

**VOICES IN THE WILDERNESS:
TREATY 3 & THE DISSENT OF THE SUPREME COURT IN *ST. CATHERINE'S***

by

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Abstract

The numbered treaties entered into at and around Confederation set out the terms by which Indigenous peoples and the Crown agreed to live together in much of what is now known as Canada. However, Indigenous peoples and the Crown hold starkly different interpretations of the treaties. For decades, the Crown and courts have relied on the decision in *St. Catherine's Milling and Lumber Company v The Queen* in support of the position that the Indigenous treaty parties surrendered the entirety of their interest in lands at the time of the treaties in exchange for limited rights to use their ancestral lands. Courts' reliance on *St. Catherine's* obscures the fact that in the years closely following Treaty 3, both the Government of Canada and two Supreme Court of Canada justices advanced a different view of the treaty which aligns more closely with the perspective of the Anishinaabe treaty parties

This thesis uses Treaty 3 and the *St. Catherine's* litigation as a focal point to examine the obligations assumed by the Crown in relation to the Indigenous signatories on entering into treaties. Chapter One introduces the topic and objectives of the thesis. Chapter Two sets out the context and circumstances leading up to the conclusion of Treaty 3. Chapter Three provides an overview of the *St. Catherine's* litigation. Chapter Four considers the effect of the Privy Council's decision on treaty interpretation and implementation. Chapter Five provides a detailed exploration of the arguments of the federal government and dissenting judgments in *St. Catherine's*. Chapter Six sets out, on a preliminary basis, possibilities for understanding the treaty relationship when viewed in light of the alternative perspectives from *St. Catherine's*. The thesis concludes that the position of the Dominion and dissenting judges can be used to support an approach to treaty interpretation which could provide a renewed basis for affirming the

Indigenous perspective on the treaty relationship and enforcing the obligations assumed by the Crown at the time of treaty.

Lay Summary

Indigenous peoples and the Crown hold different perspectives on the meaning of the treaties negotiated around the time of Confederation. Indigenous peoples argue that the treaties constitute a nation-to-nation relationship by which they agreed to share lands and resources. By contrast, the Crown's position, based in part on the Privy Council decision in *St. Catherine's Milling and Lumber Company v The Queen*, is that Indigenous peoples surrendered their lands in exchange for specific, limited rights. However, in *St. Catherine's* the federal government and the dissenting judges at the Supreme Court advanced positions which more closely align with those of the Indigenous treaty parties. This thesis considers how the arguments of the federal government and reasons of dissent in *St. Catherine's* can be used to enforce the Crown's treaty promises today. It concludes that these alternative perspectives remain relevant to understanding and implementing the treaties in a manner which more closely aligns with the views of both treaty parties.

Preface

This thesis is original, unpublished, independent work by the author, Kathryn Gunn.

Table of Contents

Abstract.....	iii
Lay Summary	v
Preface.....	vi
Table of Contents	vii
Acknowledgements	ix
Chapter 1: Introduction	1
Chapter 2: Treaty 3 in Context.....	5
2.1 Introduction.....	5
2.2 Governing Principles	5
2.3 Negotiating Treaty 3	14
2.4 The Treaty Agreement	23
2.5 Conclusion	32
Chapter 3: Dominant Perspectives from <i>St. Catherine's</i>.....	34
3.1 Introduction.....	34
3.2 Positions of the Parties in <i>St. Catherine's</i>	35
3.3 The Trial Decision	45
3.4 The Ontario Court of Appeal & Supreme Court of Canada Decisions.....	50
3.5 The Privy Council Decision.....	54
3.6 Conclusion	57
Chapter 4: Impacts of the <i>St. Catherine's</i> Decision	59
4.1 Introduction.....	59

4.2	Impacts on the Treaty Relationship	59
4.3	Impacts on Canadian Jurisprudence.....	61
4.4	Conclusion	68
Chapter 5: Alternative Perspectives from <i>St. Catherine's</i>		69
5.1	Introduction.....	69
5.2	Arguments of the Dominion	70
5.3	The Dissenting Judgements	79
5.4	Conclusion	88
Chapter 6: Possibilities for Understanding the Treaty Relationship		90
6.1	Introduction.....	90
6.2	Fiduciary Obligations and the Crown	91
6.3	Fiduciary Obligations and Treaty 3	100
6.4	Conclusion	113
Chapter 7: Looking Ahead.....		115
Bibliography		120

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Chapter 1: Introduction

The numbered treaties entered into at and around Confederation set out the terms by which Indigenous peoples and the Crown agreed to live together in much of what is now known as Canada. Today, the treaties remain an essential component of Canada's constitutional structure, as evidenced by the recognition and affirmation of treaty rights in the *Constitution Act, 1982*.¹ However, Indigenous peoples and the Crown advance starkly different interpretations of the meaning and intent of the treaties. Indigenous peoples consistently state that the treaties constitute nation-to-nation agreements by which they agreed to share their resources and live in peace with European settlers. The Crown, by contrast, asserts that on entering into treaties the Indigenous parties surrendered their lands and jurisdictional authority in exchange for specific rights and benefits. Canadian courts have generally relied on judicial precedent to interpret the treaties in a manner which supports the Crown's position and which maintains the colonial status quo.

The Judicial Committee of the Privy Council's decision in *St. Catherine's Milling and Lumber Company v The Queen*,² is among the earliest and most influential decisions on the court's interpretation of the treaty relationship. In *St. Catherine's*, the court was asked to determine whether the Dominion of Canada or the Province of Ontario held the beneficial interest to lands surrendered by the Anishinaabeg of Lake of the Woods pursuant to Treaty 3 in

¹ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

² *St. Catherine's Milling and Lumber Company v The Queen* [1888] UKPC 70, 14 App Cas 46 [*St. Catherine's* JCPC decision]. The *St. Catherine's* JCPC decision is located in the Osgoode Hall Law Library, York University, KF8208 S25 in *St. Catharine's Milling and Lumber Company vs. The Queen: Collected Materials*, vol.3, Toronto: Printed by Warwick & Sons, 1886). Volume 2 includes the Factum of the Appellants [Appellants' Factum, *St. Catherine's* SCC]. The lower court decisions in *St. Catherine's* and subsequent literature discussing the proceeding refers to the decision using both "*St. Catherine's*" and "*St. Catharines*." For consistency, "*St. Catherine's*" is used throughout this thesis unless an alternate spelling is used in the specific source cited.

what is now northwestern Ontario and eastern Manitoba. At the Privy Council, Lord Watson held that prior to Treaty 3, the Crown held a full proprietary interest in the lands in question on which “Indian title” was a mere burden, and that after Treaty 3, any remaining rights held by the Anishinaabeg existed only at the pleasure of the Crown. In the result, the Privy Council concluded that the Anishinaabeg held only limited rights to use the lands subject to Treaty 3 and that the Province alone was entitled to benefit from those lands.

The Privy Council’s decision has heavily influenced Canadian courts’ approach to interpreting the numbered treaties. Subsequent cases which address the rights of Indigenous treaty parties and the corresponding obligations of the Crown have proceeded on the assumption that at the time of Confederation the Crown held full title to lands which would become subject to treaty, and that on entering into treaty the Indigenous parties surrendered the entirety of their property interest in lands outside of reserves.³ More broadly, the judicial approach to treaty interpretation following *St. Catherine*’s implicitly supports the Crown’s position that the treaties did not create a nation-to-nation partnership by which the parties would share and benefit together from the lands and resources covered by the treaties.

Despite the pervasive influence of the Privy Council’s *St. Catherine*’s decision, little consideration has been given to the dissenting judgements at the Supreme Court of Canada in subsequent treaty interpretation decisions. The courts’ reliance on the decisions of the trial judge and Privy Council in *St. Catherine*’s overlooks the fact that evidence-based arguments were raised at trial and throughout the appeals in the litigation which diverge sharply from the Privy

³ See for example *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII) [*Grassy Narrows*].

Council's final decision. Counsel for the Dominion argued in *St. Catherine's* that the Anishinaabeg had full title to their lands prior to and at the time of Confederation, and that the entirety of the lands subject to Treaty 3 were to be held by the Dominion for the benefit of the Anishinaabeg. The Dominion's arguments were largely accepted by two of the five Supreme Court justices who heard the appeal in *St. Catherine's*, both of whom issued lengthy dissenting judgements which confirmed that at Confederation the Indigenous signatories to Treaty 3 held title to their lands which could only be divested to the Crown by treaty. Justice Strong affirmed that Canadian practice had always been to recognize that Indian title could only be dealt with via surrender to the Crown, and that Indians held legal rights to land which must be taken into account when federal and provincial powers were distributed at Confederation.⁴ Similarly, Justice Gwynne held that at Confederation the Anishinaabeg held title to their lands which could only be divested by treaty, and that the lands subject to Treaty 3 were to be used by the Dominion to fulfil the Crown's treaty promises.⁵ If recognized by courts today, the arguments of the Dominion and the dissenting judgements at the Supreme Court in *St. Catharine's* could provide a renewed basis for affirming the Indigenous perspective on the treaty relationship and enforcing the obligations assumed by the Crown at the time of treaty.

This thesis will use Treaty 3 and the *St. Catherine's* litigation as a focal point to examine the obligations assumed by the Crown in relation to the Indigenous signatories on entering into treaty. Chapter 1 introduces the topic and objectives of the thesis. Chapter 2 sets out the context and circumstances leading up to the conclusion of Treaty 3 in 1873. Chapter 3 provides an

⁴ *St. Catharine's Milling and Lumber Co. v. R.*, 13 SCR 577, 1887 CanLII 3 (SCC) [*St. Catharine's* SCC].

⁵ *Ibid.*

overview of the *St. Catherine's* litigation. Chapter 4 considers the effect of the Privy Council's decision on treaty interpretation and implementation. Chapter 5 provides a detailed exploration of the arguments of the federal government and dissenting judgments of Justices Strong and Gwynne at the Supreme Court. Chapter 6 describes, on a preliminary basis, renewed possibilities for understanding the treaty relationship when viewed in light of the alternative perspectives from *St. Catharine's*. Chapter 7 sets out my conclusion that the position of the Dominion and dissenting judges can be used today to support an approach to treaty interpretation which is more consistent with the Indigenous-Crown relationship at the time of the treaties and the position advanced by the Indigenous parties today.

Chapter 2: Treaty 3 in Context

2.1 Introduction

In order to understand the judicial treatment of Treaty 3 in both the majority and the dissenting judgements in *St. Catherine's*, it is first necessary to understand the historical and political circumstances in which the treaty was negotiated. This chapter aims to situate the numbered treaties in the context of an extensive history of alliances and agreements based on established inter-societal principles which governed the relations between the Crown and Indigenous peoples prior to and at Confederation, and which led to the eventual negotiation of the agreement known as Treaty 3.⁶

2.2 Governing Principles

Reaching the agreement known as Treaty 3 between the Anishinaabeg and the Crown in 1873 did not occur as an isolated event. Rather, the negotiations were grounded in the context of a lengthy history of Indigenous-Crown alliances and agreements dating back to the arrival of Europeans in North America. When Europeans first arrived in North America, the lands which now comprise Canada were largely occupied and controlled by Indigenous nations based on their own legal systems and traditions governing the use of territories and resources.⁷ In order to extend their reach westward, incoming Europeans were “obliged to maintain extensive sets of

⁶ Slaterry, Brian. “Aboriginal Sovereignty and Imperial Claims.” *Osgoode Hall Law Journal*, vol. 29, no. 4, 1991 [Slaterry 1991] at 702.

⁷ Usher, Peter J., Frank J. Tough, and Robert M. Galois. “Reclaiming the Land: Aboriginal Title, Treaty Rights and Land Claims in Canada.” *Applied Geography*, vol. 12, no. 2, 1992 [Usher] at 111. See also McNeil, Kent. “Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions.” *Sovereignty: Frontiers of Possibility*. Eds. Julie Evans, Ann Genovese, Alexander Reilly, and Patrick Wolfe. Honolulu: University of Hawai'i Press, 2013 [McNeil 2013] and Coates, Ken. “The ‘Gentle’ Occupation: The Settlement of Canada and the Dispossession of First Nations,” in Paul Havemann, ed. *Indigenous Peoples' Rights in Australia, Canada & New Zealand*. (Auckland: Oxford University Press 1999 [Coates] at 142-3.

diplomatic relations” with Indigenous peoples, including by negotiating agreements to facilitate access to territories and resources necessary to sustain settler populations.⁸ As Brian Slattery notes:

From early times, the British Crown cultivated relationships with powerful Aboriginal nations living in the territories adjacent to the British settlements on the Atlantic seaboard- the Micmac, the Iroquois Confederacy, the Cherokee, and many others. These relations took many forms - from Treaties of peace and friendship to seasonal parleys, from military alliances to trading partnerships, from land cessions to mutual guarantees of rights.⁹

For the representatives of European powers in the early days of colonization, entering into alliances and agreements with the Indigenous nations who occupied the lands in question was necessary both as a matter of day-to-day survival and to further their own military, political and economic objectives.

Negotiating treaties with Indigenous nations was also necessary for imperial powers to bolster their claims to sovereignty relative to other colonial nation-states. Under imperial law, sovereignty was acquired based on occupancy, which in turn required that states take effective possession of the territories they claimed.¹⁰ In the early days of colonization, however, imperial claims to sovereignty were largely theoretical. European occupation and control on the ground was minimal, and imperial powers faced considerable difficulties in asserting jurisdictional authority over Indigenous populations.¹¹ If they were to be able to legitimate and sustain their assertions of sovereignty, Europeans needed to assume effective control over the claimed

⁸ Slattery, Brian. “The Hidden Constitution: Aboriginal Rights in Canada.” *The American Journal of Comparative Law*, vol. 32, no. 2, 1984 [Slattery 1984] at 363.

⁹ Slattery, Brian. “The Aboriginal Constitution.” *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 67. (2014) [Slattery 2014] at 323.

¹⁰ McNeil 2013, *supra* note 7 at 3.

¹¹ Slattery 1984, *supra* note 8 at 363.

territories, either by conquest or by cession of Indigenous land interests.¹² Given the significant challenges associated with attempting to conquer Indigenous nations, from early days the British Crown opted to negotiate and seek the consent of Indigenous nations in order open up territories for incoming settlers.¹³ Formal treaty agreements between Indigenous peoples and the Crown became the principle means of obtaining that consent. As such, treaties became an essential element in the process of actualizing British assertions of sovereignty over vast areas of North America and protecting those areas from the claims of competing colonial powers.

For Indigenous peoples, the process of entering into arrangements with incoming Europeans was consistent with established governance systems which included long-standing traditions of negotiating arrangements with other nations to ensure access to the lands and resources were necessary for survival. Far from being unfamiliar with the concept of treaties, Indigenous peoples approached treaty talks with Crown representatives prepared to negotiate for specific, well-articulated demands.¹⁴ At the time of the numbered treaties, documentary records prepared by Crown representatives demonstrate that Indigenous leaders were “well informed about land and resource issues, both in terms of their own needs and of the values Whites placed on them.”¹⁵ In negotiations, leaders were “shrewd in business, adept at diplomacy, and ingenious in coping with threatening social, economic and political change.”¹⁶ They viewed the agreements “as the foundation of a more equitable and substantial role within the rapidly changing colonial

¹² *Ibid.*

¹³ *Ibid.* at 362.

¹⁴ Usher, *supra* note 7 at 118.

¹⁵ Ray, Arthur J., et al. *Bounty and Benevolence: A History of Saskatchewan Treaties*. McGill-Queen’s University Press, Montreal, 2000 [Ray] at 69-70.

¹⁶ *Ibid.* at 209.

society, not as a means of retreating into permanent isolation.”¹⁷ As D.J. Hall explains, at the time of the treaty negotiations, both Indigenous peoples and the Crown “understood at the outset that negotiation and agreement must precede substantial Canadian possession and use of the land, though they did necessarily have the same thing in mind.”¹⁸

The Crown’s approach to treaty-making with the Indigenous nations who occupied North America gained the force of law in 1763 with the issuance of the Royal Proclamation.¹⁹ According to Brian Slattery, the Proclamation itself was rooted in a set of customs and norms which had developed over the preceding century as a result of the numerous alliances and agreements between Indigenous peoples and the Crown.²⁰ These customs, including the process by which the Crown could obtain access to Indigenous lands for immigration and settlement purposes, “were neither wholly Indigenous nor European, but a form of intersocietal law that bridged the gulf between Aboriginal and English legal systems”²¹ and which were recognized as binding by both the Crown and Indigenous nations.²² The Proclamation reflected and formalized the Crown’s existing policy of protecting Indigenous peoples’ land interests from incoming settlers, which itself arose in part as a consequence of inter-societal customs developed throughout the preceding period of colonization.²³ It would also set the stage for subsequent treaty negotiations, including Treaty 3.

¹⁷ Coates, *supra* note 7 at 146.

¹⁸ Hall, D. J. *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905*. McGill-Queen’s University Press, Montreal; Kingston; 2015 [Hall 2015] at 41.

¹⁹ Tobias, John. “Protection, Assimilation, Civilization: An Outline History of Canada’s Indian Policy.” Eds. Ian Getty and Antoine S. Lussier. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. University of British Columbia Press, Vancouver, 1983 [Tobias] at 40.

²⁰ Slattery 1991, *supra* note 6 at 702.

²¹ Slattery 2014, *supra* note 9 at 323.

²² Slattery 1991, *supra* note 6 at 702.

²³ Tobias, *supra* note 19 at 40.

The conquest of New France in 1763 established British dominance relative to other imperial powers in much of North America.²⁴ However, the Indigenous peoples occupying the claimed territories at that time did not view themselves as falling under the Crown's jurisdiction.²⁵ Instead, they continued to function as autonomous nations whose relations with the Crown ranged from various forms of alliance to outright hostility.²⁶ In addition, Indigenous groups in the lands newly-acquired by Britain had made it known that they were increasingly dissatisfied with the impact of encroaching settlers on their livelihood.²⁷ The Crown was faced with the prospect of asserting control over large territories already populated by independent Indigenous nations which did not recognize the Crown's authority and which in many cases were showing growing signs of discontent with the presence of European settlers.

The Proclamation represented the Crown's response to these concerns and its desire to formalize its relations with Indigenous peoples and to set out the terms and conditions for obtaining access to their lands.²⁸ Pursuant to the Proclamation, lands held by Indigenous peoples could not be purchased directly private parties. Rather, those lands could be obtained only "by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay."²⁹ The prohibition on the purchase of Indigenous lands in the Proclamation was a cornerstone in the Crown's plan to "assure the Indians of the Crown's good intentions by removing a principal cause Indian

²⁴ Coates, *supra* note 7 at 143.

²⁵ Slattery 1984, *supra* note 8 at 374.

²⁶ *Ibid.*

²⁷ Morin, Jean-Pierre. "Concepts of Extinguishment in the Upper Canada Land Surrender Treaties, 1764-1862," in *Aboriginal Policy Research*, vol. 7, 2010 [Morin] at 21.

²⁸ Milloy, J.S. "The Early Indian Acts: Developmental Strategy and Constitutional Change." Eds. Ian Getty and Antoine S. Lussier. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. University of British Columbia Press, Vancouver, 1983 at 56.

²⁹ *Guerin v. The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC) [*Guerin*] at 383.

discontent- white intrusion on Indian lands.”³⁰ As Ken Coates argues, the Proclamation constituted “an attempt to contain westward expansion from the American colonies and to prevent further conflict with the Indians” by “effectively barring settlement in ‘Indian Territory’ (and, importantly, providing the legal foundation of subsequent First Nations’ claims for treaty rights).”³¹

The written terms of the Proclamation issued by the Crown must be interpreted in light of the subsequent understanding reached by representatives of the Crown and Indigenous nations a year later at Niagara in 1764.³² The importance of the gathering in relation to the Proclamation has been affirmed by Canadian courts, including in the 2018 *Restoule* decision, in which the court held that:

Following the issuance of the *Royal Proclamation*, [Sir William Johnson, Superintendent of Indian Affairs] convened a Council at Niagara in 1764 where over 1,700 Indigenous people, including many Ojibwe and Odawa Chiefs, gathered. Some historians contend that the tenets of the *Proclamation* became a formal part of the treaty relationship between the Crown and the Indigenous nations at this Council.³³

According to John Borrows, as a result of the gathering at 1764, the Proclamation became a treaty in which “a nation to nation relationship between settler and First Nation peoples was renewed and extended.”³⁴ Taken as a whole, the Proclamation and Treaty of Niagara became the start of a formal relationship built on “principles of peace, friendship, and respect” which

³⁰ Slaterry 1984, *supra* note 8 at 369.

³¹ Coates, *supra* note 7 at 145.

³² Slaterry 2014, *supra* note 9 at 327.

³³ *Restoule v. Canada (Attorney General)*, 2018 ONSC 7701 (CanLII) [*Restoule*] at para 81.

³⁴ Borrows, John. “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation.” *University of British Columbia Law Review*, vol. 28, no. 1, 1994 [Borrows 1994] at 29. See also Borrows, John. “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government.” Ed. Michael Asch. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. University of British Columbia Press, 1997. [Borrows 1997]

would “form and sustain the foundations of the First Nations/ Crown relationship, and to inform Canada’s subsequent treaty-making history.”³⁵

Despite the affirmation of a nation-to-nation Crown-Indigenous relationship in Niagara, the text of the Proclamation itself is inherently contradictory.³⁶ On the one hand, the Proclamation is grounded on the assumption that the Crown was the ultimate sovereign over the lands acquired from New France, which it refers to as “Our Dominions and Territories.”³⁷ On the other, it contains express recognition of Indigenous peoples’ political autonomy, as evidenced by its description of Indigenous peoples as “Nations or Tribes with whom We are connected, and who live under Our Protection.”³⁸ Although the Proclamation is “primarily a strong affirmation of Aboriginal title and sovereignty” the text has been used subsequently to support arguments both confirming the existence of and placing limits on Indigenous peoples’ jurisdiction and rights to land.³⁹

Among the key affirmations of Indigenous nations’ rights and autonomy in the Proclamation is the confirmation that lands occupied by Indigenous peoples as of 1763 were to be reserved for their use unless they had already been surrendered to the Crown.⁴⁰ Through this provision, the Crown recognized that the territories over which it asserted sovereignty were in fact already owned and occupied by Indigenous nations, and that those nations retained rights to

³⁵ *Ibid.*

³⁶ Foster, Hamar. “Canada: ‘Indian Administration’ from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights.” Ed. Paul Havemann. *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand*. Oxford University Press, 1999 [Foster 1999] at 355.

³⁷ *Ibid.*

³⁸ Slattery 1984, *supra* note 8 at 370.

³⁹ Foster 1999, *supra* note 36 at 355.

⁴⁰ Slattery 1984, *supra* note at 371. See also Narvey, Kenneth. “The Royal Proclamation of 7 October 1763, the Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company.” *Saskatchewan Law Review*, vol. 38, no. 1, 1973-74 at 137.

those lands unless the lands were voluntarily ceded to the Crown.⁴¹ The underlying purpose of this provision was to create a “homeland” for Indigenous peoples where they would be “free to live according to their traditions without pressures from white farmers” and which would be beyond the jurisdiction and control of colonial officials.⁴²

The Proclamation’s prohibition on the private purchase of Indigenous lands absent a formal surrender also reflects the Crown’s position as an intermediary between Indigenous nations and local populations. This position would be replicated in numerous federal statutes in ensuing centuries. For example, as Justice Dickson explained in reference to the *Indian Act*⁴³ in the Supreme Court’s decision in *Guerin* in 1984:

The purpose of this surrender requirement [originating in the Royal Proclamation] is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that ‘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.’⁴⁴

The Proclamation’s reference to “protection,” however, did not necessarily imply that the Crown stood in a position of power relative to Indigenous nations in 1763. Instead, it reflects the fact that Indigenous peoples were valued as political and military allies (potential or actual), and that this in turn “dictated that Aboriginal people be treated as though they had the right to the

⁴¹ Morin, *supra* note 27 at 21. See also Slattey 1984, *supra* note 8 at 370.

⁴² Stanley, George. “As Long as the Sun Shines and the Water Flows: An Historical Comments.” .” Eds. Ian Getty and Antoine S. Lussier. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. University of British Columbia Press, Vancouver, 1983 at 7.

⁴³ *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

⁴⁴ *Guerin*, *supra* note 29 at p 383.

lands they lived on.”⁴⁵ As the Supreme Court recently explained in *Manitoba Metis Federation*, “the ‘Protection’ proffered by the Crown did not arise from a paternalistic desire to protect Indigenous Nations; rather, it was a recognition of their military strength and the need to persuade them that their rights would be better protected by peaceful relations than force of arms.”⁴⁶ Rather than undermining the jurisdictional independence of Indigenous nations, the Proclamation set out “a quasi-federal structure in which a protective shield of imperial rule is extended over a host of autonomous Indian nations, living within their own territories, with their own internal governments and laws.”⁴⁷

Ultimately, the Proclamation affirmed two enduring principles: that the Crown recognized that Indigenous peoples held rights to the lands which they traditionally used and occupied, and that the Crown was bound to protect those rights.⁴⁸ These principles – particularly when interpreted in reference to the Treaty of Niagara- would be foundational to relations for Crown and Indigenous relations for the next hundred years and established a lasting precedent for the Crown’s recognition of Indigenous peoples’ ownership of land.⁴⁹ As the Royal Commission on Aboriginal Peoples explains:

Despite their clear imperial ambitions, in practice the colonizing European powers recognized Aboriginal nations as protected yet nonetheless autonomous political units,

⁴⁵ Hildebrandt, Walter, et al. *The True Spirit and Original Intent of Treaty 7*. vol. 14; McGill-Queen's University Press, Montreal, 1996 [Hildebrandt] at 213.

⁴⁶ Slattery 2014, *supra* note 9 at 322.

⁴⁷ *Ibid.* at 327.

⁴⁸ Venne, Sharon. “Understanding Treaty 6: An Indigenous Perspective.” Ed. Michael Asch. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. Vancouver: UBC Press, 1997.

⁴⁹ Tobias, *supra* note 19. See also Hildebrandt, *supra* note 45 at 214, and Wilkins, Kerry. “Life among the Ruins: Section 91(24) After *Tsilhqot’in* and *Grassy Narrows*.” *Alberta Law Review*, vol. 55, no. 1, July 2017 at 97. In addition to recognizing the land rights of Indigenous peoples, however, the Royal Proclamation also reflected the Crown’s ultimate objective of securing control over those interests, including by providing that the Crown alone could extinguish Indigenous peoples’ interest in lands. As John Borrows argues, the Proclamation “uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights.” See Borrows 1997, *supra* note 34 at 170.

capable of governing their own affairs and of negotiating relationships with other nations. In the case of the British Crown in particular, it also included the important recognition that Aboriginal nations were entitled to the territories in their possession, unless these were properly ceded to the Crown.⁵⁰

As such, when the Crown sought to negotiate the numbered treaties over a century later, “it did so against a backdrop of fundamental constitutional norms flowing from the Royal Proclamation and the body of intersocietal law that it reflected.”⁵¹ These principles remain crucial in understanding the context in which Treaty 3 was negotiated.

2.3 Negotiating Treaty 3

The negotiations between the Anishinaabeg at Lake of the Woods and the Crown leading up to Treaty 3 were based on well-defined processes and understandings developed over the preceding century and a half of colonization, including the principles set out in the Royal Proclamation and the established body of inter-societal law which affirmed the nation-to-nation relationship between Indigenous nations and the Crown. This section will explore the circumstances leading up to the negotiation of Treaty 3 and will seek to demonstrate that at the time of the negotiations the Anishinaabeg were a “politically articulate Indian nation with a strong tradition of land tenure and a well-organized social order”⁵² and that the Crown

⁵⁰ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, “Looking Forward, Looking Back” (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP] at 122.

⁵¹ Slaterry 2014, *supra* note 9 at 329. These norms were reflected in the text of the treaties themselves. For example, Kent McNeil notes that “the treaties implicitly acknowledged the existence of the Indian tribes as political entities capable of entering into nation-to-nation relations with the Crown. In the treaties, the Indian parties were designated as ‘tribes,’ a term that was used synonymously with ‘nations’ in the Royal Proclamation of 1763.” See McNeil, Kent, “Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples” in McNeil, Kent, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) [McNeil 2001] at 347.

⁵² Harring, Sidney. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, Toronto, 1998 [Harring] at 138.

representatives were aware of and adhered to specific laws and policies designed to govern the process for obtaining access to Anishinaabe lands.

Initial negotiations between the Anishinaabeg and the Crown began in 1869, when Canada acquired what was then known as the North-West Territories and Rupert's Land from the Hudson's Bay Company. In order to maintain its authority and fulfil the terms of the transfer, the federal government needed to establish a transportation route connect Canada with the newly-acquired territories.⁵³ This route was to pass directly through lands in present-day Ontario and Manitoba occupied by the Anishinaabeg.

When negotiations commenced in 1869, obtaining a surrender of Anishinaabe lands was not part of the Crown's agenda. Instead, Canada's objective was to develop a waterway passage through lands held by the Anishinaabeg which would be used for communication and transportation purposes, including for the passage of safe passage of military troops through the region following the first Riel Resistance.⁵⁴ Simon Dawson, chief engineer for the project, made it clear in his instructions to federal representatives that the focus of the negotiations should be on maintaining a "continuance of friendly relations" between the Anishinaabeg and the government, not obtaining title to their lands.⁵⁵ The Anishinaabeg were in turn informed that the Queen was interested in negotiating for the limited purpose of obtaining permission to pass through their lands, and that as such, no land surrender was necessary.⁵⁶

⁵³ Daugherty, Wayne. *Treaty Research Report Treaty Three (1873)*, Treaties and Historical Research Centre, Department of Indian Affairs and Northern Development, 1986 [Daugherty]. See also Talbot, Robert. *Negotiating the Numbered Treaties: An Intellectual and Political Biography Alexander Morris*. Saskatoon: Purich, 2009 [Talbot] at 69.

⁵⁴ Krasowski, Sheldon K. *Mediating the Numbered Treaties: Eyewitness Accounts of Treaties between the Crown and Indigenous Peoples, 1871-1876*, ProQuest Dissertations Publishing, 2011 [Krasowski] at 50.

⁵⁵ Daugherty, *supra* note 53.

⁵⁶ Mainville, Sara J. *Manidoo Mazina'Igan: An Anishinaabe Perspective of Treaty 3*, ProQuest Dissertations Publishing, 2007 [Mainville] at 30.

The Anishinaabeg from whom the Crown sought the right-of-way also had no intention in 1869 of entering into an agreement to surrender their rights to their lands.⁵⁷ Rather, they were prepared to enter into a limited agreement for a specific purpose – to allow Crown representatives to pass through the territory westward – in exchange for compensation.⁵⁸ As the Chiefs advised in the early stages of negotiations:

...we expect an answer to our demand sent to Mr. Pither during the winter so that we may know how to act and when to assemble for the payment. For this we are willing to allow the Queen's subjects the right to pass through our lands, to build and run steamers, build canals and railroads and to take up sufficient land for buildings for Government use - but we will not allow farmers to settle on our lands. We want to see how the Red River Indians will be settled with and whether the soldiers will take away their lands - we will not take your presents, they are a bait and if we take them you will say we are bound to you.⁵⁹

From the beginning of negotiations in 1869, the Anishinaabeg made their views and objectives known, including their position that no settlers would be permitted to pass through their lands without an arrangement with the Crown which included compensation.⁶⁰ They were also clear that they intended to protect their resources, including gardens and fisheries, and were prepared to defend their territory against incoming settlers if necessary.⁶¹ “Do not bring settlers and surveyors amongst us,” warned one Chief during negotiations, “until a clear understanding has been arrived at as to what our relations are to be in time to come.”⁶² As these demands

⁵⁷ Krasowski, *supra* note 54 at 58; Haring, *supra* note 52 at 131.

⁵⁸ Daugherty, *supra* note 53.

⁵⁹ *Ibid.*

⁶⁰ Telford, Rhonda M. “*The Sound of the Rustling of the Gold is Under My Feet Where I Stand; we have a Rich Country:*” *A History of Aboriginal Mineral Resources in Ontario*, ProQuest Dissertations Publishing, 1996 [Telford] at 193; McNab, David. “The Administration of Treaty 3: The Location of the Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915.” Eds. Ian Getty and Antoine S. Lussier. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. University of British Columbia Press, Vancouver at 146.

⁶¹ Krasowski, *supra* note 54 at 274; Walmark, Brian. *Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73*, ProQuest Dissertations Publishing, 1993 at 15.

⁶² Talbot, *supra* note 53 at 63.

demonstrate, the Anishinaabeg did not view the arrangement with the Crown as an agreement to sell or surrender their territory.⁶³ To the contrary, “the fact that they flatly stated they would not ‘allow farmers to settle on their land’ indicates clearly that they were not prepared to cede the title to their land.”⁶⁴

The Anishinaabeg’ approach to the right-of-way discussions reflected their negotiation skills which had been honed in part as a result of their longstanding relationships with the Hudson’s Bay Company, French traders and the North-West Company.⁶⁵ They were also well aware of treaty arrangements elsewhere as a result of kinship relationships both with tribes in the United States and north of Lake Superior, and expected any agreement with the Crown to be at least as generous as the terms of treaties with other nations.⁶⁶ The Anishinaabeg brought this knowledge and skill into negotiations with the Crown and exhibited “strong and purposeful negotiating style in their dealings with British Imperial officials over land and resource issues, especially in areas where settlement had not yet descended upon them.”⁶⁷

The Anishinaabeg also possessed advantages that enhanced their bargaining position with the Crown. Among these advantages was the fact that they controlled the entirety of what was the only viable route for the much-needed passageway west.⁶⁸ In addition, the Anishinaabeg had a diverse economy including hunting, fishing, gathering and trade which had allowed them to remain largely independent from settlers.⁶⁹ In particular, unlike nations further west, the

⁶³ Krasowski, *supra* note 54 at 58.

⁶⁴ Daugherty, *supra* note 53.

⁶⁵ Walmark, *supra* note 61 at 12.

⁶⁶ *Ibid.* at 94; Mainville, *supra* note 56 at 32.

⁶⁷ Telford, *supra* note 60 at 121.

⁶⁸ Daugherty, *supra* note 53.

⁶⁹ Mainville, *supra* note 56 at 18.

Anishinaabeg had not been significantly affected by the decline of buffalo populations on the prairies.⁷⁰ Finally, because their lands were generally considered unsuitable for agriculture, the Anishinaabeg did not face the prospect of a large-scale influx of settlers seeking to permanently occupy their lands.⁷¹ As a result, the “stability of their food supply and the sanctity of their environment permitted them to adopt a far more independent and at times almost intransigent stance than might otherwise have been the case.”⁷²

The result was an agreement in 1870 by which the Crown committed to pay the Anishinaabeg annuities in exchange for the right-of-way (to be known as the Dawson road) and assurances that troops could pass freely through the territory.⁷³ Far from being a comprehensive agreement for the surrender of lands and jurisdiction, the agreement was limited to “those specific items [the Anishinaabeg] were willing to grant.”⁷⁴ The right-of-way agreement for the Dawson road demonstrates the strength and strategic negotiating position of the Anishinaabeg. It further reflects the fact that the Crown recognized the Anishinaabeg interest in their lands and was prepared to engage in serious negotiations with them on their own terms in order to further its colonial priorities at that time.

The Crown’s original objective of securing a right of way through Anishinaabe territory evolved considerably in the years immediately following the conclusion of the right-of-way negotiations for the Dawson road. As a result of a number of political and economic factors, in 1871 Canada sought to negotiate a comprehensive, long-term agreement with the Anishinaabeg

⁷⁰ Daugherty, *supra* note 53.

⁷¹ Talbot, *supra* note 53 at 70.

⁷² Daugherty, *supra* note 53.

⁷³ Krasowski, *supra* note 54 at 274.

⁷⁴ Daugherty, *supra* note 53.

which would address issues of ownership and control over land and resources on a permanent basis.⁷⁵ The pressure to conclude a treaty was attributable in part to Canada's ongoing need to demonstrate its authority over its new territories, including by encouraging settlers to move westward and ensuring the safe passage of military personnel in response to the Red River Resistance.⁷⁶ It was also attributable to the fact that Canada had promised to construct a national railway line in order to induce British Columbia to enter into confederation.⁷⁷ Like the Dawson road, the proposed route of the future Canadian Pacific Railway was to pass directly through Anishinaabeg territory, and as such it was critical that the Crown maintain a positive relationship with the Anishinaabeg who continued to control those lands.⁷⁸

After several unsuccessful attempts at negotiations between 1871 and 1872, commissioners for the Crown were again dispatched to Anishinaabe territory in 1873 with instructions to conclude a treaty which would include the surrender of Anishinaabe title to their lands.⁷⁹ The treaty commissioners now faced considerable pressure to succeed in finalizing a treaty, largely because the Crown recognized that without one, the Anishinaabeg could pose a serious obstacle to European expansion westward.⁸⁰ The Anishinaabeg had made it clear that while they were prepared to engage in alliance-building with the British, they would also defend themselves against unauthorized intruders on their lands.⁸¹ As Sara Mainville notes, the Crown sought a treaty because the Anishinaabeg demanded compensation for the use of their lands and

⁷⁵ Krasowski, *supra* note 54 at 274.

⁷⁶ *Ibid.* at 59; Talbot, *supra* note 53 at 69; Hildebrandt, *supra* note 45 at 207.

⁷⁷ *Ibid.*

⁷⁸ Talbot, *supra* note 53 at 69.

⁷⁹ *Ibid.*

⁸⁰ Walmark, *supra* note 61 at 14.

⁸¹ Holzkamm, Tim and Waisberg L. *We Have Kept Our Part of the Treaty: The Anishinaabe Understanding of Treaty #3*. Kenora, ON: Grand Council Treaty #3, 2012 [Holzkamm] at 75.

“created fear of violence against prospective settlers who crossed their land or made use of their territory” without a prior agreement with the Crown.⁸² Treaty 3 was thus essential if the Crown was to fulfil its colonial objectives and avoid the prospective of violent conflict between incoming settlers and the Anishinaabeg.⁸³

By 1873, the Anishinaabeg’ view on a comprehensive treaty with the Crown had also shifted. Increasingly, the Anishinaabeg at Lake of the Woods faced challenging economic circumstances resulting from a diminished resource base, increased competition for furs and changes to the Hudson’s Bay Company’s transportation system.⁸⁴ In light of these challenges, they sought to preserve their culture and way of life while at the same time enhancing their economy security and wellbeing.⁸⁵ The Anishinaabeg recognized that an agreement with the Crown to share their lands with incoming settlers could provide economic benefits while also advancing their primary objective of sustaining their traditions and livelihood.⁸⁶ They approached negotiations with two overarching, complementary goals: ensuring their cultural survival as a people, and enhancing their material circumstances.⁸⁷

Another key factor motivating the Anishinaabeg to negotiate Treaty 3 was the desire to establish a formal alliance with the Crown.⁸⁸ The Anishinaabeg had already long-recognized the value of developing relationships of alliance with other nations and had established treaty-making processes rooted in an egalitarian, consensus-based government.⁸⁹ At the time of the

⁸² Tobias, John L. “Canada’s Subjugation of the Plains Cree, 1879–1885.” *Canadian Historical Review*, vol. 64, no. 4, 1983 at 520.

⁸³ Walmark, *supra* note 61 at 14.

⁸⁴ Krasowski, *supra* note 54 at 59.

⁸⁵ Talbot, *supra* note 53 at 71.

⁸⁶ Telford, *supra* note 60 at 121; Krasowski, *supra* note 54 at 115.

⁸⁷ Walmark, *supra* note 61 at 100.

⁸⁸ Mainville, *supra* note 56 at 48.

⁸⁹ Talbot, *supra* note 53 at 58. See also Holzkamm, *supra* note 81 at 54.

Treaty 3 negotiations, the Anishinaabeg saw a treaty with the Crown as an opportunity to confirm and formalize a relationship of protection, alliance and reciprocity which would allow them to retain their existing way of life while taking advantage of the new opportunities presented by incoming Europeans.⁹⁰ Although they remained unwilling to surrender their lands or to allow settlers or development which would interfere with hunting, fishing and other traditional activities, they also wanted to avoid any deterioration in their relationship with the Crown.⁹¹ A formal agreement, in their view, would allow them to maintain a relationship of peace and alliance with the Crown while also establishing specific conditions and limits on how their lands would be used and developed.⁹²

Despite their increased willingness to enter into an alliance with the Crown, the Anishinaabeg nevertheless approached treaty negotiations based on the firm position that they owned and controlled all the lands and resources in their territory, and would only enter into a treaty on terms which furthered their own objectives. They were also well aware of the territory's strategic and economic value to the Crown. As Sydney Haring explains, the Anishinaabeg “knew their land was invaluable, both for its mineral and forest wealth and because Canada needed a route to the west.”⁹³

This understanding, and the underlying position that the lands belonged to the Anishinaabeg, was a central theme throughout discussions with the Crown. For example, during the first day of negotiations, Anishinaabeg Chiefs pushed Crown representatives to address a host of outstanding issues, including “sovereignty over land, water, and resources, including

⁹⁰ *Ibid.* at 61.

⁹¹ Krasowski, *supra* note 54 at 115.

⁹² Walmark, *supra* note 61 at 15.

⁹³ Haring 1998, *supra* note 52 at 131.

timber taken for the Dawson Road, a route leading from Thunder Bay to Red River through Treaty #3 territory.”⁹⁴ Similarly, in the second day, Chief Ma-We-Do-Pe-Nais, spokesperson for the Anishinaabeg, again emphasized their ownership of their lands and resources, stating that:

...That is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property.⁹⁵

Chief Ma-We-Do-Pe-Nais went on to advise the Crown that “it is riches that we ask so that we may be able to support our families as long as the sun rises and the water runs.”⁹⁶ The Chief’s statements demonstrate that for the Anishinaabeg, concepts of “title and livelihood were intertwined” – that is, the Anishinaabeg expected that after treaty they continue to be able to rely on their lands for sustenance and trade as well as being able to benefit from new opportunities provided through a relationship with the Crown.⁹⁷

While the Crown and the Anishinaabeg had different objectives in 1873, both parties entered into negotiations in the context of established inter-societal principles for treaty-making, the formal requirements set out in the Royal Proclamation and the relationship between Indigenous nations and the Crown as affirmed through the Treaty of Niagara.⁹⁸ Both parties also

⁹⁴ Holzkamm, *supra* note 81 at 49.

⁹⁵ Daugherty, *supra* note 53.

⁹⁶ Ray, *supra* note 15 at 73.

⁹⁷ *Ibid.* In *Restoule*, *supra* note 33, the Ontario Superior Court of Justice described the Anishinaabeg who entered into the Robinson Huron and Robinson Superior treaties with the Crown in 1850 in similar terms, noting at para 415 that in negotiating the treaties, the Anishinaabeg “were seeking respect for their jurisdiction over the territory (acknowledged in the *Royal Proclamation* of 1763) and their authority to enter into agreements to share the use of and authority over the territory.”

⁹⁸ For an alternate perspective on the Crown’s objectives on negotiating the numbered treaties see for example Hall, *supra* note 18 at 42-3, in which the author argues that:

There was never any question in the minds of the British and Canadian governments, and of HBC officials, that ultimate title to British North America lay in the British Crown by right of ‘discovery,’ of occupation and exploitation, and of conquest. The fact that Indians occupied and lived off the land did not give them full title but what the courts later defined as ‘a personal and usufructuary right, dependent upon the good will of the Sovereign. This right to ‘absolute use and enjoyment of their lands’ could only be alienated to

understood that the Anishinaabeg occupied and exercised authority over the lands subject to the negotiations and expected to continue to rely on and benefit from those lands post-treaty. The result of these negotiations would be Treaty 3, an agreement which remains foundational to Canada's constitutional order and to the Crown's relationship with the original inhabitants of the Lake of the Woods region today.

2.4 The Treaty Agreement

After 3 days of negotiations, an agreement known as Treaty 3 was concluded between the Anishinaabeg and Canada on behalf of the Queen. The negotiations resulted in a number of written and oral records which set out the parties' understanding of the treaty terms. While Canada's written version of the treaty has formed the basis for much of the subsequent judicial consideration of the agreement, other records suggest that the English text prepared by Canada does not provide a complete or accurate record of the entire agreement.⁹⁹ Key promises made orally by Canada to the Chiefs during negotiations appear to have been altered or omitted entirely from the written text.¹⁰⁰ In addition, the written treaty published by Canada includes formal, legalistic words for which there is no direct equivalent in Anishinaabemowin.¹⁰¹ As such, the treaty must be understood in the context of the entire record of negotiations, including the oral and written accounts of Anishinaabe witnesses who attended negotiations.¹⁰²

Based on Canada's version of the treaty, the Anishinaabeg surrendered title to their lands in what is now portions of Ontario and Manitoba to Her Majesty the Queen. According to the

the Crown. In a sense, then, the treaty negotiations from the government perspective were partly, or even mainly, about determining the price at which Indians would be willing to alienate their ancestral rights.

⁹⁹ Holzkamm, *supra* note 81 at 2-3.

¹⁰⁰ *Ibid.* at 40-1.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* at 3.

written version the treaty published by Canada, on entering into Treaty 3, the Anishinaabeg agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever” to the lands described in the treaty.¹⁰³ The document further provides that:

...the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada.¹⁰⁴

In sum, the document provides that the Crown acquired the land itself, as well as the right to limit Anishinaabeg hunting and fishing activities by passing laws or otherwise using the land for its own development and settlement objectives. As Brittany Luby notes, the focus in the treaty text on the concept of land surrender, rather than sharing of territories, is consistent with the Crown’s objective in 1873 of entering into treaty in order to open up lands for settlers to move west.¹⁰⁵

By contrast, Anishinaabeg oral records of the treaty emphasize principles of co-existence and mutuality, not the wholesale surrender of land. While the text of the treaty published by Canada provides that the Anishinaabeg surrendered the entirety of their lands, “both the eyewitness accounts and Treaty Three oral histories affirm that this was not discussed during the

¹⁰³ Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions [Treaty 3].

¹⁰⁴ *Ibid.*

¹⁰⁵ Luby, Brittany. “‘The Department is Going Back on these Promises’: An Examination of Anishinaabe and Crown Understandings of Treaty.” *Canadian Journal of Native Studies*, vol. 30, no. 2, 2010 [Luby] at 208.

oral negotiations.”¹⁰⁶ Instead, Anishinaabeg witnesses who attended to the negotiations indicated that the Anishinaabeg agreed to share their lands and resources with incoming Europeans.¹⁰⁷

Anishinaabeg written records also differ in significant respects from the record written prepared by Canada. The primary written text prepared on behalf of the Anishinaabeg is the Paypom Treaty, which was the result of a set of notes prepared by Joseph Nolin, a Red River Metis who had been retained by Anishinaabeg leaders during the negotiations. The notes were ultimately given to Chief Alan Paypom of Washagamis Bay First Nation, and were included as an appendix to the treaty commissioners’ official report of the treaty negotiations.¹⁰⁸ The Paypom Treaty differs from the treaty published by Canada on several key points. For example, it provides that the “the Indians will be free as by the past for their hunting and rice harvest” and that the treaty “will last as long as the sun will shine and water runs, that is to say forever.”¹⁰⁹ Unlike the equivalent provision in the Crown’s version of the treaty, there is no reference to the right to hunt and harvest being limited by the Crown’s right to regulate or “take up” lands as necessary for settlement and other purposes.¹¹⁰ Critically, the document contains no reference to what was arguably the most important term from the perspective the Crown – agreement on the part of the Anishinaabeg to surrender their rights to land and resources.¹¹¹

Since the conclusion of the treaty, the Anishinaabeg have clearly expressed the view, consistent with their oral histories and written records, that Treaty 3 constituted an agreement to share, not surrender, their lands. Contrary to the written record of the treaty prepared by Canada,

¹⁰⁶ Krasowski, *supra* note 54 at 281.

¹⁰⁷ Holzkamm, *supra* note 81 at 50.

¹⁰⁸ *Ibid.* at 44.

¹⁰⁹ *Ibid.* at 31.

¹¹⁰ Krasowski, *supra* note 54 at 141.

¹¹¹ *Ibid.* at 141.

according to the Anishinaabeg, “the Chiefs agreed to permit settlement and to share resources in exchange for special rights and guarantees, a higher monetary payment and economic development assistance.”¹¹² The Anishinaabeg have also repeatedly stated that on entering into treaty they did not agree to submit to the jurisdictional authority of the Crown. They understood that they would retain the ability to exercise their own laws, and that by entering into an agreement with the Crown they were not surrendering their ability to control and make decisions about the use and development of their lands.¹¹³ This understanding was confirmed recently by the trial judge in *Grassy Narrows*, who concluded that the Anishinaabeg agreed to surrender exclusive use of their lands on the expectation that the treaty partners’ respective uses of the lands would be compatible with each other.¹¹⁴ At treaty, the Anishinaabeg understood that they were agreeing to allow settlers to use and occupy some of the lands, but not that they were surrendering their own jurisdictional authority.¹¹⁵ They believed that they would share the lands and the benefits of those lands together with their treaty partner.¹¹⁶ In 2018, the court in *Restoule* described the Anishinaabeg who entered into the Robinson Huron and Robinson Superior treaties with the Crown in similar terms, noting that:

These principles of respect, responsibility, reciprocity, and renewal were fundamental to the Anishinaabe’s understanding of relationships. For the Anishinaabe, the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances.¹¹⁷

¹¹² Holzkamm, *supra* note 81 at 39.

¹¹³ Mainville, *supra* note 56 at 1.

¹¹⁴ *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801 (CanLII) [*Grassy Narrows* trial decision] at para 801.

¹¹⁵ *Ibid.* at para 803.

¹¹⁶ *Ibid.*

¹¹⁷ *Restoule*, *supra* note 33 at para 423.

This view is reflected in the conduct of Anishinaabeg leaders in the decades following Treaty 3. Shortly after the treaty was concluded, the Anishinaabeg emphasized to the Crown that they expected the terms of the agreement, as they understood them, to be honoured and fulfilled. In 1874, a year after the treaty, a number of Chiefs wrote to Lieutenant Governor and treaty commissioner Alexander Morris to advise that “[w]hen we desired to ally ourselves with the whites by a treaty, we calculated on being maintained by them, at least to the extent that we were promised.”¹¹⁸ Similarly, Chiefs in subsequent decades “reported their frustration over federal policies that removed or reduced Indigenous control over Treaty #3 territories” and “maintained - as do their descendants - that Treaty #3 was a land sharing agreement.”¹¹⁹

The Anishinaabe perspective on Treaty 3 as an agreement to share lands and resources has been echoed by Indigenous signatories to the other numbered treaties throughout Canada.¹²⁰

As D.J. Hall explains:

Today Indian elders assert that in the 1870s the only thing that Indians conceded to whites was a right to access and use the land for a price and subject to certain conditions. From this perspective, the treaties were about how the land might be shared for mutual benefit.¹²¹

Similarly, Michael Asch argues that the Indigenous treaty parties “speak with one voice in asserting that what the Crown asked for was permission to share the land, not transfer the authority to govern it.”¹²² Far from agreeing to cede their rights to control and benefit from their

¹¹⁸ Krasowski, *supra* note 54 at 142.

¹¹⁹ Luby, *supra* note 105 at 204.

¹²⁰ Krasowski, *supra* note 54 at 41.

¹²¹ Hall 2015, *supra* note 18 at 43.

¹²² Asch, Michael. *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. Toronto: University of Toronto Press, 2014 [Asch 2014] at 77.

lands, the treaties were “seen as a framework for mutual obligations for continuing economic and diplomatic relations with European newcomers.”¹²³

Unlike the position of the Anishinaabeg, the prevailing view advanced by the government in Canada today is that on entering into the numbered treaties, the Indigenous parties surrendered their interest in their territories to the Crown, thereby entitling European settlers to use those lands for their own purposes.¹²⁴ According to this perspective, the federal government viewed its constitutional authority pursuant to the *British North America Act*¹²⁵ “not as a mandate to forge relations with self-governing communities, but as entirely displacing Aboriginal sovereignty.”¹²⁶ In the case of Treaty 3, the Supreme Court confirmed as recently as 2014 that on entering into treaty the Anishinaabeg ceded ownership and control of their territories to the Crown, save for specific lands which would be reserved for them by the federal government.¹²⁷

To accept Canada’s position that the treaties constitute a complete surrender of jurisdictional authority and ownership over Indigenous lands raises the possibility that there may have never been a mutually-understood agreement between the treaty parties in the first place.¹²⁸ Perhaps even more troubling than the possibility that there was no agreement in the first place is the corollary that rights and obligations advanced by the Indigenous parties – the right to benefit and rely on their traditional lands, and the Crown’s corresponding obligation to ensure this was the case -- were never promised at all. There is, however, evidence that this view does not

¹²³ Hildebrandt, *supra* note 45 at 311.

¹²⁴ Asch 2014, *supra* note 122 at 76.

¹²⁵ *The Constitution Act, 1867*, 30 & 31 Vict, c 3 [*Constitution Act 1867*], formerly the *British North America Act, 1867* [*BNA Act*].

¹²⁶ Foster, *supra* note 36 at 354.

¹²⁷ *Grassy Narrows*, *supra* note 3 at para 2.

¹²⁸ Hildebrandt, *supra* note 45 at 194.

provide a complete picture, and that Crown officials at the time of treaty negotiations held a view of the treaties which aligns more closely with those of the Anishinaabeg and other Indigenous signatories to the numbered treaties. As Asch argues, contrary to the position accepted by the courts and federal government today, “there is reason to believe that at least for some in the Dominion government as well as within Indigenous polities a goal of Confederation was to establish an approach to governance that would reflect something akin to a partnership between the parties rather than the subordination of Indigenous peoples to the dictates of settler governments.”¹²⁹ This is also consistent with the findings of the trial judge in *Grassy Narrows* who affirmed that contrary to the Crown’s position, both the Anishinaabeg and the treaty commissioners understood the agreement to be about the sharing of lands and resources. She found that at the time of treaty the commissioners expressly promised that the Anishinaabeg would be entitled to continue to use their territory as they had previously.¹³⁰

That the Crown negotiators at and around Confederation held a different understanding of the treaties than the current view reflected by the government and courts is reflected by the views of commissioners who negotiated Treaty 3, particularly lead negotiator Alexander Morris and Simon Dawson. According to Mainville, the Crown’s treaty relationship with the Anishinaabeg “was developed through an ongoing relationship developed by Dawson and fostered by Morris.”¹³¹ As part of this relationship, the commissioners recognized Anishinaabeg political autonomy as well as “the customs, traditions and practices integral to sustaining future good

¹²⁹Asch, Michael. “On Being Here to Stay: A Conversation on Resolving Political Relations between Indigenous Peoples and the Canadian State.” Conference paper. 2017. Print. [Asch 2017].

¹³⁰ *Grassy Narrows* trial decision, *supra* note 114 at para 913.

¹³¹ Mainville, *supra* note 36 at 43.

relations.”¹³² Critically, throughout negotiations the commissioners implicitly recognized Anishinaabeg ownership of their lands.¹³³

For Morris, this view evolved over the course of his position as treaty negotiator. As Robert Talbot explains, “Morris came to the North West with a view of the treaties as another necessary step in legitimatizing Canada’s territorial expansion; by the end of his tenure he had come to realize that they entailed much more than a mere land transaction.”¹³⁴ As Morris’ involvement in treaty negotiations deepened, he came to view the treaties as “the basis for a positive, reciprocal relationship between the Crown and the First Nations of the North West”¹³⁵ which “would entail responsibilities and obligations on both sides.”¹³⁶ Michael Asch similarly argues that Morris “negotiated on the understanding that treaties were required before settlement, and that their purpose is to build relationships with those already here, not impose our ways on them.”¹³⁷ While Morris worked to expand Canada’s territorial control, he also “attempted to integrate the Indigenous peoples into the process of development, to make them co-beneficiaries with the settlers” who would use their territories.¹³⁸ Ultimately, Morris approached negotiations on the basis the purpose of the treaties was “to build relationships with those already here, not to impose [European] ways on them.”¹³⁹

In the case of Dawson, the view of the treaties as agreements for reciprocity and sharing was grounded in a relationship with the Anishinaabeg which developed over a number of years

¹³² *Ibid* at p 45.

¹³³ Krasowski, *supra* note 54 at 110.

¹³⁴ Talbot, *supra* note 53 at 57.

¹³⁵ *Ibid* at p 57.

¹³⁶ *Ibid* at p 7.

¹³⁷ Asch 2014, *supra* note 122 at 162.

¹³⁸ *Supra*, note 53 at 57.

¹³⁹ Asch, *supra* note 122 at 162.

as a negotiator for both the provincial and federal governments.¹⁴⁰ At the time of the Treaty 3 negotiations, Dawson was familiar with Anishinaabe systems of governance and leadership, as well as their specific objectives in negotiating with the Crown.¹⁴¹ He was also aware of the Anishinaabeg position that they owned the lands and resources which were the subject of the negotiations.¹⁴² Dawson's position on the purpose and intent of the treaty is reflected in recommendations made to government officials both prior and subsequent to 1873. For example, in an 1870 report, Dawson recommended that certain lands be sold for the benefit of the Anishinaabeg in order to maintain a fund through which the federal government would be able to fulfil its treaty obligations.¹⁴³ Dawson later argued before the House of Commons that the Anishinaabeg did not surrender rights to fish when they entered into treaty.¹⁴⁴ In both cases, Dawson's comments reflect the view that the Crown assumed significant financial obligations on entering into treaty, and that the Anishinaabeg were correct in their understanding that they would be entitled to rely on their lands for sustenance even after finalizing the treaty.

The Crown's obligations to ensure the protection and livelihood of the Indigenous treaty parties was also evident in publications issued close to the time of the treaty. For example, in 1870 the *Manitoban* published an article in which it acknowledged that "[t]hough the Indian title to lands is of a peculiar and abnormal nature, Britain has never denied it," and that in the event that the Crown took possession of lands used by Indigenous peoples for hunting, it "always provides them with a means of living otherwise."¹⁴⁵ The Crown's obligations were similarly

¹⁴⁰ Walmark, *supra* note 61 at 8.

¹⁴¹ Krasowski, *supra* note 54 at 52.

¹⁴² Walmark, *supra* note 61 at p33.

¹⁴³ Daugherty, *supra* note 53.

¹⁴⁴ Walmark, *supra* note 61 at 39.

¹⁴⁵ "The Indian Question" in *The Manitoban*, March 25, 1871, quoted in Krasowski, *supra* note 54 at 63.

recognized by other federal officials, such as Lord Dufferin, who advised Morris in 1873 that for the Anishinaabeg, the treaty would “ secure their protection and to avert the troubles which too frequently attend the advance of the white man.”¹⁴⁶ As these and other statements demonstrate, contrary to the views of modern-day governments and courts, there is evidence that at the time the treaties were negotiated Crown representatives recognized the Anishinaabeg as a politically autonomous nation which owned and controlled the territories in question, and that on entering into Treaty 3, the Crown assumed binding obligations to ensure the Anishinaabeg treaty party’s ongoing right to rely on and benefit from their lands.

2.5 Conclusion

This chapter has sought to demonstrate that the numbered treaties, and Treaty 3 in particular, were negotiated in a context of established principles and norms which governed Crown-Indigenous relations in the years leading up to Confederation, and that while the treaty parties had different objectives in negotiations, the Anishinaabeg and at least some representatives for the Crown in the treaty negotiations entered into Treaty 3 on the shared understanding that the Anishinaabeg held and retained rights to their lands and that the Crown acquired specific obligations in exchange for the right to use and share those lands. However, this view has long since been overshadowed by decisions of the court which affirm Canada’s position today that the treaty constituted a surrender of all rights and interests in Anishinaabe territory in exchange for reserves and limited rights to hunt and fish. The following chapter will

¹⁴⁶AM, Morris Papers, “Sir John A. MacDonald to Morris, February 18, 1873,” quoted in Krasowski, *ibid.* at 124. Lord Dufferin’s statement on this issue is consistent with his subsequent public statements on issues related to the rights of Indigenous peoples. See for example Lord Dufferin’s statements in his ‘Speech at the Indian Reserve, Tuscarora,’ quoted in Asch 2014 at 159.

focus on the trial, majority and Privy Council decisions in *St. Catherine's* as basis for understanding how this view came to obscure the legal and political context in which Treaty 3 was negotiated.

Chapter 3: Dominant Perspectives from *St. Catherine's*

3.1 Introduction

As the contextual review of Treaty 3 in Chapter 2 indicates, there is evidence to suggest that the Dominion entered into negotiations on the understanding that the Anishinaabeg owned their lands prior to the treaty, and that they retained a right to benefit from and use those lands afterwards. These are understandings, which if not entirely consistent with the Indigenous view of the treaty, would nevertheless have played a substantial role in maintaining a relationship based on mutuality and respect between the Anishinaabeg and the Crown post-treaty. Unfortunately, these understandings were to be subsumed shortly thereafter by the decision of the Privy Council in the *St. Catherine's* decision in 1888.¹⁴⁷

The *St. Catherine's* case was the first time the Privy Council was asked to consider the legal nature of Indigenous peoples' title to their lands in Canada.¹⁴⁸ As such, it quickly became the judicial foundation for courts' interpretation of Indigenous title and the legal effect of Crown-Indigenous treaties.¹⁴⁹ Although the reasons of the Privy Council have been varied in recent years, the decision nevertheless stands as a starting point for understanding how Canadian courts have approached the issue of Indigenous peoples' legal right to their ancestral lands.¹⁵⁰ What is striking, however, is the extent to which this approach diverges not only from that of the

¹⁴⁷ For a detailed discussion of the shortcomings of the *St. Catherine's* trial decision, see McNeil, Kent. *Flawed Precedent: The St. Catherine's Case and Aboriginal Title*. University of British Columbia Press, 2019.

¹⁴⁸ Cottam, S. "Indian Title as a Celestial Institution," in Abel, Kerry M., et al. *Aboriginal Resource Use in Canada: Historical and Legal Aspects*. vol. 6:6, University of Manitoba Press, Winnipeg, 1991 [Cottam] at 248.

¹⁴⁹ Harring 1998, *supra* note 52 at 125.

¹⁵⁰ See for example *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313, 1973 CanLII 4 (SCC) [*Calder*] at 320; *Guerin*, *supra* note 29 at 349; *R. v. Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC) [*Van der Peet*] at para 115; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) [*Delgamuukw*] at para 112; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 SCR 220, 2005 SCC 43 (CanLII) at para 135; *Grassy Narrows*, *supra* note 3 at para 33.

Anishinaabeg treaty parties, but also from the position of the federal government which negotiated the actual treaty, and of two of the judges at the Supreme Court in *St. Catherine's*. This chapter will describe the circumstances leading up to the *St. Catherine's* litigation and the reasons of the lower courts and Privy Council, with a focus on the majority judgments which have been adopted in subsequent jurisprudence. I will seek to demonstrate that the decision, while often cited as precedent for understanding the numbered treaties, has little connection to the facts and law on which the treaty was based, and that the conclusions of most of the judges are contrary to the understandings of both of the parties to Treaty 3.

3.2 Positions of the Parties in *St. Catherine's*

On its face, the *St. Catherine's* litigation had little to do with the Anishinaabeg or their treaty with the Crown. The litigation arose as a result of a dispute between Ontario and Canada following Confederation regarding which level of government was entitled to benefit from the lands and resources in northern Ontario – including lands subject to Treaty 3.¹⁵¹ The stakes for both the provincial and federal governments were high. Both sides claimed the sole right to benefit from an expansive area which was rich in timber and mineral resources.¹⁵² The resulting conflict between the two levels of government spanned decades and produced case law which would be used as precedent for understanding Indigenous land rights for over a century. However, the Anishinaabeg, who were assumed to have surrendered the entirety of their interest in their lands via treaty, were not even parties to the case.¹⁵³

¹⁵¹ Haring 1998, *supra* note 52 at 126; Cottam, *supra* note 148 at 247.

¹⁵² Lester, Geoffrey S. "Aboriginal Land Rights: Some Remarks upon the Ontario Lands Case." *Queen's Law Journal*, vol. 13, no. 3, 1988 [Lester] at 13.

¹⁵³ McNeil, Kent. "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s." *Journal of the West*, vol.38, no.1, 1999 [McNeil 1999] at 68.

The key legal issue underpinning the dispute in *St. Catherine's* flowed from the division of federal and provincial powers under the *BNA Act*. Enacted in 1867, the *BNA Act* assigned powers and responsibilities over various matters to federal and provincial governments.¹⁵⁴ The federal government was to assume authority over “Indians and lands reserved for the Indians,” while existing provinces, including Ontario, were assigned ownership over Crown lands falling within their boundaries.¹⁵⁵ As Harring notes, “[t]his division, between Indians and Indian lands under crown control on the one hand, and provincial control of most other crown lands on the other hand, was at the core of the federalist arrangement that was to be the political foundation of Canada.”¹⁵⁶ It also created a critical ambiguity – legally, it was unclear whether the federal or provincial government held title to “Indian lands,” leaving it open for both sides to advance claims to own and benefit from those lands and their resources.¹⁵⁷

For the Dominion, its new constitutional responsibility for “Indians and lands reserved for the Indians” consisted in practice of replicating the existing structure and processes established by the British Crown in the preceding centuries of colonization.¹⁵⁸ This included negotiating a series of treaties between 1871-1877 with Indigenous nations in the newly-acquired territories, largely on the same basis and pursuant to the same policies as those of the imperial Crown in the decades prior to Confederation.¹⁵⁹ Treaty 3 was among the treaties negotiated by the Dominion following the enactment of the *BNA Act*. Although the terms of Canada’s version

¹⁵⁴ Hall, A. “*St Catherine’s Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth Century Canada*,” in Abel, Kerry M., et al. *Aboriginal Resource use in Canada: Historical and Legal Aspects*. vol. 6, University of Manitoba Press, Winnipeg, Man, 1991 [Hall 1991] at 269.

¹⁵⁵ Harring 1998, *supra* note 52 at 126.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Hall 1991, *supra* note 154 at 270.

¹⁵⁹ *Ibid.* at 270.

of the treaty give no indication that the lands were the subject of a federal- provincial dispute, at the time the treaty was negotiated the area was in fact claimed by both the federal and provincial government. The competing claims to the territory flowed from Canada's acquisition of Rupert's Land from the Hudson's Bay Company in 1870.¹⁶⁰ Following the transfer, the province of Manitoba was created, supposedly out of what was then Rupert's Land.¹⁶¹ However, Ontario's western boundaries at that time had not yet been fully defined, leading Ontario to claim that the territory which comprised the newly-created Manitoba, including lands in Treaty 3, was within its provincial boundaries.¹⁶² The lands within Treaty 3 became a focal point in the ongoing boundary and jurisdictional dispute between the two levels of government.¹⁶³

The federal-provincial boundary dispute persisted after the negotiation of Treaty 3, and was eventually brought before the courts in *St. Catharine's* case. As Geoffrey Lester explains, *St. Catherine's* was "essentially contrived litigation brought to test the beneficial interest in a huge tract of territory in northwestern Ontario" and to resolve the jurisdictional dispute between Ontario and Canada on a final basis.¹⁶⁴ The defendant, the St. Catharine's Milling and Lumber Company, was a corporation based in Ottawa which held a lease issued by the dominion government to harvest timber in the area subject to the boundary dispute.¹⁶⁵ Ontario sought a declaration that the defendant corporation had no right to harvest timber in the disputed area pursuant to a permit issued by the dominion government.¹⁶⁶ Because the company's liability

¹⁶⁰ Cottam, *supra* note 148 at 247.

¹⁶¹ Lester, *supra* note 152 at 133.

¹⁶² *Ibid.*

¹⁶³ Hall 1991, *supra* note 158 at 271.

¹⁶⁴ Lester, *supra* note 152 at 132.

¹⁶⁵ Harring 1998, *supra* note 52 at 132.

¹⁶⁶ Lester, *supra* note 152 at 135.

hinged on whether the dominion government had the right to issue authorizations for resource activities in respect of lands within the province of Ontario, in practical terms the ‘defendant’ in the litigation was actually the Dominion.¹⁶⁷

The *St. Catherine’s* case quickly came to involve much more than the nature of federal and provincial rights and interest to lands. Resolving which level of government had the right to benefit from the timber in the disputed area required “an assessment of the legal character of Treaty 3, an inquiry that required the judges to consider the concept of Indian land title in the historic evolution of constitutional principles used to justify the British colonization of North America.”¹⁶⁸ The court was asked to determine both the basis of the Crown’s title to the lands in question and the right of the federal and provincial governments to benefit from those rights.¹⁶⁹ For the Anishinaabeg, who were not parties to the case, the resolution of these issues would put their own interest in their lands and resources, along with the larger question of the extent to which that issues would be recognized, directly at issue.¹⁷⁰

Unsurprisingly, the federal and provincial governments in *St. Catherine’s* relied on arguments which were diametrically opposed to each other. For the Dominion, the primary objective was to confirm its interest in the lands subject to Treaty 3. For Ontario, the aim was to deny that same right and confirm its ownership and control over lands and resources within its boundaries.

¹⁶⁷ *Ibid.* At the lower courts, the Dominion presented arguments on behalf of the company. At the Privy Council, the Dominion participated formally as an intervenor.

¹⁶⁸ Hall 1991, *supra* note 154 at 271.

¹⁶⁹ *Ibid.*

¹⁷⁰ Telford, *supra* note 60 at 250.

At its core, the Dominion's position in *St. Catherine's* rested on its interpretation of the nature of the interest obtained by the Crown from the Anishinaabeg pursuant to Treaty 3.¹⁷¹ In order to succeed in establishing its own right to the disputed lands, the Dominion had to demonstrate that the Anishinaabeg had full ownership rights to the lands up to the point of treaty.¹⁷² The Dominion took the position that the Anishinaabeg held title to the lands based on prior occupation and possession and that this title included legally-enforceable rights, including the right to transfer title to the Crown through purchase or cession.¹⁷³ According to this line of argument, the Dominion had title to the disputed lands because it had acquired them from the Anishinaabeg in 1873.¹⁷⁴

The Dominion's arguments were grounded on the views of the Prime Minister and Superintendent General of Indian Affairs at that time, Sir John A. Macdonald. In court the Dominion (and the company, on its behalf) argued that "the Indians owned the land and passed it to the Dominion through the treaty; thus the Dominion owned the land and its resources even though it lay within the boundaries of Ontario."¹⁷⁵ Macdonald had already advanced these views publicly in the years leading up to *St. Catherine's*, including in a speech in Toronto in 1882 where he argued that Ontario's claims to lands within Treaty 3 "were irrelevant because the dominion had actual ownership of all lands regardless of the province they were located in: the dominion took title from the Indians through its purchase of the lands in Treaty 3."¹⁷⁶ In effect,

¹⁷¹ Cottam, *supra* note 148 at 248.

¹⁷² *Ibid.*

¹⁷³ Lester, *supra* note 152 at 137.

¹⁷⁴ Haring 1998, *supra* note 52 at 135.

¹⁷⁵ Cottam, *supra* note 148 at 248.

¹⁷⁶ Haring 1998, *supra* note 52 at 133.

Macdonald's position was that Indigenous peoples "held title to property under Anglo-Canadian law."¹⁷⁷

In the alternative, the Dominion argued that the Anishinaabeg obtained title to the territory through the Royal Proclamation, and had subsequently ceded that interest to the Dominion by treaty.¹⁷⁸ As such, the lands in dispute were held by the Anishinaabeg from the date on which the Proclamation was issued until 1873, when they surrendered title to the Crown.¹⁷⁹ Dalton McCarthy, who appeared on behalf of the defendant company (but in fact represented the Dominion) argued that the requirements of the Proclamation "'were more than political niceties to be conducted or not conducted according to the whims of policy.'"¹⁸⁰ Rather, the Proclamation imposed enforceable legal requirements on the Crown to purchase Indigenous lands prior to opening those lands to settler populations.¹⁸¹ As Barry Cottam explains, according to the Dominion, the numbered treaties had been obtained "in fulfillment of the constitutional principles made explicit by the Royal Proclamation," and as result of those, treaties, "a real and substantial interest in the land had changed hands."¹⁸²

As a corollary, the Dominion argued that the lands in dispute fell within its jurisdiction by virtue of the *BNA Act*. The Dominion's position on this issue was that the effect of the Proclamation's reference to "lands reserved for the Indians" was that all lands which had not been surrendered or purchased from Indigenous peoples by the Crown remained "reserved" for

¹⁷⁷ *Ibid.*

¹⁷⁸ Lester, *supra* note 152 at 138.

¹⁷⁹ Harring 1998, *supra* note 52 at 132.

¹⁸⁰ Cottam, *supra* note 148 at 274.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

their use and occupation.¹⁸³ In the Dominion’s view, the disputed territory had not been surrendered or purchased at Confederation, and consequently those lands continued to be “lands reserved” within the meaning of the Proclamation until 1873. Following the treaty, the federal government acquired title to the lands by virtue of its legislative authority over “Indians and lands reserved for the Indians” pursuant to section 91(24) of the *BNA Act*.¹⁸⁴

In essence, the Dominion argued that the Indians owned the land prior to Treaty 3, based either on prior occupation or the language in the Proclamation, and the lands ceded pursuant to Treaty 3 were to be held by the Dominion for the benefit of the Indians. Both of these arguments rested on the assumption that prior to 1873, the Anishinaabeg owned the lands in question, and that any rights held by the Crown at the time of the litigation had been acquired from the Anishinaabeg.¹⁸⁵ While this position assumes that the Crown acquired full title to the lands in dispute after Treaty 3 — a position which is inconsistent with the Anishinaabeg view of the treaty as an agreement to share lands and resources -- it does provide important insights in the Dominion’s position on the nature and effect of the treaties shortly after Confederation. In particular, it reflects the Crown’s view that Indigenous nations held title to their lands and that the treaties were therefore a “necessary adjunct of British colonization” – that is, Treaty 3 and the other numbered treaties were required in order for the Crown to be able to assert an interest in the lands in question.¹⁸⁶ In addition, it follows from Canada’s argument that it understood the

¹⁸³ *Ibid.*

¹⁸⁴ Lester, *supra* note 152 at 139.

¹⁸⁵ Telford, *supra* note 60 at 251.

¹⁸⁶ Cottam, *supra* note 148 at 273.

Anishinaabeg as possessing a full, legally enforceable title to land prior to treaty, not the limited right to use the lands which was eventually recognized by the Privy Council.¹⁸⁷

To succeed in *St. Catherine's*, Ontario needed to establish that the Anishinaabeg held something less than a full property right to their lands prior to 1873, which would in turn have negated the Dominion's argument that it acquired the lands in dispute via Treaty 3.¹⁸⁸ However, Ontario's arguments went much further. The Province's lawyers "denied that aboriginal possession conferred any sort of legal or equitable title on the Indians whatsoever, much less a right that could be conveyed so as to enlarge the Crown's own proprietary rights."¹⁸⁹ In contrast to the view of the Dominion – not to mention the Anishinaabeg – Ontario's position was grounded in the complete denial of Indigenous title, both before and after treaty.¹⁹⁰

In arguing against the existence of Indigenous peoples' land rights, Ontario adopted the position that prior to the arrival of Europeans, Indigenous peoples lived a nomadic existence without legal systems or organized government.¹⁹¹ This position was forcefully stated at the Supreme Court, where counsel for the Province argued in respect of the Anishinaabeg that "nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation capable of holding lands."¹⁹² In the absence of a legal system, Ontario argued that Indigenous peoples were incapable of conceiving of land ownership or holding rights to property which were recognizable under British law.¹⁹³ Ontario submitted that even if

¹⁸⁷ Telford, *supra* note 60 at 251.

¹⁸⁸ Cottam, *supra* note 148 at 248.

¹⁸⁹ Lester, *supra* note 152 at 140.

¹⁹⁰ Telford, *supra* note 60 at 251.

¹⁹¹ Hall 1991, *supra* note 154 at 275.

¹⁹² *St. Catharine's* SCC decision, *supra* note 4 at 596.

¹⁹³ Hall 1991, *supra* note 154 at 275.

Indigenous peoples did hold property at the time of contact, they were “immediately dispossessed and subjugated once their homelands were discovered by agents representing a higher law vested in the authority of a Christian monarch.”¹⁹⁴ In either case, then, the Crown had acquired full title to the territory long before Confederation and Treaty 3 by virtue of discovery and settlement.¹⁹⁵ No purchase or cession of Indigenous peoples’ interest in their lands was required to complete the Crown’s ownership to the lands.

Ontario also disputed the Dominion’s argument that the Royal Proclamation recognized the existence of Indigenous title to lands occupied as of 1763. According to Ontario, the Proclamation created new, limited rights for Indigenous peoples; it did not recognize any pre-existing rights to territory.¹⁹⁶ The right created by the Proclamation was not a propriety right to land, but rather a limited right to occupation which could not be transferred to private parties and which could be extinguished unilaterally by the Crown.¹⁹⁷ As such, “the only right that the Indians in the disputed territory could hold was a right that had been explicitly created by the British Sovereign.”¹⁹⁸ Finally, Ontario argued that in any case, the Proclamation had been repealed by the *Quebec Act* of 1774 and as such was no longer legally effective in respect of Indigenous peoples.¹⁹⁹

In light of the above, Ontario described the Crown’s obligations in respect of Indigenous peoples’ lands as moral rather than legal in nature.²⁰⁰ The Attorney General for Ontario argued at

¹⁹⁴ *Ibid.* at 276.

¹⁹⁵ Telford, *supra* note 60 at 251. See also Cottam, *supra* note 148 at 248.

¹⁹⁶ Hall 1991, *supra* note 154 at 276.

¹⁹⁷ Lester, *supra* note 152 at 140.

¹⁹⁸ Hall 1991, *supra* note 154 at 276.

¹⁹⁹ Telford, *supra* note 60 at 251.

²⁰⁰ *Ibid.*

trial that Indigenous peoples had “no legal or equitable estate in the lands.”²⁰¹ Similarly, at the Supreme Court counsel for Ontario submitted that the Crown had never recognized any right beyond a right of occupancy, and that “this recognition was based upon public policy and not upon any legal right in the aboriginal inhabitants.”²⁰² Accordingly, any land rights held by the Anishinaabeg prior to treaty existed solely at the pleasure of the Crown and were subject to unilateral extinguishment.²⁰³

Ontario’s position that Indigenous peoples were incapable of holding legally-recognizable rights to land meant that they were also incapable of conveying a right of ownership of those lands to the Dominion by treaty. The fact that the treaties were negotiated in accordance with the requirements set out in the Proclamation did not constitute evidence that the treaties were a legal requirement in order to access Indigenous territories.²⁰⁴ Instead, Ontario argued that the Crown’s longstanding policy of negotiating treaties prior to opening up lands for development or immigration was “urged on grounds of prudence, to secure peace and friendship, and thus to facilitate settlement.”²⁰⁵ Far from being a legal requirement, the practice “reflected nothing more than considerations of expediency, or, at best, moral duty.”²⁰⁶ As a result, the Dominion could not have obtained the disputed lands via Treaty 3 because the Anishinaabeg did not hold a proprietary interest capable of transfer in the first place.²⁰⁷

²⁰¹ *R. v. St. Catharines Milling* (1885) 10 O.R. 196 (Ont. Ch.) [*St. Catherine’s* trial decision] at 199.

²⁰² *St. Catherine’s* SCC decision, *supra* note 4 at 597.

²⁰³ Cottam, *supra* note 148 at 248.

²⁰⁴ Hall 1991, *supra* note 154 at 276.

²⁰⁵ Factum of the Appellants, *St. Catherine’s* SCC, *supra* note 2, quoted in Cottam, *supra* note 148 at 258.

²⁰⁶ Hall 1991, *supra* note 152 at 276.

²⁰⁷ *Ibid.* at 275.

Given that the Anishinaabeg did not have an interest in the lands which could have been transferred by treaty, the only remaining issue for Ontario was which level of government was entitled to benefit from those lands pursuant to the *BNA Act*.²⁰⁸ On this point, Ontario took the position that title to the disputed lands was held by the Crown and had passed to the province on Confederation, and that the Dominion's authority in respect of "lands reserved for the Indians" in section 91(24) referred to lands specifically set aside as reserves, not all unceded lands at the time of the Proclamation. Ontario further argued that section 91(24) related solely to the Dominion's legislative authority, not to ownership of land.²⁰⁹ The correct interpretation of the *BNA Act* was that the Province held the proprietary interest in all Crown lands within its boundaries, and that the Dominion's interest was limited to the right to exercise legislative authority in respect of those specific portions of land set aside as reserve.²¹⁰ Consequently, the Dominion had no legal interest in the disputed lands, and the defendant company had no right to harvest timber on those lands pursuant to an authorization issued by the Dominion.²¹¹

3.3 The Trial Decision

The trial decision, issued by Chancellor Boyd in 1885, was based entirely on Ontario's research and legal argument.²¹² Boyd concluded that Indigenous peoples had no legally-enforceable rights to land, that the treaties were negotiated as a matter of political expediency rather than law, and that Ontario, not the Dominion, was entitled to benefit from the lands within its boundaries which were subject to Treaty 3. The decision would set the stage for the higher

²⁰⁸ Lester, *supra* note 152 at 141.

²⁰⁹ *St. Catherine's* trial decision, *supra* note 201 at 199.

²¹⁰ Hall 1991, *supra* note 154 at 277.

²¹¹ Harring 1998, *supra* note 52 at 132.

²¹² *Ibid.* at 137.

courts' denial of the nature and effect of Treaty 3 and the dismissal of the Crown's treaty obligations.

Boyd's conclusion that the Anishinaabeg had no legal rights to their lands both before and after treaty relied heavily on racist assumptions about Indigenous peoples and their rights to their territories which had no basis in fact or evidence.²¹³ The decision is also striking in its absence of reference to the historical Indigenous-Crown relations which underpinned the provincial-federal dispute and the negotiation of Treaty 3. Boyd characterized Indigenous peoples throughout North America as "heathens and barbarians" who were "found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes" and who had never held a recognized legal right to land.²¹⁴ He was particularly dismissive of the Anishinaabeg signatories to Treaty 3, stating that "when the treaty was made, the land it deals with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways, most of them presenting a more than usually degraded Indian type."²¹⁵ It is difficult to reconcile Boyd's statements regarding the Anishinaabeg and Treaty 3, made without any supporting evidence, with the extensive record of the treaty negotiations prepared by both the Anishinaabeg and the Crown, and with the Crown's repeated, failed attempts to secure a treaty prior to 1873. Boyd's ignorance of these historical and political realities, combined with overt racism, allowed him to gloss over complicated legal questions surrounding the nature of Indigenous title and resulted in a decision which was incorrect in fact and in law.²¹⁶

²¹³ McNeil 1999, *supra* note 153 at 69.

²¹⁴ *St. Catherine's* trial decision, *supra* note 201 at 206.

²¹⁵ *Ibid.* at 227.

²¹⁶ Harring 1998, *supra* note 52 at 137. For example, Boyd incorrectly relied on the American decision in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) as precedent for the position that Indigenous peoples had no legal interest in unceded lands.

Among the most significant inaccuracies perpetuated by Boyd was that Indigenous peoples in North America became subjects of the Crown by way of conquest rather than through voluntary cession of lands. Boyd held that the “legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown” and that after conquest, both the “French and Indian population that remained in the country became, by the terms of capitulation, the subjects of the King.”²¹⁷ According to Boyd, therefore, the lands in question belonged to Ontario because the Crown held a full proprietary title to them by virtue of conquest which it subsequently transferred to Ontario by statute.²¹⁸

Like Ontario, Boyd characterized the Royal Proclamation as a provisional arrangement which was no longer operative in respect of Indigenous land rights. He held that the “primary intent of the proclamation was to provide, temporarily, for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America.”²¹⁹ Having been superseded by the *Quebec Act* in 1774, the Proclamation continued thereafter to operate as a “declaration of sound principles” in respect of the Crown’s disposition of Indigenous lands, but otherwise had no legal effect.²²⁰ The treaties represented an extension of an existing Crown policy of negotiating with Indigenous peoples in order to open up lands and expedite settlement, not the fulfilment of the formal legal requirements set out in the Proclamation.²²¹

Boyd also assumed that regardless of the existence or absence of treaties, the settlement of Indigenous territories by European populations was inevitable. On this issue he relied not on

²¹⁷ *St. Catherine’s* trial decision, *supra* note 201 at 202.

²¹⁸ Harring 1998, *supra* note 52 at 137.

²¹⁹ *St. Catherine’s* trial decision, *supra* note 201 at 209.

²²⁰ *Ibid.* at 210.

²²¹ Telford, *supra* note 60 at 252.

the record of the Treaty 3 negotiations, but on a report in the Journal of the Legislative Assembly issued almost thirty years prior to the treaty. The report provided that in the absence of the Crown obtaining a voluntary surrender of Indigenous lands, “white settlers would gradually have taken possession of them, without offering any compensation whatever” and that the “Government therefore adopted the most humane and most just course in inducing the Indians, by offers of compensation to remove quietly to more distant hunting grounds, or to confine themselves within more limited reserves, instead of leaving them and the white settlers exposed to the horrors of a protected struggle for ownership.”²²² Pursuant to this line of reasoning, the Crown’s practice of negotiating treaties was intended to minimize conflict associated with the predetermined appropriation of Indigenous lands by settler populations.

Boyd characterized the post-Confederation treaties between the Crown and Indigenous peoples as a continuation of this policy. He held that “the manner of dealing with the rude redmen of the North-West” by way of treaty was a means of obtaining surrender of their interest in their lands and of “conciliating them in the presence of an ever-advancing tide of European and Canadian civilization.”²²³ Regarding Indigenous peoples’ right to enter into or refuse treaties, he held that:

While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them. If, however they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupilage, and have their rights assured in perpetuity to the usual land reserve.²²⁴

²²² 1844 Report of the Journal of the Legislative Assembly, quoted in *St. Catherine’s* trial decision, *supra* note 201 at 205.

²²³ *Ibid.* at 211.

²²⁴ *Ibid.* at 212.

Consequently, on entering into Treaty 3, the Anishinaabeg surrendered the entirety of their interest in their lands, save for rights to specific reserves which were to be set aside following the treaty.²²⁵ Any additional rights exercised by the Anishinaabeg depended on the goodwill of the Crown.

On the issue of the distribution of federal-provincial powers pursuant to the *BNA Act*, Boyd largely accepted Ontario's interpretation of the legislation, including that the Dominion's authority in respect of "lands reserved for the Indians" in section 91(24) was confined to legislative power over parcels of land reserved following treaty, not all lands unceded by Indigenous peoples at Confederation.²²⁶ Accordingly, the Dominion government's jurisdictional authority was limited to surrendered lands which had been set aside as reserves, and all of the remaining Crown lands within the provincial boundaries were the property of Ontario.²²⁷

Importantly, Boyd did recognize that the Dominion held obligations to the Indigenous treaty parties, and that a consequence of the decision in *St. Catherine's* would be to deny the Dominion access to the resources necessary to fulfil those obligations. Boyd acknowledged that it "would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer, presently or prospectively, the expenditure."²²⁸ However, he also expressly declined to address that issue, holding that "in the present case, my judgment is, that the extinction of title procured by and for the Dominion, enures to the benefit of the Province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Harring 1998, *supra* note 52 at 137.

²²⁸ *St. Catherine's* trial decision, *supra* note 201 at 214.

vested right of the Province to this as part of the public domain of Ontario.”²²⁹ The trial decision thus rests largely on the denial of both historical fact and Indigenous land rights, but nevertheless acknowledges the outstanding obligations held by the Dominion government in respect of its treaty partners.

3.4 The Ontario Court of Appeal & Supreme Court of Canada Decisions

The defendant company, on behalf of the Dominion, appealed Boyd’s decision. In its judgment, the Court of Appeal found for Ontario but focused primarily on the interpretation of the *BNA Act* rather than Indigenous land rights.²³⁰ Chief Justice Hagarty concurred with Boyd that the words “lands reserved for the Indians” in the *BNA Act* referred to lands specifically set aside as reserve, not all the unceded territories at Confederation.²³¹ Pursuant to this interpretation, the disputed lands were “public lands” within the meaning of the legislation, and were therefore the property of Ontario, not the Dominion.

Notably, Hagarty did not fully endorse Boyd’s viewpoint that Indigenous peoples were incapable of holding rights to their lands. Hagarty “admitted the difficulty of the question of Indian title” and held that that title had been extinguished by Treaty 3, thereby implicitly rejecting Boyd’s position that the Anishinaabeg held no property rights capable of transfer prior to the treaty in the first place.²³² Based on his interpretation of the legislation, however, Hagarty held that he was “forced to the conclusion that when the Dominion Government in 1873

²²⁹ *Ibid.*

²³⁰ Haring 1998, *supra* note 52 at 138.

²³¹ *St. Catharines Milling and Lumber Co. v. R* 13 Ont. App. R. 148. [*St. Catherine’s* ONCA decision] at para 35.

²³² Haring 1998, *supra* note 52 at 139.

extinguished the Indian claims, such action must be held to enure to the benefit of the Province in which is the legal ownership of the land.”²³³

In his concurring judgment, Justice Patterson agreed with Hagarty’s interpretation of the *BNA Act*. Although he attributed underlying Crown title to the principle of discovery, he nevertheless “recognized that the relationship between the Indians and Europeans was ‘peculiar’ and that the Indians had some type of sovereignty over the land, which included some right to sell or transfer it.”²³⁴ Patterson held, based on the terms of the treaty published by Canada and Treaty Commissioner Morris’ record of the treaty negotiations, that on entering into treaty, “certain outlay was incurred and certain burdens assumed by the [Dominion] Government,” but that “[o]f these things I can no more than that they seem to me to leave the legal question untouched.”²³⁵ Like Boyd, Patterson’s decision expressly acknowledges that the Dominion assumed obligations to the Indigenous treaty parties entering into treaty, and that the fulfilment of those obligations would be complicated by the decision in *St. Catherine’s*.

In contrast to Hagarty and Patterson, Justice Burton’s concurring decision was dismissive of the idea that Indigenous peoples held title to their lands. He held that the position that the Anishinaabeg owned their lands prior to treaty was “startling” and that Indigenous peoples had “no idea of a title to the soil itself.”²³⁶ Burton concluded that the Crown could extinguish Indigenous peoples’ interests in their lands, but that the interest itself was not capable of transfer. As such, any recognition of Indigenous title by the Crown was attributable to political or

²³³ *St. Catherine’s* ONCA decision, *supra* note 231 at para 42.

²³⁴ *Ibid.* at para 69; Harring 1998, *supra* note 52 at 140.

²³⁵ *Ibid.* at para 81.

²³⁶ *Ibid.* at paras 48-9.

humanitarian considerations, and did not constitute recognition of a legal right to the land.²³⁷ The Court of Appeal decision thus supported Ontario both in reasons and in the result, although Justices Hagarty and Patterson took some measures to distance themselves from the most overtly racist assumptions of the trial judge.

Like the Court of Appeal, the majority of the judges at the Supreme Court agreed with the decision of Chancellor Boyd in the result, if not the underlying reasons. The majority concluded that based on the Proclamation Indigenous peoples did hold a legal right to occupy to their lands, but that this right was merely a burden on the Crown's underlying title which had been extinguished by treaty. The court took a slightly more expansive view of Indigenous rights than that of Boyd, but still issued a decision which strongly favoured Ontario and which denied the Anishinaabeg any legal right to their lands post-treaty.

In his reasons, Chief Justice Ritchie held that the sole basis for Indigenous peoples' title to lands was the Royal Proclamation. According to Ritchie, prior to Treaty 3 the Crown held a full proprietary interest in the lands on which Indigenous title was a mere burden. The Anishinaabeg's interest in the land was limited to a right of occupation which could be extinguished by the Crown through purchase or surrender, as was the case in Treaty 3.²³⁸ Ritchie further found that the words "lands reserved for the Indians" in section 91(24) of the *BNA Act* meant lands specifically set aside as reserve by the Crown, not all unceded lands at the time of

²³⁷ *Ibid.* at para 51. A fourth judge, Justice Osler, concurred with the Chief Justice but did not provide written reasons.

²³⁸ *St. Catherine's* SCC decision, *supra* note 4 at 599-600.

Confederation.²³⁹ The effect of Treaty 3 was “simply to relieve the legal ownership of the land belonging to the Province” from the burden of the Anishinaabe right of occupancy.²⁴⁰

In a concurring judgment, Justice Henry agreed with Ritchie that the Crown had never recognized Indigenous peoples as having legal title to the lands they used and occupied. He found that the Crown had acquired the lands in question by conquest, and that the effect of the Proclamation was simply to place restrictions on Indigenous peoples’ right to sell their lands.²⁴¹ According to Henry, the Crown did not require Treaty 3 in order to secure legal title to the land. Instead, the Crown’s objective in negotiating the treaty was to avoid conflict with the Indigenous occupants of the land and facilitate British settlement.²⁴² The treaty document as published by Canada demonstrated that the agreement was “simply a cession of all the Indian rights, titles, and privileges whatever they were,” and any consideration on the part of the Crown “emanated from Her Majesty's bounty.”²⁴³ Henry further agreed with Ritchie that the term “lands reserved” in section 91(24) refer to all unceded lands at Confederation. As a result, the transfer of Anishinaabe rights to the Dominion pursuant to Treaty 3 had no effect on Ontario’s title to public lands within its boundaries.²⁴⁴

Like Justice Henry, Justice Taschereau provided written reasons which largely concurred with the Chief Justice. Taschereau found that Britain had acquired full title to the territory in 1763, and that nothing in the Proclamation recognized or conferred legal rights on the

²³⁹ *Ibid.* at 600.

²⁴⁰ *Ibid.* at 601. Justice Fournier concurred with the Chief Justice without providing separate written reasons.

²⁴¹ *Ibid.* at 603.

²⁴² *Ibid.* at 640.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.* at 642.

Indigenous occupants.²⁴⁵ Taschereau rejected the proposition that the Crown's longstanding practice of entering into treaties prior to settlement constituted recognition of Indigenous peoples' beneficial interest in those lands.²⁴⁶ To accept this position, he argued, would mean that "all progress of civilization and development in this country is and always has been at the mercy of the Indian race."²⁴⁷ Instead, the practice of negotiating treaties was motivated solely by political concerns and the Crown's "humanity and benevolence."²⁴⁸

In the result, the majority of the Supreme Court firmly rejected the Dominion's arguments and affirmed that Ontario held the sole right to own and benefit from the disputed lands. This decision came to be the basis for the decision of the Privy Council and the resulting impacts on the rights of the Anishinaabeg and other Indigenous signatories to the numbered treaties. As will be explored in Chapter 4, however, two dissenting judges at the Supreme Court wrote lengthy, reasoned arguments in support of the Dominion's position which, while often ignored, conform much more closely to the historical and political circumstances surrounding the treaty.

3.5 The Privy Council Decision

When the *St. Catherine's* case reached the Privy Council in 1888, the Dominion and Ontario again relied on arguments regarding the effect of the Proclamation, Treaty 3 and the *BNA Act* to advance their respective positions.²⁴⁹ Lord Watson for the Privy Council issued a brief set of reasons which, with important exceptions, supported the Province's argument and the

²⁴⁵ *Ibid.* at 647.

²⁴⁶ *Ibid.* at 648.

²⁴⁷ *Ibid.* at 649.

²⁴⁸ *Ibid.* at 648.

²⁴⁹ Telford, *supra* note 60 at 260.

decisions of the lower courts.²⁵⁰ While the Privy Council moved away from Boyd's complete denial of Indigenous rights, it nevertheless maintained that the Crown held underlying title to the lands and that any rights held by Indigenous peoples were limited to rights of occupation which were dependent on and attributable to the Crown.

Like the Chief Justice at the Supreme Court, Lord Watson rejected Boyd's view that the Proclamation was of no legal effect and that the Anishinaabeg were incapable of holding a legal interest in their lands.²⁵¹ Instead, Watson held that the Proclamation was a legally valid document that conferred specific rights and obligations in respect of lands occupied by Indigenous peoples.²⁵² Watson also found that the Dominion had no right to benefit from the disputed lands, not because Indigenous peoples were incapable of holding a legal interest in the lands, but because the lands had been surrendered pursuant to Treaty 3 to the Crown, not the Dominion.²⁵³ In reaching these conclusions, the Privy Council affirmed the existence of an Indigenous right to land which was recognized in law rather than custom or policy.²⁵⁴ However, the Privy Council ultimately chose to characterize Indigenous peoples' rights to land as a limited right of occupancy rather than a full legal interest. Lord Watson held that Indigenous peoples' legal right to land could be only be ascribed to the Proclamation, and that in any case, it was merely "a personal and usufructuary right, dependent upon the good will of the Sovereign."²⁵⁵

Having dismissed Indigenous title as a simple right of occupancy, Lord Watson went on to conclude that the claims of the Dominion and Ontario could be resolved by reference to the

²⁵⁰ Haring 1998, *supra* note 52 at 143.

²⁵¹ *Ibid.*

²⁵² Hall 1991, *supra* note 154 at 280.

²⁵³ Lester, *supra* note 152 at 145.

²⁵⁴ Cottam, *supra* note 148 at 261.

²⁵⁵ *St. Catherine's JCPC decision*, *supra* note 2 at 54.

statutory provisions in the *BNA Act*.²⁵⁶ He found that when the Anishinaabeg surrendered the interest in land which had been created by the Proclamation, “the surrender enured to the benefit of the Crown, whose proprietary title became a *plenum dominium*, available to the Crown for disposal in accordance with the distribution of property rights” pursuant to the legislation.²⁵⁷ Pursuant to section 109 of the *BNA Act*, Ontario was entitled to the beneficial interest in all the lands within its boundaries, because this was the property of the Crown at the time of Confederation.²⁵⁸ The underlying title to the disputed lands was therefore with the Crown, and following surrender of the Anishinaabe rights at Treaty 3, the beneficial interest in those lands was vested in the Province.

The Privy Council rejected the lower courts’ restrictive interpretation of section 91(24) and held that the term “lands reserved for the Indians” was to be read expansively and in reference to the Proclamation.²⁵⁹ However, even under this liberal interpretation, the Privy Council found that the Dominion had no right to use the disputed lands to fulfil its treaty promises because federal jurisdiction under section 91(24) pertained to legislative authority, not property rights.²⁶⁰ The Privy Council held that prior to Treaty 3 the Crown already held the paramount estate which was underlying Indigenous peoples’ occupancy right and which became complete once title was surrendered or extinguished. As such, before 1873 the disputed lands were both subject to the personal and usufructuary right of the Anishinaabeg and within the authority of the federal government, but at the same time were the property of the Province

²⁵⁶ *St. Catherine’s JCPC decision*, *supra* note 2.

²⁵⁷ Lester, *supra* note 152 at 147.

²⁵⁸ *St. Catherine’s JCPC decision*, *supra* note 2.

²⁵⁹ Lester, *supra* note 152 at 147.

²⁶⁰ *Ibid.* at 146.

pursuant to section 109.²⁶¹ When the Crown extinguished the Anishinaabe land interest by way of treaty, all lands set aside as reserve became “public lands” within the meaning of section 92(5) of the *BNA Act* and were available as a source of revenue for the Province.²⁶²

Although the Privy Council found that the Anishinaabeg held only a limited right to land prior to Treaty 3, it did recognize that the Crown had assumed binding legal obligations on entering into treaty. The Privy Council found that as a consequence of the division of powers under the *BNA Act*, which failed to provide the Dominion means to fulfil its treaty promises, Ontario should assume responsibility for meeting financial obligations assumed by the Dominion as a result of the treaty. Lord Watson held that given that the “benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government.”²⁶³ This statement, while directed at Ontario’s obligations to the Dominion, nevertheless confirms that the Crown acquired binding obligations to the Anishinaabe treaty signatories on entering into Treaty 3 which were recognized at the Privy Council.

3.6 Conclusion

The *St. Catherine’s* case moved through three prior levels of court before being heard by the Privy Council in 1888. Throughout the proceeding, the majority of the judges who heard and decided the *St. Catherine’s* case failed to take into account key historical and legal facts. With two notable exceptions, which will be examined in Chapter 4, each of the judges who heard the

²⁶¹ *St. Catherine’s* JCPC decision, *supra* note 2.

²⁶² Lester, *supra* note 152 at 147.

²⁶³ *St. Catherine’s* JCPC decision, *supra* note 2.

case agreed substantially with Ontario's arguments. The result was a final decision by the Privy Council which is inconsistent with the context in which the treaty was negotiated and the Anishinaabeg's and Dominion's understandings of the treaty in 1873. The Privy Council's perspective on the treaty relationship has come to dominate much of the subsequent interpretation of Treaty 3, and continues to affect the way in which the judiciary understands Indigenous peoples' rights to land today.²⁶⁴

²⁶⁴ Cottam, *supra* note 148 at 250.

Chapter 4: Impacts of the *St. Catherine's* Decision

4.1 Introduction

The impact of the Privy Council decision in *St. Catherine's* has been significant and long lasting, both on the respective positions of the Anishinaabeg and the federal and provincial governments regarding use and ownership of treaty lands, and on judicial conceptions of Indigenous land rights and the effect of the numbered treaties.

4.2 Impacts on the Treaty Relationship

Cumulatively, the decisions at the various levels of court in *St. Catherine's* supported the Province's view that the Anishinaabeg held no property interest to surrendered lands outside their reserves and that the treaty was fundamentally a tool of political expediency rather than a nation-to-nation partnership between the Anishinaabe and the Crown. For the Province, the Privy Council's interpretation of the *BNA Act* affirmed its position that it had the sole right to use and benefit from the lands and resources in question. For the federal government, the decision meant it no longer held any interest in the subject lands. Consequently, the decision expanded Ontario's political and constitutional powers, while at the same time weakening those of the federal government.²⁶⁵

For the Anishinaabeg, the Privy Council's interpretation of the *BNA Act* made it considerably more difficult to enforce their understanding of the Crown's treaty obligations. As Telford explains, as a result of the decision, "Ontario obtained the beneficial interest in all lands including Aboriginal lands, while Canada, as the chief caretaker of the First Nations, retained

²⁶⁵ Harring 1998, *supra* note 52 at 125.

only an administrative interest” in the treaty lands.²⁶⁶ As a corollary, the Dominion could no longer access those lands as a source of revenue to fulfil the promises it made to the Anishinaabeg in 1873. The decision thus allowed the Dominion to abdicate responsibility for fulfilling the Crown’s promises to its treaty partners without also requiring it to take steps to ensure that the Province would fulfil those obligations.

The decision further confirmed the Province’s view that the Anishinaabeg held no legal interest to surrendered lands outside their reserves. According to the Privy Council, the Ontario had the right to all resources generated from the treaty lands, because the treaty had left “the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown.”²⁶⁷ This severely restricted Anishinaabe rights to use, benefit and make decisions about their territory and resources, contrary to their understanding of the treaty agreement.²⁶⁸

The decision also set the stage for the denial of the treaty relationship by both levels of government. Regardless of the positions taken during the proceeding, both the federal and provincial governments relied on the Privy Council’s interpretation of the division of powers and its conclusion that the Anishinaabeg held no property interest in treaty lands outside of reserve in the following years as basis to deny its responsibility for fulfilling the Crown’s treaty promises.²⁶⁹ The Province used the decision to further its stance on Indigenous rights. As historians Leo Waisberg, Joan Lovisek and Tim Holzkamm explain:

For Ontario, victory in cases such as *St. Catherine’s* meant more revenue and White settlement. Through the courts and by an aggressive public assertion of provincial rights,

²⁶⁶ Telford, *supra* note 60 at 263.

²⁶⁷ *St. Catherine’s* JCPC decision, *supra* note 2.

²⁶⁸ Luby, *supra* note 105 at 207.

²⁶⁹ See for example *Grassy Narrows*, *supra* note 3.

Ontario denied that Indians could legally own property. Its use of this doctrine brought great benefits to the province, and established for a century Canadian legal doctrine on Indian property rights. Ontario secured within Treaty 3 territory the removal of both federal and Indian rights from Crown lands.²⁷⁰

For its part, the federal government used the decision as justification for minimizing its treaty obligations and ignoring Indigenous peoples in decision-making about lands related to treaty.

The Royal Commission on Aboriginal Peoples found that in the years following Confederation in Canada, the “eclipse of treaties and the absention of Indian people from decision making was pervasive” and that for the federal government, “treaty obligations were seen as a burden on the treasury, with costs to be pared down to the bare minimum.”²⁷¹

4.3 Impacts on Canadian Jurisprudence

The Privy Council decision had a significant impact on the development of Canadian law in relation to treaties and Indigenous land rights. Initially, one of the main impacts was the foreclosure of legal challenges by Indigenous peoples regarding the interpretation and enforcement of the treaty agreements. As RCAP explains, following *St. Catherine's*, the “original Aboriginal inhabitants who had been living on the land from time immemorial were found to have no real property interest in the land at all; rather, they had a mere ‘personal’ and ‘usufructuary’ right that constituted a burden on the Crown’s otherwise absolute title.”²⁷²

Consequently,

The judgement in *St. Catherine's Milling* seemed to close off important avenues for Aboriginal peoples to contest Crown claims to their lands or regulations controlling their traditional hunting, fishing and trapping activities. The lack of legal avenues for action...led to a long period during which the courts were seldom called upon to deal

²⁷⁰ Waisberg, Leo G., Joan A. Lovisek, and Tim E. Holzkamm. “Ojibwa Reservations as ‘an incubus upon the territory:’ The Indian Removal Policy of Ontario, 1874-1982.” Papers of the Algonquian Conference 27, 1996 at 349.

²⁷¹ RCAP, *supra* note 50 at 163.

²⁷² *Ibid.* at 202.

with important questions of Aboriginal and treaty rights.²⁷³

The Crown's position on Indigenous land rights as endorsed by the Privy Council was further solidified in 1927 by an amendment to the *Indian Act* prohibiting the raising of funds for litigation related to Indigenous lands without the permission of the Department of Indian Affairs.²⁷⁴ Between 1927 and 1951, when the amendment was eventually repealed, virtually no claims arising from the numbered treaties were heard by Canadian courts.²⁷⁵ It was not until *White and Bob* in the 1960s (after the *Indian Act* amendment was repealed) that the decision and its basis came under greater scrutiny.²⁷⁶ As the Supreme Court noted in *Sparrow*:

For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises.²⁷⁷

The Crown's acceptance of the position set out in the Privy Council decision on Indigenous land rights, coupled with the long period of non-litigation of Indigenous claims, allowed important issues associated with the decision to go unchecked for decades, including the Privy Council's failure to address the evidence and arguments of the Dominion and the reasons of the dissenting judges at the Supreme Court.²⁷⁸ The Dominion in *St. Catharines* presented

²⁷³ *Ibid.* at 204.

²⁷⁴ Harris, Douglas. "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal." *B.C. Studies* no. 162, 2009 at 136.

²⁷⁵ *Ibid.* 136.

²⁷⁶ *R. v. White*, 1964 CanLII 452 (BC CA) at 639. Justice Norris, writing for the majority at the BC Court of Appeal, rejected the application of strict contractual rules in treaty interpretation, and held instead that the court was to "have in mind the common understanding of the parties to the document at the time it was executed" The decision, which was affirmed in a brief oral judgement by the Supreme Court, established the basic approach to treaty interpretation that is still used by the Supreme Court. See *Regina v. White and Bob*, 1965 CanLII 643 (SCC).

²⁷⁷ *R. v. Sparrow*, [1990] 1 S.C.R 1075 at [*Sparrow*] at 1103-4 (emphasis in original).

²⁷⁸ For further discussion on Canadian courts' failure to recognize, until recently, the legally-enforceable nature of Aboriginal title to land see Townshend, Roger. "What Changes did Grassy Narrows First Nation make to Federalism and Other Doctrines?" *Canadian Bar Review*, vol. 95, no. 2, 2017 [Townshend] at 461.

extensive evidence outlining the history of Crown-Indigenous treaty-making and the consistent recognition of Indigenous title throughout the colonial period.²⁷⁹ The reasons of the dissent at the Supreme Court similarly contain a thorough analysis of the political, legal and historical context surrounding Crown-Indigenous relations prior to and after Confederation. Almost none of this evidence or argument is referenced in the Privy Council's decision. Instead, the Privy Council ignores the lengthy, nuanced history of Indigenous-Crown relations and the complex nature of the Crown's conception of Indigenous title in favour of a decision which focuses primarily on the interpretation of the *BNA Act*.²⁸⁰

The Privy Council's decision also fails to take into account historical and legal issues which were critical to the treaty agreement. Lord Watson also relies largely on incorrect or biased factual and legal assumptions made by Justice Boyd at trial which are no longer consistent with values endorsed by the courts or society at large. The Privy Council's conclusion that the Anishinaabe right to land was merely "usufructuary" and wholly dependent on the goodwill of the Crown is indicative of the Victorian imperialism, social Darwinism and racism against Indigenous peoples which was prevalent in British society in the 1880s.²⁸¹ As James Youngblood Henderson argues, in *St. Catharine's* "[t]he colonial courts and system of law allowed racial bias and social engineering to prevail over vested treaty rights under the rule of law," which in turn "removed from the federal government the necessary revenue to fulfil its

²⁷⁹ Importantly, however, the Dominion failed to call any witnesses other than Treaty Commissioner Alexander Morris. Had the Dominion called the Chiefs who signed Treaty 3 as witnesses at trial or made more effective use of Morris' testimony the resulting decisions could conceivably have been much different.

²⁸⁰ Harring 1998, *supra* note 52 at 125-6.

²⁸¹ *Ibid.* at 147. See also McNeil 1999, *supra* note 153 at 72.

promises to its treaty partners.”²⁸² The decision thus reflects the ongoing political power struggle over the federal and provincial governments’ respective rights to control land. As Henderson describes it, “[i]nstead of holding the imperial Crown to the terms of its treaty, explaining the meaning of treaty cessions between Aboriginal tenure and the Crown, the decision [of the Privy Council] treated the conflict as a matter of the constitutional allocation of legislative power between the federal and provincial governments.”²⁸³ This focus allowed the importance of the treaty relationship and the Crown’s obligations to go unexamined for years.

The decision has been the subject of extensive criticism for its failure to address key historic and legal issues related to the treaty, and in recent decades, some aspects of the *St. Catherine*’s case have been decisively rejected by Canadian courts.²⁸⁴ Among the most significant developments has been the court’s rejection of the Privy Council’s conclusion that any interest in land held by Indigenous peoples originated in the Royal Proclamation and was “dependent upon the good will of the Sovereign.”²⁸⁵ A century after the decision, Justice Judson in *Calder* found instead that Indigenous peoples held rights to their land not as a result of the Proclamation, but because “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”²⁸⁶ As the Supreme Court confirmed in later cases, aboriginal title within the meaning under section 35(1) of the

²⁸² Henderson, James Youngblood. *Aboriginal Tenure in the Constitution of Canada*. Scarborough: Carswell, 2000 [Henderson 2000] at pp. 226-7.

²⁸³ *Ibid.* at 212.

²⁸⁴ For example, courts no longer accept the Privy Council’s view that the Royal Proclamation constitutes the sole source of Indigenous title. Instead, it is widely acknowledged that the Indigenous peoples who exclusively occupied territories at the time the Crown asserted sovereignty also had title to those lands. See *Calder*, *supra* note 150 and *Delgamuukw*, *supra* note 150.

²⁸⁵ *St. Catharine*’s JCPC decision, *supra* note 2 54.

²⁸⁶ *Calder*, *supra* note 50 at 328; *Delgamuukw*, *supra* note 150 at para 189; *Van der Peet*, *supra* note 150 at para 30.

Constitution Act is based on the Indigenous group's occupation and possession of the lands prior to the assertion of European sovereignty, not on Crown grant or recognition.²⁸⁷

The court also dismissed the Privy Council's characterization of Indigenous peoples' interest in lands as a limited right of use and occupation. In *Delgamuukw*, the court emphasized that the fact that Indigenous peoples' title to their lands could not be alienated to private parties did not mean that it was not a property right.²⁸⁸ Justice Lamer held that the court had taken "pains to clarify that aboriginal title is only 'personal' in this sense [of being inalienable] and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a right to use and occupy the land."²⁸⁹ Lamer went on to hold that aboriginal title is a "right to the land itself," not merely a right to engage in certain activities on that land.²⁹⁰ The court in *Tsilhqot'in* confirmed this definition of Indigenous lands rights, holding that aboriginal title confers a right of ownership, including the right to possess, use and occupy the lands and to enjoy its economic benefits.²⁹¹ By recognizing that the Proclamation was not the sole source of Indigenous peoples' interest in land and by defining aboriginal title as a property interest which exists by virtue of Indigenous peoples' prior use and occupation, the court effectively overturned the Privy Council's characterization of the source and nature of Indigenous peoples' interest in lands.²⁹²

²⁸⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), [2014] 2 S.C.R. 257 [*Tsilhqot'in*] at para 25.

²⁸⁸ *Delgamuukw*, *supra* note 150 at para 113.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* at para. 111.

²⁹¹ *Tsilhqot'in*, *supra* note 287 at para. 73.

²⁹² Henderson 2000, *supra* note 282 at 229.

Despite this shift, however, the imperial-era attitudes of the majority in *St. Catherine's* continue to appear in contemporary decisions regarding Indigenous peoples and lands.²⁹³ The Privy Council's conclusions, and the courts' disregard for historical facts and the Indigenous perspective on the meaning of the treaties are particularly evident in decisions which deal specifically with the numbered treaties. For example, in 2014 the Supreme Court in *Grassy Narrows* held, without reference to the Anishinaabe view of the treaty, that in 1873 the Anishinaabeg "yielded ownership" of all of their lands in exchange for various goods, annuities and harvesting rights.²⁹⁴ The court went on to hold that, based on the division of powers, Ontario was entitled to take up and benefit from the treaty lands without federal involvement in protecting the Anishinaabeg treaty rights.²⁹⁵

In the same year, the Ontario Divisional Court in *Wabauskang* heard an application for judicial review challenging Ontario's approval of an underground gold mine in Treaty 3 territory.²⁹⁶ The First Nation argued, based in their understanding of the treaty agreement, that they had a right to share in decision-making and benefits regarding the development of lands and resources in their territory, and that the Crown had failed to consult with them about how the approval of the mine would affect that right.²⁹⁷ The court concluded that the First Nation had no

²⁹³ McNeil 1999, *supra* note 153 at 74.

²⁹⁴ *Grassy Narrows*, *supra* note 3 at para 10.

²⁹⁵ *Ibid.* at para 4. Note that in Townshend, *supra* note 278 at 461, the author argues that the Supreme Court's conclusion in *Grassy Narrows* fails to accord with the honour of the Crown and principles of treaty interpretation, and suggests that "to recognize the solemnity of the oral promise, to preserve the honour of the Crown, to properly consider evidence other than the written text of the treaty, and to reconcile the goals and interests of the parties to the Treaty is to essentially strike out the taking up clause from the written text of the treaty."

²⁹⁶ *Wabauskang First Nation v. Minister of Northern Development and Mines et al*, 2014 ONSC 4424 (CanLII) [*Wabauskang*]. For further analysis on the court's textual approach to treaty interpretation in the context of resource extraction in Ontario see Drake, Karen. "The Trials and Tribulations of Ontario's 'Mining Act': The Duty to Consult and Anishinaabek Law." *McGill International Journal of Sustainable Development Law and Policy*, vol. 11, no. 2, 2015 at 205-6.

²⁹⁷ *Ibid.*

right to be consulted about sharing in benefits and decisions about Treaty 3 lands and resources because the written English version of the treaty “makes no express or implied reference to shared decision-making and revenue sharing.”²⁹⁸ As *Grassy Narrows* and *Wabauskang* suggest, the influence of *St. Catharine’s* remains pervasive, both in its disregard for the Indigenous perspective on the treaty and for its repeated affirmation that the Province is entitled to benefit from treaty lands to the detriment of the Anishinaabe treaty parties.

Other courts across Canada have demonstrated a similarly dismissive approach to interpretation of other numbered treaties in recent decisions. For example, in 2015 the B.C. Supreme Court in *Prophet River* held that the “basic structure of all of the numbered treaties was that the Aboriginal peoples who signed the treaties were guaranteed a number of rights in exchange for surrendering their lands to the Crown.”²⁹⁹ The B.C. Court of Appeal in 2017 in the same case subsequently stated that territories in question “lie within the lands surrendered to the Crown” pursuant to the treaty.³⁰⁰ In a separate decision, the Federal Court of Appeal recently held that pursuant to Treaty 1, the Indigenous signatories “agreed to give up their title to land.”³⁰¹ The underlying assumption on which the courts are proceeding in all these cases is that the written text of the treaty prevails and that the Indigenous parties have no rights to their land other than those that are set out in the treaty itself.

²⁹⁸ *Ibid.* at para 212.

²⁹⁹ *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682 (CanLII) at para 12.

³⁰⁰ *Prophet River First Nation v. British Columbia (Environment)*, 2017 BCCA 58 (CanLII) at para 8.

³⁰¹ *Canada v. Long Plain First Nation*, 2015 FCA 177 (CanLII) at para 11.

4.4 Conclusion

The findings of the Privy Council set the stage for decades of denial of treaty rights. However, they were directly contrary to the Anishinaabe understanding of the relationship and negotiations between their nation and the Crown in 1873. They are also at odds with the views of the treaty commissioners, the Dominion, and the dissenting judges at the Supreme Court. The implications of these alternate perspectives and their relevance today in respect of the judiciary's understanding of aboriginal title and the numbered treaties will be examined in detail in the following chapter.

Chapter 5: Alternative Perspectives from St. Catherine's

5.1 Introduction

The Privy Council's decision in *St. Catherine's* remains well known today for its influence on the development of judicial concepts related to aboriginal title and the nature and effect of the numbered treaties. Less familiar are the arguments advanced by the Dominion and the reasons of the dissenting judges who heard the case at the Supreme Court. This is partly because at the time the case was argued decisions of the Privy Council were determined behind closed doors and issued unanimously, thus making it impossible to know whether dissenting opinions were voiced in the course of deciding the appeal. However, notwithstanding the Privy Council decision, there was in fact serious disagreement among the judges at the Supreme Court as to the nature and effect of Treaty 3, and it was by no means a foregone conclusion that the Anishinaabeg would be permanently dispossessed of their lands and resources to make way for the Crown's colonial objectives. These alternate perspectives provide important insight into how the Dominion and the courts understood the treaties and the nature of Indigenous peoples' land interests shortly after the conclusion of Treaty 3. This chapter will explore the arguments of the Dominion and the reasons of the dissenting judges in the *St. Catherine's* case at the Supreme Court.³⁰²

³⁰² The federal government did not formally participate in the litigation until the proceeding reached the Privy Council. At the Supreme Court, Dalton McCarthy appeared as counsel on behalf of the appellant, the St. Catharine's Milling and Lumber company. As was the case in the lower courts and as is apparent from his arguments, in reality he represented the Dominion. The remainder of this chapter will therefore refer to the arguments advanced on behalf of the appellant as the arguments of the Dominion rather than of the appellant company.

5.2 Arguments of the Dominion

At the Supreme Court, Dalton McCarthy, counsel for the appellants, presented a series of arguments backed by a significant body of jurisprudence and documentary evidence in support of the position that Indigenous peoples held a legal right to their lands.³⁰³ According to the Dominion, in Canada Indigenous peoples had never been consistently recognized by the Crown as holding title to the soil which could be acquired by purchase or cession to the Crown.³⁰⁴ As McCarthy argued:

...the contention of the Appellants is this: -- That the Indian title has always been recognized as a valid title to the soil, from the times of the earliest settlements of the North American Colonies, and that it has been dealt with as such by all the various European nations on whose behalf the different portions of the continent have been taken possession of and settled by Europeans, and by the various commonwealths which have grown upon this continent; and that, whatever may have been the rule laid down as governing the European powers who long struggled for possession of the continent, as between themselves, and founded upon a right of sovereignty acquired by discovery and possession, yet the right which they were acknowledged to acquire over the invaded country, where it was inhabited, was simply a right of prior purchase the natives of the title which belonged to them as the original possessors.³⁰⁵

As such, while the Crown asserted sovereignty over the lands at issue, prior to Confederation title to those lands remained with the Anishinaabeg – albeit in a unique and only partially defined form -- and was not transferred to the Dominion until Treaty 3 was concluded in 1873.

Although the Dominion was emphatic that Indigenous peoples held a legal title to their lands, its characterization of the specific nature and scope of that title was less clear. McCarthy expressly acknowledged that Indigenous title had not been fully defined under British common law at the time of the *St. Catharine's* case.³⁰⁶ However, he maintained that regardless of its

³⁰³ *St. Catharine's* SCC, *supra* note 4 at 580. See also Harring 1998, *supra* note 52 at 141.

³⁰⁴ *Ibid.*

³⁰⁵ Appellants' Factum, *St. Catherine's* SCC, *supra* note 2 at 8.

³⁰⁶ *Ibid.* at 76.

precise legal nature, throughout the history of colonization imperial states recognized that Indigenous peoples held “beneficial ownership” of the lands they occupied prior to European arrival.³⁰⁷ For McCarthy, the Crown’s recognition of Indigenous title was not a matter of political expediency or an act of goodwill. Rather, it was a principle had been applied consistently throughout the colonial period such that by the time of the *St. Catharine’s* litigation it had become part of the “settled law of the country.”³⁰⁸

McCarthy went on to set out the basis and general characteristics of Indigenous title from the perspective of the Dominion, notwithstanding the acknowledged challenges associated with attempting to define the interest in the language of the common law. As a starting point, he referred to Indigenous title as a “perpetual right of occupancy” in respect of the lands in question.³⁰⁹ He characterized the interest as extending beyond a mere right to occupy, use and live on the lands.³¹⁰ Instead, he argued that the Crown had consistently followed the principle of allowing the “substantial property, the beneficial interest, to reside in the Indians as proprietors of the soil they occupied.”³¹¹ The language used by McCarthy suggests that Indigenous title was viewed by the Dominion as a proprietary, legal interest in land, not the more limited “usufructuary” right later referred to by the Privy Council.

Despite its unique characteristics, McCarthy nevertheless attempted to situate Indigenous title, as understood by the Dominion, within the parameters of British property law. For example,

³⁰⁷ *Ibid.* at 9, 64, 76. See also *St. Catharine’s* SCC decision, *supra* note 4 580; Lester, *supra* note 152 at 137.

³⁰⁸ *Ibid.* at 64. The Dominion’s arguments on this point follow an established thinking regarding the nature of Crown-Indigenous relations at Confederation. As Michael Asch argues, at the time of Confederation, Lord Dufferin and Treaty Commissioner Morris, “believed that in Canada to ‘be here to stay’ would mean making treaties amendable to all before settling on new lands.” See Asch 2014, *supra* note 122 at 164.

³⁰⁹ *Ibid.* at 76.

³¹⁰ *Ibid.*

³¹¹ *Ibid.* at 64.

he compared Indigenous title to a life estate and concluded that the former constituted a larger legal interest because the interest would continue “as long as there remain survivors or successors of the tribe or nation in possession.”³¹² He then described Indigenous title as analogous to an interest in fee simple, save for the fact that it was subject to the restriction that the lands could be alienated only to the Crown.³¹³ Importantly, McCarthy argued that this restriction which “was implied in the prohibition to individuals against dealing with the Indians for a transfer of their ownership and the reservation of that privilege to the Crown” constituted a restriction “only upon the individual’s right to purchase, and not upon the Indian’s right to sell.”³¹⁴ The Dominion interpreted the restriction on alienation as arising not from any inherent limitation on Indigenous peoples’ ability to own or sell lands, but as a result of the Crown’s own decision to reserve for itself the sole right to purchase lands held by Indigenous peoples.³¹⁵

McCarthy argued that Indigenous peoples held title to their lands based on prior possession rather than the Royal Proclamation or some other act of recognition by the Crown. According McCarthy, North America was occupied by Indigenous peoples when Europeans arrived such that in the course of advancing westward the British found “the Indian in possession of the soil, and assuming the position of Lord Paramount.”³¹⁶ Indigenous peoples’ title resulted from their “immemorial usage and occupation” of their ancestral lands, not from Crown recognition or grant.³¹⁷ Indigenous title therefore existed as a legal interest independent of the

³¹² *Ibid.* at 76. While not expressly stated, McCarthy’s argument seems to implicitly characterize the Anishinaabeg interest in land as collective.

³¹³ *Ibid.*

³¹⁴ *Ibid.* at 10.

³¹⁵ *Ibid.* at 76.

³¹⁶ *Ibid.* at 64.

³¹⁷ *Ibid.*

Crown and was not attributable to what the Privy Council would subsequently describe as the “good will of the Sovereign.”³¹⁸

Although not expressly stated, it appears from McCarthy’s arguments that the Dominion operated on the assumption that where a tract of land was occupied by an Indigenous group, that group would be recognized as holding a legal title to those lands – no specific proof of control of occupancy was required. For example, in respect of the Anishinaabeg specifically, McCarthy argued that prior to Treaty 3, they “were undoubtedly proprietors of the tract of land in question” as against any other Indigenous nation, and had acquired title by virtue of having exclusive possession of the lands in question.³¹⁹ Contrary to the federal government’s approach in later years, at the time of the *St. Catherine*’s litigation the Dominion appeared prepared to begin with the premise that unsurrendered lands were legally owned by the Indigenous group in possession at that time, without inquiring further into the specifics of how or for how long those lands had been used and controlled by the group in question.

The Dominion’s position that Indigenous peoples owned those lands not ceded or surrendered to the Crown rested on the premise that the Crown could not acquire a complete title to lands occupied by Indigenous peoples simply by asserting sovereignty over those lands. McCarthy argued that pursuant to established principles in international law, European states acquired rights of sovereignty relative to other states based on discovery, provided that the state claiming the right was able to secure possession of that territory.³²⁰ McCarthy described this principle as being an established and recognized rule which gave definite rights between

³¹⁸ *St. Catherine*’s JCPC decision, *supra* note 2.

³¹⁹ Appellants’ Factum, *St. Catherine*’s SCC, *supra* note 2 at 5-6.

³²⁰ *Ibid.* at 9; *St. Catherine*’s SCC decision, *supra* note 4 at 580.

competing European states and which served to ensure the peaceful settlement of territorial disputes which frequently arose between those states.³²¹

The Dominion argued that while an assertion of sovereignty based on discovery might confer rights relative to other states in international law, it did not also automatically confer title to those lands if they were already used and controlled by Indigenous peoples. McCarthy submitted that:

...a distinction should be pointed out between the modes of dealing with lands which, when discovered, were uninhabited, and with those which were found inhabited by natives. A large portion of the continent was uninhabited; other parts were inhabited by tribes with jurisdiction over well-defined limits, within which the respective tribes claimed absolute rights, which rights, as among the Indians themselves, were well known and recognized. With regard to the uninhabited territory, the European governments, on discovery, assumed, and properly enough assumed, a sovereign power, and were at once permitted and enabled to grant estates, and to sell and dispose of the land. But, where the land was claimed by the Indians, and owned and possessed by them, the Indian title was respected, and was dealt with by the Crown as a valid title to the soil.³²²

As the above statement suggests, the position advanced by the Dominion at the Supreme Court was that an assertion of sovereignty over lands already occupied by Indigenous peoples amounted only to right to purchase those lands, not ownership of the land itself.³²³ As McCarthy described it, the right acquired by the Crown in respect of lands subject to Indigenous title was a right “of purchasing such lands as the natives were willing to sell, in other words, a right of pre-emption.”³²⁴

McCarthy further expressly recognized that assertions of sovereignty in respect of discovered territories, while binding on other states under international law, did not affect the

³²¹ *Ibid.*

³²² *Ibid.* at 10.

³²³ *Ibid.* at 9-10.

³²⁴ *Ibid.* at 9.

property rights of the Indigenous peoples who possessed those territories. In support of this position he argued that:

To one looking at this question for the first time, there certainly seems an incompleteness in a title resting solely on a patent, say from the King of England, of lands thousands of miles beyond the sea, concerning which neither he nor any one about him had aught beyond the most vague and shadowy ideas, which were inhabited by a people who have possessed the country for centuries it might be, and who, so far from acquiescing in the transfer, were ignorant of the very existence of the Monarch who was dealing with their lands in such a summary manner.³²⁵

Given that an assertion of sovereignty did not automatically also transfer ownership of lands possessed by Indigenous peoples – that is, that acquisition of sovereignty and title were not equivalent – McCarthy submitted that it was incumbent on the Crown to take further steps to obtain a clear title to any territory it claimed where that territory was already possessed by an Indigenous group. As a matter of law, it was necessary for the Crown to negotiate a voluntary surrender of Indigenous peoples' interest in their land in exchange for compensation if it wished to open up those lands for settlement purposes.³²⁶

As the Supreme Court, the Dominion characterized Indigenous title as a legal interest which was assumed to be held by the Nation or tribe in possession of the lands in question.³²⁷ The interest was one which extended beyond a right to use and live on the land and included the right to claim and benefit from resources such as timber and minerals.³²⁸ It was further capable of being passed on to the title-holder's successors indefinitely, or transferred to the Crown by surrender or purchase.³²⁹ Consequently, based on the Dominion's submissions, any lands which

³²⁵ *Ibid.* at 11.

³²⁶ *Ibid.* at 64, 76.

³²⁷ *St. Catharines*'s SCC decision, *supra* note 4 at 589.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

were possessed by Indigenous peoples and which had not been sold or surrendered were subject to a form of legal title held by the Indigenous group, regardless of whether those lands were also subject to assertions of sovereignty on the part of the Crown.

The Dominion's submissions at the Supreme Court on the nature of Indigenous title are instructive as to how the federal government viewed the numbered treaties in the period directly following Confederation.³³⁰ According to the Dominion, the treaties themselves constituted a form of recognition of Indigenous peoples' title to lands in their possession. As McCarthy argued in reference to the language used in treaties between the Crown and Indigenous peoples:

Could language of conveyance be clearer, to show the recognition in the Indians of an estate of some kind, a vested estate, and the right to voluntarily convey that estate to the Crown on terms to be mutually agreed upon? The very words used imply such an estate. The word 'surrender,' used in numerous dealings both here and in the United States, with the Indians, implies an estate in the surrenderor.³³¹

McCarthy further argued that "...it certainly would seem an absurdity to allow that a purchase from the Indians gave a good title as against them, and at the same time to deny that they had any title or right whatever in the lands conveyed."³³² The Dominion's position was that both the act of conveyance and the specific language used in the treaty supported the assertion Indigenous

³³⁰ It can also be argued that McCarthy's submissions were intended to further the political and economic interests of the Dominion, and do not represent a genuine recognition of Indigenous title or commitment to fulfilling the Crown's treaty promises. On this point, I rely on the position of Foster, Hamar. "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases." *Manitoba Law Journal*, vol. 21, no. 3, 1992 at 343. Foster argues at 387 that in the context of cases related to the *Canada Jurisdiction Act* of 1803, submissions of counsel for the Dominion which suggested that Indigenous peoples were not subject to the legislation in question were "admittedly motivated by considerations of what was most in the interests of their non-Aboriginal clients" but that regardless, "good counsel do not make arguments that have no hope of success, and these were good counsel." Similarly, my position is not that the Dominion in *St. Catherine's* advanced submissions which were intended to benefit their treaty partners, but rather that they advanced arguments which reflected a more robust interpretation of Indigenous land rights and the Crown's treaty obligations because in the view of counsel at that time it was legally sound to do so.

³³¹ Appellants' Factum, *St. Catherine's* SCC, *supra* note 2 at 72.

³³² *Ibid.* at 51.

peoples held a legal interest in their lands which was capable of being sold or transferred to the Crown.

The Dominion's characterization of Indigenous title also underscored the importance of the treaties in legitimating Crown title. If the Anishinaabeg held a legal title to the lands they occupied, then it followed that at Confederation the Crown – notwithstanding its assertion of sovereignty relative to other European states -- did not hold an interest in those lands which was capable of being transferred to the Province.³³³ According to McCarthy, prior to Treaty 3 the Crown's interest in the lands consisted of nothing more than "a mere right to the land when the Indian title was extinguished."³³⁴ Further, at Confederation the land "was not an asset that could be transferred" to the Province because "it became property to be dealt with by the Crown until the Treaty Number Three was made."³³⁵ In essence, the Dominion's position that it owned the lands in question rested on the argument that the Dominion on behalf of the Crown had purchased them from the Anishinaabeg by way of treaty, and that without such a purchase, the Crown had no right to own, sell or transfer the lands.

As McCarthy's arguments demonstrate, from the perspective of the Dominion the primary purpose of the treaty was the transfer of a property interest in the lands in question from the Anishinaabe to the Dominion government. However, the Dominion's submissions also suggest that the treaties were more than a simple agreement of purchase and sale. For example, the Dominion argued that historically, Indigenous groups were dealt with directly by the Crown because they were "looked upon as independent nations capable of treating as nationalities, and

³³³ *St. Catharine's* SCC decision, *supra* note 4 at 589.

³³⁴ *Ibid.*

³³⁵ Appellants' Factum, *St. Catherine's* SCC, *supra* note 2 at 74.

of binding themselves by the solemn compacts of formal treaties.”³³⁶ This statement can be seen as an acknowledgement on the part of the Dominion that in its view, the treaties were not merely a means by which the Crown could purchase lands from private parties, but rather agreements with larger collective entities which held and controlled lands pursuant to their own legal systems.

McCarthy’s description of the negotiation of Treaty 3 further suggests that the Dominion recognized the legal organization and structure of the Anishinaabeg treaty parties specifically. In reference to the lands subject to Treaty 3, McCarthy argued that:

The territory in question has been, for a long time, in such firmly established possession of the Saulteaux, that when it was first proposed to deal with them for the surrender of their lands, it was found that the country which they looked upon as theirs was divided into distinct and recognized districts ruled over by independent chiefs, jealous as princes of their territorial rights, and having little interest in common beyond the necessity for union against the common enemies of their nation as a whole.³³⁷

McCarthy further acknowledged the “diplomatic shrewdness and ability displayed by the chiefs to whom was entrusted the management of the negotiations” of Treaty 3.³³⁸ At the Supreme Court the Dominion thus recognized that lands were held by Indigenous peoples prior to treaty, and that prior to Treaty 3 the Anishinaabeg owned, used and controlled the lands which would become subject to treaty.

Importantly, McCarthy recognized that the Dominion had acquired binding obligations on entering into treaty, including in respect of Indigenous rights to lands outside reserves, and asked the courts to endorse the position that the Dominion was legally responsible for fulfilling those obligations. McCarthy argued that on concluding treaty negotiations, both parties

³³⁶ *Ibid.* at 10.

³³⁷ *Ibid.* at 8.

³³⁸ *Ibid.* at 5.

understood and intended to fulfil the agreement, stating that there “never was a treaty entered into in a more solemn manner, or with more serious intentions in the minds of both contracting parties to abide by and carry out the terms of the agreement.”³³⁹ He further noted that the obligations on the part of the Dominion would go unfulfilled if Ontario’s position was accepted by the courts.³⁴⁰ In particular, to adopt Ontario’s position that the lands were “public lands” within the meaning of the *BNA Act* and outside the jurisdiction of the federal government would mean that the hunting and fishing provisions promised by the Crown in Treaty 3 would be rendered inoperative.³⁴¹

In summary, at the Supreme Court in *St. Catharine’s* McCarthy argued that the Crown had always recognized Indigenous peoples’ rights to their lands, and that unsurrendered lands would be held by Indigenous nations until they voluntarily decided to enter into a treaty to convey that title to the Crown. If accepted, this position would have had significant implications for jurisprudence going forward, both in respect of the federal government’s treaty obligations and in Canadian courts’ conception of aboriginal title.

5.3 The Dissenting Judgements

At the Supreme Court two judges, Justices Strong and Gwynne, wrote detailed reasons in support of the position advanced by the Dominion.³⁴² In broad terms, both judges concluded that prior to and at Confederation Indigenous peoples held legal rights to their lands, that the Proclamation’s expansive definition of “lands reserved for the Indians” was applicable to the Dominion’s legislative authority pursuant to section 91(24) of the *BNA Act*, and that on entering

³³⁹ *Ibid.* at 4.

³⁴⁰ *St. Catharine’s* SCC decision, *supra* note 4 at 588.

³⁴¹ Appellants’ Factum, *St. Catherine’s* SCC, *supra* note 2 at 78.

³⁴² Hall 1991, *supra* note 154 at 279.

into Treaty 3, the Dominion acquired both a legal interest in the lands at issue and a corresponding obligation to fulfil the Crown's treaty promises to the Anishinaabeg.

Unlike the decision of the majority, the dissenting judges situated their reasons in the historical context of Indigenous-Crown relations and in particular, the Crown's pre-existing policies for recognizing and dealing with Indigenous peoples' land interests.³⁴³ Justice Strong agreed with the Dominion that in Canada there existed a longstanding practice of recognizing that Indigenous peoples held title to their unsurrendered lands, and that that title provided Indigenous peoples with a right to the "absolute use and enjoyment of their lands," subject only to the restriction on alienation to parties other than the Crown.³⁴⁴ Strong further held, by reference to the U.S. court's decision in *Cherokee Nation v State of Georgia*, that the restriction on alienation arose as a consequence of European states asserting an exclusive right to purchase lands relative to other states, not as a result of a perceived lack of capacity on the part of Indigenous nations to hold and deal with land.³⁴⁵ The limitation on the sale of lands by Indigenous nations to private parties was characterized as merely a right held by the Crown to purchase lands which Indigenous nations were willing to convey.³⁴⁶ As Justice Strong explained, the Crown's policy towards lands occupied by Indigenous peoples:

...may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which was nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, while at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom ultimate title was, in accordance with the English law of real property, considered as vested.³⁴⁷

³⁴³ *St. Catharine's* SCC decision, *supra* note 4 at 606.

³⁴⁴ *Ibid.* at 623.

³⁴⁵ *Ibid.* at 611, relying on *Cherokee Nation v. State of Georgia* (1831), 5 Peters 1, 30 U.S. 1. [*Cherokee Nation*].

³⁴⁶ *Cherokee Nation* quoted in *St. Catharine's* SCC at 611.

³⁴⁷ *Ibid.* at 608.

Strong noted that prior to 1763, Crown policy was to recognize that Indigenous peoples hold legal title to lands they occupied, and that this practice was given “legislative expression” by the Proclamation, which acknowledged “the right of the Indians to enjoy, by virtue of a recognized title, their lands not surrendered or ceded to the crown.”³⁴⁸ Strong characterized the Proclamation as a “legislative act” which had the effect of “assuring to the Indians the right and title to possess and enjoy [lands in their possession] until they thought fit of their own free will to cede or surrender them to the crown.”³⁴⁹

Strong also took the position that Indigenous title existed and should be recognized under the common law, regardless of the presence or absence of legislation confirming that title. Based on historical evidence and on the reasons in *Cherokee Nation*, Strong held that in Canada, Indigenous peoples had always been considered to be “nations” who were “competent to maintain the relations of peace and war and of governing themselves under [the Crown’s] protection,”³⁵⁰ and that they were consistently dealt with as “proprieters of the soil which they claimed and occupied,” subject to the restriction on alienation.³⁵¹ Strong relied on *Cherokee Nation* for the proposition that on discovery, European states gained an exclusive right under international law to purchase those lands from the Indigenous peoples who possessed them, but that “this right was not founded on a denial of the Indian possessor to sell.”³⁵² According to Strong, by the time of Confederation, the Crown’s consistent recognition of Indigenous peoples’

³⁴⁸ *Ibid.* at 623.

³⁴⁹ *Ibid.* at 628-9. Justice Strong relied on the *Campbell v Hall* 1 Cowp 204, 98 ER 1045 for the position that the Royal Proclamation the force of legislation.

³⁵⁰ *Cherokee Nation*, *supra* note 345, quoted in *St. Catharine’s* SCC decision, *ibid.* at 611.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

title to their lands “had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations.”³⁵³

Strong’s conclusions followed the arguments advanced by McCarthy for the Dominion that the restriction on alienation of Indigenous peoples’ lands arose as a consequence of international law principles governing the acquisition of lands by European states, and not from an inherent inability on the part of Indigenous peoples to legally own or sell lands in their possession. In practical terms, prior to treaty the Crown held only “a contingent right of ownership dependent for its realization upon the Crown's exercise of its right to pre-emption.”³⁵⁴ As such, Crown title to the lands in Treaty 3 existed only by virtue of the Anishinaabeg having ceded their interest by treaty. As John Hurley notes:

The Indian usufructuary title, according to Strong J., constitutes a genuinely proprietary interest in land. This title is qualified by the adjectives ‘personal and usufructuary’ to denote the consequences of the Crown’s right of pre-emption attendant upon its ultimate sovereign title. It differs from an unqualified right of property, or fee simple, in the one sense that it can only be alienated to the Crown. Alienation is, however, possible to the Crown; the Crown’s own beneficial ownership, or *dominium utile*, has no other source than the Indians' cession of their own beneficial interest.³⁵⁵

Like McCarthy, Strong found that the Crown’s longstanding policy of recognizing Indigenous title was not based on benevolence or good will. He held that to ascribe the Crown’s approach “to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise.”³⁵⁶ Instead, the

³⁵³ *Ibid.* at 616.

³⁵⁴ Hurley, John. “The Crown’s Fiduciary Duty and Indian Title: *Guerin v. the Queen*.” *McGill Law Journal*, vol. 30, no. 3 1985 [Hurley] at 580.

³⁵⁵ *Ibid.* at 581.

³⁵⁶ *St. Catharines*’s SCC decision, *supra* note 4 at 609.

Crown's approach to the recognition and protection of Indigenous peoples' title to lands was rooted in pragmatic considerations tied to its own colonial objectives. He held that the origin of the Crown's policy was based on "experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies."³⁵⁷

Justice Gwynne similarly held that for more than a century the Crown had expressly recognized Indigenous peoples' title to their lands by way of various documents, proclamations and transactions, and that with the exception of lands already surrendered, "if there were any Indians claiming title their rights, as declared in the proclamation, were respected."³⁵⁸ According to the dissenting judges, therefore, the Crown's policy of recognizing and protecting Indigenous peoples' land interests was intended at least in part to further its own interests, and that as part of this policy, the Crown recognized that provincial governments were ill-suited to assume responsibilities for Indigenous peoples and lands. The dissenting reasons also reflect an interpretation of the historical and political relationship between Indigenous peoples and the Crown wherein Indigenous peoples were recognized as holding a right to own and control their own land which existed notwithstanding assertions of the Crown's sovereignty and jurisdiction over those same lands relative to other imperial states.

³⁵⁷ *Ibid.* at 609.

³⁵⁸ *Ibid.* at 652.

Strong, like McCarthy, characterized Indigenous title as being a “usufructuary” right to the lands in question.³⁵⁹ However, the entirety of the dissenting judges’ reasons suggests that they viewed Indigenous title as constituting considerably more than a right to live on and use the land. Both judges confirmed unequivocally that Indigenous peoples’ interest in their lands was proprietary in nature.³⁶⁰ Strong held that at Confederation, Indigenous peoples were recognized “by the constant usage and practice” of the Crown as possessing a certain “proprietary interest in the unsurrendered lands which they occupied as hunting grounds.”³⁶¹ This interest constituted both a “right of enjoyment” and an “inalienable possessory title” which could be extinguished only by way of a treaty of surrender.³⁶² He further found in respect of the *BNA Act* that the “territorial rights of the Indians were strictly legal rights” which should be accounted for in the distribution of rights and responsibilities between the federal and provincial powers.³⁶³

According to Justice Gwynne, an Indigenous group’s legal title to lands in its possession entitled the title holder to retain its interest in the lands indefinitely, or to cede those lands to the Crown voluntarily on specific terms. Gwynne held that the Anishinaabeg could have chosen to never surrender their lands at all, or could have surrendered them “only upon trust for sale and investment of the proceeds for the benefit of the Indians themselves, so that the public might never acquire any interest whatever in the monies arising from the sale of the lands.”³⁶⁴ In Justice Gwynne’s view, Treaty 3 was not an inevitability or concession on the part of the Crown to assist

³⁵⁹ *Ibid.* at 616.

³⁶⁰ *Ibid.* at 615, 618.

³⁶¹ *Ibid.* at 615.

³⁶² *Ibid.* at 617.

³⁶³ *Ibid.* at 613.

³⁶⁴ *Ibid.* at 666.

in the expeditious settlement of lands occupied by the Anishinaabeg, but rather a negotiated agreement necessitated by the Crown's recognition in law of Anishinaabeg title to their lands.

The dissent at the Supreme Court supports the Dominion's argument that Indigenous peoples' interest in their lands was not limited to a right to use the lands for sustenance, but was rather a distinct property interest recognized under colonial law. The reasons of both judges affirm the view that aboriginal title exists at common law and had always been recognized by the Crown, and that any rights claimed by the Crown by virtue of discovery were applicable only in respect of other imperial powers, not to Indigenous nations who already used and occupied those lands. If the Crown wished to obtain a complete title to lands possessed by Indigenous peoples, it was required to negotiate an agreement for the surrender of those lands on terms acceptable to the Indigenous title-holder.

Having found that Indigenous peoples held a legal title to their lands which was recognized by the Crown, the dissenting judges went on to examine the specific rights and responsibilities held by the Dominion as a result of that title. Justices Strong and Gwynne agreed with the Dominion's position that the definition of "lands reserved" in section 91(24) of the *BNA Act* had the same meaning as that in the Royal Proclamation, meaning all unsurrendered lands occupied by Indigenous peoples, not just those set aside specifically as reserve.³⁶⁵ Gwynne held that in the years following the Proclamation, unsurrendered lands were consistently treated as "lands reserved" for Indigenous peoples. He concluded that the text of the Proclamation referred to lands not ceded or purchased by the Crown, and that the definition of "lands reserved" remained in force and applicable to unsurrendered lands, including the lands now subject to

³⁶⁵ *Ibid.* at 636.

Treaty 3, at the time of Confederation.³⁶⁶ Given that the *BNA Act* did not alter the existing relationship between Indigenous peoples and the Crown, including the longstanding policy that Indigenous peoples held title to lands not ceded to the Crown, it followed that at Confederation those unsurrendered lands could not be “public lands” available to Ontario within the meaning of the *BNA Act*.³⁶⁷

Both Justices Strong and Gwynne further held that the Crown had expressly sought in the *BNA Act* to limit provincial jurisdiction in respect of Indigenous peoples. For example, Strong found that the inclusion of “Indians” as well as “lands reserved for the Indians” in section 91(24) was intended to assign to the Dominion “the right to regulate [Indigenous peoples’] relations with the crown generally, a duty which could not be properly performed by the Dominion if the tribes were liable to be beset by the Provinces seeking surrenders of their lands.”³⁶⁸ Gwynne confirmed that under the *BNA Act*, the provincial government was assigned “no control whatever over Indian affairs,” and did not hold “the power of entering into a treaty or agreement with the Indians for obtaining from them a cession of the lands in question.”³⁶⁹ As a consequence, at Confederation lands held by Indigenous peoples which had not been surrendered to the Crown, including the lands at issue in *St. Catherine’s*, could not pass to Ontario.³⁷⁰

The dissenting judges interpreted section 91(24) as conferring on the Dominion both legislative authority and corresponding obligations in relation to Indigenous peoples and their lands. According to Strong, by virtue of section 91(24) the Dominion was “burdened with the

³⁶⁶ *Ibid.* at 664.

³⁶⁷ *Ibid.* at 665-6.

³⁶⁸ *Ibid.* at 623.

³⁶⁹ *Ibid.* at 666.

³⁷⁰ *Ibid.*

support and maintenance of the Indians” and should therefore have the “the benefit of any advantage which may be derived from a surrender of their lands.”³⁷¹ In the case of Treaty 3, the Dominion was responsible for fulfilling the Crown’s treaty promises, and the lands subject to treaty were to provide the resources to fulfil this responsibility. Strong held that:

I see nothing inequitable or inconvenient, but much the reverse, in a construction of the statute which has the effect of attributing the profits arising from the surrender and sale of Indian lands to the Dominion, upon which is cast the burden of providing for the government and support of the Indian tribes and the management of their property, not only in the Provinces, but throughout the wide domain of the North-West Territories, rather than upon the Provinces, who are not only free from all liabilities respecting the Indians, but are not even empowered to undertake them and cannot legally do so.³⁷²

Justice Gwynne similarly affirmed that as a consequence of the division of powers and responsibilities pursuant to section 91(24), the lands subject to Treaty 3 were to be used by the Dominion for the purpose of fulfilling the treaty obligations. Gwynne held that that the lands subject to Treaty 3 were intended to be a source of revenue available to the Dominion to enable it to fulfil its legislative responsibilities pursuant to section 91(24) and the Crown’s treaty promises, which included the maintenance of schools, financial payments and other obligations.³⁷³ Gwynne noted that because lands subject to Treaty 3 constituted the sole source of revenue available to fulfil the terms of the treaty, if Ontario’s claims were accepted the Crown’s treaty promises would go unmet.³⁷⁴ He held that:

To obtain a judicial decision to the above effect, by what appears to me a strange procedure, Her Majesty’s name is used by the Province for the purpose of having the treaty which has been solemnly entered into by Her Majesty with the Indians, and for the faithful observance of which Her Majesty is solemnly pledged to the Indians, declared to be void and of none effect.³⁷⁵

³⁷¹ *Ibid.* at 617.

³⁷² *Ibid.* at 620.

³⁷³ *Ibid.* at. 671-2; 675.

³⁷⁴ *Ibid.* at 672.

³⁷⁵ *Ibid.*

The correct approach, according to Gwynne, was to characterize the Dominion as “trustees” who were entitled to “hold the property ceded in the terms of the treaty of cession as their security and means of executing the trusts imposed on them, unless and until some agreement shall be entered into between the Provincial Government and them.”³⁷⁶ The reasons of both Strong and Gwynne were therefore clear that the Dominion had acquired specific responsibilities as a consequence of its legislative authority under section 91(24), including the responsibility for fulfilling the Crown’s obligations to the Anishinaabeg as a result of Treaty 3.

5.4 Conclusion

In the decade following Confederation both the federal government and members of the judiciary advanced interpretations of the nature of Indigenous title and the effect of the numbered treaties which differed sharply from the view later endorsed by the Privy Council. Far from dismissing the treaties as an act of good will or political expediency, the dissenting judges affirm the Dominion’s position that prior to Treaty 3 the Anishinaabeg held a recognized property interest to lands in their possession which could be extinguished only upon surrender or sale to the Crown. As a corollary, the dissenting judgments confirm that prior to Treaty 3 the Crown was unable to transfer lands owned by the Anishinaabeg to the Province, and that following the treaty, the Dominion was legally obligated pursuant to section 91(24) to fulfil the treaty obligations assumed by the Crown.

The multiple written reasons of the judges of the Supreme Court decision indicate that from the perspective of the judiciary, issues related to Indigenous lands and the effect of the

³⁷⁶ *Ibid.* at 676.

treaties were unsettled at the time of the *St. Catharine's* litigation. Had the case not proceeded to the Privy Council, it is conceivable that the reasons of Justice Strong and Gwynne would have been revisited and adopted by the court in whole or part in later cases, resulting in a substantially different legal landscape on the issues of treaty rights and obligations.

Chapter 6: Possibilities for Understanding the Treaty Relationship

6.1 Introduction

Had the dissent in *St. Catherine's* prevailed, the Supreme Court would have confirmed that prior to treaty, the Anishinaabeg held a legal property interest in their lands, and that post-treaty, the resources from those lands were to be used by the federal government to fulfil the treaty promises to the Anishinaabeg. These findings would have substantially altered the legal landscape for the Anishinaabeg and the Crown in the decades following the decision. This chapter will consider the implications for the Crown-Anishinaabe treaty relationship today in light of the dissenting judgments in *St. Catherine's*, and in particular, whether the Crown's treaty promises give rise to fiduciary obligations to the Anishinaabe treaty parties. The first section provides an overview of the principles governing the Crown's fiduciary obligations to Indigenous peoples in contemporary jurisprudence. The subsequent section considers the extent to which those principles are applicable to the Crown's promises to the Anishinaabe signatories of Treaty 3.³⁷⁷

At the outset, I note that the possibilities for understanding the Crown's treaty obligations explored in this chapter are preliminary only. In proposing the application of principles of fiduciary law to the fulfilment of the Crown's treaty obligations, I do not attempt to speak on behalf of the Anishinaabe treaty parties, nor is the approach outlined here necessarily consistent with the Anishinaabe perspective on Treaty 3 or Indigenous peoples' understanding of their

³⁷⁷ In addition to fiduciary doctrine, principles from the law of trusts could also potentially be used to enforce the Crown's treaty obligations. While a detailed exploration of this option is beyond the scope of this thesis, it nevertheless merits further consideration in light of the alternative perspectives from *St. Catherine's* and current Canadian law.

relationship with the Crown more generally. Rather, this chapter is intended to set out one potential option for enforcing the Crown's treaty promises, based on the obligations recognized by the Dominion and dissent in *St. Catherine's*, and on principles established in contemporary law. My objective is to explore one possible avenue available to the Indigenous treaty parties to ensure that treaty promises are met, consistent with principles of treaty interpretation, laws related to fiduciary obligations, and the overarching honour of the Crown.

6.2 Fiduciary Obligations and the Crown

In the years following the Privy Council decision in *St. Catharine's*, the Supreme Court held that the Crown held only limited obligations to Indigenous peoples which were political rather than legal in nature.³⁷⁸ However, the Court now recognizes that the Crown-Indigenous relationship includes legal elements such that the Crown stands in the position of a fiduciary relative to Indigenous peoples. The Crown's role as a fiduciary arose as a result of Canada's colonial history, and specifically as a consequence of the Crown's gradual assumption of discretionary control over the lives and interests of Indigenous peoples throughout the process of colonization.³⁷⁹ As Gordon Christie explains, over the course of colonization, the Crown-Indigenous relationship "emerged as essentially fiduciary when the Crown, as it became the fiduciary, began to take on, or 'capture', power enjoyed by Canada's Aboriginal peoples."³⁸⁰ Pursuant to principles of fiduciary theory, the Crown's assumption of discretionary control

³⁷⁸ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79 (CanLII) [*Wewaykum*] at para 73, citing Taschereau J. in *St. Catharine's* SCC decision, *supra* note 4.

³⁷⁹ *Ibid.* at para 79; *Sparrow*, *supra* note 277 at 1108.

³⁸⁰ Christie, Gordon. "Delgamuukw and the Protection of Aboriginal Land Interests." *Ottawa Law Review*, vol. 32, no. 1, 2000 at 89.

brought with it corresponding requirements to act in the best interests of the Indigenous beneficiaries.³⁸¹

The fiduciary relationship between Indigenous peoples and the Crown is closely connected to the control and use of lands historically used and occupied by Indigenous peoples. The origins of this relationship dates back to at least 1763, when the Crown asserted its control over Indigenous peoples' ancestral lands through the Royal Proclamation. Pursuant to the Proclamation, the Crown recognized that Indigenous peoples held an interest in the lands they occupied prior to European arrival, and took the position that that interest could only be extinguished by cession or purchase by the Crown. The Proclamation's prohibition on the private purchase of Indigenous lands reflects the Crown's position as an intercessor between Indigenous nations and local populations. In assuming this role, the Crown sought to represent Indigenous nations in land transactions involving third parties, both for its own ends and to protect Indigenous peoples from the "avaricious designs of colonial whites" who sought to obtain lands reserved under the Proclamation.³⁸² Whatever the Crown's motivation was in doing this, be it to further its own objectives of control, pacify Indigenous populations, or some combination of the two, the net result was an assertion of its control over Indigenous peoples' interests in their lands.

Following the Proclamation, Crown continued to consolidate its control over Indigenous lands. This included the eventual passage of the *BNA Act*. Section 91(24) of the *BNA Act*, which reserved for the federal government jurisdiction over "Indians, and Lands reserved for the Indians," served a similar function as the Proclamation - to place the federal government

³⁸¹ Luk, Senwung. "Not so Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*." *Saskatchewan Law Review*, vol. 76, no. 1, 2013 at.4.

³⁸² Harring, Sidney L. "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law." *Saskatchewan Law Review*, vol. 56, no. 2, 1992 at 303. See also Hurley, *supra* note 354 at 576.

between Indigenous peoples and third parties seeking to acquiring their lands.³⁸³ The purpose of section 91(24) has been described variously as “to protect Indians, a vulnerable minority/the pupils or wards of the Dominion, from exploitation by the majority,”³⁸⁴ to advance “the expansionist goals of Confederation,” and to authorize the federal government “to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain...[and] eventually to civilize and assimilate Native people.”³⁸⁵ As McNeil notes, the various purposes assigned to section 91(24) “are consistent with the Royal Proclamation of 1763, which asserted the centralized authority of the British government over Indian affairs and restricted the powers of colonial governors, in part to protect the interests of the Indian nations.”³⁸⁶ As such, section 91(24) constitutes an expression of federal control – protective or otherwise- over Indigenous peoples and their lands.

In addition to providing for federal jurisdiction over Indigenous peoples and lands, section 91(24) also authorized the federal government to enter into treaties with Indigenous peoples on behalf of the Crown. This jurisdiction is directly related to the Crown’s fiduciary obligations with Indigenous peoples. As Leonard Rotman explains, as a result of the federal government’s jurisdiction over “Indians, and Lands reserved for the Indians” under section 91(24), the federal government was “empowered to enter into treaty negotiations with aboriginal

³⁸³ Henderson, James Y. *Treaty Rights in the Constitution of Canada*. Thomson Carswell, Toronto, 2007 at 466.

³⁸⁴ *Grassy Narrows* trial decision, *supra* note 114 at para 743.

³⁸⁵ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII) at para 4-5. See also McIvor, Bruce and Kate Gunn. “From Shield to Sword: Section 91(24) and the Division of Powers,” Canada 150 – Constitutional Law Symposium, University of Alberta, Edmonton, 2017.

³⁸⁶ McNeil 2001, *supra* note 51 at 324.

nations across Canada.”³⁸⁷ Where an Indigenous nation has entered into a treaty with the Crown, the Crown will owe “both general fiduciary duties, which predate Confederation, and more specific fiduciary obligations, which arise from the particular circumstances of the treaty.”³⁸⁸ In the context of treaties relating to land, the promises made under treaty may also give rise to specific fiduciary obligations in addition to the broader obligations associated with the Crown-Indigenous fiduciary relationship in general.³⁸⁹ As McNeil notes, “the numbered treaties acknowledged and continued the nation-to-nation relationship between the Indian nations who signed them and the Crown,” and as such, “reinforce the Crown’s general fiduciary obligations to those nations.”³⁹⁰ Consequently, the Crown’s obligations pursuant to the numbered treaties “are all part of the modern Crown fiduciary obligation.”³⁹¹

Regardless of the existence or absence of a treaty, the Crown may acquire additional, specific fiduciary obligations to an Indigenous group beyond its general obligations as a fiduciary where it assumes discretionary control over a legally-cognizable interest, including an interest in land, which is held by an Indigenous group.³⁹² This obligation may arise in one of two ways. In *Manitoba Metis Federation*, the Court explained that the first way in which a fiduciary duty may arise is “where the Crown administers lands or property in which Aboriginal peoples

³⁸⁷ Rotman, Leonard. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*. University of Toronto Press, Toronto, 1996 [Rotman] at 222.

³⁸⁸ *Ibid.*

³⁸⁹ Slattery, Brian. “First Nations and the Constitution: A Question of Trust.” *Canadian Bar Review*, vol. 71, no.2, 1992 at 274, citing *Guerin*, *supra* note 29 at 376-79.

³⁹⁰ McNeil 2001, *supra* note 51 at 349. See also McNeil, Kent. “Fiduciary Obligations and Aboriginal Peoples.” *The Law of Trusts: A Contextual Approach*, 2nd Edition. Toronto, ON: Emond Montgomery, 2015 at 907-976.

³⁹¹ Rotman, *supra* note 387 at 222.

³⁹² *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 SCR 83, 2018 SCC 4 (CanLII) [*Williams Lake*] at para 44, citing *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII) [*Manitoba Metis Federation*] at paras 49 and 51; *Wewaykum*, *supra* note 378 at paras 79-83; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) [*Haida*] at para 18.

have an interest.”³⁹³ The Crown will hold fiduciary obligations to the Indigenous group “if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest.”³⁹⁴ This obligation is characterized as “*sui generis*” by virtue of the fact that it exists as consequence of the unique relationship between Indigenous peoples and the Crown, and the particular responsibilities which flow from that relationship.³⁹⁵

In the alternative, a fiduciary duty may arise “where the general conditions for a private law *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary.”³⁹⁶ To establish a fiduciary duty on this basis requires:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary’s control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary’s exercise of discretion or control.³⁹⁷

A fiduciary obligation which arises where the above conditions are met is referred to as an “*ad hoc*” fiduciary duty.³⁹⁸

³⁹³ *Manitoba Metis Federation, ibid.*, at 51, citing *Guerin, supra* note 29 at 384. See also *Williams Lake, ibid.* at para 44.

³⁹⁴ *Ibid.*, citing *Wewaykum, supra* note 378 at paras 73-89 and *Haida, ibid.* at para 18.

³⁹⁵ *Williams Lake, supra* note 392 at para 44.

³⁹⁶ *Ibid.* See also *Manitoba Metis Federation, supra* note 392 at para 50.

³⁹⁷ *Manitoba Metis Federation, supra* note 392 at para 60, citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII) at para 36.

³⁹⁸ *Restoule, supra* note 33 at para 508; *Williams Lake, supra* note 392 at para 44. This chapter will focus on the existence and nature of the Crown’s *sui generis* obligations to the Anishinaabe signatories to Treaty 3. The question of whether the Crown holds *ad hoc* fiduciary obligations to its treaty parties is beyond the scope of this thesis, but further consideration and analysis is warranted to determine whether there are viable arguments which support the existence of an *ad hoc* fiduciary obligation in the context of the Crown’s promises pursuant to Treaty 3.

A key question in establishing the existence of a *sui generis* fiduciary obligation is whether the Indigenous group hold a legally-cognizable interest over which the Crown has assumed discretionary control. As Justice Wagner explained in *Williams Lake Indian Band*:

The specific or cognizable Aboriginal interest at stake must be identified with care. The fiduciary's obligation is owed in relation to that interest, and its content will depend on "the nature and importance of the interest sought to be protected."³⁹⁹

The importance of determining the specific interest that is vulnerable to the Crown's exercise of discretionary control reflects the principle that even where two parties are in a fiduciary relationship, not every obligation existing between them will be fiduciary in nature.⁴⁰⁰

Consequently, if an Indigenous group does not hold a cognizable interest over which the Crown exercises discretionary control, then the Crown may owe public law duties, but not will not also hold specific, *sui generis* fiduciary obligations in respect of that interest.⁴⁰¹

The Crown has been found to hold *sui generis* fiduciary obligations in relation to Indigenous peoples' rights under section 35 of the *Constitution Act*, as well as lands set aside as reserve, and lands subject to the reserve creation process where the process has not been finalized.⁴⁰² Fiduciary obligations also extend to Indigenous peoples' interest in ancestral lands which have not been surrendered and are not subject to treaty. As Justice Dickson noted in *Guerin*, for the purpose of evaluating the Crown's fiduciary obligations, the interest held by the Indigenous party in reserve lands set aside and administered by the Crown pursuant to the *Indian*

³⁹⁹ *Williams Lake*, *ibid.* at para 52, citing *Manitoba Metis Federation*, *supra* note 392 at para 49 and *Wewaykum*, *supra* note 378 at para 86.

⁴⁰⁰ *Ibid.* at para 51.

⁴⁰¹ *Ibid.* para 52, citing *Wewaykum*, *supra* note 378 at paras 74 and 85 and *Guerin*, *supra* note 29 at p 385; Elliott, David E. "Much Ado about Dittos: Wewaykum and the Fiduciary Obligation of the Crown." *Queen's Law Journal*, vol. 29, no. 1, 2003 at 1.

⁴⁰² *Ibid.* at para 53.

Act was the same as an interest held by an Indigenous group in “unrecognized aboriginal title in traditional tribal lands.”⁴⁰³

The circumstances which give rise to a fiduciary obligation also play a role in shaping the contents of that obligation.⁴⁰⁴ For example, in *Guerin*, the Court’s conclusions on the nature and extent of the Crown’s fiduciary obligations turned on reserve lands held and surrendered by the Musqueam to the federal government pursuant to section 18(1) of the *Indian Act*.⁴⁰⁵ Justice Dickson held that the requirement in section 18(1) that reserves be held by the Crown for the use and benefit of the bands for which they had been set apart constituted “acknowledgment of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it.”⁴⁰⁶ Dickson concluded that in this historic context, the nature of Aboriginal title and the statutory framework for the surrender and disposal of reserve lands placed upon the Crown “an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians.”⁴⁰⁷

⁴⁰³ *Guerin*, *supra* note 29 at 379, citing *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, at 410-11. Note also that in *Guerin* the Court was divided on whether the Crown’s obligations were limited to those of a fiduciary or if the surrender of Indigenous lands had the potential to give rise to a trust. Justice Dickson for the majority concluded in respect of reserve lands that while the Crown had acquired obligations to the surrendering Indigenous party, the surrender did not give rise to an express trust because the interest transferred to the Crown was not a property interest (386). Justice Wilson for the minority concluded that the surrender of reserve land to the Crown on specific terms resulted in the Crown becoming “a full-blown trustee by virtue of the surrender” (355). The decision of the majority in *Guerin* has been criticized as denying both Indigenous peoples’ proprietary interest in land and their access to established remedies in law (see for example Johnston, Darlene M. “A Theory of Crown Trust Towards Aboriginal Peoples.” *Ottawa Law Review*, vol. 18, no.2, 1986 at 316.). However, as Leonard Rotman notes, the distinction may be more apparent than real. Rotman argues that “[o]ne of the more important points to be gleaned from the *Guerin* decision, though, is that regardless of whether the relationship between the Crown and Musqueam is described as fiduciary or trust-like in nature, there is no difference in the nature, scope or extent of the Crown’s obligations.” Rotman, *supra* note 387 at 103.

⁴⁰⁴ *Williams Lake*, *supra* note 392 at para 53.

⁴⁰⁵ *Indian Act*, *supra* note 43.

⁴⁰⁶ *Guerin*, *supra* note 29 at 349-50.

⁴⁰⁷ *Ibid.* at 376.

The question of whether the Crown has undertaken discretionary control of a cognizable interest does not require the existence of a statute or express statement on the part of the Crown. In *Guerin*, it was the surrender requirement assumed by the Crown and its corresponding responsibilities, not the statute itself, which constituted the source of the Crown's fiduciary obligations.⁴⁰⁸ Similarly, the majority in *Williams Lake* held that the fiduciary obligations in that case as a result of the assertion of Crown sovereignty over the lands at issue, not as a result of a specific enactment on the part of the Crown.⁴⁰⁹ By corollary, to give rise to a fiduciary obligation, an Indigenous group's interest in land must be based on its historic use and occupation of that land. As the Court noted in *Manitoba Metis Federation*, an "Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or by extension, legislation."⁴¹⁰ Consequently, under principles of modern Canadian law where Indigenous peoples hold a legal interest in land based on their prior use and occupation and the Crown asserts discretionary control over that interest, the Crown may also hold corresponding fiduciary obligations to deal with those lands for the benefit of the interest-holding group.⁴¹¹

The nature of the Crown's fiduciary obligations will depend on the circumstances of each case. The Court noted in *Manitoba Metis Federation* that in general terms, "a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person."⁴¹² In the context of its relationship with Indigenous peoples, the Crown's position as a

⁴⁰⁸ *Ibid.* at 375.

⁴⁰⁹ *Williams Lake*, *supra* note 392 at para 43.

⁴¹⁰ *Manitoba Metis Federation*, *supra* note 392 at para 58.

⁴¹¹ Hurley, *supra* note 354 at 561.

⁴¹² *Manitoba Metis Federation*, *supra* note 392 at para 47, citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, at 646-47.

fiduciary requires that it act honourably in all its dealings with Indigenous peoples, including in respect of aboriginal and treaty rights protected under section 35(1).⁴¹³ As the Supreme Court stated in *Sparrow*:

... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.⁴¹⁴

Regarding the Crown's overarching fiduciary obligations to Indigenous peoples, McNeil explains that:

While its application no doubt depends on the circumstances, clearly [the Crown's fiduciary obligation] applies broadly to compel the federal government to maintain a high standard of conduct in both its executive and legislative capacities, so that the honour of the Crown is upheld, particularly in situations where the government has discretionary power over Aboriginal peoples. This places constitutional restraints on both the Crown and Parliament in their dealings with Aboriginal peoples. Moreover, the fiduciary duty also supports the principle of interpretation, applicable generally to constitutional instruments, statutes and treaties, that provisions touching upon the interest of the Aboriginal peoples are to be construed generously and liberally in their favour.⁴¹⁵

Where the obligation relates to a specific interest, the Crown's role as a fiduciary requires that its control "be exercised in accordance with the standard of conduct to which equity holds a fiduciary."⁴¹⁶ This standard includes "the fiduciary duties of loyalty, good faith and full disclosure."⁴¹⁷ For the purpose of assessing whether the Crown has acted in accordance with its fiduciary obligations, the Court will ask "whether 'the Crown [has] act[ed] with reference to the

⁴¹³ *Van der Peet*, *supra* note 150 at para 24, citing *Simon v. The Queen*, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387 at 402; *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at 36; *R. v. Horseman*, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901, at 907; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025 [*Sioui*] at 1066. .

⁴¹⁴ *Wewaykum*, *supra* note 378 at para 78, citing *Sparrow*, *supra* note 277 1108.

⁴¹⁵ McNeil 2001, *supra* note 51 at 322.

⁴¹⁶ *Williams Lake*, *supra* note 392 at para 46.

⁴¹⁷ *Ibid.*

Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake."⁴¹⁸ However, the existence of a fiduciary obligation does not require that the Crown deliver a particular result – rather, it sets out the standard of conduct which the Crown must fulfil.⁴¹⁹ Beyond these principles, the nature of the Crown's *sui generis* obligations will depend on the legally-cognizable interest held by the Indigenous group in question and the circumstances surrounding the Crown's exercise of control over that interest.

6.3 Fiduciary Obligations and Treaty 3

Like the Privy Council, the majority of the jurisprudence and scholarship in the years following *St. Catherine's* assumed that the Crown did not recognize Indigenous peoples as being capable of holding a legal interest in land at the time the numbered treaties were negotiated. According to this line of thinking, the treaties were negotiated for political purposes and to remove whatever limited interest Indigenous peoples did possess in the lands in order to make way for incoming settlers.⁴²⁰ However, the arguments presented by the Dominion at the Supreme Court and adopted by Justices Strong and Gwynne less than fifteen years after the treaty negotiations suggest that the Crown's intentions at treaty may have been very different. The reasons of the dissent suggest the Dominion understood that prior to Treaty 3, the Anishinaabeg to held a legally-cognizable interest in land which is similar in nature to the contemporary

⁴¹⁸ *Ibid.* at para 51, citing *Haida*, *supra* note 392 at para 18.

⁴¹⁹ *Ibid.* at para 48, citing *Guerin*, *supra* note 29 at 385 and 388-89 and *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 (CanLII) at para 57.

⁴²⁰ See for example Hall 2015, *supra* note 18 which the author argues, based in part on the Privy Council decision, that at the time the treaties were negotiated:

[t]here was never any question in the minds of the British and Canadian governments, and of HBC officials, that ultimate title to British North America lay in the British Crown by right of 'discovery,' of occupation and exploitation, and of conquest. The fact that Indians occupied and lived off the land did not give them full title but what the courts later defined as 'a personal and usufructuary right, dependent upon the good will of the Sovereign. (42)

definition of Aboriginal title in Canadian law. The following section explores whether the circumstances in Treaty 3, when considered in light of the reasons of the dissent in *St.*

Catherine's, give rise to *sui generis* fiduciary obligations on the part of the Crown in accordance with the test established by the Supreme Court in *Guerin*, *Manitoba Metis Federation* and *Williams Lake*.

The dissent in *St. Catherine's* described the Anishinaabeg interest in land prior to Treaty 3 in terms which are similar in many respects to the definition of Aboriginal title established by the Supreme Court in current jurisprudence. The Supreme Court today characterizes Aboriginal title as an ownership right similar to fee simple which includes “the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”⁴²¹ Similarly, in *St. Catherine's* Justice Strong held that at Confederation, the Anishinaabeg were recognized as holding a certain “proprietary interest in the unsurrendered lands which they occupied as hunting grounds” which amounted to both a “right of enjoyment” and an “inalienable possessory title.”⁴²² Justice Gwynne held that Indigenous title constituted a right to retain lands indefinitely unless the title holder chose to voluntarily sell or surrender those lands to the Crown.⁴²³ The dissent, like the Supreme Court today, accepted that the Royal Proclamation’s restriction on the alienation of Indigenous lands constituted a limitation on the right of private parties to purchase the land, and did not reflect an inherent limit on Indigenous

⁴²¹ *Tsilhqot'in*, *supra* note 287 at para 73.

⁴²² *St. Catharine's* SCC decision, *supra* note 4 at 615, 617.

⁴²³ *Ibid.* at 666.

peoples' capacity to hold title to land.⁴²⁴ Finally, while not addressed explicitly in the decision, it appears that both Justices Strong and Gwynne assumed that the Anishinaabeg held title to their lands on a collective basis. This too is consistent with the characterization of Aboriginal title in contemporary jurisprudence.⁴²⁵

The reasons of Justices Strong and Gwynne further suggest that in the view of the dissenting judges, the Anishinaabeg fulfilled the primary criterion for the Supreme Court today for establishing Aboriginal title. According to Supreme Court, the test for Aboriginal title “is based on ‘occupation’ prior to assertion of European sovereignty.”⁴²⁶ In *St. Catherine's*, both dissenting justices confirmed that Indigenous peoples held a legal property interest in their lands by virtue of their historic and present use and occupation of those lands.⁴²⁷ Justice Strong describes the subject lands prior to Treaty 3 as the “lands in the possession of the Indians”⁴²⁸ and “lands occupied by the Indians,”⁴²⁹ and notes that at Confederation the Crown recognized the lands as being subject to a proprietary interest by virtue of the fact that they were occupied by the Anishinaabeg for hunting purposes.⁴³⁰ Justice Gwynne similarly describes the subject lands as lands which at Confederation had not been ceded by the “Indian Nations or Tribes occupying the same as their hunting grounds and claiming title thereto.”⁴³¹ These comments, while general in nature, suggest that the dissenting judges considered prior occupation and possession as the key

⁴²⁴ *Ibid.* at 611; Appellants' Factum, *St. Catherine's* SCC, *supra* note 2 at 10; *St. Catharine's* SCC at p. 611. See *Delgamuukw*, *supra* note 150 at para 129.

⁴²⁵ *Tsilhqot'in*, *supra* note 287 at para 74.

⁴²⁶ *Ibid.* at para 25. See also *Delgamuukw*, *supra* note 150 at para 143.

⁴²⁷ *St. Catharine's* SCC decision, *supra* note 4 at 615, 618.

⁴²⁸ *Ibid.* at 612.

⁴²⁹ *Ibid.* at 614.

⁴³⁰ *Ibid.* at 615.

⁴³¹ *Ibid.* at 665.

factors in their conclusion that the Anishinaabeg held title to their lands prior to treaty.⁴³² In sum, the dissent found that prior to Treaty 3, the Anishinaabeg held a collective interest in land based on occupation, and that like the contemporary definition of Aboriginal title, that interest constituted a right to the land itself.

Justices Strong and Gwynne's conclusion that Indigenous peoples held a legally-cognizable interest to the lands they occupied prior to entering into treaties with the Crown has been affirmed in recent Canadian law. In the 2018 *Restoule* decision, the Court was asked to consider whether the Crown had acquired *sui generis* fiduciary obligations to the Anishinaabeg signatories to the historic Robinson Treaties. The Court held that:

The first element of the *sui generis* approach requires the Plaintiffs to establish that they have a specific or cognizable Aboriginal interest: the interest must be a distinctly Aboriginal, communal interest in land that is integral to the nature of the distinctive community and their relationship to the land. The Anishinaabe interest in the territories that became the subject of the Robinson Treaties was historically occupied and communally held prior to contact and is, therefore, capable of constituting a specific or cognizable Aboriginal interest in land in the pre-Treaty context. There is no controversy on this point.⁴³³

The Court's conclusion in *Restoule* is based on the specific facts relating to the Anishinaabeg who occupied lands on the northern shore of Lake Superior and Lake Huron. However, the finding that the Indigenous group collectively held and occupied their ancestral lands, which in turn gave rise to a legally-cognizable interest in those lands prior to treaty, parallels the conclusions of the dissent discussed in *St. Catherine's* that prior to treaty the Anishinaabeg held a communal interest in land which is legally cognizable under Canadian law.

⁴³² The general references to "possession" by Justices Strong and Gwynne are also consistent with the description of possession as an element of Aboriginal title in modern jurisprudence. See for example *Delgamuukw*, *supra* note 150 at para 119.

⁴³³ *Restoule*, *supra* note 33 at para 509.

In addition to holding an interest in land prior to Treaty 3, the Anishinaabeg would also need to have retained a form of interest in those lands post treaty in order to give rise to fiduciary obligation on the part of the Crown. In *St. Catherine's*, the Privy Council concluded that any land rights held by the Anishinaabeg originated in the Royal Proclamation, and that their rights to those lands was surrendered on the conclusion of the treaty. Lord Watson held that on entering into Treaty 3, the Anishinaabeg were left “no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown.”⁴³⁴ Any rights that the Anishinaabeg did have to use the surrendered lands were rights created by the treaty itself, not rights which existed as a consequence of their pre-existing interest. In the century and a half which followed *St. Catharine's*, the Crown used this view as justification for the position that it holds a complete legal interest in the lands subject to Treaty 3 and is entitled to control and benefit from those lands and resources in its sole discretion.

Although aspects of the Privy Council are no longer followed in relation to the source of Indigenous title to land, recent decisions of the Supreme Court continue to endorse the position that the rights of the Anishinaabeg are restricted to those enumerated in the treaty. In 2014 the Supreme Court held that on entering into Treaty 3, the “Ojibway yielded ownership of their territory, except for certain lands reserved to them” in return for “annuity payments, goods, and the right to harvest the non-reserve lands surrendered by them until such time as they were ‘taken up’ for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada.”⁴³⁵ This interpretation is based on a literal reading of the written English version of the

⁴³⁴ *St. Catharine's* JCPC decision, *supra* note 2.

⁴³⁵ *Grassy Narrows*, *supra* note 3 at para 2. See also *Wabauskang*, *supra* note 296, in which the Ontario Divisional Court concluded at para 212 that First Nations in Treaty 3 were not entitled to be consulted on shared decision-

treaty, which states that in exchange for the payment of annuities, farming implements, and the right to continue to hunt and fish in the treaty area (subject to the lands being “taken up” by the Crown), the Anishinaabe treaty parties “cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever” to the lands described in the treaty document.⁴³⁶

This interpretation has also been advanced by scholars such as D.J. Hall, who argues that for the federal government, treaties were about “compensating Indians for loss of their title or, to put it another way, for loss of their right to live off the land in their traditional way, so that whites could possess and settle the land peacefully.”⁴³⁷ According to Hall, from the perspective of the Dominion,

The government (Queen) possessed ultimate title to the land, and Indians did not, despite their assertions to the contrary. The treaties were about land surrenders (that is, surrender of aboriginal title in the land), compensation to permit peaceful white settlement, and the means (reserves, assistance, education, and so forth – all as grants from the Queen’s bounty) to ensure that Indians had the opportunity to adapt, transform, and thrive in the new circumstances.⁴³⁸

Similarly, Thomas Isaac argues that most historical treaties in Canada “involved Aboriginal people ceding, releasing, and surrendering their rights to land and to their traditional activities in return for specific rights specifically outlined within the terms of the negotiated treaty.”⁴³⁹

Pursuant to this interpretation, the Anishinaabeg and other Indigenous signatories to the numbered treaties surrendered the entirety of their interest in the lands on entering into treaty in

making in respect of resource development in Treaty 3 territory because “Treaty 3 makes no express or implied reference to shared decision-making and revenue sharing.”

⁴³⁶ Treaty 3, *supra* note 103.

⁴³⁷ Hall 2015, *supra* note 18 at 43.

⁴³⁸ *Ibid.* at 54.

⁴³⁹ Isaac, Thomas. *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond*. Purich Pub, Saskatoon, 2001 at 27.

exchange for a specific set of rights, and all remaining benefits from the surrendered lands passed to the Crown.

However, other scholars argue that Indigenous treaty parties not only retained an interest in their land post treaty, but that this interest was proprietary in nature. For example, Kent McNeil notes that where a right to hunt or fish in a specific area is held by an individual or defined group of people, that right will constitute an interest in the land itself.⁴⁴⁰ According to McNeil, because “Aboriginal land rights clearly include a right to hunt and fish, that right must also be proprietary.”⁴⁴¹ In the context of treaties, the fact that the Indigenous parties retained certain rights related to hunting and fishing must “operate as a qualification on the surrender provision” in the treaty, and could be construed as confirming the existence of an ongoing property interest in treaty lands.⁴⁴² Consequently, the provision in Treaty 3 which provides that the Anishinaabeg will have the right to fish and hunt throughout their territory can be viewed as affirming the existence of an ongoing property interest in the treaty lands.

The position that Indigenous peoples retained a property interest in lands subject to treaty is largely consistent with the Anishinaabeg oral and written record of the negotiation of Treaty 3. For example, the Paypom Treaty, which sets out the terms of the treaty as understood by the Anishinaabe Chiefs, makes no reference to the Anishinaabeg having surrendered ownership and control of their lands.⁴⁴³ It provides that pursuant to the treaty agreement the Anishinaabeg would “be free as by the past for their hunting and rice harvest.”⁴⁴⁴ Unlike the version published

⁴⁴⁰ McNeil, Kent. “The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case.” *Canadian Native Law Reporter*, vol. 1992, no. 1, 1992 [McNeil 1992] at 51.

⁴⁴¹ *Ibid.* at 52.

⁴⁴² *Ibid.*

⁴⁴³ Ojibwa Chiefs of Treaty 3, 4 October 1873, Paypom Treaty.

⁴⁴⁴ *Ibid.*

by Canada, this provision is not subject to the Crown's right to make regulations or take up lands for settlement and other purposes.

Anishinaabe oral records of the negotiations further confirm that the Chiefs present at the negotiations did not agree to surrender all interests in their lands to the Crown on entering into treaty.⁴⁴⁵ Instead, they agreed to share their lands and resources with incoming settlers in exchange for rights, guarantees, monetary payments and other terms intended to assist with economic development.⁴⁴⁶ Contemporary analyses of the treaty negotiations suggest that Crown representatives also promoted the concept of mutual benefit in the course of negotiations. For example, Robert Talbot notes that during Treaty 3 negotiations, Treaty Commissioner Alexander Morris “evoked the principles of reciprocity, equality, and mutual trust that persist today in Aboriginal understandings of the treaty relationship”⁴⁴⁷ and that Morris attempted to “make [the Anishinaabeg] co-beneficiaries with the settlers” who were moving into their ancestral lands.⁴⁴⁸ The written treaty prepared on behalf of the Anishinaabe treaty negotiators and oral record of negotiations thus suggests that pursuant to the treaty agreement, the Anishinaabeg understood that they retained a right, based on their prior occupation and ownership of the lands, to use those lands for hunting and harvesting in the same manner as they had prior to the treaty.

The position that the treaty constituted an agreement to share, not surrender, lands and resources, has been confirmed by the courts in recent years. In the 2011 trial decision in *Grassy Narrows*, the judge found that on entering into treaty, the Anishinaabeg agreed to share the use of the Treaty 3 lands based on the understanding that they would be entitled to continue to

⁴⁴⁵ Holzkamm, *supra* note 75 at 50.

⁴⁴⁶ *Ibid.* at 39.

⁴⁴⁷ Talbot, *supra* note 53 at 65. See also Asch 2014, *supra* note 122.

⁴⁴⁸ Talbot, *ibid.* at 57.

carrying out harvesting activities as they had in the past.⁴⁴⁹ Justice Sanderson concluded that on entering into treaty:

The Ojibway understood they were agreeing to share the use of their whole territory and resources with Euro-Canadians, so long as the sharing would not significantly interfere with their own Harvesting Rights. They did not agree to give up their means of making a living, i.e., their own use of resources or their continuing rights to subsistence harvesting on that land. The Commissioners recognized that that was their condition for entering into the Treaty, and they expressly promised the Ojibway could keep those rights to induce them to do so.⁴⁵⁰

Justice Sanderson went on to find that, contrary to the Crown's position in that case, at the time of Treaty 3 the Crown treaty negotiators, as well as the Anishinaabeg, understood the treaty to be about the establishment of a relationship based on mutual obligations. Sanderson found that in the course of negotiations the treaty commissioners expressly promised that the Anishinaabeg would be entitled to continue to use their territory as they had previously and that both parties expected that the Anishinaabeg would maintain their traditional harvesting activities on those lands.⁴⁵¹ According to the court, "the parties mutually understood and anticipated that the Ojibway and Euro-Canadians would be sharing the use of the resources,"⁴⁵² and both parties expected that their use of those resources would be compatible.⁴⁵³

Justice Sanderson's interpretation of Treaty 3 is consistent with principles of treaty interpretation set out by the Supreme Court. In interpreting Crown-Indigenous treaties, courts

⁴⁴⁹ *Grassy Narrows* trial decision, *supra* note 114 at para 1293. The trial decision was later overturned on the issue of which level of government is entitled to 'take up' land under treaty, but the findings of fact on the understandings of the treaty parties remain undisturbed. The 1973 decision of the Northwest Territories Supreme Court in *Re Paulette et al. and Registrar of Titles* (No. 2), 1973 CanLII 1298 (NWT SC) provides further support in contemporary jurisprudence for the proposition that an Indigenous interest in lands remained following the treaties.

⁴⁵⁰ *Grassy Narrows* trial decision, *ibid.* at para 913.

⁴⁵¹ *Ibid.* at paras 913, 917, 1236. The trial decision was later overturned on the issue of which level of government is entitled to 'take up' land under treaty, but the findings of fact on the understandings of the treaty parties remain undisturbed.

⁴⁵² *Ibid.* at para 1236.

⁴⁵³ *Ibid.* at para 1237.

must “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.”⁴⁵⁴ Treaties must be “liberally construed,” with any ambiguities resolved in favour of the Indigenous treaty parties.⁴⁵⁵ As McNeil notes, interpreting the treaties as including a continued proprietary interest in land “corresponds more closely to the understanding of the Aboriginal peoples who signed the treaty.”⁴⁵⁶ As such, McNeil argues that an interpretation of the hunting and fishing provisions in the treaty acting as a qualification or limit on the surrender provision “is in keeping with the rule that treaties are to be interpreted in favour of the Aboriginal parties.”⁴⁵⁷ In the case of Treaty 3, the absence any reference to the purchase of lands, along with the fact that there is no record the issue was discussed in the course of negotiations, supports the position that the entirety of the Anishinaabeg land interest could not have been ceded on entering into treaty.⁴⁵⁸

If we assume, based on the discussion above, that the Anishinaabeg had a pre-existing interest in land based on use and occupation prior to Treaty 3 and retained some form of interest following treaty, then the remaining question is whether the Crown asserted discretionary control over that interest such that it gives rise to fiduciary obligations to its treaty partners.⁴⁵⁹ Prior to

⁴⁵⁴ *R. v. Marshall*, [1999] 3 SCR 456, 1999 CanLII 665 (SCC) [*Marshall*] at para 78, citing *Sioui*, *supra* note 413 at 1068-69.

⁴⁵⁵ *Marshall*, *ibid.*

⁴⁵⁶ McNeil 1992, *supra* note 440 at 53. The interpretation of Treaty 3 in the *Grassy Narrows* trial decision is also consistent with the findings of the Royal Commission on Aboriginal Peoples, which states in relation to the numbered treaties that the Crown “asked First Nations to share their lands with settlers, and First Nations did so on the condition that they would retain adequate land and resources to ensure the well-being of their nations.” See RCAP, *supra* note 50.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Luby, *supra* note 105 at 207.

⁴⁵⁹ For the purposes of this discussion, I will consider the interest held by the Anishinaabeg broadly as an ongoing interest related to their ancestral lands, and any corresponding fiduciary obligations as a responsibility on the part of the Crown to administer those lands on behalf of the Anishinaabeg. To address this issue fully, however, further consideration would need to be given to the specific nature of the interest and what type of obligations might arise if the elements necessary to establish the existence of a fiduciary obligation are met.

the negotiation of Treaty 3, the Crown had already sought to establish control over Indigenous peoples' lands in North America, including by way of the Royal Proclamation and the *BNA Act*. These instruments remained in effect in 1873 when Treaty 3 was concluded. From the Crown's perspective, if Indigenous peoples, including the Anishinaabeg, wanted to sell their lands to third parties, their only option was to deal directly with the Crown. Statements by Crown representatives during treaty negotiations further suggest that the Crown viewed Indigenous peoples as falling under the authority of the Queen even prior to treaty. For example, throughout negotiations for many of the numbered treaties, Treaty Commissioner Alexander Morris makes repeated reference to both the Dominion and Indigenous nations as being "subjects" of the Crown.⁴⁶⁰ The assumption that is also reflected in the written text of Treaty 3, which describes the Anishinaabeg as the Queen's "Indian subjects."⁴⁶¹

Despite these assertions, at the time of the Treaty 3 negotiations the extent of the Crown's actual ability to exercise jurisdictional authority over Indigenous peoples and their lands is unclear. As Hamar Foster notes, there is evidence even in the 1800s that a significant number of colonial officials openly doubted whether certain imperial statutes which purported to apply in the area which would become Treaty 3 applied to Indigenous peoples, and whether the Crown's jurisdictional authority even extended to the "Indian Territories."⁴⁶² At that time, even those Indigenous peoples who acknowledged the sovereignty of the Crown by way of treaty "did not see this acknowledgment as an automatic forfeiture of their title and powers of self-

⁴⁶⁰ Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on which they were Based and Other Information Relating Thereto*. Coles Pub. Co, Toronto, 1971 at 58.

⁴⁶¹ Treaty 3, *supra* note 103.

⁴⁶² Foster 1999, *supra* note 36 at 353.

government.”⁴⁶³ By many accounts, the Anishinaabeg were largely autonomous, self-governing people who negotiated Treaty 3 on the basis that they were the rightful owners of the land and resources which were the subject of the negotiations.⁴⁶⁴ Prior to Treaty 3, it is unlikely that they viewed themselves or their lands as already under the jurisdiction and control of the Crown.

Regardless of the ambiguities regarding the Crown’s control of Anishinaabe lands prior to treaty, however, it is clear that the Crown did exercise discretionary control over the treaty lands after 1873.⁴⁶⁵ While the Anishinaabeg do not accept that they surrendered their entire interest in their ancestral lands pursuant to the treaty agreement, there is little dispute that on entering into treaty they did relinquish exclusive control over those lands.⁴⁶⁶ The treaty agreement was based in part on the Anishinaabeg understanding that the Crown might now exercise a measure of control over their lands, but that it in doing so it would act in the interests of its treaty partner. As the trial judge held in *Grassy Narrows*, on entering into treaty, the Anishinaabeg “perceived that they now had kinship links to the Canadian Government/shared a mutual relationship in the form of a symbolic kinship with the Great Mother, the Queen” and as such, “expected mutual give and take and that their Treaty partner would have due regard for their welfare.”⁴⁶⁷ Thus, from the perspective of the Anishinaabeg the Crown was seen as

⁴⁶³ *Ibid.*

⁴⁶⁴ See for example Daugherty, *supra* note 53, and Telford, *supra* note 60.

⁴⁶⁵ In *Restoule*, *supra* note 33 the question of whether the Crown’s treaty promises can give to *sui generis* fiduciary obligations was considered in respect of the Robison Treaties. In that case, the court considered whether the Crown had acquired fiduciary obligations in respect of its treaty promise to increase annuity payments to the treaty beneficiaries (the “augmentation clause”). The court found that the augmentation clause did not amount to an undertaking of discretionary control on the part of the Crown, and as such found it unnecessary to determine whether the Anishinaabeg held a cognizable interest in their lands which survived the signing of the treaties (para 510-12).

⁴⁶⁶ *Grassy Narrows* trial decision, *supra* note 114 at para 781.

⁴⁶⁷ *Ibid.* at para 1191.

exercising discretionary control over their lands, that as their treaty partners they expected that they would benefit from the Crown's exercise of control.⁴⁶⁸

The reasons of Justices Strong and Gwynne in *St. Catherine's* similarly suggest that the Dominion controlled lands in Treaty 3, but was obligated to use that control to fulfil its obligations to its treaty partner. Justice Strong concluded that the Dominion was entitled to the benefits from lands surrendered by treaty not to use for its own purposes, but specifically because it was the Dominion which was "burdened with the support and maintenance of the Indians"⁴⁶⁹ -- thereby suggesting that the federal government's right to resources from treaty lands was tied directly to its obligations to its treaty partners. Similarly, Justice Gwynne found that the federal government held jurisdictional authority over the lands subject to treaty because the land "supplies the primary and indeed the only source from which the funds are required to maintain the schools contemplated by the treaty, and to meet all the other pecuniary payments and obligations incurred, can be raised."⁴⁷⁰ Justice Gwynne went on to hold that:

The benefits received and to be received by the Indians under the treaty are in effect so many fruits issuing from their own acknowledged estate and interest in the lands ceded. The administration and management of the estate constituting the source from which the funds required to meet the obligations incurred by the treaty must remain under the control of the Dominion of Canada, which alone, by the B.N.A. Act, has jurisdiction in relation to the Indians and their affairs, at least until a sum shall be realized which, in the judgment of Her Majesty's government of the Dominion having the obligations of the treaty imposed upon them, shall be deemed sufficient to supply for all time to come the necessary funds.⁴⁷¹

⁴⁶⁸ This expectation was emphasized by the Anishinaabeg a year after the conclusion of Treaty 3, when the Chiefs who had negotiated the agreement wrote to Treaty Commissioner Alexander Morris to remind the Crown that they when they decided to enter into the treaty, they "calculated on being maintained by [the Crown], at least to the extent that we were promised." See Krasowski, *supra* note 54 at 142.

⁴⁶⁹ *St. Catharine's* SCC decision, *supra* note 4 at 617.

⁴⁷⁰ *Ibid.* at 671.

⁴⁷¹ *Ibid.*

Importantly, Justice Gwynne expressly characterized the Dominion's obligations to the Anishinaabeg as those of a trustee by reference to section 109 of the *BNA Act*, which provided that the lands in question belonged to the Province "subject to any Trusts existing in respect thereof."⁴⁷² Given this qualification on provincial rights, Gwynne held that:

...the "trusts" and "interest" in the sentence referred to must be held to be the "purposes" mentioned in the treaty, in consideration of which the cession was made, and the interest which the Indians have in the due fulfilment of the terms of the treaty, of which the Dominion Government are the trustees, and are, therefore, entitled to hold the property ceded in the terms of the treaty of cession as their security and means of executing the trusts imposed on them, unless and until some agreement shall be entered into between the Provincial government and them.⁴⁷³

For both dissenting judges, the fulfilment of the treaty promises was intrinsically connected to the revenue generated from lands subject to treaty. As their reasons demonstrate, the position of Justices Strong and Gwynne was that on entering into treaty, the Crown acquired specific, legally-enforceable obligations to its treaty partners which arose as a result of its assertion of discretionary control over lands held by the Anishinaabeg.

6.4 Conclusion

While the reasons of Justices Strong and Gwynne do not fully reflect the Anishinaabe understanding of the treaty and cannot be viewed as a complete or comprehensive interpretation of the rights and obligations flowing from the treaty agreement, they do confirm that at the time Treaty 3 was negotiated, some representatives for the Dominion recognized Anishinaabeg ownership and control over their ancestral lands, and that the Dominion's obligations to the Anishinaabeg were linked to the Anishinaabeg's interest in the treaty lands.⁴⁷⁴ Based on the

⁴⁷² *BNA Act*, *supra* note 125.

⁴⁷³ *St. Catharine's* SCC decision, *supra* note 4 at 676.

⁴⁷⁴ *Ibid.* at 666.

analysis in this chapter, it appears arguable, on a preliminary basis, that the Anishinaabe retained an interest in their lands post-treaty, and that the Crown undertook discretionary control over that interest in a manner which gives rise to *sui generis* fiduciary obligations pursuant to the requirements established by the Supreme Court today.

Chapter 7: Looking Ahead

The reasons of the dissent in *St. Catharine's* provide critical insight into how the federal government understood its treaty obligations in the years immediately following Treaty 3. When read in light of the treaty record and current jurisprudence, the reasons suggest the Anishinaabeg had an interest in their lands which was recognized by the Dominion and the dissent at the Supreme Court as something equivalent to what we now describe as Aboriginal title and which constitutes a legally-cognizable interest in land under Canadian law. On entering into treaty, the Crown assumed discretionary control over that interest, and in so doing, the Crown also assumed a fiduciary relationship to the Anishinaabeg relative to their interest in those lands.

The preliminary conclusions discussed above raise a number of substantive and practical questions regarding the effect of the numbered treaties today and the related implications for the present-day relationship between Indigenous peoples and the Crown. As a starting point, it would be necessary to determine the precise nature of the interest held by the Anishinaabeg to their lands post treaty. The nature of the Crown's obligations and the standard to which they have been performed – including whether the Crown has breached that standard – must also be explored. In the case of a breach, further complex questions arise regarding how compensation is to be valued and awarded. Each of these questions are beyond the scope of this thesis, but will be critical in developing a fuller picture of the treaty obligations assumed by the Crown.

In addition, further consideration must be given to the role of the Province in fulfilling the treaty promises and any liability flowing from its failure to do so. In *St. Catharine's*, the Dominion, dissent at the Supreme Court and even Lord Watson at the Privy Council expressed concern that a decision in favour of the Province would result in challenges in fulfilling the terms

of the treaty by denying the federal government access to the lands intended to generate revenue for that purpose. In the years following *St. Catharine's*, this is effectively what occurred – the Province, on the assumption that it held property rights pursuant to the *BNA Act* to lands within its boundaries, proceeded to use and develop those lands without acknowledging any corresponding obligations in respect of the treaty. In 2014, however, the Supreme Court in *Grassy Narrows* held that the treaty itself was with the Crown, not the federal government, and that as such the Province bears equal responsibility for fulfilling the treaty promises to the Anishinaabeg.⁴⁷⁵ The full effects of this decision remain to be seen, but it points to significant issues regarding both the fulfillment of the treaty promises going forward as well as which level of government may be liable for any breaches of treaty which occurred in the years following *St. Catharine's*. Like the other issues identified above, this will require careful consideration before conclusions or recommendations can be reached.

More broadly, what emerges from the examination of the reasons of the dissent in the preceding chapters is a need to revisit the spirit and intent of the treaty as it relates to the Crown's obligations towards its treaty partners. For more than a century and a half, the Anishinaabeg have consistently expressed the perspective that they did not surrender their entire interest in their lands and that significant portions of the treaty agreement – including obligations regarding sharing of lands and benefits from those lands – have been disregarded. At the same time, the Crown has implemented the view of the treaty endorsed by the Privy Council, including unilaterally controlling and developing resources in Treaty 3 without the involvement of the Anishinaabeg, and without providing their treaty partners with benefits from that development.

⁴⁷⁵ *Grassy Narrows SCC*, *supra* note 3.

When viewed in the context of the Dominion's arguments in *St. Catharine's*, along with more recent findings of fact which support the Anishinaabeg view that the treaty was an agreement to share lands and resources, this position appears increasingly untenable.⁴⁷⁶

The findings of the dissent, which suggest that the federal government was prepared to accept more extensive obligations to its treaty partners than is often assumed, are particularly salient today in light of the court's modern principles of treaty interpretation. In interpreting the treaties, the courts' overriding objective is to choose the interpretation which, to the extent possible, reconciles the interests of both parties at the time of treaty.⁴⁷⁷ The conduct of the treaty parties, particularly that which most closely follows the conclusion of the treaty, is a critical factor in determining the parties' intentions.⁴⁷⁸ In *St. Catharine's* the reasons of the dissent give us important insight into the conduct of the Dominion shortly after the treaty was negotiated. This conduct in turn supports an interpretation of the treaty which would confirm that Crown's treaty promises align more closely with the view advanced by the Indigenous treaty parties than the position advanced by the Crown and Canadian courts today.

An approach to treaty interpretation which takes into account the alternate perspectives in *St. Catharine's* would also be consistent with judicial decisions in recent decades which have already rejected other aspects of the Privy Council decision. As Michael Asch and Catherine Bell note, in certain circumstances courts have shown themselves to be willing to move beyond the strict application of precedent in order to address changes in societal values and ideologies.⁴⁷⁹ In

⁴⁷⁶ See *Grassy Narrows* trial decision, *supra* note 114.

⁴⁷⁷ *Marshall*, *supra* note 54 at para 78; *Sioui*, *supra* note 413 at 1068-69.

⁴⁷⁸ *Sioui*, *ibid.*

⁴⁷⁹ Asch, Michael and Catherine Bell. "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation." Ed. Michael Asch. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. Vancouver: UBC Press, 1997 at 41.

such cases, the decision to take active steps to direct the development of the law rather than applying existing precedent can be seen as recognition on the part of the court that it is no longer appropriate to issue decisions which rely on outdated, unjust or racist ideologies and beliefs. In this respect, the reasons of the dissent in *St. Catharines* can serve as a starting point for a more comprehensive understanding of the Crown's treaty obligations. As former Supreme Court Justice L'Heureux-Dubé writes, dissenting judgements can play a prescient or predictive role by raising the possibility of alternative approaches which, if adopted later, may in turn "allow the law to adopt to society's new values and realities."⁴⁸⁰ While much work remains to be done, courts have already demonstrated that they are prepared to move beyond the Privy Council's interpretation of Aboriginal title towards a view which acknowledges Indigenous peoples as the prior occupants and owners of the lands throughout Canada. It remains open to the courts to employ a similar approach regarding the obligations which flow from the Crown's treaty promises to the Anishinaabeg.

The reasons of the dissent at the Supreme Court also bear consideration because they speak more closely to society's understanding of the treaty relationship between the Crown and Indigenous peoples today. Societal values and attitudes towards the relationship between settler and Indigenous populations have shifted significantly since the issuance of the Privy Council decision. Courts have since confirmed that the mutual, respectful reconciliation of Indigenous and non-Indigenous Canadians is the "grand purpose" which underlies constitutional protections

⁴⁸⁰ L'Heureux-Dube, Claire. "The Dissenting Opinion: Voice of the Future?" *Osgoode Hall Law Journal*, vol. 38, no. 3, 2000 at 516. See also Kirk Makin, 'Justice Ian Binnie's Exit Interview,' *Globe and Mail* (23 September 2011), cited in Hogg, Peter W., and Ravi Amarnath. "Why Judges Should Dissent." *University of Toronto Law Journal*, vol. 67, no. 2, 2017, in which former Supreme Court Chief Justice Ian Binnie notes that "dissenting opinions are extremely useful to tell the legal community and the broader public that there is a real debate going on among the judges and displaying the different contending points of view" (131).

extended to aboriginal and treaty rights.⁴⁸¹ More recently, the federal government affirmed that Crown- Indigenous treaties “have been and are intended to be acts of reconciliation based on mutual recognition and respect.”⁴⁸² In the case of Treaty 3, the alternative perspectives in *St. Catharine’s* suggest the Crown sought to obtain the consent of the Anishinaabeg to use and share their lands, and that the treaty agreement established a relationship based on an assumption of mutual obligations, including obligations on the part of the Crown to use the land to fulfil the treaty promises. If the Crown and courts are indeed committed a to renewed process of reconciliation with Indigenous peoples in Canada, then it is time to revisit those promises made by the Crown which form the bedrock of non-Indigenous Canadians’ right to live on and share the lands with our treaty partners.

⁴⁸¹ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 (CanLII) at para 10; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 (CanLII) at para 1.

⁴⁸² Department of Justice, Canada, *Principles respecting the Government of Canada's relationship with Indigenous peoples*. Online: <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>. Accessed March 14, 2019.

Bibliography

Legislation

British North America Act, 1867

Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Constitution Act, 1867, 30 & 31 Vict, c 3

Indian Act, RSC 1985, c I-5

Jurisprudence

Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24 (CanLII)

Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401

Beckman v. Little Salmon/Carmacks First Nation, [2010] 3 SCR 103, 2010 SCC 53 (CanLII)

Calder et al. v. Attorney-General of British Columbia, [1973] SCR 313, 1973 CanLII 4 (SCC)

Campbell v Hall 1 Cowp 204, 98 ER 1045

Canada v. Long Plain First Nation, 2015 FCA 177 (CanLII)

Cherokee Nation v. State of Georgia (1831), 5 Peters 1, 30 U.S. 1.

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12 (CanLII)

Delgamuukw v. British Columbia, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC)

Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9 (CanLII)

Grassy Narrows First Nation v. Ontario (Natural Resources), [2014 SCC 48 (CanLII)

Guerin v. The Queen, [1984] 2 SCR 335, 1984 CanLII 25 (SCC)

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (CanLII)

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)

Keewatin v. Minister of Natural Resources, 2011 ONSC 4801 (CanLII)

Lac Minerals Ltd. v. International Corona Resources Ltd., 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574

Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14 (CanLII)

Marshall; R. v. Bernard, [2005] 2 SCR 220, 2005 SCC 43 (CanLII)

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 SCR 388, 2005 SCC 69 (CanLII)

Nowegijick v. The Queen, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29

Prophet River First Nation v. British Columbia (Environment), 2017 BCCA 58 (CanLII)

Prophet River First Nation v. British Columbia (Environment), 2015 BCSC 1682 (CanLII)

R. v. St. Catharines Milling (1885) 10 O.R. 196 (Ont. Ch.)

R. v. Horseman, 1990 CanLII 96 (SCC), [1990] 1 S.C.R. 901

R. v. Marshall, [1999] 3 SCR 456, 1999 CanLII 665 (SCC)

R. v. Sioui, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025

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

R. v. Van der Peet, [1996] 2 SCR 507, 1996 CanLII 216 (SCC)

R. v. White, 1964 CanLII 452 (BC CA)

Re Paulette et al. and Registrar of Titles (No. 2), 1973 CanLII 1298 (NWT SC)

Regina v. White and Bob, 1965 CanLII 643 (SCC)

Restoule v. Canada (Attorney General), 2018 ONSC 7701 (CanLII)

Simon v. The Queen, 1985 CanLII 11 (SCC), [1985] 2 S.C.R. 387

St. Catharines Milling and Lumber Co. v. R 13 Ont. App. R. 148

St. Catharine's Milling and Lumber Co. v. R., 13 SCR 577, 1887 CanLII 3 (SCC)

St. Catherine's Milling and Lumber Company v The Queen [1888] UKPC 70, 14 App Cas 46

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 (CanLII), [2014] 2 S.C.R. 257

Wabauskang First Nation v. Minister of Northern Development and Mines et al, 2014 ONSC 4424 (CanLII)

Wewaykum Indian Band v. Canada, [2002] 4 SCR 245, 2002 SCC 79 (CanLII)

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), [2018] 1 SCR 83, 2018 SCC 4 (CanLII)

Secondary Material

Abel, Kerry M., et al. *Aboriginal Resource use in Canada: Historical and Legal Aspects*. vol. 6, University of Manitoba Press, Winnipeg, Man, 1991.

Asch, Michael. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. UBC Press, Vancouver, 1997.

Asch, Michael. "On Being Here to Stay: A Conversation on Resolving Political Relations between Indigenous Peoples and the Canadian State." Conference paper. 2017. Print.

Asch, Michael. *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. Toronto: University of Toronto Press, 2014.

Borrows, John. "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation." *University of British Columbia Law Review*, vol. 28, no. 1, 1994, pp. 1.

Christie, Gordon. "Delgamuukw and the Protection of Aboriginal Land Interests." *Ottawa Law Review*, vol. 32, no. 1, 2000, pp. 85.

Daugherty, Wayne. *Treaty Research Report Treaty Three (1873)*, Treaties and Historical Research Centre, Department of Indian Affairs and Northern Development, 1986.

Drake, Karen. "The Trials and Tribulations of Ontario's 'Mining Act': The Duty to Consult and Anishinaabek Law." *McGill International Journal of Sustainable Development Law and Policy*, vol. 11, no. 2, 2015, pp. 138.

Elliott, David E. "Much Ado about Dittos: Wewaykum and the Fiduciary Obligation of the Crown." *Queen's Law Journal*, vol. 29, no. 1, 2003, pp. 1.

Evans, Julie, et al. *Sovereignty: Frontiers of Possibility*. University of Hawai'i Press, Honolulu, 2013.

Foster, Hamar. "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases." *Manitoba Law Journal*, vol. 21, no. 3, 1992, pp. 343.

Getty, Ian A. L., and Antoine S. Lussier. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*. University of British Columbia Press, Vancouver, 1983.

Gillen, Mark R., Faye Woodman, and Jeffrey B. Berryman. *The Law of Trusts: A Contextual Approach*. Emond Montgomery Publications Limited, Toronto, ON, 2015.

Hall, D. J. *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905*. McGill-Queen's University Press, Montreal; Kingston; 2015.

Harris, Douglas. "A Court Between: Aboriginal and Treaty Rights in the British Columbia Court of Appeal." *B.C. Studies* no. 162, 2009, pp. 137.

Harring, Sidney L. "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law." *Saskatchewan Law Review*, vol. 56, no. 2, 1992, pp. 297.

Harring, Sidney. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, Toronto, 1998.

Havemann, Paul. *Indigenous Peoples' Rights in Australia, Canada & New Zealand*. Oxford University Press, Auckland; New York, 1999.

Henderson, James Youngblood. *Aboriginal Tenure in the Constitution of Canada*. Scarborough: Carswell, 2000.

Henderson, James Y. *Treaty Rights in the Constitution of Canada*. Thomson Carswell, Toronto, 2007.

Hildebrandt, Walter, et al. *The True Spirit and Original Intent of Treaty 7*. vol. 14; McGill-Queen's University Press, Montreal, 1996.

Hogg, Peter W., and Ravi Amarnath. "Why Judges Should Dissent." *University of Toronto Law Journal*, vol. 67, no. 2, 2017, pp. 126.

Holzkamm, Tim and Waisberg L. *We Have Kept Our Part of the Treaty: The Anishinaabe Understanding of Treaty #3*. Kenora, ON: Grand Council Treaty #3, 2012.

Hurley, John. "The Crown's Fiduciary Duty and Indian Title: *Guerin v. the Queen*." *McGill Law Journal*, vol. 30, no. 3, 1985, pp. 595.

Isaac, Thomas. *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond*. Purich Pub, Saskatoon, 2001.

Johnson, Darlene M. "A Theory of Crown Trust Towards Aboriginal Peoples." *Ottawa Law Review*, vol. 18, no.2, 1986, pp. 307.

Krasowski, Sheldon K. *Mediating the Numbered Treaties: Eyewitness Accounts of Treaties between the Crown and Indigenous Peoples, 1871-1876*, ProQuest Dissertations Publishing, 2011.

Lester, Geoffrey S. "Aboriginal Land Rights: Some Remarks upon the Ontario Lands Case." *Queen's Law Journal*, vol. 13, no. 3, 1988, pp. 132.

L'Heureux-Dube, Claire. "The Dissenting Opinion: Voice of the Future?" *Osgoode Hall Law Journal*, vol. 38, no. 3, 2000.

Luby, Brittany. "'The Department is Going Back on these Promises': An Examination of Anishinaabe and Crown Understandings of Treaty." *Canadian Journal of Native Studies*, vol. 30, no. 2, 2010, pp.203.

Luk, Senwung. "Not so Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*." *Saskatchewan Law Review*, vol. 76, no. 1, 2013, pp.1.

Mainville, Sara J. *Manidoo Mazina'Igan: An Anishinaabe Perspective of Treaty 3*, ProQuest Dissertations Publishing, 2007.

McIvor, Bruce and Kate Gunn. "From Shield to Sword: Section 91(24) and the Division of Powers," Canada 150 – Constitutional Law Symposium, University of Alberta, Edmonton, 2017.

McNeil, Kent. *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia*. Native Law Centre, University of Saskatchewan, Saskatoon, 2001.

McNeil, Kent. *Flawed Precedent: The St. Catherine's Case and Aboriginal Title*. University of British Columbia Press, 2019.

McNeil, Kent. "The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case." *Canadian Native Law Reporter*, vol. 1992, no. 1, 1992, pp.40.

McNeil, Kent. "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s." *Journal of the West*, vol.38, no.1, 1999.

Morin, Jean-Pierre. "Concepts of Extinguishment in the Upper Canada Land Surrender Treaties, 1764-1862," in *Aboriginal Policy Research*, vol. 7, 2010.

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on which they were Based and Other Information Relating Thereto*. Coles Pub. Co, Toronto, 1971.

Narvey, Kenneth. "The Royal Proclamation of 7 October 1763, the Common Law and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company." *Saskatchewan Law Review*, vol. 38, no. 1, 1973-74.

Ray, Arthur J., et al. *Bounty and Benevolence: A History of Saskatchewan Treaties*. McGill-Queen's University Press, Montreal, 2000.

Rotman, Leonard. *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*. University of Toronto Press, Toronto, 1996.

Slattery, Brian. "The Aboriginal Constitution." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67 (2014).

Slattery, Brian. "Aboriginal Sovereignty and Imperial Claims." *Osgoode Hall Law Journal*, vol. 29, no. 4, 1991, pp. 681.

Slattery, Brian. "The Hidden Constitution: Aboriginal Rights in Canada." *The American Journal of Comparative Law*, vol. 32, no. 2, 1984, pp. 361.

Slattery, Brian. "First Nations and the Constitution: A Question of Trust." *Canadian Bar Review*, vol. 71, no.2, 1992, pp. 261.

Talbot, Robert. *Negotiating the Numbered Treaties: An Intellectual and Political Biography Alexander Morris*. Saskatoon: Purich, 2009.

Telford, Rhonda M. "*The Sound of the Rustling of the Gold is Under My Feet Where I Stand; we have a Rich Country:*" *A History of Aboriginal Mineral Resources in Ontario*, ProQuest Dissertations Publishing, 1996.

Tobias, John L. "Canada's Subjugation of the Plains Cree, 1879-1885." *Canadian Historical Review*, vol. 64, no. 4, 1983, pp. 519-548.

Townshend, Roger. "What Changes did Grassy Narrows First Nation make to Federalism and Other Doctrines?" *Canadian Bar Review*, vol. 95, no. 2, 2017, pp. 459.

Usher, Peter J., Frank J. Tough, and Robert M. Galois. "Reclaiming the Land: Aboriginal Title, Treaty Rights and Land Claims in Canada." *Applied Geography*, vol. 12, no. 2, 1992, pp. 109-132.

Waisberg, Leo G., Joan A. Lovisek, and Tim E. Holzkamm. "Ojibwa Reservations as 'an incubus upon the territory:' The Indian Removal Policy of Ontario, 1874-1982." *Papers of the Algonquian Conference* 27, 1996, pp. 337-52.

Walmark, Brian. *Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73*, ProQuest Dissertations Publishing, 1993.

Wilkins, Kerry. "Life among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*." *Alberta Law Review*, vol. 55, no. 1, 2017.

Other

Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, "Looking Forward, Looking Back" (Ottawa: Minister of Supply and Services Canada, 1996).

Department of Justice, Canada, *Principles respecting the Government of Canada's relationship with Indigenous peoples*. Online: <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>. Accessed March 14, 2019.

Ojibwa Chiefs of Treaty 3, 4 October 1873, Paypom Treaty.

St. Catharine's Milling and Lumber Company vs. The Queen: Collected Materials, vol.3, Toronto: Printed by Warwick & Sons, 1886.

Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions.