

## **MINERAL RIGHTS ON INDIAN RESERVES IN ONTARIO**

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### **ABSTRACT/RESUME**

The author reviews the history of the establishment of Indian reserves in Ontario, noting many differences in rights to minerals. In spite of clear evidence that some reserve lands carry full mineral rights for Indians, a 1924 agreement between Canada and Ontario gave that province the right to receive one-half of all proceeds from the disposition of reserve mineral rights. This became part of the Natural Resources Transfer Agreements for Manitoba, Saskatchewan, and Alberta. Negotiations are underway to amend the 1924 agreement.

L'auteur examine l'histoire de l'établissement des réserves indiennes en Ontario, et souligne un grand nombre de différences parmi ces réserves en ce qui concerne les droits minéraux de chacune. Bien qu'il soit clair que certaines réserves ont été investies de tous les droits relatifs aux ressources minérales de leur terre, un accord entre le Canada et l'Ontario, conclu en 1924, donne à l'Ontario le droit de recevoir la moitié des fonds résultant de l'exploitation des richesses minérales dans les réserves indiennes. Cette entente fait partie intégrante des accords actuellement en vigueur au Manitoba, en Saskatchewan et en Alberta, concernant le transfert des droits relatifs aux ressources naturelles. Des négociations ont été entreprises pour modifier l'accord de 1924.

"During the past year very few applications have been received for minerals."

Indian Affairs Annual Report, 1909<sup>1</sup>

#### RESERVE INCOME, ONTARIO

	Farm Products	Beef	Wages	Timber and Land Rentals	Fishing
1919 <sup>2</sup>	\$960,091	45,545	904,148	62,214	161,488
1945 <sup>3</sup>	\$295,340	56,910	1,777,000	81,915	342,933
	Trapping and Hunting	Other		Mining Royalties incl. Sand & Gravel	
1919	271,858	106,487		---	
1945	960,085	571,380		2,111	

In the Annual Report of the Department of Indian Affairs for 1967/68 it was observed that "mining resources on Indian lands are largely undeveloped".

Mineral resources on reserve lands in Ontario have yet to confer any meaningful benefits upon the Indian people of the Province. The comments and data above provided reflect the near absence of mineral development on Indian reserves. The Annual Reports of the Department of Indian Affairs indicate that gypsum mining on the Six Nations Reserve, quarrying for limestone, sand and gravel, and limited gas production on the Six Nations Reserve I.R. 40 are the only forms of mineral production on reserve lands. In 1970, the royalty accruing to the Six Nations band from gypsum mining was reported to be a mere \$24,000. In 1980, a discovery of commercial quantities of natural gas on the Sarnia Reserve was described as representing the "first major petroleum find on Indian land in Eastern Canada in 50 years".

The state of mineral development on Indian reserves in Ontario may be contrasted with that of the province generally. Ontario has historically ranked as the leading producer of minerals, other than oil and gas, in Canada. In 1981 the value of mineral production in Ontario was four and a quarter billion dollars comprising 28.3% of Canadian production.

As of August 31, 1978, there were 183 Indian reserves in Ontario totalling 1,727,564 acres. Such area consists in 1.55% of the total area of Ontario. In 1979, it was estimated that 16% of reserves in Ontario indicated good-to-excellent metallic mineral potential, 9% indicated structural mineral potential, and 4% indicated non-metallic mineral potential, and that the mineral potential on reserves in Eastern Canada was more than six billion dollars.

Indian bands in Ontario are not acknowledged in law as the full beneficial owners of the minerals located on their reserves. The Provincial claim to ownership of some minerals on some reserves led to the constitutional entrenchment

of provincial rights with respect to minerals on Indian reserves in Ontario in the 1924 Canada-Ontario Indian Reserve Lands Agreement. Indian refusal to accept the terms of the Agreement has discouraged mineral development. In 1971 it was observed:

A number of Indian bands have been deeply concerned about the lack of benefit under the present Agreement and have refused to allow mineral development on their reserves. A few examples are the Garden River, Muncey, Chippewa, and Oneida Bands. Other bands have permitted development expecting that the Province will trim back its share of revenue to them. This is not possible till the Agreement has been amended.<sup>4</sup>

The function of this paper is to determine the ownership of the mineral resources on Indian reserves in Ontario. It is hoped that it may explain the need for a prompt adjustment of the 1924 Agreement to reflect the full beneficial ownership of Indian bands and to ensure the development of the mineral potential of reserve lands for the benefit of the Indian people of Ontario.

A determination of the ownership of minerals on Indian reserves requires a study of the manner in which reserves were established. Such study may incidentally serve to explain the relative absence of the location of mineral riches on reserve lands.<sup>5</sup>

#### A. THE ESTABLISHMENT OF RESERVES IN ONTARIO

The ownership of minerals on Indian reserves depends upon the manner of establishment of the reserves. It is necessary to determine what interest it was intended to grant and the rights that accrued thereunder. Reserves were established by executive act, by agreement upon treaty or surrender, and by purchase.

The Six Nations Reserves were established in recognition of the Indian alliance in the American Revolutionary War. The reserves were established in law by executive act of the Governor of Upper Canada.<sup>6</sup> In 1784, the Crown purchased a tract of land from the Mississaugas in order to provide land for the Six Nations. The Haldimand Deed of October 25, 1784 declared:

I have at the earnest desire of many of these His Majesty's faithful allies purchased a tract of land from the Indians situated between the Lakes Ontario, Erie and Huron, and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation and authorize and permit the said Mohawk Nation and such others of the Six Nation Indians as wish to settle in that quarter to *take possession* of and settle upon the Banks of the River commonly called Ouse or Grand River, running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river beginning at Lake Erie and extending in that proportion to the

head of the said river whit them and their posterity are to enjoy for ever.<sup>7</sup>

In 1793, the lands were regranted to the Six Nations and the boundaries re-defined in the Simcoe Deed. The Deed, *inter alia*, provided:

Giving and granting... the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner.<sup>8</sup>

The Simcoe Deed concluded by asserting that "We have caused these our letters to be made patent and the Great Seal of our said Province to be affixed." Following alienations and surrenders, there remained by 1845<sup>9</sup> only 55,000 acres "in the hands of the Indians" of the original 650,000 acres which had been set apart. In 1793, Lieutenant Governor Simcoe granted 92,700 acres to the Mohawk at the Bay of Quinte upon the same terms as the lands granted on the Grand River.<sup>10</sup> By 1845 no more than 16,800 acres remained in their possession.<sup>11</sup>

Some lands were set apart by executive act as reserves for Indians which they might cultivate and occupy as they were raised "to the level of their white neighbours".<sup>12</sup> Instances of such reserves were at Walpole Island, Alnwick and the North West shore of Lake Simcoe.<sup>13</sup> In other circumstances, lands were provided to trustees to hold in trust for the use or benefit of Indian tribes. In 1798, 51,160 acres of land was appropriated by order in council to the Trustees of the Moravian Society "to be reserved forever to the Society, in trust, for the sole use of their Indian converts". Title to the land was never conveyed to the Moravian Society and by 1857 most of the land had been surrendered.<sup>14</sup> Other grants to trustees conveyed title to the land. For example, in 1834 and 1837 lands were granted to the New England Company in trust "for the benefit of Indian tribes in the Province, and with a view to their conversion and civilization". The lands were occupied by the Mississauga of Rice Lake and Mud Lake.

The establishment of reserves for the Indians by executive act, whether by "deed" or not, did not include the grant of title to the land to the Indians. The Indians were granted an undefined right to use and possession of the lands which made no express reference to minerals.

Reserves were more commonly established by agreement or treaty. The 1845 Report of the Legislative Assembly explained:

In Upper Canada, on the other hand, where at the time of the Conquest, the Indians were the chief occupants of the Territory where they were all Pagans and uncivilized; it became necessary, as the settlement of the country advanced, to make successive agreements with them for the peaceable surrender of portions of their hunting grounds.

The Treaties or Agreements did not always provide for the establishment of

reserves:

The terms were sometimes for a certain quantity of Presents, such as have been before described, once delivered, or for an annual payment in perpetuity, either in money, or more generally in similar Presents. One of the earliest of these agreements was made with the Mississauga Tribe on the Grand River in 1784, by which the Crown purchased above 670,000 acres, to be again ceded to the Six Nations on their retirement from the United States, at the close of the War of Independence.

The Report commented upon the treaties and agreements which did provide for reserves:

These agreements are mostly drawn up in general terms; they do not appear to have been recorded, and some of them are missing. They sometimes contain reservations of a part of the land surrendered for the future occupation of the Tribe. In other cases, separate agreements for such reservations have been made or the reservations have been established by their being emitted from the surrender, and in those instances consequently the Indians hold upon their original Title of occupancy.

In all these cases, and in the Grants of purchased Lands, which, on two or three occasions the government has made for the settlement of certain Tribes, the power of alienation is distinctly withheld from the Indians and reserved to the Crown.

The treaties and agreements did not provide for the grant of title to the lands to the Indians nor did they expressly provide for entitlement with respect to minerals. An early reservation is instanced by the purchase from the Mississauga Indians of 1805 which provided:

Reserving to ourselves and the Mississauga Nation . . . the flats or low grounds on said creeks and rivers, which we have heretofore cultivated and where we have our camps.<sup>15</sup>

The language of the treaties and agreements customarily purported merely to "reserve a tract of land" from the surrender.<sup>16</sup> The surrender of the Chippewa of Chenail Ecarte and St. Clair in 1827, which released Indian title to over two million acres in the "London and Western Districts", was more explicit in terms of the reservation:

. . . expressly reserving to the said Nation of Indians and their posterity at all times hereafter, for *their own exclusive use and enjoyment*, the part or parcel of the said tract which is hereinafter

particularly described...<sup>17</sup>

Similarly, distinctive provision was made in the treaty providing for the establishment of the reserve on the Manitoulin Islands in 1836. The Ottawa and the Chippewa surrendered Indian title to the Islands in order to "make them the property (under your Great Father's control) of all Indians whom he shall allow to reside on them".<sup>18</sup>

The 1845 Report of the Legislative Assembly had acknowledged that some reserves had been established by Indian purchase:

In a few recent instances, the Indians have purchased Land for themselves, with the proceeds of their annuities.

Instances of such purchases included lands at Rama by the Chippewa of Lake Huron, at Delaware by the Oneida of the Thames, by the Rice Lake and Scugog Lake Bands, and by the Mississauga of the New Credit. It appears that such purchases conveyed absolute title to the Land, but that such title was held in trust for the Indians by the Crown.<sup>19</sup>

The absence of reference to mineral resources in the establishment of reserves to the middle of the nineteenth century may be explained by the lack of mineral development in the Province generally up to that time. In 1843, the report of the progress of the Geological Survey suggested that the Lake Superior country might be possessed of substantial mineral riches.<sup>20</sup> 1845 was the "first season of exploration and discovery" in the Lake Superior region and rapidly extended to the shores of Lake Huron. The origins of the Ontario mining industry may be properly ascribed to that time.<sup>21</sup> In 1846, silver was discovered in the vicinity of Thunder Bay, Lake Superior and further discoveries of precious and non-precious minerals followed on the shores of Lakes Superior and Huron. The Indian people resisted the activities of the prospectors and miners. Peau de Chat, Chief of the Fort William Ojibway complained:

"The miners burn the land, and drive away the animals, destroying the land... Much timber is destroyed and I am very sorry for it, when they find mineral they cover it over with clay so that the Indians may not see it, and now I begin to think that they wish to take away and steal my land..."<sup>22</sup>

Following further Indian protests, bands from Garden River and Batchewana attacked a mining location of the Quebec Mining Company near Michipicoten and prevented survey teams from surveying the unsurrendered lands.

A Royal Commission was appointed in 1849 to investigate. The Commission recommended that a treaty of cession with respect to the unsurrendered land be entered into with the Indian people. The Government responded by appointing William B. Robinson, a Director of the Quebec Mining Company, as Treaty Commissioner.

Treaty Commissioner Morris commented subsequently:

In consequence of the discovery of minerals, on the shores of Lake Huron and Superior, the Government of the Late Province of Canada, deemed it desirable, to extinguish the Indian title, and in order to that end, in the year 1850, entrusted the duty to the late Honorable William B. Robinson, who discharged his duties with great tact and judgment, succeeding in making two treaties, which were the forerunners of the future treaties, and shaped their course. The main features of the Robinson Treaties—viz, annuities, reserves for Indians, and liberty to fish and hunt on the unconcealed domain of the crown—having been followed in these treaties.<sup>23</sup>

The Robinson<sup>24</sup> Treaties provided for the surrender of Indian title to the lands upon the northern shore of Lakes Huron and Superior "save and except the reservations set forth in the schedule hereto annexed." The schedules described the area and approximate location of the reserves. The treaties specifically provided that if the bands desired to dispose of any "mineral or other valuable productions, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being... for their sole benefit, and to the best advantage." With respect to mining locations on reserve lands that were sold prior to the date of the agreement it was promised that "the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs". The Crown also undertook to supplement the promised annuities of 600 pounds and of 500 pounds "if the territory hereby ceded... shall at any future period produce an amount which will enable the Government of the Province without incurring loss to increase the annuity" to a maximum of "one pound" for each individual "or such further sum as Her Majesty may be graciously pleased to order".

The initial amount of the annuities was determined by reference to "the amount which the Government had [already] received for mining locations after deducting the expenses of their sale". Robinson observed:

That amount was about eight thousand pounds which the Government would pay them without any annuity or certainty of future benefit; or one half of it down, and an annuity of about one thousand pounds . . . they all preferred the latter proposition.<sup>25</sup>

The Treaty Commissioner rejected Indian demands for better terms as "extravagant" and declared to the Chiefs in Council that:

. . . the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell, and bring provisions and stores of all kinds among them at reasonable

prices.<sup>26</sup>

The Indians agreed to allow existing and future mineral exploration and development to go forward:

. . . Nor will they at any time hinder or prevent persons from exploring or searching for minerals, or other valuable productions, in any part of the territory hereby ceded to Her Majesty, as before mentioned• The parties of the second part also agree, that in case the Government of this Province should before the date of this agreement have sold, or bargained to sell, any mining locations, or other property, on the portions of the territory hereby reserved for their use; then and in that case such sale, or promise of sale, shall be perfected by the Government, if the parties claiming it shall have fulfilled all the conditions upon which such locations were made.<sup>27</sup>

The reserves that were selected consisted in "most cases" in "such tracts as they had heretofore been in the habit of using for purposes of residence and cultivation". In the case of Garden River, the Commissioner promised that the sale of two mining locations thereat would not be completed. Robinson explained in his report that "as the locatees have not, I believe, complied with the conditions of the Crown Lands Department there can be no difficulty in cancelling the transaction".<sup>28</sup>

In 1871, the Privy Council authorized the negotiation of a treaty providing for the surrender of Indian title to the land between Prince Arthur's Landing on Lake Superior and the north-west angle of the Lake of the Woods in order to

... secure for the passage of emmigrants and of the people of the Dominion generally, and also to enable the Government to throw open for settlement and portion of the land which might be susceptible of improvement and profitable occupation.<sup>29</sup>

The treaty, Treaty #3, was eventually made on October 3, 1973. The written terms of the Treaty provided for the setting aside of "reserves for farming lands" and "other reserves for the benefit of the said Indians". No express provision in such terms was made for minerals, but Treaty Commissioner Morris reported this exchange in the negotiations:

Fort Francic Chief:

Should we discover any metal that was of use, could we have the privilege of putting our own price on it?

Governor Morris:

If any important minerals are discovered on any of their reserves the minerals will be sold for the benefit with their consent but not

on any other land mat discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser.<sup>30</sup>

"To prevent complication" Treaty Commissioner Morris urged that "no patents should be issued, or licences granted, for mineral or timber lands, or other lands, until the question of the reserves has first been adjusted".<sup>31</sup> The surveyors, however, who were commissioned to set apart the reserves were instructed to exclude any "known mineral lands" from within reserve boundaries.<sup>32</sup> He commented that on the closing of the treaty, "a territory was enabled to be opened up of great importance to Canada, embracing as it does the Pacific Railway routes to the North West Territories - a wide extent of fertile lands, and, as is believed, great mineral resources".

In 1883, blasting operations in the building of the Canadian Pacific Railway led to the discovery of the great nickel-copper deposits of the Sudbury basin. The discovery spurred mineral exploration in Ontario and in 1903 the very rich deposits of silver were found at Cobalt in Timiskaming District. The precious metal discovery at Cobalt "touched off a surge of interest in Northern Ontario". As the order in council authorizing the Treaty Commission with respect to Treaty #9 explains:

Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario north of the height of the land and south of the Albany river rendered it admirable to extinguish the Indian title.<sup>33</sup>

In 1905, Treaty #9 was entered into providing for the surrender of Indian title to that Territory. The Treaty Commissioner reported that the "Indians were familiar with the provisions of Treaty #3". It was explained to the Indians "that their reserves were set apart for them in order that they might have a tract in which they could not be molested, and where no white man would have any claims without the consent of their tribe and of the government".<sup>34</sup> The Commissioner hoped, in the report to the Superintendent General of Indian Affairs, that the "treatment of the reserve question will meet with approval". The Commissioner observed that "for the most part, the reserves were selected by Commissioners after conference with the Indians. It was commented:

They have been selected in situations which are especially advantageous to their owners, and where they will not in any way interfere with railway development or the future commercial interests of the country.<sup>35</sup>

It would seem that the Commissioner assured the Indians of their entitlement to all the minerals on the reserve lands, but did their best to ensure that reserve lands were not located where there were mineral deposits. Thereafter, gold was found at Larder Lake and Kirkland Lake, silver at Gowganda, and the huge

and enormously rich gold deposits of Porcupine at Timmins. In 1930, an adhesion to Treaty #9 was signed with respect to the land northward to Hudson Bay. The written terms of Treaty #9 provide for the laying aside of 'reserves', but do not make any specific provision with respect to minerals.

In 1923, outstanding Indian title in large areas of Southern Ontario was surrendered in treaties with the Chippewa of Christian Island, Georgina Island and Rama, and the Mississauga of Rice Lake, Mud Lake, Scugog Lake and Alderville. The treaties excepted "those lands which have already been set apart as Indian reserves" within the tracts thereby surrendered.

## B. THE CONSTRUCTION OF THE GRANTING INSTRUMENTS

A legal examination of the nature of the interest granted or appropriated conventionally entails the ascertainment of the "plain meaning" of the language employed. The Supreme Court of Canada has very recently indicated that such approach may not be appropriate with respect to treaties, statutes and other instruments relating to Indians. In *Nowegijick v. The Queen*<sup>36</sup> Dickson, J. declared, for a unanimous Court, that:

. . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians...

The learned judge cited the decision of the United States Supreme Court in *Jones v. Meehan*<sup>37</sup> that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians". The Ontario Court of Appeal adopted a not dissimilar approach in *R. v. Taylor Williams*,<sup>38</sup> the "bull-frog case", in the construction of the 1818 treaty between the Chippewa of Port Hope and the Crown. The Court declared that the following principles were applicable to the construction of the treaty:

In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "share dealing" should be sanctioned.

X X X

Further if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R. White and Bob*.<sup>39</sup>

Finally, if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such under-

standing and practice is of assistance in giving content to the term or terms.<sup>40</sup>

The Divisional Court of Ontario<sup>41</sup> held in the same case that the oral discussions recorded in the minutes of the negotiation of the Treaty constituted part of the terms of the treaty. The Ontario Court of Appeal supported and accepted counsel's agreement on the question.

The adoption of such principles of construction to the instruments whereby reserves were established in Ontario dictates the full beneficial ownership of minerals by the Indians. The Six Nations Indians were granted "the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner". The lands appropriated to the Moravian Society were to be held for the "sole use of their Indian converts". The treaties entered into between 1780 and 1850 in Southern Ontario customarily provided for the reservation of "tracts of land". The mining industry of Ontario had yet to begin at that time, and accordingly, such reservation would have presumed to carry with it all benefits that the land might provide. Minerals were not referred to because they were not at that time contemplated or considered significant. The Robinson Treaties were entered into in 1850 in contemplation of precious and non-precious mineral potential and specifically provided that "mineral or other valuable productions" on the reserves might only be sold for the exclusive benefit of the Indians. The written terms of Treaty #3 contain no specific assurance of the mineral entitlement of the Indians, but the oral terms include the promise that "if any important minerals are discovered on any of their reserves, the minerals will be sold for their benefit with their consent." The region surrendered by Treaty #9 is rich in mineral wealth. The written terms of the Treaty are almost identical to Treaty #3. Like Treaty #3, there is no specific provision in the written terms of the mineral entitlement of the Indians, merely provision for the laying aside of 'reserves', but the Indians were assured that "no white man would have any claims" on their land without their consent.

Reserves were exceptionally established by executive appropriation of lands without agreement to the "use" of the Indians or by purchase of the fee simple title thereto. Mines, quarries and minerals are part and parcel of the land, and consequently the owner of the surface of the land is entitled prima facie to everything beneath or within it to the centre of the earth.<sup>42</sup> Such venerable principle of the common law when considered in conjunction with the principles of construction declared applicable to treaties with the Indians suggests that the ownership of non-precious minerals is properly attributed to the Indians, no matter how a reserve was established. The laying aside of reserves of "land" under Treaty #9 and the executive appropriation of lands for the "use" of the Indians includes such entitlement. A fee simple title by definition includes such right.

It has long been established that the precious metals, gold and silver, do not pass upon a general designation of land and minerals.

. . . it is perfectly clear that ever since that decision [Case of the

Mines, (1567) it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words, the intention of the Crown be expressed that it shall pass.<sup>43</sup>

Such principle was applied by the Privy Council in *A.G. of British Columbia v. A.G. of Canada*<sup>44</sup> in a dispute as to which jurisdiction owned the gold and silver in the "railway belt" transferred to the Dominion. Lord Watson concluded that the transfer was a "commercial transaction" which was merely "part of a general statutory arrangement", the Terms of Union, and accordingly the precious metals did not pass to the Dominion. The learned judge declared, however, that the precious metals would have passed if the article in question "had been an independent *treaty* between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land farming the railway belt, royal as well as territorial, to the Dominion Government."

It is tentatively suggested that a proper construction of the deeds, agreements and treaties whereby Indian reserves were established in Ontario requires that the precious metals on most reserves be vested for the benefit of the Indians. None of the instruments specifically refer to gold or silver but it is suggested that the principles of construction declared in *Nowegijick v. The Queen, R. v. Taylor and Williams* and *A.G. of British Columbia v. A.G. of Canada* requires such result. Indian ownership of gold and silver in the Six Nations Reserves, and those established pursuant to the Robinson Treaties and Treaties #5 and #9 can be more assuredly declared on account of the more expansive expressions employed in those instruments and the oral terms providing for such reserves. Less assurance can be attached to such a declaration with respect to reserves established pursuant to agreements or treaties where more general terminology was used. With respect to the exceptional reserves established without agreement of executive appropriation to the "use" of the Indians, greater difficulty is encountered in suggesting that the Indians of such reserves are entitled to the precious metals thereon. An appropriation merely to the "use" of the Indians would not seem likely to be construed to pass the prerogative metals, no matter what principles of construction were employed. Such reserves are few and small in area.

The purchase of fee simple title to reserve land did not originally include the precious metals, but in 1869 the Province of Ontario enacted the General Mining Act,<sup>45</sup> section 4 of which provided:

All reservations of gold and silver mines contained in any patent or patents heretofore issued, granting in fee simple any land or lands situate within this Province, are hereby rescinded and made void, and all such mines in or upon any such lands shall henceforth be deemed to have been granted in fee simple as part of such lands, and to have passed with such lands, to the subsequent and present

proprietors or owner thereof in fee simple.

The rescision of the Crown reservation of gold and silver and other minerals upon patented lands has remained in effect with respect to land patented before May 6, 1913.<sup>46</sup> Accordingly, the reserve lands purchased by, *inter alia*, the Chippewa of Lake Huron at Rama, by the Oneida at Delaware and by the Missassauga of the New Credit included the precious metals therein.

### C. THE INDIAN ACT

It is suggested that the legislation enacted by the Pre-Confederation Provinces of Upper Canada and Canada and the Dominion affecting Indians supports the conclusion that the minerals on reserves, precious and non-precious, are generally vested for the benefit of the Indian bands.

Prior to the development of the mining industry in Ontario, the legislature recognized the beneficial interest of the Indians in such materials as were then considered valuable. The 1839 Act for the Better Protection of the Lands of the Crown in this Province from Trespass and Injury<sup>47</sup> provided for the appointment of a commissioner to inquire into and require the removal of trespassers from, *inter alia*, "lands appropriated for the residence of certain Indian tribes". The statute provided for penalties and seizure with respect to the quarrying upon, or removal of "any stone or other materials from such lands".

The first Indian Act,<sup>48</sup> so-called, of 1876 defined a "reserve" so as to include de:

. . . all the trees, wood, timber, soil, stone, minerals, metals or other valuables, thereon or therein.

The minerals could not be disposed of without a surrender to the Crown, although the Superintendent General might issue a licence "to quarry and remove stone and gravel" with the consent of the band.<sup>49</sup> In 1919, the Indian Act was amended to provide for the "issuance of leases for surface rights... for the mining of precious metals", without surrender purportedly to enable the *British Columbia* government to exercise its rights upon reserve lands to precious metals. The Annual Report<sup>50</sup> of the Department of Indian Affairs of 1920 observed:

Owing to local conditions, misapprehension or hostility on the part of a band, it is not always possible to secure a surrender for mining rights. This obstacle has been effectively overcome by the amendment.

The absence of any reference in the Act or amendment to sub-surface rights caused the Justice Department to question the validity of oil and gas disposition regulations purportedly promulgated pursuant to the amendment. As the Federal Minister of Mines and Resources candidly observed:

At the time the regulations were passed, or indeed at the time the provision was inserted in the Indian Act, it was not expected that developments of minerals or coal or of oil so far as Alberta is concerned would take place on Indian reserves, located as they were mostly in the northern part of the province. The opinion of the Justice department is that the power of the Governor in Council to make these regulations does not extend to the sub-surface rights.<sup>51</sup>

In 1938, the Act was amended<sup>52</sup> to provide for the disposition, upon surrender, of sub-surface rights and without surrender, of surface rights in respect of all minerals. In 1951, the Act was amended to its present form.<sup>53</sup> "Reserve" is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".<sup>54</sup> Upon surrender, the Minister "may manage, sell, lease or otherwise dispose of surrendered lands in accordance with the Act and terms of surrender".<sup>55</sup> The Governor in Council is authorized to make regulations "providing for the disposition of surrendered mines and minerals underlying lands in a reserve".<sup>56</sup>

The legislation contemplates that minerals on reserves are vested for the benefit of the Indian bands. It does not expressly declare the Indian ownership of precious minerals but is consistent therewith.

#### D. THE CLAIM OF THE PROVINCE

The claims of the Province of Ontario to ownership of an interest in resources on Indian reserves is founded upon section 109 of the British North America Act:

All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

In *St. Catherine's Milling and Lumber Co. v. The Queen*<sup>57</sup> in 1889, the Privy Council declared that the effect of Treaty #3 was to vest the plenum dominium in the Crown in the right of Ontario with respect to the lands in the Province thereby ceded:

The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same", within the meaning of section 109; and must now belong to Ontario in terms of that clause.<sup>58</sup>

The decision in *St. Catherine's* suggested that any Indian interest in reserved land sought to be created by the Dominion after 1867 would require the concurrence of the Province. Accordingly, in 1894 the Dominion and the Province entered into an agreement<sup>59</sup> with respect to the lands encompassed by Treaty #3, which provided that the "concurrence of the Province of Ontario is required in the selection of the said reserves". The agreement also provided:

That any future treaties with the Indians in respect of Territory in Ontario... shall be deemed to require the concurrence of the Government of Ontario.

The agreement did not preclude litigation between those claiming title from the Province and those from the Dominion. In *Ontario Mining Co. v. Seybold*<sup>60</sup> the holder of letters patent issued by the Government of Canada to surrendered lands in a reserve set aside pursuant to Treaty #3, but without provincial concurrence, sought a declaration that it was the owner of such lands, including the minerals, precious and base therein. Chancellor Boyd<sup>61</sup> dismissed the action holding that the letters patent issued by the Dominion were invalid. The Chancellor concluded that the effect of the surrender of the reserve set apart under Treaty #3 was to "free the part in litigation from the special treaty privileges of the land and to leave the sole proprietary and present ownership in the Crown as representing the Province of Ontario".<sup>62</sup>

The Chancellor considered whether the precious minerals could ever have formed part of the reserve and been subject to Indian ownership. The learned judge declared the general principle:

According to the law of England and of Canada, gold and silver mines, until they have been aptly severed from the title of the Crown are not regarded *as partes soli* or as incidents of the land in which they are found.<sup>63</sup>

Accordingly,

The right of the Crown to waste lands in the colonies and the baser metals therein contained is declared to be distinct from the title which the Crown has to the precious metals which rests upon the royal prerogative. Lord Watson has said in *A.G. of British Columbia v. A.G. of Canada*<sup>64</sup> the prerogative revenues differ in legal quality from the ordinary territorial rights of the Crown.<sup>65</sup>

The Chancellor concluded that the precious metals passed by section 109 of the British North America Act to Ontario:

These prerogative rights, however, were vested in Canada prior to the Confederation by the transaction relating to the civil list which took place between the Province and Her Majesty - the

outcome of which is found in 9 Vict. ch. 114, a Canadian Statute, which, being reserved for the royal assent, received that sanction in June, 1846. The hereditary revenues of the Crown, territorial and others then at the disposal of the Crown, arising in the United Province of Canada, were thereby surrendered in consideration of provisions being made for defraying the expenses of the civil list. So that while the Crown continued to hold the legal title the beneficial interest in them as royal mines and minerals, producing or capable of producing revenue, passed to Canada. And being so held for the beneficial use of Canada, they passed by section 109 of the British North America Act to Ontario by force of site.<sup>66</sup>

Section 109 is, however, declared to be "subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same". The Chancellor considered the Indian interest in the lands surrendered by Treaty #3 and declared:

Now with these royal mines, the Indians had no concern. Whatever their claim might be to the waste lands of the Crown, and hunting and fishing thereon, it was never recognized that they extended to the gold and silver of the country.

Having no interest in the gold and silver, they could surrender nothing. The Dominion Government in dealing with these particular Indians in 1873, had no proprietary interest in the gold and silver and could make no valid stipulation on that subject with the Indians which would affect the rights of Ontario.<sup>67</sup>

The Chancellor considered that the "proper result from this state of affair" to be "that while the Dominion would be interested in seeing that a proper return was obtained for land and baser minerals - they would have nothing to say as to the terms and price for which the Province should dispose of the precious minerals".

The Chancellor considered that the precious minerals were not within Indian title even if the base minerals were. Accordingly, the Dominion could not promise the Indians any entitlement to the precious minerals on the reserves and no such entitlement ever existed.

The stipulations on the face of the treaty do not deal with the precious metals, but even if it is competent to go behind the treaty, still it remains that the Indians had no interest, and the Dominion had no competence quoad these royal mineral rights.

The Chancellor acknowledged that the Indians might have a claim against the Dominion with respect to the treaty promise of ownership of the precious minerals:

The Indians are not in any way represented in this litigation, and I do not and could not prejudice their claims against any government by what I now decide.

The Ontario Court of Appeal<sup>68</sup> and the Supreme Court of Canada<sup>69</sup> approved the conclusions of Chancellor Boyd.

The Dominion appealed to the Privy Council, but on the first day of the hearing on July 7, 1902, counsel on behalf of the Dominion and Ontario agreed<sup>70</sup> that the Dominion had full power to grant title to surrendered lands in "all treaty Indian reserves" in Ontario, provided that the Dominion agreed to hold the proceeds "subject to such rights of Ontario thereto as may exist by law". The parties further agreed as to the precious metals on reserves in Ontario:

As to the reserves in the territory covered by the Northwest Angle Treaty which may be duly established as aforesaid, Ontario agrees 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 to the same extent and subject to the same undertaking as to the proceeds as heretofore agreed with regard to the lands in such reserves.

The question as to whether other reserves in Ontario include precious metals to depend upon the instruments and circumstances and law affecting each case respectively.

It was explained that:

Nothing is hereby conceded by either party with regard to the constitutional or legal rights of the Dominion or Ontario as to the sale or title to Indian reserves or precious metals, or as to any of the contentions submitted by the cases of either government herein, but it is intended that as a matter of policy and convenience the reserves may be administered as hereinbefore agreed.

Counsel for the Dominion took no further part in the argument of the case. The Privy Council dismissed the appeal and declared:

Let it be assumed that the Government of the province, taking advantage of the surrender of 1873 [Treaty#3], came at least under an honourable engagement to fulfill the terms on the faith of which the surrender was made, and therefore to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of

the two governments.<sup>71</sup>

The decision of the Privy Council in *Ontario Mining v. Seybold* established that neither the Indians nor the Dominion possessed any interest in the reserves set apart after 1867 without provincial concurrence. The decision of Chancellor Boyd, however, had recognized that the Indians had a *claim* against the Dominion with respect to the reserve lands, *minerals* and *precious metals* therein which had been promised by treaty. It has been earlier suggested that the conclusion of the Chancellor is that demanded by the applicable rules of construction with respect to Treaty #3.

The 1894 Agreement required the "concurrence of the Government of Ontario" in any further treaties. The concurrence of the province to Treaty #9, and the "setting apart and location of reserves" pursuant thereto was declared in a 1905 Agreement<sup>72</sup> between the Dominion and the Province, subject to the terms of the 1894 Agreement and the 1902 Agreement between counsel for the parties.

In 1915, the Province confirmed reserves set apart pursuant to Treaty #3, "subject to all trusts, conditions and qualifications now existing respecting lands held in trusts by the Government of Canada for the Indians".<sup>73</sup>

*Ontario Mining Co. v. Seybold* had concerned the surrender of reserve lands purported to be set apart after Confederation and the enactment of section 109 of the British North America Act, 1867. In 1920, the Privy Council delivered a judgment regarding the ownership upon surrender of reserve lands set apart before 1867. In *Attorney General of Quebec v. Attorney General of Canada (The Star Chrome Mining Case)*<sup>74</sup> the Privy Council concluded that title and ownership was in the Crown in the right of the province:

The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case* it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867."<sup>75</sup>

Duff, J. for the Privy Council, described the Indian interest in the reserve lands then under consideration as "a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown". The reserve lands had been "set apart and appropriated to and for the use of" the Indians pursuant to an 1851 statute<sup>76</sup> and had "vested" in a Commissioner for Indian lands pursuant to an 1850 Act for the Better Protection of the Lands and Property of the Indians in Lower Canada.<sup>77</sup>

The decision of the Privy Council in *Star Chrome Mining* is not considered to require the conclusion that the Indian interest in all reserve lands is properly described as merely "usufructuary". Duff, J. observed that the language of the statute did "not point to an intention of enlarging or in any way altering the quality of the interest confirmed upon the Indians by the instrument of appro-

priation or other source of title".<sup>78</sup> The characterization of the Indian interest as a "usufructuary right" may bear upon those exceptional reserves established by executive action in Ontario and those held under original Indian title, but is not applicable to those established by agreement treaty, deed or purchase. The "quality" of the Indian interest, in the words of Duff, J. in such reserves and the mineral entitlement therein must depend upon the construction and effect accorded the particular instruments by means of which the reserves were established.<sup>79</sup>

It should be observed that the content of the usufructuary interest in Indian reserves has not been clearly defined in Canada.<sup>80</sup> United State jurisprudence has established the right to the commercial exploitation of the natural resources of the land insofar as "the right of perpetual and exclusive occupancy of the land is not less valuable than the fee".<sup>81</sup> Consideration of civilian notions of the usufruct provides no clear analogy by which to determine Indian mineral entitlement. The concept of the right to "continue an exploitation [of mineral resources] that has already begun"<sup>82</sup> seems peculiarly inapplicable to the notion of the communal Indian usufruct that stretches over thousands of years in changing forms. Whatever the uncertainty of the mineral content of the usufruct generally it is suggested that it probably does not extend to precious metals. The courts are likely to adhere to the common law notion that the transfer of gold and silver from the Crown requires a clear expression of intention to that effect. Such conclusion comports with that already suggested with respect to reserves set apart by executive act without deed, treaty or agreement.

#### E. BREAKING TREATY PROMISES

The 1924 *Canada-Ontario Indian Reserve Lands Agreement: An Act for the Settlement of certain questions between the Governments Of Canada and Ontario respecting Indian Reserve Lands.*<sup>83</sup>

The 1920 decision of the Privy Council in *Star Chrome Mining* cast a cloud upon the Indian entitlement to minerals on reserves set apart by executive act. No such doubt could be said to exist with respect to the Indian entitlement to minerals, precious and non-precious, under the Robinson Treaties, Treaty #3 and in lands to which the fee simple title was granted upon purchase or otherwise before 1913. Moreover, the better opinion suggests, although it is not beyond controversy, that such entitlement arises under Treaty #9 and the agreements and treaties entered into the first half of the nineteenth century. Such determinations suggest that the 1924 Canada-Ontario Indian Reserve Lands Agreement may represent a substantial denial of the Indian mineral rights promised by treaty and a confiscation of existing beneficial ownership of Indians in minerals, precious and non-precious, in reserves.

The 1924 Agreement between Ontario and the Dominion primarily sought to provide for the disposition of reserve lands upon a surrender. The Minister of Indian Affairs read a memorandum to the House of Commons which sought to explain the need for the Agreement. It, *inter alia*, provided:

It was not until 1920 that the strictly legal position of lands in Indian reserves surrendered for sale was discussed before the Judicial committee. Then in a case from Quebec (*Attorney General for Quebec v. Attorney General for Canada* [1921] A.C. 401) it was held that a patent by the Dominion of lands included in a reserve and surrendered by the Indians in trust for sale was ineffective, since upon the surrender the title passed, not to the Dominion, but to the province. It is probable that the strictly legal position in relation to reserves in the province of Ontario is identical with that in Quebec. . .<sup>84</sup>

The Minister explained that the matter had been resolved administratively by the "counsels' agreement" of 1902, but that "statutory confirmation" of the agreement "would be highly convenient to both the Dominion and the Province".

The convenience of the Province and the Dominion also demanded "settlement of the uncertainty in relation to the precious metals". The memorandum of the Minister explained:

. . . no step has ever been taken to settle the legal position even as to the surface and base metals, and the uncertainty as to the precious metals had stood in the way of the disposition of these, with the result that such precious metals as the reserves may contain have in fact not been dealt with, to the detriment both of the Indians, who would receive the benefit of the disposition, and of the province, which does not obtain the benefit of any taxation on the output of mines, which it might otherwise do.<sup>85</sup>

The memorandum thereby acknowledged the certainty of the Indian entitlement to non-precious minerals but asserted an undefined uncertainty as to the precious minerals. The memorandum is singularly unclear as to the "benefit" which the Indians will derive from the disposition of precious, as opposed to non-precious minerals. The memorandum offered the following explanation and justification for the provisions of the Agreement respecting minerals:

The geological formations in Ontario are such that precious and base metals ordinarily occur together and are only separated in the course of refinement. To deal with the precious metals consequently involves dealing also with the base metals, and the arrangement proposed by the present draft agreement is that upon the sale or other disposition of minerals, lands one-half of the total proceeds should belong to the Dominion for the benefit of the Indians, and the other half to the Province.<sup>86</sup>

The explanation offered by the memorandum is manifestly incomplete. It does not explain how a mere "uncertainty" with respect to precious metals is

transformed into a Provincial entitlement to one half of the proceeds from any mineral disposition.

The Indian people of Ontario did not consent to the 1924 Agreement. Such lack of consent can be readily understood. The explanation for the Agreement provided by the Minister of Indian Affairs is incomplete and the terms of the Agreement constitute a violation of treaty promises. The Minister chose merely to observe to the House of Commons "that it is difficult to get the tribes of Indians in the north country to thoroughly grasp the situation and in many cases, they are given bad advice".<sup>87</sup> It might be observed that perhaps it was the Dominion Government that was tendering "bad advice" to the Indians.

Despite the absence of Indian consent, the 1924 Agreement reached between the Dominion and the Province of Ontario for the "settlement of certain questions . . . respecting Indian Reserve Lands" was confirmed by statutes of the Dominion<sup>88</sup> and the Province.

The Agreement recites the surrender of the Indian title to lands in Ontario in return, *inter alia*, for the "setting apart for the exclusive use of the Indians of certain defined areas of land known as Indian reserves," the decisions reached by the Privy Council, and the counsel's agreement of 1902. Clause I of the Agreement then provides:

1. All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands...

Clause 2 stipulates that any such sale, lease or other disposition "may include or be limited to the minerals (including the precious metals)". Clauses 1 and 2 provide for the administration and disposition of Indian reserves for the benefit of the Indian bands. Clause 6, however, declares a provincial entitlement to one-half of any consideration payable with respect to mineral dispositions:

6. Except as provided in the next following paragraph, one-half of the consideration payable, whether by way of purchase money, rent, royalty or otherwise, in respect of any sale, lease or other disposition of a mining claim staked as aforesaid, and, if in any other sale, lease or other disposition hereafter made of Indian Reserve lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease or other disposition was to the knowledge of the Department of Indian Affairs affected by the existence or supposed existence in the said lands of such minerals, one-half of the consideration payable in respect

forthwith upon its receipt from time to time, be *paid to* the *Province of Ontario*; the other half only shall be dealt with by the Dominion of Canada as provided in the paragraph of this agreement numbered 1.

Clause 6 declares the entitlement of the Province to one-half of any consideration payable with respect to mineral development "except as provided in the next following paragraph". The "next following paragraph", clause 7 provides:

7. The last preceding paragraph shall not apply to the sale, lease or other disposition of any mining claim or minerals on or in any of the lands set apart as Indian Reserves pursuant to the hereinbefore recited treaty made in 1873, and nothing in this agreement shall be deemed to detract from the rights of the Dominion of Canada touching any lands or minerals granted or conveyed by His Majesty for the use and benefit of Indians by letters patent under the Great Seal of the Province of Upper Canada, of the Province of Canada or of the Province of Ontario, or in any minerals vested for such use and benefit by the operation upon any such letter patent of any statute of the Province of Ontario.

Clause 7 denies any mineral entitlement to the Province in Indian reserves set apart pursuant to Treaty #3. It also declares that nothing in the Agreement shall be deemed to detract from the rights of the Dominion "touching any lands or minerals" granted by letters patent of the Provinces of Canada, Upper Canada or Ontario "for the use and benefit of Indians".

The exclusion of the reserves established under Treaty #3 from the operation of clause 6 is explicable by reference to the terms of the 1902 Agreement which had declared "that the precious metals shall be considered to form part of the reserves" set apart pursuant to such treaty.

The exclusion of reserves granted or conveyed for the "use and benefit" of the Indians by letters patent under the great Seal of the Provinces of Canada, Upper Canada and Ontario recognizes the vesting of the mineral entitlement, precious and non-precious, conferred upon the grant of the fee simple title to any person bolero 1913. Such reserves include those purchased by the Indians, e.g. at Rama by the Chippewa of Lake Huron, at Deleware by the Oneida of the Thames, and those granted to trustees for the benefit of the Indians, e.g. to the New England Company and occupied by the Mississauga of Rice Lake and Mud Lake. Clause 7 of the Agreement also denies Provincial entitlement to a share of the minerals on the lands of the Six Nations on the Grand River and the Bay of Quinte. Such lands were granted to the use and benefit of the Six Nations by letter patent under the Great Seal of the Province of Canada. The entitlement of the Six Nations to all the minerals, precious and non-precious, is recognized by clause 7 despite the absence of the conveyance of the fee simple title thereto.

The result of the operation of clauses 6 and 7 of the Agreement is to declare

a provincial entitlement to one-half of the consideration received with respect to any disposition of minerals on Indian reserves set apart pursuant to all treaties and agreements, except Treaty #3, and Indian reserves set apart by executive act without agreement or treaty or grant. It is, accordingly, astonishing to be able to record the remarks of the Minister of Indian Affairs delivered to the House of Commons in 1924:

. . . Treaties that were in existence prior to 1873 . . . are not included in the bill because in that case the tribes made treaty arrangements whereby they have complete ownership of all minerals that are on their lands.<sup>89</sup>

Such treaties are included in the Agreement, and the Agreement is a manifest violation of the promises made to the Indians and represents an effectual confiscation of the beneficial ownership of the minerals which had already vested in the Indians.

The 1924, Canada-Ontario Indian Reserve Lands Agreement has yet to be amended. In the 1960's negotiations took place between Ontario and Canada to amend the Agreement, apparently because "some provisions have held up mineral development".<sup>90</sup> Representatives of the Union of Ontario Indians were "present" at meetings held in 1968 and 1969. On September 14, 1970 the Ontario Minister of Mines and Northern Affairs sent proposals to the Minister of Indian Affairs and Northern Development to amend the Agreement. It appears that the proposals were those which had been agreed to between the Province and Canada. The proposed amendments were stated to include the cancellation of "Ontario's share, allowing full revenues to go to the Band".<sup>91</sup> A 1971 Statement issued by Canada for the "purpose of informing you of the benefits which the Indians of Ontario will receive if these proposals are accepted" suggested that the "proposed amendment brings major benefits to the Indians of Ontario. On the other hand, there is no direct benefit to the Government of Ontario..." It must be wondered what benefit Ontario should expect to receive for the giving up of an entitlement wrongfully denied the Indians in violation of treaties and agreements! The proposals to amend the Agreement did not provide for the return of mineral proceeds retained by the Province in violation of the Indian treaty entitlement nor damages for the effectual confiscation of half of the mineral entitlement of the Indians. The 1970 proposals were not acted upon and the 1924 Agreement remains in place. It is understood that at present, the provincial "half-share" of mineral revenues is placed in trust pending the settlement of negotiations with respect to the amendments to the Agreement.<sup>92</sup> The 1981-82 Annual Report of the Department of Indian Affairs recorded that negotiations between the Province, Canada and the Indian organizations were proceeding with respect to the amendment of the Agreement.

## F. CONCLUSION FULFILLING TREATY PROMISES

The 1924 Canada-Ontario Indian Reserve Lands Agreement awaits sub-

stantial amendment. It is to be hoped that amendment be not too long delayed. The Agreement was a breach of the treaty promises made by the Crown and represented an accommodation of provincial and federal interests to the detriment of Indian treaty rights and ownership with respect to minerals. Indian agreement to the form of any provisions that replace the 1924 Canada-Ontario Agreement is, of course, essential. It is to be hoped that any changes will provide for, or at least not prejudice, claims with respect to the denial of rights over the past half century. Upon the settlement of such claims, it may then be appropriate to consider to what extent the deliberate exclusion of mineral lands from reserves represents a further violation of the treaties.

Whatever settlement is arrived at in Ontario, its significance extends beyond the boundaries of that Province. The 1924 Canada-Ontario Agreement was incorporated into the 1930 Natural Resources Transfer Agreements between Canada and Alberta, Manitoba and Saskatchewan. The Provinces have been granted thereby a statutory entitlement to a half-share of mineral proceeds on reserves set apart after 1930. It is suggested that any settlement of the ownership of minerals on Indian reserves in Ontario must, in the words of Associate Chief Justice of Ontario MacKinnon, avoid any "appearance of 'sharp dealing' ".<sup>93</sup> Such cannot be said of past dealings.

#### NOTES

1. Parliamentary Papers, 1910, Sessional Paper #27.
2. Indian Affairs Annual Report 1919-20, Parliamentary Papers, 1920, Sessional Paper #27.
3. Indian Affairs Annual Report, 1945-46.
4. Statement on Proposals to Amend Ontario Indian Land Agreement, 1924, Department of Indian Affairs, July 16, 1971.
5. For comments on the pursuit of a deliberate policy of excluding reserve lands which might contain minerals in Saskatchewan, see R. Bartlett, 'Indian and Native Rights in Uranium Development in Northern Saskatchewan' (1981-82) 45 Sask.L.Rev. 13.
6. *Logan v. Styres* (1959) 20 D.L.R. (2d) 416 (Ont. H. Ct.) per King, J: "It should be noted that the foregoing document [the Haldimand Deed] is a deed and is not in any sense a treaty although in the course of evidence it was referred to as the Haldimand Treaty from time to time."
7. *Ibid.*
8. *Ibid.*

9. Report of the Special Commissioner on Indian Affairs, 1858, 21 Vic. Sessional Papers. Appendix #21. Much of the lands so granted were alienated by members of the Six Nations, particularly Joseph Brant, and in 1855 these lands were surrendered so that "such persons as have obtained under fair and equitable circumstance the leases aforesaid shall receive from His Majesty free grants of the several tracts or parcels of land. "Indian Treaties and Surrenders", Coles Canadiana Collection, Vol. #1, p. 94. A final surrender was made in 1841 reserving only that "tract called the Johnson Settlement" out of the lands formerly reserved. *Ibid.*, p. 119.
10. "Indian Treaties and Surrenders", Coles Canadiana Collection, Vol. #1, p. 7.
11. Report on Indian Affairs, 1845, 8 Victoria Sessional Papers, Appendix (EEE).
12. *Ibid.*, Journal of the Legislative Assembly, 1847, Vol. 6, Appendix T.
13. See Report on Indian Affairs, 1845, 8 Victoria Sessional Papers, Appendix (EEE). "The Settlement at Walpole Island was commenced at the close of the American War, when Col. McKie . . . collected and placed upon the island., the scattered remains of some tribes of Chippewas who had been engaged on the British side." The Chippewas were joined by Pottawatamies from the United States, and in 1839 "mischievous intruders" were expelled under statute of the same year of the legislature of Upper Canada (Statutes of Upper Canada, 1839, c. 15) enacted to protect "lands appropriated for the residence of certain Indian tribes." In 1858, the reserve encompassed 10,000 acres.  
  
In 1850 Lieutenant Governor Sir J. Colbourne collected members of the Chippewa of Lake Huron on a tract of land on the North West shore of Lake Simcoe, of 9,800 acres in extent "reserved by our Great Father for our use and cultivation". In 1836, the lands were surrendered. Sir J. Colbourne established the reserve for the Mississauga at Alnwick from crown lands in 1830.
14. 1858 Report of Special Commissioner on Indian Affairs, "Moravians of the River Thames".
15. See Coles, "Indian Treaties" Vol. #1, p. 52-40, and especially p. 36. The purchases from the Mississauga Indians of 1787, 1805 and 1806 provided for "lands" to be reserved to them about the River Credit in the approximate amount of 10,940 acres. By 1822, most of such lands had been surrendered; the band moved to 6,000 acres on the Six Nations Reserve at Grand River in 1847.

16. Eg. Upon the purchase from the Huron in 1790, 22,390 acres was "reserved" on the banks of the Detroit River. Coles, "Indian Treaties" Vol. #1, p. 1-2. By 1845, only 8,000 acres remained in their possession.

In 1819, the Chippewa of the Thames surrendered 552,000 acres on the north side of the river "reserving" 15,520 acres for their occupation in the Town of Carocdoc. Coles, "Indian Treaties" Vol. #1, p. 49. In 1856, the Chippewas of Lake Huron surrendered four islands in Lake Simcoe and Huron excepting the Christian Islands which were "reserved to our own use and behoof forever". Coles, "Indian Treaties" Vol. #1, p. 204.

In 1836, the Chippewa of the Saugeen surrendered approximately 1.6 million acres lying between Georgian Bay and Lake Huron on the understanding that they:

"Shall repair either to this island [Manitoulin] or to that part of your territory which lies on the North of Owen Sound . . . to enable you to become civilized and to cultivate land, which your Great Father engages for ever to protect for you from the encroachments of the whites". (Coles, "Indian Treaties" Vol. #1, p. 113.)

The reserved territory amounted to about 450,000 acres, but in 1854 a cession of almost the entire Peninsula was obtained leaving an area of only 43,839 acres. 1858 Report of Special Commissioner on Indian Affairs.

17. Coles, "Indian Treaties" Vol. #1, p. 71.
18. *Ibid.*, p. 112-113. The Manitoulin Islands were sought to be established as a reserve for the tribes upon the north shore of Lake Huron and those "wandering among the white population in various parts of Upper Canada".

"The scheme, however, was practically a failure" (1858 Report of Special Commissioner on Indian Affairs) and in 1862 the Islands were surrendered except for an easterly part where the Indians were to "remain under the protection of the government as family." Coles, "Indian Treaties", p. 235-236.

19. 1858, Report of Special Commissioner on Indian Affairs, particularly, "The Oneidas of the River Thames": "... the title deeds were lodged with the then Chief Superintendent for Indian Affairs for Registration".
20. 1843, Report of Progress of Geological Survey, Sessional Papers, 1844-45, Appendix IV.
21. See "Report of the Royal Commission on the Mineral Resources of Ontario", 1890 Legislative Assembly.

22. See K. Roy, "Kidakimanan (Our Land)", *Ontario Indian*, July 1981 p. 40.
23. "Treaties of Canada with the Indians", Alexander Morris, 1880.
24. *Ibid.*, p. 302-309. Actual wording is that of the Robinson-Huron Treaty. It has been suggested that, inter alia, the Ojibway of Pic Mobert, Pic Heron Bay, Long Lake #58 and Pays Plat did not sign the Treaties. See K. Roy "Kidakimanan (Our Land)", *Ontario Indian*, July 1981, p. 80. Also the Teme-Agama Anishinabai of Lake Tenagami did not sign the treaties - their traditional lands include rich gold and silver deposits including Gowganda; see J. Cullingham "Deep Water People", *Ontario Indian*, June 1981, p. 28.
25. *Ibid.*, p. 17-18. In 1880, Morris observed:

The annuities under these treaties have recently been increased, the following item having been inserted in the Supplies Act of Canada, viz., 'Annual grant to bring up annuities payable under the Robinson Treaty to the Chippawas of Lakes Huron and Superior, from 96 cents to \$4 per head, \$14,000.' " Despite extensive mineral and other development in the tract surrendered the annuities have not been increased since.

26. *Ibid.*, p. 17.
27. *Ibid.*, p. 303, 306.
28. *Ibid.*, p. 19.
29. *Ibid.*, p. 44.
30. *Ibid.*, p. 50, 70.
31. *Ibid.*, p. 52.
32. Grand Council of Treaty #3, *Ontario Indian*, April 1981, p. 24, 26.
33. Treaty #9, Queen's Printer, Ottawa, 1964.
34. *Ibid.*, p. 4, 6.
35. *Ibid.*, p. 11.
36. S. Ct. Canada, Jan. 25, 1983. Unreported. To similar effect see *R. v. Sutherland*, [1980] 5 W.W.R. 456, at 467 per Dickson J. with respect to the Natural Resources Transfer Agreement.
37. 175 U.S.I.

38. [1981] 3 C.N.L.R. 114, Ont. C.A., Oct. 16, 1981.
39. (1965) 50 D.L.R. (2d) 613 at 652 (B.C.C.A.), aff'd (1965) 52 D.L.R. (2d) 481 (S.Ct. Can.).
40. [1981] 3 C.N.L.R. 114, 124 per MacKinnon, A.C.J.O.
41. [1980] 1 C.N.L.R. 83, 86.
42. *Wilkinson v. Proud* (1843) 11 M & W 33. *Rowbotham v. Wilson* (1860) 8 H.L. Cas. 348, 360 per Lord Wensleydale, *Case of Mines* (1567) 1 Plowd. 310.
43. *Wooley v. A.G. of Victoria* (1877) 2 A.C. 163 per Sir J. Colville. (P.C.)
44. (1889) 14 A.C. 297 (P.C.).
45. Statutes of Ontario, 1869, 32 Victoria, c. 34.
46. Statutes of Ontario, 1913, 3-4, George V, c. 6, s. 53(1).  

"... the mines and minerals therein shall be deemed to have passed to the patentee by the letters patent, and every reservation thereof contained in the letters patent or by statute is void." The Public Lands Act also declares that "in the case of lands patented after May 6, 1913, mines and minerals pass to the patentee unless expressly reserved by the letter patent". "Mines and minerals" is defined so as to include "gold, silver, copper, lead, iron, and other mines and minerals". Revised Statutes of Ontario, 1980, c. 413, s. 58.
47. Statutes of Upper Canada, 1839, c. 15 (2 Victoria). And see Statutes of Canada, 1849, c. 9, Statutes of Canada, 1850, c. 74, Statutes of Canada, 1860, c. 151.
48. Statutes of Canada, 1876, c. 18 (39 Victoria) s. 3.
49. *Ibid.*, s. 26(3).
50. Parliamentary Papers, House of Commons, 1938 Sessional Paper No. 27.
51. Hon. T.A. Crerar, May 30, 1938, House of Commons Debates 3349.
52. Statutes of Canada, 1938, c. 31, s. 1.
53. Statutes of Canada, 1951, c. 29. R.S.C. 1970, c. 1-6.

54. *Ibid.*, s. 2.
55. *Ibid.*, s. 53(1).
56. *Ibid.*, s. 57(e). Indian Mining Regulations, R.R.C., c. 956.
57. (1889) 15 A.C. 46 (P.C.).
58. *Ibid.*
59. Statutes of Canada, 1891, 54-55, Victoria c. 5 Statutes of Ontario, 1894, s. 4, Victoria, c. 3.
60. (1903) A.C. 73.
61. (1900) 31 O.R. 386.
62. *Ibid.*, 395-396.
63. *Ibid.*, 399.
64. (1889) 14 App. Cas. 302, 313.
65. (1900) 31, O.R. 386, 399.
66. *Ibid.*
67. *Ibid.*, 399-400.
68. (1900) 32 O.R. 301 at 302, 304 (Ont. C.A.).
69. (1902) 3 S.C.R. 1, at 2.
70. See Treaty #9, Queen's Printer, 1964, Ottawa, p. 27.
71. (1903) A.C. 73.
72. See Treaty #9, Queen's Printer, 1964, Ottawa, p. 27.
73. Statutes of Ontario, 1915. c. #12. Not all reserves were confirmed. Reserves 24C, 10, 12, 13, 14, 15 and other reserve lands were abolished. See Grand Council of Treaty #3, April 1981, p. 24, 27.
74. (1920) 1 A.C. 40.
75. *Ibid.*

76. Statutes of Canada, 1951, c. 106 (14 & 15 Victoria).
77. Statutes of Canada, 1850, c. 42 (13 & 14 Victoria).
78. (1920) 1 A.C. 401,410 (P.C.).
79. Such did not preclude the conclusion of the Ontario Court of Appeal in *Isaac v. Davey*, (1975) 50.R. (2d) 610, 623 (Ont. C.A.) that title to the Six Nations Reserve near Brantford was vested in the Crown "subject to the exercise of *traditional Indian rights*." The Court was not considering the mineral rights of the Indians and was only concerned to determine if title was vested in the Crown in order to determine if the lands constituted a "reserve." The judgment of Arnup, J.A. observed at p. 620:

For the purpose of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the good will of the sovereign. Arnup, J.A. appears to assume that Indian title and the Indian interest in reserve lands must be equated else there would be created "a unique interest in the Six Nations which no other Indians in Canada enjoyed". (p. 621) It is suggested that if the judgment may be regarded as an authority which denies the mineral rights of the Six Nations upon their reserve lands it must to that extent be considered in error. The judgment fails to recognize the variety of Indian interests in reserve lands that occur in Ontario and Canada and is contrary to the reasoning of Duff, J. in the *Star Chrome Mining Case*.

The Supreme Court of Canada expressly refused to make a "final decision on the matter of title to the lands". [1977] 2 S.C.R. 897, 902 per Martland, J.

Also see Obiter of Armour, J. in *Point v. Diblee Construction* (1934) 2 D.L.R. 785 (Ont. S. Ct.) with respect to the Cornwall Island reserve of the St. Regis Band. The reserve is not apparently the subject of any treaty.

80. See *James Bay Develop Corp. v. Chief Robert Konatewat*. Que. C.A., Nov. 21, 1974. Unreported. P. Grant, "Les Reserves Indiennes", *Dorion Report* Vol. 43, p. 129 at 147. R. v. Isaac (1976) 9 APR 460, 478 per C.J. MacKeighan (N.S.C.A.).
81. *United States v. Shoshone* (1938) 304 U.S. 111, 116, 82 L. Ed. 1213, 1219. Also see *United States v. Northern Paiute Nation* 393 F. 2d 6786 (1968) U.S. Ct. Claims where \$15,790.00 was awarded for the taking of Indian lands which included the Comstock Lode.
82. *Planiol, Treatise on Civil Law*, 1939. Translated by Louisiana State Law

- Institute, 1959 para. 1791-1796.
83. Statutes of Canada, 1924, c. 48.
  84. House of Commons Debates, June 16, 1924, p. 32-34.
  85. Ibid.
  86. Ibid.
  87. House of Commons Debates, July 7, 1924, p. 4177.
  88. Statutes of Canada, 1924, c. 48.
  89. House of Commons Debates, July 7, 1924, 4172.
  90. Statement of Proposals to Amend Ontario Indian Lands Agreement 1924, Dept. of Indian Affairs, July 16, 1971.
  91. Ibid.
  92. Telephone conversation with Assistant Director, Minerals Division, Indian Affairs, Toronto, Nov. 19, 1982.
  93. *R. v. Taylor and Williams* [1981] C.N.L.R. 114, 123 (Ont. C.A.).