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Wikwemikong First Nation: Unceded Aboriginal Title to Manitoulin Island?

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**Wikwemikong First Nation :
Unceded Aboriginal Title to Manitoulin Island?**

Jo-Ann E. C. Greene

Thesis Submitted to Graduate Studies in Law

As Partial Fulfilment of the Requirements

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ABSTRACT

The premise of the paper is that Wikwemikong First Nation still retains Aboriginal title to their reserve land and the rest of Manitoulin Island, including the portion of the Island ceded by other First Nations. Two pre-Confederation treaties or agreements - Manitoulin Island Treaties of 1836 and 1862 - and surrounding circumstances are analyzed to support the premise.

The Doctrine of Discovery begins the discussion of Aboriginal title followed by an overview of contrasting land ownership concepts. Wiky's historical background and Colonial and Canadian government policies and legislation that affected the community's current unceded state are examined. Aboriginal title, its nature, scope and treatment in the courts, is outlined including the necessary criteria and tests the Canadian courts require to prove Aboriginal title. After analyzing all the findings, the criteria and tests for proving existing Aboriginal title are applied to establish the validity of the paper's premise.

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PREFACE

My interest in the interpretation of the Manitoulin Island Treaty of 1836, also known as the Bond Head Treaty after the Lieutenant Governor of Upper Canada, Sir Francis Bond Head, started five years ago when I was asked to do a project summarizing reports about Manitoulin Island. Included in the material, for background purposes, were both the 1836 and 1862 Manitoulin Island Treaties.

Until reading the Manitoulin Island or Bond Head Treaty of 1836, I thought that the First Nations of Manitoulin Island, including Wikwemikong First Nation, had surrendered their Aboriginal title to the Island. The wording in the last paragraph of the Treaty conveyed a different possibility. A different interpretation would mean that surrender was not the intent; Crown control over which Indians should be allowed to live on the Island with the Odawa and Chippewa inhabitants was the agreement made by the signatories.

Following the alternative interpretation, by not participating in the Manitoulin Island or McDougall Treaty of 1862, the result would be that Wikwemikong retained Aboriginal title to all of Manitoulin Island including their reserve. After graduating from law school, I decided that I had something to say about the potential of the alternative 1836 Treaty interpretation.

Who I wanted to tell about the often competing concepts involved in asserting existing Aboriginal title, were people on the ground making the decisions on a daily basis that can affect not only their immediate lives but those of future generations, more especially, the people of Wikwemikong. No where do the results of First Nations actions and choices have such long lasting affects as they do with Aboriginal law in the Canadian justice system.

With my audience being the frontline, the challenge was to make the concepts, case law

and analysis accessible. In a community dealing with claims and Aboriginal and/or treaty rights, a lot of time is spent explaining how First Nations experience ownership of their community land to members and surrounding municipalities in relation to the mainstream operation of real property law. Provincial and federal legislation, regulations, written and unwritten policies, economic development and strategic plans all impact on their rights and interests - along with the official plans of the connecting municipalities.

Community members, elected and traditional leaders are expected to decide right courses of action often without the benefit of a legal, historical, business and/or educational background. Court decisions, Aboriginal and treaty rights, and other legal interests are concepts often at odds with their own experience, relationship to the land and traditional laws and governance structures.

Chapter One, the foundation or background of the paper, conveys, in a digestible form, how the disparity developed. The irony for Aboriginal people in Canada is that the English property and common law system that completely disrupted our own governance structures, concepts of ownership and stewardship, relationship to the land and ultimately subsistence methods, was developed through a series of conquests and imposition of foreign language custom and laws. Those property concepts were imposed here in North America through the Doctrine of Discovery.

The contrast and comparison between property law fee simple, common law Aboriginal title and Aboriginal perspective of land ownership are the starting point for truly understanding what follows in the government policies, treaty interpretation and analysis. The basic introduction of the Royal Proclamation of 1763 here, provides the reason for the limitation on alienation of traditional territory necessary for the discussion of the Manitoulin Island treaties in the next chapters.

In order to determine if indeed Wikwemikong still retains Aboriginal title to their reserve and

all of Manitoulin Island, including the portion of the Island ceded by other First Nations in the McDougall Treaty of 1862, the principles of treaty interpretation had to be applied to both of the Manitoulin Island Treaties. Given that the burden of proof rests with the First Nation asserting Aboriginal title, the outcome of the interpretation and analysis of the Bond Head Treaty of 1836 was crucial to continuing on to the 1862 Treaty and subsequent consideration of Aboriginal title.

INTRODUCTION

Wikwemikong First Nation¹ is one of four First Nations in Ontario that claim to be residing on unsurrendered land.² Their claim to the unsurrendered status of their land is reflected in the official name - Wikwemikong Unceded Indian Reserve No. 26. Wikwemikong, commonly known as “Wicky,” is located on the eastern side of Manitoulin Island, which rests in portions of Georgian Bay and Lake Huron near the entrance to Lake Superior in the province of Ontario.

What makes Wikwemikong and the other three First Nations oddities is that the vast majority of Ontario’s 127 First Nation reserves were established through multiple agreements or treaties ceding or surrendering traditional territories with the British Crown before Confederation or with the Canadian government after Confederation.³ Agreements and treaties reflect mutual agreement between parties. The first treaties entered into shortly after contact were created to form peaceful relations on a Nation to Nation basis between the Indigenous people and European colonialists.

¹ The terms First Nation, Native and Indian are used interchangeably throughout this paper when referring to descendants of the Indigenous people of Canada who are registered under the *Indian Act*, R.S.C. 1985, c. I-5 as amended. The terms Aboriginal or Indigenous include all descendants such as First Nation, Metis and Inuit peoples. The Department of Indian Affairs and Northern Development (DIAND) was established in 1966 by statute to handle Indian, Inuit and Northern Affairs under the *Department of Indian Affairs and Northern Development Act* (R.S.C. 1985, c. I-6). DIAND administers the *Indian Act*, negotiates modern treaty agreements and land claims on behalf of Canada.

² The others are Walpole Island I.R.#46 near Wallaceburg in southwestern Ontario and two First Nations affected by the Treaty of 1836, (Chippewas of Nawash I.R.# 27 (Cape Croker) on the Bruce Peninsula and Chippewas of Saugeen I.R.# 29 on Lake Huron near Southampton), all of whom claim that their territory is unceded.

³ Canada, Indian and Northern Affairs Canada, *Ontario Treaties*, (Ottawa: Department of Indian Affairs and Northern Development) at 3, online: INAC Website <http://www.ainc-inac.gc.ca/pr/trts/ont/ont_e.pdf> (date accessed: 11 November 2001). The terms cede and surrender are used interchangeably in this paper. The result of surrendering land to the Crown to make way for settlement was the extinguishment of Aboriginal title and often Aboriginal rights to the land.

Claimed to be two of the oldest recorded agreements between Europeans and First Nations in what is now Canada are the Two Row Wampum and the Friendship Treaties, entered into for peaceful relationships and commerce between the Dutch and the Hotinonshon:ni⁴ Confederacy (Iroquois - People of the Longhouse) in the 17th century.⁵ The English and the Hotinonshon:ni formed with the Silver Covenant Chain of Friendship in 1677, an agreement of peace between them and military alliance.⁶

The British government wanted to ensure continued peaceful relations and protect the Indigenous residents from fraudulent and abusive acquisitions of their territorial lands with the advent of settlers. The *Royal Proclamation of 1763*,⁷ discussed in Chapter One as the starting point for the consideration of Aboriginal title in this paper, was an imperial directive to the British Colonial government in North America. Its provisions created new colonies granting them the

⁴ This is in Mohawk language using modern spelling. The spelling varies with the older versions, such as Haudenosaunee, and the other four Confederacy languages, Onondaga, Seneca, Oneida, and Cayuga.

⁵ Treaties and alliances were formed between many of the First Nations and the European colonists before England took control. Kathryn Muller in her thesis entitled “The Two Row Wampum: Historic Fiction, Modern Reality” suggests that this Treaty was not amongst those formed between the two groups in 1613, 1618 or 1643. Rather, she argues that it is a “mythical constructed representation of the Haudenosaunee worldview” that came about later in the nineteenth century. See, K.V. Muller, “The Two Row Wampum: Historic Fiction, Modern Reality” (M.A. Paper, University of Laval 2004) [unpublished] at 103.

⁶ N.J. Fredrickson, *The Covenant Chain Indian Ceremonial and Trade Silver* (Ottawa: National Museums of Canada, 1980) at 11; see also R.L. Haan, *Beyond The Covenant Chain The Iroquois and Their Neighbors in Indian North America, 1600-1800*, J.H. Merrell, & D.K. Richter, eds., (Syracuse, N.Y.: Syracuse University Press, 1987) at 45-46.

⁷ *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No.1.[hereinafter *Royal Proclamation*]. The directive covered the older American colonies, newly ceded and other American holdings. The four governments named were Quebec, East Florida, West Florida and Grenada.

power, in part, to enact laws and regulations to maintain the Native population's ability to continue unmolested with their hunting/gathering and other resource harvesting activities, on their own land and land ceded to the Crown.

Further, the *Royal Proclamation* provided that third parties were prevented from purchasing land directly from First Nations. The *Royal Proclamation* provisions acted as a procedural guideline for the relinquishment of, and compensation for, the ceded territorial land. Only the British Crown, and later the federal Canadian government, could negotiate to purchase Indian land through public meetings where Aboriginal title and rights were relinquished for monetary compensation and/or other benefits and rights such as annual payments. The British Imperial government continued to be responsible for carrying out Indian policy and legislation until the responsibility was passed to the Canadian federal government, as recognized in the *Constitution Act, 1867*.⁸

By the early 1800's as a result of the end of the American Revolution and separation of the British Territory in North America, the terms of the treaties and agreements began to change. A portion of the newly surrendered land, the title now held by the Crown, was set aside or reserved for the exclusive use and benefit of the First Nation family group or Tribe that had ceded the land. In some instances the result was small reserve areas for individual Tribal families rather than whole First Nation groups or Tribes. The seasonal lifestyle of some First Nations hampered the colonial policies of civilization and assimilation until the reduction of beaver and other wildlife, disease and starvation, caused a necessary change in traditional subsistence methods.

The new ownership or right, after relinquishing Aboriginal title to the Crown, that First

⁸ *Constitution Act, 1867*, 30 & 31 Vict., c.3., reprinted in R.S.C. 1985, App. II, No. 5.

Nations have in their reserved land was previously unknown in British law. There was no legal property definition such as fee simple or fee tail that was available to describe the retained interest. Aboriginal peoples in Canada did not experience possession/ownership of their territory as an estate as developed in common law. The judicial system's attempts to define legally First Nations' rights and ownership to their own reserve land resulted in terms such as beneficial interest⁹ and *sui generis*.¹⁰

Agreements or treaties completed in what is now southern Ontario, up to and including 1862, are called the Upper Canada or pre-Confederation treaties. Manitoulin Island First Nations were affected by two pre-Confederation treaties - the Manitoulin Island Treaty of 1836¹¹ and the Manitoulin Island Treaty of 1862.¹² The Manitoulin Island Treaty of 1836 is also known as the Bond Head Treaty, after Sir Francis Bond Head, the Lieutenant Governor of Upper Canada who orchestrated the controversial agreement. The Manitoulin Island Treaty of 1862 is known as the McDougall Treaty after William McDougall, the Chief Superintendent of Indian Affairs who, along

⁹ *Ontario Mining Company, Limited v. Seybold* (1903), A.C. 73 (P.C.) [hereinafter *Seybold*].

¹⁰ *Guerin v. Canada*, [1984] 2 S.C.R. 335, (sub nom. *Guerin v. R.*) (S.C.C.) online: QL (SCR) [hereinafter *Guerin*]. The use of the term *sui generis* is the Supreme Court of Canada's (S.C.C.) attempt to provide a definition for the possessory form of land ownership experienced by First Nations.

¹¹ Manitoulin Island Treaty of 1836, Chippewa and Ottawa Indians to Lt. Gov. Head, 9 August 1836, No. 45, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen's Printer, Ottawa 1891) at 112.

¹² Manitoulin Island Treaty of 1862, Chippewa and Ottawa Indians to Hon. W. McDougall, 6 October 1862, No. 94, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen's Printer, Ottawa 1891) at 235.

with two other Crown representatives, obtained signatures to the Treaty.

The Wikwemikong First Nation has not participated in any treaty or agreement that would lead to the surrender to the Crown or extinguishment of their Aboriginal title. They retain the Aboriginal rights to their traditional territory, which includes Aboriginal title and interest in their reserve land.¹³

The premise of the paper is that the Wikwemikong First Nation still retains Aboriginal title to their reserve land and the rest of Manitoulin Island, including the portion of the Island ceded by other First Nations in the Manitoulin Island Treaty of 1862. Sir Francis Bond Head claimed the Treaty of 1836 was a surrender. The language of surrender was used in the McDougall Treaty. Wikwemikong was not a signatory to the 1862 Treaty, therefore, it did not remove Aboriginal title and interest in their occupied territory. Currently, First Nations asserting an Aboriginal right or title bear the burden of proof.¹⁴ The evolution in jurisprudence for recognition of the existence of Aboriginal title created tests that must be met to prove that the First Nation asserting the title is correct.

The question central to the premise of this paper is: Can Wikwemikong's Aboriginal title still exist given the language in the 1836 and 1862 Manitoulin Island Treaties and the surrounding government actions? The answer to the question will determine the survival of Wikwemikong's Aboriginal title and interest in their reserve land and the remainder of Manitoulin Island. In order

¹³ Wiky claims to retain possession of the surrounding Islands. The title of the Islands is not discussed in this paper but is mentioned later in Chapter Two in the discussion of Modern Wikwemikong.

¹⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 143 [hereinafter *Delgamuukw*].

to answer that question, historical documents, events, legislation, texts, treaties, case law, legal commentary and secondary materials will be examined.

Chapter Content

To facilitate an understanding of underlying principles, ownership concepts and Aboriginal title as a right, Chapter One starts with a brief overview of the Doctrine of Discovery that consists of the colonization theories that form the basis and starting point of the imposition of English European concepts of land ownership in Canada. Next, a discussion of land ownership in fee simple, as experienced by mainstream Canadians, provides a contrast to Aboriginal concepts of ownership and reality. Aboriginal title, as an Aboriginal right, was recognized in the *Constitution Act, 1982*,¹⁵ s. 35(1).

Chapter Two begins probing what occurred during the relevant time period and shortly before with a historical overview of the First Nation inhabitants of Manitoulin Island. For the purposes of the paper, it is assumed that the ancestors of Wikwemikong occupied and used the land and resources on Manitoulin Island before assertion of sovereignty by England. It is beyond the scope of this paper to provide the detailed oral and historical information that would be needed to substantiate the claim of Aboriginal title in court. Next is a brief overview of the modern Wikwemikong Unceded Indian Reserve No. 26.

Indian Affairs policies from 1828 to 1850 are examined for the reasons behind the Bond Head Treaty. The Treaty is presented after the policy. The next section contains the principles of treaty interpretation that provide the tests and criteria needed to decipher the meaning of the

¹⁵ *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44 En. *Canada Act 1982* (U.K.), C. 11 Am. Constitutional Amendment Proclamation, 1983, SI/84-102, Schedule B at s. 35.

historical documents. The steps and tests outlined in this section are used in the next chapter in the corresponding sections. The actual content of the Bond Head Treaty 1836 is examined and analyzed to ascertain if the Treaty was merely an agreement or actually had the effect of surrendering land as asserted by Sir Francis Bond Head.

Legislation and regulations generated by the British Colonial government pertaining to Indian lands along with other Indian Affairs policies from 1851 to 1862 are examined at the beginning of Chapter Three. The analysis of the Treaty follows, particularly information surrounding the circumstances of what transpired during the negotiations of the Manitoulin Island Treaty of 1862 that created Wiky's unceded reserve and the basis of the paper premise.

Chapter Four provides the nature and content of Aboriginal title, the criteria needed to prove Aboriginal title and analysis as it relates to Wikwemikong. Finally, Chapter Five is the conclusion.

CHAPTER ONE: THE DOCTRINE OF DISCOVERY AND LAND OWNERSHIP

1.0 Introduction

The purpose of this Chapter is to provide background information that underlies the situation in which the Wikwemikong Unceded Indian Reserve No. 26 community currently finds itself. An often over looked subject in the discussion of Aboriginal title or the origin of Aboriginal Law in Canada is the discussion of the Doctrine of Discovery. The European colonizing countries developed an understanding between themselves or theories to support their claim of other territories for imperial expansion and economic gain. An overview of the theories involved is provided to facilitate an understanding of underlying principles, ownership concepts and Aboriginal interests in land.

Discussion of common law Aboriginal title starts with the *Royal Proclamation of 1763* and moves on to *St. Catherine's Milling & Lumber Co. v. R.*,¹⁶ the first case in Canada to consider Aboriginal title. A brief description of the contrasting common law property ownership in fee simple is outlined. This background information is important for determining the interest Wikwemikong First Nation members hold in their unceded reserve land and neighbouring land.

1.1 Doctrine of Discovery

The Doctrine of Discovery, discussed in court challenges on Aboriginal title in Canada and the United States, has its origin in international law. The term itself was not used prolifically in the Canadian material researched and it was difficult, therefore, to find references to it.¹⁷ The Doctrine

¹⁶ *St. Catherine's Milling & Lumber Co. v. R.*, (1888), 14 App.Cas. 46 in (1981), 2 CNLC 541 (P.C.) [hereinafter *St. Catherine's*].

¹⁷ There is material available in the United States. However, the preference of the author is to rely mainly on material generated in Canada. Although caselaw and secondary material

deals with the “discovery”, claiming and colonization of previously unknown territories by European sovereign countries. The new territories were claimed to be under the discovering country’s exclusive control and authority.

At the beginning of the colonial expansion period, from a Christian Eurocentric point of view, lands to be claimed as *terra nullius*¹⁸ were to be barren or uninhabited, a position which was later expanded to include uncivilized or non-Christian societies.¹⁹ In reality a combination of theories, the Doctrine of Discovery was used by European countries to justify colonization that imposed their culture, language, economic exploitation and laws on the new territory and its Indigenous occupants. Under the Doctrine of Discovery, the theories and methods used to acquire new territories during this time period and later included discovery, occupation/settlement, adverse possession, conquest, cession, and annexation.²⁰ Treaties were made between competing sovereign countries in some instances, to recognize formally the newly acquired “ownership” by one of the

from other countries are used in Canadian courts, the greater influence appears to be created by domestic jurisprudence and articles. I preferred to stay with the Canadian context and experience as much as possible.

¹⁸ The definition of the phrase is: “a Latin expression meaning “empty land” or “no man’s land.” The term refers to a 17th century legal fiction that permitted European colonial powers to assume control of land that was unclaimed (at least by each other).” *Wikipedia, The Free Encyclopedia*, s.v. “*terra nullius*”, online: AOL <http://en.wikipedia.org/wiki/Terra_nullius> (date accessed: 7 August 2004).

¹⁹ See, J.J. Borrows & L.I. Rotman, *Aboriginal Legal Issues Cases, Materials & Commentary* (Toronto: Butterworths Canada Ltd., 1998) at 6; See also, B. Stevens, “Aboriginal Title and The Doctrine of Discovery” in *Native Rights Student Papers*, vol.1 (Ottawa: Faculty of Law, 1981-82) tab 4 at 4; B. Ziff, *Principles Of Property Law* (Scarborough: Carswell, 1993) at 25.

²⁰ See Borrows & Rotman, *ibid.*, at 5; Stevens, *ibid.*, at 3-4; and see also, B. Slattery, “The Land Rights Of Indigenous Canadian Peoples As Affected By The Crown’s Acquisition Of Their Territories” (D. Phil. Thesis, Oxford University) (Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 10.

imperial expansionist nations. Of course, this was done by completely ignoring the Indigenous population's occupation of the territory, methods of subsistence, customary laws and governance.

The historical development that created the common law was a series of occupations of what is now England. Each occupation left behind different methods and ideas surrounding concepts of law and relationships to the land, however providing full details of each occupation is beyond the scope of this paper. Briefly, the Celtic occupation left behind the language in Ireland, Scotland, and Wales and land tenure based on a tribal or clan system.²¹ Roman occupation brought the concept of separate sovereign and family property. The Roman law recognized a usufructuary right to use and enjoy the land but not to the exclusion of others. The concept of possession started as mere occupation without rights and evolved into possession with rights due to occupying the land but did not take away the state ownership of the Emperor.²²

The Teutonic or Germanic occupation of the Angles, Saxons and Jutes, brought the English language and the idea of communal holdings of areas, courts and codification of their customary laws. The concepts of *seisin*, temporary possession or beneficial occupation of the land, grants of land in return for personal services rendered, although not feudal, and leasehold grants came to England from this period of occupation.²³ Norse occupation saw the practice of sealing documents and the start of the feudal system.²⁴ Building on the Anglo-Saxon methods established before William the Conqueror brought Norman rule as King to England, feudal law through military

²¹ M.L. Benson, I.M. Findlay & J.S.Y. Henderson, *Aboriginal Tenure In The Constitution Of Canada* (Scarborough: Carswell, 2000) at 17.

²² M.L. Benson *et al.*, *ibid.*, at 17-19.

²³ M.L. Benson *et al.*, *ibid.*, at 20-27.

²⁴ M.L. Benson *et al.*, *ibid.*, at 28.

alliance was formed. The result was that instead of a series of communities with a headman or king, there was now one sovereign, central government, laws and courts.²⁵ Military force was used to gain the allegiance of the Anglo-Saxon lords or heads of the many communities.

The Roman Catholic Church through this time period was strong, functioning as a governing state. The Church provided rules and laws that even sovereign Kings obeyed. The King or Queen was responsible for making laws or declarations using their prerogative power to control and govern their country. Portugal and Spain (Castile) were vying for colonial holds on the African coast for approximately 100 years before North America was “discovered.” On January 8, 1455, Pope Nicholas V issued the Papal Bull *Romanus Pontifex* granting King Alfonso of Portugal, in the name of Christianity, authority to take control of specific areas in Africa and explore south toward the Antarctic pole.²⁶ Under his authority, any islands, lands, seas and ocean could be claimed as a possession of Portugal.

As the rhyme used for educational purposes states: “In 1492 Christopher Columbus sailed the ocean blue.”²⁷ The result was the discovery of the “New World,” North America, on behalf of Spain. Columbus was seeking India. After Columbus returned, on May 4, 1493, Pope Alexander VI issued the Papal Bull *Inter Caetera* to King Ferdinand and Queen Isabella.²⁸ Portugal asserted

²⁵ M.L. Benson *et al.*, *ibid.*, at 29-33.

²⁶ F.G. Davenport, ed., *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, English translation (Washington, D.C: Carnegie Institution of Washington, 1917) at 20-26, online: GOOGLE <<http://www.nativeweb.org/pages/legal/indig.html>> (date accessed: 15 January 2003).

²⁷ The author’s maternal Grandmother, who was born in 1903, said this was the teaching method employed when she was in elementary school.

²⁸ Davenport, *supra*, note 26 at 75-78.

rights to the New World as well, after Columbus stopped there in March 1493 before continuing home.²⁹ However, the *Inter Caetera* and a subsequent Bull secured for Spain the unfettered “rights” to colonize the New World for economic expansion and for Christianity. It was expected, in return for the Bulls, that the Spanish Imperials would ensure that Christian men would be sent to the new lands to teach and convert any inhabitants to Christianity. The *Inter Caetera* stated:

Moreover we command you in virtue of holy obedience that, employing all due diligence in the premises, as you also promise -- nor do we doubt your compliance therein in accordance with your loyalty and royal greatness of spirit -- you should appoint to the aforesaid inhabitants and residents in the Catholic faith and train them in good morals. Furthermore, under penalty of excommunication *late sententie* to be incurred *ipso facto*, should anyone thus contravene, we strictly forbid all persons of whatsoever rank, even imperial and royal, or of whatsoever estate, degree, order, or condition, to dare, without your special permit or that of your aforesaid heirs and successors, to go for the purpose of trade or any other reason to the islands or mainlands, found and to be found, discovered and to be discovered, towards the west and south.³⁰

The threat for not complying with the Bull was, for its time, extreme through excommunication. The *Inter Caetera* contained a caveat that the found or discovered lands fell under the protection of the Bull even if they were not India, the primary goal of the colonizing countries.

Not to be left out of the race for new lands, the British Crown in 1496 authorized John and Sebastian Cabot to claim territory for England. The authority given was:

to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as

²⁹ Davenport, *ibid.*, at 75-77; see also, B. Slattery, *supra*, note 20 at 67.

³⁰ P. Gottschalk, “The Earliest Diplomatic Documents on America: The Papal Bulls of 1493 and the Treaty of Tordesillas Reproduced and Translated” (Berlin: P. Gottschalk, 1927) online: GOOGLE <<http://www.nativeweb.org/pages/legal/indig-background.html>> (date accessed: 15 January 2003).

far as Virginia. To this discovery the English trace their title.³¹

The point Chief Justice Marshall of the United States Supreme Court made in *Johnson* by referring to Cabot's charter to take possession of the unknown lands, was that the instructions given were to have regard only to any prior Christian title to the territory. He stated:

In this effort made by the English government to acquire territory on this continent, we perceive complete recognition of the principle which has been mentioned. The right of discovery given by this commission [...] Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.³²

Sir Humphrey Gilbert granted a charter in 1578 to Sir Walter Raleigh, "to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people."³³ The charters given by the British Crown support the idea that the sovereign colonizing countries believed that discovery alone gave them possession and control over the new land. Because they were considered heathen and barbarous, the Indigenous inhabitants in North American were not a deterrent to claiming the new land. The stated direction not to encroach on another Christian country's previous claim confirms the purpose the Doctrine of Discovery served, to avoid conflict among the European empire building nations.

Britain was no longer affiliated with the Roman Catholic Church. King Henry VIII, to enable

³¹ *Johnson v. McIntosh*, 21 U.S. 543 (U.S. Ill. 1823) online: WL (FNAM-CS) [hereinafter *Johnson*] at 576. In 1773 and 1775, land speculation companies in the United States purchased from the Piankashaw and Illinois Indians title to four enormous parcels of land in present day Indiana and Illinois. After almost 50 years of fruitless attempts to have the titles acquired by these purchases legislatively recognized, the companies sought judicial recognition. The court decided against the companies because the Indians had no fee simple to convey.

³² *Johnson, ibid.*, at 576-77.

³³ *Johnson, ibid.*, at 577; see also, Slattery, *supra*, note 20 at 99.

him to divorce one of his wives in 1533, established the protestant³⁴ Anglican Church in England with agreement of the British Parliament. The fear of excommunication from the Roman Catholic Church and losing the spiritual connection with the Vatican in Rome was no longer a deterrent to expanding their land holdings.

A Spanish theorist, Francisco de Vitoria, 1480 - 1546, basing his theories on the supremacy of God known as Primitives theory,³⁵ provided, according to Felix Cohen,³⁶ the Aboriginal rights theory that was disclosed in two lectures given by de Vitoria in 1532 entitled *De Indis* and *De Jure Belli*.³⁷ Peter A. Cumming and Neil H. Mickenberg attribute to de Vitoria the following ideas on native rights:

the Indians were the true owners of the land, both from a public and private point of view. The Indians' lack of belief in the Roman Catholic faith could not affect the question, as heretics in Europe were not denied property rights. He suggested that the Indians were no less intelligent than some Spanish peasants and therefore were equally fit to have legal rights. To the argument that the Pope had granted the New World to Spain, Vitoria replied that the Pope had no temporal power over Indian lands. Spain had no claim to the land through discovery, he said, because that notion only applied to unoccupied lands.³⁸

³⁴ The Protestant Reformation that occurred in the 16th century was brought about by the Christian theology of men like Martin Luther, John Calvin, Huldrych Zwingli and John Knox. They believed that all people had spiritual access through the Bible and did not need to rely on the interpretations of the Pope and priests. Reform was sought as a result of some of the Roman Catholic Church actions and doctrines.

³⁵ J. Currie, Professor, "International Law," Course-CML 3231, University of Ottawa, 12 September, 2000, orally.

³⁶ P.A. Cumming & N.H. Mickenberg, eds., *Native Rights In Canada*, 2nd ed. (Toronto: General Publishing Co. Limited, 1972) quote F. Cohen, "The Spanish Origins of Indian Rights in the Law of the United States," (1942) *Geo. L.J.* 1, at 14.

³⁷ Cumming & Mickenberg, *ibid.*, quote E. Hys, ed., *Classics of International Law, De Indis et De Jure Belli Relectiones* (New York: Oceana Publications, 1964).

³⁸ Cumming & Mickenberg, *ibid.*

For its time, these statements were very controversial, especially for de Vitoria, a Professor of Sacred Theology at the University of Salamanca,³⁹ in a completely Roman Catholic country.

Clearly, from de Vitoria's statement, the Spanish had a hierarchical system in place. He did not even grant that all Spanish peasants, his fellow patriots, were intelligent. Spain's treatment of the Inca, Aztec and other Indigenous nations was infamous for its brutality and cruelty.⁴⁰ It probably resulted from the classism within its society and total disregard for what they conceived to be lower status people. Pope Paul III, in 1537, five years after de Vitoria's public release of his Aboriginal rights theory, issued the Bull *Sublimis Deus* which stated: "Indians are truly men [...] they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect."⁴¹ The Bull was incorporated into Spanish law espousing protection for Indian rights. However, the reality, as noted above in the Spanish treatment of Indigenous peoples, demonstrated a flagrant disregard for the law.

As a concept, sovereignty of nations emerged in European international law with the signing of the Treaty of Westphalia in 1648 that ended the Thirty Year War. The two ultimate European sources of law existing prior to 1648, the church and imperial/crown law, were described as comprising "a single European state, many subordinate rulers, and no recognition that diplomatic

³⁹ Cumming & Mickenberg, *ibid.*

⁴⁰ C.F. Mares de Souza Filho, "Multiculturalism and Collective Rights" RSE: Full Text at s.2 [text not edited] online: AOL <<http://www.ces.fe.uc.pt/emancipa/research/en/ft/direitos.html>> (date accessed: 26 October 2003).

⁴¹ Cumming & Mickenberg, quoting Cohen, *supra*, note 36 at 14.

relations could exist with non-Christian societies.”⁴² The European countries saw themselves as sovereign. A Dutch jurist, Hugo Grotius, 1583 - 1645,⁴³ an advocate for governing by the theory of Natural Law using reason and no longer basing actions on religious theologies or dictates of God,⁴⁴ described the result of the Westphalia Treaty as a separation of the “politics of man and state.”⁴⁵ With the separation of church from state and the Protestant movement, the dominant colonizing countries (England, France, Spain and Portugal) were getting stronger. The Doctrine of Discovery was needed to provide rules for the European colonizing expansion race.

1.1.1 Discovery

The theory of discovery, as previously stated, started by applying only to unoccupied or empty lands, *terra nullius*, but was expanded to include territories without civilized, Christian peoples, often called barbarians. De Vitoria’s assertion that discovery was not possible if Indigenous peoples already occupied the territory finds support from Aboriginal peoples in Canada, who claim they could not have been found because they were never lost.

John J. Borrows and Leonard I. Rotman suggest the theory of discovery was developed to justify the claim of European colonizing countries to all the land and allowing the Indigenous occupants to sell or give up their interest in the land only to them.⁴⁶ The justification concept was

⁴² M.L. Benson *et al.*, *supra*, note 21 at 89.

⁴³ Currie, *supra*, note 35.

⁴⁴ Currie, *ibid.*

⁴⁵ “Indigenous People - Global Issues: Background” at 1, online: GOOGLE <<http://www.nativeweb.org/pages/legal/indig-background.html>> (date accessed: 2 December 2001).

⁴⁶ Borrows & Rotman, *supra*, note 19 at 7.

rejected in the *Island of Palmas*⁴⁷ case, an international law decision in 1928 that was a challenge to the United States asserted ownership of the Island. Symbolic acts were used by the early explorers to claim new territory under the justification concept, such as placing a flag on the claimed territory or a cross, as Jacques Cartier did at the entrance to the Gaspé Bay, claiming the land for France.⁴⁸

Chief Justice Marshall in *Johnson* considered the historical evolution of colonialization and, as shown in the quote from the *Johnson* case, asserted that England acquired the exclusive title to the land on discovery. He stated:

the rights of the original inhabitants were, in no instance entirely disregarded; but were necessarily, to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever, they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.⁴⁹

The statement supports the theory of discovery as operating in Indigenous occupied territory. The act of discovering the new land, alone, conveyed exclusive sovereign authority but not absolute ownership of the land to the imperial power which, in what is now Canada, was the English Crown.

1.1.2 Occupation/Settlement

Occupation or settlement of the discovered land carried more weight than just discovery and the placement of a symbol. Bruce Ziff describes the first occupation of property as “first in time is first in right [...] The act of taking possession is treated as labour that merits reward.”⁵⁰ The

⁴⁷ *Island of Palmas*, (1928), 2 R.I.A.A. 829.

⁴⁸ Stevens, *supra*, note 19 at 3; Borrows & Rotman, *supra*, note 19 at 11.

⁴⁹ *Johnson*, *supra*, note 31 at 574.

⁵⁰ Ziff, *supra*, note 19 at 24.

conclusion in *Island of Palmas* case supports Ziff's statement. The decision was that the Island was not included in the Philippine territory acquired by the United States, as more than just discovering the land was required. Actual possession, in the form of occupation or settlement, was needed and had to be maintained in some manner on an uninterrupted basis. It may explain, in part, why England was anxious to establish communities in the New World in 1606 by issuing grants to Sir Thomas Gates to form settlements at specified latitudes that split the group into north and south settlements.⁵¹

1.1.3 Adverse Possession

The adverse possession aspect of the doctrine of discovery, encapsulates the previous two theories of discovery and occupation. One colonizing party claims the previously claimed area of another Imperial country by occupying that territory and establishing settlements. The original claimant sees the area has been occupied for an extended period of time and acknowledges the ownership of the second sovereign country. England did this to the Dutch who had originally settled in the area now known as New York state through to Delaware, especially in what is now New York City, before the English moved into the area.

Henry Hudson, representing the United East India Company, sailed into the New York area and up the East River in 1609.⁵² The sole purpose for claiming possession of the new lands was trade. Manhattan Island became the main Dutch centre of New Amsterdam. The Dutch even entered into treaties of commerce, peace and friendship, as mentioned in the introduction to this paper.

⁵¹ Ziff, *ibid.*, at 577.

⁵² Department of Special Collection, University of Notre Dame, "A Brief Outline of Dutch History and the Province of New Netherland," online: GOOGLE <<http://www.coins.nd.edu/ColCoin/ColCoinIntros/Netherlands.html>> (date accessed: 1 December 2001).

England never recognized the Dutch claim to the area, asserting they had previous rights of possession. The presence of the Dutch did not impede England's claim on the whole eastern coastal portion of what is now the United States. In 1664, a British war ship sailed into the Bay at Manhattan Island and met with little resistance. The physical presence of military power supported England's adverse possession of the area. The use of force may have changed the acquisition of the Dutch occupied area, from adverse possession to conquest. A brief war between the two countries in 1665-67 ended in the Treaty of Burda, where the British retained the New Netherlands and the Dutch obtained Surinam, a colony just north of Brazil.⁵³

1.1.4 Conquest

According to the Doctrine of Discovery, conquest is what it implies, that is, the taking over of a territory by force or war. One of the three methods sovereignty over new territory was gained,. Once the occupying government was vanquished, the conqueror had the right to impose its laws, culture and presence, an essential aspect of the conquest.⁵⁴ One demonstration of this theory was outlined in England's series of occupations and the changing forms of governance and cultural aspects that came with the new conqueror. Another is the French-English war for control of the fur trade and lands claimed by the other countries in Canada and the United States.

The French were entrenched in the fur trade and had expanded into the west. The English wanted to control the whole territory, which was rich in resources. The English were unsuccessful in excluding France from the fur trade by war as a means to dominate the New World. The Treaty of Utrecht was signed in 1713, the official end to the war.

⁵³ Department of Special Collection, *ibid*.

⁵⁴ Borrows & Rotman, *supra*, note 19 at 9.

Renee Dupuis and Kent McNeil contend that Article XV of the Treaty displayed internationally, for the first time, the relationship between the Aboriginal people and the French and English.⁵⁵ Article XV, of the Treaty of Utrecht reads:

The subjects of France inhabiting Canada and others shall hereafter give no hindrance or molestation to the 5 nations or cantons of Indians, subject to the dominion of Great Britain, nor to the other natives of America, who are friends to the same. In like manner the subjects of Great Britain shall behave themselves peaceably towards the Americans, who are subjects or friends to France [...] But it is to be exactly and distinctly settled by Commissaries, who are and who ought to be accounted the subjects and friends of Britain or of France.⁵⁶

Dupuis and McNeil go on to point out that both France and England classify the Aboriginal groups as either friends, meaning allies, or subjects. The warring countries were assisted by First Nation groups in their efforts. The Huron and Algonquin Nations were allied with the French. Generally, the Hotinonshon:ni fought with the British against the other First Nations and the French.

Again, England and France went to war for seven years, from 1756 to 1763, when the Treaty of Paris was signed. The war extended to both Upper and Lower Canada. England claimed all of France's land holdings in the New World except for the Islands of St. Pierre and Miquelon in the Gulf of St. Lawrence, the Caribbean and Louisiana.⁵⁷ Aspects of French culture, land tenure, judicial system and civil law remained after the conquest. Some of the special concessions made at the time the Treaty was signed, such as education and language, have carried through to the *Constitution Act*,

⁵⁵ R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Domestic Dimensions*, vol. 2 (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 7-8.

⁵⁶ Dupuis & McNeil, *ibid.* quoted "Treaty of Utrecht", in *British and Foreign State Papers*, 1846-1847 (London: Harrison and Son, 1860) at 843-44.

⁵⁷ G. Carruth, "The Encyclopaedia of American Facts and Dates", 10th ed. (New York: Harper Collins Publishers, 1997) at 3, online: AOL <<http://usahistory.com/wars/sevenyrs.htm>> (date accessed: 15 January 2003).

1867.

In *Johnson*, Chief Justice Marshall discusses the concept of conquest, relating to the bloody wars that ensued in what was then the western United States following the American Revolution, resulting from the resistance by many Indian Tribes to the encroachment of settlers on their traditional territories. The reference implies that the strength of first, the British Colonial government and then, the more adequately equipped United States government, and the subsequent reduction in Indian population and resistance, gave the United States the right to claim exclusive jurisdiction over Indian lands by conquest. Chief Justice Marshall's reference to rights by conquest means that under either Doctrine of Discovery theory, discovery by Britain or conquest by the United States, the result was the same - the encroaching group claimed jurisdiction over the land. The Revolution in 1776 that gained the United States' freedom from Britain was not referred to as the source of conquest over the Indians. The result was a flow through of responsibility for the Indians from Britain to the United States, in much the same manner as Canada on independence in s. 91(24) of the *Constitution Act, 1867*.⁵⁸

The idea of being a conquered people does not rest well with First Nations in the United States or Canada. Commentator Lindsay G. Robertson argues there were many other theories available to Chief Justice Marshall at the time he made his decision in *Johnson*. Further, Robertson suggests that Chief Justice Marshall himself knew there were gaps and insufficient evidence to support the conquest theory in England's occupation and dealings with the original inhabitants.⁵⁹

⁵⁸ *Constitution Act, 1867*, *supra*, note 8 at s. 91(24).

⁵⁹ L.G. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) 13 J. L. & Politics 759 at 761.

1.1.5 Cession

Cession, another of the Doctrine of Discovery theories, at international law is the voluntary releasing or letting go of land under the ownership and occupancy of one nation to another nation through an agreement, usually in the form of a treaty. The treaties entered into by First Nations and the British Crown and later Canada could be classified as treaties of cession. Chief Justice Marshall described the sovereignty of the United States government as inevitable.

Another aspect of cession, in international law, is that the parties entering into the agreement or treaty to cede the land are considered independent sovereign nations or the treaty is not valid. If not sovereign, the parties to the treaty would not have the authority to sign over control, thereby releasing their exclusive right to possession of their territory. First Nations claim to be sovereign and the evidence of that was apparent in the first treaties entered into with the French, Dutch and the English during the early years of contact. This assertion, not substantiated by the Canadian government or the S.C.C., is discussed below in the Aboriginal title section.

1.1.6 Annexation

Last on the list of methods and theories recognized within the Doctrine of Discovery for acquiring new territory is annexation. Again, voluntary agreement and cooperation of the sovereign countries involved is required. The territory transferred to the new owner country by way of treaty is added to the total land holdings of the new owner. For annexation to occur the land being transferred must be adjacent to land already in the possession of the country receiving the new land. In this way it differs from cession that need not be contiguous.

Hypothetically, if the Treaty of Burda that ended the war between England and Holland was the end result of peaceful negotiation, with the same result, that would be an example of annexation

on England's part. England already claimed territorial ownership of the land to the south and west of the Dutch territory, New Netherlands. The result of the hypothetical treaty would be the adding of the Dutch New Netherlands to the existing English territory and England exercising governmental control over the whole amalgamated area.

1.1.7 Summary

The impact of de Vitoria's Aboriginal rights theory, though not credited by the English, may have influenced their procedure for acquiring the land for settlement expansion from the Indians in the "New World," at least in North America. Another influence may have been the number and strength of the Indigenous population at the time of early contact. The Pope, the Roman Catholic Church, recognized Indians as "men" or people whose rights should be protected. England, as an advocate for the Protestant Religion, did not want to be outdone morally by their Christian counterparts. The resulting influences created British Colonial policy and laws that are covered, in part, in this chapter and Chapter Four on Aboriginal title.

The British claimed exclusive possession and title to the land in their portion of North America under several Doctrine of Discovery theories, first by *terra nullius* possession and symbolic marking of the New World in the name of the British Crown by Cabot. Next, Sir Humphrey Gilbert and Sir Walter Raleigh were sent to ensure the newly claimed territory stayed under British control through occupation by the establishment of settlements. The eastern part of New York state was claimed through adverse possession of Dutch territory which was ultimately recognized through the doctrine of conquest. Conquest of the French led to the acquisition of Lower Canada (Quebec) and other areas and Islands, including Newfoundland, Nova Scotia and Prince Edward Island. Cession was used to surrender and extinguish the Indians' rights to the land in the pre-Confederation treaties

in Canada in exchange for goods, reserved lands for their use, and sometimes money.

The actual concept of Aboriginal title considered in the United States, in *Johnson*, formed the basis of the divergent laws relating to Indians in that country. In deciding the *Johnson* case, Chief Justice Marshall followed his minority decision in the 1810 case *Fletcher v. Peck*⁶⁰ finding that the Indian tribes were independent and held their land to the exclusion of other interests until extinguished by the federal government purchasing the land.

Later in Canada, the decision by the English Privy Council, then the highest court of appeal, in *St. Catherine's*,⁶¹ considered the concept of Aboriginal title or rights in land, all without knowledge or participation of the First Nation people. The decision affirmed the split in the division of power in the *Constitution Act, 1867*, between the provinces and the federal government. The Privy Council discussed the development of Aboriginal law in the United States in that decision. As will be demonstrated, the Law Lords' finding in *St. Catherine's* and the development of the Doctrine of Discovery affects Wikwemikong First Nation and the rights they have in their traditional territory in the present day.

1.2 By Way of Contrast - Three Concepts of Land Ownership⁶²

1.2.1 Fee Simple

England claimed all the land in Canada for the Crown under the Doctrine of Discovery including by conquest as discussed above. English law, culture and language were imposed on the

⁶⁰ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (US.S.C. 1810).

⁶¹ *St. Catherine's*, *supra*, note 16.

⁶² The ideas and content of this section were previously submitted in an essay for fulfilling requirements for an undergraduate course by the author. J.E.C. Greene, "First Nations' Reserve Land: Title in Fee Simple and the Fall-out" (LL.B. Paper, University of Ottawa 2000) [unpublished]. Amendments and structural changes have been made.

original inhabitants.⁶³ The common law land tenure system that developed in England over the centuries, in response to the desire of the landowners to be able to transfer their holdings to whomever they wanted rather than have the title revert back to the Crown, was estate in free and common socage (more commonly known as title to the land held in fee simple). A dictionary definition of fee simple is “an estate in land without any limitation on inheritance or transfer of ownership; in Canada it denotes full ownership, subject to the rights of the Crown.”⁶⁴ The characteristics of rights inherent in fee simple title ownership of property in common law are:

1. A right of possession;
2. A right to exclude others;
3. A right of disposition;
4. A right of user;
5. A right of enjoying the fruits and profits of land; and
6. A right of destroying or injuring property.⁶⁵

The driving force behind the development of this type of land estate is described as “an economic need for the land to be freely alienable, for whole absolute ownership to be freely transmissible, but this has to be reconciled with the human desire for fragmentation of ownership and for keeping property within the family.”⁶⁶ Land became a commodity, a source of revenue like any other asset or trade good. Often, the Crown sold land as a means of raising funds. Land was the only valuable possession most early settlers could afford. The government, at times, gave land away

⁶³ Civil law and land tenure in Quebec was allowed to continue under the French system.

⁶⁴ *Gage Canadian Dictionary*, Revised and Expanded ed., s.v. “fee simple.”

⁶⁵ A.H. Oosterhoff & W.B. Rayner, *Losing Ground: The Erosion Of Property Rights In Ontario*, 2nd ed. (London: Ontario Real Estate Association Foundation, 1980) at 11.

⁶⁶ D.J. Hayton, *Modern Legal Studies Registered Land*, 2nd ed., (London: Sweet & Maxwell, 1977) at 8.

for free to promote settlement and development of the more remote areas. Individuals in Ontario who gained land in colonial times, with a few exceptions to land granted by the French around Windsor,⁶⁷ owned their real property in fee simple title.

Civil law, under the French colonial government, recognized allodial title⁶⁸ where ownership of the land was outright like a chattel.⁶⁹ The title claimed by England upon the exercise of various Doctrine of Discovery methods is in essence allodial contrasting with the fee simple ownership of individuals in Canada.⁷⁰ Allodial title includes all aspects of the property ownership, interest, possession, beneficial and legal title that was said to be vested in the Crown. According to property law, it is more accurate to say that “title”, as it relates to fee simple, connotes the lawful right of possession of an estate in land.⁷¹ Estate in this context means an interest or *seisin* connected to the land. Benson *et al.* assert the old concept of *seisin*, possession, is not to be confused with title.⁷² They state: “The English language has preserved an ancient simplicity that the analytical

⁶⁷ E.E Gillese, *et al.*, *Property Law Cases, Text and Materials*, 2nd ed. (Toronto: Edmond- Montgomery Publications Limited, 1990) at 7:2-7:6.

⁶⁸ Allodial title comes from the word “allodium” defined as “[l]ands not held by any lord or superior, in which, therefore, the owner had an absolute property and not a mere estate,” *Osborn’s Concise Law Dictionary*, Seventh ed., s.v. “allodium”. Allodium title differs from fee simple title in that the Crown would not have underlying title.

⁶⁹ E.E Gillese, *et al.*, *supra*, note 67 at 7:2, the authors describe the French settlers’ ownership as “‘beneficially entitled’ to the land ‘by possession and long enjoyment’” that did not rely on the Crown granting the land, resulting from the decision of the case *Druland v. Walsh*, (1906) 11 O.L.R. 647 (Div. Ct. of Ont.). Possession demonstrating ownership is a personal property right.

⁷⁰ M.L. Benson, *et al.*, *supra*, note 21 at 71.

⁷¹ A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2nd ed., vol. 2 (Aurora: Canada Law Book Inc., 1985) [footnotes omitted] at 1258.

⁷² M.L. Benson, *et al.*, *supra*, note 21 at 41.

language of the law has obscured. To the English mind, one who occupies land is equated with having the most intimate connection with it, more than anyone else can possibly have.”⁷³ The desire to possess and to have an intimate connection with the land, during the colonialization period of the English, meant to the exclusion of others.

Absolute fee simple, “the largest estate known to law,”⁷⁴ combines the legal and equitable interests in land. Ownership is experienced as something more than just possession. Although a fee simple land estate is absolute, it is held “subject to the rights of the Crown.”⁷⁵ The provincial Crown retains the underlying ownership of the land in each province.

The ownership of the land in Canada held by the Crown in England was transferred at the time of Confederation to the Crown in right of Canada, the federal government, in the *Constitution Act, 1867*, ss. 91(24) and 117 and the Crown in right of the provinces, s. 109. Section 109 of the *Constitution Act, 1867*, provided for “[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces [...] shall belong to the several Provinces [...] in which the same are situate or arise, subject to Trusts existing in respect thereof, and to any Interest other than that of the Provinces in the same.”⁷⁶ The federal government retained any interest not held by the provinces, such as Indian land held in trust⁷⁷ or land claimed for military purposes.⁷⁸

⁷³ M.L. Benson, *et al.*, *ibid.*

⁷⁴ Ziff, *supra*, note 19 at 118; see also, Oosterhoff & Rayner, *supra*, note 65 at 11.

⁷⁵ Ziff, *ibid.*

⁷⁶ *Constitution Act, 1867*, *supra*, note 8 at s. 109.

⁷⁷ *Constitution Act, 1867*, *ibid.*

⁷⁸ *Constitution Act, 1867*, *ibid.*, at s. 117.

Currently, fee simple title has only been obtained by First Nations through purchases of third party land. The nature of fee simple title is that it can, barring any interruption by the provincial government, go on indefinitely, through sales, gifts and wills. One of the rights of property in the older property texts included the right not to have the land expropriated. Almost every province has an expropriation act to enable the taking of private land for government use. Ziff describes the estate in fee simple as “a time in the land without end.”⁷⁹ The only way the Crown gets the land back is if the current owner dies without a will and has no family who can take possession of the estate in fee simple, then the estate in fee simple ends and the land returns to the Crown in right of the province.⁸⁰

There are common law powers in owning an estate in land in fee simple. The seisin aspect of possession conveys to the landowner rights before anyone else to occupy the land unmolested. Absolute title in fee simple gives the landowner control over activities on the property to the exclusion of everyone else.⁸¹ An absolute owner, according to Alan Sinclair, is the:

“complete owner” insofar as that is legally possible,...I mean no one else has any rights in relation to that property [...]. Within limits as set by some governmental body... I can live there, tear it down, turn it into a filling station and generally do as I please with it. [...] imagine then, that my ownership is a complete circle with no segments cut out of it.⁸²

The limits set by “some governmental body” in most urban, and even rural areas, are commonly expressed as bylaws regarding modifications which can be made to the property, how the land may

⁷⁹ Ziff, *supra*, note 19 at 118.

⁸⁰ Oosterhoff & Rayner, *supra*, note 71 at 11.

⁸¹ D.J. Hayton, *supra*, note 66 at 15.

⁸² A.M. Sinclair, *Introduction To Real Property Law*, 3rd ed. (Toronto: Butterworths, 1987) at 8.

be used, zoning, and, even in some cases, how big an election sign you can put on your lawn. However, the landowner is still the one to decide what is done on his land and to have the enjoyment of the property, and does not have to share it with anyone unless by choice. He also has the right to decide to tear down or destroy the property if he chooses. However, the reality of the right to destroy property and the decision of what is placed on an individual's property is usually subject to municipal and/or provincial legislation.

Another power inherent in fee simple title to land is that the title is timeless or durable. As previously mentioned, the freehold estate has no time limit, but has "indefinite duration and thus [...] a legal right as against all the world."⁸³ Fee simple ownership can be distinguished from a leasehold, which is a limited right to possession of the land and usually involves paying the legal owner a fee for the right to possession of the property for a period of time. This is another right that the common law has attributed to fee simple ownership. The landowner has the "right to enjoy the fruits and profits of the land."⁸⁴ A leasehold is another way to use the property as a commodity without completely giving away the legal title. A leasehold means the full property interest will come back to the fee simple owner. A prime example of this was when Hong Kong returned to the possession of the Peoples Republic of China when England's ninety-nine year lease expired in 1996.

Finally, fee simple title gives to the title holder the power to alienate the land by legal transfers which means to sell or gift it. A definition of alienation is "the intentional and voluntary transfer of a right by a person or persons in whom the right resides to another person or persons."⁸⁵

⁸³ A.M. Sinclair, *ibid.*

⁸⁴ Oosterhoff & Rayner, *supra*, note 65 at 11.

⁸⁵ Oosterhoff & Rayner, *supra*, note 71 at 1259 [footnotes omitted].

The methods that can be used to alienate the land are sale, *intervivos* gift or through descent in a will.⁸⁶ The conditions on the transfer of property held in fee simple are, “[t]he purported giver of the right must have the capacity to transfer it and the purported receiver of the right must have the capacity to receive it.”⁸⁷

In the next section, the list of rights and powers contained in the ownership of land held in fee simple title in common law is used in the comparison of mainstream Canadians, common law Aboriginal title and Aboriginal perspectives on ownership of traditional territories.

1.2.2 Aboriginal Perspectives

The Doctrine of Discovery and the evolution of land possession and individual ownership in fee simple examined above contrast greatly with First Nations’ understanding of the land in their traditional territories and their rights to occupation, use and enjoyment. A spiritual connection with the land and the responsibility to care for the land as stewards are the prime differences between First Nations and mainstream experience in relation to land. Most First Nations have a completely different view and relationship with the land than that of the European colonialists and settlers. The land is owned communally with other members and other species. Ownership is experienced without literal possession. It is harder to use the land as a commodity.

In an essay prepared for the Royal Commission on Aboriginal Peoples (RCAP) Patrick Macklem states: “Aboriginal use and enjoyment of land is often spoken of by Aboriginal people as possessing a profound spiritual dimension. Aboriginal people often refer to a uniquely Aboriginal conception of land, where land is viewed not simply as a commodity but as something to which

⁸⁶ Oosterhoff & Rayner, *ibid*, at 1258.

⁸⁷ Oosterhoff & Rayner, *ibid*, at 1259 [footnotes omitted].

Aboriginal people are spiritually connected.”⁸⁸ Many Aboriginal people describe the relationship with the land using the term Mother Earth, conveying gratitude for her supplying all things for survival and nurturing. Implicit in the relationship is the stewardship element of treating the land with the respect due to the familial tie espoused.

The special relationship experienced with the land did not translate into ownership as it was known by the Europeans. However, First Nations exercised possession of large territories of land over which they exerted their control. Life sustaining activities were carried on in the territories to the exclusion of other First Nations, except if permission was given. Prior to contact with European colonization, Indigenous peoples were sovereign. Dictionary definitions of sovereign that apply are: “*n.* **2** a person, group, or nation having supreme control or dominion; [...] *adj.* **3** independent of the control of other governments.”⁸⁹ Indigenous people in Canada had their own governance structure, customary methods of internal control and external defense. The territory belonged to the Nation group collectively.⁹⁰

1.2.3 Common Law Aboriginal Title

British law is the base and starting point for the reference to Aboriginal rights, of which Aboriginal title is one expression. Aboriginal title itself is a term developed to fit within the Western or Eurocentric legal system. It was developed by the courts in an effort to describe the undefined

⁸⁸ P. Macklem, “Normative Dimensions of the Right of Aboriginal Self-Government” in *Aboriginal Self-Government Legal and Constitutional Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1995) 4 at 10-11.

⁸⁹ *Gage Canadian Dictionary*, Revised and Expanded ed., s.v. “sovereign”. Canadian courts have not provided a definition of sovereign in relation to the Aboriginal people in Canada.

⁹⁰ Some First Nations in British Columbia owned parts of a larger territory in traditional family groups and in a few instances, individuals claim ownership to certain sections of the territory.

rights Aboriginal people in Canada still retained in their territory/land after being claimed under the Doctrine of Discovery and colonial expansion by England. Aboriginal title and rights to a First Nation's own territory resulted in terms such as burden on the crown,⁹¹ beneficial interest,⁹² and *sui generis*.⁹³ According to property law, the Indigenous population did not "own" the legal title, fee simple, or even the equitable interest of possession to their traditional territorial land.

The *Royal Proclamation of 1763*, the starting point for examining Aboriginal title, was issued by King George III exercising his Royal Prerogative on October 7, 1763. Relevant provisions in the *Royal Proclamation of 1763* are:

And whereas it is just and reasonable, and essential to our Interest, 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, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. [...] And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from asking any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained. [...]

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; In order therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, [...] no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose.⁹⁴

⁹¹ *St. Catherine's*, *supra*, note 16.

⁹² *Seybold*, *supra*, note 9.

⁹³ *Guerin*, *supra*, note 10.

⁹⁴ *Royal Proclamation of 1763*, *supra*, note 7.

The provisions acted as procedural guidelines,⁹⁵ in part, for the newly formed colonial governments on how to interact with Aboriginal people when dealing with their traditional territorial land, including the restriction of ceding it to the Crown only and not to third parties.⁹⁶

Delia Opekokew summarizes the directing provisions of the Royal Proclamation related to Indian traditional territory. She states:

- (a) the Indian allies are not to be disturbed in the possession of their hunting grounds;
- (b) the hunting grounds that have not been ceded to or purchased by the Crown, are reserved for the Indians;
- (c) no patents should issue for lands beyond the bounds of the newly created colonies;
- (d) private individuals may not purchase the reserved lands, and private persons settled on the lands must leave them;
- (e) lands may only be purchased from the Indians by the king at a public meeting held for that purpose.⁹⁷

Ms. Opekokew states further that the *Royal Proclamation of 1763* outlines the treaty making process as it confirms that “for all future land transactions [...] the Indian nations should consent, not only to the disposition of the land, but also to the purposes for its disposition.”⁹⁸ From her interpretation of the provisions, the direction given to the Colonial representatives required when a meeting was called for the specific discussion of surrendering Aboriginal title to the Crown, the Indian group involved should know the purpose of the meeting and why the surrender was being sought. This is an important statement that impacts on treaty analysis discussed in the next Chapter.

⁹⁵ D. Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada* (Background paper 4) (Kingston: Institute For Intergovernmental Relations, Queen’s University, 1987) at 21.

⁹⁶ Under the current *Indian Act* (*supra*, note 1), this restriction on alienation of reserve land continues.

⁹⁷ D. Opekokew, *supra*, note 95 at 17.

⁹⁸ D. Opekokew, *ibid.*, at 21.

First Nations' view of the *Royal Proclamation of 1763* is that it constitutes recognition by the British Crown that they had an interest in the land and were in control over their own hunting territory and land. Marjorie L. Benson, James (Sakej) Youngblood Henderson and Isobel M. Findlay describe the process in the *Royal Proclamation of 1763* for treaties with the Aboriginal peoples in North America as constitutional.⁹⁹ They state: "After the *Treaty of Paris* (1763) and the *Royal Proclamation of 1763*, British law enshrined treaty making with Aboriginal nations and tribes as the constitutional responsibility of the imperial Sovereign in right of the United Kingdom."¹⁰⁰ The authors take Ms. Opekokew's comment on the treaty process contained in the *Royal Proclamation of 1763* a step further, conveying that the Crown exercised a British constitutional responsibility when the residual royal prerogative was exercised in its promulgation.¹⁰¹ Therefore, the British Crown and its Colonial government were not held to a legislated responsibility to ensure the *Royal Proclamation of 1763* treaty process was followed when dealing with First Nations' land cessions in Canada, but a constitutional responsibility that could not be waived or altered on the whim of an administrator or Crown representative.

Section 25 of the *Canadian Charter of Rights and Freedoms*¹⁰² entrenches the protection of Aboriginal land rights as recognized in the *Royal Proclamation of 1763* in the Canadian Constitution. The relevant portion of *Charter* s. 25 reads:

⁹⁹ M.L. Benson, *et al.*, *supra*, note 21 at 99-100.

¹⁰⁰ M.L. Benson, *et al.*, *ibid.* at 99.

¹⁰¹ M.L. Benson, *et al.*, *ibid.* See also, P.A. Cumming, "Public Lands, Native Land Claims and Land Use" (Symposium on the Public Lands in Canada, Social Science Research Council of Canada, Ottawa, 25-27 October, 1973) [unpublished] at 2.

¹⁰² *Canadian Charter of Rights and Freedoms The, Part 1 of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate and derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.¹⁰³

At the time the Constitution was drafted, the Canadian courts were still examining what was meant by Aboriginal and land rights, an exercise that had begun 100 years earlier.

England's Privy Council interpreted the Aboriginal land rights provisions of the *Royal Proclamation of 1763* for the first time in 1888 in the *St. Catherine's* case. Arising from a dispute over control of minerals and natural resources in territory ceded by the Saulteaux Tribe of Ojibways in the Treaty 3 area of Ontario, the federal and Ontario governments both claimed jurisdiction. The federal government asserted the right to control natural resources as Canada received freehold title to the Saulteaux ceded territory and issued a timber permit to the St. Catherine's Milling and Timber Company. Ontario argued that s. 109 of *Constitution Act, 1867*, then known as the *British North America Act, 1867*, gave them jurisdiction over the minerals and natural resources and sought an injunction and damages for the cut timber. Further, Ontario argued that Indian title did not have any legal impact that would convey a complete freehold title to Canada.

Lord Watson of the Privy Council stated that the interest the Indians had in the land had not changed in 100 years, and that the tenure provided for in the provisions of the *Royal Proclamation of 1763* was "a personal and usufructary right, dependent upon the good will of the Sovereign [...]" there have been all along vested in the Crown a substantial and paramount estate, underlying the

¹⁰³ *Charter, ibid.* at s. 25.

Indian title.”¹⁰⁴ Further, had the Indians owned the territory in fee simple the province would not have a claim.¹⁰⁵ Since “the Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden,”¹⁰⁶ the Crown had an interest in the land at the time of Confederation. Therefore, the province was to receive the benefit from the resources on the land when the Saulteaux Indian title was extinguished by their adherence to Treaty 3 and the full legal title received by the federal Crown was conveyed to the Crown in right of Ontario.

By signing the Treaty the Indians did not continue to have an interest in the timber on the land according to Lord Watson. The narrow interpretation of the *Royal Proclamation of 1763* provisions to include only the right of using the territory for hunting and fishing was done without involving the Saulteaux. As a result of the decision for the province and the factors, such as the actual extent of Indian title, not looked at by the Privy Council, First Nations in Canada struggled for almost another 100 years to demonstrate a greater right or interest existed beyond the usufruct in their traditional unceded territory.¹⁰⁷ Canadian laws forbidding the hiring of a lawyer to bring a challenge by a First Nation against the Crown concerning land issues were not repealed until 1929.¹⁰⁸

1.2.4 Summary of Contrasts

Unlike mainstream Canadians and their rights and ownership in fee simple title to their home,

¹⁰⁴ *St. Catherine's*, *supra*, note 16 at 549.

¹⁰⁵ *St. Catherine's*, *ibid.*, at 550.

¹⁰⁶ *St. Catherine's*, *ibid.*, at 553.

¹⁰⁷ See, *Delgamuukw*, *supra*, note 14.

¹⁰⁸ Indian and Northern Affairs Canada Website, “Fact Sheet - Aboriginal rights in British Columbia” (Ottawa: Department of Indian Affairs and Northern Development) online: MSN <http://www.ainc-inac.gc.ca/pr/info/abr_e.html > (date accessed: 28 May 2005).

First Nations rights, including the scope and nature of Aboriginal title, were developed in a series of cases without First Nations being parties to the proceeding. Obtaining rights by purchasing land versus having to prove an Aboriginal right, accentuates the difference for First Nations in Canada. It contrasts mainstream ownership where proving ancestry and the exclusive right to be in an area is not required. By producing a deed to the property in question, fee simple ownership is proven.

A summary of the contrasts between fee simple title, common law Aboriginal title and Aboriginal perspective of land ownership is provided below.

FEE SIMPLE TITLE	ABORIGINAL LAW PERSPECTIVES	ABORIGINAL TITLE - COMMON LAW
A right of possession	Collective ownership of territory; spiritual familial relationship to the land	Arises from possession pre-sovereignty by England
A right to exclude others	Expectation that other groups respect their territory. Protocol to be observed when entering on friendly terms	Occupy and control the land exclusively; can be shared with another First Nation
A right of disposition	Could share their territory with others or exclude; made on a collective decision; no concept of land as a commodity	Can only dispose of the land to the Crown not to a third party
A right of user	Made full use of the resources over vast tracks of land; form of resource management	Have rights as a user
A right of enjoying the fruits and profits of land	Able to engage in whatever activity was necessary and/or desired in keeping with traditions and ceremonies; trading harvested resources	The same right of enjoying the fruits and profits of land

<p>A right of destroying or injuring property</p>	<p>With the right of use of the land there is a responsibility to protect the sources; role of stewardship</p>	<p>The land can not be used for a purpose that varies substantially from the original use of the land; a use can not destroy the Aboriginal group's tie to the land (<i>Delgamuukw</i>)</p>
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CHAPTER TWO: MANITOULIN ISLAND TREATY/ BOND HEAD TREATY OF 1836

2.0 Introduction

This Chapter begins with a historical overview of the original Manitoulin Island inhabitants, then briefly describes modern Wikwemikong. The principles of treaty interpretation are outlined next, following the 1999 S.C.C. decision on the Mi'kmaq treaty right to trade or sell eel in the first *R. v. Marshall*.¹⁰⁹ This decision provided principles for future treaty interpretation that courts have followed in subsequent cases. For example, the Federal Court Trial Division followed the principles outlined in *Marshall* when examining the right of Treaty 8 adherents not to pay any income tax in its 2002 decision in *Benoit v. Canada*.¹¹⁰ The treaty interpretation principles are used to analyze the Manitoulin Island (Bond Head) Treaty of 1836 in this Chapter and the Manitoulin Island Treaty of 1862 analysis in Chapter Three. Indian Affairs policy provides a background for demonstrating the reasoning behind the 1836 Treaty on the part of the Colonial government.

2.1 Historical Overview of the Inhabitants of Manitoulin Island

The objective of this section is to provide a historical overview. A thorough in-depth historical analysis of the development of Wikwemikong's community is beyond the scope of this paper. Any effort by Wikwemikong to assert Aboriginal title in court would require oral history and

¹⁰⁹ *R. v. Marshall*, [1999] 3 S.C.R. 456 (S.C.C.) online: QL (SCC) [hereinafter *Marshall*].

¹¹⁰ *Benoit v. Canada*, [2002] F.C.J. No. 257 (F.C.T.D.) online: QL (FCJ) [hereinafter *Benoit*]. This decision was reversed on appeal in *Benoit v. Canada*, [2003] F.C.J. No. 923 (F.C.A.) online: QL (FCJ). However, the decision did not touch on the treaty interpretation principles. Leave to appeal to the S.C.C. was denied. *Benoit v. Canada*, [2003] F.C.J. No. 923 (F.C.A.), leave to appeal to S.C.C. refused, S.C.C Bulletin of Proceedings, 30 April 2004, 698-759 at 705-724 online: AOL <<http://www.lexum.umontreal.ca/csc-scc/en/bul/2004/html/04-04-30.bul.wpd.html>>.

stories for verification. Experts in archaeology and history would provide the background to inform the oral histories. Modern written records of life in Wikwemikong starts in 1840, after the Bond Head Treaty, when the Jesuits were invited into the community.

According to historians and archaeologists, the Indigenous inhabitants of the Lake Huron area, including Manitoulin and the surrounding Islands, were Algonquin linguistic groups known as Ojibway,¹¹¹ Potawatomi,¹¹² and Odawa.¹¹³ The Wikwemikong Ojibway and Odawa ancestors occupied the area before and at the time of contact. According to Theresa Smith, the islands were inhabited for approximately 10,000 years.¹¹⁴ Helen Hornbeck Tanner states that the groups migrated to the area from the east but more recently, only 500 years ago.¹¹⁵ Other sources stated there was migration but from the west thousands of years ago. The indigenous population claims to have

¹¹¹ Ojibway is the more known version of referencing this Indigenous group. Other versions are Ojibwe, Ojibwa, Ojebway and Ochipwe; see, T.S. Smith, *The Island of the Anishnaabeg: Thunderers and Water Monsters In The Traditional Ojibwe Life-World* (Moscow, Idaho: University of Idaho Press, 1995) at 3. Included in the Ojibway sub-group are the Chippewa, Saugeen, Saulteaux, and Mississauga. The Author is unaware if the Ojibway have a spelling preference. Collectively the Algonkian groups call themselves Anishnabe, “The People.” The Ojibway are noted as one of the few First Nations in North America for having their own recorded histories in the form of pictorials on birch-bark scrolls. The practice was to keep the scrolls well hidden. The responsibility for guarding and copying the scrolls fell to a few men. See, S. Dewdney, *The Sacred Scrolls of the Southern Ojibway* (Toronto, University of Toronto Press, 1975).

¹¹² The United States-Canada border placed the majority of the Potawatomi people within the United States.

¹¹³ The Odawa people prefer this reference to the English version Ottawa or French Outaouan. The Odawa, Ojibway and Potawatomi form what is called the Three Fires Confederacy.

¹¹⁴ T.S. Smith, *supra*, note 111 at 9.

¹¹⁵ H.H. Tanner, *The Ojibwa: Indians of North America*, F.W. Porter III, gen.ed., (Philadelphia: Chelsea House Publishers, 1992) at 14.

always inhabited the area and would apply the term “since time immemorial.”

Archaeologists classify the pre-European contact period in Ontario, that started in A.D. 1000 and ended with contact, as Terminal Woodland.¹¹⁶ The Indigenous occupants of the Manitoulin Islands went through the seasonal cycles and corresponding resource harvesting activities in small clans, marriage or family groups.¹¹⁷ Each autonomous group had their own hunting territory and chief or chiefs. The chiefs’ role was keeping social order following customary laws through public actions and reminders.¹¹⁸ They were not the decision-makers for the group. The larger nation groups would gather together for ceremonies and socializing at different times of the year.

Usually leading a more nomadic lifestyle, the Ojibway, Odawa, and Potawatomi in the Manitoulin Island area participated in agricultural activities growing corn, beans and squash.¹¹⁹ The extent and importance the individual groups placed on the agricultural activity as a supplement to their hunting, fishing and gathering activities differed. Sources agree that the three First Nation inhabitants of Manitoulin Island and Lake Huron shores tended to have a more sedentary lifestyle due to the influence of the nearby farming communities of the Hotinonshon:ni and the abundance

¹¹⁶ J.V. Wright, “Before European Contact,” E.S. Rogers & D.B. Smith, eds., *Aboriginal Ontario Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) 21 at 24.

¹¹⁷ Wright, *ibid.* at 35; see also, G.M. Day & B.G. Trigger, “Southern Algonquian Middlemen: Algonquin, Nipissing, and Ottawa, 1550-1780” E.S. Rogers & D.B. Smith, eds., *Aboriginal Ontario Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) 64 at 64-65; J.W. Frieson, *Rediscovering the First Nations of Canada* (Calgary: Destselig Enterprises Ltd., 1997) at 84.

¹¹⁸ G.M. Day & B.G. Trigger, *ibid.*; see also, Frieson, *ibid.*

¹¹⁹ Wright, *supra*, note 116 at 36; see also, J.J. Borrows, “Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island” (LL.D. Thesis, York University 1994) [unpublished] at 25.

of game, fish and natural foods such as berries, seeds and roots.¹²⁰ Reliance on the different resources varied.

Gordon Day and Bruce Trigger suggest that the Odawa on Manitoulin Island lived in permanent villages “inhabited year-round by women, children, and old men.”¹²¹ According to John Borrows, the Odawa and Potawatomi groups on Manitoulin Island relied upon their agricultural activities for half their food.¹²² Generally, according to the sources, the Ojibway groups tended to rely more on hunting and gathering activities such as harvesting maple sugar, wild rice and berries.¹²³ If they participated in agriculture, it was limited.¹²⁴

Trade amongst the nations was an active practice before contact. Even the acquiring of corn has been attributed to trade. Copper was available from the west end of Lake Superior and clay pots came from the south. Alliances and trading-partners were a norm that passed into participating in the European fur trade with the French. The Manitoulin Island Odawa and Ojibway, in an ideal location for access to the west, became middlemen in the fur trade using the established connections. The nearby Huron, allies of the Odawa, travelled to meet the French to create a trading partnership

¹²⁰ G.M. Day & B.G. Trigger, *supra*, note 117 at 66; see also, Frieson, *supra*, note 117 at 85; E.P. Patterson II, *The Canadian Indian A History Since 1500* (Don Mills: Collier-Macmillan Canada, Ltd., 1972) at 73; C.A. Bishop, “Northern Algonquians, 1550-1760”, E.S. Rogers & D.B. Smith, eds., *Aboriginal Ontario Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994) 275 at 279.

¹²¹ G.M. Day & B.G. Trigger, *ibid.*

¹²² Borrows, *supra*, note 119 at 25; see also, O.P. Dickason, *Canada’s First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McLelland & Stewart Inc., 1994, 1992) at 72.

¹²³ Frieson, *supra*, note 117 at 84; see also, Borrows, *ibid.* at 26; O.P. Dickason, *ibid.*

¹²⁴ Borrows, *ibid.*; see also, Bishop, *supra*, note 120 at 278.

as early as 1609.¹²⁵ By the end of the 1600s, the Hurons were scattered and the Odawa dominated as the middlemen for fur trade until the British gradually cut them off by dealing with England's allies the Hotinonshon:ni in the south, and in the north through the Hudson's Bay Company. Preference for the Odawa was for the French as trading allies. They observed the protocol of gift giving. Olive Dickason describes the importance of gift giving and exchange: "Above all, gifts were essential for sealing agreements and alliances with other peoples. Without gifts, negotiations were not even possible."¹²⁶ Gift giving by the British gradually was ended by the mid-1800s.

France lost the war with England in 1763 and most of its North American holdings, as outlined earlier in this paper. As a result, Indians that were French allies in the war had to deal and trade with the English. The English, actively seeking to expand settlements, engaged in the process of land surrenders for the European settlers. With the encroachment of settlers, the southern First Nations in Upper Canada pushed west and north. By 1810, decline in the beaver population required a change in what was trapped to exchange for European trading goods.¹²⁷ Further, a reduction in other available game also depleted due to over trapping, meant the Manitoulin Island Indians had to find other economic activity, such as selling fish, maple syrup and wood for the lake steam ships, to supplement their agriculture and hunting activities.

Whether the actual Wikwemikong village site was established pre-contact in its current location is not evident from the written material researched. The village was certainly there when Sir Francis Bond Head became Lieutenant-Governor of Upper Canada and the time of the

¹²⁵ O.P. Dickason, *supra*, note 122 at 122; see also, Tanner, *supra*, note 115 at 33. Tanner states the contact as about 1610.

¹²⁶ O.P. Dickason, *ibid.*, at 78.

¹²⁷ C.A. Bishop, *supra*, note 120 at 294.

Manitoulin Island Treaty 1836.

2.2 Introduction To Modern Wikwemikong Unceded Indian Reserve No. 26

The Wikwemikong Unceded Indian Reserve No. 26 encompasses the entire peninsula located at the east end of Manitoulin Island, and is composed of a main community and the smaller communities of Kaboni, Wikwemkongsing, Rabbit Island, Buzwah, South Bay, and Murray Hill.¹²⁸ Wikwemikong asserted ownership of Point Grondine on the mainland, as part of the reserve, which has been relinquished by the Ontario government but not added to their reserve by the federal government to date.¹²⁹ The agreement classified as fully implemented by the Ontario government was called the “Wikwemikong Settlement Agreement (Point Grondine) (1995).”¹³⁰ The Ontario Region of DIAND lists under “Reserve,” the name Point Grondine #3 and classified Wikwemikong Unceded Indian Reserve No. 26 as inhabited.¹³¹ In the First Nations Community Profile portion on the Indian and Northern Affairs Canada (INAC) website the size of the Wikwemikong Reserve, listed as under review, was 46,701.7 hectares¹³² or 417.04 square kilometres. The size of the Reserve

¹²⁸ Wikwemikong Unceded Reserve No. 26 Website, WDC, online: MSN <<http://www.wiky.net/wikydevelopment/location.htm>> (date accessed: 17 November 2001). As of August 28, 2004, the development address does not display on the Wiky Website.

¹²⁹ Ontario Native Affairs Secretariat, Claims Branch, Senior Official, 13 November 2001, orally. Adding the land to the reserve has been delayed due to environmental issues identified in the environmental assessment done by INAC as part of the Additions To Reserve process. The property shows as a specific claim on the INAC Website.

¹³⁰ Ontario Native Affairs Secretariat, Land Claims, online: MSN <<http://www.nativeaffairs.jus.gov.on.ca/english/landclaims.htm>> (date accessed: 17 November 2001). As of August 27, 2004, this information is still displayed at this address.

¹³¹ Indian and Northern Affairs Canada, Ontario Region, “First Nation Community Profiles” (1997) [unpublished] at Wikwemikong’s page, 13 August 1997.

¹³² Indian and Northern Affairs Canada Website, First Nations Community Profiles, (Ottawa: Department of Indian Affairs and Northern Development) online: MSN

converted into acres is 115,351.72. Sudbury is the closest large city and is approximately a two-hour drive from Wiky.

Wikwemikong translated from Ojibway means “Bay of the Beaver.”¹³³ They are located in an Algonkian cultural area. Ojibway and Ottawa (Odawa) are the traditional languages spoken in Wiky. The community name was established before the Bond Head Treaty of 1836. The claim on the home page of the Wiky Website states that: “Wikwemikong is recognized as Canada's only Unceded Indian Reserve, meaning that the Wikwemikong Band has not relinquished title to its land to the government by treaty or otherwise.”¹³⁴ As stated in the paper Introduction, Ontario has three other known First Nations claiming the land upon which their reserves are located to be unceded.

The total number of people registered with Wikwemikong First Nation as of December 31, 2002 was 6,646.¹³⁵ Of that number, 63 persons were from other Bands and 3,769 members lived off-reserve.¹³⁶ Brief outlines of some of the programming provided for the Wiky First Nation members are listed on the website. A Community Access Program for employment training, including access to computers and other educational services, such as the Wikwemikong Public Library, is provided

<<http://esd.inac.gc.ca/fnprofiles/>> (date accessed: 15 November 2001). The hectares are noted as of the date 1990, *ibid*. This address is no longer available. The new address <<http://sdiprod2.inac.gc.ca/FNProfiles/>> (date accessed: 27 August 2004) does not provide any information on the community besides contact information and refers to the Wiky Website.

¹³³ Wikwemikong Unceded Reserve No. 26 Website, *supra*, note 128.

¹³⁴ Wikwemikong Website, *ibid*.

¹³⁵ Canada, Information Management Branch, Indian Affairs and Northern Development, *Registered Indian Population by Sex and Residence 2002* (Ottawa: Department of Indian Affairs and Northern Development, March 2003) at 15. The publication of 2003 statistics was not available as of July 30, 2004.

¹³⁶ Information Management Branch, *ibid*.

in conjunction with Industry Canada. The Wikwemikong Development Commission, a nonprofit organization, provides economic development services for small businesses and other programming to on-reserve members only. Waasa Naabin Community and Youth Services Centre operates, six days a week, an evening drop-in for community youth. The De-Ba-Jeh-Mu-Jig Theatre Group tours each year performing original Aboriginal plays.

Designed as a holistic approach for healthy choices in the community and to incorporate family values, the Wikwemikong Recreational Program was initiated. The Program was formed to encourage leadership from within the community in providing recreational and leisure activities and education for the community. Several of the activities planned for the community serve a dual purpose, including the promotion of tourism which brings outside funds into the community. The community holds annually both Competition and Traditional Pow Wows, a Fall Fair and plan to host a winter carnival and a summer festival. The Wikwemikong Heritage Organization is involved in some of the activities as well, promoting cultural inclusion and language resources. There is a community marina which would allow for summer recreational use and access to the community by water. Also, having access to a marina aids those within the community involved in fishing activities.

Statistics Canada presents statistical information from the 1996 Census that provides further insights into Wikwemikong's community fabric. The average family income was \$35,151, which was almost half of what the average for Ontario families was at \$64,434. The employment rate for those 15 years and older was 59.6 per cent. The Ontario employment participation rate was only slightly higher at 66.3 per cent. Wikwemikong members experienced a relatively high employment rate during that time period in comparison to other First Nations. One of the sharpest contrasts is

the percentage of dwellings with more than one person per room. Wiky has 15.4 per cent compared to Ontario at 2.3 per cent. Another, is that only 6.2 per cent, contrasted with the Ontario percentage of 18.8, of Wikwemikong members over the age of 25 have completed university.¹³⁷ The statistics for completing high school and trade or non-university certificates are comparable between the two groups.

Although on unceded reserve land, Wikwemikong First Nation administers the business and operations of the Band under the provisions of the *Indian Act*.¹³⁸ Wiky has this in common with other, approximately 607, registered First Nations in Canada that do not have self-government agreements or completed comprehensive agreements which bring them outside the *Indian Act* and its regulatory instruments. The Minister of DIAND is responsible for the administration and management of the Department's funding and supervision of First Nations and Inuit programming.¹³⁹

Part of the administration process involves devolving to First Nations the responsibility for management and administration of different programs in their communities, such as social services, housing, education, and health care. Wikwemikong has responsibility for education on reserve through such an agreement. As participants in the Ontario First Nations Policing Program, Wikwemikong has their own Police Force.

Since Wikwemikong is defined as an Indian Band under the *Indian Act*, they will share in

¹³⁷ Statistics Canada Website, "Statistical Profile of Canadian Communities," Population Statistics for Wikwemikong Unceded 26 (Indian Reserve), (1996), online: MSN <<http://ceps.statcan.ca/english/profil/PlaceSearchForm1.cfm>> (date accessed: 18 November 2001). When this site was accessed August 6, 2004, to check 2001 Census material, no further information was available for Wikwemikong to update the statistics used above.

¹³⁸ *Indian Act*, *supra*, note 1.

¹³⁹ DIAND, *supra*, note 1.

the net revenues distributed from the First Nations Fund in the Consolidated Revenue Fund under the *Ontario Casino Corporation Act, 1993*¹⁴⁰ by the Ontario Casino Corporation. Millions of dollars have been distributed and will continue to be distributed according to a negotiated formula from the 20 per cent gross proceeds sent to the Consolidated Revenue Fund from Casino Rama on the Chippewas of Mnjikaning First Nation Reserve near Orillia, Ontario.

The distribution of the funds was delayed by litigation challenging discrimination for exclusion from sharing in the proceeds. The action was initiated in 1996 by Metis organizations, urban Aboriginal groups and First Nations that did not operate under the *Indian Act* but had established communities. The S.C.C. decision, finding for the respondents, the Ontario provincial government and the Chiefs of Ontario, freed the money for distribution to the 133 registered Ontario Indian Bands.¹⁴¹ First Nations are to use the funds for their economic and community development. Each First Nation Band has the discretion under the leadership of Chief and Council to allocate the funds on community programs and development as they deem appropriate and most needed for their individual community.

Band Councils are selected and operate through either *Indian Act* provisions ss. 74-80, by their own elections codes, or Band custom. Wikwemikong selects their Chief and twelve Councillors by election following the sections in the *Indian Act*.¹⁴² In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,¹⁴³ the S.C.C. suspended, for 18 months, the striking down of the

¹⁴⁰ *Ontario Casino Corporation Act*, S.O., 1993, c. 25.

¹⁴¹ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 (S.C.C.) online: QL (SCJ).

¹⁴² INAC, Ontario Region, *supra*, note 128.

¹⁴³ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24. 9 (S.C.C.).

words “ordinarily resident on the reserve” in s. 77(1) of the *Indian Act* as discriminatory against off-reserve Band members’ right to participate in their First Nation elections. DIAND’s response to the S.C.C. was to develop what it believes to be *Charter* compliant amendments to the *Indian Referendum Regulations*¹⁴⁴ and the *Indian Band Election Regulations*¹⁴⁵ to include off-reserve Band members in *Indian Act* elections. The Chief and Council at Wikwemikong had to adjust their election process to meet the amendments for the election held in June 2001.

A consequence of the *Indian Act* provisions, under the criteria in ss. 79(a), (b) and (c), an eligible voting member of the First Nation has the right to challenge the election result of a councillor or the chief. This section reads:

79. The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that
- a) there was corrupt practice in connection with the election;
 - b) there was a contravention of this Act that might have affected the result of the election;
 - or
 - c) a person nominated to be a candidate in the election was ineligible to be a candidate.¹⁴⁶

The appeal is made to the Elections Unit of Band Governance and Estates Directorate, of the Lands and Trusts Services Branch at DIAND headquarters Gatineau, Quebec. Wikwemikong’s first election under the amended regulations resulted in an appeal to set aside the election of a Councillor. The investigation of the situation resulted in Order in Council 2001-1888 approval by the Governor in Council on October 18, 2001 stating: “Order setting aside the election of R. GERARD (GERRY) KABONI who was elected to the office of Councillor of the WIKWEMIKONG BAND in

¹⁴⁴ *Indian Referendum Regulations*, C.R.C. 2000, c. 957.

¹⁴⁵ *Indian Band Election Regulations*, C.R.C. 2000, c. 952.

¹⁴⁶ *Indian Act*, *supra*, note 1.

Ontario.”¹⁴⁷ Information surrounding the election challenge on which subsection of s. 79 DIAND found the grounds for vacating the Councillor from the elected position were not provided in the Order in Council. The Band Council was not happy with the findings by the DIAND Elections Unit and was contemplating taking legal action.¹⁴⁸

Political turmoil amongst the Council representatives was a problem for the June 2001 Wiky elected Band Council. Chief Gladys Wakegijig won a September 2001 by-election. Amid controversy in a unilateral action the Chief locked the Wikwemikong Development Commission doors, the building housing the Land Claims Office and fired Albert Peltier, Special Projects Officer, who was handling the community’s Island Land Claim. Protests followed the second time the Chief walked out of a Council meeting before the meeting was adjourned.¹⁴⁹ On April 5, 2002, five Councillors resigned in protest over the Chief’s actions and those of the other Councillors.¹⁵⁰ A total of six Councillors resigned, Gerry Kaboni was removed for election practices, and the Chief left a Councillor’s position vacant upon election, the four remaining Councillors and the Chief decided to continue until the August 26, 2002, election.¹⁵¹ Chief Walter Manitowabi was elected in that

¹⁴⁷ Canada, Regulatory Affairs and Orders in Council Secretariat, Orders in Council, Indian Affairs and Northern Development, online: <http://www.canada.gc.ca/howgoc/oic/iand_e.html> (date accessed: 26 November 2001).

¹⁴⁸ Department of Indian Affairs and Northern Development, Elections Unit, Senior Official, 26 November 2001, orally.

¹⁴⁹ E. Murray, “Chief orders Wikwemikong Development Commission (WDC) door’s locked” *The Wiky News* (March 2002) 1.

¹⁵⁰ Editorial, “News in Brief” *The Wiky News* (May 2002) 2.

¹⁵¹ D. Smith, “Is Wiky council in crisis?” *The Manitoulin Expositor* (6 March 2002) 11.

election and has chosen not to run in the August 21, 2004 election.¹⁵² The problems that plagued the previous Council did not carry over into this last term.¹⁵³

According to a Land Claims Committee member, Wikwemikong is still proceeding with the Land Claim for the surrounding islands, currently in the court, despite the Council turmoil that occurred in 2002.¹⁵⁴ The statement of claim in *The Wikwemikong Indian Band v. Attorney General of Canada and Her Majesty the Queen in Right of Ontario*,¹⁵⁵ Court File No. C97-44, asserts Aboriginal title to the islands, lands covered by water and Manitoulin Island, that are unsold and unpatented. Excluded in Wiky's claim are the Indian reserves and road allowances established by agreement. Included in the claim is the Wikwemikong understanding of the Bond Head Treaty of 1836. Their Ottawa and Ojibway ancestors were agreeing to share the Manitoulin and surrounding islands and their hunting and fishing areas with other First Nations that would come to live there. Further, the Ottawas were in control and at Wikwemikong from 1670.

2.3 Indian Affairs Policy Starting 1828 -1850

An 80-year era of governing by the Johnson family, that started with Sir William Johnson who had a close relationship with the Hotinonshon:ni, ended with the retirement of Sir John Johnson

¹⁵² Wikwemikong Administration, Wikwemikong First Nation, 6 August 2004, orally.

¹⁵³ Wikwemikong Administration, *ibid*.

¹⁵⁴ Wikwemikong Community and Land Claims Committee member, Wikwemikong First Nation, 15 March 2003, orally. The Ontario Native Affairs Secretariat Website, *supra*, note 127, lists the Wikwemikong Islands Claim under ongoing negotiations as of April 14, 2004.

¹⁵⁵ *The Wikwemikong Indian Band v. Attorney General of Canada and Her Majesty the Queen in Right of Ontario* (8 December 1997), Gore Bay Court File No. C97-44 (Plaintiff's Statement of Claim) (Ont. C.(G.D.)).

in 1828, opening up the colonial government to other influences.¹⁵⁶ Under the new Chief Superintendent, Major-General H.C. Darling, 1828-1830, the era of civilization/assimilation Indian policy began.

Olive Dickason attributes Major-General Darling's 1828 report on the Indians to be the "founding document of the British civilizing program."¹⁵⁷ Building on what was considered the successful farming village of the Mississauga on the Credit River in Upper Canada (Ontario), Darling proposed establishing, under the guidance of the department, Indian only model farm and village communities, essentially reserves.¹⁵⁸

Lieutenant Governor of Upper Canada, Sir John Colborne, 1828-1836, a proponent of the civilizing reserve policy, decided the financing of the policy and the gifts that were still being supplied as a peace gesture, was to come from the sale and leasing of Indian land.¹⁵⁹ Another benefit to the civilizing/assimilation policy that attempted to create Indian farming communities was making way for the ever increasing non-Aboriginal settlers. Palmer Patterson II suggests it was easy to follow the pattern of European settlement during this time by the location of the signed treaties with the First Nations.¹⁶⁰

The government representative expressed that the First Nations were unable to decide for themselves what was best when faced with the loss of and diminishing hunting territories. The

¹⁵⁶ O.P. Dickason, *supra*, note 122 at 232.

¹⁵⁷ O.P. Dickason, *ibid.*

¹⁵⁸ O.P. Dickason, *ibid.*

¹⁵⁹ O.P. Dickason, *ibid.*, at 234.

¹⁶⁰ E. Palmer Patterson II, *supra*, note 120 at 86.

paternalistic policy was pervasive in the Indian department. Captain Thomas G. Anderson, departmental agent, attempted to implement model farming communities. Sir Francis Bond Head, Lieutenant Governor of Upper Canada, 1836-1838, perpetuated the paternalism but disagreed with the model farm policy.

In contrast to assimilating the First Nations, Sir Francis Bond Head prescribed isolation from the influences of the “whites” in remote areas deemed to be unsuitable for agriculture and undesirable by the settlers. Manitoulin Island was chosen as a prime location due to the lack of agricultural land, therefore, undesirable by the European settlers. Sir John Colborne had arranged for the annual gift giving to be held on Manitoulin Island before he left. Lieutenant Governor Bond Head followed through on the relocation and used the gift giving practice for the implementation of his proposed new policy by arranging the signing of the Bond Head Treaty No. 45 on August 9, 1836.

The Saugeen from Lake Huron, Saugeen (Bruce) Peninsula, were in attendance at the Manitoulin Island gathering. Sir Francis Bond Head spoke with them and Treaty No. 45½ was signed on August 9, 1836, at Manitowaning, releasing their southern territory to reside on either Manitoulin Island or the Bruce Peninsula north of Owen Sound.¹⁶¹ The result was two of the four unceded Indian reserves in Ontario. The Chippewas of Nawash I.R.# 27 (Cape Croker) on the Bruce Peninsula and Chippewas of Saugeen I.R.# 29 on Lake Huron near Southhampton, assert they are on unceded territory.

¹⁶¹ Saugeen (Saukings) Treaty of 1836, Chippewa and Sir Francis Bond Head, 9 August 1836, No. 45½, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen’s Printer, Ottawa 1891) at 113.

Civilizing and assimilation continued to be the Indian policy after Sir Francis Bond Head left in 1838. Sir George Arthur, Lieutenant Governor, 1838-1841, commissioned Justice J.B. Macaulay to do a study of the Department's relationship with the Indians in 1838. He recommended reorganization of the Department and a continuation of the methods of introducing European lifestyles and opportunities such as education, Christianity, trades and farming to the Indians.¹⁶² Money to provide the necessary indoctrination into mainstream society was always an issue.

The continued push for settlement land resulted in treaties and agreements for the releasing of traditional First Nations' territories, and legislation calculated to achieve the policy's aim. The sale and lease of the surrendered lands became the commodity that supplied the money needed to provide First Nation policy programming and to pay for annuities and gifts. Also, it became a major source of revenue for the government. Twenty treaties were formed between First Nations and the Colonial government after the Bond Head Treaties in 1836. The treaties contained varying forms of compensation for surrendered lands to the First Nations involving either proceeds from the sale or lease, interest earned for their benefit or annual annuities.

In 1840, Upper and Lower Canada united to form the Province of Canada. The union lasted until Confederation in 1867 at which time the provinces of Ontario and Quebec were created, splitting the Colonial debt and responsibilities. As outlined previously, the federal government became responsible for the Indians.¹⁶³ *St. Catherine's* demonstrates the issue of the separation of

¹⁶² J.D. Leighton, "The Development of Federal Indian Policy in Canada, 1840-1890" (Ph.D. Thesis, University of Western Ontario 1975) [unpublished] at 81.

¹⁶³ The Metis and Inuit were not included. Not until the S.C.C. in *Reference Re Eskimo*, [1939] S.C.R. 104 (S.C.C.) online: QL (ABRQ), found that the Inuit in Quebec were the responsibility of the federal government and not the province did the "Indian Policy" start applying to the Inuit. They were found to be Indians for the purpose of s. 91(24) of the

provincial and federal responsibility. As a result, which government was liable and responsible for the actions by the Colonial government pre-Confederation is sometimes still a hindrance for First Nations when asserting claims.¹⁶⁴

Superintendent of the Indian Department, William Benjamin Robinson, was urged to make way for settlement and access to minerals discovered on the northern shores of Lake Huron and Lake Superior. As a result, he engaged in two policy processes at the same time. The treaties required the Indians to cede by relinquishing Aboriginal title to their traditional territories for small reserves for their use and benefit as a means of leading them to form settlements and move away from traditional hunting and trapping activities. According to George Brown and Ron Maguire, the two Robinson treaties “discharged the aboriginal title of twice as much land as had been affected in all other Upper Canada treaties put together.”¹⁶⁵ The treaties would definitely have been a notable event among other nearby First Nations.

The Robinson-Huron Treaty of 1850¹⁶⁶ made with the Ojibway on the northern shore of Lake Huron was the closest to the inhabitants of Manitoulin Island. For some of the signatories of this

Constitution Act, 1867 (*supra*, note 8). However, they were never included in the *Indian Act* provisions. The recent S.C.C. decision in the Metis hunting rights case *Powley* may have an impact on future policy.

¹⁶⁴ See, C. Bell, Q.C., “Pre-Confederation Liability: Indian Affairs 1763 to 1867 & Two Case Studies” (*Aboriginal Law, 2003*, Pacific Business & Law Institute Conference, Ottawa, 10-11 September 2003) (Vancouver: Pacific Business & Law Institute, 2003).

¹⁶⁵ G. Brown & R. Maguire, *Indian Treaties in Historical Perspective* (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1979) at 28.

¹⁶⁶ Robinson-Huron Treaty of 1850, Chippewa and Hon. W.B. Robinson, 9 September 1850, No. 61, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen’s Printer, Ottawa 1891) at 149.

treaty, Manitoulin Island was a place they visited during the summer months. The treaty participants received per “tribe” or family group, £2000 immediately, annuities of £600 and a reserve within their traditional territory. One group received a reserve that was two square miles. The treaty groups were allowed to continue to hunt and fish on unpatented Crown land within their ceded territories. Allowance was made in the treaty to increase the annuity on a per capita basis to reflect a rise in resource revenues. Descendants of the treaty adherents continue to receive annuity payments on a per capita basis.

An Act for the Better Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury,¹⁶⁷ was passed in 1850. This multipurpose legislation reinforced the *Royal Proclamation of 1763* provision that Indian land could only be sold to or with permission of the Crown. European squatters and attempts at land speculation were a problem for some First Nations. The sale of liquor to Indians and the purchase of the presents that were distributed annually were prohibited by the legislation. Sir Colborne cited one of the reasons for moving the distribution of the gifts to Manitoulin Island in 1836 was to remove the Indians from close proximity to the forts where the presents could be sold.¹⁶⁸

2.4 Bond Head Treaty of 1836

Sir Francis Bond Head’s short term as Lieutenant Governor of Upper Canada was mostly due

¹⁶⁷ *An Act for the Better Protection of Indians in Upper Canada from Imposition, and the Property Occupied or Enjoyed by Them from Trespass and Injury*, S.C. 1850, c.42 (13 & 14 Vict.).

¹⁶⁸ Letter Sir J. Colborne, Lieutenant Governor of Upper Canada to Lord Glenelg, Colonial Secretary, No. 8 (30) 22d January 1836 in *Copies or Extracts Correspondence Since 1st April 1835 Between The Secretary of State for the Colonies and The Governors of the British North American Provinces Respecting the Indians In Those Provinces*, Mr. Labouchere, ed. (Unknown: The House of Commons, 17 June 1839) at 118.

to his handling of the 1837 Rebellion in Upper Canada and Lower Canada in the following year and the ensuing criticism he received. Most of the commentary available on the Lieutenant Governor's two-year term mentions the treaties and policy but the majority is aimed at the unrest of the opposition to the Colonial government leading to the Upper Canada Rebellion in what is now Toronto. Criticism of the Colonial government and the rebellion overshadows the major Indian policy changes in the Manitoulin Island relocation project, the consequences of which for many First Nations in Upper Canada, far out weighed the short-lived rebellion.

On August 9, 1836, Sir Francis Bond Head encouraged the chiefs or head men of the Odawa and Ojibway (Chippewa) inhabitants of Manitoulin Island to sign the treaty. The first part of the treaty describes the encroachment of the white population on Indian land and the ability of the King to protect their traditional territory (as land grabbing was becoming more prevalent). The next portion of the text demonstrates the misunderstanding of how the First Nations used their traditional territories in a cyclical manner to optimize resources. Finally, the text addresses the issue of relocation to Manitoulin Island.

The wording of the treaty stated:

Seventy snow seasons have now passed away since we met in Council at the crooked place (Niagara), at which time and place your Great Father, the King, and the Indians of North America tied their hands together by the wampum of friendship.

Since that period various circumstances have occurred to separate from your Great Father many of his red children, and as an unavoidable increase of white population, as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds it has become necessary that new arrangements should be entered into for the purpose of protecting you from the encroachment of the whites.

In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your forest for game. If you would cultivate your land it would then be considered your own property, in the same way as your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and your Great Father, who has hitherto protected you has now great difficulty in securing it for you from the whites, who are hunting to cultivate it.

Under these circumstances, I have been obliged to consider what is best to be done for the red children of the forest, and I now tell you my thoughts.

It appears that these islands on which we are now assembled in Council are, as well as all those on the north shore of Lake Huron, alike claimed by the English, the Ottawas and the Chippewas.

I consider that from their facilities and from their being surrounded by innumerable fishing islands, they might be made a most desirable place of residence for many Indians who wish to be civilized, as well as to be totally separated from the whites; **and I now tell you that your Great Father will withdraw his claim to these islands and allow them to be applied for that purpose.**

Are you, therefore, the Ottawas and Chippewas, willing to relinquish your respective claims to these islands and **make them the property (under your Great Father's control) of all Indians, whom he shall allow to reside on them;** if so, affix your marks to this my proposal.¹⁶⁹

Sixteen First Nation names appear on the Treaty that was signed by applying their totem. The witness was Sir Francis Bond Head.

Seven witnesses signed on the Saugeen Treaty including Joseph Stinson, General Superintendent of the Wesleyan Missions. The Wesleyans, Methodist missionaries, criticized Sir Francis Bond Head for his isolationist policy and proceeding with the signing of these Treaties. John Leslie describes the Wesleyans as "outraged".¹⁷⁰ According to Mr. Leslie, the Wesleyan Methodist Conference provided comment in a 1837 report on the "unrest among the Indians of Upper Canada."¹⁷¹ He states:

Head's policy threatened every Indian settlement they said, and retarded progress in religious conversion, civilization and assimilation since all bands feared their lands would be seized and that they would be removed to the Manitoulin Islands. The missionaries argued that only the security of land titles would persuade the Indians to

¹⁶⁹ Manitoulin Island Treaty of 1836, *supra*, note 11 at 112-113 [emphasis added].

¹⁷⁰ J.F. Leslie, "Commissions of Inquiry into Indian affairs in the Canadas, 1828-1858: evolving a corporate memory for the Indian department" (M.A. Thesis, Carleton University 1984) [unpublished] at 39.

¹⁷¹ J.F. Leslie, *ibid.*

continue making improvements.¹⁷²

Obviously, the missionaries felt integration into mainstream society was the best Indian policy approach. Criticism of the two treaties was aimed more at the Saugeen treaty for the proposed surrender of land for relocation.

Sir Francis Bond Head's relocation policy drew other criticism. A subcommittee of the Aborigines Protection Society published a pamphlet in 1839 giving their opinion about the policy and the circumstances of the First Nations in Canada as a result. The Society of Friends Meeting for Sufferings Aborigines' Committee opposed the relocation and "encouraged" the continuance of the policy that would result in the Christianization and assimilation of the Indians.¹⁷³ Lord Glenelg, Colonial Secretary, was not ready to accept that the Indians needed to be isolated and the current assimilation policy was a failure.¹⁷⁴ He sent a memorandum stating the gift distribution should not be held on Manitoulin Island but it arrived too late.¹⁷⁵

In a memorandum to Lord Glenelg dated August 20, 1836, Sir Francis Bond Head sought to get support and retroactive approval for his two agreements made on Manitoulin Island in the summer. He substantiated his actions by refuting the success of Christianizing and civilizing the

¹⁷² J.F. Leslie, *ibid.*, at 39-40 [footnote omitted].

¹⁷³ Society of Friends Meeting for Sufferings Aborigines' Committee, "Facts Relative to the Canadian Indians" (London: Society of Friends Meeting for Sufferings Aborigines' Committee, 1839) National Archives of Canada CIHM No. 21758 at 1.

¹⁷⁴ J.D. Leighton, *supra*, note 162 at 29.

¹⁷⁵ Letter Sir F.B. Head, Lieutenant Governor of Upper Canada to Lord Glenelg, Colonial Secretary, No. 70 (31) 20th August 1836 in *Copies or Extracts Correspondence Since 1st April 1835 Between The Secretary of State for the Colonies and The Governors of the British North American Provinces Respecting the Indians In Those Provinces*, Mr. Labouchere, ed. (Unknown: The House of Commons, 17 June 1839) at 122.

Indians. However, Sir Francis Bond Head must have convinced Lord Glenelg of the advantages of removing the Indians from desirable land suitable for “white” settlement, conveying the impression that money was saved as suggested by his predecessor Sir John Colborne and the opportunity to appease political opposition.¹⁷⁶ Treaties 45 and 451/2 were given official recognition through sanction by the King.¹⁷⁷

2.5 Treaty Interpretation

Treaty interpretation as an aspect of Aboriginal law has developed in Canadian courts on a case by case basis similar to Aboriginal rights. The constitutional entrenchment of existing Aboriginal rights and treaty rights in the *Constitution Act, 1982*, while providing protection of the rights, did not determine scope or content of those rights.

Chief Justice McLachlin provided a summary of nine principles in the dissenting opinion in *Marshall* that reflect previous decisions by the S.C.C. on treaty interpretation. She stated:

This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights,

¹⁷⁶ Letter Sir F.B. Head, 20th August 1836, *ibid.*

¹⁷⁷ Letter Lord Glenelg, Colonial Secretary to Sir F.B. Head, Lieutenant Governor of Upper Canada, No 102 (15) 5th October 1836 in *Copies or Extracts Correspondence Since 1st April 1835 Between The Secretary of State for the Colonies and The Governors of the British North American Provinces Respecting the Indians In Those Provinces*, Mr. Labouchere, ed. (Unknown: The House of Commons, 17 June 1839) at 7; see also, R.J. Surtees, "Indian Reserve Policy in Upper Canada, 1830-1845" (M.A. Thesis (History 599), Carleton University, 1966) [unpublished] at 44.

- [page512] and the Sparrow Justificatory Test" (1997), 36 Alta. L. Rev. 149.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: Simon, *supra*, at p. 402; Sioui, *supra*, at p. 1035; Badger, *supra*, at para. 52.
 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: Sioui, *supra*, at pp. 1068-69.
 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: Badger, *supra*, at para. 41.
 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: Badger, *supra*, at paras. 52-54; R. v. Horseman, [1990] 1 S.C.R. 901, at p. 907.
 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: Badger, *supra*, at paras. 53 et seq.; Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36.
 7. A technical or contractual interpretation of treaty wording should be avoided: Badger, *supra*; Horseman, *supra*; Nowegijick, *supra*.
 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: Badger, *supra*, at para. 76; Sioui, *supra*, at p. 1069; Horseman, *supra*, at p. 908.
 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: Sundown, *supra*, at para. 32; Simon, *supra*, at p. 402.¹⁷⁸

The above principles are used to interpret the two treaties at issue in this paper.

Also outlined by Chief Justice McLachlin in *Marshall* was a two-step approach to the principles in interpreting. She stated:

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. [...] taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the

¹⁷⁸ *Marshall, supra*, note 109 at 78.

wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests.¹⁷⁹

Wording of the treaty and the intention of the parties outside the written wording are important aspects of treaty interpretation for analysis of the two Manitoulin Island treaties.

2.6 Bond Head Treaty of 1836 Analysis

Sir Francis Bond Head did not receive the surrendered Aboriginal title to Manitoulin Island in the Manitoulin Island Treaty of 1836 between the Odawas and Ojibway inhabitants and the British Colonial government he represented.¹⁸⁰ The procedure outlined in the *Royal Proclamation of 1763* for surrendering Indian land to the Crown was well established by the August 9, 1836, signing, as discussed in Chapter One. The first line of the Treaty mentions the 1764 meeting in Niagara that was held to share those provisions of the *Royal Proclamation* with First Nations. As is discussed later in the paper, Bond Head did not follow them.

The Manitoulin Island First Nations would be aware of other treaties that had taken place. For instance, the Mississaugas of the Credit's (also Ojibway Nation) treaties for land surrender around Toronto in 1806.¹⁸¹ Empathy for their "brothers" is in part the reason the Wikwemikong members agreed to allow other First Nations to be relocated to Manitoulin Island.¹⁸² Other

¹⁷⁹ *Marshall, ibid.*, at 82-83 [footnotes omitted].

¹⁸⁰ See, R.J. Surtees, *Treaty Research Report: Manitoulin Island Treaty* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 15.

¹⁸¹ Wikwemikong Claim Committee member, *supra*, note 151.

¹⁸² *Ibid.*

irregularities in the Bond Head Treaty of 1836 process are the legal language and content did not conform with previous or subsequent treaties.

2.6.1 Language and Content

In his August 20th letter to Lord Glenelg, Sir Francis Bond Head admitted that the signed document was not in legal format, but a memorandum written by him to explain the arrangements made during the Grand Council called for the purpose of discussing the “subject.”¹⁸³ He did not have prior approval to enter into the agreements made during the gift giving on Manitoulin Island. From the content of his letter to Lord Glenelg, the idea to proceed with his isolation plans was solidified on his five-day canoe trip to Manitowaning. He satisfied himself that the area was rocky, located a good distance from white settlement and an area not likely to be desired by the settlers. Further, he was satisfied that the fish, game, and berries were plentiful enough for the Indians to carry on their traditional activities.

There are contradictions contained in the language of the Treaty that would give rise to a difference in opinion on the issue of whether the Odawas and Ojibway were agreeing to surrender land. Sir Francis Bond Head acknowledges in the wording that the three groups, English, Odawas and Ojibway, all claim the islands and north shore of Lake Huron. After laying out the physical attraction for living on the Island and being civilized separate from the whites, the Treaty states: “and I now tell you that your Great Father will withdraw his claim to these islands and allow them to be applied for that purpose.”¹⁸⁴ For the inhabitants of Manitoulin Island, this would likely have meant their claim to the area was affirmed. They would be required to make no other change to their

¹⁸³ Letter Sir F.B. Head, 20th August 1836, *supra*, note 175 at 122-123.

¹⁸⁴ Manitoulin Island Treaty of 1836, *supra*, note 11 at 112.

lifestyle other than including any groups that might want to relocate on a permanent basis to the Island.¹⁸⁵

The contradiction and ambiguity arise in the last paragraph of the Treaty. Sir Francis Bond Head asks the Odawas and Ojibway to sign the “proposal,”¹⁸⁶ if they were “willing to relinquish your respective claims to these islands and make them the property (under your Great Father’s control) of all Indians, whom he shall allow to reside on them.”¹⁸⁷ What is the difference between the King withdrawing his claim and the First Nations relinquishing their claim to allow all the Indians chosen by the Crown, therefore, under the control of the King to reside on the Island? The author did not locate any minutes of the meetings held before the Treaty was signed in 1836. Most of the sources state the Island was surrendered by the Agreement and so does Sir Francis Bond Head in his August 20th letter to Lord Glenelg.

The Manitoulin Island Indians when signing the Treaty were agreeing to allow the Crown to have control over what other Indians would come to live on Manitoulin and the surrounding Islands. The issues of control and relinquish should be taken in context with the preceding portion of the Treaty that embodies Bond Head’s isolationist policy. The Treaty wording states:

I consider that from their facilities and from their being surrounded by innumerable fishing islands, they might be made a most desirable place of residence for many Indians who wish to be civilized, as well as to be totally separated from the whites; and I now tell you that your Great Father will withdraw his claim to these islands

¹⁸⁵ The Potawatomi would summer on Manitoulin and surrounding Islands and were included in the gift giving in 1836. They were informed by Sir Francis Bond Head that they would have to locate permanently to be included in the future.

¹⁸⁶ Manitoulin Island Treaty of 1836, *supra*, note 11 at 113.

¹⁸⁷ Manitoulin Island Treaty of 1836, *ibid*.

and allow them to be applied for that purpose.¹⁸⁸

The cyclical lifestyle of the Ojibway saw many of the smaller family groups arriving on the Island at different times of the year. The Island inhabitants' exclusive control would remain intact; by agreeing to Crown control of other First Nations that would relocate to Manitoulin Island the circumstances of Ojibway/Odawa residents' ownership really had not changed. More than one Aboriginal group can claim the same area.¹⁸⁹ According to Robert Surtees, "[t]he ownership base was broadened";¹⁹⁰ the Island would be owned by more First Nations people.

A dictionary definition of withdraw is "1 draw back [...] 2 take back; remove [...] 3 go away [...] 4 take back or retract [...] 5 cease one's involvement with some activity, commitment."¹⁹¹ For relinquish, a dictionary definition is "give up; let go."¹⁹² There is a difference in the meaning of the words, however, the action involved could be the same.

The Federal Court of Appeal in its consideration of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,¹⁹³ an appeal of the challenge by the Mikisew First Nations against a 118 kilometre winter road that would go through the Wood Buffalo National Park in Alberta to connect two other First Nations communities Garden River and Point Peace to the road system,

¹⁸⁸ Manitoulin Island Treaty of 1836, *ibid.*, at 112-113.

¹⁸⁹ *Delgamuukw*, *supra*, note 14 at para. 158.

¹⁹⁰ R.J. Surtees, *supra*, note 180 at 15.

¹⁹¹ *Gage Canadian Dictionary*, Revised and Expanded ed., s.v. "with draw."

¹⁹² *Gage Canadian Dictionary*, Revised and Expanded ed., s.v. "relinquish."

¹⁹³ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2004] 2 C.N.L.R. 74 (F.C.A.) [hereinafter *Mikisew*]. The S.C.C. has granted leave to appeal the Court of Appeal's decision.

discussed principles listed by Chief Justice McLaughlin in *R. v. Badger*.¹⁹⁴ Justice Rothstein quoted:

Aboriginal treaties should be liberally construed and any uncertainties resolved in favour of the Indians. The words of the treaty must not be interpreted in their strict technical sense but rather must be interpreted in the sense they would naturally have been understood by the Indians at the time of the signing.¹⁹⁵

When the question of whether the Ojibway-speaking Manitoulin residents would have understood the translation of the word “relinquish” in the context of a treaty was put to Professor Shirley Williams,¹⁹⁶ Ojibway language instructor at Trent University, she responded in the negative. The Ojibway word for surrender is completely different from the words representing the translation for relinquish and withdraw.¹⁹⁷

The best meaning for the ambiguous words in the Treaty According to the principles of treaty interpretation keeping in mind the historical and cultural context, “the common intention is the one which best reconciles the interests of both parties at the time the treaty was signed.”¹⁹⁸ Since we are to presume the honour and integrity of the Crown while finding the common intention between the Odawa and Ojibway First Nation signatories and Sir Francis Bond Head, the assumption is that he did not mean to trick or deceive the Indians. How can withdrawal by the Crown not be the same as relinquish for the First Nations? Calling the Treaty a land surrender does not make it one. The

¹⁹⁴ *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.) online: QL (SCJ) [hereinafter *Badger*].

¹⁹⁵ *Mikisew*, *supra*, note 193 at para. 15 quoted from *Badger*, *ibid.* at para. 52.

¹⁹⁶ Professor Shirley Williams is fluent in Ojibway and has always spoken her language. Professor Williams was asked what the Ojibway translation of “withdraw” and “relinquish” would be in English to help understand if the meaning of the words would convey the same message. The two words were only given with the sentence they were used in the Treaty. Professor Williams was not told what Treaty the words were taken from.

¹⁹⁷ Professor S. Williams, Trent University, December 2003, orally.

¹⁹⁸ *Marshall*, *supra*, note 109 at 78.

requisite elements that constitute valid land surrender were missing. This is examined further in the next section on the *Royal Proclamation of 1763*.

One common intent in signing the Treaty/memorandum was to agree to other Indians coming to live on Manitoulin Island to enjoy the resources available. The First Nations could utilize the land in whatever manner they wanted; the Treaty contained no direction on land usage. It was suggested in the wording that cultivation of the land would secure their land ownership to a greater degree. In the European view, uncultivated land meant that the land was not being utilized and was being wasted. As a result, the implication was that cultivation of First Nations' traditional land would create a greater degree of control over their territory because it would be seen as being used productively. This contrasts with Indigenous traditional use and management of their land and the resources found there.

The Odawa and Ojibway residents benefited from signing the Treaty. One benefit was that settlers would be excluded. They would have been well aware of the problems other First Nations were experiencing with settlers squatting on their land. As middle men in the fur trade, the knowledge of its end as a viable lifestyle was first hand. Culturally, hunting and fishing were important and an integral part of their daily lives.

Sir Francis Bond Head reminded the First Nations at the Council of the impending doom to their territories due to settlement expansion and the desire for arable land and placed it in the Treaty. He stated: "as an unavoidable increase of white population, as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds [...] new arrangements should be entered into for the purpose of protecting you from the encroachments of the whites."¹⁹⁹ Common

¹⁹⁹ Manitoulin Island Treaty of 1836, *supra*, note 11 at 112.

sense dictates that the Manitoulin inhabitants did not intend to surrender the territory in which they carried on those cyclical activities for the settlers that were “hunting to cultivate”²⁰⁰ their land. Especially, when the threat of settlers coming to the Island and the ability to retain their way of life was supported by the Treaty provisions. They were to be “totally separated from the whites.”²⁰¹

Another benefit or incentive to signing the Treaty for the Indians was better protection for their territory. According to Robert Surtees, the wording of the Treaty suggested that by moving to or living on Manitoulin Island the Crown could provide the First Nations with protection that was getting harder to provide otherwise.²⁰² He stated: “There was no payment indicated in the memorandum, but it implied that the lands so given up would be protected by the Crown as an Indian territory, and that assistance of some kind would be given to Indians who chose to take up residence on the islands and adopt a sedentary existence there.”²⁰³ Arguably, the Indians understood that they were being offered protection for their territory.

A common intent may be in the issue of control. It seems likely that in his “private Interviews”²⁰⁴ with the Chiefs before calling the Council, Sir Francis Bond Head expressed to the First Nations that by settling on Manitoulin Island they could continue to carry on their traditional activities unmolested by settlers, which implies continued control for the Island residents. Even by

²⁰⁰ Manitoulin Island Treaty of 1836, *ibid.*

²⁰¹ Manitoulin Island Treaty of 1836, *ibid.*

²⁰² R.J. Surtees, *Indian Land Surrenders In Ontario 1763 - 1867* (Ottawa: Indian and Northern Affairs Canada Treaties and Historical Resource Centre, 1984) at 91.

²⁰³ R.J. Surtees, *ibid.*

²⁰⁴ Letter Sir F.B. Head, 20th August 1836, *supra*, note 175 at 122. Again, there was no record located of the private meetings.

the wording of the Treaty, “and make them the property (under your Great Father’s control) of all Indians, whom he shall allow to reside on them,”²⁰⁵ conveys Indian ownership in the phrase “make them the property”. The First Nations were told they had control and that cultivating their land would give them more. Alternatively, if the intention was to surrender their land to the Crown the Manitoulin residents were given the land back by the same phrase. They would have received the property back the instant after signing the Treaty by the fact that Sir Francis Bond Head allowed them to stay on the Island. According to the terms of the Treaty, Bond Head had control of determining which First Nations would relocate to Manitoulin Island, but he had no control over the land itself.

There is a contrast between the Manitoulin Island and the Saugeen Treaty. “Surrender” language was used in the Saugeen No. 45½ Treaty.²⁰⁶ Sir Francis Bond Head used completely different language from “relinquish”. Treaty No. 45½ states: “I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this island or to that other part of your territory.”²⁰⁷ The comparison demonstrates the difference in the usage of language and, therefore, the difference in the intent of the parties in Treaty No. 45. The fact that the Saugeen were much more vocal, along with the missionaries, in denouncing their Treaty supports the difference in understanding the intent of the Treaty as perceived by the Manitoulin Indians.²⁰⁸ The Manitoulin residents were agreeing to share their territory with

²⁰⁵ Manitoulin Island Treaty of 1836, *supra*, note 11 at 113.

²⁰⁶ The Author is not implying that the Saugeen’s surrendered their land by signing the Treaty.

²⁰⁷ Saugeen No. 45½ Treaty, *supra*, note 158.

²⁰⁸ R.J. Surtees, *supra*, note 202 at 14.

other First Nations that would be sent by the Crown to live there, but not to surrendering the land. Further, seven witnesses signed the Saugeen Treaty besides Sir Francis Bond Head thereby conveying a more serious intent. Treaty No. 45, Manitoulin Island Treaty of 1836, on the other hand, has only Sir Francis Bond Head's signature.

According to the principles of interpretation, the ambiguities in treaty language and content should be found in favour of the Aboriginal group. In *R. v. Sparrow*,²⁰⁹ the S.C.C. found that the Crown had to provide a clear and plain intention to extinguish an Aboriginal right, that includes Aboriginal title. The Court stated: "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."²¹⁰ The language in Treaty No. 45 was not clear and plain that the intent was to extinguish the Odawa and Ojibway Aboriginal title to Manitoulin Island. Wikwemikong's assertion of being unceded in its official name demonstrates the belief surrender was not their ancestors' understanding or intent.

2.6.2 *Royal Proclamation of 1763 Procedures*

When Sir Francis Bond Head made the agreement with the Odawa and Ojibway for relocating other First Nations to Manitoulin Island, the instructions in the *Royal Proclamation of 1763* on how to proceed were not followed. As Colonial Governor he erred in not getting permission from England first before entering into the Treaty for the relocation or surrender that would initiate his isolationist policy.²¹¹ For the Treaty to have been effective as a surrender compensation would

²⁰⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at para. 37 online: QL (SCJ) [hereinafter *Sparrow*].

²¹⁰ *Sparrow, ibid.*; see also, *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746 (S.C.C.) online: QL (SCR) [hereinafter *Osoyoos*].

²¹¹ Letter Sir F.B. Head, Lieutenant Governor of Upper Canada to Lord Glenelg, Colonial Secretary, No. 95 (32) 20th November 1836 in *Copies or Extracts Correspondence Since 1st April*

have to be provided, according to the provisions of the *Royal Proclamation of 1763*. A council was held but the exact purpose of the meeting is suspect. The First Nations would have knowledge of the provisions of protection and surrender in the *Royal Proclamation of 1763*. The Treaties formed with other First Nations directly before and after the 1836 signing included monetary compensation. The provisions of the *Royal Proclamation of 1763* provide the historical position of the Crown at the time.

By his own admission, Sir Francis Bond Head did not have express permission to distribute the annual gifts or enter treaty with the First Nations gathered at Manitoulin. He was still trying to convince Lord Glenelg that his actions were correct, and would save the Indians from sure extinction, in his November 20, 1836, dispatch No. 95.²¹² According to John Borrows, the reason Sir Francis Bond Head did not follow the correct procedure for land surrenders with the Saugeen or, as he claimed, the Manitoulin residents, was his lack of knowledge of the *Royal Proclamation of 1763* provisions that guided the Crown's policy.²¹³ However, the two Treaties were Sanctioned by the King retroactively. James Douglas Leighton describes Lord Glenelg's ratification of the Treaties

1835 Between The Secretary of State for the Colonies and The Governors of the British North American Provinces Respecting the Indians In Those Provinces, Mr. Labouchere, ed. (Unknown: The House of Commons, 17 June 1839) at 124.

²¹² Letter Sir F.B. Head, 20th November 1836, *ibid*.

²¹³ Borrows, *supra*, note 119 at footnote 256 quoting from Indian Commission of Ontario, *Consolidated Statement of Facts Claim of the Saugeen and Newash Bands of Ojibwa, Treaty 45½*, July 7, 1981, Document 27, Col. Given to Chief Superintendent D.C. Napier, August 20, 1836. See also, G.M. Craig, *Upper Canada The Formative Years 1784-1841* (Toronto: McLelland and Stewart Limited, 1963) at 232.

as “qualified approval”²¹⁴ for which he was criticised.²¹⁵ Mr. Leighton stated: “Glenelg’s cautious endorsement of Bond Head’s “apartheid” policy drew some criticism. One authority has claimed that ‘influenced by showy rhetoric alone, he approved a scheme which was contrary to his convictions.’”²¹⁶ Ultimately, the thought of gaining 1.5 million acres²¹⁷ of arable land for settlement by removing the Saugeen, who were encouraged to relocate to Manitoulin Island, and potentially appeasing political opposition, outweighed his concern for the protection of the hunting grounds of the First Nations involved, as provided for in the *Royal Proclamation of 1763*.²¹⁸

A contract is not valid unless there is consideration given and received. While avoiding a contractual interpretation of the Treaty, nominal consideration is present in the Agreement. The Crown withdrew its claim to the Islands;²¹⁹ the Islands were to be protected from

²¹⁴ J.D. Leighton, *supra*, note 162 at 31.

²¹⁵ J.D. Leighton, *ibid*.

²¹⁶ J.D. Leighton, *ibid*. [emphasis in the original; footnotes with reference to Scott omitted].

²¹⁷ P.S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991) at 135; see also, J.F. Leslie, *supra*, note 170 at 39.

²¹⁸ Though not found in a document by the author, it was mentioned orally (Community member, *supra*, note 151) that Manitoulin Island representatives attended the Treaty of Niagara 1764, that had a large First Nation attendance, where the provisions of the *Royal Proclamation of 1763* were shared orally and a copy provided to over 22 nations. The Treaty was an assurance of peace by the First Nations and the establishment a Nation to Nation relationship with the British newcomers. See, Borrows, *supra*, note 119 at 67.

²¹⁹ The author understood the claim withdrawn by the Crown was the underlying title asserted by the Doctrine of Discovery. John Borrows, *supra*, note 119 at footnote 256, still quoting the same source proposes that the Crown may not have had an interest in the islands as they were “Indian territory” as defined by the *Royal Proclamation* and not the subject of a previous treaty.

settlers;²²⁰ and the territory was to remain Indian land. However, the standard procedure for surrendering land was to financially compensate First Nations for surrendering land, especially as the provisions in the *Royal Proclamation 1763* required it.²²¹ By limiting the sale or ceding of Indian land only to the Crown, not to third parties, the best interests of the First Nations would not be served if some form of monetary and/or goods were not included in the transaction. Without making comment as to the appropriateness of the treaties, both Treaty No. 44²²² with the Mississauga, and Treaty No. 46²²³ with the Wyandot, contain references to monies to be received. Another element noted in the two Treaties is a detailed description of the land involved that is missing in the Manitoulin Island Treaty of the same year.

The *Royal Proclamation of 1763* states “if at any Time any of the Said Indians should be inclined to dispose of the said lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose.”²²⁴ The first problem with the manner in which Sir Francis Bond Head raised the proposal of isolation, which led to

²²⁰ Sources assert that Sir Francis Bond Head used the encroachment and ability not to provide adequate protection for the First Nations on their territories as coercion to sign the Treaties on that day. See, E. Palmer Patterson, *supra*, note 120 at 87; R.J. Surtees, *supra*, note 180 at 14.

²²¹ See *Delgamuukw*, *supra*, note 14 at paras. 200-203.

²²² Treaty No. 44, Mississauga Indians of Kingston and the Bay of Quinte to Charles Anderson, 25 May 1836, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen’s Printer, Ottawa 1891) at 112.

²²³ Treaty No. 46, Wyandot Tribe of Indians to George Ironside, Superintendent Indian Affairs, 20 September 1836, *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen’s Printer, Ottawa 1891) at 113.

²²⁴ *Royal Proclamation 1763*, *supra*, note 7.

surrender for the Saugeen, was that no prior notice was given. Only the family groups that travelled to the gift distribution were a part of the process. No mention is made of how long the First Nations had to deliberate on the proposal before proceeding to Council. Prior notification would have ensured the intent of the Treaty was clear and the Odawa and Ojibway had time to consider the ramifications of their decision.

Another aspect of the lack of prior notice is that Sir Francis Bond Head took the opportunity to raise the subject during the gift distribution. The gifts were not being provided as a commitment to the Treaty but for past and continued peaceful relations as raised in the Treaty's first paragraph reference to the Niagara Council. Sir Francis Bond Head assured Lord Glenelg protocol for intent to follow the Treaty was provided in the form of wampum being given to the First Nations gathered with their copy of the document.²²⁵ The First Nations were not given that additional consideration of gifts for entering into the Agreement as dictated by their cultural ceremony for treating and dealing with matters connected to the land.²²⁶

A second problem is, as outlined in the historical section on Wikwemikong, the chief or headman of the smaller family group was not the decision-maker. The people would need time to discuss the matter and give direction to their chief or headman who would meet in the Grand Council. The family groups were governed "by the voice of the people."²²⁷ Sir Francis Bond Head was only on Manitoulin Island for three days,²²⁸ not very long for discussing such important land use

²²⁵ Letter Sir F.B. Head, 20th August 1836, *supra*, note 175 at 123.

²²⁶ Borrows, *supra*, note 119 at 101-102.

²²⁷ P.S. Schmalz, *supra*, note 217 at 142 [footnote omitted].

²²⁸ Sir F.B. Head, *The Emigrant* (New York: Harper & Brothers, Publishers, 1847) at 90.

issues that continue to impact on Wikwemikong today. Without prior notice, the Odawa and Ojibway would have had to make their decision quickly. Also, Sir Francis Bond Head did not mention receiving gifts from the First Nations, a protocol usually observed to acknowledge a treaty agreement involving land.²²⁹

Further, oral record keeping meant the First Nations would consider Sir Francis Bond Head's conversation during the private interviews as well as what was said at the Grand Council to be part of the treating process, not just the written document.²³⁰ Not all the family groups may have been in attendance. Several Saugeen Chiefs argued this point, claiming Treaty No. 45½ did not apply to them because they did not sign it.²³¹

The common intent of the parties to the Manitoulin Island Treaty of 1836 was to share the Island with other First Nations sent there as chosen by the Crown. Sir Francis Bond Head wanted to fulfill his vision of the continued civilization of the Indians away from close proximity to white settlements, out of concern that the Indians would cease to exist due to being caught up in vices and disease; not the surrender of the inhabitants' Aboriginal title to the Crown. Otherwise, the honour of the Crown is not upheld and the government breached its duty as fiduciary to the Manitoulin Island Indigenous residents. All Sir Francis Bond Head did, if surrender was the Treaty intent, was save money on gifts and compensation, free land for settlement, thereby pleasing the political opposition and benefit the colony as his motivating factors, not the best interests of the Odawa and

²²⁹ Borrows, *supra*, note 119 at 101.

²³⁰ Borrows, *ibid.*, at 103.

²³¹ R.J. Surtees, *supra*, note 180 at 14; see also, W.R. Wightman, *Forever on the Fringe: Six studies in the development of the Manitoulin Island* (Toronto: University of Toronto Press, 1982) at 19. He states that the Saugeen signed because they were coerced by Sir Francis Bond Head.

Ojibway on their unceded hunting grounds. The relocation to Manitoulin Island was considered a failure, as only a few First Nations moved to the Island. The isolation aspect of the policy was never achieved.²³²

²³² R.J. Surtees, *supra*, note 177 at 137-138; see also, P.S. Schmalz, *supra*, note 217 at 164.

CHAPTER THREE: MANITOULIN ISLAND TREATY OF 1862

3.0 Introduction

Beginning this Chapter is an examination of Indian Affairs policy from 1851 - 1863, a period that ends just after the Manitoulin Island Treaty of 1862 was signed. The government continued the push to free up land for settlement and resource development, as the Crown's civilization and assimilation policy through reserve creation and model communities was advanced. The Manitoulin Island Treaty of 1862 is discussed next followed by analysis that focusses mainly on the circumstances surrounding the Treaty. It is argued that by not participating in the 1862 Treaty, Wikwemikong First Nation retained its Aboriginal title and that use of "unceded" in its official name accurately reflects the situation. The rights affirmed in the Bond Head Treaty of 1836, such as hunting, fishing and exclusive use by First Nation residents on Manitoulin Island, continue to exist undisturbed.

3.1 Indian Affairs Policy From 1851 - 1863

The civilization policy based on creating model communities was a failure.²³³ Indian policy was not unified, allowing decisions and actions to be made largely at the discretion of the Indian agents and superintendents.²³⁴ The pressure for arable land and resource development continued. England was constantly urging that expenses be cut, encouraging innovative ways of reducing Indian program costs.²³⁵

²³³ P.S. Schmalz, *supra*, note 217 at 143-146.

²³⁴ P.S. Schmalz, *ibid.* at 164-165; see also, J.D. Leighton, *supra*, note 162 at 177.

²³⁵ D. Whiteside & S.D. Whiteside, "Indians in Upper Canada through 1845, with special reference to half-breed Indians. The Circle being threatened" (Ottawa: Aboriginal Institute of Canada for Aboriginal Title Research Group, Ontario Metis and Non-Status Indian Association, 1979) [unpublished] at 4.

Lord Bury, Civil Secretary, Superintendent General Indian Affairs, in a 1855 report to Sir Edmund Walker Head, Governor, criticized Imperial intent to curtail financial support for the Indian Department.²³⁶ Money was supplied to the province and a debenture was issued. Lord Bury reported that there were two things impeding the gradual civilization policy of Sir Edmund Walker Head. According to John Leslie the two problems classified as “major barriers to Indian civilization”²³⁷ were “continued use of Native language and communal ownership of band property.”²³⁸

A series of legislation was issued to regulate and control Indians and their land within the province of Canada as an attempt to remove the communal property ownership barrier. Later residential schools were used to remove the Indigenous language barrier. John S. Milloy called the series of legislation “reformulation of the civilizing system [...] that came to an end in 1860”²³⁹ the redefinition of civilization that rejected “the goal of community self-sufficiency [...] in favour of the assimilation of the individual.”²⁴⁰ Up until the 1857 legislation, *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*,²⁴¹ according to John Milloy, First Nations experienced self-government; in that government initiated

²³⁶ J.F. Leslie, *supra*, note 170 at 126. Building on the legislation that regulated Indian activities in this time period, the newly formed Canadian federal government implemented the first *Indian Act* in 1876. *Ibid.* at 102 and 122.

²³⁷ J.F. Leslie, *ibid.*, at 127 [footnote omitted].

²³⁸ J.F. Leslie, *ibid.*

²³⁹ J.S. Milloy, *A National Crime: The Canadian Government and The Residential School System 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 19.

²⁴⁰ J.S. Milloy, *ibid.*

²⁴¹ *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians*, S.C. 1857, c. 26 (amended C.S.C. 1859, c.9; S.C. 1860, c.38) [hereinafter *Gradual Civilization of the Indian Tribes Act*].

programming needed their approval before being implemented in their community.²⁴² The 1857 legislation imposed programs that did not require First Nation consent or input.

The new unilateral policy was initiated in 1857 by the *Gradual Civilization of the Indian Tribes Act*²⁴³ that applied to both Upper and Lower Canada. The legislation was all encompassing and promoted assimilation through “enfranchisement” of qualified male Indians who would no longer be considered Indian as defined by the legislation. The legislation provided that the enfranchised “Indian” would give up all inherent rights, becoming subject to mainstream Canadian law.

Derek G. Smith credits this legislation with being the basis for post-Confederation Indian policy. He states: “The principal elements of Indian policy, which will later be consolidated without any major modification in the Post-Confederation *Indian Act* are by now well established.”²⁴⁴ Enfranchisement was an innovative way of getting reserve land and not having to follow the surrender provisions of the *Royal Proclamation of 1763* for traditional territory cessions.²⁴⁵ The legislation provided that the enfranchisee was given part of the First Nation’s reserve land in fee simple without the consent of the group, as would have been required for cession.

In 1858, the Report of the Special Investigating Committee, known as the Pennefather Report, conducted by Robert Pennefather, Superintendent General, declared “that Indian policy, on

²⁴² J.S. Milloy, *supra*, note 239 at 16.

²⁴³ *Gradual Civilization of the Indian Tribes Act*, *supra*, note 241.

²⁴⁴ D.G. Smith, “Introduction,” D.G. Smith, ed. *Canadian Indians and The Law: Selected Documents, 1663-1972* (Toronto: McClelland and Stewart Limited in association with the Institute of Canadian Studies, Carleton University, 1975) at xvii.

²⁴⁵ D. Johnston, *The Taking of Indian Lands in Canada Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989) at 59.

the whole had failed miserably.”²⁴⁶ England wanted to discontinue the Indian Department but was persuaded to continue temporarily. Band funds constituted just under half of the department’s yearly expenses.²⁴⁷ The practice of distributing the annual gifts was stopped as one of the cost cuts, in 1858.²⁴⁸ The Pennefather Report recommended that the province make up the difference in the Department’s expenses to continue with the education and civilization program.²⁴⁹

*An Act respecting the sale and management of the Public Lands*²⁵⁰ granted to the Commissioner of Crown Lands the responsibility for handling Crown land, including in section nine Indian land, as directed by the Governor in Council. The *Public Lands Act* provided detailed procedures for handling all aspects of public land including but not limited to sale, leasing, claims, issuing patents and forfeiture of claims. Professor Darlene Johnston argues that traditional lands are not subject to this *Act*, despite the reference to Indian land. Further, she states: “by 1860, there were virtually no traditional lands left within the reach of colonial administrators. Surrender activity had accomplished the alienation of traditional lands in the settled regions of the province.”²⁵¹ It was

²⁴⁶ R.J. Surtees, *supra*, note 177 at 42.

²⁴⁷ J.F. Leslie, *supra*, note 170 at 134.

²⁴⁸ O.P. Dickason, *supra*, note 122 at 234; see also, J.F. Leslie, *ibid.*, at 124; D. Shanahan, Ph.D., *The Indian Land Management Fund: Financing The Indian Department, 1830-1914* (Ottawa: Indian and Northern Affairs Canada, Report prepared for Treaties and Historical Research, 1991).

²⁴⁹ D. Shanahan, *ibid.* at 43.

²⁵⁰ *An Act respecting the sale and management of the Public Lands*, S.C. 1860, c.2. (23 Vict.) in G. Hinge, “Consolidation of Indian Legislation, Vol. I United Kingdom and Canada” (Ottawa: Department of Indian and Northern Affairs, unknown) [unpublished] at 131 [hereinafter *Public Lands Act*].

²⁵¹ D. Johnston, *supra*, note 245 at 60.

included, she suggests, to ensure that traditional surrendered land fell under the “the management of the provincial Indian Department.”²⁵²

John Milloy’s comment about the Imperial civilization policy ending in 1860 was due to the transfer of responsibility for Indians and Indian affairs from England to the Colonial government in the province of Canada on July 1, 1860.²⁵³ *An Act Respecting the Management of the Indian Lands and Property*,²⁵⁴ affirmed that transfer and outlined the procedure, in s. 4 of the *Act*, for the voluntary surrender of reserve land to be affirmed by a majority vote of the Chiefs, if more than one. The *Act* did not apply to traditional territorial land until it was surrendered to the Crown.²⁵⁵

Responsibility for the Indian Department and monies was completely transferred to the Province of Canada by the end of 1861.²⁵⁶ A change made as a result of the transfer was the creation of a powerful position in the Crown Lands Commissioner who “acted as Superintendent General of Indian Affairs.”²⁵⁷ One person controlled all the public and Indian land disposition and management under delegated authority by the respective legislation. Therefore, the same person was responsible for carrying out the continued civilization through assimilation Indian policy.

3.2 Manitoulin Island Treaty of 1862

²⁵² D. Johnston, *ibid.*

²⁵³ J.S. Milloy, *supra*, note 239 at 19; see also, D. Shanahan, *supra*, note 248 at 45; J.D. Leighton, *supra*, note 162 at 178.

²⁵⁴ *An Act Respecting the Management of the Indian Lands and Property*, S.C. 1860, c. 151 (23 Vict.).

²⁵⁵ *An Act Respecting the Management of the Indian Lands and Property*, *ibid.*, at ss. 2 and 6; see also, D. Johnston, *supra*, note 245 at 59.

²⁵⁶ D. Shanahan, *supra*, note 248 at 46.

²⁵⁷ D. Shanahan, *ibid.*

Within one generation (25 years) Manitoulin Island, a rocky, remote, undesirable area for “white settlers” that was to remain Indian territory exclusively, as agreed to by Sir Francis Bond Head, was sought after in the push for new settlement land to be opened up and the continuing civilization/assimilation Indian policy. In October 1861, a first attempt was made to acquire the land and survey the Island. However, the Crown’s proposal was forcefully rejected by the First Nations who were not prepared to surrender their land. Despite continued affirmation of the First Nations’ position, William McDougall, Superintendent General of Indian Affairs, and William Spragge, Deputy Superintendent of Indian Affairs, called a council for Saturday, October 4, 1862, at Manitowaning to discuss cession of the land. The first response to the officials’ proposal was an unconditional no. McDougall explained the terms further, then recessed the proceedings until the following Monday offering to meet separately with individual Indians who were interested in discussing his offer.²⁵⁸

During the recess, it became clear that the Indians were not as unified in their opposition as it first appeared and that the main opponents were the Indians of Wikwemikong. When the council reconvened on October 6, 1862, McDougall was able to take advantage of the division among the Island First Nations by excluding the eastern portion of the Island from the Treaty. In this way he was able to obtain signatories for the Treaty.²⁵⁹

Odawa and Ojibway chiefs and headmen on the western portion of Manitoulin Island surrendered their Aboriginal title to 600,000 acres (242,811 hectares)²⁶⁰ of the Island for \$700

²⁵⁸ R.J. Surtees, *supra*, note 177 at 263-266.

²⁵⁹ Burrows, *supra*, note 119 at 143-154.

²⁶⁰ O.P. Dickason, *supra*, note 122 at 255.

immediately, interest money in the future and reserve land allotted in 50 or 100 acre parcels according to the formula contained in the Treaty. The relevant text of the Manitoulin Island Treaty of 1862 reads:

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 Ottawas 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.”

And whereas, but few Indians from the mainland, whom it was intended to transfer to the island, have ever come to reside thereon.

And whereas, it has been deemed expedient (with a view to the improvement of the condition of the Indians as well as the settlement and improvement of the country) to assign to the Indians now upon the island certain specified portions thereof to be held by patent from the Crown, and to sell the other portions thereof fit for cultivation to settlers, and to invest the proceeds thereof, after deducting the expenses of survey and management, for the benefit of the Indians.

And whereas a majority of the chiefs of certain bands residing on that portion of the island easterly of Heywood Sound and the Manitoulin Gulf, have expressed their unwillingness to accede to this proposal as respects that portion of the island, but have assented to the same as respects all other portions thereof, and whereas the Chiefs and Principal Men of the bands residing on the island westerly of the said sound and gulf, have agreed to accede to the said proposal.

Now this agreement witnesseth that in consideration of the sum of seven hundred dollars now in hand paid (which sum is to be hereafter deducted from the proceeds of lands sold to settlers) the receipt whereof is hereby acknowledged, and in further consideration of such sums as may be realized from time to time as interest upon the purchase money of the lands to be sold for their benefit as aforesaid, the parties hereto of the second part, have, and hereby do release, surrender and give up to Her Majesty the Queen, all the right, title, interest and claim of the parties of the second part, and of the Ottawa, Chippewa and other Indians in whose behalf they act, of, in and to the Great Manitoulin Island, and also, of, in and to the islands adjacent which have been deemed or claimed to be appurtenant or belonging thereto, to have and to hold the same, and every part thereof, to Her Majesty, Her heirs and successors forever. [...]

Seventhly. That portion of the island easterly of Heywood Sound and Manitoulin Gulf, and the Indians now residing there are excepted from the operation of this agreement as respects survey, sale of lots, granting deeds to Indians and payments in respect of moneys derived from sales in other parts of the island, but the said Indians will remain under the protection of the Government as formerly, and the said easterly part or division of the island will remain open for the occupation of any Indians entitled to reside upon the island as formerly, subject in case of dispute, to the approval of the

Government.

Eighthly. Whenever a majority of the Chiefs and Principal Men, at a council of the Indians residing easterly of the said sound and gulf, to be called and held for the purpose, shall declare their willingness to accede to the present agreement in all respects, and the Government shall signify its approval, then that portion of the island shall be surveyed and dealt with in like manner as other portions thereof, and the Indians there shall be entitled to the same privileges in every respect, from and after the date of such approval by the Government, as those residing in other parts of the island.

Ninthly. This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be approved by the Governor in Council.²⁶¹

Nineteen chiefs or head men signed the Treaty. Two of the signatures were from Wikwemikong, Tehkummeh and Paimsahdung²⁶² who signed as individuals not for the group, and were subsequently sent out of the community for their actions.²⁶³ Eleven witnesses signed the Treaty.

3.3 Analysis: Manitoulin Island Treaty of 1862

While it is important to examine questionable provisions of the Manitoulin Island Treaty of 1862, the effect on Wikwemikong comes more from the circumstances surrounding the Treaty process than the actual content of the Agreement. However, the unilateral actions by William McDougall and William Spragge that created the Wikwemikong unceded reserve mirrors Sir Francis Bond Head's earlier actions. The result of the Crown representatives' actions not only created Wikwemikong's reserve, it left the First Nation with Aboriginal title to the reserve and the rest of Manitoulin Island. The Manitoulin Island or McDougall Treaty of 1862 analysis is provided in two sections, first, treaty interpretation and the second, surrounding circumstances.

3.3.1 Treaty Interpretation

The procedure for obtaining the surrender of Indian land, as outlined in the *Royal*

²⁶¹ Manitoulin Island Treaty of 1862, *supra*, note 12 at 235-236 [emphasis added].

²⁶² Manitoulin Island Treaty of 1862, *ibid.*, at 237.

²⁶³ W.R. Wightman, *supra*, note 231 at 47-48.

Proclamation of 1763 and affirmed in subsequent legislation, was followed to a great extent by the government. For instance, an Order in Council issued on September 12, 1862, provided the mandate for Messrs. McDougall and Spragge to approach the Odawa, Ojibway and other Indians on Manitoulin Island for the surrender of their Aboriginal title.²⁶⁴ The impression given is that the terms of the Treaty were defined and set out before the meeting. The Report states: “terms of the agreement with the Indians, as contemplated by that Order, [...] these modifications have been embodied.”²⁶⁵ The First Nations were informed ahead of time that a Council was being called for the purpose of discussing the land surrender. A commission was sent in 1861 to approach the Indians about surrendering the land for sale. They refused. The Island was surveyed against the First Nations’ wishes. The local Indian agent, George Ironside, continued to discuss the issue with the First Nations throughout the year. The survey revealed the settlement possibilities for the land that resulted in the call for a General Council to discuss surrender of the land for sale.²⁶⁶ The language and format of the Treaty itself was legal.

However, the unexpected refusal by Wikwemikong to participate in the Treaty meant the Crown representatives did not have approval to unilaterally exclude the eastern portion of Manitoulin Island. Again, approval was granted retroactively by the Governor General in Council on November

²⁶⁴ Approval of Report of a Committee of the Executive Council, Wm. H. Lee, C.E.C. to the Provincial Registrar, dated 14th November 1862, in *Canada Indian Treaties and Surrenders from 1680 to 1890 - In Two Volumes*, vol. 1 (Saskatoon: Fifth House Publishers, 1992, originally published by Queen’s Printer, Ottawa 1891) at 237.

²⁶⁵ Approval of Report, *ibid.*

²⁶⁶ R.J. Surtees, *supra*, note 177 at 108. See also, J.D. Leighton, *supra*, note 162 at 197; W.R. Wightman, *supra*, note 231 at 43.

14, 1862.²⁶⁷ The questionable sections of the Treaty or “Articles of Agreement and Convention”²⁶⁸ were included, “being deemed necessary to prevent future difficulty,”²⁶⁹ modifying the original mandate, according to the Report. Messrs. McDougall and Spragge were concerned about their actions and inserted the sections in an attempt to avoid problems in the future as a result of them. Since Wiky is in court to claim the surrounding islands, the representatives for the Crown were unsuccessful in preventing difficulties. It raises a question. What actions did Messrs. McDougall and Spragge want to ensure did not raise difficulties in the future? This aspect is explored in the next section.

The first questionable passage is in the second paragraph. The Treaty states Indian title was surrendered in the 1836 Bond Head Treaty citing, “be made the property (under the Great Father’s control) of all Indians whom he should allow to reside thereon.”²⁷⁰ However, after stating the Indian title was previously surrendered, the provisions of the Treaty follow with the criteria by which the land will be surveyed and sold to settlers excluding the reserves set aside for the First Nation participants. The provincial government’s actions contradict the text in question. If the government truly believed the land was previously surrendered, why compensate the First Nations for something that the Crown claimed to already be ceded.

An argument could be made for the provincial government to justify, following the *Royal*

²⁶⁷ Approval of Report, *supra*, note 264 at 237.

²⁶⁸ Approval of Report, *ibid*.

²⁶⁹ Approval of Report, *ibid*. See, O.P. Dickason, *supra*, note 122 at 325. The Manitoulin Island First Nations joined in a specific claim against the Canadian government concerning 90,000 acres (36,422 hectares) that reached an agreement by 1990. Wikwemikong did not sign the final agreement. Ontario Native Affairs Secretariat, *supra*, note 130 and 127.

²⁷⁰ Manitoulin Island Treaty of 1862, *supra*, note 12 at 235.

Proclamation of 1763 and confirm the actions taken to arrange for the land surrender. It may have been to uphold the honour of the Crown as a moral rather than a legal obligation to compensate the First Nations. Realistically, the provincial government by 1862 would know from engaging in the aggressive, legislated policy to obtain Indian land for settlement and resource development, that the Manitoulin Island residents should be compensated for the cession. Avoiding problems in the future was probably one of the motivating factors, as stated in the Approval Report. Another may have been that the Crown did not really believe the land was ceded and Aboriginal title extinguished in 1836, despite stating the contrary. The terms of the Treaty ensure that the provincial government is not out any money by granting the compensation. All the expenses, such as surveying and the \$700 immediate payment, were to be recouped from the sale proceeds.

The second questionable text is in the fifth paragraph that describes the boundaries of the Treaty application. Here the text excludes the eastern portion of Manitoulin Island, but states the eastern residents (including Wikwemikong) agreed the rest of the Island could be ceded. By defining the parameters of the surrender in the treaty, or in this instance, exclusion of the eastern portion of Manitoulin Island, Wikwemikong was not consulted on the creation of the reserve or the boundaries as required. The government representatives unilaterally created the Wikwemikong reserve. If Wikwemikong was not a signatory to the Treaty, how could they agree to any of its terms?

The treaty interpretation principle of avoiding a contractual interpretation is harder for this Treaty than the 1836 Bond Head Treaty. The legal language and context are contractual. For instance, the Treaty starts with the words “Articles of Agreement and convention,”²⁷¹ includes a preamble with the format including “whereas”, and has numbered sub-sections. However, again the

²⁷¹ Manitoulin Island Treaty of 1862, *ibid*.

government is attempting to create an agreement, where none exists, by including the phrase “but have assented to the same as respects all other portions thereof”²⁷² in the Treaty referring to Wikwemikong. How is it possible to consent to ceding other parts of the Island and surrounding islands when Wikwemikong representatives ended their participation in the Treaty process after the first day? The answer is, it is not possible.

Wikwemikong could not be bound by an oral agreement to cede the rest of Manitoulin Island. Despite First Nations’ world view that the oral agreements and conversation conducted leading up to and including the final signing ceremony is part of the Treaty process, Wiky representatives were not there when the final text of the Treaty was discussed. The reason for obtaining a written agreement was to be able to prove, although questionable for this Treaty, that the First Nations participated willingly, were consulted and agreed to the terms. Sub-section nine of the Treaty states: “This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be approved by the Governor in Council.”²⁷³ Wikwemikong was not a party to the Treaty.

Sub-section seven of the Treaty affirms that Wikwemikong did not participate in the Treaty by providing for its inclusion at a later time if so desired. Further, it affirms the argument that the 1836 Bond Head Treaty did not surrender Aboriginal title to Manitoulin Island, contradicting the second paragraph of the Treaty. The Treaty reads: “the said easterly part or division of the island will remain open for the occupation of any Indians entitled to reside upon the island as formerly, subject in case of dispute, to the approval of the Government.”²⁷⁴ Chief Justice Lamer in *R. v.*

²⁷² Manitoulin Island Treaty of 1862, *ibid.*

²⁷³ Manitoulin Island Treaty of 1862, *ibid.*, at 236.

²⁷⁴ Manitoulin Island Treaty of 1862, *ibid.*

Sioui,²⁷⁵ stated:

It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: [...] The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.²⁷⁶

Therefore, the Wikwemikong Indians would have to take part in the 1862 Treaty to extinguish the previous Treaty of 1836 that gave them control of the Island, their activities and excluded settlers while maintaining their Aboriginal title to Manitoulin Island.

The government would have to continue to provide protection and approve residents as provided in the Bond Head Treaty. Government intervention was not to go beyond that, as the land was for the exclusive use of all the Indians on Manitoulin Island including Wikwemikong, as agreed to in 1836.

3.3.2 Surrounding Circumstances

Since the Saugeen signed Treaty 45½ on the same day in 1836, Wiky members would be aware of the ongoing struggle faced by that First Nation as the Saugeen's large territory was reduced to small reserves. The purpose of mentioning the Robinson-Huron Treaty of 1850 in the previous chapter was to demonstrate that Wikwemikong resisted taking part in the 1862 Treaty with the knowledge of the process and result of forming a Treaty that extinguished Aboriginal title to vast neighbouring traditional territory for small extended family unit reserve lands. Wikwemikong members would also be aware of the other treaties made, taking land for settlement in other communities, between the Bond Head 1836 Treaty and 1862.

²⁷⁵ *R. v. Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) online: QL (SCJ) [hereinafter *Sioui*].

²⁷⁶ *Sioui*, *ibid.*, at 1062 [references in text omitted].

Whether Wiky members actually read or physically saw the treaties would not matter in an oral society. The distribution of gifts continued to be held on Manitoulin Island up to 1858. The visiting or returning First Nations would share information about themselves and things they had heard in their respective territories. Sharing news would be an integral part of the interaction and festivities associated with gathering together for the gifts or ceremony.

Further, Wikwemikong members, in their continued cyclical seasonal activities travelled to the surrounding islands and the mainland, where they would encounter other groups and gather information. The successful, although uncompleted, return of Point Grondine on the mainland to Wiky, supports this argument.²⁷⁷ News would come to the community through the Jesuits, other visitors, the Indian Department officials and by the steamboats that were active on the Great Lakes. The Wikwemikong members would have made a fully informed decision not to participate in the Treaty process.

Among the Wikwemikong members, the issue of the 1862 Treaty validity was raised. The issue was inappropriate people participating in signing the Treaty and the negotiation process. According to James Douglas Leighton, the Treaty negotiations on October 4, 1862, met with the same resistance as in the previous fall exploratory meetings held by Ironside to bring the issue of surrender before the Manitoulin Indian residents.²⁷⁸ There is a question of whether Wikwemikong First Nations went home, thinking the Treaty talks had ended because they would not cooperate or Mr. McDougall realized they posed the greatest resistance and wanted them out of his way. Mr. Surtees suggests the latter. He states: “While the group maintained its ascendancy, no agreement

²⁷⁷ Ontario Native Affairs Secretariat, *supra*, note 130 and 127.

²⁷⁸ J.D. Leighton, *supra*, note 162 at 198.

was possible. Accordingly, he recessed the council and offered to meet separately with any band willing to treat for their lands.²⁷⁹ The government has been accused by First Nations that a tactic employed to achieve wanted policy outcomes was to divide and conquer. Mr. McDougall certainly utilized that form of methodology, assuming that Wiky controlled the other chiefs and head men and with their influence removed, the remaining First Nations would comply and sign the Treaty. It is clear that Wikwemikong did not take part in the Treaty, mainly because they did not want to surrender their Aboriginal title.

John Borrows provides an alternative argument to Professor Johnston's suggestion that the 1860 legislation did not apply to traditional land. His argument questions the validity of the 1862 Treaty due to the failure of the government representatives to follow the provision of the 1860 legislation. *An Act Respecting the Management of the Indian Lands and Property* required a majority vote in s. 4(1) that stated:

4. No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions:
 1. Such release or surrender shall be assented to by the Chief, or if more than one Chief, by a majority of the Chiefs of the tribe or band of Indians, assembled at a meeting or Council of the tribe or band summoned for that purpose according to their rules and entitled under this Act to vote thereat.²⁸⁰

Without the Wiky representatives, constituting the majority on the Island according to Mr. Borrows, the vote and subsequent signing of the Treaty would not be valid.

He states:

The fact that McDougall signed the treaty with only a minority of Anishnabe certainly

²⁷⁹ R.J. Surtees, *supra*, note 177 at 108.

²⁸⁰ *An Act Respecting the Management of the Indian Lands and Property*, *supra*, note 254 at s. 4(1).

casts a cloud over the validity of the treaty. McDougall appears to have violated legislation passed just two years earlier which gave specific instructions regarding majorities with respect to treaty making. Furthermore, McDougall's actions did not follow the spirit and intent of the terms of the Royal Proclamation and the Treaty of Niagara which set out a public process to allocate land. While McDougall justified his actions on the basis that he had obtained a majority of signatures from those who lived closest to the land surrendered, this argument does not hold legal or moral validity. As has been repeatedly demonstrated, according to the First Nations' understanding the title to the entire island was vested in them collectively; therefore McDougall was not free to treat with some bands separately.²⁸¹

Mr. Borrows points out the collective nature of the Island ownership by the resident Indians. By purposely leaving Wikwemikong out of the resumed treaty negotiations due to their resistance to the surrender of their land, the provisions of the legislation were not followed.

Olive Dickason raises the issue of the impropriety of the methods used by William McDougall to get the other First Nations on the western part of the Island to agree to the surrender of their land. She states: "His tactics were dubious to say the least and involved the use of liquor, despite an express governmental prohibition of such procedures."²⁸² The Treaty negotiations reconvened on October 6, 1862, at which time it was signed. Wikwemikong members were immediately critical of the Treaty process.²⁸³ They believed that the provincial representatives misrepresented the actual persons who signed the Treaty in some fashion, as a result of their improper negotiating techniques.²⁸⁴ In 1863, other First Nations on Manitoulin Island joined in the criticism of the methods used to obtain the Treaty.²⁸⁵

²⁸¹ Borrows, *supra*, note 119 at 154-155 [footnotes omitted].

²⁸² O.P. Dickason, *supra*, note 122 at 255.

²⁸³ J.D. Leighton, *supra*, note 162 at 200.

²⁸⁴ Wikwemikong Land Claims Committee member, *supra*, note 151.

²⁸⁵ W.R. Wightman, *supra*, note 231 at 53.

CHAPTER FOUR: ABORIGINAL TITLE AND ANALYSIS

4.0 Introduction

Can Wikwemikong's Aboriginal title still exist given the language in the 1836 and 1862 Manitoulin Island Treaties and the surrounding government actions? Interpreting the two Manitoulin Island Treaties was key to the argument that Wikwemikong First Nation retains Aboriginal title not only to its reserve, but to the Island. It has been shown that the Crown did not make clear and plain its intent to remove Wikwemikong First Nation's Aboriginal title to Manitoulin Island and their reserve in 1836, and that the attempt in 1862 failed as well. The purpose of this chapter is to provide the nature and content of Aboriginal title, the criteria needed to prove Aboriginal title, and analysis of its application to the Wikwemikong First Nation.

4.1 Nature and Content of Aboriginal Title

The Privy Council finding in *St. Catherine's* stood as the interpretation of Indian land interest until 1973 and the split decision from the Supreme Court of Canada in *Calder v. Attorney General of British Columbia*.²⁸⁶ In *Calder*, the Nisga'a Tribal Council, consisting of four First Nations, claimed unsurrendered Aboriginal title to their traditional territory in the Nass River Valley,

²⁸⁶ *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 (S.C.C.) online: QL (SCR) [hereinafter *Calder*]. It is interesting to note at the same time that Aboriginal and treaty rights were being considered in this case and in other cases such as *R. v. White and Bob*, (1964), 50 D.L.R.(2d) 613 (B.C.C.A.) online: QL (ABRQ) [hereinafter *White and Bob*], over the possession of six deer carcasses hunted on unoccupied off-reserve land during the closed hunting season on Vancouver Island, the Canadian government under the Honourable Pierre Elliott Trudeau issued the 1969 White Paper. Former Prime Minister Jean Chretien, then the Minister of Indian Affairs, proposed doing away with the Indian Affairs Department and the *Indian Act*, thereby eliminating First Nations and Indians registered under the *Act*, asserting that all Canadians should have the same rights. The White Paper received a violent and negative reaction from First Nations across Canada. In 1973, a formal statement was made at Queen's University withdrawing the White Paper and acknowledging the existence of Aboriginal rights in Canada.

Observatory Inlet, Portland Inlet and Portland Canal, in northwestern British Columbia. Justices Martland, Judson and Ritchie agreed in *obiter*, unlike the Privy Council in *St. Catherine's*, that the *Royal Proclamation of 1763* was not the “exclusive source of Indian title,”²⁸⁷ and moreover, it did not apply to the land in question. A partial definition of Aboriginal title, recognizing a different interest from that of the Privy Council, is provided by the Court in the denial of *Royal Proclamation of 1763* jurisdiction reaching to British Columbia. The statement provided was:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.²⁸⁸

The difference in this definition of Aboriginal title is the confirmation that First Nations had customary societal and governmental structures and were occupying their territorial land in a traditional manner. The phrase proposed by the Nisga'a that is recognized today to describe their occupation and use of the land was “since time immemorial.”²⁸⁹ The phrase depicts a relationship of longevity conveying a far different right or interest in the land than just a simple right to use or usufruct.

However, Mr. Justice Judson followed the British Columbia government's argument that the series of legislation issued under James Douglas, appointed Governor of the British Columbia Colony in 1851, extinguished any existing title or rights to the territory after 1858, if any existed in

²⁸⁷ *Calder, ibid.*, at 5.

²⁸⁸ *Calder, ibid.*, at 7.

²⁸⁹ *Calder, ibid.*, at 14.

the first place.²⁹⁰ The three Justices agreed with Mr. Justice Pigeon that the appeal should be dismissed.

The dissenting opinion presented by Mr. Justice Hall stated that the determination of Aboriginal title's nature and scope was not necessary for this case. He said:

The precise nature and value of that right or title would, of course, be most relevant in any litigation that might follow extinguishment in the future because in such an event, according to common law, the expropriation of private rights by the government under the prerogative necessitates the payment of compensation: *Newcastle Breweries Ltd. v. The King* [[1920] 1 K.B. 854]. Only express words to that effect in an enactment would authorize a taking without compensation. This proposition has been extended to Canada in *Montreal v. Montreal Harbour Commission* [[1926] A.C. 299]. The principle is so much part of the common law that it even exists in time of war as was made clear in *Attorney General v. DeKeyser's Royal Hotel* [[1920] A.C. 508], and *Burmah Oil Co. v. Lord Advocate* [[1965] A.C. 75]. This is not a claim to title in fee but is in the nature of an equitable title or interest. (see *Cherokee Nation v. State of Georgia* [(1831) 5 Peters 1, 30 U.S. 1]) a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right. The essence of the action is that such rights as the Nishgas possessed in 1858 continue to this date. Accordingly, the declaratory judgment asked for implies that the status quo continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law.²⁹¹

Although the statement concerning compensation was made in the dissenting opinion, it impacts on the interpretation of the 1836 Treaty Bond Head initiated on Manitoulin Island. The common law recognizes that Aboriginal title has to be compensated for when removed by the Crown; removal or extinguishment of Aboriginal title and interest can only be done explicitly in specific legislation;²⁹²

²⁹⁰ *Calder, ibid.*, at 8.

²⁹¹ *Calder, ibid.*, at 16.

²⁹² *Calder, ibid.*, at 17; see also, *Sparrow, supra*, note 209 at para. 51.

the nature of Aboriginal title is equitable, usufructuary and contains the right to occupy, possess and enjoy the resources there; and Aboriginal title exists without removing or affecting the Crown's underlying title to the land.

The dissenting group of Justices found that the *Royal Proclamation of 1763* applied to mainland British Columbia, stating the opinion in *White and Bob* that said it did not, was decided without thorough knowledge and research.²⁹³ They went on to consider the issue of extinguishment of rights whether existing under common law or the *Royal Proclamation of 1763*. Mr. Justice Hall stated: "It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect."²⁹⁴ Further, the need to have formal recognition of the existence of Aboriginal rights/title by the Sovereign government or by legislation was not needed, as proposed by British Columbia.²⁹⁵ The Justices declared that the Nisga'a rights to the land in question were not extinguished and the appeal should be allowed.

Calder was dismissed by the Supreme Court due to a technicality by the tie breaking decision of Mr. Justice Pigeon who did not address the substantive issues in the case because the procedure of obtaining permission to litigate against the British Columbia Crown was not obtained before commencing.²⁹⁶ However, the split decision by the other six Justices provided consideration and

²⁹³ *Calder, ibid.*, at 44.

²⁹⁴ *Calder, ibid.*, at 47 [emphasis in the original].

²⁹⁵ *Calder, ibid.*, at 48, all six Justices agreed on this point.

²⁹⁶ *Calder, ibid.*, at 47.

opinions on the existence of Aboriginal title and rights.

A series of cases heard by Canadian courts on Aboriginal rights followed the *Calder* decision. A few cases considered Aboriginal title such as *Baker Lake v. Minister of Indian Affairs and Northern Development*.²⁹⁷ Among the orders sought by the Inuit was the recognition of Aboriginal title to a large area of land surrounding Baker Lake in the Northwest Territories and to stop permits for mining in the area as a result. The Federal Court dismissed the action though finding an “aboriginal right and title of the Inuit to hunt and fish thereon.”²⁹⁸

In *Guerin*, the S.C.C. considered the actions and duties of the Crown to the Musqueam First Nation when dealing with lands surrendered for lease as a golf course. Chief Justice Dickson for Justices Beetz, Chouinard and Lamer, dismissing Canada’s appeal, described the process of disposing of Indian land as a fiduciary duty on the Crown resulting from Aboriginal title that can only be surrendered to the Crown and must be done for the Indians’ benefit. He stated:

the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. [...] The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. [...] the conclusion, that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown. [...] The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.²⁹⁹

However, a fiduciary duty will not always arise, according to this decision.

²⁹⁷ *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (F.C.T.D.) [hereinafter *Baker Lake*] online QL: (FCJ).

²⁹⁸ *Baker Lake*, *ibid.*, at para. 139.

²⁹⁹ *Guerin*, *supra*, note 10 at 23.

When examining “the basis of aboriginal title and the nature of the interest in land which it represents,”³⁰⁰ Chief Justice Dickson stated that an Indian interest in the land was not created by the *Royal Proclamation of 1763*, *Indian Act* provisions or other legislation, as it stemmed from a pre-existing legal right. Further, the interest in reserve land and Aboriginal title in traditional territory was the same.³⁰¹ He noted that the Musqueam reserve was part of their traditional territory, the reserve being formed by the unilateral actions of the Colonial government before Confederation.³⁰² Wikwemikong’s reserve was also created by unilateral Colonial government actions. The nature of Aboriginal title or interest was ascribed by the Court with two characteristics – inalienability to third parties and an obligation on the Crown to handle the surrendered land in the best interests of the Indians.

The first case that examined the nature and scope of common law Aboriginal title in Canada as protected by s. 35(1) of the *Constitution Act, 1982*, was *Delgamuukw v. British Columbia*,³⁰³ which was heard by the S.C.C. over 20 years after *Calder*. Although the original claim was in fee simple, the Gitksan and Wet’suwet’en claimed Aboriginal title to a total of 58,000 square kilometres, being 133 individual territories owned by 71 hereditary houses in British Columbia. The S.C.C. allowed the First Nations’ appeal in part and dismissed the cross-appeal and ordered a new trail.

In this case, Chief Justice Lamer supported his statement in *R v. Van der Peet*,³⁰⁴ when

³⁰⁰ *Guerin, ibid.*

³⁰¹ *Guerin, ibid.* at 24

³⁰² *Guerin, ibid.* at 24-25.

³⁰³ *Delgamuukw, supra*, note 14.

³⁰⁴ *R v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.) online: QL (SCR) [hereinafter *Van der Peet*].

dealing with Aboriginal oral testimony, “that the ordinary rule of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.”³⁰⁵ He called for a new trial for two reasons: (1) the trial judge did not give sufficient weight to the First Nations’ oral testimony that related specifically to the land in question; and (2) the entire nature of the legal argument had changed before the S.C.C. without the foundation having been laid for Aboriginal title at trial. Chief Justice Lamer directed that the facts and oral testimony presented at the new trial should be considered using the principles from *Van der Peet*.

The content of Aboriginal title and its entrenchment in s. 35(1) of the *Constitution Act, 1982*, were examined by Chief Justice Lamer to provide guidance for the new trial. He found the Privy Council term “personal and usufructuary” in *St. Catherine’s* was not useful. The different interest aspects of Aboriginal title were better defined by the term *sui generis*. John Borrows and Leonard Rotman provide the literal translation of *sui generis* to mean “of its own kind or class.”³⁰⁶ Chief Justice Lamer stated “[a]s with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives,”³⁰⁷ providing for an inclusive broadened description. As stated above, the concept of Aboriginal title does not fit within Canadian property law or Indigenous legal systems.

Starting at paragraph 113 to 115 of *Delgamuukw*, Chief Justice Lamer outlined the nature of Aboriginal title. Briefly, the attributes enumerated were:

Inalienability to third parties; can only be transferred, sold or surrendered to

³⁰⁵ *Delgamuukw*, *supra*, note 14 at para. 105.

³⁰⁶ J. Borrows & I.L. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 *Alta. L. Rev.* (No. 1) 9 at 2 online: QL (ABRT).

³⁰⁷ *Delgamuukw*, *supra*, note 14 at para. 112.

the Crown; it provides a proprietary interest;
Source of Aboriginal title is the prior occupation by the Aboriginal group; physical occupation relates to the common law principle of possession and arises before British asserted sovereignty to the territory; this is the connection between common law and the pre-existing Aboriginal law systems; and
Communally held right that cannot be held by an individual.³⁰⁸

Another important corollary advancement for Aboriginal groups resulting from this decision was the recognition that customary systems of governance pre-existed contact and were in place up to the assertion of British sovereignty in their territory and beyond.

The scope or content of Aboriginal title was examined next. Chief Justice Lamer found that there were two aspects. He stated:

First, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.³⁰⁹

He did not hold Aboriginal groups to a traditional exclusive use of the land specific only to their national culture. However, in his opinion, there was an inherent limit in how the land in question was used. The historical use must be able to connect to the present and flow through the present continuing into the future without breaking the relationship to the land.³¹⁰ Strip mining was one of the examples given that would destroy the relationship to the territorial land. He compared the limit to that of the doctrine of equitable waste of a person holding a life estate in real property law.³¹¹

Mr. Justice La Forest, while agreeing with the Chief Justice's result, objected in part to the

³⁰⁸ *Delgamuukw, ibid.*, at para 113 - 115.

³⁰⁹ *Delgamuukw, ibid.*, at para. 117.

³¹⁰ *Delgamuukw, ibid.*, at para. 126 - 128.

³¹¹ *Delgamuukw, ibid.*, at para. 130.

methodology put forward in his decision. In his opinion the continued occupation of a territory may not be interrupted if relocation of the Aboriginal group takes place post-sovereignty. He stated: “continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.”³¹² The claimant group would then still have existing unextinguished Aboriginal title derived from possession of the land through exclusive occupation. Further, he found that use of remote hunting areas by the group recognizes the “*central significance* to them”³¹³ of the territory.

Differing in his opinion on the second part of the justification test, Mr. Justice La Forest asserted that the Aboriginal group’s rights should be accommodated. He states: “legislative objectives are subject to accommodation of the aboriginal peoples’ interests. This accommodation must always be in accordance with the honour and good faith of the Crown.”³¹⁴ He agreed compensation for the infringement of the Aboriginal title, as outlined in the *Royal Proclamation* and *Sparrow*, should be provided.

The Honourable Justice Daigle, New Brunswick Court of Appeal, in finding for acquittal in the split *Bernard v. R.* decision,³¹⁵ summed up the importance of the definitions, scope and nature

³¹² *Delgamuukw, ibid.*, at para. 197.

³¹³ *Delgamuukw, ibid.* at para. 199 [emphasis in the original].

³¹⁴ *Delgamuukw, ibid.*, at para. 203.

³¹⁵ *Bernard v. R.*, 2003 NBCA 55, [2003] N.B.J. 320 (N.B.C.A.) online: QL (LNT) [hereinafter *Bernard*]; see also, *R. v. Paul (appeal by Sockabasin et al.)*, [2003] N.B.J. No. 338 (N.B.C.A.) online: QL (ABJ) [hereinafter *Paul*]. To claim a treaty right the nine convicted appellants in *Paul* had the onus to prove they harvested the trees only to earn a moderate livelihood. The Court said they failed. One appellant, who harvested trees on another First Nation’s territory, had the onus to prove he had an Aboriginal right to harvest there and failed. The S.C.C. has granted leave to appeal the *Bernard* decision.

of Aboriginal title. Joshua Bernard was convicted for possession of timber cut on Crown land outside his Eel Ground Reserve. He claimed treaty rights and Aboriginal title held by the Miramichi Mi'kmaq as the basis of his right to harvest the timber on the Crown land in question. After reviewing the caselaw on Aboriginal rights and title, he stated: "the issue of the interpretation and weighing of the evidence is central to the resolution of the aboriginal title."³¹⁶ All three Justices provided lengthy decisions in *Bernard*, demonstrating the reluctance to overturn findings of fact at trial and the difficulty in interpreting and assigning weight to oral evidence.

4.2 Proving Aboriginal Title

"Once aboriginal title is established, it is presumed to continue until the contrary is proven."³¹⁷ The burden of proving that valid unextinguished Aboriginal title exists falls on the Indigenous group asserting the right. Sometimes the task seems particularly onerous to the claimant nation in light of the evidence of many fiduciary breaches by federal and provincial governments in the past and the lack of written histories. Despite the decision by the S.C.C. in *Delgamuukw*, oral testimony is not always given equal weight. An example is in *Kingfisher v. Canada*,³¹⁸ a determination of Chief Chipeewyan Band beneficiaries, where the trial judge accepted oral evidence to the extent that it was substantiated by expert historian evidence. The weight of the oral evidence presented in the case was not addressed in the Court of Appeal decision.³¹⁹

Chief Justice McLachlin for the majority, in *Mitchell v. Canada (Minister of National*

³¹⁶ *Bernard, ibid.*, para. 44.

³¹⁷ *Calder, supra*, note 286 at 46 quoting Viscount Haldane in *Amodu Tijani* at 409-10.

³¹⁸ *Kingfisher v. Canada*, [2001] F.C.J. No. 1229 (F.C.T.D.) online: QL (FCJ).

³¹⁹ *Kingfisher v. Canada*, [2002] F.C.J. No. 831 (F.C.A.) online: QL (FCJ).

Revenue - M.N.R.),³²⁰ affirms the difficulty of the burden of proof when relying on oral evidence and states it should be given consideration as evidence. However, she narrows the scope of oral evidence, despite admonishing judges not to be Eurocentric in the use of their discretion.³²¹ She states:

it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense".³²²

Judges relying on this conservative, albeit flexible, approach to the admission of evidence in Aboriginal claims cases in relation to oral testimony, may result in the same outcome as *Kingfisher*. A true understanding and equal weight to the Aboriginal group's legal and cultural systems existence pre-sovereignty is necessary for a fair assessment of unextinguished Aboriginal title.

In a treaty context, *Benoit* is a good example of the importance given oral testimony. The trial judge gave a great deal of weight to the oral testimony given and, unlike the trier of first instance in *Kingfisher*, did not require it to be substantiated by expert testimony or historical written evidence.³²³ The Federal Court of Appeal overturned the *Benoit* decision. In so doing, the Court said:

³²⁰ *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] 1 S.C.R.911 (S.C.C.) online: QL (SCC) [hereinafter *Mitchell*]. The case involved a determination of a Mohawk from Akwesasne's assertion of treaty and Aboriginal rights exempting him from paying duty on goods imported across the United States-Canada border.

³²¹ *Mitchell, ibid.* at para. 34.

³²² *Mitchell, ibid.* at para. 38 [footnotes omitted; emphasis in the original].

³²³ *Benoit*, (F.C.T.D.), *supra*, note 110.

oral history evidence cannot be accepted, per se, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archaeologists, social scientists, apply to the various types of evidence which they have to deal with.

My specific purpose [...] is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution.³²⁴

An important part of Aboriginal culture is oral tradition. Therefore, the acceptance of oral evidence without the necessity to withstand the expert scrutiny is essential to allow First Nations to adequately discharge the burden of proof of Aboriginal title.

A summary of the underlying principles of evidence for admission of testimony from *Mitchell* that relate to determination of Aboriginal rights, according to Chief Justice McLachlin, are:

First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge. Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed.

Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. [R]eliability: does the witness represent a reasonably reliable source of the particular people's history? However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.³²⁵

The first and second principles of what is useful and reasonable evidence are completely at the discretion of the judge in each case. Discretion is the third principle. It is the discretionary aspect of the admission and weighing of evidence where differing results may be found in the courts'

³²⁴ *Benoit*, (F.C.A.), *supra*, note 110 para. 113.

³²⁵ *Mitchell*, *supra*, note 320 at paras30-33 [emphasis added].

decisions. Appeal courts tend to defer to the judge of first instance for the assessment of facts. The *Bernard* decision resulted in allowing the appeal, due in part, to finding the trial judge erred in interpreting the facts which is rare.

Chief Justice Lamer stated in *Delgamuukw* that the test for Aboriginal rights as detailed in *Van der Peet* had to be adapted for Aboriginal title, especially as it relates to the timing of European contact versus exertion of European sovereignty. The test for the proof of Aboriginal title that must be satisfied by an Aboriginal claimant group, according to Chief Justice Lamer, is:

- (i) the land must have been occupied prior to sovereignty,
- (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
- (iii) at sovereignty, that occupation must have been exclusive.³²⁶

The first criteria differs from the test for an existing Aboriginal right in that for a right the test is pre-contact not at the time of sovereignty. Pre-contact would mean the First Nation group asserting the right to hunt in a specific area, for example, must be able to prove that before first contact with European colonizers hunting was carried on in that area by their group.

The second criteria, present occupation, did not require an “unbroken chain of continuity.”³²⁷

³²⁶ *Delgamuukw*, *supra*, note 14 at para. 143. The S.C.C. released its decision in *R. v. Powley*, [2003] S.C.J. No. 43 (S.C.C.) online: QL (ABRQ) [hereinafter *Powley*], a Metis assertion of the right to hunt out of season contrary to Ontario provincial law. The *Van der Peet* test for establishing an Aboriginal right was altered to recognize Metis rights point of origin as the time of contact altering the pre-contact requirement. Among the presenters and attendees at the Indigenous Bar Association 11th Annual Conference held October 16-17, 2003, in Vancouver, was the expectation that the *Powley* decision would have an impact on the pre-contact test expected to be proven by First Nations. Professor Larry Chartrand presented another area of impact, from his point of view, in his presentation to the Senate Aboriginal Affairs Standing Committee on October 1, 2003, stating that the Metis people in Canada should be included in the Specific Claims process and Bill C-6, *Specific Claims Act*, should be altered to reflect the *Powley* decision.

³²⁷ *Delgamuukw*, *ibid.*, at para. 153.

However, a tie to the claimed land must be evident. Supporting the exclusive control of the territorial land by the group asserting title, Chief Justice Lamer again stated that common law and Aboriginal perspectives should be given equal weight.³²⁸ Another Aboriginal group's use of the land, in the manner of trespass or with permission, would not negate Aboriginal title. Joint title was a possibility envisioned in this decision.

Aboriginal title being a right recognized and affirmed in s. 35(1) of the *Constitution Act, 1982* is not absolute and may be infringed by federal or provincial governments.³²⁹ Once an Aboriginal right has been proven, the onus of proof on the balance of probabilities then switches to the government to prove the right does not exist. As with any Aboriginal right, it must pass the justification test for that infringement as determined by the S.C.C. in *Sparrow* and *R. v. Gladstone*.³³⁰ The two part infringement test is: (1) "The infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial",³³¹ and (2) "Whether the infringement is consistent with the special fiduciary relationship between Crown and aboriginal peoples."³³² The second part of the test requires that Aboriginal rights be given priority of consideration, but that priority and the way it is addressed may vary with each claim. Consultation with a First Nations group before implementing government legislation may be considered that

³²⁸ *Delgamuukw, ibid.*, at para. 156.

³²⁹ *Delgamuukw, ibid.*, at para. 160.

³³⁰ *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) online: QL (SCJ) [hereinafter *Gladstone*].

³³¹ *Delgamuukw, supra*, note 14 at para. 161.

³³² *Delgamuukw, ibid.*, at para. 162.

priority was given.³³³

Calling justification for infringing Aboriginal title, “reconciliation” of historical possession with British sovereignty,³³⁴ he stated:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.³³⁵

According to the statement, making way for European settlers can be a justifiable infringement. The decision in *Calder* requires that “[p]roof of Aboriginal title or interest is to be made out as a matter of fact,”³³⁶ on a case by case basis.³³⁷

However, Chief Justice Lamer stated that the second part of the infringement test and fiduciary duty changes when dealing with Aboriginal title rather than hunting or fishing rights, due to the economic aspect contained in that title and the ability to choose how the land may be used.

³³³ See, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.) online: AOL <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc073.wpd.html>> [hereinafter *Haida*]; and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (S.C.C.) online: AOL <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc074.wpd.html>> [hereinafter *Taku River*] at paras. 1-2. The November 18, 2004, S.C.C. decision in *Taku River*, following *Haida*, stated that the Crown (provincial and federal) has a duty to consult with First Nations when making decisions “that may adversely affect as yet unproven Aboriginal rights and title claims.” Further, the Crown may be required to accommodate the First Nation, however, agreement need not be reached on the issue in question.

³³⁴ *Delgamuukw*, *ibid.*, *supra*, note 14 at para. 165.

³³⁵ *Delgamuukw*, *ibid.*

³³⁶ *Calder*, *supra*, note 286 at 17.

³³⁷ *Delgamuukw*, *supra*, note 14 at para. 165.

Therefore, according to him, “[t]here is always a duty of consultation,”³³⁸ whether giving priority to the Aboriginal group or not to whatever economic activity may be planned for the land. Aboriginal title when breached, to uphold the honour and good faith of the Crown, means “fair compensation will ordinarily be required when aboriginal title is infringed.”³³⁹

As stated earlier the onus to prove Aboriginal title, according to the S.C.C. decision in *Delgamuukw*, rests with Wikwemikong. The three criteria that must be met are:

- (i) the land must have been occupied prior to sovereignty,
- (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
- (iii) at sovereignty, that occupation must have been exclusive.³⁴⁰

Stuart Rush provided a summary of the elements for proving Aboriginal title as outlined in *Delgamuukw* in his presentation at the Pacific Business & Law Institute Conference, *Litigating Aboriginal Law*. Mr. Rush provides a further breakdown of the Aboriginal title elements. The breakdown makes the criteria for meeting the test for Aboriginal title more accessible. The list of elements, as provided by Mr. Rush, is:

- occupation of land prior to sovereignty; or
- present occupation of land with continuity to pre-sovereignty occupation;
- substantial connection to the land;

³³⁸ *Delgamuukw, ibid.*, at para. 168.

³³⁹ *Delgamuukw, ibid.*, at para. 169. See, *Haida, supra* note 333 at paras. 39-51. The requirement to consult, possibly accommodate and compensate when making decisions that may adversely affect Aboriginal rights and title, including unproven, stemmed from upholding the honour of the Crown. The S.C.C. said the duty to consult and accommodate would vary according to a spectrum that reflected impact on and strength of the group’s claim. See also, *Taku River, supra* note 333. The two 2004 S.C.C. decisions were delivered after the paper was submitted for defence. The author thought it was important to include them. There are varying opinions on the impact that the decisions may have for Aboriginal people, the governments and third party proponents.

³⁴⁰ *Delgamuukw, ibid.* at para. 143; see also, *Bernard, supra*, note 315 at para. 437.

- exclusivity of occupation;
- collective occupation by a distinctive nation;
- reasonably defined geographic area occupied; and
- occupation by physical possession or land-tenure system.³⁴¹

4.3 Analysis

4.3.1 Occupation of Land Prior to Sovereignty

The Odawa and Ojibway carried on their fur trade activity with the French. First contact had been with the French. However, for the purposes of Aboriginal title, the important time period is when Britain claimed sovereignty to the area. Rupert's Land, owned by the Hudson's Bay Company, as granted by England in 1670, was north of Lake Superior and did not reach down to Lake Huron where Manitoulin Island is situated.

The period of time that Britain claimed sovereignty over this area through the Doctrine of Discovery by conquest was initiated with the signing of the Treaty of Paris in 1763.³⁴² At the time of the *Royal Proclamation of 1763*, Manitoulin Island was part of the Indian Country that "not having been ceded to or purchased by Us, as reserved to them, or any of them, as their Hunting Ground."³⁴³ However, if the *Royal Proclamation of 1763* applies to British Columbia, as decided

³⁴¹ S. Rush, "Proof of Aboriginal Title-Interpreting Delgamuukw" (*Litigating Aboriginal Law*, Pacific Business & Law Institute Conference, Ottawa, 6-7 June 2002) (Vancouver: Pacific Business & Law Institute, 2002) at 8.

³⁴² In their Lake Bed Statement of Claim, the Chippewas of Nawash and Saugeen concede that England was winning battles against the French in 1759-60 and had ships sailing the Great Lakes in 1760. See *Chippewas of Nawash Unceded First Nation and Saugeen First Nation v. Attorney General of Canada and Her Majesty the Queen in Right of Ontario*, (Plaintiff's Statement of Claim at para. 16) unregistered version (Ont. S.C.) online: AOL <<http://www.bmts.com/~dibaudjimoh/page3.html>> (date accessed: 30 August 2004).

³⁴³ *Royal Proclamation of 1763*, *supra*, note 7.

by the S.C.C. in *Delgamuukw*,³⁴⁴ then it applies to this area of Upper Canada/Ontario.³⁴⁵

Although not a popular interpretation with First Nations, the *Royal Proclamation of 1763* has been found by the courts to be an assertion of sovereignty by England.³⁴⁶ The portion of the *Royal Proclamation of 1763* that was relied on to support the declaration of sovereignty was: “And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments.”³⁴⁷

John Borrows asserted that the Odawa and Ojibway occupied Manitoulin and surrounding islands from time immemorial.³⁴⁸ Other historians described the ten thousand year occupation by the Indigenous ancestors of Wiky. Wikwemikong in their claim for the surrounding islands, state the Odawa were there by 1670, living and using the many resources of the territory as described earlier. The assertion in Chapter Two that Wikwemikong had pre-contact, thus pre-sovereignty, control of this area is supported by the fact that the Crown entered into Treaty with the First Nations group resident there on two occasions. Therefore, Wiky’s ancestors occupied the land before the assertion of sovereignty by England to this portion of Ontario.

4.3.2 Present Occupation of Land with Continuity to Pre-Sovereignty Occupation

Unquestionably, Wikwemikong currently occupies their territory on Manitoulin Island where

³⁴⁴ *Delgamuukw*, *supra*, note 14 at para. 200.

³⁴⁵ *Delgamuukw*, *ibid.*

³⁴⁶ See, *Sawridge Band v. Canada (T.D.)*, [1995] F.C.J. No. 1013; [1996] 1 F.C. 3 (F.C.T.D.) at paras. 28-30 online: QL: (ABRQ) [hereinafter *Sawridge*].

³⁴⁷ *Royal Proclamation of 1763*, *supra*, note 7; see also, *Sawridge*, *ibid.*

³⁴⁸ Borrows, *supra*, note 119 at 22.

the members continue to use the available resources. Whatever the effect of the 1836 Treaty, it had no practical impact on the occupation of the Manitoulin Island Indigenous residents. Although there is some uncertainty as to when occupation began, it is well established that occupation pre-dated European sovereignty.

4.3.3 Substantial Connection to the Land

Mr. Justice Iacobucci provided the majority decision for the S.C.C. in *Osoyoos* where a British Columbia First Nation taxed a local city for a cement ditch crossing their reserve. Finding the First Nation still retained enough interest in the surrendered reserve to tax the city, he described the interest in reserve land and Aboriginal title, though different interests with similarities, to be the same *sui generis* in nature.³⁴⁹ He stated:

The features common to both the aboriginal interest in reserve land and aboriginal title include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally. Thus, it is now firmly [...] established that both types of native land rights are *sui generis* interests in the land that are distinct from "normal" proprietary interests³⁵⁰ [...] The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.³⁵¹

Although using a European law term, *sui generis*, to name the interest, Mr. Justice Iacobucci recognized the special relationship First Nations experience with their land whether reserve or traditional territory.

Wikwemikong First Nation has such a special substantial and holistic connection to their territory, Manitoulin Island. This is the unique value of which Mr. Justice Iacobucci spoke. The

³⁴⁹ *Osoyoos*, *supra*, note 210 at para. 42.

³⁵⁰ *Osoyoos*, *ibid.*, [emphasis in the original].

³⁵¹ *Osoyoos*, *ibid.*, at para. 46.

relationship to the land is as integral and substantial as life itself. All the concepts of Aboriginal title – the criteria and test for finding an Aboriginal right – come from Western legal thought.³⁵² The relationship and connection between the land and the Wiky members is hard to define with European concepts. *Delgamuukw* recognized that Aboriginal legal systems could aid in understanding a First Nation group's relationship with the traditional territory over which they are claiming an Aboriginal title or right.

Wikwemikong's active resistance to surrendering their territory and resources for settlement demonstrates their ardent connection to, and reliance on, the land. Their economic and sustenance activities, such as hunting, fishing, maple syrup production, wood for the steam boats and the trading of those harvested goods exhibits their substantial connection to the land. Belonging and connection to their traditional territory could be experienced by the members in the simple act of smelling the air. It is home.

4.3.4 Exclusivity of Occupation

There are two Nation groups, the Odawa and Ojibway, that used and occupied Manitoulin Island. The Potawatami did not settle permanently there, but in the United States and other areas in southern Ontario such as Walpole Island, Kettle and Stony Point and Moose Deer Point. The decision in *Delgamuukw* allowed for permission to be granted, including by means of treaty, to other groups to reside on their territory without affecting their assertion of exclusivity.³⁵³ The S.C.C. stated:

³⁵² See, P.H. Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence", (1998) 61 Sask. L. Rev. 247.

³⁵³ *Delgamuukw*, *supra*, note 14 at para. 157

aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.³⁵⁴

More than one group can exclusively claim the same area. The S.C.C. in *Delgamuukw* stated:

Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else.³⁵⁵

Exclusivity of occupation by the Odawa and Ojibway at the time of European sovereignty is clear and it continued to exist until the making of the Treaty of 1836.³⁵⁶ The Wikwemikong First Nation would have no trouble establishing this fact through oral evidence. It is almost certain that expert testimony from archaeologists and anthropologists would substantiate this assertion if necessary.³⁵⁷

The fact the Crown entered into an agreement with the Odawa and Ojibway to allow other First Nations to move to the area, is a tacit recognition of the exclusive occupation by those two groups. The number of First Nations that moved to the Island as a result of the 1836 Treaty is unknown. However, any First Nations that did move to the Island following the making of the Treaty did so by permission, which would support the assertion of exclusive occupation by the signatories to the Treaty. Chief Justice Lamer in *Delgamuukw* stated: "A consideration of the

³⁵⁴ *Delgamuukw, ibid.*

³⁵⁵ *Delgamuukw, ibid.*, at para. 158.

³⁵⁶ The author was told by a Manitoulin Island Elder of rocks located throughout the area capable of making, when struck, different sounds that were used by the resident groups as a system of communication and warning.

³⁵⁷ Archaeological work has been done and continues to be done on Manitoulin Island.

aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title.”³⁵⁸ The Crown, whether intending to or not, recognized that the Manitoulin Island residents’ Aboriginal title was retained, including Wikwemikong, by including them in the 1836 Treaty and by seeking to extinguish it through the 1862 Treaty.

4.3.5 Collective Occupation by a Distinctive Nation

All the family groups of the Odawa and Ojibway that occupied and used Manitoulin Island and surrounding area, including the mainland, did so collectively. Collective ownership is one of the contrasting factors between fee simple ownership and Aboriginal title ownership.

Hunting and trapping areas would have been utilized by the smaller family groups. The trapping and hunting trails would not necessarily be in the same location. However, the whole group utilized the resources within the entirety of their traditional territory. The smaller groups came together in their larger Nation group at different times of the year for ceremony and socializing. The Nations were distinctive or the Crown would not have been able to determine with which group to treat in 1836 and 1862.

The Treaty of 1836 ensured the collective occupation of Manitoulin Island by not only the resident Odawa and Ojibway but that of any First Nation group that wanted to join them. Very few other groups moved there. The control of the communities continued without disruption or the Crown would not have declared their attempt at isolation policy unsuccessful.

4.3.6 Reasonably Defined Geographic Area Occupied

³⁵⁸ *Delgamuukw*, *supra*, note 14 at para. 157.

This element is easily met. The area occupied and used seasonally by the ancestors and modern day members of the Wikwemikong First Nation are beyond their reserve on the eastern part of Manitoulin Island. Wikwemikong’s claim of the surrounding islands and successful pending return of Point Grondine demonstrate that the geographic area occupied went beyond just their reserve area. Since this paper is only concerned with the Manitoulin Island that includes Wiky’s reserve land, the element is met.

4.3.7 Occupation by Physical Possession or Land-Tenure System

There is no question that the ancestors of Wikwemikong occupied the area physically. The historical background given provides information on the physical occupation of the Odawa and Ojibway. They engaged in cyclical resource gathering and the more sedentary agriculture activities. A system of land-tenure would have been in place defining where the different family groups making up the larger Nation would hunt and trap. The Indigenous knowledge that applied to the resource management would coincide with land-tenure. The oral history, stories and ceremonies of the Wikwemikong First Nation would describe the land-tenure system.

4.4 Summary

A brief summary of the analysis for proving Wikwemikong First Nation has Aboriginal title to Manitoulin Island including their reserve is provided below.

ELEMENT TO BE PROVEN	WIKWEMIKONG FIRST NATION
Occupation of Land Prior to Sovereignty	Present on the Island and established by 1670 British sovereignty to this area as of 1763 - possibly 1760 at the earliest
Present Occupation of Land with Continuity to Pre-Sovereignty Occupation	Resided on the Island with continuity

Substantial Connection to the Land	Holistic substantial connection to the land through use and occupation
Exclusivity of Occupation	Two Nation groups can exercise exclusive control of the same area; permission to other groups does not affect the finding of exclusive occupation
Collective Occupation by a Distinctive Nation	The Odawa and Ojibway were distinct nations
Reasonably Defined Geographic Area Occupied	The area is reasonably defined since it is Manitoulin Island
Occupation by Physical Possession or Land-Tenure System	Occupation substantiated by oral histories, and expert evidence

CHAPTER FIVE: CONCLUSION: WHAT IT MEANS FOR WIKWEMIKONG

It is clear from the proceeding discussion that the situation of Wikwemikong First Nation meets all the tests set out in the case law. Historical information, treaty interpretation and analysis of the elements needed to prove Aboriginal title confirm that Wikwemikong First Nation retains Aboriginal title to Manitoulin Island, including their reserve. It answers the question “Can Wikwemikong’s Aboriginal title still exist given the language in the 1836 and 1862 Manitoulin Island Treaties and the surrounding government actions?” in the affirmative.

The application of the principles of treaty interpretation to the Bond Head Treaty of 1836 demonstrates that the Crown did not follow the necessary procedures to obtain a valid surrender. The language and content of the Manitoulin Treaty of 1836 were not clear and plain enough to constitute extinguishment of Aboriginal title or the intent on the part the Manitoulin residents to cede or surrender their control and Aboriginal title to the Crown. What Sir Francis Bond Head received was the First Nations’ agreement to share the Island with other First Nations. The government would have control over which First Nations would relocate to Manitoulin Island. The common intent that best reconciles the parties’ interests was not surrender but agreement to share. Wikwemikong and the other First Nations on Manitoulin Island would still be in control of their traditional territory and Bond Head would achieve his isolationist policy while clearing the way for further European settlement and economic activity on the mainland.

Sir Francis Bond Head admitted a more formal document should be drafted as the Treaty that was signed lacked legal language and format, yet none followed. Therefore, the ancestral residents of Wikwemikong did not cede their Aboriginal title to Manitoulin Island when they participated in

the Bond Head Treaty of 1836. If that interpretation is incorrect, then they were immediately given back ownership after the Treaty was signed by being allowed to reside on the Island where the Crown had withdrawn its claim. Wikwemikong still retained Aboriginal title after August 9, 1836.

At the time of the 1862 Treaty, the Crown was well informed regarding the treaty process. Legislation had been passed confirming the provisions of the *Royal Proclamation of 1763* and providing that a majority of the chiefs or headmen in any given area had to agree to land surrenders. The government representatives were well enough informed that they knew compensation had to be given to the Treaty signatories for ceding their Aboriginal title to Manitoulin Island. Despite this knowledge, the unilateral actions and breaches of procedure by the Crown in 1862 shows that they believed they had the power to do whatever they wanted. To some extent, the procedures for surrendering Aboriginal title as outlined in the *Royal Proclamation of 1763* were followed. However, the government asserted that it had title to the land already as a result of the Treaty of 1836, despite concerns to the contrary expressed in writing by one of the government officials. The Crown representatives virtually told the resident First Nations to make a deal because they had no other recourse.

The Wikwemikong First Nation was well informed and knowledgeable. By refusing to participate in the 1862 McDougall Treaty, they made it very clear that they did not want to extinguish their Aboriginal title. As a result of their resistance, McDougall inserted in the Treaty that it did not include the eastern portion of Manitoulin Island thereby creating Wikwemikong's unceded reserve. Despite their refusal to participate, he included a statement in the Treaty that Wikwemikong agreed to the ceding of the rest of the Island. By these facts alone, if Wikwemikong decides to bring the claim forward for their Aboriginal title to Manitoulin Island, the level of

compensation should be high. The Wikwemikong First Nation still retains Aboriginal title to their reserve and the rest of Manitoulin Island, including the portion of the Island ceded by other First Nations in the Manitoulin Island Treaty of 1862. By not signing along with other Manitoulin Island First Nations in the 1990 specific claim, Wikwemikong has not entered into any agreement with the Crown that would alter this finding.

5.1 Implications

There are three avenues open to Wikwemikong if they choose to assert their retained Aboriginal title and interest in their traditionally occupied lands and their reserve land. They could seek restitution through litigation, as they did in the surrounding islands claim, and have the Canadian courts make the decision. Alternatively, they could assert their unextinguished Aboriginal title through Canada's comprehensive land claims policy or bring a specific claim for the breach of fiduciary duty for the way that the Manitoulin Island treaties were negotiated. If one of the latter two avenues is chosen, then Wikwemikong would deal with Canada directly to resolve its outstanding claim through negotiation.

Although the claims process is controversial among Aboriginal people in Canada, no alternative method of resolution outside the present options are available. Most of the First Nations in British Columbia assert that their traditional territories are unsurrendered lands that are being used by the province. Their claims arise from non-participation in an agreement or treaty during the pre-Confederation period or following Confederation with Canada, and existing Aboriginal title on those unsurrendered lands. The process these First Nations take part in, to compensate for the use and surrender of the Aboriginal title to their territorial land, including now the negotiations for self-

government, is comprehensive claims negotiation. The *Nisga'a Final Agreement Act*³⁵⁹ and the *Nunavut Land Claims Agreement Act*³⁶⁰ are examples of completed comprehensive claims or modern treaties.

The method First Nations in Ontario and across Canada use to seek fulfilment of agreement or treaty promises regarding, for instance, reserve land entitlement, annual treaty payments or government mishandling the disposition of surrendered land is the specific claims negotiation process. Point Grondine is an example of a specific claims filed by Wiky with DIAND's Specific Claims Branch. If an application to negotiate a specific claim is rejected by Canada, as decided by the Minister of DIAND, the First Nation may submit the claim for consideration by the Indian Claims Commission (ICC)³⁶¹ in a public inquiry.

The problem facing Aboriginal groups seeking to settle a land claim through either comprehensive or specific claims is the length of time the process takes. Some comprehensive claims have been working through the system for fifteen years. The Nunavut claim was first submitted in 1976 and the final enactment took place on April 1, 1999. The national total of specific claims, as of December 31, 2004, in various stages that have been submitted to DIAND for resolution, is 1,296.³⁶² Canada has not provided an increase of funding allocation for the resolution

³⁵⁹ *An Act to give effect to the Nisga'a Final Agreement*, S.C. 2000, c. 07 [hereinafter *Nisga'a Act*].

³⁶⁰ S.C. 1993, c. 29. The *Nunavut Act*, S.C. 1993, c. 28 established the territory of Nunavut that officially began April 1, 1999.

³⁶¹ ICC, a Commission of Inquiry, was established to enable First Nations to have rejected specific claims considered by an outside body under Order-in-Council P.C. 1991-1329, under Part I of the *Inquiries Act*, amended by P.C. 1992-1730, Consolidated Terms of Reference.

³⁶² Indian and Northern Affairs Canada Website, "National Mini Summary, Specific Claims Branch"(Ottawa: Department of Indian Affairs and Northern Development, December

of First Nations claims at DIAND for several years. The result is continued delays at various stages of the process.

Using litigation as a resolution process can be lengthy, costly and risky. Court resolution of Indian claims sets a precedent that can affect all other First Nations in Canada. DIAND's policy is generally not to fund research on claims or enter into negotiations if a First Nation is in court seeking resolution of a claim against Canada. Also, the doctrine of laches and limitation defences are usually employed by Canada when going to court against pre-Confederation outstanding claims. Litigation may be used as a last resort. For example, a First Nation may submit a specific claim application to DIAND, be rejected, seek inquiry at the ICC, on the recommendation of the Commission negotiate with the Crown and if there is still no satisfactory outcome, then go to court.

Pre-Confederation claims carry an added burden, especially for First Nations located in Ontario. Whether seeking resolution in court or through the claim process, the extent and scope of liability between the federal and provincial Crown is raised. The *Constitution Act, 1867*, created two separate provinces—Ontario and Quebec—at the time of Confederation. As discussed earlier in this paper, the Colonial debt was split between the two entities and Indian land was to be held in trust by the federal Crown. It is the split of pre-Confederation debt, in part, that the federal Crown relies on to include Ontario as being responsible for the liability owed to First Nations where an outstanding lawful obligation is found. The federal Crown often relies on the fact that it did not exist at the time the breaches of administration or actions occurred and that the responsibility for those breaches did not transfer with Indian land trust. Conversely, Ontario argues Canada carries the full responsibility.

31, 2004) online: AOL <http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf> (date accessed: 21 May 2005).

Two issues that Wikwemikong could put forward in asserting their claim in any of the three choices available to them are fiduciary duty and honour of the Crown. The actions of the colonial government representatives while engaging in the treaty process in 1836 and 1862, calls into question the validity of the Treaties.

5.1.2 Fiduciary Duty

The 1984 S.C.C. decision in *Guerin*, discussed in Chapter Four, was the first instance of recognition that the Crown had a fiduciary duty to First Nations, albeit, that the duty did not always arise. Canadian courts have looked at the fiduciary duty in subsequent cases. However, again any Aboriginal group bringing forward a fiduciary argument does so on a case by case basis. It has been said that the fiduciary duty argument has been overused in attempts to substantiate outstanding Aboriginal claims. In reality, the full scope and extent of the Crown's (provincial and federal) fiduciary responsibility has not been completely determined by the courts.

What constitutes a fiduciary relationship is the transfer of power or property to the fiduciary, the Crown in the Aboriginal/Crown relationship, for the use and benefit of the transferor or beneficiary, the Aboriginal group. The key is that any actions on the part of the government in dealing with Indian land or monies are to be for the use and benefit of the Aboriginal group not the government. The fiduciary relationship would arise when Wikwemikong's title, rights and interests were dealt with by the Crown in the two Manitoulin Island Treaties. Failure of the Crown to act honourably when dealing with Wikwemikong and its traditional territory would constitute a breach. The inappropriate actions and approach taken by the government representatives are enough to question the validity of the two Manitoulin Island Treaties.

Further, the courts when considering the scope and nature of the Aboriginal/Crown fiduciary duty have referred to the relationship as a public law obligation "in the nature of a private law

duty”³⁶³ that “varies with the nature and importance of the interest sought to be protected.”³⁶⁴ Mr. Justice Binnie in the decision in *Weywaykum Indian Band v. Canada* reiterates that the S.C.C., in previously considering reserve creation, stated the Crown should intend to create a reserve and the First Nation should be aware of that fact.³⁶⁵ As a fiduciary, the Crown has an element of discretion in its handling of Aboriginal affairs.³⁶⁶ It is to be exercised in good faith and loyalty³⁶⁷ and in keeping with upholding the honour of the Crown³⁶⁸ for “the best interests of the beneficiaries.”³⁶⁹ Wikwemikong could argue this did not happen in 1836 and 1862.

5.1.3 Honour of the Crown

The honour of the Crown requires that the actions and decisions of the agents or representatives carrying out government policy related to Aboriginal people in Canada were and are done fairly. Wikwemikong could question the honour of the Crown given the manner in which the Manitoulin Island Treaties were handled by Bond Head and McDougall respectively. While acting on an isolationist policy and removing Aboriginal title to make way for settlement may be legitimate reasons for entering into the Treaties, as Crown agents the two groups had to take Wikwemikong’s best interests into consideration. In addition, the fact that the Treaties were subsequently ratified, despite the questionable actions of the agents in obtaining signatories, compounds the question of

³⁶³ *Weywaykum Indian Band v. Canada*, [2002] S.C.J. No. 79 (S.C.C) online: QL (SCJ) at para. 74 quoting from *Guerin* [hereinafter *Weywaykum*].

³⁶⁴ *Weywaykum*, *ibid.* at para. 86(1).

³⁶⁵ *Weywaykum*, *ibid.* at para. 13.

³⁶⁶ *Weywaykum*, *ibid.* at para. 80.

³⁶⁷ *Weywaykum*, *ibid.* at para. 86(2).

³⁶⁸ *Weywaykum*, *ibid.* at para. 80.

³⁶⁹ *Weywaykum*, *ibid.* at para. 86(2).

whether the Crown's actions were honourable in relation to both Treaties. Whether the actions of the representatives in 1836 and 1862 constituted sharp dealings, that *Delgamuukw* and *Van der Peet* state would not uphold the honour of the Crown, could be explored further by Wikwemikong.

Although the honour of the Crown is not a new argument, the recent S.C.C. decisions in *Haida* and *Taku River* now require the provincial and federal governments to meaningfully consult and possibly accommodate First Nations when making decisions that may adversely affect their rights and interests.³⁷⁰ An important aspect of the decisions is that the rights or interests, such as Aboriginal title that are being seriously asserted by the Aboriginal group, do not have to be proven valid before the duty on the part of the government is engaged.³⁷¹ The extent or scope of the government duty to consult and accommodate depends on the seriousness of the right or interest being claimed.³⁷² The fact that Wikwemikong has gone to court to resolve the outstanding rights and interests in the surrounding islands, would assist in demonstrating that a claim for unextinguished Aboriginal title to Manitoulin Island is not frivolous.

5.1.4 Conclusion

No matter which of the avenues discussed above Wikwemikong First Nation may choose to use to assert their unceded rights and interests to all of Manitoulin Island, it will be some time before there is resolution. If they choose to litigate, it will be interesting to see if the court agrees with the conclusions of this paper.

³⁷⁰ *Haida*, *supra*, note 333 at para. 47 ; and *Taku River*, *supra*, note 333 at para. 1.

³⁷¹ *Haida*, *ibid.* at para. 38.

³⁷² *Haida*, *ibid.* at para. 40.

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