ABORIGINAL LAND CLAIMS: THE TEME-AUGAMA ANISHNABAI

THE CANADIAN STATE AND ABORIGINAL LAND CLAIMS: TEMAGAMI IN A NEO-INSTITUTIONAL PERSPECTIVE

By

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ABSTRACT

This thesis uses the land claim of the Teme-Augama Anishnabai in Northern Ontario to explain why some land claims endure over decades with no apparent solution in sight. A neo-institutionalist framework, drawing heavily on the work of March and Olsen, focuses the study on the institutions of the Canadian state and the decision-making processes contained therein. Realizing that adjudication and negotiation represent two very distinct decision-making processes, the thesis explains why each process has been unable to effectively deal with some aboriginal land claims. To help explain these failures, the concept of cultural imprint is introduced. Cultural imprint refers to the values that a particular culture may imbue into institutions. This thesis also recognizes that comprehensive land claims (a claim based on aboriginal title) constitute a unique demand on institutions. Such claims suggest that a consensual relationship between aboriginal peoples and non-aboriginal society does not exist. Thus comprehensive land claims are interpreted as exogenous demands on the state. In this context adjudication is concluded to be an inherently inferior process when it is confronted with comprehensive land claims. Although negotiation is considered to be the more desirable process, the current structure of the negotiation process is completely inadequate in Canada. The thesis concludes that some land

claims will not be resolved until an improved negotiation process, where aboriginal peoples can bargain as equals, is established.

PREFACE

Research presented in this thesis began in late summer, 1989. At that time letters were sent out to a number of key individuals and organizations soliciting information. While the majority of these letters were ultimately unsuccessful, a number of contacts were made. Of these, the responses obtained from officials in the Ontario Native Affairs Directorate (ONAD) were particularly encouraging.

Empirical research was conducted at McMaster University in the early fall of 1989. Newspaper microfilm was consulted to obtain a background to the Temagami land claim and textbooks were consulted to develop an understanding of aboriginal rights. These materials were used as preparatory devices for interviews to follow later that fall. Formal interview sheets were designed and followed for each interview. The first interviews were with three senior ONAD officials. While at ONAD offices in Toronto, I made extensive use of microfiche files dealing with the land claim. The files had been inherited by ONAD from the Ministry of Natural Resources (MNR) and covered the period from 1910 until 1982.

One interview was later conducted in Sudbury with the Director of Communications for the Teme-Augama Anishnabai when I attended the "Temagami Perspectives" Conference held at Laurentian University, 20 -21 October 1989. The

tribal council had previously granted me permission to make use of their archival resources on Bear Island. Although I visited Temagami, two factors prevented any research at the Bear Island library. First, transportation to and from Bear Island each day is difficult to arrange. Second, McMaster University does not fund field research for M.A. students. As such a proposition would have been expensive, research was not conducted on Bear Island.

Two interviews were conducted with middle management officials at the Department of Indian Affairs and Northern Development (DIAND) in November 1989 (one of whom is no longer with DIAND). While in Ottawa I made extensive use of the resources found at the Treaties and Historical Research Centre (THRC) and at the Departmental library. THRC had files covering a period from 1880 through to the mid-1970s.

One interview was subsequently conducted with a key provincial official in early December. I was ultimately unsuccessful when I attempted to arrange interviews with personnel at MNR. Unfortunately, each foray was referred to ONAD by MNR.

All interviewees were guaranteed complete anonymity.

Thus the reconstruction of the Temagami story comes from several sources. The history from 1880 until 1982 is largely derived from letters and memoranda found in the files of ONAD and THRC. Considerable assistance with this research was provided by the published research of Bruce Hodgins. I am grateful to Dr. Hodgins for an early morning coffee and discussion that we shared at his house in the fall of

1989. After 1982, the story becomes much more difficult to trace as this is a sensitive and ongoing conflict. Information provided through interviews has been the primary source of data post-1982. Since memories are limited, wherever possible, I have attempted to verify this information through corroborating interviews or by examining whatever primary research material was available. Any ensuing errors are mine.

A special note of appreciation goes to Bill Coleman, my supervisor, for all the effort, encouragement and interest he has shown in this project. Without Bill's encouragement, I would not have finished this thesis following my "hiatus" as an Intern at Queen's Park and as researcher in Ottawa.

My thanks also go to the other members of my committee, Mike Atkinson and Charlotte Yates, for their time, interest, and insights.

I will always be indebted to the friends I made while at Mac. They helped me through both the courses and the thesis. I know that the department one day hopes to have a Ph.d. programme. I hope that a Ph.d. programme does not change the atmosphere of the M.A. programme, which I believe to be unique. I believe I could not have received a better graduate education at any other department in the country.

Finally, I would like to thank my family for their support and encouragement (hopefully, there really will be a job for me after this!!). Although my mother did not live to see me begin university, I'm sure she would be proud of the the higher levels of education all her sons have achieved, something she did not have the opportunity to achieve herself.

TABLE OF CONTENTS

CHAPTER ONE

AN INTRODUCTION TO ABORIGINAL LAND CLAIMS

Canada has experienced a surge of aboriginal[1] political activity over the past two decades. The modern aboriginal rights movement developed in a new multicultural era[2] and followed the federal government's white paper on Indian Policy (1969)[3]. The white paper, demonstrating the antagonism between special, group rights and equality, sparked anger in the Canadian aboriginal community which had struggled for so long to maintain a separate identity.[4] Throughout the 1970s and on into the 1980s, aboriginal associations lobbied for constitutional reform while individual tribes began to press land claims through the courts and the bureaucracy. While several major claims in northern Canada have progressed significantly, many of the claims within provincial jurisdictions have not been addressed. As this process

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[1] Throughout this thesis the term "aboriginal" shall be used in lieu of "Indian." This is a corporate term which includes the Inuit and Metis as well.

[2] E. Palmer Patterson, "Native Peoples and Social Policy," in Shankar A. Yelaja ed., Canadian Social Policy (Waterloo: Wilfrid Laurier University Press, 1987), pp. 175-194.

[3] See Canada, Ministry of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy (Ottawa, 1969).

[4] See Sally M. Weaver, Making Canadian Indian Policy, The Hidden Agenda 1968-1970 (Toronto: University of Toronto Press, 1981).

drags out, aboriginal frustration has increasingly turned to civil disobedience as a tool of political action.

Throughout the summer of 1990, the attention of the entire country was focused on the intense conflict at Oka, Quebec. The land claim of the Mohawks of that region graphically illustrates the intense feeling of aggrievement that has developed and the tragic consequences that can follow. It also creates the unfortunate impression that aboriginal demands and frustration will only receive the attention of the government, the media, and the public when extraordinary incidents of civil disobedience occur. While the Temagami land claim has not resulted in similarly disturbing violent incidents, both cases are marked by neglect, denial and frustration.

Why have some aboriginal land claims resulted in frustration and civil disobedience? Part of the answer lies with the structure of the Canadian political system. It is a system that channels land claims alternatively through processes of negotiation and adjudication. Each process emphasizes distinct qualities that address problems requiring either political compromise or rational thought. None of the current institutions are capable of assimilating and responding to aboriginal demands. Consequently, aboriginal groups have been shuffled from one set of institutions to another, with frustration increasing as the process has continued over time.

This thesis will argue that the design of the Canadian political system has led to the frustration and anger that aboriginal groups are currently expressing. This approach to problems in Canadian public policy is not new. Atkinson and Coleman have argued in The State, Business, and Industrial Change in Canada that the failure to

institute a coherent and successful industrial policy is largely a result of the requirements of parliamentary government and federalism combined with the nature of industrial structure in Canada.[5] The application of this perspective to aboriginal land claims is offered as a new approach to the problem of persistent aboriginal demands. In order to carry out this project, I need to define and use a number of rather technical legal terms. These are explained at some length in chapter two.

The precise relationship between state and society leads to problems for neo-institutionalists when they attempt to define institutions. Neo-institutionalists are certain that institutions profoundly constrain society and thus have an independent influence on politics. Yet what are the boundaries between state and society? There is a recognition that institutions were, at some point, the product of human endeavour, yet they somehow change to take on an independent existence. Robert Grafstein has set out two principles for institutional definition,

> .. what institutions are cannot be independent of what the members of society in aggregate have done and are doing..
>
> and
>
> .. a proper conception of institutions must enable one to conceive of (though not necessarily specify) an underlying physical process "realizing" the constraints they impose.[6]

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[5] Michael M. Atkinson and William D. Coleman, The State, Business, and Industrial Change in Canada (Toronto: University of Toronto Press, 1989).

[6] Robert Grafstein, "The Problem of Institutional Constraint," Journal of Politics 50(1988), pp. 588-589.

Despite this ambiguous and unclear theoretical definition, institutional constraint remains empirically clear.

Atkinson identifies three elements crucial to the definition of institutions.[7] Like Grafstein, he identifies the role of human beings. Institutions were created by people and people continue to interact within institutions based on the structure given to the institution. Second, he identifies rules as a crucial component of institutional definition. Rules shape the function of institutions and channel and constrain human behaviour. Finally, Atkinson identifies organizational capacity as the third critical element for a definition of institutions. Organizational capacity refers to the independent identity created when individuals perform their roles prescribed by rules, so that collective goals become attainable. Thus Atkinson defines institutions as:

> configurations or networks of organizational capabilities (assemblies of personal, material, symbolic and informational resources available for collective action) that are deployed according to rules and norms which structure individual participation, govern appropriate behaviour, and limit the range of acceptable outcomes.[8]

The institutions of the Canadian political system are not equipped to deal with demands based on aboriginal title.[9] Canadian federalism has resulted in a mismatched set of institutional responsibilities and jurisdiction between the provinces and the federal government. The overriding characteristic is the vacuum created by the

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[7] Michael M. Atkinson, "How Do Institutions Constrain Public Policy?" (Draft paper prepared for the Conference, "Governing Canada: Political Institutions and Public Policy," McMaster University, 25-26 October 1991).

[8] Ibid, p. 3.

[9] There is no clear definition of 'aboriginal title.' The courts have not yet made a clear ruling in this area. See below for a further elaboration in chapters two and four.

absence of an institution which can address aboriginal land claims on their own merit. While the federal government is permitted to ignore its constitutional obligation to aboriginal peoples with impunity, provincial governments have almost inescapably become the opponents of aboriginal land claims. The inclusion of two orders of government in the negotiation process in and of itself complicates negotiations. The historically unsympathetic provincial governments, possessing far greater resources than any aboriginal group, constitute a structural disadvantage for aboriginal peoples.

Aboriginal peoples also have recourse to the judicial process. I will argue, however, that some aboriginal land claims are of such a nature that the courts have no basis upon which to make a well conceived decision. The courts are a product of non-aboriginal society. Aboriginal peoples did not participate in the creation of these institutions. Consequently when the courts are confronted with the demands of particular aboriginal peoples, the claims are of such an exogenous nature that the courts fail to recognize the arguments that aboriginal peoples put forth. Such claims present the courts with values that they cannot comprehend or incorporate into the decision making process. Instead Canadian courts maintain a jurisprudence based on existing law and legal precedent in the pursuit of value-free decisions. Consequently they apply such a narrow legal philosophy that their decisions become disjointed interpretations of historical and contemporary situations.

I also argue that the inherently political nature of aboriginal land claims necessitates negotiation. A favourable judicial decision would make it incumbent upon provincial and federal authorities to negotiate a settlement with an aboriginal group,

but it could not eliminate the necessity of a negotiated settlement. The federal and provincial governments will need to negotiate the specifics with aboriginal peoples so as to have a workable arrangement with them.

THE NEO-INSTITUTIONALIST APPROACH

In order to understand the processes governing aboriginal land claims, this thesis will build upon the school of research known as "neo-institutionalism," elements of which have been alluded to earlier. Politics is understood in this approach to be not simply the product of aggregated individual preferences. Instead institutions are ascribed a role as independent actors in the political system. As actors, institutions have an impact on politics beyond the sum of their parts. This study focuses on some of the rules and norms that have contributed to the persistent challenge of aboriginal land claims.

Society centred paradigms (a catch-all phrase embracing everything from pluralism to rational choice paradigms,[10] but which essentially describes those paradigms which understand society as the central driving force in politics) are treated critically by neo-institutionalists for their reductionist analysis of institutions. March

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[10] Rational choice is actually society-centred, according to Atkinson and Nigol, because it "presumes that institutions are composed of individual political actors who reflect societal interests." See Michael M. Atkinson and Robert A. Nigol, "Selecting Policy Instruments: Neo-Institutional and Rational Choice Interpretations of Automobile Insurance in Ontario" Canadian Journal of Political Science XXII:1 (March 1989), p. 113.

and Olsen have noted that these approaches have relegated institutions to little more than "arenas within which political behaviour, driven by more fundamental factors occurs."[11] Similarly, Atkinson and Chandler write that "the State emerges as something close to a huge public utility for the mutual benefit of all citizens."[12] These are reactions not only to the pluralist and rational choice paradigms, but also to a whole body of society-centred research that dominated political analysis since the Second World War. Their critique of society-centred paradigms challenges the conception of institutions as mirrors of social forces.

Neo-institutionalists believe that institutions constrain the behaviour of all participants in the political system and thus play a critical role in political development. In part, this institutional constraint is exercised simply by limiting the options available to participants. Institutions constrain more fundamentally by socializing participants to institutionally prescribed rules and norms.[13] As Atkinson and Coleman note "they [institutions] not only aggregate individual 'preferences,' they shape individuals' values, influence the definition of interests, and provide

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[11] James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," American Political Science Review 78(1984), p. 197.

[12] Michael M. Atkinson and Marsha D. Chandler, "Strategies for Policy Analysis," in Michael M. Atkinson and Marsha D. Chandler eds., The Politics of Canadian Public Policy (Toronto: University of Toronto Press, 1983), p. 5.

[13] Atkinson and Nigol, "Selecting Policy Instruments," p. 114.

opportunities for developing these further."[14] The state becomes, in this analysis, an active entity capable of setting the direction society follows.

By definition, human beings and the patterns of interaction established between them, are a basic component of institutions. Human beings create institutions. The practices and procedures that are implemented are rooted in a belief that they are morally correct.[15] Yet the values which may justify institutional procedures and practices in one era, may be considered obsolete or unthinkable at another time. Despite the temporal nature of values, institutions have a sense of permanence. The people within an institution change over time, their practices and procedures may persist.

The point at which institutions are established is critically important. The values incorporated into the body of institutions may persist for a very long time following the initial stages of an institution. It is also possible that those who do create an institution are representative of a narrow section of society. For example, the institutions dealt with in this thesis were all creations of non-aboriginal, white society. This necessarily has implications for the following study. I shall refer to the impact of a homogenous section of society on institutions as "cultural imprint." This thesis documents the impact of non-aboriginal cultural imprint on the institutions which deal with aboriginal land claims in Canada.

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[14] Atkinson and Coleman, State, Business, and Industrial Change, p. 8.

[15] Atkinson, "How Do Institutions Constrain," p. 3.

The values expressed by public officials are important indicators of institutional norms. This is particularly true of aboriginal affairs, a policy field historically paternalistic in approach and assimilationist in intent. In 1918, Arthur Meighen defended his government's policy in the House of Commons:

> The Indian is a ward of the Government still. The presumption of the law is that he has not the capacity to decide what is for his ultimate benefit in the same degree as his guardian, the Government of Canada.[16]

Arguably, Meighen was correct in his legal interpretation of aboriginal status at the time. Yet the quote belies a paternalistic attitude not overtly acceptable for contemporary social actors (though it is conceivable that certain actors may still harbour such opinions at least privately). The lack of public pronouncements to that effect is suggestive of a policy environment where those views can no longer be acceptably disseminated. If social actors consult "not only their own preferences but institutionally prescribed norms"[17] then we can consider public discourse as a sort of litmus test for institutionally imbued norms.

In this thesis, I shall utilize the distinctions between integrative and aggregative institutions developed by March and Olsen.[18] The term "integrative institutions" refers to that body of institutions which applies a decision-making model based on

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[16] Sir Arthur Meighen quoted in S.D. Grant, "Indian Affairs Under Duncan Campbell Scott: The Plains Cree of Saskatchewan," Journal of Canadian Studies 18:3 (Fall 1983), p. 26.

[17] Atkinson and Nigol, "Selecting Policy Instruments," p. 115.

[18] James G. March and Johan P. Olsen, "Popular Sovereignty and the Search for Appropriate Institutions," Journal of Public Policy 6(1986).

reasoned deliberation and rational thought.[19] Typically, and in this thesis, the courts are referred to as an integrative institution. Aggregative institutions employ a decision-making model based on bargaining and coalition formation.[20] The democratic process is a good example of an aggregative decision-making model.

In Meighen's era, aboriginal people did not possess the same rights as most Canadians. The treatment of rights is an important distinction of institutional function.[21] Recognition of rights brings order and meaning to institutions embodying integrative processes by accentuating a sense of human unity.[22] These institutions seek an integration of society and common understanding based on shared values. They recognize rights as inviolate and inalienable principles drawn from the shared values upon which society has been formed.[23]

Alternatively, other institutions may emphasize processes of bargaining and compromise. In these instances rights are treated either as tradable commodities or as tools which guarantee the free functioning of the negotiation process.[24] These

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[19] Integrative institutions shall be described at greater length in Chapter Three.

[20] Aggregative institutions shall be described at greater length in Chapter Four.

[21] "Institutional function" refers to the separate qualities that integrative and aggregative institutions bring to a problem solving process.

[22] Ibid, pp. 350-351.

[23] Ibid, p. 350.

[24] Ibid.

processes attempt to aggregate diverse preferences which can be translated through compromise into majority coalitions.[25]

For March and Olsen, the key assumption in any society is:

> that even in situations in which there is ex ante disagreement about values, there are processes of public discussion and private thought that arrive at better ex post social solutions than does bargaining, exchange, and coalition formation in the service of prior preferences.[26]

Yet the problem in Canada is a clash of aboriginal values with non-aboriginal society and the absence of an institutional structure capable of resolving the conflict. Rights, in this case, are not agreed upon. For aggregative processes, the problem is a search for a Pareto optimal compromise. For integrative processes, the problem is more fundamental: the search for a shared value structure which recognizes the rights of others. Yet the body which most closely incorporates integrative processes, the judicial system, has been unwilling to resolve the problem. The entire institutional system is further cast in a manner that treats aboriginal demands as political problems to be dealt with by the political elite. In such a system, aboriginal land claims are inherently frustrated.

The neo-institutional analysis developed by March and Olsen is not unproblematic. Later, it will become clear that March and Olsen had not considered the effect of an exogenous demand on integrative institutions. As assumption was made that all demands made upon integrative institutions would come from within a

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[25] Ibid, p. 345.

[26] Ibid, p. 352.

unified society that has agreed upon rules and norms. Clearly, this is not the case with some aboriginal land claims. A neo-institutional analysis must recognize that while this is normally true, it is not necessarily true.

A second problem is the assumption that all disadvantaged groups have some form of recourse to an intervening body when the aggregative decision-making process continually operates to the disadvantage of that group. For aboriginal peoples, this assumption may appear preposterous. For reasons introduced above, the courts which should serve this function are incapable of doing so.

This thesis focuses on the entire institutional structure, not isolated institutions or social actors. What are the consequences of the policy field and the institutional structure upon policy development? In Canada, integrative processes anchored in the courts have deferred decisions on aboriginal land claims to processes of bargaining. Of course negotiation is not entirely devoid of integrative processes, as much of the discussion occurs in private amongst an elite group of officials. Reasoned discussion, taking into account the wants of others, no doubt is an element in these secretive tripartite meetings. But overwhelmingly, negotiation is a bargaining process in which aboriginal peoples must either compromise or continue to live with their unresolved demands. Compounding this problem is a provincial government antagonistic, by constitutional design, to aboriginal demands and a federal government re-evaluating its constitutional responsibilities towards aboriginal people. Clearly then, the problem cannot be focused narrowly on a single actor in the process: a number of factors are coming together to create barriers to aboriginal land claims.

This thesis examines the difficulties encountered by the Teme-Augama Anishnabai of Northern Ontario with the aid of this neo-institutionalist approach. Their land claim is more than one hundred years old.[27] Since the last quarter of the nineteenth century, the Teme-Augama Anishnabai made repeated requests for a reserve entitled to the tribe under the terms of the Robinson-Huron Treaty (1850) to a generally receptive federal government. Ontario, however, was clearly less willing to negotiate the claim. The claim changed significantly in the early seventies when its basis shifted from one of treaty entitlement to one of aboriginal title. These new claims challenged not only the basis of property rights in Canada, but also the existing constitutional order.

The Teme-Augama Anishnabai have defended and lost their claim at the Supreme Court of Ontario, the Appeal Court of Ontario, and the Supreme Court of Canada. All parties agree that the Teme-Augama Anishnabai proper, never signed a treaty that would have ceded away their rights. At issue, however, is whether or not title had been ceded through a variety of other mechanisms. In each case the claim was rejected because the courts agreed that the Robinson-Huron Treaty was a unilateral act of extinguishment by the sovereign authority. The legal philosophy supporting these rulings seeks out applicable law and, regardless of the merits of the

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[27] Teme-Augama Anishnabai, "Teme-Augama Anishnabai Fact Sheet" (mimeo distributed at the Temagami Perspectives Conference, Laurentian University, October 1989). This is confirmed in Bruce W. Hodgins and Jamie Benedictson, The Temagami Experience: Recreation, Resources and Aboriginal Rights in Northern Ontario (Toronto: University of Toronto Press, 1989), pp. 44-45.

law, applies it.[28] In other words, the courts do not attempt to place the law which they apply into context, resulting in a situation where they may not realize that law itself is prejudicial to aboriginal peoples. Although recent analysis of the Supreme Court has suggested it may be evolving into an institution capable of examining cases as much on merit and natural justice as on precedent, the failure of the Supreme Court to recognize the claim of the Teme-Augama Anishnabai indicates a continued resistance of the court to reconsider its decision-making process.

Changes have also been made to the negotiation process in Ontario in the last half of the 1980s. Taking the policy lead from the federal government (though not necessarily acknowledging any added responsibility), Ontario has attempted to manage its overall, corporate policy regarding aboriginal people. Although the province recognizes a need to extend provincial social services to aboriginal people to ameliorate aboriginal socio-economic conditions, it has been drawn into an antagonistic relationship with aboriginal peoples because of a federal constitution which provides for exclusive provincial jurisdiction over areas of vital interest to aboriginal peoples.

Chapter two examines the technical and legal aspects of aboriginal land claims. It elaborates on aboriginal rights, treaties and the concept of aboriginal title in Canada with reference to the Robinson-Huron Treaty. It also examines the claims process in

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[28] William B. Henderson, "Canadian Legal Judicial Philosophies on the Doctrine of Aboriginal Rights," in Menno Boldt and J. Anthony Long eds., The Quest for Justice, Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), p. 223.

Canada. The last half of the chapter focuses specifically on the Temagami land claim. Chapter two points out that since the filing of the Temagami land claim in 1973, the institutional structure of both the federal government and the provincial government with respect to aboriginal affairs has been evolving. However, instead of improving the situation for the Teme-Augama Anishnabai, these evolving structures have stalled the claim with each change.

The third chapter examines the barriers created by the judicial process to the resolution of aboriginal land claims. Examining jurisprudence, this chapter argues that the courts are not the impartial arbiters that they purport to be, rather they employ a subjective decision-making process imbued with the values of non-aboriginal culture. Consequently the courts cannot comprehend aboriginal values. Thus the particular demands aboriginal peoples place before the courts are treated as alien and exogenous.

The fourth chapter explores the processes of negotiation as they exist in Ontario. Building upon the discussion of chapter two, this chapter argues that the absence of effective structures to deal with land claims has led to the development of certain norms in the Canadian political system to the detriment of aboriginal peoples.

CHAPTER TWO

AN HISTORICAL EXAMINATION OF ABORIGINAL RIGHTS AND THE TEMAGAMI LAND CLAIM

The first chapter introduced the basic framework for the thesis, posing the question: are civil disobedience and policy failure a necessary consequence of aboriginal land claims? To study this question, attention was turned to state structures and how they accommodated aboriginal land claims. Observing that some land claims stretch over years, decades and even centuries, the question then became: do state structures in some way prohibit the accommodation of land claims?

The application of the neo-institutionalist approach to these questions led to the distinction between the qualities brought to land claims by adjudication and negotiation. Adjudication was described as an integrative process involving rational thought. Negotiation was described as an aggregative process involving bargaining and compromise (with a touch of reasoned deliberation), both of which are potentially detrimental to the resolution of land claims. Conversely, adjudication exhibited qualities suitable for the protection of minority rights. Yet the institutions of adjudication, the courts, have not been able to resolve land claims. Cumulatively neither process has achieved the ex post agreement on rights aboriginal peoples seek.

This chapter introduces and describes some of the terms and concepts required to understand the land claims process. The first section deals with the concept of aboriginal rights and more specifically, aboriginal title. It attempts to define these terms for the purposes of this thesis. The second section examines the claims process in Canada, focusing in particular on the federal government and the effects of the 1973 Calder decision. The third section examines the Temagami land claim, with separate analyses of two significant periods: 1850-1973 and 1973-1989.

ABORIGINAL RIGHTS AND ABORIGINAL TITLE

The following section will provide an introduction to the problem of aboriginal rights. The most significant impediment to the understanding of aboriginal rights are the generalities and vagueness found therein. To cope with this problem, this section begins with an examination of the problems inherent in the definition of aboriginal rights. Its primary objective is to provide a basis upon which such an ill-defined concept can be understood. This leads into a discussion of aboriginal title. Here I examine how Canadian political institutions have dealt with aboriginal title, including various alternative definitions. For the purposes of this thesis, aboriginal title, as opposed to simply aboriginal rights, is a crucial concept. Whereas aboriginal rights may refer to a spectrum of legal and political rights, aboriginal title more narrowly focuses on land rights as well as hunting and fishing rights. Not surprisingly, it is an

important distinction for this thesis. Finally, this section deals with the treatment of aboriginal title, primarily through the establishment of treaties.

Aboriginal rights in Canada are generally ill-defined. Neither the Canadian political, nor judicial, nor bureaucratic elites have been able or willing to define aboriginal rights. Nevertheless as time passes, prevailing attitudes towards aboriginal peoples and their rights have changed. An older paternalistic approach has gradually eroded and been replaced with an ethos of equality and recognition of past injustices. Despite evolving political attitudes, many land claims remain outstanding.

While aboriginal people have sought to define their rights as widely as possible, the Canadian political system has sought to limit aboriginal rights without defining them. Such a response is consistent with liberal conceptions of participatory democracy where special group rights conflict with equality.[29] When the 1981 Constitutional Accord was finalized, section 35 of the Constitution Act, 1982 read: "The *existing* aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" [emphasis mine]. Aboriginal peoples were not to

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[29] According to Weaver the key dilemma facing public officials is conflicting conceptions of equality and special rights:

> ...how to protect Indian interests while at the same time integrating Indians into the mainstream of Canadian society on an equal basis with other citizens; if protection - and the special rights historically developed to ensure this protection - were too overpowering, integration was jeopardized; if the legal and administrative protections were minimized, integration could be enhanced but possibly at the cost of special rights and security of Indian lands. The dilemma was phrased as special rights versus equality and although often discussed by senior officials, they found the problem intractable.

See Sally M. Weaver, Making Canadian Indian Policy, The Hidden Agenda 1968-1970 (Toronto: University of Toronto Press, 1981), p. 47.

expand upon their existing rights after Royal assent was given to the Constitution Act, 1982.[30] No other rights were prefaced in this manner, demonstrating both the special treatment aboriginal rights have received, and the fear many Canadian governments have of undefined aboriginal rights.

Aboriginal perspectives normally include two distinct bodies of rights within their definition of aboriginal rights. David Ahenakew, Chief of the Assembly of First Nations, used the following three points to illustrate aboriginal rights:

> (1) The rights that flow to a people from aboriginal title to govern and control land and resources.
> (2) The rights to a people's cultural survival and elements of self-determination, which flow from common identity, language, culture and values.
> (3) The right of a people to be exempt from or protected from the application of the laws of another jurisdiction to which it has not agreed to be subjected, and which would have the effect of unreasonably abrogating rights and privileges.[31]

Items two and three describe political rights, while the first is a property right. Political rights were the focus of four federal/provincial conferences in the 1980s and were extensively examined in the Penner Report.[32] In this thesis I am primarily concerned with property rights and, unless otherwise specified, I will refer to

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[30] For a thorough discussion of this point see Michael Asch, Home and Native Land, Aboriginal Rights and the Canadian Constitution (Toronto: Methuen, 1984). See especially chapter 1.

[31] David Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition" in Menno Boldt and J. Anthony Long eds., The Quest for Justice, Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), p. 25.

[32] Canada, Special Committee on Indian Self-Government, Indian Self-Government in Canada (Ottawa, 1983).

aboriginal property rights as aboriginal title. While my focus is narrow, it may be excused, for as Michael Asch points out, aboriginal peoples consider their political and property rights to flow from the same source, thus the discussion herein indirectly deals with aspects of aboriginal political rights.[33]

However aboriginal title comes to be defined, it will certainly be conceptualized on the basis of aboriginal occupation of the land since 'time immemorial.' One of the first books to thoroughly examine aboriginal rights was Cumming and Mickenberg's Native Rights in Canada. They defined aboriginal rights as "those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial."[34] Similarly Gary Potts, Chief of the Teme-Augama Anishnabai, makes the same assertion: "We are the descendants of our ancestors who have inhabited and claimed what is now Canada for thousands upon thousands of years."[35] Ultimately then, all aboriginal rights, including political rights, are based upon the historic and continued occupation of lands in Canada by aboriginal peoples. Although the source of aboriginal rights is clear, the definition remains vague. Yet the concept can still be understood for the purposes of this thesis, as a

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[33] See Asch, Home and Native Land.

[34] Peter A. Cumming and Neil H. Mickenberg eds. Native Rights in Canada (Second edition; Toronto: Indian-Eskimo Association of Canada, 1972), p. 13. Rick J. Ponting, in a more contemporary analysis, defines aboriginal rights as "the rights held by the descendants of the original peoples of Canada by virtue of their ancestors occupancy of the land since time immemorial." See J. Rick Ponting, Arduous Journey, Canadian Indians and Decolonization (Toronto: McClelland and Stewart, 1986), p. 228.

[35] Chief Gary Potts, "What Are the Existing Rights of the Aboriginal Peoples," (mimeo, February 1983).

right of aboriginal peoples that "inures" to them by virtue of their occupation of the land since time immemorial, the content of which requires an ex post agreement through negotiation.

Aboriginal rights in some form have always been recognized in Canada. Registered Indians under the Indian Act have always received special individual rights, while Treatied tribes have always received special collective rights. The precise content and source of aboriginal rights has always been contentious. Since Confederation, aboriginal title has been narrowly considered as "usufructory."[36] While the courts have repeatedly used the language of the usufruct, no attempt has been made to determine the extent to which usufructory rights apply in Canada.[37]

These usufructory rights were considered to flow from the Crown and not from any innate corpus of human rights. Consequently aboriginal title was "a personal and usufructory right, dependent on the good will of the sovereign."[38] The Royal Proclamation of 1763 was interpreted as a source of aboriginal rights. This

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[36] A usufruct is a latin analogy more commonly utilized in French Civil Law than English Common Law. It refers to a right of possession while ownership (or title) lies elsewhere. It is meant to convey a higher interest than merely the right of occupancy. The aboriginal bands would have the right to possess and use lands as they traditionally had. Title to those lands would still be vested in the Crown. See William B. Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution" (Ottawa: Research Branch, Indian and Northern Affairs, 1980).

[37] Ibid, p. 1.

[38] See the decision of the Judicial Committee of the Privy Council in St. Catharine's Milling and Lumber Company v. the Queen, summarized in James O'Reilly, "Comprehensive Land Claims Litigation" in Canadian Bar Association, Native Land Issues (See You in Court...) proceedings from the Conference, Winnipeg, Manitoba, April 28 - 29, 1989.

Proclamation was issued by the British Crown immediately following the Seven Years War and was intended to bring order to a disorderly frontier by carefully controlling the expansion of the colonies.[39] The Proclamation declared all territories beyond the borders of the established colonies as Indian Lands which could not be settled until those lands had been ceded by aboriginal inhabitants directly to the Crown.

The traditional (non-aboriginal) view of aboriginal rights considered the Proclamation as a document which bestowed upon aboriginal peoples any rights they may possess.[40] A non-traditional view of the same Proclamation considers it a confirmation of the existing and inherent aboriginal rights of the first nations.[41] Although the Crown may have had various legal obligations under common and international law towards the aboriginal peoples in the new world, the Proclamation was the first instrument of statutory law dealing with the question. Its impact is readily evident today as the Proclamation led to the development of the Treaty Reserve System in North America. Relationships were established by Treaty between the British Crown and the various aboriginal nations. The obligations of the Crown in

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[39] Douglas Leighton, "The Historical Significance of the Robinson Treaties of 1850," paper presented to the Annual Meeting of the Canadian Historical Association, Ottawa, June 1982, p. 3.

[40] Developed by the Judicial Committee of the Privy Council in St. Catherine's Milling and Lumber Company V. the Queen and repeated much later by the Supreme Court of Ontario in Attorney-General of Ontario V. the Bear Island Foundation et al.

[41] Chief Justice Dickson's ruling in the case of Guerin et al V. the Queen found the majority and minority decisions in Calder to be in agreement over the existence of aboriginal rights independent of the Royal Proclamation. Summarized in O'Reilly, "Comprehensive Land Claims," p. 20, 26.

Right of Great Britain were later transferred to the Crown in Right of Canada by the Constitution Act, 1867 which made the federal government responsible for "Indians, and lands reserved for Indians." Accordingly, the Indian Act, which was passed by the federal government the following year, was designed to regulate the lives of aboriginal peoples literally from birth to death.[42] It established tribal councils and elected Chiefs even within groups of peoples who had never had similar structures and processes of governance.

The Crown, by virtue of Treaty, has entered into a trust relationship with aboriginal peoples. Recent judicial interpretation has identified this special relationship as a fiduciary.[43] Such an interpretation makes it incumbent upon the federal government to administer aboriginal lands on behalf of aboriginal peoples. Clearly the federal government since Confederation had treated aboriginal people not as their clients but rather as their wards.[44] Arthur Meighen typified this attitude, when he explained the government's decision not to consult the Peguis tribe about the

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[42] For a description of the Indian Act see Weaver, Indian Policy, pp. 18-19.

[43] Chief Justice Dickson defined a fiduciary relationship in the Musqueam case as follows: "Whereas by statue, agreement or perhaps by unilateral undertaking one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to a fiduciary strict standard of conduct." Cited in National Indian Brotherhood/Assembly of First Nations (NIB/AFN), "Submission to the Task Force on Comprehensive Claims Policy," Ottawa, November 1985, p. 16.

[44] Some writers attribute this to racist Victorian attitudes and values. See, for example, Anthony J. Hall, "The St. Catherine's Milling and Lumber Company v. The Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth Century Canada." Paper for Presentation at the Aboriginal Resource Use in Canada, Historical and Legal Aspects, Conference, St. John's College, University of Manitoba. 21-23 January 1988.

proposed settlement of their claim, "The Government of Canada represents the Indians; the Indians are our wards, and we are making the settlement as their guardians."[45]

The combined result of the Proclamation/Treaty System and the Constitution Act is an agency obligation vested solely in the federal government. Ottawa consequently has an obligation to preserve and enhance "Indianness or more generally aboriginality."[46] The provinces do not share the same obligation to aboriginal interests. Instead, section 109 of the Constitution Act gives the provinces control over natural resources and Crown lands. "Lands reserved for Indians" has come to mean only Indian Reserves as established by Treaty and not lands claimed by aboriginal peoples. The federal government must therefore negotiate with provincial governments when land claims arise (excluding those Claims in the Yukon and the Northwest Territories).

Aboriginal land claims by definition indicate disagreement between aboriginal peoples and the state. From the aboriginal perspective, the federal government has not discharged its obligations in a suitable fashion. Some aboriginal groups and interested observers have indicated that the federal government, in lieu of former colonial governments, has an obligation to abide by an interpretation of the Royal Proclamation

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[45] Sir Arthur Meighen cited in Richard C. Daniel, "A History of Native Claims Processes in Canada, 1867-1979" (Ottawa: Research Branch, DIAND, February 1980), p. 202.

[46] Ian B. Cowie and Associates, Federal Provincial Roles and Responsibilities in the Era of Aboriginal Self-Government, Discussion Paper, Prepared for the Department of Indian and Northern Affairs and the Ontario Native Affairs Directorate, 15 April 1989, p. 9.

grounded in international law, which would recognize inherent aboriginal rights. They argue that aboriginal peoples never intended to abandon their aboriginal rights, but instead hoped to come to an understanding with the Crown in order to protect themselves from settler incursions. Is this a problem of agency? Neo-institutionalists suggest that the question of agency is solved when public officials are socialized to "an ethic of administrative duty and autonomy."[47] Agents must act not solely in their own interest but also "to interpret and communicate the moral character of political practice."[48] However in this case, paternalism was part of the ingrained value structure of Canadian political institutions. "Indians" were the wards of the federal government. Any rights they possessed were usufructory and stemmed from Crown grants. Aboriginal title was never considered. Yet even in contemporary Canadian society where "equality" is so much a part of the value environment, there has been no ex post agreement on rights that could lead to the settlement of many aboriginal land claims. Equality came to mean an ahistoric political integration of aboriginal peoples. Thus the problem is not so much one of agency as it is a problem of a proper ex post resolution of aboriginal rights and a lack of any mechanism capable of achieving such a resolution.

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[47] James G. March and Johan P. Olsen, "Popular Sovereignty and the Search for Appropriate Institutions," Journal of Public Policy 6 (1986), p. 345.

[48] See Michael M. Atkinson and Robert A. Nigol, "Selecting Policy Instruments: Neo-Institutional and Rational Choice Interpretations of Automobile Insurance in Ontario," Canadian Journal of Political Science, XXII:1 (March 1989), p. 115.

English Common law and International law provide an opportunity to change some of these values. Since Common Law recognizes international law,[49] land claims have been asserted on the basis of international law. In Canada, the courts have characterized aboriginal rights alternatively as: burdens upon the government; usufructory and personal (cannot be alienated except by surrender to the Crown); as the right of occupation; and/or as the right of possession.[50] The Courts have not recognized aboriginal rights under international law. Instead they have looked more to domestic sources of law to interpret aboriginal rights. Unfortunately national law was not necessarily built upon any sense of natural justice, but rather upon the value structures of the day. The result is the application of the law without regard to its origin.[51] When jurisprudence dictates the positive application of law and handles the merits of law as extraneous considerations, then moral arguments will not be salient unless statutory law will support the same arguments, or unless judicial philosophy can be shifted. While international law and common law provided the opportunity for change, these opportunities have not been acted upon in Canada.

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[49] John D. Whyte, "Indian Self-Government: A Legal Analysis," in Leroy Little Bear, Menno Boldt and J. Anthony Long eds., Pathways to Self-Determination: Canadian Indians and the Canadian State (Toronto: University of Toronto Press, 1984), p. 105.

[50] Task Force to Review Comprehensive Claims Policy, Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy (Coolican Report), (Ottawa: Department of Indian Affairs and Northern Development, 1985), p. 7.

[51] This is also the case in the United States where the Supreme Court, ruling on the application of domestic law upon aboriginal peoples, noted that "whether that is in accordance of the principles of justice or not, it is the law of the United States and a United States judge cannot question it." Cited in Whyte, "Indian Self-Government," p. 105.

Prior to the Proclamation, only informal military alliances had been arranged between the European powers and aboriginal tribes. These alliances were crucial to successful military campaigns in North America.[52] After the surrender of Quebec, military alliances were unnecessary since Britain emerged as the sole European power north of Mexico. As land for expansion became more valuable, formal written arrangements between the British Crown and aboriginal peoples were arranged. In Southern Ontario, the British made lump-sum payments in return for the surrender of aboriginal rights.[53] In Northern Ontario, the Robinson-Huron Treaty (1850) covered a large tract of land from the north shore of Lake Huron (excluding Manitoulin Island) to the Height of Land[54] and along with the Robinson-Superior Treaty (1850) served as the guide for all treaties thereafter.[55] Robinson-Huron surrendered all Aboriginal lands in the specified area in return for £2,000 treaty money and annual payments (annuities) of £500.[56] Reserve sites were chosen by all signatory tribes and appended

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[52] Leighton, "Significance of the Robinson Treaties," p. 2. See Also E. Palmer Patterson, "Native Peoples and Social Policy," in Shankar A. Yelaja ed., Canadian Social Policy revised edition, (Waterloo: Wilfrid Laurier University Press, 1987), p. 176.

[53] Canada, Task Force to Review Comprehensive Claims Policy, 1985, p. 2.

[54] The Height of Land is the division between the Great Lakes watershed and the Hudson's Bay Watershed. In 1850 all land north of the Height of Land belonged to the Hudson's Bay Company and was therefore not included in the Robinson Treaties. This was a convenient method for European powers to divide territories for which they did not possess the capacity to accurately map.

[55] This includes all the numbered treaties, One through to Eleven, beginning in northwestern Ontario, across the Prairies and north into the Mackenzie River watershed.

[56] See Robert J. Surtees. Indian Land Cessions in Ontario, 1763-1862: The Evolution of a System (Ottawa: Carleton University, Ph.D Dissertation), p. 255.

to the treaty.[57] If valuable minerals were discovered on the Reserves then the sale of these minerals would be conducted by the Chief Superintendent of the Indian Department on behalf of aboriginal people and "for their sole use and benefit and to the best advantage."[58]

Treaties opened up large tracts of land for settlement by white settlers.[59] Hunting and gathering requires vast territories that would have otherwise brought aboriginal peoples into frequent conflict with non-aboriginal settlers had a reserve system not been in place. The reserve system encouraged aboriginal peoples to remain stationary and pursue activities other than those associated with traditional aboriginal economy. In return, aboriginal peoples were protected from further encroachment by settlers.

Following the Proclamation, Colonial authorities were bound by British law to enter into Treaty with aboriginal peoples. At the very least, the Royal Proclamation recognized the aboriginal right of occupancy.[60] A component of the colonial treaty practice was no doubt a desire to end the unscrupulous land dealings between

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[57] It is the contention of the Teme-Augama Anishnabai that they never signed the Robinson-Huron Treaty and that they consequently never surrendered their aboriginal rights.

[58] Leighton, "Significance of the Robinson Treaties," p. 13.

[59] Patterson, "Native Peoples," p. 178.

[60] R. J. Surtees, "Indian Land Surrenders in Ontario 1763-1867," (Ottawa: Department of Indian Affairs and Northern Development, February 1984), p. 4-5. Also see Weaver, Indian Policy, p. 32.

aboriginal tribes and private citizens while at the same time guaranteeing a land base for aboriginal settlement.[61]

Both Pre-confederation and Post-Confederation Treaties are recognized in law under Section 88 of the Indian Act.[62] Though considered legally binding, these Treaties have never been ratified by Parliament. Instead federal Cabinet approved each Treaty by Order In Council.[63] Although technically and practically referred to as "treaties," these agreements between aboriginal peoples and the governing authorities are not accorded the same status as international treaties. According to Morse:

> Total sovereignty, in the sense understood in international law, was unilaterally declared to be lost as a result of historical developments and to be replaced by domestic dependant nationhood in the United States or assumed subservience in Canada.[64]

Aboriginal nations, are not and have never been, for purposes of international law, considered independent and sovereign.[65] If the fundamental unit of international law is the state, it is therefore not inconsistent with international law that aboriginal nations, and other culturally homogeneous nations, be contained within another

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[61] Weaver, Indian Policy, p. 32.

[62] See Peter A. Cumming and Neil H. Mickenberg eds., Native Rights in Canada second edition, (Toronto: The Indian-Eskimo Association of Canada, 1972), p. 55. See also Weaver, Indian Policy, p. 33.

[63] Daniel, "Native Claims Processes," p. 13.

[64] Bradford W. Morse, "Providing Land and Resources for Aboriginal Peoples," Background Paper 16, (Kingston: Institute of Intergovernmental Affairs, Queen's University, 1987), p. 7.

[65] Cumming and Mickenberg, Native Rights, p. 54.

sovereign political unit.[66] Nevertheless aboriginal nations may still be accorded some sort of status under international law.

All of these aspects (aboriginal rights, aboriginal title, and the treaty system) have a direct bearing on the contemporary Temagami situation. Setting aside, for the moment, the issue of the aboriginal rights of the Teme-Augama Anishnabai, we must focus on the issue of aboriginal title since they have made their claim on the basis of an unextinguished title to the land around Temagami. To understand this situation we have examined the concept of aboriginal title and the treaty reserve system that attempted to deal with it. To understand the history of the claim of the Teme-Augama Anishnabai, I will present a brief exploration into the history of the claims process in Canada itself.

THE CLAIMS PROCESS

Before the creation of the Office of Native Claims (ONC) in 1974, the federal government did not have an established process or policy for dealing with aboriginal land claims.[67] In various ways the Department of Indian Affairs (DIA) discouraged the aboriginal land claims process. Lawyers and missionaries acting on behalf of

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[66] Whyte, "Indian Self-Government," pp. 103-104.

[67] For a thorough discussion of this topic see Daniel, "Native Claims Processes," chapter 11 (pp. 193-218) and chapter 12 (pp. 219-245). The term 'claim' is used here in the legal sense: to denote that a grounds for a complaint rests upon a right or a supposed right. See Daniel, "Native Claims Processes," p. 13. Aboriginal peoples themselves reject the term "claim," since they believe that they are asserting their inherent rights.

tribes with claims were frowned upon. Unless aboriginal tribes could convince the Superintendent of Indian Affairs of the validity of their claim, the Department would deny the tribe the right to use tribal funds to research and pursue their claim.[68] This policy made the task almost impossible as funds were required to prepare a concise, well documented and convincing claim. When a difficult claim was brought forward by the Allied Tribes of British Columbia in 1927, and was documented by privately raised research funds, Parliament established a Special Joint Committee of the Senate and the House of Commons to examine the claim. The unanimous conclusion of the Committee was that the claim had not been established and that this "agitation" was a result of "designing white men" who were "deceiving Indians."[69] Section 141 was added to the Indian Act to prevent aboriginal tribes from raising funds privately for claims purposes and remained in the Statutes until it was repealed in 1951.

The federal government's ad hoc approach to aboriginal claims persisted throughout the 1960s until the release of the White Paper on Indian Policy. This document promised to recognize "lawful obligations" to aboriginal communities.[70] The federal government proposed to recognize those obligations that had already been made to aboriginal peoples by virtue of the Indian Act and by Treaty. Any additional, inherent, aboriginal rights were not recognized by the federal government since such rights had no legal recognition at the time.

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[68] Clifford Sifton cited in Daniel, "Native Claims Processes," p. 68.

[69] Daniel, "Native Claims Processes," p. 52.

[70] Canada. Department of Indian Affairs and Northern Development. Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: DIAND, 1969), p. 11.

The Supreme Court of Canada decision in Calder (also known as the Nishga case) shattered the federal government's approach to aboriginal land claims in January 1973. The majority ruling found that aboriginal rights had existed but had been extinguished.[71] Although this upheld the federal government's position that the aboriginal title of the Nishga in British Columbia had been extinguished by legislative action, three of the seven Justices found that neither Parliament nor provincial legislatures could unilaterally extinguish aboriginal title, and a majority of the Justices held that aboriginal title existed independently of the Royal Proclamation.

As a direct result of Calder, the federal government set up ONC within the Department of Indian Affairs and Northern Development (DIAND) in 1974.[72] The government was now forced to develop a policy to deal with claims where aboriginal title might still exist. Termed "Comprehensive claims" they were defined by the government in a 1974 policy statement (and reiterated in this quote from a 1981 policy statement):

> Because of historical reasons - continuing use and occupancy of traditional lands - there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests. Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money as well as other rights and

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[71] To 'extinguish' aboriginal rights, the Crown must either supersede aboriginal rights by legislative action, or the Crown must enter into an agreement with a group of aboriginal peoples wherein return for the cessation of any and all claims specified rights are confirmed.

[72] The connection is expressly stated in Canada. DIAND. In All Fairness (Ottawa: 1981), p. 11.

> benefits, in exchange for a release of the general and undefined Native title, such claims came to be called comprehensive claims.[73]

"Specific claims" became those claims "which relate to the administration of land and other Indian assets and to the fulfilment of treaties,"[74] (statutory legal obligations). DIAND has assumed that aboriginal title can only exist in those areas where treaties have never been established.[75] Consequently claims in those provinces thought to be covered by treaties (Ontario, Manitoba, Saskatchewan and Alberta) could not, in the opinion of the federal government, be comprehensive. Therefore DIAND has not and will not classify the claims of either the Algonquins of Golden Lake or the Teme-Augama Anishnabai as Comprehensive.

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[73] Ibid.

[74] Canada. Department of Indian Affairs and Northern Development. Outstanding Business, A Native Claims Policy (Ottawa: 1982), p. 7.

[75] See, for example, the introduction by the Chief of Treaties and Historical Research Centre, John F. Leslie, to Daniel, "Native Claims Processes:"

> The statement also indicated the Government's willingness to negotiate with native groups in those areas of Canada where any native rights based on traditional use and occupancy had not been extinguished by treaty or superseded by law. While this native interest has never been definitively recognized or defined by Canadian law, it relates to traditional usage and occupancy of land in these areas (the Yukon, Northern Quebec, most of British Columbia and the Northwest Territories.

(See Daniel, "Native Claims Processes," p. III.)

THE TEMAGAMI[76] LAND CLAIMS

In order to examine this situation, it is necessary to divide the study into two sections, 1850 to 1973 and 1973 to 1989. Although the focus of this thesis will be on the latter years, what transpired later cannot be fully understood without some familiarity with earlier events. The dates were chosen strategically. 1850 recognizes the signing of the Robinson-Huron Treaty and 1973 was chosen for two reasons. First, 1973 was the year the decision of the Supreme Court of Canada in Calder was handed down. Second, 1973 was also the year that the Bear Island Foundation acting on behalf of the Temagami tribe, filed cautions on land around Lake Temagami. The 1850-1973 examination is further subdivided into three sub-sections describing the actions and attitudes of DIA, the Province of Ontario, and the Temagami tribe.

The following examination reveals a number of trends that were evident throughout the history of the Temagami land claim. In the period 1850-1973, the federal government supported the tribe's claim and generally acted on the tribe's behalf, although federal resolve was not absolute. In the same period, the government of Ontario ignored and denied the claim. Ontario, in this period, had the most at stake. The resources in the area were under provincial control and they did not wish to forgo valuable revenue generators. Ottawa's only responsibility was to settle the calls for a reserve in the Temagami region. This, they hoped, could have been

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[76] Since the Teme-Augama Anishnabai did not officially use their Ojibwa name until 1977, they will be referred to as the "Temagami tribe," or "the tribe," until that date.

accomplished under the terms of the Robinson-Huron treaty. With the Supreme Court of Canada decision in Calder, the dynamics of the land claim changed substantially. Ottawa would no longer support the claim, once it was based on aboriginal title. Earlier demands for a reserve could have been settled by a treaty adhesion. Now however, the federal government could not permit a comprehensive claim in a region that was supposedly covered by treaty because the entire treaty reserve regime was at stake. Ontario continued to stall the claim, although the province began to take on more responsibility for aboriginal affairs. As Ontario developed institutional mechanisms to deal with aboriginal affairs, branches within the provincial government became sympathetic to the Temagami claim.

1850 to 1973

DIA generally pursued the claim of the Temagami tribe once it became known to them. Ultimately DIA was more concerned with a settlement of the claim than in securing a favourable deal for the tribe from the provincial government.[77] Early on it was recognized that the Temagami tribe had a claim that should be addressed by the federal government. The Superintendent of Indian Affairs, Sir John A. Macdonald, was personally informed by his Deputy Minister, L. Vankoughnet, of the precise nature of the problem in 1880:

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[77] For a thorough examination of the early contacts between federal authorities and the Temagami Band see Bruce W. Hodgins, "The Temagami Indians and Canadian Federalism," Laurentian University Review, 11:2 (February 1979), pp. 71-100.

> the [Temagami] Indians were not represented at the Robinson-Huron Treaty of 1850 and for years they have protested to the department that they were not parties to that treaty and derived no benefit therefrom.[78]

The following year Vankoughnet urged Macdonald to press Ontario to release the Crown lands necessary to compensate the Temagami tribe.[79] Recognizing responsibility for this tribe, DIA began providing annuities in 1883[80] although a reserve was not yet made available. Despite these annuities, there was considerable concern at the time that, without a reserve, the Temagami tribe would become destitute since the fur trade had depleted the animals which the tribe had depended upon for food and livelihood.[81]

In 1884, approximately 100 square miles was surveyed as a reserve site for the Temagami tribe by a provincial land surveyor. For the next ten years, the federal government pursued an initiative to have the site accepted by the province. Ontario never responded. A federal cabinet document of 1890 noted that repeated requests had been made to the Ontario government for land:

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[78] Memorandum, L. Vankoughnet to Sir John A. Macdonald, May 4, 1880. Most of the historical data (letters, memorandums, cabinet documents) have been obtained through one of two sources. The first is the Treaties and Historical Research Centre of DIAND. The file consulted there was entitled "Temagami Band (History)." The original source of data for these files was DIAND file 19,233. Documents originating from these files will be denoted as: (THRC). The second source was files on microfiche at the Ontario Native Affairs Directorate. These files were transferred from MNR file 18,000. Material from these files will be denoted by: (ONAD).

[79] Memorandum, L. Vankoughnet to Sir John A. Macdonald, April 11, 1881. (THRC).

[80] Hodgins, "The Temagami Indians," p. 75.

[81] Letter, Thomas Walton, Indian Agent (Parry Sound), to Sir John A. Macdonald, September 5, 1884. (THRC).

> to which the Temogamingue [sic] Band appeared to be justly and properly entitled, though it was not specified in the Robinson Treaty owing to the fact that the Band was unrepresented when the Treaty was negotiated with the Ojibbewas [sic] of Lake Huron.[82]

Accepting the evidence before them, and accepting responsibility for the Temagami tribe's claim, DIA was frustrated by provincial inaction. In 1896, federal frustration led to a case before the Board of Arbitration, a review board of judicial officials. Acting on behalf of the Temagami tribe, the federal factum outlined Ottawa's acceptance of the claim:

> The said Temogamingue [sic] Band of Ojibbewa Indians have always occupied and do still occupy the said tract of land before mentioned as their hunting-ground, and they allege that they have never surrendered their title thereto, or that their said title has never become extinguished in any way, and they have claimed and still do claim that their rights and interests in the said tract, were not and are not in any way affected by the Robinson Treaties.[83]

Although the action did not amount to much, (it was decided that the Temagami claim was not within the terms of reference of the Board of Arbitration), it did seem to have the effect of forcing an informal dialogue between the federal and provincial governments over the issue.

After the establishment of the Temagami Forest Reserve by the Government of Ontario in 1905, the federal government once again made a series of requests for reserve land from Ontario. The issue was now more urgent as the Forest Reserve would pave the way for future exploitation of the area by resource extractors and

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[82] Cabinet Memorandum, March 1890. (THRC).

[83] Statement of the Case of the Dominion On Behalf of the Temogamingue Band of Ojibbewa Indians, p. 2. (THRC).

would restrict the access that the Temagami tribe had to timber in the area.[84] Railway lines reached the Temagami in January of that year.[85] The federal government correctly feared that as development in the area progressed, the possibility of settlement of the Temagami claim would become more and more remote.

DIA insisted that Ontario accept the 100 square mile reserve surveyed in 1884. However when the provincial government rejected this proposal and suggested a reserve site that would be much smaller and outside the boundary of the Temagami Forest Reserve, the federal government acquiesced and put the proposal to the Temagami tribe.[86] This proposal and a later proposal in 1913 were both rejected by the tribe. The situation remained static for the next several years. However when officials from the Ontario Department of Lands and Forests (DLF) began charging rent to tribe members for the land they were occupying on Bear Island and around Lake Temagami in 1929, DIA stepped in on behalf of the tribe and again pressed the claim.

The current Reserve on Bear Island, is much smaller than the 100 square miles originally surveyed. It officially became a Reserve under the Indian Act in 1970. The land was granted to the federal government by Ontario in 1943. However the province put such heavy restrictions on the transfer that the federal government, while accepting the grant, refused to turn the Island into a Reserve. All timber on the Island

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[84] See Bruce W. Hodgins and Jamie Benedickson, The Temagami Experience: Recreation, Resources and Aboriginal Rights in Northern Ontario (Toronto: University of Toronto Press, 1989).

[85] Ibid, 83.

[86] Letter, J.D. Maclean (Deputy Superintendent General of Indian Affairs) to Chief Francois Whitebear, June 17, 1910. (THRC).

was to remain in Provincial control and could only be cut with provincial consent. Although DIA considered this a poor settlement, they nevertheless accepted the transfer.[87] Barren or not, the federal government felt compelled to accept the offer, against the interests of the Temagami tribe.

Throughout the entire period, Ontario clearly associated its own interests with those of the natural resources found in the Temagami region. DLF's objective was to protect these resources for exploitation. Consequently the demands of the Temagami tribe posed a threat to provincial interests. At this time there was little or no direct communication between the tribe and the provincial government. While the federal government had a department to handle aboriginal affairs and had direct links with aboriginal peoples, the province had no corresponding ministry. Consequently the provincial government remained ignorant of the true demands and condition of the tribe.

Although DIA requested Provincial Crown land to create a Reserve as early as 1885 and had repeatedly sent letters to that effect to Toronto, one of the first provincial responses was to establish the Temagami Forest Reserve in 1905. The purpose of the Forest Reserve was to protect the Temagami region from forest fires and unregulated cutting. Its creation clearly indicated the direction of provincial priorities at the time.

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[87] One DIA official remarked "Without the ownership of the timber, which is the principal future asset of the proposed reserve to which generations of Indians may look for at least part of their subsistence, this presents to them a pretty barren reserve." See letter, Acting Deputy Minister of Indian Affairs to F.A. MacDougall (Deputy Minister, Department of Lands and Forests), February 20, 1943, (THRC).

When Ontario began communicating with DIA over the land claim in 1910, they expressed in words what their actions had previously demonstrated. In the opinion of the Province, all the land that was to be set aside under the terms of the Robinson-Huron treaty had been arranged in 1850 and they were therefore under no obligation to turn over any lands now:

> In view of the fact that the Treaty does not call for any reserve in this locality, and because of the importance of preserving the timber, the Department cannot promise a favourable reply to your request that a Reserve be set apart for these Indians.[88]

Ontario had no cause to recognize this claim. The lack of contact with the tribe combined with a degree of indifference to DIA demands led the deputy minister of Lands and Forests to remark:

> As already intimated to you in previous correspondence, we have not disturbed the Indians who are resident in the Forest Reserve, and they are permitted to roam about here over a much larger area than they could expect to get in an Indian Reserve, and they are employed as fire rangers and guides, and our information is that they are contented to be left as they are.[89]

This statement was completely false. The Temagami tribe had indicated on numerous occasions its displeasure with the situation but they had always done so via federal authorities. The provincial government cannot be excused for these attitudes, as DIA had repeatedly made Ontario aware of the tribe's desire for a Reserve.

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[88] Letter, Aubrey White to S. Stuart (Assistant Secretary, Department of Indian Affairs), January 20, 1910. (THRC).

[89] Letter, Aubrey White to J.D. Maclean, June 22, 1910. (THRC)

Without Reserve Lands, the Temagami tribe continued to maintain a subsistence living throughout the area, although many often gathered on Bear Island around the Hudson's Bay post in the winter. If a Reserve was set up as the federal government proposed, then the tribe would have land to cultivate. Ontario desired to concentrate the tribe in a defined area, but at the same time they were unwilling to give up any land or resources to achieve this objective. Ontario proposed to set aside a "small area" for the tribe to settle on so long as the federal government could guarantee that tribal members would restrict their activities to whatever land was made available.[90] The province clearly had no intention of providing land for a conventional Reserve. This was repeatedly indicated by DLF. The situation remained static for a number of years thereafter.

When Ontario began to demand rent from several tribe members occupying land on Bear Island in 1929, the conflict again flared up. At this point the tribe was put in the extraordinary position of not "possessing" land of its own, forbidden from cutting wood for building materials and firewood, and charged rent for lands and resources it was denied. In response to charges of injustice, the Provincial Surveyor-General reiterated the position of the Province:

> I think you will find that the Indians on Lake Timagami [sic] are more in touch with civilization than any other band, and make their living by guiding and exploring in the ordinary way of the White man, and it is

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[90] Letter, Aubrey White to J.D. MacLean, June 22, 1913. (THRC).

> very doubtful if they would be satisfied to occupy any other lands on Lake Timagami than these where they are now established.[91]

DLF did not recognize any provincial responsibility towards the aboriginal inhabitants of the Temagami Forest Reserve and suggested that the federal government should take responsibility for any indigent individuals residing therein.[92]

The province continued to hesitate on the issue throughout the 1930s, unconvinced the tribe would actually move to and reside on any land set aside for them. Underlying this fear was a greater concern for the timber in the region. The suggestion to create a Reserve at the southern end of Lake Temagami, as had been surveyed in 1884, solicited the provincial response that this area is "altogether too valuable from a timber point of view to even consider the question."[93] The Province proposed to lease Bear Island (less the Hudson's Bay lands) to the tribe for a reserve site. When DIA rejected this offer and demanded a land grant, Ontario agreed so long as the federal government would accept the land with a number of restrictions that would leave the timber on the island in provincial control. DIA, believing this to be the best possible offer, accepted the grant while maintaining the position that the restrictions should be removed. As a result the federal government did not create a

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[91] Letter, W. Cain (Surveyor-General, Province of Ontario) to A.F. MacKenzie (Assistant Deputy Minister, Department of Indian Affairs), July 12, 1929. (ONAD).

[92] See letter, Deputy Minister, Lands and Forests to H.W. McGill, April 29, 1938. (ONAD).

[93] Letter, J.W. Cain to D.J. Allen (Superintendent of Reserves and Trusts, Department of Indian Affairs), October 20, 1939. (ONAD).

reserve on the site until 1973, though the land was set aside for the use of the Temagami tribe in 1943.

When the Temagami tribe began pressing their demands on the federal government in the last quarter of the nineteenth century, they had had no experience or knowledge of western legal practices. Their demands sought out the protection and security which other tribes had already been afforded. In 1881, Chief Tonene wrote to the Indian Agent, Captain Skene:

> You want to know on what terms we would surrender our Hunting Grounds - We have hardly any idea of such bargains - but what I could say is this: would you be so kind as to let us have some money, for instance four dollars per head of living souls for our Hunting Grounds, maybe we might surrender. Of course, not to receive that money only one year but every year as you dispose of our hunting grounds, we would like to receive that same amount every year for the surrender of our lands [sic].
>
> But still besides we would like to have a reserve for ourselves so as to stay on, and to make our farms wherefrom to be able to provide for the children - and they forever.
>
> That is only what I can state to you now.[94]

The tribe determinedly and consistently maintained they were entitled to a Reserve as the other tribes throughout the entire region had received under the Robinson-Huron Treaty.

Without land, the tribe was left unprotected from intrusions and encroachments by the provincial government and settlers. Provincial forest rangers would periodically tear down their homes and at the same time forbid the cutting of trees to construct

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[94] Letter, Chief Tonene to Captain Skene, August 19, 1881. (THRC).

new dwellings. In a letter, Chief Alexander Paul pleaded with a federal official to recognize the injustices his tribe was facing:

> We have been forbidden by Chief Ranger (Hindson) to build small shacks for our own use on Bear Island. ...We deem it only our rights to have the privilege to live like people and surely it is only fair that we should be allowed to build for our own use on Bear Island where we come to send our children to school.
> Also we ask for our Reserve at Austin Bay, these we deem is fair [sic] and justly coming to us.[95]

And so the tribe continued to assert its rights. When they finally received a Reserve on Bear Island, it was a result of Federal/Provincial negotiations not involving the tribe. The Bear Island Reserve was only a fraction of the 100 square miles that had been surveyed in the late 1800s for the tribe.

The Temagami Land Claim, Post-1973

The analysis of the treaty reserve system, aboriginal title and aboriginal rights is crucial to proper understanding of the modern Temagami land claim. The land claim itself has been made on the basis of unextinguished aboriginal title to the land. As such, it is not necessarily related to self-government negotiations. It does however, come into direct conflict with the treaty reserve system. The practice of extinguishing rights by treaty, is at issue in Temagami. The tribe claims that its aboriginal title was never extinguished. Letters and documents seem to support this conclusion. The

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[95] Letter, Chief Alexander Paul to F. Pedly. Undated, though it appears to have been written after 1910 and was most likely written in 1911 or 1912. (THRC).

federal government cannot afford to jeopardise the treaty reserve system, while the Ministry of Natural Resources (MNR) is unwilling to cede control over the lands and resources in the Temagami area. In the following analysis, it will become clear how some of the dynamics of the Temagami land claim changed, once responsibilities and roles were altered following Calder. With increased responsibility for the aboriginal rights across Canada, the federal government has withdrawn from the policy field in steps. This, in turn, has placed added pressure on the provinces to assume responsibility for aboriginal peoples. In Ontario, the result has been the creation of the Ontario Native Affairs Directorate (ONAD). The creation of ONAD led to a branch of the Ontario government that was more sympathetic to aboriginal land claims than MNR had been.

When the claim of the Temagami tribe was registered on 14 August 1973, both federal and provincial legal experts were caught off-guard. Both seemed ignorant of the matter, having not paid any serious attention to the issue since 1970. The transformation of Bear Island into a Reserve site had hardly settled the problem. The tribe, through the Bear Island Foundation, placed legal cautions on 110 townships on and around Lake Temagami. A caution does not establish ownership. It is actually a method of notifying all persons potentially interested in purchasing a parcel of land that a third party has expressed an interest in the land. Until it can be established through a hearing on the validity of the cautioner's interest, all sales and development are effectively prohibited. A caution may stay in place for up to five years at which time the cautioner may register another caution.

Much confusion followed in the wake of the cautions. Government officials at all levels were unclear as to the basis of the claim, the history of the claim, as well as to the objectives of the tribe. Further fuelling the confusion, the Union of Ontario Indians requested money from the federal government to research the claim on behalf of the Temagami tribe.[96] This was to be the only occasion on which an umbrella aboriginal organization would make a submission on behalf of the Temagami tribe. In fact, the 'assistance' of the Union of Ontario Indians was not solicited by the tribe and in a letter to DIAND, Chief Gary Potts indicated that his tribe had no knowledge of this proposal nor was the tribe a member of this organization.[97]

Early divisions began to emerge between the Ministry of the Attorney General (MAG) and MNR. Essentially the legal advisors at MAG were of the opinion that the Temagami tribe might have a valid claim and if this were the case, then litigation was not advisable because of the very real possibility that the Province might lose. An extensive forty-two page report prepared by MAG concluded: "The Temagami band does have a claim to certain lands in Ontario which claim [sic] has not been extinguished by treaty or otherwise."[98] The report clearly recommended negotiation over litigation.[99]

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[96] Letter, John Poters (Acting Executive Director, Union of Ontario Indians) to J.B. Hartley (Acting Director, Policy Planning and Research, DIAND), August 27, 1974. (THRC).

[97] Letter, Chief Gary Potts to C.I. Fairholm, November 7, 1973. (THRC).

[98] Ontario, Ministry of the Attorney General, "Bear Island Foundation, Temagami Indian Band Claim," (Toronto: May 16, 1974), p. 41. (ONAD).

[99] Ibid, 42.

MNR viewed negotiation without litigation as essentially unwarranted. It wanted to determine whether the tribe had any legal rights from the outset, and was willing to pursue any legal technicality whatsoever to challenge the claim. Thus the Deputy Minister of Natural Resources dictated a letter to the Deputy Attorney General:

> In summary, and with respect, I find difficulty in believing that our present position is the wisest one. I wonder why we have not or should not go the route of requiring the foundation to prove the worth or validity of its claim.[100]

The response of MAG was two-fold. First, it argued that to pursue such a strategy was irresponsible and petty. Any future negotiations would be clouded by these actions. Second, the present "position" was only to determine the tribe's objectives before any decision was made. In the end the government must keep in mind not only the possible consequences of litigation, but also the cost and time involved therein.[101] Although the legal arm of MNR eventually concurred with the position of MAG, MNR continued to pursue its own approach to the problem. A letter from the Legal Services Branch of the MNR to its Minister indicated that MNR did not recognize a claim based on rights: "The fact that the Indians are not claiming a right as one of their current objectives does not mean that they will not try to do so in the future."[102] The same letter suggested MNR should attempt to further its

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[100] Letter, J.K. Reynolds (DM, MNR) to F.N. Callaghan (DM, MAG) June 19, 1974. (ONAD).

[101] Letter, F.W. Callaghan to J.K. Reynolds, June 25, 1974. (ONAD).

[102] Letter, M.S. Smith (Director, Legal Services, MNR) to J.K Reynolds, July 8, 1974. (ONAD).

understanding of the tribe's objectives so as to judge if its demands are "reasonable in light of their legal rights." MAG, while not necessarily recognizing the validity of the claim in law, nevertheless recognized a possible basis of the claim in aboriginal title.[103]

Meanwhile, the Temagami tribe's land claim had attained a high profile in the media which no doubt added to the confusion within the bureaucracy. Temagami was highlighted in the news not so much because of the aboriginal land claim itself, but rather because Ontario was planning to build a major recreation park at Maple Mountain which was within the claimed area. The province was forced to delay the Maple Mountain project until the land claim was settled. Eventually Ontario abandoned the idea altogether.

After a meeting attended by two solicitors from the Office of the Attorney General, Chief Gary Potts and the tribe's solicitor, Bruce Clarke, the Temagami tribe presented their demands:

1. LAND USE CONTROL
   -priorities and control mechanisms must be established for future development
   -basic premise: environmental protection essential to guarantee a future economic base for the area, other than through exploitation of non-renewable natural resources wherever possible.

2. DECISION MAKING PROCESS
   The Native people of the area must be guaranteed an effective role in the decision making process.

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[103] Memorandum, MAG, Office of the Senior Crown Counsel, July 29, 1974. (ONAD).

3. ECONOMIC ISSUES
   (a) Compensation for past infringement of rights.
   (b) Reasonable guarantees of a future economic base.

4. BASIC APPROACH
   The Native people of the area wish to co-operate with government in establishing workable concepts of land use. This is not a protest movement and no unilateral demands are being made.[104]

By demanding a role in future development and guarantees for a future economic base, the Temagami band were essentially indicating that they would not be satisfied with a treaty adhesion. Even the widest possible interpretation of the Robinson-Huron Treaty could not have accommodated these demands. At this time the tribe appeared reluctant to specify terms of settlement, such as amounts of land and money, as this could prejudice future negotiations.

While Cabinet had not yet determined how to deal with the claim, the recommendations of the Legal Services Branch of MNR was for the Attorney General to challenge the claim in Court.[105] An anonymously written and diplomatically worded cabinet submission later that year in October recommended negotiation while preparing for litigation should that possibility arise.[106]

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[104] Temagami Band, Guidelines for Settlement, presented in Haileybury, July 8, 1974. (ONAD).

[105] Memorandum, MNR, "Preview of the Difficulties Facing the Ministry Due to the Existence of the Caution." August, 1974. (ONAD).

[106] Cabinet Submission, "Policy Submission, Temagami Indian Band Claim," October 22, 1974. (ONAD).

DIAND had managed to maintain a low-profile in the Temagami conflict until this point. They had funded claim research in 1972 in the amount of $16,000.[107] Yet it was not until early 1975 that DIAND first discussed the issue with Provincial officials. Officials in the Office of Claims Negotiation apparently expressed a willingness to negotiate the claim and avoid litigation provided that the Government of Ontario was willing to make "some arrangement" for the tribe. Presented with the reluctance of DIAND and MAG to take the case to court, the Deputy Minister of Natural Resources decided that he was convinced of a provincial "responsibility to honour the original proposal."[108] The "original proposal" referred to the 100 square miles surveyed in 1884. However the Austin Bay site, as was originally proposed, was forthwith ruled out in favour of some other site "unencumbered by mining claims, timber licenses, etc."[109] Meanwhile the Lands Administration Branch of MNR sent a memorandum the next day to its Deputy Minister restating the previously expressed MNR opinion viewing the courts as the "proper forum for resolving this issue."[110] The Policy Coordination Secretariat of MNR also supported this approach, but in any case that branch suggested that "it would be far preferable to open negotiations with the band to determine their true objectives without first making any kind of specific

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[107] See letter, P.F. Girard (Executive Director, Office of Claims Negotiation, DIAND) to J.B Hartley (Acting Director, Policy Planning and Research, DIAND), August 27, 1974. (THRC).

[108] Memo, J.K Reynolds to F.W. Callaghan, March 4, 1975. (ONAD).

[109] Ibid

[110] Memorandum, J.R. McGinn (Director, Lands Administration Branch, MNR) to J.K. Reynold, March 5, 1975. (ONAD).

offer to them."[111] Nevertheless, MNR made a submission to Cabinet recommending the province offer the tribe the same benefits it would have received under the Robinson-Huron Treaty had its "existence been known."[112] Provincial officials had discussions over the matter with federal officials that summer and it was resolved to develop a joint position/offer.[113]

The hearing to determine the status of the cautions was scheduled for February 1977. When the tribe lost the hearing, meaning the cautions would be lifted, the tribe immediately appealed the ruling. The appeal hearing was scheduled for October 1977 and in the meantime, counsel for the Province had determined they would fight the appeal on points of law, not points of fact. In keeping with this decision, they decided to assume certain facts without the burden of proof. These were: the Teme-Augama Anishnabai have from time immemorial occupied the lands which are now claimed; the individuals of the current tribe are the descendants of the Teme-Augama Anishnabai; and the Teme-Augama Anishnabai never surrendered any right, title, or interests to the Crown.[114] If the case came down to a dispute over fact, provincial officials agreed that they would call in their own expert witnesses to rebut the tribe's factual material. The Appeal Hearing for the Caution referred the matter to the

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[111] Memorandum, M. Mogford (Director, Policy Coordination Secretariat) to J.K. Reynolds, March 12, 1975. (ONAD). Ms Mogford is currently the Deputy Minister of MNR.

[112] Ministry of Natural Resources, Cabinet Submission, April 1, 1975. (ONAD).

[113] Memorandum, M. Mogford to J.K. Reynolds, July 31, 1975. (ONAD).

[114] Memorandum, Gary Carsen (Solicitor, Legal Services Branch, MNR) to J.W. Keenan (Executive Director, Division of Lands, MNR), July 26, 1977. (ONAD).

Supreme Court of Ontario where a decision could be made on the validity of the land claim as a basis of the caution.

In 1976 a new branch of MNR had been set up to deal with aboriginal land claims. This branch, called the Office of Indian Land Claims and later renamed the Office of Native Resource Policy, would have a definite impact on the Temagami land claim. The director began to intervene in the land claim. He sent a memorandum to Blenus Wright, Crown Counsel, reacting to a letter Wright had sent to Bruce Clark. He expressed concern that the Crown Counsel might have implied that the government wishes to settle the matter by requesting the tribe to forward its terms:

> A request for such information is, in my judgement, considerably premature. Such a request seems to infer that the Ontario government is interested in negotiating a settlement of the Temagami Indian land claim. To my knowledge the Ontario government has made no decision on the validity of that claim and thus cannot proceed to negotiate a settlement.[115]

He went on to suggest that MAG may have overstepped its administrative jurisdiction by taking a lead role in what was a matter to be determined by MNR. "I do think you will agree," he concluded, "that it is important that we share a common understanding and mutually supportive roles in order that our efforts will be fully complementary and harmonious." The Ministry of Natural Resources, through the Office of Indian Land Claims, was struggling for control over the conflict.

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[115] Memorandum, E.G. Wilson (Director, Office of Indian Land Claims, MNR) to Blenus Wright (ADM, MAG), November 16, 1977. (ONAD). Mr. Wilson is currently the Director of Federal/Provincial Relations in ONAD.

A new tactic was employed to deal with the deadlocked position of land claims in 1980. The claim was referred to the Indian Commission of Ontario (ICO), a tripartite body consisting of the federal government, Ontario and the First Nations of Ontario. Created in 1978, the Commission has the simple mandate to assist the three parties to "identify, clarify, negotiate and resolve issues which they agree are of mutual concern."[116] The objective of the Commission is to bring together in a neutral environment high level officials and use this to reach common understandings. Meeting under the umbrella of the ICO on 19 December 1980, the federal government made the following commitment:

> Canada agrees to participate in negotiations with the Teme-Augama Anishnabai and the Government of Ontario to provide a definitive resolution to the Tribe's claim. The federal position recognizes the indigenous native Temagami people as a separate independent tribe; one which was omitted from the signing of the Robinson-Huron Treaty and which did not enter into any other treaty relationships with the Crown.[117]

This was only a preliminary position, and further discussion was required. For the second meeting under the aegis of the ICO, the Minister of Natural Resources, armed with a mandate from Cabinet to negotiate the claim,[118] put forward a more extensive, yet still vague, proposal:

1. Effective Participation of the Teme-Augama Anishnabay [sic]

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[116] Indian Commission of Ontario, Report of the Indian Commission of Ontario, October 1, 1985 - March 31, 1987. (Toronto: 1987), p. 5.

[117] Letter, John Munroe (Minister, DIAND) to Chief Gary Potts, January 1981. (THRC).

[118] MNR, Cabinet Submission, "A Proposal for the Temagami Indian Land Claim," (draft) June 14, 1982. p. 3. (ONAD).

with the Governments of Ontario and Canada in the administration, management and conservation of the land and other natural resources in the Temagami area.

2. An economic development corporation with initial capital funding.

3. Legal access to game, fish and timber in the Temagami area.

4. Employment opportunities in the local area.

5. Additional Indian Reserve land.

6. Additional housing with appropriate associated water and sewage services.

7. Various social, cultural and educational programs and facilities.[119]

This proposal was made for a meeting held on April 7. The meeting also resulted in a commitment to meet on Bear Island in May. One week later the case of the Attorney-General V. the Bear Island Foundation et al. began at the Supreme Court of Ontario and was subsequently held over until the following November. At the Bear Island meeting, the tribe challenged the federal government's classification of their claim as specific, and suggested this was inconsistent with past positions of the federal government.[120]

Everything at this point suggested that the possibility of reaching a negotiated settlement without litigation was possible. Inexplicably, provincial game wardens apprehended and charged two tribe members in October for "illegal" hunting and trapping. The tribe subsequently decided to cease any further negotiations with the

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[119] Letter, Alan Pope, (Minister, MNR) to E.P. Hartt (Commissioner, ICO), March 31, 1982. (ONAD).

[120] Draft Minutes, Negotiation Meeting. Held on Bear Island, May 27, 1982. (ONAD).

Provincial government as it appeared to the tribe as though the Province was not negotiating in good faith.[121] Suspicious of the Province, the Teme-Augama Anishnabai would not accept any financial awards which left them with little or no control over the management of the claim area.[122] When the trial began in November 1982, tripartite negotiations had effectively ended and would never again be reopened.

Without going into great detail in this chapter, the trial did involve the introduction of historical data by both parties. The province introduced evidence suggesting both that the Teme-Augama Anishnabai were not the descendants of persons living in the Temagami area before 1850 and that in any case, the rights of the tribe had effectively been surrendered by other individuals who had signed the Treaty on their behalf. These startling submissions are striking not only for the apparent contradiction, but also because all the correspondence between the federal government and Ontario dating back as far as 1885 indicated the contrary was true. Justice Steele found in favour of the Province on almost all points ruling "aboriginal rights are personal and usufructory and dependent upon the pleasure of the Crown," further finding that the Crown in Right of Ontario "has the right to extinguish aboriginal rights by legislation, administrative action or treaty." Justice Steele determined the "defendants ancestors were either parties to the Treaty in 1850 or adhered to it in

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[121] See Teme-Augama Anishnabai, Press Release. October 28, 1985.

[122] Hodgins and Benedickson, The Temagami Experience, p. 268.

1883."[123] This decision was completely unexpected. Chief Potts responded that "the judicial system is incapable of protecting aboriginal rights."[124] Provincial and federal officials involved in the issue were "amazed at the extent of the decision in favour of Ontario."[125] Chief Potts vowed to "appeal their case all the way to the Supreme Court of Canada and, if necessary beyond it."[126] Having lost the decision in 1984 and with no prospects for negotiation, the Teme-Augama Anishnabai fired Bruce Clarke, secured the services of the prestigious Toronto firm of Borden and Elliot, and began new proceedings to launch an appeal to the Court of Appeal.

The following year, the Conservative government was defeated and replaced by a minority Liberal government. Ian Scott, who had been Commission Council on the Berger Inquiry, became the Attorney General and, at his own request, the Minister Responsible for Native Affairs.[127] Subsequently ONAD was established and housed within MAG in 1985. ONAD inherited staff and functions from the old Office of Native Resource Policy in MNR. The mandate of the Directorate was to develop

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[123] See Attorney General for Ontario v. Bear Island Foundation et al. 49 Ontario Reports (2d), pp. 353-489.

[124] Chief Gary Potts, cited in "Courts Not Capable of Protecting Aboriginal Rights, Chief of Band Says," Globe and Mail December 13, 1984. p. M8.

[125] Interviews, Some senior provincial and federal officials. Conducted fall 1989.

[126] Chief Gary Potts cited in Hodgins and Benedickson, The Temagami Experience, p. 269. Hodgins and Benedickson cite the CBC radio program "Sunday Morning" (December 16, 1984) as the source.

[127] This was apparently a strategic decision since as both the Attorney General and Minister Responsible for Native Affairs, Scott would be able to more effectively represent Ontario at the First Ministers' Conferences on Aboriginal Self-Government.

corporate aboriginal affairs policy. The resulting momentum built up by Scott resulted in an offer that the Attorney General personally made to the Teme-Augama Anishnabai in September of 1986 on Bear Island.[128] Mr. Scott proposed to make a $30 million settlement to the tribe consisting of land, capital and "other considerations." The offer was to be contingent on the federal government providing half of the settlement amount. The release of this offer came as a complete surprise to officials involved with the claim at DIAND. MAG had failed to inform federal officials prior to the release of the settlement offer.[129] The result was strained relations between DIAND and ONAD officials over the matter. According to one federal official, "this was probably the lowest point I ever had in federal/provincial relations."[130] This statement must be tempered with the realization that the federal government had not been actively involved in the Teme-Augama Anishnabai land claim since the breakdown of negotiations in 1982.

Certainly if the offer had been accepted, Ian Scott would have improved his own image by single-handedly solving the longest standing land claim in the province. In fact, the offer was actually crafted by an interministerial committee on aboriginal affairs. Established by the Conservative Government in 1983 or 1984, the committee

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[128] See Land Claim Settlement Offer released by the Office of the Minister, September 1, 1986.

[129] Confirmed by interviews with federal and provincial officials. One senior provincial official insisted that the failure to inform the federal government was not deliberate. Apparently there had been some sort of administrative mix up within the MAG.

[130] Interview. Former DIAND official involved with the claim. November 1989.

of senior bureaucratic personnel from various ministries concerned with land claims developed the offer before the Liberals formed the government.[131] The proposal was not acted upon by the Conservatives and Ian Scott seized upon the opportunity to present a bold new solution to the problem.

The offer was flawed, not only because of the failure to consult with both the Teme-Augama Anishnabai and DIAND, but also because the basis of the offer was a treaty entitlement. The Teme-Augama Anishnabai could never accept an offer of land and money that was supposed to meet treaty obligations. Although they were "grateful and appreciative of the initiative," the tribal council felt the financial settlement as well as the land management provisions and relationships between tribal and provincial institutions were not adequate.[132]

Meanwhile, the provincial government announced a plan to save the financially troubled logging interests in the Temagami region in May 1988. The plan was to include more than fifty kilometres of road construction into the uncut sections of the forest along the Red Squirrel and Goulard logging roads. The Teme-Augama Anishnabai responded by blockading the Red Squirrel Road for the following six months. The dispute was covered extensively in the media. Subsequently the province sent their negotiator, Barton Fielders from the Ministry of Mines and Northern Development, to live on Bear Island throughout July and August. Fielders had no specific instructions on how to deal with the situation but he did have a

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[131] Interview, senior public official.

[132] See Hodgins and Benedickson, The Temagami Experience, p. 271.

mandate from Cabinet to negotiate a settlement. A tentative proposal was arrived at between Fielders and the tribe Executive which would have included land and money, as had the last offer, and it would also have included a stewardship council with aboriginal representation to manage the natural resources and the environment in the land claim area. Although the tribal Executive agreed to the proposal, a vote of the entire tribe membership rejected it.[133] The Teme-Augama Anishnabai subsequently made a counter-proposal designed to provide the stewardship council with enhanced authority and the tribe with increased representation on the council. The province's response was to seek court injunctions to have the protesters prohibited from blocking road construction.

Two and a half months later, the Court of Appeal finally made a ruling in favour of the Province on 27 February 1989. The Appeal Court was charged with the responsibility of examining the decision of Justice Steele.[134] Ontario immediately made a second offer to the tribe in an effort to simultaneously take advantage of the tribe's misfortune and make political points by solving a seemingly intractable situation. This time the province offered the tribe 50 square miles for a reserve. Referring to the decision of the Court of Appeal, Scott explained

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[133] See Christie McLaren, "New Conflict Looms on Logging Roads" Globe & Mail November 22, 1988. p. A12.

[134] Appellate courts are not courts of first instance. Evidence cannot be introduced at this level. Instead, it is the appellate court's duty to examine the rulings of lower courts to determine whether decisions were properly rendered. This is true of the Supreme Court of Canada when it is not the court of first instance (a case may, on rare occasions, be referred directly to the Supreme Court, thereby bypassing lower courts). For this reason it is critical that evidence is properly, and fully, examined in the first trial.

that the issue of "what the Band is entitled to under the Treaty... must now be addressed."[135] Chief Potts rejected the offer exclaiming "It's very offensive to us," to which Scott replied outside of the Legislature "They're slowly running out of options."[136]

If there had been a relationship prior to this second settlement offer, any constructive dialogue between the two parties had now largely evaporated.[137] There was no communication between the province and the Teme-Augama Anishnabai. Cabinet was nevertheless attentive to the issue. The provincial negotiator met with full Cabinet every Wednesday morning throughout the summer of 1989. This is highly unusual. Normally the policy structure begins at the Senior Officials Working Group on Land Claims. It would move from there to the Deputy Minister's Committee on Native Affairs and from there to the Cabinet Committee on Native Affairs.[138] If any financial considerations were involved, these proposals would go to the Management Board of Cabinet, and then on to full Cabinet itself for

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[135] See Office of the Minister Responsible for Native Affairs. Press Release, "Ontario Makes Land Offer to the Teme-Augama Anishnabai." March 1, 1989.

[136] See Christie McLaren, "Temagami Indians Reject New Land Offer." Globe and Mail March 2, 1989. p. A1.

[137] Indeed the relationship had become so bad that very senior provincial officials described the situation as "no relationship."

[138] The Cabinet Committee on Native Affairs is chaired by the Minister Responsible for Native Affairs and includes the Ministers of Natural Resources, Northern Development and Mines, Skills Development, Education, Colleges and Universities, Citizenship and Culture, Solicitor General, and Correctional Services. See Shelly Spiegel, "Ontario Provincial Native Policy" in J. Anthony Long and Menno Boldt eds., Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988), pp. 102-108.

discussions. All these committee structures were completely by-passed. To date Temagami is the only issue treated in this manner by Cabinet.

Leave to appeal to the Supreme Court of Canada was granted in October 1989. The case was heard by the Supreme Court in the spring of 1991 and a decision upholding the finding of the Ontario Court of Appeal came down in August of 1991. Meanwhile, the Teme-Augama Anishnabai signed a Memorandum of Understanding with Ontario which establishes a stewardship council over four townships covering 1,805 hectares. The council is to be comprised of equal numbers of Teme-Augama Anishnabai appointees and provincial appointees with a jointly appointed chair. The Memorandum was signed by Chief Gary Potts and Second Chief Rita O'Sullivan for the Teme-Augama Anishnabai, and by the Minister of Natural Resources and the Minister Responsible for Native Affairs for Ontario. The stewardship council will oversee resource development in the four townships. While this is a significant development, it does not constitute a settlement to the land claim. Furthermore, the stewardship area covers only four townships out of 110 townships that are within the land claim area.

SUMMARY

The early conflict was punctuated by a federal desire to discharge its obligations to the tribe and by provincial reluctance to deal with the claim. Ontario unmistakably had a greater concern for resource revenues and development than for

land claim settlements. The Temagami tribe and Ontario did not have direct contact. Instead, the tribe conveyed their demands to DIA officials who later pressed the demands with provincial officials.

In the post-Calder policy environment, the entire dynamic of land claims has changed. State structures must now cope with unsurrendered aboriginal title existing independently of Crown grants. The provinces are now involved in trilateral and even bilateral negotiations with aboriginal peoples whereas previously they did not negotiate directly with aboriginal tribes. All negotiations since 1982 concerning the Temagami claim have been conducted between the Teme-Augama Anishnabai and Ontario. The federal government has not played an active role.

A closer examination of the provincial government revealed that serious divisions emerged between the Ministry of the Attorney General and the Ministry of Natural Resources over the proper route to deal with the Temagami land claim. The Attorney General's office recommended negotiation, while Natural Resources recommended litigation. Although tripartite negotiations were initiated in 1980 they were eventually abandoned two years later. When the negotiations eventually broke down, litigation was the only device left to deal with the claim.

CHAPTER THREE

THE ADJUDICATION OF COMPREHENSIVE LAND CLAIMS

> wherever any two men are who have no standing and common judge to appeal to on earth for the determination of controversies of right between them, they are still in a state of nature.[139]

This chapter will argue that the courts are an unsatisfactory dispute resolution mechanism when dealing with comprehensive land claims. When the claim is made that the Crown has never come to terms with aboriginal peoples, never included them in the "social contract," the conditions necessary for adjudication, and integrative decision-making do not exist. Thus the courts cannot authoritatively make decisions. Furthermore, the absence of certain necessary conditions brought about by the nature of comprehensive claims serves to further aggravate the constraints on rational decision-making in the courts.

The normal recourse citizens may pursue when they have an unresolved grievance against the state or another citizen is to bring the matter before a judge. The judge is expected to impartially examine the case and make a decision based on

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[139] John Locke, quoted in Peter Russell, The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw Hill Ryerson Ltd, 1987), p. 20.

points of law. However comprehensive land claims are a special case because they make demands unlike any other claim. It is suggested that certain prior rights of aboriginal peoples still exist and that the crown has never come to terms with aboriginal peoples. It is an exogenous claim or more specifically, it is a claim made on our institutions but formulated from a culture outside the normal Canadian political order.

INTEGRATIVE THEORY

Integrative processes were described as those which discover the will of the people "through deliberation by reasoning citizens and rulers seeking to find the general welfare within a context of shared social values."[140] Whereas aggregative institutions are based on the individual and are understood to collect individual prior preferences, integrative institutions are based on a concept of community values. If individuals are to behave as members of a community rather than as an aggregate of individuals, integrative institutions must encourage attitudes that focus on community values and the general welfare.

Instead of decision-making based on bargaining and coalition formation, integrative decision-making favours rational thought processes and reasoned deliberation in search of the common good. In this way decisions are in the interests

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[140] James G. March and Johan P. Olsen, "Popular Sovereignty and the Search for Appropriate Institutions," Journal of Public Policy 6:4, p. 344.

of the community rather than those of dominant coalitions in society. Accordingly, every member of society has natural rights that exist independently of institutions.[141]

The maintenance of human rights is a fundemental component of integrative institutions. March and Olsen describe them as "'natural rights,' as part of a social contract, or as part of the shared culture from which a political system springs."[142] This fundamentally distinguishes integrative institutions from aggregative institutions where rights ameliorate imperfections in the bargaining process. In the case of integrative institutions, rights are an immutable expression of community values which are to be protected, regardless of the cost to others. The purpose of such rights does not have to be defined, no one must justify them. Instead they are simply a concrete expression of community values and shared culture.

The emerging integrative process synthesizes conflict through authoritative decision-making reflecting the general will. Integrative decision-making, based on authority and respecting certain rights and norms, provides qualities which aggregative institutions cannot replicate. Integrative decision-makers have the capacity to function rationally through reasoned debate not present in a bargaining forum. Power and autonomy provide the integrative decision-maker with the necessary tools to function divorced from the political process. However it is precisely these three components,

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[141] Ibid., p. 350.

[142] Ibid.

authority, power and autonomy that March and Olsen offer as elements that can lead to the corruption of the integrity of public officials.[143]

Among all institutions in liberal democracies, the judicial system bears perhaps the closest resemblance to March and Olsen's integrative qualities. Judges are authoritative decision-makers. They are supported by the state and its coercive elements. Those serving as judges, especially those at the Appellate and Supreme Court levels, are recognized legal experts. More importantly, judicial decisions are made on the basis of weighted evidence placed before them and not on the momentary passions of the masses nor the political might of the powerful. Their decisions incorporate community values found both in the law and in previous judicial decisions.

Autonomy is a crucial element of the judicial process. Though judges have the support of the state, and the government controls the reins of the state, judges must not act as agents of the government. They must therefore be both independent of the government and impartial to the interests arguing before them. In Canada, while judges make decisions free of direct political influence, they are responsible to the government for their appointment and possible promotion. Once appointed, their

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[143] The term "integrity" is used to refer to "a good faith attempt to examine public policy as an instrument of the community, to subordinate personal needs and private desires to a sense of public interest as defined by the community, and to maintain confidence that similar commitments and subordinations c an be expected from others." Ibid., p. 357.

positions are secure and free of political threats.[144] In order to make decisions that are not simply a result of political pressure, judges in Canada are given the right to make decisions free of political interference.

When judges are given society's permission to make authoritative decisions, it is critical that they discharge these duties with competence and integrity.[145] The question of competence challenges judges' technical knowledge of the subject under examination and it also challenges their appreciation of community values. March and Olsen suggest that integrity requires "a good faith attempt to examine public policy as an instrument of the community, to subordinate personal needs and private desires to a sense of the public interest as defined by the community..."[146]. This can be a problem when decisions are rendered on cases involving aboriginal litigants. The courts must function as a protector of inalienable right rather than as an instrument of the dominant sectors of society. Yet this is a difficult proposition because the courts must deal with laws that are overwhelmingly imbued with the values of non-aboriginal culture. Judges are not value neutral, they are human products of the legal system.

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[144] According to Russell, judicial freedom from political interference is much more the case here than in continental Europe where judges spend their entire career from law school until retirement on a promotional ladder at the discretion of politicians and other judges. Russell, The Judiciary in Canada, p. 23.

[145] This is what March and Olsen refer to as the "efficacy of integration." March and Olsen, "Popular Sovereignty," p. 352.

[146] Ibid., p. 356.

Yet if rights are the unresolved problem, then the courts would seem to be the proper institution to provide the best ex post social solution.[147]

THE COURTS AND COMPREHENSIVE LAND CLAIMS

This section suggests that the courts have not played an integrative role in the instance of aboriginal peoples in Canada. The courts, when dealing with comprehensive land claims, are not accepted as a legitimate institution by aboriginal peoples. Legitimacy refers to the acceptance of decisions as right and proper. It is evident to even the casual observer that aboriginal peoples have repeatedly denied the legitimacy of the courts and other institutions.

Why then do the courts lack legitimacy for aboriginal peoples? The primary reason is the exogenous nature of comprehensive land claims. Comprehensive claims, claims based on aboriginal title, challenge the notion of a shared value system and strike at the heart of a value-laden legal system. They are a demand from beyond our social contract and in that context are an affront to the very institution before which they are presented. A second reason is the institutional tilt against the incorporation of aboriginal values into the judicial system.

The courts are an instrument of governance designed and agreed to by the non-aboriginal sectors of Canadian society but not by aboriginal peoples. Comprehensive land claims are a statement that some aboriginal peoples have never agreed on rights

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[147] See the discussion of the New Institutionalism in chapter one.

with non-aboriginal society. The independence of the judiciary is irrelevant. For aboriginal peoples the courts are one part of the instruments of domination by non-aboriginal culture.

The exogenous character of comprehensive land claims challenges the very core of integrative institutions as constructed by March and Olsen. Throughout their paper, "Popular Sovereignty and the Search for Appropriate Institutions" March and Olsen assume that integrative institutions exist only in an environment of shared values and norms. Rights, so important to the construction of integrative institutions, are described as "metaphors of human unity, symbolizing the common destiny and humanity of those who share them."[148] That some form of 'social contract' had been formed was assumed by March and Olsen. But comprehensive land claims indicate that no such contract has been formed. Such a claim challenges the integrative capacity of institutions such as the court because it suggests that a shared value framework from within which authoritative decisions are made cannot exist.

Comprehensive land claims nevertheless come before the courts and a process is begun that attempts to grapple with the problem. As I shall show in the following chapter, the failures in the negotiating process leave the courts as one of the few apparent opportunities available to aboriginal peoples to pursue their claim. However, once in the court system, comprehensive land claims aggravate an already flawed system.

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[148] March and Olsen, "Popular Sovereignty," p. 351.

Jurisprudence and the Judicial System

Traditional legal theorists have considered judges to be neutral arbiters who declare the law rather than make it. Decisions, they argued, were made on the basis of the existing law and precedent. In an examination of competing theories of jurisprudence, Paul Weiler describes the primary focus of adjudication in the traditional approach as: "the settlement of disputes arising out of private line of conduct in the light of established rules and principles."[149] Adjudication is considered an objective process rooted in fact and logic. Weber captured the positivist approach when he referred to the Western mode of adjudication as "logically formal rationality."[150] Traditional theorists argue that legal principles and practices are designed to aid the court in a rational decision-making process. The principle of stare-decisis which binds the courts to previous judicial decisions and which binds lower courts to higher court decisions is a dispassionate guiding force in the process of judicial decision-making.

This traditional view of jurisprudence, positivism, has more recently come under close scrutiny. Some scholars now suggest that the positivist depiction of the

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[149] Paul Weiler, "Two Models of Judicial Decision-Making," in F.L. Morton ed., Law, Politics and the Judicial Process in Canada (Calgary: University of Calgary Press, 1984), p. 27.

[150] Max Weber quoted in Eric Colvin, "Legal Process and the Resolution of Indian Claims," unpublished law paper, University of Ottawa, 1981. Rational refers to an objective set of general rules to decide a case. Logically formal rationality suggests that the system is based on logical, as opposed to partisan, premises.

courts is reductionist. Noticeably absent in the positivist approach are considerations of the impact of a judicial decision. Writers such as Peter Russell focus on the political power of judges and the impact on policy their decisions have. They point to competing laws and legal principles that transform judicial decision-making into an uncertain process dependent upon judicial discretion. These generalities in law result in a paradoxical situation where judges base their decisions on existing law yet "also shape and develop the law in the very process of settling disputes about it."[151] No set of rules and principles could fully deal with every situation placed before a judge.

An alternative theoretical approach to jurisprudence, the realist school, assumes that judicial decision-making necessarily has subjective elements. In this analysis the subjectivity/objectivity debate is secondary to the examination of judicial backgrounds. If it is assumed that judges are necessarily subjective, then the selection of judges becomes a critical process. For example, the question of the representativeness of women and visible minorities becomes a much larger concern than would be the case in a positivist analysis. In the United States, for example, the selection of Supreme Court Justices routinely focuses on the ideological disposition of the candidates. Yet such a debate in Canada would be considered a transgression of the assumption of judicial objectivity. For positivists, judicial background would make little difference to the decision-making process, but it would be important to maintain the confidence

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[151] Russell, The Judiciary in Canada, p. 13.

of all segments of society. In short, realists acknowledge and accept that judges, as fallible humans, will be less than perfect in applying the law.[152]

Though adjudicators continue to present the image of rational decision-makers influenced by logic and precedent, in reality this picture is incomplete. The law cannot possibly and predictably deal with every legal dispute that may arise. When the law is ill-defined on a particular point, and when competing legal principles are at stake, judges find themselves not only interpreting the law, but making it. When land claims are at stake, matters are sufficiently unclear that judges move toward a policy-making role.

As Russell identifies, the generalities in the law and the conflicting legal principles that are at work deliver enormous discretionary power to the judiciary. Furthermore, the Teme-Augama Anishnabai claim to be a distinct society, never a party to the institutions of non-aboriginal culture. Such exclusion aggravates the problems outlined by Russell. Aboriginal peoples, as an excluded culture have never been participants in the legal system that has had such a dramatic impact on their lives. Laws have been enacted by legislatures with few, if any, aboriginal representatives.[153] The case law used as precedent in all comprehensive land claims

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[152] William B. Henderson, "Canadian Legal and Judicial Philosophies on the Doctrine of Aboriginal Rights" in Menno Boldt and J. Anthony Long eds., The Quest for Justice, Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), p. 223.

[153] Out of at least 3,375 MPs who have at one time sat in the House of Commons only 9 have ever identified themselves as aboriginal. Currently there are only 3 MPs in the House of Commons who identify themselves as aboriginal, only one of whom (continued...)

cases was not decided by aboriginal judges, nor argued by aboriginal lawyers. Aboriginal groups were not even permitted to retain lawyers to argue their cases from 1927 to 1951.

The current situation may not have been altered if aboriginal legislators had played a role in writing the statutes, if aboriginal lawyers had argued their own cases, if aboriginal judges had decided cases or if lawyers representing aboriginal groups had been permitted between 1927 and 1951, but all this highlights that this entire legal construction is that of another society with foreign values and customs. Aboriginal peoples did not play a role in the construction of the values and norms used to judge their cases. The general point that I make here is that when these crucial laws were formulated aboriginal peoples were not a party to it. As a result of this exclusion from debate at such a crucial period, the law did not incorporate aboriginal values. Consequently aboriginal values have no place in court because that process is so heavily tilted to another value system that continues to exclude aboriginal values. The following case is one example of the general points I have made above.

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[153](...continued)
represents a riding south of sixty degrees.

The total number of MPs was calculated in David Docherty, "Are Politicians Rational Actors? Political Careers in the House of Commons," unpublished M.A. thesis, McMaster University, 1990).

See also Mark LeClair, History of Aboriginal Participation Within the Electoral System, unpublished research paper, July 1990, p. 35.

Attorney General of Ontario V. the Bear Island Foundation et al.

This case arose following the cautions placed on the land claim area by the Teme-Augama Anishnabai in 1973. Frustrated by the disruption on development in the Temagami area[154], the government of Ontario eventually decided to have the cautions removed through court action. The Crown Attorney further asked the courts to deny the Teme-Augama Anishnabai any right to the land they claim as their traditional homeland.

The issues involve the nature of aboriginal rights, their origin, and how or if they can be extinguished or ceded. The Teme-Augama Anishnabai argued that they are:

> entitled to all of the lands including the waters and lands under the waters, by virtue of their aboriginal (or Indian or native or indigenous) rights (or title) as well as by virtue of the rights reserved to them under the Royal Proclamation of 1763.[155]

The trial lasted a record breaking 119 days and involved the following two questions. First, is the source of aboriginal rights derived from a sovereign authority (in this case European) or is it something inured to aboriginal peoples by virtue of their historic occupation of traditional homelands? Second, how might these rights be extinguished?

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[154] The provincial government had plans to construct a major recreation park (Maple Mountain) in the area.

[155] Attorney General for Ontario v. Bear Island Foundation et al. 13-49 Ontario Reports (2d), p. 360.

Must the Crown enter into treaty with each tribe, or may they be extinguished at the pleasure of the Crown?

The historical evidence at issue involved anthropological data on the Teme-Augama Anishnabai, the Royal Proclamation of 1763, and the Robinson-Huron Treaty of 1850. The interpretation of the anthropological data, the Royal Proclamation, and Robinson-Huron involve a number of controversial and competing legal principals. In the primary case, the Teme-Augama Anishnabai were the defendants and the Government of Ontario was the plaintiff (a counter-case was simultaneously launched by the Teme-Augama Anishnabai against the government of Ontario.) Under common law, plaintiffs in criminal cases must establish the guilt of the defendant who is presumed innocent. Thus the onus of evidence is placed upon the plaintiff. However in land law cases, since titles originate from Crown grants, the onus is upon the citizen to prove entitlement.[156] In Bear Island, Justice Steele ruled that the onus of proof was shared both by the Teme-Augama Anishnabai and Ontario.[157] The Anishnabai were required to provide evidence to establish three elements:

> (1) the nature of the aboriginal rights enjoyed at the relevant dates (1763 or the coming at settlement);
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> (2) the existence of an organized society or social organization and the fact that it exercised exclusive occupation of the Land Claim Area, thereby exercising its aboriginal rights. Included would be proof that there was an organized system of landholding and a system of social rules and customs distinct to the band;

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[156] Bruce A. Clark, Indian Title in Canada (Toronto: The Carswell Co., 1987), p. 67.

[157] Attorney-General for Ontario v. Bear Island Foundation, p. 367.

> (3) the continuity of the exclusive occupation to the date of the commencement of the action.[158]

These requirements were designed not only to identify the tribe, they were also designed to prove entitlement.

The admissibility of evidence was not the only factor to have an enormous impact on the interpretation of the anthropological data. The Ojibwa culture, to which the Teme-Augama Anishnabai belong, did not have its own written language or a written tradition but instead depended heavily on oral tradition. Thus in court the Teme-Augama Anishnabai relied heavily on oral tradition to substantiate their case. While accepting the necessity of this oral evidence, Justice Steele nevertheless proceeded to completely reject it:

> In summary, I believe that a small, and well-meaning group of white people, in order to meet the aspirations of the current Indian defendants, has pieced together a history from written documents, archaeology and analogy to other bands, and then added to that history a stud of physical features [sic], together with limited pieces of oral tradition. Even the name Teme-Augama Anishnabay was not used in any printed form or record of the band or registered band until 1976. This leads me to doubt the credibility of the oral evidence introduced, and affects the weight to be given to the evidence of non-Indian witnesses.[159]

Justice Steele brushed aside the history constructed by Bruce Clarke and the Teme-Augama Anishnabai because of a predisposition towards written documentation that could not exist in this case.

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[158] Ibid.

[159] Ibid., p. 372.

These data were necessary if the defendants were to meet and counter the requirements for acceptable evidence enumerated by Justice Mahoney of the Federal Court of Canada in Baker Lake v. Minister of Indian Affairs (1980), and subsequently utilized by Justice Steele when he set his three conditions. While Justice Mahoney set four conditions[160], the most important condition that the aboriginal litigants must satisfy is that their ancestors comprised an "organized" society. McNeil has attacked this judgement on the basis of its own inherent inconsistencies.[161] He questions the origin of these criteria and speculates that if they are justified on the basis that only an organized society could produce a system of property law, then "what happens if that law did not provide for exclusive occupation by the society, another of Mahoney's requirements."[162] Other eminent scholars in this field have also attacked the

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[160] The four conditions are: 1. that they and their ancestors were members of an organized society, 2. that the organized society occupied the specific territory over which they assert the aboriginal title, 3. that the occupation was to the exclusion of other organized societies, 4. that the occupation was an established fact at the time sovereignty was asserted by England.

[161] Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Straight-jacket," in Matt Bray and Ashley Thomson eds., TEMAGAMI A Wilderness Debate (Toronto: Dundern Press, 1990). Professor McNeil is an assistant law professor at Osgoode Hall.

[162] Ibid., p. 187

decision.[163] Michael Asch bluntly accuses Justice Mahoney with ethnocentrism and violating the principle of cultural relativism forged by Calder.[164]

The examination of the Robinson-Huron treaty has to do with a debate on extinguishment. While both the Teme-Augama Anishnabai and the Government of Ontario agreed that members of the tribe proper had never signed Robinson-Huron, Ontario nevertheless argued that others had signed on behalf of the tribe. This, they argued, had the effect of extinguishing any aboriginal title in the area as Robinson-Huron was clearly intended to cover the land claim area, in the opinion of the province. To this, the Teme-Augama Anishnabai countered that the Royal Proclamation stipulated that extinguishment can only take place when the tribe had decided to dispose of its lands, which could only be done by a sale to the Crown at a public meeting of the Indians called for that purpose.

Ontario furthered their argument by challenging the existence of the Anishnabai as a continuous tribe since 1763. They also contended that the tribe had in any case adhered to the treaty in 1883 by requesting and accepting annuity payments.[165] To

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[163] O'Reilly indicated that he thought that Justice Mahoney's conclusions do not logically flow from the decisions he cites. See James O'Reilly, Comprehensive Land Claims Litigation, p. 26.

[164] Cultural relativism refers to a situation where no culture can be seen as inferior to another. See Michael Asch, Home and Native Land, Aboriginal Rights and the Canadian Constitution (Scarborough: Nelson, 198), pp. 53-4.

[165] Annuity payments were accepted by band members from 1883 until 1979 when they began to return the cheques to the government uncashed. According to McNeil, "Although adhesions to Indian treaties are common enough, this is the only instance I am aware of where an Indian tribe has been held to have adhered to a treaty merely by (continued...)

be prudent, the province further argued that ownership of the disputed area had fallen to the Crown in Right of Ontario by virtue of administrative action and legislative competence. To this, the Teme-Augama Anishnabai replied that they had never signed a treaty nor adhered to Robinson-Huron thus Ontario could not possibly possess title as their aboriginal title had not been extinguished. The task to prove aboriginal title inuring as a result of historic occupation is thus contrasted with the task of the provincial government which was to provide evidence of the extinguishment of aboriginal title by treaty, by legislation, or by administrative action.[166] The Royal Proclamation of 1763 established the principle of extinguishment of aboriginal rights through treaty. As explained in chapter two, at the very least, the Royal Proclamation recognized the aboriginal right of occupancy. Calder further confirmed that aboriginal peoples might still possess aboriginal rights if title had not been extinguished. Thus the requirements for evidence are of critical importance here: Justice Steele had to decide between the common and statutory law principles of extinguishment, which requires the government to provide evidence, and on the other hand he had the common law principles of land law which required the defendant to provide evidence of ownership.

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[165](...continued)
accepting the benefits of it. Adhesions generally take the form of officially executed documents, which are signed by the parties in the presence of witnesses after the terms of the treaty have been interpreted and explained." See Kent McNiel, "Temagami Indian Land Claim," p. 194.

[166] Attorney-General for Ontario v. Bear Island Foundation, p. 367.

On the issue of the Robinson-Huron treaty, Justice Steele ruled that the Anishnabai's ancestors "were either parties to the Treaty in 1850 or adhered to it in 1883."[167] Thus despite the documentary evidence presented in chapter two, which indicated that the Teme-Augama Anishnabai had neither signed a treaty nor agreed to the extinguishment of title, the Robinson-Huron treaty was nevertheless held prejudicial to their case. In a sense, however, as far as Justice Steele was concerned, the case as to whether or not the Anishnabai were adherents to Robinson-Huron was secondary to the fact that the government of Ontario had extinguished their aboriginal title through administrative action.

He also ruled that the Crown could unilaterally extinguish aboriginal rights. According to Justice Steele:

> At that time, Europeans did not consider Indians to be equal to themselves and it is inconceivable that the King would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense.[168]

The Crown was not required to have a formal treaty with aboriginal peoples because, according to Justice Steele, Europeans considered "Indians to be inferior beings." Therefore any treaties that had been signed were not necessary agreements between nations, but instead were convenient arrangements made by the colonial administrators. Thus aboriginal title could be extinguished by treaty, legislation or even administrative

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[167] Ibid., p 354. 1883 was the year the federal government began making annuity payments to the band.

[168] Ibid., p. 386.

action.[169] In this case, the Public Lands Act of Ontario, under which land patents had been issued to approximately 28 square miles of land scattered throughout the land claim area, effectively extinguished the aboriginal title of the Teme-Augama Anishnabai, according to the decision.

Later in the same year, the Supreme Court of Canada established in Simon v. the Queen that strict proof of extinguishment of aboriginal title must be provided by the Crown when the issue arises.[170] Justice Steele's decision is certainly not compatible with this decision. The decision of the Supreme Court in Simon does indicate the divergent paths courts can take on similar issues and suggests that adjudication is indeed an unpredictable process.

Following the decision upholding Ontario's petition, the tribe immediately rejected not only the decision, but also the legitimacy of the institution itself. According to Chief Gary Potts:

> Obviously the decision was totally against us. What is particularly disturbing about the judgement is that it shows the judicial system is incapable of protecting aboriginal rights when they are in conflict with settlers' claims, at least as far as this particular judge is concerned.[171]

The decision against the Teme-Augama Anishnabai did not quell their desire to press their claim. In one sense, the decision gave Ontario an advantage because it meant that the Teme-Augama Anishnabai apparently did not have a legal claim. In another

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[169] Ibid., p. 354.

[170] See James O'Reilly, "Comprehensive Land Claims Litigation" in Native Land Issues, Canadian Bar Association, pp. 30-31.

[171] "Courts Not Capable of Protecting Rights, Chief of Band Says," Globe and Mail, 13 December 1984, p. M8.

sense, the decision was inconclusive not only because the Teme-Augama Anishnabai were not prepared to drop their demands, but also because of the way that the decision was so overwhelmingly in favour of the provincial position. The apparent extremity of the decision in this regard led some involved with the claim to consider it an unreasonable decision.[172] Thus judicial denials of aboriginal title are not the end of the issue.

Armed with a judicial victory, and frustrated by an inability to settle the land claim, the provincial government proceeded to permit the logging companies to extend the Red Squirrel road into areas of old growth forest in the spring of 1989. The Teme-Augama Anishnabai, rejecting the decision of the Supreme Court of Ontario, blockaded the road throughout the summer and into the fall. A number of protesters were subsequently arrested, including Chief Gary Potts. Following his acquittal in the fall of 1990,[173] Chief Potts remarked

> The court is the last fortress, the last wall. It is starting to crumble because the foundation is immoral. It is immoral because they say they own the land. They do not. When we are acknowledged by the courts they will find that we have meant no harm. We will not deprive them of their right to be Canadians. When the courts have honour, integrity and morality, then the institutional laws of Canada will represent them. They have nothing to fear from us. When that happens, Canada will be recognized as a great country. When they recognize n'Daki-Menan [the

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[172] Interview, Senior federal official. Provincial officials also expressed surprise at the single sidedness of the decision.

[173] The judge ruled that Chief Potts could not be found guilty because he honestly believed that the land the logging road would extend into belonged to the Teme-Augama Anishnabai. Therefore his actions were justified. This is known as a "colour of right."

> name the Teme-Augama Anishnabai give to the area they claim], when legal institutions realize our rights, this will be an honest country.[174]

The Tribe's actions clearly indicate that it were not willing to give up their fight simply because of an adverse decision. Chief Pott's words clearly demonstrate the lack of legitimacy that the courts can have in aboriginal communities. His words more subtly indicate the distance from which he and his tribe view courts. The courts may be a useful tool, but they are an element of alien domination.

Justice Steele's approach to the conflicting legal principles, restricted the capacity of the Teme-Augama Anishnabai to successfully argue their case while at the same time it was extremely lenient towards the government of Ontario. Under Justice Steele's new interpretation, strict evidence of extinguishment was not necessary.

This analysis, then, should leave an indication of the processes at work within judicial decision-making. Justice Donald Steele, confronted with (A) two conflicting legal principles and (B) the unique Temagami situation of a group of aboriginal peoples overlooked when colonial officials from Upper Canada were in the region arranging a treaty, had the capacity to, in effect, make law by weighing the two principles. According to James O'Reilly, a lawyer involved with both the James Bay Cree and the Lubicon Lake Cree, it was a stinging setback for aboriginal case law.[175] Although Hall states that the clear intent of Justice Steele was to "deny that aboriginal rights have any validity other than what has political masters in the provincial

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[174] Chief Gary Potts quoted in Arnie Hakala, "Potts Acquitted of Mischief," North Bay Nugget, 29 November 1990.

[175] O'Reilly, "Comprehensive Land Claims," p. 29.

government may chose to afford them," such an extreme condemnation is perhaps an overstatement, given the facts.

In terms of integrative theory, this example highlights some of the weaknesses of adjudication. Instead of being a strictly rational decision-making body that objectively searches for the logically correct decision, elements of subjectivity are also involved. Subjectivity, in itself is not an undesirable element except that in this instance it appears in an institution which has carefully groomed an alternate image of itself. Instead of unifying conflicting interests, the adversarial confrontation in Attorney-General for Ontario v. Bear Island Foundation et al. has driven deeper animosities. In order to understand the inherent incompatibility of adjudication and land claims, one must examine the purpose of adjudication and the nature of the dispute before the courts.

CONCLUSION

The foregoing discussion examined the nature of integrative institutions and suggested that comprehensive land claims place exogenous demands upon the courts. The conclusion drawn from this was that the courts should not be given the responsibility for dealing with comprehensive land claims. In the real world, however, comprehensive land claims do come before the courts. When this occurs, the courts react unpredictably except that they continue to refuse to give meaning to "aboriginal rights."

There are several reasons, beyond simply cost and delay, why the courts are not a useful forum for the resolution of land claims. The courts can only make decisions on legal disputes. The courts are not, and never have been, forums for the resolution of social problems. A land claim can only be dealt with in a courtroom to the extent that there is uncertainty in the law. The successful resolution of comprehensive land claims requires negotiation and bargaining because at the core of a comprehensive land claim is the establishment of a new relationship between aboriginal peoples and the state. In short, comprehensive land claims are a political problem requiring pragmatic and innovative solutions which are beyond the competence of the courts.

The courts only become involved in a claim at the point where the actors resign themselves to an inability to reconcile their differences on their own (upon which they may or may not agree). While aboriginal peoples often perceive their struggle as one of self-preservation and dignity, the courts narrowly focus on principles of law based on a non-aboriginal value system. Yet much more is at stake in a land claim than simply legal rights enjoyed under the law. For aboriginal peoples, as the federal government notes, comprehensive land claims are wrapped up in the concept of self-identity and self-determination.[176]

While court victories provide substantial support for the winning side, they do not end the conflict. A decision that strikes down a land claim does not cause aboriginal peoples to lay down their demands. The court is simply viewed as another

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[176] Canada, DIAND, Comprehensive Land Claims (Ottawa 1987).

obstacle placed in their path by non-aboriginal society. Conversely, a decision in support of a land claim has no meaning until all parties can sit down and negotiate how they will all live by the decision. In all cases negotiation is the final step to the resolution of the dispute.

The result of the decisions against the Teme-Augama Anishnabai has been to encourage militancy and to discourage the conciliatory attitudes that will be necessary if negotiation is ever to be successful. Justice Steele's decision rejected virtually every argument the tribe made. His words are not without effect. Treaties, according to Justice Steele, were only entered into where there was a "threat of insurrection." The implication of this statement is ominous, as Hall notes, for if the only reason the Crown will enter into a relationship with aboriginal nations is because of the threat of insurrection, then the clear message sent to aboriginal people's is that civil disobedience, and only civil disobedience, commands the attention of the Crown.[177]

Although they have been dealt with in separate chapters here, adjudication and negotiation do not function in isolation of each other. The antagonism generated by litigation has an effect on negotiation. Beyond simply the amount of time adjudication consumes, it also encourages polarization. It is, after all, an adversarial process. It confirms that each side is engaged in a struggle with potentially far reaching consequences. It encourages each side to overstate their case in an effort to make sure that their argument is watertight. But it is also a process that involves people and

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[177] Tony Hall, "The Ontario Supreme Court on Trial: Mr. Justice Donald Steele and Aboriginal Rights," Paper for Presentation at the Indian Heritage Conference, Walpole Island Reserve, Ontario, 15 and 16 November 1985, p. 7.

human emotions. In the end, it is a destructive process when dealing with comprehensive land claims, far from the unifying process of integrative institutions.

CHAPTER FOUR

THE NEGOTIATION OF COMPREHENSIVE LAND CLAIMS

The negotiation of aboriginal land claims is an ad hoc process. Notably absent are forums within which political actors can deal with the issues. By contrast, regional cleavages in Canada can be mediated in Parliament. Political conflict between aggregated sections of society have a well defined forum with agreed upon rules and procedures within which bargaining can take place. But Parliament is not a forum where aboriginal land claims are negotiated, nor are there any existing institutions within which comprehensive land claims can be negotiated.

The second chapter introduced a number of technical terms and concepts regarding aboriginal land claims. This chapter will examine the negotiation of aboriginal land claims. I will argue that a proper institution within which comprehensive land claims can be resolved is not currently available. Due to that absence both the federal and provincial governments have imposed their own procedures which are inherently detrimental to the process of negotiation.

AGGREGATIVE THEORY

Critical elements of any democratic society are the bodies of institutions which make decisions on the basis of community consensus. In Canada, periodic elections permit diverse interests the opportunity to select representatives to Parliament and provincial legislatures. Parliament is ideally a meeting place where all interests have representation and where compromises can be struck.[178] The ability to reach compromise peacefully between diverse interests is crucial to liberal democratic societies.

Political processes of aggregation, as defined by March and Olsen, are fundamentally processes of "interests, power and exchange."[179] Importing theories of economic exchange, aggregative institutions emphasize rational actors bargaining within a forum of agreed upon rules of exchange such as Parliament or the United States Congress, etc. Bargaining results in majority coalitions upon which decisions

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[178] Of course this is not the entire picture. One might argue that the single member plurality system distorts the representation of interests in Parliament. One might further argue that party discipline prevents the true representation of diverse interests within Parliament. On the other hand, one could argue that the substitution of regional cleavages for class cleavages in the party system has resulted in a brokerage style politics where decision-making is indeed a result of compromise between diverse interests. Thus while one cannot authoritatively declare Parliament to be an institution functioning on true political compromise, those elements do indeed have a strong tradition within that institution.

[179] James G. March and Johan P. Olsen, "Popular Sovereignty and the Search for Appropriate Institutions" Journal of Public Policy 6:4, p. 345

are made. While this will, with any decision, exclude some segments of society, it is recognized by all actors in the process that not all preferences are possible.

The purpose of aggregative processes is to transform individual and group preferences into collective choices.[180] This is achieved through some mechanism of majority rule. Unlike integrative institutions which seek to shape preferences and create a unity of thought and action, aggregative institutions collect prior preferences and by way of bargaining and coalition formation arrive at a decision.

The relative success of aggregative institutions is normally gauged according to the extent to which the process can arrive at Pareto optimal[181] solutions. This evaluative criterion, however, is subject to two conditions that qualify further the success of the process. The first condition, as identified by March and Olsen, is the extent to which initial endowments are equitably distributed among all participants. The second condition examines the preferences of participants to determine the extent to which they are suitable for an aggregative process.

The question of initial endowments has to do with the equitable distribution of rights, resources and authority. Yet in any system of majority rule, some segments of society will habitually be deprived of political power. These are the groups lacking initial endowments who are not able to organize themselves and achieve the access

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[180] March and Olsen, "Popular Sovereignty," p. 345.

[181] A situation in which nobody could be made better off without someone else being made worse off.

other sectors of society have attained. It is in these situations that intervention by some higher authority is required. According to March and Olsen,

> The proposition is that they [disenfranchised groups] have a right to be represented, that any aggregative political system deprives them of that right and that therefore it is only through the intervention of their trustees, found in the institutions of the state, that they can be properly protected."[182]

The question of preferences is broken down into a further three conditions. First, the participants must agree on a set of rules through which preferences may be aggregated. Second, the preferences must be precise. Precise suggests that the preferences are consistent, stable and are indeed prior preferences in that they are genuinely exogenous and not merely products of the existing institutional constraints. Third, the preferences must be tolerable, they cannot be noxious to the existing social order such as race laws similar to those of the Third Reich would be to all liberal democracies.

In summary, the process of negotiation is dependent on at least three conditions. First, the rules and procedures must be applied to all equally and each participant must accept those rules. Second, actors must possess sufficient resources to be able to competently bargain on their own behalf and in those situations where this condition is not met, state intervention is necessary. However, when bargaining involves state actors, the state may find itself in a conflict of interest situation, supporting those with insufficient resources may undermine the state's own success at

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[182] March and Olsen, "Popular Sovereignty," p. 356.

the bargaining table. Third, all participants must be able to define clearly their preferences.

The following sections argue that an institution for the negotiation of comprehensive land claims has never been established. Therefore in the absence of such an institution a number of norms have been developed by the federal and provincial governments that perpetually place aboriginal peoples at a disadvantage when they attempt to negotiate a comprehensive land claim. Since the negotiation of comprehensive land claims is a unique situation, pitting aboriginal peoples against institutions of the state, it is clear that they cannot possibly possess the immense resources of the agents of the state. This being the case, the federal government has a fiduciary obligation to aboriginal peoples to improve the situation. However it is also clear that the federal government has not lived up to this obligation.

THE NEGOTIATION OF THE TEMAGAMI LAND CLAIM

Substantial negotiation of the Temagami land claim took place over a two year period from 1980 until 1982. I refer to it as substantial because it was during this period that tripartite negotiations involving the Teme-Augama Anishnabai, the government of Ontario, and the federal government, were attempted. At no other time did tripartite negotiations occur. The initial period, 1973-1980, was a time when talks were held on a bilateral basis between Ottawa and Ontario, Ottawa and the Teme-Augama Anishnabai, and Ontario and the Teme-Augama Anishnabai. The final period

from 1982 and extending into the present takes place after the failure of tripartite negotiations and after litigation had begun at the Supreme Court of Ontario. When the land claim was under examination by the Supreme Court of Ontario and later by the Appeals Court of Ontario and the Supreme Court of Canada, negotiation did not take place. However, in the interval between the Appeals Court and the Supreme Court of Canada examinations, Ontario and the Teme-Augama Anishnabai did have discussions.

The examination of each period will begin with a description of the policy community as it existed at that point in time. With the exception of the Teme-Augama Anishnabai, the representatives of other actors have changed over time. Their internal structures also changed, a significant point for the study at hand.

Confusion and Discovery (1973-1980)

Throughout the 1970s and into the 1980s, the Department of Indian Affairs and Northern Development (DIAND) was organized around four main programmes: Indian and Inuit Affairs (IIA), Northern Development, Parks Canada, and Administration.[183] IIA's functions included the delivery of services to aboriginal peoples, the execution of trustee responsibilities, and the fostering of development and opportunity among Indians. The Administrative Program provided corporate policy as well as advisory and administrative advice to the other programs in the department.

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[183] Ponting and Gibbins provide an excellent examination of these structures in Ponting and Gibbins, Out of Irrelevance, pp. 97-138.

Northern Development, as its title suggests, dealt with the socio-economic development of the North, particularly with reference to the Inuit, Cree and other northern aboriginal peoples. Parks Canada was transferred to the Department of the Environment in 1979.

The Office of Native Claims (ONC) was established in 1974 but was not housed within any of the four major programmes. ONC managed the Indian Rights and Treaty Research Program under which it had a responsibility to research claims, provide tribes with funds to research claims, consult with the Department of Justice and make recommendations to the Minister. Although ONC actually managed claims negotiations, such as the Temagami claim, the broader parameters setting out how the government approached particular claims were determined by a committee of the Deputy Minister, the Assistant Deputy Ministers, and senior executive directors.[184]

A separate agency designed to deal with aboriginal grievances was the Indian Claims Commission (ICC) with Dr. Lloyd Barber as the Commissioner.[185] The ICC was empowered to examine treaty and other grievances, but was not given the ability

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[184] Ponting and Gibbins, Out of Irrelevance, p. 102.

[185] For a synopsis of this history and the establishment of the Indian Claims Commission see Vic Savino "The 'Blackhole' of Specific Claims in Canada, Need it Take Another 500 Years?" in Canadian Bar Association. Native Land Issues (See You in Court...) proceedings from the Conference. Winnipeg, Manitoba. April 28-29, 1989.

Dr. Barber was the Vice-President of the University of Saskatchewan, and was apparently a confident of Trudeau and other senior Liberals. See J. Rick Ponting and Roger Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworths, 1980), p. 154.

to examine comprehensive claims.[186] Although the ICC had an ombudsman-type role, comprehensive claims were beyond its mandate. Contemporary observers noted that this exclusion was:

> an illogical exclusion as the Commissioner can inquire into the performance of the terms of the treaties but is precluded from considering the very basis upon which the Indians entered into the treaties and thereby agreed to "cede, release, surrender and yield up" their lands.[187]

Barber's primary contribution was to influence DIAND to be more "sympathetic" towards aboriginal land claims.[188]

In response to the increased pressure Ontario felt following Calder (see chapter 2), the province made two changes at the bureaucratic and cabinet level in 1976. Within the Ministry of Natural Resources (MNR), the Office of Indian Land Claims was established. René Brunelle, the member from Cochrane-North, was appointed as Minister without portfolio for Native Affairs. The following year Brunelle became the Provincial Secretary for Resources Development while still maintaining his Native Affairs portfolio.[189] Brunelle's duties included the coordination of policy

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[186] Peter A. Cumming and Neil H. Mickenberg eds. Native Rights in Canada 2nd ed. (Toronto: Indian-Eskimo Association of Canada, 1972) pp. 263-264. See also Sally M. Weaver, Making Canadian Indian Policy, The Hidden Agenda 1968-70. (Toronto: University of Toronto Press, 1981), pp. 181-182.

[187] Sally M. Weaver, "The Joint Cabinet/National Indian Brotherhood committee: A unique Experiment in Pressure Group Relations" in Canadian Public Administration vol. 25, no. 2 (summer 1982), p. 220.

[188] Weaver, Canadian Indian Policy, p. 182.

[189] Created in 1972, Provincial Secretaries were given responsibility for an entire policy field. They coordinated programs between ministries and chaired cabinet (continued...)

development for Native Affairs and the coordination of communications between Ontario and Native Organizations.[190]

The first meeting between federal officials and the Teme-Augama Anishnabai to discuss the claim took place in 1975 with Barber and the ICC acting as a facilitator.[191] After several meetings when Bruce Clark, the lawyer representing the Teme-Augama Anishnabai, indicated that the tribe intended to go to court, Barber apparently became "greatly annoyed."[192] This heated meeting was the last involvement of Barber and the ICC in the conflict.[193]

The federal government was represented by officials from ONC and a solicitor from the Department of Justice. The delay between the 1973 register of the cautions and these 1975 meetings permitted the tribe time to research their claim. There was

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[189](...continued)
committees for each of their respective policy fields. The Provincial Secretaries for Resources Development and the dates of their initial appointment were: Rene Brunelle (1977); Russell Ramsey (1981); Lorne Henderson (1982); Norm Sterling (1984). See James C. Simeon, "Policy-Making in the Cabinet" in Donald C. MacDonald ed. Government and Politics of Ontario Second edition (Toronto: Van Nostrand Reinhold Ltd, 1980), pp. 105-106.

[190] George G. Bell and Andrew D. Pascoe, The Ontario Government, Structure and Functions (Toronto: Wall & Thompson, 1988), p. 377.

[191] Letter, P.F. Girard (Executive Director, Office of Claims Negotiation) to J.B. Hartley (Acting Director, Policy, Planning and Research) August 29, 1974. [THRC]

[192] Memorandum, M. Mogford to Dr. J.k. Reynolds (DM, MNR), February 27, 1975. [ONAD]

[193] The ICC was dissolved in 1978. In 1990 the federal government issued the terms of reference for a new Indian Claims Commission, under the Chair of Harry LaForme, which will examine specific claims that are at least 15 years old.

not any consideration of conducting tripartite meetings at this time. Instead federal officials met with tribal officials and subsequently with provincial officials.

When federal officials met with MNR personnel in early February 1975, they described federal processes regarding land claims and informed MNR officials of the extent and content of discussions between the tribe and the federal government. They made the distinction between comprehensive claims (normally in the Northwest Territories, the Yukon, Northern British Columbia and northern Quebec) and specific claims. Federal officials indicated that the Temagami tribe was attempting to make a comprehensive claim.[194] Provincial officials decided to work with federal official in order that a joint position/offer could be presented to the tribe.[195]

What was probably unknown to federal officials at the time was the struggle taking place within the government of Ontario between the Ministry of the Attorney General (MAG) and MNR. Each Ministry had opposing views as to how the land claim should be approached. MNR favoured litigation from the earliest stages of the claim while MAG preferred negotiation. MNR's concern was to manage natural resources. They also did not want to set any sort of precedent that could damage their ability to manage natural resources in the future. Therefore an internal memorandum to an Assistant Deputy Minister of Natural Resources cautioned:

> surely with so little legal foundation the government would be most reluctant to open the Pandora's box of negotiations with the Indians

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[194] Memorandum, M. Mogford to File, February 4, 1975/

[195] Memorandum, M. Mogford to J.K. Reynolds. July 31, 1975. [ONAD]

> especially when the Indians insist that the government make the first cash offer,

and concluded:

> once the government makes an offer it will be very difficult to then deny liability and move to litigation. In addition we should not presume that the Indians will surrender all their rights in any settlement and we may thus be faced with additional claims in the future.[196]

Part of MNR's desire to litigate stemmed from a concern for both public perception and for other, interested, third parties. In 1974 an internal assessment noted that

> If we continue doing nothing it could be construed by the [Bear Island] Foundation as a sign of weakness and by the public as mismanagement on the part of our Ministry.[197]

The Report recommended a court assessment of the claim and concluded that

> This approach would permit the whole matter to be aired in the proper forum and, at the same time, protect innocent third parties from the undue hardship they are presently facing as a result of the rigid position both sides are presently taking.[198]

At the same MAG reports were recommending exactly the opposite.[199] Two

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[196] Memorandum. M.S. Smith, Director, Legal Services, to A.J. Herridge, Assistant Deputy Minister, Resources and Recreation. December 20, 1974. For similar arguments see: Letter. J.K Reynolds, DM, MNR, to F.W. Callaghan, DM, MAG. June 19, 1974; Memorandum. J.R. McGinn, Director, Lands Administration Branch, to J.K. Reynolds, DM, MNR. March 5, 1975.

[197] Ontario. Ministry of Natural Resources. "Review of the Difficulties Facing the Ministry Due to the Registration of the Caution." 1974.

[198] Ibid.

[199] At the time this apparent conflict was apparent to concerned observers. In a letter written to the Deputy Minister of MNR, the local MPP commented,

> One aspect of my research which deeply disturbs me has been that your Ministry has given me the indication that they expect the Attorney General's office to resolve the Caution through the courts, whereas to me

(continued...)

exhaustive 1974 studies of the land claim recommended negotiation, one of which pointed out that litigation could not provide a quick solution, that the Ontario government at no time ever made the case that the tribe's assertions were incorrect and that litigation might irreparably damage any chances of a negotiated settlement.[200] MAG preferred to have MNR negotiate the settlement because, in its opinion, having found that the tribe had a claim of some validity, the Ministry was not convinced that they could win in court.[201]

A decision on the provincial approach to the land claim could not be taken until the struggle between MNR and MAG had been resolved. By 1976, Cabinet made the decision to challenge the cautions in court (court action began in 1978). The resource interests of the government successfully deflected the apprehensions expressed by MAG.

Once the initial classification of the Temagami claim had been made, the federal government refused to alter its position. Temagami was to be dealt with

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[199](...continued)

> the Attorney General's office has clearly indicated that they feel that the Band's claim is sufficiently strong that they do not want to argue the case in the courts and thus risk the possibility of a damaging precedent being set. The Attorney General's office would much prefer that the Ministry of Natural Resources negotiate a settlement. But as I said my dealings with your Ministry has indicated that you expect the Attorney General's office to solve the problem through the courts.

Letter, Bob Bain, MPP, Timiskaming, to J.K. Reynolds, DM, MNR. February 24, 1976.

[200] See Ontario, MAG, "Bear Island Foundation, Temagami Indian Land Claim," (Toronto 1974). See also Memorandum, F.W. Callaghan, DM, MAG, to J.K. Reynolds, DM, MNR, 25 June 1974.

[201] Memorandum. F.W. Callaghan, DM, MAG, to J.K. Reynolds, DM, MNR. June 25, 1974.

strictly as a specific claim by Ottawa.[202] However the agency responsible for that classification, ONC, was not a neutral independent agency.[203] As a branch of DIAND, ONC had an inherent interest in restricting the classification of this claim. Comprehensive claims are much more time consuming and costly than specific claims. They require a substantial investment in the process of negotiation and are likely to require a substantial investment for the settlement of the claim. To limit the number of comprehensive claims that the department would deal with, DIAND only accepted six comprehensive claims for negotiation at any one time.[204] Another method designed to alleviate the burden was only to accept claims from those areas where treaties had clearly never been negotiated (northern areas). Consequently the six comprehensive claims currently under negotiation are all being dealt with by the Comprehensive Claims Branch of Northern Affairs.[205]

Clearly the rules governing the approach to the claim did not apply to all equally. The federal government decided that the Temagami land claim must be treated as a specific land claim. However the federal government is in a conflict of interest when it makes such a decision. Although the federal government still has a

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[202] See Canada. DIAND. Annual Report 1976-77 (Ottawa, 1977). See also the reports for 77-78 and 78-79.

[203] Savino, "The Blackhole of Specific Claims," pp. 8-11.

[204] Canada. Task Force on Program Review. (Nielsen task force). Indian and Native Programs (Ottawa, April 1985), p. 251. See also the Coolican Report at page 13.

[205] The six claims are: Council of Yukon Indians (CYI Claim), Tungavik Federation of Nunavut (TFN Claim), Dene/Metis Claim, Conseil Attikamek Montagnais (CAM Claim), Newfoundland/Labrador Claims and the Nishga Claim.

fiduciary duty to aboriginal peoples, it was in Ottawa's interest to deny a comprehensive claim in this case because of added resources required to settle a comprehensive claim and because of the implications such a classification may have had for other claims.

For Ontario, the designation of comprehensive or specific on a land claim is immaterial. The province has responsibility for the management of Crown lands and natural resources. The evidence indicates that Ontario continued to be pressured by the same interests that had dominated its approach to the claim since the 1880s. MNR would not permit its control over the Crown lands in the land claim area to be eroded by the Teme-Augama Anishnabai. The province initially had difficulty reaching this decision because MAG advocated negotiation. However the Minister who ultimately had control over the province's approach, René Brunelle, succeeded in obtaining Cabinet approval for the strategy recommended by officials within his portfolio. Without the Ontario Native Affairs Directorate, the government lacked an in-house advocate for aboriginal peoples that could have argued for a redress of fundamental injustices. As a result, tripartite negotiations began with a provincial commitment to attempt to adhere the Teme-Augama Anishnabai to the Robinson-Huron treaty and if this failed, to litigate the claim.

Negotiation and Failure (1978-1982)

When negotiation of the claim finally began in 1980, it was conducted under the aegis of the Indian Commission of Ontario (ICO). ICO is a neutral tripartite body supported by the First Nations of Ontario, the Government of Ontario and the Government of Canada. Established in 1978, it receives approximately two thirds of its funding from Ottawa and the other third from Ontario.[206] The Commissioner of the ICO, originally Mr. Justice Patrick Hartt[207], also serves as the Chair of the Tripartite Council of Ontario (TCO). TCO is composed of Federal and Provincial cabinet ministers as well as the Chiefs or heads of groups of First Nations. The Council has a corporate overseer function, examining and making recommendations on the breadth of aboriginal-state relations in Ontario.

Unfortunately the ICO has not proven to be an effective forum for the negotiation of comprehensive land claims. The ICO acts as a secretariat to the TCO and to the individual claim negotiations. Claims must be voluntarily presented to the

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[206] For the 1988-89 year it had a total operating budget of $529 123. Although the ICO is an independent body and is not required to file reports, an estimate of the ICOs budget can be derived from the Public Accounts of Ontario and the Federal Government. In 1989 the provincial government allotted $163 123 to the ICO. See Ontario. Ministry of Treasury and Economics. 1988-1989 Public Accounts. Volume 3, Details of Expenditure. (Toronto: 1989), p. 193.

Over the same period the federal government provided $366 000 for the ICO. See Canada. Receiver General for Canada. Public Accounts of Canada, vol II, Part II, Additional Information and Analysis. Ottawa, 1989.

[207] Justice Hartt was succeeded in October of 1985 by Roberta Jamieson, who was succeeded by Harry S. LaForme on June 1, 1989.

Commission and all parties must agree to use this tripartite forum before proceedings can begin. Upon initial agreement the ICO's principle task is to create an equitable and open forum conducive to negotiation. To accomplish this the ICO has six persons on staff including the commissioner. Of those, one staff member is permanently assigned to the policing negotiations,[208] one is an Executive Assistant/Policy Advisor, one is a claims advisor, and the remaining two are office administrative staff.

The ICO does not have a set process for dealing with specific problems nor does it have a mandate to intervene when comprehensive claims arise. Each problem is dealt with on a case by case basis. Since participation on any issue is voluntary, there is nothing compelling all three parties to attend meetings and to actively seek a solution. When the Temagami negotiations began, the federal government sent specific claims negotiators to the ICO sponsored meetings. They began the negotiation process with the understanding that the claim was to be handled as a specific claim despite the insistence of the Teme-Augama Anishnabai that they had a comprehensive claim. The federal negotiators also represented or responded to other federal government departments such as Environment, Fisheries and Oceans, and Energy, Mines and Resources, as well as the program branches within DIAND.[209] The province was represented by negotiators from the Office of Indian Resource

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[208] Part of an effort to provide aboriginal bands with control over local law enforcement.

[209] Canada. Department of Indian Affairs and Northern Development. Departmental Audit Branch. Review of the Comprehensive Claims Process. Ottawa, 1983. p. 17.

Policy of MNR and Rene Brunelle.[210] Once again the province was to set aboriginal issues in conflict with resource management issues. Both levels of government began the negotiations with basic positions that they were unwilling to compromise.

The record of success of the ICO has been marginal and those areas where success has been met have generally not been in the area of claims negotiation. According to Ian Scott,

> I cannot say that we have resolved as many issues as I would have liked [at the ICO] -- nonetheless, there has been a real accomplishment and this lies, I believe, in the preservation and development of an independent and neutral forum in which all parties are free to bring issues for consideration.[211]

The 1987 ICO Report indicates that only one land claim, the Garden River Claim (a specific claim), was actually settled through ICO involvement over the previous two years. Two of the recent major initiatives of the ICO have been negotiations on policing and education.[212]

Since the First Ministers Conferences have failed to reach an agreement on self-government, the federal government has shifted away from a "top-down" approach, entrenching self-government in the constitution, to a "bottom-up" approach, negotiating agreements at the tribal and regional level and then entrenching self-

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[210] ICO, Report, p. 19.

[211] Ian Scott, "Notes for the 1988-89 Estimate Speech of the Honourable Ian Scott," (Toronto: ONAD, 1988), p. 14.

[212] ICO, "Progress Report," (mimeo, June 1 - November 15, 1989).

government in the constitution.[213] The ICO has become the instrument of this policy approach in Ontario. Thus in late December 1985 (following the April First Ministers Conference on Self-Government) the ICO presided over the signing of a "Declaration of Political Intent" between Ontario, Canada, and the Indian First Nations of Ontario. The Declaration committed the parties to:

> enter into tripartite discussions to resolve issues relating to Indian First Nations self-government and matters and arrangements with respect to the exercise of jurisdiction and powers by First nations' governments in Ontario.[214]

When the federal government and Ontario entered into tripartite negotiations with the Teme-Augama Anishnabai, they brought preferences that were fundamentally at odds with the aspirations of the tribe. Ottawa was unwilling to re-examine the specific claims designation it had imposed. Similarly, Ontario would consider accommodating an adhesion to the Robinson-Huron treaty, but it would rather litigate than consider a more significant settlement. The ICO was incapable of softening these hardened approaches. It did not have the authority to compel all three parties to negotiate nor did it have the authority to encourage Ottawa and Ontario to be more flexible.

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[213] David C. Hawkes, Negotiating Aboriginal Self-Government, Developments Surrounding the 1985 First Ministers' Conference (Kingston: Institute for Intergovernmental Affairs) Background Paper Number 7.

[214] ICO. Report of the Indian Commission of Ontario (Toronto: October 1, 1985 - March 31, 1987) p. 32.

The End of Tripartism (1982-Present)

DIAND was reorganized into four new sectors, each designed to "support a central theme relating to policy priorities and ongoing commitments,"[215] in 1987. The four new sectors were: Self-Government, Economic Development, Indian Services, and Lands, Revenues and Trusts. Indian Services deals with housing, education, and other activities of a similar nature. Lands, Revenues and Trusts deals with reserves and land claims.

The department has further been divided into two halves creating a dual ministry under a single Minister. Indian Affairs contains the four sectors discussed above. The other ministry is Northern Affairs. This change is particularly relevant to the study of the Temagami claim since comprehensive claims became a responsibility of Northern Affairs while specific claims were now handled by Indian Affairs. This particular aspect of the reorganization has woven into the structure of DIAND an approach that considers comprehensive claims to be strictly a northern problem confined to the Yukon, the Northwest Territories, northern Quebec, and northern British Columbia. While the reorganization did not create this approach, it did institutionalize a policy that the department had pursued since Calder.

The ongoing commitment of ONC is to demand the extinguishment of aboriginal rights in exchange for a settlement of comprehensive claims. Tribes must

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[215] Bruce Rawson, "Federal Perspectives on Indian-Provincial Relations" in J. Anthony Long and Menno Boldt eds. Governments in Conflict? Provinces and Indian Nations in Canada (Toronto: University of Toronto Press, 1988), p. 26.

relinquish their aboriginal rights, which are general and ill-defined, in return for a set of well defined rights. The Coolican task force pointed out in 1986 the dangers of extinguishing rights which the constitution had so recently affirmed.[216] To which the Teme-Augama Anishnabai added:

> while words like surrender and extinguishment crept into the treaties to satisfy bureaucratic necessities in the Crown's system, it clearly was never the intention or the belief on the part of the First Nations that they were extinguishing or surrendering their original title to their respective lands. To my knowledge nowhere in Canada is there a First Nation who would give up their lands to the prejudice of their children. The purchase of land was an unknown concept in First Nation culture. The loan and use, with consent of First Nations, of lands and waters to other Nations was practised, as well as alliances for various purposes.[217]

The Ontario Native Affairs Directorate (ONAD) emerged from the union of the Office of Indian Resource Policy in MNR (formerly the Office of Indian Land Claims) and the office of the Provincial Secretary for Resources Development. Staff from both offices were transferred to the Ministry of the Attorney-General in 1985. The Minister, Ian Scott, had also been given the Native Affairs portfolio. Initially those staff transferred to MAG comprised an ad hoc secretariat to the Minister. Gradually they took on more and more responsibility for the management of corporate native affairs policy and officially became the Ontario Native Affairs Directorate in 1987. MNR was left with only the Native Lands Section which negotiates trades of Crown

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[216] Canada. DIAND. Task Force to Review Comprehensive Claims Policy. Living Treaties: Lasting Agreements (Ottawa, 1985), p. 23.

[217] Teme-Augama Anishnabai. "Teme-Augama Anishnabai Submission to Task Force to Comprehensive Claims Policy." November 2, 1985.

lands to aboriginal tribes in exchange for reserve lands when necessary.[218] The Native Lands Section does not play a role in the negotiation of land claims in Ontario, nor does MNR play a direct role in negotiations.

Although MNR was no longer directly involved in land claims, the Ministry did relinquish its position in the policy process. The Ministry was now unburdened of the responsibility inherent in the management of aboriginal land claims. MNR's primary input was now through its control of the land use debate. To manage the debate, MNR established the Temagami Area Working Group (TAWG) in December 1987 under the Chair of Dr. John Daniel, president of Laurentian University. Aside from Daniel, the committee had fifteen members representing environmentalists, labour unions, area townships, resource extractors and recreational users. The committee's mandate was to examine the land use debate, report on it, and propose recommendations for long term solutions for land use and resource use conflicts.[219] Unfortunately this process quickly deteriorated, so that the final report was individually penned by the Chair, though Daniel insists the report found its genesis in the committee hearings.[220] The report's proposals were vague, emphasizing that the Temagami area "includes so many special features that it should be managed as a

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[218] This is the case if the province needs to negotiate for a road right-of-way, or similarly, a hydro corridor (among other things).

[219] Temagami Area Working Group, Report March 1988, p. 44.

[220] Ibid, "Envoi," p. ii. Hodgins and Benedickson explicitly refer to the recommendations in the report as "Daniel's own" and "Daniel's recommendations." Clearly in their minds, the report did not indicate a collaborative effort. Hodgins and Benedickson, pp. 284-286.

model area forestry, recreation, earth and life science features and tourism that Ontario could hold up to the world" and calling for the establishment of a permanent advisory body, among other things.[221]

The actual impact of the removal of MNR from the land claims field is difficult to gauge. Chandler and Chandler noted that the creation of the Departments of the Environment and Northern Affairs (later Mines and Northern Development) were innovative developments but that they were changes at the margin that "did not displace the key participants."[222] The same argument is valid in this case. ONAD has not displaced MNR but it does provide aboriginal peoples in Ontario a voice in Cabinet that they previously did not possess. As I indicated previously, when the land claim was under examination by the successive courts, negotiation did not take place. None of the three parties wished to compromise their court positions with any possible negotiating position or with the possible outcome of negotiations. It was also considered to be an unnecessary burden on available resources to commit to negotiation when a judicial decision could completely undermine a negotiating position. The beginning of the Supreme Court of Canada case, following in the wake of the failure of tripartite negotiations, also marked the last instance when the federal government was willing to negotiate the land claim at all. Ottawa had a committed

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[221] TAWG, Report, p. 1.

[222] Marsha A. Chandler and William M. Chandler, "The Path of Resource Development" in Donald C. MacDonald ed., The Government and Politics of Ontario 3rd ed. (Toronto: Nelson, 1985), p. 328.

approach that only a favourable decision for the Teme-Augama Anishnabai could displace.

DIAND has embarked on a program in the 1980s which would devolve much of the responsibility the federal government has for aboriginal peoples to the provinces. According to one former Assistant Deputy Minister of DIAND the policy goals were:

> Devolution of programs and responsibility; extension of provincial services to Indians; amendment of the Indian Act; fulfilment of treaty land entitlements; and the involvement of Indian people in major resource development.[223]

These initiatives bring the federal government into conflict with provincial governments largely over matters of fiscal responsibility. Aboriginal peoples such as the Teme-Augama Anishnabai have become caught in the middle.

Provincial governments have grown increasingly agitated by a thinly disguised federal program to transfer fiscal responsibility for the delivery of aboriginal social services to the provinces. According to Ian Scott and J.T.S. McCabe:

> It is self-evident that in the 1980s aboriginal peoples should receive provincial programs on a non-discriminatory basis to meet their needs to the extent that provincial legislation of general application applies to them and to the extent that Ministry budget allocations and program planning permit.
>
> At the same time, provincial governments can be expected vigorously to seek appropriate mechanisms for the recovery of costs in

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[223] David Nicholson, "Indian Government in Federal Policy: An Insider's Views," in Leroy Little Bear, Menno Boldt and J. Anthony Long eds., Pathways to Self-Determination, Canadian Indians and the Canadian State (Toronto: University of Toronto Press, 1984), p. 64.

> the event that the federal government withdraws from current program responsibilities and program supports.[224]

Since discrimination on the basis of race is no longer permissible for any level of government, it has become increasingly difficult for the provinces to insist that the federal government deliver education, health and housing services to status-Indians since all other citizens receive these services on a non-discriminatory basis from their provincial government. Provincial governments have no ethical choice but to accept responsibility for the delivery of these services. Yet at the same time, they do not receive the required fiscal resources for these added responsibilities from the federal government.

CONCLUSION

The absence of institutions designed to deal with comprehensive land claims has meant that aboriginal peoples pursuing any claim have had to respond to the priorities of the federal and provincial governments. In this case, we cannot say that the rules for negotiation are mutually agreed upon and apply to all equally. The attempts of aboriginal associations to appeal to the Queen during the 1981 constitutional debate and the threats of the Teme-Augama Anishnabai to follow a

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[224] Ian G. Scott and J.T.S. McCabe, "The Role of the Provinces in the Elucidation of Aboriginal Rights in Canada," in Long and Boldt eds., Governments in Conflict?, pp 64-65.

similar route during the negotiation of their claim is indicative of a profound disagreement on rules of procedure.

Early in the life of every claim application, the federal government imposes a classification based on its own criteria that profoundly affects the direction of the claim. In the case of the Temagami land claim, the federal government pronounced it to be a specific claim and it continues to maintain that position. Except through the legal process, there can be no appeal of the federal classification.

The federal government has not significantly involved itself with the Temagami claim since 1982. Ottawa simply will not accept a comprehensive claim in the province of Ontario, when it has so many other regions, especially the north, which are not currently covered by treaty.[225] Therefore Ottawa can ill-afford such a challenge to "settled" areas. Though the federal government has a constitutional responsibility towards aboriginal peoples and a legal fiduciary duty, DIAND has embarked on an ambitious program designed to shed the federal government of many of its responsibilities towards aboriginal peoples. The result has been a struggle between provincial governments and the federal government which has adversely affected native peoples.

Although Ontario has significantly changed its approach to aboriginal land claims since 1985, when the tripartite negotiations of the Temagami land claim occurred, the provincial position was dominated by its natural resource concerns. As a result of the constitutional division of powers, Ontario accepted no responsibility for

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[225] Much of the north has recently been covered by agreements-in-principle.

the clear injustices the Teme-Augama Anishnabai suffered, nor would the province permit this land claim to serve as a precedent for other claims in the province. Ontario pursued a confrontational approach that led to litigation.

It is also clear that the Teme-Augama Anishnabai do not possess the vast resources of the federal and provincial governments. The fact that aboriginal peoples must enter a process that pits them against two levels of government makes the negotiation of aboriginal land claims a qualitatively different process than the negotiation of a collective agreement between labour and management, for example. The federal and provincial governments possess the financial resources of the state as well as its coercive elements. In order to research, negotiate and litigate its claim, the tribe relied on financial assistance from DIAND and public support.[226]

At the trial level the iniquitous position of the Teme-Augama Anishnabai may not have had an effect on their ability to mount a case,[227] however at the negotiation table it certainly did have an effect. The federal government had no stake in the claim aside from its fiduciary responsibility which it chose to ignore. The provincial government was able to order the construction of logging roads into land that the

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[226] In May 1987 DIAND withdrew funding for an appeal of the claim to the Supreme Court of Canada. The Minister stated that "those who have a stake in the outcome should raise the balance." See Matt Bray and Ashley Thomson eds., TEMAGAMI A Debate on Wilderness (Toronto: Dundurn Press, 1990), p. 150.

[227] It has been argued however that the local lawyer the Teme-Augama Anishnabai used to litigate on their behalf at the Supreme Court of Ontario, Bruce Clarke, made many mistakes that a more experienced lawyer from a large law firm would not have made.

Teme-Augama Anishnabai considered their own. The only defense available to the Teme-Augama Anishnabai was civil disobedience.

The ICO presents perhaps the best opportunity to deal with aboriginal land claims. The ICO sponsored Temagami negotiations failed because the negotiating teams from both the federal and provincial governments entered a voluntary process on terms that they had mandated for themselves. Both levels of government remained inflexible throughout. However if the ICO was to become a regular component of the negotiation process and if it had the ability to deal more authoritatively with each issue before it, then perhaps it would meet greater success. This is unlikely however since both levels of government would probably consider any enhancement of the ICO's role to be a dangerous intrusion into the aboriginal affairs policy field.

The claim of the Teme-Augama Anishnabai will inevitably require a negotiated settlement. Unfortunately the current situation simply does not provide ample opportunity for negotiation. Until the federal government is willing to accept the possibility of a comprehensive claim within Ontario, tripartite negotiation is impossible. Only when this hurdle is crossed, may the claim of the Teme-Augama Anishnabai be settled.

CHAPTER FIVE

CONCLUSION

A number of questions remain unanswered. The introductory chapter suggested that civil disobedience is the inevitable product of an inadequately designed institutional structure. But are there no other options? Why do some aboriginal groups pursue litigation when chapter three argued that litigation is the worst possible option? Is civil disobedience the necessary product of the failure of this system? Finally, has the application of the neo-institutionalist framework to the problem of persistent aboriginal demands provided any new or meaningful insights to that approach?

The immediate option available to aboriginal peoples is to negotiate their land claim. The previous chapter demonstrated the pitfalls of this approach. Canada lacks institutions capable of creating a neutral atmosphere where all parties might negotiate on an equal basis. Instead, aboriginal peoples must deal with two levels of government and the priorities that each level of government has established. The federal government imposes a classification on each claim that cannot be appealed. The classification is made on the basis of the federal government's interpretation of the claim, taking into consideration factors irrelevant to the individual claimant group. For example, one factor that led to the "specific" classification of the Temagami land

claim was the fear of setting a precedent. For if a band occupying an area previously considered to be ceded by treaty successfully made a comprehensive claim, then perhaps others could do the same. This would mean that every treaty in the country could be subject to renegotiation, clearly undesirable from the federal government's perspective. Provincial governments in Canada have become inescapable opponents of aboriginal land claims because of the division of powers (as explained in chapters two and four). Yet they are inextricably linked to the negotiation process. The historical record of Ontario's treatment of the Teme-Augama Anishnabai, as well as the contemporary record throughout the tripartite negotiations, confirm this hypothesis.

If negotiation fails, taking the land claim to court becomes a second option. However the courts were founded upon western legal traditions and aboriginal peoples had no role in creating legal institutions. Consequently the courts have difficulty understanding and incorporating aboriginal values into their decisions. In fact, the value system upon which the courts function is so far removed from aboriginal values that comprehensive claims become exogenous demands which the courts cannot comprehend. Instead the courts fall back on a subjective analysis of the problem, an analysis imbued with western legal values.

The courts are a sub-optimal approach to the problem of comprehensive land claims. In all possible cases, settlement can only be reached through negotiation. The courts are simply an intermediary step when utilized, yet they can cause irreparable damage. Litigation encourages each side to present adversarial positions in the extreme. Should the aboriginal claimant group unsuccessfully defend its claim in

court, it may not be willing to accept the court's decision as final. Instead, it will pursue its claim through other methods. Should the aboriginal claimant group successfully defend its claim in court, then negotiation will be required in order to give meaning to the judicial decision. Therefore, because the courts can only be an intermediate step, and because litigation is an unpredictable process, we can conclude that the courts are not a desirable mechanism for the resolution of land claims.

In the real world, comprehensive land claims are taken to court. But if the courts are such an undesirable option, then why are comprehensive land claims taken to court at all? The answer can be found in the frustration that underlies the whole system. For example, the Teme-Augama Anishnabai filed their claim in 1973. The federal government did not meet with the band to discuss the claim for three years, while it took the provincial government five years to even decide on an approach to the claim. It took seven years for tripartite negotiations to begin and two years for them to fail. The tribe first appealed for assistance in the 1880s and had waited ninety years before they "officially" filed a claim.

While it is not inconceivable that the courts could provide a solution for aboriginal peoples, any such perception is normally illusory. Calder provided extra impetus to the modern aboriginal rights movement but the general reaction of the courts has been negative to aboriginal rights. The process is unreliable and the consequences are significant. A favourable settlement would be much more difficult to achieve following a negative court decision. However, when negotiation appears fruitless, it may appear that little is to be lost by litigating the claim.

What options does this leave aboriginal peoples? Once the ordinary channels have been explored and found insufficient, only extraordinary measures remain, such as civil disobedience. The process of negotiation, in its current form, is biased against groups such as the Teme-Augama Anishnabai when they attempt to assert comprehensive land claims. If they then litigate, they must deal with a risky and inherently biased process. Litigation ultimately leads back to negotiation, but aboriginal claimant groups will find that the negotiation process remains a biased process. At the same time, tension and frustration have increased because of the polarization that litigation encourages. This can only be intensified by a judicial decision denying aboriginal rights.

There are, of course, costs to employing a strategy of civil disobedience. It may encourage a hardening of federal and provincial bargaining positions. Conversely, it may bring federal and provincial negotiators to the bargaining table in an effort to alleviate an embarrassing situation. Recent polls indicate that a majority of Canadians are becoming more sympathetic towards aboriginal peoples. Civil disobedience will certainly publicize the situation and may have the effect of building wide spread public support for the aboriginal position.

To suggest that civil disobedience is the necessary result of a failed system may be slightly too deterministic. One cannot suggest with certainty that a particular situation will definitely result in civil disobedience. Too many extraneous factors, such as personalities, are involved. Yet, it is clear that if the system remains as it currently is structured, then the incidence of civil disobedience will increase.

Finally, how useful has the application of the neo-institutionalist perspective been to the study of aboriginal land claims? At times the analysis seemed to collapse. For example, March and Olsen had not anticipated the effect of exogenous demands on integrative institutions. Nor had they anticipated the effect of an institutional structure that continually works to the disadvantage of one particular group for which there is no intervening body to ameliorate the situation. This, of course, raises immediate questions as to the utility of a neo-institutionalist analysis of aboriginal land claims.

Nevertheless, a neo-institutionalist analysis of aboriginal land claims has not only contributed to our understanding of the specific problem, it can also expand our understanding of neo-institutionalist theory. I can point to two themes, in particular, that run throughout the course of this thesis. The first is the lasting effect of values which influence the characteristics of institutions at their point of inception, what I have referred to as a "cultural imprint." Institutions are not value neutral. Rather they reflect the values of those who created them. Since institutions also tend to resist change, such values may persist for extended periods of time. Neo-institutionalist theory deals directly with the problem of institutional persistence. It must also address the point that certain groups may continue to be excluded because of the organizing values of the institution at its crucial formative period.

The second theme is the effect of insufficient resources on integrative and aggregative processes. March and Olsen suggested that resource poor groups must not be perpetually excluded and if the system tends to function in that way, then there

must be an intervention on behalf of the disenfranchised group so that the situation may be ameliorated. But in the case of aboriginal peoples, there has been no intervention. Aboriginal people have taken the initiative through civil disobedience, and any other means at their disposal. However neo-institutionalist theory has not addressed well how one is supposed to understand a situation when such "good faith" interventions do materialize. As we have seen, one consequence is that disenfranchised groups are forced to take extraordinary measures outside the institutional framework in order to force a response from this very institutional framework.

The question of why the required intervention may never occur is a complicated one. To answer it we must return to the concept of cultural imprint. The courts, the statutes, and judges, the whole integrative process in this case, are all products of a western European legal system transplanted to Canada simultaneously with European colonies. As I stated earlier, the integrative processes have failed because of an inability to recognize aboriginal values and traditions in the decision-making process. Cultural imprint also affected the manner by which aggregative processes dealt with aboriginal land claims. Obviously it meant that no institution was established for negotiating land claims and other problems because it was not recognized that the institutions that had been created were incapable of addressing the problem. Consequently the institutions that were established did not recognize the unique nature of comprehensive land claims. Such claims were treated as another political problem capable of resolution within the existing structures.

To conclude this thesis, the neo-institutionalist approach stresses the importance of institutions to social outcomes. By taking this approach, the question that launched this study has been framed in a unique way. Instead of focusing on aboriginal peoples and what they can do to better their own situation, we began with a question that placed institutions as the focus of study. In other words, how have the institutions of non-aboriginal culture dealt with aboriginal peoples? The solution, therefore, does not focus on aboriginal peoples, but instead takes aim at the institutions of the state.

The problems discovered by this neo-institutionalist approach are distinct from those that a sociological analysis might suggest. Sociologists frequently point to such causal factors as racism and the socializing effect of institutions. Certainly, racism is involved in the problems aboriginal peoples face on a daily basis. At the same time, it is also true that comments such as those that Arthur Meighen made seventy years ago are no longer acceptable. Despite a growing atmosphere of tolerance little has been resolved. While individuals and their attitudes might have changed, institutions have remained resistant to change. Herein lies the value of a neo-institutionalist examination of aboriginal land claims. We can come to an understanding of how the institutional design itself has led to frustration.

APPENDIX A

LIST OF KEY DATES[228]

1877 Chief Tonene asks to be taken into treaty to gain protection of his people from encroaching lumbermen and settlers.

1883 The federal government recognizes the omission of the Temagami Band from the 1850 Robinson-Huron Treaty, arranges for annuity payments, and promises to survey a reserve.

1884 A 260-square-kilometre reserve is surveyed at the southern outlet of Lake Temagami.

1894 The federal government states the Temagami case before a board of arbitrators: "The Dominion on behalf of the said [Temagami] Indians says that the lands are subject to the interest of the said Indians and that the Province ought to allow a reserve to be set apart, or approve of the reserve so surveyed by the Dominion upon such terms as to surrender of the Indian title in the remaining portions of the tract."

1901 Ontario establishes the Temagami Forest Reserve.

1910 The Department of Indian Affairs (DIA) asks Ontario for a reserve for the Temagami band. Ontario refuses.

1929 Ontario charges rent to the Temagami band living on living on Bear Island.

1933 The federal government insists that "the Province has a moral as well as a legal obligation to provide these [Temagami] Indians with a reserve."

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[228] With information obtained from Bruce W. Hodgins and Jamie Benedictson, The Temagami Experience: Recreation, Resources and Aboriginal Rights in Northern Ontario (Toronto: University of Toronto Press, 1989).

1943 The federal government purchase Bear Island from Ontario for $3,000.

1970 Bear Island Indian Reserve Number 1 is created by Order-in-Council.

1973 Chief Gary Potts files land cautions on 110 townships on behalf of the Bear Island Foundation.

1978 Ontario sues the Teme-Augama Anishnabai in the Supreme Court of Ontario.

1982 In June trail proceedings commence before Justice Donald Steele of the Supreme Court of Ontario. The trial continues for 119 days over the next two years.

1983 Ontario creates the Temagami Planning Area and the Lady Evelyn-Smoothwater Provincial Park.

1984 In December Justice Donald Steele finds against the Teme-Augama Anishnabai.

1984 Four days later the Teme-Augama Anishnabai file notice of Appeal.

1987 In November the Minister of Indian Affairs, William McKnight, withdraws funding of the appeal proceedings.

1988 In April appeal hearings are scheduled for January 1989.

1988 On 17 May the Minister of Natural Resources, Vince Kerrio, announces that construction of the Red Squirrel extension and the Pinetorch corridor will go ahead.

1988 The Teme-Augama Anishnabai Tribal Council decides at its annual assembly on 22 May to blockade any further road developments in the land claim area.

1988 In December the Ontario Court of Appeal rules on injunctions brought forward by Ontario which sought the order of the court to remove the then six-month-old Teme-Augama Anishnabai blockade of the Red Squirrel road. In a compromise ruling, the Teme-Augama Anishnabai were ordered to remove their blockade and Ontario was ordered to stop all construction until the outstanding title issue had been addressed by the Ontario Court of Appeal.

1989 The appeal case proceeds from 9 to 27 January.

1989 On 27 February the Ontario Court of Appeal upholds the lower court decision. The Teme-Augama Anishnabai apply for leave to appeal to the Supreme Court of Canada and reaffirm their intention to take the case to the international

courts.

1989 On 28 March the Teme-Augama Anishnabai stage a one day blockade on the Goulard logging road.

1990 On 23 April the Teme-Augama Anishnabai and the government of Ontario sign an agreement to create a stewardship council to regulate resource development in four critical townships.

1991 The Supreme Court of Canada hears the appeal of the Teme-Augama Anishnabai in the spring. In the summer the court brings down a decision rejecting the appeal and upholding the decision of the Appeal Court of Ontario.

APPENDIX B

LIST OF ABBREVIATIONS

ADM	Assistant Deputy Minister.
DIA	Department of Indian Affairs (federal, preceded DIAND).
DIAND	Department of Indian Affairs and Northern Development (federal).
DLF	Department of Lands and Forests (Ontario, preceded MNR).
DM	Deputy Minister.
ICC	Indian Claims Commission (federal, abolished 1978, re-established 1990).
ICO	Indian Commission of Ontario (tripartite).
MAG	Ministry of the Attorney General (Ontario).
MNR	Ministry of Natural Resources (Ontario).
ONAD	Ontario Native Affairs Directorate (Ontario).
ONC	Office of Native Claims (federal,branch of DIAND).
TAWG	Temagami Area Working Group.
TCO	Tripartite Council of Ontario.
THRC	Treaties and Historical Research Centre (federal, branch of DIAND).

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Chief Alexander Paul to F. Pedly	(circa 1911)
Aubrey White to J.D. MacLean,	(June 22, 1913)
W. Cain to A.F. MacKenzie	(July 12, 1929)
Deputy Minister, Lands and Forests, to H.W. McGill	(April 29, 1938)
J.W. Cain to D.J. Allen	(October 20, 1939)
Acting DM of Indian Affairs to F.A. MacDougall	(Feb. 20, 1943)
Chief Gary Potts to C.I. Fairholm	(November 7, 1973)
J.K. Reynolds to F.N. Callaghan	(June 19, 1974)
F.W. Callaghan to J.K. Reynolds	(June 25, 1974)
M.S. Smith to J.K Reynolds	(July 8, 1974)
MAG, Senior Crown Counsel, Memorandum to file	(July 29, 1974)
MNR, Memorandum to file	(August, 1974)
John Poters to J.B. Hartley	(August 27, 1974)
P.F. Girard to J.B Hartley	(August 27, 1974)
J.K Reynolds to F.W. Callaghan	(March 4, 1975)
J.R. McGinn to J.K. Reynold	(March 5, 1975)
M. Mogford to J.K. Reynolds,	(March 12, 1975)
Gary Carsen to J.W. Keenan	(July 26, 1977)
M. Mogford to J.K. Reynolds	(July 31, 1975)

E.G. Wilson to Blenus Wright (Nov. 16, 1977)
John Munroe to Chief Gary Potts (January 1981)
Alan Pope to E.P. Hartt (March 31, 1982)