay in one location for long - often no more than five days. After that point they would move, usually about nine miles, to another location. This was likely done to conserve wildlife and prevent over-hunting.

⁴² Archives of Ontario (AO), MU 2200, Box 5-5c. D. Cameron, "The Nipigon Country: A Sketch of the Customs, Manners and Way of Living of the Natives of the barren country around Nipigon." The Nipigon Department extended as far north as Hayes River; therefore, Cameron was also referring to Cree. p. 2.

⁴³ Archives of Ontario (AO), MU 2200, Box 5-5c. D. Cameron, "The Nipigon Country: A Sketch of the Customs, Manners and Way of Living of the Natives of the barren country around Nipigon."

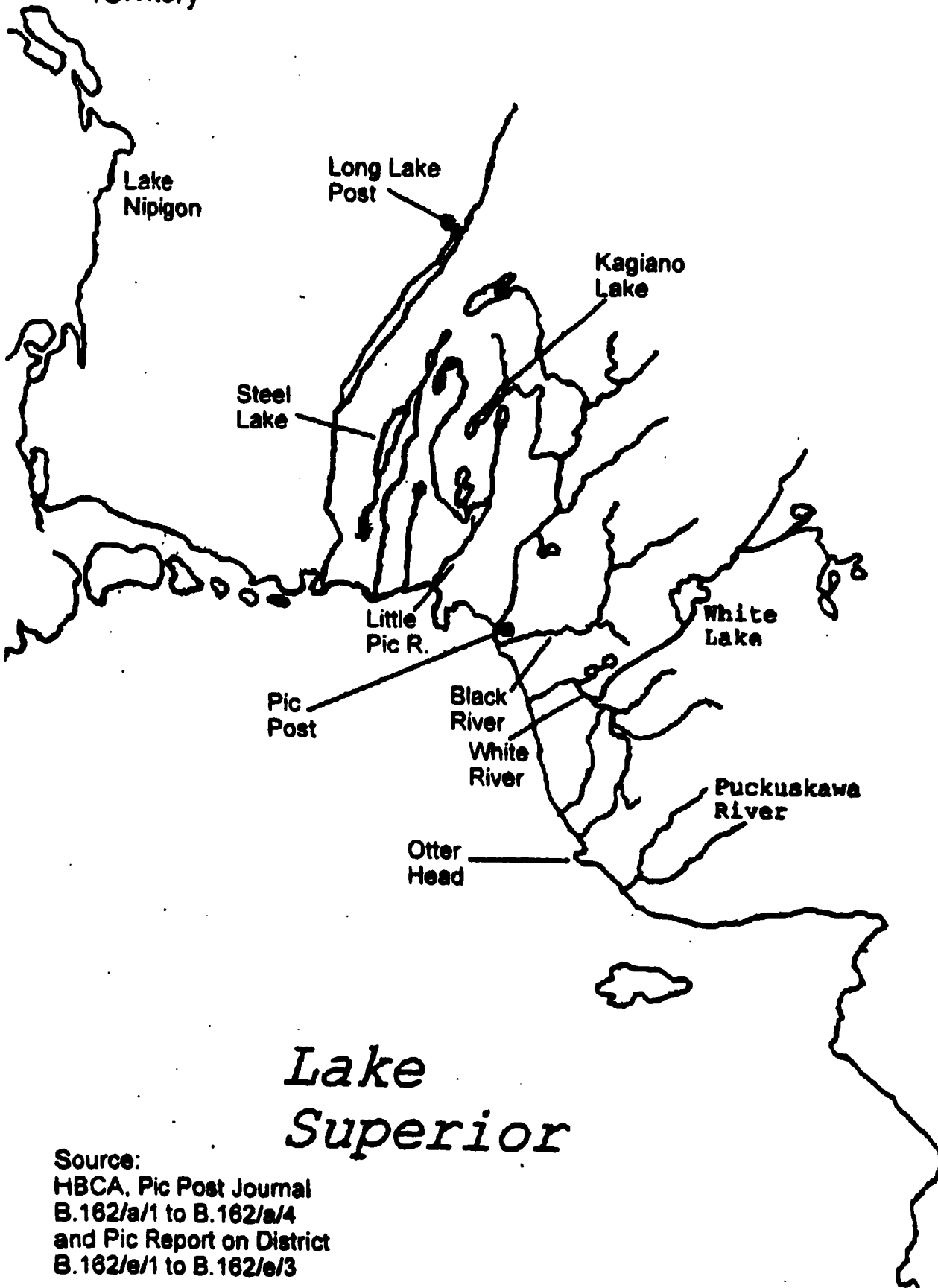
HBC records and Cameron's observations coincide in that both indicate that the Nipigon Ojibwa operated within a specific area centered around the lake. Their limited travel may have been due to the abundance of fish in Lake Nipigon and the Nipigon River. The limited winter travel of the Ojibwa is further substantiated by an even earlier observation by another HCB employee George Sutherland in the winter of 1777-78. Sutherland was living with an Ojibwa family of six people, and described their hunting pattern in his journal:

Durring [sic.] the whole winter - for Ever since we Left our Canoes in the fall - we Generally Traveled about 8 or 10 miles at a time that is when we repitcht. the men set off soon in the morning with their Sleds and Left the wemen in the tents - and after the men had Traveled about 8 or 10 miles - then Left the Sleds at a proper place for the wemen to pitch the Tent - then the men set off and hunted all the Day - then they Returned where they Left there Sleds where we always found the wemen and the Tents all Ready made and the Day that we killed anything we had a good Supper.⁴⁴

The Pic Ojibwa seemingly operated within a larger area, and hunted deeper within the interior often as far as Long Lake (*see Map #3, p. 49*). The HBC's Pic Post was located at the mouth of the Pic River on the north shore of Lake Superior to take advantage of the families that hunted and trapped in the area. There are numerous references to Native hunters and families trading inland in the winter to hunt and trap, but fewer references to actual locations. However, if the Natives traveled inland in the winter and did not spread out along lake shore it is possible to estimate the area that the Pic River Ojibwa

⁴⁴ Cited in Charles Bishop, "Northern Algonquians, 1760-1821." 294.

Map #3
Pic Ojibwa
Hunting/Trapping
Territory



Source:
HBCA, Pic Post Journal
B.162/a/1 to B.162/a/4
and Pic Report on District
B.162/e/1 to B.162/e/3

hunted and trapped over in conjunction with more specific references in the post journals.

The 1828 Pic District Report noted the limits of that district's territory. This in itself may only indicate the boundaries imposed by the HBC; however, based on the observations made in the Nipigon district report the limits of an HBC post's territory seemed to correspond to the land the local Ojibwa hunted and trapped over. The Pic territory was described as extending:

...along Lake Superior from the Otter Head to the Pille [likely Pay] Plat...the distance it extends inland has never been exactly ascertained but is supposed to be about one hundred and twenty miles.⁴⁵

The uncertainty regarding the post's inland boundaries suggests that the post manager was referring to Ojibwa hunting territories whose northern limits were unfamiliar to him. A later district report estimated the Ojibwa population at two hundred and forty people, with thirty five trading regularly at Pic Post (the latter number is likely a reference only to the men who traded while the former referred to men, women and children).⁴⁶

The inland extent of the Pic River Ojibwa's hunting territories is further evidenced by their relationship with the Long Lake Ojibwa. The 1828 Pic annual report indicated that there was a close relationship between the Pic River Ojibwa and those families that resided around Long Lake. Indeed, the post manager wrote that the two groups were so interrelated by marriage that "they look upon each others [sic.] as kindred and relations; hence when they meet occasionally

⁴⁵ HBCA, B.162/e/1. Pic Report on District, 1828.

they are very friendly and sociable.” This close relationship to the Pic River Ojibwa resulted in their hunting grounds extending a considerable distance north. In March, 1828, several hunters (Carcajou, Ecrivan, Wiskejauck and his son) left the Pic Post, and headed to their camp near Long Lake.⁴⁷ There is further evidence that Wiskejauck hunted around Long Lake. In the district report for Long Lake (1816-1817) the post manager there noted a hunter named Whisacajack traded at his post.⁴⁸ It is possible that this is a different spelling for Wiskejauck. Three other Pic Ojibwa passed the summer at Long Lake in 1830.⁴⁹

There was also a connection between the Fort William and Pic Ojibwa. Peau de Chat's father, Little Old Bird, appeared to live in the Pic area. The journal entry for 11 February, 1828, noted that the “Old Bird and his son Peau de Chat arrived” at the post.⁵⁰ The Little Old Bird's hunting and fishing grounds were apparently close to the post. In August, 1827, he arrived at the post with two of his sons. They were enroute to “Pic Bay to hunt Bears.”⁵¹ They came back in October, 1827, with “5 Bear skins & some dry Bears [sic.] meat.”⁵² There are also references to the Little Old Bird fishing on the “River Blanche” (White River, south of Pic River), and at Louison's Bay.⁵³

⁴⁶ HBCA, B.162/e/3. Pic Report on District, 1828-1829.

⁴⁷ HBCA, B.162/a/1. Pic Post Journal, 1827-1828. 17 March 1828

⁴⁸ HBCA, B.117/e/1. Long Lake Report on District, 1816-1817.

⁴⁹ HBCA, B.162/a/4. Pic Post Journal, 1830-1831. 11 June 1830.

⁵⁰ HBCA, B.162/a/1. Pic Post Journal, 1827-1828. 11 February 1828.

⁵¹ Ibid., 29 August 1827,

⁵² Ibid., 2 October 1827.

⁵³ Ibid. 3 October 1827, 6 November 1827.

It would appear that the Michipicoten Ojibwa had little contact with the Pic River Ojibwa or any other western bands, but were closer to those further south at Batchewana Bay. There are numerous references to Ojibwa hunting grounds throughout the Michipicoten Post journal. A number of families that traded at Michipicoten hunted around Dog Lake, Manitowik Lake, near Brunswick Lake, and along the Montreal River. The latter location is not the same Montreal River that runs close to the communities of New Liskard and Kirkland Lake, but is slightly south of Michipicoten Bay (*see Map #4, p. 53*).

Although there are earlier records for this post, starting in 1797, there are few references to place names. This could reflect the first post manager's ignorance of the local geography. The first reference to a location is in the summer of 1800 when "four canoes of New Brunswick Indians" arrived to trade their furs at the Northwest Company post right beside the HBC post.⁵⁴ The following month another three canoes of Natives from New Brunswick traded at the NWC post.⁵⁵ It is likely that this is a reference to Brunswick Lake which lay northeast of Michipicoten. In October, 1800, some Ojibwa headed for the Trout River to trap. Later that month a group of hunters went to the hills south of Michipicoten Bay to hunt bear.⁵⁶

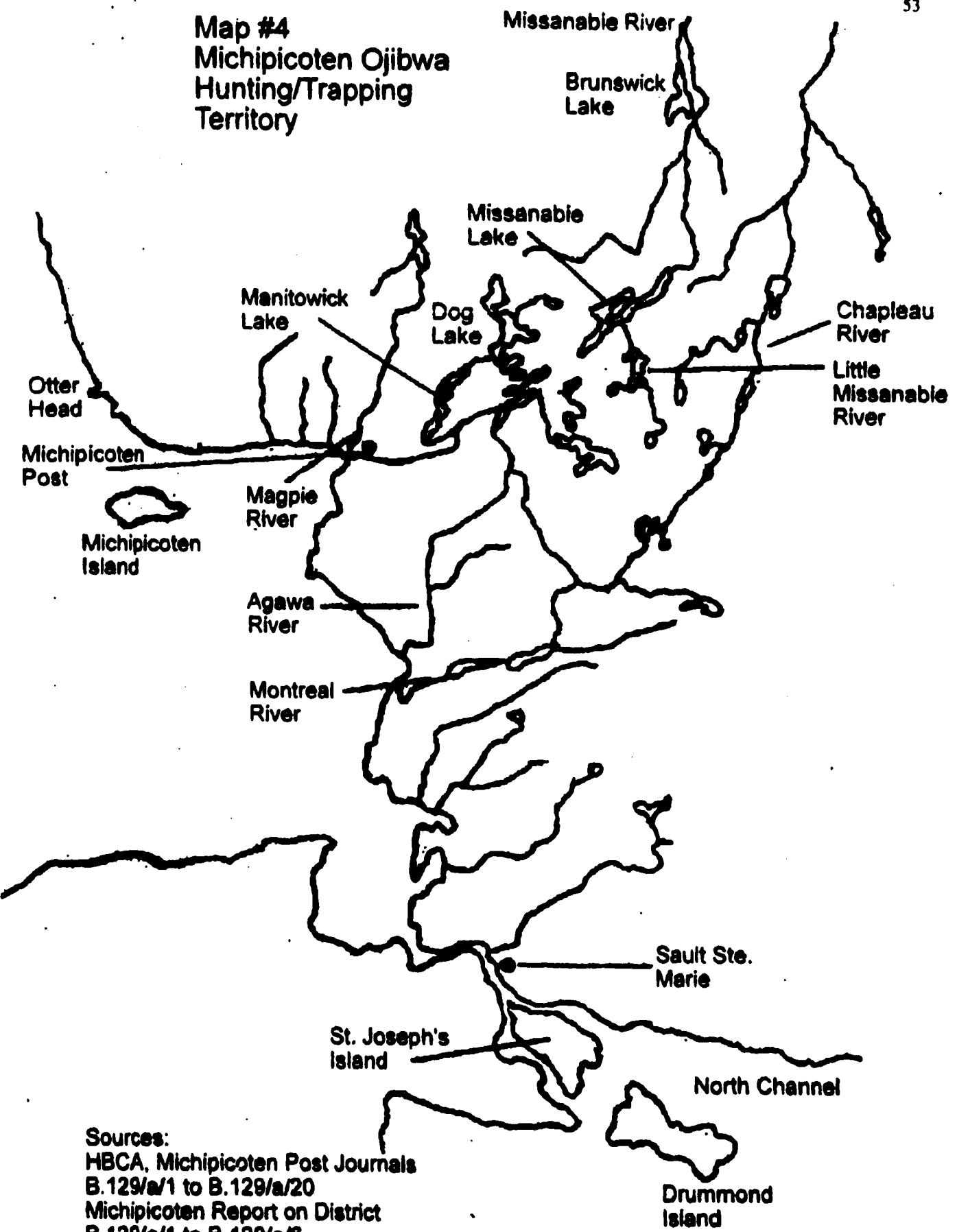
The Montreal River, Manitowik Lake, and Dog River were also favoured hunting or fishing grounds. In September, 1839, a group of hunters left

⁵⁴ HBCA, B.129/a/2. Michipicoten Post Journal, 1799-1800, 6 June 1800.

⁵⁵ *Ibid.*, 6 July 1800.

⁵⁶ *Ibid.* 9 October 1800, 27 October 1800.

Map #4 Michipicoten Ojibwa Hunting/Trapping Territory



Sources:
HBCA, Michipicoten Post Journals
B.129/a/1 to B.129/a/20
Michipicoten Report on District
B.129/e/1 to B.129/e/6

Michipicoten for the Montreal River to fish.⁵⁷ Another Ojibwa hunter known as "Little Duck" also left to rejoin his friends at the Montreal River that same autumn.⁵⁸ Manitowik Lake was used more for trapping than fishing. In the winter of 1830 "two Indians...arrived from Manitouwick [sic.] Lake bring 1 Beaver skin, 2 Otter, 20 Martens, and 6 Mink."⁵⁹ The Dog River was similarly a trapping ground. Two Native men came from there in the fall of 1831 with otter skins to trade for winter supplies.⁶⁰

There is every indication that the Michipicoten Ojibwa were possessive of their hunting grounds, and resented those who trespassed on them. In November, 1839, after trading a quantity of furs at the post a hunter complained to the post manager that "an Indian belonging to the Pic Post...poached upon his hunting grounds and killed some beaver..."⁶¹ An earlier reference in the Michipicoten journal also noted that families had clear territorial divisions, but that poaching was a common problem:

...altho family territorial divisions seem to be long established and cherished they are very prone to poach upon anothers [sic.] hunting grounds and the Beaver...often falls prey to such depredation which sometimes occasions dangerous feuds between families.⁶²

⁵⁷ HBCA. B.129/a/20. Michipicoten Post Journal, 1839-1840. 5 September 1839.

⁵⁸ *Ibid.*, 13 September 1839.

⁵⁹ HBCA. B.129/a/15. Michipicoten Post Journal, 1830-1831. 24 December 1830.

⁶⁰ *Ibid.*, 19 October 1831.

⁶¹ HBCA, B.129/a/20. Michipicoten Post Journal, 1839-1840. 30 November 1839.

⁶² Cited in Lise C. Hansen, "The Anishnabek Land Claim and the Participation of the Indian People Living on the North shore of Lake Superior in the Robinson Superior Treaty, 1850." (Toronto: Ministry of Natural Resources): 14.

Lake Huron:

Similar evidence exists regarding familial hunting territories for the Lake Huron Ojibwa bands although very few pre-1850 post records have survived. Documents from posts located on Lake Nipissing and the French River no longer exist. Limited records for the Company post on Lake Temagami exist but only for the post-treaty period. Some pre-treaty records are not at all useful to examining Ojibwa hunting territories. The Sault Ste. Marie post journal, for example, contains no information pertaining to Native hunting grounds, or camp locations. Only the La Cloche journals still exist, and contain pertinent information. Luckily, La Cloche was responsible for other small posts east of the North Channel, and contains references to those areas and the Natives that resided there.

La Cloche post was responsible for a number of posts throughout what would become the Robinson-Huron area: Whitefish Lake, Lake Nipissing⁶³, French River, Green Lake, and Shawanaga. La Cloche received Natives from all of these areas, although they often came with HBC canoes to either pick up supplies for one of the posts, or to bring in fur bundles for that season. No records exist for any of the posts under La Cloche's control, although it is apparent that wherever the posts were located there were Ojibwa families close by. Despite the lack of documents for the posts, there are references in the La

⁶³ At the end of the 1832 Outfit, the HBC closed the Lake Nipissing Post and moved it north to Lake Timiskaming. The reason was that the trade at Lake Nipissing was very low compared to that at Lake Timiskaming. See B.109/e/5, La Cloche Report on District 1832-1833.

Cloche journal that provide some detail about the Ojibway living along the North Channel. Unlike the other journals used for this report, the La Cloche journal does not make many specific references to Ojibwa hunting grounds; however, it does refer to Natives by place names which gives some indication of where certain families lived. The Ojibwa families that hunted in the La Cloche district were fairly mobile, but seemed to move within the area around the North Channel and inland, the French River, and Lake Nipissing (*see Map #5, p. 57*).

There are a large number of islands in the North Channel that Ojibwa families encamped upon when trading at La Cloche. On the 27 August, 1827, "some of the Indians who are encamped at the Islands came to the Fort for a few necessaries."⁶⁴ There are also several references to families spending time on Cockburn Island, particularly around the area known as Sheshegwaning.⁶⁵ In November, 1827, a hunter named Frisee and his family arrived at La Cloche from "Sheshegwaning where he has been fishing."⁶⁶ In the spring of 1828, the manager of La Cloche sent several men to Sheshegwaning to obtain maple sugar from the Ojibwa there.⁶⁷ It appears that the families at Sheshegwaning also engaged in some farming. In the fall of 1828, several men set out from La Cloche to Cockburn Island, they returned several days later with "a few skins, about 12

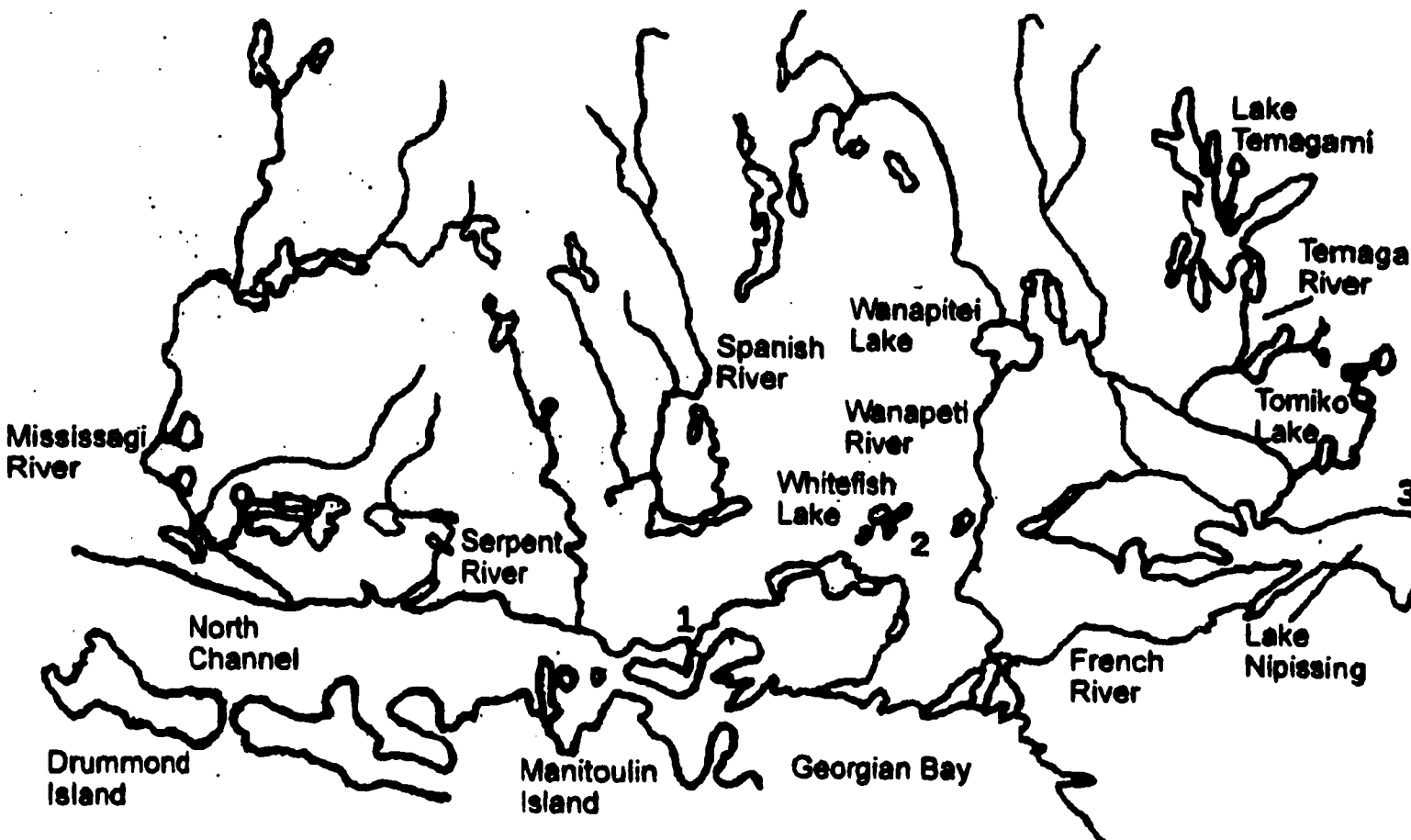
⁶⁴ HBCA, B.109/a/1, La Cloche Post Journal, 24 August, 1827.

⁶⁵ Cockburn Island is just off the northern tip of Manitoulin Island.

⁶⁶ *Ibid.*, 25 November 1827.

⁶⁷ *Ibid.*, 4 May 1828.

**Map #5
North Channel/Georgian
Bay Ojibwa Hunting/Trapping
Territory**



Hudson's Bay Company Posts

1. La Cloche Post
2. Whitefish Lake Post
3. Lake Nipissing Post

Sources:

HBCA, La Cloche Post Journals
B.109/a/1 to B.109/a/4
La Cloche Report on District
B.109/e/1 to B.109/e/8

bushels Indian corn, 22 bushels potatoes [and] some pumpkins collected from the Indians at those places."⁶⁸

White Fish Lake also figures prominently in the La Cloche Journal. At the beginning of September, 1827, "Wawaran's Eldest daughter arrived [at La Cloche]...She says that a good many of the White Fish Lake Indians are coming to this lake to Dry fish in the Fall."⁶⁹ Another hunter, Manawash, and his sons arrived at La Cloche "to spear a few fish and afterwards they mean to go to White Fish Lake and remain on their lands for the winter."⁷⁰ In the summer of 1828, some of the Natives from White Fish Lake came to La Cloche via the Spanish River.⁷¹

There are references to Natives from the French River coming to La Cloche. The first was in June, 1827, when a group of "Indians from French River arrived [at La Cloche] in the afternoon...They brought 7 Beaver, 15 Rats and 3 Minks [sic]."⁷² On the 8 June, 1828, another large group of Ojibwa from the French River arrived at La Cloche.⁷³ In November, 1828, "Old Serpent & [a] little boy made their appearance. They came from French River but bring nothing new."⁷⁴

⁶⁸ HBCA, B.109/a/2. La Cloche Post Journal, 20 September 1828 and 24 September 1828.

⁶⁹ HBCA, B.109/a/1, La Cloche Post Journal, 1 September 1827.

⁷⁰ Ibid., 18 October 1827.

⁷¹ HBCA, B.109/a/2. La Cloche Post Journal, 2 June 1828.

⁷² HBCA, B.109/a/1. La Cloche Post Journal, 9 June 1827.

⁷³ HBCA, B.109/a/2. La Cloche Post Journal, 8 June 1828.

⁷⁴ Ibid., 16 November 1828.

The Spanish River also appears in the La Cloche post records. “[The] Frisee and his family with some of the White Fish Lake Indians came from Spanish River” to La Cloche in June, 1828.⁷⁵ One and a half months later two other hunters visited La Cloche, and then returned to the Spanish River.⁷⁶ In the spring of 1829 two La Cloche servants returned from the Spanish River with furs procured from Natives encamped there.⁷⁷ Two months later two hunters came to La Cloche to get fish spears, and returned to the mouth of the Spanish River.⁷⁸

There are also indications that the Ojibwa who traded at La Cloche travelled inland to hunt and trap. An Ojibwa hunter stopped at La Cloche on 9 July, 1828, from Drummond Island, on his way inland.⁷⁹ Another hunter named “Entatzgoening” came to La Cloche near the end of August, 1828, to take on winter supplies. After taking on his debt he “went off for the interior.”⁸⁰ In the fall of 1828, two families left for the interior after taking on some provisions.⁸¹ A hunter named “Wetookawa” “arrived from inland”, in August, 1828, and brought nine muskrat to trade.⁸² Wetookawa appears in the journal in April, 1829, again returning inland.⁸³ The following month Wetookawa and another hunter “Atchitaman” “arrived from their hunting excursions inland.”⁸⁴ They

⁷⁵ Ibid., 2 June 1828.

⁷⁶ Ibid., 21 July 1828.

⁷⁷ Ibid., 22 May 1829.

⁷⁸ Ibid., 27 July 1829.

⁷⁹ Ibid., 8 July 1828.

⁸⁰ Ibid., 24 August 1828.

⁸¹ Ibid., 26 and 27 September 1828.

⁸² Ibid., 31 August 1828.

⁸³ Ibid., 14 April 1829.

⁸⁴ Ibid., 8 May 1829.

brought a total of twelve beaver and seven muskrat pelts to trade. Two days later Wetookawa, Atchitaman, and another hunter, "Petawanaquait" "left [La Cloche] for the interior to hunt..."⁸⁵

It appears that the families that traded around La Cloche were as protective of their hunting grounds as Ojibwa on Lake Superior. On the 14 September, 1828, "the Frisees [sic.] 1st and 3rd sons arrived on there [sic.] way to there [sic.] lands."⁸⁶ They left the next day with provisions as they were "going after some Indians from Drummond Island who they suspect mean to hunt on their lands."⁸⁷

The seasonal and territorial nature of Ojibwa subsistence patterns is evident throughout the post journals on Lakes Huron and Superior. In the spring and summer families and groups of families resided on the lake shores where they fished and hunted. In the fall they moved inland to familial hunting territories where they trapped, hunted, and fished but to a lesser extent than the summer. These territories were important to each family, and steps were taken to insure that no one used their grounds without their permission. Since trespassing was a problem it is also fair to assume that each territory had known boundaries, and that the land contained therein was known to belong to a particular family.

Families that interacted together, and whose territories bordered on or were close to on another formed bands. Using post records it is clear that

⁸⁵ Ibid., 10 May 1829.

⁸⁶ Ibid., 14 September 1828.

Ojibwa around Fort William, for example, hunted and trapped around the fort. Similar observations can be applied to other HBC posts. As noted earlier this is not meant to imply that Ojibwa harvesting activity was closely linked to, or dictated by Company post managers. It is more likely that the HBC located its posts where the Ojibwa congregated simply as good business sense. This still provides the historian with an advantage as each post provides documented evidence regarding Ojibwa harvesting territories in a particular area.

These territories played a strong role in the treaty negotiations that occurred in September, 1850, and afterwards when Ontario first began to apply its Game Act in the north. The Ojibwa perceived their hunting and trapping rights within the context of these territories. The promise contained within the Robinson Treaties, that the bands and their descendants could continue to hunt and trap as they "heretofore had been in the habit of doing," meant to the Ojibwa that their territorial division of land would be respected by the Crown as would their right to use it for traditional harvesting activity. It was a promise both sides made in good faith, but it would not be kept. Neither party could foresee the changes that would occur less than fifty years later.

The Crown and the Ojibwa

The Government of the Province of Canada realized, to some extent, the important role territorial divisions played in Ojibwa life, and its relevance to the creation of the Robinson Treaties. That tentative knowledge came from a report

⁶⁷ Ibid., 14 September 1828, and 15 September 1828.

prepared by two men sent by the government to examine the Ojibwa claims to the Lake Huron and Lake Superior region. In 1849 when Alexander Vidal and Thomas Anderson traveled to Lakes Superior and Huron to visit with the Ojibwa they noted the land claimed by each band. They knew the government had to negotiate with each band in order to secure access to these lands. A chief from the North Channel, for example, could not speak for the Michipicoten Ojibwa. This territorial division ultimately led to the creation of two Robinson treaties instead of one as the Lake Superior chiefs agreed to take treaty before the Lake Huron chiefs. The former could speak only for the bands and families they represented. They did so, and took treaty first. The Lake Huron chiefs, as will be outlined later, held out for better terms but could not force the Lake Superior chiefs to do the same.

Sometime passed before the government dispatched Vidal and Anderson northwards to investigate the Ojibwa claims. From the early 1840s to 1848 the government either refused, in the case of Denis Benjamin Papineau, to recognize the proprietary rights of the bands, or had its attention diverted by the more immediate concerns of a newly created, combined colonial legislature. Negotiations surrounding the Robinson-Superior and Robinson-Huron treaties reveal an important element of the government's perception of the Ojibwa that would continue into the first decades of the twentieth century: that the Ojibwa were a barrier to the economic progress of the province. The government of the Province of Canada and various mining companies wanted access to mineral deposits on the shores of Lake Superior, north of present day Sault Ste. Marie.

Hindering access to these minerals, mainly copper, were the inhabitants of the region: the Ojibwa. As early as the 1840s, when the first mining leases were let out by the province, these bands wrote to and petitioned the government to treat with them for access to their territory. Initially the government took little notice of these complaints until a change in administration took place, and the new Reform government and Governor-General agreed to enter into treaty negotiations with the Ojibwa.

Despite this recognition of Ojibwa title the Reform government was, in many ways, no different than their Tory predecessors. By signing these treaties, from the government's perspective, the Ojibwa ceded all title to the land and were effectively removed as an obstruction to mining and logging. The government was happy to grant the Ojibwa continued hunting and trapping rights as a means ending the conflict that was erupting in the north. Hunting and trapping would not interfere with mining or logging operations, and government officials believed that such activity would not last much longer owing to the decreasing numbers of species in the region. By placing the Ojibwa on reserves, giving them an annuity, and promising them continued hunting rights the government believed it had signed a treaty which not only settled a contentious and potentially violent issue but which also held the promise of wealth and development at a reasonable price.

The Robinson treaties were indeed part of an emerging trend in Crown Native policy. When Upper Canada was created in 1791, Natives were still seen as important military allies to a British colony that faced a real threat on its

southern boarders. After the War of 1812, however, Native usefulness as military allies declined. Improved relations with the United States meant that the possibility of war became increasingly slim, and a growing number of settlers coupled with a shrinking supply of land led the Indian Department and the Commissioner of Crown Lands to change its policy towards its former Native allies. While the policy of treaty making had been established well over a century earlier, the Crown now wanted treaties to remove Natives from the path of 'progress' as opposed to cementing military and trade alliances. By gaining control of land through treaty the Crown opened it up for agricultural settlement. Situating bands on reserves allowed the Crown to maintain greater control over where the bands were located, and prevented future misunderstandings from occurring between settlers and bands.

This desire to move Natives out of the way onto reserves coincided with the emergence of a reforming zeal amongst English missionary and evangelical movements to Christianize and civilize non-white peoples throughout England's colonies. By situating bands on reserves it was easier to evangelize a people who moved over large areas on a seasonal basis, or, in the terminology of the period, simply "wandered." The Crown, therefore, embarked on a policy of not only opening lands for settlement and development, but moving Native bands and tribes out of the way of this progress. Once moved they would be taught proper Christian/British values, and acculturated into the growing white society. Reserves would end their 'wandering' lifestyle, missionaries would

convert them, and farm instructors would teach them agricultural techniques to reinforce their new settled lives.⁸⁸

Why the Crown undertook this new policy is a matter of debate. John Milloy argues that the impetus grew out of the desire of the British Colonial Office to reduce the yearly cost of distributing presents and gifts to bands in order to insure their allegiance to the Crown.⁸⁹ It was cheaper to relocate them to reserves and acculturate them thereby ending the annual round of gift giving. Robert Surtees believes the policy grew out of the reforming zeal amongst Evangelical Christians, such as the Clapham Sect, to Christianize 'heathen' peoples throughout the Empire.⁹⁰ This debate is secondary to this thesis. Both men, and other scholars agree that 1830 was the approximate turning point in Indian Affairs in Canada. Officials in the Indian Department came to believe that a reserve system would eventually acculturate Canada's Native population, and turn them into self-sustaining parts of the colony while at the same time creating economic benefits as new land was opened and developed through land cessions.

This, of course, did not happen. The Ojibwa did not agree to relocate to reserves and simply give up their land and their way of life. While the bands did ask for reserve lands it was often locations where they engaged in traditional

⁸⁸ A brief outline of this policy is provided in Robert J. Surtees, "Canadian Indian Policies." Handbook of the North American Indian, vol. 4, Wilcomb E. Washburn ed. (Washington: Smithsonian Institution, 1988): 86-89.

⁸⁹ John Milloy, "The Era of Civilization: British Policy for the Indians of Canada, 1830-1860." Ph.D. Thesis, History (Oxford University, 1978).

harvesting activity (usually fishing), or where they typically gathered at certain times of the year. What the government saw as a land cession was, from the perspective of the Ojibwa, an agreement to permit miners and others to settle on their land. The promise of continued hunting and fishing rights makes greater sense within this context. By taking measures to guarantee their continued access to the land the Ojibwa were not surrendering very much from their perspective.

The government, concerned solely with mining could not, nor could it be expected to, foresee the day when wildlife would be seen as a valuable resource. In the mid-nineteenth century what lay below the ground was more valuable than what roamed the surface. As Robert Surtees noted: "The impetus to seek...a land surrender in the northwestern portion of Canada West was provided by the mining industry."⁹¹ James Morrison has also noted the influence mineral discoveries had on the government in deciding to enter into a treaty with the Ojibwa of the Upper Lakes.⁹² The Crown Lands Department created regulations to govern the licensing of prospectors in 1845, and by 1846 thirty-four companies were given permission to hunt for minerals in the north

⁹⁰ Surtees, "Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System."

⁹¹ Surtees, Treaty Research Report: The Robinson Treaties, (Ottawa: Treaties and Historical Research Centre, Department of Indian Affairs and Northern Development, 1984): 3. Treaties and Historical Research Centre and the Department of Indian Affairs and Northern Development will hereinafter be referred to THRC and DIAND respectively.

⁹² Morrison, 34.

shore of Lake Superior.⁹³ The government's desire to encourage mining was so strong it overlooked the necessity of a formal land cession.

Dating back to the Royal Proclamation of 1763, no private interests could settle Native land until that land was first surrendered to the Crown through a formal treaty process. After the Seven Years War, Native tribes west of the Allegheny Mountains became angry as settlers headed into the interior. This influx of Whites, in addition to other problems, led to Ottawa Chief Pontiac to create an Indian confederacy which, for a short time, effectively hamstrung British military forts in the interior.⁹⁴ As regards settlement, however, various Native groups found their lands occupied by settlers without their permission. The Royal Proclamation made specific reference to this:

And whereas Great Frauds and Abuses have been committed in purchasing lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians...⁹⁵

Natives who resided within the British colonies, that is south of the Royal Proclamation Line, were to be protected from such abuses.⁹⁶ Their lands would

⁹³ Surtees, Treaty Research Report: The Robinson Treaties, 5.

⁹⁴ Pontiac was also concerned with the end of annual gift giving which the French had been careful to observe.

⁹⁵ Quoted in Surtees, Treaty Research Report: The Robinson Treaties, 3. See also Jack Stagg, Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763 (Ottawa: DIAND, TRHRC, 1981):394-400.

⁹⁶ The Proclamation Line of 1763 extended in two directions from the southeastern tip of Lake Nipissing: northeast and southeast. These lines were drawn in such a way due to the long standing French settlement along the lower St. Lawrence River and some of its tributaries. Lands outside this area were removed from recognized by the Royal Proclamation, and not considered to be part of the "Indian Territory." See Robert J. Surtees, "Canadian Indian Treaties."

be protected by the Crown, and settlement only allowed upon it when they decided they wanted to cede it. In such an instance, a Crown representative would hold a public, and well announced meeting with the relevant band and its leaders, and enter into a formal land cession agreement with the band on the Crown's behalf.

The area that would eventually be covered by the Robinson Treaties was clearly north of the Proclamation Line of 1763. The government was well aware of the legal and proprietary state of Ojibwa lands north of the Proclamation line. The provincial government first investigated the situation in the north in 1845 when George Wilson, a government customs collector, reported that Americans were cutting timber on the British side of the border and taking it back across to Michigan.⁹⁷ Lieutenant Harper, commander of the steamship *Experiment*, was dispatched by the government to Sault Ste. Marie in the summer of 1845 to investigate the situation. Harper's observations regarding the cutting of timber are not important here, but he did comment on the state of the land in general:

The Indian title to the Lands on the North Shores of Lake Huron on the route from Penetanguishene to the [Sault] St. Marie inclusive has never been extinguished [by treaty]...⁹⁸

Handbook of the North American Indian, vol. 4, Wilcomb E. Washburn ed. (Washington: Smithsonian Institute, 1988): 202.

⁹⁷ Morrison, 29.

⁹⁸ National Archives of Canada (NAC), RG 10, Vol. 151, Report from Lieutenant Harper RN. 1 September 1845.

In essence, Harper said the government could not regulate the cutting of timber on public lands around Sault Ste. Marie because there were no public lands there. He concluded:

...not one individual on the British side, with the sole exception of the Hudson's Bay Company, own one foot of soil or land...as the Indians here claim the land, and the Government I am told has not yet admitted their claim to it.⁹⁹

Harper said there were some white and Metis settlers there with the permission of the Ojibwa, but as Harper noted this occupation was legally invalid as the Natives could not "sell or give a little [land] to any but the British Government."

The Executive Council, either unsure or unhappy with Harper's opinion, asked Captain Thomas G. Anderson, former Indian Superintendent of Manitoulin Island, to comment on Harper's report.¹⁰⁰ Much to the dismay of the Commissioner of Crown Lands, Denis-Benjamin Papineau, Anderson concurred with Harper's opinions. In a statement to the Council Anderson wrote that: "The Indian Title to the Land on the North shores of Lake Huron on the route from Penetanguishene to the Sault Ste. Marie has never been extinguished."¹⁰¹

Questions of Indian title, however, were of little concern to government. It was interested solely in issuing mining patents to companies. Papineau, in an effort to diffuse Harper's report, focused on other portions of the Lieutenant's account. Harper had noted that there were problems determining the original

⁹⁹ *Ibid.*

¹⁰⁰ Anderson was named Indian Superintendent of the Manitoulin Island Experiment in 1839. By 1845 he no longer held this position.

¹⁰¹ Morrison, 32.

Aboriginal inhabitants of the land around Sault Ste. Marie. Ojibwa that had supported the British in the War of 1812 moved there after the conflict at the invitation of the Crown. "Therefore," Harper wrote, "it would not be easy to find the real proprietors of any particular section of country, as some would most probably claim that part on which others now live."¹⁰² While Harper may have accurately represented problems at the Sault regarding territorial divisions between bands and families, and done so to inform the government of potential problems should it decide to enter into treaty negotiations, Papineau seized upon Harper's statement as proof that the Ojibwa at the Sault were not the original inhabitants of the land, had no claim to the territory, and did not have to be treated with.

Papineau was clearly ignorant of British treaty precedence, or simply did not care.¹⁰³ The Crown had entered into treaties before with First Nations who were not the original occupants of a particular portion of the country. The treaties covering much of modern southern Ontario were made in the late

¹⁰² NAC, RG 10, Vol. 151. Report of Lieutenant Harper RN, 1 September 1845. See also Janet Chute, The Legacy of Shingwaukonse: A Century of Native Leadership (Toronto: University of Toronto Press, 1998). On page 29 Chute quotes from an 1812 petition from Shingwaukonse in which the chief said: "When the war was over the [British] chiefs spoke to me...and said thank you Shingwaukonse, many thanks to you, you will never be badly off... You have lost your land in the bargain, made between us and the whites. Chose for yourself land in the neighbourhood of the Sault on the British side."

¹⁰³ James Morrison has looked for reasons to explain Papineau's animosity towards the Ojibwa: his sympathy with French Canadians living at the Sault, the fact that Papineau's family seigneurie was subject to a land claim by the Iroquois at the Sulpician mission at Oka, or that Natives played an active role against French rebels during the Rebellion of 1837 in Lower Canada. See Morrison, 45.

eighteenth and early nineteenth centuries with Ojibwa who occupied what had once been part of the Huron country. By 1701 the Ojibwa had expelled the Iroquois invaders from Huronia, driven them back to their lands in upper New York and occupied the region. Papineau, however, was unconcerned with this detail. When Alexander Vidal, a provincial surveyor, was sent to Sault Ste. Marie in the Spring of 1846 to survey mining properties he was told by Papineau that: "The Indians about Sault Ste. Marie are not considered as having any claim to the lands which they occupy, having immigrated from the United States."¹⁰⁴

Vidal quickly discovered that the chiefs around the Sault were of a different opinion. Vidal was approached soon after he arrived at the Sault by the "Indian chief residing in the neighbourhood...Shing-gwâk" and a young, hereditary chief "Nabwa-qu-ghin."¹⁰⁵ Both men were angry over the actions of the government, and expressed this to Vidal. They claimed all the land around the Sault as their own. Furthermore, they said that the government had never purchased the land, and had no right to issue mining licenses or even send Vidal to survey the territory. The depth of the anger was evidenced by Shingwaukonse's threat that if he and the other chiefs had more men they would have driven the surveyors and exploration parties off their land.¹⁰⁶

¹⁰⁴ AO, RG 1, Series A-I-6, vol. 25, No. 4. Alexander Vidal to Papineau, 27 April 1846.

¹⁰⁵ Ibid. The latter chief was likely Nebenaigoching of Batchewana Bay.

¹⁰⁶ Ibid.

Ojibwa protests did not end after this encounter. Indeed, in the Spring of 1847, a group of Ojibwa men expelled a mining exploration party.¹⁰⁷ Approximately one month later, a group of chiefs sent a petition to the Governor-General.¹⁰⁸ They said they represented the bands "residing on the tract of land contained between Mishipocoton River on Lake Superior in the North and Teselon Point Lake Huron." They explained that they settled in the area after the war at the invitation of the British. Initially, they explained, they had little contact or trouble with whites until copper was discovered:

...we seldom saw the face of an English whiteman now one, then another whiteman came stealing along our shores and entering into our wigwams told us in answer to our enquiries that they were come to look for metals which they heard were to be found in our land and asked us to show them the copper, but we refused.

The chiefs said they paid little attention to the prospectors until "several persons say that some of our land had been already sold to those explorers." Since the Crown had never treated with them for the land the chiefs were astounded by this statement. They, particularly Shingwaukonce, were well aware of the necessity of formal treaty negotiations:

When your ancestors wanted the Island of Michahlahmackinack [sic.] to build a strong castle on, they assembled our fathers in council and asked them to let them have it, they did so and a treaty was drawn up on deer skin which you have in your possession still

Again when the English wanted St. Josephs [sic.] Island they assembled the chiefs of the Indians

¹⁰⁷ Morrison, 42.

¹⁰⁸ NAC, RG 10, Vol. 123. Chiefs to Governor-General, 5 July 1847.

who then inhabited it and purchased from them the whole of the Island...

The chiefs were also aware of treaties made with the Saugeen Ojibwa, and those at Rama, Rice Lake, and the Credit River. The chiefs asked that a council be held with them "in the same form and manner as has always been the custom between our nation and the British Government..."

It took a change in administration before these petitions received any consideration by the government. With the defeat of the Tories and the ascension of the Baldwin-Lafontaine Reform government, and the appointment of Lord Elgin as Governor-General, the government began to take action to deal with the Ojibwa's claims. Elgin took a particularly critical view of his predecessors actions in this matter. In a letter to the Colonial Secretary, Elgin expressed his dissatisfaction with Papineau's reports on the question of Indian land title.¹⁰⁹ Indeed, Elgin was completely disgusted with the former government's handling of the situation. He noted that "Metcalf's Gov[ernment] of Jobbers gave licenses to certain mining companies in that quarter [Sault Ste. Mare] without making any arrangements with the Indians, and I have been occupied for the last two years in getting some compensation for them..."¹¹⁰

Elgin and the government dispatched Thomas Anderson northwards once again to investigate the situation. Arriving at the Ojibwa village at Garden River in the Spring of 1848, Anderson held council with the chiefs of the various bands

¹⁰⁹ Sir Arthur G. Doughty ed., The Elgin-Grey Papers, 1846-1852, vol. 4, p. 1485. Lord Elgin to Colonial Secretary Earl Grey, 23 November 1849.

living along Lake Superior and Lake Huron.¹¹¹ During the council Shingwaukonce addressed Anderson. His speech emphasized not only the Ojibwa's strong attachment to the land, but the importance they attached to being able to continue hunting and trapping:

The Great Spirit placed us on this land long before the Whites crossed the Great Salt Lake. Our ancestors then lived in happiness - there being plenty of animals for food, at that time we had everything we could desire - the animals supplied us with food, the skins were taken from their backs and placed on ours for covering.

Peau de Chat, the Fort William chief, traveled the great distance to attend the council. He too spoke of the mistreatment the Ojibwa had received at the hands of the government:

...the whites asked us Indians, when there were many animals here - would you not sell the skins of these various animals for the goods I bring - our old ancestors said Yes...I did not know that he [Europeans] said come, I will buy your land, everything that is on it under it etc. etc. he the whites said nothing about that to me...

Both men expressed their concern about the effect mining exploration was having on the animals. They said the miners burnt the forest, destroyed trees, and scared away much of the game. Anderson agreed, noting that "the damage done by the burning of the Forest and blasting of the Rock by the mining companies" far exceeded any selective fires set by the Ojibwa.

¹¹⁰ Doughty ed., The Elgin Grey Papers, vol. 2., p. 549. Lord Elgin to Grey, 21 November 1849.

¹¹¹ NAC, RG 10, Vol. 173. Anderson to Civil Secretary, 9 October 1848.

Anderson concluded that the policy of assigning tracts to mining companies without first negotiating a treaty was unjust.¹¹² He wrote that he spoke with a number of individuals in the area who “consider the sale of these locations oppressive.”¹¹³ Furthermore, Anderson stated, it was in the interests of the government to settle these claims. Although small in number Anderson warned that the Ojibwa “will give serious annoyance until their rights be extinguished.” In order to settle all outstanding claims Anderson proposed a treaty which, in terms of area, far exceeded anything undertaken by the Crown to that point:

...the unceded Lands north and west of the Midland, Newcastle, Home and Simcoe Districts as far as the Ottawa or Grand River, and following the Height of Land or the Hon. Hudson’s Bay Company Boundary line north of Lakes Huron and Superior...[to] the mouth of the Pigeon River.¹¹⁴

Before he would support Anderson’s recommendations, however, Elgin wanted more detailed information regarding the Ojibwa and the land they occupied.¹¹⁵ He wanted to know the geographic limits of each bands’ territory, and the possible economic value of it in terms of minerals and timber. Since Anderson did not consider these questions he was sent north yet again, but this time in the company of Alexander Vidal, a provincial land surveyor. Vidal and Anderson (the former was put in charge of the Commission) were charged with visiting:

¹¹² Ibid.

¹¹³ Ibid. Anderson to Civil Secretary, 9 October 1848.

¹¹⁴ Ibid. Anderson to Civil Secretary, 26 August 1848.

the Indians on the North shores of Lakes Huron and Superior, for the purpose of investigating their claims to territory bordering on those Lakes, and obtaining information relative to their proposal to surrender their Lands to the Crown with a view to the final action of the Government on the subject.¹¹⁶

While these constant trips may seem redundant they were required.

The government was generally ignorant of the north. The last significant northern treaties were the Saugeen Surrender and the Manitoulin Island treaties of 1836. The former had little to do with the Sault Ste. Marie, and the latter was concerned primarily with settling bands on Manitoulin for purposes of both protection and acculturation. Furthermore, the information gathered at that time was now fifteen years old. The Indian Department's interest in the Ojibwa had waned since then in light of the relatively somnolent nature of Canada-U.S. relations. The Indian Department instead concentrated on 'civilizing' and settling Natives on reservations. This policy led the Indian Department to focus on those First Nations already within the boundaries of British settlement. Those situated beyond the fringe received little attention until the 1840s. Lastly, during the 1830s the Indian Department suffered a series of financial cutbacks which reduced its field staff. Indian agents were now confined to the southern portions of the colony. The ignorance of the department regarding the northern bands is aptly proven by the Report on the Affairs of the Indians of Canada, commissioned by Governor-General Bagot in 1845. Two paragraphs were

¹¹⁵ Elgin-Grey Papers, vol. 4, p. 1485. Elgin to Grey, 23 November 1849.

devoted to the Ojibwa at the Sault and further north. The general impression left was that these were "wandering Indians" and of little consequence.

The Vidal-Anderson Commission was expected to rectify this state of affairs. Its report reveals the cultural gap that divided both parties regarding the treaties, and what each hoped to accomplish from it. The government, even though it now took the Ojibwa claims more seriously, was obviously of the opinion that the Ojibwa were impeding the development of the north. Copper deposits were there, and Ojibwa claims could seriously hinder any mining operations. A treaty was a means of not only dealing 'justly,' from the government's perspective, with these claims but it would also remove all obstacles from the path of the mining companies. Promising the bands that they could continue to hunt, trap and fish as they had "heretofore been in the habit of doing" was a small price compared to the value of the other resources.

For the Ojibwa the Vidal-Anderson Commission, and William Robinson's subsequent negotiations, reflected the government's willingness to respect each bands' territorial rights. Each chief received money to distribute to his band members. Each chief, and others, described the limits of each bands' territory. The treaties, therefore, respected the Ojibwa's political and territorial divisions along the lake shores. The promise of continued hunting rights meant that each family retained its hunting and trapping grounds as they had prior to the treaty. It was of the utmost importance to the Ojibwa. This treaty condition was not

¹¹⁶ AO, MU 1464, Irving Papers, 26/13/4. Typescript copy of Report of Commissioners Vidal and Anderson, 1849. Hereafter referred to as the Vidal-

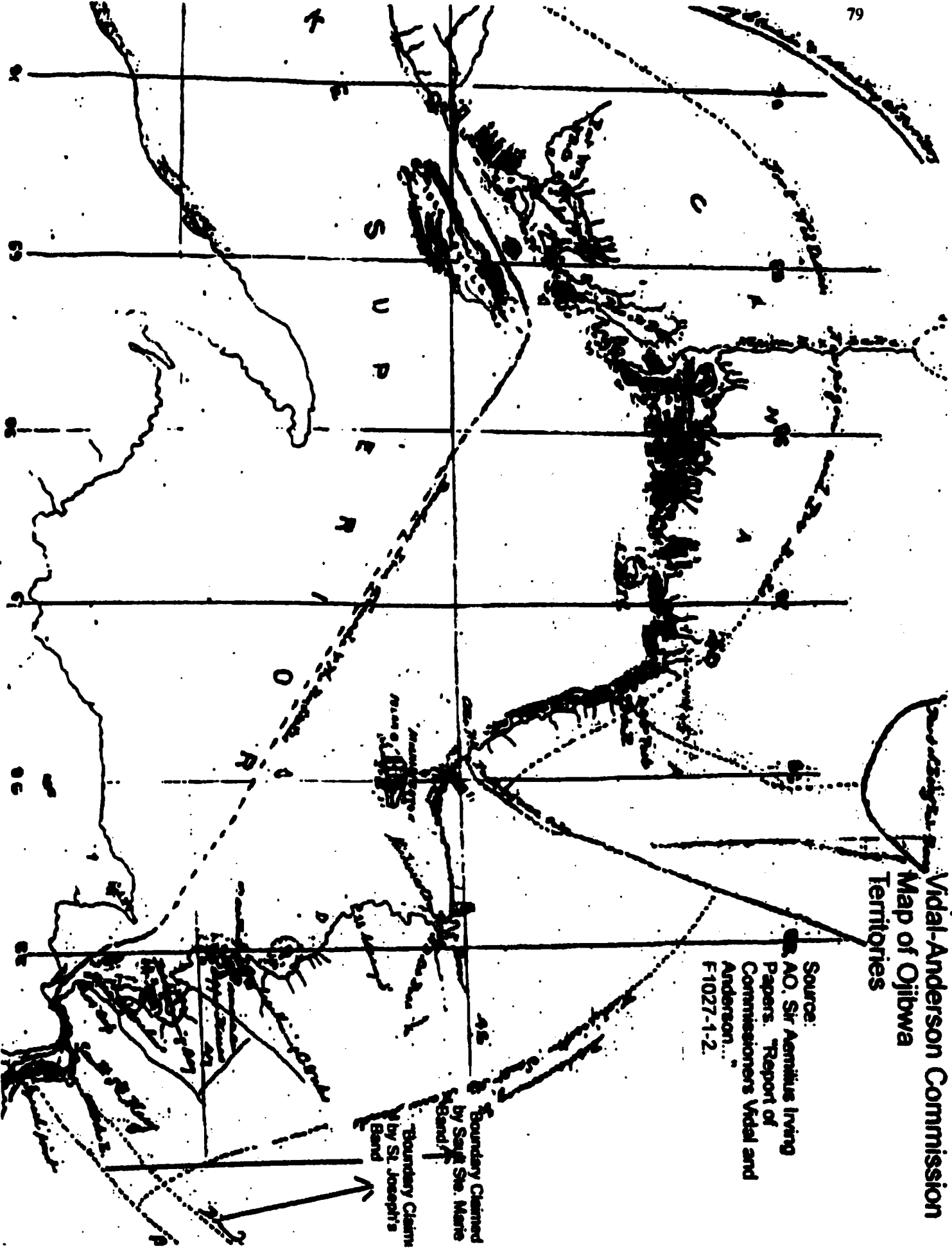
asked for lightly by the chiefs. It reflected the continued importance of hunting, trapping and fishing to their bands and the families that made up those bands.

In September, 1849, Vidal and Anderson met at Sault Ste. Marie and traveled hence to Fort William to meet with the Ojibwa there. From Fort William both men intended to travel east and south along Lake Superior's north shore to Sault Ste. Marie, and then down the coast of Lake Huron. They did have trouble meeting with all the bands along the coast. Owing to the lateness of the season some families had already left for their winter hunting grounds in the interior. Furthermore, an outbreak of cholera kept some Ojibwa away from Sault Ste. Marie. Despite these difficulties they managed to meet with representatives from sixteen of the twenty-two bands in formal council.¹¹⁷

Anderson's and Vidal's concerns about the mineral potential of the region is evidenced by the nature of the questions they posed to each chief they met with. As they wrote in their report the Commissioner's followed a uniform system of questioning at each council. They explained the nature of their mission, and then proceeded to ask specific questions about each band's territory: its extent and boundaries, its nature (i.e.: swampy, types of timber, evidence of mineral deposits), and the chief's expectations regarding compensation should a treaty be offered.¹¹⁸ This division of the region into familial territories, grouped loosely around bands, was indicated on both a map and a chart (*see map #6, and chart #1, pp. 79-81*). Vidal and Anderson were

Anderson Report.

¹¹⁷ Vidal-Anderson Report, 1-2.



Map #6

Vidal-Anderson Commission
Map of Ojibwa
Territories

Source:
AO, Sir Aemilius Irving
Papers. "Report of
Commissioners Vidal and
Anderson..."
F1027-1-2

Boundary Claimed
by Sault Ste. Marie
Band

Boundary Claim
by St. Joseph's
Band

Chart from Vidal-Anderson Commission, 1849

Taken from Archives of Ontario, Irving Papers, MU 1464, 26/31/4, "Report of Commissioners Vidal and Anderson", Appendix B.

Designation or Locality of Bands	Chief's Names	Residence	Total No. of Individuals in Band	Boundaries & Remarks
Fort William	Joseph Peau de Chat	Fort William	175	From Pigeon River (the boundary between Canada and the United States) along the Lake eastward
Lake Nepigon	Mishemusquaw	Lake Nepigon	357	to Puckuswawsebe in which the Nepigon & Pic Bands are included; the division between the bands not known, and extending Northward & westward to the Height of Land, the Province boundary
Pic	Shong Shong Louison(or Mistoche)	The Pic River	165	"
Long Lake	unknown	South side of the Height of Land	40	Part of a large band adjoining the Pic band on the North
Michipicoton	Totomoneh Chickenass	Michipicoton River	160	From Puckuswawsebe eastward in common with the Batchewawnung and St. Marie bands, and back to the Height of Land.
Batchewawnung	no chief	Batchewawnung Bay	50	"
Sault Ste. Marie	Nabanagoghing Shinguakouse	Sault Ste. Marie Garden River	204 [in total]	The east boundary claimed by the Sault Ste. Marie band is Squash Point at the east of Lake George but it interferes with the next
St. Joseph's	Kewokouse	St. Joseph's Island	25	From Echo River (Lake George) to Grand Batture, Lake Huron
Mississaga	Pawtossewag	near the Mississaga River	74	From Grand Batture to Isle aux Rosses
Inland Indians	(unknown)	about Green Lake	40	Lands South of the Height & in rear

Chart from Vidal-Anderson Commission, 1849

Taken from Archives of Ontario, Irving Papers, MU 1464, 26/31/4, "Report of Commissioners Vidal and Anderson", Appendix B.

Designation or Locality of Bands	Chief's Names	Residence	Total No. of Individuals in Band	Boundaries & Remarks
Serpents	Waytauntegowenene Mainwaywaybenaise	Serpent River	35	of the 2 land and next Bands From Isle aux Rosses to Nid d'aigle (4 miles west of Spanish River) From Nid d'aigle to La cloche R. & back to the Inland Band
La Cloche & Spanish River	Penaiseseh	About La Cloche River	250	Between the Lake bands and the height about White Fish Lake.
White Fish Lake	Shawwenawyezhik	White Fish Lake	74	[no entry]
Mebawwenawning	Shawwawnosseway	Manitowaning	50	From La Cloche to Grumbling Point
French River	Waygenawkaingh Mishshquongay Payneequenaishcum	near French River Manitowaning	109 25	From Grumbling Pt. to S.E. mouth of French River including Lake Nipissing in the interior
Shawwaynagar	Muckatehmishoquot Nawbequaybezhik	Beau Soleil Island near Penetanguishene & Isle aux Sables	40 75	From Saugreen Bay to the surveyed lands and back to the sources of the Rivers running into the lake
			Total 1918	

clearly trying to ascertain the cost of any future treaty with the Ojibwa, and the potential return the government could expect in the form of mineral and timber development.

The Commissioners' low opinion of the Ojibwa and their knowledge of the land reflected their preoccupation with European concepts of proprietary value. "The Indians...are confessedly ignorant of the value of the lands," they reported.¹¹⁹ By this the Commissioners believed the Ojibwa placed too high a price on their land. Some bands asked for one hundred dollars per annum for every man, woman and child - an excessive amount from the Commissioners' perspective. Despite the "ignorance" of the Ojibwa, however, the Commissioners advised in their report that the most valuable land was along the lake front and that the interior was essentially valueless. For this reason they recommended two possible strategies for the government. First, the government could treat with those bands with mines already operating on their territory and pay them a portion of the mines' annual profits.¹²⁰ This would permit existing mines to continue to operate unmolested; however, it posed problems should deposits be discovered in other locations. The Commissioners, therefore, favoured the second option: obtain a cession of the entire territory. The bands, they reported, were generally unwilling to part with only their lake frontage "as there was a general wish to cede the whole" and have reservations set aside.¹²¹ By treating for all the Ojibwa's land, the Commissioners stated, the government

¹¹⁹ Vidal-Anderson Report, 9.

¹²⁰ Vidal-Anderson Report, 11.

would obtain "all that is known to be of value...on the [lake] front" while the Ojibwa could "retain undisturbed possession of their hunting grounds."¹²² Both men agreed it was a solution that suited both parties:

whatever may be given to them [the Ojibwa] for the surrender of their rights, they must be gainers, for they relinquished nothing but a mere nominal title, they will continue to enjoy all their present advantages and will not be poorer because the superior intelligence and industry of their white brethren are enabling them to draw wealth from a few limited portions of their territory which never were nor could be of any particular service to themselves.¹²³

This surrender could be only be accomplished, they said, be assembling all the chiefs and representatives of all the bands. Anderson and Vidal recommended "that all the Lake Superior bands and Chiefs should be assembled at Michipicoten River, and those of Lake Huron and the River St. Mary at Manitowanning [sic.]" for the purposes of signing a treaty¹²⁴

The Ojibwa were certainly interested in maintaining their particular hunting territories. It was a concern they voiced prior to 1849, and continued doing so during the Commissioners' trip. During their visits to Sault Ste. Marie, Fort William, La Cloche and Penetanguishene Vidal and Anderson met with chiefs claiming certain portions of the land along the lakes and Georgian Bay.¹²⁵

¹²¹ Vidal-Anderson Report, 11.

¹²² Vidal-Anderson Report, 12.

¹²³ Vidal-Anderson Report, 12.

¹²⁴ Vidal-Anderson Report, 13.

¹²⁵ In conjunction with their report both men kept a diary of their travels. See University of Western Ontario, Regional Collection, Alexander Vidal Papers, "Journal of Proceedings on my mission to the Indians of Lake Superior and

The chiefs and other headmen often expressed a desire to cede their territory provided they did not have to “[leave] their present place of abode [and] their hunting and fishing not interfered with.”¹²⁶ By retaining these rights and land the Ojibwa were not surrendering very much. In essence they were granting the government permission to grant mining licenses to companies to operate on Ojibwa lands. In return, they received an annuity and could continue to live as they had before the treaty.

Despite the Commissioner’s visit some Ojibwa took steps to force the government to negotiate with them. On November 19, 1849, shortly after Anderson and Vidal returned to Toronto, a group of armed Ojibwa, Métis and three White men occupied the Quebec Mining Company location at Mica Bay.¹²⁷ Their intentions, according to observers, was to force the mining company to abandon its location - an understandable reaction after several years of illegal mining.¹²⁸ The government sent troops to expel this group from the site, and to insure that no violence occurred as a result of the incident.¹²⁹ However, the troops turned back before reaching Mica Bay. By late November the lakes were starting to freeze up, and the cold weather forced the men to winter over at Sault Ste. Marie. The soldiers never actually hunted down the leaders as they turned

Huron, 1849. transcribed by George Smith. Also Metropolitan Toronto Library, Baldwin Room, T.G. Anderson Papers, “Diary of Thomas Gummersall Anderson, a visiting Supt. of Indian Affairs at this time 1849 at Coburg.”

¹²⁶ Vidal-Anderson Report, 7.

¹²⁷ The Ojibwa that led this party were Shingwaukonce and Nebenaigoching. The Whites were: Allan Macdonell, his brother Angus and a man named Wharton Metcalf. See Morrison, 79.

¹²⁸ Morrison, 79-81.

themselves in the following spring, were placed under arrest, and taken to Toronto.

If the Vidal-Anderson report had not convinced Governor-General Elgin and the government of the necessity of a treaty, than the Mica Bay incident did. It reinforced Elgin's belief that a treaty was a necessity if peace was to be maintained on the Upper Lakes. He blamed the problems on the previous government. "It is probable," he wrote, "that this necessity [of sending troops] would not have arisen if, before concessions of mining privileges had been made in the District in question the claims of the Indians had been fully investigated and adjudicated..."¹³⁰ When he authorized the sending of troops he did so on the understanding that these "coercive measures" would not hinder the "immediate and equitable adjustment of all Indian claims..."¹³¹

This more enlightened view did not mean that Elgin or the government had lost sight of the minerals. When William Benjamin Robinson was chosen by the Executive Council to negotiate with the Ojibwa on behalf of Her Majesty he was given specific instructions regarding the value of the Ojibwa's territory in relation to the minerals located there. Robinson was to secure a treaty for the whole region, but he was to avoid paying the Ojibwa an excessive amount of compensation.¹³² Echoing the Vidal-Anderson Report, the Council noted that only a small portion of the territory under consideration was needed for mining,

¹²⁹ No shots were fired when the Ojibwa took the mining site.

¹³⁰ NAC, RG 1, E1, Vol. 72. Executive Council Minute, 19 November 1849.

¹³¹ *Ibid.*

¹³² NAC, RG 1, E.1. State Book "J". Executive Council Minute, 11 January 1850.

and Robinson should not entertain any extravagant Native ideas regarding the value of land they had used only for hunting .

Recently arguments have been made that the Ojibwa were coerced into signing the Robinson treaties because of the Mica Bay incident, and the troops that were stationed at Sault Ste. Marie because of it. James Morrison, in a report written for the Royal Commission on Aboriginal Affairs about the Robinson Treaties, argued that the troops sent to Sault Ste. Marie to deal with the Mica Bay leaders remained as a means of intimidating the Ojibwa:

The policing role the military performed at the Sault in 1850 was at least partially intended not to protect, but to intimidate the Ojibways. The troops had originally been sent up to guard the lives and properties of the miners, and it was Captain Cooper and his men who supervised the arrests of two Chiefs and their colleagues after the Mica Bay incident. There is little doubt that the Executive Council Members wanted to convince Shingwakonce and Nebenaigoching that by asserting their property rights to the mines, they were committing a criminal offence. Certainly, the fact that the two Sault area chiefs were still facing criminal charges at the time of the September treaty council must have had an intimidating effect. Those charges were stayed in May of 1851, after the Chiefs had formally asked Her Majesty's forgiveness for their actions.¹³³

Morrison's argument, however, overlooks certain things. First, based on Elgin's Executive Council instructions, troops were sent on the understanding that the action would not hinder future treaty negotiations. Considering the speed with which Robinson was selected and sent north it seems that Elgin was not prepared to let the Mica Bay incident, or the presence of troops, prejudice any

future treaty negotiations. Indeed, the fact that Elgin traveled north prior to the treaty negotiations to meet with some Ojibwa chiefs indicates his personal interest in this matter. Second, while the troops were sent to, amongst other things, arrest the Mica Bay leaders their effectiveness was laughable. Winter prevented them carrying out their duties, and the soldiers wintered at the Sault. Shingwaukonce and Nebenaigoching were not hunted down but turned themselves in, and there is no evidence they were mistreated. Furthermore, the same government that arrested them also released them and gave them money to travel back to the Sault to take part in the treaty negotiations. These two intimidated chiefs were also the most recalcitrant of all the Ojibwa leaders Robinson dealt with. Lastly, troops had long been part of treaty negotiations. There was overwhelming historical precedence to justify the presence of military personnel when tribes and bands signed land cession agreements. Lastly, considering Shingwaukonce's military experience it is unlikely he was intimidated by British troops.

When William Robinson left for Sault Ste. Marie in April, 1850, only five months had passed since the Mica Bay incident. On the nineteenth of that month he left Toronto by steamer, but completed the final twenty five miles of the journey by foot. On May 1, he went to Garden River, and met with the assembled, local chiefs. He convinced them not to interfere with any of the existing mining operations until he returned in September to begin formal treaty

¹³³ Morrison, 105.

negotiations.¹³⁴ Robinson spent the next two weeks making arrangements for his forthcoming trip, and preparing for the upcoming council in accordance with Britain's established rules regarding treaties. As per the Royal Proclamation, which dictated that treaty councils be announced in advance, Robinson sent letters to HBC posts along the lake shore that the Company managers inform the Ojibwa, and the chiefs in particular, that he would be at Sault Ste. Marie in September to negotiate with them. He also informed missionaries who worked near Lake Nipigon of his plans, and asked that they speak with the Ojibwa in that area.¹³⁵

Robinson left for Toronto on May 13, and returned to the Sault on August 14. Peau de Chat, the Fort William Chief and other Lake Superior Chiefs arrived on August 21. Lord Elgin arrived at Sault Ste. Marie on August 30 on the steamer *Mohawk*. Both he and Robinson met with Peau de Chat, who was ill, two days later. The chief told Elgin of "his disappointment of proceedings with Micha [sic.] Bay. He professed much respect and attachment to [the] Queen and her representatives."¹³⁶ The Chiefs from Gros Cap (Michipicoten) arrived on September 2, and treaty negotiations proceeded shortly thereafter.

After delaying on day on account of rain, Robinson met with the assembled chiefs on September 5. He explained the terms the government was offering to them:

¹³⁴ AO, J.C. Robinson Papers, Diary of William B. Robinson on a visit to the Indians to make a treaty, 1850. 1 May 1850. Hereafter referred to as the Robinson Diary.

¹³⁵ Robinson Diary, 2 May to 13 May 1850.

...[I] addressed them, explaining my appt to them, & finished by proposing to pay them \$16,000 (£4000) down in specie and an annuity forever of £1000. Explained to them the benefits of a perpetual annuity instead of a present pay[ment] only. Also told them they might make reasonable reservations for their own use for farming &c &c, & that they would still have the free use of all territory ceded to H.M., to hunt & fish over as heretofore, except such places as were sold to white people and others by the Govt. & occupied in such a manner to prevent such hunting...¹³⁷

After Robinson spoke Peau de Chat rose and "expressed his satisfaction at what he had heard & willingness to treaty..." Totomenaise, representing Michipicoten, said "he would not consent to give Michipicoten to the whites who asked for it, but would cede it to the Queen." Shingwaukonce asked that he be given until the next day to think over the terms. Robinson agreed, and the council was adjourned.

The following day Shingwaukonce told Robinson that he wanted ten dollars per head as a perpetual annuity for every member of his bands, and a reserve "from Partridge pt below the Sault to Garden River & thence to Echo Lake for a reserve about 15 miles [of lake] front."¹³⁸ Robinson told Shingwaukonce he could not provide such an annuity, and "that they [would] have the same privileges as ever hunting & fishing over the whole territory & to reserve a reasonable tract for their own use." Robinson informed the chief that

¹³⁶ Robinson Diary, 1 September 1850.

¹³⁷ Robinson Diary, 5 September 1850.

¹³⁸ Robinson Diary, 6 September 1850.

since the majority of those assembled were willing to sign he would simply proceed without him.

Peau de Chat and the other Lake Superior chiefs assembled on September 7. Robinson read the treaty to them and George Johnson and William Keating translated it to them. Peau de Chat and the others stated they understood the terms of the treaty and "were perfectly satisfied & said they were ready to sign it."¹³⁹ Peau de Chat said he did not "wish to dictate to the Chiefs of the other Lake how they were to act," but that he and the other Lake Superior chiefs were there only to represent the interests of their bands and they "had done what [they] thought best." After his speech Peau de Chat and three other chiefs and five "principal men" signed the two copies of the Robinson-Superior Treaty in open council.

Shingwaukonce was not prepared to concede to Robinson's terms. After the signing he restated the terms upon which his band would enter into the treaty. Robinson again told him that the demands were excessive, but that he would not pressure anyone into signing. He told the remaining chiefs:

Those who signed [would] get the money for their tribes & those who did not sign [would] get none, & I [would] take the remainder of the money back to Toronto, give it to the govt. and take no further trouble about the treaty matter.¹⁴⁰

Robinson then distributed half of the annuity money (\$8000) to the Lake Superior chiefs for their bands.

¹³⁹ Robinson Diary, 7 September 1850.

¹⁴⁰ Robinson Diary, 7 September 1850.

Shingwaukonce and Nebenaigoching made one final demand on Robinson. Two days later Robinson reconvened the meeting to sign the Robinson-Huron Treaty with those Lake Huron chiefs willing to sign. Shingwaukonce and Nebenaigoching said they would not sign the treaty unless the government pledged to give the Métis in the area a free grant of one hundred acres each.¹⁴¹ Robinson confirmed that “certain old residents [could retain]...free & full possession of their lands on which they now reside,” but told both chiefs that he was authorized only to treat with the Ojibwa; however, he said they were free to give portions of their reserve and annuity money to the Métis if they chose. Robinson then had the treaty read aloud, and translated. Shingwaukonce and Nebenaigoching were the first Lake Huron chiefs to sign.

The terms of both treaties are identical apart from the land each described as being surrendered by the Ojibwa to the Crown. The Ojibwa agreed, on their part, to:

...voluntarily surrender, cede, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed...¹⁴²

While this statement may, at first glance, indicate that the Ojibwa surrendered all rights to the land, including their right to hunt and trap over it, such an interpretation ignores the broader context surrounding the treaty negotiations

¹⁴¹ Robinson Diary, 9 September 1850.

and other clauses in the document itself. First, it is clear from the Vidal-Anderson Commission, Robinson's Diary, and Robinson's official report to the government that the Ojibwa believed that they treaty protected their harvesting rights. In addition to the above clause the Crown also promised:

to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government.¹⁴³

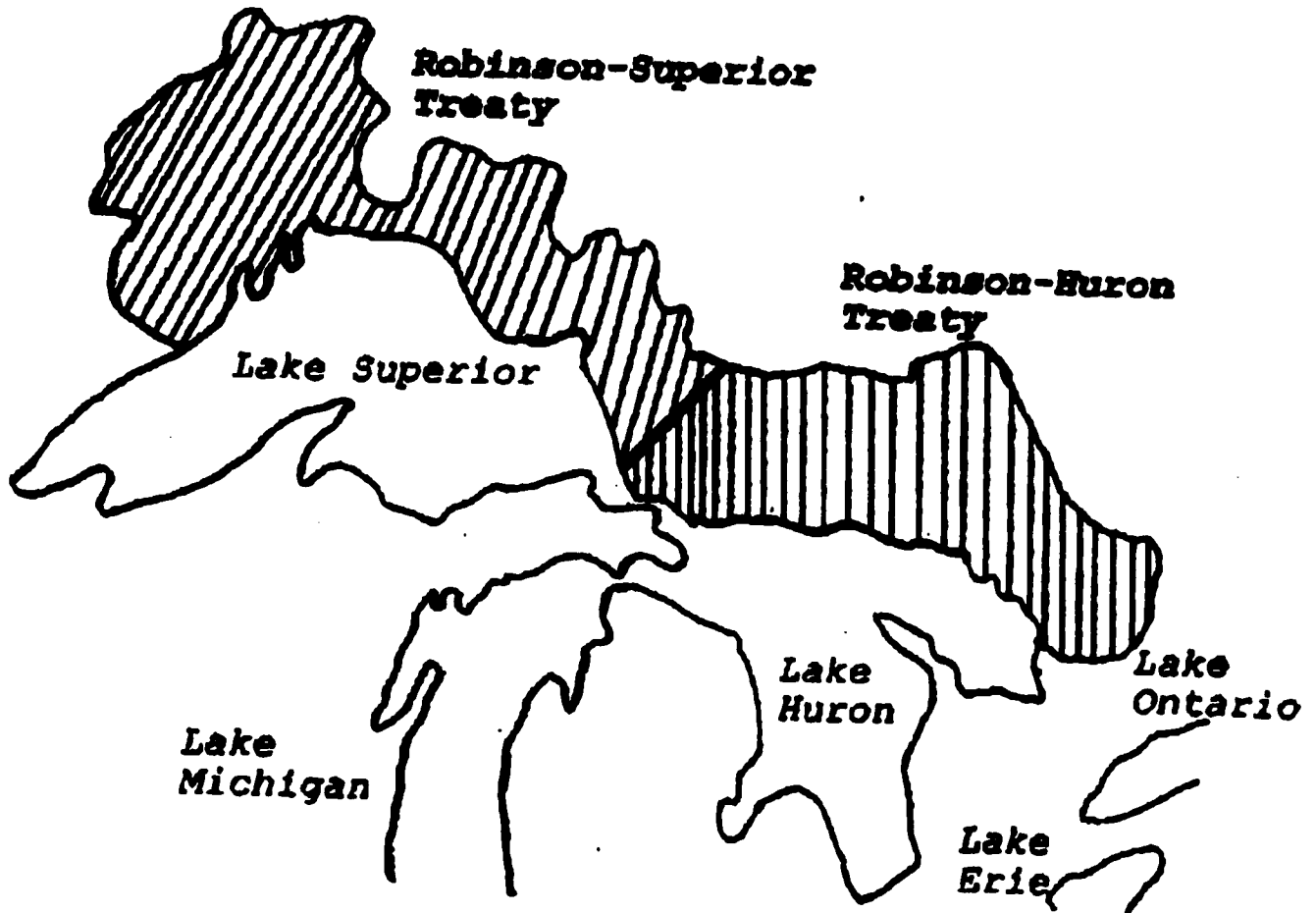
Neither the Crown nor the Ojibwa could foresee the day when mining, logging and farming would extend into the interior, and large tracts of land would be taken up by private interests. Within the context of 1850, the Ojibwa and the Crown both believed that mining would be confined to the lakeshore. The Ojibwa believed they were ceding control over that land required for mining, and logging. They never agreed to cede their hunting rights, and the government had no interest in extinguishing these rights.

The Robinson Treaties covered the land, generally, from Mattawa to the mouth of the Pigeon River, and as far north as the height of land (*see Map #7 and Map #7a, pp. 93-94*). The Ojibwa did not really surrender a great deal from their perspective. While Shingwaukonce and Nebenaigoching were

¹⁴² Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which they were based (Saskatoon: Fifth House Publishers, 1991): 303, 305.

¹⁴³ Morris, 303, 305.

**Map #7
Robinson Treaties'
Boundaries**



Taken from:

Aboriginal Ontario: Historical Perspectives on the First Nations

Edward S. Rogers and Donald B. Smith eds. (Toronto: Dundurn Press, 1994): 128.

**Map 7a
Treaties in
Ontario**



Taken from Aboriginal Ontario: Historical Perspectives on the First Nations, Edward S. Rogers and Donald B. Smith eds. (Toronto: Dundurn Press, 1994). p. 335.

understandably suspicious of the government it appears the other chiefs took Robinson at his word. By retaining the full right to hunt, trap and fish the Ojibwa believed they not only retained continued access to the animal resources of the region, but that their social and cultural conventions regarding the use of these animals also remained intact. The maintenance of family hunting territories was implied in the Robinson Treaties. They had formed the basis of Ojibwa hunting and trapping prior to 1850, and there is no reason to suspect that the bands and chiefs suddenly abandoned them upon signing the treaties (*a complete copy of both Robinson Treaties is provided in Appendix #1*).

Neither party to the treaties could foresee the future, and the new demands that would be placed upon fur bearing animals, game and fish. The government was uninterested in wildlife as it was not considered a valuable resource compared to the copper that existed in the rocks. It was more than happy to allow the Ojibwa to continue to hunt, fish and trap as they always had. Furthermore, the government took no interest in interfering in the territorial divisions that existed in the region. Indeed, the government respected these divisions by insuring that the chiefs and headmen of each band signed the treaties. No single Ojibwa spoke for all the bands from Lake Nipissing to Fort William. Each bands' representatives, speaking only for the families within that particular territory, had to agree to the terms of the treaty.

Chapter Two
““A merciless, ruthless and relentless slaughter...”
The Game Commission, Wildlife Conservation,
and the Ojibwa in Ontario, 1892-1911.”

The creation of the Ontario *Game Act* in 1892, and the Game and Fish Commission to oversee its implementation marked a turning point in Ontario's attitude towards wildlife and its conservation. Ontario's animals were now seen as any other resource: to be protected, and harvested in such a way as to insure long term economic viability. The “myth of superabundance”, as Janet Foster termed it, lost its hold over the province, and earlier beliefs in a limitless supply of game gave way to the stark reality of overhunting.¹ Deer, moose, fur bearing animals and other species were declining in the face of “a merciless, ruthless and relentless slaughter...”² The Ontario government believed it had to act before many species became extinct, and an important resource was lost. The result was the *Game Act*.

The new game laws contained measures to prevent the destruction of species, and maintain their population at levels that permitted continued hunting or trapping. Quotas were set detailing how many of a particular species a hunter or trapper could take each season. Open and closed seasons were created for each animal based on what was known of its reproductive patterns, or, in the case of fur bearing animals, when their pelts were at their best. In

¹ Janet Foster, *Working for Wildlife: The Beginning of Preservation in Canada* 2nd edition (Toronto: University of Toronto Press, 1998): 4.

² Ontario Sessional Papers, “Ontario Game and Fish Commission: Commissioner's Report.” (Toronto: Warwick and Sons, 1893): 5. Hereinafter referred to as “Game Commission Report,” accompanied by the year.

some instances province wide hunting bans were enforced for species the Ontario Game Commission deemed to be threatened. The most innovative element of this legislation, however, were the enforcement measures. Unlike previous pre-Confederation attempts at conservation the new *Game Act* provided for game wardens and deputy game wardens to patrol the province. In conjunction with provincial police officers a system was put in place across Ontario to insure citizens complied with the new laws.

Within this relatively straightforward piece of legislation lay the Ojibwa. Promised by William Benjamin Robinson in 1850 that they could continue to hunt and trap as they had been in the habit of doing they found their treaty rights trod upon by the provincial government. The Province of Canada was gone, and the division of powers under the British North America (BNA) Act left the management of natural resources in the hands of the provinces. Ontario, bent on controlling and protecting its resources almost immediately after 1867, saw the Ojibwa (indeed all Natives across Ontario) as impediments to the full development of the province's wildlife resource. As far as Ontario was concerned treaty rights allowed an uncivilized race of people to follow a lifestyle that was detrimental to the economic well being of "Empire Ontario." Throughout the annual reports of the Game and Fish Commission the metaphorical finger constantly pointed to Natives as one of the chief cause of over-hunting and trapping throughout the province.

The Ojibwa found themselves in a situation similar to their ancestors in 1840 except this time the resource coveted by the province was wildlife. Even though the bands were simply carrying in the spirit of the Robinson Treaties, they found that such harvesting activity was being perceived negatively by the dominant Anglo-British society. Family hunting territories still existed at the end of the nineteenth century, and families still spent much of their time in the interior hunting and trapping. Despite this Ontario's newly formed Game Commission was determined to regulate Ojibwa, indeed all Native hunting and trapping throughout the province in order to preserve game and its long term economic viability.

Economic optimism and the aggression of late nineteenth century Ontario governments, utilitarian or economic concepts of conservation, Victorian Canada's faith in science and its ability to manage nature, and White society's negative views of Natives led the newly formed Game Commission towards this conclusion. The 'gospel of efficiency', an almost religious faith in the ability of science to manage natural resources to maximize economic returns, captured the minds of the Commissioners and affected everything they did from the inception of the Royal Commission to look into the state of Ontario's wildlife in 1890 to the creation of a permanent Game and Fish Commission in 1892. Annual reports filed by the Commission depicted animals and conservation within this framework: natural resources must protected and regulated to maximize their economic profitability.

In this context wildlife fell into the same general framework as other natural resources in late nineteenth century Ontario although important distinctions have to be made which will be outlined later. However, it is important to note that the regulation of fish and game followed the same path already laid out by previous provincial commissions pertaining to mining and logging. Commissions were formed in the nineteenth century to look into the use and exploitation of minerals and timber, and legislation was passed to regulate mining and logging. The provincial government hoped that through regulation the province's resource economy would develop while at the same time it would reap increased revenue through the sale of prospecting licenses, timber limits and other regulatory measures.

Any factor which hindered this orderly development was to be controlled, destroyed, or penalized to prevent improper use or destruction of game and fish. Wolves were often singled out for destruction and extermination because it was believed that they killed animals indiscriminately, and in great numbers. Natives were often compared to wolves in the annual reports. Wolves were not loved by most people of that period. Depicted as cowardly brutes, as evidenced by their hunting in packs and outnumbering defenceless deer, their animal savagery led them to kill massive numbers of deer and other animals out of sheer bloodlust. Natives, uncivilized and childlike according to the preconceived notions of the day, killed in a similar manner. Their uncivilized condition, it was held, imposed a bloodlust in them too, and led them to kill not just to meet their immediate needs but to satisfy a more primal urge. Reflecting

the paternalistic attitude of the federal department of Indian Affairs and many of those involved with Native peoples, the Game Commission believed that Natives would continue this activity until they were 'elevated' to the level of White, civilized society.

Compounding the "Indian problem", from the perspective of the Commission, were the treaties between the Crown and Natives. From its annual reports, and later correspondence with Indian Affairs' officials, the Game Commission clearly held the treaties in low regard. These agreements, such as the Robinson treaties, contained clauses and promises which protected the signatories' and their descendants' hunting and trapping rights. In the Commission's opinion the treaties served only to maintain Natives in a state of barbarism by protecting their hunting privileges. It prevented them from realizing the error of their ways, and perpetuated their wanton slaughter of wildlife. Crown protection and the treaties, in essence, retarded their progress. This attitude led the Game Commission to ignore its own legislation which stated treaty rights would not be interfered with by the game laws, and eventually resulted in the *Game Act* being amended by the Legislature to remove any consideration of treaty rights.

Ontario suffered no legal consequences as a result of this conflict between the *Game Act* and the Robinson Treaties. During the nineteenth century Canadian/Ontario courts and the Judicial Committee of the Privy Council generally ruled against Natives when questions arose over the ownership of

land and resources. Legal scholar Sidney Haring has outlined how nineteenth century courts were “fundamentally hostile to Native rights.”³ Haring discerned a pattern whereby Native land and resource rights were ignored by Ontario courts regardless of treaties, or the Royal Proclamation of 1763.

The same can be said of the Judicial Committee of the Privy Council. The *St. Catherine’s Milling* decision strengthened Ontario’s hold over its land and resources to the detriment not just of the Dominion government but Natives too. This decision has received ample coverage elsewhere,⁴ but a brief summary is in order here. Growing out of Ontario’s boundary dispute with the federal government, the *St. Catherine’s Milling* case revolved around federal and provincial struggle for control of the natural resources in the region covered by Treaty Number Three (see Map #6). In 1883 the federal government granted a timber license to the St. Catherine’s Milling and Lumber Company. This action was part of an attempt by the Conservative government of Sir John A. Macdonald to counter the growing power of Oliver Mowat’s Ontario, and

³ Nineteenth century judicial treatment of Native peoples is considered in Sidney L. Haring, “The Liberal Treatment of Indians”: Native People in Nineteenth Century Ontario Law.” *Saskatchewan Law Review*, Vol. 56, No. 2 (1993): 297-371.

⁴ See Donald B. Smith, “Aboriginal Rights a Century Ago: Were the Indians Cheated in 1885? An old case re-examined.” *The Beaver*, vol. 67, no. 1 (Feb./March, 1987): 4-15. Barry S. Cottam, “An Historical Background of the *St. Catherine’s Milling and Lumber Co. case*.” M.A. Thesis, Dept. of History, University of Western Ontario (1987). Cottam, “The Twentieth Century Legacy of the *St. Catherine’s Case*: Thoughts on Aboriginal Title in the Common Law.” *Co-Existence? Studies in Ontario-First Nations Relations*, John Milloy, Shawn Heard and Bruce Hodgins eds. (Peterborough: Frost Centre for Canadian Heritage and Development Studies, 1992): 118-127.

prevent it claiming what is today northwestern Ontario and its abundant resources.

The federal government based its claim to the natural resources of the region on Treaty Three. This treaty was entered into by the Ojibwa of the area and the Dominion government in 1873. By virtue of this treaty Ottawa contended that the Ojibwas' proprietary rights to the timber and minerals of the territory passed to it. Oliver Mowat, the province's strong willed premier, led Ontario's charge against Ottawa. Mowat argued that the federal government could not have inherited Ojibwa title to the region because:

...there is no Indian title at law or equity. The claim of the Indians is simply moral and no more.⁵

The Dominion government, represented by D'Alton McCarthy (of the Toronto law firm of McCarthy and Osler), lost before all of Ontario's and Canada's courts. Each time it appealed the ruling until the case finally reached the Judicial Committee of the Privy Council (JCPC). The JCPC ruled in Ontario's favour. Natives never possessed any title to the land; it rested with the Crown as soon as England claimed it. The Court did recognize that the Ojibwa possessed a usufructuary right to the territory, but that it had been extinguished by the treaty. This right never passed to the federal government, but to Ontario.

The *St. Catherine's Milling* decision has been the topic of some debate amongst historians. Donald Smith contends that if the federal government had won that the Ojibwa of Treaty Three, and perhaps Natives across Canada, would

⁵Cited in Smith, 11.

have benefited in future legal proceedings over land and resource rights. Smith refers to Justice Steele's decision regarding the Temagami Ojibwa's land claim as evidence of the *St. Catherine's Milling* decision's detrimental impact on Natives today. Barry Cottam disagrees with this interpretation. Describing Smith's perception as "optimistic", Cottam argues that: "Had Macdonald's conception of Indian title held, the Indians would have lost their lands to the federal, not a provincial, government."⁶ Cottam is certainly correct in one sense. If the federal government were victorious it would have been Ottawa granting timber and mineral licenses instead of Queen's Park. Within the broader context of Native treaty hunting rights Smith is correct. Ontario's victory in *St. Catherine's Milling* was worse on the whole for Native hunting and trapping. It strengthened Ontario's control over natural resources, degraded the status of treaties and the rights contained therein in relation to provincial power, and stung the federal government to such an extent that it became reluctant to challenge Ontario's game laws even though officials at Indian Affairs and the Department of Justice believed the *Game Act* to be *ultra vires* of the Ontario legislature. *St. Catherine's Milling* essentially removed Natives from the path of Ontario's economic progress. Within the broader context of the provincial rights movement of the late 1800s, *St. Catherine's Milling* declared that the federal government could not interfere in provincial jurisdiction and further that any other competing interest such as Native peoples.

⁶ Cottam, "An Historical Background of the *St. Catherine's Milling and Lumber*

Considering the poor state of Ontario's fish and game resource at the time it was unlikely the Game and Fish Commission would have recommended any leniency for Native peoples and their treaty rights. "On all sides," the Commission wrote, "[and] from every quarter has been heard the same sickening tale of merciless, ruthless and relentless slaughter."⁷ These words encapsulate the opinions of the Game and Fish Commission in 1892. After a two year investigation the five man commission reported to the provincial government that wildlife and game in Ontario was in a precarious state. Throughout the report the Commissioners outlined those factors that led to this decline, and recommended policies to rectify the situation. The approach adopted by the Commission was both new and innovative, and it marked a departure from past provincial conservation policy. Concrete legislation would be now passed to deal with the problem, and most importantly it would be enforced.

Wildlife became a regulated resource like any other. The late nineteenth century saw provincial commissions established to investigate timber, minerals, and (by the first decade of the twentieth century) hydro power.⁸ The policy issues that confronted the Game Commission were similar to those the

Co Case." 75.

⁷ Ontario Sessional Papers, "Ontario Game and Fish Commission: Commissioners' Report." (Toronto: Warwick and Sons, 1893): 186. Hereinafter referred to as the "Commission Report," and the year.

⁸ Jean Manore has outlined the close links between mining and hydroelectric development in northeastern Ontario in Cross Currents: Hydroelectricity and the Engineering of northern Ontario (Waterloo: Wilfrid Laurier University Press, 1999).

provincial government faced when it regulated mining. It wanted to promote development, and prevent practices that harmed the resource, while at the same time securing the 'people' (or more properly the government) a share of the profits.⁹ When nickel was found in the Sudbury Basin, for example, the provincial government created the Royal Commission on Mineral Resources (1888). Although the Commission recommended against strong regulation the government imposed royalties on certain types of mining. With the discovery of silver in Cobalt the government imposed more uniform regulations with the *Mining Act* of 1906.¹⁰ Other provincial agencies, such as the newly created Temiskaming and Northern Ontario Railway, provided the infrastructure that allowed Queen's Park to extend its laws into a previously remote area of Ontario.¹¹ It was a haphazard process that was more a case of trial and error than clear, well thought policy. In many ways it was a partnership between industry and government. When regulations became too harsh, such as

⁹ Peter George, "Ontario's Mining Industry, 1870-1940." in Progress without Planning: The Economic History of Ontario from Confederation to the Second World War, Ian Drummond ed., (Toronto: University of Toronto Press, 1987): 64.

¹⁰ George, 65-66.

¹¹ Originally intended as a colonization railway to link the agricultural settlements of New Liskard and Haileybury to the existing national railways in North Bay the Temiskaming and Northern Ontario Railway Commission soon found itself in the centre of the largest silver discovery in North America. Robert J. Surtees has noted the important role the Temiskaming and Northern Ontario Railway played as a regulatory agency for the provincial government. See Robert Surtees, The Northern Connection: Ontario Northland Since 1902 (North York: Captus Press, 1992).

excessive royalties, the government relented to industry pressure.¹² Legislators, therefore, walked a line between sufficient regulation to insure the province received a portion of the revenue while at the same time not suffocating these vital industries.

Some similarities existed with wildlife. The Commissioners argued that Ontario's game should be protected because it was a valuable natural resource. Just as timber and minerals produced wealth for the province wildlife also had economic potential. Sportsmen, both foreign and domestic, pumped money into the tourist industry and had to be encouraged. Sales of guns, ammunition, traps, and supplies aided small businesses in remote portions of the province.

Railways benefited from both the increased tourist traffic, and the shipping of deer and other spoils of a successful hunt. Animals such as deer provided food for many farmers particularly those in the more unsettled portions of northern Ontario. Conservation, therefore, was a means of promoting the settlement of "New Ontario" as hunting provided an incentive for prospective farmers.

The problem the Commission faced was finding a means whereby this game could be protected and conserved to prevent extinction, and still permit economic growth in the tourist/hunting industry. Within this context wildlife was far different from minerals or timber. Such resources were stationary.

Timber or mineral permits could be let out to a company for a particular area,

¹² The link between resource exploitation by private industry and the Ontario government was explored by H.V. Nelles in The Politics of Development: Forest, Mines & Hydro-Electric Development in Ontario, 1849-1941 (Toronto: Macmillan of Canada, 1974).

and ownership could be properly and legally claimed. Deer limits, however, were an impossibility. Companies did not try to claim ownership of all the fur bearing animals in a particular area. Wild animals moved around and were common property unless located on private property - although even then a wild deer did not belong to someone merely because the creature stumbled onto their property. Unlike mining where large companies such as Inco wielded considerable political clout with political parties in and out of government hunting was a more populist endeavour. Anyone with a gun could obtain a licence and hunt. In this sense, wildlife was a democratic resource.

Furthermore, no one expected minerals to be conserved. Mineral deposits were to be mined out. Even timber limits at that point in time were granted with no expectations of reforestation. Fish and game, however, were viewed as renewable resources. This necessitated imposing rules to insure the long term sustainability of the resources without stifling its use. It was a grim situation, the Commission warned, that required immediate action:

Where but a few years ago game was plentiful, it is hardly now to be found; and there is great danger that...even those animals which have been so numerous as to be looked upon with contempt, will soon become extinct. In many places where game animals formerly abounded, large cities stand today. The clearing of land, the cutting down of the forests, the introduction of railways, the ravages of the wolves, the indiscriminate hunting of the human assassin, and the use of dynamite and net, have all contributed to the general decrease of the game and fish of this land. This is...a deplorable state of affairs,

not only from the sportsman's but from an economic point of view.¹³

In fact the "sportsman" and the "economic" point of view were analogous. These considerations were at the forefront of the Commission's report, and remained entrenched for years to come.

Economic utility, termed the "gospel of efficiency" or "doctrine of usefulness" by historians, provided the Commission with a means of wedding economic regulation and exploitation with conservation. This idea was not unique to the Game Commission within either a Canadian or North American context. Sir John A. Macdonald's National Policy, based on the exploitation of natural resources, drew extensively from this approach. During the 1880s national parks were established along the western extreme of the Canadian Pacific Railway line in areas deemed worthy of conservation, and the most likely to attract tourists.¹⁴ This same doctrine affected Ontario in its parks program. Starting with Niagara Falls and perhaps best symbolized by the creation of Algonquin Park, Ontario established its parks system not to protect natural areas for their own sake but to develop the resources contained therein in a sound, scientific manner.¹⁵

¹³ Commission Report, 1892, 16.

¹⁴ See Robert Craig Brown, "The Doctrine of Usefulness: Natural Resources and National Park Policy in Canada, 1887-1914," Canadian Parks in Perspective, J.G. Nelson ed. (Montreal: Harvest House, 1970): 49. Janet Foster examined later applications of this principle in federal park establishment and federal conservation laws in Working for Wildlife: The Beginning of Preservation in Canada (Toronto: University of Toronto Press, 1978).

¹⁵ See Gerald Killam, Protected Places: A History of Ontario's Parks System (Toronto: Dundurn Press, 1993).

This pragmatic approach to conservation grew out of the environmental movement in the United States during the nineteenth century, and became so popular that even more romantic beliefs such as the Transcendentalist movement took on a decidedly utilitarian bent. Characterized most effectively by Henry David Thoreau, Transcendentalists argued that untouched wilderness gave modern man an escape from civilization.¹⁶ It enabled people to balance two extremes of their personalities: the “higher, or as it is named, spiritual life...[and] a primitive savage one.”¹⁷ This close spiritual attraction to nature found further expression in the work of conservationist John Muir (1838-1914). Muir respected nature, as Thoreau did, as part of a community to which humans belonged.¹⁸ Despite these strong ideals, Muir eventually came to realize that the way to preserve nature was to convince the general population of its worth.¹⁹ As the U.S. historian Roderick Nash noted, Muir “camouflaged his radical egalitarianism in more acceptable rhetoric centered on the benefits of nature for people.”²⁰ Muir, in a sense, found practical elements in Thoreau’s romantic idealism, and from this emerged the belief in the tangible, physical benefits of wilderness tourism.

¹⁶ Phillip D. Thomas, “Thoreau, Henry David,” Biographical Dictionary of American and Canadian Naturalists and Environmentalists, Keir B. Sterling et.al. eds., (Westport: Greenwood Publishing, 1997): 775. Nash, 39.

¹⁷ Thomas, “Thoreau, Henry David,” 775.

¹⁸ Nash, 39. See also Paul Cammarate and Keir B. Sterling, “Muir, John,” Biographical Dictionary of American and Canadian Naturalists and Environmentalists, 563-566.

¹⁹ Nash, 39.

²⁰ Nash, 41.

Similar sentiments relating the practical need to preserve wilderness for the mental and physical well being of society were expressed by the Ontario Game Commission in 1897:

On the other hand, and probably the largest class, are the lovers of nature, and the true sportsmen, who desire to preserve the game as long as possible, to furnish, if for nothing else, an inducement for those field sports which have done so much to develop both physically and mentally, the better men of the country.²¹

One part of Ontario that quickly proved popular to both tourists and sport hunters for its regenerative powers was the Temagami area.²² Lake Temagami was opened to city dwellers from throughout Ontario after construction of the Temiskaming and Northern Ontario (T&NO) Railway from North Bay to New Liskard began in 1902.²³ Bruce Hodgins and Jamie Benedickson refer to this surge in wilderness travel as the “summering movement.” Canadian magazines, such as *Rod and Gun*, promoted the practical physical and mental benefits one received from visiting not just the Temagami area itself, but any remote location:

²¹ Commission Report 1897, 4. Patricia Jasen also examined the belief that wilderness holidays provided a respite from “the mental and physical degeneration that was common to many western industrial societies in the late nineteenth century.” See Patricia Jasen, Wild Things: Nature, Culture and Tourism in Ontario, 1790-1914 (Toronto: University of Toronto Press, 1995): 106-111.

²² Bruce Hodgins, Jamie Benedickson, The Temagami Experience: Recreation, Resources, and Aboriginal Rights in the Northern Ontario Wilderness (Toronto: University of Toronto Press, 1989): 109.

²³ The Grand Trunk, Canadian Pacific Railway and the Temiskaming and Northern Ontario Railway all met in North Bay. Tourist traffic was so heavy that the T&NO organized direct connections with the Grand Trunk and CPR in North Bay. Hodgins and Benedickson, 110.

Here the brain-fagged, nerve racked denizens of our great cities may find rest, real rest, from the clash and clang, the hurry and the worry of the ten months of grind in the treadmill of business life.²⁴

While such notions may appear at first glance to be romantic they reflected more practical concerns of an increasingly urban southern Ontario. Wilderness required preservation and scientific management to provide a rugged but idyllic respite for urbanites seeking escape from the pressures of the city.

In this sense conservationism was an extension of the nineteenth century Victorian faith in science, and its ability to both provide society with tangible benefits and reveal the secrets of nature. Natural history, to use the term popular at the time, "combined an intellectual fascination with the strange forms of life in northern America with an intense interest in exploiting new resources."²⁵ Local natural history societies appeared in Canada's fledgling towns and cities as a concrete manifestation of this trend. Well intentioned and occasionally gifted amateurs formed the membership of these groups which was typically drawn from the educated middle class. Doctors and pharmacists formed an important element of these groups. Both professions required a strong science background and knowledge of local plants for curative reasons.²⁶ These local societies dotted Canada's landscape, and systematically observed and catalogued local flora and fauna either due to the efforts of individual

²⁴ Cited in Hodgins and Benedickson, 109.

²⁵ Carl Berger, Science, God, and Nature in Victorian Canada (Toronto: University of Toronto Press, 1983): 2.

²⁶ Berger, 10-11.

members or during group field trips. Occasionally a society published their studies of larger mammals such as deer, bear, beaver or otter.²⁷

When Ontario formed the Game and Fish Commission in 1890 to investigate the state of Ontario's wildlife it reflected the convergence of economics, science and conservation. It was concerned with preserving one of Ontario's potentially profitable resources, had an abiding faith in science, as reflected in its roots in amateur naturalist societies, and was concerned with preserving nature for society's practical benefit. For example, Dr. G.A. MacCallum from Dunnville, Ontario, was chosen as chairman. A trained physician, MacCallum came to his position with a strong background in biology and chemistry, and love of science.²⁸ While no information exists about the Commission's other permanent members none of them was noted as being university trained biologists, but reflected the amateurish state of wildlife research at that time. When more detailed scientific information was needed regarding different species in Ontario the Commissioners turned to outside experts or relied on published scientific studies. The last portion of their 1892 report contained descriptions of animals, birds and fish found in Ontario. This decidedly naturalist element of their report relied heavily on contemporary scientific findings combined with more popular, and ill-informed opinions

²⁷ Berger, 14. One such man was Thomas McIlwraith, a Hamilton fuel dealer, who gathered enough material to write The Birds of Ontario (1886) which became the standard work for some time. See Berger, 12.

²⁸ Lambert and Pross Renewing Nature's Wealth: A Centennial History of the Public Management of Lands, Forests and Wildlife in Ontario, 1763-1967 (Toronto: Department of Lands and Forests, 1967): 449.

regarding certain species such as wolves. For this section the Commission relied on the work of Professor Frederick True, Curator of the Department of Mammals for the Smithsonian Institute in Washington, and the advice of Dr. H.M. Smith of the United States Fish Commission, and Professor Ramsay Wright, Professor of Biology at the University of Toronto.²⁹

The structure of the report, and the recommendations put forth by the Commissioners reinforced this economic and scientific approach to game conservation although the latter suffered from its roots in amateur naturalist societies. It was believed that scientific management was necessary to maximize economic returns from hunting, trapping, and fishing yet the science the Commission used is questionable. Data to base this management on was gathered through the use of interviews and questionnaires which were given to over six hundred people across Ontario (although most resided in eastern and southern Ontario). These questionnaires were designed to be scientific and unbiased, but viewed with the benefit of hindsight it is clear that they were completely subjective. No attempts, for example, were made by the Commission to enumerate animal populations. The only information the Commission relied on in determining animal numbers was the subjective opinions of those interviewed. Even the people the Commission consulted had little to do directly or indirectly with hunting or trapping. Only ten men noted their occupation as being hunter or trapper, one as a fur trader, two guides, one sportsman, and

²⁹ Commission Report, 1893.

eight bush rangers.³⁰ In contrast, two hundred men were farmers, thirty-seven were merchants, eleven were carpenters, and sixteen were noted simply as being a "gentleman."³¹ The Hudson's Bay Company was not consulted in any way. It was the largest, and oldest, fur trading company in Ontario, and still maintained posts throughout northern Ontario. No record exists, however, of the Commission interviewing any post managers or HBC executives. They could have provided information regarding animal populations based on their post records, which detailed the number of pelts brought in each year, and provided greater insight into Native hunting and trapping.

The questionnaires also reveal the Commission's preoccupation with economics. They were broken down to cover certain animals so particular rules could be established for each species: deer, moose, elk, caribou, birds (with this category broken down into particular varieties), fur bearers, and wolves and other "destructive animals." Each questionnaire focused not only on the habits of animals, but their economic value to the province. Questions concerned with birds shot for sport³² centered around the market for these birds during or outside of the established closed season.³³ General questions were posed to people regarding the protection of game, and the tourist trade in their particular location. One such question asked if tourists/sportsmen would visit the

³⁰ Ibid. p. 43-53.

³¹ Ibid.

³² The birds considered by the Commissioners were: species of grouse, quail, wild turkey, woodcock, snip, rail, plover, swan, three species of geese, and seventeen species of duck. Commission Report, 1892, 17.

³³ Commission Report 1892, 19.

respondent's locale more regularly if the local game was protected.³⁴ Similar questions were posed to hotel operators and store keepers located in what the Commission referred to as "sporting localities."³⁵ Rail and steam liner operators were asked how many "sporting, camping and angling" passengers they carried each year, and the value of this traffic.³⁶

No consideration was given towards any other value an animal might hold apart from the price of its pelt or its worth as a game animal. Questions regarding rabbits and hares, for example, centered on the value of their pelts. The closed season for rabbits in 1890 was from March 1 to September 1. During this period rabbit furs would be at their worst as they shed hair for the warm months of spring and summer.³⁷ The Commission gave no consideration to people snaring and eating rabbits during the spring and summer. More traditional fur bearing animals (beaver, mink, marten, muskrat) received similar treatment even though some (particularly beaver) were an important source of food for the Ojibwa. Questions centered around closed and open seasons which related to those times of the year when these furs were at their best.³⁸

Deer were singled out for particular attention by the Commission as one of Ontario's most valuable game resources. Accumulating sufficient data to conserve and develop the species was of great importance to the Commission. The deer questionnaire was several pages longer than that devoted to any other

³⁴ Commission Report 1892, 24.

³⁵ Commission Report 1892, 29.

³⁶ Commission Report 1892, 30-31.

³⁷ Commission Report 1892, 169.

single animal. It consisted of forty-three questions compared to three questions for moose, elk and caribou combined. Deer were much sought after by sportsmen both domestic and foreign (i.e.: American). They brought in a great deal of money to the province in terms of tourist dollars, were an important source of food for many in rural areas, and doe, fawn and buck skins were sold on the open market. Their multiple uses resulted in a long and varied questionnaire. Commissioners wanted to know when the rutting season began and ended, and when does gave birth. They asked witnesses when young does were able to bear young. They asked what the dressed weight of a yearling was, and if does should be shot when heavy with young.³⁹

Economics and revenue continued to dominate the Game Commission's thinking after its initial findings in 1892. Subsequent annual reports focused on the more lucrative animals such as deer and other large land animals, quail, partridge, and duck. These animals attracted foreign hunters, and led sportsmen from more settled parts of the province to travel to more remote regions. Such tourism was a growing industry in Ontario. Revenue obtained through the sale of hunting licenses and the imposition of fines brought tens of thousands of dollars to the government of Ontario. These two compelling factors created annual reports which focused on those animals sought by sportsmen. Each of Ontario's game wardens noted how many deer were killed

³⁸ Commission Report 1892, 171.

³⁹ Commission report 1892, pp. 11-12.

in their district each season, and related information relating to the killing of game birds and animals.

Economic concerns led the Commission to ignore the advice of those they interviewed when these opinions might possibly harm tourist operators, or impact negatively on government revenue obtained from hunting. The Commission noted a growing concern regarding foreign sportsmen amongst those they interviewed in its 1892 report; a strong belief that foreign hunters should not be allowed to hunt deer if it was becoming scarce, and domestic hunters were unable to secure deer for their own purposes.⁴⁰ In essence, local hunters should have 'first shot' at a domestic resource. Such an opinion did not sit well with the Commissioners. Foreign sportsmen were too important to the province to let such concerns influence the government in terms of tourist dollars and a source of government revenue:

...it must be remembered that foreign sportsmen put much money into circulation and very materially help the residents and business men in sporting localities, and your Commissioners have therefore to recommend that if it is not thought wise to entirely prohibit foreigners from killing deer in the Province, a permit should be obtained, and a fee paid for the privilege.⁴¹

This would be a recurring theme throughout future Commission annual reports.

In the annual report for 1905 a more blunt statement was rendered:

Of great importance, also, is the interest of the Province, that is to say of the people as a whole, in the game as attracting tourist travel. The money spent in

⁴⁰ Commission Report, 1892., p. 191.

⁴¹ Ibid., p 191.

the country by visitors coming here for the purpose of hunting, shooting and fishing, can only be measured by hundreds of thousands of dollars annually, and the amount is capable of being multiplied many times over by increasing the attractions. The mere market value of game as an article of commerce is a trifle compared with the amount of money expended in pursuit of it.⁴²

In 1906 the Commission noted that the foreign "tourists who annually visit our northern resorts, large as the numbers are, will increase tenfold in a few years, if the attractions remain, namely an abundant supply of game and fish."⁴³

After the Commission's initial report other government appointed bodies made similar observations about northern Ontario's tourist potential. As early as 1900 provincial survey crews, sent throughout northern Ontario to report on the territories' mineral, timber and hydro potential, noted how the local wildlife and fish represented a considerable attraction to sport hunters. That year the provincial government sent ten survey crews north to investigate the resource potential of the region.⁴⁴ Throughout the report, although concerned primarily with minerals and timber, the surveyors noted the abundance of fresh water fish, game birds and animals. Survey team number three, which explored the area north of North Bay to the HBC post at Matachewan (west of present day Kirkland Lake) reported that:

The entire territory explored by us is an excellent field for lovers of sport and without a doubt, when this country is known to the sportsmen, it will be

⁴² Commission Report, 1905. p. 7.

⁴³ Commission Report, 1906, p. 9.

⁴⁴ Ontario Sessional Papers, "Report of the Survey and Exploration of Northern Ontario, 1900." (Toronto: K.K. Cameron, 1901).

invaded by them "en masse," and districts hitherto untrodden by the foot of man will become the haunts of the pleasure seeking Nimrod.⁴⁵

Such an opinion, while it obviously overlooked countless generations of Native occupation and the travels of French missionaries and fur traders who travelled the same rivers and portages as the surveyors, evoked an image of an unspoiled wilderness waiting for the sportsmen, the tourist and their money.

Opinions that conflicted with these optimistic reports, or the Commission's perception of tourism's economic potential were ignored by the Game Commission. Issuing deer licenses to sportsmen and hunters, both foreign and domestic, was fundamental to the Commission's *mentalité* and existence. Issuing licenses reinforced the idea that proper regulation of Ontario's animal resource, regardless of the pressures put on it, would insure a ready supply of deer or other species. Such an idea formed the very foundation of the Commission's conclusions, and the utilitarian approach to conservation in general. Furthermore, license fees provided the Commission with a source of revenue which lessened its drain on the public purse. It is unlikely that the provincial government would have financed a conservation commission if it was prohibitively expensive. In fact, the Commission and its later incarnation, the Department of Game, ran a small budget surplus well into the twentieth century. The license system worked so well that the Commission began to issue them to domestic hunters in 1896 at a nominal fee.⁴⁶ Prior to this anyone in Ontario was

⁴⁵ Report of the Survey and Exploration of Northern Ontario, 1900." 94.

⁴⁶ Commission Report 1896, p. 5.

permitted to kill two deer per season, and the Commission was surprised to learn this resulted in large numbers of deer being killed. According to the Commission licensing domestic hunters helped for not only "was the slaughter curtailed by nearly one half, as compared with last year, but the plan furnished a very handsome revenue."⁴⁷ By 1898 it was noted that the money brought in by deer licenses covered a large portion of the Commission's operating expenses. In that year 3559 deer hunting licenses and 2,065 settlers' permits were issued.⁴⁸

Considering the amount of money foreign and domestic White hunters provided for both the government and the small businesses that catered to the hunters it is not surprising the Commission was not prepared to look at over-hunting by sport hunters as a cause of game depletion. Instead it found culprits in natural predators, and amongst members of society for whom governments in general expressed little concern. It was much easier to single out predatory animals rather than restrict the more lucrative sport hunting industry.

Unmanaged use of wildlife, whether natural or human, was something the Commission sought to control, and it encouraged the destruction of all "vermin" (i.e.: wolves, fox, weasels, skunks, owls, hawks, etc.). These animals, wolves in particular, were portrayed as relentless destroyers of game. Such animals killed not only to meet their immediate requirements for food, but also because of a more basic and primal blood lust.

⁴⁷ Commission Report, 1896, p. 5.

⁴⁸ Commission Report 1898, p. 6.

Natives were also portrayed in a similar fashion, and analogies were drawn between the depredations of wolves and the assumed destruction wrought by Natives. Disenfranchised, and generally looked down upon by White society, it was as easy for the Game Commission to single out Natives as a cause of game depletion like any predatory animal. Indeed, the Commission noted that apart from this vermin the only factor that hindered the development of a profitable hunting and fishing industry was the "Indian problem." Natives were portrayed as reckless destroyers of game as early as the first Game Commission report in 1892. This was particularly evident in the questionnaires circulated by the Commission. As regards deer the first report devoted some of its questions towards determining the cause of Ontario's declining deer population. Questions regarding "crust hunting" were posed, specifically which "classes" of society practiced this method.⁴⁹ Similar questions were asked about "marsh" or "jack-light hunting."⁵⁰ In regards to crust hunting, 468 respondents said it was practiced extensively. When asked by what classes, 309 said farmers and settlers and 113 said Indians.⁵¹ As regards marsh hunting, only 138 said it was a common practice with 137 saying farmers and settlers were the most likely to engage in this practice, and 57 indicating Indians were the chief culprits.⁵² Questions regarding the open season for deer, from the fifteenth of October to

⁴⁹ Commission Report 1892, p. 13. Crust hunting was done in the winter. When a thin layer of ice built up on deep snow deer would often fall through this crust. They would flounder, and be easy targets for hunters. Shooting an animal in such a situation was considered to be unsportsman like.

⁵⁰ Ibid. Jack-light hunting was done with a light, electrical or torch at night.

⁵¹ Ibid., p. 60.

the twentieth of November, were asked. Specifically, the Commissioners wanted to know: "Is the close season commonly disregarded, and by what classes?"⁵³ In their general conclusions the Commissioners found that existing close seasons for fish and game were not being respected, and were being broken primarily by "settlers, Indians, boys, and pot-hunters."⁵⁴

Although other human factors were identified Native peoples were singled out for particular attention by the Commission. Blood-lust was, in the opinion of the Commission, an element of Native people's child-like state for they could neither appreciate nor understand the consequences of hunting irresponsibly. Portraying them as being akin to wild animals fit within the existing paternalistic paradigm of the Indian as 'uncivilized savage.' Indian Affairs followed such a belief as expressed through the reserve system and residential schools. These institutions were designed, apart from other reasons, as a means of civilizing Native peoples. Reserves kept them rooted, and ended their 'wandering.' Residential schools were designed to Christianize them, and alienate younger generations from the more traditional ways of their parents. The Game Commission simply meshed existing convictions regarding Natives with prevailing concepts of conservation.

The Game Commission also believed that treaties compounded the Indian problem. In their 1893 report, the Commissioners wrote that "where these protected children are domiciled it is almost impossible to bring home to these

⁵² Ibid., p. 60.

⁵³ Ibid. p. 14.

people the proof of their crime" due to the adverse affect of the treaties.⁵⁵ In their 1894 report the Commissioners noted that they had received many complaints regarding Native hunting, "but find it almost impossible to bring home to these people the proof of their evil doing, or to punish them by reason of the special privileges which they enjoy as wards of the Crown."⁵⁶ As a means of convincing Native people's of their wanton destructiveness the Commission recommended employing someone fluent in a Ojibway and Cree to speak with the bands in Northern Ontario:

A matter of great import to which I take the liberty of drawing your attention, is one of a missionary character, namely to send a competent man well versed in the Indian language, to make a tour of the Indian reserves in the northern portions of the Province, for the purpose of convincing the Indians that they are acting very foolishly and much to their own detriment, in the useless and indiscriminate slaughter of game.⁵⁷

While this never occurred it reveals the extent to which the Game Commission equated Native hunting with their 'uncivilized' culture.

At times the Commission went beyond depicting Natives as children, and compared them to wild animals. In 1905, Native peoples were believed to be so destructive that they were likened to the most detested vermin in Ontario: the wolf. The Game and Fish Commission did not offer a flattering portrayal of the wolf in 1892, and it did not improve over the years. Wolves were described as

⁵⁴ *Ibid.*, p. 196.

⁵⁵ Commission Report, 1893, p. 6.

⁵⁶ Commission Report, 1894, p. 5.

⁵⁷ Commission Report, 1895, p. 9.

“noxious animals, possessed only of “detestable qualities,” and completely lacking in courage which was “absolutely foreign to [their] nature.” In short the wolf was “cordially detested wherever found.”⁵⁸ In relation to deer, the wolf was its mortal enemy “and the destruction wrought by him is great and merciless...[deer are] easily overtaken by the band of snapping cowards...”⁵⁹ Even a wolf’s environs was a subject of derision. Invoking an image reminiscent of Bram Stoker’s Carpathian Mountains, the Commission said wolves spent their time amongst “somber pine forests...rugged mountains...and snow covered wastes.”⁶⁰ The wolf stopped “skulking” about its mountain retreat only when forced by its ravenous appetite to descend on farms and villages by night where helpless cattle or sheep slept.

Such an image did not bode well for Native peoples. The 1905 report’s portrayal of Natives seemed designed to play on societies’ misconception of wolves as unrelenting killers:

Indians...bear a strong resemblance to wolves, they recognize no close seasons, age or sex. Cow or calf moose is always preferred when required for food, and killed accordingly, irrespective of season or condition.⁶¹

Similar statements were made in the 1906 annual report. Natives wasted animals, the Commission wrote, killing them only for their hides and leaving the meat to

⁵⁸ Commission Report, 1892, p. 325.

⁵⁹ *Ibid.*

⁶⁰ Commission Report, 1892. p. 11.

⁶¹ Commission Report, 1905, p. 17.

rot in the bush.⁶² By way of example, the report referred to an incident at Lake Nipigon where it was reported that Natives stacked lake trout like cord wood to feed their dogs for the winter.⁶³ No thought was given by the Commission that the Ojibwa traditionally fed their dogs with fish over the winter. Drawing further on the image of Indians as vermin one report went so far as to note that only those parts of the province not "infested by Indians" experienced an increase in game animals.⁶⁴

In order to cease this slaughter the Commission believed Natives should be stripped of their treaty rights. By 1905, H.S. Osler, the Chairman of the Game and Fish Commission, wrote that the "provision exempting Indians...from the operations of the Act have been greatly abused."⁶⁵ Edward Tinsley, Chief Game Warden for the province, agreed. Tinsley argued that the only way to prevent Natives from over hunting was to abolish the special privileges accorded to them under the existing game laws. Natives should be forced to give up "supplying lumber camps, summer hotels and tourists with game during the...close seasons,"⁶⁶ and take on wage paying jobs in order to end their dependence on hunting. "Employment can now be procured in nearly all parts of the Province by those who want to work," according to the 1906 annual report. If Natives did not want to work, but preferred to live their leisurely life, the Commission recommended they "should be made to either work or starve, and not be

⁶² Commission Report, 1906. p. 9.

⁶³ Ibid.

⁶⁴ Commission Report, 1903. p. 7.

⁶⁵ Commission Report, 1905. p. 15.

allowed to lead lazy loafing lives, destroying valuable assets of the Province with impunity."⁶⁷

Prevailing concepts of economic growth, conservation, and Natives combined in the 1892 in such a way as to deprive Native peoples in Ontario of their treaty rights to hunt, trap and fish. As Ontario embarked on a course designed to develop it into a small economic empire within Confederation it refused to let any obstacle stop it. When challenged, as in the case of the boundary dispute and *St. Catherine's Milling*, Ontario was unwilling cede any control over the resources within its boundaries. Perhaps it was only a matter of time before wildlife and the money involved in White hunting and tourism attracted the resource hungry eyes of Queen's Park. Just as the Legislature was beginning to regulate mining and lumbering to maximize their economic potential, wildlife was brought under legislative and bureaucratic control. Concurrent with this development in Ontario were ideas regarding conservation, nature's place in relation to society, its utility, and the ability of science to not only explain nature but regulate it. Utilitarian conservationism, with its emphasis on the scientific management of nature and the tangible benefits society reaped from such direction, provided Ontario's Game and Fish Commission with an approach that easily combined conservation and economic development. The hunting of deer, game birds, and fur bearers could be

⁶⁶ *Ibid.*, p. 17.

⁶⁷ Commission Report 1896. p. 9.

regulated to insure not only the long term viability of these species, but also guarantee their economic potential.

In the middle was Ontario's Native population. Treaties, such as the Robinson treaties, guaranteed them the right to hunt and fish as they had been in the habit of doing when the treaties were created. Such a promise conflicted with Ontario's desire to develop its natural resources. Disenfranchised, and looked down upon by White/Euro-Canadian society, Natives could be easily singled out by the Game Commission as an undesirable factor in the conservation of species. Unfortunately, the lifestyle of the Ojibwa living in the Robinson Treaties was still based on traditional hunting and trapping. Despite the words of the Game Commission wage labour, although available, was not a viable option for the Ojibwa. At best it was seasonal, and complemented more traditional means of support.

A brief survey of 1861 census data for Algoma District reveals that those Ojibwa who lived in the region were heavily dependent on traditional harvesting practices just prior to Confederation.⁶⁸ Some did make a living from other sources. Several Ojibwa men residing in the vicinity of Batchewana Bay had \$1200.00 invested in a provisioning business for the fur trade.⁶⁹ All the other Ojibwa listed, however, were either noted as being hunters or no occupation was listed at all. The enumerator for the Fort William area noted the Ojibwa were

⁶⁸ NAC, Census, 1861, Algoma District. Reel C-1091. Enumeration Districts 1 to 7. Algoma District was much larger in 1861. It extended from Manitoulin Island and the north shore of Georgian Bay to the Hudson's Bay Company post at Fort William, and as far north as the height of land.

"Bush Indians" under the occupational heading. As regards religion some were noted as being Catholic, Anglican or Methodist but the vast majority were noted as being either "pagan" or "heathen."⁷⁰ On the North Shore of Georgian Bay (between Bruce Mine and the west side of the Spanish River) the enumerator noted that none of the half-dozen families he met lived in log houses but in "wigwams."⁷¹

By the end of the nineteenth century Ojibwa life had changed to a certain extent, but traditional pursuits still played an important role in their lives. J.F. Hodder was the Indian Agent responsible for the Ojibwa residing on the north shore of Lake Superior in 1898. In his annual report to Indian Affairs he noted, among other things, the type of economic and subsistence activity the different bands engaged in. Hodder observed that the bands engaged primarily in traditional harvesting activity, or worked in fields related to such activity. As regards Nipigon, Hodder wrote: "Hunting is the principle occupation of these Indians, though a few act as guides to the Nepigon [sic.] tourists."⁷² The Red Rock band also found job opportunities as guides for tourists travelling up the Nipigon River. As regards Pays Plat, the "pursuits of these Indians are hunting, fishing and exploring for minerals;" the latter activity likely referring to band

⁶⁹ Census 1861, Enumeration District #1.

⁷⁰ Those living on the mainland were primarily traditionalists while those Ojibwa and Ottawa residing on Manitoulin Island were almost evenly split between Roman Catholics and Methodists and "Heathens." Census, 1861, District 4.

⁷¹ Census 1861, Enumeration District 2.

members being hired by mine survey crews.⁷³ The Pic band lived by “farming, fishing and hunting.” Long Lake Ojibwa were primarily “a hunting band, the only other occupation being the transportation of merchandise from Lake Superior for the Hudson’s Bay Company.”⁷⁴ The one exception, according to Hodder, was the Fort William Band. He noted that the Fort William Ojibwa worked as farmers, guides, prospectors, and picked berries; some women worked as domestic servants.⁷⁵ Its proximity to the towns of Port Arthur and Fort William (present day Thunder Bay) likely accounted for the Fort William Band’s more diversified economic activity.⁷⁶

More will be said later of Indian agents’ reports. What is clear is that the Ojibwa still relied on traditional harvesting activity to support themselves when Ontario enacted its new game laws in 1892. Wage labour had made inroads into the lives of many Ojibwa. Bush and mining camps, and railway crews employed some Ojibwa on a seasonal basis to either guide men through unfamiliar territory or provide cheap, fresh meat. While some camps did hire Natives to cut railway ties, or work as lumberjacks or drive horses others were hesitant to hire Natives. Some logging foremen claimed the Ojibwa “were never

⁷² Dominion Sessional Papers, “Annual Report of the Department of Indian Affairs for the year ended 30th June 1898.” (Ottawa: S.E. Dawson, 1899): 18. Hereafter *DSP*, Indian Affairs Annual Report, 1898.

⁷³ Ibid., p. 19.

⁷⁴ Ibid., p. 19.

⁷⁵ Ibid., p. 17.

⁷⁶ Thomas Dunk also makes this observation in his article, “Indian Participation in the Industrial Economy on the North Shore of Lake Superior, 1869-1940.” Thunder Bay Historical Museum Society, Papers and Records, vol. 15 (1987): 3-

to be depended on to work any length of time.”⁷⁷ Foremen argued that Ojibwa only worked until trapping or hunting season began then left for their interior hunting grounds thereby making them unreliable. Some Ojibwa were hired by tourists who wanted the romance of an ‘Indian guide’ to take them through the bush to the best hunting and fishing spots.⁷⁸

While wage labour had started to assume some importance in the lives of the Ojibwa more traditional pursuits continued to hold greater sway particularly among more remote bands. Even those Ojibwa close to White towns such as Fort William/Port Arthur and North Bay still trapped and hunted regularly to support themselves and their families. Indian Agents’ report, anthropological studies from the period, government geological survey reports, and Ojibwa recollections bear out this assertion, and paint a picture of Ojibwa culture still engaged in many of the same activities their ancestors were when the treaties were signed in 1850. Hunting and trapping still occupied much of their time. Traditional beliefs still existed amongst many Ojibwa. Familial hunting territories continued to exist after the treaties were signed, and persisted into the twentieth century. In short, according to the wording of the Robinson Treaties, the Ojibwa still continued to hunt and trap as they had “heretofore been in the habit of doing.”

13. The same can be said of other bands located close to sizable White towns such as North Bay and Sault Ste. Marie.

⁷⁷ Report of the Survey and Exploration of Northern Ontario, 206.

⁷⁸ See Jasen, 133-136.

This adherence to traditional activities and beliefs was simply a continuance of the adaptive strategies the Ojibwa had used for centuries. In the decade prior to the *Game Act's* creation, the Ontario government sent E.B. Borron northwards to investigate the Hudson's Bay Basin. Although Borron's trip took him outside the northern boundaries of the Robinson treaties he did spend some time in that area, and some of his observations of the Ojibwa north of the arctic watershed are applicable to those living below it. Indeed, in 1885, he spend a considerable amount of time along the north shore of Lake Superior visiting Lake Nipigon, Long Lake, Pic and Michipicoten.⁷⁹ Borron's report provides some indication of the activity the Ojibwa were engaged in at the end of the nineteenth century, and how this activity reflected their continued and close link to the environment.

Agriculture, for example, was not a widespread activity amongst the bands. Many of the areas in the Robinson treaties possessed poor soil. Intensive agriculture simply was not an option for those in the region.⁸⁰ The Ojibwa on the Nipigon River and the lake itself did engage in some farming, although it was limited to potato. At the Hudson's Bay Company post at Red Rock, Borron wrote that there was some arable land "on which potatoes would seem to be the

⁷⁹ Ontario Sessional Papers, "Report of E.B. Borron, Stipendiary Magistrate, on that part of the Basin of Hudson's Bay belonging to the Province of Ontario," vol. 1 (1885): 1. Hereafter referred to as Borron's Report.

⁸⁰ Even when bands tried to engage in farming they were not provided with sufficient equipment, or instructors to teach them. This has been examined in relation to the Treaty Three area in Leo Waisberg, Tim Holzkamm, "A Tendency to Discourage them from Cultivating: Ojibwa Agriculture and Indian Affairs

principal if not the only crop grown."⁸¹ The Ojibwa residing around Lake Nipigon grew some potatoes too. Travelling north up the Nipigon River Borron encountered a group of Ojibwa. They had been to the HBC's Nipigon Post, and were returning with a bag of seed potatoes. Despite their intention to plant their seed potato their fondness for the food and necessity often prevented them.

Borron noted:

that if a little pinched for food during the winter they will eat or sell their last potato and have nothing left for seed in the spring.⁸²

In comparison to this single crop Borron indicated the many different species of fish that could be found in Lake Nipigon: whitefish, lake trout, speckled trout, silver fish, sturgeon, pike, suckers, pickerel, and perch. Similar species were found in Long Lake except sturgeon although it could be found in the Kenogami River.⁸³ Such variety and abundance made the humble potato pale in comparison.

Traditional harvesting activity was followed more closely by the Long Lake Ojibwa. This band still resided in birch bark wigwams, even during the summer, and lived principally on fishing, hunting and trapping. Borron noted that rabbits were an important source of food, as were ducks and other fowl. As noted in chapter one the importance of rabbit as a source of food made hunting territories incredibly important as each family tried to secure land that possessed

Administration in Northwestern Ontario." Ethnohistory vol. 40, no. 2 (1993): 175-211.

⁸¹ Borron's Report, 1885. p. 3.

⁸² Borron's Report, 1885. p. 5.

a large population of rabbits and other small game. When the rabbit population was reduced by regular bouts of plague the Long Lake Ojibwa suffered a corresponding loss of food. This was further exacerbated by the scarcity of deer, moose and caribou. Fur bearing animals such as the beaver, mink, otter, lynx, fox, bear, marten and muskrat were plentiful, and some of these species were an important source of food.⁸⁴ Borron noted, with a level of disgust, that the Ojibwa "will...eat almost anything, from a bear to a skunk, a fact of which I have had ocular and other demonstration."⁸⁵ Particularly important to the Ojibwa was the beaver. Besides providing a fur to sell an adult beaver, weighing forty pounds, provided "as much as twenty-five pounds of actual food..."⁸⁶

In short, Borron found the Ojibwa to be engaged in the same activity they had been in 1850. Ironically, Borron wrote that hunting and trapping were so important to the bands the Ontario government should take steps to protect their harvesting rights. While this comment was in regards to the Natives living north of the height of land, it was a sentiment that could easily be applied to those south of the watershed. Borron considered this policy expedient for several reasons: hunting, fishing and trapping were the only source of food and income (as regards the sale of furs) for the bands; Whites entering into the region would trap and hunt with no interest in maintaining a sustainable supply of animals because it was not in their immediate interest; lastly, much of northern

⁸³ Borron's Report, 1885. p. 7 and 14.

⁸⁴ Borron's Report, 1885. p. 14.

⁸⁵ Borron's Report, 1890. p. 76.

⁸⁶ Borron's Report, 1890. p. 81.

Ontario was suited only to hunting and trapping as the soil was too poor for intensive agriculture.⁸⁷ Clearly, traditional harvesting activity was the only viable means of existence for the Ojibwa.

The continued importance of such activity to the Ojibwa resulted in many of their social and territorial customs being continued. Hudson's Bay Company post records for Temagami bear out Borron's observations that traditional Ojibwa customs regarding hunting and trapping persisted after 1850, specifically the existence of familial hunting territories. The Temagami Post's correspondence⁸⁸ contains numerous references to local hunters, and to their ownership of specific hunting grounds. Such a form of land division still permitted the most efficient use of land as each family had a vested interest in maintaining the long term viability of the animal resources contained therein.

In one letter the Temagami Post manager, Arthur Ryder, noted how two Timiskaming Ojibwa, "that old thief Wabekegick and his sneaking companion Masenekegick" took possession of "Sabawois" lands.⁸⁹ Ryder considered this a form of trespass. Sabawois had died recently, and although his lands were lying vacant technically they still belonged to his family. Ryder tried to arrange for a Temagami hunter, Shabekegick, to hunt on Sabwois' land "in order to pay off the lake man's debt," but a member of Sabawois' family, Windaban, "promised to pay off the debt in full, so I gave up the idea of sending Shabekegick." Ryder

⁸⁷ Borron's Report, 1890, 88.

⁸⁸ AO, MU 1392, F431. Fur Trade Records C-1-3. Hudson's Bay Company Records, Envelope 3, Temiskaming District, Temagamingue Post, 1874-1886.

⁸⁹ Ibid. Arthur Ryder to Colin Rankin, 25 October 1875.

noted that "Windaban and Cana Chinty are Sabawois' "executors.""⁹⁰ The familial division of hunting territories obviously continued after the death of an owner as members of the surviving family assumed control of it.

Other letters indicate that the lands of the Temagami Ojibwa were divided amongst different families. The post manager referred to lands based on a hunter's name. In 1877 Ryder wrote to Colin Rankin at Fort Timiskaming regarding the lands around Lake Temagami. He noted that the lands of two of the hunters were not being used, and he was worried about not collecting their outstanding debt:

Tonomie cannot hunt on the Chief's lands, and I can get no one else. I wish very much I could get a good man (William for instance) to put there until the debt is paid. Petrant is a lucky hunter I believe, and would be willing to go. If I cant [sic.] get a man, Shabakegick will take possession of the lands, and give all or most of the fur to Duckas [an independent trader]. In fact not only the Chief's land but McLean's lands will go to the dogs, just the same way as Sabawois' lands did.⁹¹

This familial division of land continued into the twentieth century. Frank Speck made similar observations regarding Ojibwa hunting and trapping during his visit to the Ojibwa residing at Lake Temagami and the Algonquin living on Lake Timiskaming in 1913. The Timiskaming people, although residing outside the eastern boundary of the Robinson-Huron Treaty, were, according to Speck,

⁹⁰ Ibid.

⁹¹ Ibid. Ryder to Rankin, 15 October 1877.

heavily influenced by the Ojibwa residing at Temagami and Matachewan.⁹² His observations indicate that the bands there not only engaged in traditional harvesting activity but still ordered their lives around established and traditional patterns of behaviour. Land was divided based on familial hunting territories, and religious customs were followed by both bands when hunting and trapping.

Speck noted that the social unit which comprised the band was the family. What held these units together was their mutual interest in the family hunting territory (*nok-i-'wak ·i' - "hunting ground"*).⁹³ These were fixed tracts of country with boundaries determined by geography: rivers, swamps, lakes, or even a patch of a particular species of trees. These lands were owned by the male heads of families, and passed down to each succeeding generation. Hunting outside one's territory was socially unacceptable, and occasionally punished by death. Usually such drastic measures were not resorted to, and most trespassers were dealt with through shamanic conjuring. A curse would be placed on the trespasser by the offended family via a shaman. Usually such curses took the form of a wish for sickness to be inflicted upon the guilty party.⁹⁴

In addition to the social and territorial importance of the hunting territory, Speck wrote that the Ojibwa also adhered to a number of "taboos"

⁹² Matachewan First Nation lies approximately fifty kilometers west of the city of Kirkland Lake. Speck made his observations in Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley (Ottawa: Department of Mines, Geological Survey, 1915): 1.

⁹³ Speck, 4.

⁹⁴ Speck, 4.

when hunting or trapping.⁹⁵ Hunters would always eat a certain part of a particular animal first. Other hunters would not eat certain animals at all. Speck explained these beliefs stemmed from individual experiences which the person perceived to have some spiritual meaning.⁹⁶ Many hunters also engaged in common practices, such as placing moose or deer antlers in a tree close to the site at which the animal was killed. This was meant to show respect for the animal, and insure successful hunts in the future. Dances were also a common occurrence after a successful hunt. Speck wrote that several dances were still performed regularly by the Temagami Ojibwa for certain occasions.

Reminiscences of people living on Lake Temagami in the early twentieth century provide more detailed information regarding the continuation of Ojibwa customs, and substantiate Speck's general observations. One such person, Madeline Katt Theriault, born on Bear Island in 1908, remembers the Bear Island Ojibwa engaging in traditional harvesting activity.⁹⁷ From 1910 to the early 1930s she lived in the region, and in her memoirs noted how the Bear Island Ojibwa not only engaged in traditional activities, but still used indigenous implements. Maple trees were tapped in the spring, for example, and the sap was still collected in birch bark containers. When moose were killed during the warmer months it was common practice to cut the animal into quarters, and sink each piece into a deep lake with a line and cedar float attached. The cold water

⁹⁵ Speck, 26-27.

⁹⁶ Speck, 26.

⁹⁷ Madeline Katt Theriault, Moose to Moccasins: The Story of Ka Kita Wa Pa No Kwe (Toronto: Natural Heritage/Natural History Inc., 1992).

at the bottom of the lake kept the meat from spoiling. When meat was needed the quarter could be hauled up, and a portion cut off.⁹⁸ Lake trout was caught in October, and salted for winter use. Animals caught for their furs were also eaten, such as muskrat and beaver. Moss, used as a diaper liner for babies, was collected in the autumn before cold winter weather froze it to the rocks.

Families still constructed their own canoes using cedar for the frame, birch bark for the cover, spruce roots as thread, and spruce gum to seal the cracks.⁹⁹

Theriault also outlined how each family maintained their own hunting territory. Her grandfather's land had covered Diamond Lake as well as "Maple Mountain, Florence Lake and McPherson Lake."¹⁰⁰ The west side of Lake Evelyn Lake was also part of his grounds. When Theriault married her first husband, Alex Mathias, her grandfather, who was too old to continue trapping, transferred his trapping grounds to Mathias. "From this time on," Theriault noted, "this area was known as our trapping ground."¹⁰¹

Indian Agents' reports for the turn of the century make similar observations indicating the continued importance of hunting and trapping to the Ojibwa. The Robinson treaties were divided into several agencies with an Indian agent assigned to each. One agency was the "Ojibbewas of Lake Superior-Eastern Division." This was comprised of the Garden River, Batachewana, and Michipicoten bands. The Western Division consisted of: Fort

⁹⁸ Theriault, 43-44.

⁹⁹ Theriault, 14.

¹⁰⁰ Theriault, 17.

¹⁰¹ Theriault, 42.

William, Nipigon, Pays Plat, Pic, and Long Lake bands. The Parry Sound Superintendency was made up of: Parry Island Band, Shawanaga, Henvy Inlet, Nipissing, Dokis, and Temagami.¹⁰² Indian Agent's annual reports were broken down into a number of standardized categories for each reserve relating information regarding the band's "resources," "health," "occupation," "characteristics," and "morality." While the agents noted that some agriculture was undertaken at certain reserves this was apparently limited. Traditional harvesting activity, supplemented by wage labour, was the basis of band and family economies.

W.B. Maclean was the Indian Superintendent in charge of the area. He noted that the Parry Island Band engaged in some farming in the summer, and worked in lumber camps during the winter. Maclean also observed that many of the men found work as guides for tourists.¹⁰³ The Nipissing Ojibwa were apparently able to earn a good living due to the proximity of their reserve the Canadian Pacific Railway (CPR) line. This, together with local lumbering operations, "enables them to secure employment at almost any time they desire it."¹⁰⁴ This assessment was, perhaps, overly optimistic. What Maclean did not note, however, was that the CPR and lumber camps often employed Ojibwa

¹⁰² The Gibson Reserve also formed part of this agency, but it was not a Robinson-Huron treaty band.

¹⁰³ Dominion Sessional Papers, "Annual Report of the Department of Indian Affairs, 1898." (Ottawa: S.E. Dawson, 1899): 33. Hereafter referred to as Indian Affairs A.R., followed by the year and page number.

¹⁰⁴ Indian Affairs A.R., 1898. p. 35.

hunters to supply their work crews with fresh meat (see chapter three of this thesis) which could land the Ojibwa in trouble.

Maclean outlined how other reserves were very dependent on hunting and trapping. Shawanaga did engage in some farming but “fishing, and the gathering and selling of wild fruit [berries]” was the primary occupation of its members. Similar observations were made in regard to Henvey Inlet with the addition of hunting. The Dokis band engaged in farming to a limited extent.¹⁰⁵ The Temagami band engaged in only hunting and fishing. Maclean noted that this band was in the unusual position of not having a reserve. For this reason, the band told Maclean they were not going to start clearing any land “which might afterwards be placed outside the bounds of their reserve.”¹⁰⁶

Similar observations were made in regard to the Eastern Division. The Garden River and Batachewana bands engaged in a variety of occupations.¹⁰⁷ Fishing, working as guides and in lumber camps, boat building and farming. Most of this activity was centred around Garden River. As regards Batachewana, the agent, William Van Abbot, noted that the “buildings of this band are mostly on the Garden River Reserve...Most of the farming or gardening is done on the Garden River Reserve. The Michipicoten Band, however, practised little or no farming. Abbot wrote that the Ojibwa there “follow the Indian mode of life almost altogether, and move from place to

¹⁰⁵ Ibid., 33-35.

¹⁰⁶ Ibid., 36.

¹⁰⁷ Ibid., 14-16.

place...They do next to nothing in the way of raising crops, making a living principally by hunting and fishing."¹⁰⁸

J.F. Hodder, the agent responsible for the Western Division, made similar comments about the bands under his supervision. The Fort William Band's men, according to Hodder, worked as farmers and guides (for both tourists and mineral companies), while female members of the band laboured as domestic servants.¹⁰⁹ Other bands, however, followed more traditional pursuits. While some of the reserves did have some land under cultivation the primary crop was potatoes. Wage labour consisted primarily of working as guides for sports fishermen and hunters.¹¹⁰ The Hudson's Bay Company provided some jobs to the men to transport material and furs.

Indian Agent's reports do reveal that those bands close to white settlement (i.e.: Parry Island, Nipissing, Garden River and Batachewana, and Fort William) had a more varied economy. While hunting continued to play an important role for these bands there were other employment opportunities. Some of these jobs did, however, rely on more traditional Ojibwa talents such as guiding. Regarding work with the railway and lumber crews agents were not always specific about the type of employment the men found. Although some did cut railway ties or haul logs as will be outlined later in this thesis Ojibwa men were often hired to supply crews with fresh deer and moose meat. Occasionally a hunter who had extra meat would sell it to whites in the area.

¹⁰⁸ *Ibid.*, 17.

¹⁰⁹ *Ibid.*, 17.

Furthermore, this work was often short term or seasonal and was merely a means of securing sufficient capital to purchase supplies for a winter of trapping.

Some bands did farm, but it was not a viable option for many of them particularly as a full time occupation. Agriculture is possible in northern Ontario, but during the early twentieth century little land was cleared (the Little Clay Belt north of Cobalt was only just being opened). Clearing land was time intensive, and the returns limited. Furthermore, reserves were not very large. Pic Reserve comprised only eight hundred acres and Long Lake consisted of only six hundred. Some reserves, such as Nipigon, were several thousand acres in size or more but, when that land was divided into farms it is doubtful large enough operations could be established which would be economically viable for a family. Nipigon, for example, was seven thousand five hundred acres in size, and had approximately seventy six men and ninety two women. If eighty of these people took up farming the average farm would only be 93.75 acres and this is assuming that every acre of the reserve was viable farm land.¹¹¹

Making a living as best they could through a combination of hunting and trapping with occasional wage labour and some farming the Ojibwa were vulnerable to any interference in the more traditional elements of their economy. As the nineteenth century ended prevailing concepts of economic growth, conservation and Natives combined to deprive the Ojibwa of their treaty rights.

¹¹⁰ Ibid., 18-19.

¹¹¹ Ibid., 18.

Ontario, intent on building itself into a small economic empire, embarked on a course of intense resource exploitation. While initially focused on minerals, timber and hydro power Ontario eventually turned towards wildlife. Utilitarian conservationism, already prominent in the United States, provided an ideology which fit easily into the natural resource drive of Queen's Park. Sport hunters and fishers, worried that much of Ontario's wildlife was on the verge of extinction, convinced the Ontario government to create a Game Commission and enact legislation to not only protect animals but insure their long term economic viability to a growing tourist industry.

Just as Ontario, particularly during the premiership of Oliver Mowat, did not appreciate federal interference in provincial jurisdiction it was not prepared to allow Native treaty rights to undermine its conservation efforts. Natives with treaty rights to hunt and fish found the province ignoring the agreements they had reached with the Crown decades before Ontario even existed. The Game Commission was not about to worry about an uncivilized race that ravaged wildlife with no thought to conservation, and was technically protected by treaties with the federal government.

The Ojibwa, with limited economic or employment opportunities, had few options open to them but to hunt. Family hunting territories persisted in the Robinson Treaties as they continued to be relevant to the cultural lifestyle of the Ojibwa. Families continued to follow traditional patterns of resource harvesting despite the slow inroad wage labour was making as lumber camps, railway crews and tourist operations appeared in the north. Such labour, even when it

could be procured was seasonal. The tourist season lasted only as long as northern Ontario's short summer. The Hudson's Bay Company still hired men to haul supplies and furs from remote posts at the end of each trading season, but this too was seasonal. Traditional activity, therefore, was still an essential part of the Ojibwa's lifestyle.

Chapter Three
**"Indians had the right to kill Moose...": First Nations,
the Game Commission and Indian Affairs, 1892-1909**

Chief Semo Commanda of the Nipissing Reserve, just west of the town of North Bay, was angry. His brother, Barnaby Commanda, and another band member, Wilson Ottawaska, had been arrested for shooting a moose out of season contrary to Ontario's new *Game Act*, and a province wide ban on moose hunting. A Canadian Pacific Railway (CPR) survey crew was working in the vicinity and Commanda, who had just brought down a moose, agreed to sell some of the excess meat to the crew with Ottawaska's aid in transporting it. Joseph Rogers, the local Ontario Provincial Police constable, arrested both men and brought them before the local magistrate. In August, 1898, both men pleaded guilty to illegally hunting moose. They were fined, and had their guns and the meat confiscated. Chief Commanda, illiterate in English, dictated a letter to George Chitty, the local timber agent, and sent it to Indian Affairs in Ottawa. The arrest, the Chief contended, was an outrage as "Indians had the right to kill moose under the Robinson Treaty."

While Chief Commanda perceived the problem solely within the context of the Robinson-Huron Treaty matters were not that simple for the Game Commission and Indian Affairs. Conflicting and complementary interests on both the provincial and federal level as well as other factors unique to Indian Affairs coalesced in such a way that the Ojibwa complaints although heard were never properly addressed. Instead, by 1909, Ojibwa problems began to increase

as the Ontario Game Commission moved towards a more narrow definition of what constituted an Indian "hunting territory" under the *Game Act*. The conflict that emerged when the *Game Act* was first applied, and the Ojibwa's treaty rights became an issue that was far more complicated than previous Ontario-Dominion disputes over natural resources. Ontario thought any attempt by Indian Affairs to secure the Ojibwa an exemption from the *Game Act*, even though the legislation contained this provision, was unwarranted Dominion interference in an area of provincial jurisdiction. However, the Game Commission knew that there was never any question of Indian Affairs or any other Dominion department trying to wrest control away from the province, and regulate Ontario's wildlife from Ottawa. It simply refused to compromise the *Game Act* for the sake of 'uncivilized' Indians who refused to give up the chase and adopt White ideas and behaviour. Similarly, Indian Affairs was not questioning Ontario's *Game Act* in its entirety, merely its application to Natives with treaty hunting rights. However, even in this limited capacity Indian Affairs was not willing to risk Queen's Park's displeasure for both political and policy reasons. Senior bureaucrats at Indian Affairs and the Department of Justice did not want to antagonize Ontario for the sake of some Indians who Indian Affairs was trying to acculturate and have give up hunting and trapping.

Ontario's position regarding the economic importance of hunting and the conservation of wildlife, and the Game Commission's opinion of Natives, were outlined in chapter two. These theories were put into practice when provincial

enforcement officials began to arrest Natives who were, in the opinion of the Department of Crown Lands and the Game Commission, breaking Ontario's game laws. Even though Ontario's new *Game Act* contained provisions which stated that it would not affect any special rights "reserved to or conferred upon Indians by any treaty or regulations...made by the Government of the Dominion of Canada with reference to hunting on their reserves or hunting grounds" the Ontario government ignored its own legislation, and applied the exemption only when the Ojibwa hunted on their reserves. Ontario's position in this matter was firm despite the letters it received from Indian Affairs: no exceptions would be made for Natives regardless of any treaty they might have with the Dominion government. Even when Indian Affairs noted that the legislation itself provided for such an exemption the Commissioner of Crown Lands, and the Attorney-General's office argued that the act was never intended to release Natives from the game laws. The Ontario government was not willing to risk the success of their conservation measures for the sake of Natives and their treaties.

Ontario's opinions regarding treaties did not bode well for the Ojibwa. The Robinson Treaties were of paramount importance to the Ojibwa during the initial years of their struggle with the Game Commission and Indian Affairs. These treaties were, from the Ojibwa perspective, the sole documents that both codified and regulated their relationship with the Dominion government. They outlined the promises both parties made in 1850 which permitted the Crown to gain access to the mineral deposits on the north shore of Lakes Huron and

Superior, and allowed the bands to receive annual annuities and the right to continue to hunt, trap and fish as they had been in the habit of doing. Issues such as the constitutional division of powers under sections 91 and 92 of the BNA Act, provincial rights, or federal disallowance powers had little meaning for the Ojibwa. Indian Affairs was the only government department with which the Ojibwa had regular contact, mainly through the several Indian agents who were stationed throughout the Robinson treaty region. The Ojibwa did not appreciate the broader political context Indian Affairs existed in. Indian Affairs' essential role, as far as the Ojibwa were concerned, was to protect the rights guaranteed to them in 1850. The surprise and anger that the Ojibwa expressed in their letters to Indian Affairs is a clear indication of the importance they placed on the treaties, the promises contained therein, and their belief that Indian Affairs should protect them.

Matters were not as simple for Indian Affairs as the Ojibwa believed. Indian Affairs was not interested in challenging the legality of Ontario's game laws. Departmental officials in Ottawa were well aware of the *Game Act*, and that it was being applied to Natives. Furthermore, they knew that these laws contravened promises made to the Ojibwa in the Robinson Treaties. Internal correspondence at Indian Affairs, and with officials at the Department of Justice, reveals a reluctance on the part of bureaucrats to protect the Ojibwa's treaty rights and, in the process, provoke Ontario through recourse to the judiciary which would solve neither the legal nor the political problems surrounding the

issue. Instead, Indian Affairs adopted what can be termed a 'policy of leniency': attempt to convince the Game Commission to apply its laws humanely in cases where Natives were not 'civilized' and still relied heavily on hunting and trapping.

The behaviour of Indian Affairs, and the Department of Justice when it was involved, stands in stark contrast to the picture of Ontario-Ottawa relations described by Christopher Armstrong in his work, The Politics of Federalism.¹ Armstrong noted how both Queen's Park and Parliament resisted any loss of authority over natural resources regardless of whether this loss were real or imagined.² Armstrong is correct within the context of the natural resources he considered: timber, minerals, and hydro development. Armstrong's thesis is also applicable to Ontario as it sought to regulate its wildlife resource with the "widest possible sphere of independence [possible] in shaping policies designed to promote the economic growth of the province..."³ Indian Affairs, however, does not fit into the Armstrong mould. While its officials tried to secure a degree of leniency for Natives, Indian Affairs' bureaucrats never expressed anger or resentment over Ontario's meddling in their jurisdiction. It was seen as a political problem to be solved through negotiation rather than litigation.

There are several reasons why Indian Affairs reacted in a passive manner: the *Game Act* was not dissimilar to Indian Affairs' own policies; a lack of both

¹ Christopher Armstrong, The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942 (Toronto: University of Toronto Press, 1981).

² Armstrong, 4-5.

³ Armstrong, 233.

material and political resources hampered officials; and Indian Affairs' low position and importance in relation to the other concerns of the department (the Interior) of which it formed only a small portion. Regarding the first, Ontario's game laws complemented Indian Affairs' policies. The primary goal of Indian Affairs in the late nineteenth century and through much of the twentieth was the "protection, civilization and assimilation" of Natives across Canada.⁴ The manner, therefore, which Indian Affairs adopted to try and convince the Game Commission to show leniency when applying its game laws to the Ojibwa was an extension of Indian Affairs' own civilization policy. The game laws may serve to push the Ojibwa away from hunting and trapping by depriving them of their ability to engage in that activity, and, therefore, encourage them to support themselves through more 'civilized' activity such as farming. Indian Affairs' officials only qualm with Ontario, initially, was that this process should not be precipitous. It required time for Natives to be weaned from more traditional pursuits, and adopt more 'acceptable' behaviour. Eventually the Ojibwa would abandon their traditional ways, hunting rights would cease to be an issue altogether, and Indian Affairs' civilization policy would be a success. Within this context Indian Affairs differed with the Game Commission only over the timing and implementation of their policies not their ultimate goals.

⁴ John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy." As Long as the Sun Shines and Water Flows: A Reader on Canadian Native Studies Ian A.L. Gettey and Antoine S. Lussier eds., Nakoda Institute Occasional Paper No. 1 (Vancouver: University of British Columbia Press, 1981): 39.

Indian Affairs itself was trying to convince Natives to give up hunting, settle on their reserves and adopt farming. The *Indian Act* and other federal legislation was designed to enfranchise and acculturate Natives across Canada.⁵ From 1876, when Canada's pre-Confederation Indian legislation was consolidated into the *Indian Act*, onwards into the early twentieth century the *Indian Act* underwent numerous amendments to push Natives towards white societal norms and away from their own.⁶ In 1890, for example, Parliament amended the *Indian Act* to permit the governor-in-council to declare the game laws of Manitoba and the North-West Territories applicable to Natives.⁷ Natives who continued to follow traditional pursuits were "retarding the education of [their] children" as parents often took their children with them into the bush, and out of school during hunting and trapping season.⁸ Indian Affairs, therefore, would not argue that treaty rights to hunt and trap were sacrosanct because it was itself trying to acculturate the western tribes by contravening the very treaties it had negotiated with them in good faith.

Indian Affairs also lacked the prestige or resources to undertake any lengthy and complicated legal challenge. In the 1880s Indian Affairs' headquarters employed only thirty-eight people including janitors and box

⁵ John Leslie and Ron Maguire eds., The Historical Development of the Indian Act (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1978): 89-105.

⁶ Leslie and Maguire, 95.

⁷ Tobias, 48.

⁸ Tobias, 48.

packers.⁹ During Clifford Sifton's tenure as Minister of the Interior the department was divided into only three branches: Accounts, Lands and Timber, and a Secretariat.¹⁰ Under his reign Sifton also reduced the department's personnel and their salaries to save money.¹¹ Indian Affairs was not only small physically, it occupied a minute portion of the East Block of the Parliament buildings, but it occupied an even smaller segment of the government's concerns. It was part of the Department of the Interior, and was subordinated to the greater concerns of both Conservative and Liberal administrations preoccupied with railway construction and western settlement. Indian Affairs became important to the Dominion government only when it required western lands to be opened for settlement, railways, or resource development.

Numerous minor incidents illustrate the minor position Indian Affairs occupied in the Dominion government. When the deputy minister of the Interior required more office space for his staff in the 1880s he recommended destroying Indian Affairs earliest records to open up storage rooms.¹² Luckily this did not happen. Sir John A. Macdonald's staff, at the Prime Minister's Office, often lost papers sent to him by Indian Affairs when he held the Interior portfolio. One file remained missing for thirty-two years long after Macdonald's

⁹ Douglas Leighton, "A Victorian Civil Servant at Work: Lawrence Vankoughnet and the Canadian Indian Department, 1874-1893. As Long as the Sun Shines and Water Flows. Ian A.L. Getty and Antoine S. Lussier eds., Nakoda Institute Occasional Paper No. 1 (Vancouver: University of British Columbia Press, 1981): 108.

¹⁰ Leslie and Maguire, 98.

¹¹ See Leslie and Maguire, 99.

¹² Leighton, 108.

death and presumably long after he would have cared. Clearly Macdonald had little interest in this portfolio, apart from the Northwest Rebellion, and this situation remained unchanged over the ensuing decades. When Clifford Sifton assumed the position of Minister of the Interior in 1896 his interests and duties lay primarily in dealing with western settlement and immigration. Indeed, one of the few times that Sifton even considered Native policy was when he considered selling uncultivated reserve land in western Canada to farmers. Indian Affairs was already leasing portions of reserves that were considered "waste lands," so Sifton believed similar action could be taken and more valuable reserve territory sold. Sifton, however, had to be told by his officials that Indian Affairs could not simply sell reserve land without band consent and a vote. Sifton believed that, as minister, he should simply have the right to sell it.¹³ With a minister ignorant of land cessions, an essential element of Crown-Native relations, it is little not surprising he had little time for, or appreciation of hunting claims.

During Sifton's tenure the Ojibwa and Indian agents in northern Ontario sent dozens of letters and petitions asking Indian Affairs to protect hunting rights, or create a substantive policy dealing with the issue. There is no evidence that Sifton ever responded to any of this correspondence even though some of it was addressed directly to him. Like his predecessors, Sifton left the majority of

¹³ D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896-1905." As Long as the Sun Shines and Water Flows. Ian A.L. Getty and Antoine S. Lussier eds., Nakoda Institute Occasional Paper No. 1 (Vancouver: University of British Columbia Press, 1981): 123

the decision making in the hands of senior officials. As Douglas Leighton noted in his study of deputy-superintendent general Lawrence Vankoughnet, "the real power of decision making [at Indian Affairs] was firmly entrenched in the hands of the deputy-superintendent general."¹⁴ For a short time even the deputy-superintendent general took little interest in Aboriginal matters. When James Smart was appointed head of Indian Affairs after Vankoughnet's retirement he was responsible not only for Indian Affairs but the entire Ministry of the Interior. By giving him both positions Sifton hoped to reduce expenditures in his Ministry by reducing the number of senior officials.¹⁵ Smart, consumed with matters relating to western settlement and immigration, left the running of Indian Affairs to Secretary J.D. McLean, another Liberal patronage appointment.

Besides the disinterest of its minister, and the schizophrenic position of the deputy-superintendent general other factors kept Indian Affairs from fulfilling its fiduciary obligation to the Ojibwa. Specifically, it was clearly not going to go out on a political limb to protect the hunting and trapping rights of a few thousand Natives living in northern Ontario when there was no substantial benefit for doing so. Wildlife was and is not analogous to other natural resources in one important way: mobility. Minerals, timber, and hydro are stationary resources. This allows governments to sell development rights to companies. Companies, in turn, can claim ownership to a particular area and the mineral, timber or hydro resources located therein. Armstrong outlines

¹⁴ Leighton, 109.

¹⁵ Hall, 122.

throughout The Politics of Federalism how private companies tried to enlist the aid of either Ontario or Ottawa to secure access to a particular resource. Both levels of government could be recruited because each saw benefits, both political and economic, in controlling these resources. The sale of mineral and timber licenses, for example, was not only a source of revenue but gave the government and party which controlled it an important source of patronage. Similar incentives did not exist for wildlife, so private businesses (which consisted, apart from the HBC, as either small to mid-size businesses) did not employ the same tactics. There is no evidence, as was the case with mining and timber, of large companies trying to obtain access to large amounts of wildlife. Hunting and trapping licenses were sold to individuals, not companies. There were tourist outfitters, but they were small locally run operations which lacked the clout of large mining or timber companies. As will be noted in chapter four of this report the Hudson's Bay Company did appeal to Indian Affairs for help in its legal battle with the Ontario government, but the context was different than that noted by Armstrong in the Politics of Federalism when mining and lumber companies played federal and provincial governments off against one another. The HBC sought only legal protection for its operations it never claimed any right to the animals themselves to the exclusion of fur trading companies.

Indian Affairs was simply not equipped with either the attitude or staff to deal with the hunting issue. Its Ottawa staff was organized primarily to deal with other issues such as the handling of band funds and the sale of reserve lands and resources located therein. Compared to other departments in Ottawa

it ranked the lowest on the bureaucratic totem pole. Ministers of the Interior, in charge of Indian Affairs, took little interest in this aspect of their portfolio. They concentrated instead on the more pressing and important matters of western development. Resource fights in Ontario had been largely decided, particularly after *St. Catherine's Milling*, and Indian Affairs did not stand to reap any tangible benefits from aiding the Ojibwa or any other bands.

This reality became readily apparent with the arrest of Barnaby Commanda and Wilson Ottawaska of the Nipissing Band in August, 1898. Commanda had brought down a moose near the Wanipitae River (near Sudbury), and Ottawaska agreed to help Commanda bring the meat back to the reserve. At some point a local CPR survey crew asked Commanda to sell them his excess meat. Commanda agreed, and was arrested shortly thereafter by the enforcement officials from the Department of Crown Lands for hunting moose out of season. During this time the Game Commission was enforcing a complete ban on all moose hunting throughout the province. Both men were convicted by a magistrate in Sudbury. Commanda was able to pay his fine (fifty dollars) and his gun was confiscated. Ottawaska, however, did not have enough money to pay his fine and was sentenced to thirty days hard labour in the Sudbury jail.

It is not surprising that these two men were arrested. Nipissing Band members were already the subject of police scrutiny. Sergeant Joseph Rogers, head of criminal investigations for the Department of Crown Lands, thought band members were the chief perpetrators of illegal hunting in the area. Rogers

was on special assignment to travel throughout northern Ontario and assess the game situation in relation to Native hunting. Writing to the Commissioner of Crown Lands, Rogers outlined how members of the Nipissing band believed "that the Ontario Government could not do anything to them"¹⁶ by virtue of their treaty with the federal government. The money the band earned through the sale of illegal moose meat was not even used to buy necessities, Rogers continued, but spent on liquor. Rogers said he tried to convince the band that following the province's laws regarding moose conservation was in their best interest but to no avail. He said that if the moose population rebounded the Game Commission would open a fifteen day moose season, and this would provide the band's male members with a chance to earn 2-3 dollars per day as guides for white sport hunters.¹⁷

Apparently the Band was not interested in fifteen days work as a guide. It was far more concerned with learning about the status of their hunting rights. With this in mind the band retained the services of two North Bay lawyers, Browning and Leask. These men, the official solicitors for the Town of North Bay, worked *pro bono* for the band.¹⁸ Writing initially to Clifford Sifton, Messrs. Browning and Leask outlined the confusion surrounding the hunting rights guaranteed to the Nipissing Band by virtue of the Robinson-Huron Treaty.¹⁹ The local Indian Agent and the resident Deputy Game Warden (Mr.

¹⁶ NAC, RG 10, vol. 2405, file 84,041, pt. 1. Joseph Rogers to J.M. Gibson, 26 April 1899.

¹⁷ *Ibid.*

¹⁸ *Ibid.* Browning and Leask to J.D. McLean, 17 December 1898.

Huntington), had informed the band on earlier occasions that treaty Indians could hunt moose and sell the meat. Obviously, Browning and Leask continued, someone was wrong. Quibell, the Sudbury Magistrate who convicted Commanda and Ottawaska, told the band's lawyers that regardless of the Robinson-Huron treaty the Ojibwa could not hunt moose when a ban was in effect. Quibell, not living up to his name, thought the Robinson-Huron Treaty was a small and irrelevant detail in relation to the *Game Act*.

Quibell's decision likely grew out of the Attorney-General's interpretation of the *Game Act*, and the poorly worded section dealing with Native hunting.

Section 27(1) of the Ontario *Game Act* for 1893 states that:

The provisions of the game laws of this Act shall not apply to Indians or to settlers in the unorganized districts of this Province with regard to any game killed for their own immediate use for food only, and for the reasonable necessities of the person killing the same, and his family, and not for the purposes of sale or traffic. And nothing herein contained shall be construed to affect any rights specially reserved to or conferred upon Indians by any treaty or regulation in that behalf made by the government of the Dominion of Canada, with reference to hunting on their reserves or hunting grounds or in any territory specially set apart for the purpose; nor shall anything in this Act contained apply to Indians hunting in any portion of the Provincial territory as to which their claims have not been surrendered or extinguished.²⁰

¹⁹ *Ibid.* Browning and Leask to Clifford Sifton, 17 August 1898.

²⁰ *Statutes of the Province of Ontario*, "An Act to amend the Act for the Protection of Game and Fur-bearing Animals." 56 Vic. (Toronto: L.K. Cameron, 1893): 204. Hereinafter referred to as *Statutes of Ontario*, followed by the year and the page number.

The logic behind section twelve was badly flawed. First, unorganized territory was primarily in northern Ontario where the Robinson treaties and Treaty Three already guaranteed the Ojibwa continued hunting rights. Furthermore, most of Ontario was already covered by treaty. To state that the provisions of the legislation would not apply to Natives living on unceded land in Ontario was unnecessary, as unceded land was technically not part of the province.

The poor structure of sub-section one was worsened by sub-section two.

It read:

- (2) The Lieutenant-Governor in Council may, from time to time, by Order in Council in that behalf, exempt Indians or settlers or persons in the habit of dealing with Indians or actual *bona fide* settlers in the northern or north-westerly portions or other sparsely settled portions of the Province, whether the same be organized or unorganized, from any of the provisions of this Act, which may be specified in the said Order in Council. All such Orders in Council shall be published in, or in connection with, the annual report of the fish and game commissioners.²¹

If Natives in unorganized portions or sparsely settled portions of the province were already exempt from the provisions of the act by virtue of section 12(1) then there is no reason to state they can be exempted by an Order in Council. The obvious implication of section 12 was that Native hunting rights in Ontario, regardless of any treaty, were a privilege conferred upon bands by the provincial government.

²¹ Ibid.

This stood in clear contrast to the spirit, intent and the content of the Robinson treaties. As outlined in chapter one the government of the Province of Canada sought only to secure unfettered access to mineral deposits on the north shore of Lakes Huron and Superior. The Ojibwa, angry over the arrival of miners and others on their territory, pressed the government for a treaty. Although the common sentiment amongst government officials, and even the Ojibwa, was that the bands would soon give up hunting due to the scarcity of animals there was clearly no intent on the part of any party to the treaty to restrict Ojibwa harvesting rights. Indeed, Vidal and Anderson, and William Robinson after them, believed that allowing the Ojibwa to continue to hunt, trap and fish as they had been in the habit of doing was a small price to pay for access to the mineral and timber wealth of the region. There was no way Robinson or the bands could foresee the problems that would occur almost fifty years later.

Ontario's Attorney-General, however, saw no problem in reconciling the Robinson Treaties with the *Game Act*: the legislation took precedence over the treaties. He stated unequivocally that the *Game Act* "only protects Indians in the same way it protects settlers, and that...such was the intention of the Act." In essence, regardless of the Robinson treaties, Ontario determined the status of the Ojibwa's harvesting rights in northern Ontario through its legislation.

Commanda and Ottawaska were subject to the provisions of the legislation, and, therefore, to the moose hunting ban being enforced in Ontario.²²

Interestingly, J.D. McLean and other bureaucrats at Indian Affairs were of the same opinion as the Attorney-General. Even after receiving Chief Commanda's letter regarding the arrest, and the Chief's argument that promises contained in the Robinson-Huron Treaty protected the Nipissing Band's hunting rights, McLean focused solely on the legislation as the determining factor in the arrest. In his letter to Browning and Leask, McLean noted that the arrest of Commanda and Ottawaska was suspicious but only because the men might have shot the moose in an area not organized into a township which was allowable under section 12(1) of the *Game Act*.²³ McLean expressed no concern over the fact that the province was contravening promises in the Robinson-Huron Treaty. Indeed, McLean said that Indian Affairs was of the opinion that appealing convictions of treaty Indians was inadvisable. He noted the opinion of Ontario's Attorney General as regards the game laws, and stated that "if the opinion...be a correct expression of the intention of the Ontario government and a judgment were obtained adverse to that opinion, the Provincial Government would doubtless promptly amend the Act in accordance with its views."²⁴ With this admission that the Ontario Legislature was free to contravene the Robinson

²² NAC, RG 10, Vol. 2405, file 84,041 pt. 1. J.D. McLean to Browning and Leask, 23 October 1898.

²³ *Ibid.* McLean to Browning and Leask, 24 August 1898.

²⁴ *Ibid.*

Treaties, McLean advised Browning and Leask to plead with the Sudbury magistrate who convicted the two men and ask for a reversal.

McLean's opinions likely grew out of earlier attempts Indian Affairs made to determine the legality of Ontario's new game laws. Earlier instances of Natives being arrested for contravening the game laws occurred before the Commanda/Ottawaska incident. In 1897, for example, Michael Whiteduck of the Golden Lake Reserve in eastern Ontario was arrested for hunting deer out of season. This incident led McLean to ask the Department of Justice for its opinion regarding the right of Indians to hunt over territory ceded by them to the Crown in light of treaty obligations and the *Game Act*. The response, formulated by A. Power the acting deputy-minister of justice, was unambiguous. Power said that Ontario could deprive Natives of any rights promised them by treaty:

...as a matter of constitutional law, I think that the Legislature of Ontario can make such provisions as seems to it proper, for the preservation of game within the Province, and that such provisions, if in terms sufficiently general, would extend and apply to Indians, unless and except in so far as the Indians were expressly or implicitly exempted from them. I think that such laws, passed by the Legislature and not disallowed, would be valid and binding, even if they operated to deprive the Indians of rights assured to them by treaty.²⁵

Power proceeded to explain that it was the *Game Act* which conferred hunting rights on Natives, not any treaties they may have with the Crown, and all Natives were subject to it. If a Native wanted to sell the pelt of an animal killed

²⁵ NAC, RG 10, Series B-8, vol. 11194, file 4, Box 50. A. Power to McLean, 20 July 1897.

for food, for example, it had to be done within the meaning of section 27: "for the reasonable necessities of sale and traffic." This also applied to the sale of meat; however, all such transactions should be "exercised by the Indians *bona fide*," Power cautioned for "[if] animals are killed only colourably for the purposes defined in the section, the exemption granted by the Act to Indians would not protect them from prosecution."

Power was so convinced that the Ontario government could restrict Native hunting rights that he counseled Indian Affairs against appealing any lower court ruling. Power did believe that the Attorney-General's interpretation of section twelve of the *Game Act* was incorrect, namely that only Natives residing in unorganized district were exempt, but the legality of the situation was not as important as the political context. Power thought that if Indian Affairs successfully appealed a conviction that it would win a pyrrhic victory.²⁶ It would be expensive, and solve nothing. Power said that:

...whatever the true interpretation of the statute may be the intention of the Ontario Government was that the exemption granted [by the *Game Act*]...should be limited to Indians residing in unorganized districts...and if a judgment should be obtained declaring that this is not the meaning of the section as enacted, there can be little doubt that the Provincial Government would be on the earliest occasion which offered itself, viz.:- at the next session of the Legislature, have the Act amended in according with its views.²⁷

²⁶ Ibid. Power to McLean, 5 July 1898.

²⁷ Ibid.

Powers advised McLean to simply let the matter rest, and not attempt a legal solution.

E.L. Newcombe, Deputy Minister of Justice, echoed Power in his recommendations to McLean. Newcombe wrote to McLean that he received correspondence from Ontario's Deputy Attorney General regarding the *Game Act*. The opinion attributed to the Ontario government was correct. The Attorney-General's Office believed that the *Game Act* protected Natives only in the same way as it protected settlers, and that was the intention of the legislation from the beginning.²⁸ Newcombe agreed with Power that the best course of action was to try and convince Ontario to apply its game laws leniently, and take no legal action against the province.

Neither Power nor Newcombe ever considered the Robinson treaties when formulating their opinions. It is not entirely clear why this was so, but it is possible to speculate. First, as noted, Indian Affairs itself did not consider the treaties relevant so it is not surprising that the Department of Justice chose to ignore them. Secondly, there was no legal precedence that interpreted treaties as being binding documents upon governments as guarantors of Native rights. Lastly, the opinions expressed by both Indian Affairs and the Department of Justice indicate that both regarded the entire situation as a political rather than legal problem – one to be solved through negotiation rather than litigation. The

²⁸ NAC, RG 10, vol. 2405, file 84,041 pt. 1. E.L. Newcombe to McLean, 27 August, 1898.

treaties were valuable only if Indian Affairs sought the very legal solution the Department of Justice counseled against.

Only one person considered the Robinson treaties in relation to the *Game Act*. This was an anonymous clerk at Indian Affairs who provided a detailed memorandum to McLean at the end of August, 1898.²⁹ The clerk noted that regardless of the Ontario government's current opinions the true intention of the Legislature in passing the *Game Act* was to be found in the legislation itself. The act clearly intended "that an Indian should be reserved the right to kill any game (whether in [an] organized township or territory or not) in the Province for his immediate use for food and for the reasonable necessities of himself and his family, and not for the purpose of sale or traffic." Furthermore, the legislation was clearly intended to respect treaty rights promised to Natives. Legislation cannot be assumed, the clerk continued, to abrogate rights unless that intention is expressed unequivocally. The Robinson-Huron Treaty, which the ancestors of the Nipissing Band signed, clearly stated that the Ojibwa could continue to hunt, trap and fish as they had been in the habit of doing. Clearly, the clerk continued, the Ojibwa enjoyed unrestricted hunting rights prior to 1850, those rights continued after that date, and were recognized in the first *Game Act* in 1892.

²⁹ *Ibid.* Memorandum, 31 August 1898. The clerk may have been Reginald Rimmer, a law clerk at Indian Affairs in the late nineteenth Century. See Leslie and Maguire, 97.

As regards the Commanda/Ottawaska incident the clerk thought the Sudbury magistrate, Quibell, meted out such a stern punishment (a \$50 fine, and the confiscation of both the meat and Barnaby Commanda's gun) in order to force the question of treaty rights with Indian Affairs. In light of this, the clerk reasoned, Indian Affairs had to determine the legal extent to which Ontario's game laws could be applied to Natives. However, the clerk agreed with the Department of Justice that attempting to overturn Commanda's and Ottawaska's conviction by way of appeal was ill-advised. Such action, the clerk said, would be misinterpreted by the Ontario government as federal interference its jurisdiction. A legal approach would ultimately result "either in injury to a greater number of Indians by more stringent amendment of the game laws or in increased difficulties between the Governments of the Dominion of Canada and Ontario in relation to this question." Perhaps remembering the Dominion government's record when confronting Ontario in court the clerk advised that the solution lay in both governments reaching an understanding through negotiation.

Indian Affairs should, the clerk concluded, write to Ontario's Provincial Secretary with a view to having Commanda and Ottawaska's fines remitted, and their guns returned. McLean should lay before the Provincial Secretary the divergent views of Ontario's Attorney General and the federal Department of Justice, and the fact that the fines and confiscation were causing undue injury

and injustice to “a class of ignorant people.”³⁰ Indian Affairs should also try to convince the Provincial Secretary that the best way to prevent Natives from engaging in commercial hunting out of season was to prosecute consumers of illicit game. Nothing in the *Game Act*, at that point, outlined what penalties such people incurred for purchasing illegally killed meat, nor was there anything in the legislation which prohibited someone with the right to kill moose from selling the same. The clerk believed that as regards Commanda and Ottawaska justice may have been better served if the purchasers, the CPR survey crew, had been prosecuted.

While this memorandum is unique because the clerk considered the Robinson Treaties in his analysis of the situation he still perceived the essential problem to be one of interpreting the *Game Act*, the extent to which it should apply to Natives, and trying to find a political solution to the problem. His Machivellian solution lay in amending the *Game Act* in such a way that Natives could continue to hunt for their own personal use during closed seasons, but could not engage in any commercial activity. The clerk did not consider how such a condition would affect the Ojibwa’s trading relationship with the HBC but such an approach was preferable to Indian Affairs. Unwilling to incur Ontario’s displeasure, Indian Affairs chose not to challenge the legislation and, by extension, the province’s control over wildlife.

³⁰ Ibid. Memorandum, 31 August 1898.

It is also notable that neither Power nor the Indian Affairs' clerk considered the *St. Catherine's Milling* decision in any detail. Gerard LaForest noted in Natural Resources and Public Property under the Canadian Constitution that the Privy Council implied a continued Aboriginal interest in lands even after a treaty is signed.³¹ The Privy Council noted in its 1889 decision that

It was suggested that in the course of the argument for the Dominion, that inasmuch as the [Royal] proclamation [of 1763] recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew [sic.] that the tenure of the Indians was a personal and usufructuary right dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds , under his protection and dominion. ... It appears to...be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title , which became a plenum dominium whenever that title was surrendered or otherwise extinguished.³²

As LaForest observed the Privy Council recognized an existing and continued Ojibwa interest in the lands surrendered through Treaty Three. While the *St.*

³¹ Gerard V. LaForest, Natural Resources and Public Property under the Constitution (Toronto: University of Toronto Press, 1969): 113.

³² Cited in LaForest, 113. Emphasis added.

Catherine's decision did not explain the exact nature of this "Indian title," it clearly implied that it was related to hunting and trapping.

Since the issue was never raised by the clerk it never formed part of Indian Affairs' arguments. Indeed, McLean was selective even with what the clerk offered. He did not ignore the clerk's advice, but neither did he follow it completely. He scrawled at the end of the clerk's memorandum: "I approve of the recommendations [have] the letter prepared," but McLean raised the issue of the treaties only momentarily in his letter to E.J. Davis, Ontario's Provincial Secretary, and not to the extent recommended by the clerk.³³ McLean must have approved of this tact for his signature appears at the end of the letter. It is clear that McLean relied more on Department of Justice opinions as regards the Robinson-Huron Treaty - specifically, he did not deal with it in any substantial manner. Indeed, he raised the treaty issue only to dismiss it:

Waiving for the present the question of whether treaty stipulations can properly be affected by legislation, it seems clear that the effect of the [*Game Act*]...is expressly to preserve to the Indians rights reserved to them by treaty with regard to their hunting grounds...³⁴

The treaties are not mentioned again. McLean chose instead to address the problem within the very arena where the Ontario government was the strongest: within the context of the *Game Act*

³³ NAC, RG 10, Vol. 2405, file 84,041 pt. 1. McLean to E.J. Davis, 18 September 1898

³⁴ Ibid.

McLean's argument rested entirely on stipulations in the legislation: Natives may hunt during closed seasons, McLean said, because the *Game Act* permitted it. Acutely aware of the possibility of Ontario amending the legislation if harassed, McLean claimed he raised the issue only because the "Indians are clamouring for [Ottawaska's release and the return of Commanda's gun..."³⁵ McLean argued that Commanda's sale of the moose meat could be justified within the confines of the legislation specifically that excess meat from an animal killed by a Native for personal use may be sold for the reasonable necessities of himself and/or his family. McLean admitted to Davis that Barnaby Commanda was hired short term by the CPR survey crew to hunt moose, but killed the moose in question for himself and his family and sold only excess meat to the survey crew.³⁶ Reflecting his desire to effect a compromise, McLean proposed allowing Natives to hunt at all seasons on public lands, but, echoing the advice of his law clerk, said Ontario should "make stringent provisions to prevent the purchase from them, by anyone, of game during the closed season."

To insure Provincial Secretary Davis that Indian Affairs did not want to challenge the *Game Act* in court McLean attempted to convince the provincial secretary that it was in Ontario's interest to show the Natives benevolence. McLean hoped that the fine paid by Commanda and his confiscated gun would simply be returned without the necessity of the band turning to a court of

³⁵ Ibid.

³⁶ Ibid..

appeal.³⁷ Such a statement was keeping in line with the department's desire to distance itself from any appearance of wanting to challenge Ontario's game laws in court. McLean even insinuated that a legal victory for the band, as opposed to the Ontario government bestowing benevolence upon them, would be disastrous for both the Department of Crown Lands and Indian Affairs. McLean noted it was prudent to ingratiate Natives to the Ontario government by making concessions because "the effect upon the Indians of gaining a reversal of the magistrate's decision and remission of penalty otherwise than by the apparent exercise of grace would be anything but beneficial."³⁸ Such a victory would give the Ojibwa legal sanction to hunt when they pleased which would not be in the best interests of the Game Commission.

An Ojibwa legal victory was also not in the best interests of Indian Affairs. Its paternalistic attitude towards Natives was likely a mitigating factor in the policy it was formulating regarding hunting rights. A legal victory, won by the band independent of Indian Affairs, would serve to undermine their control over the band. It would strengthen in the mind of the Nipissing Band, and bands throughout the Robinson treaties, that Indian Affairs was not needed to protect their treaty rights. Such a victory also threatened Indian Affairs' attempts to civilize and assimilate Natives. Armed with a favourable judicial decision the Ojibwa would hunt and fish as they wanted, and, in Indian Affairs' opinion, it would become more difficult to pull them away from such pursuits..

³⁷ Ottawaaska had already served his thirty day sentence by this point.

³⁸ Ibid.

Securing provincial leniency in the application of its game laws served to avoid these two possibilities.

Ontario's officials, however, were not interested in McLean's overtures. Although the provincial secretary's response could not be found, a letter from J.M. Gibson, the Commissioner of Crown Lands, still exists. Gibson, who was also responsible for the Game Commission, wrote to James Smart, Deputy Superintendent General of Indian Affairs, and clearly indicated the opinions of the Ontario government. Gibson condoned the arrest. The game warden for the Nipissing area informed him that Commanda and Ottawaska were, in fact, employed full time to hunt for the CPR, and both men admitted this in court.³⁹ The Magistrate who presided over the case told the Commissioner he would not have convicted the two men were not for their admission that they were hunting for the CPR survey crew on a permanent basis. With such facts known, the Commissioner asked Smart if the fines should still be remitted and steps "taken by the Ontario Government to nullify the action which was thought necessary in the case of these two Indians."

As regards the *Game Act*, and its application to treaty Indians, the Commissioner agreed with Smart that the issue was vague, and that the two governments should try to come to a satisfactory arrangement - but at a later date. Why the Commissioner wanted discussions put off is unclear. However, he did state that the current ban on moose hunting in Ontario was having its desired affect. While the animal had been "almost entirely unknown" in the

eastern and north eastern portions of the province the prospect now existed of a short open season being declared. With such positive results being obtained, the Commissioner concluded, it should be clear to Indian Affairs why "the Ontario authorities are not disposed to look lightly upon or deal very lightly with cases of actual traffic in moose killing and selling."

With such information before him McLean wrote to the Nipissing Band's lawyers. He told Browning and Leask that if Commanda was under contract to sell moose meat to the survey crew there was nothing Indian Affairs could do for either man.⁴⁰ McLean conceded that the Nipissing Game Warden was possibly overstating the facts of the case, but it would be difficult to prove. McLean said that he had received a conflicting opinion from George Chitty, Indian Affairs' timber inspector, who claimed Commanda shot the moose for his and his family's own personal needs, and only excess meat was sold to the survey crew. Commanda agreed to bring the meat to the crew at a wage of \$1.50 per day. If this were the case, McLean continued, then Commanda's actions may be defensible. McLean told Browning and Leask that until such time as Indian Affairs received a copy of the proceedings and evidence presented at the trial it could not offer Commanda and Ottawaska any help.

This evidence never came to Indian Affairs. The Indian Superintendent for the Parry Sound Indian Agency, William Maclean, who was responsible for the Nipissing Band, wrote to the Department of Justice in early October, 1898.

³⁹ Ibid. J.M. Gibson to James A. Smart, 23 September 1898.

⁴⁰ Ibid. McLean to Browning and Leask, 27 September 1898.

Barnaby Commanda had written to the Superintendent about his conviction. Commanda's gun had still not been returned to him, and the conviction still angered him. The assistant-secretary of the Department of Justice, A.N. McNeil, informed Superintendent Maclean that no evidence was admitted into court, as was standard procedure, because Commanda and Ottawaska pleaded guilty. Without such evidence, McNeil stated, there was nothing that could be done. In the meantime the assistant-secretary advised McLean that:

The Indians should be made to clearly understand that whatever their own views may be relative to hunting rights conferred upon them by Treaty stipulations, they will have to obey the laws, and the Department is powerless to protect them.⁴¹

Echoing the provincial government's rhetoric, McNeil stated Indians should be made to understand that wildlife conservation was in their best interests "and they cannot suppose that other classes could be expected to submit to restrictions for the benefit of all, if one particular class were...allowed to nullify the benefits of such restriction." As regards Commanda's desire to pursue the matter, McNeil said he would, "in due time be advised of the outcome of the Department [of Justice's] intervention on his behalf." Considering the opinions expressed by McNeil in his letter the Department's intervention was not likely to accomplish much.

Indeed, the only action taken was by Indian Affairs deputy superintendent James Smart. He sent one further letter to the Commissioner of

⁴¹ Ibid. A.M McNeil to McLean, 5 October 1898.

Crown Lands regarding the Commanda/Ottawaska arrest.⁴² Smart noted that if what the Sudbury Police Magistrate said was true, specifically that Commanda and Ottawaska were employed to supply meat to the CPR survey crew, it was “very regrettable and far from just that the employers should have gone scot-free, while the comparatively ignorant and poor Indians had to pay the penalty.” Smart said that Browning and Leask supplied him with the few documents they had, and from his vantage point all Commanda and Ottawaska pleaded guilty to was hunting out of season not selling the moose meat. Smart continued that the conviction did not state what constituted the illegality of their actions since the *Game Act* itself exempted treaty Indians from the legislation.

Smart also contended that the trial was unfair. First, Magistrate Quibell acted improperly during the trial. Specifically, Quibell elicited a statement from Commanda and Ottawaska that they were employed by the survey crew to supply them with deer and moose meat. In so doing Quibell abandoned the role of adjudicator and took up the mantle of the prosecutor. This action denied Commanda and Ottawaska a fair trial as the Magistrate not only overstepped his authority, but did not act in an impartial manner. Furthermore, both men may have been duped into stating they were employed full time by the survey crew because neither possessed a sound knowledge of English. Since no interpreter was used at the trial Smart contended that neither man properly understood the charges brought against them nor were they warned that any admissions they made, elicited no less by the Magistrate, could be used against them.

⁴² Ibid. Smart to Gibson, 19 October, 1898.

Smart turned his attention to Gibson's request to put off further discussion of Native hunting rights until a later date. He stated that Indian Affairs would wait until the Commissioner of Crown Lands found a convenient time to discuss the issue. However, until such time Smart asked that all prosecutions of Natives be discontinued where game is killed within the meaning of the *Game Act* - that is for personal or family use.

Despite their letters to top provincial officials, Indian Affairs' officials were unwilling to risk souring relations with the Game Commission, and perhaps Dominion-Ontario relations, for the sake of its Native wards. Indian Affairs' concern with maintaining a degree of distance from future hunting incidents was so strong that even when Natives continued to face arrests and prosecutions it did nothing. Only one day after Smart's letter to Gibson, an Indian agent in southern Ontario wrote to J.D. McLean regarding the arrest of a Native in his agency for shooting deer out of season. McLean responded that Indian Affairs had corresponded with Provincial authorities on the matter, but they were unwilling to discuss the issue at the present time. Bearing this in mind, McLean advised the agent that:

Under these circumstances and pending the result of the proposed discussions just referred to, the Department does not see that anything further can be done for the present in the direction indicated by you, and any killing the Indians may do in the meantime will have to be done at their own risk.⁴³

⁴³ Ibid. McLean to B.J. McPhee, 20 October, 1898.

McLean issued similar instructions in December, 1898, when a member of the Golden Lake Reserve was arrested for an infraction of the game laws. The responsible Indian Agent sent Indian Affairs a telegram to inform it of the upcoming trial, and asked if a lawyer should be retained to defend the accused.⁴⁴ McLean told the agent that the employment of a lawyer could not be sanctioned by the department.⁴⁵

Matters surrounding the Nipissing Reserve also did not improve. Joseph Rogers, an inspector with the Criminal Investigations section of the Department of Crown Lands, wrote to the Commissioner in the spring of 1899. As noted earlier (p. 9) in this chapter, Rogers was on special assignment in Northern Ontario to investigate incidents of Native violations of the game laws. Rogers noted in his letter that members of the Nipissing Reserve were the chief perpetrators of over hunting in that area. They still pursued moose out of season, and sold the meat and heads.⁴⁶ Rogers informed his superiors that he confronted band members, and told them they would be arrested and prosecuted for breaking the Game Laws. Those he spoke to responded that "they would do as they liked, [and] that the Ontario Government could not do anything about it." Rogers tried to convince them that the government would declare a fifteen day moose season if the moose population in the area improved, and the men could earn two to three dollars a day as guides. Rogers never considered, even though he noted it in his letter, that a hunter could earn three

⁴⁴ *Ibid.* E. Bennett to McLean, 9 December, 1898.

⁴⁵ *Ibid.* McLean to Bennett, 9 December, 1898.

to ten dollars for a single moose head not to mention the money he earned selling the meat;⁴⁷ guiding, as a job, clearly paled in comparison to hunting.

Rogers claimed he tried to convict those who bought the meat, but clearly focused more on those who supplied the animals. In this endeavour, Rogers found it difficult at times to get at the Ojibwa suppliers directly. They employed a local "Frenchman" who went through the towns of North Bay and Sturgeon Falls, took orders, and delivered the meat. Local settlers were also employed occasionally to haul meat into town. The only way to stop this slaughter, according to Rogers, was to arrest and convict several of the offending Ojibwa and punish them to the full extent of the law. The Nipissing Band, according to Rogers, should be singled out as its members were far more inclined to break game laws than other bands. He indicated that he met with a group of Ojibwa north of Sault Ste. Marie who told him that they followed the province's conservation laws.

Rogers' letter sparked another round of correspondence between Gibson and James Smart. Upon receiving Rogers' correspondence, Gibson sent a copy of it to Smart. Gibson said that in his capacity as Commissioner of Crown Lands he avoided "taking any course that could be considered antagonistic to the true interests of the Indians," but in light of Rogers' report regarding the Nipissing Band he felt that stronger action was necessary.⁴⁸ Some members of the band believed that the "big Government" in Ottawa would protect them from the

⁴⁶ Ibid. Rogers to Gibson, 26 April 1899.

⁴⁷ Ibid.

Game Act, Gibson said. As a result, Nipissing Ojibwa were killing too many moose and selling the meat. Gibson said that his department wanted more cooperation from Indian Affairs in convincing the Band that "their true and permanent interests are in protecting the deer and moose." In order to do that, Gibson continued, some of the worst violators should be made an example of.

Smart's response, both the rough draft and the final version, still exist. Smart noted, perhaps with a degree of exasperation, that Indian Affairs had sought to open discussion with the Department of Lands regarding Native hunting eight months previous, but was told that discussions should be put off to a later date.⁴⁹ As regards the belief amongst the Nipissing Band that the government in Ottawa would protect them, Smart hypothesized as to its origins, and tried to assure Gibson that Indian Affairs was not encouraging the Ojibwa in this attitude. Confusion still existed, Smart said, around "what constitutes a breach of the game ordinances on the part of the Indians." This led Indian Affairs to occasionally give the accused, as in the case of Commanda and Ottawaska, the benefit of the doubt as regards their guilt. The bands misconstrued this for support and protection.

Smart paternalistically noted that the somewhat simple nature of the Ojibwa also led them astray, and into trouble with the province. White men, interested in obtaining meat and pelts, were encouraging members of the Nipissing Band to break the game laws. In the final draft of his letter Smart

⁴⁸ *Ibid.* Gibson to Smart, 27 April 1899.

⁴⁹ *Ibid.* Smart to Gibson, 5 May 1898.

reiterated his belief that the buyers were “more guilty than those with whom they deal.” Far stronger language as regards the intelligence and gullibility of the Ojibwa was used in the first draft of his letter. Smart initially wrote: “Those purchasers are more guilty than their comparatively ignorant dupes...”⁵⁰

Some discussion did ensue following this exchange, but it was limited. Gibson tried to determine who, exactly, Indian Affairs classified as an Indian.⁵¹ He argued that, due to intermarriage and “inter-breeding”, it was difficult for enforcement officers to determine who was Native. This was quite likely a diversionary tactic to direct Indian Affairs’ attention away from the real issue of treaty rights, and Ontario’s ability to affect them. Smart’s stated that the “class of Indians” he referred to on previous occasions were those defined as such under the *Indian Act*, and that such persons were “under the care of this Department.”⁵² Smart did provide Gibson with the conditions someone had to meet to be defined as “Indian” (i.e.: trace their ancestry through the male line of their family). Referring specifically to Gibson’s request, and the on-going concerns of Natives in the Robinson treaties, Smart said that very little inter-marriage occurred on reserves in northern Ontario. Such a statement was likely an attempt to prevent the Department of Crown Lands from trying to argue that its game laws were not being applied to *bona fide* Indians, but to ‘half-breeds.’

Despite this small bit of correspondence matters remained virtually unchanged. When MPs began to write to Indian Affairs, likely due to letters

⁵⁰ *Ibid.* Rough draft of Smart’s letter to Gibson, 2 May 1899.

⁵¹ *Ibid.* Gibson to Smart, 16 June 1899.

received from Natives in their constituency, they received the same response that Indian agents received. Indian Affairs' officials stated the divergent views of the Department of Justice and Ontario's Attorney General regarding the actual intention of the *Game Act*, to how far a provincial legislature can affect treaty stipulations regarding hunting and trapping, and what constituted a hunting ground within the context of the *Game Act*. Letters were concluded with the same warning: until such time as matters can be settled all Natives hunted and trapped at their own risk, and Indian Affairs could do little to help them.⁵³

This warning was accurate as Indian Affairs' officials left the Ojibwa to their own devices as the twentieth century began. Several developments occurred in the decade following the Commannda/Ottawaska incident regarding the Game Commission, Indian Affairs, and the Ojibwa. First, Ontario's Department of Crown Lands and the Game Commission begin to apply the game laws more forcefully against Natives. Small amendments were made to the *Game Act* which, in light of the Attorney-General's statement that Natives and settlers were analogous within the context of the legislation, did not bode well for the Ojibwa in northern Ontario. Hunting and trapping bans were created for animals other than moose, but which were equally important to the Ojibwa as a source of food. Furthermore, the Game Commission began to define the *Game Act* even more narrowly. That portion of the legislation which stated

⁵² *Ibid.* Smart to Gibson, 19 July 1899.

⁵³ *Ibid.* Samuel Stewart, Assistant Secretary Indian Affairs to J.M. Hurley, MP House of Commons, 28 July 1899.

that Indians could hunt over their hunting grounds regardless of existing closed seasons was interpreted as referring only to reserve lands. Therefore, an Indian could hunt whenever he wanted on his reserve, but the moment he left that land he was subject to the game laws. This obvious misinterpretation of what constituted hunting grounds, within the context of the Robinson Treaties, served to further restrict Ojibwa rights.

Indian Affairs did nothing to protect these rights, nor did its officials pursue Ontario's Attorney-General to meet his earlier commitment of discussing the issue. It is not surprising that Indian Affairs' policy remained unchanged considering the influence the Ontario government exerted over Dominion-Native relations as the twentieth century began. Ontario, for example, used an earlier 1894 arrangement with the Dominion government to affect the negotiation of the James Bay Treaty, or Treaty Nine, of 1905/1906. In this agreement it was established that:

any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid shall be deemed to require the concurrence of the government of Ontario.⁵⁴

Ontario used its agreement to affect reserve selection by Treaty Nine bands.

Any site which contained valuable minerals, timber, or a river with the ability to produce more than 500 h.p. in hydro-electricity was off limits to bands.⁵⁵

⁵⁴ Cited in James Morrison, Treaty Research Report: Treaty Nine (Ottawa: DIAND, T&HRC, 1986): 23.

⁵⁵ NAC, RG 10, Vol. 3033, file 235,225, part 1. A.J. Matheson to Pedley, 23 June 1905.

Ontario also squashed the idea of making the James Bay Treaty an extension of the Robinson treaties. Those treaties contained a clause which provided for an increase in annuity payments. After Confederation, both Ontario and Quebec fought with the federal government over who was responsible to pay this money. The matter went before the Privy Council where, once again, Ontario was victorious. Afraid that it might find itself facing the possibility of paying annuity money for Treaty Nine, Ontario had Indian Affairs drop the idea of making the treaty an extension of the 1850 agreements.⁵⁶ Instead, Ontario and Indian Affairs agreed that the province would pay the initial annuity payments, and the Dominion government would assume responsibility for all future expenditures.⁵⁷

So consigned was Indian Affairs to Ontario's assumed ability to affect treaties that its Commissioners lied to Cree and Ojibwa bands during the negotiation of Treaty Nine. During negotiations in the summer of 1905 and 1906, several Cree raised concerns about their hunting rights. Indian Affairs representatives Duncan Campbell Scott and Samuel Stewart, with the provincial representative Daniel McMartin looking on, informed these people that their hunting rights would be unaffected by the treaty:

Missabay, the recognized chief of the band [at Osnaburgh], then spoke, expressing the fear of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve...and would be deprived of the fishing and hunting privileges which they now enjoyed

⁵⁶ Ibid. Memorandum, 17 August 1903.

⁵⁷ Ibid. A.J. Matheson to Pedley, 23 June 1905.

On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves, and then asked to be given till the following day to prepare their reply.⁵⁸

From one perspective this was true: the treaty itself would not affect Cree and Ojibwa hunting. However, once the land was ceded Indian Affairs was aware that it would not be able to protect the bands from the application of Ontario's game laws. Duncan Campbell Scott and Samuel Stewart were certainly aware of this when they assured Chief Missaby that his fears were groundless.

The Ojibwa to the south knew that treaties alone were not capable of protecting them against provincial interference. Bands and individual Natives turned increasingly to local lawyers to represent their interests before Indian Affairs and the courts. Bands also began to organize politically. There is only evidence of this occurring once prior to 1910, but it clearly indicates the chiefs and councils realized the common nature of the problem they were fighting and the necessity to work cooperatively. This, combined with increased use of the legal system, was a portent of the future direction bands took in their efforts to protect treaty rights. Lastly, they turned to Indian Agents who seemed to sympathize with the bands in their agency. These agents, acting perhaps as much out of a desire for clear direction from Indian Affairs as empathy for the bands, tried to convince Indian Affairs headquarters in Ottawa to stand up more vigorously to Ontario.

⁵⁸ A complete copy of the Commissioners' Report is in Morrison, Treaty

It is doubtful Ontario would have changed its legislation if faced with a more belligerent Indian Affairs. Changes to the *Game Act* in the first decade of the new century, and continued application of game laws to Ojibwa residing in either of the Robinson Treaties, reflect the continued confidence of the Game Commission. With Commission records prior to 1950 destroyed only the *Game Act* provides any information as to how the Commission, and the Department of Crown Lands attempted to circumvent the treaties. The Game Commission's annual reports, outlined in chapter two above, clearly indicate what the Commission thought of Indians and their treaties in relation to conservation, but provide no insight into how officials attempted to find ways to apply the game laws to Natives in contravention of treaty promises. The *Game Act* and amendments to it provide some understanding of the Commission's thinking.

The Ontario government did nothing to correct the ambiguity in the *Game Act* regarding Native treaty rights. However, it did make subtle changes that further restricted Indian hunting rights. Between 1899 and 1905 the act was amended four times. Of particular importance was the change made in 1900 to Section 32(1) which dealt with "Indians and settlers killing, etc. for food." This was the section which created problems for Barnaby Commanda in 1898 as it states, in theory, that treaty rights would not be affected by the *Game Act* although in practice the reality was much different.

The section stated that Indians or settlers residing in unorganized townships or territories could kill game for their own use as food, or for necessities. It further stated that the provisions of the act would not affect "any right specially reserved to or conferred upon Indians by any treaty or regulations in that behalf made by the Government of the Dominion of Canada with reference to hunting on their reserves or hunting-grounds..."⁵⁹ Within this context the 1900 amendment was the same as the 1896 version; however, there now existed an additional condition:

provided, that no settler shall hunt, take, kill or have in his possession any moose, reindeer, or caribou except in any year when the same may be lawfully killed according to the provisions of this Act.⁶⁰

While the wording clearly indicates it applies only to settlers, considering the earlier statements made by the Attorney-General and the Commissioner of Crown Lands for Ontario it is clear, from their perspective, that "settlers" was analogous to "Indians."

The *Game Act* for 1900 further affected the Ojibwa of northern Ontario by creating new hunting bans for some animals, and allowing very limited ones for others. While a moose season was created (from November 1 to November 15 for 1900 and every third year thereafter), it reflected the Game Commission's concern for sportsmen as opposed to the needs of Ojibwa families which relied on moose for more than fifteen days every third year. The act was also amended

⁵⁹ *Statutes of the Province of Ontario, "An Act to Amend and Consolidate the Ontario Game Protection Act"* (Toronto: L.K. Cameron, 1900): 164.

⁶⁰ Ibid.

to ban all beaver and otter trapping throughout Ontario until November 1, 1905: "No beaver or otter shall be hunted, taken or killed or had in possession by any person before the first day of November, 1905..."⁶¹ After that date the beaver and otter season was open from November 1st to March 31st; however, when 1905 finally arrived, the beaver and otter ban was extended to 1910.⁶² Again, no thought was given to the Ojibwa who relied on beaver as both a source of food, and income when trading with HBC posts.⁶³

Correspondence between Indian Affairs in Ottawa and its field agents indicate that it had also not changed its mind regarding the application of the *Game Act* to the Ojibwa. When another member of the Commanda family, Francis, was arrested in the early winter of 1906 the Indian agent, George Cockburn, wrote to Ottawa and asked if Indian Affairs could secure Commanda some leniency. McLean, still secretary of Indian Affairs, responded to Cockburn's request. His letter shows that in the seven years following the Commanda/Ottawaska arrest Indian Affairs had substantially lessened its expectations in securing any concessions from Ontario, and continued to accept that Ontario decided the nature and extent of Native treaty rights in the province. McLean informed Cockburn that "the Department is not aware of any exemptions in favour of Indians in the province of Ontario from the operation of

⁶¹ *Ibid.*, 147.

⁶² An Act to amend and consolidate The Ontario Game Protection Act, 1910: 134.

⁶³ Even in the early twentieth century the HBC still maintained a series of posts in the area of the Robinson Treaties. Temagami, Matachewan, Michipicoten and others still played a role in the Ojibwa's' lifestyle.

the statutes other than those granted by the statutes.”⁶⁴ Indeed, McLean said

Indian Affairs was powerless to protect the Ojibwa:

The Department has no jurisdiction and is powerless to protect Indians from the consequences of their own disregard or defiance of lawful authority.⁶⁵

Regardless, McLean continued, there was no “class” that would ultimately benefit more from the game laws than the Ojibwa. McLean’s letter even went so far as to indicate that Indian Affairs accepted Ontario’s legal prerogative when prosecuting Natives.

Indian Affairs’ resignation did not prevent bands in the Robinson treaties from trying to protect their hunting and trapping rights. Bands and the accused employed local lawyers to represent their cases, and to try and convince Indian Affairs to protect their interests. One such person was Thomas King of the Parry Island Reserve (in Georgian Bay near the town of Parry Sound). Frank Powell, a barrister working in Parry Sound, was employed by King. Powell wrote to Frank Pedley, who replaced James Smart as Deputy-Superintendent of Indian Affairs, in the winter of 1908. King had shot a deer on unoccupied Crown land in the Township of Cowper just across the channel from the Parry Island Reserve, and was arrested for hunting deer out of season.⁶⁶ The deer was shot on unoccupied crown land. Bearing this in mind, Powell asked if “this Indian is liable to being prosecuted under the Ontario Game Laws, and whether or not the

⁶⁴ NAC, RG 10, Vol. 6743, file 420-8-1. McLean to George P. Cockburn, 6 December 1906.

⁶⁵ Ibid.

⁶⁶ Ibid. Frank Power to Frank Pedley, 21 December 1908.

Indians on Parry Island are exempt under their Treaty rights?" Powell referred to both the 1907 *Game Act*, which stated treaty rights would not be interfered with by the legislation, and to that section of the Robinson-Huron Treaty which indicates that the signatories and their descendants maintained their right to hunt. King clearly intended to fight his conviction as Powell asked for a certified copy of the Robinson-Huron Treaty to be used as evidence in court.

Frank Pedley responded that Natives possessed only those rights which Ontario gave them under the *Game Act*.⁶⁷ Indian Affairs, however, did not attempt to force Ontario to properly apply its own legislation. Its policy continued to be to try and secure leniency for Natives arrested and prosecuted. This usually meant asking the Superintendent of Game and Fisheries, Edward Tinsley by 1905, to remit any fines paid by the Natives, or try to convince him before a trial was held to agree to a suspended sentence.⁶⁸

This did little to alleviate the situation for Indian agents who dealt with aggrieved band members on a regular basis. In the winter of 1909, for example, Frank Ogima of the Fort William Band was arrested for killing a moose out of season.⁶⁹ The Indian agent, William McDougall, had told the bands in his agency that they possessed the right to kill game, for their own use as food, throughout the year, but now they were being arrested for doing so. Writing to J.D. McLean, McDougall sought clear direction from Indian Affairs in this

⁶⁷ *Ibid.* Pedley to Power, 24 December 1908.

⁶⁸ *Ibid.* Pedley to E. Tinsley, 29 December 1909. Tinsley to Pedley, 29 December 1909.

⁶⁹ *Ibid.* McDougall to McLean, 27 December 1909.

matter. He referred McLean to both the Robinson-Superior Treaty, and the *Game Act* of 1907. Ogima's arrest, which was not an isolated incident, had brought the matter of hunting rights to a climax with the Fort William Band. Told by their agent they could hunt, and facing arrest as a consequence, the band wanted "to know just where they stand and want your [McLean's] ruling in the matter." To enforce his point, and likely a reflection that he and the bands had had trouble with the game laws on previous occasions, McDougall sent McLean pertinent extracts from the Robinson-Superior Treaty and the *Game Act* which referred to Native hunting.

It appears that the Fort William Band and McDougall may have worked cooperatively to force Indian Affairs to deal with the problem. Two days after McDougall sent his letter to McLean, Chief Moses McCoy of the Fort William band also sent a letter. McCoy drew McLean's "attention to the hardships which are imposed upon the Indians of the Robinson-Superior Treaty by the present game laws in the Province of Ontario."⁷⁰ Not only did the *Game Act* prevent the Ojibwa from hunting, McCoy said, but their fishing was also restricted in both Lake Nipigon and the Nipigon River.⁷¹ As outlined in chapter one of this thesis

⁷⁰ *Ibid.* Chief Moses McCoy to McLean, 29 December 1909.

⁷¹ Section 29 (1) of the 1907 *Game Act* states: Except under the authority of a license, no one shall fish in the waters of Lake Nipigon [sic.] in the District of Thunder Bay, in the River Nipigon in the same District, nor in any tributaries of the said Lake or River..." Section 29(2) continued: This section and the conditions applicable to licenses authorizing such fishing shall apply to Indians as well as to all other guides, boatmen, canoemen, camp assistants or helpers of any kind of any fishing party or persons who may hold such licenses. *Ontario Statutes*, "An Act respecting the Game, Fur-bearing Animals and Fisheries in

the Fort William Ojibwa had a close relationship with the Nipigon Ojibwa, and likely fished in that area.⁷² Such a restriction meant that for those bands on the north shore of Lake Superior an important part of their livelihood was gone. McCoy quoted that portion of the Robinson-Superior Treaty relating to hunting rights. He asked McLean to have the game law restrictions removed, as the band could not afford to appeal Ogima's conviction, so that they could continue "to hunt for a living as we have heretofore been in the habit of doing and as promised in the Treaty."⁷³

The Ogima arrest also brought to light the new question of what constituted "hunting grounds" as referred to in the *Game Act*. Attached to McCoy's letter was a newspaper clipping. The origin of the clipping is not indicated, but was likely taken from a Fort William or Port Arthur newspaper. The clipping noted that the local Magistrate, O'Brien, had recently convicted Frank Ogima for hunting moose without a license. O'Brien had written to Edward Tinsley, presumably before making his ruling, as to whether the game laws applied to Natives. The report continued that Edward Tinsley said that "Indians off their reserves are amenable to the laws which have been enacted for

Ontario", 1907: 348. The cost of obtaining a license was: \$15 for two weeks, \$20 for three weeks, \$25 for four weeks. The time allotted to each license is obviously adjusted to coincide with fishing trips made by sportsmen. The Ojibwa, therefore, were capable of guiding fishermen but not fishing themselves as the price of a license, for such a short period of time, was unreasonable for those that lived in the area and relied heavily on fish throughout the year.

⁷² A proper footnote will be placed here when the thesis is complete to refer to the proper pages.

⁷³ NAC, RG 10, Vol. 6743, file 420-8-1. McCoy to McLean, 29 December 1909.

the protection of game and fish the same as anyone else.”⁷⁴ The letter did not affect the magistrate’s decision, which was made before Tinsley’s letter arrived, but it did support his ruling.

The *Game Act* noted, in its 1900 amendment that the provisions of the game laws would not affect any treaty rights conferred upon Indians “with reference to hunting on their reserves or hunting grounds or in any territory specially set apart for the purpose...”⁷⁵ Tinsley took this portion of the legislation to mean Natives possessed hunting rights only on their reserves. The Robinson treaties were not created with this in mind. The treaties state that the bands and their descendants retained the right to hunt as they had been in the habit of doing. As outlined in chapter one of this thesis the bands on the north shore of Lakes Huron and Superior possessed familial hunting grounds prior to 1850. The treaties were not intended to restrict hunting only to that land set aside for each band as a reserve. Common sense alone would indicate that the reserves, some of which were only a few thousand acres in size, could not support an entire band.. Since Ogima was arrested in the vicinity of the reserve, as he was tried in a Fort William court room, it is safe to assume that he was hunting on land that his ancestors used prior to 1850; therefore, he had not broken the intent of either the treaty or the *Game Act*.

⁷⁴ ***Ibid.***

⁷⁵ ***Statutes of the Province of Ontario, “An Act to Amend and Consolidate the Ontario Game Protection Act.” (Toronto: L.K. Cameron, 1900): 164.***

There was also case law on Ogima's side. Part of the *St. Catherine's Milling* decision dealt with section 91(24) of the *Constitution Act of 1867*, that is "Indians and Lands reserved for Indians." The province had argued that this gave the Dominion control only over Indian reserves proper, and "not the extensive tracts of land reserved by the [Royal] proclamation [of 1763]."⁷⁶ The Privy Council rejected this argument and held that this section gave the Dominion control over both types of reserved lands. This decision found further support in 1897 and *Attorney-General of Canada v. Attorney General of Ontario*.⁷⁷

A similar statement was issued in *Ontario Mining Co. v. Seybold*.⁷⁸ In its decision the Privy Council referred to the *St. Catherine's Milling* decision, and unsundered Aboriginal hunting rights:

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

⁷⁶ LaForest, 114.

⁷⁷ LaForest, 116.

⁷⁸ LaForest, 117-118. *Ontario Mining Co. v. Seybold* was concerned with a portion of Reserve 38B (Treaty Three) which the band surrendered to the Dominion government in 1886. The Dominion granted a portion of that land to the Ontario Mining Company by letters patent in 1889. In 1899, the company claimed "to be entitled to the land as against the respondent who claimed an interest in the same land under provincial letters patent of 1899." The Supreme Court ruled that once the Dominion effected the surrender of that portion of Reserve 38B sole proprietary ownership passed to the province.

*of hunting and fishing as was reserved to the Indians in the treaty.*⁷⁹

These decisions make it clear that the Ojibwa retained an unsurrendered right to hunt and trap throughout their respective treaties, subject to land taken up for settlement.

Since J.D. McLean was not interested in the more obvious facts such as the promises contained in the Robinson-Superior Treaty or the wording of Ontario *Game Act*, it is not surprising he was either unaware or uninterested in existing case law. He must, however, have been aware of the wording of the Robinson treaties as regards hunting, but did not consider it important. Despite the cooperative efforts of McDougall and McCoy, Indian Affairs' secretary was not disposed to consider this new arrest any different than past ones. Indeed, McLean wrote to McDougall that there was nothing Indian Affairs could do.⁸⁰ McLean advised that "it would be worse than idle" to encourage the Fort William Band, or any other bands, to resist the law since they would simply be arrested and the department would be powerless to protect them.

McDougall was instructed to convey this message to the Chief. Whether or not McDougall did is unknown, but shortly into the new year McLean received a letter from Langworthy and McComber, two prominent lawyers in Port Arthur. They acted as solicitors for several banks in the town, and Langworthy was the Crown Attorney and Clerk for the area.⁸¹ Considering

⁷⁹ Cited in LaForest, 119. Italics used by LaForest.

⁸⁰ NAC, RG 10, Vol. 6743, file 420-8-1. McLean to McDougall, 3 January 1910.

⁸¹ Ibid. Langworthy and McComber to Mclean, 10 February, 1910.

Chief McCoy's statement that the band did not have enough money to appeal Ogima's conviction it can only be assumed that these two lawyers worked *pro bono*. They told McLean that they represented Frank Ogima, who claimed immunity from the game laws by virtue of his treaty rights. They asked McLean to send them copies of the *Game Act* and the Robinson-Superior Treaty. It is unknown if McLean fulfilled their request, but it seems unlikely. Both men received the standard response McLean delivered to others seeking clarification regarding the application of game laws to Natives; McLean said that Ontario was within its jurisdiction to regulate game in the province, and apply those laws to Natives. McLean even spouted Ontario's logic that Natives were the one group in Ontario that stood to gain the most from such laws, and, therefore, should be amenable to them.⁶² McLean continued that whenever the issue was brought before the courts magistrates and judges always ruled in Ontario's favour, and there was no reason to believe that an appeal of Ogima's conviction would result in a different outcome.

This, however, was not entirely true. In late April, 1909, five Natives were arrested near Lindsay for trapping muskrat out of season.⁶³ Three of the men were from St. Regis, Quebec. They were found guilty of breaking Ontario's game laws, and fined. The lawyers who represented the five men, however, were able to have the other two acquitted of the charge. They convinced the presiding magistrate that these were Indians who were "domiciled in Ontario."

⁶² Ibid. McLean to Langworthy and McComber, 15 February 1910.

McLean was as well aware of this as the lawyers, Hopkins and Hopkins, who represented the men consulted Indian Affairs about the case, and asked if the St. Regis Natives could be charged with hunting in an area they had used for decades.

Despite the obvious implications of this ruling, that Natives residing in Ontario were exempt from the game laws, McLean continued to advance the idea that Indian Affairs could not do anything to protect Native hunting and trapping rights. The Port Arthur Indian Agent raised the Ogima question with Indian Affairs again in March, 1910. Ogima was still trying to get his conviction overturned. The Indian Agent wrote to Indian Affairs with new information regarding the case. First, McDougall noted that Ogima killed the moose on November 12, 1909 - during the open season for moose. His only crime was not being in possession of a license. The question then became, the agent stated, whether "an Indian has a right to kill moose or deer in an open season without a hunting license."⁸⁴ The agent expressed his frustration at the arrest. "I trust the Dept. should take a definite stand," he said, "either to say the Indian has no further right than a white man or protect him in so far as his rights go." McLean's response offered neither the agent, nor Ogima any hope. The game laws, McLean said, apply to Indians as well as to white people "except in so far as the Indians are specifically exempted."⁸⁵ Essentially, McLean told the agent

⁸³ Ibid. Hopkins and Hopkins to McLean, 21 April 1909.

⁸⁴ Ibid. J.G. Ramsden to McLean, 8 March 1910.

⁸⁵ Ibid. McLean to Ramsden, 11 March 1910.

that the Department was simply unwilling to protect the treaty rights of the Ojibwa.

Indian Affairs' lack of concern regarding the Game Commission's restrictive interpretation of what constituted hunting grounds was apparent when Francis Commanda, arrested previously in 1906, was arrested again in 1909. On November 29, 1910, the Indian Agent wrote to headquarters to tell them of Commanda's arrest. Commanda was returning from his hunting grounds on November 26, according to the agent, when he was arrested for having partridge, muskrat and beaver out of season.⁸⁶ Commanda must have had a large number of pelts and birds with him, for the local Police Magistrate imposed a fine of \$280.00. The Agent noted that the fine may increase while evidence was gathered to determine if Commanda intended to sell any of the animals. The agent stated that during the trial the Magistrate was presented with an extract from a letter written by Edward Tinsley. In this letter Tinsley stated that "Indians have not anymore rights when off their reserves than other people."⁸⁷ The Agent stated that if confined to hunting only on the reserve the Nipissing Band would be deprived of both meat and fish. as the reserve was not large enough to support the entire Nipissing Band.

Such concerns had little impact on either McLean or any other senior bureaucrat at Indian Affairs. The department had settled on its policy regarding the Ontario *Game Act*, and its application to Natives regardless of any treaty that

⁸⁶ Ibid. Nipissing Indian Agent to J.D. McLean. 29 November 1910.

⁸⁷ Ibid.

protected their hunting and trapping rights. Regardless of any promises made by the Crown when these agreements were made Indian Affairs would not make any strong or overt attempt to protect those rights. While J.D. McLean did write letters to the Game Commission about the arrest of Natives and expressed concern over these incidents Ontario rebuffed his efforts and McLean was willing to risk a political conflict with Ontario for the sake of some Indians who the federal government wanted to assimilate, and have abandon their traditional harvesting activity.

Even if McLean or others wanted to challenge Ontario's *Game Act* it is unlikely they would have received the political backing necessary for such an endeavour. Indian Affairs was the poor section of the Department of the Interior. Ministers, starting with Sir John A. Macdonald, had little time for the Native portion of their portfolio. Tribes and bands were, by the late nineteenth century, a nuisance to be removed. Western Canada was being opened by this point, settlers were arriving in the eastern port cities, and a transcontinental railway was being built. With issues such as this being considered the fate of Indians was not something that occupied the attention of the Minister unless treaties were needed to open up land for Whites. While Indian Affairs realized the Robinson treaties were being broken they were unwilling to protect the rights of the Ojibwa.

The Ontario government was more than pleased with the situation. Despite stipulations in both the *Game Act* and the Robinson Treaties the Game

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Chapter Four
The Company of Adventurers vs. the Ontario Government:
The Hudson's Bay Company and the Game Commission, 1898-1914

In 1910, Ontario's Game Commission turned its attention towards Canada's oldest company: the Hudson's Bay Company (HBC). Provincial enforcement officers conducted raids on the HBC's storage warehouse at Biscotasing (on the Canadian Pacific Railway mainline), and its post at Montizambert. In each instance hundreds of furs were confiscated, and the managers arrested. Both men, George Train and R.C. Wilson respectively, were tried, convicted and fined approximately fifteen hundred dollars each. The charge leveled against both men was the possession of certain pelts (mainly beaver and otter) trapped and sold out of season. The HBC, which had attempted negotiating a settlement with the Ontario government prior to this, realized its only hope lay in challenging the legality of the *Game Act*. It turned to the Toronto law firm of McCarthy, Osler and Hoskin to represent their interests. Efforts were made, primarily by Leighton McCarthy, to arrive at an arrangement with the Ontario government. These failed. After eighteen years of successfully applying its game laws unchecked the Game Commission clearly was ill disposed towards overtures of compromise. However, unlike the individual or small bands of Ojibwa who had test the act before, the HBC had significant resources to undertake a lengthy legal battle.

The HBC's case against the provincial government was an important turning point in Native hunting rights for several reasons: it brought forth new

arguments to counter Ontario's *Game Act*; it made Indian Affairs more aggressive with Ontario over the issue of hunting/treaty rights; and it revealed the political complexities surrounding the hunting issue. As regards new arguments, the constitutional element of the hunting issue, previously underplayed by Indian Affairs, was brought to the fore by the Company. Officials at Indian Affairs and the Department of Justice had considered the constitutional elements of the *Game Act* before the HBC situation arose, but never forced the issue partly from a desire to preserve good relations with Ontario, and partly from the belief that such an effort would prove futile. Acting on behalf of the Company, however, Leighton McCarthy, had no such qualms. He argued that Ontario had overstepped the constitutional boundaries of section 92(16)¹ when it applied the *Game Act* to the Ojibwa of the Robinson Treaties. Furthermore, "Indians and Lands Reserved for Indians" was a Dominion responsibility under section 91(24), and McCarthy argued that only Indian Affairs could properly affect treaty hunting rights regardless of any overlapping provincial jurisdiction. The Ojibwa had been making this argument for almost two decades.

Treaty rights were another important element of the Company's case on par with even the BNA Act, and they too were brought out in the HBC's arguments in a substantial manner. Indeed, section 91(24) and the Robinson treaties complemented each other. The province, McCarthy contended, could

¹ Section 92(16) gives the provinces jurisdiction over "Generally all Matters of a

not alter promises made to the Ojibwa in the Robinson Treaties as the Dominion government retained control over all existing and future treaties. In 1850, William Robinson promised the Ojibwa that if they signed the treaty they retained the right to hunt and trap as they had "heretofore been in the habit of doing." Although McCarthy and the Company were never overly concerned with the deleterious effect of the *Game Act* on Ojibwa subsistence hunting, McCarthy cut a new and dramatic path by arguing that this portion of the treaty as a promise that the Ojibwa retained the right to engage in commercial trapping. The Ojibwa had been in the habit of trapping and trading furs with the HBC prior to 1850; therefore, McCarthy concluded the Ojibwa retained the right to trap and sell furs and the Company's posts kept the right to buy them.

The Company's legal challenge also reinvigorated Indian Affairs. McCarthy turned to the department's top bureaucrats in his battle with the Ontario government. Indian Affairs' officials provided surreptitious aid to McCarthy in the hope that they could reap the benefits of an HBC victory without assuming the political risk of either a loss, or of incurring Ontario's wrath if it won. The Company was essentially bringing forward the very legal challenge Indian Affairs wanted to undertake against Queen's Park, but had not for fear of the potential political fallout. Indian Affairs' bureaucrats, particularly J.D. McLean, helped McCarthy in the preparation of court documents. McLean likely believed that the HBC, a large and powerful company, stood a reasonable chance of success and his efforts would be rewarded by a Company victory.

merely local or private Nature in the Province."

McLean gave the Department of Justice copies of HBC legal submissions for its opinion, and he provided McCarthy with copies of provincial correspondence with the provision that this was done “unofficially.” McLean also stepped up pressure on Ontario when Natives were arrested during the time that the stated case was being brought to trial. In seeking leniency for Natives, McLean no longer meekly accept provincial explanations for these arrests, but pursued issues relating to the *Game Act* and the Robinson treaties.

Initially Indian Affairs’ actions placed it squarely within the context outlined by Christopher Armstrong in his book, The Politics of Federalism. The HBC, faced with an intransigent provincial government, had turned to the Dominion government for help and was not disappointed. The nature and context of Native hunting rights, however, soon forced Indian Affairs to deviate from the framework described by Armstrong. Indian Affairs was not, as outlined in chapter three, opposed to forcing Natives to abandon traditional harvesting. The Dominion government was attempting to convince Natives to abandon the hunt in favour of farming. Indian Affairs’ only qualm with Ontario’s *Game Act* was that it did not take northern bands that were dependent on hunting and trapping into consideration. McLean wanted only that Game Commission extend leniency towards these bands until they became ‘civilized,’ or acculturated, gave up traditional beliefs, and abandoned hunting and trapping or at least became less dependent on it.

Prior to this falling out it seemed as if Company pressure combined with a more belligerent Indian Affairs was causing the Game Commission to doubt itself. The Commission initially exhibited some apprehension regarding the legality of its *Game Act*. Its correspondence with Indian Affairs expressed less confidence than in the past. Also, provincial officials involved with the hunting issue were more subdued when J.D. McLean asked for leniency in the application of game laws, or requested that the Game Commission reconsider its conservation policies. At one point top officials in the Game Commission even asked Indian Affairs' its opinion regarding the application of game laws to treaty Indians something that never happened even when the *Game Act* was first implemented.

Indian Affairs, however, had no interest in protecting the ability of the Ojibwa to engage in commercial hunting which, Indian Affairs believed, retarded their civilization efforts. The department realized the necessity of subsistence hunting for some bands, but believed that permitting commercial hunting or trapping would entice Natives away from more sedentary, civilized pursuits such as farming or wage labour. When it eventually realized that the HBC sought only to protect commercial hunting rights, and subsistence activity indirectly, Indian Affairs lost some of its initial enthusiasm. What eagerness remained dissipated completely when the HBC asked the department in 1912 to send representative counsel to the appeal hearing, and state in court that Indian Affairs supported the Company's legal arguments. This was amounted to a

Dominion challenge of Ontario's *Game Act*, and Indian Affairs balked at the suggestion. Considering that the HBC and Indian Affairs were at cross purposes regarding commercial hunting, and that the Department wanted to avoid open constitutional warfare with Ontario, Indian Affairs refused to send counsel to the appeal. The Company received no further assistance after this point.

Eventually Ontario's Attorney-General's Office found a solution to its problems with the HBC. After stalling the stated case for two years it finally agreed to have it heard if Sir William Meredith, Ontario's newly appointed Chief Justice, sat in judgment. Ontario was so insistent on Meredith's presence that it threatened to prevent the case ever being heard if the Company refused its request. McCarthy was in no position to refuse. Both sides presented their arguments before the Court of Appeal in February, 1913, waited over a year for its decision, and were then faced with an odd outcome: the court refused to make a ruling. Rather, it recommended that both sides negotiate a settlement because the judges believed that a ruling in the Company's favour (which they were prepared to make) was not in the best interests of Indians who would take such a decision as a free license to hunt and trap with abandon. The results caught the Company, and McCarthy completely off balance. The Game Commission, however, was somehow prepared for this unusual turn of events and took some fast action. Immediately after the Court's decision provincial officials raided several HBC posts in northern Ontario, and the government

tabled amendments to the *Game Act* which provided for retroactive charges back to 1910.

Apart from the obvious paternalism of the Court, its decision was the most favourable Ontario could expect - indeed, the ambiguity actually worked in the province's favour. If the Court had ruled in favour of the HBC then Indians with treaty promises of continued hunting rights were immune to prosecution. Such a ruling would effectively neuter aspects of the *Game Act*. Conversely, if Meredith ruled in favour of the provincial government it was obvious that the HBC could appeal the ruling and likely continue to do so all the way to the Privy Council. McCarthy had anticipated this outcome from the very beginning, and this scenario must have occurred to provincial officials. Ontario likely feared that unlike previous constitutional questions brought before the Privy Council it could conceivably lose on this question. The *Game Act* stated clearly that it would not interfere with treaty rights, and the Robinson Treaties similarly indicated that the bands and their descendants retained the right to hunt. The court's decision, therefore, in conjunction with the province's conveniently timed retroactive legislation, effectively ended the HBC's legal challenge.

This decision although distressing to the Company did cause it any real problems, for it secured some limited concessions from the Ontario government. In 1914, provincial representatives agreed to sit down with McCarthy and the HBC's Fur Trade Commissioner to work out a compromise. Within this context

the Company's efforts were successful. Ontario agreed to negotiate a settlement, which it initially refused in 1910, and work out an arrangement with the HBC that permitted it to continue its fur trading activities relatively free of harassment. There was never a question of the Company trying to purchase pelts in the summer - such furs were useless from the point of view of the fur trade. The HBC simply agreed to a degree of policing and a system of fur tagging in exchange for the Game Commission providing some leniency for post managers who received legally trapped furs in the spring after the trapping season ended.

This compromise did not help the Ojibwa in any way. Although trapping was certainly an important component of their income, the HBC-Ontario compromise did nothing to secure recognition of their subsistence hunting rights. Company disinterest in Ojibwa welfare, however, was not out of the ordinary. Company concern for indigenous people, from the founding of Moose Factory in 1671, never went any further than their commercial value to the fur trade. Natives, in general, were needed to procure and prepare furs, act as guides, perform tasks around the posts, and transport freight over northern Ontario's myriad of waterways. When post managers supplied food to starving hunters and their families it was often grudging, and always in the form of "debt". Post journals are full of managers complaining that hunters showed more concern for supplying their families with food than trapping furs. The Company always sought to protect its own interests.

This attitude continued into the early twentieth century. There is no indication the HBC showed any concern for Ojibwa arrested for engaging in subsistence harvesting activity after the creation of the *Game Act* in 1892. Its focus always remained its commercial operations. The Robinson treaties and Ojibwa hunting rights were important to the Company's lawyers only in the abstract – as a means of proving that that the HBC had a *de facto* right to possess animal pelts legally hunted by Ojibwa. When the Ojibwa and the treaties no longer held the promise of protecting the Company's fur trading activity they were forgotten in favour of more fruitful negotiations.

The Company was aware of the implications of the *Game Act* almost immediately. Only a few months after the Game and Fish Commission reported in 1892, HBC Commissioner C.C. Chipman corresponded with the Company's Board of Governors in London. Writing from the Company's Canadian offices in Winnipeg, Chipman observed that full enforcement of the legislation would affect "the fur trade proper from Mattawa to Rat Portage [Kenora]."² Chipman's first concern was not Native treaty rights, but the effect of the newly established closed seasons on particular fur bearers. The beaver, otter and fisher season were reduced in the 1892 *Game Act* to such an extent that "the catch of beaver will, by enforcement of the *Ontario Game Act*, be limited, in all probability, by at least one quarter." Chipman was also concerned about the muskrat season,

² Hudson's Bay Company Archives, Provincial Archives of Manitoba (hereafter referred to as HBCA). A.12/FT 230/1. C.C. Chipman to William Armit, 20 June 1892.

which was reduced by one month. He wrote that it “practically precludes the spring hunts of Musquash when the fur is at its best.”³

Chipman’s only expressed interest in the treaty rights of the Ojibwa was the possibility of using them to challenge Ontario’s new legislation. By 1897 it was apparent that Ontario was intent on applying the Act to the Ojibwa. Chipman realized this provided the Company with the possibility of a constitutional challenge to the legislation. Writing to the Governors of the Company Chipman stated:

...the effect upon the Indians (which might induce the Dominion Government to disallow the Act of the Provincial Government) will no doubt suggest [itself]...to the Governor and Committee as worthy of consideration.⁴

While Chipman certainly overestimated the response of the Dominion Government to the *Game Act*, his belief in the legal value of the Ojibwa, the treaties and the constitution formed the basis of the Company’s future legal challenge even if the former failed to find a place in the Company’s conscience.

Chipman’s disinterest in the effect of the *Game Act* on the well being of the Ojibwa continued so long as it did not affect the Company’s trade. This insensitivity, however, worked against the Company as it gave the Game Commission time to extend its enforcement system, and entrench itself against change. By 1905 the provincial government had arrested and fined hunters in the area of the Robinson treaties, but took no action against the Company. It was

³ Ibid.

⁴ Ibid. Chipman to William Ware, 7 July 1897.

a situation that Chipman found tolerable enough that he told William Ware, secretary to the HBC's Board of Governors, that "Game Laws are not closely kept anywhere and in outlying and unsettled districts they are paid very little heed to..."⁵

The possibility of the situation changing, however, was not lost on the Commissioner. The first decade of the twentieth century saw increased settlement of northern Ontario. The newly founded Temiskaming and Northern Ontario Railway was bring settlers into the northeast, and the new towns of New Liskard and Haileybury were growing. Within one year the discovery of silver at Cobalt would created a boom town.⁶ Chipman predicted:

that before long the Company's exportations from Hudson Bay points may expect the interest of some one party or another having a sentimental regard (real or assumed) for the preservation of Beaver or other wild animals they may think to be disappearing.⁷

In an effort to prepare for this eventuality Chipman began to correspond with Leighton McCarthy of the law firm of McCarthy, Osler and Hoskin in Toronto, but it soon became apparent that the Game Commission would not alter its legislation in any way.⁸ In 1907 the HBC's chief trading rival in northeastern

⁵ Ibid. Chipman to Ware ,21 February 1905.

⁶ The growth of settlement in northeastern Ontario, the discovery of silver and gold and the extension of the Temiskaming and Northern Ontario Railway is discussed in Robert Surtees, The Northern Connection: Ontario Northland Since 1902 (North York: Captus Press, 1992).

⁷ Ibid.

⁸ McCarthy, Osler and Hoskin were one of the most established law practices in Canada. Its founders, Dalton McCarthy and Briton Bath Osler were two of the most well known lawyers in nineteenth century Canada, with the former more

Ontario, the Revillon Brothers, unsuccessfully attempted to procure changes to the *Game Act*⁹ When Chipman asked McCarthy if the HBC should make a similar attempt he was advised against it. McCarthy believed the effort would ultimately prove futile since the Commission was unwilling to alter either its legislation or its policies.¹⁰

The Company followed this advice until the Biscotasing seizure in 1910. Furs were seized on several occasions prior to that, but never on a grand scale. In late January, 1906, a shipment of fur from the Lake Superior District en route to St. Johns, New Brunswick, were seized by a Game Warden in Ottawa.¹¹ In this instance an arrangement was worked out through the Company's solicitors and the furs were returned.¹² Chipman met with Ontario's Minister of Public Works who agreed that the seizure was unwarranted. The Minister "expressed his satisfaction in the belief that the Company were [sic.] not desirous of transgressing the law, and future difficulties with the Game Warden, although possible, it is hoped are not probable."¹³ This arrangement, however, was based on the understanding that the Company had not engaged in any activity

famous(or infamous) for his anti-French sentiments. The firms still exist as Osler, Hoskin and Harcourt in Toronto, and as McCarthy, Tetrault in Montreal. See Curtis Cole, "McCarthy, Osler, Hoskin and Creelman, 1882-1902: Establishing a Reputation, Building a Practice." Essays in the History of Canadian Law. Vol. 1, David H. Flaherty ed. (Toronto: University of Toronto Press, 1981): 149-166. The former firm was contacted by the author to determine if it had any papers relating to the 1912 HBC case. Although a search was made no records were turned up.

⁹ HBCA, A.12/FT230/1. Leighton McCarthy to Chipman, 14 April 1908.

¹⁰ Ibid. McCarthy to Chipman, 28 March 1908.

¹¹ Ibid. Chipman to Ware, 29 January 1906.

¹² Ibid. Chipman to Ware, 9 February 1906.

contrary to the *Game Act*. The post manager at Lac Seul, where the furs came from, was required to submit an affidavit to Ontario's Attorney-General stating where the furs were taken, and agreed to appear to give evidence if called upon.¹⁴

Three years later, however, another seizure occurred. In July, 1909, fifteen beaver skins and thirty-nine otter skins were seized from the Company's warehouse in North Bay. The Company turned to Leighton McCarthy to meet with the arresting warden, and secure release of the furs.¹⁵ McCarthy tried to argue that the furs were procured outside the province, but the Crown Prosecutor was uninterested. All that mattered to him was that the furs were on the HBC's premises in contravention of the *Game Act*.¹⁶ McCarthy, therefore, entered a plea of guilty on that charge. The HBC was fined sixty dollars per beaver skin for a total of nine hundred dollars. The charge regarding otter skins, a separate concern, was adjourned until the following September. McCarthy believed the Crown did not have enough evidence to secure a conviction in that matter.

The Deputy Attorney-General of Ontario, J.R. Cartwright, contacted McCarthy shortly after the incident in North Bay.¹⁷ The Company was obviously planning to appeal the conviction as Cartwright informed McCarthy that the Attorney-General agreed to extend the time limit for an appeal until the

¹³ *Ibid.* Chipman to Ware, 16 October 1906.

¹⁴ *Ibid.* Chipman to Ware, 12 March 1906.

¹⁵ *Ibid.* Chipman to Ware, 23 July 1909.

¹⁶ *Ibid.* Chipman to Ware, 28 July 1909.

middle of September to provide McCarthy with preparation time. McCarthy told Chipman that "the giving of the notice of appeal is the only step which must be taken within a specified time, the result is that no immediate steps need be taken." McCarthy hoped that once the appeal was filed "there will be an opportunity to thrash this matter out with the Crown Officers [so]...that some understanding can be come to which will protect the interests of the Company and make it unnecessary to challenge the enactment's of the Government."¹⁸

McCarthy and his partner, H.S. Osler, re-emphasized this in a later meeting with Chipman. Chipman traveled to Toronto shortly after Thanksgiving, 1909, to meet with both men.¹⁹ They advised Chipman that the Company should try to negotiate with the province, informally, rather than start a legal conflict which would be both expensive and damage the Company's relations with the government. Chipman concurred. He hoped that such talks would result in the fine being remitted, and an arrangement arrived at to prevent future seizures.

Chipman's efforts were rewarded, but only briefly. The province remitted the fine to the Company, but shortly thereafter another seizure occurred. In March, 1910, the Company's storage warehouse at Biscotasing was raided. But for the size of the seizure the Company may not have reacted as forcefully. Several thousand furs were taken, the warehouse manager, George Train, was arrested, and the Sudbury magistrate imposed a fine of fifty dollars

¹⁷ Ibid. Chipman to Ware, 11 August 1909.

¹⁸ Ibid.

per skin for a total, including court costs, of almost \$6400. The judge's ruling no longer exists so it is impossible to know why he applied such a stiff penalty, but it struck Leighton McCarthy as excessive. He advised Commissioner Chipman that the HBC should appeal Train's conviction, and forgo any attempt at negotiations.²⁰

After a review of the situation, McCarthy wrote to Chipman and said the Company should seek protection under four points. The first revolved around the Robinson Huron Treaty, and the HBC's historic relationship with the Ojibwa bands covered by that agreement:

That the skins in question [confiscated from Biscotasing] were of beavers which had been hunted and killed by the Indian tribes within the Robinson-Huron Treaty of 1850. Section 8 of the [Ontario] Game Act makes that Act inapplicable to these Indians because the Treaty reserved to them the privilege of hunting as it existed heretofore, which privilege of hunting we say included the right to sell, and if they had the right to sell...the Company had the right to buy.²¹

This element of the Company's appeal was, by far, the most innovative. It argued that Ojibwa commercial hunting was protected under the Robinson treaties something Indian Affairs sought to curtail as a means of appeasing the Ontario government and protecting Ojibwa subsistence hunting. Furthermore, that the Ojibwa right to sell provided the HBC with a legal justification to purchase such furs.

¹⁹ Ibid. Chipman to Ware, 15 October 1909.

²⁰ Ibid. T. Clouston to Ware, 1 March 1910. The total fine was \$6393.35.

²¹ Ibid. Chipman to Ware, 8 April 1910.

The second and third element of the appeal focused on the BNA Act:

That any Act attempting to regulate the Indian's privilege of hunting is *ultra vires* of the Ontario Legislature, inasmuch as the subject matter of Indians and Indian lands is by the B.N.A. Act within the exclusive jurisdiction of the Dominion Parliament.

That the Ontario Game Act is *ultra vires* of the Ontario Legislature because it is in effect dealing with the subject matter of criminal law, which by the B.N.A. Act is exclusively confined to the Dominion Parliament...²²

The latter argument never formed an important element of the HBC's appeal, but the former did. While the specter of the constitution had materialized briefly prior to the HBC case it was never brought to the forefront. The Department of Justice had advised Indian Affairs that the constitution protected Ontario's right to legislate natural resources, but did not extend similar refuge to the Dominion government as regards "Indians and Lands reserved for Indians."

McCarthy's last argument is noted here, but like his third point never formed an important part of the Company's appeal:

We say that the Hudson's Bay Company only surrendered its rights of Government and other rights, privileges, franchises, powers and authorities, lands and territories, upon the distinct understanding and agreement that the Company was to be at liberty to carry on its trade without hindrance in its corporate capacity, and as the Company, has at all times been fur traders and purchasers of beaver skins, this Act...is a hindrance to it carrying on its trade in its corporate capacity...and is for that reason *ultra vires* of the Ontario Legislature.²³

²² Ibid.

²³ Ibid.

It is not clear why McCarthy wanted to argue this point. Clearly the Company's 1670 Charter never gave it control over lands south of the height of land.

Charles II granted the HBC all lands that drained into Hudson's Bay - Biscotasing is south of that region. Furthermore that land, already part of the Province of Canada, passed to Ontario in 1867. It was not sold to the Dominion Government as part of the Rupert's Land sale in 1869; therefore, the Company could not seek protection under that agreement. It is possible that McCarthy realized this, but hoped this argument would impress a small town Sudbury magistrate when George Train's appeal was heard.

Compared to Indian Affairs, McCarthy was unfettered in his attempts to find a legal solution to the Company's problems. He did not have to worry about upsetting provincial officials. Attempts at negotiation were obviously useless, as evidenced by the failure of the Revellion Brothers to secure changes to the *Game Act*, so the Company chose a legal venue to protect its perceived rights. Focusing on the treaty, the constitution, and the fact that the *Game Act* recognized treaty rights, Leighton McCarthy adopted the legal course Indian Affairs knew existed but was afraid and politically unable to make. Moreover, unlike Indian Affairs, the Company had a vested interest in the treaty rights of the Ojibwa. While there were certainly more white traders in northern Ontario than in the past the Company still relied on the Ojibwa to supply most of the furs, and it wanted to maintain traditional Ojibwa harvesting practices. Indian

Affairs, conversely, looked forward to the day when Natives would abandon the hunt.

The Company was also cognizant that whatever occurred in Ontario would affect its future in other provinces. British Columbia and Quebec had game laws also. If the HBC capitulated to Ontario the other provinces would be aware of this, and if Ontario won the outcome for the Company in other jurisdictions would be equally bleak. A victory for the HBC, however, would protect its operations throughout the country. Writing to William Ware, Commissioner C.C. Chipman noted that "the final decision, if favourable...would afford equal protection in other provinces where similar Acts are now operative or may hereafter become operative."²⁴

In its efforts to secure such a decision, Chipman instructed McCarthy to contact Indian Affairs. He corresponded with Frank Pedley, the Deputy-Superintendent General, to explain the situation.²⁵ McCarthy explained that since George Train was an employee of the HBC and the furs were purchased from Ojibwa in the Robinson-Huron Treaty that the arrest and conviction were improper. The treaty, McCarthy noted, "preserves to the Indians the right and privilege of hunting as existed prior to the day of the Treaty." McCarthy continued by pointing out that the *Game Act* itself recognized that treaty rights were inviolate. McCarthy told Pedley that the Company was appealing Train's conviction based essentially on the treaty: that the Ojibwa possess the right to

²⁴ Ibid.

trap and sell furs, and that the right to sell meant, by extension, that the HBC had the right to purchase those furs.

McCarthy concluded by trying to convince Pedley that Indian Affairs should send a representative to Chelmsford where the appeal was to be heard. It would be an important decision, to both Natives and Indian Affairs. Federal representation would, McCarthy stated, either:

[sustain] the position of Train or at all events of watching the proceedings on behalf of the Department, and stating the Department's position which we understand to be that the Ontario Game Act is not applicable to Indians whose rights to hunt have been preserved by Treaty.²⁵

McCarthy's real intention was likely to try and insure a favourable decision. Appealing a court decision, with legal representation from the Dominion Government supporting his arguments, could not hurt McCarthy's efforts. Furthermore, he was likely aware of Indian Affairs' failed efforts to secure leniency for Natives across Ontario. McCarthy probably thought that a favourable decision for the HBC was equally beneficial for Indian Affairs.

Breaking with Indian Affairs' unwritten policy of not having legal counsel present when Natives were arrested for contravening the *Game Act*, J.D. McLean agreed to send representatives to hear the HBC's appeal. McLean likely thought such representation, at the magisterial level, would not create any ill will between the Game Commission and Indian Affairs. McLean wrote to the

²⁵ National Archives of Canada (NAC), RG 10, Vol. 6743, file 420-8. McCarthy to Frank Pedley, 17 March 1910.

²⁶ Ibid.

Department of Justice which advised him that suitable counsel could be found in Sudbury. Reflecting the level of paranoia at the Department of Justice that a hint of Dominion interference in provincial affairs might lead Ontario to simply amend the *Game Act*, it offered McCarthy some advice. McLean was told that the HBC's appeal should stress that the *Game Act* was *ultra vires* of the Ontario Legislature not because it contravened section 91(24) of the BNA Act, but because prosecution under the *Game Act* related to criminal prosecution which was also an area of federal jurisdiction.²⁷

The appeal was heard at the District Court in Chelmsford, near Sudbury, on March 30, 1910. Ontario's Crown Prosecutor, Mr. Drayton, met with McCarthy before the appeal and urged him to agree to a stated case before an Ontario Court of Appeal. Drayton argued that the Company's appeal hinged on constitutional points, that a District Court was an unsuitable venue for such questions to be considered, and the case should be submitted to the Attorney-General of Ontario. McCarthy refused Drayton's request due perhaps to his confidence for not only did the Attorney-General of Canada have legal representation present Frank Pedley also attended the appeal. Both men made a point of telling Drayton that "they were there to maintain the rights of the Indians to hunt and sell and to have the Act...declared *ultra vires*."²⁸

McCarthy's hopes of having the matter settled in Chelmsford vanished almost immediately after the appeal started. Judge Kehoe, who presided,

²⁷ *Ibid.* E.L. Edwards to J.D. McLean, 22 March 1910.

refused to hear any constitutional questions. These formed the very basis of McCarthy's case. Kehoe stated, as Drayton had done, that his court was not the proper forum to consider such important legal questions. He said he would only interpret the *Game Act* and the Robinson-Huron Treaty as they were written. Clearly McCarthy was not prepared for this. He feared that Train, the Biscotasing manager, would be "knocked to pieces in cross-examination." McCarthy also realized that, since Kehoe refused to consider any constitutional arguments, that Drayton would ask the judge to withhold any judgment until a stated case settled those issues.

Faced with the prospect of his appeal falling apart, McCarthy agreed to adjourn the case until the next sitting of the Ontario Divisional Courts in October, 1910. The time provided would allow Ontario's Attorney-General's office sufficient time "to state a case for the determination of the constitutional questions in the appeal."²⁹ McCarthy did, however, convince Drayton to agree to certain facts being admitted into court. McCarthy noted that these admissions "were a great deal better than we could have by any possibility hoped to prove."³⁰ First, it was established that the furs were trapped by members of the Ojibwa tribe who were "entitled to all the benefits of the Robinson treaties."³¹ These Ojibwa, furthermore, trapped the animals in question on their own account and not as employees of the HBC. Second, that the accused (George Train) was an

²⁸ HBCA, A.39/14. Chipman to Ware, 8 April 1910.

²⁹ NAC, RG 10, Vol. 6743, file 420-8. J. Mulligan to McLean, 2 April 1910.

³⁰ HBCA, A.39/14. Chipman to Ware, 8 April 1910.

³¹ NAC, RG 10, Vol. 6743, file 420-8. Draft of State Case, 28 October 1910.

employee of the Company, and was in possession of the furs as a result of the ordinary course of trade and barter. Third, that the Ojibwa and their forefathers "have for centuries been in the habit of hunting animals of the kind in question in the territory in question...and the said Governor and Company of Adventurers of England Trading into Hudson's Bay have for the purpose of its trade for the past two centuries or more been trading with them and purchasing such skins." Lastly, McCarthy had admitted into evidence the charter incorporating the HBC, and the Deed of Surrender of 1869 between the Company and the Dominion government. These statements of fact were clearly intended to support the Company's arguments. They progressed in such a way that one is led to the conclusion that the Robinson Treaties, the charter incorporating the HBC and the Deed of Surrender were all complementary. Each supported the contention that the Company had a right to trade and barter for furs, and that the Ojibwa possess the right, as outlined in the Robinson Treaties, to trap such furs, and by extension sell them.

Given the logic behind these submissions it begs the question as to why Drayton agreed to allow these admissions. What seems likely is both Drayton and Ontario's Attorney-General's office had a low opinion of Indian treaties in general, and were confident in both the legality of their actions and the *Game Act*. Up to this point Ontario had acted with impunity when applying its game laws to the Ojibwa in northern Ontario. Local magistrates had upheld, often, the legal right of the Game Commission to apply the *Game Act* to treaty Indians,

and to the Hudson's Bay Company. Perhaps the most obvious evidence of the Game Commission's confidence was the raid on the HBC's Montizambert Post only several months after the appeal hearing in Chelmsford.

In June, 1910, R.C. Wilson, the manager of Montizambert Post, was arrested for possessing certain pelts out of season. Based on the speed with which Train was arrested and convicted, McCarthy directed his efforts towards persuading the Crown to put off Wilson's prosecution and combine the Biscotasing appeal and the Montizambert case together in the stated case. The proceedings were to take place in Fort William, and be prosecuted by the local Crown Attorney, F.W. Langworthy. The Attorney-General's office refused to delay the prosecution of Train, but agreed that if Wilson were found guilty the two cases would be combined for the purposes of the stated case.³²

R.C. Wilson, to no one's surprise, was found guilty of possessing sixty-five beaver skins, seventy-eight otter skins, and one thousand nine hundred and sixty one muskrat skins out of season, and fined close to \$6500.³³ Ontario's Attorney-General refused to stay Wilson's prosecution out of the belief that McCarthy and the Company had, in essence, misled his office. In 1909, as stated earlier, McCarthy came to an arrangement with the Attorney-General, J.J. Foy, regarding the fur seizure in North Bay, and had the fine remitted on the understanding that the Company would be more mindful of the *Game Act* in the

³² *Ibid.* McCarthy to Pedley, 14 June 1910. See also Archives of Ontario (AO), Aemilius Irving Papers, MU 1469, Box 31, Package 37, "Northwest Angle Treaty: Game and Fisheries."

future. The Biscotasing incident, coupled with the Montizambert arrest, led Foy to believe that McCarthy had played him for a fool. It was McCarthy's partner, Osler, who wrote to Foy and asked that the proceedings be stayed. Foy's reply indicated that his office would not enter into negotiations. He referred to the North Bay seizure, and said at that time the HBC agreed to "discontinue illegal activity" in return for the fine being remitted. Foy considered the HBC's actions at Biscotasing and Montizambert to be a breach of that understanding. In future, Foy said, the HBC should "try to obey the law and not give the Crown the trouble of prosecuting such cases."

With the Attorney-General adopting a firm stance, McCarthy turned to Indian Affairs for advice in preparing for the stated case. A draft copy of the Company's arguments was sent to Indian Affairs, and forwarded to E.L. Newcombe the Deputy Minister of Justice.³⁴ Newcombe deviated substantially from the opinions of his predecessors whose opinions neutered Indian Affairs in the past. While he said that the Ontario Legislature was within its constitutional jurisdiction in creating the *Game Act* certain provisions of it may be *ultra vires* when applied to Natives.³⁵ He recommended that McCarthy adopt this approach in the appeal as opposed to attacking the validity of the entire Act. Lastly, reflecting the low opinion Dominion officials had of the very treaties which formed the basis of Native-Crown relations, Newcombe believed that the

³³ HBCA, A.39/14. Bischoff to Chipman, 26 June 1910. The total cost of the fine and court costs was \$6447.58.

³⁴ NAC, RG 10, Vol. 6743, file 420-8. McCarthy to McLean 14 June 1910. *Ibid.* McLean to Edwards, 16 June 1910.

Robinson treaties would not help McCarthy in his appeal. He said McCarthy should "rest the claims of the Indians on the Robinson Treaties [only] as an alternative."

McCarthy agreed with Newcombe's recommendations, and made the appropriate alterations.³⁶ He agreed to challenge only particular points of the *Game Act*, and he eliminated all references to the treaties. He resubmitted the draft to McLean, and outlined the questions he intended to pose. Pursuant to Newcombe's suggestions McCarthy then asked if the Ontario Legislature had jurisdiction to pass the Ontario Game and Fisheries Act, and, specifically, were "any, and if so which, of the provisions of the said Act *ultra vires*."³⁷ McCarthy also made changes to question two. Initially it read:

Does the Act having regard to the Indian Treaties of 7th and 9th September, 1850, and section 8 of the said Act, affect the right of the Indians to hunt, have in possession or sell game protected by the said Act. If so, had the legislature of Ontario power by the aforesaid Act to so legislate as to restrict or prohibit the Indians from hunting and selling the skins of the animals so hunted that had been in the habit of doing prior to the date of the Treaties.³⁸

All portions of the second question relating to the treaties were crossed off the document. The first section was changed to: "Does the Act affect the right of the Indians to hunt, have in possession, or sell game protected by the Act." The

³⁵ Ibid. Newcombe to McLean, 2 September 1910.

³⁶ HBCA, A.12/FT/319/1a. McCarthy to Chipman, 22 October 1910.

³⁷ NAC, RG 10, Vol. 6743, file 420-8. Draft of Stated Case, 28 October 1910

³⁸ Ibid.

second sentence asked if the Legislature could restrict Indians from "hunting and selling game protected by the said Act."

The third and fourth questions related to the Hudson's Bay Company being singled out for prosecution. Question three asked if, notwithstanding the *Game Act*, the Ojibwa had the right to possess the furs did the Act make it unlawful for anyone to purchase those furs or just the HBC? Within this context, the final question asked if the Act could properly affect the HBC's business in light of the Deed of Surrender.?

After McLean revised the draft he forwarded it to the Department of Justice, where Deputy-Minister Newcombe expressed satisfaction at the changes McCarthy made. McCarthy also was pleased with the final product, particularly his challenge of the *Game Act's* constitutionality. Indeed, he said that the appeal had "so shaken the confidence of the law officers of the Crown in the constitutionality of their own *Game Act* that they are not very anxious to proceed with the stated case..."³⁹

Considering the Game Commission's new found humility in its correspondence with Indian Affairs, McCarthy's initial assessment was not without foundation. Correspondence between Indian Affairs and the Game Commission, relating to several incidents involving Natives arrested after the stated case was filed indicates that the former had found new confidence at the latter's expense. An intensive round of correspondence between the two

³⁹ HBCA, A.12/FT/319/1a. McCarthy to Chipman, 22 October 1910.

departments commenced which differed from the usual monotony of previous communications in which Indian Affairs relayed Native complaints and the Game Commission ignored them. Indian Affairs also began to offer legal support to Ojibwa from the Robinson treaties who were arrested for contravening the *Game Act*. Since similar support was not offered to Natives in southern Ontario it can be assumed that Indian Affairs tried to capitalize on the HBC's case as it pertained to the Robinson Treaties.

When Francis Commanda of the Nipissing Reserve was arrested in 1910, J.D. McLean inquired about the incident with far greater vigour and aggression than ever before. McLean wrote to K. Tinsley, the Superintendent of Game and Fisheries in December, 1910, and expressed concern over two sections of the 1907 *Game Act* section 8 and 9(j). Section 8 read:

Nothing herein contained shall be construed to affect any right specially reserved to or conferred upon Indians by any treaty or regulations in that behalf made by the Government of the Dominion of Canada with reference to hunting on their reserves or hunting grounds, or in any territory specially set apart for that purpose; nor shall anything in this Act contained apply to Indians hunting in any portion of the provincial territory as to which their claims have not been extinguished.⁴⁰

McLean noted that section 8 "appears to grant certain privileges in virtue of the treaties made with the Indians," but the behaviour of the Game Commission conflicted with the implied intent of the legislation.⁴¹ McLean referred

⁴⁰ *Statutes of the Province of Ontario, "An Act respecting the Game, Fur-bearing Animals and Fisheries of Ontario."* chap. 49 (Toronto: L.K. Cameron, 1907): 339.

⁴¹ NAC, RG 10, Vol. 6743, file 420-8. McLean to K. Tinsley, 2 December 1910.

specifically to the recent arrest of Francis Commanda of the Nipissing Reserve (see Chapter three). The Indian Agent, George Cockburn, said Commanda was arrested upon returning from his hunting grounds for being in possession of certain pelts and partridge. The Robinson-Huron Treaty, McLean said, allowed Nipissing Band members to engage in traditional harvesting in unoccupied territory. It seemed, McLean continued, that the Game Commission was engaging in a policy "more restrictive than the statute referred to."

McLean referred to other problems with the *Game Act*, specifically subsection "j" of section 9 which read:

9. The Lieutenant-Governor in Council may make regulations:
 - ...
 - (j) Exempting Indians or actual *bona fide* settlers in the northern or northwesterly or other sparsely settled portions of the Province, whether the same be organized or unorganized, from any of the provisions of this Act, which may be specified in such Order-in-Council; provided that no settlers shall hunt, take, kill or have in his possession any moose, reindeer or caribou except in any year when the same may be lawfully killed according to the provisions of this Act.⁴²

McLean did not touch on the obvious contradiction between section 8 and section 9(j), but noted that the government had recently conferred hunting privileges on settlers and not Indians. McLean asked Tinsley to specify which, if any, privileges the Game Commission believed Natives possessed.

⁴² Statutes of the Province of Ontario, "An Act respecting the Game, Fur-bearing Animals and Fisheries of Ontario." chap. 49 (Toronto: L.K. Cameron, 1907): 341.

Unlike previous enquiries, McLean did not abandon his questioning when the Game Commission sought to derail his inquiry, and even pursued new lines of questioning. Game Commissioner Tinsley responded, as his predecessors had in the past, that Natives possessed special rights only when hunting on their reserves or hunting grounds both of which, to his mind, were analogous.⁴³ McLean, however, wrote back and asked Tinsley to provide a list of the grounds and territories that had been set apart for Natives as hunting grounds.⁴⁴ McLean was fully aware that no such grounds were set aside as the Robinson treaties clearly stipulated that the Ojibwa could continue to hunt over all unoccupied Crown land. To emphasize this point McLean took the innovative step of outlining the historical context within which William Robinson and the Ojibwa signed the 1850 treaties:

There can be no doubt but that the Commissioners who negotiated the treaties with the Indians under the authority of the Government, and the Indians with whom the treaties were made both understood, rightly or wrongly, that the promise so solemnly made would be kept, that the Chiefs and their tribes would be allowed the "full and free privilege to hunt over the territory ceded by them..."⁴⁵

If the intent of both parties was to allow the Ojibwa unrestricted hunting over unoccupied Crown Land then surely, McLean concluded, Francis Commanda's arrest was unjustified. He was hunting over territory set apart for him not only

⁴³ NAC, RG 10, Vol. 6743, file 420-8. McLean to George Cockburn, 10 December 1910.

⁴⁴ Ibid. McLean to Tinsley. 15 December 1910.

⁴⁵ Ibid.

within the meaning of the treaty (i.e.: unoccupied Crown Land), but also over his own personal hunting grounds.

McLean said there could be little wonder as to why both the Ojibwa and Indian Affairs concluded that the bands were merely exercising rights “of which they could not be deprived.”⁴⁶ The wording of the treaty, as regards hunting, was explicit. Furthermore, and this may have been a jab at Ontario’s Department of Lands which had responsibility for the Game Commission, the treaty was ratified by the Governor-General on the recommendation of the Commissioner of Crown Lands. McLean hinted that within the context of the Robinson treaties, Ontario’s *Game Act* was meaningless unless it recognized the right of the Ojibwa to hunt over the territory ceded by them.

It appears that the Company’s legal challenge, and Indian Affairs’ newly discovered courage, caused the Game Commission’s resolve to waver. Kelley Evans, an employee in the office of the Game Commissioner, wrote to Indian Affairs and asked a number of questions regarding treaty rights, Natives and hunting. Evans was working on a report regarding the Game Commission and its conservation efforts (see Chapter five), and in this course of his investigation he often came into contact with conservation concerns that involved Natives. Evans claimed he was “particularly anxious not to clash in any way with the general policy of your department and the Dominion Government in regard to

⁴⁶ Ibid.

Indian rights and privileges."⁴⁷ Considering the self-assured tone of the Game Commission in the past, Evan's query seems strange. Evans asked:

1. Have Indians any rights greater than white men in reference to hunting, fishing, or trapping in territories other than their reservations?
2. Have Indians the right to trade fish, game, or furs, during the close seasons, which have been caught or taken on their reservations?
3. In the case of Indian reservations on lakes or rivers what extent of waters should be considered included in their reservation for fishing and shooting purposes?
4. In the event of a license being exacted for fur trappers, as a provincial regulation, could this be collected from Indians when trapping on their reservations?

Ignoring the riparian nature of question three, none of Evans' questions had ever concerned the Game Commission prior to the HBC's stated case. Frank Ogima's arrest and conviction in 1909 (see Chapter three) clearly reflected the Game Commission's confidence as regards the *Game Act* and the rights of Indians hunting off their reserves. The Robinson-Superior treaty, in the minds of the arresting officer and presiding magistrate, obviously did not relieve the Ojibwa of the necessity of securing a hunting licence. Edward Tinsley said as much when the Fort William magistrate wrote him for information regarding the case.

Before McLean responded he sent Leighton McCarthy a copy of Evan's letter.⁴⁸ McCarthy's written response (January 3, 1911) is dated after McLean's reply to Evans (26 December, 1910); however, given the similarities between the

⁴⁷ Ibid. Kelley Evans to McLean, 14 December 1910.

two it is obvious that McCarthy made his views known to McLean before the beginning of the new year. McCarthy told McLean that his suggestions were both "confidential and unofficial," and not for Indian Affairs' files - indeed, there is no record of them in current Indian Affairs files.⁴⁹ McCarthy was certainly pleased with this turn of events. It was obvious, he said, that the Ontario government was trying to draw out Indian Affairs before submitting the HBC's stated case which had already languished at Queen's Park for ten months. McCarthy suggested McLean craft his response to Evan's four questions thusly. First, it should be clearly stated that "Indian[s] certainly have rights greater than white men..."⁵⁰ McCarthy said McLean's argument should rest on the fact that the Ontario Legislature has no jurisdiction over Indian affairs, that this is exclusive to the Dominion government, and that "no act of the Ontario Legislature which is not supplemented by Dominion Legislation can effect the Indians..." Taking all this into consideration, McCarthy concluded, it should be stated that, by virtue of their treaties, Indians can hunt, trap and fish off their reservation. As regards Evan's second question, the commercial hunting rights of Indians, McCarthy followed a similar pattern of logic. Only the Dominion government, he said, can create closed seasons for hunting and trapping and prevent the trade in game, fish or furs. Similarly, McCarthy said no licence can be imposed on Native hunters because Ontario has no jurisdiction over Indians.

⁴⁸ HBCA, A.12/FT 319/1a. McCarthy to McLean. 3 January 1911.

⁴⁹ Ibid.

⁵⁰ Ibid.

McLean took his cue from McCarthy, although, as will be noted, the first inkling of Indian Affairs and the HBC's future parting appeared in McLean's letter. His reply to Evans focused on the same points McCarthy outlined in his correspondence. For the first time, McLean raised the question of the constitutional division of powers under the British North America Act.⁵¹

McLean began by noting that Ontario claimed not only the right to legislate relative to fish and game, but that the only exemption Natives enjoyed from these laws was determined by the province. McLean, however, referred Evans to the BNA Act which granted the Dominion government sole jurisdiction over Indian affairs:

...it is contended with every show of reason that under the British North America Act the sole right of legislation, in so far as concerns Indians, is vested in the Dominion Government, and that provincial legislation of the same character if inconsistent with Dominion enactment is ultra vires and null and void.⁵²

McLean even took the unwarranted action of referring Evans to a recent court decision in Alberta where a the provincial Supreme Court ruled that the province's game act could not restrict Native hunting rights guaranteed by treaty.

McLean continued that regardless of what may be thought of Indian claims to treaty rights and legislative exemption the final arbiter of this matter should be the courts. In this regard, McLean was confident that the courts

⁵¹ NAC, RG 10, Vol. 6743, file 420-8. McLean to Evans, 26 December 1910.

⁵² Ibid.

would determine that Indians are subject only to Dominion legislation. McLean proceeded to indicate that, as regards commercial hunting rights, that this too was an issue that lay in the realm of the courts, and that he could not provide Evans with a definitive answer as to Indian Affairs' policy on the matter. McLean, however, did not dwell on this issue. While half a page was devoted to subsistence hunting activity, McLean devoted only several lines to the question of commercial hunting.⁵³

It is quite likely that McLean's letter was merely an attempt to force the Game Commission to the negotiating table. As noted in chapter three, Indian Affairs was just as prone to restrict Native hunting rights as the Ontario government. It believed that traditional Native hunting prevented them from becoming a 'civilized' people. Granting them rights beyond those of Whites only encouraged them in this direction. Indian Affairs, however, preferred a slow process compared to the province's sudden enforcement of game laws. McLean said to Evans that "so far as it can properly be done they [Natives] should be made to conform to the same laws and regulations as white men." However, removing an important subsistence activity, particularly from bands in remote areas, left many families subject to the possibility of starvation and Indian Affairs with a large number of people to support on a small budget.⁵⁴

McLean clearly wanted only to negotiate. He indicated to Evans that Indian Affairs sought leniency only for those bands, such as in the Robinson

⁵³ Ibid.

⁵⁴ Ibid.

treaties, that relied heavily on subsistence activity. As regards licensing he noted that the courts may determine that the province cannot force treaty Indians to buy a hunting license, but Indian Affairs was not opposed to free licenses being issued as a means of enumerating and regulating Native hunting to a certain extent.⁵⁵ As regards commercial hunting, the focus of the HBC's stated case, McLean stated Indian Affairs' opposition to the entire issue. It would actively discourage Natives from taking game and fish during close seasons, even from their reserves, for the purpose of sale or traffic.⁵⁶ Such activity only served to reinforce traditional lifestyles.

McCarthy, unaware of Indian Affairs' intentions, continued to prepare the Company's case against the Ontario government. He decided, against the advice of the Department of Justice, to reinstate references to the Robinson treaties in the Company's appeal. McCarthy believed that the Company could seek protection "on account of his [Natives'] rights by virtue of the treaties."⁵⁷ Although the Attorney-General's office was stalling, McCarthy remained confident that the Company would ultimately prevail. He believed that the Game Commission, by virtue of its letter to Indian Affairs seeking confirmation of its policies regarding hunting rights, had lost its confidence.

McCarthy's assessment seemed correct. In February, 1911, Lake Superior post managers began to worry about the furs they would collect that season. Mink and Muskrat season closed on May 1. If post managers were caught with

⁵⁵ Ibid.

⁵⁶ Ibid.

these furs in their possession after this date they faced the possibility of arrest. There was no way they could buy all the furs, prepare them for shipment, and get them out of the posts before the beginning of May.⁵⁸ Almost 40,000 muskrat and 5600 mink skins were at risk. Commissioner Chipman asked McCarthy to meet with Edward Tinsley to secure some form of leniency while the stated case was being prepared.⁵⁹ McCarthy was able to get Tinsley to agree to a blanket permit allowing post managers to retain furs until they could be properly shipped.⁶⁰ While Chipman had some concerns that the quantity of furs being shipped may cause an overzealous game warden to act independently,⁶¹ McCarthy assured him that "it is unlikely that the Government will make any further seizures as against the Company pending the disposition of the Stated Case..."⁶² Despite McCarthy's assurances that further seizures were unlikely, he was instructed to secure, without prejudice against the HBC, permits to allow the shipment of furs through Ontario.⁶³ Tinsley agreed to this, and there were no fur seizures in 1911.

This seemed to lull the Company's Winnipeg Office into a sense of complacency, but this ended by the spring of 1912 for two reasons. First, C.C. Chipman stepped down, and R.H. Hall became the new Fur Trade Commissioner. Nothing could be found regarding Hall's career in the HBC, but

⁵⁷ HBCA, A.12/FT 319/1a. McCarthy to Chipman. 4 January 1911.

⁵⁸ Ibid. R.D. Sutherland to Chipman, 16 February 1911.

⁵⁹ Ibid. Chipman to McCarthy, 24 February 1911.

⁶⁰ Ibid. McCarthy to Chipman 2 March 1911.

⁶¹ Ibid. Chipman to McCarthy 27 March 1911.

⁶² Ibid. McCarthy to Chipman, 22 April 1911.

he adopted a policy far different than that of Chipman's concerning the stated case. Hall knew that post managers were buying illegally trapped furs. While these furs were not trapped far beyond the end of a trapping season they were technically illegal. Furthermore, post managers were taking furs from trappers who had exceed their quota.⁶⁴ To avoid being caught some managers took to burying their furs in the bush surrounding their post. Hall feared that breaking the law, whether the law was just or not, was bad policy. It put the Company at risk not only of seizures and fines, but ultimately of increased surveillance by game wardens and police officers.

By the spring of that year it also became apparent that Ontario had not turned a blind eye to illegal HBC activities. Provincial detectives continued to search Company posts and warehouses in northern Ontario. N.M. Mackenzie, the HBC's Officer in charge of the Lake Huron District, wrote to Hall in June, 1912, that local detectives were adopting new tactics in their attempts to stop illegal trapping.⁶⁵ Mackenzie related how a local trapper (non-Native) sold the Temagami Post manager some fur, and then asked for them back the following day because he could get a better price for them elsewhere. These buyers were enforcement officers. Detectives in North Bay were offering trappers with illegal furs excessive prices for their catch in an effort to arrest them. This man, Mackenzie related, was arrested. Company operations were not immune from these sting operations. At the beginning of June, officers searched the HBC's

⁶³ *Ibid.* McCarthy to Tinsley, 10 May 1911.

⁶⁴ Hall did not indicate if these furs were from Ojibwa or White trappers.

storehouse at Biscotasing, even going so far as climbing through the rafters, but found nothing. Mackenzie asked Hall what the status of the stated case was for he warned, "I may be placed under circumstances that may put the Company to extraordinary expenses..."

Hall informed the HBC's directors in London of this, and cautioned them that co-existence might not be an option.⁶⁶ He pointed out to the London directors that the Company's fur trade business was in jeopardy. First, any disgruntled post employee could simply supply information to a local game warden against the HBC for violation of the Ontario *Game Act*. This, Hall continued, was a real problem as the posts breached the act regularly. Lastly, with the extension of the Ontario/Quebec boundary the Company's remote northern posts were now subject to the *Game Act*.⁶⁷ The Post Manager at Abitibi had already informed Hall that his shipment of furs might be seized en route to Moose Factory. Situated on the shores of Lake Abitibi, the post already faced increased provincial interference only six years after the creation of Treaty Nine.

Hall also discovered that under his predecessor the stated case had slipped into apathy. Leighton McCarthy was apparently labouring under the belief that the Company did not want to actively pursue the stated case. Hall wrote to McCarthy after receiving Mackenzie's letter regarding anxious detectives. McCarthy's response indicates a degree of exasperation, and a desire for clear direction from his clients:

⁶⁵ *Ibid.* N.M.W.J. Mackenzie to Hall, 16 June 1912.

⁶⁶ *Ibid.* R.H. Hall to F.C. Ingrams, 19 June 1912.

If...you are being hampered in carrying on the Company's business, and it would be to your advantage to have this question definitely settled of, win or lose, then you should so instruct us and we will use our most active endeavours to have the form of the Stated Case agreed upon and argued.⁶⁸

McCarthy, however, cautioned Hall that the outcome may not be to the Company's liking. Why McCarthy had this sudden attack of anxiety is unclear compared to his more confident musings in 1910. It may have been a result of his years of legal experience. McCarthy warned that "nothing is so uncertain as a law suit." McCarthy advised that the threat of a stated case may be the best way of keeping the province from interfering in Company business. He noted that no seizures were made against the HBC since the stated case was initiated. and recommended it may be wiser to follow the policy of "let sleeping dogs lie..."⁶⁹

Hall believed that the stated case should be brought before the courts, and the issue decided even if the Company lost. He firmly believed that the Company was placing itself in an awkward position by willfully breaking the *Game Act*. Such behaviour did not help the Company determine its rights, whether under the Deed of Surrender or the Robinson Treaties, but served merely to perpetuate a problem.⁷⁰ Hall was

...convinced that it is a bad policy from every standpoint to violate the Law, whether that law is constitutional or not, but this policy apparently had

⁶⁷ Ibid.

⁶⁸ Ibid. McCarthy to Hall, 26 June 1912.

⁶⁹ Ibid.

⁷⁰ Ibid. Hall to McCarthy

the approval of the Governor and Committee and of the Company's solicitors in Canada and in London.⁷¹

Hall thought that either the Company should force the case, or try to enter into meaningful negotiations with the Ontario government. Hall was working with the governments of Manitoba, Saskatchewan and Alberta to create workable and beneficial game laws. Indeed, Hall warned that the Company might be forced to adopt such a position even if it won its case against Ontario. He feared that the provincial government would find some way to amend its *Game Act*, and the Company would find itself facing the same problem again.

Ontario was certainly not willing to tolerate continued violations of its conservation laws. In June, 1912, provincial police officers began to conduct raids along the north shore of Lake Superior. They started with Montizambert post again.⁷² Over \$2600 in furs were seized, and the possibility existed of a fine in excess of \$1500. Hall's fears regarding a disgruntled employee came true to a certain extent. The furs were discovered in the bush ten miles from the post. The officer in charge of the Lake Superior District told Hall that it was likely Daniel Rohrer, a White trapper in the area, who informed the officers of the cache.⁷³ John Routledge, the manger of Fort William, received a warning from Montizambert that a Constable Depew was headed for Fort William. Routledge

⁷¹ Ibid.

⁷² Ibid. Hall to Ingrams, 26 June 1912.

⁷³ Ibid. McKenzie to Hall, 22 June 1912.

transferred the otter and beaver skins, and the twenty pounds of beaver castorum from his warehouse to a private residence in Fort William.⁷⁴

The activities of the provincial government, and Hall's insistence, regenerated the Company's attempts to get a stated case heard. The HBC's London solicitors were consulted to examine the possibility of the case proceeding as far as the Privy Council.⁷⁵ At the end of July, 1912, Hall, McCarthy and Sir Augustus Nanton (Chairman of the Canadian Committee of the HBC) met with Sir James Whitney, Premier of Ontario to convince him to expedite the hearing of the stated case. While Hall reported that they "had a very satisfactory interview with...Whitney..."⁷⁶ Nanton had a different recollection. Nanton said that it "was arranged with great difficulty [that] the Gov't would consent to stated case being brought before courts as soon as possible & that fur seizures would stand till stated case had been presented & decision given."⁷⁷ Despite the difficulties they encountered, Whitney agreed to bring the case forward quickly.

The Company's London solicitors, Younger and Mackinnon, provided their opinions regarding the HBC's arguments. They believed, contrary to McCarthy's earlier prophesy regarding lawsuits, that the three questions on which the appeal was based would be decided in favour of the Company:

⁷⁴ **Ibid.** John Routledge to Hall, 21 June 1912.

⁷⁵ **Ibid.** Ingrams to Hall, 27 July 1912.

⁷⁶ **Ibid.** Hall to Ingrams, 3 August 1912.

⁷⁷ HBCA, RG 2/2/8. "Fur Seizures in Ontario and Quebec." 31 July 1912.

- (a) Has the Ontario Legislature jurisdiction to enact the Act regulating game and fixing close times etc. in general?
- (b) Has it jurisdiction to enact the Act in so far as it imposes an obligation on persons possessing skins at certain seasons to have a licence?
- (c) Has it jurisdiction to enact the Act in so far as it specially affects the killing, possession and sale of game in certain seasons by the Indians.⁷⁸

Younger and Mackinnon noted that the Company was not seeking to declare the entire *Game Act ultra vires*, but only that portion dealing with prohibitions of killing and possessing game in certain seasons and only insofar as those sections applied to the Ojibwa in the Robinson Treaties (although a ruling in the Company's favour would have national implications). They made arguments similar to those of the Department of Justice two years previous, and drew heavily on the BNA Act. They agreed that although portions of section 92 gave the province the right to legislate natural resources "Indians and lands reserved for Indians" was expressly reserved to the Dominion government.⁷⁹ Younger and Mackinnon also suggested, as McCarthy had earlier, that since the HBC carried on a large national and international trade it fell outside the confines of 92(16) ("Matters of a merely local or private nature"); therefore, the Ontario Legislature could not restrict its business.⁸⁰ This argument never formed part of HBC's case.

⁷⁸ HBCA, A.39/14. Ontario Game and Fisheries Act, Memorandum of Mr. Younger, K.C., and Mr. F.D. Mackinnon. 28 October 1912.

⁷⁹ Younger and Mackinnon cited sub-sections 2 (Direct Taxation), 5 (Management of Public Lands, etc.), 9 (Licenses for raising revenue, etc.), 13 (Property and civil rights), and 16 (Matters of a merely local nature).

⁸⁰ Ibid.

Younger and Mackinnon also agreed with McCarthy's arguments regarding the Company's right to buy furs from Treaty Indians. Section 8 of the *Game Act* clearly stated that it would not interfere with rights guaranteed to any Natives by virtue of their treaties with the Crown.⁸¹ Younger and Mackinnon concluded that "without let or hindrance by the Provincial Legislature an Indian may kill when he likes and as much as he likes...he may have killed creatures in his possession...[and] it would be no offence on *his* part to sell the skins or furs to anyone else." The problem was that the Act could make it an offence to purchase such furs; however, they noted that such a provision would amount to restricting the Ojibwa's rights to sell furs:

To say that an Indian may sell to whom he likes, while at the same time saying that anyone who buys from the Indian shall be punished for having the things he bought, is in effect to deprive the Indian of the power to sell.⁸²

After seeing Younger's and MacKinnon's opinions, McCarthy took steps to insure that the federal Minister of the Interior would support the Company. McCarthy wrote to Canadian Committee Chairman Augustus Nanton shortly after his meeting with Premier Whitney.⁸³ Up to this point, McCarthy noted, the permanent officials at Indian Affairs had been both sympathetic and helpful, but the opinions of the minister were not known. McCarthy wanted Indian Affairs to have legal counsel present when the stated case was heard as a political representation of Indian Affairs' support. McCarthy was aware that Department

⁸¹ Ibid.

⁸² Ibid.

of Justice officials had expressed the opinion that the *Game Act* should not be challenged in court, but hoped that Indian Affairs would act independently.

McCarthy's hopes, however, were misplaced. Indian Affairs balked at the idea of openly supporting the HBC and *de facto* confronting the Ontario government in court. While officials had been sympathetic to the Company's case, McCarthy overestimated their enthusiasm for challenging Queen's Park. As noted earlier, J.D. McLean had already intimated to Kelly Evans that all Indian Affairs wanted was some leniency for those bands in northern Ontario that were more dependent on traditional subsistence activities. Indian Affairs did not support the idea of commercial hunting rights which formed the essence of the HBC's legal challenge. Commercial hunting, in the opinion of Indian Affairs, encouraged Natives to continue their "uncivilized" practices. In essence, Indian Affairs was willing to support the Hudson's Bay Company so long as the stated case coincided with their interests.

This became apparent when Nanton met with the federal minister. Reflecting the general ignorance, and disinterest of his predecessors in matters concerning Natives the Minister, Robert Rogers, confessed he knew little about the Company's legal challenge.⁶³ Rogers, did not give a definite answer when Nanton proposed that Indian Affairs be represented by counsel at the hearing of the Company's case; however, he promised to take the matter up with his officials. He also asked that McCarthy write him with particulars of the case,

⁶³ HBCA, RG 2/2/7. McCarthy to Nanton, 31 July 1912.

⁶⁴ Ibid. Nanton to McCarthy, 8 August 1912.

and why the Dominion Government and Indian Affairs in particular should be interested. Rogers, although reticent to state directly what his decision would be, intimated that he was reluctant to publicly support the HBC in a constitutional challenge of the *Game Act*

I [Nanton] understood from Mr. Rogers that he of course desired that there should be no interference with any rights the Indians were entitled to, but that he did not want to oppose the Ontario Government unless the Indians' interests would be detrimentally effected.⁸⁵

Rodgers' reluctance may have also had its roots in the Borden government's reliance on provincial support. During the 1911 federal election, Borden turned to provincial Tory governments for assistance against Laurier's popular Liberal government.⁸⁶ One of the most important was Whitney. Premier of riding-rich Ontario, Whitney was a valuable ally for Borden. After the Tory's victory Whitney took full advantage of his favour to Borden as he pressed for federal subsidies to expand the Temiskaming and Northern Ontario Railway and a decision about expanding Ontario's northern boarder with Manitoba. When the House of Commons debated the appropriation of two million dollars for Ontario one Liberal member aptly observed that: "Ontario has given a large majority to the present government, and it has only to present its claim and get any amount of money it may require."⁸⁷ The HBC's demand for greater federal support simply came at a politically inopportune moment.

⁸⁵ *Ibid.*

⁸⁶ Armstrong, 122.

⁸⁷ Cited in Armstrong, 124.

Indian Affairs, already fearful of raising Ontario's ire, was now headed by a minister whose government owed Premier Whitney a substantial political debt.

While Indian Affairs debated its next course of action, McCarthy prepared for the next sitting of the Court of Appeal in September. Despite Premier Whitney's assurance that the case would be heard, it was postponed. Deputy-Attorney General Cartwright took his summer holidays in August, and the government did not assign anyone else to prepare its argument.⁸⁸ The hearing was postponed until the November sittings, but was delayed once again. Ontario's newly appointed Chief Justice, William Meredith, was in England, and it was unlikely he could arrive in Toronto in time to hear both side's arguments. Indeed, the Attorney-General refused to proceed with the case unless Meredith was present.⁸⁹ The case was deferred until January, 1913.

January arrived, and still the HBC waited for the hearing. In the interim provincial constables seized another shipment of HBC furs. Six bales of "fine furs" and one bale of musquash (muskrat), en route from the Lac Seul post to London, were removed from a CPR train at McIntosh Station (north of the present day town of Kenora).⁹⁰ Commissioner Hall wrote to Premier Whitney, and complained about the seizure. Besides the fact that the seizure occurred while both sides awaited a hearing of the Company's appeal, the total value of the furs was \$15,000. Hall was furious. He asked Whitney how, "in view of our conversation," he could approve of or even permit such a seizure. Hall asked

⁸⁸ HBCA, A.12/FT 319/1a. Hall to Ingrams, 28 August 1912.

⁸⁹ Ibid. McCarthy to Hall, 16 November 1912.

the premier to personally intervene, and secure the release of the furs pending the Court of Appeal's decision.

The furs were released, and resumed their journey to London.⁹¹ The Court of Appeal, furthermore, finally heard the Company's case on 10 February 1913. While no transcript exists of the hearing it is unlikely McCarthy's arguments deviated from those he formulated over the three years it required to appear before the court. Chief Justice Meredith sat on the bench, as did Justices Maclaren, Magee, Hodgins and Kelly.⁹² McCarthy was confident after the appeal hearing, and bragged to Hall that he had either won the Court over, or made them think seriously about the issue. As McCarthy noted the Court was initially "inclined to take the Provincial view, but we certainly succeeded in moderating their views considerably if not bringing them absolutely to our view." That the Court reserved judgment likely accounted for McCarthy's confidence.

Two months passed, and the Company waited for a decision. While the Company's London Directors made arrangements with counsel in England to prepare for an appeal in the event of an unfavourable judgment, McCarthy attempted to ascertain when a decision would be reached. He discovered "the questions raised are giving the Judges considerable trouble" and that a decision was not likely for some time.⁹³ McCarthy, however, may have made an

⁹⁰ Ibid. Hall to Whitney. 20 January 1913.

⁹¹ Ibid. Hall to Ingrams, 12 February 1913.

⁹² Ibid. McCarthy to Hall 11 February 1913.

⁹³ Ibid. McCarthy to Hall. 3 April 1913.

important political error in the course of his inquiries. It is not known who McCarthy asked about the Court's delay in rendering judgment, but he did say he was "endeavouring to ascertain whether or not judgment is likely to be given in time to permit an appeal being taken to the Privy Council this Summer..."⁹⁴

While this is conjecture, McCarthy's inquiry may have forced the Province into pressuring the Company into accepting the *Game Act*. One month after McCarthy's questioning the HBC's posts at Missanabi and Montizambert were raided. The Officer in Charge of the Lake Superior District, McKenzie wrote to Commissioner Hall about the raids. He was suspicious that "these seizures are being made for some purpose..."⁹⁵ McKenzie said there were no contraband furs at either posts, and that each post manager had provincial permits to cover the out of season muskrat and mink furs. J.H. Stanger, the Montizambert manager, said that the investigating officer, Constable Edwards, did not produce a search warrant. Edwards stated that "the Government had given him direct orders..." to search the post.⁹⁶

Before McCarthy could meet with provincial officials to stay prosecution of both managers each was tried and convicted. While the value of the furs, and the fines imposed were small compared to past seizures it was apparent that the province was unwilling to cease its prosecution of Company employees regardless of the pending Appeal decision. N.H. Bacon, who replaced Hall as Fur Trade Commissioner in June, 1913, left Winnipeg for Toronto to meet with

⁹⁴ Ibid.

⁹⁵ Ibid. McKenzie to Hall. 26 May 1913.

McCarthy and discuss the situation. Bacon was not optimistic. He noted in a letter to the HBC secretary in London that "the Company [does] not seem to be any nearer a solution of the grave difficulties facing them in connection with these repeated seizures of furs."⁹⁷

When the province's actions are considered in conjunction with the Court of Appeal's decision it suggests that provincial officials knew in advance what the court's decision would be. Continued seizures and harassment by enforcement officers was meant to pressure the HBC to abandon any legal efforts to protect their operations. On June 12, 1914, a year and four months after being heard, the Court of Appeal finally gave its decision. Bacon cabled Company officials in London with the news:

Stated case situation become very grave owing to refusing to deliver judgment and introduction of new legislation with retrospective effect directed prevent [further] appeal [to the] Privy Council. Endeavouring to arrange consultation with Nanton and Counsel. Circumstances so involved may necessitate conference in London. ...⁹⁸

Based on the urgency of the cablegram it is apparent that neither anyone in the HBC, nor McCarthy expected the Court to refuse to deliver judgment. Writing to Nanton, Bacon tersely noted that "the Judge has said the he will not deliver a judgment in the Stated Case...the Judge has realized that he cannot deliver a

⁹⁶ Ibid. J.H. Stanger to McKenzie. 23 May 1913.

⁹⁷ Ibid. N.H. Bacon to Ingrams. 18 June 1913.

⁹⁸ Ibid. Ingrams to Bacon. 17 June 1913.

judgment other than one which would be picked to pieces by the Law Lords in England.”⁹⁹

This may have been true, but later documents from the 1930s reveal that the Justices refused to rule because they did not think a decision in the Company’s favour was in the Indians’ best interest. One of the Justices that heard the HBC appeal, Hodgins, sat on another similar case in 1930 dealing with the trapping rights of two Pic River Ojibwa (see chapter six). Hodgins noted in 1930 that he and the other Justices refused to rule in the HBC case because “it might injuriously affect the real interests of the Indians and the then Chief Justice (Meredith, C.J.) suggested that the parties get together and come to some settlement...”¹⁰⁰

Meredith’s politically advantageous decision, for the Ontario government at any rate, was made even more devastating when the government tabled new game laws in the Ontario Legislature. The government’s legislative timing in conjunction with the Court of Appeal’s logic indicates that the justices may have either succumbed to political pressure, or the government selected Meredith to hear the case because it expected him to make a particular ruling and as Chief Justice would wield a degree of influence over the court. It was obvious to the Company that the new legislation was designed to prevent their appealing to the Privy Council. Bacon wrote to Nanton:

⁹⁹ HBCA, RG 2/2/7. Bacon to Nanton. 12 June 1914.

¹⁰⁰ NAC, RG 10, Vol. 6747, file 420-8x, part 1. Ludwig to Mackenzie, 15 October 1930.

You will appreciate the delicacy of the situation as if we run counter to the Chief Justice, the Department can enter into the fight and simply walk into everyone of our posts in Ontario, [and] fine us for every contraband pelt that has gone through the books...¹⁰¹

Given the behaviour of the Department of Crown Lands and the Game Commission prior to the ruling, Bacon was justified in fearing that all of the HBC's Ontario posts would be raided if the Company appealed this decision.

Secondly, the Court of Appeal's actions actually served Ontario's interests. As noted, if the Court ruled in favour of the Company the government would be in an awkward position. However, even if the province won it was obvious that the Company would appeal the decision to the Privy Council if necessary. Such an undertaking was not only an expensive proposition for the government, but there was the strong possibility that it might lose. By refusing to rule the Court maintained the status quo between Ontario and the HBC. Furthermore, by conveniently having retroactive legislation in place and demonstrating earlier that it was not adverse to harassing the HBC while an appeal was being heard, the Ontario government pressured the HBC into entering into negotiations.

There was little else for the Company to do but acquiesce, and try to secure the best terms possible from the government. Shortly after the ruling Augustus Nanton wrote to the HBC Secretary in London. After meeting with McCarthy and Bacon, the three men decided that the best course of action for the

¹⁰¹ **Ibid.**

Company to follow was negotiation. McCarthy still thought that the *Game Act* was *ultra vires* of the legislature, but he realized that the courts were not a viable recourse for the Company.¹⁰² He noted that several other provinces, notably Quebec, intended to enforce their game laws in the same manner as Ontario. The Company could not afford to challenge every province's conservation laws. Furthermore, McCarthy believed there was the possibility of the provinces requesting the Dominion government to pass national game laws as a means of circumventing future legal challenges. While this seemed highly unlikely (and definitely impossible in the case of Ontario which would certainly not request federal control over its natural resources), McCarthy still advised Bacon and Nanton to avoid this possibility:

A point to be considered is whether it would be advisable to endeavour to compromise with the Ontario Government and try to come to an agreement that will be acceptable to the Province rather than risk Dominion legislation.¹⁰³

Company officials and directors agreed that McCarthy and Bacon should meet with officials to discuss a solution. McCarthy reported in October, 1914, that the Deputy Minister of Game and Fisheries, Mr. Sheriff, also wanted to end hostilities with the HBC.¹⁰⁴ McCarthy also believed that the negotiations would be "cleared and made somewhat easier by the death of Sir James Whitney...and...by the serious illness of J.J. Foy, Attorney General, whose place

¹⁰² Ibid. Nanton to Ingrams. 25 June 1914.

¹⁰³ Ibid.

¹⁰⁴ Ibid. McCarthy to Nanton. 23 October 1914.

is being filled by the Honourable W.J. Hanna.”¹⁰⁵ Considering the suspicions harboured by Bacon and McCarthy it is not surprising they did not trust Whitney, and hoped that Premier Hearst would prove more reasonable.

There is no record in either Premier Hearst’s papers or the Hudson’s Bay Company Archives of what transpired at the meeting. McCarthy, in a letter to Secretary Ingrams, provided a sketchy outline.¹⁰⁶ McCarthy asked that: the existing fines (totaling almost \$30,000) be remitted and that the Game Department and HBC agree to reasonable regulations. In return the Company would not seek compensation for damages incurred as a result of the seizures, and would not pursue any further legal challenges against the government. Premier Hearst was amicable, and agreed to pursue negotiations “in the best interest of the Province and the Company.” McCarthy, evidently pleased with this first meeting, wrote to the Company secretary that

This may be looked upon as an interim report of the opening of negotiations which were instructed by the Governor and Committee to be taken on their behalf with the representatives of the Ontario Government.¹⁰⁷

These negotiations evidently did not produce a deal which suited the Company perfectly, but was sufficient to allow the fur trade to continue. Bacon noted in 1916 that the new game regulations should “enable the Company to carry on its business without being subjected to any molestation by authorities except in cases of any flagrant offence against the law, which will meet with my

¹⁰⁵ HBCA, RG 3/FT 319/1B. McCarthy to Ingrams, 11 November 1914.

¹⁰⁶ Ibid.

severe disapproval..."¹⁰⁸ The Company now took out fur trading licenses for its managers, clerks and trippers. Permits and trading coupons had to be attached to shipments of fur headed out of province. Posts had to supply written fur returns on an annual basis. The Department of Game, for its part, recognized that outlying posts cannot furnish fur returns in the allotted time, and a period of grace was granted to them.

Regulations were also enacted regarding "Treaty Indians living north and west of the French and Mattawa Rivers and Lake Nipissing..." or within the Robinson Treaties.¹⁰⁹ In stark contrast to the Company's former position Bacon now believed "it is quite a moot point as to whether the Province has the right to legislate regarding Indian..." Regardless, Bacon did not think the new regulations would adversely affect the Company's trade. Treaty Indians were exempted from taking out a trapping license provided they could produce a Certificate, provided by Indian Affairs, attesting to their status. While treaty Indians were limited to ten beaver and/or otter per season, both Indian Affairs and the HBC believed they could circumvent the regulation by allowing an adult male trapper to trap the beaver quota of each family member. Furthermore, only properly licensed fur traders granted the provincial authority to issue "Royalty Coupons," which established the legality of beaver and otter pelts taken by treaty Indians, could purchase such furs. Bacon noted that "the parties to whom this privilege is to be granted will be very limited."

¹⁰⁷ Ibid.

¹⁰⁸ Ibid. Memorandum regarding 1916 Game Laws. 7 December 1916.

The incidents surrounding the Hudson's Bay Company's legal challenge of the reveals several things about the context surrounding the hunting issue. First, the Company was not concerned with the actual rights of the Ojibwa but wanted to use the treaties as a shield to protect its fur trade operations against provincial interference. Initially the Company attempted only to convince the province to enter into negotiations with it to permit it leniency in the application of the *Game Act* to its fur trade operations. When this failed a court case became the only means of securing concessions. When the case was deadlocked by the Justices, the Company accepted the terms offered to it by the Ontario government, and abandoned its lofty ideals regarding treaty rights.

The HBC case also revealed that Indian Affairs would not openly challenge the legality of Ontario's *Game Act*. When the HBC sought advice or more clandestine aid Indian Affairs was more than happy to help. However, when it became apparent that it could not longer hide, but would have to openly support the Company's legal challenge to insure its success Indian Affairs recoiled. Its policy of not confronting Ontario was too precious to risk in a legal battle against Ontario, and provincial-federal relations were not worth risking over the sake of Indians who were destined for acculturation. Furthermore, as outlined in chapter three, Indian Affairs was simply not an important part of the government. In this way the department itself commanded as much respect as it granted to its own Native wards.

¹⁰⁹ Ibid.

Left to their own devices were the Ojibwa. While its arrangement with the Ontario government helped the Company it did little to aid the Ojibwa. Beaver and muskrat were still an important source of food during close seasons, but the HBC was not concerned with this. With Indian Affairs equally unconcerned the Ojibwa, as will become clear in succeeding chapters, took matters into their own hands. While the nature of the debate prior to and during the HBC legal challenge had, in many ways, nothing to do with conditions the Ojibwa faced in northern Ontario that changed during and after the war years.

Chapter Five
"The Transitional Indian:"
Duncan Campbell Scott and the *Game Act*, 1914-1920

While the Hudson's Bay Company solved many of its problems through negotiations with the Ontario Government the Ojibwa continued to suffer under the application of the *Game Act*. Overly-zealous game wardens and Ontario Provincial Police officers, particularly in the area around Fort William and Port Arthur detained and arrested Ojibwa hunters who were engaged in subsistence hunting. The Company's settlement did not even help the Ojibwa sustain themselves through commercial trapping. Subsistence hunting became increasingly important after 1914 as the outbreak of war in Europe caused fur prices to drop. Trapping for the Hudson's Bay Company or independent traders no longer provided the same monetary rewards. Subsistence hunting, therefore, became an even greater necessity for the bands.

Despite the apparently stagnant nature of the situation, changes occurred in the Native hunting issue between 1914 and 1920 on the part of the Ojibwa and Indian Affairs which made it differ from the initial years of the *Game Act's* creation and its enforcement. Frank Tough has characterized the war years as period of continued acquiescence on the part of Indian Affairs, but this is inaccurate.¹ Important changes occurred which set the stage for greater action by both the Ojibwa and Indian Affairs in the future. While the hunting issue

¹ Frank Tough, "Ontario Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930." Prepared for the Ontario Native Affairs Secretariat (January, 1991): 10.

was not solved during the war years there was a transformation in the nature of the debate for two reasons. First, there were changes at Indian Affairs. The Ojibwa and their local circumstances provided the second factor.

Their immediate concern was harassment by local provincial officials. The clash was so intense that the Fort William Indian Agent, William Brown, became convinced that provincial officials were intent on persecuting rather than prosecuting Ojibwa hunters. This time the complaints forwarded to Indian Affairs had an impact, albeit limited on the new Deputy Superintendent General, Duncan Campbell Scott. Scott appreciated the unique circumstances facing the Ojibwa due to his own experiences in northern Ontario. While this did not immediately solve the problems faced by the bands, it provided the foundation for future change.

Ojibwa actions, and local problems helped to lay this new base. While the Ojibwa's perception of the problem did not vary their attempts at solving it did, and this drew increased support to them. They still believed that the Robinson treaties protected their hunting and trapping rights, but Ontario's Department of Game and Fisheries² still maintained that the treaties could not affect their legislative prerogative to regulate hunting. Bands, in an effort to protect their rights, began to turn to local agencies to publicize their problems. They used local newspapers to explain to northern Ontario how the province was deliberately breaking the Robinson Treaties, and how Indian Affairs was ignoring its fiduciary obligation towards the Ojibwa. Band members also turned

to their local Indian Agents with increasing regularity. Several chiefs from neighbouring bands in the Fort William Agency, complained to their Indian Agent, William Brown, about the excesses of local enforcement officials.

This increased activism began to impact on Indian Affairs' officials. It became apparent that these officials, both in the field and in Ottawa had begun to change their opinions regarding the game laws. Indian Agents became more sympathetic to the plight of the bands in their agencies. They regularly dealt with the complaints of band members who were arrested by game wardens and Ontario Provincial Police (OPP) officers, and realized that the game laws were a grave injustice. One agent even sent sworn affidavits to Ottawa in an effort to appeal one Ojibwa's recent conviction, and have a game warden fired. Agents also took dictation from chiefs who wanted to send petitions to Ottawa, but were illiterate in English. Agents often wrote letters to their supervisors explaining that the game laws were a heavy burden on the bands, and by doing so corroborated Ojibwa complaints of being harassed by heavy handed officers. Agents explained that hunting and trapping was an important means of support for many families, and local provincial officials were singling out the Ojibwa for arrest and prosecution. Most importantly, they countered the statements made by local provincial officials that the Ojibwa deserved the treatment they received. It was not the Ojibwa, Agents explained, but White hunters and trappers who were over hunting. In this way Indian Agents were able to keep Indian Affairs in Ottawa properly apprised of the situation.

² By this date the Game Commission had become a separate department.

Even officials in Ottawa began to change their minds somewhat, particularly Duncan Campbell Scott. Scott was the first deputy superintendent general to suggest to his Minister that the Department should appeal the next conviction of an Ojibwa from the Robinson treaties, and challenge the *Game Act*. Previously department heads and top officials took no interest in protecting the subsistence hunting activities of the Ojibwa against Ontario's interference. They tried to secure leniency, but would not go take firm judicial action against Ontario when it became clear the province would not comply with these requests. What stopped Scott was the refusal of his Minister, Arthur Meighen, to support the proposal. While ultimately unsuccessful this does not detract from the novelty of Scott's effort.

The best historical study of Scott, E. Brian Titley's *A Narrow Vision*, does not explain why Scott differed from other bureaucrats such as J.D. McLean in handling the hunting issue.³ Titley outlines how Scott, in many ways, reflected the dominant culture's perception of Natives: a lazy, uncivilized people who needed to be elevated in much the same way Kipling described in his poem, "The White Man's Burden." Titley notes that Scott fervently believed in the civilizing mission of the British Empire,⁴ and Indian Affairs' policy of convincing Indians everywhere to give up hunting, and learn to farm. This transformation would occur by Native adoption of Christianity, and

³ E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986).

⁴ Titley, 25.

white/British culture. Schools, both religious and government, would provide this training, as would inter-marriage. Scott noted:

The happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.⁵

Why Scott acted as he did can be found in his past, specifically the summers of 1905 and 1906 which he spent negotiating Treaty Nine, and encounters with the Ojibwa in 1899 when making Robinson-Superior Treaty annuity payments. These northern experiences had a profound affect on Scott as evidenced by his "Indian Poems," and the essays he wrote about his trips north. While certainly romantic depictions of Ojibwa life and the wilderness these represented a particular conceptualization of Natives: the "transitional Indian." Caught between traditional values and customs and the influence of White/European society these Indians required time to abandon hunting and trapping and adopt White/British customs and culture. Stan Dragland details this in his study of Scott's literary work, Floating Voice.⁶ Dragland notes the recurring image of the transitional Indian in Scott's poetry and articles, and in so doing provides the rationale behind Scott's decision to challenge Ontario's *Game Act*. The Ojibwa of the Robinson treaties, as well as other more remote northern bands, were Scott's transitional Indians. This explains why Scott considered bringing forth a stated case, in much the same manner as the HBC had in 1910.

⁵ Cited in Titley, 34.

While this was not novel in one sense - Indian Affairs' officials had recognized the importance of hunting to the Ojibwa before Scott's ascension - Scott's idea of the "Transitional Indian" provided him with the intellectual foundation to justify his actions and provided a degree of conviction that other officials lacked. Scott, however, was torn between his desire to civilize Indians, something he believed in, and at the same time protect their subsistence hunting rights until such time as they adopted White customs.

Scott's desire to assimilate Natives while concurrently insuring they did not suffer was a common attitude towards Natives during the first decades of the twentieth century. Ronald Graham Haycock, in his study of Canada's national magazines, noted that there were three dominant themes regarding Native peoples between 1900 and 1930. One of these was that Natives were "doomed to assimilation by the incursion of Anglo-Saxons...The white, however, is trying his best to make the death struggle of the primitive as soft as possible."⁷ Indeed, Haycock refers to Scott's article in *Scribner's Magazine*, "The Last of the Indian Treaties," as an example of the attitude of Canadian writers during the early twentieth century.⁸

Ontario's Department of Game and Fisheries suffered no similar crisis of conscience. While Scott understood the importance of hunting and trapping to

⁶ Stan Dragland, Floating Voice: Duncan Campbell Scott and the Literature of Treaty 9 (Concord: House of Anansi Press, 1994).

⁷ Ronald Graham Haycock, The Canadian Indian as a subject and concept in a sampling of the popular national magazines read in Canada, 1900-1970 (Waterloo: Waterloo Lutheran University Press, 1970): 1.

northern bands, the Department of Game and Fisheries maintained its policy regarding the application of the *Game Act* to Natives throughout Ontario. Indeed, the Department believed that its game laws were fair since they were applied equally to all citizens of Ontario, and that it treated Natives with as much benevolence as it could. This was the opinion expressed in 1912 by Kelly Evans. Evans was appointed by the provincial government in 1909 to survey the application of the game laws and report on their effectiveness. Kelly did not approach his job objectively. He was the founder of the Game Protective Association, a group of sportsmen who sought to conserve game for recreational hunters. His recommendations, published in 1912, reinforced the supporting central argument underlying the Game Commission: wildlife was an important economic resource for the province, and should be protected to maximize its economic utility. As regards Indians, Evans noted that "one of the principle factors in the destruction of game is the Indian living in the wilder regions."⁹ In his report Evans refused to "enter into a discussion as to the treaty rights and privileges of Indians," but concluded that game laws should be applied to Natives in the same manner as all citizens.

In Evan's opinion there were two problems with Indians in the province as regards conservation. They over hunted on their reserves thereby driving them to hunt on Crown land, and the bands would not engage in agriculture.

⁸ Haycock, 19. See also D.C. Scott, "Last of the Indian Treaties," *Scriber's Magazine*, Vol. 40 (November, 1906): 573-583.

⁹ Kelly Evans, Final Report of the Ontario Game and Fisheries Commission, 1909-1911 (Ontario: L.K. Cameron, 1912): 198.

Evans said that substantial reservations had been set aside for Indians throughout the province by treaty, but they continued to hunt on Crown Land around their reserves. He conceded that some reserves were quite small, but maintained that the main cause of this illegal hunting was that the reserves "have been more or less depleted of game ...by the Indians themselves..."¹⁰ Considering that some of the northern bands numbered over one hundred people even several thousand acres was not a large enough area to provide a sufficient resource base. Regardless, Evans believed that Natives would not have to hunt on Crown land if they conserved game on their reserves, and adopted farming. The problem, as Evans saw it, was that the bands were "not addicted to agricultural pursuits."¹¹ Evans did not consider that northern reserves were largely unsuited to intensive agriculture, but believed instead that Natives were generally "loathe to undertake prolonged or steady work..."¹² The only time they showed any energy or enthusiasm was during the hunt.

While Evans' conceded that Natives were not wasteful in their use of animals their commercial hunting and trapping adversely affected game throughout the province. He stated that so long as Natives could take game with impunity on Crown land the commercial fur market would continue to entice them as would the market for moose and deer meat. To combat this problem Evans recommended not only arresting and fining white individuals who purchased skins and meat from Natives, but also believed "that no injustice

¹⁰ Ibid.

¹¹ Ibid., 199.

would be done to the Indian by making him liable to imprisonment or fine where he barter...any form of game proscribed by the white man's law..."¹³ Furthermore, Evans argued that even subsistence hunting and trapping must be regulated regardless of treaty stipulations. Evans believed allowing Natives to hunt at all times of the year, while expecting Whites to abide by the game laws, would not only "be a manifest injustice to the general public...but a palpable absurdity..."¹⁴ The best means of conserving game, Evans concluded, was to have one law applied equally to Whites and Natives.

Evans believed that the privileges afforded settlers in remote regions of the province would be suitable for Native families during the winter, and during the summer they could live on the money they made trapping supplemented by farming. According to the report, settlers' families should be allowed to take one moose, or one caribou and one deer, or two deer during the proper open season if the family had a hunting permit. Furthermore, this permit should apply only within a ten mile radius around the settler's homestead, and was issued only if the settler made "actual improvements" to his land.¹⁵ These provisions were inappropriate considering the Ojibwa lifestyle. The lives of settlers and Ojibwa cannot be considered analogous. Settlers chose their land based on its suitability for farming, or other commercial endeavours. These farms provided food for the winter, and one moose was likely sufficient as a

¹² Ibid.

¹³ Ibid. 200-201.

¹⁴ Ibid. 201.

¹⁵ Ibid. 201.

meat supplement. Few reserves were suited to extensive agriculture, and were not chosen with that endeavour in mind. Many factors affected reserve selection, the cultural significance of the land, its location in relation to summer fishing spots or the nearest HBC post, or merely as a convenience to receive treaty annuity payments. Reserves were largely unsuited to agriculture, and one moose would not feed an entire family for a winter. Furthermore, there was no explanation stating if hunters could only hunt and trap in a ten mile radius around their reserve. As it stood, Evans thought it was wrong for Natives to hunt on Crown Land. Clearly Evans and the Department of Game were more interested in ameliorating settlers' conditions in the north, as a means of encouraging settlement, than dealing substantively with the Ojibwa.

Nor did Evans make any concessions in regards to Native trapping. While he did believe that Natives should be issued free trapping licenses, he asserted that they should "conform to the laws and regulations in force as regard to the fur-bearing animals." Beaver was, as noted earlier, an important source of food for many Ojibwa families. While the open seasons for fur bearing animals did correspond to those times of the year when furs were at their best they did not reflect that hunger occurred throughout the year.

This was an important concern to the Ojibwa. Alexander McCoy and Frank Peltier, Fort William band councilors, wrote to D.C. Scott in the fall of 1916 to complain about the application of game laws. They said that restrictions on the trapping of beaver and otter had "taken food out of the mouths of the Indians," and the fines imposed upon hunters for subsistence activity

compounded this problem.¹⁶ Both men explained that the Ojibwa in the area stretching from Fort William to Lake Nipigon were being arrested for engaging in subsistence hunting. The most recent arrest was that of Joe Martin of the Red Rock Band. An elderly man, both of Martin's sons were fighting overseas in France. Unable to hunt for himself a younger member of the Red Rock Band, "out of kindness," shot a moose for Martin. Martin, however, was arrested because the hide was in his possession. Luckily, friends loaned Martin money to pay his fine and thereby avoid imprisonment, but the councilors saw a greater injustice at work. They argued that the Robinson-Superior treaty protected them "against the actions of game wardens and Magistrates in this District." It was an indignity, they said, to be treated like common thieves when hunting for food.

A more specific problem facing the Ojibwa in the area was an overzealous OPP officer, Constable Edwards. According to Ojibwa complaints and the Fort William Indian Agent, William Brown, Edwards harassed hunters throughout the region. The agent, forced to handle the numerous complaints he received, began to pressure Indian Affairs to investigate the matter further. Due to the number of accusations leveled against Edwards, the agent obviously believed what the Ojibwa told him. Furthermore, it was clear to the agent that Edwards was frightening the Ojibwa to such an extent that the men would not go out into the bush to hunt and trap, and their families suffered accordingly. This was the

¹⁶ NAC, RG 10, Vol. 2406, file 84,041, pt. 2. Alexander McCoy and Frank Peltier to D.C. Scott. 2 October 1916.

same charge that Councilors McCoy and Peltier laid against Edwards.¹⁷ Joe Martin, even after he paid his fine, was chased out of the bush on several occasions by Edwards. As these complaints grew in number, Indian Affairs began to take notice of them.

One noteworthy incident was the death of Pierre Hunter. Edwards arrested Hunter in August, 1915, for hunting moose out of season. He was found guilty, and sentenced to thirty days hard labour at an Industrial Farm near Port Arthur. At the end of his term he was released, and given one dollar for good behaviour. Without food Hunter walked back to his home at Sioux Lookout, a distance of two hundred miles. Four weeks after his return home Hunter died of unknown causes. While Sioux Lookout was a Treaty Three band, the incident caused great concern amongst the Fort William Ojibwa and their Indian Agent. All concerned believed that the journey killed Hunter.¹⁸

When Indian Affairs learned of this matter they sent a letter to Ontario's Attorney-General asking for information. The Provincial Secretary, W.J. Hanna, responded but apparently took little interest in Hunter's demise. After contacting the local officials involved in the case, Hanna reported that nothing extraordinary happened to Hunter. He said there was no evidence Hunter died as a result of his journey. An Indian, according to Hanna, "is...at home in the bush, and such a trip as he is said to have taken would be much the same as his

¹⁷ Ibid.

¹⁸ Ibid. W.J. Hanna to Scott. 20 October 1916.

routine life.”¹⁹ Hannah said that, based on the opinions of an undisclosed friend of Hunter’s, the man died of consumption. Besides, Hannah concluded, the family of the deceased did not deserve any sympathy:

As to the yarn about his and his wife’s children it is again all nonsense. The squaw is a bad character who takes up with any Indian who wants her, and her children are all grown up. Pretty much the same can be said of Hunter’s children, -- some of them at least are married.²⁰

As the winter of 1915-16 approached, the Fort William Indian Agent continued to send in complaints given to him by Ojibwa and non-Native alike. It appeared that Constable Edwards had a particular dislike for the Ojibwa. One individual, a local White trapper named Arthur Henry Nichols, gave a statement to the Indian Agent regarding Edward’s opinion of Ojibwa hunters. Nichols was arrested, for an unknown infraction, by Edwards. During his journey back to Port Arthur, Edwards told Nichols that it was the “Indians [who] were slaughtering so many moose that there would not be any left for the next generation.”²¹ As regards Joe Martin, Edwards said that he was essentially a lazy old man, whose daughters supported him through prostitution. Edwards gave Nichols the clear impression that he “disliked the Indians and would prosecute them on every occasion.”

Brown hoped Nichol’s statement would support the allegations made by Samuel Chapleau of the Long Lake Band and other Ojibwa. Chapleau, in

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid. Statement of Arthur Henry Nichols to W.R. Brown, 2 November 1916.

November, 1916, stated that both Edwards and the local magistrate, O'Conner, entered his father's cabin, searched it and two locked trunks without a search warrant, and then proceeded to search cabins close to his father's for illegal pelts and meat.²² With Nichols' and Chapleau's written statements, Brown wrote to J.D. McLean to complain about the treatment the Ojibwa received from Edwards.²³ Besides Chapleau, Brown said, several other Ojibwa made similar allegations regarding the constable. In Brown's opinion, Edwards was conducting a systematic campaign of terrorizing the Ojibwa. He searched fur bags and cabins (on reservations) without warrants. Edwards also, when arresting one hunter, asked him what their furs were worth, paid the accused below market value for the pelts, and then sold them "to Jew fur buyers." In another instance, one hunter told Brown that Edwards threatened to arrest him if he did not pay a delinquent account with a HBC post. Upon further investigation the Agent learned, via the HBC's district office, that Edwards was employed by the Pic Moberg Post to collect old fur trade debts on commission. With the evidence before him Brown believed what the Ojibwa told him about Edwards. He even warned that the situation was at a point where "before long there will be trouble with the Indians."

Brown's report had an impact on J.D. McLean although he was not optimistic about extracting any compromises from the Department of Game. McLean took the matter up with the Deputy Minister of Game and Fisheries,

²² Ibid. Statement of Samuel Chapleau to Brown, 2 November 1916.

²³ Ibid. W.R. Brown to J.D. McLean. 7 November 1916.

Sheriff. While he conceded that the *Game Act* allowed constables to search the premises of suspected person, he believed that “the manner in which Constable Edwards exercises these powers would appear to give the Indians reason for complaint.”²⁴ McLean also referred Sheriff to the allegation that Edwards bought furs from Ojibwa at reduced prices, and then sold them for a profit. If Sheriff responded there is no evidence of it. McLean, however, wrote to Agent Brown on the same day he corresponded with the Department of Game and Fisheries. McLean regretted the treatment the Ojibwa received, but reminded Brown that past complaints about Edwards had little affect and there was no reason to expect a different outcome.²⁵

Sections 42 and 61(4) of the *Game Act* (1913) did give game wardens and overseers considerable powers of search and seizure. Section 42 read:

Every railway and express company and every other common carrier, every person engaged in the business of cold storage, or of purveying or dealing in game or fish, or of lumbering, or in charge of any camp near any fishery or near any place in which game is usually found, every person fishing or in charge of any fishery, and every person holding any lease or license, shall, upon request, permit the Superintendent or any inspector, warden, overseer, or other officer to enter and inspect any car, building or premises or enclosure, and to open any receptacle for the purpose of examining for the purpose of examining all game and fish taken...and for the purpose of searching for game or fish illegally killed or procured...and in case of refusal the officer may, without search warrant, break such locks and

²⁴ *Ibid.* McLean to A. Sheriff, 17 November 1916.

²⁵ *Ibid.* McLean to Brown, 17 November 1916.

fastenings as may be necessary in order to make such examination.²⁶

Section 61(4) read of the same act read:

Every overseer, if he has reason to suspect and does suspect that game, peltries or fish have been killed, taken or shipped or had in possession contrary to the provisions of this Act, or the Regulations, and are contained in any trunk, box, bag, parcel, or receptacle, shall open the same, entering all premises which under the provisions of this Act, he is authorized to enter, and using necessary force, in case the owner or person in charge obstructs or refuses to facilitate his search, and if such overseer has reason to believe and does believe that it is necessary to enter any store, private house [etc.]...which he is not under the provisions of this Act authorized to enter without a search warrant, he shall make a deposition, Form A, before a Justice of the Peace and demand a search warrant...²⁷

The *Game Act* provided enforcement officials with extraordinary powers of search and seizure, but it appears that Edwards abused these. In essence, anyone who wanted and purchased a hunting, trapping or fishing license *de facto* agreed to allow any provincial enforcement official to search their belongings or residence without a search warrant. There was, however, the proviso that an official could only search someone's premises if they had a reasonable suspicion of activity occurring therein contrary to the *Game Act*. Since Agent Brown did not indicate if any charges were laid by Constable Edwards and Magistrate O'Conner during their search of the Ojibwa's cabins it

²⁶ Statutes of the Province of Ontario, "An Act Respecting the Game, Fur-Bearing Animals and Fisheries of Ontario." (Toronto: L.K. Cameron, 1913): 970-971.

²⁷ Ibid., 978-979.

is logical to assume that no 'illegal' meat or furs were discovered. This certainly supports Brown's contention that the Ojibwa were being harassed by Edwards. Edwards may have had suspicions, but it appears they were based more on prejudice than evidence. In his letter to Agent Brown, McLean advised him that sections 42 and 61(4) of the *Game Act* justified Edward's actions. McLean made no reference to the Ojibwa's allegations of harassment. McLean reminded Brown that when past complaints were sent to the Department of Game and Fisheries nothing was done as the Department had "every confidence in that officer [Edwards]." ²⁸ McLean told Brown to read the *Game Act* carefully, and insure that the bands in his agency were fully apprised of its provisions.

This advice did little to help the agent. By the beginning of 1917, Brown was once again writing to McLean to advise him of the situation in the Port Arthur Agency. The length and detail contained in Brown's letter indicates both a degree of exasperation on his part because of the lack of support he received from Ottawa, and a clear sympathy with the bands in his agency. Constable Edwards and another official, Game Warden George Fanning, were the focus of Brown's letter. ²⁹ Fanning had arrested Michael Fox Junior, an Ojibwa, in October, 1916. For reasons unknown, Fanning had questioned Fox regarding the sale of some beaver skins the previous winter. Fanning obviously thought Fox was the culprit, and allegedly threatened the man by saying if "you do not tell me all about it I will put you in jail." When Fox denied selling beaver skins

²⁸ NAC, RG 10, Vol. 2406, file 84,041 pt. 2. McLean to Brown, 17 November 1916.

²⁹ Ibid. Brown to McLean, 5 January 1917.

Fanning arrested him. When Fox's father, Fox Senior, met with Fanning and protested his son's arrest, the Game Warden said he would set the younger man free if the father agreed to keep the matter to himself. Considering the suspicious nature of the incident, Brown asked McLean if he should obtain sworn statements from both men regarding the incident. Brown obviously had a low opinion of Fanning. This was the same warden who arrested Pierre Hunter, the Ojibwa who died shortly after his release from prison. Fanning, furthermore, was a trapper prior to his employment as a game warden. Brown believed, based on the information obtained from local Ojibwa trappers, that Fanning broke the game laws on a regular basis prior to his employment with the Department of Game, and was not to be trusted.

Besides the problem with Fanning, Brown related another incident involving Constable Edwards and Magistrate O'Conner. Both men (apparently O'Conner did not restrict his legal activity to the court room) attempted to stop an Ojibwa hunter along the Canadian Pacific Railway main line, but the man fled into the bush. Brown later questioned this man's brother about the incident. He said his brother fled because he had old, dried moose blood on his pack, and was afraid Edwards and O'Conner would consider this evidence of illegal moose hunting.

Brown was obviously frustrated with the effect Fanning, Edwards, and O'Conner were having on the Ojibwa. He related that some hunters were even arrested for having fresh meat in their house, and not being able to produce a sales receipt for it. It was to the point, Brown stated, that "the Indians think that

these provincial authorities have the power to do almost anything to them..."

Perhaps as a criticism of McLean's handling of the situation, Brown said that the Ojibwa "have been given some cause to so believe." While the Ojibwa were frustrated before, Brown said that the possibility of violence now existed. "These Indians openly state," Brown said, "that they will shoot any constables who interfere with them while they shoot game for their own use."³⁰

Only two days after writing to McLean, Brown was made aware of another incident involving Constable Edwards and the Pic River Band. Chief Louis Michano and several other Ojibwa, were traveling north in the autumn of 1916 to set their winter traps.³¹ At a portage point on the Brunner River they met a trapper from the village of White River, George Cook. Acting under orders from Edwards, Cook told Michano and the others that "he would put some bullets into some of us if we kept on going up the river to set traps."³² Michano said he confronted Cook about this, and was informed that Constable Edwards had given Cook permission to hunt throughout the area around the portage and he was going to defend his tract. Michano said he took so long in writing to Brown about the incident because "I had no one that could explain matters properly" which likely meant the Chief needed someone who could write a letter for him.

While Brown considered Chief Michano to be "a level headed Indian," and took his complaint seriously the Department of Game, and the OPP

³⁰ Ibid.

³¹ Ibid. Chief Louis Michano to Brown, 7 January 1917.

superintendent for northwestern Ontario, Joseph Rogers, had different opinions.³³ In a letter to J.D. McLean, Rogers responded to complaints the Ojibwa leveled against Edwards. First, Rogers contended that game laws were being violated all along the Canadian National Railway (CNR) line. At "nearly every watertank between Nepigon [sic.] and Folleyette," Rogers claimed, "bands of Indians were selling moose meat to the train crews on the road."³⁴ He claimed that Indians killed fourteen moose at one time near the train stop at Jellicoe, and that Edwards found a dead cow moose at one Indian camp. Based on these reports, Rogers said he ordered Edwards to move immediately against "Indians and whites for violations of the *Game Act* along the line of the C.N.R." As regards allegations of Edwards frightening the Ojibwa and selling confiscated furs to Jewish traders Rogers said that was "absolutely untrue." Rogers contended that Constable Edwards was the most valued officer in northern Ontario, and did an impeccable job protecting game. Rogers claimed Edwards was a friend to the Ojibwa, providing money and provisions when asked, and could easily secure the services of one hundred Ojibwa if in need.

Brown received a copy of Rogers' letter, but was unimpressed. He immediately responded to McLean to inform him that Rogers assessment of the constable was ill informed.³⁵ Brown was aware of the story of moose being slaughtered to feed railway crews as Edwards told him of it. He admitted he

³² Ibid.

³³ Ibid. Brown to McLean, 7 January, 1917.

³⁴ Ibid. Joseph Rogers to McLean, 15 January 1917.

³⁵ Ibid. Brown to McLean, 22 January 1917.

initially believed the constable, but as stories filtered in about Edwards and Magistrate O'Conner, Brown changed his mind and decided that the story was a ruse. Brown said Edwards exaggerated the number of offenses, hunting or otherwise, to justify extracting exorbitant fines from people along the railway line. Workers, and shop keepers along the line made "good wages" according to Brown, and the constable was wont to create stories in order to lay fines against people who could pay, and thereby improve his image with his superiors. By way of example, Brown referred to one shop keeper who paid \$135.00 for "selling two bottles of fly repellent without attaching the necessary labels."

Regarding Edwards' story of blood thirsty Ojibwa killing over a dozen moose, Brown said it was an exaggeration. The dead cow moose, for example, was really an old moose skin Edwards found in Joe Martin's camp. It was this skin which had resulted in Martin's arrest. Brown also offered evidence to support allegations of Edwards selling furs to traders. A fur buyer at Nipigon, who Brown considered reliable, knew of Edwards searching one hunters' pack and taking the furs to an independent trader. Brown also stated that the HBC manager at the Fort William store confirmed that Edwards collected overdue accounts for the Company's Pic Mobert store. Brown's opinion of Edwards was obviously low. In closing Brown said that the only way Edwards could secure the service of any Ojibwa was if they were asked to dig his grave.

While the stories of Constable Edwards, Magistrate O'Conner and Game Warden Fanning may seem parochial, it was the incidents like this which convinced Duncan Campbell Scott to reconsider Indian Affairs' policy regarding

the *Game Act* after he became Deputy Superintendent General in 1913.

Obviously a non-confrontational policy of securing leniency for the Ojibwa on a case by case basis was not working. There were occasional successes. In the winter of 1917, for example, the Department of Game issued a letter to all of its officers in northern Ontario asking them to "exercise leniency towards the Indians, so long as they are not guilty of waste in the taking of fish or game for their subsistence."³⁶ However, on the whole it was apparent that no real permanent progress was being made by Indian Affairs. While this did not bother other senior bureaucrats - there is no indication it troubled J.D. McLean - it apparently caused Scott some distress.

In the winter of 1916, when Indian Agent Brown was relaying complaints about Constable Edwards and others, Scott began to consider the possibility of challenging the Ontario *Game Act* in court. The first evidence of this turn of events is a memorandum from an individual with an almost illegible signature, but which reads as Martin. Martin did not work for either Indian Affairs or the Department of Justice. He was a constitutional expert, and graduate of the Faculty of Law at McGill University where he studied constitutional law. It appears that Scott asked Martin to comment on the Robinson Treaties in relation to the constitution, and Dominion-provincial jurisdiction. Martin argued, in his eight page memorandum, that "under the Robinson treaties no Indian privilege can be withheld except by deliberately breaking the terms of the treaties."³⁷

³⁶ Ibid. D. Macdonald to Scott, 27 January 1917.

³⁷ Ibid. Memorandum from Martin to Scott, 19 December 1916.

Martin stated that the Ontario Government, by restricting Ojibwa hunting, had done such a thing. Unlike other treaties, such as Treaty Three (signed in 1873), the Robinson Treaties did not contain any provisions for regulating Ojibwa harvesting activity; therefore, the provincial government could not claim any right to apply its game laws to the Ojibwa there.

Martin went into some detail regarding the origin of the Robinson treaties, and the ability of the Ontario government either to alter the treaties or ignore them. As regards the former, Martin noted that William Robinson negotiated with the Ojibwa on behalf of the colonial government of the Province of Canada under the authority of Queen Victoria. When the Province ceased to exist in 1867, Martin said, "its [the Province of Canada's] authority and the responsibility for its actions reverted to the Crown, from which they emanated, and not to any subsequent provincial government" except for those powers outlined in section 91 of the constitution. The constitution, Martin continued, did not reserve to the provinces the ability to alter any treaty between the Crown and an "alien people, for the Robinson Treaty Indians were an alien people at the time of the treaty."³⁸ By way of example Martin stated that New Brunswick could not disregard the provisions of the Ashburton Treaty with the United States. The only other possibility, Martin continued, was that Ontario was the direct successor of the Province of Canada. Therefore, the Ontario government inherited the obligations contained therein, and assumed the responsibility of insuring that the terms of the treaty were lived up to by all parties. If this

interpretation was true, Martin said, then Queen's Park had "deliberately violated an agreement given under its own hand and seal." If this were the case the Ojibwa would be within their rights to consider the treaties null and void.

Obviously the original framers of the *Game Act* recognized the legal weight of the treaties. Martin noted that section 8 of the 1908 *Game Act* provided for exemptions where the legislation conflicted with Indian treaties. Martin stated that the Robinson treaties set aside all unoccupied Crown land as their hunting grounds. Within that context, Section 8 permitted the Ojibwa to hunt over the vast majority of the tract ceded in the treaties as it qualified as "hunting grounds" as provided for in the Act and the Treaties. Therefore, Martin concluded, all past arrests and convictions of Ojibwa were illegal and improper not only because they violated treaty rights, but they also contravened the provisions of the *Game Act*. The fact that the revised 1913 *Game Act* made no reference to treaty rights did not change matters.³⁹ This new act stated that all Native hunting privileges were conferred at the pleasure of the Lieutenant-Governor in Council. Section 8(i) stated:

The Lieutenant-Governor in Council may make regulations... exempting Indians or actual *bona fide* settlers in the northern and northwesterly or other sparsely settled portions of Ontario, whether organized or unorganized, from any of the provisions of this Act, which may be specified in the Order in Council; but not so as to authorize a settler to hunt, take, kill or have in his possession any moose, reindeer or caribou except in any year when the same

³⁸ Ibid.

³⁹ Ibid.

may be lawfully killed according to the provisions of this Act.⁴⁰

Martin considered the inconsistency between the 1908 and 1913 Act to be a weak feature of the Provincial government's argument that it had the right to regulate Native hunting regardless of any treaties. Essentially, Martin said, a right cannot be recognized and affirmed then subsequently taken away.

Martin had spent some time considering this issue. He examined Indian Affairs records going back to the 1890s. He referred to a Department of Justice opinion, given by Augustus Powers in 1897. At that time Powers believed that the Ontario *Game Act* was an "improper and unjustifiable exercise of...legislative power." (see chapter 3)⁴¹ While Powers recommended that Indian Affairs not openly challenge the Ontario *Game Act*, for fear of the political ramifications, Martin took Power's legal interpretation and endorsed an opposite course of action. He believed that establishing the validity of the treaties was urgent considering "the antagonistic attitude assumed by the Provincial Government and the consequent futility of depending upon future concessions from that source." Having read through the correspondence Indian Affairs received over the years from the different provincial departments and commissions, Martin characterized the province's attitude as "uncompromising and flippant."

⁴⁰ Statutes of the Province of Ontario "An Act respecting the Game, Fur-bearing Animals and Fisheries of Ontario." (Toronto: L.K. Cameron, 1913): 957-958.

⁴¹ NAC, RG 10, Vol. 2406, file 84,041 pt. 2. Memorandum. 19 December 1916.

More recent problems with provincial officials in northern Ontario further convinced Martin that Indian Affairs needed to take strong action. Constable Edwards and others were, in Martin's opinion, being both "arrogant and unreasonably severe" in their enforcement of the *Game Act*. Indians, Martin said, were being persecuted not prosecuted. In light of this Martin recommended that:

a stated case be arranged to afford a final decision as to whether or not the treaty is to be upheld, and that the matter should be laid before the Minister at an early date with a view to that end.⁴²

Indian Affairs could either wait for an Indian to kill a moose or deer, or expedite matters by agreeing upon a set of facts with Ontario's Attorney-General (e.g.: that an Indian had killed a moose during the close season). Martin believed that even if Indian Affairs lost it would still win a moral victory because it would force the Ontario government to admit that it has no "respect for a solemn agreement [the treaties] and written pledge" with the Ojibwa. Furthermore the injustice of its actions would be on the public record, and the case could provide the basis for some future rectification of the hunting issue.

While Martin's memorandum was novel in light of his final recommendation, in many ways it fit into Indian Affairs' concerns regarding continued Native hunting. First, the memorandum was concerned solely with subsistence hunting. Martin referred specifically to the HBC's earlier court challenge regarding Ojibwa trapping rights, but believed that commercial

⁴² Ibid.

concerns were secondary even if the Ojibwa trapped in season and sold the furs. This coincided with Indian Affairs' desire to acculturate Natives into adopting farming and wage labour instead of more traditional forms of support. Martin also did not want Natives to kill game wantonly even though he acknowledged they had a right to do so. He said if Indian Affairs won an appeal it and the Department of Game should reach an agreement to permit families to kill enough game to support themselves while still respecting the need for conservation. The Ojibwa would not be consulted in this endeavour.

Scott likely turned to an outside expert to consult with because he knew that the Department of Justice would caution against bringing a stated case against Ontario. As noted earlier in this chapter, it is not surprising that Scott took an interest in maintaining the subsistence rights of the northern Ojibwa as a result. He had spent time with the Ojibwa in both 1899, and the first decade of the twentieth century. During the 1899 trip to the north shore of Lake Superior, Scott met a group of Natives from north of the height of land.⁴³ They traveled to meet Scott and his companion, Indian Superintendent J. Macrae, to complain of white trappers, miners and surveyors entering their hunting grounds and disturbing the game. If Ojibwa from north of the height of land were complaining of this it is logical to assume that the Robinson-Superior Ojibwa Scott and Macrae met faced similar problems, and made them known.

This 1899 meeting was the spark that led to the creation of Treaty Nine. Indian Affairs realized that trouble might appear if Whites continued to enter

unceded Native land. Six years later Scott and other members of the Treaty Commission traveled throughout the lands north of the arctic water shed to negotiate Treaty Nine (also known as the James Bay Treaty). Unlike the later 1929 adhesion to this treaty, in which the Commissioners flew northwards, Scott traveled only part of the journey by train and the vast majority by canoe. Unlike air travel the canoe permitted Scott to see and appreciate the land he was travelling through, and the people he met. In the summer of 1906, for example, the treaty party traveled first to Mattawa on the CPR line, and then, via Lake Timiskaming, to Fort Abitibi and other locations with the aid of Ojibwa guides.⁴⁴ The 1906 trip saw Scott skirt along the northern boundary of the Robinson Huron Treaty visiting the bands at Flying Post, Mattagami, and Matachewan.⁴⁵ After concluding negotiations at Matachewan the Commissioners traveled south via the Montreal River and Lady Evelyn Lake to the Temiskaming and Northern Ontario Railway Station at Lake Temagami. During this trip the treaty commissioners hired Ojibwa guides from Temagami to take them through the rivers, lakes and portages.

Scott's travels through northern Ontario, and his visits with the bands had a profound affect upon him and his poetry. A less explored facet of this voyage

⁴³ NAC, RG 10, Vol. 3033, file 235,225 pt. 1. 3 June 1901.

⁴⁴ Treaty Nine was negotiated in two summers: 1905 and 1906. The 1905 trip covered primarily those bands north of the Robinson-Superior Treaty. The 1906 trip dealt with bands north of the Robinson-Huron Treaty, particularly those accessed via the Montreal River. Scott's travels are recounted in his diary. NAC, RG 10, Vol. 1028 "Duncan Campbell Scott. Journal of James Bay Treaty Trips, 30 June - 6 September 1905, 22 May - 16 August 1906.

was how it formed Scott's opinions regarding subsistence hunting and the role it played in the lives of the Ojibwa. Unlike past deputy superintendent generals such as James Smart, Scott was not a political appointee but worked his way through Indian Affairs, had some actual experience with bands in northern Ontario, and appreciated the importance of hunting to them. This does not mean that Scott was not a product of his time. He believed that Natives should be acculturated and made to abandon their traditional ways. Until such time, however, hunting was an integral part of their culture. Scott's poetry reflected these opinions, particularly "The Onondaga Madonna," and "The Forsaken."

The former reads in part:

She stands full throated and with careless pose,
This woman of a weird and waning race,
The tragic savage lurking in her face,
Where all her pagan passion burns and glows...

And closer in the shawl about her breast,
The latest promise of her nation's doom
Paler than she her baby clings and lies...⁴⁵

This portion reflects the common belief, held by Scott too, that interbreeding would eventually result in the assimilation of Native peoples. The mother is from a "waning race." The cause of this is her child, who, being "paler than she, is obviously Metis. Such opinions regarding the eventual assimilation of Natives were common in the early twentieth century.

⁴⁵ Matachewan lies approximately fifty miles south of the height of land. Somehow it was overlooked in 1850, and signed onto Treaty Nine in 1906.

⁴⁶ D.C. Scott, "The Onondaga Madonna." Canadian Anthology, Carl F. Klinck and Reginald E. Watters eds. (Toronto: Gage Educational Publishing Company, 1974): 149.

Despite this, however, Scott also realized the importance of allowing Natives the ability to support themselves until such time as they were 'civilized.' In "The Forsaken" Scott used the same imagery of a mother and her child. A "Chippewa woman" and her baby are on a frozen lake in a snow storm. The woman is fishing with a line made of twisted cedar bark, and a rabbit bone hook. Lacking bait, the mother cuts herself and puts her own flesh on the hook:

Fished with the bare hook
 All through the wild day,
 Fished and caught nothing;
 While the young chieftain
 Tugged at her breasts
 ...
 Valiant and unshaken,
 She took of her own flesh,
 Baited the fish hook,
 Drew in a gray-trout,
 Drew in his fellows
 Heaped them beside her,
 Dead in the snow.⁴⁷

The woman in the poem saves herself and her child because of her ability to live off the land, and use traditional skills (or at least what Scott considered traditional).

Not all academics believe Scott's poems are an accurate portrayal of his attitudes towards Natives. Brian Titley states, unequivocally, that "Scott's poetry is a highly unreliable guide to his feelings regarding the native population."⁴⁸ Titley states that Scott's official writing, as a civil servant, provides a more accurate picture of Scott's attitudes. As evidence Titley points

⁴⁷ Scott, "The Forsaken." *Ibid.*: 151-152.

⁴⁸ Titley, 32.

to eight scholars all with differing views regarding Scott's poetry, and what it reveals about his opinions regarding Native peoples.⁴⁹ This, apparently, is enough evidence for Titley that Scott's poetry is unreliable for understanding his bureaucratic life and treatment of Natives. This indictment of professors of English, that they lack consensus, is weak considering that academics from any discipline can hold differing views on the same topic. Scott's poetry, at least within the context of hunting rights, offers important insight into his motivations. While the official records he left behind are more revealing, Titley should not ignore what was obviously an important feature of Scott's life.

Stan Dragland offers a different view in his book, Floating Voice.

Dragland maintains that "the only true recorded meeting of the whole man with individual Natives takes place in those poems."⁵⁰ While Dragland, the antithesis of Titley, focuses almost exclusively on Scott's poetry and essays he does make an important point: that Scott wrote almost no "Indian poems" prior to 1905 (the "Onondaga Madonna" is the exception although it may have been written as a result of his trip north in 1899), but afterwards there is "a poetic explosion fascinating to imagine happening at such a distance from a study in Ottawa."⁵¹ It is clear that this new environment affected Scott's official attitudes towards Native people. The Ojibwa ceased to be an abstract or distant people for Scott, but became the people he had met and traveled with.

⁴⁹ Titley, 30-31.

⁵⁰ Dragland, 14.

⁵¹ Dragland, 30.

Scott's trip led him to appreciate what Dragland terms the "transitional Indian:"⁵² Natives who had adopted some facets of White/British culture, but retained the majority of their traditional culture and practices. This more complex depiction of Scott's perception of Natives accounts for his desire to defend, albeit in a limited way but far more than his predecessors, the treaty rights of the Ojibwa to engage in subsistence hunting while at the same time encouraging their acculturation. The transitional Indian made its first appearance not in any of Scott's official/Indian Affairs work, but in an article he wrote for *Scribner's Magazine* in 1906 shortly after his return from northern Ontario. In this article Scott described a meeting between himself and Charles Wabino at Fort Albany in 1905:

His name was Charles Wabino. We found it on the [treaty] list, and gave him eight dollars. When he felt the new crisp notes he took a crucifix from his breast, kissed it swiftly, and made a fugitive sign of the cross. "from my heart I thank you," he said. There was an Indian at the best point of a transitional state, still wild as a lynx, with all the lore and instinct of his race undimmed, and possessed wholly by the simplest rule of Christian life, as yet unspoiled by the arts of sly lying, paltry cunning and the lower vices which come from contact with such of our debased manners and customs.⁵³

The Ojibwa of the Robinson Treaties were the transitional Indians that Scott wrote about in 1906. They hunted, trapped and fished, but had also adapted certain elements of Anglo-Canadian society. Although there are intimations of

⁵² Dragland, 51.

⁵³ Cited in Dragland, 48.

this concept in Scott's official writing and correspondence, it first appears in his literary work.

He carried this idea with him into his professional life, and it eventually led him to consider the possibility of challenging the Ontario *Game Act* even though he supported its general aims. Scott was a supporter of wildlife conservation, as evidenced by his own involvement in the creation of similar federal initiatives (such as the *Migratory Birds Convention*), but believed it was being applied inappropriately by Ontario when they restricted Ojibwa subsistence hunting. Scott likely appreciated the economic importance of hunting, fishing, and trapping to Ontario's economy. Scott also understood the importance of convincing Natives across Canada to abandon hunting and trapping, and take up more 'civilized' occupations such as farming. The *Game Act* facilitated this by restricting Native hunting. It also aided in the acculturation of Natives by making them amenable to the same laws as Whites. This was the guiding principle behind many of Indian Affairs' policies which sought to acculturate Natives into mainstream/English-Canadian society. Scott did not dispute the *Game Act* on these grounds. In his mind, however, the *Game Act* was being applied too quickly and harshly.

Scott wanted leniency for the more remote bands that still relied on hunting and trapping. These transitional Indians required additional time to abandon the hunt because the environment they lived in was ill suited to farming. While leniency was something Scott's predecessors also strove for in

their dealings with Ontario's Game Commission, Scott was willing to take stronger steps to secure his goals. Scott appreciated the role hunting and trapping played in the lives of the Ojibwa because he had spent months in the north. This appreciation and the construct he fabricated to understand it (the "Transitional Indian") gave Scott the intellectual foundation to formulate a clear policy regarding the *Game Act*, and the determination to see it through to fruition.

With his opinions formed, and the legal opinion of Martin behind him, Scott waited for the proper moment to raise the possibility of a stated case. This came approximately six months later, in June, 1917, when Alex McCoy, the Fort William Band chief, and Councilor Frank Peltier, sent a petition to King Edward VII. These were the same two men who wrote to Indian Affairs about the excesses of Constable Edwards a year previously. In their appeal they stated they could not receive justice from either the province of Ontario, or from Indian Affairs. McCoy and Peltier referred to the individual instances of arrest that occurred in the area over the past two years, and the death of Pierre Hunter after his two hundred mile trek from the Port Arthur jail to his home at Sioux Lookout without any money to purchase food or supplies. Now, they said, his wife and children had no one to support them. They referred to the imprisonment of Joe Martin for having moose meat to feed his daughters while his two sons fought overseas in the service of the King. In an attempt reminiscent of Ojibwa attempts to show military loyalty to the Crown during its wars with the United States,

McCoy and Peltier argued that they were still fighting for the Crown as their ancestors had in the past and as loyal subjects deserved some special consideration. Of Joe Martin's sons, they said, one had been killed in the trenches of France and the other wounded. Two other Fort William men, they noted, were awarded medals for bravery at the Front. Considering the sacrifices made by their bands in the service of the King, McCoy and Peltier said that it was wrong "that the older people of our Tribe should be unfairly dealt with and deprived of their only means of livelihood..."⁵⁴

Attached to their petition was a copy of the Robinson-Superior Treaty. They underlined that portion relating to hunting rights, and called the attention of King Edward to it. They said that this promise was kept by the Crown until the *Game Act* was created after which they were "placed nearly in the same position as white men." Reflecting an increased appreciation of the politics surrounding the issue, McCoy and Peltier said that the British North America Act was depriving them of promises made to their tribe by Queen Victoria:

...[we] are told that William Benjamin Robinson should not have agreed to the hunting and fishing clause and again that under the British North America Act, the Province of Ontario have full right to administer in everything in the province, thus cancelling [sic.] without our consent the most vital portion of our Treaty...⁵⁵

Both men asked the King to intercede with the government of Ontario to restore their hunting privileges.

⁵⁴ NAC, RG 10, Vol. 2406, file 84,041 pt. 2. Petition of Ojibwa Indians, 29 June 1917.

This petition seemed to be the catalyst which sparked Scott to action. While the petition was written in June, 1917, it did not arrive at Indian Affairs until August after being forwarded from the Governor General's office (which refused to forward it to Buckingham Palace). Scott wrote to E.L. Newcombe, the Deputy Minister of Justice, about the situation in the north. He noted that it was becoming increasingly acute, and that the time had come to have "the legality of the Indians' claim finally determined."⁵⁶ Scott recommended that in the event of a another prosecution (which was not unlikely) the Department of Justice and Indian Affairs should enter an appeal against the conviction and, if necessary, go to the Judicial Committee of the Privy Council to settle the issue.

If Scott was looking for support from Newcombe it was not forthcoming. His assistant, William Edwards, responded to Scott's request. Apparently the Department of Justice had not changed its original opinion expressed in 1898: Edwards did not think that, considering the current state of the *Game Act*, the issue was one for the courts to decide.⁵⁷ The only explanation for this advice was the possibility that the courts may not render a decision favourable to Indian Affairs, and effectively neuter any future attempt to secure hunting rights for Natives. What seemed more likely is Edwards and Newcombe did not want to risk challenging Ontario. Edwards recommended that Indian Affairs review the various treaties, and determine to what extent Natives should be immune to provincial game laws. Reflecting a general ignorance of the situation, Edwards

⁵⁵ Ibid.

⁵⁶ Ibid. Scott to E.L. Newcombe. 29 August 1917.

said Indian Affairs should then attempt to convince Ontario to adopt its recommendations regarding Natives and the *Game Act*. If this proved impossible the Dominion should pass legislation to supersede the *Game Act*, and accord Natives a degree of protection. This, Edwards, concluded was possible in light of section 91(16) of the BNA Act. Before attempting such an action, however, Edwards said Scott should open negotiations with the Ontario government.

If Edwards did not think the matter should be settled before the courts one wonders what Ontario's reaction would have been had the Dominion passed legislation protecting Ojibwa treaty rights, and in essence disallowed a portion of the *Game Act*. In general, however, Edwards' response reflected his department's ignorance of the situation. Since the first arrest in 1898 Indian Affairs had, albeit feebly, tried to negotiate a settlement with the Ontario government to no avail. Matters stalled after Edward's letter perhaps reflecting Scott's disbelief in the advice received from the Department of Justice. Scott wrote back to McCoy and Peltier and told them that their petition was being considered. That Scott wrote back to McCoy and Peltier personally is no small matter considering that past Deputy-Superintendent Generals only corresponded with Indian Agents, and told them to relay information to the bands.

⁵⁷ Ibid. Edwards to Scott. 5 October 1917.

By January, 1918, the chief and councilor were again writing to Indian Affairs to inquire as to their hunting rights.⁵⁸ This time, however, it was J.D. McLean who responded to their inquiry and he expressed little sympathy for their plight. Ironically it was the war, which McCoy and Peltier said had left the older members of the band in such dire straits, which prevented the government from turning its attention towards the problem. McLean, by-passing McCoy and Peltier, wrote to William Brown, the Indian Agent, regarding the recent complaint. Members of the government, McLean explained, were preoccupied with the war effort and other issues were being held over until the war's successful conclusion. McLean instructed Brown to relay this to the Ojibwa in his agency, and tell them to follow the game laws more closely in the future.⁵⁹

If McLean informed Scott of his letter and advice there is no evidence of it. It seems likely, however, given the actions of both men that Scott and McLean differed in their opinions regarding the *Game Act*. While McLean was satisfied with the current state of affairs it is apparent that Scott was not. Several months after McLean rebuffed McCoy and Peltier's letter, Scott wrote to the Minister of the Interior, Arthur Meighen, to explain the gravity of the situation facing the Ojibwa.⁶⁰ In an eight page memorandum Scott went into considerable detail regarding the issue. He started with the Robinson treaties, and the explicit

⁵⁸ *Ibid.* Scott to McCoy and Peltier, 29 August 1917. McCoy and Peltier to McLean, 16 January 1918.

⁵⁹ *Ibid.* McLean to Brown, 19 January 1918.

⁶⁰ *Ibid.* Scott to Arthur Meighen, 6 March 1918.

wording contained therein relating to hunting and fishing. From there Scott outlined how, starting in the late 1890s, the Ontario government began to apply its game laws more stringently against Natives. Scott also noted the advice Indian Affairs received from the Department of Justice - that Ontario was acting within its constitutional jurisdiction - and his dissatisfaction with it.

The matter, in Scott's mind, remained unsettled until Indian Affairs took firm action. Scott told Meighen that the Ojibwa were either "unwilling or unable" to accept the *Game Act*, and as a result the numerous violations and arrests were creating a volatile situation. Scott believed that many of these arrests happened due to over zealous game wardens and officers, and that these local events had brought matters to a head. Recently, he noted, two members of the Commanda family were arrested and brought before the magistrate in Sudbury and sentenced to one year in jail. Frank Latchford, a judge in northern Ontario, learned of this arrest and made a public announcement that the treaty rights of the Ojibwa were being violated: that they had the right to take game under the Robinson Treaties, and Ontario was violating an agreement between the Crown and the Ojibwa. While Latchford had not presided over the Commanda case his public statement, combined with the authority he wielded as a judge, still carried considerable weight.⁶¹ Combined with the recent petition

⁶¹ It is possible that Latchford, a Liberal, was simply trying to cause problems for Premier Hearst's Conservative government and the minister of Lands, Forest and Mines, George Ferguson. Latchford, at least by the 1920s, had a deep dislike for Ferguson. It was a mutual aversion. Ferguson later sought revenge upon Latchford during his premiership in retaliation for Latchford's time spent on Premier Drury's Royal Commission which investigated improper political

sent by the Fort William band to King Edward, Scott was convinced the matter had become serious enough to warrant Indian Affairs' direct intervention in the matter regardless of the Department of Justice's opinions to the contrary.

What the Department of Justice failed to appreciate, Scott warned, was that the government was open "to the charge of breach of faith with the Indians."⁶² With this, the first recognition of Indian Affairs' fiduciary responsibility, Scott proceeded to advise Meighen that some action was required. If the courts were not a viable option, Scott said Meighen could introduce a bill in Parliament which would be a national set of Game Laws. These would protect the treaty rights of the Ojibwa. Before taking such action, however, Scott recommended the Minister attempt to open negotiations with the Province to settle the issue. While bureaucrats made similar attempts in the past, Scott perhaps hoped that a political effort would yield results.

Meighen was both uninterested in Scott's memorandum, and his energies were directed elsewhere. Meighen finally replied to Scott's memorandum in the autumn of 1918, six months after it had been penned. Meighen's letter displayed an utter lack of understanding of the treaties in relation to the *Game Act* even though Scott quoted the treaties' hunting clause in full. Meighen concurred with the Department of Justice: that the matter was a policy issue, and not one for the

interference in the Department of Lands, Forests and Mines during Ferguson's watch. See Peter Oliver, G. Howard Ferguson: Ontario Tory (Toronto: University of Toronto Press, 1977): 97-100, 172. See also, Charles M. Johnston, E.C. Drury: Agrarian Idealist (Toronto: University of Toronto Press, 1986): 171-172, 174.

⁶² Ibid.

courts to consider.⁶³ Meighen said that Indian Affairs should only attempt to “modify” the *Game Act* as much as possible in deference to the treaties. After making this statement, however, Meighen contradicted himself by stating that the full rights promised by the treaties should be made available to the Ojibwa, and that “such restrictions as applies to hunting and fishing within these limits be consistent with the full and permanent enjoyment of those rights.”

Considering that Scott referred only to the Robinson Treaties in his memorandum it is logical to assume that Meighen was concerned with the same treaties. Meighen obviously misunderstood the hunting clause which guaranteed unrestricted hunting and trapping rights over unoccupied Crown land. The Minister, in essence, directed Indian Affairs to secure to the Ojibwa their full treaty rights although this obviously was not his intention as he concluded by saying that Indian Agents should urge the bands in their agencies “to comply with Provincial law.”

Meighen’s lack of interest in the matter was not due to his inability as a politician or Cabinet minister. Roger Graham, in his three volume biography of Meighen, depicted the minister and future Prime Minister as one of the ablest men in Cabinet. Meighen’s skills as a politician made him Prime Minister Borden’s point man on a number of contentious issues starting with the Naval Bill issue in the Commons in 1912 (by creating a bill to limit Opposition questioning), and continuing with the controversy over Regulation 17 in Ontario in 1916, and the election of 1917 (the same year he was made Minister of the

⁶³ *Ibid.* Meighen to Scott, 31 October 1918.

Interior as well as Secretary of State, and Minister of Mines).⁶⁴ Perhaps it was Meighen's experience in dealing with the issue of French language schooling in Ontario which opened the young politician's eyes to the contentious relationship between Queen's Park and Parliament Hill, and made him cautious about tackling Ontario over hunting rights. Ontario's support was of utmost importance to Borden's Conservative government considering the stranglehold the Liberals had on riding rich Quebec.⁶⁵ This, combined with the many wartime duties Borden heaped on his able minister, likely led Meighen to ignore Scott's advice.

It is also clear that the Ministry of the Interior was unimportant to Meighen, the Cabinet, and the Prime Minister. Graham noted in his biography that Borden did not give Meighen "charge of any departments which were vitally important in a wartime department" in order that he could be directed to those issues that Borden wanted handled quickly and efficiently.⁶⁶ Furthermore, even if Meighen had taken an interest in Scott's plan it is not certain if the Cabinet would have supported him. Meighen occupied an anomalous position in the government as someone who came "more and more to the fore, both in the Common's chamber and the Council room, [yet] he remained until the autumn of 1917 the most junior of the ministers."⁶⁷ Meighen's energies were clearly

⁶⁴ Roger Graham, Arthur Meighen, Volume 1: The Door of Opportunity (Toronto: Clark, Irwin & Company, 1960). Graham discusses Meighen's entry into Cabinet, and the aforementioned issues in chapters four to nine.

⁶⁵ Graham, 101-102.

⁶⁶ Graham, 86.

⁶⁷ Graham, 86.

directed elsewhere, but even if he had taken up the hunting issue it is clear that Indian Affairs was not going to attract the attention of Cabinet.

Scott could not contradict or ignore the dictates of his Minister. However, he was still willing to intimate to the provinces that their game laws were perhaps overly restrictive of Native subsistence hunting. Scott never came out completely against provincial hunting laws, or openly stated that they contravened any treaties but at times he courted provincial anger with his comments. This was most apparent in 1919 at a Dominion-Provincial Wildlife Conference.⁶⁸ At the conference, which included provincial representatives from across Canada, Scott made a presentation entitled: "Relations of Indians to Wildlife Conservation." Scott said that Indian Affairs tried to convince Natives everywhere to abide by provincial game laws; however, Scott also expressed a degree of sympathy for Natives. They had an increasingly difficult time trying to support themselves due not only to increased competition in the fur trade from white trappers, but the many regulations they are expected to follow.⁶⁹ This set off a barrage of comments from the Saskatchewan and British Columbia representatives. Both men accused Natives in their provinces of wantonly slaughtering moose and other large game.⁷⁰ The Saskatchewan representative outlined how one party of Indians killed 127 moose, and left the moose heads to rot (this is not surprising as most of the meat is found on the rest of the moose).

⁶⁸ Frank Tough, "Conservation and the Indian: Clifford Sifton's Commission of Conservation 1910-1919." Native Studies Review, vol. 8, no. 1 (1992): 61-73.

⁶⁹ Tough, "Conservation and the Indian..." 65.

⁷⁰ Tough, "Conservation and the Indian..." 66-68.

The B.C. representative said that Natives in his province killed mountain sheep "just for the love of killing." Scott was forced to backtrack considerably, and concede that game conservation was a provincial concern and the provinces had every right to enforce their laws.

Frank Tough has examined the Dominion-Provincial Conservation Commission, and looked at the opinions Scott expressed there. While Tough is correct in one sense, Scott decided not to openly challenge the provinces' game laws and their effect on Indians, he fails to appreciate the complexity of the matter for Scott. Scott was trapped between his own desires, conflicted as they might be, and the orders of his Minister. Scott wanted Natives to adopt White manners, culture and society, and reject their traditional lifestyle. This civilizing mission was Indian Affairs *raison d'être*, and led it to adopt a paternalistic attitude towards its wards: they were children who required guidance. However, Scott also appreciated the necessity of hunting for the "transitional Indian," but could not act on this because his Minister refused to support a him.

While such complexities explains the actions of Scott and Indian Affairs they did little to help the Ojibwa. Faced with what they perceived to be simple inaction on the part of Indian Affairs some Ojibwa turned to local media to turn public opinion in their favour. A local Port Arthur newspaper, the News Chronicle, ran two editorials in January, 1919, regarding the treaty rights of the Ojibwa. The service of Fort William men in the Canadian Expeditionary Force served the band in good stead. Francis Boucher, a Fort William Ojibwa, had

fought overseas and lost a leg in the process. Upon his return, frustrated by the game laws affecting his band, Boucher went to the editor of the News Chronicle to complain. The result was a series of editorials. The first editorial, which ran on January 15, 1919, noted with appropriate patriotism that "the Indians of Canada sent quotas from every section of the country..." to fight for King and Country.⁷¹ Upon their return, however, these same men who had literally laid their lives on the line found the Ontario government no better towards them than Germany had toward Belgium in 1914. The Ontario government, the editor said, "had done to the Indians what the Germans did to Belgium in the way of maintaining a treaty." Boucher, the editorial explained, claimed that the Indians "are entitled to shoot game for their own use at any season and are not governed by the game laws of the province." The editorialist noted, with some degree of perception, that the Ojibwa were helpless. They were not a potent political force, and were seen as being "more bothersome than useful" by people both in and out of government. Considering the important role Natives across Canada played in the war effort the paper noted the irony that Canada fought a war because of a broken treaty, and was now disregarding its own treaties:

But the Indian, having taken a comparatively large part in the war, which was caused by the breaking of a treaty [Germany's invasion of Belgium], has a right to now ask that the intention of the treaty made with his forefathers shall be carried out.⁷²

⁷¹ NAC, RG 10, Vol. 2406, file 84,041 pt. 2. "A Broken Treaty." 15 January 1919.

⁷² Ibid.

In a further editorial the following day, the News Chronicle abandoned its more patriotic depiction of the hunting issue and delved into the legal aspects. In considerable detail it outlined the meeting between William Robinson and the assembled bands at Sault Ste. Marie in 1850. From there it detailed the land ceded by the Lake Superior bands, and the promise that “the Chiefs and their tribes [retained] the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have hitherto been in the habit of doing...” except for land sold to private individuals or companies.⁷³ This meant, the editorial concluded, that the Ojibwa retained full and free access to their hunting grounds. The Ontario government was, in the opinion of the paper, a party to the treaty and could not simply ignore its provisions:

That contract should be held sacred and no set of men at Toronto, at the behest of hunt clubs or fish clubs, has the right to make the Queen of England a liar, which they are doing every time an Indian is penalized for hunting or fishing out of season.⁷⁴

As regards Indian Affairs, the paper said it was “nothing short of derelict to its wards...” The treaty’s hunting clause was plain and clear, and Indian Affairs could offer no excuse for its behaviour. Until such time as the Ontario government and Indian Affairs recognized the Ojibwa’s treaty rights neither government was any better than Germany on the day it invaded Belgium.

⁷³ Ibid. “The Indians and his Right.” January 20 1919.

⁷⁴ Ibid.

Equally strong and opposite views were expressed by others in the north. The Northern Ontario Guides Association, for example, believed that Chippewa (i.e.: Ojibwa) hunters were destroying big game in the north.⁷³ Reflecting many of the general misconceptions regarding Ojibwa hunting the president of the association, F.G. Armstrong, stated it was “a well known fact throughout the North that the Indians kill many moose...” not for meat but because of a simple desire to kill. Armstrong warned that unless Indian Affairs convinced the Ojibwa to follow the game laws moose would go the way of the buffalo. Unaware of the irony of this statement, Armstrong was obviously unaware that it was the White buffalo robe trade that led to the near demise of the plains buffalo. Regardless, Armstrong suggested that Indian Affairs translate the game laws into Ojibwa and Cree syllabic as a means of teaching the laws to the hunters and preventing the “ruthless slaughter” being wrought by them.

The conflicting opinions of the News Chronicle and the Guides Association show how the debate regarding hunting and Native treaty rights on a local level was not much different from that affecting Duncan Campbell Scott on a national level, and how this local debate was finally affecting men like Scott. Indian Affairs officials, notable Indian Agents and Scott, finally began to realize the gravity of the situation. Scott recognized that Indian Affairs was, in fact, breaking its treaties with the Ojibwa by refusing to protect the bands’

⁷³ NAC, RG 10, Vol. 6745, file 420-8 part 3. F.G. Armstrong to D.C. Scott, 27 August 1920. It is ironic that this organization, which depended heavily on American sport hunters would use the American term “Chippewa” when referring to the Ojibwa.

hunting and trapping rights. His experiences in the north convinced him that the bands needed protected subsistence hunting rights. Indian agents, placed in the middle of difficult circumstances, adopted a similar position. They knew that local provincial officials were singling the Ojibwa out for harassment and this denied families their most important means of supporting themselves.

Conversely, the opinions of the Guides Association certainly reflected those of Ontario's Department of Game and Fisheries. Their portrayal of Natives in general as ruthless killers was a replica of the first Game Commission report in 1892. Kelly Evans' 1912 report continued this belief into the twentieth century, and supported the ill-informed opinions of guides and hunting associations across Ontario: savage and blood-thirsty Natives damaged Ontario's wildlife resource as much as the roving packs of wolves that infested the woods. That Evans was the founder of the Game Protective Association further indicated that extent to which the Department of Game accepted the opinions of the White hunters and trappers across the province.

Lastly, the opinions expressed by the Port Arthur News Chronicle, Indian Agents, and to a lesser extent by Scott, indicates the extent to which the Ojibwa, although unable to control matters, kept the issue alive and gained new allies in their attempts to protect their treaty rights. As Scott noted in a letter the bands were either "unwilling or unable" to abide by Ontario's game laws - the answer was both. With limited opportunities for wage employment, as outlined in chapter two, and farming an unworkable option in the poor soil of northern Ontario reserves, the Ojibwa could not stop hunting when their driving

motivation was hunger and subsistence. Scott realized this and attempted to protect subsistence hunting rights as much as he could given his own preconceived notions regarding Natives and their eventual fate of assimilation. Indian Agents, at least those in the Fort William area, sympathized with the Ojibwa's plight and attempted to convince Indian Affairs to take a stronger stand against the Department of Game. The editorials in the News Chronicle shows that some Ojibwa came to realize that public opinion was an important element in their fight. Just as the Department of Game listened to guides associations Indian Affairs took notice of public editorials that condemned its inaction. Indian Affairs would continue to be pushed by the Ojibwa into action even into the 1930s. It became apparent to Indian Affairs that the situation in the Robinson treaties would not simply go away because the Ojibwa would not permit it to. Scott's transitional Indians were not prepared to give up their hunting rights.

Chapter Six
A Lost Chance:
Padjena v. Rex, 1920-1931

In 1929 the Port Arthur News Chronicle ran an editorial entitled "The Robinson Treaties." The catalyst was the recent arrest of two Ojibwa from the Pic Mobert Reserve, Joe Padjena and Paul Quesawa, for having beaver pelts out of season. While such instances usually resulted in the pelts merely being confiscated the arresting game warden, Harold Harrison, chose to prosecute the two men before the local magistrate. The News Chronicle, already sympathetic towards the Ojibwa and their attempts to protect their subsistence hunting rights, attacked the decision of the Department of Game to proceed with this prosecution. The Robinson-Superior, it argued, was a binding agreement created in good faith - a faith the province was breaking. Aware of the animosity the Ojibwa felt towards the game laws the editor wondered where it all might end. With a degree of foresight he predicated that this case may prove "to become famous for the Indians present a very united front to have their treaty rights fulfilled."¹

This prediction turned out to be partly true. Padjena and Quesawa were found guilty by the magistrate of contravening Ontario's *Game Act* and fined \$600.00. These men, although they did not have legal representation during the initial trial, retained the services of a Port Arthur lawyer, Arthur McComber, who appealed their conviction based on the treaty and the contention that the

¹ NAC, RG 10, Vol. 6747, file 420-8x part 1. "The Robinson Treaty." 18 January 1929.

***Game Act* could not restrict the hunting promises contained therein.**

Approximately a year later Judge McKay of the District Court in Fort William overturned the earlier conviction. McKay stated in his decision that the hunting rights guaranteed to the Ojibwa under the Robinson-Superior Treaty could not be ignored by the provincial government, nor could the *Game Act* restrict the treaty rights promised to the Ojibwa. For the first time an Ontario court recognized and affirmed the hunting rights of the Ojibwa, and stated that the *Game Act* was *ultra vires* of the Ontario legislature.

A stunned provincial government appealed McKay's decision, and then resorted to the same tactics that had worked so well during the earlier HBC legal challenge in 1912: stalling and harassment of the Ojibwa. It had worked well during the Hudson's Bay Company's challenge in 1912, and provincial officials had no reason to doubt its effectiveness. Ontario's Attorney-General's office tried to delay the appeal being heard before the courts, while at the same time it and the Department of Game issued orders to game wardens and other provincial enforcement officers to continue arresting all Ojibwa in the Robinson treaties who broke the game laws to maintain its authority. Local northern magistrates, who must have been aware of McKay's decision, still found the men brought before them guilty. Indian Affairs, which assumed the financial burden of hiring a lawyer to represent the interests of Padjena and Qewasa in Toronto, found itself in the same position the HBC was in 1912: awaiting an appeal while the provincial government continued to engage in behaviour of dubious legality.

Following the period during the war years the hunting issue evolved into its third phase by the 1920s as the Ojibwa, Indian Agents and Indian Affairs officials in Ottawa began to take a more active role in solving the problem. The Ojibwa, whose frustration and anger had increased during the preceding decade, began to take matters into their own hands. This culminated in the case of *R. v. Padjena*. The same can also be said of the Indian Agents. They believed, based on past experience, that Indian Affairs' officials in Ottawa were either unwilling or incapable of protecting the Ojibwa's hunting rights. For the agents, *R. v. Padjena* also represented a chance to finally settle the issue.

Initially, there was some cause to believe that the matter might well be settled in a court room hundreds of kilometers from Ottawa or Toronto. Starting in the 1920s, Indian Affairs in Ottawa had become more active. It abandoned its previous policy of avoiding confrontations with the Ontario government, and began to defend the Ojibwa's treaty rights more vigorously. This grew out of the direction of Duncan Campbell Scott, the Deputy-Superintendent of Indian Affairs who re-directed Indian Affairs efforts towards securing the Ojibwa relief from the application of Ontario's *Game Act* until such time as they abandoned the rifle and trap and took up the hoe and plough. This culminated in Scott's decision to provide legal counsel for Padjena and Quesawa when the Ontario government appealed Judge McKay's decision in 1930. Although this ultimately came to naught it marked the beginning of Indian Affairs' new policy of pursuing the hunting issue with greater vigor, and attempting to permanently

secure the Ojibwa some subsistence hunting rights until their eventual acculturation made such rights unnecessary.

Until that Sisyphean task was accomplished, however, the Ojibwa faced immediate problems which required attention. Increased hunting by Whites reduced the availability of game for the Ojibwa, and Game Wardens compounded this problem. Indian Agents received complaints from the bands that Whites were encroaching on their trapping and hunting grounds, and often pushed Ojibwa hunters off their traditional territory. This problem increased in the 1920s with the collapse of pulpwood prices, and the closing of logging camps in northern Ontario. Unemployed white loggers turned to hunting and trapping for food and income, and pushed Ojibwa families off traditional territories. Game wardens only exacerbated this problem. While the Department of Game said it instructed its wardens to treat Indians hunting for food with leniency this was rarely the case. Game wardens possessed a narrow concept of what constituted food, and this resulted in hunters with beaver being arrested. Often wardens simply ignored their instructions altogether and arrested Ojibwa for hunting moose or deer.

The Department of Game worsened the situation by creating game preserves in northern Ontario. During the 1920s, prior to the depression, the Department decided to create game preserves as a means of maintaining a viable supply of game animals. They were a means of maintaining the economic viability of Ontario's hunting stock. These preserves, on which hunting, trapping and fishing was prohibited, contained sizable populations of various

species. As these populations grew the excess, in theory, would spill out of the preserve into the surrounding territory, and be mopped up by paying sport hunters and trappers. The problem, however, was these preserves were created with little attention paid to the Ojibwa who resided within them. It happened with the Chapleau Game Preserve, and in the case of Quetico Provincial Park. Without any forewarning of a preserve's existence Ojibwa hunters were arrested for hunting in protected areas.

The game preserves only convinced Indian Affairs' officials that the Department of Game would not compromise its game laws, but was actively strengthening them. Faced with this intransigence officials adopted a more belligerent policy, and Scott's idea of the "Transitional Indian" was translated into Indian Affairs' new policy. Scott and other officials began to actively try and secure increased subsistence hunting rights for the Ojibwa. This endeavour was made easier with the departure of older bureaucrats, notably J.D. McLean, who had little time for the Ojibwa's problems, and an incoming generation of new bureaucrats. *R. v. Padjena* was Indian Affairs' test of its new policy.

Initially, *R. v. Padjena* seemed a perfect test case as it permitted Scott to test Ontario's *Game Act* without openly challenging the province. When Ontario's Attorney-General appealed Judge McKay's decision Scott agreed to pay for the services of a Toronto lawyer. This counsel would represent not only the interests of Padjena and the Ojibwa throughout the Robinson treaties, but more importantly Indian Affairs'. He could settle the legal questions

surrounding the hunting issue under the guise of fulfilling Indian Affairs' fiduciary responsibility to the Ojibwa without compromising Indian Affairs' general policy of not antagonizing Ontario's Department of Game or Attorney-General. Indeed, when the Attorney-General asked why Indian Affairs had embarked on this policy, Scott responded that he had no choice due to his department's legal obligation towards Natives. Scott, in essence, could use legal and moral necessity to justify his actions while squeezing concessions out of the Ontario government. *R. v. Padjena* offered him the perfect opportunity to do so without compromising Indian Affairs civilization policy towards Natives. Compared to the HBC's 1912 case against the *Game Act* the *Padjena* case was far superior. While the HBC sought to protect commercial hunting and trapping rights the *Padjena* case was concerned only with subsistence hunting; therefore, it fit into Indian Affairs' general policy of persuading Natives to adopt more sedentary activity such as farming or wage labour. Subsistence hunting was acceptable, indeed necessary for some bands as they slowly evolved and abandoned traditional pursuits. Indian Affairs, therefore, could pursue the case and still adhere to its assimilationist goals.

It was readily apparent to Indian Affairs that it could not simply ignore the *Padjena* case. Ontario, despite its lofty announcements that it had the best interests of Natives at heart was continuing to blatantly ignore treaties across northern Ontario and deny the Ojibwa subsistence hunting rights. Quetico Provincial Park and the Chapleau Game Preserve, although neither was located

within either Robinson treaty, reflected the contempt the province had for Indian treaties in general. In both instances the park and preserve boundaries were set with no thought given to the Indian reserves that were situated in each of them. Reserves were relocated and traditional trapping and hunting grounds were made off limits to families that had used them for generations. In the case of Chapleau it disrupted the hunting of some Robinson-Superior families, notably those from Michipicoten, who traditionally hunted north of the height of land, and within the boundaries of the preserve.

R. v. Padjena foundered on the concept of Aboriginal rights, and the pervasive sense of paternalism that infected almost all facets of Indian policy. Regarding the former, Indian Affairs agreed to support Padjena and Quesawa during the appeal because it was understood that the men were arrested for trapping beaver within the boundaries of the Robinson-Superior Treaty. When it became known that the beaver were procured beyond the treaty boundaries Indian Affairs dropped its support on the grounds that neither man could seek protection under the treaty. This was a limited reading of the treaty on the part of Indian Affairs for it was quite likely that either Padjena and Quasawa were hunting on their traditional grounds, or had received permission to trap there and as such could claim an Aboriginal right to trap. Such practices fit into the nature of traditional harvesting in the nineteenth and early twentieth centuries (see Chapter one). Furthermore, the treaty stated that the Ojibwa could continue to hunt as they had been in the habit of doing - based on available evidence (see

chapter one) many of the Robinson-Superior bands hunted north of the watershed, and the Pic River Ojibwa historically had close ties to the Long Lake band. However, owing to the limited definition of treaty and aboriginal rights and sparse knowledge regarding Ojibwa culture (at least at Indian Affairs) that existed in the 1930s Indian Affairs withdrew from the appeal and the issue was never decided.

Even had Indian Affairs continued to support the Ojibwa it is uncertain how the Appeal Court would have ruled. The appeal judges made it known to both sides that, in their opinion, the *Game Act* could not affect or restrict the treaty rights of the Ojibwa; however, they did not think it was in the best interests of the Ojibwa to make such a ruling. Reflecting the paternalism common to the period the judges believed that the 'class' of people who stood to benefit most from the game laws were the Ojibwa, but they did not realize this because they were not sufficiently advanced to appreciate it. Using this reasoning they decided that the Ojibwa should be grateful for the game laws as they protected the very resource which was so important to them even though the same laws served to deny them rights which even the court recognized. The judges, therefore, did not want to deny the province's appeal and permit the Ojibwa to engage in a mad hunting spree and deplete the north of all its game. Bearing this in mind the judges asked that the Department of Game, Ontario's Attorney-General, and Indian Affairs attempt to work out a solution between the three of them.

Considering the actions of the Department of Game it was clear that it would not compromise its game laws. Within this light the Court's request was patently ridiculous. By the 1920s the Department of Game had embarked on new policies to that it was felt would conserve wildlife in northern Ontario, but these also served to restrict Ojibwa hunting rights. This was plainly demonstrated by the creation of the Chapleau Game Preserve on June 1, 1925. The Ontario government created that preserve to conserve wildlife in the area, particularly beaver which the Department of Game believed were in danger of becoming extinct.² Located within the context of modern district boundaries the preserve covered parts of Sudbury and Algoma districts. Its total area was 4500 square miles. It also lay close to the Michpicoten Reserve. As noted previously the hunting territory of the Michpicoten Ojibwa likely extended as far north as Dog Lake which lay within the boundaries of the Preserve.

At the centre of the new preserve lay the New Brunswick House Reserve, created when the New Brunswick House Ojibwa (so named because of the Hudson's Bay Company Post situated there) signed Treaty Number Nine in the summer of 1906. With the creation of the preserve the Ojibwa could no longer hunt, trap or fish within the boundaries of the preserve. It is apparent that the Ontario government did not consult Indian Affairs when creating the preserve. Indian Affairs' first inclination that something had occurred in the area came in

² Douglas Baldwin, The Fur Trade in the Moose Missinabi River Valley, 1770-1917 (Toronto: Ontario Ministry of Culture and Recreation, 1975): 191. See also David T. McNab, "Research Report on the Chapleau Game Preserve and New

September, 1925, when George Prewar, an Anglican missionary, telegraphed D.C. Scott.³ Prewar informed Scott that the New Brunswick House Ojibwa were angry that an "extensive area surrounding their reserve" was now off limits to them.

Scott wrote to the Department of Game immediately upon receiving the telegram, but no response arrived for over three weeks. In the interim Prewar contacted Scott again, and provided a lengthy explanation of the situation in Chapleau and how the creation of the preserve affected not only the New Brunswick House Ojibwa but Natives north and south of the preserve too.⁴ Of particular importance was the Missanabie River which ran through the preserve. This river, Prewar explained, had been and still was of utmost importance to the Ojibwa:

The Missanabie River has been a traveled waterway for canoe and packet from time immemorial. Indian and voyageurs have used this stream to traverse the country from Michipicoten to James Bay, living on the game and fish which the country and rivers abounded in...⁵

While Prewar acknowledged that few Ojibwa still resided on the Brunswick House Reserve, since the HBC post relocated to Peterbell on the Canadian Pacific mainline, the area covered by the preserve was still used for hunting and trapping. Prewar noted that not all the Ojibwa who used the preserve were

Brunswick House Indian Reserve #76, Treaty #9." (Toronto: Ministry of Natural Resources, 1980): 5.

³ NAC, RG 10, Vol. 6745, file 420-8a. George Prewar to D.C. Scott, 21 September 1925.

⁴ Ibid. Prewar to Scott, 9 October 1925.

from New Brunswick House Reserve, but that some came from Michipicoten and Chapleau.⁶ The latter hunters' territories either straddled the preserve's boundaries or lay within its borders.

Prewar argued that Indian Affairs should step in to protect the hunting rights of the Ojibwa as "the Indians depend on Dominion Authorities to see that their rights are not infringed upon." While Prewar was concerned primarily with the New Brunswick House band, since their reserve was surrounded by the game sanctuary, his anxiety can be easily extended to all the hunters whose territories lay within the preserve. While Prewar believed that laws should be obeyed those that harmed innocent people could not be tolerated. Natives were already suffering, he said, as white trappers pushed them off their traditional hunting grounds. Prewar feared that the privation suffered by the Ojibwa might lead them to alcoholism. If the Dominion government would not live up to its responsibility, Prewar warned, Indian Affairs would be responsible for providing food to the Ojibwa.

The Department of Game and Fisheries was not concerned with the plight of the Ojibwa. On October 12, 1925, D. McDonald, Deputy Minister of Game and Fisheries, wrote to J.D. McLean stating that the Department of Game and Fisheries was not disposed to change its policy because the situation concerning the New Brunswick House reserve did not warrant it.⁷ McDonald claimed to speak from experience since he had been "[in] charge of a Hudson's Bay Post

⁵ Ibid.

⁶ Ibid.

practically opposite the location referred to..." The Ojibwa, according to McDonald, did not reside on the reserve anymore, and their hunting and trapping grounds were some distance away from the game preserve.

Furthermore, according to Macdonald the game situation in the area was acute.

He claimed it was virtually impossible to find any fur-bearing animals on the Ojibwa's reserve. McDonald also believed it was not fair to ban white hunters and trappers from the preserve, but permit the Ojibwa to harvest there.

McDonald closed by stating that the game preserve would ultimately benefit the Ojibwa who would "in later years reap the harvest." When pressured further regarding Chapleau, McDonald wrote that "it is not necessary to deal with the subject at the present time."⁸

Reflecting an ignorance of hunting territories, and in some ways indicating why it eventually abandoned the Padjena appeal, Indian Affairs came up with a solution of selling the New Brunswick House Reserve to the Ontario government, and re-locating the Ojibwa. While this solved the immediate problem of the reserve location it did nothing for those families from New Brunswick, Michipicoten and Chapleau whose hunting grounds lay within the preserve.⁹ This solution grew out of a suggestion made by H. Bury, Supervisor

⁷ Ibid. D. McDonald to J.D. McLean, 12 October 1925.

⁸ Ibid., McDonald to J.D. McLean, 29 October 1925.

⁹ Robert and Nancy Wightman note that the Michipicoten Ojibwa almost entirely abandoned their small reserve at Gros Cap near Michipicoten in the 1880s, and moved inland to Chapleau. See W. Robert Wightman and Nancy M. Wightman, The Land Between: Northwestern Ontario Resource Development, 1800 to the 1990s (Toronto: University of Toronto Press, 1997): 97

of Indian Timber Lands. Bury wrote to Scott on 26 October, 1925.¹⁰ Bury had been at the New Brunswick House Reserve in order to estimate the value of the timber located on it. While there Bury realized that the Ojibwa of New Brunswick House, totaling 120 people, were suffering due to the creation of the preserve. They were prevented from hunting, trapping, and even carrying firearms. Bury pointed out that Treaty Nine stipulated that the Ojibwa and Cree had the right to hunt, trap and fish subject to regulations made by the government of the country. Within this context Bury believed the Ojibwa could not complain about the loss of their hunting grounds because they agreed to government hunting regulations when they signed the treaty apart from the lands they selected for their reserve.¹¹ However, the reserve, Bury noted, was completely useless for agriculture. By creating the game preserve around it, Bury argued, the province effectively prevented the Ojibwa from using a reserve they had chosen under the terms of the treaty.

Bury's solution, however, did not address the problem directly, rather it attempted to find a political solution that would suit both governments but do little for the Ojibwa. He recommended that the New Brunswick House Ojibwa be compensated by Ontario. This could, Bury wrote, take the form of a per capita annual allowance paid at treaty time, or simply buying the reserve. Bury believed this was a suitable course of action as the residents of New Brunswick House had not occupied the reserve permanently for some years. Seventy-five

¹⁰ Ibid. H. Bury to McDonald, 26 October 1925.

¹¹ This is not entirely true. See chapters three and eight.

cents per acre was sufficient, Bury said. This would allow the Province to have full control over the entire game preserve, "and the Indians would be properly compensated for the loss of their Treaty rights."¹²

Duncan Campbell Scott concurred with Bury's opinion. He wrote to W.C. Cain, Deputy Minister of the Department of Lands and Forests, and expressed concern over the preserve and the New Brunswick House Ojibwa.¹³ Although no longer permanent residents of the reserve, Scott wrote that approximately thirty trappers still used the reserve and twenty-three others the land adjacent to it, and were "rightly entitled to some reasonable compensation."¹⁴ If the province bought the New Brunswick House Reserve the Ojibwa could be properly remunerated, and the money "utilised for the benefit of the Indians." The response of the Department of Game and Fisheries was positive. Deputy Minister McDonald asked what the price for the reserve would be.¹⁵ If a suitable price could not be reached, McDonald continued, his department would amend the regulations in the game preserve to permit the Ojibwa to hunt and fish on their reserve only, but not outside of it.

This did little for the Michipicoten Ojibwa who had trapping and hunting grounds within the game preserve. Neither Scott nor Bury took an interest in them, but were concerned primarily with the New Brunswick House Ojibwa. One such hunter, Albert Fletcher of Michipicoten, was arrested in June, 1928, for

¹² Ibid.

¹³ Ibid. Scott to W.C. Cain, 12 November 1925.

¹⁴ Ibid.

¹⁵ Ibid., McDonald to Scott, 27 November 1925.

killing a moose within the preserve and fined twenty dollars. In a letter to Indian Affairs Fletcher explained that he killed the moose for food.¹⁶ Fletcher stated his hunting and trapping grounds were within the preserve, but now the game wardens "chase me away" and he could not make a living.

Chapleau was not the only instance of the province effectively stealing trapping and hunting grounds from the Ojibwa. Outside the Robinson-Superior Treaty, within the boundaries of Treaty Three, the provincial government expanded the northern limits of Quetico Provincial Park north to the CNR line in 1928 even though this would bring it close to Indian Reserve #25D.¹⁷ With this expansion more Ojibwa were arrested, and, owing to the interference of the Department of Game, convictions were insured. The first two Ojibwa arrested for hunting in Quetico were brought before the Fort Frances Magistrate for hunting within the park contrary to the *Provincial Parks Act*, but he acquitted them of all charges. When news of this reached the Department of Game it issued instructions to John Jamieson, Superintendent of Quetico Park, that in the future all people arrested for hunting in the park must appear before him. As park superintendent Jamieson, under the *Provincial Parks Act*, had the same powers as a magistrate when dealing with legislative infractions.¹⁸ With a biased magistrate the Ojibwa had no chance of a fair hearing.

¹⁶ NAC, RG 10, Vol. 6767, file 420-8x part 1. Albert Fletcher to Indian Affairs, 23 July 1928.

¹⁷ Deborah Doxtator, Jean Manore, "Research Report: Administrative History of Access by Native People to Quetico Provincial Park." (Toronto: Ontario Native Affairs Directorate, 1988):13.

¹⁸ Doxtator and Manore, 14-15.

With new game preserves being created, and older parks expanding, and the Department of Game seeking to guarantee convictions it became apparent to Indian Agents throughout northwestern Ontario, from Thunder Bay to Kenora, that the provincial government was acting in an illegal and unprofessional manner. Frank Edwards, who was the Indian Agent stationed in Kenora, wrote to Indian Affairs in 1927 regarding the creation of a forest and game preserve near Kenora. As a member of the Northern Ontario Guides Association (see Chapter 5) and local Indian Agent, the Kenora Board of Trade asked Edwards to advise them regarding the creation of the preserve.¹⁹ Edwards wrote to Indian Affairs to inform them that the proposed preserve would adjoin three Indian reserves. Although the area under consideration was not large compared to Chapleau and Quetico, Edwards said Ojibwa from all three reserves hunted and trapped there, and their rights would be taken from them if the preserve was created. Sympathetic to the problems facing the bands Edwards advised the Kenora Board of Trade that the Ojibwa suffered already due to land settlement, mining and logging activities which restricted their hunting and the proposed game preserve would only compound these problems. The Board's members were obviously not interested as it passed a resolution to create the preserve despite Edward's objections, and even though one local band chief expressed support for the idea provided some concessions were made for his band.

¹⁹ NAC, RG 10, Vol. 6747, file 420-8x part 1. Frank Edwards to J.D. McLean, 19 January 1924.

This incident, combined with his past experience dealing with Ojibwa complaints led Edwards to ally himself with Port Arthur Indian Agent J.G. Burke to convince Indian Affairs to take a stronger stand against the Department of Game. Both men attended a conference of game wardens in northern and northwestern Ontario in December, 1927. Afterwards they wrote to Indian Affairs to advise them of the desperate situation of the bands they were responsible for.²⁰ Their two agencies covered Treaty Three, part of Treaty Nine and a large portion of the Robinson-Superior Treaty, and the situation in all these areas was similar. They started by quoting the hunting clauses of the three treaties, and concluded that the Ojibwa were not able to enjoy the rights the treaties were intended to provide and protect. They both noted that wage labour opportunities for Natives in their agencies was limited, and families relied heavily on hunting, trapping and fishing. The problem, however, was that game was becoming scarce in both Agents' agencies.

The agents, unlike the game wardens, blamed white hunters and trappers for the state of affairs. The Indians, they said, trapped and hunted only for their immediate use, and took great care to preserve enough game on their grounds to insure a steady supply of animals on their hunting grounds. Given the influx of hunters, the Ojibwa were losing their hunting grounds and game was rapidly disappearing. Edwards and Burke reported that whites had no problem driving the Ojibwa away, and often resorted to threats of physical violence. Once they took possession of a particular area, white trappers had no interest in preserving

²⁰ Ibid. Edwards and J.G. Burke to D.C. Scott, 22 December 1927.

a suitable supply of game but trapped out all the fur bearing animals a practice referred to a "fur mining." They sold these pelts to "unscrupulous fur dealers" who, when caught, declared they purchased the pelts from Indians. It was this, the men explained, which often resulted in the Ojibwa bearing the brunt of criticisms regarding over hunting and trapping.

There was also the problem of Americans posing as Ontario citizens and taking out domestic hunting licenses. These were obtained from store owners who were not particular about who they issued licenses to. A person buying a license usually purchased supplies, ammunition and other hunting supplies which meant a sizable amount of business for a small store owner. This problem led Ojibwa hunters, they explained, to move further north, sometimes two or three hundred miles, to find new territory free of whites. Such a move was expensive as a larger outfit was required to supply the hunter during his journey. Lacking sufficient capital they often set off alone instead of taking their families with them as was customary. They usually left their wife and children behind near the residential or denominational schools so that their children would have somewhere to stay for the winter and regular meals. All of this resulted, Edwards and Burke reiterated, because of the encroachment of white hunters.

It seemed unfair, they argued, that the Ontario government and whites should benefit from other resources such as mining and timber while the Ojibwa could not hunt and trap. In their opinion the treaty was created, as far as hunting was concerned, "with an obvious intended balance in favour of the

Indian.” Such an arrangement was not necessarily one-sided considering the millions of dollars Ontario extracted from the treaty areas, and the profit that logging, mining and other companies made from the land. Edwards and Burke believed the Ontario government was “morally responsible for giving the Indians a reasonable and natural way of making a living by giving them a few more privileges than the white man as regards hunting, trapping and fishing...”

Both men recommended that Indian Affairs pressure the Department of Game to create specific regulations to protect the traditional hunting grounds of the Ojibwa. First, they wanted those who issued licenses to demand proof that the applicant had lived in Ontario for six months and was a citizen. As regards the Ojibwa, they recommended that exclusive trapping and hunting areas be set aside for them. Whether these areas would correspond to traditional grounds or not is unclear, but they would be marked for the exclusive use of a particular Ojibwa trapper. They also wanted severe penalties inflicted on anyone threatening Ojibwa trappers, interfering with their trap lines, “or otherwise molesting Indians in their legitimate hunting, trapping and fishing.” Several other suggestions revolved around fur buyers, and penalties that should be levied against them for buying furs from non-Indian trappers.

These recommendations went further than any suggested by an Indian Agent. Obviously both Burke and Edwards were well acquainted with the problems the Ojibwa faced, and the hardships they endured as a result of the game laws. Both men had, in the past, written to Indian Affairs to complain about the treatment the Ojibwa received when trying to engage in traditional

harvesting activity, and both were rebuffed. Their letter reflected the growing desperation and frustration of the Indian Agents and, indirectly, the bands. It was obvious to them that game wardens did not show the Ojibwa any leniency in the application of the *Game Act* and in some instances harassed Ojibwa families who were merely trying to secure enough food for their own subsistence. Faced with conditions such as this it is not surprising that Indian Agents and bands increasingly took the initiative in their struggle with the Department of Game.

It was within this environment that two Ojibwa men from the Pic Reserve, Joseph Padjena and Paul Quesawa were arrested for possession of beaver pelts out of season. The Ontario government passed an Order-in-Council in April, 1928, making it illegal for Indians south of the Canadian National Railway to possess raw beaver and otter pelts without a special license:

It shall be unlawful for any Indian residing outside of the territory lying north of the main line of the Canadian National Railway...to have the raw pelts of beaver and otter or any part thereof in possession at any time except under special license or permit issued by the Department of Game and Fisheries.²¹

Chief Ellis Desmoulin of the Pic Band wired Indian Agent Burke to complain about the arrest.²² In his letter Desmoulin touched on some of the same themes

²¹ Cited in Rex v. Padjena and Quesawa, Brian Slatterly, et.al., Canadian Native Law Cases, with comprehensive subject and statute indexes (Saskatoon: University of Saskatchewan Native Law Centre, 1986): 27-34.

²² Ibid. Chief Ellis Desmoulin to Indian Affairs, 19 December 1928.

Burke and Edwards outlined in their letter to Indian Affairs. Desmoulin stated bluntly that:

We are quite within our Treaty rights in trapping beaver and it is up to you as our Agent to see that we are protected. At the time our Treaty was made it was stated in the Treaty that our full trapping and hunting privileges would be protected for all time. No agreement was made about close seasons or anything of this nature.²³

Desmoulin said that twenty-seven skins, which comprised the entire catch, were taken from the two men; with the loss of this fur he said both families would have a hard winter. Desmoulin demanded that Burke take the matter up with Indian Affairs in Ottawa, and have the beaver skins returned. Farming was not an option for his band, he explained, because the soil on the reserve was poor. The families depended heavily on hunting and trapping to survive. Further exacerbating the problem, he said, was the fact that all the lumber camps had shut down for the winter. Out of work and needing money white camp workers were now in the bush hunting and trapping thereby making it "impossible for us to make a living unless we trap beaver."

Burke, already empathetic to the problems faced by the bands in his agency, took Desmoulin's complaint to heart. Indeed, in his letter to Indian Affairs he noted that Desmoulin was not the only person complaining in his agency of white men infringing on Ojibwa hunting grounds. Burke said the problem stemmed from the drop in the price of pulp wood which resulted in lumber camps closing, and former employees turning to hunting and trapping to

support themselves.²⁴ The Ojibwa, however, found themselves being pushed off their traditional trapping grounds. This resulted, he said, in Ojibwa trappers taking animals whenever they could. Burke said he warned them that they enjoyed no special privileges when trapping beaver, but said it was almost impossible for them to make a living without doing so. Burke asked headquarters to help Padjena and Quesawa recover their furs. He said the over trapping problem in the area stemmed from Whites. The Ojibwa, he said, were not natural offenders against the game laws, but did so only because of competition from white trappers.

Whites turned to hunting and trapping during the early 1920s and in increasing numbers during the Depression because of the prices that furs commanded and the fact that there were increasing numbers of buyers in northern Ontario. By 1920 numerous independent traders were operating throughout the north, and offered high prices, in cash, for furs brought to them. These high prices attracted large numbers of white trappers even though the 1920s also saw a great deal of flux in the prices different furs commanded.²⁵ Those living in the north commented on this phenomena. Dr. J.J. Wall, who was conducting a medical survey of bands between Cochrane, Ontario and La Tuque, Quebec in 1926, noted the large number of white trappers who took over

²³ Ibid.

²⁴ The drop in the price of pulp wood is analyzed in Morris Zaslow, The Northward Expansion of Canada, 1914-1967 (Toronto: McClelland and Stewart, 1968): 82-85.

²⁵ Arthur Ray, The Canadian Fur Trade in the Industrial Age (Toronto: University of Toronto Press, 1990): 107-114.

traditional Cree hunting grounds, and used poison for bait (and to purposely kill the Crees' sleigh dogs).²⁶ While Cochrane was far north of Lake Superior it indicates the degree to which white trappers had penetrated the north by the 1920s. Archie Belaney, after he entered his conservationist phase, noted that around the town of Biscotasing the area was over-run by "get-rich quick transient hunters [who] depleted the fur bearing animals almost to the point of extinction."²⁷ From the testimony of contemporary observers the Ojibwa were not to blame for the state of game in the north.

It was an observation the Department of Game was not interested in. Duncan Campbell Scott took the Padjena matter up with the Department of Game, but with no success.²⁸ Deputy Minister Macdonald said that beaver in that particular area of the north were almost extinct, and his department was not disposed to look lightly upon illegal trapping. Macdonald promised to take the matter up with the Minister, but he was currently in Bermuda. Whether the minister was in Bermuda for business or pleasure is unknown, but Scott received no further communication from Macdonald.

By mid-January, 1929, it became apparent that the Department of Game intended to make an example of Padjena and Qesawa. Agent Burke wrote to J.D. McLean to advise him that both men were being brought up on charges

²⁶ Cited in Ray, 202-203.

²⁷ Grey Owl (Archie Belaney), Pilgrims of the Wild (London: Peter Davies, 1935): 8.

²⁸ NAC, RG 10, Vol. 6747, file 420-8x part 1. D. Macdonald to D.C. Scott, 31 December 1928.

before Magistrate Depew in the town of White River on January 25.²⁹ Burke was surprised by this decision. In the past furs were confiscated, but the Ojibwa were never brought to trial. He explained that both men were destitute, and could not afford proper counsel. Burke asked if he should pay for a lawyer, or if he should attend to testify on behalf of the accused. Scott responded by telegram. Believing the men would be found guilty, based on past legal precedent, Scott advised Burke to attend the trial and plead with the magistrate for leniency on compassionate rather than legal grounds.³⁰

Documents from this original trial still exist. The synopsis of the testimony presented in court reveals the extent to which the Ojibwa were suffering as a result of the game laws, and how they clashed with traditional harvesting activity. The trial was held on January 25, 1929, before Magistrate Depew. Joe Bananish was sworn in as an interpreter as neither of the accused had a strong knowledge of English. Harold Harrison, the Game Warden who arrested the men, gave his testimony first. He said he and Wilfred Foubert, the game warden from Nipigon, met Padjena and Quesawa at White Lake, north of the Pic Reserve, searched their toboggan, and seized thirty beaver pelts comprised of sixteen dry and fourteen green pelts.³¹ When cross-examined by Agent Burke, Harrison said he received information that the two men would be

²⁹ *Ibid.* Burke to McLean. 17 January 1929.

³⁰ *Ibid.* Scott to Burke. 24 January 1929.

³¹ Department of Indian Affairs and Northern Development (DIAND), Treaties and Historical Research Centre (T&HRC). Unit No. P.92. Padjena, Joe and Paul Quasawa v. Rex/Police Magistrate, District of Thunder Bay. Typed transcript of Proceedings of trial, 25 January 1929.

using the trail near White Lake, and that they had beaver skins in their possession. Foubert corroborated Harrison's testimony.

Burke, the accused and Chief Desmoulin appear to have cooperated, and launched a two pronged defence: that Padjena and Quesawa had to trap beaver as a source of food, and that the Robinson-Superior Treaty protected their right to do so. The court transcript does not detail what Burke asked Game Warden Foubert, but his answers indicate that Burke was trying to prove to the Magistrate that the accused were hunting out of necessity, and for subsistence purposes. Foubert testified that he saw no rabbits near the Pic Reserve. While such a statement seems innocent, it is quite likely Burke tried to indicate that rabbit, an important source of food for the Ojibwa, was scarce and Padjena and Quesawa trapped the beaver for food. The furs were going to be sold, but only because it was illogical to simply throw them away.

When Joe Padjena testified in his defence he reinforced what Burke had started. He related he had two children, a wife, and an uncle and aunt to look after. He said he went hunting in late September to try and secure food for his family. Initially looking for moose, caribou or rabbit he eventually settled on beaver because he could not find any other animals. Since rabbit were scarce in the region it is possible that the existing population was suffering from a periodic outbreak of disease that rabbit are prone to. Padjena stated he trapped the beaver for food because the provisions he purchased at a store were running out. Although not stated in his testimony it was unlikely Padjena would have trapped the beaver, used the meat and discarded the pelts; this would explain

why the pelts were in his possession. While they would not have brought a good return due to the season they were trapped in they likely possessed some value either for trade or some other purpose.

Chief Desmoulin and Agent Burke substantiated what Padjena said. The chief asked the magistrate for permission to address the court. Desmoulin said that the Robinson-Superior Treaty protected the Ojibwa's right to hunt trap and fish "so long as the sun moves, the water runs and the green grass grows." His band, he said, were having a difficult time supporting themselves by hunting. White hunters and trappers were entering the bush in increasing numbers, and taking all the game away. Families were becoming desperate as a result and taking whatever animals they could. Agent Burke made a similar statement. He outlined how the closing of lumber camps had forced Whites to take up hunting and trapping. The Ojibwa, as a result, were now forced to break the game laws to support themselves. Burke asked Magistrate Depew to take this and the financial situation of the accused into consideration and show leniency.

These appeals had a limited affect on Depew. He found both men guilty based on faulty interpretation of case law. Regarding the Robinson-Superior Treaty Depew said the case of Sero v. Gault (1921) had already established the principle that the Ontario government could "make regulations affecting Game and Fisheries, and...include Indians in said Regulations."³² Sero v. Gault³³

³² Ibid. Judgment in case of King vs. Joe Padjena and Paul Quesawa. 25 January 1929.

concerned a Mohawk widow from Tyendinaga Band in Hasting's County. The woman owned a four hundred foot seine which was operated by a number of band members to catch fish in the Bay of Quinte. Thomas Gault, a Dominion fishery inspector, and John Fleming, a game and fisheries warden, entered the reserve and seized the net. Sero demanded that the net be returned to her as the seizure was illegal. She contended that the Mohawk were an independent people who, while historically allies of the Crown, never submitted themselves to Crown rule.³⁴ Gault, in his defence, said that both the Dominion and Ontario fishery regulations empowered him to seize any net which was being used contrary to existing legislation.

Justice Riddell of the Supreme Court of Ontario agreed with Gault. Since the Mohawks never produced any evidence that they possessed a valid fishing license their actions were unlawful. Furthermore, he rejected the notion that the Mohawks were an independent people. Riddell referred to pre-Confederation correspondence regarding the state of Mohawk sovereignty in Upper Canada, earlier case law regarding a Mohawk charged with murder in 1822, and to English Common law which stated that those born "within the dominions of the Crown whatever may be the nationality of either or both of his parents" is

³³ Case cited in Brian Slatterly et.al., Canadian Native Law Cases, with comprehensive subject and statute indexes (Saskatoon: University of Saskatchewan Native Law Centre, 1986): 27-34.

³⁴ Ibid. 31.

subject to the laws of the Crown.³⁵ For these reasons Riddell ruled that the Mohawk were subject to the prevailing fishery laws.

In the case of Padjena and Quesawa, Magistrate Depew extended Riddell's ruling into an area where it clearly did not apply. The Robinson-Superior Treaty plainly stated that the Ojibwa retained the right to hunt, trap and fish as they had been in the habit of doing. The Ojibwa never claimed to be immune to other provincial laws, but merely asked that the promises made to them by the Crown in 1850 be honoured. Regardless, Depew took Riddell's decision at face value, ignored the specifics of the case before him, and found the accused guilty of breaking Ontario's *Game Act*. Under the act the fine for having beaver skins out of season was a minimum of twenty dollars and a maximum of one hundred dollars per skin. Depew, "having respect for the hardships which at present the Indians are enduring owing to the scarcity of Game..." set the fine at twenty dollars per skin for a total of six hundred dollars.³⁶ If the men could not pay the fine they were to each serve thirty days hard labour in the Port Arthur jail.³⁷

In the space of a few hours events were put into motion to challenge the ruling. Padjena and Quesawa were not prepared to either pay the fine, which they could not afford, or spend time in jail. Present at the trial was Arthur McComber, a lawyer from Port Arthur. He filed notice of appeal immediately

³⁵ *Ibid.* 31-33.

³⁶ DIAND, T&HRC, Unit No. P.92. Padjena, Joe and Paul Quasawa v. Rex/Police Magistrate, District of Thunder Bay. Judgment in case of King vs. Joe Padjena and Paul Quesawa. 25 January 1929.

after Depew rendered his judgment and convicted the men. Agent Burke lent what aid he could. He wired D.C. Scott after the trial to inform him of the decision, and that the Department of Game was willing to reduce the fine if contacted.³⁸ Indicating Scott's interest in the case he sent a telegram to the Department of Game the same day and asked that it reduce the fine imposed on Padjena and Quesawa.³⁹ The Department of Game agreed to reduce it to two hundred dollars.

When news of the appeal reached the Department of Game it asked Indian Affairs why its agent, Burke, was encouraging Padjena and Quesawa to appeal the decision.⁴⁰ With what constituted a veiled threat, McDonald asked how Indian Affairs could expect his department to continue granting the Indians leniency and privileges when it was supporting their legal appeals. J.D. McLean responded to McDonald, and assured him that Indian Affairs was not responsible for the current appeal. Padjena and Quesawa had retained legal counsel on their own, and were acting independent of Indian Affairs and Agent Burke.⁴¹ McLean also told McDonald that Indian Affairs was trying to convince the Ojibwa to follow the game laws, but that in this instance the Department of Game had not told Indian Affairs about changes to regulations regarding the trapping of beaver. This resulted in Padjena and Quesawa trapping out of

³⁷ Ibid. Conviction, 25 January 1929.

³⁸ NAC, RG 10, Vol. 6747, file 420-8x, part 1. 25 January 1929.

³⁹ Ibid. Scott to McDonald, 25 January 1929.

⁴⁰ Ibid. McDonald to McLean, 28 February 1929.

⁴¹ Ibid. McLean to McDonald, 11 March 1929.

season. He agreed with McDonald that it would be a calamity if the appeal were successful, and the region thrown open to unrestricted trapping.

While McLean had a low opinion of the appeal it is apparent that Agent Burke retained a deal of sympathy for Padjena and Quesawa. Writing to D.C. Scott, Burke informed him that the appeal would be heard shortly. In the event that it proved unsuccessful Burke suggested that Indian Affairs continue the appeals process on behalf of the Ojibwa.⁴² He said they were under the strong impression that the treaty enabled them to hunt and trap when they pleased, and Burke agreed. "This right was given to them to insure their livelihood," he said. Burke argued if the Ontario government derived them of it then it should pay some form of compensation. Burke believed that until the matter was settled by pursuing it through the courts arrests and jail sentences would continue to plague the Ojibwa.

When the appeal was finally heard, before Justice McKay of the Ontario Division Court in Port Arthur, the outcome was not what either Indian Affairs or the Department of Game expected. The appellant's arguments still exist. They reveal how the bands had become more sophisticated in their efforts to protect their hunting rights.⁴³ While it is obvious that many of the arguments made by Padjena and Quesawa originated from their lawyer it can be assumed that McComber met with his clients prior to the appeal and explained the nature of the constitutional arguments to them, and consulted with them. Their first, and

⁴² Ibid. Burke to Scott, 6 September 1929.

most important argument, was that the Robinson-Superior treaty granted the Ojibwa hunting and fishing privileges. This promise was made freely by the Crown, and in return the Ojibwa ceded their land. After the treaty was signed there was a long precedence established by the Province of Canada, and later Ontario, as each permitted the Ojibwa to exercise their full treaty hunting rights.

McComber also drew extensively on the constitutional division of powers as outlined in the British North America (BNA) Act. While Ontario did not inherit the fiduciary responsibility that accompanied the treaty by virtue of section 109 of the constitution it agreed to respect any interests other than the provinces in the land and its resources. Section 109 reads:

All lands mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated, subject to any trusts existing in respect thereof, and to any interest other than of Province in the same. [emphasis contained in document.]⁴⁴

The Province of Ontario, according to the appellants, had express notice in 1867 by virtue of section 109 that their legislation had to consider the Ojibwa interest in wildlife. Furthermore, section 91(24) of the BNA Act gave the Dominion government sole legislative authority over "Indians and Lands reserved for Indians." Therefore, the Ontario *Game Act*, and the Order-in-Council issued

⁴³ DIAND, T&HRC, Rex v. Padjena and Quesawa, Argument of appellants on appeal to Division Court, 10 April 1929.

⁴⁴ Ibid.

thereunder which changed the open season for beaver and resulted in the arrest of the appellants, was *ultra vires* of the legislature because it directly affected Indians.

McComber also drew extensively on case law to support his argument that the province cannot affect the terms of a treaty, and that the Dominion government had sole authority over Indian affairs. He referred to United States' legal precedence which states that treaties made between the United States and Indian tribes "constitute a part of the supreme law of the land, and Acts of a State Legislature in conflict therewith are void." Cases in which it was decided that provincial legislatures could not pass laws that affected Indians or lands reserved for Indians were outlined for the court, as were the specifics of Sero v. Gault. McComber noted that there were four reasons why Magistrate Depew erred when using this case to substantiate his decision: first, there was no treaty involved in the Sero case; the Crown made no promise to the Tyendinaga band that they could hunt and fish as they pleased; the lands occupied by the band were granted to it by the Crown, whereas in the case of the Robinson Treaties their lands were ceded in a binding contract; lastly, in the land grant to the Tyendinaga band there was no promise that they were excluded from any laws.⁴⁵

W.F. Langworthy, the Crown Attorney for Port Arthur seemed unprepared for the arguments McComber made in his appear. In a letter to Judge McKay, Langworthy outlined his objections to Padjena's and Quesawa's

appeal.⁴⁵ The majority of his letter dealt with McComber's less substantial arguments, namely: that Depew heard a case that lay outside his territorial jurisdiction, and that Padjena and Quesawa should not have been jointly convicted. That Langworthy spent two thirds of his letter dealing with such trifling elements of McComber's appeal reveals he was unprepared for it. Only the last page of his letter dealt with what he termed the "so called Robinson Treaty," and the provincial Order-in-Council.

Langworthy started with the provincial Order-in-Council which changed the *Game Act* to make it illegal for anyone south of the National Transcontinental Railway to possess raw beaver pelts without a special permit. Langworthy was not entirely honest with his explanation as the order referred specifically to "Indians," and was not a law of general application. Regardless, Langworthy warned Judge McKay that if the appeal was granted he was in essence stating that the order, indeed the entire act, was *ultra vires* of the province. Langworthy's argument was that if the order and the *Game Act* passed through the Legislature, and received the assent of the Lieutenant-Governor, it must be legal. Langworthy's proceeded from this to question if the Robinson-Superior Treaty was still, or ever had been a binding treaty upon the province. "There is no evidence before the Court", Langworthy stated, "to show that this so called Treaty has not been cancelled or modified, if ever it was

⁴⁵ Ibid.

⁴⁶ Ibid. W.F. Langworthy to Judge McKay. 1 March 1930.

effective.⁴⁷ Lastly, in case his rather flimsy polemic failed, Langworthy said that a Division Court could not decide if an Order-in-Council was *ultra vires*. Such a question was constitutional in nature, and notice should be served on the Attorney-General to bring a stated case before the appeals court.

Langworthy's arguments had no affect on Judge McKay. On April 10, 1930, he rendered his decision in favour of the appellants.⁴⁸ McKay's ruling corresponded almost exactly with the arguments put forth by McComber. In his ruling he referred to the treaty, and sections 91(24) and 109 of the BNA Act which combined gave the Ojibwa the right to hunt and trap, vested control over Indian affairs in the Dominion government, and obligated the Ontario government to respect the Ojibwa's interest in the land. For these reasons McKay stated that the treaty was "binding on both the Dominion of Canada and on the Province of Ontario." Referring to the argument made by McComber relating to U.S. legal precedence, McKay said that an Indian treaty "constitute[d] a supreme law of the land" and could not be ignored by a provincial legislature.

McKay also broadly and correctly interpreted the meaning of the word "reserve" in relation to the treaty, the *Game Act*, and the lands over which the Ojibwa could hunt free of provincial regulation. The *Game Act* would not only be void on an Indian reserve proper, McKay said, but over all Crown land within the Robinson Treaties. McKay also, although he did not refer to them in his decision, drew correctly on the legal precedents established in the *St.*

⁴⁷ Ibid.

Catherine's Milling decision and *Ontario Mining Company v. Seybold*. The treaties expressly stated that the Ojibwa retained the right to hunt and trap over all Crown land not sold or leased to a private individual or company. Therefore, McKay concluded, the *Game Act* could not apply to Ojibwa hunting on unoccupied Crown land.⁴⁹ McKay referred to the case of Rex v. Rodgers (1923) to support his decision. Rex v. Rodgers was decided in the Manitoba Court of Appeal. It involved a treaty Indian who killed a mink on reserve, and sold the pelt off the reserve. While the local magistrate found the buyer guilty, he submitted the case to the appeal court to decide if the Manitoba *Game Act* was *ultra vires* of the legislature. Chief Justice Perdue stated that "I do not think that the Provincial Legislature has any power to pass laws interfering with the rights of Treaty Indians to hunt, fish and trap on their own reserves." Furthermore:

Provincial statutes, even of a general application do not, as a rule, expressly state the territory to which they are meant to apply. They are generally worded as if they applied to all the territory comprised within the boundaries of the Province. But everyone understands that they cannot apply to regions in the Province over which the Legislature has no jurisdiction in the particular matter, and that, however broad the terms, these regions are meant to be exempt.⁵⁰

While Rex v. Rodgers interpreted "reserve" in the literal sense, McKay considered it within the broader context of the hunting clause contained in the

⁴⁸ Brian Slatterly et.al., Rex v. Padjena and Quesawa, 10 April 1930.

⁴⁹ Ibid.

⁵⁰ Ibid. See also Slatterly, Rex. v. Rodgers, (1923).

Robinson-Superior Treaty which permitted Ojibwa to hunt and trap over unoccupied Crown land.

As regards the Order-in-Council under which Padjena and Quesawa were arrested and convicted, McKay said that it was *ultra vires*. It expressly legislated in respect of Indians, despite Langworthy's argument to the contrary, and this was the sole jurisdiction of the Dominion government. It also abrogated Ojibwa rights under the treaty, and was *ultra vires* for that reason too. Considering the evidence McKay allowed the appeal, overturned the conviction and ordered the arresting game warden, Harold Harrison, to repay the appellants the twenty-five dollars they paid when Magistrate Depew convicted them.

Langworthy did not file notice to appeal immediately after McKay's decision - an indication that the province did not anticipate this turn of events. This court ruling did, however, set off a chain of events in Port Arthur. McComber, who had worked *pro bono* for Padjena and Quesawa, informed Agent Burke that he had not received any money for his services, and could not afford to employ counsel in Toronto for his clients should the province appeal.⁵¹ Burke wrote directly to D.C. Scott to ask if Indian Affairs would employ counsel on behalf of the Ojibwa.⁵² Frank Edwards, the Kenora agent, also wrote to Scott and recommended Indian Affairs "continue the fight [for] these Indians as it is a vital thing that they may Hunt and Trap for a living."⁵³

⁵¹ NAC, RG 10, Vol. 6747, file 420-8x, part 1. McComber to Burke, 10 April 1930.

⁵² *Ibid.* Burke to Scott, 12 April 1930.

⁵³ *Ibid.* Edwards to Scott, 16 April 1930.

As noted in chapter five, Scott clearly wanted to secure permanent subsistence hunting rights for the Ojibwa in order that they could support themselves but was blocked in 1917 by his minister. With this victory Scott could now pursue the matter on the grounds that Indian Affairs had an obligation to support the Ojibwa's legal rights. This allowed Scott to have the issue decided in the courts while at the same time claiming that it was not Indian Affairs' policy to challenge the *Game Act*.

Besides the political opportunity that presented itself, it is quite likely that other events within the Robinson-Superior Treaty further convinced Scott that Indian Affairs should press its advantage against the Department of Game. The Ojibwa at Michipicoten were suffering under the game laws, and the creation of the Chapleau Game Preserve which encompassed many of their trapping grounds. Several days before McKay's ruling T.J. Godfrey, the Sault Ste. Marie Indian Agent, wrote to A.F. Mackenzie, the new assistant Deputy and Secretary of Indian Affairs (J.D. McLean had finally retired) to inform him of the situation.⁵⁴ He noted that the winter had been extremely harsh, and owing to the strict game laws and the growing number of white trappers and hunters some of the Ojibwa families were nearing starvation. If this occurred, Godfrey warned, Indian Affairs would be responsible for supplying relief to them.

⁵⁴ *Ibid.* T.J. Godfrey to A.F. Mackenzie, 3 April 1930.

Michipicoten Ojibwa, some of whom resided in the town of Missanabie⁵⁵, also wrote to Indian Affairs. Walter Soulier stated the with the creation of the game preserve many families lost their best hunting grounds.⁵⁶ Further compounding the problem, according to Soulier, were the number of trapping licenses issued to Whites by the government. These trappers often used poison to bait their traps. This compounded the scarcity of game as scavengers and predators ate the trapped animals, ingested the poison and died. The local Indian Agent, Godfrey, corroborated Soulier's letters in a damning indictment of game wardens:

I beg leave to report that much in a letter written by Mr. Soulier is correct and that the Indians of this district are not being treated fairly as according to the Robinson Treaty these people have a right to secure a living from the Game and Fish of the country but the Ontario Game Officials here and elsewhere in my agency are using the Indians as an excuse to hold their positions, letting the white trappers go with what ever they care to do by never passing up an Indian who always tries to make his living by hunting and trapping.⁵⁷

Game Wardens, in essence, used Ojibwa arrests to keep their arrest records high and justify their employment. Godfrey maintained that white trappers were the greatest offenders in his agency, but wardens continually singled out Ojibwa trappers. He cited the case of one Ojibwa woman who had five muskrat skins confiscated even though it was open season for muskrat and she was a treaty

⁵⁵ Missanabie was on the north shore of Dog Lake. Dog Lake formed part of the hunting grounds of the Michipicoten Ojibwa. See chapter one of this thesis.

⁵⁶ *Ibid.* Walter Soulier to Indian Affairs, 11 April 1930.

⁵⁷ *Ibid.* Godfrey to McKenzie. 23 April 1930.

Indian. Godfrey said the warden returned the skins only after he persuaded him with "arguments and threats." Further compounding the problem was the Chapleau Game Preserve. Godfrey estimated twenty-five to thirty families lost their trapping grounds as a result of the preserve's creation.

With his own agents pressing him to challenge the Ontario government's appeal, and relating stories of Ojibwa hunters being persecuted for trapping and their families nearing starvation, Scott possessed sufficient reason to hire counsel to represent the Ojibwa in the upcoming appeal. In a carefully worded letter to Charles McCrea, the provincial Minister of Mines (who also had responsibility for game and fish), Scott stated Indian Affairs' intention to retain counsel on behalf of the Ojibwa.⁵⁸ Scott explained that Padjena and Quesawa had appealed their first conviction without the knowledge of Indian Affairs, and his department was now obligated to see matters through. Considering that their appeal was successful, and the Attorney-General was now challenging that decision ("as might be naturally expected in view of the importance of the case," Scott noted) Padjena and Quesawa asked Indian Affairs to employ counsel for them. Noting again that Indian Affairs had nothing to do with the original appeal, Scott said their request carried weight "by virtue of Judge McKay's finding," and due to the constitutional question involved. Scott even stated that Indian Affairs' decision to employ counsel was, in fact, to the Department of Game's benefit. An appeal "fully expounded pro and con by eminent counsel" Scott explained would settle this dispute which had become "a source of

embarrassment to both our departments." Scott assured McCrea that this action was not "taken in a hostile spirit but simply as a natural obligation that devolves upon the department in its capacity as guardian of the Indian interest."⁵⁸

By the end of May Scott chose which counsel to employ on behalf of the Ojibwa: M.H. Ludwig of the Toronto firm Ludwig, Shulyer and Fisher. McComber sent all of his papers from Port Arthur to Ludwig's Toronto office, and the latter set about preparing for the hearing.⁶⁰ All that remained was discovering when the appeal was to be heard. This proved more difficult than Ludwig or Indian Affairs thought. A.F. Mackenzie, departmental secretary, asked McComber when the appeal was to be heard, but McComber could not answer. He said his office received notice of the appeal, and assumed the date was set.⁶¹ Ludwig, writing to A.S. William, assistant Deputy-Superintendent General of Indian Affairs, said that the appeal was set for the second week of June, but was postponed until the following week.⁶²

From this started the Attorney-General's attempts to stall the case as long as possible, and harass the Ojibwa until the appeal was heard. During the interim game wardens continued to arrest Ojibwa throughout the Robinson treaties, and magistrates continued to find the accused guilty and fine them according to the *Game Act* or the very Order-in-Council which Judge McKay stated was *ultra vires* of the legislature. Chief Cogish of Batchewana Bay, for

⁵⁸ *Ibid.* Scott to Charles McCrea. 16 May 1930.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* A.F. Mackenzie to McComber, 30 May 1930.

⁶¹ *Ibid.* McComber to Mackenzie, 2 June 1930.

example, was arrested for shooting a partridge in the spring of 1930, and sentenced to several weeks in jail.⁶³ While in jail Cogish complained he “lost all my spring hunting” and his supplies were stolen from his hunting cabin. Cogish was arrested again in the fall of 1930. He wired Indian Affairs on November 14 to state that he did not appear in court to answer the charge, and wanted a lawyer to represent him.⁶⁴ Two other hunters, Henry Hunter and Sidney Ojebah, from Chapleau (near Michipicoten Reserve) were also arrested in the fall of 1930, convicted, and sentenced to thirty days imprisonment.⁶⁵ When the Indian Agent, Godfrey, wrote to the district game warden to ask for clemency he was informed that the matter would have to be referred to the Attorney-General’s office.

The Department of Game also began to put increased pressure on Indian Affairs. In a letter to D.C. Scott, Deputy Minister Macdonald raised the possibility of game wardens applying game laws even more rigorously. Macdonald was angry at the actions of Indian Agents, Thomas Godfrey of Chapleau in particular, who encouraged Indians to break the game laws. Macdonald quoted two passages from a letter Godfrey wrote to an Indian in his agency:

There is nothing to hinder you from selling some fish if you wish to help keep your family and if you have not got a net to help you I will have one sent to you

⁶² **Ibid.** M.H. Ludwig to A.S. William, 13 June 1930.

⁶³ **Ibid.** Chief Cogish to Indian Affairs, 4 September 1930.

⁶⁴ **Ibid.** Cogish to Indian Affairs, 14 November 1930.

⁶⁵ **Ibid.** William a Lyness to T.J. Godfrey, 20 November 1930.

from the H.B. Co. at Missanabie and you can make it up yourself.⁶⁶

Macdonald was angry that Godfrey and others were not helping the wardens enforce the game laws throughout northern Ontario. As regards the aforementioned net Macdonald said his department did not arrest Natives fishing for their own use, as long as they did not take sport fish, but could not permit the selling of fish. In light of the steps the Department of Game had taken "in connection with creating a means of livelihood for the Indians," Macdonald asked Scott to take steps to, in essence, discipline the agent.

Scott wrote to Godfrey who responded with a blistering letter damning the game wardens and Macdonald's contention that the Department of Game sought to protect the Indians' livelihood. While Godfrey believed that the Ojibwa should not be allowed to hunt within the Chapleau Game Preserve he thought it was reprehensible that Macdonald would want to deny the Ojibwa the right to take fish for themselves and to make a little money:

...they have no right to stop Indians from catching what ever fish they require to keep their families from starving and the...white fish that...[they] might sell to help a starving family is their right and I question the authority of the Game Department's authority to stop them as according to their Treaty they have a right to hunt and fish and nothing is said about whether they can sell them or not⁶⁷

Godfrey said that the warden's were merely creating trouble for him because he prevented them from prosecuting some Ojibwa in his agency. Regarding

⁶⁶ *Ibid.* Macdonald to Scott, 18 November 1930.

⁶⁷ *Ibid.* Godfrey to Scott, 5 December 1930.

Macdonald's contention that the Department of Game has protected the Ojibwa's hunting and fishing, Godfrey countered that all the department had done was take away "every heritage the Indians have in the way of livelihood by create Game Preserves mostly to give some fellow a soft job..."

Clearly the Department of Game was trying to pressure Indian Affairs into giving up its support of the Ojibwa. By continuing its harassment of Ojibwa, and stalling the appeal it hoped that Indian Affairs' patience would end. It also became apparent to Ontario's Attorney-General that the Appeal Court was not pre-disposed towards the province, and stalling the hearing meant the possibility of a non-legal solution being found. By the middle of October, 1930, Ludwig was still waiting for the appeal date to be set. Ontario's Attorney-General continued to file special applications with the Ontario Supreme Court for continuances. A date was set for October 15, but the case was held over. Ludwig and the Crown counsel appeared before the First Appellate Division on that date, but owing to statements made by the presiding judges the Crown asked for another continuance. Justice Hodgins, who also presided over the Hudson's Bay Company's 1912 case against the Game Commission, noted that the current appeal shared numerous similarities with the HBC appeal. Hodgins said no judgment was delivered on that date because "it might injuriously affect the real interests of the Indians and the then Chief Justice (Meredith, C.J.) suggested that he parties get together and come to some settlement..."⁶⁸ Ludwig believed that if judgment had been rendered "the Court would have held that

Ontario could not pass Fish and Game Laws which would override the...rights of the Indians in the Robinson Treaty." The Crown counsel obviously thought the same thing. After Hodgins' statement, he asked that the case stand until he consulted the Attorney-General. The court granted this request.

Given Ontario's insistence that Meredith hear the HBC 1912 appeal it is quite likely that there was more involved than what Hodgins' said (see Chapter 4); however, it was clear now that if the Crown pressed on with the Padjena appeal it would lose. Faced with this possibility, Ontario's Attorney-General's office continued asking for continuances while concurrently wardens continued arresting Ojibwa. By the middle of December, 1930, Indian Affairs began to lose its patience with the Department of Game, and Secretary Mackenzie wrote to Ludwig to ascertain when the appeal would be heard. Mackenzie realized that the Department of Game was trying to pressure Indian Affairs into negotiating a settlement by continually arresting Ojibwa, while at the same time delaying the appeal.⁶⁸ Ludwig's response regarding the appeal was not heartening. He said the appeal was to be heard on December 10, but two days prior to the hearing the Attorney-General requested that it be held over until after the Christmas vacation. Initially Ludwig could not understand why, and the Attorney-General gave no reason. When he learned of the continuing arrests in the north Ludwig theorized that the Attorney-General and Department of Game had issued

⁶⁸ Ibid. Ludwig to Mackenzie, 15 October 1930.

⁶⁹ Ibid. Mackenzie to Ludwig, 12 December 1930.

instructions to the magistrates and wardens to ignore McKay's decision.⁷⁰ As it stood, however, the appeal would have to wait until the new year.

When January arrived it became clear the province wanted to find some way of negotiating a settlement with Indian Affairs. Charles M. Garvey, the Crown counsel, wrote to Ludwig to advise him that the Department of Game and Attorney-General's office wanted the appeal held over until September, 1931, "in order that the Department may go fully into the question of Game and Fisheries in...and settle a policy in regard thereto."⁷¹ Garvey asked Ludwig to appear with him before the court to arrange the postponement.

Ludwig refused to comply. January 14 had been set as the appeal date, and Ludwig did not want to delay the hearing any longer. Duncan Campbell Scott agreed with Ludwig. The case centered on the force and status of the treaty, and Indian Affairs was not interested in any future provincial policy regarding hunting and fishing.⁷² When the case came before the court on the prescribed date Garvey asked the Court for a further adjournment until September.⁷³ Garvey said that the Ontario government wanted time to consider all the treaties in Ontario "for the purpose...of laying down some future policy regarding the Indians and deciding on legislation which will be satisfactory to the Department of Indian Affairs." Obviously the Attorney-General and Department of Game hoped to play on the sensibilities of the court which

⁷⁰ Ibid. Ludwig to Mackenzie, 13 December 1930.

⁷¹ Ibid. Charles M. Garvey to Ludwig, 31 December 1930.

⁷² Ibid. Ludwig to Scott, 2 January 1931. Scott to Ludwig, 8 January 1931.

preferred both parties negotiate a settlement rather than forcing them to make a ruling.

Ludwig realized quickly what Garvey was up to, and attempted to convince the Court not to grant the Attorney-General more time.⁷⁴ He told the Court that since their last appearance in October, 1930, neither he nor Indian Affairs were approached by the Ontario government for the purpose of reaching any form of settlement. Indeed, Ludwig said that it was not until his last communication with Garvey, in which he said Indian Affairs would not consent to a further adjournment, that he had any intimation that the Ontario government was considering new policies. Furthermore, it was not until that very instance that Garvey stated clearly what these new policies were. Ludwig's arguments were partially successful. The Court stated that the appeal would be heard on January 28. This provided Indian Affairs with enough time to discover if the Ontario government was earnest in its desire to enter into negotiations.

Duncan Campbell Scott was not disposed to enter into negotiations with the Ontario government.⁷⁵ He informed Ludwig that his department wanted the case to proceed. Indian Affairs had received no representations from the Department of Game regarding the creation of new conservation policies that took the various treaties and surrenders into account, and based on his past

⁷³ *Ibid.* Ludwig to Scott, 14 January 1931. Ludwig noted who presided: Chief Justice Mulock, Magee, Hodgins, Middleton and Grant.

⁷⁴ It is also possible that Ludwig realized the ambiguous nature of the province's request. There was no date set for the new policy, and there was every possibility that the Department of Game and the Attorney-General's Office would stall for months.

experiences Scott did not believe that the Department of Game was sincere in its current overtures. The time for negotiation was immediately after McKay's decision, and, considering that the province appealed the decision not Indian Affairs, Scott preferred a legal decision over a settlement.

Shortly after Scott's decision, however, the case fell apart for the Ojibwa or, more correctly, Indian Affairs. Two days before the hearing, Ludwig wrote to Scott and informed him that the Crown was going to include an additional argument against Judge McKay's decision:

That the learned District Court Judge erred in holding that the Robinson Treaty was applicable to his case as the evidence shows the Beaver were killed by the accused outside the areas fixed by the said Treaty.⁷⁶

Ludwig said the map he had of the territory showed that the northern limits of the Robinson-Superior Treaty lay a considerable distance south of the Canadian National line. Considering that Padjena and Quesawa killed the beaver outside the treaty they could not seek protection under it. In his testimony before Magistrate Depew, Padjena stated he trapped the beaver near the town of Lux which lay in the Treaty Nine area. Ludwig asked what provisions Treaty Nine made regarding hunting and fishing. In a written post script Ludwig also noted that he had the hearing postponed for two weeks to give Indian Affairs time to consider the new evidence.

⁷⁵ Ibid. Scott to Ludwig, 19 January 1931.

⁷⁶ Ibid. Ludwig to Scott, 26 January 1931.

A.S. Williams, assistant Deputy Superintendent General replied. He said that the treaty border actually crossed the CNR line ten miles west of the town, but that it "would be too great a stretch of the imagination to believe that the said beaver [were]...taken near Lux, west of this boundary."⁷⁷ Williams believed that Treaty Nine provided for regulation of hunting, trapping and fishing, and that Padjena and Quesawa could not seek protection under the Robinson-Superior Treaty if they were trapping outside of it. In short, William said Indian Affairs had no chance of winning. Williams did ask how the location of Lux was overlooked in the prosecution before Magistrate Depew, and the appeal before McKay. He instructed Ludwig to contact Arthur McComber to find out.

Williams and others at Indian Affairs obviously gave no consideration to the explicit wording of the Robinson-Superior Treaty. There were no geographic limits set on where the Ojibwa could hunt or trap. The treaty stated only the Ojibwa could continue to hunt as they had been in the habit of doing. Based on the Anderson-Vidal report, which Indian Affairs had, it was obvious that the Pic Ojibwa hunted north of the height of land. They noted in their report that during their investigation many of the bands had retreated for the interior because of the approaching winter. Furthermore, the map submitted by them did not show a definite northern boundary of the Pic Ojibwa's territory. Evidence of Ojibwa hunting in the Treaty Nine area had arrived at Indian Affairs over the last two years in relation to the Michipicoten Ojibwa and the

⁷⁷ Ibid. Williams to Ludwig, 3 February 1931.

Chapleau Game Preserve. Based on this Indian Affairs could have instructed Ludwig to argue that Padjena and Quesawa were actually following the letter of the treaty by hunting as their ancestors "have heretofore been in the habit of doing."

As regards Treaty Nine it is odd that Scott did not offer evidence to Ludwig of the true intention of the hunting clause in the treaty. During the 1905 and 1906 negotiations the Ojibwa and Cree bands the Commissioners met with asked if they could continue to hunt, trap and fish as they had in the past if the signed the treaty. In every instance the Commissioners promised the assembled bands that their hunting, trapping and fishing rights would not be interfered with. Furthermore, the provision within Treaty Nine stated that the bands harvesting activity was subject to "regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty."⁷⁸ There is no indication if the "government of the country" referred to the Dominion or provincial government, but in light of section 91(24) the former seems likely.

Regardless, the matter dropped quickly after it became known where Padjena and Quesawa trapped the beaver, and the Ojibwa found themselves in the same legal ambiguity as before. Shortly after meeting with Crown Counsel Ludwig arranged to have the appeal postponed until October, 1931.⁷⁹ After this

⁷⁸ The Treaty Nine text is cited in James Morrison, Research Report: Treaty Nine (Ottawa: Department of Indian Affairs, Treaties and Historical Research Centre, 1985).

⁷⁹ NAC, RG 10, vol. 6747, file 420-8x. Ludwig to Williams, 7 February 1931.

R. v. Padjena disappeared from the documentary record. Wasting little time, the Department of Game apparently stepped up its arrests of Ojibwa throughout both Robinson treaties. Alexander Mathias, of the Bear Island Ojibwa, had his rifle confiscated from his boat which was tethered at the island. The Game Warden took the rifle because Mathias admitted to hunting deer.⁸⁰ Not receiving his gun back, Mathias wrote to the Indian Agent at Sturgeon Falls, George Cockburn.⁸¹ He admitted he shot the deer, but only to feed his family as the Depression was hitting him and the entire band hard. Summer tourists and hunters, who usually employed the Temagami men as guides, could no longer afford to hire them. Fur bearing animals were scarce in the winter, Mathias stated, and the Department of Game kept them from netting fish or taking deer and moose. Lacking the charitable organizations that existed in the cities, Mathias said the only way he and others could support themselves was through hunting. They had no money for food, or clothing and Mathias could not even afford to buy another gun.

With the dropping of the appeal the status quo reestablished itself. Even though McKay's decision still stood, and the province did not continue with its appeal, Ojibwa throughout the Robinson treaties continued to be arrested for contravening the *Game Act*. R. v. Padjena offered Indian Affairs an opportunity to settle, in court, the issue of treaty hunting rights and the ability of the Ontario government to restrict them. It foundered, however, on Indian Affairs' limited

⁸⁰ Ibid. George Cockburn to T.R.L. MacInnes, Secretary Indian Affairs, 15 May 1931.

perception of what constituted a treaty right. In this manner it reveals the complexity of the debate, and the nature of the forces at work. While the Ojibwa, and various Indian Agents, had a much clearer appreciation of the Robinson Treaties, and the promises contained therein, they were still at the mercy of bureaucrats in Ottawa and Toronto.

As noted earlier the bands, aided by Indian Agents, pushed the debate. Constant arrests and harassment led hunters to complain to Indian Agents who, aware of the situation facing the Ojibwa, pressured Indian Affairs to take a stronger stand against the provincial government. Finally realizing that it the Ontario government was uninterested in meaningful negotiation with it, Indian Affairs in Ottawa agreed to support the Ojibwa when the province appealed McKay's ruling. However, even though the Ojibwa were finally able to have the matter pushed to the District Court level it stalled after that because of factors beyond their control.

Despite this failure R. v. Padjena did have a lasting affect on the hunting issue. Indian Affairs, even after Scott's departure as Deputy Superintendent General in 1932, continued to pressure the Ontario government for some sort of arrangement that would permit the Ojibwa to sustain themselves through hunting and trapping. The complaints of bands and Indian Agents, and the continued arrogance of the Department of Game finally pushed Indian Affairs towards actively seeking a solution to the problem. While in contemporary terms these attempts were paternalistic (the Ojibwa were never consulted by

⁸¹ Ibid. Alexander Mathias to George Cockburn, 24 June 1931.

Indian Affairs) it does show a concerted effort by Indian Affairs to create a compromise solution to please the Ojibwa and the provincial government. R. v. Padjena was the catalyst which led to this. However, while these efforts grew in intensity they were still hampered by the paternalism that affected not only Indian Affairs but all matters where well-intentioned Whites sought to improve the lot of Natives.

Chapter Seven
The Failure of Trapping Grounds
1931-1937

The 1930s started with the promise of change in the hunting issue, but ended with the affirmation of the status quo. Indian Affairs continued to pursue the Department of Game to change its policies regarding Native subsistence hunting, despite the failure of the Padjena appeal and D.C. Scott's retirement, but these efforts ultimately came to naught. While the Padjena failure made Indian Affairs leery of another court challenge of the *Game Act* the branch still hoped to secure the Ojibwa some relief from the game laws. Thus, Dominion officials attempted another round of negotiations with the Department of Game during the 1930s. The problem was Indian Affairs' officials did not want to protect the Ojibwa's full treaty rights. While Indian Affairs' policy was more pro-active compared to its efforts prior to World War I it still did not address the Ojibwa's essential problem: securing subsistence hunting rights as per the Robinson Treaties. By tempering its own efforts Indian Affairs was incapable of effectively fighting the Department of Game.

Indian Affairs hoped its new idea of Indian trapping/hunting territories, one which it had applied in the Northwest Territories, would serve to provide the bands with a protected section of land over which they could hunt and trap as they wanted. This system was preferable for two reasons. First, as Indian Affairs' officials conceptualized it, no white trappers or hunters would be permitted on this land. With this competition eliminated, the Ojibwa would

conserve the game in their territories out of their own self-interest. Second, the system would also allow bureaucrats to control and monitor Ojibwa hunting. This control would enable Indian Affairs to wean the Ojibwa from more traditional pursuits, and guide them towards more 'civilized' activity. Although Indian Affairs' officials realized that the Department of Game would likely reject this desire to give the bands unrestricted hunting rights over these areas it still believed that the hunting territory system would help address the problems faced by the Ojibwa in the north.

However, the interests the Department of Game sought to protect were not those of the bands but hunting, fishing and conservation clubs and tourist operators. Any 'concessions' it might grant were made with these groups in mind. Ojibwa would not be granted unrestricted hunting and trapping rights if they served, in any way, to harm the economic activity generated by sport hunters and tourists. By the 1930s hunting, trapping and tourism had become a multi-million dollar activity. This was apparent when the Department agreed to create Indian trapping territories. After appointing a special commission in 1931 to investigate the game situation in Ontario, the first since Kelly Evans' 1912 report, the Department of Game adopted Indian Affairs' idea of Indian hunting/trapping territories. While this was treated as a victory by Indian Affairs it was pyrrhic at best. Despite the resources Indian Affairs and its agents put into setting up Indian territories the Department of Game never intended to respect treaty rights on these lands, or provide the degree of leniency Indian Affairs wanted. The Department of Game was willing to allow these territories,

but for all trappers in the province and in such a manner that the treaties were still considered as irrelevant agreements. Trapping territories were still subject to game laws, and if they were used for anything other than trapping (e.g.: shooting deer) game wardens arrested the offending person. A system of this nature also did not reflect the reality of Ojibwa trapping during which time a hunter would often, when the chance presented itself, take other animals for food. Such restrictions, however, placated Whites who depended on hunting and trapping business.

By the late 1930s it became apparent that the trapping territory system would not work for the Robinson treaties because the Department of Game did not make any concessions for the Ojibwa, and Indian Affairs was not willing to fight for those concessions. First, the Department of Game would not change its policies unless faced with possible defeat in court. It is clear from the records that the Department of Game doubted the legality of the *Game Act* only when it was forced to go to court. This was true when the Hudson's Bay Company brought a stated case before the Court of Appeal, and it occurred during the Padjena case. Lacking a legal club to beat the Department of Game with Indian Affairs did not have the political or legal clout to force trapping territories onto Game officials in a manner that would address the Ojibwa's problems.

Because of this the Department of Game implemented trapping territories in its own manner, and did not bother to address problems specific to Ojibwa subsistence hunting in two important ways. The trapping system did not take

into consideration how the Ojibwa hunted and trapped. When a family was working its trap line it was common to carry a rifle and hunt for any game that presented itself. If a buck, for example, was in the area the trapper would kill it as food for his family. Ducks, partridge and other animals were also taken to provide food while a family was at a winter hunting camp. Ducks, in particular, were an important source of food in late fall when winter camps were established and flocks of ducks and geese flew south. Even before the trap line system was implemented several instances occurred where Ojibwa were arrested for hunting while working their trap lines. Food, taken within this context, was obviously being used for subsistence purposes, but the Ojibwa were regularly arrested and fined. Lastly, trapping territories failed because the Department of Game made no effort to insure that Ojibwa families received their traditional territory for their trap lines. Each government issued line constituted a single township which was awarded annually. Even if a family applied for and received their familial grounds for one year there was no guarantee they would receive it the following year. Furthermore, Ojibwa hunting and trapping territories did not, for obvious reasons, correspond to township lines but were based on natural boundaries such as lakes, rivers, and other natural phenomena. One family's grounds might cross several township lines.

A system was now firmly in place, and the Department of Game was not prepared to jeopardize it. This was apparent several years before the Department even began to implement the trap line system. In January, 1932,

several Nipissing Ojibwa, Chief John Ojeek, David Commanda and Barnaby Commanda, were arrested for possessing four partridge and a quarter of deer meat out of season.¹ The men were trapping near the Sturgeon River (see Map #5, Chapter one), and took the animals for their own use while trapping and to bring back to their families. While no legal action was taken against the men, and the meat was returned, this incident reflected the inability of the Department of Game, and wardens in particular, to accept subsistence hunting while trapping. A similar incident occurred several months later when Philip Commanda and Noah Aneshnabi, also of Nipissing, were arrested for trapping muskrat out of season and possessing partridge and duck. When the game warden seized the two birds one was cooking over the fire.²

Such realities were of little concern to Department of Game officials. When the Game Commission was first formed in 1892 its primary concern was conserving wildlife for sport hunters and tourists. By the late 1920s this continued to be the overriding reason for the Department's existence. The Department was influenced extensively by the dozens of hunting and fishing clubs and associations in Ontario. Almost every county, district, and city had one, and some were part of larger provincial organizations such as the Ontario Hunting and Fishing Association. These larger associations represented thousands of hunters and anglers across the province and wielded considerable political influence. Further influencing the government were groups such as the

¹ NAC, RG 10, Vol. 6767, file 420-8x, part 1. George Cockburn to A.F. Mackenzie. 5 February 1932.

Ontario Tourist Association. Representing tourists operators, and their seventy million dollar a year operations, this association held equal sway over the decisions of the Department of Game. Compared to these groups the Ojibwa, who did not even possess the right to vote, were of little consequence.

The influence of these groups is apparent in the records of the Standing Committee on Game Representations formed by the Department of Game in 1927 to advise it on fish and game laws.³ Comprised of MLAs from across Ontario the Committee heard presentations from fish and game clubs and associations. University trained specialists made occasional presentations to the Committee regarding fish breeding and habitat, but opinions regarding hunting and trapping were purely anecdotal and biased toward maintaining a suitable environment for sport hunters. At no time did a representative of the Hudson's Bay Company appear before the Committee, nor did a representative of Indian Affairs, or any band chief or deputation from the various Indian organizations that were slowly appearing in Ontario. White hunters dominated the Committee, and kept it focused on issues that concerned them.

Their recommendations often centred on changing open and closed seasons for different animals. Readily apparent in their suggestions is that these were men for whom shooting and fishing were sports, not vocations or undertaken out of necessity. Duck hunting, for example, was often a topic of

² Ibid. Cockburn to Mackenzie, 20 April 1932.

³ Journals of the Legislative Assembly of the Province of Ontario, "Minutes of the Meetings of the Fish and Game Committee." (Toronto: King's Printer, 1927). The Committee met between 1927 and 1935 after which it was disbanded.

discussion. The use of decoys was discussed, something an Ojibwa hunter never used. Other issues included the open season in various parts of southern Ontario for quail and other game birds, and bag limits per hunter during open seasons.⁴ The entire concept of a bag limit, in itself, indicates the pre-occupation of the Committee with sport concerns. An Ojibwa hunter took whatever food was necessary either by directly hunting for it, or by carrying a gun with him when checking his trap-lines. Restricting the number of ducks or deer that someone could take in an eight week open season was inapplicable to the lifestyle of Ojibwa who relied on hunting and trapping throughout the year.⁵

Moose and deer seasons were set according to the dictates of white hunters with absolutely no regard given to the Ojibwa. Appearing before the Committee in 1927, Charles McCrea reported on the decision of his Department regarding open seasons for moose and deer. The Department wanted to open the season ten days earlier and close it ten days sooner for the region north and west of the French and Mattawa Rivers and south of the Transcontinental Railway.⁶ This met with the approval of some hunters who liked entering the bush by canoe, and appreciated the early start to the season before some of the more northern lakes began to freeze over at the end of November, but others thought that closing the season ten days sooner was a bad idea as hunting in

⁴ Minutes, 1927. p. 6.

⁵ Suggestions for bag limits were astronomically high. The Ontario Hunters' Game and Fish Protective Association recommended that the daily bag limit for ducks be set at fifteen per day per hunter, or a total of 120 ducks per season. See Minutes, 1927, p.6.

⁶ Minutes, 1927, p. 9.

colder weather made it easier to keep deer meat fresh. To placate both camps McCrea said that the season would still open ten days earlier, on September 15, but close at the regular date of November 30. Clearly the wish was to please the sports hunters

While references to Indians are exceedingly rare in the Committee's minutes it was clear that it considered anything which competed with white hunters as being undesirable.⁷ This was readily apparent with the ideas put forth regarding wolves. Almost every meeting of the Committee, between 1927 and 1935, contained references to the increasing number of wolves in Ontario and the need to eradicate this menace. Algonquin Park and other smaller parks came were seen as refuges where wolves could breed with impunity.⁸ While some concerns were expressed on behalf of farmers who lost livestock to wolves most centred around the prevailing stereotype of wolves as wantonly destroying deer. One individual, speaking on behalf of the Ontario Hunters' Game and Fish Protective Association, stated that one wolf killed ten to fifteen deer each year.⁹ Specious reasoning was put forth when Reverend Father Crowley of the Algoma Fish and Game Association declared that "wolves were increasing at a rapid rate and that along the Algoma and Central Railway and the surrounding district there had been only one half the number of deer as last year..."¹⁰ No

⁷ The only negative reference to Indians was the opinion that they over-fished. See Minutes, 1928, p. 6.

⁸ Minutes, 1928. p. 3-4.

⁹ Minutes, 1928. p. 8.

¹⁰ Minutes, 1928. p. 9.

actual evidence was put forth to show such a correlation between the number of wolves and the decline in the deer population.

Despite this inconclusive evidence numerous suggestions were put forth to deal with the wolf problem. Some recommended increasing the wolf bounty. This was a common idea almost every year. At one point it was suggested that the bounty be raised to forty dollars per wolf regardless of the age of the animal. Mr. Legault of Sturgeon Falls sent a letter to the Committee, and recommended one possible course of action. Legault said he represented an unnamed organization that would put up fifteen thousand dollars as prize money for a week long wolf hunt.¹¹ A more innovative and exceedingly dangerous proposal was soaking live deer with liquid poison then setting them loose in the bush.¹² This idea was not considered, but the use of poison bait was accepted by the Committee as a useful practice.

Based on the discussions regarding wolves it is obvious that hunting and trapping policies were not directed by any scientific evidence. This stood in stark contrast to fisheries management which, by the 1920s, became increasingly driven by long term studies undertaken by people trained in biology and other disciplines. In 1928 the Department formed a separate Biological and Fish Culture Branch to apply "scientific findings, both Canadian and foreign, whenever possible and practicable to fish culture and the fisheries of Ontario." Ontario's three big universities, Toronto, Queen's and Western, provided the

¹¹ Minutes, 1928, p. 17.

¹² Minutes, 1929, p. 13.

Department with almost two dozen men “with the necessary qualifications” in the summer of 1930 to study various elements of fish culture and habitat.¹³ Of these men six possessed post graduate degrees, several had doctorates, and the rest were engaged in postgraduate studies of fishery topics. They were either members of, or studied in, departments of biology, biochemistry, applied biology or chemistry.

As regards the management of game animals and fur bearers, however, the Department still relied on the evidence presented by its game wardens, district superintendents, and the casual observations of hunters and trappers. While observations of this nature can be valuable the data presented to the Department was not systematic, and was purely anecdotal. No attempts were made by the Department to enumerate a particular species’ population in any defined area. Furthermore, wardens were employed to enforce game laws not conduct field studies and were not trained to carry out such operations. Some work was undertaken at provincial experimental fur farms regarding parasites that attacked particular animals, but such studies were not necessarily applicable to wild animals.¹⁴ Furthermore, such work did not help to determine how much harvesting could occur each season of a particular species and still maintain a viable population.

¹³ Ontario Sessional Papers, “Twenty Fourth Annual Report of the Game and Fisheries Department, 1930.” Sessional Paper No. 9 (Toronto: King’s Printer, 1931): p. 29. Hereafter referred to as the Game and Fish Report.

¹⁴ Game and Fish Report, 1931, p. 20.

While the Standing Committee never considered the question of Native treaty rights the issue did eventually come to the fore. The Standing Committee recommended creating a special committee to investigate the state of game and fish in Ontario:

in view of the growing nature of the tourist traffic and the possibilities of the fur and fish resources, a careful investigation of the whole Province in the light of its fish and game interests would prove most profitable.¹⁵

In 1931 Charles McCrea, the minister responsible for the Department of Game and Fisheries, appointed a special committee to investigate the game and fish situation in Ontario. W.D. Black, MPP for Addington, was appointed chairman. The Black Committee, as it came to be known, was the first such investigation since Kelly Evans' report in 1912. Unlike Evans' endeavour, and the even earlier 1892 endeavour, the Black Committee set aside time to consider the trapping and hunting activities of Indians throughout the province, and met with representatives of both the Hudson's Bay Company and Indian Affairs. Indian Affairs representative, T.R.L. MacInnes, spoke at length with the Committee and Frank McCarthy, the son of Leighton McCarthy who represented the HBC in its 1912 legal challenge, spoke on behalf of the Company. Both men noted the difficult position Natives were in as railways, a growing highway system, and bush planes brought increasing numbers of white trappers and hunters into parts of the north previously used only by indigenous peoples.

¹⁵ Minutes, 1927. p. 9.

The minutes of MacInnes' and McCarthy's meeting with the Black Committee still exist. These minutes show that despite the continued belligerence of the Department of Game, as reflected in the attitude of the Committee members, Indian Affairs' officials were not willing to completely acquiesce to the Committee's whims. However, MacInnes was also unwilling to completely defy the Committee. While he put forth the idea of trapping territories, and explained their advantages to the Committee, MacInnes did not openly state that the *Game Act*, when applied to Natives with treaty hunting rights, was *ultra vires* of the legislature.

On August 10, 1931, MacInnes and Dr. E.L. Stone appeared before the Committee on behalf of Indian Affairs, and McCarthy and J.B. Matthews spoke on behalf of the Hudson's Bay Company (HBC). The Committee Chairman, W.D. Black, started the meeting with a statement which indicated quite clearly that the Committee believed Indians were the chief culprits when it came to over hunting. It became obvious as the meeting progressed that the Committee members were already convinced that Indians killed game indiscriminately, and that they had little time for any suggestion that the Game Act was denying the Ojibwa their legal treaty rights. Stories of Indian slaughtering game had been presented to the Committee, Chairman Black stated, and he wanted to "find out what steps have been taken by your [MacInnes'] Department by way of instructing the Indians as to the proper taking of fur, and to avoid abuses."¹⁶

¹⁶ NAC, RG 10, Vol. 6746, file 420-8C. Minutes of Meeting of Special Game Committee, 10 August 1931. p. 2.

MacInnes, although put on the defensive, refused to accept that Indians were the sole perpetrators of over-hunting. Instead he tried to put forth a compromise solution. Indian Affairs had its own officials stationed throughout northern Ontario, and they told a different story regarding the abuse of the game laws. "[T]he white trapper uses poison extensively," MacInnes countered, "...the Indian does not use poison because he does not want to exterminate the fur. The Indian is not like the white trapper who comes in and traps out a whole area."¹⁷ MacInnes conceded that some Indians abandoned their tradition of conservation, but only because of pressure from white hunters. Faced with the increased commercialization of hunting and trapping, and the possibility that whites intended to take out all the animals "the Indian will take what he can get while he may."¹⁸

To prevent this MacInnes suggested that Indian trapping/hunting territories would solve the problem. He referred to Indian Affairs success with the program in the Northwest Territories where huge areas were set aside for the exclusive use of the northern bands. MacInnes hoped that a similar program could be instituted in Ontario. He proposed setting aside all the land north of the Transcontinental Railway and parts of the Lake of the Woods district as Indian hunting grounds. MacInnes explained that once Indians were in sole possession of a certain tract of land, and protected against itinerant white trappers, they would return to their "old habits of conservation."

¹⁷ Special Game Committee, p. 3.

¹⁸ Special Game Committee, p. 4.

The Committee chairman, and its members, were not prepared to give up their ideas regarding overhunting by Indians, and the threat it posed to game and tourism. D.J. Taylor, an Ontario MPP, said that others had testified before the Committee that Indians were decimating beaver in the north, and fishing illegally.¹⁹ Jack Miner, better known as "Wild Goose Jack", also spoke up regarding the slaughter inflicted by Indians on his favourite species: the Canada Goose. Putting aside that Miner killed any animal, such as hawks and foxes, that preyed on his beloved birds he implied that the northern Cree and Ojibwa were killing numerous geese:

For the last fifteen years I have been keeping wild geese and sending them into the northern country, and I got tags from the Indians saying they had killed the goose at James Bay, and I also got tags from the Eskimos in Baffin Island. I have sent \$5.00 to Indians who sent down the tags, but the time came when they were sending down so many tags that I had to stop sending up the money.²⁰

Like any other conservationist of the day, with perhaps the exception of Archie Belaney, Miner could not understand the realities facing Ojibwa and Cree hunters. The goose hunt was an integral part of their life, and was an important source of food. Miner's empathy also did not extend to the hunting of beaver. He said he spoke to one Indian who claimed to have killed one hundred and fifty beaver before October 28 (although Miner did not say if the Indian was referring to the number of beaver he had taken in one week or one year). With the conservation ethic of the sportsmen ingrained in him Miner said he "would

¹⁹ Special Game Committee, p. 4, 8.

like to know some way by which we can control the trapping and hunting of our wild animals, so that people who come here to visit us will be able to see some of our game."²¹

This statement went to the heart of matter. The Game Committee believed that for the game laws to be effective and tourism to remain viable Indians had to adhere to the legislation. If Indians were permitted to hunt and trap at all seasons regardless of whether it was for personal or commercial use it threatened the growing value of the tourist economy. As Miner stated the tourist trade was a "great opportunity for the people [of the north]." It offered them, including Indians, work as guides and canoemen. Store owners sold supplies, lodge operators rented rooms, and the railways saw increased traffic as a result of Americans heading to the 'unspoiled' northland. The tourist trade, Miner said, was like "ripened wheat ready for the harvest for the people of Northern Ontario."²²

Treaty rights threatened this trade, and the Committee pressured MacInnes and the HBC representatives to justify their position regarding the treaties. Black asked MacInnes directly what the rights of Indians were regarding hunting and fishing. MacInnes responded that it depended on the treaty to which an Indian belonged, but matters soon centered on the Robinson Treaties. "Under the Treaty the right to hunt fur on all unoccupied Crown land was reserved absolutely to the Indians," MacInnes explained. To emphasize this

²⁰ Special Game Committee, pp. 15-16

²¹ Special Game Committee, p. 16.

point MacInnes referred to Justice McKay's 1927 ruling when Padjena appealed his conviction.²³ Since Ontario's appeal of that ruling "fizzled out" MacInnes said the matter remained unsettled until a higher court decided the issue.

This statement did not ingratiate MacInnes to the Committee. Deputy Minister McDonald, of the Department of Game, was present at the meeting. He and others, particularly D.J. Taylor, hit MacInnes with a barrage of questions. Do the Indians possess exclusive rights to hunt and trap? Do they have the right to trap in Algonquin Park? What constitutes unoccupied Crown land? The line of questioning MacInnes endured indicates that the Committee members were not prepared to accept the Robinson Treaties as binding agreements. MacInnes explained that, in the opinion of Indian Affairs, the Ojibwa had the right to hunt, trap and fish at all seasons for subsistence purposes. Regarding unoccupied Crown Land one Committee member asked MacInnes to state if a timber limit fell under that definition. MacInnes responded that a timber limit was occupied, but, perhaps to criticize the Department of Game, a Game Sanctuary should be considered unoccupied. MacInnes said the Department of Game was wont to set aside large pieces of land, state "This is a Game Sanctuary by Order in Council," and not employ anyone to manage the area.²⁴ The land then sat there unused, unmanaged, and off limits to the Ojibwa.

This raised the consternation of the Committee members who displayed their ignorance not only of northern Ontario, but of the Robinson Treaties.

²² Special Game Committee, p. 22.

²³ Special Game Committee, p. 7.

“Without occupation of that kind,” Taylor said, “ it is absolutely useless to control [hunting and trapping] under the Game Laws.”²⁵ Several members pressed MacInnes on the subject of treaty rights. MacInnes was asked if the Robinson Treaties could be renegotiated to remove the hunting clause.²⁶ Ignorant of the soil and farming conditions in most of northern Ontario, Taylor asked why the Ojibwa could not simply farm like the Six Nations Reserve near Brantford. MacInnes responded that farming was not a viable option for many bands in the north. Furthermore, he said that the whole matter was set out in the Robinson Treaties. MacInnes quoted the hunting clause, and then stated quite bluntly: “If any one of you gentlemen had a contract with Her Majesty, the Queen, you would think you had some rights.”²⁷

After the meeting in Toronto the Special Game Committee moved on to northern Ontario. Meetings were held at Chapleau and Port Arthur/Fort William, and minutes and correspondence from these meetings still exist. G.B. Nicholson, MP for Algoma East, appeared before the Committee in Chapleau. Nicholson prepared a memorandum, which he sent to Indian Affairs, that detailed what he said before the Committee.²⁸ Nicholson’s presentation centered on “the rights of Native races.” He stated that if the north country had been left to the Indians that there would be no need for conservation. It was the white

²⁴ Special Game Committee, pp. 9-10.

²⁵ Special Game Committee, p. 11.

²⁶ Special Game Committee, p. 35.

²⁷ Special Game Committee, p. 38.

²⁸ NAC, RG 10, Vol. 6746, file 420-8C. Memorandum Re. Game Conservation, 2 September 1931.

man, Nicholson maintained, who had “despoiled the Indian of his ancient heritage.” While Nicholson believed in what Kipling termed “the White Man’s Burden,” he argued that in the case of the northern Ojibwa this principle had been perverted. Civilization was supposed to improve the Ojibwa’s lot, he said, but instead they were made poor. When the Indians trapped and hunted, Nicholson said, they only took the natural increase of a particular species and left behind sufficient breeding stock. The only way of remedying this situation was to make all the lands north of the upper lakes an Indian trapping territory for fur bearing animals. Nicholson said that no new licenses should be issued to White trappers, and sufficient time granted to existing non-Native trappers to liquidate their equipment.

How the Committee responded to Nicholson’s suggestions, the most radical to date, is unknown. The Port Arthur minutes, however, do give some insight into how field agents and others with first hand knowledge of the northern condition fared with the Committee. On September 3, 1931, MacInnes, the Chapleau, Fort Frances and Fort William Indian Agents, Father Coutoure from Nipigon and Corporal Bibb of the Royal Canadian Mounted Police (RCMP) appeared before the Committee.²⁹ MacInnes started by making a statement that reflected the years of reports Indian Affairs received from its northern agents:

From our experience and from reports of our officers, it is evident that the Indian is losing ground, and is rapidly being ousted by the white trapper...who use any methods to make money. They are not really

²⁹ Ibid., Minutes of a Conference held in Port Arthur, 3 September 1931.

trappers, they are fur miners, who go in to trap out an area and then move on.³⁰

MacInnes reiterated the recommendation he made before the Committee in Toronto: that all lands north of the Transcontinental Railway be set aside as an Indian trapping territory, and that substantial portions of unoccupied Crown land south of the railway be set aside too. Reflecting what was said during the Toronto meeting MacInnes stated again, for the record, that farming was not an option for northern bands.

The Port Arthur meeting did not play out in the same manner as that in Toronto. Committee members made statements, based on evidence provided by white trappers, but in this instance those appearing before the Committee had first hand experience with the north and countered the assertions of the Committee more effectively. Agent Godfrey from Chapleau outlined how white trappers and hunters, particularly foreigners, were destroying the northern game.³¹ Godfrey stated that of the two hundred and fifty families in his agency none of them could now make a living solely from trapping due to competition from whites, and the ever decreasing animal population. Frank Edwards explained that the current fur season was particularly bad due to the decimation of the rabbit population.³² Albert Spencer, the Fort William agent, said that in

³⁰ Ibid.

³¹ Ibid., p. 2.

³² Rabbits, being at the bottom of the food chain, were an important source of food for certain fur bearers such as mink. Foxes also relied on rabbits for food. Natives often used rabbit meat to bait their traps.

his agency "Finns and Swedes" were responsible for much of the damage done to the fur bearing animals.

The Committee tried to implicate the Ojibwa as the chief cause of game depletion, but with little success. Chairman Black referred to Indians netting fish and throwing them to their dogs. Agent Edwards asked rhetorically how else an Indian was to feed his dogs.³³ Furthermore, he personally never saw any Indians in his agency take fish indiscriminately. Father Coutoure supported Edward's statement which prompted another member to say that the Committee "heard at Schreiber of a case where an Indian had killed three moose and left them to spoil." Coutoure, having spent considerable time amongst the Ojibwa and in the north, retorted that "very often the tourist will kill four or five moose, cut off their heads and leave the rest."³⁴ Considering other evidence before the Committee that the Ojibwa were having a hard time making ends meet it is astonishing that Committee members believed Ojibwa wasted meat.

Jack Miner reiterated his story of Indians near Cartier³⁵ tearing apart beaver dams and houses, and slaughtering beaver for their pelts. Corporal Bibb said that one instance, true or not, should not be used to condemn every Indian in the north. Bibb said that if the Committee went to some of the reservations, and saw first hand the conditions most families lived in they would understand why some occasionally kill large numbers of game. He said in many instances he and the Indian agents provided relief to families because they were literally

³³ Ibid. p. 4.

³⁴ Ibid., p. 4.

on the verge of starvation.³⁶ When the issue was pressed, one Committee member claimed to have evidence of an Indian trapping a pond of all the beaver even though there was no local trapping competition, Agent Spence and Father Couture both said that they had never seen or heard of such an instance in the north. Indeed, Edwards maintained that two of the white trappers who appeared before the Committee with tales of Indian slaughter were well known poachers who were merely trying to portray the Indians in a bad light to protect themselves.

Several months after the Committee's round of meetings ceased Corporal Bibbs investigated an incident similar to that reported by the agents and Father Couture. Two Ojibwa from the Pic Mobert Band, Paul Kwisiwa and Joe Tokeney were checking their trap lines around Whitefish Lake. They noted that several traps had been sprung. Bits of fur were in the traps, evidence that something had been caught, but the animals were gone. Written on bits of wood were messages stating that these trap lines belonged to a white man, and that no Indians should trap on them. Kwisiwa and Tokeney gave this evidence to Bibbs. In his report to his superiors Bibbs noted that these complaints were similar to those put forward by Nicholas Whiskayjack. Whiskayjack trapped around Bucknikalick Lake, close to the Pic Mobert Reserve. He reported having bear taken from his trap, and a note left that he was trapping on someone else's land. Since the note was written in English, Bibbs suspected it was not left by another

³⁵ Cartier is just west of Sudbury.

³⁶ Ibid. p. 5.

Ojibwa. Both Bibbs and the complainants suspected that several whites (Slim Haynes, Silver Hall and Tom Laird) were responsible, but when Whiskayjack and the others reported the incident to the local game authorities nothing was done.³⁷

Although this incident occurred after the Special Game Committee finished its series of meetings it illustrates the problem faced by the Ojibwa in the 1930s, and why those officials (apart from Game Wardens) who worked in the north sympathized with them. It also explains why Indian agents and others who worked closely with the bands believed that setting aside specific trapping grounds, recognized by the Department of Game, would enable the bands to support themselves by trapping. The Committee did ultimately recommend the creation of trap lines. These lines, which would cover an area the size of a township, would be used by only one trapper for an entire season. There were several problems, however, which show that the trap line system was not created by the Department as a means of rectifying the situation regarding Ojibwa hunting. It intended to apply the game laws to them regardless of whether they secured a trap line or not.

Trappers applied to the local game warden for a trap line at a designated time each year, and were each given a particular area on a 'first come, first served' basis. There was no land set aside within the Robinson Treaties as "Indian trapping grounds," and no distinction was made between Native and

³⁷ It is likely that Kwisiwa was another spelling of Quesawa. Whiskayjack's name also appears in both the Long Lake and Pic Post journals. See chapter one.

non-Native trappers who applied for a line. An Ojibwa family might find, one season, that part of its hunting territory was leased to a white trapper.

Furthermore, since trap lines were awarded on a yearly basis if a family was lucky enough to secure an area that fell within their traditional territory one year there was no guarantee they would receive the same area next year. Lastly, and this was discovered after the program was implemented, Ojibwa trappers were not always informed of when townships were being allotted. For this reason some families discovered, at the start of the season, that there were no areas left for them.

The Department of Game was simply not prepared to permit unregulated Native hunting, trapping or fishing in Ontario. Large sums of money were at stake in terms of government revenue and private economic activity. By the 1930s the Department of Game regulated a section of the economy worth tens of millions of dollars, and its officials were not going to compromise this. The Department also maintained a large number of deputy fish and game wardens throughout Ontario. Three hundred and fifty eight men patrolled the forests and lakes. In one year 1,253 convictions were secured, and in 1,635 cases goods and equipment were seized from people.³⁸

For the 1930 fiscal year the Department pulled in \$401,527.60 in revenue from game. When money obtained from fishing licenses and other general programmes was added the total was slightly over \$775,000.³⁹ The Department

³⁸ Game and Fish Report, 1930. p. 28

³⁹ Game and Fish Report, 1931: 1.

also ran an \$88,000 surplus. While this was small compared to 1926, when a surplus of \$282,000 was produced it was still a surplus. Fines also netted the Department over sixteen thousand dollars in 1930, confiscated equipment was auctioned for a total of seven thousand dollars, and illegally killed game was butchered and provided to hospitals or relief agencies. The money created by hunting and trapping was also considerable. In 1930 the Department estimated that almost two and a half million dollars worth of pelts were trapped. This value was substantially lower than previous years due to the low prices furs fetched on the market due to the depression.⁴⁰ With this much money at stake, including the outfitters, guides and hotel and tourist operators that relied on hunting, trapping and fishing (estimated at between fifty and eighty million dollars per year by the Department of Game, and one hundred and fifty million dollars by Jack Miner), it was apparent that the Department of Game regulated an important part of Ontario's economy.⁴¹

Considering the money and interests involved it is easy to understand why Department of Game officials were unwilling to compromise their game laws. Even after the trap line system was accepted by Game officials as policy, and implemented it did not take Ojibwa subsistence needs into account. Ojibwa were arrested for hunting when the animals were clearly taken for their own use. Department of Game officials, notably Deputy Minister Taylor, took no

⁴⁰ Game and Fish Report, 1930, p. 5.

⁴¹ NAC, RG 10, Vol. 6746, file 420-8C. Minutes of Meeting of Special Game Committee, 10 August 1931. p. 9. Miner produced no evidence to support this assertion.

interest in the extenuating circumstances surrounding each case, but paraded out standard responses, developed over the years, regarding blood-thirsty Indians slaughtering game. Several such instances emerged shortly after the Department of Game began to implement the trap line system.

In the summer of 1935, Chief John Ojeek of the Nipissing Reserve was arrested for possessing deer meat out of season.⁴² Both the meat, and Ojeek's rifle were confiscated. Despite protests that the meat was for his own use the local game warden was instructed by his superiors in Toronto to prosecute Ojeek.⁴³ Unwilling to accept his fate the Chief asked the local Indian Agent if there was sufficient money in the Nipissing Band fund for him to appeal the magistrate's decision should he be found guilty. Indian Affairs' new secretary, A.F. Mackenzie, thought the Ojeek case possessed merit, and wrote to the Department of Game to ask for a stay of proceedings until the matter could be considered.⁴⁴

Mackenzie explained that the Ojeek arrest once again raised the question of treaty rights which had never been adequately resolved in R. v. Padjena. Not wanting to antagonize the Department of Game's new deputy minister, D.J. Taylor, the same Taylor who sat on the Special Game Committee, Mackenzie proposed that a representative of Indian Affairs meet with him in Toronto to discuss the issue. While Taylor did not dismiss Mackenzie's suggestion he also

⁴² NAC, RG 10, Vol. 6767, file 420-8x, part 1. George Cockburn to A.F. Mackenzie, 6 August 1935.

⁴³ Ibid. Cockburn to Mackenzie, 19 August 1935.

⁴⁴ Ibid. Mackenzie to D.J. Taylor, 9 September 1935.

did not give any indication that his department would entertain the possibility of delaying O'Jeek's prosecution. Taylor stated the Department of Game would not tolerate "Indians taking game and fish unnecessarily out of season...and thereby materially affecting a natural resource that we think very valuable, particularly as a tourist attraction, without making every effort possible to prosecute."⁴⁵

Taylor explained that trap lines would solve many of the problems that occurred regarding Indian hunting rights once the plan was implemented. However, in the interim, Taylor said that hunting and fishing which attracted between fifty and eighty million dollars a year in tourist trade could not be sacrificed for the sake of allowing Indians to slaughter game "for dog feed." Using a tactic his predecessors made standard, Taylor said that he presumed Indian Affairs was "only too anxious to cooperate with us," but that its own employees were actually hurting the interests of the Ojibwa. Taylor referred to unspecified instances of Indian Agents telling the bands that they possessed extra hunting rights by virtue of their treaties with the Crown. This was hindering the Department of Game, Taylor contended, in its efforts to create to find a solution for the Ojibwa. This arrangement, however, was clearly not meant to permit subsistence hunting. Indians had to understand, Taylor concluded, "that they cannot at all seasons of the year slaughter game unnecessarily in this Province."

⁴⁵ Ibid. Taylor to Mackenzie, 12 September 1935.

Taylor's proof of Indian slaughter amounted to little more than anecdotal evidence taken out of context, and of much the same caliber presented to the Special Committee in 1931. Considering that Taylor was the member who used such information most often it is not surprising he relied on it again when he became deputy minister. An examination of Taylor's 'facts' reveals the degree of bias in the Department of Game towards Natives. Shortly after his exchange with Mackenzie a white hunter, Hillard J. Davis, wrote to the Department of Game in 1935 to complain about Indians in the Temagami area shooting an inordinate number of deer.⁴⁶ Writing from southern Ontario, Davis related that he and four others purchased deer licenses and traveled from Toronto to Temagami to hunt. Davis said that despite spending money on a license, railway passage, and accommodations he and his party secured only one small buck. The problem, according to Davis, was two families of Indians, those of Angus Beaucage and Joseph Beaucage. Davis said he and his party came upon the Beaucage's camp where they had two does hanging. While Davis claimed he was not opposed to "an Indian or part Indian getting meat to eat" he had it on "good authority" that these two families killed twenty-five deer the previous season. Continuing with his unsubstantiated claims David said that:

It is a known fact in the district that they kill deer for the hide which they tan and make up mitts, etc., and sell to lumber jobbers, thus the meat is wasted and ourselves and another party who go in there come home without a chance to get deer.⁴⁷

⁴⁶ Ibid. Hillard J. Davis to the Department of Game, 18 November 1935.

⁴⁷ Ibid.

With such flimsy evidence before him, and ignoring that two deer to feed two families was not excessive, Deputy Minister Taylor sent the local game warden to investigate Davis' complaint. Warden Haskins went to the Beaucages' camp in early December, 1935. In his report to Taylor he enumerated the deer that he found:

Angus Beaucage:

4 partly tanned deer hides
 3 green " "
 1 carcass meat, "Doe."
 1 fawn head
 Several deer feet

Joe Beaucage:

1 partly tanned deer hide
 5 green " "
 1 carcass meat "Doe."
 1 front quarter "Fawn."
 1 Doe Head
 1 Buck Head
 2 Front quarters of buck laying in the yard
 5 Fresh deer tails.⁴⁶

Between the two of them Haskins' reported they killed fifteen deer that Fall. Haskins asked Taylor, based on his past experiences with both men, that the Department permit him to arrest and prosecute both of them.

While fifteen deer might seem excessive Haskins gave no indication as to how big either family was. It is safe to assume that, since the word "family" was used that each constituted at least a husband, wife and one child. Within this context fifteen deer is not excessive for six, and quite likely more people over an entire season. While the amount of wild game needed to support a family is difficult to estimate there is some indication that it is quite large. J.W. Anderson

was the Hudson's Bay Company's post manager at Mistassini in northern Quebec just prior to World War One. Anderson wrote a book containing his reminiscences of his time in the north, and noted that a Cree family could consume a surprising amount of meat during a hunting season. Anderson asked some of the families to keep track of the number of animals they killed and ate, or simply trapped. One hunter, Robert Peetawabano, provided a list for the winters of 1912-1913 and 1913-1914. Between October and May of these two years he hunted, trapped or fished:

[1912-1913] 430 lbs moosemeat, 6022 rabbits, 7300 fish, 100 ptarmigan, 59 beaver, 53 marten, 9 otter, 26 muskrats, 9 mink, 10 ermine, 40 ducks, 3 black bear and 18 loons.

[1913-1914] 3306 fish, 1642 rabbits, 67 beaver, 8 otter, 21 marten, 4 mink, 3 ermine, 66 ptarmigans, 140 ducks, 3 owls, 2 harks, 2 weenisk, a red fox, 2 yellowlegs, 1 gull, 2 caribou, 3 black bear, and 55 muskrats.⁴⁹

Anderson explained that the Cree ate everything except the marten, mink, ermine and fox which were consumed only in difficult circumstances. The large quantity of certain game, particularly rabbit, was due to the low fat content of some species. Bear and beaver meat, Anderson stated, had a high fat content and were considered by the Cree to be very "strong meat" because they were sustaining and nourishing. Rabbit and ptarmigan, however, were very low in fat and a large number had to be consumed. Anderson said he heard of one Cree who ate eight rabbits at one time. Meat was simply an essential part of

⁴⁹ Ibid. H.E. Haskins to Taylor, 16 December 1935.

every meal owing to the Cree's limited access to vegetables and having only a small amount of flour for bannock.

Placed within this context it was not excessive for two families to kill fifteen deer over several months. However, since Hillard Davis and his companions were sport hunters/tourists, and represented the very clientele the Department of Game sought to cater to Deputy Minister Taylor wrote immediately to Indian Affairs to complain of the actions of the two Temagami families.⁵⁰ Referring to the unsubstantiated evidence presented to him, Taylor informed Secretary Mackenzie that the Department of Game was in a difficult position. It could not permit Ojibwa to slaughter deer to such an extent. Referring specifically to Davis' letter Taylor noted the effect such hunting had on the tourist trade in Temagami. With this stated Taylor concluded that he would instruct the local game warden to arrest of the Beaucage men, and prosecute them to the full extent of the law.⁵¹

A Nipigon Ojibwa received similar treatment in 1936. Michell LeGarde was arrested for possessing moose meat out of season. The Port Arthur Indian Agent, J.G. Burk, after learning LeGarde's problem, wrote to the Royal Canadian Mounted Police detachment in Winnipeg to investigate the matter. The

⁴⁹ J.W. Anderson, A Fur Trader's Story (Toronto: The Ryerson Press, 1961): 101-102.

⁵⁰ NAC, RG 10, Vol. 6747, file 420-8x part 1. Taylor to Mackenzie, 17 December 1935.

⁵¹ Both men were sentenced to twelve months, but with a suspended sentence. Their guns were confiscated, but eventually returned to them.

investigating officer's report still exists.⁵² LeGarde, he noted, killed three moose over the winter of 1936, but that the accused stated that he always killed that many to feed both his family and his dogs. The local game warden, discovering LeGarde's food cache at one of his camps, seized the moose meat and also took some of LeGarde's possessions (i.e.: traps and a sleigh). LeGarde contended that the meat was entirely for the use of his family, and that he did not intend to sell any of it.⁵³ When the officer, Waugh, questioned LeGarde he was told that the first moose lasted for a month. The other two were taken down in February, and lasted until the end of March. LeGarde said he left some of the hind and front quarters behind in the bush because they were heavy, and he would retrieve them when his family needed more meat. It was at this point that the local game warden, John Noble, discovered the moose meat while patrolling his district. After confiscating the meat, and without bring LeGarde to trial to determine his guilt, the meat was cut up and divided amongst families on relief.

Despite these continued conflicts over subsistence hunting and the Department of Game's harassment of Ojibwa hunters clearly engaged in subsistence hunting, Indian Affairs worked with the Department of Game to create the trap line system. Deputy Minister McDonald wrote to MacInnes to inform him that, pursuant to the report of the Special Game Committee, the Department of Game had divided northern Ontario into three sections for the

⁵² Ibid. Royal Canadian Mounted Police Report, 15 May 1936.

⁵³ LeGarde's family consisted of himself, two brothers, his cousin and his mother. He had four dogs.

purposes of issuing trapping licenses: East, Central and North.⁵⁴ The Eastern and Central sections encompassed the land lying east of the French and Mattawa Rivers and all territory between those rivers, the Canadian National Railway and the Manitoba boarder. The territory north of the railway constituted the Northern Section. McDonald explained that, starting this year, all trapping licenses were to be issued by game wardens, and each license was valid for only one section. To hunt outside of a section a trapper would have to secure the written permission of the North Bay District Superintendent.⁵⁵ District Superintendents were also ordered to curtail the issuing of licenses to whites wanting to trap in the Northern Section. After a trial run, McDonald explained, his department would have information regarding the number of whites trapping in northern Ontario and the location of their trap lines. For this year McDonald said Indians would also require a trapping permit to give the Department of Game an idea of where their trapping grounds were located. McDonald also asked that Indian Agents aid the District Superintendents in obtaining information about the Ojibwa's trapping grounds.⁵⁶

It would be several years before the Department of Game got around to instituting the trap line system. In the interim, based on the reports sent to it by its field agents, Indian Affairs officials in Ottawa realized that the trap line system would not work because it did not address the problems facing the

⁵⁴ NAC, RG 10, Vol. 6746, file 420-8E part 7. McDonald to MacInnes, 12 September 1933.

⁵⁵ Ibid.

⁵⁶ Ibid.

Ojibwa. Specifically, unless land was set aside exclusively for the Ojibwa they would not benefit from the new system. A piece meal system of trap lines, with Ojibwa lines either surrounded by White trappers or not corresponding to traditional areas, would not address the specific problems facing the bands. In February, 1937, Michael Christianson, General Superintendent of Indian agencies, and Thomas McGookin the district superintendent, toured the Nipissing Agency which was comprised of the Nipissing, Temagami and Matachewan Bands.⁵⁷ Both men reported that in the past the Ojibwa in the agency had made a good living from hunting and trapping, but owing to the increasing number of whites this was becoming impossible. Christianson said conditions were so bad some hunters were forced to travel further away from their usual hunting grounds. Some Nipissing Ojibwa, for example, were going into the region around Chapleau.⁵⁸ Such extreme travel was necessary, he explained, because the Ojibwa had few other opportunities to support

⁵⁷ NAC, RG 10, Vol. 6746, file 420-8 part 8. Michael Christianson to Dr. McGill, 22 February 1937. The Matachewan Band was part of Treaty Nine, but its reserve lay just within the northern portion of the Robinson-Huron Treaty. Matachewan Ojibwa hunting territories lay both north and south of the height of land. Frank Speck said that the Matachewan and Temagami Ojibwa were closely related by virtue of intermarriage. Indeed, examination of the HBC's Matachewan post journal reveals that members of the Matachewan Band did hunt and trap as far south as Gogama which lies within what is claimed as the traditional hunting grounds of the Temagami Ojibwa. See AO, F431, MU 7848, ACC. 2115, Miscellaneous Fur Trade Papers, Fort Matachewan Journal, part 1 and part 2, 1870-1874. Also AO, F.431, MU 1399, envelope #8, HBC Papers - Temiskaming District, Matachewan Fur Trade Papers, 1872. Frank Speck also noted the southern areas of Matachewan's hunting territories. See Speck, Family Hunting Territories and Social Life of the Various Algonquian Bands of the Ottawa Valley, Memoir 70, No. 8 (Ottawa: Department of Mines, Geological Survey, 1915).

themselves. None of the bands engaged in extensive farming. While many of the Ojibwa men worked in the tourism industry as guides for the summer they relied exclusively on hunting and trapping in the winter. Christianson said the only way Indian Affairs could get these families off relief was to set aside land specifically for their use, and prohibit whites from hunting or trapping there.

Several months after Christianson's report was received Indians Affairs' departmental secretary, T.R.L. MacInnes, met with the deputy minister of the Department of Game in Toronto.⁵⁸ MacInnes brought Christianson's report with him, and presented the evidence to Deputy Minister Taylor as proof that special hunting preserves be created for the Ojibwa. Taylor said his department was now ready to create such preserves as long as the Indians understood that they were subject to all closed seasons and other conservation measures enacted by the province while hunting on the preserves. MacInnes raised the issue of the Robinson Treaties, and that the bands were permitted to hunt on all unoccupied Crown land. Taylor, however, "questioned the validity of the treaty as against the game laws of the Province, and intimated that his department proposes to prosecute Indians for infractions of the game laws even on unoccupied Crown lands in the Robinson treaty areas." Even when MacInnes drew Taylor's attention to "existing jurisprudence" (i.e.: the McKay decision) he remained confident that the province's actions were perfectly legal. Taylor claimed to be particularly concerned about the Indian slaughter of moose, deer and other

⁵⁸ Ibid.

⁵⁹ Ibid. MacInnes to McGill, 26 April 1937.

“sport game.” MacInnes retorted that such game was killed to prevent starvation, but Taylor said that in light of the money made from hunting and tourism it would be cheaper for Indian Affairs to simply provide more relief. Taylor did not indicate if the province would subsidize this relief out of the money it garnered from hunting and tourism.

During their meeting Canon Prewar from the Anglican Diocese of Moosonee called on Taylor, and sat in on his meeting with MacInnes. Why Prewar arrived is unclear, but this interruption reveals how territorial Taylor was when he suspected anyone of interfering in his department’s jurisdiction. Taylor accused Prewar of “aiding and abetting the Indians in violation of the Game and Fisheries regulations.”⁶⁰ Prewar had, on numerous occasions, written to Indian Affairs and the Department of Game regarding the Ojibwa and Cree in the Chapleau Agency and their problems with the game laws. Prewar denied these accusations, and reminded Taylor that he had, on one occasion, told the local game warden that a man claiming to be Indian was actually French Canadian and not possessed of any treaty rights. Taylor was uninterested, and proceeded to produce evidence of the damage wrought by Natives upon fish and game. Brandishing four letters which complained about the Ojibwa breaking departmental fishing regulations in the Lake of the Woods district, Taylor reiterated his claim of Ojibwa wrought destruction in the north. MacInnes explained that many reserves in Treaty Three were chosen by the Ojibwa in order to have lake frontage, and access to traditional fisheries, but

Taylor was not interested. Taylor even went on to say that none of the bands within the Robinson treaties possessed extraordinary fishing rights, and said "he would welcome a test of the validity of this section of these treaties."⁶¹

From MacInnes' memorandum it is clear that he was not impressed with Taylor's tirade, but believed that the trap line system, regardless of the limitations within it, should be implemented. MacInnes' conversation ended with him agreeing to obtain information from northern Indian agents regarding the specific preserve requirements of their bands. Indian Affairs sent a circular to all of its agents in northern Ontario in the spring of 1937 informing them of the new system.⁶² Indian Affairs told its agents to try and secure the best possible trapping grounds for the Ojibwa. The system had not yet been started, and the department wanted the agents to ascertain where their bands usually trapped and hunted. MacInnes noted that "it would be desirable, if at all possible, to have the old trapping grounds formerly used by the Indians included in the selected area..." taking into account land leased to logging operations.

Some bands agreed to participate. The Chapleau Indian Agent, T.J. Godfrey, sent in his map and report to Indian Affairs in the summer of 1937. Although responsible for some Treaty Nine bands the Michipicoten, Mississauga

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² NAC, RG 10, Vol. 6748, file 420-8-2 part 1. MacInnes to Agent Godfrey, et.al., 15 March 1937. The agents and their agencies were as follows: T.J. Godfrey, Chapleau; G.H. Sims, Sault Ste. Marie; J.M. Daly, Parry Sound; R.J. Lewis, Manitowaning; C.F. Rothera, Thessalon; A. Levesque, Sturgeon Falls.

and Spanish River bands also fell within the Chapleau agency. During his treaty annuity trip Godfrey met with each band, and after discussing the matter with them drew up a map showing five different hunting and trapping areas.⁶³ The first three were for Robinson-Superior and Robinson-Huron bands. The Mississauga and Spanish River bands had hunting grounds that lay close together, so Godfrey designated them as area number one, the Michipicoten Ojibwa had more dispersed territory which lay partially within areas two and three.⁶⁴ Godfrey considered the implementation of the trapping lines as vital to the interests of the Ojibwa due to the increasing frequency of white trappers poaching on their territories. Thomas McGookin, the Inspector of Indian Agencies, agreed. He said that the Ojibwa and Cree in Godfrey's agency were experienced trappers who knew when to rotate their trap lines, and how to conserve the fur bearing animals. He noted that it was Whites, drawn to trapping after losing their jobs in the logging camps, who were destroying the wildlife resource in the north.⁶⁵

Not all the bands were interested in participating in the trap line scheme. John Daly, Indian Agent for the Parry Sound agency, said he took the matter up with the bands in his agency but they refused to answer his questions regarding their trapping grounds. Daly could "not understand why they are not interested in this, but the fact is...when I ask them for an explanation they shut up and

⁶³ Unfortunately the map is too faded to indicate where the various trapping grounds were located.

⁶⁴ Ibid. Godfrey to MacInnes, 12 June 1937.

⁶⁵ Ibid. Thomas McGookin to MacInnes, 16 June 1937.

wont [sic.] say anything.”⁶⁶ The Fort Frances Indian agent, Spencer, experienced similar difficulties.⁶⁷ Although some of the Treaty Three bands were interested in the plan he said the majority were not. Spencer recommended setting aside land anyway “regardless of what the Indians want for protection of the bands of this agency...”

While neither agent provided any explanation for the behaviour of the bands it is possible to guess at their reasons. First, particularly within the Parry Sound agency, the bands were subjected to a large number of arrests. This agency included the Nipissing and Temagami bands. The latter did not possess a reserve, even though by the 1930s they had been asking for one for more than fifty years. The 1930s also saw, as evidenced earlier in this chapter, a number of arrests. Believing that they were being denied their right to hunt, coupled with their anger over not being given a reserve likely led the Temagami Ojibwa to ignore the Indian agent. Similarly the Nipissing band had been at the centre of the hunting issue since Wilson Ottawaska and Barnaby Commanda were arrested in 1898 for hunting moose out of season (see Chapter 3). Since that initial incident other members of the Nipissing Band had been arrested, and it is quite likely that neither the chief, band council nor the members of the band were interested in cooperating with either John Daly or the Department of Game.

⁶⁶ *Ibid.* John Daly to MacInnes, 2 September 1937.

⁶⁷ *Ibid.* A. Spencer to MacInnes, 30 July 1937.

Another reason why some bands refused to participate is provided by George Prewar. Prewar, as noted earlier, was the head of the Anglican Western Moosonee Mission. He noted that some of the Treaty Nine bands also did not want to participate in the trap line idea. Prewar discovered that some of the families believed the trap line system was too restrictive. They did not think they should limit themselves to such a small territory when, previous to signing the treaty, they could hunt over a much larger area.⁶⁸

By September of 1937 the Indian agents had reported to Indian Affairs regarding the land that was to be set aside. The Sault Ste. Marie agent recommended that the Goulais River Ranger Lake Game Preserve, approximately five hundred and fifty square miles in size, be opened to the Garden River and Batchewana bands as a hunting territory.⁶⁹ The Thessalon agent requested that eight hundred and fifty square miles of land be set aside for the Thessalon and Mississauga Bands, and a separate parcel of one thousand square miles for the Serpent River and Spanish River bands. T.J. Godfrey, the agent responsible for the Michipicoten Band, suggested that two thousand four hundred and fifty square miles be set aside for one group of Michipicoten Ojibwa who hunted in the area around Chapleau, and another fifteen hundred square miles for those that used the land around Missanabie Lake. Other agents, however, reported difficulties in finding land to set aside. The Port Arthur agent said that most of the land around the reserve had been leased to logging

⁶⁸ Ibid. George Prewar to MacInnes, 12 November 1937.

⁶⁹ Ibid. Memorandum, 27 September 1937.

companies and, since it was privately held, could not be set aside for trap lines. The Parry Sound and Nipissing Agents did not send in reports for reasons noted above.

The problems that seemed inherent in the system began to appear shortly after it was instituted. In 1939 the Fort Frances Indian Agent, J.P. Lockhart, wrote to Indian Affairs that Ojibwa in his agency were unhappy with the new regulations. Specifically, they were still losing their trapping grounds to whites only this time it was being done with the sanction of the Ontario government. The problem, as outlined at the beginning of this chapter, was that family trapping territories were not guaranteed to the Ojibwa. Lockhart referred to one man who had trapped in a certain area for ten years only to have a white trapper receive a permit for the same land.⁷⁰

The Chapleau agent, Godfrey, also reported that very little had changed. In his report for January, 1938, he said that owing to the scarcity of fur-bearing animals, and the inability of the Ojibwa to find employment, he was forced to distribute relief amongst the bands in his agency.⁷¹ Furthermore, even though they possessed certain trapping grounds they still could not hunt beaver for food. Godfrey said that until the Spring "rat" (muskrat) hunt started there was nothing for the bands to do.⁷² By March, Godfrey had issued almost two months rations to some families to enable them to go further into the interior to find

⁷⁰ NAC, RG 10, Vol. 6747, file 420-8x-3. Fort Frances Agency Report, November 1939.

⁷¹ NAC, RG 10, Vol. 10751, Series C-V-2. File 484/42-2. Chapleau Agency Report, January 1938.

game and fish. The entire situation was exacerbated, Godfrey explained, because Ontario game wardens prevented the hunters from securing enough deer and moose to feed their families.⁷³ The following year Godfrey reported that the Department of Game agreed to open a short beaver season, which pleased the bands in his agency, but the manner in which it was done did little to help them. It was announced so suddenly that some Ojibwa were unable to secure licenses, and during the season the Department changed the trapping regulations which resulted in several arrests.⁷⁴ The problem was that once a family went to its trapping grounds they stayed there for the entire season while white trappers might go back to the nearest town after several days in the bush. The other problem was that the Department would not permit wives, and grown up daughters and sons to trap. Only the head of a family was issued trapping licenses even though all the members of an Ojibwa family helped during the trapping season.⁷⁵ The only people who benefited from the new trapping system, Godfrey stated, were "white trappers who will trap all over the Indians territory where he has conserved beaver for years."⁷⁶

Despite the promise that the new trapping territory system would solve some of the problems the Ojibwa faced the opposite occurred. As agents' reports indicate many families were unable to secure trapping territories, and could not even take advantage of open seasons. The trap lines did not integrate into the

⁷² Ibid. Chapleau Agency Report, February 1938.

⁷³ Ibid. Chapleau Agency Report, March 1938, and April 1938.

⁷⁴ Ibid. Chapleau Agency Report, March 1939. Only two days notice was given.

⁷⁵ Ibid. Chapleau Agency Report, June 1939.

lifestyle of the Ojibwa. Familial boundaries were not considered, nor was the simple fact that families often went into the bush for several months or longer and, as a result, were often unaware of new regulations issued by the Department of Game. Furthermore, the new system did nothing to address the issue of subsistence hunting. Deer and moose, being large animals, were sought after by sport hunters. They were also desired by the Ojibwa who required large animals to provide their families with sufficient food. The Department of Game was not prepared to jeopardize the money that hunting and tourism brought into Ontario.

With this in mind, it created the trapping territories not as a means of protecting Ojibwa harvesting rights but to protect and regulate one of Ontario's natural resources. Fur bearing animals, while not as important as mines and timber, represented millions of dollars in economic activity every year. The Department hoped the trapping system, by placing stricter controls over trappers in general, would serve to protect beaver and other animals from over-trapping. Little consideration was given to the needs of the Ojibwa, or to the promises made to them in 1850. The Department had been successfully applying its game laws to Indians throughout Ontario since the 1890s there was no reason for them to suddenly change their policy.

Indian Affairs took hold of the new trapping system as a possible remedy to a particular situation: white trappers trespassing on traditional Ojibwa familial territory. It realized that the new system would not address the

⁷⁶ Ibid. Chapleau Agency Report, March 1939.

subsistence hunting issue, but hoped perhaps that it could solve one problem. It did make an effort to insure that Ojibwa families were able to use their traditional trapping territory, but this did not work once the new system was implemented. Its continued desire to look for a compromise with Game officials prevented Indian Affairs from effectively settling the problem. While certainly more aggressive in its relations with provincial officials Indian Affairs was still too timid to use a legal club to beat concessions out of the Department of Game. By the late 1930s Indian Affairs, in an effort to finally settle the entire issue, began to look and wait for the right conviction to appeal. Indian Affairs accepted that it could not longer hope for a negotiated settlement - only the courts could force the Ontario government to amend its game laws either through a ruling, or if used as a threat by Indian Affairs to force the Department of Game to negotiate seriously.

Chapter Eight
"...Justice for our wards:"
***R. v. Commanda* , 1937-1944.**

In 1944, Hugh Conn, Indian Affairs' Fur and Wildlife Superintendent, wrote a detailed memo outlining Indian Affairs attempts to secure subsistence hunting rights for Natives in Ontario. Referring to the *R. v. Commanda* case of 1939, Conn stated that Indian Affairs had wasted the perfect opportunity to settle the issue. Only the courts would force Ontario to recognize treaty rights, Conn argued. Until such time as Indian Affairs was prepared to reopen the question of treaty rights before the courts, Conn said, the department would never secure "justice for our wards."

Starting in 1937 Indian Affairs actively looked for an incident with which it could challenge Ontario's *Game Act*. With the failure of the Padjena case and the creation of the trap line system it was evident that no concessions could be wrung from the Department of Game until a court of law declared the province's conservation laws *ultra vires* when applied to Natives, or the threat of a protracted legal battle forced provincial officials to the bargaining table. Although Indian Affairs was still involved in the creation of a trap line system for the Ojibwa it was clear by the late 1930s that subsistence hunting was still a problem. When hunting for deer, moose or small game Ojibwa were still being arrested, prosecuted and convicted. While few served any jail sentences, and magistrates often imposed minimum sentences the Ojibwa were becoming increasingly angry. After almost fifty years of arrest and harassment, and

apparent inaction and disinterest on the part of Indian Affairs, this sentiment is easy to understand. With this in mind Indian Affairs hunted for a suitable test case to finally settle the matter either through a court imposed solution, or negotiations with a legally chastened Department of Game.

It found one with Joe Commanda, a member of the Nipissing Reserve. It is ironic that the first incident involving the Ojibwa and the *Game Act* involved a Commanda, and the most important court decision to that point involved a member of the same family. Commanda and several companions (also from the Nipissing Band) were hunting moose and deer out of season, and, after successfully killing two moose and one deer, were arrested by the local game warden. Indian Affairs believed that this was their perfect test case: Commanda was hunting within the Robinson-Huron Treaty, he was a Treaty Indian, and, based on the available information, he killed the animals for subsistence purposes. This case did not suffer from the same weaknesses as the Padjena and Quesawa arrest where the accused were hunting outside the northern boundary of the Robinson-Superior Treaty. Commanda and the other hunters were hunting around Tomiko Lake just north of the Nipissing Reserve. Furthermore, the land they were hunting on was completely unoccupied. It was not part of a game preserve, nor had it been sold or leased to anyone. It was Crown land.

Several factors, however, worked against *R. v. Commanda* becoming the solution Indian Affairs hoped it would be. First, Ontario controlled the situation and had denied the Ojibwa their treaty rights for several decades. Second,

Indian Affairs own paternalistic bias worked to deprive the Ojibwa of their treaty rights. Lastly, when the case went to trial the judge ruled that the Ojibwa possessed no extraordinary hunting or trapping rights by virtue of the Robinson Treaties. Undeterred, Indian Affairs was fully prepared to appeal, but agreed to put off the appeal until a later date after Ontario's Provincial Secretary, Harold Nixon, intervened. Nixon promised that Ontario would enter into meaningful negotiations with Indian Affairs if the appeal were dropped. Timing, however, and political circumstances worked against this deal. The *Commanda* decision came in 1939 just as Europe was about to be engulfed in war. It is unlikely the Dominion Cabinet would have welcomed any constitutional distractions during that time particularly from Mitchell Hepburn who was already a thorn in Prime Minister King's side. By 1944 Indian Affairs realized that Ontario's offer was in fact a ruse, and that not only was the Department of Game unwilling to compromise but that it was now too late for Indian Affairs to appeal the *Commanda* decision.

Lastly, paternalism was still the guiding principle within Indian Affairs. It never wanted to give the Ojibwa unrestricted subsistence hunting rights only the privilege of securing enough food to support themselves. It appreciated the conservation measures enacted by Ontario, and only wanted them changed not abolished. Therefore, even if the provincial government had been willing to negotiate following *R. v. Commanda* it is unlikely the bands would have been pleased with the outcome. Letters detailing Indian Affairs negotiating position

still exist, and indicate that it was willing to ignore the treaty rights of the Ojibwa in order to achieve a political settlement with the Department of Game. Although its motives were altruistic Indian Affairs knowingly ignored the hunting promise made in the Robinson Treaties for the sake of a political compromise. Indian Affairs likely believed that this agreement was preferable to the current situation, but there was another factor at work: paternalism. Indian Affairs believed that conservation was necessary, and did not think that unrestricted hunting and trapping rights were in the best interests of the Ojibwa who stood to benefit from the *Game Act* but did not realize it.

Indian Affairs' paternalistic attitude towards the Ojibwa in this matter is further evidenced by the complete absence of records detailing Commanda's opinions. After Indian Affairs learned of the Commanda arrest and conviction they proceeded to put the appeals process in motion. There is no indication that Indian Affairs officials, or even the Nipissing Indian Agent corresponded with Commanda regarding the appeal. Essentially, Commanda was not necessary for the appeal. It was being conducted by bureaucrats for other bureaucrats who only wanted to settle outstanding legal and policy issues regarding Ontario's game laws and the Robinson Treaties. The Ojibwa although necessary were essentially extraneous.

However, before Indian Affairs could extract a compromise from the Department of Game it realized that a lever was necessary to pry such an agreement out of it. While the Depression was lifting by the end of the 1930s

there was still high unemployment in northern Ontario particularly amongst the bands. The incidents of hunters being arrested for simply trying to feed themselves and their families rose to such a level, and Indian Affairs' frustration at the Department of Game's arrogant handling of the situation grew to such an extent that Indian Affairs began to look for a test case to use as a threat in order to acquire some bargaining power. It was clear that only a court decision would settle the matter, and force the Ontario government to agree to concessions.

The situation surrounding the Fort William Agency aptly summarizes the situation facing the Ojibwa. Two Ojibwa from the Fort William Reserve were convicted under the *Game Act* in April, 1937, for possessing moose meat out of season.¹ The convicting magistrate, Joseph McQuaig, wrote to Joseph Burk, the Indian Agent, and explained that he had to convict both men because the Robinson-Superior Treaty was never introduced into evidence. McQuaig had even provided one of the defendants, Podan Nockwinagus, with an extra month to get a copy of the treaty for the court. Obviously the magistrate did not want to convict but in the absence of contrary evidence he had to rule based solely on the provisions of the *Game Act*.

Chief Paul Auger of the Pays Plat Reserve (part of the Fort William Indian Agency) was experiencing similar difficulties. In a letter to Agent Burk, Auger explained that the local game warden had warned him and other members of his

¹ NAC, RG 10, Vol. 6747, file 420-8x part 2. Joseph McQuaig to J.G. Burk, 7 June 1937.

band not to hunt moose or deer.² Auger explained that there was little work available for people on the reserve, and the situation was particularly bad for seniors. They were too old to either work or hunt, and many of the young men were working at a lumber mill in Nipigon. They were not paid sufficient wages to send money back, nor could they hunt moose or deer to provide older family members with food, as was customary, because they were afraid to hunt for fear of being arrested. Fishing was not even possible, Auger explained, as White fishermen were setting up nets only one half mile from the reserve's shoreline and taking the majority of the fish. Agent Burk forwarded Auger's letter to Indian Affairs, and explained that approximately every second day he received letters from Ojibwa in his agency complaining about the game laws and wardens harassing them.³ Burk asked if Indian Affairs intended to appeal the Nockwinagus conviction as the case was a point of contention with the bands in his agency and an appeal would clarify the situation.

By this date Indian Affairs was clearly considering the viability of appealing a game conviction against an Ojibwa. However, it wanted to wait until the right case presented itself - essentially one that Indian Affairs stood a reasonable chance of winning at either the provincial appeal level or, ultimately, before the Privy Council. The Nockwinagus case did not meet Indian Affairs' criteria as the moose in that case was killed on a provincial game preserve.⁴ Indian Affairs, despite the remarks of Secretary MacInnes before the Special

² Ibid. Chief Paul Auger to Burk, 5 June 1937

³ Ibid. Burk to T.R.L. MacInnes, 19 June 1937.

Game Committee in 1931 (see chapter six), was not entirely sure a Crown game preserve qualified as “unoccupied Crown land” as per the Robinson Treaties.⁵ Afraid that this fact might jeopardize an appeal Indian Affairs decided to wait.

Matters were not much better for bands within the Robinson-Huron Treaty. In August, 1937, the Temagami, Nipissing and Dokis bands sent simultaneous petitions to Thomas Crerar, the Minister of Mines (who was also responsible for Indian Affairs) to complain about the treatment they had received at the hands of game wardens over the last several decades.⁶ The chiefs of each band stated that unless Indian Affairs dealt substantively with their petitions within sixty days of receiving them that they would take their appeal before the League of Nations in San Francisco. They were taking this step, each chief explained, because “for too long a time have you [Indian Affairs] allowed members of our Band to be jailed, fined, imprisoned, and our game and food confiscated for violating the Ontario Game Laws.”⁷

When these petitions arrived at Crerar’s office they were forwarded to Dr. McGill now the Director of the Indian Affairs Branch of the Department of Mines and Resources.⁸ In a memorandum to the minister McGill explained that it was

⁴ **Ibid.** MacInnes to Burk, 8 July 1937.

⁵ **Ibid.**

⁶ **Ibid.** Petitions of Nipissing, Dokis and Temagami Bands to Thomas Crerar, 30 August 1937.

⁷ **Ibid.**

⁸ **Ibid.** C.W. Jackson, Secretary to the Minister, to Dr. H.W. McGill, 11 September 1937. When the Department of Indian Affairs was placed under the control of the Department of Mines and Resources the Deputy-Superintendent General assumed the new title of Director of Indian Affairs while another official became Deputy Minister of the entire department.

the intention of Indian Affairs to undertake an appeal of some future conviction to settle the hunting matter, but not to provide the Ojibwa with completely unrestricted hunting and trapping rights. Putting aside that McGill mistakenly believed the Temagami Band fell within the purview of Treaty Nine, he explained that an appeal could go as far as the Privy Council. Although this would involve some expense he believed that this action was necessary as Indian Affairs had been negotiating with the Department of Game for some time with little success.⁹ McGill, however, concluded that although the Ojibwa's hunting and trapping rights should be protected they should only be encouraged "in the proper pursuit of the aboriginal vocations of hunting and trapping" and not be supported "in [the] wanton destruction of game or flagrant violations of provincial regulations made in the interests of conservation."¹⁰ McGill saw the appeal only as a tool to extract compromises from the Department of Game.

It was not long after this memorandum that Joseph Commanda, John O'Jeek, Louis Shabogesic and Angus Shabogesic were arrested at Tomiko Lake, north of North Bay, for killing two moose and one deer out of season.¹¹ McGill now had his test case. It was ironic that one day before the Nipissing Indian Agent, J.A. Marleau, wrote to Indian Affairs to notify them of the arrest that Secretary MacInnes was instructed to discuss the hunting situation in North Bay

⁹ Ibid., Memorandum, 25 September 1937.

¹⁰ Ibid.

¹¹ Ibid. J.A. Marleau to MacInnes, 10 February 1938. Both Shabogesic men were eventually let go because they were not in possession of any meat at the time of arrest. Joseph Commanda and John O'Jeek were fined. See Ibid. Marleau to G.A. Conley, 21 March 1938.

with game officials in Toronto because of the number of arrests in the area and the ensuing complaints that followed.¹² Marleau, writing to MacInnes about the arrest, stated that he spoke with McCurry, the local magistrate, regarding the upcoming case. McCurry said that under the *Game Act* the men would be convicted although Indian Affairs could appeal the case. By February 17, 1937, the case was heard before Magistrate McCurry in North Bay. Agent Marleau appeared on behalf of the accused.¹³ The case was, however, adjourned in order that it be prepared as a stated case for the Supreme Court.

MacInnes thought an appeal was in the best interests of the department.

In a memorandum marked "important", an unknown bureaucrat wrote that:

Should the Indians be convicted and should it be found that the moose were taken on Crown lands, Mr. MacInnes thinks that an appeal should be considered.¹⁴

With this done MacInnes referred the matter to a solicitor, Mr. Cory, within the Department of Mines and Resources to comment on the merits of the case, and if the Department should appeal the pending conviction.¹⁵ MacInnes, however, made it clear that Indian Affairs did not want to exempt Ojibwa from Ontario's game laws, but merely clarify their legal position relative to the treaties:

In connection with this matter I may say that our purpose is not to oppose the policy of the Ontario Government for game conservation, but to ascertain

¹² NAC, RG 10, Vol. 6746, file 420-8 part 8. Memorandum, February 9, 1938.

¹³ *Ibid.* Marleau to MacInnes, 17 February 1938.

¹⁴ NAC, RG 10, Vol. 6747, file 420-8X part 2. Memorandum, n.d.

¹⁵ *Ibid.* MacInnes to Cory, 22 February 1938.

clearly just what the legal rights of the Indians are under the treaty...¹⁶

Armed with such ammunition MacInnes likely thought he would have no trouble forcing concessions from the Department of Game. He was not disappointed. Cory advised MacInnes that the Robinson Treaties permitted the Ojibwa to hunt and trap as they had prior to 1850 over all unoccupied Crown land, and that the recent arrest would provide a suitable test case.¹⁷

The case proceeded as expected at the magisterial level. Commanda and O'Jeek were each fined \$25.25 for possessing moose and deer out of season.¹⁸ Indian Affairs agreed to pay these fines out of the Nipissing band fund on the understanding that this would not set a precedent.¹⁹ Cory was forwarded all of the pertinent files relating to the past case of *R. v Padjena*, and the Department of Mines' deputy minister, Charles Carswell wrote to the Deputy Minister of Justice about the upcoming appeal. Carswell asked that the Department look into the matter, and file Indian Affairs' appeal.²⁰ E.A. Tilley, a barrister from North Bay, was authorized to file the appeal, did so, but later proved unable to act on behalf of Commanda, O'Jeek and Indian Affairs.²¹ J.H. Macdonald was then retained by Indian Affairs to conduct Commanda's and Shabogesic's appeal.²²

¹⁶ Ibid.

¹⁷ Ibid. Cory to MacInnes, 24 February 1938.

¹⁸ Ibid. Marleau to MacInnes, 25 February 1938.

¹⁹ Ibid. MacInnes to Marleau, 1 March 1938.

²⁰ Ibid. Charles Carswell to Deputy Minister of Justice, 4 March 1938.

²¹ Ibid. Deputy Minister of Justice to Carswell, 7 March 1938.

²² Ibid. Marleau to Thomas McGookin, 12 March 1938.

Few documents exist for the period between the appeal being filed and finally heard in Toronto. While some letters passed between officials they dealt with minute details of little consequence. One possible reason why this occurred was the haste with which the appeal was dealt with, and Ontario's apparent decision to dispense with its usual obstructionist tactics. Unlike the Hudson's Bay Company's attempt, and the Padjena case both of which took an inordinately long time to come to trial, the Commanda case was heard within five months. Ontario's Attorney-General's Office, for unknown reasons, did not try to delay it. In April, 1938, Justice Greene of the Ontario Supreme Court heard the appeal in chambers at Osgoode Hall. While no transcripts exist two documents provide some insight into the nature of the arguments presented. C.R. Magone appeared on behalf of the Crown. In an article in the *Toronto Daily Star* it was noted that Magone questioned the validity of the treaty.²³ Magone said that although called a "treaty," the Robinson Treaties were in fact only an agreement. Since the Ojibwa did not constitute a foreign power a formal treaty could not exist between them and the Crown. Therefore, since the it was only an agreement it could be changed by Ontario by virtue of section 92 of the British North America Act. Magone took a risk with such an argument. It was identical to that used by the Fort William Crown Attorney in 1929 when the Padjena conviction was appealed before Judge McKay. In that case the Crown lost.

²³ *Ibid.* *Toronto Daily Star*, "Indians ask for Rights under old Hunting Pact." 23 April 1938.

Much more detailed information exists regarding the appellant's argument. J.H. Macdonald's written submission details his, Indian Affairs and the Department of Justice's thinking on the issue.²⁴ The Robinson-Huron Treaty formed the basis of Macdonald's argument, and he drew attention to the promises made therein regarding hunting and trapping.²⁵ Regarding the viability of the treaty, he stated that it was given legislative sanction by the Legislature of the Province of Canada by the initial and continued payment of annuity money, and the surveying of reserves. By adhering to the terms of the treaty the Legislature had *de facto* given its approval. Drawing further on historical evidence Macdonald outlined that the treaties were an established part of Crown-Native relations, and that Aboriginal title to the land and its resources (at least in terms of hunting) had been recognized in the past. Macdonald quoted from the Articles of the Capitulation of Montreal (1760) and the Royal Proclamation of 1763. In the former document it was noted that: "the savages or Indian allies of his Most Christian Majesty shall be maintained in the land which they inhabit if they choose to remain there." The Royal Proclamation, which referred to different Native tribes as "allies," noted that the tribes of British North America owned their respective lands until such time as they were ceded to or purchased by the Crown:

²⁴ Macdonald's submission related to the case of John Fisher another Nipissing Ojibwa who was arrested for hunting moose out of season. Fisher was arrested shortly after Commanda, but his case was included in the Commanda appeal because it dealt with the same issues.

²⁵ *Ibid.* Argument on Behalf of the Appellant, n.d.

And whereas it is just and reasonable and essential to our interests and the security of our colonies that the several nations or tribes of Indians with whom we are connected and who live under our protection shall not be molested or disturbed in the possession of such parts of our Dominion and territories as not having been ceded to our purchased by us are reserved to them or any of them as their hunting grounds.²⁶

After countering Magone's arguments regarding the legal validity of the treaty Macdonald proceeded to consider relevant sections of the constitution. He started with Section 109 which reads:

All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.²⁷

Macdonald contended that the reservation in the final part of s.109 would "primarily , if not altogether, refer to any trusts or interests which remained in the original inhabitants...by virtue of the Robinson and similar Treaties and Agreements..." The Robinson-Huron Treaty provided for the continued interest of the Ojibwa in the land and the wildlife located therein. Macdonald then moved onto s.91(24) which vested control over "Indians and Lands Reserved for Indians" to the Dominion government. Macdonald argued that insofar as an

²⁶ Ibid.

²⁷ Cited in J.L. Finlay and D.N. Spraggue, The Structure of Canadian History (Scarborough: Prentice Hall, 1984): 548. Underlining appears in Macdonald's submission.

Ojibwa interest existed in the land only the Dominion government, by virtue of s.91(24), could affect it subject to the explicit promise in the treaty regarding continued hunting and fishing rights. Macdonald conceded that Ontario could affect these rights, but only insofar as the treaty permitted the province to sell or lease portions of the treaty area. The Robinson Treaties note that the Ojibwa could not exercise their harvesting rights on "such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government." Within this context the province could limit the rights of the Ojibwa, but Macdonald reminded the court that the offence in question occurred on land that had been neither sold nor leased by the province.

Macdonald concluded that, by virtue of the Robinson-Huron Treaty and the BNA Act the Ontario government's actions were *ultra vires* of the Legislature. The act, Macdonald said, should "definitely exclude Treaty Indians within the territorial limits of their Treaties."²⁸ Macdonald stated that he was not implying that Natives in Ontario were immune to all laws, but where specific rights were guaranteed by treaty they must be respected.

Five months passed before Justice Greene rendered his decision.²⁹ When it finally came forth Greene disagreed with McDonald's argument, and stated that the Ojibwa lost their interest in the land after the treaty was signed. He referred to Lord Watson's decision in *St. Catherine's Milling and Lumber Co. v.*

²⁸ NAC, RG 10, Vol. 6747, file 420-8X. Arguments on Behalf of Appellant. n.d.

the Queen (1888). While this decision did recognize an Aboriginal interest in the land Greene noted that the treaty in question during that decision (Treaty Three) was created in 1873, while the Robinson Treaties came into being prior to Confederation. The 1850 surrender was made “to the Crown in the right of the Province of Canada and passed in 1867 to the Province of Ontario without the Dominion of Canada ever having any beneficial interest therein.”³⁰ In essence the Ojibwa could not possess an interest in the land independent of the Dominion government. When interest in the land and its resources passed to the provinces in 1867 the Ojibwa interest traveled with it. Greene referred to a later decision, *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario* (1897) to support his ruling.³¹

This decision revolved around whether Ontario was responsible for making annuity payments to bands within the Robinson Treaties. It was held that since these lands fell within the limits of the Province of Ontario, “the beneficial interest therein” was vested in the province as per s.109 of the BNA Act, but that responsibility to pay the annuities, and all increases provided for

²⁹ *Ontario Weekly Notes*, John J. Robinette ed., *R. v. Commanda* (Toronto: Carswell Company, 1939): 466-470,

³⁰ *R. v. Commanda*, 468.

³¹ *R. v. Commanda*, 468. See also *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario; Attorney-General for Quebec v. Attorney-General for Ontario*. (1897). This case is found in Brian Slatterly ed., Canadian Native Law Cases with comprehensive subject and statute indexes Vol. 2 (Saskatoon: University of Saskatchewan Native Laws Centre, 1986): 199-213.

by the treaties, lay with the Dominion government by s.111 of the constitution.³² The Dominion had argued that Ontario, having assumed interest in the land, was responsible for the payments. Ontario contended this assertion. It argued, amongst other things, that “no trust exists in respect of the said lands; [and] that the Indian title was extinguished in order that the lands might be open for settlement...”³³ Furthermore, the Dominion government agreed to assume any provincial debts by virtue of s. 111 of the BNA Act. While Ontario was initially found liable for all annuity payments the Supreme Court of Canada overturned that decision. The Dominion appealed to the Privy Council. It argued that the Ojibwa maintained an interest in the land, and that “the lands having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians should be observed and carried out by that province” as Ontario benefited from the value of the minerals and other resources extracted from the land.³⁴ While the decision had no real impact (the province and Dominion negotiated an agreement prior to it) it haunted the Ojibwa forty years later. Their Lordships stated in their ruling that “the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province...” Greene cited this in his decision against *Commanda*.³⁵

³² *Attorney-General for the Dominion of Canada v. Attorney General for Ontario...*, 199. Section 111 reads: “Canada shall be responsible for the Debts and Liabilities of each Province existing at Union.” Cited in J.L. Finlay and D.N. Sprague, *The Structure of Canadian History*, 2nd ed., (Scarborough: Prentice Hall, 19884): 549.

³³ *Attorney-General for the Dominion of Canada...*, 201.

³⁴ *Attorney-General for the Dominion of Canada...*, 203.

³⁵ *R. c. Commanda*, 470.

Greene continued that even if the Ojibwa possessed a trust or interest in the land it still did not protect them from the Ontario *Game Act* as it was not legislation relating directly to Indians or lands reserved for Indians within the meaning of section 91(24) of the constitution. Therefore, as a law of general application it did not infringe upon the Dominion's constitutional jurisdiction as outlined in 91(24). The primary object of the *Game Act* was to protect and conserve wildlife, and as such did not relate to specifically Indians even though it directly affected them.³⁶ Ontario had legislative authority to pass and enforce the *Game Act* by virtue of section 92, subsections 12 and 16.³⁷ In essence, even if the Ojibwa possessed an interest in the land Greene concluded that their hunting rights could be "taken away by the Ontario Legislature without any compensation."

After Greene rendered his decision Indian Affairs and the Department of Justice considered appealing the decision much to the Ontario government's dismay. Indian Affairs officials believed that Greene had not dealt substantially with the treaty itself, and that his reference to the St. Catherine's Milling decision was incorrect. In that instance the decision revolved around the granting of timber licenses while in *Commanda* it dealt with specific treaty promises. Furthermore, *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario* was concerned with liability for treaty annuity payments not hunting

³⁶ *R. v. Commanda*, 470.

rights. Such thinking apparently worried Premier Mitchell Hepburn. The Honourable Harold Nixon, the Ontario's Provincial Secretary, wrote to Prime Minister King and Thomas Crerar to convince both men to drop the appeal. In his letter to King, Nixon asked that the Prime Minister intervene and convince Indian Affairs to drop its appeal.³⁸ Nixon lamented that the greatest problem his government faced was convincing Indians that they had to follow conservation laws. Nixon said that the Indians "believe that by ancient treaties they may kill moose, deer, and fur-bearing animals at their pleasure," and this was a difficult misconception to dispel. In contrast to the Indian's destructive nature Nixon said that his department had, after several years of hard work, caused a substantial improvement in the population of various species. While the Department of Game worked towards this goal, Nixon stated, the Indians were given "equal opportunity with whites," and they felt "general satisfaction in the north with conditions as they now exist." Referring to Indian Affairs' possible appeal of Greene's recent decision Nixon drew again on the image of the marauding Indians. With winter approaching, Nixon cautioned, it was inadvisable to give Indians the impression that they can hunt whenever they please. Deep snow, he explained, made it difficult for deer and moose to escape hunters and Indians would likely inflict an "indiscriminate slaughter" if an appeal was carried forward. Considering the tourist money that wildlife

³⁷ 92(13) gave the provinces control over "Property and Civil Rights in the Province." Subsection 16 dealt "Generally with all Matters of a merely local or private nature in the Province." *R. v. Commanda*, 470.

brought into Canada, Nixon concluded that an appeal was not in the best interests of the country or the Indians.

Nixon's letter to Crerar was similar to that sent to King. Enclosing a copy of the letter he sent to the Prime Minister, Nixon said he was "at a loss to understand" why Indian Affairs was appealing Greene's decision.³⁹ Stating that it was contrary to the public good to permit Indians to slaughter animals indiscriminately Nixon stated theatrically that if Indian Affairs' appeal proved successful than the Department of Game might as well "throw up [its] hands in any attempt to conserve wildlife in that district."⁴⁰ With so many mines, towns and lumber camps in the north, he explained, there was a ready market for fresh moose and deer meat. Implicit in this statement was the idea that the Ojibwa would kill moose and deer to meet this need until both species were extinct - no mention was made of trying to prosecute those who purchased this meat. Furthermore, Nixon concluded, the Indians were "well pleased with the treatment they receive from the Department of Game..." as they were permitted to net fish, hunt geese in the Hannah Bay Preserve, and were not discriminated against at all.

In characteristic fashion Prime Minister King sent Nixon an ambiguous reply. The matter, he said, would be considered by Indian Affairs.⁴¹ Crerar turned to McGill to write a detailed reply to the Provincial Secretary which

³⁸ NAC, RG 10, Vol. 6747, file 420-8x part 2. Harold Nixon to Prime Minister Mackenzie King, 29 September 1939.

³⁹ Ibid. Nixon to Thomas Crerar, 30 September 1939.

⁴⁰ Ibid.

Crerar signed.⁴² McGill noted that the hunting issue was not new, and that Greene's recent judgment did not settle matters. He noted, quite correctly, that "the Indians will [never] be satisfied until further appeal is made and their status settled one way or the other."⁴³ McGill said that Indian Affairs did not countenance Indian slaughter of wildlife, and sought to make them realize that conservation was in their best interests. However, McGill noted that where Indians are protected against competition from white trappers and hunters they naturally conserve the available wildlife "in accordance with their own aboriginal practice."

McGill then turned his attention to Nixon's statements regarding the Ojibwa's satisfaction with Ontario's game laws. Based on reports received from Indian Agents, missionaries and others McGill wondered how Nixon can state that the "Indians are well pleased with the treatment they receive." On the contrary, McGill said, some of the game wardens in northern Ontario were "unduly harsh and severe" when dealing with Ojibwa. Regarding Nixon's statements concerning fishing licenses and the Hannah Bay Preserve, McGill observed that these did not concern the Ojibwa in the Robinson Treaties and had no bearing on Indian Affairs' decision to appeal Greene's decision.⁴⁴ Regarding the Department of Game's success in beaver conservation McGill reminded Nixon that this applied only to the territory north of the Canadian National

⁴¹ **Ibid.** King to Nixon, 4 October 1939.

⁴² **Ibid.** Final Letter, McGill to Nixon, 18 October 1939.

⁴³ **Ibid.**

⁴⁴ The Hannah Bay Preserve is located on James Bay within Treaty Nine.

Railway, and came about because Cree hunters suffered through a four year ban on beaver trapping.

McGill further reminded Nixon that legal precedence supported Indian Affairs; decision to appeal Greene's ruling. Justice Latchford, in 1914, stated that the Robinson Treaties should be considered as a "formal treaty made between great nations." This decision cast doubt on Magone's statement regarding the validity of the Robinson-Huron Treaty. In *R. v. Padjena* it was noted that treaty obligations should be kept as a matter of public faith. McGill said that before either a provincial government or the Dominion government ignored treaty rights they should hesitate and remember that these promises were "given under Seal by the Crown to the Indian."

McGill likely failed to see the hypocrisy in this statement considering that the Dominion government restricted Native treaty rights with its Migratory Birds Convention Act. Indeed, as further evidence of McGill's lack of interest in securing the Ojibwa's full rights, he offered Nixon an olive branch: negotiation. Referring to the on going process of creating a trap line system McGill intimated that Indian Affairs and the Department of Game could work together to reach a compromise solution acceptable to both. In so doing it would be possible for both governments to live up to the promises made to the Ojibwa (at least as far as McGill was concerned), while at the same time protecting wildlife. With this in mind McGill offered to send an official to Toronto to discuss the matter with the Department of Game. McGill saw no reason why both departments could

not settle the issue so that the welfare of his department's 5000 Indian wards would be protected, and Nixon's department could continue with its wildlife conservation. Nixon responded positively to McGill's suggestion.⁴⁵ He did note, however, that any arrangements must recognize both closed seasons and bag limits.

W.C. Bethune, Crerar's Private Secretary, informed McGill that the Minister approved of the meeting.⁴⁶ Secretary MacInnes and D.J. Allan, Superintendent of our Reserves and Trusts Division, were sent to Toronto in late November to meet with Department of Game officials.⁴⁷ While minutes of that meeting no longer exist a later letter between the Deputy Minister of Mines and Resources and Nixon reveals Indian Affairs' negotiating position.⁴⁸ In December, 1939, the Deputy Minister outlined the specific problems he wanted addressed: big game, small game, fur bearers and fishing (although the latter was a problem more specific to the Ojibwa in Treaty Three). Regarding Big Game, Indian Affairs' position can be summarized thusly: that Indians be subject to the game laws but be provided free hunting licenses and permitted to take deer at any season for food on the condition that only one deer be taken at a time, and that no deer be killed for sale or barter. A one deer limit per hunt insured that no deer would be killed for commercial purposes. The same conditions were offered for small game although Indian Affairs was not

⁴⁵ Ibid. Nixon to Crerar, 3 November 1939.

⁴⁶ Ibid. W.C. Bethune to McGill, 4 November 1939.

⁴⁷ Ibid. McGill to Nixon, 16 November 1939.

prepared to make any concessions regarding its own game laws pertaining to migratory birds. As regarded fur bearing animals Indian Affairs said that the Ojibwa would be subject to all game laws, but not have to purchase a license except for special beaver seasons. Furthermore, Indian Affairs wanted trapping grounds of a generous size suitable to "the nature of the territory and the...Indian population" to be set aside for each band.

The Ojibwa were never consulted about this arrangement. McGill realized that this compromise did not reflect the true rights guaranteed to the bands in the Robinson Treaties. As he noted, these conditions represented general principles Indian Affairs was willing to establish "in lieu of the established rights of the Indians under the Robinson Treaties to hunt and trap and fish over the unoccupied portions of the areas which they ceded..."⁴⁹

McGill suggested that a small joint committee be struck to investigate the plan's feasibility on both a political level and "on the ground." If Nixon agreed to this, McGill concluded, Indian Affairs would drop its appeal of the Commanda decision.

What transpired after this event is not known from the records of that time, but a memorandum circulated through Indian Affairs six years later offers an explanation. Hugh Conn, Indian Affairs Fur and Wildlife Supervisor, wrote that a political decision stopped Indian Affairs' appeal. By 1944 the idea of traplines was still being discussed by the Department of Game and Indian

⁴⁹ NAC, RG 10, Vol. 8865, file 1/18-11-13. Deputy Minister of Mines to Nixon, 16 December 1939.

Affairs with equally limited success as ten years previous. Conn advised that the only way Indian Affairs would ever secure “justice for our wards is to reopen the question of Treaty rights and settle once and for all the question of whether or not these treaty rights exist.”⁵⁰ This matter could have been settled in 1939 if not for a directive from Prime Minister King and the minister responsible for Indian Affairs, Thomas Crerar. Conn noted that this directive came about because of Nixon’s letter to both men. As Conn noted Nixon’s “reluctance to have the case heard was certainly not prompted by any interest in the Indian welfare so [it] must have been caused by the fear of an adverse decision.”⁵¹

His acute perception notwithstanding, Conn did not consider Indian Affairs’ or the King government’s own duplicity. If King exerted pressure on Crerar to drop the appeal there is no letter or memorandum indicating it. It is possible that the strained relationship between Prime Minister King and Premier Mitchell Hepburn had something to do with this decision. First, King and Hepburn had no love for one another. From the exporting of hydro power to the development of the St. Lawrence Seaway and Dominion-provincial relations King and Hepburn fought one another constantly often with Quebec’s Maurice Duplessis weighing in against King.⁵² The combined girth of both men

⁴⁹ Ibid.

⁵⁰ NAC, RG 10, Vol. 6747, file 420-8x part 3. Memorandum, 19 April 1944. I would like to thank John Leslie, Treaties and Historical Research Branch (DIAND) for providing me with a copy of this memorandum, and the other documents relating to the situation after *R. v. Commanda*.

⁵¹ Ibid.

⁵² Two books examine Hepburn’s life. John Saywell’s Just Call me Mitch: The Life and Times of Mitchell F. Hepburn (Toronto: University of Toronto Press,

threatened to crush King. At one point, after President Roosevelt dedicated the new bridge at Ivy Lea, Hepburn wrote an appalling letter to King regarding the proposed development of the St. Lawrence Seaway (which Hepburn opposed). If this had been a private letter it would have been capable of souring King's relations with Hepburn even further, but the premier chose to publish it in several newspapers.⁵³ King's dislike of Hepburn also grew out of his own Cabinet. In 1934 when Hepburn took extraordinary measures to quell the General Motor's Strike in Oshawa King refused to support the premier's actions. Other members of King's Cabinet, however, believed Hepburn was right. One of these men was Thomas Crerar the Minister of Mines.⁵⁴ It is possible that Crerar's support of Hepburn in the past may have led him to drop the appeal against the Department of Game five years later.

Lastly, in the autumn of 1939 war broke out in Europe. Hitler's army struck quickly against Poland, and Britain and the entire Commonwealth declared war against Nazi Germany. While there is no evidence directly pointing to this as a reason why Indian Affairs dropped its appeal this factor, combined with the animosity between King and Hepburn, makes it likely that it was a mitigating factor - war made Arthur Meighen nix D.C. Scott's suggestion of challenging the *Game Act* in 1917. King could ill afford a rancorous premier

1991), and Neil McKenty, Mitchell Hepburn (Toronto: McClelland and Stewart, 1967). McKenty examines the King-Hepburn conflict on pp. 151-173, particularly the fight over the St. Lawrence Seaway and the Rowell-Sirois Commission of 1937.

⁵³ McKenty, 155.

in Ontario at the very time that his government needed the support of the Canadian people. Furthermore, an upset Hepburn could ally himself with Maurice Duplessis and create an axis force that would be as difficult for King to defeat as that in Europe. There is some indication that Indian Affairs' bureaucrats realized Nixon sent a letter to King as an indication of future problems with Ontario regarding the war effort should the appeal proceed. As indicated earlier in this chapter McGill wrote a reply, on behalf of his minister, in response to Nixon's letter to King and Crerar. In the initial draft copy McGill stated:

I am rather sorry that you found it necessary to write to the Prime Minister on this subject at this period when, for reasons which you fully appreciate, his time and that of his staff, is fully occupied with matters of great national urgency.⁵⁵

This statement, though removed from the final version sent to Nixon, was certainly prophetic. By the spring of 1939 Hepburn was already criticizing the King government for not strongly stating its position regarding the situation in Europe. Giving Hepburn additional ammunition against Ottawa over Indian rights was not acceptable.⁵⁶

Conn also did not consider that bureaucratic duplicity played a role in scuppering the Commanda appeal. While McGill wanted to proceed with the appeal he was also uninterested in securing the Ojibwa their full treaty rights.

⁵⁴ Indian Affairs was a branch under the Department of Mines. Crerar's position is noted in Saywell, p. 319.

⁵⁵ NAC, RG 10, Vol. 6747, file 420-8x part 2. Draft Letter, McGill to Nixon, 12 October 1939.

Nixon convinced Indian Affairs at the ministerial level that he was willing to negotiate, and Conn believed that this offer was nothing more than a trick as the Department of Game never intended to deal substantively with the questions raised by *R. v. Commanda*, or the suggestions put forth by McGill. McGill, although likely following Crerar's instructions, also wanted negotiation not confrontation with the Department of Game despite his experiences with and knowledge of the Department of Game. It is clear that neither Crerar nor King had any understanding of the situation surrounding the game question, but McGill should have realized the Machiavelian nature of the Department of Game. The only possible explanation, as outlined earlier, is McGill was not interested in securing the Ojibwa their full treaty rights but, like his predecessors, preferred reaching a political compromise that would suit Indian Affairs and the Department of Game but not the Ojibwa.

By 1944, however, Conn was well aware of how the Department of Game had treated the Ojibwa and tricked Indian Affairs in the past, and was continuing to do so. To these statements Conn noted, quite bluntly, that anyone with a passing acquaintance with Indian Affairs' files could not "truthfully make [these] statements." As regards discrimination Conn noted that Deputy Minister Taylor had, just recently, refused Indian Affairs' request for Indian registered traplines north of the CNR because the Legislature was considering new changes to the *Game Act*; however, his department had registered thirty-nine townships to white trappers. As Conn noted: "If this is not discrimination what is?"

⁵⁶ Saywell, p. 419.

Indeed, under the *Game Act* for 1944, Part I, Section II defined a "Person" under the act as: A person shall mean any individual, including Indians, firm or body corporate." While this section obviously terminated any special rights the Ojibwa were promised under treaty it was also being ignored by Taylor. Conn wrote that Taylor used this section when it suited him, but ignored it when he wanted to discriminate against Indians for not only were they being subjected to game laws, contrary to treaty promises, they were not even being treated equally under the *Game Act*.

Conn quoted Deputy Minister of Game D.C. Taylor to prove that while Indian Affairs received no written assurances negotiations in 1939 the Department of Game was on the public record stating that it would investigate the matter. Taylor, in several interviews with the *Toronto Star*, stated that a special commission would be formed by his department to investigate the trap line situation, and the rights of the Ojibwa south of the Canadian National Railway.⁵⁷ On February 16, 1940, for example, he said: "A Commission was to be set up to study the problem."⁵⁸ Most startling, followed by a series of questions marks by an incredulous Conn, was Taylor's statement to the *Star* in February, 1940:

The department is trying to adhere to the spirit of the treaties, having in mind the changed conditions and the value of fur and game.⁵⁹

⁵⁷ Ibid.

⁵⁸ Ibid. These newspaper clippings can be found in NAC, RG 10, Vol. 6747, file 420-8x part 2.

⁵⁹ Ibid.

Conn went into detail regarding Treaty Nine, and the hunting promises contained therein, to demonstrate how well the Department of Game lived up to the spirit of the treaties. He even drew upon the report of the Treaty Nine Commissioners to argue that the bands were promised that their hunting, trapping and fishing would not be affected by signing the treaty. While he did not deal with the Robinson Treaties Conn's statements are equally applicable to it. Treaties constituted solemn promises, Conn stated, that cannot be ignored by Indian Affairs or the federal government. Conn suggested that Indian Affairs encourage Ojibwa to trap on their traditional territory regardless of whether it had been leased to a white trapper or not. This would force arrests and, ultimately, the matters would be resolved in the courts. Conn conceded that the litigation might prove costly, but "the benefits that would be derived by the Indians from a favourable decision warrant taking the risk involved."⁶⁰

In essence Conn suggested the same policy enunciated over two decades previous. Ontario had manipulated events successfully, and prevented Indian Affairs from proceeding with its appeal of the Commanda decision which, from all indications, it would have won. Despite Indian Affairs' efforts to bring a stated case before the Ontario Supreme Court the matter ultimately came to naught as it received ministerial direction to negotiate a settlement. This political interference, however, was not as deceptive as the machinations Indian Affairs bureaucrats were willing to engage in. King and his Cabinet likely

⁶⁰ Ibid.

realized the problems that could erupt with Hepburn if a piece of Ontario's legislation was challenged. The issue had received some newspaper coverage in Ontario and Quebec, and if the appeal proceeded could have led to greater Ontario-Ottawa conflicts than already existed. Furthermore, with fascist Germany challenging Britain's ultimatum over Poland more pressing issues were before the Cabinet.

Indian Affairs' top bureaucrats, however, should be considered far more duplicitous. They were never interested in securing the Ojibwa their full treaty rights - solemn promises as Conn called them - for which they agreed to cede their lands in 1850. The appeal was merely a means for them to extract an agreement from the Department of Game. If McGill was upset by Crerar's decision to drop the appeal there is no evidence of it. With Nixon's promise of negotiations, and the establishment of a committee to study the issue, McGill likely believed that Indian Affairs had accomplished its goal without the necessity of an appeal. Concessions would be granted to the Ojibwa to allow them some subsistence hunting rights while, at the same time, Ontario's conservation laws would remain essentially intact. While Indian Affairs' words and policies became stronger during the Commanda decision they remained incapable of carrying these ideas forward to their logical conclusion: securing the Ojibwa their full treaty rights.

Lost in these bureaucratic machinations were the Ojibwa. Fifty years after the creation of Ontario's *Game Act* they remained trapped in the status quo.

Indian Affairs rejected its fiduciary obligation to protect their treaty rights, and they, lacking a voice strong enough to be heard on Parliament Hill or Queen's Park, were left to cope with Ontario's interference. If they fail to appear with any force in this chapter it is for this reason. Despite their ability to win support in the north amongst Indian Agents, missionaries, and newspaper editors they were at the mercy of bureaucrats who hoped, even by 1940, that the problem would simply melt away as the Ojibwa abandoned traditional pursuits and adopted the ways of the dominant society.

Conclusion

From 1892-1939, Natives lacked the political strength to combat the provincial government or to force Indian Affairs to act in their interests. As a result, hunting and trapping, still an important element of their culture and economy, was regulated. They lost control of the hunt, and an explicit treaty promise was broken. Ojibwa throughout the Robinson Treaties fought a losing battle against Ontario's Game Commission and its later manifestation the Department of Game to regain control. While some small victories did appear, notably the Padjena decision, they ultimately came to naught due to Indian Affairs' limited concept of what constituted treaty rights, and its refusal to live up to its fiduciary obligations. The Ojibwa retained a true interpretation of the Robinson Treaties from the first implementation of the Game Act in 1892 to Justice Greene's misguided ruling in 1939. They remembered where their ancestors had hunted and trapped in 1850. They remembered Robinson's words to their chiefs when they signed the treaty: that they and succeeding generations retained the right to hunt and fish as they had heretofore been in the habit of doing. Throughout the almost fifty years examined in this thesis the Ojibwa constantly referred back to the treaties, and reiterated Robinson's promises, but these pleas fell largely on deaf ears.

Indian Affairs had its own agenda which directed its efforts over the hunting issue. Driven by its goal to eventually eradicate the "Indian Problem" by eventual acculturation Indian Affairs took little interest in protecting an activity which, from their perspective, retarded the progress of the Ojibwa.

Reflecting the 'realpolitik' of the day Indian Affairs realized that Empire Ontario was too strong to risk upsetting for the sake of some Indians who would eventually be acculturated. Furthermore, Indian affairs simply was not important enough for the federal cabinet compared to other issues. Indian Affairs' own policies, political expediency, conjunctions of events, and its unimportance in the departmental pecking order

Indians were simply a nuisance for the Ontario government - one to be controlled. Resource development, tourist dollars, and regulatory fees were more important to the Game Commission, and its later incarnation the Department of Game. Interest groups such as tourist outfitters and hunting and fishing associations commanded the attention of provincial ministers and bureaucrats. The image of the marauding Indian compounded this problem. Game officials were ill disposed to recognize treaty rights when faced with reports and letters detailing the destruction wrought by Ojibwa hunters on Ontario's wildlife resource. Advocates of Ojibwa treaty rights had as much chance of success with the Department of Game as wolf conservationists.

It was a situation that changed little over the ensuing decades. In 1961 Hugh Conn, Fur and Wildlife Supervisor for Indian Affairs, appeared before the Joint Committee of the Senate and House of Commons on Indian Affairs.¹ Conn presented his brief to the Committee which was a thorough examination of the many treaties that existed between the Crown and Canada's First Nations, their

hunting and fishing rights throughout Canada, and a synopsis of important legal decisions relating to those rights. When Conn arrived at *R. v. Commanda* he stated that it was the opinion of Indian Affairs and the Department of Justice in 1939 that Justice Greene erred when he relied on the St. Catherine's milling case in making his decision as that case dealt with timber while the *Commanda* case dealt with game and specific promises in the treaty. As outlined in chapter eight, Conn noted that Indian Affairs dropped its appeal of the *Commanda* decision at the request of Ontario. In so doing, Conn stated, Indian Affairs lost its best chance to settle the hunting issue in Ontario. As it stood, Conn said, Indians did not know if they were breaking laws when hunting or trapping. By way of example Conn put forth the hypothetical case of an Ojibwa hunter in the bush:

As the law stands at present, an Indian could walk up to the shores of [a lake]...He is hungry, not starving, and has food 25 miles away in his cache, but now he needs food for one meal. Swimming in the eddy to his left is a small sturgeon. Off the point, about 25 yards out, is one of these red headed merganser ducks and upstream is a female moose heavy with calf. What is the legal position of the Indian? He cannot catch the sturgeon or shoot the duck but he can shoot the moose. Is it any wonder we cannot, under these circumstances explain his position. The Migratory Birds Convention Act applies to the duck.²

Conn's example illustrated two points. First, by 1961, matters had changed little for Natives regarding their treaty rights. Second, it was an issue

¹ Joint Committee of the Senate and House of Commons on Indian Affairs: Minutes of Proceeding and Evidence, no. 11, 11 May 1961 (Ottawa: Queen's Printer, 1961): 417.

that was still rooted in the circumstances of the local individual. A Native hunter engaged in the most basic of pursuits, hunting for food, could find himself in the centre of larger constitutional and treaty questions. The hunting issue in Ontario, from its first appearance in the 1890s, to the 1930s, was driven by instances of individuals engaging in what they thought was perfectly legal activity but who were arrested and charged. Starting with the first effective *Game Act* in 1892 a moose was no longer a moose in Ontario, but a protected and regulated resource. The lone Ojibwa hunter, seeking to feed his family, found himself surrounded by legislation which he did not understand, or was even aware of until he was arrested. All he knew was that the treaties no longer seemed to protect his right to hunt and trap as his ancestors had "heretofore been in the habit of doing."

Little would change for the Ojibwa, or Natives across Canada, as regards their hunting rights until the 1960s when some courts began to rule in favour of treaty hunting rights. Even then the pattern was far from uniform, and Natives lost as often as they won. In *R. v. Sikyea* (1964) a Treaty Eleven Indian was found guilty of killing a duck contrary to the *Migratory Birds Convention Act*.³ Even though the Court of Appeal agreed with the lower court that the *Migratory Birds Convention Act* constituted a "breach of faith" on the part of the federal government it held that "the Indians notwithstanding any rights given to them

² Joint Committee, p. 451.

by their treaties are prohibited by this Act and its regulations from shooting migratory birds out of season.”⁴

However, that same year in *R. v. White and Bob* the British Columbia Court of Appeal ruled that the province’s *Game Act* and section 87 of the *Indian Act* did not restrict the hunting rights of Vancouver Island Natives who were covered by the Douglas Treaties of 1854.⁵ The Crown tried to convince the court that the Douglas Treaties did not constitute “treaties” in the legal sense of the word (a tactic identical to that used in *R. v. Padjena* and *R. v. Commanda*) because they were entered into by the Hudson’s Bay Company with the bands. The court, however, ruled that the HBC was acting as an agent of imperial policy, and the Douglas Treaties qualified as binding treaties.⁶

Other decisions were partial victories. In *R. v. Prince et al.* (1962) the Manitoba Court of Appeal ruled that treaty Indians could not be restricted by provincial game laws when hunting for food on unoccupied crown land, but

³ The ruling is cited in full in Norman F. Zlotkin, “Post-Confederation Treaties.” in Bradford W. Morse ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1991): 328-36.

⁴ Zlotkin, 336.

⁵ Zlotkin, 344-348. Section 87 of the *Indian Act* (1951) reads: Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indian in the province, except to the extent that such laws are inconsistent with this Act, or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provisions is made by or under this Act.” The complete text of the 1951 *Indian Act* is found in Contemporary Indian Legislation, 1851-1978 (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1981)/

⁶ Zlotkin, 346.

they must conform to laws preventing the use of night lights in hunting deer.⁷ Chief Justice Miller noted that the importance of conservation outweighed any treaty rights held by Natives. In an analysis of the *Prince* decision, A.H. Jakeman noted that the court's decision made the treaty rights and guarantees in the *Natural Resources Transfer Agreement* useless since "the guarantees in the resources agreements are lost the moment an important conservation principle is involved."⁸ Jakeman, in short, believed that when "hunting for food there seems to be no reason why an Indian should not hunt at night."⁹

Clearly, by the 1960s, a change was occurring in how people perceived Aboriginal treaty rights. Legal scholars such as Jakeman and Gerald LaForest, civil servants such as Hugh Conn, and some judges were either starting to interpret the treaties and the promises contained therein as binding, or at the very least develop empathy for Natives and their past treatment at the hands of governments.¹⁰ John Leslie sees this change of opinion starting in the 1930s

⁷ This case was explored in A.H. Jakeman, "Indian Rights to Hunt for Food." *Canadian Bar Journal*, Vol. 6, no. 3 (1963): 223-227.

⁸ Jakeman, 224. Section 12 of the *Natural Resources Transfer Agreement* reads: "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and any other lands to which the said Indians may have a right of access." Cited in Jakeman, 224.

⁹ Jakeman, 225.

¹⁰ Hugh Conn acted as a special consultant to the Indian-Eskimo Association of Canada for its 1970 publication, *Native Rights in Canada*. The Association also relied on several legal scholars such as Douglas Sanders, Kenneth Lysyk and Anthony Hopper from the universities of Windsor, British Columbia and Laval

when the new minister, Thomas Crerar, and some senior officials (who had replaced older bureaucrats such as J.D. McLean) chose to ignore a 1932 Indian Branch directive that ordered all Indian people to file complaints through local Indian Agents, and met directly with representatives of Native organizations. While this thesis would maintain that this change seems to have started, albeit in a limited fashion with D.C. Scott (see Chapter 6 of this thesis), Leslie's point is not lost: Native political groups found a more receptive ear at Indian Affairs starting in the 1930s and increasingly from that point onwards (indeed chapters six and seven of this thesis support Leslie's contention).¹¹ By 1946, J.A. Glen became the new minister responsible for Indian Affairs. He instructed his staff to adopt a "new approach to Indian administration." Indian Agents were instructed to act as advisors, not directors of band councils. Indian Affairs also began to turn increasingly to outside experts to advise it on matters pertaining to education and cooperative projects. A Special Joint Committee of the House of Commons and the Senate was struck soon after to investigate amendments to the *Indian Act*, and experts, Indian Affairs officials, and Indian leaders themselves addressed the Committee.¹²

Despite this change Indian Affairs' acculturation policy remained even if it was being implemented with the same zeal as before. During the 1950s and

respectively. The research was started in 1966 to "to clarify basic legal problems pertinent to [Natives'] future progress." Of particular interest was hunting and fishing rights. See Indian-Eskimo Association of Canada, Native Rights in Canada (Calgary, 1970).

¹¹ See John Leslie, "A Historical Survey of Indian-Government Relations, 1940-1970." Paper prepared for the Royal Commission Liaison Office (1993): 1-5.

60s, Indian Affairs contracted out to academics across Canada to study Indian conditions and administration, but senior government officials ignored these reports and larger Aboriginal concerns relating to land claims and reserve conditions. This reached its peak in 1969 when Minister of Indian Affairs Jean Chretien, officials in the Prime Minister's Office, Privy Council Office and Indian Affairs ignored the recommendations of the Hawthorn-Tremblay Report, and almost a year of consultations with Indian leaders to produce the Trudeau government's *White Paper* on Indian Affairs.

Sally Weaver noted that during the Trudeau administration the prevalent attitude was that special treatment for any group constituted discriminatory treatment.¹³ The Hawthorn-Tremblay Report had advanced the idea of "citizen-plus" for Native peoples something the Trudeau administration was ideologically opposed to. While this policy grew more out of Trudeau's dislike of Quebec nationalists it had unforeseen repercussions for Aboriginal peoples. Indian organizations saw it as yet another paternalistic attempt by Ottawa to rob them of rights guaranteed by treaty. Ignoring outside advice, which Native leaders thought was being considered, the *White Paper* made radical recommendations: repealing the *Indian Act* and abolishing the Department of

¹² Leslie, 5-8.

¹³ Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands." The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, Menno Boldt and J. Anthony Long eds. (Toronto: University of Toronto Press, 1985): 142. Weaver's examined Canadian Indian policy from the Hawthorn Report to the White Paper more thoroughly in Making Canadian Indian Policy: The Hidden Agenda, 1968-1970 (Toronto: University of Toronto Press, 1981).

Indian Affairs; transferring responsibility for Indian affairs to the provinces; and transferring control of Indian lands to the bands.¹⁴

Native organizations across Canada exploded into a frenzy of political activity. A sense of “pan-Indianism” had appeared in Canada, and Natives were no longer content to simply let Indian Affairs dictate their fate. The *White Paper* sparked off a process that continues to the present day: the use of courts to reclaim those rights promised by treaty or history. The lesson which Indian Affairs failed to learn in Ontario from the first application of the Ontario *Game Act* to *R. v. Commanda* was not lost upon Natives across Canada. They realized that political and legal activism was the only means whereby they could guarantee their rights as Indian Affairs officials were simply unwilling to do so. With new found political strength, and an increasing number of academics exploring the history of Native-White relations, treaties, and the injustices that were inflicted upon certain bands, Natives, including the Ojibwa in northern Ontario, began to press for their treaty rights. *R. v. Batisse* (1978) settled the hunting matter for Treaty Nine bands.¹⁵ Ontario District Court judge Bernstein ruled that since Ontario was not a party to Treaty Nine it could not affect the treaty rights of the Ojibwa and Cree residing there. Within the Robinson-Huron Treaty Nipissing District Court Judge Lunney ruled in 1971 that the Ojibwa did

¹⁴ A brief synopsis of the White Paper is provided in Robert J. Surtees, Canadian Indian Policy: A Critical Bibliography, The Newberry Library Centre for the History of the American Indian Bibliography Series (Bloomington: Indiana University Press, 1982): 54-59.

¹⁵ *R. v. Batisse* is cited in full in Zlotkin, 295-300.

not need a commercial fishing license.¹⁶ Lunney interpreted the clause in the treaty, "as they have heretofore been in the habit of doing," to include commercial fishing.

Presently, the Ojibwa throughout the Robinson Treaties enjoy the treaty rights promised to them by William Robinson almost one hundred and fifty years ago. However, new controversies are arising over aboriginal rights, inter-treaty harvesting rights and Metis harvesting rights are now appearing. The old problems are now solved, but new ones have arisen to take their place. How future historians will perceive the legal and political arguments and policies over these debates is yet to be seen.

¹⁶ Noted in D.E. Sanders, "Indian Hunting and Fishing Rights." Saskatchewan Law Review, Vol. 38, no. 1 (1973-74): 57. The case was *R. v. Penasse* (1971), 8 C.C.C. (2d).

Appendix #1

Robinson-Superior and Robinson-Huron Treaties. ¹

¹ Copied from Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which they were based (Saskatoon: Fifth House Publishers, 1991).

Suit l'attestation écrite et assermentie du premier de ces deux témoins, Alex. Mundell, en présence du Maire de Londres.

Sworn at the Mansion House, }
London, this twenty-third day } (Signed) ALEXANDER MUNDSELL.
of April, 1819, before me, }

JOHN AIKINE, [L. S.]
Major.

Puis, Attestation notariée, in testimonium veritatis.

(Signed) WILLIAM DUFF,
Notary Public.

Be it remembered that on the fourth day of September, in the year 1812, at the Forks of Red River, peaceable possession of the land and hereditaments by the within written indenture, granted and entailed, or otherwise assented or expressed, and intended so to be, was taken, had, and delivered, by the within named William Hillier, one of the attorneys for that purpose appointed, unto the within named Miles Macdonell, Esquire, who was duly authorized to receive the same, to and for the use of the within named Earl of Selkirk, his heirs and assigns, according to the form and effect of the within written indenture in the presence of

(Signed) JOHN MCLIRON,
RODRIGUE MCKENZIE.

THE ROBINSON SUPERIOR TREATY.

THIS AGREEMENT, made and entered into on the seventh day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Joseph Peanderhat, John Tuinway, Mische-Muckqua, Tomencie, Chiefs, and Jacob Wapela, Ahmutchiwagabou, Michel Shalagahick, Manitoshaine, and Chigignans, principal men of the Ojibwa Indians inhabiting the Northern Shore of Lake Superior, in the said Province of Canada, from Batchewanning Bay to Pigeon River, at the western extremity of said lake, and inland throughout the extent to the height of land which separates the territory covered by the charter of the Honorable the Hudson's Bay Company from the said tract, and also the islands in the said lake within the boundaries of the British possessions therein, of the other part, witnesseseth :

That for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each summer, not later than the first day of August at the Honorable the Hud-

son's Bay Company's Posts of Michipicoton and Fort William, they the said Chiefs and principal men do freely, fully and voluntarily surrender, give, grant and convey unto Her Majesty, Her heirs and successors forever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their tribes in common, for the purposes of residence and cultivation,—and should the said Chiefs and their respective tribes at any time desire to dispose of any mineral or other valuable productions upon the said reservations, the same will be at their request sold by order of the Superintendent-General of the Indian Department for the time being, for their sole use and benefit, and to the best advantage.

And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make the payments as before mentioned : and further to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government. The parties of the second part further promise and agree that they will not sell, lease, or otherwise dispose of any portion of their reservations without the consent of the Superintendent-General of Indian Affairs being first had and obtained : nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree that in case the Government of this Province should before the date of this agreement have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use and benefit, then and in that case such sale, or promise of sale, shall be perfected, if the parties interested desire it, by the Government, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs. The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province without incurring loss to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order : and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (which is twelve hundred and forty) to entitle them to

claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty, the annuity shall be diminished in proportion to their actual numbers.

Schedule of Reservations made by the above named and subscribing Chiefs and principal men.

First—Joseph Pean-de-chat and his tribe, the reserve to commence about two miles from Fort William (inland), on the right bank of the River Kaministikwia; thence westerly six miles, parallel to the shores of the lake; thence northerly five miles, thence easterly to the right bank of the said river, so as not to interfere with any acquired rights of the Honorable Hudson's Bay Company.

Second—Four miles square at Gros Cap, being a valley near the Honorable Hudson's Bay Company's post of Michipicoton, for Totominai and tribe.

Third—Four miles square on Gull River, near Lake Nipigon, on both sides of said river, for the Chief Mishimuckqua and tribe.

(Signed) W. B. ROBINSON.			
JOSEPH PEAN-DE-CHAT.	His x mark.	[L. S.]	
JOHN MICHAW.	" x "	[L. S.]	
MISHMUCKQUA.	" x "	[L. S.]	
TOTOMINAI.	" x "	[L. S.]	
JACOB WARELA.	" x "	[L. S.]	
AR-MUTCHINAGALON.	" x "	[L. S.]	
MICHEL SHELAGSHICK.	" x "	[L. S.]	
MANTOU SHAINAR.	" x "	[L. S.]	
CHIGINANS.	" x "	[L. S.]	

Signed, sealed and delivered at Sault Ste. Marie, the day and year first above written, in presence of—

(Signed) GEORGE IRONSIDE,
S. I. *Adjutant*.

ASHTER P. COOPER,
Capt. Com. *Rifle Brig.*

H. M. BARLOW,
2nd Lieut. *Rifle Brig.*

JOHN SWANSTON,
C. P. *Hon. Hud. Bay Co.*

GEORGE JOHNSTON,
Interpreter.

F. W. KEATING.

THE ROBINSON HURON TREATY.

THIS AGREEMENT, made and entered into this ninth day of September, in the year of our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the Province of Canada, between the Honorable William Benjamin Robinson, of the one part, on behalf of Her Majesty the Queen, and Shinguesoune Nebenaigoehing, Keekoue, Mishquongne, Tagawinini, Shubokishick, Dokta, Ponskotoh, Windaotogowinaini, Shuwakeneshick, Nemassin, Neaquagabo, Wabaketik, Kichepoussim, by Papeasime, Wagemaki, Panoquonishene, Chiefs; and John Bell, Paqwakishini, Mashkyash, Idowekesis, Wagnemnick, Ocheek, Metigoini, Watachewana, Minawapensase, Shonaroum, Oningegun, Pansary, Papeasime, Ashewanga, Kageshewawetung, Shuwonabin; and also Chief Mainquaso (also Chiefs Muckata, Mishoquet, and Metis), and Mishoquetto and Asa Waswanay and Pawia, principal men of the Ojibwa Indians, inhabiting and claiming the eastern and northern shores of Lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay, on the northern shore of Lake Superior, together with the Islands in the said Lakes, opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honorable Hudson's Bay Company from Canada; as well as all unconceded lands within the limits of Canada west to which they have any just claim, of the other part, witnesseth:

That for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose, they the said Chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors forever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their tribes in common, for their own use and benefit.

And should the said Chiefs and their respective tribes at any time desire to dispose of any such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit, and to the best advantage. And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees to make, or cause to be made, the payments as before mentioned:

and further to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing: saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government.

The parties of the second part further promise and agree that they will not sell, lease, or otherwise dispose of any portion of their Reservations without the consent of the Superintendent-General of Indian Affairs, or other officer of like authority, being first had and obtained. Nor will they at any time hinder or prevent persons from exploring or searching for minerals, or other valuable productions, in any part of the territory hereby ceded to Her Majesty, as before mentioned. The parties of the second part also agree, that in case the Government of this Province should before the date of this agreement have sold, or bargained to sell, any mining locations, or other property, on the portions of the territory hereby reserved for their use; then and in that case such sale, or promise of sale, shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the Reservation belongs.

The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees, that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order: and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

The said William Benjamin Robinson of the first part further agrees, on the part of Her Majesty and the Government of this Province, that in consequence of the Indians inhabiting French River and Lake Nipissing having become parties to this treaty, the further sum of one hundred and sixty pounds Provincial currency shall be paid in addition to the two thousand pounds above mentioned.

Schedule of Reservations made by the above-named subscribing Chiefs and Principal Men.

First—Pamegonahcung and his band, a tract of land to commence seven

miles, from the mouth of the River Maganotawang, and extending six miles east and west by three miles north.

Second—Wagemake and his band, a tract of land to commence at a place called Nekticheshgahing, six miles from east to west, by three miles in depth.

Third—Kitchepokissegan (by Papanase), from Point Grondine westward, six miles inland, by two miles in front, so as to include the small Lake Nessimung—a tract for themselves and their bands.

Fourth—Wabakekik, three miles front, near Shobawanning, by five miles inland, for himself and band.

Fifth—Namasin and Naogugabo and their bands, a tract of land commencing near Quisloche, at the Hudson Bay Company's boundary: thence westerly to the mouth of the Spanish River: then four miles up the south bank of said river, and across to the place of beginning.

Sixth—Shawenakishick and his band, a tract of land now occupied by them, and contained between two rivers, called Whitefish River, and Wambisake, seven miles inland.

Seventh—Windawegawinini and his band, the Peninsula east of Serpent River, and formed by it, now occupied by them.

Eighth—Ponekosh and his band, the land contained between the River Missisaga and the River Penebawabcong, up to the first rapids.

Ninth—Dokis and his band, three miles square at Wanabeyakokan, near Lake Nipissing and the Island near the Fall of Orickandaw.

Tenth—Shabokishick and his band, from their present planting grounds on Lake Nipissing to the Hudson Bay Company's post, six miles in depth.

Eleventh—Tagawinini and his band, two miles square at Wanashibiting, a place about forty miles inland, near Lake Nipissing.

Twelfth—Keokoue and his band, four miles front from Theasalon River eastward, by four miles inland.

Thirteenth—Mishbequang and his band, two miles on the lake shore east and west of Ogowaminang, by one mile inland.

Fourteenth—For Shingwacouze and his band, a tract of land extending from Maskingongé Bay, inclusive, to Partridge Point, above Garden River on the front, and inland ten miles, throughout the whole distance; and also Squirrel Island.

Fifteenth—For Nebensigoching and his band, a tract of land extending from Wanabekinyunung west of Gros Cap to the boundary of the lands ceded by the Chiefs of Lake Superior, and inland ten miles throughout the whole distance, including Batchewananung Bay; and also the small island at Saule Ste. Marie used by them as a fishing station.

Sixteenth—For Chief Mekis and his band, residing at Wasaguessing (Sandy Island), a tract of land at a place on the main shore opposite the Island: being the place now occupied by them for residence and cultivation, four miles square.

Seventeenth—For Chief Muckatamihaguet and his band, a tract of land

on the east side of the River Nishconteong, near Pointe aux Barils, three miles square; and also a small tract in Washawenega Bay—now occupied by a part of the band—three miles square.

(Signed)	W. B. ROBINSON.			
	SHINGUACOSUK.	His x mark.	[L. S.]	
	NEKEMAIOSCHING.	" x "	[L. S.]	
	KROKOUK.	" x "	[L. S.]	
	MISHKOCONGA.	" x "	[L. S.]	
	TAGAWININI.	" x "	[L. S.]	
	SHABORSHICK.	" x "	[L. S.]	
	DOKIS.	" x "	[L. S.]	
	PONKROSH.	" x "	[L. S.]	
	WINDAWTKOWININI.	" x "	[L. S.]	
	SHAWENAKESHICK.	" x "	[L. S.]	
	NAVASIK.	" x "	[L. S.]	
	MUCKATA MISHAURT.	" x "	[L. S.]	
	MERIK.	" x "	[L. S.]	
	MAISQUABO.	" x "	[L. S.]	
	NAOQUAGABO.	" x "	[L. S.]	
	WABOKKEICK.	" x "	[L. S.]	
	KITCHEROSKON (by Papaninoo).	" x "	[L. S.]	
	WAGEMAK.	" x "	[L. S.]	
	PAMEQUONAIRCHUNG.	" x "	[L. S.]	
	JOHN BELL.	" x "	[L. S.]	
	PAGWATCHININI.	" x "	[L. S.]	
	MASHKRYASH.	" x "	[L. S.]	
	IDOWEKESH.	" x "	[L. S.]	
	WAVUACOMICK.	" x "	[L. S.]	
	MISHOQUITTO.	" x "	[L. S.]	
	ASA WASWANAY.	" x "	[L. S.]	
	PAWIS.	" x "	[L. S.]	
	OCHERK.	" x "	[L. S.]	
	METIGOMIN.	" x "	[L. S.]	
	WATACHEWAKA.	" x "	[L. S.]	
	MIMKWAAPENASSE.	" x "	[L. S.]	
	SHEWAQUUM.	" x "	[L. S.]	
	ONINGOUK.	" x "	[L. S.]	
	PANAIK.	" x "	[L. S.]	
	PAPASAIK.	" x "	[L. S.]	
	ASHEWASSA.	" x "	[L. S.]	
	KAORIKAWITONG (by Baboncung).	" x "	[L. S.]	
	SHAWONKIK.	" x "	[L. S.]	

Signed, sealed and delivered at Sault Ste. Marie, the day and year first above written, in presence of

(Signed) ARTHUR P. COOPER,
Capt. Rifle Brig.

GEORGE LEONARD,
S. I. Affairs.

F. W. BALFOUR,
Lieut. Rifle Brig.

AILEAN MACDONELL.

GEO. JOHNSON,
Interpreter.

LOUIS CADOTT.

J. B. ASHBRACK.

T. W. KEATING.

JOE WITSON.

Witnesses to signature of Muckata Mishaguet, Makis, Mishaguetta, Asa Waswanay, and Pawis—

T. G. ANDERSON, *S. I. A.*

W. B. HAMILTON.

W. SIMPSON.

ALFRED A. THOMPSON.

THE NANITOULIN ISLAND TREATY.

ARTICLES OF AGREEMENT AND CONVENTION made and concluded at Manitowaning, on the Great Manitoulin Island, in the Province of Canada, the sixth day of October, Anno Domini 1862, between the Hon. William McDougall, Superintendent-General of Indian Affairs, and William Spragg, Esquire, Deputy Superintendent of Indian Affairs, on the part of the Crown and Government of said Province, of the first part, and Mai-be-quong-gai, Uke-mah-be-nee, J. B. Assincock, Benjamin Assincock, Mai-be-nee-ma, She-no-tah-gun, George Ah-be-ton-o-wai, Paim-o-quo-waish-gung, Absence, Tai-bose-gai, Ato-waish-cosh, Nai-wan-dai-ge-shik, Wan-kan-o-say, Keesh-ke-wan-bit, Chiefs and principal men of the Ottawa, Chippewa, and other Indians occupying the said Island, on behalf of the said Indians, of the second part:

Whereas, the Indian title to said Island was surrendered to the Crown on the ninth August, Anno Domini 1836, under and by virtue of a treaty made between Sir Francis Bond Head, then Governor of Upper Canada, and the Chiefs and principal men of the Ottawa and Chippewas then occupying and claiming title thereto, in order that the same might be made the property (under their Great Father's control) of all Indians whom he should allow to reside thereon:—

BIBLIOGRAPHY

It should be noted that many of the government records that would have been useful for this thesis were destroyed in the 1950s and 1960s. Records of the Game and Fish Commission and its later incarnations were destroyed in the 1950s because they were deemed of little interest. Even today, as noted elsewhere in this thesis, the MNR has destroyed files pertaining to game and fish regulation out of a lack of foresight.

Records of the Attorney-General were culled prior to their being transferred to the Archives of Ontario in the 1960s. The individual assigned to this task removed many of the items pertaining to Aboriginal issues because they were deemed to be of little interest.

This bibliography also does not make note of the important use made of the Department of Indian Affairs, specifically its departmental library and the Treaties and Historical Research Centre. The latter contain numerous articles, copied primary documents, theses, and government research reports pertaining to numerous Aboriginal issues. The former, besides its sizable collection of rare books and secondary sources, has all RG 10 and 15 microfilm as well as other microfilmed documents.

Record Group 10 (Indian Affairs) volumes listed here do not include the file numbers. Each volume number comprised, on average, several files pertaining to Ontario conservation laws and Native peoples.

Primary Documents:

1. National Archives of Canada

Record Group 1

- a. Series E-1, vol. 72
- b. Series E-1, Statebook "J"
- c. Series E-1, Statebook "K",
- d. Series E-1, Statebook "L"
- e. Series L-3, Vol. 263, Bundle 5, #4
- f. Landbook "C"

Census of Canada, Algoma District, 1861-1891.

Record Group 10, Records of Indian Affairs, volumes: 123, 151, 173, 2405, 2406, 3033, 6743, 6745, 6746, 6747, 6748, 8865, 10751, 11194.

Reverend Allan Salt Papers

2. Archives of Ontario

Record Group 1 (Ministry of Natural Resources/Commissioner of Crown Lands)

a. Series A-I-6, vol. 25

Record Group 3 (Premier's Office): George Ross

James Pliny Whitney

William Hearst

Ernest Charles Drury

George Ferguson

G.S. Henry

Mitchell Hepburn

Record Group 4 (Attorney-General of Ontario)

Central Registry: Civil and Criminal Files

Fur Trade Records MU 1392, F431.

Miscellaneous Fur Trade Papers, MU 7848, F. 431

i. Fort Matachewan Journal, part 1 and 2, 1870-74.

ii. Temiskaming District, Temagamingue Post, 1874-1886.

iii. Temiskaming District, Misc.

Duncan Cameron Papers - MU 2200, Box 5-5c

Parry Island Reserve Papers

Sir Aemilius Irving Papers

i. Report of Commissioners Anderson and Vidal

MU 1464, file 26/31/4

ii. Documents relating to Robinson Treaties annuity dispute

MU 1464, file 27/32/09, and file 27/32/13 to 14.

iii. "Northwest Angle Treaty: Game and Fisheries."

MU 1469, Box 31, Package 37

Sir John Beverly Robinson Papers

i. William B. Robinson Diary

3. Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre

Padjena v. Rex File, Unit Number P.92

Robinson Treaty File, Unit Number, O.56

Commanda, Joe and W. St. Pierre File, Unit Number P.18.

4. University of Western Ontario Regional Room

Alexander Vidal Papers

5. Metropolitan Toronto Library, Baldwin Room

T.G. Anderson Papers

6. Hudson's Bay Company Archives

Fur Seizure Records:

RG 2/2 - Sir Augustus Nanton Correspondence - Fur Seizures in Ontario and Quebec

RG 3/1A/1 - Fur Trade Department Annual Reports

RG 3/17E/1 to 4 - Hudson's Bay Company - Fur Trade Conference, 1934-1936

A.6/104 - London Correspondence to Fur Trade Commissioner

A.12/FT 230/1 - Game Acts - Provincial and Federal

A.12/FT 319/1a - Fur Seizures

A.39/14 - Legal Opinions and Correspondence, Seizure of Furs

A.74/1 to 14 - Report on the Fur Trade, 1894-1905

Post Records:

B.109/a/1 to 4 - La Cloche Post Journal

B.109/e/1 to 13 - La Cloche, Reports on District

B.129/a/1 to 20 - Michipicoten Post Journal

B.129/e/1 to 6 - Michipicoten, Report on District

B.149/e/1 to 2 - Nipigon, Report on District

B.162/a/1 to 6 - Pic Post Journals

B.162/e/1 - Pic Report on District

B.231/a/1 to 10 - Fort William/Point Meurion Post Journal

B.364/e/1 to 2 - Whitefish Lake, Reports on District.

B.488/a/1-3 - Temagami Post, Post Journals

B.125/z/1 - Nipissing Post, Miscellaneous Items

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