TREATY 3: THE FAILURE OF THE CANADIAN GOVERNMENT TO PROTECT NATIVE TREATY RIGHTS 1905-20

BY

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Chapter One

INTRODUCTION

The history of the relationship between Aboriginal people in Canada and Euro-Canadians has been vast and interesting. In the beginning, when settlers were few, the relationship was mutually beneficial. However, as more and more Europeans came to this part of the world, Aboriginal people became less important, both in terms of their economic contribution and with respect to the politics of this country. Increasingly, they existed apart from mainstream Canadian life and predictably, the relationship eventually broke down so completely that the cultural existence of Aboriginal people was threatened.

This paper will examine one particular aspect of the deterioration of this relationship; a case which occurred in the Treaty 3 area in Northwestern Ontario between the years 1905 and 1920. The Ontario and Minnesota Power Company, with the approval of the government of Ontario flooded a portion of an Ojibwa reserve located near Fort Frances. The Ontario government, through ignorance or racism, or both chose to ignore and then obstruct Native treaty rights in favour of powerful business interests that promised "progress" in the region. Before an analysis of this event can be undertaken

however, one must provide a context for evolution of Native and non-Native relations in Canada.

One of the earliest alliances between Native and non-Native people centred around the fur trade. Indeed, fur was the method, as Bruce Trigger notes, by which Henry IV of France hoped to colonize New France. The king granted wealthy merchants "an exclusive right to trade with the Indians in return for establishing French settlement there."[1] From the seventeenth to the nineteenth centuries, many Europeans were captivated by the wealth which could be gained from furs.[2] Because of the vital role in the fur trade played by Native people they were able to exert some pressure and influence in the system.[3]

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[1] Bruce Trigger, Natives and Newcomers: Canada's Heroic Age Reconsidered. (Montreal and Kingston: McGill-Queen's University Press, 1985) p.172.

[2] In the journals of both David Thompson and Alexander MacKenzie we get an impression of the sense of adventure as well as a description of the sort of relationship which existed between Europeans and Native people.
David Thompson, Travels in Western North America, 1784-1812, ed. Victor Hopwood (Toronto: McMillan of Canada, 1971).
Alexander MacKenzie, The Journal and Letters of Sir Alexander MacKenzie, ed. W. Kaye Lamb (Cambridge: Cambridge University Press, 1970).

[3] See, for example:
A.J. Ray, Indians and the Fur Trade (Toronto: University of Toronto Press, 1974).
Jennifer Brown, Strangers in Blood:Fur Trade Company Families in the Indian Country (Vancouver: University of Vancouver Press, 1980).
Sylvia Van Kirk's Many Tender Ties:Women in the Fur Trade Society in Western Canada 1670-1870 (Winnipeg: Watson and Dwyer Ltd. 1980).

In the Treaty 3 area, Ojibwa traders were involved with the North West Company in various capacities and brought their furs to the post at Fort William. The relationship was an economically beneficial one for both groups; the Ojibwa received European goods and the traders got the fur.[4] Indeed, the great Canadian political economist Harold Innis assigns much importance to this interaction, attributing to it the early development of Canada.[5]

This advantageous relationship had begun to alter as the fur trade declined and more settlers came into the area. Beginning with the Royal Proclamation of 1763 and continuing with the British North America Act of 1867, the government gradually succeeded in transforming a sovereign Aboriginal people, who had personal and cultural autonomy and who also possessed the freedom to negotiate such economic liaisons with non-Native people as they wished, into a subject people with limited rights and diminished power over their own affairs.

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[4] J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada (Toronto: University of Toronto Press, 1989) p. 41. Miller explains that some trade goods actually undermined the culture of Aboriginal people, but that others were used to enhance traditional beliefs.

[5] In the landmark work by Harold Innis the importance of the fur trade to the development of this nation is analyzed. Harold Innis, The Fur Trade In Canada: An Introduction to Canadian Economic Trade to 1835 (Toronto: University of Toronto Press, 1930).

The Royal Proclamation was clearly designed to protect Native people from outsiders; for example, land could not be sold to unscrupulous traders, and could only be transferred through the Crown. The profits from such land transfers were intended, at least, to benefit Native people. However, up to this time, Aboriginal people had effectively maintained control over their "internal social affairs as well as their external diplomatic and military relationships"[6] and were treated, more or less, as sovereign nations. They were also viewed by the government of Upper Canada in the British, as valued allies in constant struggle against the United States, established in 1783. For example, Native people played a vital role in the defeat of American forces during the War of 1812. As Robert Allen points out in His Majesty's Indian Allies:

> The successful defence of the province in 1812 was the result of the bold offensive strategy of Isaac Brock, 'the hero and saviour of Upper Canada' in traditional Canadian historical accounts of the War of 1812. Yet the victories at Michilimackinac, Detroit, and Queenston Heights were all determined in large measure by the physical presence or active military use of significant numbers of Indian allies.[7]

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[6] Bruce W. Hodgins, John S. Milloy, Kenneth J. Maddock, "Aboriginal Self-Government: Another Level or Order in Canadian and Australian Federalism?" in Federalism in Canada and Australia: Historical Perspectives 1920-1988. Peterborough: The Frost Centre for Canadian Heritage and Development Studies, Trent University, 1989, p.466.

[7] Robert S. Allen, His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815 (Toronto: Dudurn Press, 1992) p.140.

Although Native people were effectively made wards of the Crown under the Proclamation Act and were no longer treated as sovereign people, they still held some rights and could participate somewhat in the decision making process. For example, prior to 1860

> it was tribal councils who decided the degree and direction of culture change: whether schools would be allowed on the reserves, the rate and type of agricultural or resource development, and the extent to which Indian finances, composed of the annual payments received by the tribes for lands surrendered to the Crown, would be devoted to projects of development.[8]

However, this sort of independence was not to last. This type of constitutional relationship, which was designed to work on a nation to nation basis, was not able to survive after Confederation. Section 91(24) of the British North America Act resulted in the termination of traditional Native government; in effect the British Crown turned over control of Native people to the new government of Canada. This move meant that Aboriginal people were forced to agree to whatever laws the Canadian governments chose to make for them.[9]

The Indian Act of 1876 was a progeny of section 91(24) of the British North American Act and was established to consolidate all the previous laws that had existed which

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[8] John Milloy,"The Early Indian Acts: Developmental Strategy and Constitutional Change," As Long as the Sun Shines and Water Flows, Ian A.L. Getty and Antoine S. Lussier, eds. (Vancouver: University of British Columbia Press, 1983) p.57.

[9] CP Sessional Paper no. 50, 12 February 1909.

governed white-Aboriginal relations. One of the main intentions of the Act was to change Native attitudes through education and enfranchisement, concerning communal land, and to eventually assimilate Native people into non-Native culture.[10] Certainly the Indian Act of 1876 was meant to "civilize" Native people.[11] It also quite markedly changed the nature of the Native-white relationship by explicitly making Natives wards of the state. In short the relationship went from being one of relative equality to being one of a parent-child nature. For example, two important earlier acts, one passed in 1850 and the other in 1857, illustrate the sort of legislation that was combined to form the Indian Act. The 1850 Act assumed that the government had broad powers, even to the point of defining who was or was not Indian.[12] This particular Act was highly intrusive because it meant that the government now had the power to pronounce non-Native people as Native, and conversely, Native people

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[10] Some of the examples that illustrate both the effects of such assimilation tactics and the rationale behind them. See John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," The Western Canadian Journal of Anthropology 6 (1976).
CP Sessional Paper no. 50, 12 February 1909. Here the comments made by Chief Justice Davies are particularly valuable.
See also, Olive Patricia Dickason, Canada's First Nations: A History of Founding Peoples from Earliest Times (Toronto: McClelland & Stewart, 1992)

[11] See Dickason, p. 284

[12] J.R. Miller Skyscrapers Hide the Heavens, p.109. In Canada East the Act provided a definition of Indian that not only included those who had Aboriginal ancestors, but also anyone who chose to live with a band on a reserve.

as non-Native. Certainly this was a bizarre situation over which Aboriginal people themselves had no control, and it had disastrous implications for them. For example, Native women who married non-Native men were forced to live off the reserve and their children lost their status as Native people. Similarly, the 1857 "Act for the Gradual Civilization of the Indian Tribes in the Canadas" was designed to encourage Native people to cease being Native and to enfranchise them as full citizens in the non-Native community. Of course, what was actually expected, was that they would eventually lose all special status or Treaty rights.

By 1869, the Dominion of Canada acquired the rights to the old Hudson Bay territories in the west, finally taking possession in 1870. Native people were well aware that the only protection they would receive against the encroachment of non-Native civilization was to make treaties with the government.[13] Still "any" agreement would not suffice, a fact brought out by the drawn-out negotiations that resulted in Treaty 3 in 1873. The Treaty, covering approximately 55,000 square miles in what is now Northwestern Ontario, was

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[13] Robert Surtees, "Indian Land Cessions in Upper Canada, 1815-1830," As Long As the Sun Shines and Water Flows: A Reader In Canadian Native Studies, eds. Ian A.L. Getty and Antoine Lussier (Vancouver: University of British Columbia Press, 1983). Surtees acknowledges that Native people in the west had a legitimate fear of how Natives south of the border were treated by the American government and were afraid that without strong treaties the same sort of abuses would happen to them at the hands of the Canadian government.

believed to be necessary in order to permit the government of Canada to complete its nation-building project.[14] Tentative discussions between the local Ojibwa and Ottawa began in 1869, but were not completed for four years.

An example of the difficulties encountered during the meetings is demonstrated in an 1872 letter written by Treaty 3 negotiators to the Secretary of State for the Provinces, Joseph Howe. The officials complained that they had not been successful in negotiating with the Ojibwa west of Lake Superior because the Indians were angry that some of their land had been taken by the construction of roads, and that timber had been cut from their forests for fuel for steamers and for building.[15] The lack of trust evidenced during these negotiations stemmed from different white and Native priorities and agendas. As noted above, the letter wanted some assurances (although not at my cost) their way of life would be protected against an influx of white settlers, probably having in mind here the example of their relations to the immediate south in the United States. Conversely, the former wanted the Treaty for political and nation-building reasons, and also for any raw materials, like lumber, that might be found in the region. The conflict inherent in the motivation of each side for an agreement was not easy to

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[14] Not everyone saw it this way. Some believed it to be premature. See Irving Papers Box 40, package 38, item 16.

[15] Irving Papers, Box 30, package 36, items 1-4.

resolve and in this case and others, the economic, political, and potential military power of the government in Ottawa won out. [16]

The government relied on the recommendations of departmental agents, and the wishes of Native people were secondary to the attitude of policy makers like Treaty 3 commissioner Alexander Morris who had envisioned a collective tribal authority, under the control of a strong central government. For reasons such as these, the treaties were not negotiated differently with respect to what suited each territorial group, but rather according to an evolving central policy.[14]

Eventually it became the responsibility of the Department of Indian Affairs, formally established in 1880 but which remained with the Department of the Interior until 1936, to oversee the implementation of the agreements that had been reached through the various treaties. Initially,

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[16] For example historians, judges and government policy makers and critics have all been interested in the problems associated with conflicts over resource use and Native lands. Some examples are the following.
Thomas Berger, Northern Frontier, Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry (Toronto: James Lorimer & Co. Publishers, 1977).
Peter A. Cumming and Neil H. Mickenberg eds., Native Rights In Canada (Toronto: General Publishing Co. Limited, 1972).
Anthony Hall, Aboriginal Resource Use In Canada: Historical and Legal Aspects (Winnipeg: University of Manitoba Press, 1991).
John Leslie and Ron Maguire eds., The Historical Development of the Indian Act Ottawa: Government Publication.

[14] Milloy, p.57.

the Department was concerned more with protecting Native people from potentially dangerous situations as, for example, from the evils of prostitution and from being cheated out of their property and material possessions. Unfortunately, this paternalistic attitude came to function more as an instrument of domination than as one of salvation.[15]

One of the main goals of the department then, was to operate as guardians for Aboriginal people and subsequently to work, as the department perceived it, on their behalf. One problem with this arrangement was that it was difficult, for the Department of Indian Affairs to fulfil its mandate, that is, to represent both the Native and non-Native communities. Indeed, it found this to be increasingly difficult. As time passed, this conundrum was resolved in favour of the non-Native side. As James Frideres wrote in Native People in Canada, by the turn of the century

> a new perspective on Native Canadians began to emerge. A tremendous influx of white settlers had entered the west and the Native population began to be viewed as a barrier to Canada's general progress.... As a result...amendments to the

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[15] For a fuller understanding of how this process which began as benevolent power became an entrenched systematic dictatorship of Native people by various government agencies see the following.
John Leslie and Ron Maguire, eds., The Historical Development of the Indian Act, Treaties and Historical research Centre, Indian and Northern Affairs, 1978.
Allan G. Harper, "Canada's Indian Administration: Basic Concepts and Objectives," America Indigena 5 (April 1945). Bruce Clark, Indian Title in Canada (Toronto: Carswell Co., 1987).

> Indian Act during the early 20thC began to focus on the conditions under which land could be taken away from Natives.[16]

In the analysis of the following Treaty 3 case, one may see how this dialectic was resolved. The Department of Indian Affairs, for its Native charges in the Fort Frances area, came into conflict with powerful economic interests that promised "progress." It also came into conflict with the government of Ontario, under whose constitutional jurisdiction the Ontario and Minnesota Power Company fell.[17] As will be seen, the Department of Indian Affairs, when confronted with a formidable opponent with Queen's Park on its side, eventually caved in to the pressure exerted and accepted a situation which was not in the interests of its Native wards.

This predicament was particularly evident in the Treaty 3 region because economic development, which was predominantly connected with the mining and forest industries,[18] occurred frequently on or near reserve lands. Can a department serve two masters? Clearly not, and

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[16] James Frideres, Native Peoples in Canada (Toronto: Prentice-Hall, 1983) p.25.

[17] For the Ontario government, Native people posed as obstacles to "progress" were nothing more than ciphers who had to be moved out of the way.

[18] H.V. Nelles, The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1949-1941 (Toronto: McMillan of Canada, 1974), p.26.

therein lay the dilemma facing the Department of Indian Affairs and Native people in that region.[19]

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[19] For various reports which illustrate the difficulty Native people face in maintaining the rights given to them by treaty in the Treaty 3 area and other areas in western Canada see the following.
James Waldram, The Impact of Hydro-Electric Development Upon a Northern Manitoba Native Community (University Microfilms International, 1983).
Anthony Long & Menno Boldt, eds., Governments in Conflict (Toronto: University of Toronto Press, 1988).
Paul Driben & Donald Auger, The Generation of Power and Fear: The Little Jackfish River Hydroelectric Project and Whitesand Indian Band Lakehead Centre for Northern Studies and Research Report Series No.3, 1989.
Melvin M. Crystal, "Report of Treaty and Aboriginal Rights and Government of Ontario Native Affairs Policy of Lands and Natural Resources." Ministry of Natural Resources Report, May 31, 1986.
Thomas Berger, Northern Frontier, Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry (Toronto: James Lorimer & Co. Publishers, 1977)

Chapter Two

THE TREATY NO.3 SITUATION

The early history involving conflict between the Ontario government and the Dominion of Canada, which became known as the Ontario boundary dispute, foreshadows the later difficulties over reserve lands and resources on reserve lands.

The territory which was involved in the controversy was originally part of the land controlled by the Hudson's Bay Company. However, there had been considerable movement on the part of the Canadian government to acquire those lands for itself, ending the charter which gave the Hudson's Bay Company a monopoly which had existed since the time of Charles II. The British government was able to pressure the two parties to an agreement for a cash settlement and specific lands,[20] and in 1870, the government of Canada was finally given the authority to administer this region. An interim decision was made which created a Northwestern boundary for the province of Ontario adjacent to the Northwest Territories, but excluding the lands that would become part of Treaty 3. The federal government, which had

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[20] Morris Zaslow, Profiles of A History, p.108.

jurisdiction under section 91(24) of the British North America Act to make decisions for "Indians and lands reserved for Indians" subsequently negotiated Treaty 3. The federal government did this on its own, with no input from the province of Ontario, even though Ontario had made it clear that it felt that the district in question, the Lake of the Woods area, belonged to the province.[21] This controversy led to a lawsuit the St. Catharine's Milling Case[22], which helped to expedite the decision which ultimately awarded the territory to the province, rather than the Dominion, in 1889.

The boundary dispute caused problems for Native people because the Treaty 3 negotiations resulted in a comparatively generous land allotment, the territory not to "exceed in all one square mile for each family of five, or in that proportion for larger or smaller families."[23] Not only did this represent an entitlement about four times the maximum land allocation awarded in Treaties 1 and 2, but also set an example for future treaty negotiations. The size of this allotment proved problematic for land conscious Ontario, and was therefore readjusted following the 1889

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[21] David McNab, "The Administration of Treaty 3: The Location of the Boundaries of Treaty 3 Indian Reserves In Ontario, 1873-1915," As Long As the Sun Shines, p.146.

[22] Anthony Hall, Aboriginal resource Use In Canada: Historical and Legal Aspects (Winnipeg: University of Manitoba Press, 1991), p.280.

[23] McNab, "The Administration of Treaty 3," p.147.

decision of the Judicial Committee of the Privy Council which finally settled the question of the boundary dispute in favour of Ontario.

Land disputes were complex and involved both levels of government, different interpretations of treaty rights, and opposing views concerning the future worth of the land balanced against the immediate welfare of the Aboriginal people who were directly affected by any change to the size of reserve lands. While understanding that the demands of Indian culture required a two-fold use of the land, farming lands for summer habitation and wild lands for fall and winter hunting, the government was also cognizant of the fact that expanding settlement would put ever-increasing pressure on any lands set aside for Native people. Lands particularly susceptible to be taken over by the government for reasons other than for reserves were the so called wild lands, because the government saw these reserves as underdeveloped or set aside for limited land use.

There was much concern during the ongoing boundary dispute finally settled in 1889 between the governments of Ontario and Canada over the location of reserve lands and future economic development; it was felt that "the settlement of Crown (Ontario) lands would be retarded or underdeveloped indefinitely by the location of those Indian

Reserves."[24] It is interesting to note that even though the Indians insisted that they themselves choose the land set aside for them as part of the Treaty 3 agreement, these reserves were re-organized, without their input, by a federal-provincial pact. The Judicial Committee of the Privy Council gave the land under question, the north-west portion of what is now Ontario to the Ontario government in a decision rendered in 1888. This ruling meant that Aboriginal people lost the use of the so called wild lands near the Rainy River. Subsequently, their highly desirable river front property was now free to be "opened up" for white settlement.[25]

The Native people involved were given no real choice but to surrender their land. The government sought to force the Long Sault Band to surrender its reserve and have its members join the Manitou Rapids band. However, no amalgamation was possible because Long Sault was afraid of being dominated by the other band, whose members were, of course, the original inhabitants of that particular reserve. In correspondence between Indian Agent Wright of Kenora and the Deputy Superintendent-General of Indian Affairs, D.C.

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[24] Lise C. Hansen, "Research Report: The Rainy River Indian Band Land Claim to the Land Identified as Long Sault Indian Reserves #12 and #13 Little Forks Indian Reserve #10 The Bishop Indian Reserve #14 Paskonkin Indian Reserve #15 and Wild Lands Indian Reserve # 15M." Ministry of Natural Resources Report, December 31, 1986, p.24

[25] Ibid., p.35.

Scott, it can be shown that both officials knew that the bands were not in favour of any form of amalgamation because of their separate identities, and that the federal government was prepared to force the surrender if necessary. Scott wrote to Wright that

> Consolidation of the Indian Bands will make for progress and the Indian will receive the benefits of the lands sold...[but] if the Rainy River Indian Bands continue to block the surrender the government of Canada might be compelled to carry out arrangements by mutual consent as they have the undoubted power to do.[26]

It seems curious that the federal government would resort to threats, when in fact it was supposed to fill the role of protector of Indian rights. From 1894 to 1913 the federal government and the provincial government of Ontario were involved in negotiations to settle the location of the boundaries of reserve land in the Treaty 3 region. Part of that settlement included that 20,672 acres of reserve land would be identified as superfluous and therefore needed to be reallocated for other uses.[27] Finally it was decided that Ontario would confirm the location of the reserves if the federal government could secure the surrender of these Rainy River band reserves.

We must ask then, in what way is it fair to say that Ontario would be willing to confirm the reserves, if the

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[26] Ibid., p.37

[27] McNab, "The Administration of Treaty 3" p.149.

concern for the future developmental potential of the land was more important? The Indian people realized the difficult position that they were in and it is interesting to note that the Long Sault band sent a petition of complaint to the Department of Indian Affairs because "they now believed Indian Agent Wright's promise to them for money for houses, cattle, horses and a school house and eighty acres for each family on Manitou Rapids Indian Reserve #11 were all lies."[28] However, despite the concerns of the members of the band, the wishes of the government prevailed, and by March 1915, all of the reserves in this district were duly surrendered to the government of Ontario.

The 1915 legislation also contained another important reversal. The reciprocal legislation of the Parliament of Canada and the legislature of the province of Ontario in 1891 which had confirmed which lands and waters belonged to the Indian reserves in the Treaty 3 area had stated that

> the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian Reserve shall be deemed to form part of such Reserve including Islands...and shall not be subject to the common public right of fishery by others than Indians of the Band to which the reserve belongs.[29]

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[28] Hansen, "Rainy River Indian Band Land Claim," p.38.

[29] McNab, "The Administration of Treaty 3," p.153.

The 1915 legislation changed that, depriving Natives of the water. The needs of the Native people would become contingent upon the needs of other Ontarians.

In a letter from Aubrey White to D.C. Scott on December 4, 1914 it is evident that the provincial government had made considerable plans with respect to making use of the natural resources, in this case water, which were ostensibly part of the Indian reserves land. As he wrote,

> When I came to read clause 4 [of the proposed federal-provincial agreement of 1913] it struck me that clause left the door open for all kinds of disputes and misunderstandings hereafter...This provision is very far reaching and might seriously cripple our action with respect to the application of Winnipeg for leave to take its water supply from Shoal Lake, and I think you agree with me that there is much room otherwise for future trouble under the clause as it reads, because in some of the reserves I find there are rivers of considerable size running through them and it surely never was intended that lands under a river should belong to the Indians. I find also that there are some water powers lying within the boundaries of reserves...and some reserves border on the lake in such a way, that, under the language with respect to headlands, a large number of islands would become the property of the Indians...."[30]

Surprisingly, given Scott's position as "protector" of Native rights and therefore treaties, he agreed with White's assessment and both men thought it better for the government to renege on the 1891 agreement.

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[30] Gwynneth C.D. Jones, "Research Report: The Big Grassy Indian Band Land Claim to the Bed and Waters of the Big Grassy River Adjacent to Big Grassy Indian Reserve #35G." Ministry of Natural Resources Report, July 30, 1986, p.14.

In the 1919 correspondence between R.S. Mackenzie, Indian Agent at Kenora and J.D. McLean, secretary for the Department of Indian Affairs it is clear that the town of Kenora and its agent wanted all of the Rat Portage Indian Reserve #38B which had not been previously surrendered, including the land along Matheson Bay.[31] It is incredible that a request for Indian land surrender by a town made on May 5, 1919 involving more than five thousand acres of lake front property was achieved by June 2, 1919, less than one month later. That was in large part because the residents of Kenora were interested in the development of recreational facilities and cottages along Lake of the Woods.

A letter dated July 3, 1919 to McLean, from a number of Native residents of the reserve, George and Fred Skeet and Robert Taylor reveals the rest of the story.

> We...want to ask the Department if Mr. MacKen[zie] Our [sic] Indian Agent was realy [sic] instructed to sell our reserve wheth[er] we were willing or not. It is what he told us, that we would los[e] everything if we did not consent to sell it and that we had to sell it right away we did not have time to consult our chief [missing] delay till next treaty time but the answer was no you have to [missing] it right now or it will be taken away from you no price was fixed and we had to say yes or no and he said we would have nothing if we said no but now we have thought of it and we cannot belie[ve] the Department has given such orders if these orders have been given we would like at least

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[31] Ibid., p.17.

> to know what we will be [missing] and will be satisfied.[32]

From the report it is evident that the Indian band received no response. The Native people hired a lawyer to look into the matter and on July 23, 1920 a letter was sent from their law firm to the Superintendent General of the Department of Indian Affairs forwarding a complaint by the Rat Portage Indian Band with respect to the 1919 surrender.[33] However, there appears to have been little real action taken by the court and McLean simply responded to the inquiry by stating that "this surrender was taken by the local Indian Agent, and was regularly obtained in accordance with the requirements of the Indian Act."[34]

Another issue that clearly demonstrated the Ontario government's attitude relates to the payment of annuities to the Natives of Treaty 3. The government of Ontario was quite worried that the decision of the Judicial Committee of the Privy Council, which favoured Ontario's claim to reserve lands, would include an expectation that Ontario would be responsible for paying out the annual monies, which were

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[32] NAC, Department of Indian Affairs Records, Black Series vol.8034, File 487/32-2-6 as quoted in D.J. Bourgeois report "Rat Portage Indian Land Claim", p.17.

[33] J.D. Bourgeois, "Rat Portage Indian Land Claim with Respect to Land Identified as 'Islands' Adjacent to Rat Portage Indian Reserve #38B." Ministry of Natural Resources Report, July 14, 1986, p.19.

[34] Ibid.

part of the treaty arrangements, to Native people. The anxiety stemmed from the fact that the province's desire for more territory would result in the federal government abdicating responsibility for Native people altogether, and thus, turning over the entire administrative problem of Indian Affairs to the provinces.

Part of the provincial concern was that at the time of the treaty negotiations, there was no immediate need for land either for settlement or for development. In Toronto's view, the treaty was actually twenty or thirty years premature in terms of real need. It may be that, in economic terms, the settlers would have been better off to make their homes where roads, markets, neighbours and churches already existed. And further, that even as far as resource development represents a purely economic motive, that timber, which was considered a highly desirable resource, would have been more valuable if it had been allowed to stand and mature for a longer length of time. The province was worried that it might have taken command of a situation which was potentially more complex than any future benefit warranted. In fact, some critics of western expansion believed that the desire to settle the west was an artificially created necessity; undertaken simply because the federal government wanted to acquire the land as a right of way for the Canadian Pacific Railway.[35]

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[35] Ibid.

> In the interests of Ontario nothing could have been more irrational than the making of a treaty involving the payment of a large sum of money down, and of other large sums annually, for the surrender of the Indian rights to territory which the Province had no immediate use for or any likelihood of "settling" for half a century to come.[36]

In the provincial government's zeal to avoid having to take on a custodial role with respect to the Native people, the fact that it was surely to everyone's benefit to have a fair and equitable treaty in place before the need for one became acute was ignored. And further, that since the size of the reserves allotted was in dispute, the Ontario government could lessen its burden by disallowing the claims of 1040 people, which in turn would reduce the number of families who would have legitimate claims on the government to 358. It was also suggested that all reserves should be located on water, either the shores of lakes or on islands because fishing was one of the necessities of life to the Indians.[37] It is interesting to note this miserly attitude, and lack of real understanding of the issues involved in the early part of the twentieth century, because it characterizes the government's posture throughout.

In 1902 the Canadian government and the province of Ontario recognized that the Treaty 3 area should receive special consideration largely because both the Native people

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[36] Ibid.

[37] Ibid.

and the negotiators had been aware of the value of the resources at the time of the signing of the treaty. The federal government wanted all treaty Indian reserves in Ontario to be under the control of the government of Canada. In addition, the Dominion government would "hold the proceeds of such reserves or lands and the proceeds also of the timber, minerals and precious metals thereon...subject to the general trust...on behalf of the Indians...."[38] Ostensibly, this meant that the federal government was to use the resources from the land in a responsible manner for the benefit of the Native peoples in that area. This gave considerable power to the government, through its various departments, to make decisions on development, based upon what seemed rational and advantageous to the government as far the welfare of the local Indian population was concerned.

An example of an agreement reached between the province of Ontario and the federal government over control of Treaty 3 lands was the Ontario Mining Company vs. Seybold case in 1903. Special Reserve 38B was disallowed as a result of this action. Ontario had assumed control over this territory as early as 1882, although the land was not formally under the province's control until a judgement

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[38] Ontario Archives, Irving Papers, box 30, package 36, items 18-19.

given by the Judicial Committee of the Privy Council in 1889.

In the interim, the federal government, believing that it had control of the area because it was Indian land, and as such fell under its jurisdiction, issued a timber license to the St. Catharine's Milling and Lumber Company to cut timber near the Wabigoon Lake district.

Neither level of government sought out the opinion of Native people in this dispute, even though the land in question was considered, at least broadly speaking, to be land set aside for Aboriginal people. Historian Anthony Hall suggested that the phrase "lands reserved for the Indians" under section 91(24) of the British North America Act was interpreted, due to a rather odd quirk of Victorian racism supported by a strict adherence to the principles of social Darwinism, to mean that the Canadian government had the authority to decide how these lands ought to be utilized.[33]

This debate over land and resource use clearly revealed the federal and provincial governments' attitude toward Aboriginal rights to be abstract and malleable and to be reevaluated periodically according to the expectations or fancy of any government's ambition. However, Hall, who wrote about the St. Catharine's Milling Case, claims that

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[33] Hall,"....." Aboriginal Resource Use In Canada: Historical and Legal Aspects (Winnipeg: University of Manitoba Press, 1991), p.281.

the federal government was more steadfast in its dealings with Native people than was the provincial government. He proposed that this case had significant implications for the development of the Canadian constitution and that it illustrated a fundamental difference in the perspective of both the federal and provincial levels of government with respect to Native people. Hall asserted that each group acted in a predictable manner, that is, within the norms of a particular social atmosphere, which were appropriate for the times. He suggested, for example, that the federal government dealt with the problem with some consideration for Indian rights while the provincial government fell back on the old arguments of racial superiority.

> Within the dispute's own frame of reference, however, there were profoundly different approaches to fundamental questions of basic human rights. In advancing the prerogatives of centralized authority, officials representing the Dominion, Victorian as they were, had indeed conducted themselves as vindicators of Indian rights. On the other hand, advocates of provincial autonomy had based their claims on principles that, in light of present-day understanding, today appear totally abhorrent.[40]

However, the fact must be acknowledged that this controversy arose because both the federal and the provincial governments wanted to control the timber rights (and subsequently other natural resources as well) within this territory. The very act in which each level of

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[40] Ibid.

government issued patents to cut the timber symbolized a political contest over land ownership which would be played out in the courts. For its part, the Dominion had asserted that the Indian claim to the land was a fundamental one, originating with the Proclamation of 1763 whereby Indian title was clearly presupposed, and the extinguishment or upholding of that title was given to the Crown, and subsequently, to the Dominion government. This fact, it was felt, ought to override any later claims made by the province of Ontario.

However, the federal government failed to demonstrate exactly how Native people would benefit from this special relationship. For example, how would the wealth gained from the natural resources existing on the land be utilized in Native communities if the federal government was successful in wresting control over timber rights away from the province. This fact indicates that the Dominion government did not act out of a sense of obligation to Native people, but rather, it acted out of a desire to control the natural resources. The Dominion asserted that it, not the province, had the right to decide how best to manage the resources since it had acquired the title to the lands through the 1873 surrender by the local Native inhabitants. For example, the Prime Minister, Sir John A. Macdonald said with respect to the Dominion government's concerns about the constitutional implications of the dispute that

> The land belonged, so far back as the grant of Charles II could give it, to the Hudson's Bay Company, but it was subject to the Indian title. They and their ancestors had owned the lands for centuries until the Dominion Government purchased them. These lands were purchased, not by the province of Ontario--it did not pay a farthing--but by the Dominion....By seven treaties the Indians of the Northwest conveyed the lands to Canada; and every acre belongs now to the people of Canada, and not to the people of Ontario;...*there is not one stick of timber, one acre of land, or one lump of lead, iron or gold that does not belong to the Dominion,* or to the people who purchased from the Dominion government [emphasis in original].[41]

Moreover, Macdonald's whole idea of subordinate federalism was graphically under attack by a province bent on, as H.V. Nelles has pointed out, "empire building."[42] In supporting the Native claim to the Treaty 3 area, the Prime Minister was doing no more than asserting the right of the federal government to predominance in Canada. Certainly, his political and constitutional fight against Premier Oliver Mowat of Ontario was far more important than his concern for Native rights.[43] For its part, Ontario had argued that the Native people might not have had title to the lands in question at all, and that these lands did not belong to the federal government, but to the province of Ontario.

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[41] Hall, Resource Use, p.272.

[42] H.V. Nelles, The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1949-1941 (Toronto: McMillan of Canada, 1974) p.5.

[43] To further emphasize federal realpolitik the federal government relieved Natives of the franchise in 1898 after having extended it to Natives west of Lake Superior in 1885.

The case was heard before Chancellor Boyd who ruled that the province acquired full and beneficial interest in the land, subject only to such qualified privileges of hunting and fishing as were reserved in the treaty.[44] It is interesting to note that throughout this case, despite the lofty rhetoric which occurred on both sides of the debate, that there was no direct mention of how the wealth would be divided, nor indeed was there any mention of any other benefits which the Native people were supposed to gain from the sale or development of resources. Bruce Clark, a lawyer, wrote about the legal significance of the St. Catharine's Milling case and its aftermath in this way:

> In retrospect, the position seems to be that aboriginal rights as a litigious or justiciable issue trace to the eighteenth century, when Indian occupancy and domestic sovereignty were recognized at law. In the nineteenth century this guarantee of non-interference was legislatively compromised as to some defined areas. The Indian Acts of Canada, starting in 1876, said that Indian Reserves, which had been specially set apart for particular Indian bands, were a special case. Indians on such Reserves no longer have the unfettered rights of the eighteenth century but rather a new set of more abridged and closely-regulated possessory rights and band government powers.[45]

There was an exhaustive discussion which took place between F.L. Newcombe, representing the interests of the

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[44] Archives of Ontario, Land Records, A-1-7 vol.8 Inv.7 Indian Lands, 1887-1924.

[45] Bruce Clark, p.3.

Dominion (and presumably Aboriginal interests as well) and Edward Blake, who spoke for the province of Ontario as to how the resources, and the wealth gained from those resources ought to be apportioned. As a result of this dialogue an agreement was placed before the Provincial parliament on 23 April 1904. With reference to the question of precious metals, which had been explicitly mentioned by Native people during the treaty negotiations, Newcombe and Blake reached a consensus, stating,

> that the precious metals shall be considered to form part of the reserves and may be disposed of by the Dominion for the benefit of the Indians (as to Reserves under Treaty No.3) proceeded upon the ground--that it was indisputably proved whatever the law may be about it, that the Indians did as part of the negotiation ask for and that the commissioners who were representing Her Majesty and give them, assurances contemporaneously with the written treaty that, if precious minerals were found on the special reserves they should belong to them.[46]

The lawyer, Aemelius Irving, in commenting on the implications of the Newcombe-Blake negotiations, stated that any other questions concerning the ownership of precious metals must be judged according to the circumstances of each case, but that generally it might be assumed that anything which benefited Canada would benefit Canada's Indians.[47] There are, in fact, several examples of the federal

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[46] Irving Papers Box 40 package 38 item 16.

[47] Ibid.

government acting in a way that was contrary to the interests of Native peoples.

The federal government sold out Native interests to private individuals or businessmen as readily as it relinquished its duties to Ontario. On September 30, 1904, a memo was sent to the Commissioner of Indian Affairs from the Preston Bell Furniture Company in the Rainy River District applying for river frontage within Indian Reserve 18B for the purpose of constructing a lumber mill and store.[48] The request for land was granted by the commissioner despite the fact that there was no offer to hire Native people as workers and nor was there any clear benefit from the proposed mill to the Indians on whose property the mill was constructed. The government did not ask the furniture company to provide any employment opportunities or other tangible benefits on behalf of the reserve inhabitants.

In another letter from Indian Affairs' Deputy Superintendent General Frank Pedley to the Provincial Treasurer of Ontario, J.J. Matheson, dated January 13, 1906, a proposal was made which would lift the restrictions made by the 1902 agreement that allocated monies "arising from the sale of Treaty No.3 reserves subject to no other conditions except those of the Indian Trust."[49] This meant

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[48] Ibid.

[49] Irving Papers, Box 40, package 38, Item 16.

that the government would be able to sell off land, as long as it stated in a vague way that the proceeds would be used to benefit Native people. Pedley wrote that

> it is the policy of this Department to endeavour to obtain from the Indians a surrender in due form whenever it is considered advisable to open any Indian Reserve for settlement owing to pressure of colonization or other causes. Whenever these conditions and circumstances apply to reserves in Treaty No.3, there will be no evitable delay in approaching the Indians with a view to obtaining a legal surrender in order that the reserves may be thrown open to settlement.[50]

It seems clear that uppermost in the minds of the government officials who were entrusted with the power to act for Native people was that any land that was required by the government for any reason ought to be acquired freely and promptly, without consulting the local Natives and even without necessarily acting on their behalf.

In 1909, Mr. Justice Davies explained the decisions made by the Supreme Court of Canada in the dispute between the Dominion of Canada and the Province of Ontario over the issue of who owned the resources on reserve lands.[51] He acknowledged that, despite the fact that the two levels of government were constantly arguing over which had the proper authority to the actual title of the Indian territories and also, who had the responsibility to ensure that the

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[50] Ibid.

[51] CP Sessional Paper no. 50, 12 February 1909.

agreements made in the treaty were fulfilled, treaties had another purpose than simply allocating land. He said that

> the last clause of the treaty wherein the Indians agree "to obey and abide by the law" and "to maintain peace and good order between each other" and also between themselves and other tribes and other people, and not "molest person or property in the ceded districts or interfere with any person passing or travelling through it," etc. from which I would be justified in concluding that the considerations of the treaty had been agreed to for other purposes than those of extinguishing Indian title.[52]

Davies was clearly thinking of a larger debt which the people of Canada owed to Native people, and saw the role of the federal government as a responsible one, and one which would lead, in a spirit of cooperation, to eventual assimilation.

Mr. Justice Davies also noted that section 91(24) of the British North America Act (B.N.A. Act) gave the Dominion "exclusive power to legislate with respect to Indians and lands reserved for the Indians"[53] and that this right was created in order to ensure uniformity of administration. Davies argued that since the federal government, by virtue of this section of the British North America Act, was designated with the "high, honourable, and onerous duties of becoming the guardians of the many races of Indians..."[54]

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[52] Ibid.

[53] Ibid.

[54] Ibid.

who lived within the boundaries of Canada, that it ought to be able to exercise these duties free from constraint. The constraints which he argued against were, of course, the limitations which the province was trying to place upon federal power. Therefore, he believed that the federal government should appeal the decision of the Judicial Committee of the Privy Council which ruled that the province, not the Dominion, had the prior claim. Despite such a strong ruling by the Supreme Court of Canada, the decision of the Privy Council was affirmed.[55]

It is interesting that the courts utilized the St. Catharine's Milling case as if it represented a contest between provincial rights to acquire wealth from the land, and federal government protection of Indian rights. However, it was the federal government which first gave a license for the cutting rights on the reserve lands, and it is clear that there was no stipulation that the government was to use the profits gained to improve or better the condition of the local Native people.

In 1914 the federal government and the provinces came upon a scheme which effectively eroded treaty rights even further. By utilizing section 91 of the British North America Act the government established policies based upon two distinct and opposing premises. The first dealt with the role of the provincial government which was defined as

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[55] Ibid.

that of a "bare trustee"[56] and as such it is clear that the province cannot sell Native lands, nor can it derive benefit from them. The second proposition gave the surrendered lands to the province of Ontario, recognizing that while Native people have the right to pursue their hunting and fishing activities on these Crown lands, they were subject to any such regulations as might come into effect and further, that some of these lands might be taken up for other development by either the government of the Dominion of Canada or by some authority named by the government.[57] These agreements between the federal and provincial governments did not encourage a fair and equitable consideration for Native peoples, but rather, it seems clear that Native interests were sacrificed for political and economic interests.

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[56] British North America Act, section 91.

[57] Provincial Archives of Ontario, Land Records A-I-7 vol. 8. Inv.7 Indian Lands 1887-1924.

Chapter Three

THE FORT FRANCES CASE

The federal government's poor record regarding its responsibilities with respect to Native rights is clearly evidenced in the case of the Ontario and Minnesota Power Company's activities in the Rainy River district. The government's lack of concern over some reserve land which was flooded by this company is really indicative of its attitude in general. It is clear that, from the signing of Treaty 3 in 1873 through to the first thirty years of the twentieth century, the government attitude had been that the profit and development interests of business and the independence and assimilation interests of the governments' Indian policies meshed in a manner which was disastrous for Native people.

In Fort Frances, Ontario there is a good example of how Aboriginal rights, guaranteed under Treaty 3, were subordinated to the interests of Edward Backus, a wealthy American industrialist who dreamed of controlling all of the resources in the Rainy Lake

district. The municipal government of Fort Frances, the province of Ontario, and the federal government of Canada aided Backus in achieving this dream even if it meant that the latter bungled its responsibility toward Native people of the Rainy River region by allowing the Backus company to flood traditional Indian land.

Background 1905-7

On August 11, 1905 the federal Minister of Public Works received an application by Edward Backus requesting permission to build a power dam on the Rainy River at Fort Frances. The town is on the Canada-United States border and the dam would span the river to a point on the American side. E.W. Backus had made an agreement with the province of Ontario for land and power grants on the Canadian side because the government was also interested in developing water power facilities to foster the growth of mills and other manufacturing plants. The value of the grants described totalled $5,000[53] There were several conditions demanded of the Backus company by the government of Ontario before an agreement was struck. For example,

> the raising and maintaining of the waters of Rainy Lake; [the Rainy River flows into the Rainy Lake] the use or non-use of flash-boards; the construction of power-houses;

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[53] Department of Indian Affairs, Black Series, volume 4021, file 282,799.

> the expenditure of $50,000.00 on the works within nine months from the date of the agreement; the delivery of power to the Town of Fort Frances after the 1st January 1907, for municipal purposes and for public utilities the operation and delivery of said power; the rate at which it shall be furnished; the intervention of the Lieutenant Governor in Council concerning the price of the power or energy to be created....[59]

As well, Fort Frances had an interest in the project and worked with Backus to ensure that the dam was built. The company asked the town directly to refrain from making any inquiries which might hold up the application at any level and, not surprisingly, the town agreed.[60]

The application was accepted by the government and the Chief Engineer of the Department of Public Works reported that the dam would not interfere with navigation. Instead, because of the flooding of the rapids two miles above the falls, navigation would actually be improved.[61] The only possible objection which the engineer noted was taken care of in "a clause in the Act of Incorporation of the Company which makes

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[59] Ibid.

[60] Archives of Ontario, unprocessed records RG 22, Rainy River High Court of Justice civil assize minutes 1910-1949.

[61] NAC Department of Indian Affairs Records, Black Series, Volume 4021, file 28759.

all damages to lands caused by their works a charge to be borne by them."[62]

The application went through the "proper" channels, from the Department of Public Works, to the Department of Justice. The Justice Department replied that they had to consider how the dam would affect navigation and the fishery. After considering its report of the Department of Marine and Fisheries, the request was accepted, and the plans next went to the Governor in Council. The application was finally approved, subject to some conditions.

The Ontario and Minnesota Power Company had a map prepared in 1902 designed to show the extent of the flooding which would likely occur as a result of the dam.[63] This is important because it illustrated that the government had access to information which would predict how extensive the flooding would be after the dam was constructed. Even with all the levels of government involved, with all the departments and offices which examined the application and made further recommendations to the proposal, no one considered the impact the proposed flooding of reserve land might have on the Native people who occupied that land. The only

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[62] Ibid.

[63] NAC, Department of Indian Affairs Records, Black Series, Volume 4021, file 282,759.

worry at the time the dam was constructed, as far as the Department of Indian Affairs was concerned, was that the Indian Agent's home, located on Pithers Point, would have to be relocated elsewhere.[64] In a letter in late December 1905 to J.D. McLean, Assistant Deputy Superintendent General of the Department of Indian Affairs, E.W. Backus reported that,

> our dam will raise the water up to the foundation of the agent's house on Pithers Point, but it will not overflow the spot where the house now sits. At the same time it would probably not be agreeable to the agent's residence at that point, and therefore would like very much to have you plan to occupy one of the other locations, and I desire to have you advise me of how much the expense would be in making the change.[65]

Only later, after the political and bureaucratic machinery had rendered its decision, was there any thought given to the consequences of the flooding for the Native people. In a letter dated March 7, 1906 from J.D. McLean to E.L. Newcombe, Deputy Minister of Justice, there was some acknowledgement made that flooding would indeed occur on reserve lands.

> The Ontario and Minnesota Power Company, Ltd., claims that, under the authority granted the Company by 'an Act respecting the Ontario and Minnesota Power Company, Ltd., Chap.139-4-5-Edward VII. assented to

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[64] NAC Department of Indian Affairs Records, Black Series, Volume 4021, file 282,759.

[65] Ibid. Letter from E.W. Backus to Department of Indian Affairs December, 1905.

> 20th July, 1905,' the said Company has the right to raise the water of the St. Frances River [Rainy River] and if in doing this an Indian reserve or any portion thereof is flooded the Department of Indian Affairs may proceed, under section 35 of the Indian Act, to collect damages for the injury sustained. The Company is perfectly willing to pay such reasonable damages.[66]

McLean assured the deputy minister that this acknowledgement made by the Company applied to the "reserve in question within the meaning of the Act,"[67] and asked for guidance from the Justice Department. McLean suggested that perhaps the "surrender from the Indians [of this tract] should be dispensed with."[68] In a letter of March 12, Newcombe replied that there was little chance of restitution because section 35 stated that compensation may be "made to the Indians in the 'same manner as is provided with respect to the lands or rights of other persons' and there was no provision in the Act Chapter 139 of 1905 [the Act granting the Ontario and Minnesota Power Company the right to build the dam] for the payment of compensation."[69] Newcombe

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[66] Ibid. Memorandum DIA to Deputy Minister of Justice, March 1906.

[67] Ibid.

[68] Ibid.

[69] Ibid. Memorandum Minister of Justice to DIA, March 1906

suggested, however, that some reimbursement might be agreed to by arbitration outside of the statute.[70]

On March 14, 1906 a memo was sent from the Chief Surveyor to McLean asking for an authorization from the Department of Indian Affairs

> to sell, lease or otherwise grant the right, to flood the land in the general Indian reserve No.1, near Fort Frances Ont., that may be required in connection with the construction of the dam by the Ontario and Minnesota Power Company, (the area, of the said land being approximately eighteen acres) on such terms as may be decided upon.[71]

McLean, in turn, requested the Governor General in Council to grant (not lease or sell) the right to flood the land since the dam would result in the flooding of about eighteen acres as well as causing some damage to property belonging to the Department of Indian Affairs. McLean also noted that the Company had expressed a willingness to pay for the damage.[72]

In April, 1906 the Indian Agent at Fort Frances, J.P. Wright warned the Department of Indian Affairs to "consider the whole matter very carefully" because the flooding would also damage the road which was on the reserve which followed the lake shore. He wanted to

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[70] Ibid.

[71] NAC Department of Indian Affairs, Black Series, Volume 4021, file 282,759-1. Memorandum from Chief Surveyor to DIA, March 1906.

[72] Ibid. DIA memorandum April, 1906.

make sure that any compensation made to the department for damages would cover the building of the road. Wright also wrote to McLean, advising him that the government ought to request payment of $1000 per acre from the Ontario and Minnesota Power Company, because it was believed that the company wanted to secure the land for speculation. McLean wrote, that "the whole [Pithers] Point is an ideal place for a summer resort."[73] Curiously, while neither the Indian agent, nor the federal government seemed overly concerned that the proposed flooding would damage reserve land, Indian Agent Wright, in any case, was sufficiently worried about his own personal garden, consisting of "raspberry, gooseberry and currant bushes" to request separate compensation of $150 to be paid directly to him.[74]

Not surprisingly, lawyers for the Ontario and Minnesota Power Company informed the government that the value placed on the land was excessive and subsequently asked that a disinterested party be named to set the value of the land in question. The department instructed S. Bray, a surveyor with the government, to examine the situation. In a memorandum

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[73] Department of Indian Affairs Records, Black Series, Volume 4021, file 282 759-1. Letter from Indian Agent Wright in Fort Frances to DIA, April 1906.

[74] Ibid.

dated November 1907 the surveyor suggested that the value of the land was $1472 rationalizing that

> Pithers Point is especially adapted for the purposes of a summer resort as it is situated on the Lake shore where there is a long sand beach which happens to be the only one within easy reach of Fort Frances. Lots in Fort Frances and in the two townplots on the opposite side of the river in the United States are being held at hight prices. Sales are being made on the United States side and ready sales were made in Fort Frances two or three months ago.[75]

The government was clearly engaging in some land speculation as well; they did not quote the current value of the land in question, but rather, were looking forward to the flooding with an eye to increasing the value of the land, and consequently were hoping to charge the company on the future worth of the land.

In this memorandum, Bray also cautioned the government that the flooding would do far more damage than initially believed.

> On account of the land being very flat more land will be damaged on account of its being nearly level with the water than that actually submerged...the damage will be very great. I think any proposition to raise the water above the [previously agreed upon] 497 Bench Mark should be opposed decidedly by this Department.[76]

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[75] Ibid. Memorandum from government surveyor S. Bray to DIA, November, 1907.

[76] Ibid.

Bray noted, for example, that the foundations of the school located on the reserve would be in danger because the dam would create marsh-like conditions over much of the reserve. Bray was also concerned that much of the damage caused by the flooding would not be evident until the dam was built. Acting on this knowledge, McLean, on behalf of the Department of Indian Affairs, suggested that the company would be liable for any other damage at the rate of $50 per acre.

There is strong evidence then, that the federal government did not fully acknowledge its responsibility toward Native people regarding the trusteeship of the reserve lands. There were no declarations recorded from either the Indian agent in Fort Frances, or the department, that the proposed flooding would destroy reserve territory as such. There was no evidence to suggest that the government had any concerns whatsoever that the proposed flooding would have any impact on Native people. It seems strange that the government was only concerned with the dollar value of potential resort land, while being indifferent to the possible repercussions of the flooding on Native people because the department's mandate was clearly not to act as a realtor, but to protect Aboriginal peoples interests. The government neglected its primary obligation.

After Construction 1909-13

Predictably, after the construction of the dam, there were considerably more problems associated with the flooding than anticipated. It appeared that the worst fears of the federal government were realized; damage to reserve land was extensive, and the government lacked the strength to compel the Backus company to make reparations.

Rather like closing the barn door after the horse has run off, Indian agent Wright complained to the Department in December 1909 that the high water in Rainy Lake, caused by the dam was endangering an Indian burial plot on the reserve.[77] The Department of Indian Affairs, in turn, notified the lawyers for the Ontario and Minnesota Power Company, and requested that some preventative measures be undertaken to deflect further damage. This request launched a long and fruitless struggle between the government and the company over the damaged reserve lands. The Department of Indian Affairs threatened legal action, arranged for surveys of the damaged lands, suggested ways to correct various problems of erosion and demanded reparation. For its part, the Backus company ignored, denied, promised and executed partial and unsatisfactory repairs.

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[77] Ibid. Memorandum from Indian Agent Wright to DIA, December, 1909.

Following the initial complaints from Wright on behalf of the residents of the reserve, the lawyers for the Ontario and Minnesota Power Company wrote to the Department of Indian Affairs that the high water levels were not as severe as originally reported and that the company had taken it upon itself to drain off large amounts of water from the area so that there was no need for further concern. According to Wright, there was no such draining and, in fact, the water level was at its highest point ever. Wright warned the department that if nothing was done

> before another year...a portion of the graves [would be] washed into the lake and we would have the town of Fort Frances after us with a bill of damages for polluting the water of Rainy Lake.[78]

The department hired an engineer from Fort William, G.A. Knowlton, to study the problem and to suggest a suitable remedy. In March 1910 a report was made which recommended several measures, including the construction of a breakwater to protect the shoreline and the planting of shrubbery to prevent further erosion. The engineer's report noted that "unless something is done before next summer, the water will encroach on the cemetery, and some of the Indian houses

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[78] Ibid. Memorandum Indian Agent Wright to DIA, December, 1909.

will have to be removed."[79] The estimate for these improvements was given as $9000 which included the cost of the survey.

Backus replied to the government's plan in April of that year; he maintained that the water level had not yet risen to overflow Pithers Point, but he assured the government that he would be raising it even more in the near future. It is clear that Backus was not going to admit that any repair would be necessary, much less agree to the government's proposal for how the renovations ought to be carried out. While Wright continued to press the department for some kind of definite action to protect reserve lands and buildings, the government was trying to force Backus to do something. McLean wrote

> I have to ask you [Backus] to take immediate steps as indicated in the said letter to your Attorneys to protect the banks of the lake now being washed away. I have to request you to be good enough to send an immediate reply and to say that in the event of your not taking immediate action in this matter the Department will be obliged to undertake the work of protecting the banks and the said work will be done at the expense of your Company.[80]

Backus replied to the government through his lawyers that the $9000 estimated was too large an

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[79] Ibid. Engineer's Report submitted to DIA, March, 1910.

[80] Ibid. Letter from J.D. McLean to E.W. Backus, April 1910.

amount to spend "in this connection" and proposed rather that the company undertake to remove the bodies from the cemetery, if the Indians would agree to such a compromise. The department responded by June 1910 with the fact that the residents would not agree to move their dead, and further, that it had been discovered that the school building was now in danger as well.

Although the Backus company sent out one of their engineers with a construction crew early in July, Wright reported in October 1910 that no actual work had been done on the site as of that date. Wright was obviously frustrated that nothing was being done, and that he could not find out what work, if any, was intended. Also, Wright acknowledged that the water level had receded somewhat and informed the department that the work ought to be progressing now, when it could be done cheaply and effectively.[81] Again, the department tried to get some commitment from Backus, but he was able to defer comment in November by stating that the best time to do the necessary construction would be in the winter. In fact, correspondence from Wright as late as March 1911 indicates that no corrective work had been done at all.

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[81] Ibid. Report from Indian Agent Wright to DIA, October, 1910.

All interested parties were trying to exert pressure on the Ontario and Minnesota Power Company, but to no avail. In March 1911, the chief of the Couchiching Band at Fort Frances wrote a letter to Frank Pedley reminding the minister that they had promised that something be done and yet, "the bank of our Lake...is falling in day by day."[32]

It is clear that the government was not pressing Backus hard enough to achieve a positive effect. In an April 1911 letter to Wright, McLean revealed just how weak the government felt in this matter. Even though Backus had denied, lied and stalled over this incident for over two years McLean said that

> there appears however to be some intention to endeavour to have necessary work done. I may say the Department would prefer not to take any action until practically compelled to do so.[33]

One has to wonder exactly what it would take to "compel" the department to take some action on behalf of Aboriginal people. Property had been destroyed, burial grounds were damaged and continued to be in danger, and the original agreement between the company and the department recognized and allowed that there might be some further liability for damages which might

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[32] Ibid. Letter from chief of Couchiching Band at Fort Frances to Frank Pedley, March, 1911.

[33] Ibid. Letter DIA to Indian Agent Wright, April 1911.

have occurred after the building of the dam and that such liability rested with the company. Yet, for whatever reasons, the department was hesitant either to compel the company to do the work, or to undertake the work themselves, and take the company to court for costs at a later date.

Only in January 1913 did the Department of Indian Affairs ask the advice of the Minister of Justice as to how it might proceed with this case. The deputy minister of justice wrote that

> the Company had no right to erect a dam which would cause the waters to flow back upon the reserve. I think therefore that unless the Company agrees to satisfactory terms and obtain the necessary permission to flood these lands they may be enjoined from maintaining the dam, and are further liable for any damages consequent upon the flooding. I think the Company should be notified accordingly, and if they do not come to terms, proceedings should be taken in the Exchequer court.[84]

In February, Wright reported to the department that some work had finally been done to protect the bank and the school from the encroaching waters; however, the work "is not of a permanent nature and is of no use as it will all wash away in the spring."[85] This message was subsequently passed on to the company

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[84] Ibid. Memorandum from DIA to Minister of Justice, January, 1913.

[85] Ibid. Memorandum Indian Agent Wright to DIA, February 1913.

through the department, along with the threat of legal action if "substantial and satisfactory works" were not immediately undertaken. Although it appeared that McLean had taken a strong position with regard to the damages done, this was not the case.

The Inspector of Indian Agencies, John Simmons, submitted a standard report on the condition of the reserve to the federal government in the spring of 1913 and noted many of the concerns expressed by members of the flooded reserve. After careful investigation, the extent of the damages caused by the flooding were listed:

1. The length of the land affected is nearly a mile. The depth of the loss is from 25 to 54 feet.
2. There are many cracks in the soil at the top of the bank, which will go over shortly.
3. The bridges, which are all rebuilt last summer...will have to be moved back....
4. Five houses have already have already been moved back....
5. Some curbing was done by the Indians years ago to guard the grave yard. This consisted of poles driven into the ground horizontal logs behind the posts and stone thrown in behind the logs and this is standing fairly well.
6. A curb was built last Summer some 1200 ft.long. This consisted of two inch planks 8 ft. long sunk in the ground 2 ft...the motion of the waves has completely prostrated it and it is now lying flat on the ground and is absolutely useless.
7. The boarding school...has been damaged.
8. The hay grounds of the Indians have been

> entirely submerged and they are now compelled to buy all their hay.[86]

Simmons' report also stressed the necessity that "some real work" must be done in order to prevent further, more serious erosion damage.

In the fall of 1913 a report was sent to the Department of Indian Affairs from Chief Surveyor S. Bray outlining certain recommendations which had been suggested following an examination of the damaged lands by Bray himself, two senior executives of the Ontario and Minnesota Power Company, John J. Poss and T.D. McAnulty, and Indian Agent J.P. Wright. The report noted that the cost of effectively protecting the reserve lands from flood damage would be $25,000. and that this was "an unreasonable sum to spend for this purpose."[87] Alternatively, this group suggested that the lakefront property, consisting of some sixty acres, be subdivided into lots and sold with the understanding that the owner of the individual lot would be responsible for protecting the shoreline and would subsequently have "no redress for damage done by the

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[86] NAC, Department of Indian Affairs Records, Black Series Volume 4021, file 282 759-1.

[87] Ibid. Report from government surveyor S. Bray to DIA, October, 1913.

water either against the Department or against the Minnesota and Ontario Power Company."[88]

Not surprisingly, this plan for selling off the damaged reserve lands met with strong opposition within the Native community. Rev. Father Vales, principal of the reserve school and spokesman for band members, was against selling the lands and tried to impress upon the delegation the importance of keeping the school property separate from the town lands. Vales also suggested that many local Native people could be employed in the construction of the breakwater. Bray noted that he did not discuss the matter further with Vales because he did not think that Vales' objection was valid and because he thought it was important the department be "relieved by the proposed sale of the lots of any responsibility in regard to the washing away of the land."[89] The Department of Indian Affairs agreed wholeheartedly with Bray's report and it was decided that only the flooded lands which endangered the school would be protected with a breakwater.

As a result of these investigations, the Department decided to undertake the necessary repairs themselves, and by January 1914 the government had a

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[88] Ibid.

[89] Ibid. Report from government surveyor S. Bray to DIA, October, 1913.

plan for propping up the water front. A breakwater was subsequently constructed, and, although the cost of $6000 was originally borne by the government, it was done with the understanding that all costs would be recovered from the Ontario and Minnesota Power Company at a later date. In addition, it was not clear who did the work on the breakwater; in any event there was no mention that Fr. Vales' suggestion that local Native people be employed to work on the breakwater was ever seriously considered.

Even though the total sum for the construction of the breakwater was much reduced because the government insisted that only those lands which put the school building in danger be protected, the Backus company continued to object to such an expenditure. The government was compelled, once again, to try to force Backus to meet his obligations. However, it took years of alternatively pleading and threatening correspondence before even partial remuneration was recovered.

By July 1914, all work on the breakwater was completed, and even though a bill outlining the costs was submitted to the Ontario and Minnesota Power Company, Backus' lawyers wrote to the department complaining that financial strain made payment impossible and begged for some additional time to repay

the debt.[90] The company, it appeared, had little real desire to fulfil its obligations to the government and although it offered to make a payment of $1000 in October, the government did not receive any money until April of 1915, and that minimal amount only after much threatening of legal action.

According to correspondence from Wright to the department in April 1916, some of the residents of the reserve were protesting that the breakwater was not protecting their homes. Wright reminded the government that the surveyor, S. Bray, had recommended in his report that the houses would have to be moved back from the shoreline, and had even allowed $700 in the budget to carry this out, but this had not been done.[91] In July Bray made another visit to the reserve and noted that more damage had been caused from the high water levels on Rainy Lake. The department informed the Ontario and Minnesota Power Company of these damages. However, the company attributed the high water level to heavy rainfall rather than to the effects of the dam.[92]

The question of water levels on the Lake of the

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[90] Ibid. Letter from legal representatives of E.W. Backus to DIA, October, 1914.

[91] Ibid. Memorandum Indian Agent Wright to DIA, April, 1916.

[92] NAC, Department of Indian Affairs Records, Black Series, Volume 4021, file 282 759-1. Letter from representatives of E.W. Backus to DIA, August, 1916.

Woods was addressed by the International Joint Commission in 1917 which reported that a series of dams, constructed between 1879-1909 with the approval of both Canada and the United States for a variety of purposes, artificially raised the water level throughout the region. Generally, the report stated that the dams ought to maintain the water at ordinary summer levels, that is, about 3.5 feet above natural conditions. As well, to facilitate navigation, the report cautioned against allowing the water level to fall below a certain point.[53] The commission acknowledged many complaints from people who suffered losses by the high water levels, and noted that liability for such damages caused by the flooding varied according to the individual contracts made with the province or state agencies.

This report of the Joint Commission generated interest among non-Native residents, and may in fact have encouraged people to seek some sort of redress for damaged property. Since the government was trying to force the Ontario and Minnesota Power Company to pay to protect further property damage, and the case was likely to go to court, it seemed natural that the town of Fort Frances would seek some form of restitution as

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[53] Final Report of the International Joint Commission on the Lake of the Woods Reference Ottawa-Washington, (Washington: Washington Government Printing Office, 1917 pp. 16-17.

well. The town solicitor, A. Murray wrote to the Department of Indian Affairs informing them of the town's desire to join in any legal action which the department might bring against Backus. Murray wrote that

> a large area of the land in question is now under water and a considerable portion is converted into a swamp, resulting in the destruction of a magnificent grove of oak trees...[for which we] are entitled to compensation...[and] the damages sustained by the Town are quite serious. The most attractive part of the park being rendered absolutely unfit to be used for the purposes for which the Town leased it.[94]

Murray also asserted that the Ontario and Minnesota Power Company had been authorized to raise the level of Rainy Lake to 495 B.M., but that in fact it was raised to 497 B.M. The disagreement over what was an acceptable water level originated after the dam was built, even though the plans submitted by the Backus company and approved by the government clearly indicated that the water level was to be set at 497 B.M.[95] It may be that the government and town officials, encouraged by the fact that legal action was imminent, decided to put forth as strong a case as they could, hoping to win significant compensation.

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[94] NAC Department of Indian Affairs Records, Black Series, Volume 4021, file 282 759-2.

[95] Ibid. Blueprints of proposed dam, including high water bench marks submitted by E.W. Backus to DIA, August 11, 1905.

In December 1917 Bray sent a memorandum to the Department of Indian Affairs, acknowledging that the Ontario and Minnesota Power Company had finally paid the full $5000 owing the department for work carried out on the breakwater in 1914. In addition, however, Bray included an estimate for further claims upon the company. He cited an amount, $15,425 as costs for the flooding of thirteen acres of land and damage to buildings on Pithers Point and another $2,960 for damages suffered by the residents on the reserve.

Legal Struggles 1917-20

In 1917, there occurred what appears to have been an independent suit brought to court by the members of the reserve whose land was flooded. Individual members attempted to take the Ontario and Minnesota Power Company to court to force the company to reimburse them for damages done. The Supreme Court of Ontario heard the case on June 20th, 1917. C.R. Fitch, a Fort Frances lawyer, was the solicitor representing the Native side, while Mr. Justice Kelly presided over the case.[96]

Evidence was submitted to the court on behalf of the plaintiff, including numerous photographs of the

[96] Archives of Ontario, RG 22 unprocessed records, Rainy River High Court of Justice, civil assize minutes 1910-1949. The Native people named in the action were Matthew H. Smith, Seth S. Smith, Narcisse Gagne, Henry Durant, Christian Holbeck, A.E. Dear and Alfred Bishop.

area after the flooding, for example, pictures of the packing house, the ice house and other buildings, and pictures of private homes which had been destroyed. As well, photographs were submitted which showed the fishery at the 1915 level and pictures of people standing at both high and low water marks.[97] This evidence was submitted to illustrate the extent of the damage incurred by the Native community.

There were also items exhibited in support of the Ontario and Minnesota Power Company. These included several photographs illustrating log jams, presumably to illustrate the necessity of raising the water levels to transport logs on the waterways, and the blueprint of the final plans of the dam. Also submitted was a copy of the Act, Chapter 139-4-5 Edward VII, giving the company the right to build the dam and flood the territory as well as a copy of the agreement between E.W. Backus and the province of Ontario, the Order-in-Council dated January 13, 1905, and the Order-in-Council approving the plans in September 13, 1905, and the Order in Council of January 27, 1909.

There was a notation made on June 28th directing Charles Fowler, the Minneapolis attorney representing the Ontario and Minnesota Power Company, to gather more evidence and return within thirty days. On September

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[97] Ibid.

5, 1917 the case was again before the court, this time with new blueprints which illustrated the contour of the dam and the contour of the river at the dam.

There were more postponements, with no new evidence submitted until December 12, 1917. And on that day there was no definite date set to return to the courts. It is interesting that in the book of Judgements one of the plaintiffs, Henry Durant, was awarded $1,400 on August 1, 1917[98] which would mean that he received an award before the case was reconvened. In any case, there was no further mention of the case proceeding to some conclusive settlement. Perhaps it was a foregone conclusion that Native people could not act independently of the Department of Indian Affairs, which had a policy of interfering in, but not necessarily improving the lot of Aboriginal people. As far as the courts were concerned the matter was left in limbo, and Fitch himself was unable to collect any money for his services until 1926.[99]

The opinion of the Justice Department was sought in May 1919 by the Department of Indian Affairs because a good portion of the government's case rested on the fact that an Order-in-Council did not actually approve

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[98] RG 22, unprocessed records, Judgement Book for the High Court of Justice Rainy River District 1909-1948.

[99] On December 5, 1926 a case was heard in Port Arthur in which C.R. Fitch recovered costs of $1,514.

the original plans for the dam, which included the notation that the water level would be allowed to rise above the 495 B.M. to 497 B.M. There was also some dispute as to whether or not the town of Fort Frances could be included in a suit brought before the Exchequer Court.

Lawyers working of behalf of the government sought to find information to support all possible claims. Although the Department of Indian Affairs knew that there was more damage to some of the homes on the northern part of the reserve the impetus to ensure that these people were properly compensated did not come from them, but rather from the lawyers.[100]

It is interesting to note that compensation interests were not valued equally and consequently there was an enormous difference in the size of the claims made by some of the prominent citizens in Fort Frances compared with the claims made on behalf of Native people. Even though non-Native residents were less likely to own a great deal of property, it seems odd that such vast damages as those reported by white residents were not generally known prior to the lawyers' investigation in 1918. The average claim for any of the reserve residents was about $200, with some

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[100] NAC, Department of Indian Affairs Records, Black Series, Volume 4021, file 282759-2.

claims as low as $25 and one as high as $915. The total acreage of reserve land which was lost because of the flooding was valued by the department at $17,975. On the other hand, the average claim for non-Natives was $15,000 and no claims were lower than $13,000. Some of the elements which were considered in the assessment of non-Native claims included such intangibles as the depreciation of the scenic value of the property. The total amount of property damage claimed was in excess of $85,000 and less than $4000 of that figure represented compensation to Native people, yet, almost all of the damaged lands were, at least, technically, Aboriginal lands.[101] It seems clear that for whatever reason, non-Native residents of the town were able to claim a disproportionate amount of property damage compared to what Native people did and that the government did not press as hard as it might have for compensation. For example, there was no mention that Native people should be reimbursed for the loss of their labour due to damaged crops or fences, nor was there any mention that they ought to be compensated because they suffered any loss and enjoyment from a splendid view made unsightly by flood damage.

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[101] Ibid. Reports made from legal representatives to DIA, 1918.

From all available evidence it would appear that the court case itself was inconclusive, and that proceedings were stalled and overwhelmed by bureaucratic red tape. For example, a letter to the deputy minister of Justice in April 1919, from the Toronto law firm involved in the case, stated that in order to continue investigations an order-in-council dealing with the construction of the dam would need to be revoked or annulled because it was based on a misstatement of fact.[102] The deputy minister of Justice replied to this difficulty by suggesting that any information dealing with the original agreement and subsequent order-in-council would be held by the Department of Public Works.[103] It was also noted that in order for the government to make a case against the Ontario and Minnesota Power Company it would have to be proved that the restoration work was done was unauthorized. A further difficulty, as viewed by the Justice Department, involved establishing the value of the damaged reserve lands.

Although a court date was set for September 14, 1920, it was immediately adjourned until October. At that time a monetary settlement for damaged land was

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[102] NAC Department of Indian Affairs Records Black Series Volume 4021, file 282 159-2. Letter from legal representatives to minister of Justice, April, 1919.

[103] Ibid.

set at $17,957. In a letter describing the proceedings forwarded to McLean, it was noted that there was some disagreement over whether the Department of Indian Affairs could claim any damage to lands which flowed around the shoreline. If this claim was going to be disallowed there would be little sense of pursuing the case because almost all of the damaged land was within this disputed area.[104] It was decided to move the proceeding to Ottawa to explore the merits of the case further.

In Ottawa, the court was made aware of the fact that a strip of land was to be set aside between the water and the beginning of the reserve lands two chains, or approximately one hundred and thirty feet in width for road allowance, wharves or for other public uses.[105] A decision was subsequently made which stated that the reserve lands did not extend to the water's edge and that the reserve was, technically speaking, not damaged. While applying strict legal definitions as to where the reserve lands began it is clear that the court ignored the practical usage of that chain allowance. There was a case to be made of the fact that on the Fort Frances reserve there had never been

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[104] NAC Department of Indian Affairs Records, Black Series, Volume 4021, file 282 759-2.

[105] Ibid. Documents from court proceedings, October, 1920.

any plans for the public use of that chain allowance and that the land, realistically, was regarded as part of the reserve. However, this option was never fully developed nor was it adequately pursued through the courts. Further, the lawyers who were ostensibly representing Native interests through the Department of Indian Affairs refused to bring in Native people as witnesses, thus denying any impact their testimony of the personal loss might have brought to bear on the case. The lawyers stated that the

> Indians with one exception [were] not being called, as the other side gave no evidence in reply on this phase of the case. He accordingly did not put in the Indians as they could have been very unsatisfactory and possibly dangerous witnesses.[106]

This refusal to bring in the human element seems strange at best and negligent at worse. The fact that the "other side" chose not to speak to the damage suffered by individuals because of the flooding seems a poor reason for the lawyers whose job was to represent the interests of Native people not to bring this aspect of the case into the forefront of the discussion. The fact that this indifference did occur, and that the government, through its legal representatives, failed to protect Native rights adequately in this particular

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[106] Ibid. Documents from court proceedings. Letter from legal representatives to Toronto firm, October, 1919.

example may be symptomatic of the general lack of real concern for Native people.

There were no subsequent appeals made on behalf of Native people, even though the lawyers representing the government had stated that they were in a good position to get some costs for damages against the Ontario and Minnesota Power Company. It seems that the Department of Indian Affairs either lost interest in pursuing any case based on personal property damage alone, or it felt uncertain about attempting an additional suit once the court established the fact that the shoreline was not technically part of the reserve. In effect, the case was not resolved at all; rather, it was left to lie in indecision.

Chapter three

CONCLUSION

It would appear that the Department of Indian Affairs was more interested in the future value of the reserve land as real estate than in protecting treaty rights. Even though there was some limited procedure in place in the original contract with the Ontario and Minnesota Power Company through which the government could have insisted that restitution be made for damage resulting from the flooding, the government was not able to obtain adequate compensation. This failure on the part of the government to seek a satisfactory settlement may be attributed to racist ideas. Certainly, there was no doubt that the white people in Fort Frances were successful in justifying their losses, even to the point that, when their magnificent panorama was destroyed, they were compensated for their lost "view." The lack of justice in this case is truly astounding. The government refused to address the issue either by bringing the full force of the law to bear when considering the flood damaged property in

legal terms, or by protecting Native people as people who suffered personal loss due to the flooding. While this posture of indifference may partially be attributed to the nature of bureaucracy and the dehumanization of institutions, one must also acknowledge the racism prevalent in the government's dealings with Native people throughout history. This excerpt from an Ontario Bar Association publication written for law students provides a fair assessment of the variety of predicaments which Native people faced in their dealings with the government of Canada.

> Many of the promises made in the treaties have not been kept over the years or were never initially fulfilled. Hunting and fishing rights have been overridden by general federal legislation in the form of the Migratory Birds Convention Act and the Fisheries Act. The purchase price that was originally paid under these agreements was frequently exceedingly below the fair market value and might be regarded as so inadequate as to be unconscionable consideration.
>
> In addition, Indian reserve lands have sometimes been expropriated without adequate or any compensation, been illegally sold, been lost through moving boundaries or by redefinition, been sold below fair market value, and been totally mismanaged by Indian agents. Bands have also had their funds lost, stolen, and mismanaged. All of these form the basis for claims.[107]

It ought not to be surprising then that reserve lands, such as those guaranteed under Treaty 3, were under

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[107] Brad Morse, Current Issues in Aboriginal and Treaty Rights eds. William Henderson, Brad Morse (Ottawa: University of Ottawa, 1984), p.60.

constant threat of exploitation, largely because the government's primary concern was for increased economic development.[108]

Clearly the federal government did not perform well in this situation, either in preventing the construction of the dam until the effects of the flooding on the Native community were known, or in protecting and promoting the rights of the Native people to seek compensation after the flooding. Through the special arrangement of Treaty 3, Native people were given the right to choose which lands they wanted to inhabit throughout most of the year and which would be set aside as wild lands for seasonal use. The federal government was obligated to reserve those lands for the use of Aboriginal people, yet, the Department of Indian Affairs parcelled up whatever land was needed by commercial interests, in this case, for the Minnesota and Ontario Power Company, without ensuring that the profits from such arrangements would be utilized to benefit Native people living in that region. In addition, the lake front lands which were damaged because of the flooding were sold as cottage lots to the people of the town of Fort Frances, and the profit from the sale of those reserve lands went to the

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[108] Morris Zaslow, The Opening of the Canadian North, 1870-1914 (Toronto: McClelland and Stewart, 1971), p.149.

government. Moreover, much of the remaining land was ruined because of the flooding, and whatever use of that land Native people had originally intended for it, was now made impossible. The government did this, without consulting Native people, without advising them of their rights to that land, and without compensating them for the loss of that land.

Throughout the history of Native-white relations in Canada, as demonstrated in this case, it seems clear that the there was no genuine understanding of, or commitment to uphold, the intent of the treaties on the part of the federal government when confronted with provincial, business or settler demands. The treaties were initiated out of a desire for peace and to secure land, they were maintained through a need to subjugate and control, and they were subverted by every level of government because of greed.

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