1992

The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case

Kent McNeil
Osgoode Hall Law School of York University, kmcneil@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation

This Commentary is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
THE HIGH COST OF ACCEPTING BENEFITS FROM THE CROWN:
A COMMENT ON THE TEMAGAMI INDIAN LAND CASE

Kent McNeil*

On August 15, 1991, the Supreme Court of Canada handed down its decision in Bear Island Foundation v. The Queen1, ending a legal battle the Ontario government had been waging for nearly two decades against the Teme-Augama Anishnabai, an Algonkian First Nation inhabiting the Lake Temagami region of north-eastern Ontario. The legal dispute began in 1973 when the Teme-Augama Anishnabai filed cautions in land titles offices in the region giving notice that they had Aboriginal title to lands which the province claimed as its own. Ontario commenced legal action to have the cautions removed, alleging that the Teme-Augama Anishnabai had no claim to Aboriginal title, or if they did that their title had been extinguished by the Robinson-Huron Treaty of 1850. At trial, Mr. Justice Steele accepted Ontario’s contentions, deciding that even if the Teme-Augama Anishnabai had succeeded in proving their Aboriginal title (which he found they did not), the treaty extinguished it.2 Upholding Steele’s decision, the Ontario Court of Appeal avoided the issue of proof of Aboriginal title by assuming, without deciding, that the Teme-Augama Anishnabai had Aboriginal land rights before the Robinson-Huron Treaty was signed. Relying on the treaty, the court said it extinguished their Aboriginal title because

[t]he Temagami [as the court called the Teme-Augama Anishnabai] were signatories to the treaty. Alternatively they adhered to the treaty by receiving annuities pursuant to it and later asking for a reserve as was promised in the treaty and still later receiving a reserve. Finally, their rights were extinguished, even if the Temagami were not signatories or adherents, because the treaty was at least a unilateral act of extinguishment by the sovereign authority.3

In a two-page per curiam judgment, the Supreme Court of Canada affirmed the Court of Appeal’s decision. In the Supreme Court’s view, the case involved mainly factual issues, which on established principles an appellate court should not reverse "in the absence of palpable and overriding error which affected [the trial judge's] assessment of the facts".4 Where the lower courts were in agreement on the facts, as in this case, the rule is even stronger. The Supreme Court said they had "undertaken a detailed examination of the facts on

---

* Associate Professor of Law, Osgoode Hall Law School.

I would like to thank Robin MacKay for his invaluable assistance with the research for this article, and John Burrows and Brian Slattery for their very helpful comments.


[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

this basis [and did] not take issue with the numerous specific findings of fact in the courts below.5 However, they observed that it did not necessarily follow

... that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right.6

The court nonetheless found it unnecessary

... to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.7

The Supreme Court therefore dismissed the appeal of the Teme-Augama Anishnabai for the second reason given by the Court of Appeal, i.e. adhesion to the treaty.

The judgments of Steele and the Court of Appeal raised vital Aboriginal land rights issues which cannot be pursued here.8 Instead, this comment will focus on the Supreme Court's decision, and attempt to assess its significance for future land claims cases. In my view, the importance of the decision lies not so much in what was said as what was left unsaid, particularly the unarticulated assumptions lurking behind the court's words.

1. The Teme-Augama Anishnabai's Aboriginal Title

In favour of the Teme-Augama Anishnabai, we have seen that, unlike Steele, the Supreme Court found on the facts established at trial that "the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right."9 In this respect, the court said, Steele "was misled by the considerations which appear in the passage from his reasons quoted earlier."10 The passage referred to, which summarizes Steele's findings regarding the Teme-Augama Anishnabai's entitlement to Aboriginal rights, reads:

I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to prove that their ancestors were an organized band level

5 Ibid.
6 Ibid.
7 Ibid.
10 Ibid.
A Comment on the Temagami Indian Land Case

of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.\(^{11}\)

But in what respect was Steele misled? As the Supreme Court accepted his factual findings, explicitly disagreeing only with his legal conclusion regarding the sufficiency of the Teme-Augama Anishnabai's occupation during the relevant period, one might think that the test Steele applied for proof of Aboriginal occupation was too strict. However, a reading of Steele's judgment reveals that he decided the Teme-Augama Anishnabai did not have Aboriginal land rights because they were not an organized band in 1763, which for him was the relevant date for determining this issue in most of the Land Claim Area.\(^{12}\) In other words, the problem for Steele was not lack of adequate land use in that area by Aboriginal people during the relevant period,\(^{13}\) but insufficient evidence that the Teme-Augama Anishnabai existed as an organized band society at that time. He wrote:

\[
\ldots \text{I find that there is no evidence of the existence of a band or}
\ldots \text{of its control over allocation of land in family hunting territories}
\ldots \text{in 1763 or until, at the earliest, 1850. There is no evidence that}
\ldots \text{there was an organized society in 1763 encompassing all the}
\ldots \text{families on the charts.}
\]

After trading posts were established [in the first half of the nineteenth century], the most one can say is that a small, loose, flexible and fluid band came into being, never covering all of the Land Claim Area. This continued until the late eighteen hundreds. The territory of the band changed depending upon the families who were members of the band . . . There was no central control group that governed a fixed band territory over a long period of time or that had the power to refuse to allow a family hunting group to change its allegiance, thereby forcing the family hunting group's lands to remain part of the band's lands. The family controlled the land and decided which band it wished to belong to.\(^{14}\)

Later, Steele concluded on the evidence that

\[
\ldots \text{the persons identified by the defendants as Temagami Indians}
\ldots \text{and as a part of the Temagami band were simply heads of}
\]

\(^{11}\) Ibid., quoting from [1985] 1 C.N.L.R. 1 at 21.
\(^{12}\) See [1985] 1 C.N.L.R. 1 at 40-77. Steele chose 1763 as the relevant date for most of the Land Claim Area because that was the year the Royal Proclamation had been issued. For the small portion of that area lying north of the height of land in the Hudson watershed, and therefore beyond the Proclamation's scope in Steele's view (for criticism of this view, see McNeil, supra, n.8 at 209 n.5), he said the relevant date was "the coming of settlement": ibid., 32-3.
\(^{13}\) Ibid., especially 39 where Steele listed "the aboriginal rights in these lands existing at the relevant date."
\(^{14}\) Ibid., 51-2.
A Comment on the Temagami Indian Land Case

families and did not, as families themselves, form an organized Temagami band with a chief. The first reference in the trading post journals to a Temagami who was a chief is in 1874. This was after the 1850 treaty.\textsuperscript{15}

In order to find that the Teme-Augama Anishnabai had an Aboriginal right to their lands, the Supreme Court probably disagreed with Steele on this point, concluding instead that they were an organized society at the relevant time.\textsuperscript{16} However, it is also possible that the court disagreed with Steele's choice of 1763 as the relevant date.\textsuperscript{17} The court may even have questioned his requirement that the Teme-Augama Anishnabai prove that their ancestors were an organized society at that time.\textsuperscript{18} More obviously, the court must have rejected Steele's requirement that exclusive Aboriginal occupation continue up to the time litigation on their land claim is commenced.\textsuperscript{19} On this matter, Steele concluded that, even if the Teme-Augama Anishnabai at one time had Aboriginal title,

... such title was in fact extinguished because the Indians have abandoned their traditional use and occupation of the Land Claim Area. In other words, there is no evidence of exclusive aboriginal use of any of the lands except the Bear Island Reserve continuing to the date of the commencement of the action.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{15} Ibid., 66; see also 71-2.
\item \textsuperscript{16} For support for this conclusion, see Bruce W. Hodgins and Jamie Benidickson, The Temagami Experience: Recreation, Resources, and Aboriginal Rights in the Northern Ontario Wilderness (Toronto: University of Toronto Press, 1989), 9-26, where the authors describe the Teme-Augama Anishnabai's existence as a "band" or "tribe" prior to and following European contact.
\item \textsuperscript{17} As Dickson J., in Guerin v. The Queen [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120 at 132-3, said that Aboriginal rights pre-date the Royal Proclamation (see also Roberts v. Canada [1989] 1 S.C.R. 322, [1989] 2 C.N.L.R. 146 at 155), and do not depend on that prerogative instrument for their existence, there is no obvious reason why 1763 should be the relevant date, even in the part of Canada ceded to Britain from France in that year: see McNeil, supra, n.8 at 187-8, 212 n.24. In fact, Steele admitted this in an "Addendum" to his decision written after the Supreme Court decision in Guerin, [1985] 1 C.N.L.R. 1 at 119.
\item \textsuperscript{18} This requirement came from Baker Lake v. Minister of Indian Affairs [1980] 1 F.C. 518, [1979] 3 C.N.L.R. 17 at 45, and was apparently derived from Judson J.'s statement in Calder v. A.G. of British Columbia, [1973] S.C.R. 313 at 328: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means". But did Judson intend to make the existence of an organized society a prerequisite for Aboriginal title, or was he simply stating a general fact of Aboriginal life? Moreover, in Calder at 368, 375, Hall J. applied the common law rule that possession is proof of ownership to Aboriginal occupation. At common law, application of this rule does not require occupation of lands by an organized society: see Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989), 42-3, 56-8, 75, 207-8.
\item \textsuperscript{19} The requirement that occupation be exclusive was also articulated in Baker Lake v. Minister of Indian Affairs [1979] 3 C.N.L.R. 17 at 45. However, Aboriginal rights involving land use, such as hunting and fishing rights, do not have to be exercised exclusively in order to continue: see n.21, infra. Moreover, in the United States courts have decided that Indian title can be derived from occupation which is not exclusive where two or more tribes jointly and amicably use the same lands: see Turtle Mountain Band v. U.S., 490 F. 2d 935 at 944 (1974); U.S. v. Pueblo of San Ildefonso, 513 F. 2d 1383 at 1394-5 (1975); Strong v. U.S., 518 F. 2d 556 at 561-2 (1975), certiorari denied 423 U.S. 1015 (1975).
\item \textsuperscript{20} [1985] 1 C.N.L.R. 1 at 77. Note that Steele's conclusion that Aboriginal land rights can be abandoned by neglecting to continue exercising them stems from his erroneous view that those rights are not proprietary in nature: see text accompanying ns. 111-15, infra.
\end{itemize}

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

This conclusion so clearly contradicts recent Supreme Court pronouncements on the continuation of Aboriginal rights that the judges must have rejected it. But apart from that, their vague reference to sufficient occupation has simply cast doubt over which of Steele's legal conclusions on Aboriginal land rights are correct, and which are erroneous. If one role of the Supreme Court is to clarify controverted points of law and give guidance to lawyers and lower court judges, it has evidently failed to do so in this case, at least in so far as Aboriginal title is concerned.

2. Adhesion to the Robinson-Huron Treaty

The Supreme Court did decide that the Teme-Augama Anishnabai adhered to the Robinson-Huron Treaty, and that upon adhesion their Aboriginal land rights were extinguished, whatever the nature of those rights may have been. These were the matters which, in the Supreme Court's view, raised mainly factual issues which were best left to the trial judge. We therefore need to examine the facts leading Steele J. to these conclusions, which the Supreme Court accepted.

Steele began his examination of the treaty by outlining the background to it, and determining who the Indian parties to it were and what lands they surrendered. Regarding the Teme-Augama Anishnabai, he concluded that their leader, Nebenegwune, was present at the signing and accepted a share of the initial cash payment under the treaty. However, Nebenegwune did not sign, in Steele's view because "he was not of sufficient importance as a chief or headman to warrant his signing" and because the Teme-Augama Anishnabai were not at the time a separate Aboriginal people, but were part of "a larger group comprised of three bands" who were represented at the treaty negotiations by Chief Tawgaiwene, who signed on their behalf. Steele found that Nebenegwune and some other members of the Teme-Augama Anishnabai did receive treaty payments between 1850 and 1856, when the payments to them stopped, "likely because they did not wish to travel the long distance to receive the small payment." Steele also found that a reserve allocated to Tawgaiwene at Lake Wanapitei in 1850 was intended for the Teme-Augama Anishnabai as well as for the other two groups represented by that chief. While the Supreme Court found it unnecessary to accept or reject Steele's conclusion from these findings that the Teme-Augama Anishnabai were made parties

21 In Sparrow v. The Queen, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, cited by the Supreme Court in Bear Island on the issue of the sufficiency of Aboriginal occupation, the court held that the Musqueam Indians in British Columbia had an existing Aboriginal right to fish, even though that right had been heavily regulated by Parliament and was not exclusive. Moreover, the Supreme Court, in Sparrow placed the onus of proving extinguishment of Aboriginal rights on the Crown, holding that the intention to extinguish must be "clear and plain" when it is alleged that extinguishment was brought about by legislation. In Simon v. The Queen, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, also cited by the court in this context in Bear Island, Dickson C.J.C., referring to a treaty right to hunt, said at 170: "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises. As Douglas J. said in United States v. Santa Fe Pacific Ry. Co. [(1941) 314 U.S. 339], at p.354, 'extinguishment cannot be lightly implied.'" Moreover, A.-G. of Quebec v. Sioui [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127 at 154, the Supreme Court held that a treaty right cannot be extinguished by non-user.
22 Contrast Hodgins and Benidickson, supra, n.16 at 33-4.
23 [1985] 1 C.N.L.R. 1 at 84, 90.
24 Ibid., 90.
25 Contrast Hodgins and Benidickson supra, n.16 at 34-5.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

to the treaty by Tawgaiwene's signature, Steele's views on these matters are relevant to the question of adhesion, which he went on to deal with.26

According to the evidence relied on by Steele, members of the Teme-Augama Anishnabai began requesting treaty annuity payments in 1877. In 1878 their chief, Tonene, told Indian Agent Skene that they had received treaty money and presents in the past, and requested that the payments recommence.27 Around the same time, in Steele's words,

[...the Indians also told him [Skene] that no reserve had been set aside for them, that the lumbermen were now coming close to them, and that therefore they wanted a reserve. Skene reported that the Indians stated that they had never ceded their lands and knew nothing about the Robinson-Huron Treaty. When Skene asked how, in that case, the Indians could have received the money and presents at Manitoulin Island, the Indians merely replied that Chief Kekek [their chief at the time] received money on account of the band and also presents, and even gave details as to what the gifts were.28

This passage reveals that the Teme-Augama Anishnabai do not seem to have understood that the payments and so-called gifts were related to the treaty.29 But they knew that they had received those benefits in the past, and were probably aware that members of neighbouring bands were still receiving payments, so they wanted to be paid too.

The request for a reserve, however, was directly related to adverse use of their lands by lumbermen, and seems to have been understood as involving a surrender of some of their land rights. Steele wrote:

In February of 1881, it was reported that Chief Tonene was saying that timber was being taken, and that he wanted a meeting with the band in council with respect to negotiating a treaty for the surrender of their lands. In June of 1881, Skene asked Chief Tonene for his terms for a surrender. In August of that year, Chief Tonene advised Skene that he wanted money and suggested $4 per person annually [the amount of the treaty annuity at that time], plus a reserve. On August 26, 1882, Jocko Tawgaiwene [son of Chief Tawgaiwene who signed the treaty in 1850] applied to Canada to have the Temagami Indians placed on the Robinson-Huron Treaty annuity list.30

26 The Court of Appeal, as we have seen, expressly agreed with Steele's conclusion that the Teme-Augama Anishnabai were represented by Tawgaiwene at the treaty negotiations: [1989] 2 C.N.L.R. 73 at 79-83. For commentary, see McNeil, supra, n.8 at 189-93.
27 [1985] 1 C.N.L.R. 1 at 72. Allegations were also made that treaty payments had been accepted by certain Indian leaders on behalf of the Teme-Augama Anishnabai, but had not been turned over to them; ibid., 92.
28 Ibid., 72.
29 As the Teme-Augama Anishnabai had previously received gifts from the Crown which bore no relation to the treaty, they would not necessarily have made the connection between the two; see Hodgins and Benidickson, supra, n.16 at 34.
30 [1985] 1 C.N.L.R. 1 at 92.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

The requested meeting with the band in council does not appear to have taken place. Instead, the federal Department of Indian Affairs, which at the time thought that the Teme-Augama Anishnabai were not parties to the original treaty, decided to add them to the treaty pay list because they appeared willing to become parties. Annuity payments were accordingly made to the Teme-Augama Anishnabai from 1883 until 1979, when they began to return the cheques because they claimed that they had never surrendered their Aboriginal land rights.

Although added to the pay list, the Teme-Augama Anishnabai waited a long time for a reserve. Over the next 60 years, they made numerous requests for a reserve, to be located at Austin Bay on Lake Temagami. Some of these requests were expressly related to entitlement under the Robinson-Huron Treaty, while others - such as a 1910 request for a reserve so that they would be able to cut timber for building and firewood - were not. In 1943, lands on Bear Island were finally set aside by Ontario for a reserve subject to certain conditions, but the Teme-Augama Anishnabai continued to press for a reserve at Austin Bay. In 1947, they passed a formal band resolution declaring, in Steele's words, that

... Austin Bay was never surrendered by the band, nor was the band a party to any treaty-making convention. They also declared that their forefathers were not a party to the Robinson-Huron Treaty and that their band had never consented to a surrender nor ceded any tract of land or lands which they had occupied from time immemorial.

In 1964, however, the Teme-Augama Anishnabai appear to have passed a resolution requesting that Bear Island be officially made a reserve, which the government of Canada finally did in June 1971.

Steele summed up his assessment of the above and other less important facts as follows:

While there have been two or three occasions during the period from 1883 to date when the band, or its chief on its behalf, have denied that they ever entered into any treaty or surrendered their lands, the overwhelming majority of the documents indicates an acknowledgement and acceptance of the treaty. I am of the opinion that those documents that denied the treaty, in the years prior to the 1973 minutes indicating that a lawyer had been retained, were merely a bargaining ploy in the negotiation attempts to obtain the reserve at Austin Bay and later at Bear Island that had been promised to them. I believe these documents originated from a sense of frustration, and reflected

31 See Hodgins and Benidickson, supra, n.16 at 46. The Court of Appeal said the federal government's position was based on incomplete records: [1989] 2 C.N.L.R. 73 at 84.
32 [1985] 1 C.N.L.R. 1 at 92.
33 Ibid., 91-2; [1989] 3 C.N.L.R. 73 at 84.
34 See Hodgins and Benidickson, supra, n.16 at 47-8, 65-7, 136-8, 211-17.
35 [1985] 1 C.N.L.R. 1 at 94.
36 Ibid.
A Comment on the Temagami Indian Land Case

the hope of expediting the establishment of a reserve. Notwithstanding their wording, when seen in their historical context, I do not interpret them as being a denial of the fact that there was a treaty to which the band had been properly bound.\(^37\)

In this facile way, Steele dismissed contrary evidence by patronizingly concluding that the Teme-Augama Anishnabai were not sincere when they asserted that they had never entered the treaty or surrendered their lands.\(^38\) How could he know that? Most of these assertions were made in uncontroverted written documents, rather than by witnesses whose credibility Steele could attempt to assess. His remarkable ability to perceive the hidden motivations of people he had never met from written words is all the more suspect when one considers the cross-cultural context in which his assessments were made. What he purported to do was to read the minds of people from an entirely different culture, whose worldview he did not share. In these circumstances, the danger of misinterpreting their words and actions is very great, and must be carefully guarded against.\(^39\) Unfortunately, Steele does not appear to have even been aware of the problem.\(^40\)

The situation the Teme-Augama Anishnabai found themselves in after the Robinson-Huron Treaty was signed should be remembered. Lumbermen and others were encroaching on their territory and interfering with their traditional uses of the land.\(^41\) By the early 20th century, the Ontario government was further restricting those uses by imposing hunting and fishing regulations and even limiting Indian use of timber for building and firewood.\(^42\) Their Aboriginal rights to the land were not being respected, so the treaty may have looked like a viable alternative for protecting their way of life and securing economic benefits. However, a formal adhesion to the treaty was never signed, and a reserve was not set aside for them until 1943, and not officially created until 1971. If they adhered to the treaty in 1883, when they started taking annuity payments, they should then have been entitled to a lump sum payment (which they do not appear to have received) and a reserve. Moreover, the reserve on Bear Island that was eventually created was not the reserve they had requested, and was much smaller than treaty-entitlement reserves.\(^43\) Given the fact that they had not been accorded full

---

\(^37\) Ibid., 94-5.

\(^38\) This was not the only time Steele disregarded evidence which did not support his conclusions. On several occasions, he dismissed opinions of expert witnesses because he said they were biased in favour of the Indians. Referring to three of these witnesses, he said they "were typical of persons who have worked closely with Indians for so many years that they have lost their objectivity when giving opinion evidence": ibid., 37. Apparently "objectivity" depends on maintaining a non-Indian perspective, which close contact with Aboriginal people can interfere with. The ethnocentricity inherent in this attitude is blatant and unacceptable. See Hall, supra, n.8 esp. 232-3.


\(^40\) For discussion of another instance where Steele ignored cross-cultural factors in assessing the evidence, see McNeil, supra, n. 8 at 191.

\(^41\) See Hodgins and Benidickson, supra, n.16 at 49-67.

\(^42\) See ibid., 136-46; Teme-Augama Anishnabai, "The Native Dimension: Key Dates", in Matt Bray and Ashley Thomson, eds., Temagami: A Debate on Wilderness (Toronto: Dundurn Press, 1990), 147-51, at 148.

\(^43\) Approximately one square mile was set aside for the reserve on Bear Island: see Hodgins and Benidickson, supra, n.16 at 217. This appears to be smaller than any of the seventeen reserves created by the Robinson-Huron Treaty: see the schedule to the treaty in Alexander Morris, The Treaties of Canada with the Indians (Toronto: Belfords, Clarke & Co., 1880; reprinted Toronto: Coles Publishing, 1979), 306-8 (the treaty defines the boundaries of all the reserves, but only specifies the area of ten of them; of those specified, the average area is [1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

treaty benefits, the Teme-Augama Anishnabai may well have believed that their request to be brought into the treaty had not been accepted.

The position of the Crown in right of Canada, which was paying them annuities and trying to get lands for a reserve from the province of Ontario,44 would have confirmed this belief. At no time during the relevant period did Canada regard the annuities or the eventual creation of a reserve as sufficient to make the Teme-Augama Anishnabai parties to the treaty. But after the matter went to court in 1978, the federal government changed its mind. Steele outlined Canada's position as follows:

Throughout the period of 1883 to the date of trial, Canada has consistently taken the position that the Temagami Indians did not sign the treaty and that their Indian title has not been extinguished, while Ontario consistently has taken the position that the Temagami Indians were party to the treaty and that their title has been extinguished. Ontario's actions over the years confirm its position. At trial, Canada, though represented only with respect to the constitutional issue, has through its counsel now taken the position that the Indians have adhered to the treaty and are bound by it. Canada's previous position is somewhat suspect because, if the Indians were not party to the treaty, why were they admitted to the Robinson-Huron pay list in 1883, and why has Canada consistently argued for a reserve for the Indians?45

In answer to Steele's query, because Ontario was not respecting the Aboriginal rights of the Teme-Augama Anishnabai, Canada may well have decided that they should at least be given annuities equivalent to those of treaty Indians. Moreover, Canada's argument for a reserve was not based on the view that the Teme-Augama Anishnabai were already parties to the Robinson-Huron Treaty, but on the necessity for Ontario to agree to a reserve as part of a settlement of their Aboriginal land claim.46 In this context, it is important to observe that,

9.4 square miles). The discrepancy is not explained by population. The original Indian signatories of the treaty, who numbered 1422, would have received approximately one square mile for every nine persons, assuming an average reserve size of 9.4 square miles. The Teme-Augama Anishnabai, who according to the 1887 census numbered 93 (Hodgins and Benidickson, supra, n.16 at 65), should therefore have been entitled to a reserve of at least ten square miles in the 1880s, if they adhered to the treaty at that time.

44 [1985] 1 C.N.L.R. 1 at 93.
45 Ibid., 95.
46 As a consequence of the decision in St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, Canada agreed in 1891 to the concurrence of Ontario in any future Indian treaties in the province: see An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario Respecting Indian Lands, S.C. 1891, c.5. In a "Statement of Case of the Dominion on Behalf of the Temogamingue Band of Ojibbewa Indians", dated March 10, 1896, from Indian Affairs to the Board of Arbitrators set up under that statute, Canada stated that the Teme-Augama Anishnabai were not parties to Robinson-Huron Treaty and had not surrendered their Aboriginal land rights. The statement went on to claim that the arbitrators "should direct the Province of Ontario to grant to the said Indians a reserve, or to acquiesce and approve of the said reserve so surveyed as aforesaid, and upon such terms as to surrender of the Indian title in the remaining portions of the said tract as [to] the Board would seem just and fair": as quoted in Chief Gary Potts, "Teme-Augama Anishnabai: Last-Ditch Defence of a Priceless Homeland", in Boyce Richardson, ed., Drumbeat: Anger and Renewal in Indian Country (Toronto: Summerhill Press, 1989), 201-28, at 215.
A Comment on the Temagami Indian Land Case

unlike the so-called numbered treaties, the treaty does not provide for an overall surrender of Indian lands, with reserves to be created subsequently out of those lands; instead, the reserves were expressly excluded from the surrender, thereafter to "be held and occupied by the said Chiefs and their tribes in common, for their own use and benefit".47 So for the Teme-Augama Anishnabai to adhere to the treaty, it would appear to be essential that agreement be reached in advance on what lands were to be reserved out of the lands being surrendered, for otherwise they would be left with no lands at all, and no provision in the treaty on which to rely for the creation of a reserve after the surrender. Canada's position on the Teme-Augama Anishnabai land claim prior the trial is consistent with this interpretation.

As for Ontario, the relevance of its attitude to the adhesion issue is questionable because the province would not have been a party to any treaty negotiations that may have taken place between the Teme-Augama Anishnabai and Canada in the 1880s.48 If the position of any government is suspect in this matter, it is that of Ontario, which, as a result of the decisions of the Privy Council in St. Catherine's Milling and Lumber Co. v. The Queen49 and Ontario Mining Company v. Seybold,50 was entitled to all the lands surrendered by Indian treaties in the province without having to incur any of the costs. Ontario was simply a self-interested third party with no privity and therefore no say in whether or not a treaty had at that time been concluded between the Teme-Augama Anishnabai and the federal Crown.51

The Supreme Court nonetheless accepted Steele's factual findings and concluded in regard to the Teme-Augama Anishnabai's Aboriginal land right that, "whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve."52 As we have seen, the court emphasized that the case raised "for the most part essentially factual issues on which the courts

47 Robinson-Huron Treaty, in Morris, supra, n.43 at 305.
48 Although the province of Canada had negotiated and signed the original Robinson-Huron Treaty on behalf of the Crown in 1850, section 91(24) of the Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.), placed treaty-making authority in federal hands by assigning Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians": see St. Catherine's Milling and Lumber Co. v. The Queen (1888) 14 App. Cas. 46 at 59, where Lord Watson said that "[i]t appears to be the plain policy of the Act [of 1867] that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority." Ontario's concurrence in future treaties in the province became a statutory requirement in 1891: see n.46, supra.
49 (1888) 14 App. Cas. 46.
50 [1903] A.C. 73.
51 Moreover, Steele was not entirely accurate when he said that Ontario consistently took the position that the Teme-Augama Anishnabai were parties to the treaty. Aubrey White, Ontario's Deputy Minister of Lands and Forests, "in his formal recommendation for the creation of the Temagami Forest Reserve in 1901 ... frankly stated that 'by oversight or neglect' the Temagami Indians were not represented at the Robinson treaty and consequently did not receive a reservation": Hodgins and Benidickson, supra, n.16 at 139. What Ontario really wanted was to have it both ways: the province denied that the Teme-Augama Anishnabai had existing Aboriginal land rights, while refusing for almost 60 years to provide land for a reserve. In its factum before the Court of Appeal in the Bear Island case, the Attorney General for Ontario admitted that "from 1885 until 1939 the government of Ontario was unresponsive and intransigent": [1989] 2 C.N.L.R. 73 at 85. That is an understatement! In 1929, Walter Cain, Deputy Minister of Lands and Forests, even had the gall to write to Chief Alex Mathias and some other members of the Teme-Augama Anishnabai and demand that they pay rent to the province for their own homes on Bear Island: see Hodgins and Benidickson, supra, n.16 at 211; Potts, supra, n.46 at 217.
A Comment on the Temagami Indian Land Case

below were in agreement. However, in my view a vital legal issue arising out of the facts was not addressed judicially at any level in this case, namely, as a matter of law what must be done for an Aboriginal people to become party to an Indian treaty by adhesion? Implicit in all three judgments is the assumption that accepting benefits provided by a treaty is sufficient, but no explanation or analysis of this assumption is given. As a general rule, is the acceptance of benefits under an existing agreement between other parties sufficient to make the beneficiary a party? Do both the beneficiary and the original parties have to consent to the beneficiary becoming a party? Can that consent be implicit? In the context of Indian treaties, what formalities are necessary for adhesion? What if some benefits are conferred but not others, or the conferred benefits are not as ample as those provided in the treaty? And when does the adhesion take place, particularly if the benefits are conferred piecemeal over an extended period of time? Although all these issues were relevant to the case, none were adequately addressed, and most were simply ignored.

3. Principles of Treaty Adhesion

Starting with the questions involving acceptance of benefits by a third party under agreements generally, both international law on treaties and domestic law on contracts are relevant.

Internationally, a state which is not an original party to a treaty can adhere or accede to it only if the original parties consent, either by including an accession clause in the treaty anticipating accession by that state or states generally, or by otherwise agreeing to the accession. As for the acceding state, its consent to be bound by the treaty must be expressed in a formal written document. Lord McNair, a leading authority on treaty law, wrote:

Like a treaty, an accession is a formal instrument, and it is inconceivable that an oral communication would suffice. No precise form is required for an accession. All that is required is a notification to the original contracting parties or to such other authority as may be indicated in the treaty ...

---

53 Ibid.
54 Although the Supreme Court of Canada in Simon v. The Queen, [1986] 1 C.N.L.R. 153 at 169, said that Indian treaties are sui generis, international and contract law can be of persuasive value when new issues respecting these treaties arise. Moreover, I would argue that, where failure to apply international or contract law principles to Indian treaties is detrimental to Aboriginal interests, convincing reasons for not applying those principles should be given (this argument is indirectly supported by Supreme Court decisions, including Simon and other cases discussed infra in text accompanying nn. 132-6, that treaties and statutes relating to Indians should be construed in their favour). While the examination of contract law in this article is limited to Anglo-Canadian common law, civil law principles are also relevant, particularly where treaties relating to Quebec are concerned.
56 McNair, supra, n.55 at 152 (footnotes omitted). See also the Vienna Convention, supra, n.55, Art. 16.
A Comment on the Temagami Indian Land Case

An international treaty which purports to confer rights or impose obligations on a third state is not binding on that state without its consent. Where third state rights are concerned, the issue of enforcement is controversial. Professor O'Connell observed:

It might be argued that the enforcement of the beneficial clauses is left to the contracting parties, and that the beneficiary cannot itself initiate remedial action; the appropriate method of achieving this active participation in the treaty as distinct from passive receipt of its benefits would be by an accession clause. Or it could be argued that the third State upon acceptance of the benefit acquires legal rights itself. Even those who take the second of these alternative positions divide as to the significance of acceptance. One view is that acceptance is an accession or adhesion, so that the accepting party becomes in all respects a party to a new treaty identical in content with the old; but that if there is an accession clause acceptance can only occur in accordance with it, and cannot be implied by conduct. Another view is that the third State in accepting the benefit does not accede to the treaty but appropriates the stipulated rights. The effect of the acceptance is to deprive the contracting States of the liberty to withdraw the privilege, and to permit the beneficiary to insist upon the favourable stipulation and no other.

So even in a case where third state benefits are specifically provided in a treaty, only some commentators think that acceptance of those benefits makes the third state a party, albeit to a new treaty. However, the purpose for making the third state a party is not to impose obligations on it, but to enable it to enforce the terms of the treaty which are intended to confer benefits on it. Terms purporting to impose obligations on the third state would not be binding on it without its consent.


58 D.P. O'Connell, International Law, 2nd ed. (London: Stevens and Sons, 1970), vol. 1, 247 (footnotes omitted). Note that O'Connell was describing customary international law, unaffected by the Vienna Convention, supra, n. 55, for the same passage appears in the first edition of his book (same publisher, 1965), vol. 1, 266-7, written before the Convention was drafted.

59 The authority O'Connell gave for this view was Ronald F. Roxburgh, International Conventions and Third States (London: Longmans, Green and Co., 1917), 45, where Roxburgh referred specifically to situations where the treaty provided for accession by the third state; cf. 51-3. The suggestion that a new treaty is created merely by acceptance of benefits by a third state is convincingly refuted by Eduardo Jiménez de Arechaga, "Treaty Stipulations in Favor of Third States" (1956) 50 A.J.I.L. 338-57, at 351-5. See also L. Oppenheim, International Law, 8th ed. by H. Lauterpacht (London: Longmans, Green and Co., 1955), vol. 1, 925-7.

60 Philippe Braud, "Recherches sur l'Etat tiers en droit international public" (1968) 72 R.G.D.I.P. 17-96, at 57: "Seule la clause favorable fait l'objet du consentement, non le traité dans son entier." See also Jiménez de Arechaga, supra, n. 59 at 351-6, esp. 355: "by means of stipulations in favor of third parties it is possible to confer rights only and not to impose obligations on the third party." Cf. Roxburgh, supra, n. 59 at 45, where the author states that obligations can be incurred if there is an accession.

61 O'Connell, supra, n. 58, vol. 1 at 246, in the context of the Vienna Convention, Art. 35-6, supra, n. 55, wrote that "[c]onsent is presumed in the case of rights but must be express in the case of obligations." Art. 35

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

In Anglo-Canadian contract law, the issue of adhesion or accession does not appear to have received much attention, probably because it seldom arises. More common is a situation like that just described in international treaty law where a contract purports to confer benefits or impose obligations on a third party who was not privy to the original agreement. As a general rule, a contract of this sort cannot be enforced by or against the third party. In the leading case of Dunlop Pneumatic Tyre Co. v. Selfridge & Co., Viscount Haldane said:

"[I]n the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract." 63

A related issue in contract law arises where one person confers a benefit on another in circumstances which may imply an agreement to pay for it. For example, a company might send a product to a consumer with a stipulation that failure to return it within a specified time creates an obligation to pay the purchase price. In this kind of situation, the courts have held that acceptance of contractual obligations cannot be implied from silence, but must relate to a prior promise to pay. Acceptance can, however, be implied from conduct in some circumstances, but only if the acts unequivocally suggest an intention to enter contractual relations. After reviewing a number of cases where this issue arose, Professor G.H.L. Fridman, in his text The Law of Contract in Canada, concluded:

"In these cases some positive conduct on the part of the person to whom the offer was made was called for and occurred. What was done by the offeree did not have to be formulated specifically as an acceptance of the offer in the sense of stating precisely, "I accept". It had to take the form of an act or acts referable to the offeree's wishing to be bound and wishing to bind the offeror on the terms stipulated by the offeror." 67

Of course, for there to be a valid acceptance by conduct an offer must first be made. As Fridman wrote, "[i]f there is no such offer, or the purported offer is simply an expression of benevolent intention, then there is no contract to be spelled out of the fact that services were

---

64 Note that this kind of situation is now commonly governed by statute: e.g. see the Consumer Protection Act, R.S.O. 1990, c.C.31, s.36.
65 See Degilman v. Guaranty Trust, [1954], S.C.R. 725. Compare Upton-on-Severn R.D.C. v. Powell, [1942] 1 All E.R. 220, where a contract was found because there was a request for the services, though by mistake they were not rendered by the party intended.
66 Fridman, supra, n.62 at 46. See also Ramsden v. Chessum (1913), 30 T.L.R. 68.
67 Fridman, supra, n.62 at 47.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

rendered and not rejected". The essential element here is an unequivocal mutual intention, expressed by either words or actions, to enter into a binding agreement. If this intention is absent on either side, a contract is not created.

So in both international and municipal law, it appears that mere acceptance of benefits will not suffice to bind the beneficiary to a legally-enforceable agreement. An additional element – namely an intention to enter a binding agreement by both the person conferring and the person receiving the benefits – must be present. Moreover, in international law accession to a treaty requires the consent of all the original parties.

If the requirement of consent by the original parties is applied to Indian treaties, all adhesions not specifically provided for could be invalidated. In the case of the Robinson-Huron Treaty, adhesion by the Teme-Augama Anishnabai would be invalidated because the original Ojibway signatories consented only to the adhesion of "the Indians inhabiting French River and Lake Nipissing". However, it may be inappropriate at this late date to apply a rule of international law which no one appears to have considered when adhesions to Indian treaties were signed.

Be that as it may, the general rule that binding agreements depend on mutual intention has been applied to Indian treaties by the Supreme Court of Canada. In Simon v. The Queen, Dickson C.J.C., in his discussion of the capacity of the parties to sign a 1752 Nova Scotia treaty, said that "both the Governor and the Micmac entered into the treaty with the intention of creating mutually binding obligations which would be solemnly respected." Later, he described the treaty as

... an exchange of solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man ...

---

68 Ibid., 49.
70 Note, however, that the test for intention is objective rather than subjective. In other words, the parties do not need to actually have the intent, as long as a reasonable outside observer would infer intent from their words or actions. See Guest, supra, n.62 at 61-3; P.S. Atiyah, As Introduction to the Law of Contract, 4th ed. (Oxford: Clarendon Press, 1989), 10-11.
71 Sir Robert Phillimore, in his Commentaries upon International Law, 3rd ed. (London: Butterworths, 1882), vol. 2 at 75, wrote that "the free reciprocal consent of both contracting parties, which is indispensable to the validity of a contract between individuals, is equally requisite for a Treaty between States."
72 Adhesions were very common, and generally do not appear to have been consented to by the original Indian parties: e.g. see adhesions to Treaties 3, 4, 5, 6 and 7 in Morris, supra, n.43 at 326-9, 335-8, 349-50, 360-7, 374-5.
73 Text of the treaty, ibid., 306.
74 The rule would also be avoided if Steele J.'s suggestion in Bear Island, [1985] 1 C.N.L.R. 1 at 95, that acts of adhesion could constitute a "separate treaty" is accepted. However, neither the Court of Appeal nor the Supreme Court of Canada adopted that suggestion.
76 Ibid., 174.
A Comment on the Temagami Indian Land Case

In Attorney-General of Quebec v. Sioui, Lamer J. quoted these passages from Simon and concluded from them that "it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."[77]

This requirement of mutual intent to create binding obligations is just as applicable to adhesions as to treaty creation. So how was the Supreme Court able to conclude in the Bear Island case that the Teme-Augama Anishnabai adhered to the Robinson-Huron Treaty? Intention is a matter of fact, and the court said that it accepted the facts which were found by Steele J. at trial and affirmed by the Court of Appeal. But Steele found that the Canadian government, from the 1880s right up to the time of trial, consistently denied that the Teme-Augama Anishnabai had been made a party to the treaty.[78] So as far as the Crown was concerned, the payment of annuities and the eventual creation of the small reserve on Bear Island did not result in an adhesion, and did not extinguish the Aboriginal land rights of the Teme-Augama Anishnabai. The requisite intention of the Crown, by the admission of its own officials, was therefore absent. As for the Teme-Augama Anishnabai, at times they asked to be brought into the treaty so that they would receive its benefits, but on other occasions they denied having accepted the treaty. These positions were not inconsistent. The Teme-Augama Anishnabai may have been willing to accept the treaty if they received full treaty benefits, in particular a reserve of appropriate size at Austin Bay, but in fact that never happened.[79] As the reserve they eventually did receive was inadequate by the treaty's standards, they were not satisfied.[80] Steele J. did not address this issue of intention directly. As we have seen, he chose instead to dismiss the strong evidence of lack of intention on both sides by characterizing the Teme-Augama Anishnabai's denials of the treaty as a "bargaining ploy", and Canada's denials as "somewhat suspect". In other words, he did not believe either of them, for reasons which in my view were simply inadequate.[81] and which should have led the Supreme Court to find a "palpable and overriding error".[82] Nevertheless, by expressly dismissing the strong evidence to the contrary, Steele appears to have implicitly found that the requisite intention to effect an adhesion existed on both sides.[83] The Supreme Court's affirmation of this aspect of his decision therefore does not undermine the rule that Indian treaties and adhesions, like other

77 [1990] 3 C.N.L.R. 127 at 139. Lamer, at 139-40, also referred with apparent approval to Bisson J.A.'s description of a treaty, in his majority Quebec Court of Appeal judgment in Sioui, [1987] 4 C.N.L.R. 118 at 127, as "an agreement in which the contracting parties ... intended to create mutual obligations which they intended to observe".
78 See text accompanying nn. 44-5, supra.
79 See text accompanying nn. 34-43, supra.
80 See Potts, supra, n.46 at 210-21.
82 This is the test used by appeal courts to reverse a trial judge's factual findings: [1991] 3 C.N.L.R. 79 at 81.
83 Due to the implicit nature of this finding, it is impossible to determine whether Steele used a subjective or objective test of intention. I would nonetheless suggest that, in the cross-cultural context of Indian treaties, an objective test could be applied only if adequate account was taken of the divergent perspectives of both sides. Most Canadian judges would be unable to do this without expert evidence on the cultural values and psychosocial differences of the Aboriginal people involved, which may not be available, especially in the case of old treaties. On the problem of trying to interpret the actions of Aboriginal people from a Euro-Canadian perspective, see Ross, Brant, supra, n.39.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

agreements, require a mutual intention to create binding obligations. One can only hope that courts will take the application of this rule more seriously in the future.

For a mutual intention to enter into or adhere to a treaty to have effect, it must also be acted upon. In the case of international treaties, we have seen that adhesion or accession requires a formal written communication to the original parties or to some other authority designated in the treaty. In the case of adhesion to Indian treaties, the practice in Canada has been for the representatives of the Crown and the Aboriginal people involved to sign a formal document of adhesion. This practice accords with the terms of the Royal Proclamation of 1763, which provide in part:

... if at any Time any of the Said Indians [i.e. the Indian Nations with whom the Crown is connected and who live under the Crown's protection] should be inclined to dispose of the said Lands [i.e. Indian lands which have not been ceded to the Crown], the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie ...

This proclamation has the force of Imperial legislation, and is binding on the Crown's executive officers in the dominions of the Crown to which it applies. It was issued a few months after the Treaty of Paris, by which France ceded the last of its Canadian territories to Britain. From the colonial perspective of these European powers, French Canada included most, if not all, of the Teme-Augama Anishnabai homeland.

In the Court of Appeal, counsel for the Teme-Augama Anishnabai argued that they could not have surrendered their land rights merely by accepting benefits under the Robinson-Huron Treaty because that would violate the surrender procedure set out in the Royal Proclamation. The court got around this difficulty by holding that the proclamation's procedural aspects were repealed by the Quebec Act of 1774. In the court's view, section 3 of that statute preserved the Indians' "right, title or possession", but "the procedural requirement for purchase 'at some public Meeting or Assembly ...' was repealed." The court no doubt relied on section 4 of the Act, which revoked the proclamation "so far as the same relates to the said province of Quebec", the boundaries of which were at the same time extended to include most, if not all, of

---

84 See text accompanying n.56, supra.
85 See n.72, supra.
87 The Crown has exceptional prerogative power to legislate in colonies acquired by conquest or cession until a legislative assembly is promised or created, or English law is introduced: Campbell v. Hall (1774) Lofft 655; Wilcox v. Wilcox (1857), 8 L.C.R. 34 at 81.
88 See McNeil, supra, n.8 at 186-7, 209-10 n.5. For a more general discussion of the extent of French Canada in 1763, see Kent McNeil, Native Rights and the Boundaries of Rupert's Land and the North-Western Territory (Saskatoon: University of Saskatchewan Native Law Centre, 1982).
89 14 Geo. III, c.83 (Imp.).
90 [1989] 2 C.N.L.R. 73 at 95. Steele J. appears to have come to the same conclusion; see [1985] 1 C.N.L.R. 1 at 23.
A Comment on the Temagami Indian Land Case

the Teme-Augama Anishnabai's lands. However, the preamble to that section reveals that the repeal related to the proclamation's provisions...

... in respect to the Civil Government of the said Province of Quebec, and the Powers and Authorities given to the Governor and other Civil Officers of the said Province, ... [which] have been found, upon Experience, to be inapplicable to the State and Circumstances of the said Province, the Inhabitants whereof amounted, at the Conquest, to above Sixty-five thousand Persons professing the Religion of the Church of Rome, and enjoying an established Form of Constitution and System of Laws, by which their Persons and Property had been protected, governed, and ordered...

This and other sections of the Act were therefore intended to remedy the grievances of the French Canadians, principally by allowing them to practice their religion and restoring their civil law. The Act did not affect the Proclamation's provisions for acquisition of Indian lands, nor had it been so interpreted prior to the Bear Island case.

St. Catherine's Milling and Lumber Co. v. The Queen, the leading Canadian case on Indian land rights until Calder v. Attorney-General of British Columbia involved the surrender by the Saulteaux Indians of their Aboriginal title by Treaty 3 in 1873. The lands involved in the case are near Dryden in north-western Ontario, in an area which the Privy Council in 1884 implicitly held to be within the old province of Quebec, as defined by the Quebec Act. In the St. Catherine's case, counsel for Ontario made the argument that the Royal Proclamation had...

---

91 The new boundaries were defined in section 1. On their extent to the north and west, see McNeil (1982), supra, n.88 at 20-34.
92 14 Geo. III, c.83 (Imp.), s.4.
94 British officials who negotiated Indian land surrenders in the late 18th and early 19th centuries in what is now southern Ontario, which was also included within the extended boundaries of Quebec in 1774, made serious efforts to implement the proclamation's surrender provisions; see Peter A. Cumming and Neil H. Mickenberg, eds., Native Rights in Canada, 2nd ed. (Toronto: Indian-Inuit Association of Canada, 1972), 107-17. Robert Surtees wrote that a provision in the Robinson-Huron Treaty itself, prohibiting alienation of reserve lands by the Indians without the consent of the Superintendent-General of Indian Affairs, was based on a principle which "dated back to the Royal Proclamation, and had been tacitly understood by all parties in the intervening years": R.J. Surtees, Indian Land Surrenders in Ontario, 1763-1857 (Ottawa: Indian Affairs, 1984), 98. See also "Plan for the Future Management of Indian Affairs", para. 41-3, annexed to "Instructions to Governor Carleton, 1775", in Adam Shortt and Arthur G. Doughty, eds., Documents Relating to the Constitutional History of Canada, 2nd ed. (Ottawa: King's Printer, 1918), Part 2, 594-620 at 619, where instructions in conformity with the proclamation's provisions were given for the purchase of Indian lands. Moreover, the instructions themselves, in para. 32 at 607, specifically referred to a provision of the proclamation relating to trade with the Indians as if the proclamation's Indian provisions were still in force in the newly-defined province of Quebec. For further evidence and discussion, see Darlene Johnston, The Taking of Indian Lands in Canada: Consent or Coercion? (Saskatoon: University of Saskatchewan Native Law Centre, 1989), 8, 29-31, 46-55.
95 (1887), 13 S.C.R. 577; (1888), 14 App. Cas. 46.
A Comment on the Temagami Indian Land Case

been wholly repealed by that Act. In the Supreme Court of Canada, the argument was convincingly refuted by Strong J., who, among other things, said:

It is nowhere suggested that anything connected with the questions of Indians or Indian rights led to this enactment. None of the changes in the terms of the proclamation which were introduced by the act have the most remote bearing on Indian land rights or Indian affairs. Neither the establishment of French instead of English law, nor the substitution of a council for an assembly, nor the enlargement of the Provincial boundaries, can by implication have any such effect, and the act does not contain a word expressly referring to the Indians.98

Before the Privy Council in the St. Catherine's case, counsel for Ontario repeated the argument that "the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act".99 The argument was evidently rejected by the Privy Council. Lord Watson, after outlining the proclamation's Indian provisions, said:

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or headmen convened for the purpose.100

98 (1887), 13 S.C.R. 577 at 629-35, quotation at 631. Strong dissented in the case, but Taschereau J., who delivered one of the majority judgments, agreed that the Quebec Act did not affect any rights the Indians had under the proclamation: ibid., 648. See also Johnson v. McIntosh, 8 Wheat. 543 (1823), relied on by Strong, where the Supreme Court of the United States held that a private purchase of Indian lands in 1775 was invalidated by the proclamation (the lands were within the newly-defined province of Quebec). Marshall C.J., at 597, said: "The authority of this proclamation, so far as it respected this continent, has never been denied".


100 (1888), 14 App. Cas. 46 at 54.
A Comment on the Temagami Indian Land Case

The Privy Council not only regarded the proclamation's procedural requirements as still in force in 1873,101 but also thought that a surrender required a "formal contract", ratified at a meeting in accordance with the proclamation's terms.102

The Supreme Court of Canada did not address the issue of the effect of the Quebec Act on the proclamation's procedural requirements in its decision in the Bear Island case. In light of the St. Catherine's case and its own pronouncements respecting the proclamation,103 it is extremely unlikely that the court approved the Court of Appeal's casual reversal of over 200 years of legal history. Yet the Teme-Augama Anishnabai did not adhere to the Robinson-Huron Treaty by a "formal contract", nor had the meeting required by the proclamation been held. As the Supreme Court's judgment provides no explanation of how the court got around this difficulty, one is left wondering whether the judges were even aware of it.

But even if non-conformance with the Royal Proclamation could somehow be adequately justified in this case (which it has not been), a problem of lack of formal agreement remains. We have seen that in the Sioui case Lamer J. said that "what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."104 He then quoted the following passage from the judgment of Norris J.A. in R. v. White and Bob:

... on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law ... The nature of the transaction itself was consistent with the informality of frontier days in this Province [British Columbia] and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded ... The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a "Treaty".105


102 This part of the St. Catherine's decision provides another explanation for the federal government's position prior to the Bear Island trial that the Teme-Augama Anishnabai had not adhered to the Robinson-Huron Treaty (see text accompanying nn. 44-5, supra), as no "formal contract" had been entered into.

103 See the Supreme Court decisions cited in n.101, supra.

104 [1990] 3 C.N.L.R. 127 at 139.

105 (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at 649 (affirmed (1965) 52 D.L.R. (2d) 481), quoted in [1990] 3 C.N.L.R. 127 at 140. Note that Norris's sympathetic approach nonetheless reveals an ethnocentric value judgment regarding the relative levels of "civilization" of European and Aboriginal societies.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

Lamer remarked that this passage shows both "the importance of the historical context ... [and] that formalities are of secondary importance in deciding on the nature of a document containing an agreement with the Indians." 106 He went on to decide that a document signed in 1760 on behalf of the British Crown by General Murray, certifying that peace had been made with the Hurons of Lorette and guaranteeing certain rights to them, was a treaty. 107

In both White and Bob and Sioui, the Crown argued that lack of formalities negated the existence of a treaty. Norris and Lamer refused to allow the Crown to avoid its solemn engagements with the Indians in this way. In each case, a written agreement existed, and the Indians had relied on the commitment of the Crown contained therein. In Sioui, Lamer adopted the rule in Simon v. The Queen that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians", 108 and applied it to the issue of whether a treaty had been entered into. 109 In deciding whether General Murray had the capacity to sign a treaty, Lamer therefore said that it was ...

... necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty. 110

So on the issue of whether a treaty exists, it seems that doubts should be resolved in the Indians' favour. One consequence of this is that the Crown cannot use a lack of formalities to avoid its commitments. But where a lack of formalities casts doubt on whether a common intention to create mutually-binding obligations was present, and the Indians involved claim that they did not enter a treaty, resolution of the issue in the Indians' favour should lead to a conclusion that a treaty relationship was not created.

Lack of formalities is particularly significant when the treaty, unlike that in Sioui, involved a surrender of Aboriginal title. At trial in the Bear Island case, Steele J. appears to have regarded Aboriginal title as non-proprietary. 111 He was therefore able to conclude:

A treaty is not a conveyance of title because title is already in the Crown. A treaty is merely a simple acknowledgement that may be formal or informal in nature. 112

His view that Aboriginal title is non-proprietary was based on an erroneous interpretation of St. Catherine's Milling and Lumber Co. v. The Queen, 113 an interpretation which has since been rejected by the unanimous decision of the Supreme Court of Canada in Canadian Pacific

106 [1990] 3 C.N.L.R. 127 at 140.
107 As this was before the issuance of the Royal Proclamation of 1763, and did not involve a surrender of lands, the procedure in the proclamation (discussed in text accompanying nn. 86-102, supra) did not have to be followed.
110 Ibid., 137.
111 [1985] 1 C.N.L.R. 1 at 26-34. For further discussion, see McNeil, supra, n.8 at 189-91, 204-07.
112 [1985] 1 C.N.L.R. 1 at 82.
113 (1888) 14 App. Cas. 46.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

Limited v. Paul. 114 In the Paul case, the court did not accept the view that the St. Catherine's case decided that "Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests." 115

As Aboriginal title clearly entails a proprietary interest in land, it should be accorded the same degree of legal protection as other real property interests. One of these protections is that, statutes of limitation aside, title to land cannot be lost or transferred without appropriate formalities. At common law, this generally involved either a physical handing over of the land in the presence of witnesses or a duly executed deed, depending on whether the interest being transferred was corporeal or incorporeal in nature. 116 Transfers of interests in land to or from the Crown had to be by deed, which had to be enroled in a court of record or Parliament to be valid. 117 While statutory changes have made interests in land generally transferable by deed, formal requirements such as signature and delivery still must be complied with. 118 Land is too valuable, and certainty of title too important, for casual dealings to be sanctioned.

In the case of Aboriginal title, a formal procedure for surrendering it to the Crown was established by the Royal Proclamation of 1763. As we have seen, that involved a public meeting or assembly of the Aboriginal people concerned, held for that purpose by the Crown's representatives. Although the proclamation did not expressly say that a written document had to be signed, that may have been implicit, and in any case became the established practice. The idea that Aboriginal title could be surrendered to the Crown without express agreement at a public meeting, and without a signed document, probably never occurred to anyone before the Bear Island case. Moreover, the Court of Appeal's solution to this problem is no solution at all, because if the Quebec Act repealed the proclamation's procedural requirements for the surrender of Aboriginal title within the colony of Quebec, 119 these surrenders would still have to be governed by some law to be legally effective. If the proclamation did not apply, then the common law respecting transfers to the Crown by deed enroled would likely have to be

---

114 [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47 at 59. In fact, the issue had been decided a century earlier. In A.-G. of Ontario v. Francis (1889), 2 C.N.L.C. 6, decided immediately after the St. Catherine's case, Ferguson H.C.J., at 23-5, examined the Privy Council's decision and concluded that it was consistent with his view that the Indians have a beneficial interest in their unsurrendered lands which entitles them, among other things, to the timber growing thereon. The Francis case is particularly relevant because it involved land which the Aboriginal parties to the Robinson-Huron Treaty excluded from the land surrender and retained for themselves as a reserve, so that it remained subject to their Aboriginal title. At 25, Ferguson said: "The rights of the Indians in respect of this land, and the rights that they had in respect of the timber thereon, were rights and interests other than that of the province in the same, to say the very least". For some unexplained reason this important decision was not reported, until found in the Ontario Archives by Bennett McCardle and printed in Canadian Native Law Cases in 1981.

115 [1989] 1 C.N.L.R. 47 at 59. The Paul decision was presaged in this respect by A.-G. for Quebec v. A.-G. for Canada, [1921] 1 A.C. 401 at 408, and Guerin v. The Queen, [1985] 1 C.N.L.R. 120 at 136, where it was decided that the description of Aboriginal title as a "personal" right simply meant that it is inalienable, other than by surrender to the Crown. See McNeil, supra, n.8 at 190.


119 See text accompanying nn. 89-102, supra, where the Court of Appeal's views on this matter are shown to be erroneous.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

invoked. In either case, the Teme-Augama Anishnabai cannot have surrendered their land rights because the procedures required by law were not followed.

Both absence of mutual intention to enter into a treaty relationship and lack of compliance with formalities for the surrender of Aboriginal title should have led the Supreme Court to decide that the Teme-Augama Anishnabai did not adhere to the Robinson-Huron Treaty. But there are other problems with this aspect of the court’s decision as well. We have already seen that the Teme-Augama Anishnabai did not receive all the benefits they would have been entitled to if they had become parties to the treaty. The Supreme Court acknowledged this by observing:

It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.

If, as the court held, an Aboriginal people can become party to a treaty simply by accepting benefits, one might think that they would have to be accorded full treaty benefits for the adhesion to be complete or their land rights to be lost. Yet this was not the approach the Supreme Court adopted in this case, for acceptance of some benefits sufficed to extinguish the Aboriginal title of the Teme-Augama Anishnabai. The question which then arises is this: What proportion of the benefits has to be accepted before adhesion takes place? Is acceptance of treaty annuities enough? If so, for how many years? Or does a reserve – even if inadequate by the treaty’s standards and not in accordance with the Aboriginal people’s wishes – have to be accepted too? These questions must be answered in order to determine the date of adhesion. This date is important because the land surrender would not take effect until the adhesion was complete. If the adhesion did not take place until 1943 when the lands for the reserve on Bear Island were first set aside, or until 1971 when the reserve was officially created, Crown grants of land within the land claim area prior to those dates may not have been effective. Unfortunately, neither the Supreme Court nor the lower courts in Bear Island gave any indication of what benefits must be accepted for an adhesion to take place, or when the adhesion took effect in this particular case.

120 See text accompanying n.43, supra.
122 In Anglo-Canadian contract law, even when a valid contract has been created, partial performance by one party generally does not entitle that party to claim payment or performance by the other: see Fridman, supra, n.62 at 489-93, 503-08; Furmston, supra, n.62 at 517-20; Guest, supra, n.62 at 419-22. In the context of an agreement for the sale of land, this means that, in the absence of a term to the contrary in the agreement, the vendor does not have to convey the title until the purchase price is paid.
123 The Crown could not derogate from the Aboriginal title of the Teme-Augama Anishnabai by grant because that title is proprietary (see text accompanying nn. 111-15, supra), and a fundamental common law rule prevents the Crown from derogating from vested property rights: see The Queen v. Hughes (1866), L.R. 1 P.C. 81 at 87-8; Bristow v. Cormican (1878), 3 App. Cas. 641; Drulard v. Welsh (1906), 11 O.L.R. 647 at 656, reversed on other grounds (1907), 14 O.L.R. 54; Chitty, supra, n.117 at 386. Moreover, the Royal Proclamation of 1763 prohibited grants of Indian lands which had not been ceded to the Crown.
124 For discussion of this aspect of the lower courts’ decisions, see McNeil, supra, n.8 at 195-6.
A Comment on the Temagami Indian Land Case

4. Extinguishment of Aboriginal Title

As we have seen, the Supreme Court held that the Aboriginal title of the Teme-Augama Anishnabai had been surrendered and therefore extinguished by adhesion to the Robinson-Huron Treaty. The court did not comment on the ruling by the Ontario Court of Appeal that, even if the Teme-Augama Anishnabai did not become parties to the treaty by signature or adhesion, their land rights were unilaterally extinguished by the treaty because it was an expression of the will of the sovereign to extinguish Aboriginal title throughout the treaty area.125 Elsewhere, I have argued that this ruling is not good law, first, because the Teme-Augama Anishnabai's lands are not within the treaty area, and secondly, because the Crown does not have the authority to extinguish Aboriginal title by unilateral executive action.126 The first argument is based on interpretation of the treaty, and the second on the fundamental common law rule that the Crown cannot derogate from vested property rights.127 The idea that the Crown can unilaterally extinguish Aboriginal title comes from American law and a misapplication of St. Catherine's Milling and Lumber Co. v. The Queen,128 and is no longer viable in light of the Supreme Court of Canada's decision in Canadian Pacific Limited v. Paul.129

However, the Supreme Court's conclusion in Bear Island that the Teme-Augama Anishnabai's title was extinguished by adhesion (assuming adhesion took place, which in my view never happened) is problematic as well. The Supreme Court simply assumed, without explanation or analysis, that their title would be extinguished if they adhered to the treaty. But that assumption depends on how the treaty is interpreted, a question of law which the court could not avoid by deferring to the trial judge, as it did with respect to questions of fact.130 No doubt the Supreme Court based its assumption on the written terms of the treaty, which, among other things, provide that the Aboriginal parties

... fully, freely and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors forever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed ...131

However, in Simon v. The Queen, Dickson C.J.C., delivering the unanimous decision of the Supreme Court of Canada, said that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians."132 He relied on his earlier statement of the principles of treaty interpretation in Nowegijick v. The Queen, where, again for a unanimous court, he said:

---

126 McNeil, supra n.8, 197-207.
127 See authority in n.123, supra.
128 (1888), 14 App. Cas. 46.
130 See text accompanying nn. 4-6, supra.
131 Text of the treaty, in Morris, supra, n.43 at 305.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian ... In Jones v. Meehan, 175 U.S. 1, it was held that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians."133

These principles of treaty interpretation have been approved in a number of subsequent Supreme Court decisions.134 The rationale for them was partially explained by Wilson J. in R. v. Horseman:

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.135

The Nowegijick principles contained in the passage from that case quoted above contain "[t]wo elements of liberal interpretation", as Dickson C.J.C. pointed out in Mitchell v. Peguis Indian Band:

(1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. In some cases, the two elements are indistinguishable, but in other cases the interpreter will only be able to perceive that there is an ambiguity by first invoking the second element.136

The surrender provision in the Robinson-Huron Treaty therefore should first be examined to see if it contains any ambiguities. On its face, it may seem to be "clear and plain",137 as it

---

136 [1990] 3 C.N.L.R. 46 at 76 (note that Dickson disagreed with the other members of the court on the application of the Nowegijick principles to the Indian Act, R.S.C. 1970, c.I-6, in this particular case, but the court appears to have agreed generally on the application of those principles to treaties).
A Comment on the Temagami Indian Land Case

states in broad terms that the Aboriginal parties "surrender, cede, [etc.] all their right, title, and interest to, and in the whole of, the territory". However, the treaty also provides that the Aboriginal parties have

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

By this provision, the Aboriginal parties retained their rights to hunt and fish on any ungranted lands within the surrendered territory. At common law, a right to hunt or fish enjoyed by people generally is not proprietary in nature, being classified instead as a public right. But if the right is held by an individual or the members of a definable group, it is either a proprietary profit à prendre or, in the case of an exclusive right to fish, a privately-owned fishery. In either case, the right to hunt or fish amounts to an interest in land. If this law were directly applicable to the Robinson-Huron Treaty, the retained rights to hunt and fish would entail a continuing interest in the surrendered lands. However, in reference to an Aboriginal right to fish in Sparrow v. The Queen, Dickson C.J.C. and La Forest J. said:

Queen, [1990] 3 C.N.L.R. 160 at 174-5. In both those cases, the issue was extinguishment by legislation, but the test for extinguishment by treaty should be at least as stringent, given that treaties are to be interpreted in favour of the Indians and in accordance with their understanding of them.

Text of the treaty, in Morris, supra, n.43 at 305. The term "territory" may raise a question about what is being surrendered because it could relate to title to territory as understood in international law rather than land rights, but the immediately preceding words "to, and in the whole of," could be interpreted to include both. Some ambiguity nonetheless is present here.

Ibid., 306.

See R. v. Agawa (1988), 28 O.A.C. 201, [1988] 3 C.N.L.R. 73, where the Ontario Court of Appeal regarded a virtually identical provision in the Robinson-Superior Treaty of 1850 as amounting to a treaty right to hunt and fish in the context of section 35(1) of the Constitution Act, 1982, being Schedule B of the Canada Act 1850 (U.K.) 1892, c.11. However, this does not mean that the treaty created the right. In Simons v. The Queen, [1865] 1 C.N.L.R. 153 at 172, Dickson C.J.C. said that a provision in a 1752 treaty guaranteeing the Micmacs the "free liberty of hunting and Fishing as usual" did not create new hunting or fishing rights but merely recognized pre-existing rights. See also R. v. Padjena and Quesawa (1930), 4 C.N.L.C. 411; Denny, Paul and Sylliboy v. The Queen, [1990] 2 C.N.L.R. 115 at 122-7.


In Wickham v. Hawker (1840), 7 M. & W. 63, a reservation of the liberty "to hawk, hunt, fish and fowl at any time" in a conveyance of land was held to operate as a grant of a proprietary profit à prendre back to the alienors, so that they maintained an interest in the land. See also Muggarve v. Foster (1871), L.R. 6 Q.B. 590; Osborne v. Osborn (1891), 25 L.T. 36; Reynolds v. Moore, [1898] 2 Ir. R. 641. However, in R. v. Commanda (1939), 72 C.C.C. 246, it was held that the hunting and fishing rights provision in the Robinson-Huron Treaty did not give rise to a trust or interest within the meaning of section 109 of the British North America Act, 1867 (now the Constitution Act, 1867), 30 & 31 Vict., c.3 (U.K.), and in Pavis v. The Queen (1979), 102 D.L.R. (3d) 602, [1979] 2 C.N.L.R. 52 at 63-5, a similar claim to a trust under the same provision was dismissed. Both Commanda and Pavis relied on A.-G. for Canada v. A.-G. for Ontario, [1897] A.C. 199, where the Privy Council held that the annuity provision in the Robinson-Huron Treaty did not create a trust or interest in the lands surrendered by the treaty. However, unlike an annuity which the Privy Council held to be a personal obligation,
A Comment on the Temagami Indian Land Case

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in Guerin ([1985] 1 C.N.L.R. 120, at 136) referred to as the "sui generis" nature of aboriginal rights.144

While this passage reveals that the Supreme Court is probably unwilling to apply common law concepts respecting profits à prendre and privately-owned fisheries directly to Aboriginal fishing rights, it should not be read as a denial that those rights are as proprietary as equivalent common law rights.145 The court's decision in Canadian Pacific Limited v. Paul146 that Aboriginal land rights are proprietary shows that the "sui generis" nature of those rights cannot be used as a justification for denying them proprietary status. As Aboriginal land rights clearly include a right to hunt and fish,147 that right must also be proprietary. Retention in the Robinson-Huron Treaty of the hunting and fishing aspect of the Aboriginal parties' land rights therefore has to operate as a qualification on the surrender provision.148

Interpreting the hunting and fishing provision as a qualification on the surrender provision is in keeping with the rule that treaties are to be interpreted in favour of the Aboriginal parties. Moreover, this approach probably corresponds more closely to the understanding of the Aboriginal peoples who signed the treaty in 1850. For them, hunting and fishing were the most important uses they made of the land, as their economies were based primarily on those

---


148 Classifying the hunting and fishing right as proprietary is not inconsistent with the provision in the treaty which allows the Crown to exclude certain lands from Aboriginal hunting and fishing by selling or leasing them. In Anglo-Canadian law, this provision would give the Crown a "power", which in Halsbury's Laws, supra, n.141, vol. 36, para. 801, is referred to as

... a term of art, denoting an authority vested in a person, called 'the donee', to deal with or dispose of property not his own. A power may be created by reservation or limitation; the dealing or disposition may be total or partial, and for the benefit either of the donee or of others; and the property may be real or personal. A power is distinct from the dominion a man has over his own property. (footnotes omitted)

However, this power over Aboriginal hunting and fishing rights would not be unlimited, as the Crown has a fiduciary obligation towards the Aboriginal peoples, especially after they have surrendered their lands: see Guerin v. The Queen, [1985] 1 C.N.L.R. 120; Sparrow v. The Queen, [1990] 3 C.N.L.R. 160, esp. 130, 183-4.
A Comment on the Temagami Indian Land Case

activities. William Robinson, who negotiated the treaty for the Crown, acknowledged this in his official report when he wrote that, "by securing [their reserves] to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from them their usual means of subsistence."

He also told them that, unlike lands further south, which were "occupied by the whites in such a manner as to preclude the possibility of Indian hunting over or having access to them[,] ... the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies". As the Aboriginal parties to the treaty were told that they could continue to derive their subsistence from the land, they may well have thought that, apart from a few mining sites, they were really giving up very little.

The monetary compensation which Robertson offered may well have confirmed this impression. In his report, he wrote that he told the Indians that

... the two chiefs who were in Toronto last winter (Shinguacouse and Nebennigoebing) only asked the amount which the Government had received for mining locations, after deducting the expenses attending their sale. That amount was about eight thousand pounds which the Government would pay them without any annuity or certainty of further benefit; or one-half of it down, and an annuity of about one thousand pounds.

According to Robinson, the chiefs "all preferred the latter option", though Shinguacouse and Nebennigoebing insisted on an annuity of ten dollars per person, giving in only when they saw

---


150 W.B. Robinson to Colonel Bruce, Superintendent-General of Indian Affairs, 24 September 1850, in Morris, *supra*, n.43, 17-21, at 19.

151 *Ibid.*, 17. These factors were used by Robinson to justify the lower annuities he was offering.

152 An example of this kind of Aboriginal understanding of a treaty may be found in the treaty commissioner's report on Treaty 9, which was negotiated in 1905-06 with the Ojibway and Cree in the area immediately north of the Robinson Treaties. The commissioners reported that, at Fort Hope on the Albany River, Moonias, one of the most influential chiefs, asked a number of questions. He said that ever since he was able to earn anything, and that was from the time he was very young, he had never been given something for nothing; that he always had to pay for everything that he got, even if it was only a paper of pins. "Now," he said "you gentlemen come to us from the King offering to give us benefits for which we can make no return. How is this?" Father Fafard thereupon explained to him the nature of the treaty, and that by it the Indians were giving their faith and allegiance to the King, and for giving up their title to a large area of land of which they could make no use, they received benefits that served to balance anything that they were giving.


One may wonder how many Aboriginal people signed treaties without asking the direct question Chief Moonias posed, and without hearing the explanation he received.

153 *Supra*, n.150 at 17.
A Comment on the Temagami Indian Land Case

that the other chiefs were prepared to accept the offer Robinson had made. As the cash payment and annuities appeared to provide compensation only for lands which had already been taken for mining, Robinson inserted an additional clause in the treaty, ...

... that should the territory hereby ceded by the [Indians] at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order ... Robi

Robinson reported that "[t]his was so reasonable and just that I had no difficulty in making them comprehend it, and it in a great measure silenced the clamor raised by their evil advisers." From Robinson's report, the bargain that seems to have been made was principally for past and future mining sites, with the Aboriginal parties to retain the right to use the rest of the lands as they had always done. Further investigation of the historical context, which the Supreme Court has said is essential to understand Indian treaties, would have to be conducted to clarify the Aboriginal understanding of this particular treaty. But enough has been said to reveal that the surrender provision is not as straight-forward as it appears at first glance, and probably did not involve a complete extinguishment of Aboriginal title.

As the Supreme Court decided in the Bear Island case that the Teme-Augama Anishnabai became parties to the Robinson-Huron Treaty by adhesion, their position is different from that of the original Aboriginal signatories. The historical context in the 1880s (or whenever the

154 Ibid., 18. The monetary compensation the Aboriginal parties received under the Robinson Treaties (4000 pounds in cash plus annuities totaling 1100 pounds) was very close to the amount Robinson told them the government had received from mining locations: see the text of the treaties in Morris, supra, n.43 at 302, 305.

155 Robinson-Huron Treaty, in Morris, supra, n.43 at 306.

156 Supra, n.150 at 18-19. Note that the annuity payments were later increased from 96 cents to $4 per person: ibid., 18, Morris's note. On liability for these increases, as between Canada and Ontario, see A.-G. for Canada v. A.-G. for Ontario, [1897] A.C. 199.

157 In addition to the passage from Wilson's judgment in R. v. Horseman cited in text accompanying n.135, supra, see A.-G. of Quebec v. Sioui, [1990] 3 C.N.L.R. 127, esp. 133-4: "courts ... must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration."

158 Evidence from Aboriginal witnesses that their understanding differed from the written terms was presented and accepted in A.-G. of Ontario v. Francis (1889), 2 C.N.L.C. 6. At issue were the boundaries of one of the reserves, which were described in the treaty in miles. Ferguson H.C.J. found that the word "mile" was meaningless to the Aboriginal parties. At 17-18, he wrote: "They did not and do not know what is meant by a mile, or a league, or the difference between the two measures, nor indeed any measure that to us would be a measure at all." In fact, the word in their language which signified the measure of distance was also used for other measures, such as volume. To resolve the problem, Ferguson relied on their geographic description by place names of the limits of their reserve, and concluded at 17 that there could be no doubt "that this tract of land was what these Indians honestly thought they were getting as their reserve, and in my opinion the evidence shows that it is the tract of land they did get as their reserve." This is just one illustration of the inevitable problems of interpretation which arise in the cross-cultural context of Indian treaties, even with respect to terms which from an Anglo-Canadian perspective appear perfectly clear.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

adhesion took place) at Lake Temagami obviously would not have been the same as at Sault Ste. Marie where the treaty was originally signed in 1850. Moreover, cultural differences between the Teme-Augama Anishnabai and the original signatories could have resulted in divergent understandings.

The Supreme Court said in Sparrow that the onus is on the Crown to prove extinguishment of Aboriginal rights, and that the intention to extinguish must be "clear and plain". In the context of an alleged surrender of land rights by treaty, this means that the Crown would have to show a mutual intention for those rights to be extinguished. Given that treaties must be interpreted in their historical context as the Aboriginal parties would have understood them, the Crown could not rely simply on the written terms without evidence that the Aboriginal parties understood that the treaty involved a surrender of their land rights. At a minimum, this would involve proof that the written terms of the treaty had been explained to them, and that they understood and assented to the surrender.

None of the judgments delivered in the Bear Island case reveal that the Crown produced convincing proof that the Teme-Augama Anishnabai understood that adhesion to the Robinson-Huron Treaty would result in extinguishment of their Aboriginal land rights. Evidence of their understanding of the treaty does not appear to have been given because they maintained throughout the trial that they did not adhere to it. Therefore, after finding that they did adhere, the Supreme Court should not have simply assumed that their Aboriginal land rights were extinguished. Instead, the court should have sent the case back to trial, where evidence could have been led to determine what effect the Teme-Augama Anishnabai thought the treaty would have on their rights. The relationship between the land surrender provision and the hunting and fishing rights provision could then have been considered in light of that evidence. By denying the Teme-Augama Anishnabai the opportunity of giving their interpretation of the treaty, the Supreme Court violated one of its own principles of treaty interpretation.

5. Conclusions

In the Bear Island case, the Supreme Court of Canada decided that the Teme-Augama Anishnabai had an Aboriginal right to their lands before adhering to the Robinson-Huron Treaty, and so overruled Steele J.'s contrary view. To reach this decision, the Supreme Court probably concluded that the Teme-Augama Anishnabai were a distinct Aboriginal society, at least by the time the treaty was originally signed in 1850. This ruling vindicated the Teme-Augama Anishnabai's claim to Aboriginal rights stemming from their existence as an

159 [1990] 3 C.N.L.R. 160 at 174-5. This principle also applies to treaty rights: see R. v. Horseman, [1990] 3 C.N.L.R. 95 at 102; A.G. of Quebec v. Sioui, [1996] 3 C.N.L.R. 127 at 151. In Simon v. The Queen, [1986] 1 C.N.L.R. 153 at 170, Dickson C.J.C. said: "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises."

160 For an instance where lack of mutual intention led a court to conclude that a land surrender provision may not have been effective, see Re Paulette's Application (1973), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 97 at 138-43, reversed on other ground (1975), 63 D.L.R. (3d) 1, [1977] 2 S.C.R. 628.

161 See text accompanying nn. 133-5, 157, supra.

162 The Court of Appeal commented on the fact that few Aboriginal witnesses were called, and that the quality of the testimony given did not match that in Re Paulette's Application (1973), 42 D.L.R. (3d) 8 (where extensive evidence of the Aboriginal understanding of Treaties 8 and 11 was presented): [1989] 2 C.N.L.R. 73 at 76.

[1992] 1 C.N.L.R.
A Comment on the Temagami Indian Land Case

Aboriginal people and their occupation of their traditional homeland. They are therefore entitled to continue to assert any Aboriginal rights – such as a possible right to self-government – that were not surrendered by the treaty.

On the issue of adhesion, the Supreme Court simply assumed that an Aboriginal people can become party to a treaty by accepting benefits under it. In doing so, the court ignored general principles relating to the creation of mutually-binding agreements. It also disregarded the procedure for the surrender of Aboriginal land rights laid down in the Royal Proclamation of 1763, and followed in other treaties and adhesions, including the Robinson-Huron Treaty itself. In effect, the court held that those rights can be given up in a casual and informal way, without an actual transfer of title. As the common law has never sanctioned such unceremonious dealings in land, this holding appears to be inconsistent with the court's previously-expressed view that Aboriginal title is proprietary. Moreover, in this particular case it seems to ignore the established rule that the intention to extinguish Aboriginal rights must be "clear and plain".

The Supreme Court also took for granted that adhesion to the treaty necessarily resulted in the complete extinguishment of the Teme-Augama Anishnabai's land rights. The court did so without analysis of the treaty's terms, and in particular without discussing the relationship between the surrender provision and the hunting and fishing rights provision. The court accordingly failed to apply its own principles of treaty interpretation, specifically that ambiguities must be resolved in the Aboriginal parties' favour, and that treaties must be interpreted in their historical context as the Aboriginal parties would have understood them. If there was insufficient evidence to apply these principles at the Supreme Court level, the case should have been sent back to trial where that evidence could have been presented.

The Supreme Court's decision in this case can best be described as inadequate. The absence of analysis and the failure to apply established principles is both puzzling and disappointing. These weaknesses also make the decision valueless as a precedent. There are no clear principles to be gathered from it, and scant direction for other courts to decide Aboriginal rights cases. As the decision departs from the development of Aboriginal rights jurisprudence by the Supreme Court over the past ten years, the best approach may simply be to ignore it.

[1992] 1 C.N.L.R.