

2015-10-02

# D.G. MacMartin's 1905 Diary, Intergovernmental Conflict and Ontario's Treaty 9 Role

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MacMartin, D. (2015). D.G. MacMartin's 1905 Diary, Intergovernmental Conflict and Ontario's Treaty 9 Role (Master's thesis, University of Calgary, Calgary, Canada). Retrieved from <https://prism.ucalgary.ca>. doi:10.11575/PRISM/25697

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UNIVERSITY OF CALGARY

D.G. MacMartin's 1905 Diary, Intergovernmental Conflict and Ontario's Treaty 9 Role

by

David Lawrence MacMartin

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF ARTS

GRADUATE PROGRAM IN HISTORY

CALGARY, ALBERTA

September, 2015

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## **Abstract**

This thesis analyses Ontario's Treaty 9 role and the significance of the 1905 Treaty 9 diary written by its Commissioner, Daniel George MacMartin. Ontario's Treaty 9 involvement resulted from its decades-long co-sovereigntist campaign from 1867-1905. The diary is a unique historical document that fuses both oral and written records of the 1905 Treaty 9 negotiations. It confirms that Treaty 9 First Nations were given oral assurances they could continue hunting, fishing and trapping throughout their traditional territory. This is now a constitutionally entrenched treaty right. MacMartin's appointment as Ontario's Treaty 9 Commissioner is explained as reflecting a well-established *operative* dimension of Ontario political culture. It is concluded that George MacMartin brought honour to the Crown in 1905 in recording and preserving his observations about the Treaty 9 negotiation meetings in his diary and established a model for Canada's governments to now emulate in dealings with Canada's First Nations.

## Preface

Daniel George MacMartin and I share the same last name and heritage as descendants of the MacMartin Scottish Highland Clan that traces back to Roman times: “Martin is a Latin name. It means Martian or soldier. The name of McMartin, or MacMhartainn, means ‘a son of a soldier’.”<sup>1</sup> Evidently a Roman soldier got lost in the Scottish Highlands, found a Scottish bride and established the MacMartin Clan that then merged with the Cameron Clan. D. George MacMartin was the grandson of a soldier, King’s Royal Regiment of New York (KRR NY) officer Malcolm MacMartin, who migrated to America and served the Crown with the Loyalist forces during the American Revolution. George MacMartin also served and brought honour to the Crown as Ontario’s Treaty 9 Commissioner in 1905 and 1906. He comported himself with honour and integrity and recorded the truth of what he observed during the Treaty 9 negotiations in 1905, to the later immense benefit of Canada’s Treaty 9 First Nations. George MacMartin also served in the Union Army during the American Civil War and was the child of an American mother. My father served the Crown as a Sub Lieutenant on H.M.C.S. *Oakville*, convoying ships across the Atlantic to support Britain during World War II. My late mother, like George’s, was American and then became Canadian. My motivation in embarking on this research project regarding George MacMartin and his 1905 Treaty 9 diary has been to both learn more about my personal family heritage, as well as about the importance of the Crown and the Honour of the Crown as a defining and distinguishing element of Canadian identity. I now understand both of these things better. Perhaps other Canadians will too by reading this thesis.

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<sup>1</sup>The McMartin Clan History. Genealogies Collection, MS 871, microfilm reel 15, Archives of Ontario (AO), 1. See also Charles Ian Fraser, *The Clan Cameron: A Patriarchy Beset*, Third Edition (Edinburgh and London: Johnston & Bacon Publishers, 1979).

## **Acknowledgements**

The efforts of my thesis supervisor for this project, Dr. Heather Devine, are acknowledged with thanks. A Social Sciences and Humanities Research Council (SSHRC) Canada Graduate Scholarships (CGS) Master's Program Grant provided a basis of funding for my research. I was able to supplement this with other funding sources, including my own, to undertake extensive field research travel in Eastern Canada and the United States. Without the SSHRC funding as a basis to work with, my thesis could not have been completed. Other important research travel funding support provided by the University of Calgary Department of History and Faculty of Graduate Studies is also acknowledged and greatly appreciated. I am also especially appreciative of the opportunity provided to me by the Nishnawbe Aski Nation (NAN) to observe the late Dr. Stan Louttit's address on Treaty 9 made to the NAN First Nations Treaty Conference on March 18, 2014 and to meet him.

University of Calgary microform and inter-library loan staff members Ji Zhao, Amy Chu, Lana Wong and Judy Zhao provided professional, efficient and friendly service, obtaining needed research material for me without which this project could not have been completed. Valuable and friendly research support was also provided to me by Irene Spence (Archives Lanark), Deborah Holder (Archives of Ontario), Heather Home (Queen's University Archives), Sylvia Lassam (Trinity College Archives), Katherine Vollen (National Archives), Paul Leatherdale (Law Society of Upper Canada Archives), Justin White (Oswego County Historian) and Mark Slosek (Town of Oswego Historian). I am very appreciative of the support for my research provided by these professionals. My interaction with them was a pleasure. Finally, the ongoing support of my brothers Paul and Peter and of my cousin Sara MacMartin has been greatly appreciated. MacMartins stand together.



## **Dedication**

This thesis is dedicated to the memory of the late former Muskegowuk Council Grand Chief, Dr. Stan Louttit. His eloquent advocacy of the treaty rights of Treaty 9 First Nations based on their oral tradition-based account of the “real agreement” of Treaty 9 in the CBC *Ideas* radio program, “George MacMartin’s Big Canoe Trip” and subsequently was an inspiration for this research.

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## **Epigraph**

Daniel George MacMartin's notes, writings, as a result of the treaty are proving to be very, very critical in showing what was said and what we understand the treaty to be...Our leaders were very, very shrewd. They challenged the Commissioners consistently about what was being said to them. They kept after them. You mean we can hunt on our lands forever? Yes. Yes...Only then, when they were assured, they signed the treaty.

Dr. Stan Louttit, late Grand Chief, Mushkegowuuk Council. Remarks to Nishnawbe Aski Nation (NAN) First Nations Treaty Conference, Thunder Bay, Ontario, March 18, 2014.

## Terminology

Several terms that are used frequently throughout this thesis require clarification at the outset. In general terms, I have attempted to use terms consistent with terminology used by Treaty 9 historian Dr. John Long and by the Royal Commission on Aboriginal Peoples (RCAP). The following glossary of terms used in the thesis may be helpful and those presented are listed in alphabetical order.

***Aboriginal peoples:*** According to section 35 (2) of the *Constitution Act, 1982*, the “aboriginal peoples of Canada” are defined as including “the Indian, Inuit and Metis people of Canada.” This definition is in need of revision. When the term “Aboriginal people” is used in this thesis it is intended to reflect the following definition of this term that was presented in the Report of the Royal Commission on Aboriginal Peoples (RCAP): “The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, rather than collections of individuals united by so-called ‘racial’ characteristics. The term includes the Indian, Inuit and Metis peoples of Canada.”<sup>2</sup>

***Far northern Ontario:*** I borrow this term from Dr. John Long and frequently employ it throughout the thesis. Dr. Long indicated in his book that he himself borrowed the term too.<sup>3</sup> It essentially refers to the area of Ontario north of the 50<sup>th</sup> parallel which encompasses the route travelled by the Treaty 9 Commissioners in 1905. Treaty 9 covers most of this area that

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<sup>2</sup>Canada, Royal Commission on Aboriginal Peoples, (RCAP), *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*. Ottawa: Canada Communications Group, 1996, xiv.

<sup>3</sup>Dr. Long said that he borrowed the phrase from the subtitle of the Ontario Royal Commission on the Northern Environment’s 1985 Atlas, “North of 50.” See John Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal and Kingston: McGill-Queen’s University Press, 2010), 391.

represents “slightly more than half the surface area of the province and just over 5 per cent of Canada.”<sup>4</sup>

John Long has presented a very thorough explanation of the territory of far northern Ontario and of the fish and wildlife in the region. He said that “Moose, caribou, beaver, fisher, marten, mink, muskrat, weasel, and hare are found in far northern Ontario.” For those inclined to fish, such as this writer, the region abounds in such resources featuring “northern pike, pickerel, brook and lake trout, lake sturgeon, and whitefish.”<sup>5</sup> The region features the Canadian Shield as well as lowlands closer to the coast of James Bay. These facts are important for the reader to appreciate at the outset of the thesis that describes and explains the constitutionally-entrenched right of Treaty 9 First Nations to continue to hunt, fish and trap throughout their traditional territory as a result of Treaty 9. With abundant natural resources such as these in the region, it is not surprising that in 1905 the Treaty 9 First Nations had as a priority in agreeing to Treaty 9, the securing and protecting of their ability to practice their traditional life-style and livelihood of hunting, fishing and trapping.

**First Nation:** Again, the RCAP is the source of the meaning of this term employed in this thesis. The RCAP said that the term First Nation refers to “a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people.”<sup>6</sup>

**Mushkegowuk Council:** This is the organization that represents the western James Bay Cree people and in 1987 replaced the former Mushkegog Cree Council.<sup>7</sup> In describing the origin of the renaming of the Council, John Long referred to and quoted from a translated statement

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<sup>4</sup>Ibid.

<sup>5</sup>Ibid., 392. See “Far Northern Ontario,” 391-393 in *Treaty No. 9* for John Long’s full discussion of the “far northern Ontario region and its geography and associated natural fish and wildlife resources.

<sup>6</sup>RCAP, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, xiv.

<sup>7</sup>John Long, *Treaty No. 9*, 96.



provided by Mushkegowuk Council to explain the advice that they had received from elders regarding the origin and meaning of the name, Mushkegowuk. It will be quoted here courtesy of John Long's book, as a definition of the Mushkegowuk people by the Mushkegowuk people:

Mushkegowuk can mean two things. One refers to the muskeg. Long ago, the Ojibway Indians from the west came to see us, and they saw that we were living along the coast. So they named us Mushkego Indians. The Indians who lived here were very strong and powerful, and that is the second reason we were given the name Mushkegowuk. Our grandfathers unloaded the Hudson's Bay Company ships when they came in. The word Mushkegowuk also reminds us of our traditional religion, when we used powerful spirits to protect ourselves.<sup>8</sup>

***Treaty Nine First Nations:*** This term is used frequently throughout the thesis to refer to those "organic political and cultural entities that stem historically from the original peoples of North America" whose ancestors have lived in the far northern Ontario region and who met with the Treaty 9 Commissioners and signed Treaty 9.

It should be emphasized that Treaty 9 First Nations are not synonymous with the "trading post bands" that were artificially created by the Treaty 9 Commissioners for reasons of administrative convenience. The Hudson's Bay Company "hosted" a series of Treaty 9 negotiation meetings for the Treaty 9 Commissioners at various of its posts across far northern Ontario, with those First Nations people who traditionally traded with the company at those posts. Dr. Long has provided a very thorough analysis of this issue and said that "the bands created by the commissioners in 1905 were called Osnaburgh, Fort Hope, Marten Falls, Fort Albany, Moose Factory, and New Post."<sup>9</sup> Particularly helpful is his analysis of how the First Nation people whose ancestors participated in the 1905 Treaty 9 discussions and were grouped

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<sup>8</sup>Translated statement by the Mushkegowuk Council in 1987 describing the guidance provided to them by elders concerning the name "Mushkegowuk." The above translated statement is quoted in full from John Long, *Treaty No. 9*, 391, where it is presented in full.

<sup>9</sup>See John Long, *Treaty No. 9*, 385-390.

into these bands were an amalgam of various different and distinct groups that since 1905 have redefined and re-identified themselves as distinct First Nations entities. For example, the Fort Hope Band created by Treaty 9 is now known as the Eabametoong First Nation. The Osnaburgh Band is now known as Mishkeegogamang or “muskeg” First Nation. The New Post Band is now known as the Taykwa Tagamou First Nation (TTN). This Nation has been in the forefront of Treaty 9 First Nation treaty rights advocacy recently, as will be discussed in Chapter 6 of this thesis. When I refer to “Treaty 9 First Nations” in this thesis, I refer to the amalgam of all of these self-defined First Nation groupings of people whose ancestors agreed to Treaty 9 and are now holding the Crown to account for the commitments that its Treaty 9 Commissioners made to them on behalf of the Crown in 1905.

***Treaty 9 Region:*** John Long has concluded that, “Numerous maps of the Treaty 9 region notwithstanding, we really do not know where to draw its boundaries.”<sup>10</sup> Map 2 presented in this thesis identifies an area of land that was blacked out on the Map, south of the Albany River, that constituted the area that the Dominion government had targeted for a treaty. Chapter 4 also defines the area as the region identified by the Government of Ontario to be included in treaty negotiations. The Treaty 9 area was subsequently extended by adhesion to territory extending north to Hudson’s Bay and West to the boundary with Treaty 3 territory, though Long has made the important point that there never has been a precise demarcation made of the boundary lines between the areas covered by the Robinson Treaties of 1850, Treaty 3 and Treaty 9. Perhaps the best way to define “the Treaty 9 Region” would be in functional terms, in that it covers the

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<sup>10</sup>Ibid., 399.

traditional territories of the Treaty 9 First Nations discussed above, over which they have by tradition hunted, fished and trapped for millennia.

## Chapter One: Introduction

### 1.1 Introduction

On June 29, 1905, Ontario Provincial Treasurer A.J. Matheson sent a telegram to Frank Pedley, Deputy Superintendent of Indian Affairs for the Canadian Government, advising that “Orders in Council have been passed approving of agreement with the Dominion as to Indian Treaty No 9 and appointing D. George MacMartin Commissioner on behalf of the Province...”.<sup>11</sup> It was the eleventh hour of negotiations between the Government of Ontario and Canada regarding Ontario’s participation in imminent treaty discussions with “the Ojibeway, Cree and other Indians”<sup>12</sup> in the Hudson’s Bay drainage basin across “far Northern Ontario.”<sup>13</sup> These discussions occurred in July and August of 1905 at several Hudson’s Bay Company (HBC) post locations and were followed up by a series of discussions during the summer of 1906, leading to The James Bay Treaty – Treaty No. 9.

Three Treaty 9 commissioners were appointed to conduct these negotiations, two of whom were representatives of the Government of Canada – Department of Indian Affairs officials Duncan Campbell Scott and Samuel Stewart. They were appointed by an Order in Council of the Dominion Government, with D.C. Scott being the senior official among the two,

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<sup>11</sup>A.J. Matheson, Provincial Treasurer, telegram to Frank Pedley, Deputy Sup’t Gen. of Indian Affairs, Toronto Ontario, June 29<sup>th</sup>, 1905, Treaty No 9 The James Bay Treaty: Reports, Correspondence, Drafts, Memoranda, Order in Council, Records of the Department of Indian Affairs, RG 10 “Red Series”, Volume 3033, File 235,225 Part 1, Reel #11,314, Library and Archives Canada (LAC).

<sup>12</sup>The written version of The James Bay Treaty – Treaty No. 9 uses these terms to define the Aboriginal people with whom the Treaty 9 Commissioners met during the summer of 1905 to negotiate Treaty 9. Hereinafter the term “Ojibwe” will be substituted for term “Ojibeway” that appears in the written Treaty 9 document. This is consistent with the term used by Treaty 9 historian John Long, who stated that he did so because the term “Ojibwe” is the one commonly used by linguists today. See John Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, 396.

<sup>13</sup>John Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, 3. See discussion of the term “far Northern Ontario” in the Terminology section of this thesis for an explanation of this term.

holding the position of Chief Clerk and Accountant in the department at the time of his appointment as a Treaty 9 Commissioner.<sup>14</sup> He also took the lead during the Treaty 9 meetings held with First Nations representatives in 1905. The third Commissioner, Daniel “George” MacMartin of Perth, Ontario, was nominated by the Government of Ontario and appointed by joint Orders in Council passed by the cabinets of both the Dominion and Ontario governments.<sup>15</sup>

A photograph of the Treaty 9 Commissioners party was taken at Fort Albany in 1905 (Figure 1). George MacMartin is in the centre of the picture seated directly under the Union Jack, flanked by D.C. Scott to his immediate left and by Samuel Stewart to his immediate right. Seated in front of George MacMartin, to his right, is Hudson’s Bay Company (HBC) official Thomas Clouston (T.C.) Rae, who organized the logistics for the Commissioners’ tour on behalf of the HBC. To Rae’s left is seated Dr. A.G. Meindl, who was “...appointed as Medical Attendant to accompany the Commissioners for Treaty 9.”<sup>16</sup> Involvement of a provincial government representative on a Canadian government commission established for treaty making with First Nations was unique for post-Confederation Canada and raises a number of questions.

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<sup>14</sup>E. Brian Titley has explained how D.C. Scott first joined the public service. His father, William Scott, was a longtime supporter of John A. Macdonald, “...and in December 1879 he arranged for his son to have an interview with the prime minister with a view to employment in the civil service. No examination was necessary. The young Scott had merely to submit a specimen of his handwriting. It was found acceptable, and he was hired as a copy clerk in the Department of Indian Affairs.” See E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), 24.

<sup>15</sup>A.J. Matheson to Frank Pedley, June 22, 1905, The James Bay Treaty: Reports, Correspondence, Drafts, Memoranda, Order in Council, RG 10 “Red Series”, Volume 3033, File 235, 225. Part 1, LAC. D.G. MacMartin was named after his father, Malcolm Daniel MacMartin who, in the family tradition, was named after his father, former King’s Royal Regiment of New York (KRR NY) officer Malcolm MacMartin, but went by his second name, Daniel. He named his first son Malcolm and “Daniel George” was his second son and went by the name “George”. Daniel George MacMartin will be referred to hereinafter by his preferred name, “George.” Further details regarding George MacMartin’s family are discussed in Chapter 4.

<sup>16</sup>D.S.G.I.A to Mr. Scott, June 24, 1905, The James Bay Treaty: Reports, Correspondence, Drafts, Memoranda, Order in Council, RG 10 “Red Series”, Volume 3033, File 235, 225 Part 1, LAC.

Figure 1: Treaty Commissioners Pictured at Fort Albany, 1905<sup>17</sup>



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<sup>17</sup>The Commissioners-Fort Albany, C 275-2-0-1-57546, Container B410055, Duncan Campbell Scott James Bay Treaty Tour Photographs, Duncan Campbell Scott fonds, C 275-2, AO.

Questions arise as to what legal foundations exist for treaty making in Canada by government officials representing the Crown, how these are reflected in the Royal Proclamation of 1763, and what the relevance of the Royal Proclamation is today. Examination of the Royal Proclamation will raise the further questions of what the concept of the “Honour of the Crown” entails and what its relevance and significance is for treaty making in Canada. It will also raise questions about relations between Canada’s governments and Canada’s Aboriginal people and about how to assess Ontario’s involvement with Treaty 9. These questions will be explored and are significant for assessing the role of George MacMartin as a Treaty 9 Commissioner.

A second question that is a major focus of this thesis is, “Why was Ontario involved in treaty making activity with First Nations representatives in far Northern Ontario?” Treaty making with First Nations had been an activity that fell within the jurisdiction of the national government, given its authority over “Indian Affairs” under the *British North America Act, 1867* (*B.N.A. Act*). How did Ontario’s involvement originate? How did it evolve to the point that George MacMartin was a Treaty 9 Commissioner representing the Government of Ontario, travelling across far northern Ontario in a fleet of canoes together with two other Treaty 9 Commissioners representing the Government of the Dominion of Canada to negotiate Treaty 9 with First Nations representatives? What were the constitutional and historical foundations of this involvement of Ontario and what were Ontario’s objectives? This thesis will address these questions and explain Ontario’s involvement as a manifestation of its decades long co-sovereigntist campaign from 1867-1905.<sup>18</sup>

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<sup>18</sup>The *British North America Act, 1867*, now known as the *Constitution Act, 1867* made the national and provincial governments each sovereign within their own spheres of exclusive legislative authority.

Once appointed, George MacMartin became both a direct representative of “the Crown,” as well as a representative of one part of that “Crown” in Canada’s confederal system of government - the government of the Province of Ontario. This fact has implications in terms of both the rights and the obligations of Ontario in relation to the commitments made to Treaty 9 First Nations when Treaty 9 was negotiated and signed in 1905. These will be discussed in connection with analysis of the “Honour of the Crown” concept and its relevance to interpretation of both Ontario’s role in Treaty 9 and of the ultimate significance of the George MacMartin 1905 Treaty 9 diary.

The existing historiography of Treaty 9 has addressed the question of Ontario’s role in the creation of Treaty 9, by referencing several agreements between Ontario and Canada that are the basis for Ontario’s involvement. These agreements are either attached to the written version of Treaty 9, or are referenced therein. Only brief, summary reference is made in the Treaty 9 historiography to the *outcome* of various conflicts between Ontario and Canada that occurred between 1867 and 1905 that led to these several Ontario-Canada agreements. This treatment of the role of Ontario has been incomplete. There has been less emphasis in the Treaty 9 historiography on *detailed analysis* of the *content* of the issues around which Ontario and Canada came into conflict. More emphasis has been placed on the treaty talks themselves and on the events of the immediately preceding run up to them. Arguments made by Ontario in each of its post Confederation constitutional conflicts with Canada, that were largely fought out through the courts and ultimately resolved by the Judicial Committee of the Privy Council (J.C.P.C.), have not been discussed in detail. Nor has there been detailed analysis of the reasoning presented by the J.C.P.C. in its decisions that resolved the many legal cases between Ontario and the Dominion of Canada that came before it for resolution. These issues and the various questions



mentioned above regarding Ontario's involvement with the negotiation of Treaty 9 have not been addressed previously and will be discussed in this thesis.

George MacMartin and each of the federal government Treaty 9 Commissioners kept diaries of their Treaty 9 tour experiences during the summer of 1905. But it is the MacMartin diary that is moving to centre stage presently in both the legal and historical research realms. It is shrouded in mystery, intrigue and adventure, having only been "discovered" at Queen's University Archives during the 1990s and the study of it raises another range of research questions. How did the MacMartin diary end up at Queen's University Archives to be "discovered" in the first place? Who was George MacMartin? How and through what Ontario government decision-making process was he appointed as Ontario's Treaty 9 Commissioner? Who were the key decision-makers within the Ontario Government? Who were most influential in this appointment process and why? What was the relationship between them and George MacMartin and of what significance was this in his being appointed as Ontario's Treaty 9 Commissioner? What does analysis of this process yield in terms of enhanced historical knowledge of the Treaty 9 experience and about the nature of the Ontario governmental policy and decision-making process in 1905? Finally, what is the legal and constitutional import and significance of the George MacMartin 1905 diary that is displayed in Figure 2? This thesis explores these questions.

To address them, the individual chapters of this thesis are organized as follows. In Chapter 2, the *Royal Proclamation of 1763* (Royal Proclamation), the "Honour of the Crown" concept and their relationship to section 35 (1) of the *Constitution Act, 1982* will first be discussed. The key principle of the Honour of the Crown has in recent years become the new,

operative paradigm for Aboriginal and treaty rights law in Canada.<sup>19</sup> In addition to providing the policy foundation for treaty making in Canada, the Royal Proclamation was also the object of close and detailed judicial consideration in several of the key court cases in the late nineteenth century that dealt with major issues in dispute between Ontario and the Dominion Government. Hence, it is important to discuss the Royal Proclamation initially. An overview of Treaty 9 and review of Treaty 9 historiography then follows in Chapter 2. This will provide a basis for identifying how the analysis presented in this thesis aims to fill a gap in the existing scholarship.

Chapter 3 discusses the historical antecedents of Ontario's role in Treaty 9. It is intended to explain why Ontario was involved with the Treaty 9 negotiations and what the objectives of its involvement were. The chapter begins with identification of three Ontario-Canada Agreements that specifically led to Ontario's involvement in Treaty 9, and identifies how they arose from an array of constitutional and treaty-related issues over which Ontario and the Dominion Government were embroiled in political and legal conflict between 1867 and 1905. The Robinson Treaties of 1850 that constitute precursor treaties to Treaty 9, and the constitutional context for Ontario's involvement in Treaty 9 are then summarized. A discussion then follows of aspects of Ontario's "co-sovereigntist" campaign and associated conflicts between Ontario and Canada. Items addressed include the North West Angle Treaty, #3, the Ontario western boundary dispute, the *St. Catherine's Milling and Lumber Company* and *Ontario Mining Company v. Seybold* court cases, and arbitration and court battles between Ontario and Canada regarding responsibility for annuities payments under both the Robinson Treaties of 1850 and the

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<sup>19</sup>See Jamie Dickson, "The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada," (LL.M. thesis, University of Saskatchewan College of Law, 2013), and Brian Slattery, "Aboriginal Rights and the Honour of the Crown," *The Supreme Court Law Review* (2d) 29 (2005): 433-445.

North-West Angle Treaty, #3. Ontario's substantive objectives for the Treaty 9 negotiations were a direct outgrowth of conflicts on these issues and how they were resolved. Chapter 3 concludes with a summary of the pre-Treaty 9 negotiations between Ontario and the Dominion Government, highlighting the influence of the outcome of the major court cases on the Dominion Government's motivation to involve the Ontario Government in the Treaty 9 negotiations to come.

Chapter 4 switches the focus from legal conflicts between Ontario and the Dominion over major constitutional issues and their resolution through the courts, to a more micro level focus on George MacMartin. A description of his personal and family background and educational training and professional experience will be presented, as detailed information on this is absent at present in the existing historiography of Treaty 9. The Ontario Government decision-making process and key players involved in his 1905 appointment as Ontario's Treaty 9 Commissioner will also be explored in Chapter 4. Literature on the Family Compact and on Ontario and Upper Canadian political culture will be considered. This will facilitate part of an explanation for the reasons why George MacMartin was appointed as Ontario's Treaty 9 Commissioner. Chapter 4 is intended to answer the question of who George MacMartin was and explain the process through which he was appointed as Ontario's Treaty 9 Commissioner in 1905.

Chapter 5 will examine the content of the MacMartin diary notes on the 1905 Treaty 9 discussion meetings, location by location. The trail of provenance of the diary that has led to it becoming prominent in recent years will also be discussed. This is an underappreciated aspect of the history and intrigue that surrounds the MacMartin diary. The location-by-location analysis of the diary content will be considered in relation to three discrete sources: the Treaty 9 Commissioners' official report of 1905, the report made by the Treaty 9 "Medical Attendant,"

Dr. A.G. Meindl, and the Treaty 9 First Nations' oral accounts of the 1905 meetings. The oral accounts are those expressed principally by the late Dr. Stan Louttit, in a CBC Radio *Ideas* documentary, in a recent National Film Board documentary entitled *Trick or Treaty?* and in remarks that he made to a Nishnawbe Aski Nation (NAN) Treaty Conference in Thunder Bay in March of 2014. The contents and omissions and items absent from the diary will be discussed. Areas for further consideration and research (both document based and oral interview research) will be identified. The major differences between the content of the written version of Treaty 9 and the record of the 1905 Treaty 9 discussions contained in the MacMartin diary will be identified.

Chapter 6 will focus on the contemporary legal and constitutional significance of the MacMartin diary and present the thesis conclusions. The evolution of Supreme Court of Canada (S.C.C.) Aboriginal and treaty rights law since 1982 will be reviewed and the obligations of the Crown arising from this explained. The diary's role as a foundational evidentiary source in a current Treaty 9 First Nation treaty rights infringement legal action will be discussed. This will define the primary significance of the diary. While the visual image and physical size of the diary is small (see Figure 2),<sup>20</sup> its significance is quite the opposite. It is of major significance in both contemporary legal and constitutional terms, as well as in historiographical terms. It clarifies oral commitments that were made in 1905 by the Treaty 9 Commissioners to their First Nations negotiator counterparts. It also validates the associated oral understanding of Treaty 9 held and inter-generationally passed on to Treaty 9 First Nation members from their ancestors

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<sup>20</sup>Daniel George W. MacMartin, Diary, MC 2999, Queen's University Archives (QA). The kind permission of Queen's University Archives to include this picture of the George MacMartin diary in this thesis is acknowledged and appreciated. George MacMartin's full name was Daniel George "Morgan" MacMartin. See Freeman E. Morgan, Jr., *Updated Morgan Genealogy: A History of James Morgan (1607-1685) of New London, Connecticut and His Descendants from 1607 to 1997* (Westminster, Maryland: Heritage Books, 2007), 154.

Figure 2: Daniel George W. MacMartin 1905 Diary



who participated in the actual 1905 Treaty 9 negotiations. In so doing, the MacMartin diary is of tremendous current significance in providing evidentiary support for Treaty 9 First Nation treaty rights claims based on section 35 (1) of The *Constitution Act, 1982*. This section of the *Constitution Act, 1982* is entitled “Recognition of existing aboriginal and treaty rights” and section 35 (1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>21</sup>

Chapter 6 will show that oral commitments made by Crown representatives during treaty negotiations with First Nation representatives have the force of law according to S.C.C. jurisprudence. Based on this, the oral commitments made to Treaty 9 First Nations during treaty negotiations in the summer of 1905 are now entrenched as part of Canada’s Constitution, due to the provisions of section 35 (1) of Canada’s Constitution.

The comments that appear in the Epigraph to this thesis made by Dr. Stan Louttit, late Mushkegowuk Council Grand Chief, succinctly describe the primary significance of the diary in confirming the Treaty 9 First Nations’ understanding of what was agreed to in Treaty 9, based on their oral tradition. On March 18, 2014, Dr. Louttit said:

Daniel George MacMartin’s notes, writings, as a result of the treaty are proving to be very, very critical in showing what was said and what we understand the treaty to be...Our leaders were very, very shrewd. They challenged the Commissioners consistently about what was being said to them. They kept after them. You mean we can hunt on our lands forever? Yes. Yes...Only then, when they were assured, they signed the treaty.<sup>22</sup>

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<sup>21</sup>Canada, *Constitution Acts, 1867 to 1982*, <<<http://laws-lois.justice.gc.ca/eng/Const/index.html>>>, (accessed November 13, 2013). By amendment in 1983, subsection (3) of section 35 was added specifying that, “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.”

<sup>22</sup>Dr. Stan Louttit, “Remarks to the Nishnawbe Aski Nation (NAN) First Nations Treaty Conference,”(lecture, Thunder Bay, Ontario, March 18, 2014).

The specific entry in George MacMartin's diary that most clearly describes the assurance that was given that Dr. Louttit referred to is one made on July 25, 1905, regarding a meeting with First Nations representatives at Marten Falls. MacMartin recorded the following about what was said at this meeting in response to persistent questioning from First Nations negotiators:

When it was explained to them that they could hunt and fish as of old and  
They were not restricted as to territory, the reserve, merely being a home  
For them...that the land was theirs forever; they gladly accepted the  
situation...that it was a home for them that was being provided and not a  
hunting reserve and that they could hunt wherever they pleased, they  
signified their assent.<sup>23</sup>

Ontario has a constitutional obligation to ensure that these commitments are adhered to and upheld. In so doing, the Province must respect and adhere to the obligations of the Crown that have been defined as owed to First Nations in S.C.C. jurisprudence since 1982. Consideration of them in Chapter 6 will illustrate that the commitments made by the Crown representatives at Marten Falls that MacMartin recorded now constitute treaty rights under Canada's Constitution. In this respect the diary can be considered as a unique historical source document that bridges and fuses both oral and written records of the 1905 Treaty 9 negotiations.

The role of the Ontario government and its Commissioner in Treaty 9 can best be explained by dividing the time period under consideration into two segments. In the pre July 1905 period, Ontario's role entailed a consistent, aggressive assertion of a co-sovereigntist position within Confederation, in advocating for and defending its interests from this perspective. A quite different role emerged during the formal Crown-First Nations treaty negotiations themselves during the summer of 1905. During this second phase, by all indications from the

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<sup>23</sup>D. George MacMartin diary entry at Marten's Falls, July 25, 1905, Daniel George W. MacMartin, *Diary*, MC 2999, QA.

MacMartin diary and other sources, Ontario's representative performed a largely deferential and monitoring role. George MacMartin's diary can be considered as a product and outcome of this monitoring role that he performed for Ontario.

It will be asserted that the George MacMartin 1905 diary is a microcosmic manifestation of the Honour of the Crown concept in action. The obligations that the Government of Ontario, as part of "the Crown" in Canada's federal system, now faces as a result of the evolution of S.C.C. Aboriginal and treaty rights law are significant. Whereas Ontario's original involvement in Treaty 9 negotiations in 1905 stemmed from assertion of its rights and entitlements as a co-sovereignist element of "the Crown" in Canada, the Province will now and in the future need to focus on fulfilling its newly defined obligations as a Treaty 9 partner and Crown entity.

Before proceeding to the major content of this thesis, several limitations of the research undertaken for it will be noted. Among these are limitations associated with the cost of travel, the location and distribution of resources consulted and the uneven amount of biographical data available for a number of the historical actors discussed in this thesis. As a Master's level thesis, the available funding to support extensive travel to the various archival and historical records collections located at widely dispersed locations in Eastern North America was limited. This proved to be a major limitation and constraint for the research, given that a source triangulation research approach was undertaken for the field work conducted for this thesis. As noted above in the **Acknowledgements** section, the funding support for this research provided by a Social Sciences and Humanities Research Council (SSHRC) Canada Graduate Scholarships (CGS) Master's Program Grant provided important foundational funding that helped address this limitation to a considerable degree.



A second important limitation of the research is that the available biographical information concerning Daniel George MacMartin, as well as for other important actors discussed in this thesis, was not voluminous and was widely dispersed geographically. This thesis reflects analysis of such historical records that could be obtained and analysed within the constraints posed by time and financial support noted above. Further research sustained by higher levels of financial support could perhaps facilitate the generation of more detailed biographical data for a variety of historical actors discussed in this thesis.

Finally, at several points in the thesis and as summarized in the thesis Conclusions, the analysis presented here points to potential for conducting important oral interviews research at the local community level. This research could be conducted with descendants of Treaty 9 First Nations people whose ancestors participated in the 1905 Treaty negotiation meetings held across far Northern Ontario. It did not prove feasible to undertake such research for this Master's thesis, given the constraints of time and financial resources and the need for time to work in collaboration with Treaty 9 First Nations in developing a joint project outline that could be undertaken. A case study oral interviews research project focused on the Marten Falls 1905 meeting location that is proposed in this thesis could be a useful pilot project to explore the possibilities of with Treaty 9 First Nations. Perhaps this thesis research report will contribute to further consideration of this possibility.

## **Chapter Two: The Royal Proclamation of 1763, the “Honour of the Crown” and s. 35 (1) *Constitution Act, 1982***

There is a symbiotic relationship between the literature dealing with Treaty 9, the MacMartin diary and the current treaty rights legal process in Canada. The diary has become an important evidentiary basis for Treaty 9 First Nations treaty rights advocacy and legal initiatives. In view of this, Chapter 2 begins with discussion and analysis of the *Royal Proclamation of 1763* policy foundation for treaty making in Canada and of the related Honour of the Crown concept that, in turn, has become the foundation for Aboriginal and treaty rights law in Canada. It also discusses the Aboriginal and treaty rights protection section of the *Constitution Act, 1982*, section 35 (1), and how it, and agreements such as the Numbered Treaties are infused with the Honour of the Crown concept. Maintaining the Honour of the Crown in government interactions with Canada’s Aboriginal people provides a guide for such government behaviour as well as a basis for historical analysis and assessment of past government behaviour in such interactions. More specifically, the MacMartin 1905 Treaty 9 diary provides a basis for assessing the degree of consistency with which the Government of Canada and the Government of Ontario have maintained the Honour of the Crown in their dealings with Treaty 9 First Nations in the negotiation and the subsequent administration of Treaty 9. In short, they have not done so.

### **2.1 Royal Proclamation of 1763**

The first step in showing how the MacMartin diary illustrates this is to explain the linkage between the Royal Proclamation, the Honour of the Crown and section 35 (1) of the *Constitution Act, 1982*. The *Royal Proclamation of 1763* (a.k.a. the Royal Proclamation) is an important starting point for the analysis of any aspect of treaty making in Canada. It is featured prominently in the *Report of the Royal Commission on Aboriginal Peoples (RCAP)*, a

comprehensive review of the relationship between Aboriginal and non-Aboriginal peoples in Canada.<sup>24</sup> The RCAP divided its analysis of the history of this relationship into four distinct stages:

Stage One: Separate Worlds

Stage Two: Contact and Cooperation

Stage Three: Displacement and Assimilation, and

Stage Four: Negotiation and Renewal.

The Royal Proclamation<sup>25</sup> is featured prominently in the RCAP discussion of the second, “Contact and Cooperation” stage of the Native-Newcomer relationship. It is characterized as being “a landmark in British/Indian relations” and as “...a complex legal document” that serves two main purposes: The first is to articulate the basic principles governing the Crown’s relations with Indian nations. The second is to lay down the constitutions and geographic boundaries for several new settler colonies, one being the colony of Quebec.”<sup>26</sup> The first purpose identified is the one that is of greatest relevance for this thesis.

By 1763, Anglo/Aboriginal relations were grounded in two fundamental principles according to the RCAP:

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<sup>24</sup>Canada, Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*. Ottawa: Canada Communications Group, 1996.

<sup>25</sup>See Appendix D: *The Royal Proclamation of 7 October 1763*, in Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*: 720-725. The RCAP states in the Preamble to Appendix D that the text of the Royal Proclamation that it reproduces there, “...is derived from Clarence S. Brigham, ed., *British Royal Proclamation Relating to America*, Volume 12, *Transactions and Collections of the American Antiquarian Society* (Worcester, Massachusetts: American Antiquarian Society, 1911), pp. 212-218, which reproduces the original text of the Proclamation printed by the King’s Printers, Mark Baskett, in London in 1763. This text appears to be the most authoritative printed version of the Proclamation available.”

<sup>26</sup>RCAP, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*. 115-116.

- 1) Aboriginal peoples were generally recognized as autonomous political units capable of having treaty relations with the Crown; and
- 2) Aboriginal nations were entitled to the territories in their possession unless or until, they ceded them away.<sup>27</sup>

These principles were embedded in the Royal Proclamation and provided the conceptual foundation for its articulation of rules of procedure for subsequent treaty making in Canada.

While the primary concern here is with the core principles for Anglo/Aboriginal relations articulated in the Royal Proclamation, it must be recognized that the two purposes of the Royal Proclamation identified by the RCAP are part of an integrated package of measures. These measures were introduced by the imperial British government to deal with the challenges that it faced in 1763 when it acquired Canada from the French through the Treaty of Paris, 1763. Conflict had ensued on the colonial frontier between First Nations and the British prior to the Seven Years War, due to incursions by settlers from Britain's American colonies on Indian territory. These conflicts continued after the Treaty of Paris (Aboriginal North Americans did not sign the Treaty of Paris in 1763 and the British did not defeat them militarily in the Seven Years War). According to historian Colin G. Galloway, "Indian fighters who had not been defeated refused to accept conditions of peace that Britain imposed and France accepted."<sup>28</sup>

The post-Treaty of Paris conflict on the frontier between First Nations and the British was the culmination, rather than the beginning, of a pattern of settler incursions and abusive relations with First Nations on the American frontier. British efforts to formalize an approach to this

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<sup>27</sup>Ibid., 114.

<sup>28</sup>Colin C. Galloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006), 69.

problem had begun at the Albany Conference of 1754. It was convened to address discontent among the Iroquois at the time, who had been the object of French agitation as part of French encroachment on territory claimed by the British before the Seven Years War in the regions to the west of the established American colonies. The fact that the Albany Conference was convened reflected assertion of control over Indian affairs by the imperial government as part of a strategy for addressing Indian dissatisfaction. Prior to this, British policy had been to allow for local control of relations with Indians. This policy changed when a September 18, 1753 Privy Council meeting made the following key policy decisions and then conveyed these to the governors of the American provinces:

- 1) Broad instructions to repair damages with the Indians;
- 2) Convene a conference of the leaders of the Iroquois Nations;
- 3) Investigate Indian complaints of instances of land purchase fraud;
- 4) Further private land sales were prohibited, with the Crown to take control of these.

These instructions contain some of the key elements of British imperial Indian policy that developed in the mid-18<sup>th</sup> century. They also confirm that, “In ordering these measures, the Privy Council made it clear that, when necessary, it was prepared to intervene significantly in the administrative affairs of its colonies.” The British renewed their prior partnership with the Iroquois at the Albany Conference, with consultation and collaboration being key founding principles for this renewal.<sup>29</sup> Pontiac’s War threatened to obliterate the prospects for achieving and maintaining the kind of ordered and mutually beneficial relationship with North American First Nations that the British had taken steps to establish at the 1754 Albany Conference.

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<sup>29</sup>Jack Stagg, *Anglo-Indian Relations in North America to 1763 And An Analysis Of the Royal Proclamation Of October 1763* (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981), 93.

John Borrows has emphasized that a specific concern of First Nations in 1763 was the failure of the British to follow the prior practice of colonial French authorities of distributing gifts or presents. These were important to First Nations, "...because they were regarded as a necessary part of diplomacy which involved accepting gifts in return for others sharing their lands...in order to attain an even state of coexistence between them."<sup>30</sup>

The immediate impetus for the issuance of the *Royal Proclamation of 1763* was as a means of responding to this situation of settler abuses in relations with First Nations on the frontier, and deterioration in the type of relationship with First Nations that the British had attempted to initiate through the Privy Council directive of September 1753. From the British perspective, the Royal Proclamation was intended to establish centralized control of interactions with First Nations in British North America and to restore peace and order in the relationship. This context is important to appreciate, both for an interpretation of the nature of the undertaking made by the British at the time and for consideration of the on-going, contemporary relevance of the Royal Proclamation for Aboriginal/Newcomer treaty relations in Canada. Historian J.R. Miller's description of the relationship between the origins of the Royal Proclamation and subsequent Anglo/Aboriginal relations policy in North America is that, "At the time this policy initiative...was a pacific gesture aimed at First Nations. Historically, it has become even more important as the foundation of Britain's treaty-making policy in Canada."<sup>31</sup> This dimension of the context for the promulgation of the Royal Proclamation needs to be balanced with an appreciation of the fact that the document established the foundation for the overall relationship

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<sup>30</sup>John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self Government," Chapter 6 in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 158.

<sup>31</sup>J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto Buffalo London: University of Toronto Press, 2006), 70.

between the British and First Nations in North America following the end of Pontiac's War. Both sides at the time were looking to establish a new and common understanding of the relationship that would prevail between them going forward. It is "The legal framework for making treaties with First Nations in the last 250 years" and "Regarded by Canada's First Nations as their *magna carta*."<sup>32</sup> It is also a document that initiated a relationship of peace and friendship that both First Nations and the British established together to structure their relationship in the future.

The content of the Royal Proclamation combines a set of "Indian Policy" measures positioned at the end of the document, with other measures intended to announce and organize the governance of territories acquired by Britain through the Treaty of Paris.<sup>33</sup> It is the "Indian Policy" components that are relevant here. They reflect two core principles that would serve as the foundation for imperial "Indian policy" in North America going forward – imperial control of Indian political relations and protection of Indian hunting grounds.<sup>34</sup> Protection of Indian lands is the aim of the first paragraph in the section, wherein it is stated: "...that the several Nations or Tribes of Indians, with whom we are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not

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<sup>32</sup>David Arnot, "The Honour of the First Nations – The Honour of the Crown: The Unique Relationship of First Nations with the Crown," Chapter 10 in *The Evolving Canadian Crown*, ed. Jennifer Smith and D. Michael Jackson, (Montreal and Kingston: McGill-Queen's University Press, 2012), 157.

<sup>33</sup>The first segments of the document state the benefits resulting from the Treaty of Paris, confirm the boundaries of existing provinces and of three new provinces established in the territories acquired by the Treaty – Quebec, East Florida and West Florida and give the new provinces authority to establish assemblies and make laws.

<sup>34</sup>Clarence W. Alvord, "Genesis of the Proclamation of 1763," *Michigan Pioneer and Historical Collections*, XXXVI, 17-18.

having been ceded to, or purchased by Us, are reserved to them, or any of them as their Hunting Grounds.”<sup>35</sup>

Several important concepts are embedded in the wording of this segment. Protection of Indian hunting grounds is to be accomplished through imperial government regulatory control for lands “not having been ceded to or purchased by us...are reserved to them.” The concept also is articulated that even though such lands occupied by Indians may not have been “ceded to or purchased by us,” the Indians on such land are described as living “under Our Protection.” The RCAP describes this aspect of the Royal Proclamation as paradoxical. There is a seemingly contradictory combination of an assertion of British imperial sovereignty over the lands of Aboriginal nations that are at the same time considered autonomous political units, yet “...living under the Crown’s protection and on lands that are already part of the Crown’s dominions...In a word, it portrays the links between Aboriginal peoples and the Crown as confederal.”<sup>36</sup>

In the second paragraph of the Indian policy section, the boundary concept is applied to the “Indian policy” section where lands not included in the territories of the newly established provinces were reserved for the Indians. It is declared:

...it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West...We do hereby strictly forbid...Our loving subjects from making any Purchases or Settlements whatever...without Our special Leave and Licence for that Purpose first obtained.<sup>37</sup>

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<sup>35</sup>Appendix D: *The Royal Proclamation of 7 October 1763*, in Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*, 723.

<sup>36</sup>RCAP, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*, 117.

<sup>37</sup>Appendix D: *The Royal Proclamation of 7 October 1763*, in Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*, 723-724.



This is the core of the “Indian policy” component of the Proclamation, which is in turn the core of the overall document. The drafters fuse in this section the concepts of protecting Indian hunting grounds, with imperial regulation and control of the interaction of colonists with Indians. The third paragraph of the Indian policy section of the Royal Proclamation extends this control and assertion of imperial government authority by directing the removal of anyone located on lands within the reserve area described, “...or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians.”<sup>38</sup>

The fourth paragraph of the Indian policy section deals with regulation of land purchasing and of trade with the Indians. It begins by recognizing the longstanding Indian complaint of fraudulent land acquisitions, stating “And whereas great Frauds and abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians.”<sup>39</sup> It then announces new procedures to control such purchases that prohibit private purchases:

We do, with the Advice of our Privy Council, strictly enjoin and require that no Private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians...but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively within which they shall lie.<sup>40</sup>

The preceding analysis illustrates the basic policy intentions and motivations of British Imperial government policy makers that informed creation of the *Royal Proclamation of 1763* and identifies specific measures introduced to achieve these objectives. To capture the

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<sup>38</sup>Ibid., 724.

<sup>39</sup>Ibid.

<sup>40</sup>Ibid.

considerable benefits from the Treaty of Paris of the potential for an expanded empire in the newly acquired lands in North America, it was deemed necessary to closely control and regulate the settlement and acquisition of land within the new territories. This package of policies and procedures was intended to provide the foundation for a gradual and centrally controlled process for realizing these benefits.

Indian<sup>41</sup> title to their traditional lands was recognized and procedures established that prohibited the private sale of Indian lands that could henceforth only be sold to the Crown at public meetings arranged specifically for this purpose. The rationale for Imperial government control of interaction with First Nations was to eliminate “Frauds and Abuses” that had been occurring in these interactions following the Seven Years War as well as previously, so as to secure peace and friendship with First Nations. A corollary aim was to mandate procedures to ensure maintenance of the established tradition of the Honour of the British Crown. Both the procedures established for Aboriginal people-newcomer interaction in the Royal Proclamation and the reinforcement of the tradition of maintaining the Honour of the Crown in dealings by government representatives of the Crown with the Aboriginal people of North America became the basis for subsequent treaty negotiations in pre and post Confederation Canada.

## **2.2 Honour of the Crown and section 35 (1), the *Constitution Act, 1982***

The *Royal Proclamation of 1763* reflects the principle of the Honour of the Crown, but does not define it explicitly. There is also debate among scholars as to whether or not the

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<sup>41</sup> The term “Indian” will be used in this thesis when addressing matters at issue in the 1905 era when this term is used in legislation, court decisions and official records and correspondence. Otherwise, the term “First Nations” will be used to refer to this segment of what s. 35 (2) of the *Constitution Act, 1982* defines as part of Canada’s Aboriginal peoples.

Proclamation is itself the source of this principle. It is an ancient concept that has persisted and evolved to the point that it is now the main conceptual reference point for S.C.C. Aboriginal and treaty law cases in Canada. But what does it mean, precisely? Clarifying the concept's meaning and how it has been embraced by the S.C.C. in fleshing out through its jurisprudence how it gives practical meaning to the constitutional guarantee of Aboriginal and treaty rights through section 35 (1) of the *Constitution Act, 1982*, will provide an analytical frame of reference for defining the legal and constitutional significance of the MacMartin diary. An assessment can be made against this evaluative foil about what the content of the diary reveals about the extent to which the Crown's representatives fulfilled the requirement to act in a manner consistent with maintenance of the Honour of the Crown through their actions during the Treaty 9 negotiations in 1905.

Former Saskatchewan Treaty Commissioner David Arnot has made two important contributions to the literature on the Honour of the Crown. He provided one concise definition of what the "Honour of the Crown" means in his first article on the topic in 1996, in which he emphasized how it is deeply rooted in the tradition of English governance and that this tradition has been "inherited" by Canada. He also stressed the importance of the Honour of the Crown as, "...not merely an empty slogan but absolutely central to the historical relationship between sovereign and subject, Crown and ministers, and between Canada and aboriginal nations."<sup>42</sup> This idea was expanded on in his definition of the practical meaning of the principle in the context of treaty making from the perspective of First Nations. That perspective is that the treaties "...were reached between people and secured by their personal honour" and forged "a personal

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<sup>42</sup>David M. Arnot, "The Honour of the Crown," *Saskatchewan Law Review* 60 (1996), 343.

relationship between them and the British Sovereign.” His definition of the Honour of the Crown as informed by this First Nations perspective is that “...it refers to the same essential commitment that First Nations recall when they use the word ‘justice.’ In every action and decision, the women and men who represent the Crown in Canada should conduct themselves as if their own personal honour and family names depended on it.”<sup>43</sup> It is a behavioural definition that is rooted in a particular conception of the treaty relationship. It is also a definition that emphasizes the mutuality of commitment by the treaty making partners in anchoring their agreement on the foundation of personal and reciprocal commitments secured and verified by their honour.

Arnot’s perspective is important in that it emphasizes the reciprocity of the Honour of the Crown. Most of the academic literature on the topic and even Supreme Court of Canada decisions that reference the concept tend to discuss it from the standpoint of the Crown. Arnot, however, stresses that the concept of honour is not an exclusive creation and reflection only of the will of the British Sovereign, such as is expressed in the Royal Proclamation. It was the foundation of Canada’s First Nations’ conception of treaty making. In this sense, Canada’s treaties with First Nations represent a mutual fusion and cloaking of the specific agreements reached with the honour concept.<sup>44</sup>

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<sup>43</sup>Ibid., 342.

<sup>44</sup>Moreover, this mutual investing of treaties with the concept of honour was seen as a dynamic, rather than a static initiative, and reflects central elements of the First Nation conception of treaties and treaty making. Olive Dickason has emphasized “the Aboriginal concept of treaties as living entities that need to be periodically brought into line with altered circumstances....” and also emphasized that, “Just as it had been between the First Nations, so it was between them and the Europeans – treaties were the principal means of developing working relationships.” See Olive Patricia Dickason, “Iron Men, True Men, And The Art Of Treaty-Making,” (Paper presented as a public lecture, Making Contact: Natives, Strangers, and Barbarians Conference,” Edmonton, AB, October 1, 1998), 14. The RCAP also discussed the differing assumptions and understandings of treaties held by Europeans and First Nations, emphasizing the First Nations’ assumption, “...that the Crown would respect and honour the treaty agreements in perpetuity and that they would not suffer – but only benefit – from making treaties with the Crown.”

Arnot also considered the First Nations perspective on the honour concept in his second article on the topic in 2012. He again addressed it from the perspective of both the British Crown in Canada and of First Nations, stating: “The concept of honour was the basis of the First Nations leaders’ understanding of what they were doing when they entered into treaties with the British Crown.”<sup>45</sup> Arnot also elaborated on the behavioural requirements for government ministers and representatives arising from the honour of the Crown principle. He asserted that the principle was “resurrected by the S.C.C. in its 1984 landmark decision, *Guerin v. R.*,” wherein “...the court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law.”<sup>46</sup>

Given this definition of the Honour of the Crown as a principle requiring certain behaviour on the part of government officials in their dealings with Aboriginal people, it remains to establish the relationship between this principle and section 35 (1) of the *Constitution Act, 1982*. This can be accomplished by summarizing key elements of S.C.C. decisions and recent scholarly commentary on the “Honour of the Crown” and Canada’s constitutional guarantee of Aboriginal and treaty rights. Table 1 presents a summary of this information that identifies several key elements. Section 35 (1) provides a “judicial shield” for Aboriginal and treaty rights so as to limit and constrain government action that may infringe on these rights. Such

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The RCAP also stressed the centrality of the honour concept as informing the treaty agreements and also the dynamic conception of treaties. It stressed that due to “conceptual and language barriers...the parties had to rely on the trustworthiness, good intentions, and good faith of the other treaty partner and the ability to understand one another better through time.” See RCAP, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*, 174-175.

<sup>45</sup>David Arnot, “The Honour of the First Nations – The Honour of the Crown: The Unique Relationship of First Nations with the Crown,” 163.

<sup>46</sup>*Ibid.*, 161.

infringement is only justifiable if it meets what the S.C.C. has established as the “*Sparrow* test,” outlined in the *R v. Sparrow* decision of 1990, that established a two step process for justification. The first step is to determine if a valid legislative objective exists. The second step requires adherence to the honour of the Crown principle that, “...must be the first consideration in determining whether the legislation or action in question can be justified.”<sup>47</sup>

Table 1 shows that Supreme Court Chief Justice McLaughlin has stated in *Haida Nation v British Columbia (Minister of Forests)* that the honour of the Crown “infuses the process of treaty making and treaty interpretation.” Considering this point in connection with the third concept identified in Table 1, “Reconciliation, Sovereignty Conflict and Treaties,” reveals the linkage between section 35 (1) and treaties. When the Crown asserted sovereignty over territory inhabited by First Nations in Canada, it created a conflict of sovereignties between the *asserted* sovereignty of the Crown and the *pre-existing territorial sovereignty* of First Nations that was recognized by the Crown. Table 1 summarizes the view of legal scholars and the S.C.C. that the underlying policy objective of section 35 (1) is reconciliation of these conflicting sovereignties and that the means of achieving this is through an on-going process of reconciliation. Treaties constitute the foundation and starting point for a process of reconciliation, with the original treaties and the on-going reconciliation process triggered by section 35 (1), both being “infused” by the Honour of the Crown principle, as established by Chief Justice McLachlin in the *Haida Nation* decision.

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<sup>47</sup>*R v Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4<sup>th</sup>) 385, at 1079.

Table 1: Honour of the Crown and section 35 (1) of the *Constitution Act, 1982*

| <i>Concept</i>  | <i>Details</i>   |
|---|--|
| <b>1. A Promise &amp; Judicial Shield</b>                     | <p>“...in <i>Sparrow</i> the Supreme Court first confirmed constitutional Aboriginal and treaty rights serve to constrain Crown power generally and may not be unjustifiably infringed by the Crown.”<sup>48</sup></p> <p>“...furnished Aboriginal rights with a judicial shield against legislative infringement and limitation, except where the latter could be justified under the ‘high standard of honourable dealing’ demanded of the Crown.”<sup>49</sup></p>  |
| <b>2. Honour of the Crown</b>                                 | <p>“...infuses the process of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of ‘sharp dealing.’ ” S.C.C. Chief Justice McLachlin.<sup>50</sup></p> <p>“Certain principles apply in interpreting a treaty...the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfill its promises.”<sup>51</sup></p>   |
| <b>3. Reconciliation, Sovereignty Conflict &amp; Treaties</b> | <p>“The Court speaks of the assertion of Crown sovereignty...and it notes that this assertion effectively collided with the pre-existing sovereignty and territorial rights of indigenous people.”<sup>52</sup></p> <p>“The reconciliation mandate is the central policy objective of section 35 of the <i>Constitution Act, 1982</i>,”<sup>53</sup></p> <p>“Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35 (1) of the Constitution Act, 1982.”<sup>54</sup></p> <ul style="list-style-type: none"> <li>• <b><i>Treaties are a mechanism for resolving conflicting sovereignties</i></b></li> </ul> |
| <b>4. Crown Obligations</b>                                   | <p>Honour of the Crown principle gives “...rise to enforceable ‘off-shoot’ Crown obligations.”<sup>55</sup></p>  |

<sup>48</sup>Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 38.

<sup>49</sup>Brian Slattery, “Aboriginal Rights and the Honour of the Crown,” 413.

<sup>50</sup>*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para 19.

<sup>51</sup>*R v. Badger*, [1996] 1 S.C.R 771, [1996] 2 C.N.L.R., at 773.

<sup>52</sup>Brian Slattery, “Aboriginal Rights and the Honour of the Crown,” 437.

<sup>53</sup>Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 12.

<sup>54</sup>*Haida Nation v. British Columbia (Minister of Forests)*, 528 at para 32.

<sup>55</sup>Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 1. These obligations will be discussed in Chapter 6.

This summary of how the Honour of the Crown principle is infused in both Canadian treaty making and in the reconciliation process established through section 35 (1) of the *Constitution Act, 1982* provides a basis for historical analysis of the Treaty 9 negotiations and of the significance of the George MacMartin diary. The protocols for treaty making in Canada established by the Royal Proclamation and the now constitutionally entrenched “judicial shield” for aboriginal and treaty rights in Canada are both “infused” by the Honour of the Crown principle. In the analysis that follows, the argument will be presented that Canada’s government representatives who negotiated Treaty 9 followed the *form*, but not the *substance and original “spirit and intent”* of treaty making that was intended, either by the Treaty 9 First Nations or by the Crown when the Royal Proclamation was established.

Dr. John Long has asked this writer to reflect on the position and role of George MacMartin as Treaty 9 Commissioner in this context.<sup>56</sup> As will become apparent in Chapter 3, MacMartin was involved in the Treaty 9 negotiations because of Canada’s “compound monarchy.” A recent analysis of this aspect of the Canadian Confederation by Michael Jackson and Linda Haverstock has emphasized that, “The Crown is an institution belonging jointly to the central and provincial governments and is crucial to the co-sovereign status of the provinces in Confederation.”<sup>57</sup> This view was not shared by Canada’s first Prime Minister. The process of conflict between the Ontario and Canadian Governments in the late nineteenth century that led to agreement for Ontario to be involved in the Treaty 9 negotiations is discussed in Chapter 3.

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<sup>56</sup>Dr. John Long, e-mail message to David MacMartin, November 8, 2013.

<sup>57</sup>D. Michael Jackson and Linda M. Haverstock, “The Crown in the Provinces: Canada’s Compound Monarchy,” Chapter 2 in *The Evolving Canadian Crown*, 11.



As a Treaty 9 Commissioner appointed by the Crown, George MacMartin must have felt somewhat conflicted in his position as Treaty 9 Commissioner. He had a responsibility to participate in negotiating a treaty for the Crown. He also had a conscience formed by his personal background, family upbringing and general disposition (see Chapter 4). Perhaps by instinct, his actions in both recording accurately in his diary the oral commitments that were made to First Nations during the Treaty 9 negotiations in the summer of 1905, and in ensuring that his diary survived the experience and remained available for subsequent generations of historians (and other MacMartins) to examine, are an example of putting the principle of the Honour of the Crown into action.

An introduction to Treaty 9 and the historiography pertaining to it is next presented in advance of the history of the interactions between the Ontario and Canadian governments that led to Ontario's involvement in the Treaty 9 negotiations and to George MacMartin's appointment as Ontario's Treaty 9 Commissioner.

### **2.3 Overview of Treaty 9 and the Numbered Treaties**

Map 1 portrays the location of the areas covered by the Robinson Treaties of 1850 north of the Great Lakes and of the historical or numbered treaties (treaties numbered 1 through 11), concluded by the Government of Canada between 1871 and 1923.<sup>58</sup> Treaty 9 is one of these treaties and was concluded in two successive commissioners' tours to meet and treat with First

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<sup>58</sup>Indian and Northern Affairs, *Indian Treaties: Revised Map October 1977*, in George Brown and Ron Maguire, *Indian Treaties In Historical Perspective*, 2<sup>nd</sup> Edition, (Ottawa: Department of Indian and Northern Affairs, 1979), xxvi. The Map appears here courtesy and with the permission of Aboriginal Affairs and Northern Development Canada (AANDC), which is acknowledged and greatly appreciated.

### Map 1: Historical Treaties



Nations representatives in far Northern Ontario during the summers of 1905 and 1906. The George MacMartin diary pertains to the 1905 Treaty 9 Commissioners' tour only.<sup>59</sup>

Preceding the negotiation of the numbered treaties, the Canadian Government negotiated acquisition of Rupert's Land from the Hudson's Bay Company (HBC), building on enabling provisions for this acquisition that were included in the *British North America Act, 1867*. The Rupert's Land Order (RLO) that authorized and gave legal effect to this purchase of Rupert's Land by Canada took effect in July of 1870. It contained important commitments and undertakings in regard to the Aboriginal people of the area. The Crown required Canada to commit to fulfilling these undertakings as a condition for Crown approval of the transfer of Rupert's Land from the HBC to the Dominion of Canada. The RLO is therefore significant for consideration of the extent to which Crown representatives who subsequently negotiated the numbered treaties adequately applied the principle of the Honour of the Crown in this process.

Map 1 shows that the numbered treaties cover a vast portion of the geographical area of post 1870 Canada, extending from James Bay to the Rocky Mountains and north to the Mackenzie Delta. The numbered treaties were negotiated in two distinct phases that Ontario historian James Morrison has characterized as the "settlement treaties" and "northern resource development treaties."<sup>60</sup> The settlement treaties were sought and concluded by the Government of Canada pursuant to the requirements of the Royal Proclamation, to acquire First Nations land in exchange for compensation, so as to facilitate construction of the transcontinental Canadian Pacific Railway (CPR) and proceed with the settlement of adjacent lands. This first, "settlement

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<sup>59</sup>John Long wondered in *Treaty No. 9* whether MacMartin prepared a diary of his journey during the summer of 1906 as well, but none has materialized to date.

<sup>60</sup>James Morrison, "The Treaty-Making Process and the Participation of the Ontario Government in the Signing of Treaty No. 9," unpublished manuscript, February 13, 1978, page 8. Dr. John Long kindly provided this writer with a copy of his copy of James Morrison's unpublished paper.

treaties” phase was completed with the signing of Treaty 7 in 1877, after which the Canadian Government had little motivation for immediate negotiation of further treaties in the northern regions of the former Rupert’s Land. Treaty 9 is one of the “northern natural resource development treaties”<sup>61</sup> that were concluded during the second phase of post Confederation numbered treaties making. Table 2 shows which of the Numbered Treaties fall within each of these two subcategories and the dates that the individual treaties were concluded. The government motivation for making treaties in these cases was to obtain title to “un-surrendered” land to facilitate the exploitation and development of minerals and other natural resources such as timber and hydro-electric power.

A desire to obtain land surrenders to facilitate resource development in the region was a common factor inducing governments to engage First Nations in treaty negotiations in the case of each of the northern natural resource treaties. There were also unique factors influencing government motivations in each case. For instance, Treaty 8 in the Athabasca region of Canada’s North West was a direct consequence of the Klondike gold rush. Treaty 10 in 1906 arose in large part as a consequence of establishment of the Provinces of Alberta and

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<sup>61</sup>See J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, Chapter 8, “An empire in itself”: The Northern Numbered Treaties, 1899-1921,” 187-221.

Table 2:Two Types of Numbered Treaties

| <b>Settlement Treaties</b>                            | <b>Northern Natural Resource<br/>Treaties</b>                            |
|---|--|
| Treaty 2 (1871)                                       | <i>Treaty 8 (1899)</i>   |
| <i>Treaty 3—The Northwest Angle Treaty<br/>(1873)</i> | <i>Treaty 9--The James Bay Treaty,(1905/06)<br/>(Adhesions, 1929/30)</i> |
| Treaty 4 (1874)                                       | Treaty 10 (1906)   |
| Treaty 5 (1875/1908)                                  | Treaty 11 (1921)   |
| Treaty 6 (1876)                                       |  |
| Treaty 7 (1877)                                       |  |

Saskatchewan in 1905.<sup>62</sup> For Treaty 9, the key motivators were both resource development and, for the federal government of Prime Minister Wilfrid Laurier, railroad construction.<sup>63</sup>

In contrast to the diversity of motivators for governments to initiate a second round of numbered treaty negotiations, First Nations throughout the area ultimately covered by the northern natural resource treaties had common concerns and priorities. They consistently and persistently expressed a concern in treaty discussions about protecting their ability to continue to practice their traditional subsistence activities of hunting, fishing and trapping. The Commissioners' Report for Treaty 8 states, "There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges." Further evidence of this concern among Treaty 8 First Nations appears in Rene Fumoleau's analysis of the Treaty 8 negotiations in which he said, "Only when the Treaty Commissioners promised them that they would be free to hunt and trap and fish for a living, and that their rights would be protected against the abuses of white hunters and trappers, did the Indians at each

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<sup>62</sup>Saskatchewan historian Bill Waiser has explained this as follows: "This conviction that First Nations had no place in the province's future was nowhere more evident than in the circumstances behind the signing of Treaty 10 in northern Saskatchewan. For more than two decades, the Indians of the region had actively sought a treaty with the Crown, but it was only after the creation of the province that the Canadian government hurriedly moved to extinguish Aboriginal title in areas not covered by earlier treaties." See Bill Waiser, *Saskatchewan: A New History* (Calgary, AB: Fifth House Ltd., 2005), Chapter Two "Another Country Altogether," 21.

<sup>63</sup>Prime Minister Laurier's zeal for establishing a second and "Liberal" transcontinental railway was explained by Scott and Astrid Young in a biography of railroad contractor and mining entrepreneur, Michael John (M.J.) O'Brien. Part of their research for this biography included an interview with M.J. O'Brien's son, Ambrose O'Brien, who had joined his father in a meeting with Prime Minister Laurier to discuss the project. His reflections as reported by the Youngs are instructive: "Anyway, Laurier had no idea of the cost of building railroads. He thought at first he could build the whole eastern section of the National Transcontinental for about fifty million dollars. Father said, 'Heavens above! You can't build two hundred miles for that. Get the plans out and I'll show you what it will cost.' But Laurier declined...But he did ask Clifford Sifton to go and see Father. They knew one another. Father explained in detail to Sifton how to figure cost on a rail-road building job...the cost all figured by the yard. Sifton did take those financial facts back to Laurier, giving figures a lot higher than were ever mentioned in the Commons at the time. I guess nothing was going to change Laurier's mind, although Sifton did fight the idea as long as he could." See Scott Young and Astrid Young, *O'Brien* (Toronto: The Ryerson Press, 1967), 90. This writer faced a similar problem of government miscomprehension of the scope of investment required for railroad infrastructure in negotiating a 1995 Railway Taxation-Investment Accord between his Canadian Pacific Railway employer and the Government of British Columbia. A rough rule of thumb at the time was that the cost of constructing railroad infrastructure was over \$1 million per mile.

trading post of the Treaty 8 area consent to sign the Treaty.” A similar concern, expressed almost verbatim, is recorded in the *Report of the First Commissioner for Treaty No. 10*: “There was a general expression of fear that the making of the treaty would be followed by the curtailment of their hunting and fishing privileges.” Treaty 10 Commissioner J.A.J. McKenna also reported: “I guaranteed that the treaty would not lead to any forced interference with their mode of life.” For the Treaty No. 9 area, the late Dr. Louttit’s statement presented in the Epigraph to this thesis confirms that the priority concern of Treaty 9 First Nations was protection of their ability to continue their traditional hunting, trapping and fishing activities.<sup>64</sup>

The separation of the numbered treaties into the two broad categories of settlement treaties and northern natural resource treaties by James Morrison is both analytically useful, as well as an important distinction reflecting the different motivations of the Canadian government in seeking to conclude these treaties. There is also a geographical, geological and associated ethnographic distinction that can be made in regard to Ontario that further reinforces the value of Morrison’s categorization. Professor Harold Innis addressed this geological foundation and applied it to an ethnographic analysis of Ontario First Nations, asserting that “Geological history is a prerequisite to the study of later history” and that “The culture of the Indians indicated more broadly the effects of the geographic background.” Agricultural tribes occupied the southern, agricultural regions of Ontario whereas, “...the migratory tribes of the eastern woodlands, the

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<sup>64</sup>For Treaty 8 references, see “Report of Commissioners For Treaty No. 8,” in *Treaty No. 8 Made June 21, 1899 and adhesions, Reports, Etc.*, Reprinted from the 1899 Edition (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationary, 1966), 5, and Rene Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, Second Printing (Calgary: University of Calgary Press, 2007), 60. For the Treaty No. 10 references, see “Report of First Commissioner for Treaty No. 10,” in *Treaty No. 10 and Reports of Commissioners*, Reprinted from the edition of 1907 (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationary, 1966), 6-7.

Algonquins on the Ottawa, the Ojibway north of Lake Superior, and the Crees south of Hudson and James Bays occupied the Precambrian forested areas and depended primarily on hunting.”<sup>65</sup>

Innis’s analysis of the geological and associated foundation for the culture of the First Nations occupying the territory to be covered by Treaty 9 in far Northern Ontario is important for this analysis in several respects. It indicates that there is a cultural difference between the First Nations that negotiated treaties with the Canadian Government in the northern and southern regions of Ontario and in the Canadian Northwest respectively. While the Canadian Government may have had its own reasons for segmenting its negotiation of the numbered treaties into two phases, there also is a sound geological and ethnographic basis for grouping the treaty-making endeavour in this way. Most importantly, it establishes the historical foundation for the “migratory tribes” culture of hunting, fishing and trapping engaged in throughout the region formerly known as Rupert’s Land that had existed for millennia. This provides a basis for understanding and underscoring the importance of the consistent priority attached by First Nation representatives to preserving this traditional lifestyle in the negotiations with the Canadian Government for each of the northern natural resource treaties.

At the turn of the century, the Canadian Government finally sought to reach a treaty arrangement with the northern Ontario First Nations, despite having been in receipt of petitions for a treaty from First Nations for many years. A main driver for the interest in a treaty, as noted above, was Prime Minister Laurier’s vision of a second transcontinental railway that would be constructed north of the height-of-land. The government had also experienced some pressure from industrial interests that sought assurances of lack of interference from First Nations with

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<sup>65</sup>H.A. Innis, “An Introduction to the Economic History of Ontario From Outpost to Empire,” *Ontario History* 30 (1934): 111-112.



personnel coming to the North to conduct surveys and develop the resources. These factors combined to stimulate treaty negotiations.

The trigger point within the federal government for action to engage northern Ontario First Nations in treaty discussions was a meeting with Aboriginal people from the un-surrendered territory north of the height-of-land in 1899. This was discussed in a memorandum of June 3, 1901, from the Dominion Government Indian Affairs Department official J.D. Macrae to the Honourable Clifford Sifton, Minister of the Interior and Superintendent General of Indian Affairs (S.I.G.I.A). Macrae was the department's Inspector of Indian Agencies and Reserves and later was to serve as a Treaty No. 10 Commissioner. Together with departmental accountant and later Treaty 9 Commissioner, D.C. Scott, Macrae had met at New Brunswick House in 1899 to meet with Robinson Treaty Indians regarding annual annuity payments. While there, they came into contact with a delegation of First Nation representatives from the area north of the height-of-land that were not covered by a treaty. They expressed concern about the effect of incursions into their territory of miners and railroads and expressed a desire to be taken into treaty as well.<sup>66</sup> The Macrae memorandum reported on the meetings with this delegation. Accompanying the Memorandum for reference purposes was a map that is displayed here as Map 2. In the first paragraph of the memorandum Macrae informed the S.I.G.I.A. that the delegation he met with,

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<sup>66</sup>See E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, 62-63.

Map 2: McCrae's Map of "Un-surrendered Territory"



“...represented many others whose rights of occupancy to the territory north of the tract covered by the Robinson Treaties had not been, and have not since the date mentioned been, extinguished.”<sup>67</sup>

Macrae’s Map is instructive in several respects. He pointed out to the S.I.G.I.A. in his memorandum that there was a problem associated with the blackened area displayed on the Map:

The Robinson Treaties only extend as far north between the waters respectively running into James Bay and the Great Lakes, and this divide, as may be seen by reference to the annexed map, extends at some points south of the Canadian Pacific Railway. From this it will be clear to you that, already, country to which the Indians have recognised and unextinguished rights is being settled and used, and the undersigned conceives it to be his duty to inform you that they expect to have their title considered as he thinks the time may have arrived when they believe that this should be done.<sup>68</sup>

It is not in the least bit surprising that the Canadian Pacific Railway (CPR) would have given scant regard to the prevailing un-extinguished Indian title to the land north of the height of land over which it constructed a segment of its transcontinental railway that opened across Canada in 1885. What is remarkable is that the federal government officials in Ottawa were unaware of this fact until 1901. Not only were the CPR tracks already laid over this “un-surrendered territory,” but Prime Minister Laurier was planning a second National Transcontinental Railway north of the existing CPR line and also within the same un-ceded territory. The Royal Proclamation very explicitly required negotiation of land purchase from the Aboriginal inhabitants of un-surrendered land required by the Crown for public purposes and so the Government of Canada was therefore in direct violation of this requirement already. It would need to both rectify this

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<sup>67</sup>J.A. Macrae to the Honourable Superintendent General of Indian Affairs, The James Bay Treaty: Reports, Correspondence, Drafts, Memoranda, Order in Council, RG 10 “Red Series”, Volume 3033, File 235, 225 Part 1, (LAC), 1. Macrae’s Map is annexed to this Memorandum.

<sup>68</sup>Ibid., 2.

situation in regard to the CPR track and also clear the way for acquiring the land needed for Prime Minister Laurier's National Transcontinental Railway.

A preparatory process for initiating treaty negotiations ensued and culminated in a directive from Prime Minister Laurier to the Deputy Secretary General of Indian Affairs, Frank Pedley, in the spring of 1904. A letter was sent to the Prime Minister in April 1904, from prospector Thomas C. Irving who apparently had been active in the area, citing "promising" lignite, gypsum and iron bearing formations in the area, as well as "boundless" spruce forests and "splendid" pine. Most importantly, Mr. Irving said:

I most respectfully beg to call your attention to the fact that the Grand Trunk Pacific project which you are fathering will run some hundreds of miles through a portion of the country which does not appear to have ever been surrendered to the Crown by the Indian people living thereon. The country I refer to is that lying North of the Height of Land between Lakes Superior and Huron and Hudsons Bay.<sup>69</sup>

Prime Minister Laurier passed the letter to his Deputy Superintendent General of Indian Affairs, Frank Pedley, with the handwritten instructions visible on the file copy of the letter as follows:

"The whole question of Indian treaties for northern country should be at once considered."<sup>70</sup>

Detailed preparations had already been undertaken by the Canadian Government bureaucracy.

But Canada is a federal system of government. The governments of the Dominion of Canada and the Province of Ontario had been embroiled in conflict over a range of constitutional and jurisdictional issues since Confederation. One outcome of this conflict was that the two

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<sup>69</sup>Thomas C. Irving to The Right Hon. Sir Wilfrid Laurier, April 16, 1904, The James Bay Treaty: Reports, Correspondence, Drafts, Memoranda, Order in Council, RG 10 "Red Series", Volume 3033, File 235, 225 Part 1, LAC.

<sup>70</sup>Ibid. The Prime Minister wrote his directive over the text of the letter from Thomas C. Irving and initialed it.

governments had previously agreed that the concurrence of Ontario was required for any treaties to be concluded with First Nations in Ontario.<sup>71</sup>

It will suffice at this point to emphasize that the Government of Ontario had very specific interests in reaching a treaty agreement and that it had been asserting and defending its interests on these issues over the previous three decades of conflict with the Dominion Government. Of primary concern to Ontario was to defend its constitutional authority over land and resources in the Province. This entailed seeking to protect the Province of Ontario's ability to facilitate exploitation and development for mineral, lumber and hydro-electric resources of the northern regions of the Province and the construction of railway and road infrastructure to enable this resource development to take place.<sup>72</sup> Ontario was also interested in protecting itself from open-ended financial exposure associated with assumption of annuity payment responsibilities related to the Robinson Treaties and to the Northwest Angle Treaty, #3.

Ontario was also well ahead of the national government in its intelligence gathering regarding the issue of the CPR incursion into "un-surrendered territory." Based on the intelligence gathered during the 1880s by its appointed stipendiary magistrate for the area north of the height of land, E.B. Borron, whose reports had been sent directly to Premier Oliver Mowat, Ontario had a very good appreciation of the mineral and natural resource potential of the

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<sup>71</sup>How these issues were resolved and arrangements concluded regarding the need for Ontario concurrence is discussed in Chapter 3.

<sup>72</sup>H.V. Nelles has examined the history and evolution of Ontario's economic development policy, involving a public-private partnership approach to the development of mineral, timber and hydro-electric power resources of the northern regions of Ontario. Nelles has characterized this as the provincial counterpart to the Dominion government National Policy. See H.V. Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941*, Second Edition (Montreal and Kingston: McGill-Queen's University Press, 2005), 69 and esp. Chapter 3 "Promoting New Ontario," 108-153.

James Bay Basin.<sup>73</sup> The Province applied this knowledge as part of its negotiating leverage in negotiations that took place in early 1905 between the Ontario government and the national government that are discussed in the next chapter also.

It remains at this stage to summarize the content of The James Bay Treaty – Treaty No. 9 before reviewing the Treaty 9 historiography. How one describes the content of Treaty 9 depends on which of two perspectives on the treaty is being adopted. For the governments, Treaty 9 and the other numbered treaties were considered as treaties of land surrender, whereas First Nations regarded the numbered treaties as treaties of sharing. As noted above, Treaty 9 First Nations and those who were parties to the other northern natural resource treaties were given oral assurances by government Treaty Commissioners that their ability to continue to practice their long established, traditional lifestyle and culture of hunting, trapping and fishing would be protected. Despite these assurances, the RCAP noted in its review of the numbered treaties that:

Throughout the negotiation of the numbered treaties the commissioners did not clearly convey to First Nations the implications of the surrender and cession language in treaty documents...It is also doubtful that the First Nations participating in the numbered treaties knew that the written texts they signed differed from the oral agreements they concluded.”<sup>74</sup>

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<sup>73</sup>In one of these reports, E.B. Borron passed on the following not insignificant observation in connection with observations he made about the Missinabe Indians: “The CPR, for upwards of 100 miles passes through their hunting and fishing grounds...and will undoubtedly lead, sooner or later, to the destruction of the larger game, the fur bearing animals and to some extent also the fish, on which they are solely and entirely dependent for a living. These Indians are simply hunters and trappers and not one in twenty grows so much as a potatoe. Thus, they have no other resources to fall back on.” See E.B. Borron, *Report of the Basin of Moose River and Adjacent Country Belonging to the Province of Ontario* (Toronto: Warwick and Sons, 1890), 85. E.B. Borron is an interesting historical actor. Based on a perusal of material in the Archives of Ontario *Sir Aemilius Irving fonds*, it appears that Borron had considerable influence on the development of Ontario’s strategy for dealing with conflicts with the Dominion Government over annuities pertaining to the Robinson Treaties of 1850 and the North West Angle Treaty, #3. For an introduction to who Borron was, see Morris Zaslow, “Edward Barnes Borron, 1820-1915: Northern Pioneer and Public Servant Extraordinary,” in *Aspects of Nineteenth Century Ontario*, ed. F.A. Armstrong, H.A. Stevenson and J.D. Wilson, 297-311 (Toronto: University of Toronto Press, 1974).

<sup>74</sup>RCAP, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back*, 172-173.

For all of the northern natural resource numbered treaties, the content or architecture of each treaty was quite similar. First Nations were to give up to the Crown the bulk of their traditional territory, in exchange for designated reserve lands that they would retain, plus a one time cash “present” and a commitment to pay a series of annuities to members of the First Nation, plus various other benefits. Most importantly, there was provision made for First Nations having the right to continue their traditional lifestyle activities of hunting, fishing and trapping over the portions of their traditional lands that were being given up to the Crown.

In the case of Treaty 9, as with the other northern numbered treaties, there is a tremendous gap between the oral commitments made to protect First Nations hunting, fishing and trapping and the text of the written treaty document that deals with this issue. The First Nations’ right to continue hunting, fishing and trapping is made subject to restrictions and stated rights of the Crown to “take up” land for natural resource developments and transportation infrastructure purposes. The applicable sections of the written *The James Bay Treaty – Treaty No. 9* document are the following:

And His Majesty the King hereby agrees with the said Indians that they shall Have the right to pursue their usual vocations of hunting, trapping and fishing Throughout the tract surrendered as heretofore described, subject to regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and accepting such tracts as may be required or taken up From time to time for settlement, mining, lumbering, trading or other purposes.<sup>75</sup>

This is what has come to be known as the “taken up” clause of the treaty, for obvious reasons. The language of the clause refers to land that may be required for settlement, mining, etc., being “taken up” by “the government of the country” from the land surrendered by the

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<sup>75</sup>*The James Bay Treaty – Treaty No. 9*, 20.

treaty. This means that the land can be “taken up” and used by the specified government with the “taking up” authority and used for the specified purposes identified in the “taken up” clause.

First Nations representatives were not advised of this feature of the written treaty document when the Commissioners met with them in 1905 to discuss the treaty. The content of the MacMartin diary confirms this. A further “taken up” authority is provided for in the written treaty document regarding transportation infrastructure, as follows:

It is further agreed between His Majesty and His Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by His Majesty’s government of the Dominion of Canada.<sup>76</sup>

The combined effect of the “taken up” clause and of the transportation infrastructure clause is to provide authority to *the Crown* to take up land from the traditional territories apparently ceded to the Crown by treaty First Nations, thereby potentially limiting their treaty right to hunt, fish and trap throughout their traditional territory. It should be recalled that George MacMartin’s diary records that Treaty 9 First Nations were advised at the Marten Falls meeting that the reserve was not a hunting reserve, but a home for them where white men could not intrude without their permission, yet the above noted Treaty 9 clauses seems to run counter to this commitment. While this may be a semantical observation, it is noteworthy that the transportation infrastructure clause authorises “His Majesty’s Government of the Dominion of Canada” to take up “portions of reserves and lands above indicated” for these purposes. The

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<sup>76</sup>Ibid., 20.



“taken up” clause also vests the authority to take up land “from throughout the tract surrendered” for settlement, mining, etc. to “the government of the country.”<sup>77</sup>

Needless to say, the Treaty 9 First Nations’ oral tradition based understanding of what their ancestors agreed to when they signed the Treaty 9 document views the nature of the agreement reached when Treaty 9 was signed quite differently than the government signatories did and quite differently from what appears in the written version of the treaty. Again, the words of the late Mushkegowuk Council Grand Chief Dr. Stan Louttit on this matter are quite clear. He appears frequently in a recent National Film Board (NFB) documentary by Alanis Obomsawin entitled, *Trick or Treaty?*. In his appearance in this documentary Dr. Louttit articulated the view of Treaty 9 First Nations that the treaty that they agreed to was a treaty of sharing, not surrender:

The treaty is something historic, but I believe, I believe in my heart that it’s as relevant today as it was then. Because the understandings that were reached by my grandfather, Andrew Wesley, some of your grandfathers and great grandparents that were involved in the treaty understood certain things. They understood that they didn’t give up anything. That it’s a sharing agreement. That it’s something that we understand is as important today in terms of our lands, our resources, our territories, sharing in the wealth of the land. That’s what it’s all about isn’t it. And a lot of times our community are in poverty. And the treaty should be a vehicle that can get us out of that poverty.<sup>78</sup>

There is a stark difference in perspective between the oral understanding of the content of Treaty 9 held by Treaty 9 First Nations, as articulated by Dr. Louttit, and by the government parties that negotiated Treaty 9 and prepared the written version of the Treaty No. 9 document. This issue has been the object of research and consideration by Treaty 9 historians creating a body of historiography that is summarized in the next section.

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<sup>77</sup>The question of which level of government has authority to “take up” land has recently been adjudicated by the S.C.C. and the applicable decision and its implications are discussed below in Chapter 3 and Chapter 6.

<sup>78</sup>Dr. Stan Louttit, appearing in *Trick or Treaty?*, DVD, directed by Alanis Obomsawin (Ottawa: National Film Board, 2014), purchased DVD accessed from iTunes.

## 2.4 Treaty 9 Historiography Review

The current state of historiography regarding Treaty 9 and the involvement of the Ontario Government in it can be characterized as being both recent and incomplete, but also as being uniquely diverse and lately very dynamic and rapidly evolving. There was an initial, pioneering phase in the evolution of the historiography that featured initial written document contributions by historians in the last quarter of the 20<sup>th</sup> century through to the early years of the current century. This includes contributions focusing on D.C. Scott and work that is based mainly on archival material from Library and Archives Canada (LAC). It also includes contributions that focus on specific Treaty 9 issues and their implications, such as the role of the Hudson's Bay Company and natural resource and mineral development. In the past five years the historiography has evolved from this initial, baseline or pioneering phase to a current status featuring a major book on Treaty 9 by Dr. John Long that publicizes the issue of the gap between the written and oral version of Treaty 9 and features the diaries of each of the three Treaty 9 Commissioners. There is also a fiction novel by Mark Abley about the ghost of D.C. Scott returning to "real life" in an effort to rehabilitate his image.<sup>79</sup> The Alanis Obomsawin NFB film and an earlier CBC Radio *Ideas* feature program on the MacMartin diary illustrate the diversity and creativity that is now informing Treaty 9 historiography.

Some brief comments pertaining to each of the key items in the body of the Treaty 9 historiography are presented here, followed by a description of the gap in the historiography that

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<sup>79</sup>Mark Abley, *Conversations with a Dead Man: The Legacy of Duncan Campbell Scott* (Madeira Park, BC: Douglas and McIntyre, 2013).

this thesis intends to make a contribution to filling, thereby adding to the body of historical knowledge regarding Treaty 9 and Ontario's role.

Treaty 9 Commissioner D.C. Scott authored the first contribution to the body of Treaty 9 historiography with a *Scribner's Magazine* article in 1906. This article is notable in several respects. A discourse analysis reveals the Victorian sense of racial superiority that informed D.C. Scott's attitudes towards Canada's Aboriginal people, whom he believed were to be assimilated into the settler society and whose traditional lifestyle was going to vanish. This sentiment is evident in the title of the article – "The Last of the Indian Treaties." As a poet himself, the article is well written and also features several of the Treaty 9 Commissioners' tour pictures that he took and had taken during both of the 1905 and 1906 summer Treaty 9 Commissioners tours. These pictures, now housed within both Library and Archives Canada and the Archives of Ontario collections, provide a unique and valuable set of source material for current and future historians to consider and analyse, as well as for the younger generation of Treaty 9 First Nations people to consider and use as a source of education about important actions that their ancestors took on their behalf.

Perhaps most important for this thesis, is D.C. Scott's statement of the rationale for the advance agreements made between the Ontario and Dominion governments prior to, and not during, the Treaty 9 meetings. Scott stated the rationale as follows:

They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had made the treaty possible, what of the sense of national policy which brooded over the whole? Nothing. So there was no basis for argument. The simpler facts had to be stated, and the parental idea

developed that the King is the great father of the Indians, watchful over their interests, and ever compassionate.<sup>80</sup>

The statement speaks for itself. On the other hand, the legal and constitutional significance of Commissioners Scott's decision to *not* discuss the Ontario-Dominion negotiations and agreements with Treaty 9 First Nations in 1905 does require further consideration and will be addressed below.

An early and most prolific contributor to the historiography of Treaty 9 is Ontario historian James Morrison. His early contributions included an unpublished paper on the role of Ontario in Treaty 9 and an article entitled "The Poet and the Indians: Duncan Campbell Scott Woos the Muse and Negotiates Treaty Number Nine."<sup>81</sup> Morrison later prepared the baseline *Treaty Research Report: Treaty No. 9 (1905-1906)* for Indian and Northern Affairs Canada<sup>82</sup> and also prepared two other major works on issues relevant to Treaty 9. These are his thesis, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896" and a document entitled *The Robinson Treaties of 1850: A Case Study*, that he prepared for the Royal Commission on Aboriginal Peoples, Treaty and Land Research Section.<sup>83</sup>

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<sup>80</sup>Duncan Campbell Scott, "The Last of the Indian Treaties," *Scribner's Magazine* 40 (1906), 578.

<sup>81</sup>James Morrison, "The Poet and the Indians: Duncan Campbell Scott Woos the Muse and Negotiates Treaty Number Nine," *The Beaver* 68:4 (August/September 1988): 4-16.

<sup>82</sup>James Morrison, *Treaty Research Report: Treaty No. 9 (1905-1906)* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986).

<sup>83</sup>See J.C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1872-1896," in *Three History Theses* (Toronto: Ontario Department of Records and Archives, 1961) and James Morrison, *The Robinson Treaties of 1850: A Case Study* (Prepared for The Royal Commission on Aboriginal Peoples, Treaty and Land Research Section, Final Draft, 31 August, 1996). The Final Draft version of this paper is the one that was provided to this researcher via interlibrary loan by the Library of Aboriginal Affairs and Northern Development Canada (AANDC). Reference is made to these two works in Chapter 3 of this thesis.

Morrison's article makes several important observations. Morrison worked with the D.C. Scott collection of pictures of Treaty 9 Commissioners tours in 1905 and 1906 as a resource to base an assessment of the mood of the treaty party that he described as "self-conscious." He also observed that Scott's comportment during the 1905 tour suggests that he was uncomfortable. This reinforces some observations regarding Scott's behaviour that George MacMartin recorded in his diary. Perhaps the most important aspects of this article for the present purposes are that Morrison reinforced that "...everywhere they went, the commissioners promised that Indian hunting, fishing and trapping rights `would not be taken from them.'" He also pointed out the gap between what was said in the Treaty 9 negotiation meetings and the content of the Treaty 9 document and asserts that, "Had they known what was actually in the treaty, it is quite possible that some of the more suspicious Albany River bands would have refused to participate." <sup>84</sup>

An aspect of the Treaty 9 file given scant attention by Morrison in this article is what he refers to as "a series of favourable court decisions" through which Ontario by 1894 "won effective veto power over the terms of future treaties."<sup>85</sup> That is one way of putting it. This specific citation reveals a broader gap in the historiography of a lack of critical analysis of the arguments made by Ontario in the key court cases that led to Ontario acquiring this "veto" and also of the content and rationale offered by the applicable court for these decisions.

Morrison's unpublished paper "The Treaty-Making Process and the Participation of the Ontario Government in the Signing of Treaty No. 9" should be considered together with his *Treaty Research Report: Treaty No. 9 (1905-1906)*. Taken together they provide an essential foundational piece of research for students of Treaty 9. Morrison's treatment of the role of

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<sup>84</sup> James Morrison, "The Poet and the Indians," 14.

<sup>85</sup> Ibid., 15.

Ontario in both papers covered the evolution of this role in terms of the historical sequence of events that led to its involvement. He concluded in the 1978 paper that, "...the only concerns of the Ontario Government in connection with Treaty 9 had to do with the cost of treaty negotiations and the selection of reserve lands."<sup>86</sup> This ignores the importance of the Ontario concern about inheriting in Treaty 9 the feature of the Robinson Treaties that called for an increase in annuities. The 1986 paper also draws upon Archives of Ontario resources to some degree to supplement the analysis that is based primarily on the LAC sources. A major strength of the paper is his review of the various petitions for a treaty from Aboriginal people from the un-surrendered area north of the height-of-land border with the territory covered by the Robinson Treaties of 1850, and of the federal government's response to them. A centralist bias is evident in Morrison's analysis, reflecting a perspective that is more overt in his thesis "case study" of dominion-provincial relations from 1867-1896.

E. Brian Titley's book, *A Narrow Vision*, was also published in 1986 and falls squarely within the cluster of contributions to the historiography of Treaty No. 9 that focus on D.C. Scott. His analysis in "Chapter 4 – Treaty Maker" also draws on the federal government LAC sources primarily. Like the Morrison Treaty 9 Research Report, Titley's chapter reviews the time and event schedule that resulted in inclusion of Ontario in the Treaty 9 negotiations. Especially well stated is Titley's treatment of the gap between the written treaty document and the oral commitments made to First Nations during the actual treaty discussions, and the disproportionate benefits each side obtained via the treaty. He concluded that, "Like similar agreements that had preceded it, it constituted little more than 'a gentleman's way to take without grabbing.' The

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<sup>86</sup>James Morrison, "The Treaty Making Process and the Participation of the Ontario Government in the Signing of Treaty No. 9," 14.

glaring disparity between what was offered to the Indians and the potential wealth whites hoped to realize from the surrendered land makes it difficult to dispute that fraud of the highest order was involved.”<sup>87</sup>

In the late 1990s and early 2000s, three other contributions to the body of historiography examine specific themes or dimensions of the Treaty 9 experience, two of which make specific reference to the MacMartin 1905 diary. David Calverley addressed the role of the Hudson’s Bay Company in the Treaty 9 story in a 2005 article, “The Impact of the Hudson’s Bay Company on the creation of Treaty Number Nine.”<sup>88</sup> This is a valuable article that raised the issue of competing agendas of different organizations involved in the Treaty 9 process and noted the self-interest of the Hudson’s Bay Company (HBC) in the outcome of the treaty negotiations process. Especially important is Calverley’s discussion of the role of the HBC in providing employees to handle the important task of providing translation services at the specific Treaty 9 negotiation sessions. Calverley identifies many of the HBC officials involved in providing this service and George MacMartin identifies the individuals in his diary. It remains to provide as complete a profile of the translation capabilities and experience of these HBC employee translators. This will aid in developing as accurate a picture as possible of the degree of comprehension on the part of First Nation Treaty 9 negotiators of the various provisions of Treaty 9 that they were being asked to agree to.

The other two thematic contributions both address natural resource development issues. Patrick Macklem’s book chapter on “The Impact of Treaty 9 on Natural Resource Development

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<sup>87</sup>E. Brian Titley, *A Narrow Vision*, 73.

<sup>88</sup>David Calverley, “The Impact of the Hudson’s Bay Company on the creation of Treaty Number Nine,” *Ontario History* 98 (Spring 2006): 30-51.

in Northern Ontario,”<sup>89</sup> published in 2002, reviewed in detail the historical background to Treaty 9. It focused in on the extent of limitations on the ability of governments to restrict the scope of Treaty 9 First Nation peoples’ hunting, fishing and trapping rights, based on section 35 (1) of the *Constitution Act, 1982*. This is an early important contribution in an underdeveloped area of Treaty 9 historiography that will benefit from further contributions.

The other thematic piece is a segment of a PhD thesis by Rhonda Telford. In her “Chapter 4 – The Mineral Wealth of North-Eastern Ontario and Treaty No. 9: The James Bay Treaty,” Telford made reference in her analysis to the content of the MacMartin diary. She said, “Daniel MacMartin’s Diary provides the fullest account of what was actually said to the Native Peoples about the Treaties and clearly indicates, among other things, that the Treaty area was not being surrendered, but shared.”<sup>90</sup> She emphasized the gap between the terms of the written treaty and what was said orally to First Nations during the treaty 9 negotiations as other historians have done. What is unique and different in her dissertation, however, is that a prescription is provided as to what should be done to address this gap. She suggested that, “...Canada and Ontario should either respect the promise of unfettered Aboriginal hunting, trapping and fishing rights in the shared Treaty area or augment the Reserves to the original areas desired by the First Nations at the time of the Treaty.”<sup>91</sup> This prescription made in 1996 merits further careful consideration today in 2015.

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<sup>89</sup>Patrick Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario,” Chapter 4 in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch, 97-134 (Vancouver: University of British Columbia Press, 2002).

<sup>90</sup>Rhonda Mae Telford, “‘The Sound of the Rustling of the Gold is under My Feet Where I Stand; We Have a Rich Country’: A History of Aboriginal Mineral Resources in Ontario.” PhD dissertation, University of Toronto, 1996. See Chapter 4, “The Mineral Wealth of North-Eastern Ontario And Treaty No. 9: The James Bay Treaty,” 356.

<sup>91</sup>*Ibid.*, 361.



The major work on Treaty 9 is Dr. John Long's book published in 2010, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario*. Long's book is "the Bible" of Treaty 9 historiography. It is a major undertaking and can be seen as a transitional piece of historiography. It completes and fleshes out the basic elements of the Treaty 9 story that were outlined in the earlier work by James Morrison and E. Brian Titley, and by himself, as Dr. Long had prepared several short papers and articles dealing with various aspects of the Treaty 9 story. There are multiple benefits and contributions to Treaty 9 historiography made by Dr. Long's *Treaty No.9* book. These include his detailed analysis and emphasis upon the oral and written versions of Treaty 9 and his related emphasis on how it is important to understand the perceptions of First Nations derived from oral tradition as informing their view of what the Treaty agreement consisted of. It is because of this aspect of Long's book that it can be characterized as being transitional. In addition to fleshing out the factual basis of the Treaty 9 story, he introduces detailed discussion of the First Nations' perspective and perception of the Treaty 9 negotiations, based on their oral tradition.

Long first addressed the First Nations' oral tradition-based perceptions in Part Three of his book, "Trick or Treaty No. 9?," in which he presented a conceptual model of how First Nations participants in the Treaty 9 negotiations would have perceived what transpired during the negotiations.<sup>92</sup> The image that he used was a series of concentric rings indicating varying degrees of perception of what was transpiring in the negotiations. In developing this model Long was applying his background as an educator to the task of analysing and explaining what transpired in the Treaty 9 negotiations during the summer of 1905. Long has further elaborated

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<sup>92</sup>John Long, *Treaty No. 9*, 363-365

on this concept in a featured appearance in the Alanis Obomsawin National Film Board 2014 *Trick or Treaty?* documentary film, the title of which mirrors the title of Part Three of Long's *Treaty No. 9* book. Long has made a very important addition to his earlier analysis of the perceptual dimension of Treaty 9 in the following statement in his recent appearance in the *Trick or Treaty?* documentary:

I had this very naïve understanding that everyone thinks the same way and everyone is honourable, so that if I want to sign something, I'll explain what it is, you can read it and understand it and if you agree, you sign your name...And then I started thinking more and more about the treaties and realizing people have a way of life and they understand things based on their prior experiences. Well what were peoples' prior experiences with non-Aboriginal people? What experience did people have with signing a document?<sup>93</sup>

Long then introduced the important event of the Rupert's Land Transfer of 1870 in which Canada acquired Rupert's Land from the Hudson's Bay Company. The HBC had been the non-Aboriginal authority in the area since 1670. The Treaty 9 First Nations had established trading relationships with the HBC that featured the HBC providing subsistence assistance to their Aboriginal trading partners during times of need. Based on this understanding, Long then stated what a perception-based analysis would yield as to the expectations and perceptions of Treaty 9 First Nations when they agreed to Treaty 9 in 1905:

...one of the terms of that Rupert's Land transfer was that Canada would protect the Indian tribes. Canada actually made a promise that when we acquire this land for Canada we will protect the Indian tribes...First Nations were expecting some kind of protection and some assistance. In the case of Treaty 9, my argument would be that people just thought of it as some kind of assistance and protection and the surrender was never mentioned at all.<sup>94</sup>

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<sup>93</sup>Dr. John Long, statement appearing in *Trick or Treaty?*, DVD, directed by Alanis Obomsawin.

<sup>94</sup>Ibid.

The above comments, made by both the late Dr. Louttit and by Dr. Long in the recent *Trick of Treaty?* 2014 NFB documentary film by Alanis Obomsawin, make an important contribution to the historiography of Treaty 9. In this way, together with a 2011 Canadian Broadcasting Corporation *Ideas* radio program feature, “George MacMartin’s Big Canoe Trip,” the NFB documentary illustrates the value of this medium for updating and further developing a body of historiography such as for Treaty 9 that already has an established body of more formal historical analysis material.

It also should be pointed out, however, that the extent and power of the contribution that is made by documentary material such as the *Trick or Treaty?* film is in part a function of what it is trying to achieve and to whom it is directed. The impact of this latest contribution by Ms. Obomsawin is detracted from by the fact that the documentary fuses together two stories – the Treaty 9 story and the longer term story of Canadian government neglect and avoidance of its treaty obligations and responsibilities towards First Nations. It is an important connection to make, but the recent *Trick or Treaty?* film is at times confusing for the viewer, as a result of frequent shifts that occur back and forth between images and narratives relating to these two stories. Obomsawin’s earlier NFB documentary *100 Years of Resistance*, dealing with the Oka stand-off in 1990 between the Mohawk people and the Quebec and Canadian Governments, is a *tour de force* that has the impact on the viewer of a fast-paced adventure film. *Trick or Treaty?* in 2014 deals with different material than was being dealt with in the *100 Years of Resistance* documentary treatment of the events in the Montreal area during the summer of 1990.<sup>95</sup> The 2014

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<sup>95</sup>During the summer of 1990, this writer lived in Ottawa and commuted back and forth between Ottawa and Montreal for work purposes, travelling by the Oka area several times each week, albeit a safe distance removed from the barricades located within Oka.

documentary has multiple uses as an educative tool regarding both the Treaty 9 experience and the current status of relations between Canada's First Nations and the Government of Canada. Taken on their own, however, the segments of the documentary dealing with the Treaty 9 experience make an invaluable contribution to the current body of Treaty 9 historiography.

## **2.5 Summary and Conclusion**

Chapter 2 has proceeded from an initial analysis of the content and spirit of the *Royal Proclamation of 1763* and its implications for treaty-making in Canada and of the nature of what constitutes the Honour of the Crown concept and its relevance in contemporary Canadian governance and for Aboriginal and treaty law. The Honour of the Crown was identified as infusing both the process of treaty making and treaty interpretation, as well as an on-going process of reconciliation initiated by section 35 (1) of the *Constitution Act, 1982*. It is a guide for the behaviour of government representatives in all dealings with Canada's Aboriginal people and a guide for assessment of such government behaviour, both past and present. The MacMartin diary account of what was said at the summer of 1905 Treaty 9 negotiation meetings provides evidence that will be analysed as a means of assessing the extent to which the Honour of the Crown principle was upheld and adhered to during these negotiations in 1905. It also provides a basis, together with analysis of Canada's constitutional guarantee of Aboriginal and treaty rights, for determining what may be required now in 2015, to ensure that the Honour of the Crown is maintained in regard to government relations with Canadian Aboriginal people from Treaty 9 First Nations.

An overview has also been provided of the historical numbered treaties and of differing government and First Nations perceptions of what constitutes the content of The James Bay Treaty – Treaty No. 9. The historiography of Treaty 9 has been reviewed. Several major gaps

can be identified based on this analysis. Much of the Treaty 9 historical analyses to date have been based on Library and Archives Canada sources, with an underutilization of Archives of Ontario-based sources. There also is only summary reference to the “bottom line” decisions in major constitutional court and arbitration legal cases between Ontario and the Dominion of Canada in the decades leading up to Ontario’s involvement in Treaty 9. There is both room and a need for analysis of these cases and of the decisions themselves and the reasons offered by the judges for these decisions. This is an underemphasized body of voluminous and very significant historical source material. Analysis of it can contribute to a more complete understanding of why and how Ontario came to be involved in Treaty 9 and of the implications of this for the situation today.

There has been more analysis done of the key government players involved in Treaty 9 from the federal government side and very little done on the Ontario government leaders. Most importantly, there is an opportunity to provide a more detailed profile of who George MacMartin was and of who the other important Treaty 9 Ontario government decision makers were and what their links to Ontario’s Treaty 9 Commissioner George MacMartin may have been.

Finally, given the importance of the issue of perception as raised by Dr. Long and discussed in the review of Treaty 9 historiography above, there is an opportunity to build on his work and that of David Calverley on the HBC officials identified in the MacMartin diary as having been involved in providing translation at the 1905 Treaty 9 negotiation meetings. Such analysis can provide an initial foundation for making an assessment of their experience and capacity as translators. It is to the task of making an effort to begin to fill in these gaps in the existing historiography of Treaty 9 that the balance of this thesis now turns.

## Chapter Three: “Stepping Stones” - Historical Antecedents of Ontario’s Treaty 9 Role

### 3.1 Introduction and Three Canada-Ontario Agreements

This chapter discusses the historical antecedents of Ontario’s role in Treaty 9. It is intended to address the questions of why Ontario was involved in Treaty 9, how it came to be involved, and what the objectives of the Province’s involvement were. A longer-term approach is taken here to explain this involvement. This approach is informed by the work of the 20<sup>th</sup> century French historian, Fernand Braudel (1902-1985), who was part of the second generation of the *Annales* school of historical analysis.<sup>96</sup>

Braudel’s *la longue duree* concept was used to illuminate changes that occur over the very long term, such as climate change. His work has informed the choice of relevant time frame selected here for explaining the involvement of Ontario with Treaty 9 in 1905, by highlighting the importance for historians of considering alternative relevant time frames for historical analysis. Explaining Ontario’s involvement with Treaty 9 by referencing interactions between the national and Ontario governments in the few years between 1901 and 1905 does not permit identification of the Government of Ontario’s post-Confederation multi-year co-sovereigntist legal and advocacy campaign as a potential causal factor. Considering the issue from an up to 50 years or longer time frame permits analysis of Ontario’s Treaty 9 involvement in the context

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<sup>96</sup>The *Annales* label is derived from the journal *Annales d’histoire economique*, established in 1929 by French historians Lucien Febvre (1878-1956) and Marc Bloch (1886-1944), through which they presented a new way of viewing history, focusing on economic history and the influence of psychology and anthropology. Febvre’s particular interest was in the study of historical *mentalities*. Braudel undertook a major study of the history of the Mediterranean area in the 16<sup>th</sup> century that was rooted in geography and economics over what he called *la longue duree*. From this perspective, Braudel stressed that regular patterns can be discerned as re-enacted and reoccurring. See John Burrow, *A History of Histories: Epics, Chronicles, Romances & Inquiries From Herodotus & Thucydides To the Twentieth Century* (London: Penguin Books, 2009), 478-485. See also Fernand Braudel, “History and the Social Sciences,” Chap. 32 in *The Modern Historiography Reader: Western Sources*, ed. Adam Budd, 251-261 (London and New York: Routledge, 2009).

of this multiyear co-sovereigntist constitutional conflict with the national government as an explanatory factor for the province's involvement with Treaty 9 in 1905.<sup>97</sup>

The existing historiography of Treaty No. 9 *does* incorporate a long term approach in one area. That is the analysis of how Treaty 9 was a response to a continual series of petitions for a treaty from First Nations located north of the height of land boundary of the territory covered by the Robinson Superior and Huron Treaties of 1850. This same approach has *not* been employed in the analysis of the ongoing conflict over a range of constitutional issues that occurred between the governments of the Province of Ontario and the Dominion of Canada, between Confederation and the commencement of Treaty 9 negotiations with First Nations in the summer of 1905. The focus that typically has been taken in addressing the intergovernmental issue-based conflict during this period has been to make summary reference to some of these issues and to how they were resolved. Therefore, the main focus of the analysis is on the 1903-1905 period, when the Dominion Government turned its attention on a priority basis to consideration of actively pursuing conclusion of a treaty in the region north of the height of land in Ontario. This is too narrow a definition of the relevant segment of historical time to focus on. For example, on one issue, the dispute over Ontario's western boundary, S.J.R. Noel has argued that Ontario's approach to this issue can only be truly understood with reference to the origin and persistence of

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<sup>97</sup>Braudel's "...three-tiered conception of historical time consisted of *structure* (the long term or *la longue duree*), *conjuncture* (medium-length units of ten, twenty or even fifty years), and finally, *eventement* (the event or short term)." See Lynn Hunt, "French History in the Last Twenty Years: The Rise and Fall of the *Annales* Paradigm," *Journal of Contemporary History* 21 (April 1986), 211. The segment of historical time within which this thesis explores the role of the Ontario Government in Treaty 9 extends to the line of demarcation in Braudel's conception between *conjuncture* and *la longue duree*.

the importance of land in Ontario political culture, dating back to the time of the arrival of the Loyalists in Upper Canada.<sup>98</sup>

This chapter identifies and analyses the range of issues over which the Ontario and Dominion governments battled between Confederation in 1867 and 1905, for the purpose of identifying their significance as factors contributing to Ontario's ultimate involvement in the 1905 Treaty No. 9 negotiations. Ontario's substantive objectives for the Treaty 9 negotiations were a direct outgrowth of conflicts on these "stepping stone" issues and how they were resolved. Selected aspects of the Canadian Government preparations for Treaty 9 during 1903-1905 will also be very briefly discussed at the end of the chapter, to illustrate the influence on these preparations of the outcome of the major court decisions that were made on several key issues around which Ontario and the Dominion government had been in conflict.

Table 3 presents a summary of the key issues and events that led to Ontario's involvement in the 1905 Treaty 9 negotiations. This includes identification of three agreements that were reached between Canada and Ontario in 1894, 1902 and 1905 respectively. These agreements arose out of the conflict between the governments around the various other issues and events arrayed in Table 3 and they established the parameters for Ontario's involvement in the negotiation of Treaty 9. The short answer as to why Ontario was involved in these negotiations in 1905 is that it resulted from these three agreements.

Each of these specific agreements, in turn, was intertwined with several of the other key issues and events arrayed in Table 3. As a result of the conflict over these issues, Ontario's

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<sup>98</sup>Noel stated that, "Indeed without an appreciation of the extraordinary significance of land in the Ontario political culture it is difficult to understand either the intractability of the boundary issue or the acrimony around it. There was ample room for a negotiated settlement. The trouble was, however, that Upper Canadians had become accustomed to viewing western expansion as their undoubted right." See S.J.R. Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1896* (Toronto Buffalo London: University of Toronto Press, 1990), 250.



Table 3: Events Leading to Ontario Involvement in Treaty 9 Negotiations in 1905

| <b>Event</b>  | <b>Dates</b>                                  |
|---|---|
| Robinson Superior and Huron Treaties.   | September 7 & September 9, 1850, respectively |
| Confederation: <i>Constitution Act, 1867</i> .  | Effective July 1, 1867                        |
| Rupert's Land Transfer.   | July 15, 1870                                 |
| North-West Angle Treaty, #3.  | October 3, 1873                               |
| Ontario Western Boundary Dispute.   | 1871-1889                                     |
| <i>St. Catherine's Milling and Lumber Company</i> Case.   | 1885-1888                                     |
| <b>Canada-Ontario Agreement for Settlement of certain questions respecting Indian Lands.</b>                  | <b>April 16, 1894</b>                         |
| Supreme Court of Canada Decision on Robinson Treaties Annuities Case ( <i>"re Indian Claims"</i> ).           | December 9, 1895                              |
| <b>Agreement of Dominion and Ontario Counsel at <i>Ontario Mining Co. v. Seybold</i> case before J.C.P.C.</b> | <b>July 7, 1902</b>                           |
| Treaty No. 3 annuities expenditure statement of claim of Dominion v. Ontario, before Ontario Exchequer Court. | June 13, 1903                                 |
| <b>Agreement between Dominion and Ontario Governments re Treaty No. 9.</b>                                    | <b>July 3, 1905</b>                           |
| <b>Ontario Treaty No. 9 Orders in Council.</b>  | <b>July 3, 1905</b>                           |

objectives in becoming involved with the Dominion Government in negotiation of Treaty 9 related to reserves, to cost containment and to asserting and protecting its constitutional authority over land, minerals and natural resources, such as timber and hydro-electricity generation. The Province sought to limit the size of reserves to be set aside under the treaty, to be directly involved in their selection, and to influence their location, so as not to inhibit the subsequent development of hydro-electricity generation facilities. Ontario sought to contain and limit its exposure to costs arising from Crown treaty annuity payment obligations. It also sought to facilitate mineral and natural resource development in the “New Ontario” region north of the territory covered by the Robinson Treaties of 1850. In short, Ontario’s aim in being involved with Treaty 9 was an extension of its post Confederation campaign of asserting, protecting and projecting its position as a co-sovereignist within Confederation under Canada’s Constitution. This will become evident from the issue-by-issue analysis that follows.

### **3.2 Robinson Superior and Huron Treaties, 1850**

The Robinson Superior and Huron Treaties of 1850 should be considered as precursor treaties to the numbered treaties in general and to the northern natural resource treaties in particular. Map 2 above displays the territory covered by these treaties. As was the case with the northern natural resource treaties, facilitating mining development was the immediate impetus for the pre-Confederation Province of Canada to decide to seek a treaty in 1850 with First Nations people residing north of Lake Superior and Lake Huron. Recent gold discoveries in the area had led to the granting of location tickets to mining companies that then made incursions into un-surrendered territory north of the lakes. This led to concerns among First Nations there that erupted in 1848 into an armed skirmish, known as the “Michipicoten War” or “the Mica Bay

incident,” at one of the Quebec Mining Company’s locations.<sup>99</sup> The Executive Council of the Province of Canada responded to this incident by establishing the “Vidal-Anderson Commission,” a two-man commission of inquiry that was tasked with visiting First Nations along the shores of Lake Huron and Lake Superior to explore their interest in concluding a treaty. The commissioners reported back to the Executive Council that the area First Nations were eager to establish a treaty relationship with the government.<sup>100</sup> William Benjamin Robinson was an area fur trader at the time and he subsequently sent a memorandum on the “Mica Bay incident” to the Executive Council that led to an Executive Council appointing him commissioner tasked with negotiating a treaty with Indians in the vicinity of Lakes Superior and Huron. Treaties were ultimately concluded in September of 1850.<sup>101</sup> Professor Douglas Leighton maintained that this

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<sup>99</sup>Julia Jarvis, “Robinson, William Benjamin,” in *Dictionary of Canadian Biography*, vol. 10, University of Toronto/Universite Laval, 2003 -, [http://www.biographi.ca/en/bio/robinson\\_william\\_benjamin\\_10E.html](http://www.biographi.ca/en/bio/robinson_william_benjamin_10E.html) (accessed April 18, 2015).

<sup>100</sup>Alexander Vidal and Thomas Anderson were appointed as commissioners for this inquiry. Both were very familiar with the region and the First Nations residing there. Vidal had been a provincial land surveyor in the area and Anderson was a “veteran of the fur trade and of the War of 1812” and “had dealt with Indian peoples for more than forty years and spoke several native dialects.” See Douglas Leighton, “The Historical Significance of the Robinson Treaties of 1850,” Paper presented to the Annual Meeting of the Canadian Historical Association, Ottawa, Ontario, 9 June, 1982, 6-9. Professor Leighton very kindly provided a copy of his paper to this writer directly for analysis and reference in connection with research for this thesis, which is appreciated very much.

<sup>101</sup>William Benjamin Robinson’s personal connections and credentials helped to enhance the impact of the memorandum that he sent to the Executive Council and the fact that he was even in a position to do this. His fur trading experience enabled him to develop close connections with First Nations people north of the lakes that he had cultivated trading relationships with. On the other side of the equation, Robinson was extremely well-connected politically with the elite of Upper Canada/Canada West. He was the brother of John Beverley Robinson, a leading member of the “Family Compact” that had ruled Upper Canada before the union of the Canadas in 1841, was Chief Justice of Upper Canada/Canada West from 1829-1862 and was in 1852 to become the first Chancellor for the newly established University of Trinity College. He was also son in law of William Jarvis, another leading “Family Compact” member who had been the first provincial secretary and clerk of the Executive Council of the newly established province of Upper Canada. These connections of W.B. Robinson with the elite of the Province of Canada, combined with his direct personal and professional connections with area First Nations made him a logical choice as treaty commissioner in 1850. See Robert E. Saunders, “Robinson, Sir John Beverley,” in *Dictionary of Canadian Biography*, vol. 9, University of Toronto/Universite Laval, 2003 -, [http://www.biographi.ca/en/bio/robinson\\_john\\_beverley\\_9E.html](http://www.biographi.ca/en/bio/robinson_john_beverley_9E.html) (accessed July 23, 2015). See also Robert J. Burns, “Jarvis, William,” in *Dictionary of Canadian Biography*, vol. 5, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/jarvis\\_william\\_5E.html](http://www.biographi.ca/en/bio/jarvis_william_5E.html). (accessed April 18, 2015).

outcome illustrates how these treaties reflected the application in practice of the core principle of the Royal Proclamation that “authority was to precede settlement.”<sup>102</sup>

Professor Leighton also emphasized that these treaties, “...helped to establish important precedents which had great impact on the formation of Canadian treaties after 1867 and which contained legal consequences that are still being debated today.”<sup>103</sup> From the standpoint of subsequent governments, the precedents established by the Robinson Treaties of 1850 were both positive and negative, indicating what should be both replicated and avoided in the negotiation of treaties in the future. The basic architecture of the numbered treaties followed the basic content of the Robinson treaties. J.R. Miller noted that these treaties, “...were the first of the Upper Canadian treaties to deal with very large areas of territory, to include reserves as part of the treaty, and to recognize continuing Aboriginal hunting and fishing rights. These characteristics, plus the inclusion of annuities, would be essential elements of treaty-making in western Canada after 1867.”<sup>104</sup> Each of these elements was to prove to have both positive and negative elements for both the governments and for the First Nations and to become a factor influencing the objectives of the Ontario Government in regard to both the North-West Angle Treaty No.3 and the James Bay Treaty – Treaty No. 9.

The commitment to continued hunting, fishing and trapping rights over the territory surrendered by the Robinson treaties was constrained by the first iteration of the “taken up” clause that later was incorporated into the written versions of Treaty No. 3 and in each of the

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<sup>102</sup>Douglas Leighton, “The Historical Significance of the Robinson Treaties of 1850,” 3.

<sup>103</sup>Ibid, 2.

<sup>104</sup>J.R. Miller, “‘From our lands we receive scarcely anything.’ The Upper Canadian Treaties, 1818-1862,” Chapter 4 in *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, 117-118.

subsequent numbered treaties, including Treaty No. 9. The text of the Robinson Treaties' "taken up" clause reads as follows:

And the said William Benjamin Robinson...on behalf of Her Majesty and the Government of this Province hereby promises and agrees...to allow the said Chiefs and their Tribes the full and free privilege to hunt over the Territory ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government.<sup>105</sup>

This clause indicates that from the date of 1850, there was evidence of the "Trick or Treaty?" phenomenon emphasized in the recent analyses of Treaty No. 9 by Dr. John Long and by Alanis Obomsawin. The Government of the Province and later Dominion of Canada had established a model and practice of putting into the written version of treaties authorities that severely curtailed and constrained the First Nations' ability to exercise the treaty right to continue their traditional hunting, fishing and trapping activities that the Crown representatives had orally agreed to. Robinson himself later wrote that his motivation in offering the commitment of continued hunting, fishing and trapping privileges in the treaty negotiations was as a cost containment measure, avoiding the requirements and expense of providing food for the First Nations if their traditional means of subsistence had been officially constrained by the treaty.<sup>106</sup> A further precedential aspect of the nature of the treaty commitment to continued hunting, fishing and trapping noted by James Morrison pertains to the 'internal boundary' between the two 1850 Robinson treaties, that he emphasized should be considered as "one treaty with two sub agreements." According to Morrison, "The only conceivable reason for

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<sup>105</sup>Memorandum for the Honourable the Minister of Lands, Forests and Mines, from the Deputy Minister, Toronto, December 14, 1914, Correspondence re Treaty No. 9, RG 1-273-5-1-1, AO, 11.

<sup>106</sup>See J.R. Miller, "'From our lands we receive scarcely anything.' The Upper Canadian Treaties, 1818-1862," Chapter 4 in *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, 116.

distinguishing between the two agreements would have been to confine somehow the exercise of hunting and fishing rights to treaty limits.”<sup>107</sup>

In contrast to this taken up clause that benefited the government treaty partner, the Robinson Treaties terms pertaining to reserves and annuities were of greater benefit to the First Nations. Selection of reserves was to be made by the First Nations themselves. This experience was replicated to an extent in the Treaty No. 3 experience in which First Nations were to select reserves “in consultation with federal officials.”<sup>108</sup> After Confederation, this aspect of the Robinson Treaties led to later concerns on the part of the Province of Ontario about both the size and the location of reserves that ultimately influenced Ontario’s objectives in regard to Treaty No. 9. On the annuities issue, the Robinson treaties contained what is a unique and not to be later replicated “annuities escalator clause.” It provided for upwards adjustment of the amount of annuities paid to the First Nations treaty beneficiaries, as a function of the underlying growth in productivity of the land surrendered by the treaty to the Crown.<sup>109</sup> This escalator clause also became a major concern of the Province of Ontario after Confederation. Ontario did not wish to assume responsibility for paying these increased annuities and for the associated uncertain level

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<sup>107</sup>James Morrison, *The Robinson Treaties of 1850: A Case Study*, 113-114.

<sup>108</sup>David McNabb, “The Administration of Treaty 3: The Location of the Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915,” Chapter 7 in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, 145-157, ed. Ian A.L. Getty and Antoine S. Lussier, (Vancouver: University of British Columbia Press, 2013), 147.

<sup>109</sup>The text of the “annuities escalator” clause reads as follows: “The said William Benjamin Robinson on behalf of Her Majesty who desires to deal liberally and justly with all her subjects further promises and agrees that in case the Territory hereby ceded by the parties of the second part shall at any future period produce an amount which will enable the Government of this Province without incurring loss to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time provided that the amount paid to each individual shall not exceed the sum of One Pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided that the number of Indians entitled to the benefit of this treaty shall amount to two thirds of their present number (which is 1240) to entitle them to claim the full benefit thereof, and should the numbers at any future period not amount to two thirds of 1240, the annuity shall be diminished in proportion to their actual numbers.” Memorandum for the Honourable the Minister of Lands, Forests and Mines, from the Deputy Minister, Toronto, December 14, 1914, Correspondence re Treaty No. 9, RG 1-273-5-1-1, AO, 9.

of future cost exposure that responsibility for paying these annuities entailed. The issue became a focal point of conflict between the Province and the Dominion and was the object of the Robinson Treaties Annuities court case, discussed in section 3.5 below.

In summary, the Robinson Treaties established the model for the basic architecture of the written versions of the numbered treaties that were to follow. They also contained features such as the annuities escalator clause and choice of reserve locations by the First Nations that Ontario later sought to avoid responsibility for and to ensure were not replicated in The James Bay Treaty – Treaty No. 9. Also important is the process followed by the Government of the Province of Canada in having a committee of the Executive Council selecting W.B. Robinson as Treaty Commissioner in 1850. As the analysis of Ontario’s Treaty 9 Commissioner selection process in Chapter 4 will show, this too was precedential. Like his predecessor provincial treaty Commissioner W.B. Robinson, George MacMartin’s appointment as Ontario’s Treaty No. 9 Commissioner shows that MacMartin too possessed the proper experiential background, as well as the personal and family relationship credentials for such an appointment.

### **3.3 Constitutional and Contractual Context: *B.N.A. Act* and the Rupert’s Land Transfer**

Before discussing the specific issue conflicts that led to the trilogy of Canada-Ontario agreements that led to Ontario’s involvement in the negotiation of Treaty 9, it is necessary to explain the constitutional and contractual context for these conflicts. The *British North America Act, 1867 (B.N.A. Act)*, that established the Dominion of Canada as a confederal entity, now termed the *Constitution Act, 1867*, provides the foundational reference point for determining the constitutional parameters for this analysis. There are specific sections within the Act that were the focal points for the conflict between Ontario and Canada during the late 19<sup>th</sup> century in each of the issues identified in Table 3. These specific sections of the *B.N.A. Act* are identified and

summarized in Table 4 and in Table 5. They will be briefly discussed as a basis for the review that follows of each of the “stepping stone” issues listed in Table 3. This will provide the basis for considering the issue of Ontario’s involvement in Treaty 9 relative to the “Act or Compact?” debate among Canadian historians and political scientists over the nature of the Canadian Confederation.

There are two schools of thought as to what kind of balance was struck in the *B.N.A. Act* that established Canada’s federal system of government. Centralists contend that the essential aim of the Fathers of Confederation was to form a strong central government, to avoid the perils associated with the decentralized federalism inherent in the American system of government that led to intersectional conflict that erupted in the U.S. Civil War. From this “Act” perspective, the *B.N.A. Act* established the provinces of Canada as subordinate entities of the strong, central government. Canada’s first Prime Minister, Sir John A. Macdonald, was a tireless champion of this perspective. Ontario historian James Morrison is a strong proponent of the centralist view of Confederation that he has very ably articulated as follows:

...it is indisputable that the Constitution was so framed as to provide for a strong Central Government; and inasmuch as the Confederation scheme was admittedly a compromise arrangement it may fairly be concluded that a majority of the Fathers favoured the principle of centralization. Then too, the Confederation debates reveal very clearly that everyone, both opponents and supporters of the scheme, realized that what was being created was a centralized system of Government in which ‘local’ governments were to have a very minimum of power and jurisdiction. That certain prominent Liberals later declared against the theory of centralization cannot alter the fact that the British North America Act, by majority consent and recognized intent of its framers, instituted a Confederate system in which the Federal Government was to have paramount authority.<sup>110</sup>

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<sup>110</sup>James Morrison, “Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1872-1896,” 2.



The “certain prominent Liberals” that Morrison referred to as holding a different view were former Ontario Liberal Party Premiers Oliver Mowat (1872-1896) and Edward Blake (1871-1872). Blake also served as national leader of the Liberal Party of Canada (1880-1887).<sup>111</sup> They were leaders of what centralist historians such as Morrison refer to as Ontario’s “Provincial Rights Movement.” A better characterization is that they were leaders in Ontario’s co-sovereignist campaign of the late nineteenth century advocating for interpretation of the *B.N.A. Act* as defining separate, sovereign spheres of legislative authority for the provincial and national governments respectively. The basis for this view was the idea that Confederation and hence the *B.N.A. Act* resulted from a “compact” or treaty among the pre-existing colonial provinces in Canada, hence the label “Compact Theory.”

The clearest and most eloquent articulation of this perspective was made by Edward Blake, in his argument before the Judicial Committee of the Privy Council (J.C.P.C.) during its consideration of the *St. Catherine’s Milling and Lumber Company* case on July 20, 1888. Blake stressed that the *B.N.A. Act* was, “...little more than a skeleton, which is to be clothed with flesh and muscle, nerve and sinew, into which the breath of life is to be breathed by interpretation.”

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<sup>111</sup>Oliver Mowat succeeded Edward Blake as Ontario Premier in 1872 at the behest of Blake when Blake moved to national politics following elimination of dual representation that required Blake to choose between national or provincial politics. He invited Mowat to resign from his position on the bench to succeed him as Premier. Blake served as Minister of Justice from 1875-1877, then as national Liberal Party leader from 1880-1887. The latter date is significant as in 1888 when the *St. Catherine’s Milling and Lumber Company* case came before the Judicial Committee of the Privy Council (J.C.P.C.), Blake had returned to private practice and was available to represent Ontario before the J.C.P.C. Blake later moved back to his native Ireland to engage in the politics of Irish nationalism. Following his tenure as Premier of Ontario, Mowat moved briefly to national politics in 1896 and was appointed Minister of Justice, called to the Senate and appointed Government Leader in the Senate. Age, overwork and failing health led him to resign as Minister of Justice in November 1887 when he was appointed Lieutenant Governor of Ontario. He suffered a stroke in October 1898 and died in April 1903. See Paul Romney, “Mowat, Sir Oliver,” in *Dictionary of Canadian Biography*, vol. 13, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/mowat\\_oliver\\_13E.html](http://www.biographi.ca/en/bio/mowat_oliver_13E.html) (accessed April 18, 2015), and Ben Forster and Jonathon Swainger, “Blake, Edward,” in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/blake\\_edward\\_14E.html](http://www.biographi.ca/en/bio/blake_edward_14E.html) (accessed April 18, 2015).

Such interpretation, he argued, should be informed by an appreciation of the “scheme” of the

*B.N.A. Act*, that he defined thusly:

What then was the general scheme of this Act?...It was not the intention of Parliament to mutilate; confound and destroy the provinces mentioned in the preamble, and having done so, from their mangled remains, stewed in some legislative caldron, to evoke by some legislative incantation absolutely new provinces into an absolutely new existence. It was rather, I submit, the design and object of the act...to preserve the vital breath and continue the political existence of the old provinces. However this may be, they were being made, as has been well said, not fractions of a multiple. The Dominion is a multiple, and each province is a unit of that multiple.<sup>112</sup>

The Ontario-Canada constitutional battles in the late nineteenth century can be considered as a series of skirmishes in a larger battle between the “Act” or “Compact” perspectives about the nature of the Canadian Confederation. Centralists contend that the arguments of the proponents of the Compact Theory amount to a betrayal of the original intentions of the Fathers of Confederation, whereas the proponents of the alternate view maintain that it reflects “...a fair, not a perverse reading.”<sup>113</sup>

Oliver Mowat’s general-ship has been cited by legal historian Paul Romney as having been decisive in the victory in this battle of the Ontario perspective that the provinces are sovereign within their defined spheres of legislative authority. In reference to the *B.N.A. Act* distribution of powers between the central government and the provinces, he observed that “...as regards both sovereignty and the distribution of legislative powers, the act was an optical illusion” that required clarification. The credit for the clarification that was achieved through a

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<sup>112</sup>Argument of Mr. Blake, Q.C. before Privy Council, 1888, *The Ontario Lands Case (St. Catharines Milling Co. vs. Queen)*, (41/41/03), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2577, AO, 6.

<sup>113</sup>Paul Romney, “The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the Construction of the British North America Act,” *Canadian Journal of Political Science/Revue canadienne de science politique*, Vol. 25 (March 1992), 4.

long battle between Ontario and the national government, he argued, "...belongs to the quarter-century campaign of Oliver Mowat as Her Majesty's attorney general for Ontario – a masterpiece of forensic craft which, by harping on the case for provincial sovereignty, created a favourable context for the resolution of the distribution-of-powers problem."<sup>114</sup> Mowat played a key role in strategy development and execution in regard to the Treaty #3, the Ontario Boundary Dispute and the *St. Catherine's Milling and Lumber Company* case issues that were important contributors to Ontario assuming a role in Treaty 9 in 1905.

Specific sections of the *B.N.A. Act* that were at issue in the conflicts between Ontario and the national government of relevance to the role that Ontario assumed in Treaty 9 appear in Table 4 and Table 5. The major issues in the late nineteenth century constitutional conflicts revolved around the distribution of powers sections (s. 91 and s. 92), section 109 dealing with "Lands, Mines and Minerals" and section 117 concerning what constituted the provinces' "public property." A key point of contention relating to the North-West Angle Treaty, #3 was what the precise meaning was of section 91 (24), that granted Parliament exclusive legislative authority regarding "Indians, and Lands reserved for Indians." The Dominion contended that by Treaty#3 it had acquired the property ceded to the Crown under the treaty, arguing that a broad interpretation of the meaning of section 91 (24) was appropriate. In contrast, Ontario maintained that section 91 (24) should be interpreted narrowly and that all lands within the territorial boundaries of Ontario were "Public Lands belonging to the Province" under section 92 (5) of the

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<sup>114</sup>Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: The Osgoode Society, 1986), 281. See Chapter 6 "In Right of Ontario," for a comprehensive analysis of the Ontario co-sovereignist legal campaign of the late nineteenth century.

Table 4: *B.N.A. Act* Sections Important in Ontario-Canada Constitutional Issues Disputes, 1867-1905 (s. 6, s. 91, s.92 & s. 142)<sup>115</sup>

| Part  | Section                           | Subject Matter  |
|---|-----------------------------------|---|
| <b>II. UNION</b>  | 6.                                | Former borders of Upper Canada and Lower Canada to be borders of Ontario and Quebec, respectively.  |
| <b>VI. DISTRIBUTION OF LEGISLATIVE POWER</b>              | <p><b>91</b></p> <p><b>92</b></p> | <p><b>“Powers of the Parliament”:</b> Legislative responsibility for Matters <i>not</i> assigned exclusively to the Legislatures of the Provinces.</p> <p><i>Exclusive Legislative Authority for specified matters</i> including: 1A. Public Debt, &amp; 24. <i>“Indians and Lands reserved for the Indians.”</i></p> <p><b>“Exclusive Powers of Provincial Legislatures.”</b></p> <p>5. <i>“The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood</i> thereon.”</p> <p>10. “Local Works and Undertakings other than such as are of the following classes...”.</p> |
| <b>IX. MISCELLANEOUS PROVISIONS: Ontario &amp; Quebec</b> | 142                               | “The Division and Adjustment of the Debts, Credits, Liabilities, Properties and assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of three Arbitrators...”.  |

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<sup>115</sup>The summary of applicable sections of the *British North America Act, 1867* is based on the text of the Act. See Canada, *Constitution Acts, 1867 to 1982*, <<<http://laws-lois.justice.gc.ca/eng/Const/index.html>>> (accessed November 13, 2013).

Table 5: *B.N.A. Act* Sections Important in Ontario-Canada Constitutional Issues Disputes, 1867-1905 (s. 109, s.117 & s. 146)

| <b>Part</b>                                   | <b>Section</b> | <b>Subject Matter</b>  |
|---|----------------|--|
| <b>VIII. REVENUES; DEBT; ASSETS; TAXATION</b> | 109            | <i>“All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada...shall belong to the several Provinces...in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.”</i> <sup>116</sup> |
|   | 117            | <i>“The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.”</i>   |
| <b>XI. ADMISSION OF OTHER COLONIES</b>        | 146            | <p><i>Admission of the North-western Territory and Rupert’s Land by Addresses from the Houses of Parliament to the Crown.</i></p> <p>Admission of other Provinces or Colonies requires addresses from Parliament and from the Houses of the respective Legislatures of the Colonies or Provinces.</p>                |

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<sup>116</sup>Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.).

Act, and that the mineral and forest resources within them were the property of the Province.

This collision of arguments is an illustration of what Paul Romney was highlighting in his characterization of the distribution of powers segments of the *B.N.A. Act* as an “optical illusion” requiring clarification. The conflict over these sections of the Act was resolved principally by judicial decisions in the *St. Catherine’s Milling and Lumber Company* case.

The roots of conflict over treaty annuity payments relating to both the Robinson Treaties and to Treaty 3 can also be traced to sections 109 and 142 of the *B.N.A. Act*. Section 142 provided for the division of debts and assets of Upper and Lower Canada. It also provided the basis for the Dominion Government seeking to require Ontario to assume responsibility for paying treaty annuities due to be paid to treaty beneficiaries under the annuities escalator clause of the Robinson Treaties. This resulted in an arbitration and legal process through the courts that was required to resolve the issue. It is important for this study, as the conflict with the Dominion Government over this issue led to one of Ontario’s objective in regard to Treaty 9 being to avoid a repeat of this scenario regarding annuities.

The Ontario Boundary Dispute is related to section 6 and section 146 of the Act. Section 6 states that “The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces,”<sup>117</sup> Ontario and Quebec. This seems straightforward enough, except for the fact that the northern and western boundaries of the Province of Upper Canada had never been precisely defined. Compounding this difficulty was the purchase of Rupert’s Land by Canada in 1870 that was enabled by section 146 of the Act.

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<sup>117</sup>Canada, *Constitution Acts, 1867 to 1982*, s.6.

After acquiring Rupert's Land, the national government asserted that the mineral and forest resources rich region of the former Rupert's Land lying north of the height-of-land was part of the North-Western Territory and not part of Ontario. The Province claimed that its northern border extended northward beyond the height of land and westward well past the Lakehead region. Thus section 6 and section 146 of the *B.N.A. Act* laid the foundation for the Ontario Boundary Dispute. The two sections did not pertain to the distribution of powers between the two levels of government, but they were important features of the *B.N.A. Act* and they do provide the basis for considering the Ontario Boundary Dispute as a constitutional issue.<sup>118</sup>

The Rupert's Land Transfer of 1870 and the details of the Rupert's Land and North-Western Territory Order (RLO)<sup>119</sup> require further analysis. Since the Rupert's Land Transfer was undertaken pursuant to Section 146 of the *B.N.A. Act*, the transaction constitutes part of both the constitutional and the contractual context for Treaty 9, since the entire initial area covered by Treaty 9 in 1905-06 was formerly part of Rupert's Land. There is no indication in the Archives of Ontario material regarding the Ontario Boundary Dispute of the Province of Ontario having been consulted about or involved in any way in the negotiations between Canada, the HBC and British Imperial governmental authorities and the Crown that led to Canada's purchase of Rupert's Land. This no doubt contributed to the ensuing Ontario Boundary Dispute.

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<sup>118</sup>This nuance contrasts with the assessment of James Morrison that the Manitoba Boundary Dispute "was not a constitutional issue in any sense of the word." See James Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: a Study in Dominion-Provincial Relations, 1867-1896," 95.

<sup>119</sup>*Rupert's Land and North-Western Territory Order*, [http://www.solon.org/Constitution/Canada/English/rlo\\_1870.html](http://www.solon.org/Constitution/Canada/English/rlo_1870.html) (accessed 22 April, 2014). The link originally used to access the *Rupert's Land and North-Western Territory Order* is no longer functioning. To access the *Rupert's Land and North-Western Territory Order* now see <[www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t31.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t31.html)>(accessed September 19, 2015).

There are also specific terms of the RLO dealing with the Aboriginal people of Rupert's Land that Canada was required to commit to as part of the Rupert's Land purchase. These commitments constitute contractual commitments between Canada and the Crown that are relevant for a consideration of the 1905 Treaty 9 negotiations and the MacMartin diary account of these negotiations.<sup>120</sup> In short, the extent to which Canada and Ontario have fulfilled these commitments is important for an assessment of whether or not the Honour of the Crown has been maintained in the behaviour of the Canadian and Ontario governments in the negotiation of Treaty 9.

As shown in Table 5, the admission of Rupert's Land to Canada was authorized by Section 146 of the *B.N.A. Act* pursuant to Addresses to the Crown from both Houses of the Canadian Parliament. The commitments made by Canada to the Crown regarding the Aboriginal people from Rupert's Land as part of the conditions of the Rupert's Land Transfer are contained in each of two Parliamentary Addresses to the Crown, as well as in one of the conditions of the transfer agreed to by Canada in negotiations with the HBC. The Crown required that these conditions be satisfied as part of the terms of Crown approval of the transfer of Rupert's Land to Canada.

The first Address to the Crown from Parliament for the admission of Rupert's Land and the North-Western Territory to Canada was made in December, 1867. It stipulated that upon acquisition of Rupert's Land by the Canadian Government, "...the claims of the Indian tribes to

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<sup>120</sup>Arthur J. Ray, Jim Miller and Frank Tough have examined the Rupert's Land transfer in detail and argued that, "...a detailed discussion of the negotiations and agreements between the Imperial and Canadian governments and the HBC regarding Rupertsland is needed, to provide the background that is essential for a proper understanding of the treaty negotiations that began in the 1870s." See Arthur J. Ray, Jim Miller and Frank Tough, "The Rupertsland Transfer: Expanding the Dominion of Canada," Chap. 4 in *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000), 45.



compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.”<sup>121</sup> This in effect committed the Canadian Government to embrace and apply the principles and procedures established by the *Royal Proclamation of 1763* in its dealings with Aboriginal people whose traditional territories were within the area comprised by Rupert’s Land. The second Parliamentary Address to the Crown made in May, 1869, stated: “That upon transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and wellbeing are involved in the transfer.”<sup>122</sup> This is a very significant commitment in relation to the MacMartin diary, that confirms that maintenance of the Treaty 9 First Nations’ members’ ability to continue practicing their traditional activities of hunting, fishing and trapping over their traditional territory was a primary aim of the Treaty 9 First Nations in agreeing to Treaty 9 in 1905.

The Rupert’s Land Transfer was a three cornered transaction, involving the HBC, Canada and the Crown. The territory of Rupert’s Land was transferred first from the HBC to Her Majesty Queen Victoria, then to Canada, under the terms and conditions agreed to by Canada in negotiations with the HBC and stipulated by the Crown. One of these terms and conditions was clause 14 of the Deed of surrender of Rupert’s Land by the HBC to Her Majesty. It stipulated that, “Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government;

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<sup>121</sup>*Rupert’s Land and North-Western Territory Order*, 6.

<sup>122</sup>*Ibid.*, 11.

and the Company shall be relieved of all responsibility in respect of them.”<sup>123</sup> The immediate consequence of this commitment was the negotiation by Canada of the numbered treaties that covered the area of the former Rupert’s Land. It is unclear whether Canada has followed through on the commitment made through clause 14 to engage in communication with the Imperial Government regarding actions taken to “dispose” of Indian claims for land required by Canada for purposes of settlement. Most importantly, it is an open question whether the Government of Canada has fulfilled the commitment made in the second Address to the Crown regarding the acquisition of Rupert’s Land by the Canadian Parliament in May, 1869, to protect the interest of the Indian tribes located in the territory of the former Rupert’s Land.

The Treaty 9 First Nations do not think so. This commitment by Canada to protect their interests is referenced in a current Treaty 9 First Nation’s treaty rights legal action that is presently before the courts in Ontario.<sup>124</sup> A question to be confirmed is whether the Province of Ontario, as a co-sovereignist within the Canadian Confederation, is obligated to fulfill the clause 14 “interest protection” commitment made by Canada to the Crown during negotiation of the acquisition of Rupert’s Land. Moreover, is the Government of Ontario obligated to fulfill the requirements of clause 14, despite the fact that Ontario was not consulted about it, nor a party to the three-cornered negotiations and contractual agreement reached between Canada and the HBC? It is evident from these considerations that the Rupert’s Land and North-West Territory Order constitutes an important basis for establishing the dimensions of what might constitute the section 35 (1) treaty rights of Treaty 9 First Nations.<sup>125</sup>

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<sup>123</sup>Ibid., 15.

<sup>124</sup>This will be discussed further in Chapter 6 in which the treaty obligations of Ontario are addressed.

<sup>125</sup>The legal significance of the evidence presented in the MacMartin diary in relation to confirmation of the nature and scope of Treaty 9 First Nations’ constitutionally guaranteed treaty rights is also discussed in Chapter 6.

Table 6: “Stepping Stone” Linkages: Treaty #3, Ontario Boundary Dispute and *St. Catherine’s Milling and Lumber Company* case

| <b>Event</b>  | <b>Dates</b>                  |
|---|-------------------------------|
| <b><i>North-West Angle Treaty, #3</i></b>   | <b><i>October 3, 1873</i></b> |
| Change in government: Liberal Party summoned to form government following resignation of Macdonald Government.  | November 7, 1873              |
| Liberal Party victory in 1874 Canadian general election.  | January 22, 1874              |
| 3-Man Ontario boundary Arbitration Commission Appointed.  | 1874                          |
| Arbitration Commission Award in favour of Ontario.  | August 1878                   |
| Conservative Party victory in 1878 Canadian general election.   | October 17, 1878              |
| “Act to provide for the extension of the boundaries of Manitoba” introduced and passed by Parliament.   | March 1881                    |
| Manitoba and Ontario agree on joint case reference to J.C.P.C. re Boundary Dispute.   | December 18, 1883             |
| <b><i>J.C.P.C. affirms Arbitrator’s Ontario Boundary Award of 1878.</i></b>   | <b><i>July 22, 1883</i></b>   |
| <b><i>St. Catherine’s Milling and Lumber Company</i></b> case.  | <b><i>1885-1888</i></b>       |
| <b><i>Imperial Statute: Canada (Ontario Boundary) Act, 1889.</i></b>  | <b><i>1889</i></b>            |
| <b><i>Ontario Joint legislation with the Dominion respecting settlement of accounts by arbitration and settlement of questions respecting Indian Lands.</i></b> | <b><i>May 4, 1891</i></b>     |

### 3.4 Trilogy of Events Leading to 1894 Canada-Ontario Agreement

Table 3 presented earlier in this chapter identifies the three agreements reached between the Province of Ontario and the Dominion of Canada that led to Ontario's involvement in the negotiation of Treaty 9 and the key issues that led to these agreements. Table 6 provides more detail on the issues and events that led to the first agreement, concluded in 1894. A perusal of Table 6 reveals a linkage between the North-West Angle Treaty, #3, the Ontario Boundary Dispute and the *St. Catherine's Milling and Lumber Company*<sup>126</sup> case, the resolution of which precipitated the first of three Ontario-Dominion agreements and the enabling legislation that preceded it. The nature of the essential linkage between these issues will be first explained, followed by a discussion of key aspects of each one.

The Dominion Government concluded the North-West Angle Treaty, #3 as one of the settlement treaties required to facilitate construction of the CPR. While this was the immediate impetus for all of the settlement treaties (numbered 1 through 7), Treaty 3 differs from the others as it covers territory that lies entirely within the Canadian Shield geological region. This makes Treaty 3 similar to both the Robinson Treaties of 1850 and to all of the treaties within the "northern natural resource treaties" grouping, for which the government motivation for making these treaties was to facilitate the development of the mineral, forest and hydro-electric power resources within the territory covered by these treaties. Treaty 3 was negotiated with the Saulteaux tribe of Ojibwe on October 3, 1873, by Sir Alexander Morris, Lieutenant Governor of

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<sup>126</sup>A comical aspect of the history of this case is that the spelling of the name of the company in question was not consistent across the various courts that considered the case. The spelling of the company's name used in this thesis will follow the spelling used in the decision of the Judicial Committee of the Privy Council (J.C.P.C.) in the case, "St. Catherine's Milling and Lumber Company," that is the correct spelling.

Manitoba and the North-Western Territory.<sup>127</sup> This followed two unsuccessful prior efforts by the Dominion Government to conclude a treaty in the area. The content of the treaty involved the surrender to the Crown of 55,000 square miles of territory “containing valuable mineral and timber resources,”<sup>128</sup> in exchange for financial and other considerations. These included payment to each band member of an initial “present” of \$12 and subsequent annuity payments of \$5 per annum, as well as the provision of ammunition and twine for nets for use by the Saulteaux tribe members in their hunting and fishing activities and a commitment to their ability to continue to hunt, fish and trap over the surrendered area.

The Dominion Government sought to develop the extensive mineral and forest resources within the Treaty 3 territory, but was constrained by two key issues. The first was the Ontario Boundary Dispute. Until this was resolved, it was not legally determined that the territory covered by Treaty 3 was within the territorial boundaries of the Province of Ontario, or was within the North-Western Territory acquired by Canada through the Rupert’s Land Transfer. The second issue was the constitutional question of which level of government, the Dominion of Canada or the Province of Ontario, had ownership or “beneficial interest” in the land covered by Treaty 3 and of its minerals and resources. It was the contention of the Dominion Government that through the exercise of its constitutional treaty-making authority it had acquired beneficial interest in and de-facto ownership of the land surrendered to the Crown by Treaty 3, despite the

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<sup>127</sup>Governor Morris completed a report on the treaty negotiations himself. See Alexander Morris, “Treaty Number Three, or the North-West Angle Treaty,” Chapter V in *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 44-76.

<sup>128</sup>Wayne E. Daugherty, *Treaty Research Report: Treaty Three (1873)* (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 37. For details on the complete Treaty 3 content, see *Treaty No. 3 Between Her Majesty the Queen and the Saulteaux Tribe of Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, Reprinted 1966 (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationary, 1966).

sections of the *B.N.A Act* that assigned authority over land and mineral resources within a Province to the government of that Province. This issue was resolved in Ontario's favour in the *St. Catherine's Milling and Lumber Company* case. With this issue resolved and the Imperial Statute of 1889 passed confirming the precise borders of the Province of Ontario, the stage was set for the Dominion Government and the Government of Ontario to seek to define the terms of an agreement relating to treaties within the Province. Section 3.5 below explains the steps taken by the two governments that resulted in the 1894 agreement.

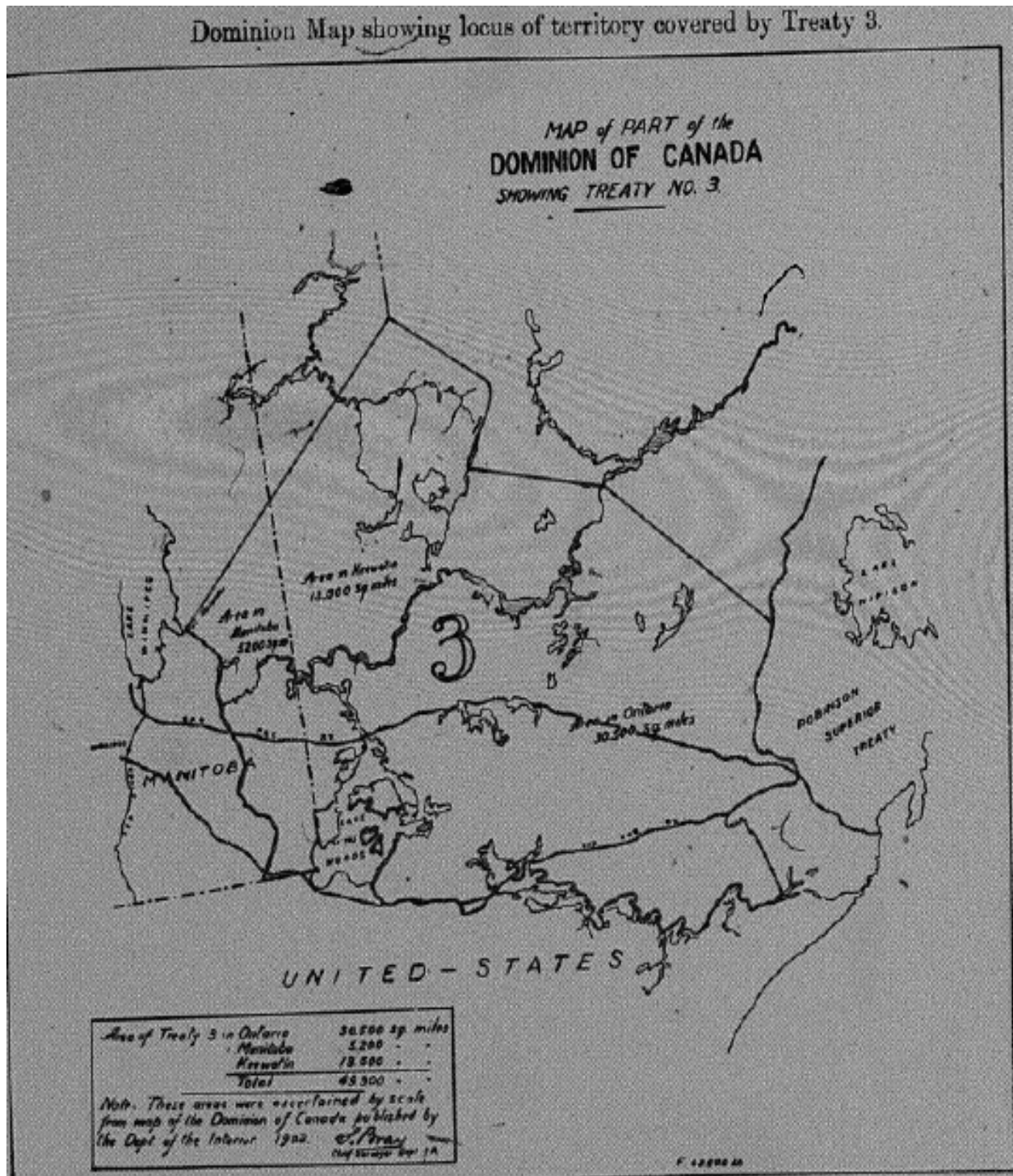
Map 3<sup>129</sup> shows the area covered by the North-West Angle Treaty, #3. Several important points are evident from a perusal of Map 3. The majority of the territory covered by Treaty 3 (56%)<sup>130</sup> was located within what later was confirmed to be the true boundaries of the Province of Ontario. This was to become a major point of dispute between Ontario and the Dominion, given that virtually all of the land area selected for reserves under the terms of the treaty was within the territory of Ontario. It is also evident that the main line of the CPR ran through the entire centre portion of the territory covered by Treaty 3, a main purpose of which of course was to facilitate its construction. Lumbering activity by the St. Catherine's Milling and Lumber Company in the central region of the Treaty 3 area in support of construction of the CPR was to precipitate Ontario taking action in October 1884 to have the company charged with illegally logging in the area.

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<sup>129</sup>Dominion Map showing locus of territory covered by Treaty 3, Record of Proceedings, Exhibit No.3, In the Privy Council on Appeal from the Supreme Court of Canada, (30/36/17), Exchequer Court Documents relative to Dominion vs. Ontario over the North West Angle Treaty, 1903, 1907, North West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2574, AO, 122a.

<sup>130</sup>The Legend to Map 3 shows that 30,500 square miles of the territory covered by Treaty 3 was within what came to be determined as the true borders of Ontario by the J.C.P.C. ruling of 1884. Since the total area surrendered by the Saulteaux through Treaty 3 was 55,000 square miles, the 30,500 squares miles of territory located within Ontario comprises 56% of the total area covered by Treaty 3.

Map 3: Treaty No. 3 Territory



Several key aspects of the North-West Angle Treaty, #3 are important to highlight as laying the groundwork for the 1894 Canada-Ontario agreement and for Ontario's ultimate involvement in Treaty 9 negotiations in 1905. These include the fact that:

- the treaty was concluded without Ontario's involvement or concurrence;
- Ontario objected to the size and location of the reserves and to the fact that the Province was not involved in their selection. This issue was addressed in the terms of the 1894 Canada-Ontario Agreement and persisted as an irritant between Ontario and the Dominion, until a solution was finally agreed upon in 1913 and implemented in 1915;<sup>131</sup>
- Governor Morris made an oral commitment during treaty negotiations that mineral resources within the reserve would be the property of the First Nations;<sup>132</sup>
- a financial commitment was made to a payment of annuities to Saulteaux band members without Ontario's involvement or concurrence. The two governments battled over this issue until it was resolved by a decision in 1910 by the J.C.P.C. in Ontario's favour. How

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<sup>131</sup>The Ontario Government's internal legal advisor, Sir Aemilius Irving, confirmed Ontario's concern about this point in a Memorandum in November of 1905 in which he recommended the following: "1. I deem it important to show that the Dominion has proposed to select a larger area for reserves out of Ontario, than is reasonable, in view of Two thirds only of the whole land surrendered being within Ontario. 2. Nearly the whole area of the Reserves is taken in Ontario so that if the selection of those Reserves is to be acquiesced in by Ontario, some consideration should be given to Ontario for yielding to the Indians as Reserves more than its just proportion." Memo made 22 Nov 1905 in relation to AE Irving waiting upon Atty Gen'l Foy and Colonel Matheson for instructions in the matter of Confirming the Reserves Treaty No 3, Notes re. Boundary dispute, Treaty #3, legal precedents, earlier stages of the arbitration proceedings, etc. (41/39/01) (1), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2577, AO. For a thorough discussion of the multi-year negotiations between Ontario and the Dominion regarding confirmation of Treaty 3 reserves, see David McNabb, "The Administration of Treaty 3: The Location of the Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915," Chapter 7 in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, 145-157.

<sup>132</sup>In a letter to the Governor General reporting on the Treaty 3 negotiations, Governor Morris stated: "They asked if the mines would be theirs. I said if they were found on their Reserves it would be to their benefit, but not otherwise. They asked if an Indian found a mine, would he be paid for it? I told them he could sell his information if he could find a purchaser, like any other person." Letter Governor Morris to Secretary of State, reporting on negotiations and completion of Treaty, 14<sup>th</sup> October, 1873, Record of Proceedings, Exhibit No.132, In the Privy Council on Appeal from the Supreme Court of Canada, (30/36/17), Exchequer Court Documents relative to Dominion vs. Ontario over the North West Angle Treaty, 1903, 1907, North West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2574, AO, 233.



it affected the Dominion-Ontario negotiations immediately preceding the 1905 Treaty 9 negotiations will be explained in section 3.7.<sup>133</sup>

Two other issues relating to Treaty 3 are important for analysis of Treaty 9 and of the significance of the MacMartin diary concerning it. These are evidence of a discrepancy between the written version of Treaty 3 and the First Nations' oral record of Treaty 3 discussions and the precise wording of the Treaty 3 "taken up" clause.

Wayne Daugherty has identified that the written version of Treaty 3 did not reflect several key items that were orally agreed to during the negotiation of Treaty 3. They are exemption of the Saulteaux from military conscription, the whole question of Indian ownership of the minerals on reserves that Governor Morris explicitly referenced in his October 14, 1873 letter to the Governor General regarding the negotiation and conclusion of the North-West Angle Treaty, #3, and the issue of Canadian Saulteaux who had migrated to the United States. The explanation provided by Daugherty for the discrepancy between the oral and written versions of Treaty 3 is that, incredibly, Treaty 3 Commissioner Dawson had confirmed subsequently that in preparing the written version of the North-West Angle Treaty, #3 they had used the draft version of the treaty that had been the object of treaty negotiations with the Saulteaux in 1872. Daugherty also noted that these oral commitments had been recorded in notes made by a Metis interpreter named Joseph Nolin who attended the treaty negotiations, working for the Saulteaux.<sup>134</sup> These "Nolin Notes" were also included with Governor Morris's report to the Governor General. They are

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<sup>133</sup>Based on an aspect of the J.C.P.C. decision in the *St. Catherine's Milling and Lumber Co.* case, the Dominion Government took action in the Exchequer Court of Ontario in June of 1903, that is identified in Table 3, to seek reimbursement from Ontario for a share of annuity and other expenses that it had incurred in concluding and administering Treaty 3 since 1873 proportionate to the amount of Treaty 3 territory that was situated within the territorial boundaries of Ontario that were finally confirmed by Imperial Statute in 1889.

<sup>134</sup>Wayne Daugherty, *Treaty Research Report: Treaty Three (1873)*, 45.

therefore a small-scale precursor of the “Diary Notes” made by George MacMartin on the Treaty 9 negotiations in 1905. Taken together, these two historical documents provide strong evidence in support of the First Nations’ arguments that the official versions of Treaty 3 and Treaty 9 are not an accurate reflection of the “real agreements” reached during the actual negotiation of those treaties in 1873 and in 1905 respectively.

The precise wording of the “taken up” clause in Treaty 3 is significant. It states:

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.<sup>135</sup>

It is the *Government of Canada* that is authorized by the terms of Treaty 3 to “take up” land required for the specified purposes of “settlement, mining, lumbering,” etc. There is no mention here of the *Government of Ontario*. This apparent oversight from the standpoint of the Province of Ontario was addressed in the terms of the 1894 Canada-Ontario Agreement, although it has not been explicitly addressed in any of the contributions to date to the historiography of Treaty 9. It has, however, been the subject of recent adjudication<sup>136</sup> that is discussed further below.

Ontario’s concerns about Treaty 3 were exacerbated by its conflict with the Dominion Government in the Ontario Boundary Dispute. This intense intergovernmental battle lasted from 1871 to 1899 and involved complex and detailed historical analysis and argumentation by both the Province of Ontario and the Dominion Government. In essence, though, the dispute was quite

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<sup>135</sup>*Treaty No.3 Between Her Majesty the Queen and the Saulteaux Tribe of Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, 5.

<sup>136</sup>*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

simple. It can be briefly explained with reference to several maps and to parts of the submission on the issue made by Ontario Premier and Attorney General Oliver Mowat to the Arbitration Commission that ruled on the question in 1878. The dispute can also be conceived of within the overall context of various factors that led to Ontario's involvement in the negotiation of Treaty 9 in 1905 as a stepping stone between the conclusion of the North-West Angle Treaty, #3 in 1873 and the *St. Catherine's Milling and Lumber Company* case that arose in 1885.

The basic chronology of the Ontario Boundary Dispute issue is summarized in Table 6. An Arbitration Commission was jointly established in 1874 by the Dominion and Ontario governments to settle the dispute, when the Liberals under Prime Minister Alexander Mackenzie were in power. The arbitrators issued a decision in August 1878 that endorsed the position expressed by Ontario in its submission. John A. Macdonald's Conservative Party was re-elected in the October 1878 national general election<sup>137</sup> and Prime Minister Macdonald refused to accept the "Liberal" arbitrators' ruling. In March of 1881, "...apparently with the intention of forcing the issue, Macdonald hastened through Parliament at the very end of the session, an Act to extend the boundaries of Manitoba."<sup>138</sup> This certainly did force the issue. It amounted to a naked effort on the part of Prime Minister Macdonald to appropriate for the Dominion Government the natural resources of the region between the Lakehead and Red River. The Prime Minister also sought to have the issue referred to the J.C.P.C. for final determination, rather than

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<sup>137</sup>In his review of these events, Christopher Armstrong referred to this election as a "federal election." See Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto Buffalo London: University of Toronto Press, 1981), 18. The use of such terminology reveals a centralist perspective. Canada has a "federal" system of government. General elections occur at both the national and provincial levels of government of this federal system of government. For there to be a "federal election," Canada would need to have provincial electors directly electing provincial representatives to the Senate portion of Canada's bicameral national Parliament. To date, this has not occurred. Historians need to take care to use accurate and precise terminology in discussing the core institutions and processes within Canada's federal system of government.

<sup>138</sup> James Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896," 97.

accede to the ruling of an arbitration commission that he felt was established by a Liberal Dominion Government of Alexander Mackenzie in cahoots with a Liberal Ontario Government of Premier Mowat. What next ensued was a testament to the adage, “be careful what you wish for.” Premier Mowat cleverly engineered an agreement with the Province of Manitoba for a joint reference of the Ontario-Manitoba Boundary issue to the J.C.P.C. that resulted in a J.C.P.C. decision in 1884 endorsing the arbitrators’ decision of 1878. Ontario Boundary Dispute historian Morris Zaslow assessed this decision as follows:

The surprising result has been attributed to the superior presentation and argumentative skill of Ontario’s attorneys, notably Premier Oliver Mowat who was closely questioned for two days by the justices, as well as the long years of preparation that had gone into the Ontario argument as compared with the unpreparedness of the Manitoba and Dominion cases.<sup>139</sup>

Part of the “long years of preparation” referenced by Zaslow was a brief submitted by Ontario Attorney General Oliver Mowat for the Arbitration between the Dominion and the Province. The brief presented Ontario’s case regarding the location of the Province’s western border that is based on a detailed review of several key historical documents. These include the *Royal Proclamation of 1763*, the *Quebec Act*, the Royal Commission of 27 December, 1774 issued to Sir Guy Carleton as Captain-General and Governor-in-Chief of the Province of Quebec and the commission of his successor Sir Frederick Haldimand, and the *Constitution Act, 1791*, that divided the Province of Quebec into the two separate provinces of Upper Canada and Lower Canada.

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<sup>139</sup>Morris Zaslow, “The Ontario Boundary Question,” Chapter 7 in *Profiles of a Province: Studies in the History of Ontario* (Toronto: Ontario Historical Society, 1967), 113. For the *Joint Case* of Ontario and Manitoba and the specific reference questions that were composed by Premier Mowat, see Memorandum of agreement between Ontario and Manitoba regarding territory in dispute, 1883, (32/37A/07), Manitoba/Ontario Boundary Dispute, F 1027-1-21, Sir Aemilius Irving fonds, F-1027, Microfilm MS 2576, AO.

Reading this brief provides the reader with a tutorial in pre-Confederation Canadian political history. Christopher Armstrong has indicated that Ontario's brief had been prepared by David Mills, Liberal MP for Bothwell.<sup>140</sup> This brief, in turn, amounted to an "executive summary" version of a much larger historical analysis document that Mills prepared as the foundation for Ontario's argument. Mills later became Minister of Justice in the administration of Liberal Prime Minister Alexander. Mills had received unparalleled prior training in constitutional law at the University of Michigan Law School under "Thomas McIntyre Cooley...one of the leading legal intellectuals in the United States and an expert on constitutional law." Mills' biographer Robert Vipond argues that Cooley "appears to have been especially influential in shaping Mills' understanding of federalism," stating:

At a time, following the Civil War, when the American model of federalism was being equated in Canada with instability and anarchy, Cooley introduced Mills to the theory of classical federalism and showed him how legislative power could be constitutionally divided between two levels of government, each 'sovereign in a qualified sense.'<sup>141</sup>

Mills, in turn, was influential in the development of Premier Mowat's understanding of federalism. In a roundabout way, then, it may be that the current shape of Canadian federalism and the balance within it between the national and provincial levels of government was influenced as much by a Michigan law school constitutional law expert, as it was by the J.C.P.C. in London, England.

The crux of the issue in dispute emphasized in Ontario's brief concerned interpretation of the direction which the border of the Province of Quebec proceeded "northward" from the

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<sup>140</sup>Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942*, 17.

<sup>141</sup>Robert C. Vipond, "Mills, David," in *Dictionary of Canadian Biography*, vol. 13, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/mills\\_david\\_13E.html](http://www.biographi.ca/en/bio/mills_david_13E.html). (accessed April 18, 2015).

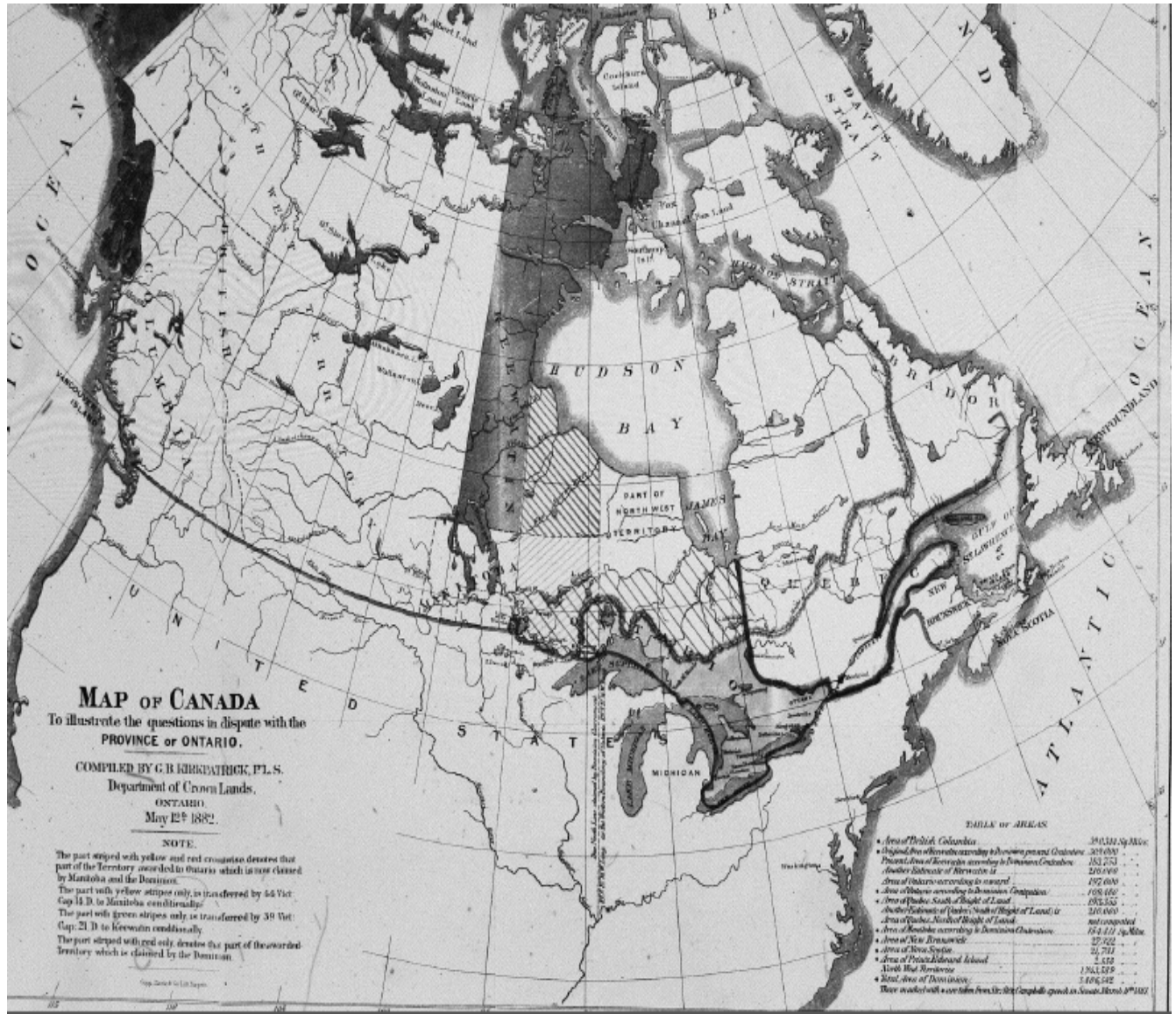
confluence of the Ohio and Mississippi rivers. The brief states that Sir Guy Carleton's Commission, "...expressly describes the line from the confluence of the Ohio and Mississippi as 'northward *along the eastern bank* of the said river [Mississippi] to the southern boundary of the territory granted to the Hudson's Bay Company.'"<sup>142</sup> In contrast, the Dominion Government contended that the boundary line from the point of confluence of the Ohio and Mississippi rivers should be drawn as a vector line, running due north from that point and not along the eastern banks of the Mississippi to its source.

The different consequences for the location of the western border of Ontario arising from the positions of Ontario and the Dominion appear in Map 4 and its derivative maps Map 5 and Map 6. Consider Map 5 by way of illustration, together with the associated enlargement of the Lakehead area of the Map that is presented in Map 6, as well as the legend for Map 4 that is presented in Figure 3. If the contention of the Ontario brief is applied to Map 5 and a line is drawn heading "northwards" along the eastern bank of the Mississippi River to its source, the boundary line would reach a location just before Turtle Lake, then turn north and cross the international border along the line of longitude shown on the map at the western end of the Lake of the Woods. The alternative view as to the western border location advanced by the Dominion is also displayed in Map 5, labelled "*Due North Line Claimed by the Dominion government.*" As shown in the map, the Dominion position would result in the western boundary of Ontario bisecting the present day community of Thunder Bay, placing the adjacent communities of Port Arthur and Fort William to its immediate West in Ontario and Manitoba respectively. The

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<sup>142</sup>A Statement of the case of the Province of Ontario respecting the Westerly and Northerly Boundaries of the Province (prepared for the Arbitration between the Dominion and the Province) Presented to the Ontario Legislature by Command of His Honour the Lieutenant Governor, By Command, Arthur S. Hardy, Secretary, Toronto, February 7, 1879, Collection of published government documents, relative to the Manitoba boundary award, (32/37A/05), Manitoba-Ontario Boundary Dispute, F 1027-1-21, Sir Aemilius Irving fonds, F-1027, Microfilm MS 2576, AO, 4.

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<sup>143</sup>Map of Canada to illustrate the questions in dispute with the Province of Ontario, No. 7 Report by the Attorney General of Ontario on the Boundary Award, 1<sup>st</sup> November, 1881, *Papers Presented to the House of Assembly of the Province of Ontario And Resolutions Moved in the Session of 1882, on the Subject of the BOUNDARY AWARD* (Toronto: Printed by C. Blackett Robinson, 1882), Collection of published government documents, relative to the Manitoba boundary award, (32/37A/05), Manitoba-Ontario Boundary Dispute, F 1027-1-21, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2576, AO. This map was compiled by G.B. Kirkpatrick of the Ontario Department of Crown Lands and is dated May 12<sup>th</sup>, 1882. It has been inserted after the fact into the body of the 1<sup>st</sup> November, 1881 Report by the Attorney General of Ontario (between page 9 and page 10) that was included in the collection of papers presented to the Ontario House of Assembly. As a result, it has no specific page reference.

Map 5: Province of Ontario Map to Illustrate Questions in Dispute (Enlarged)

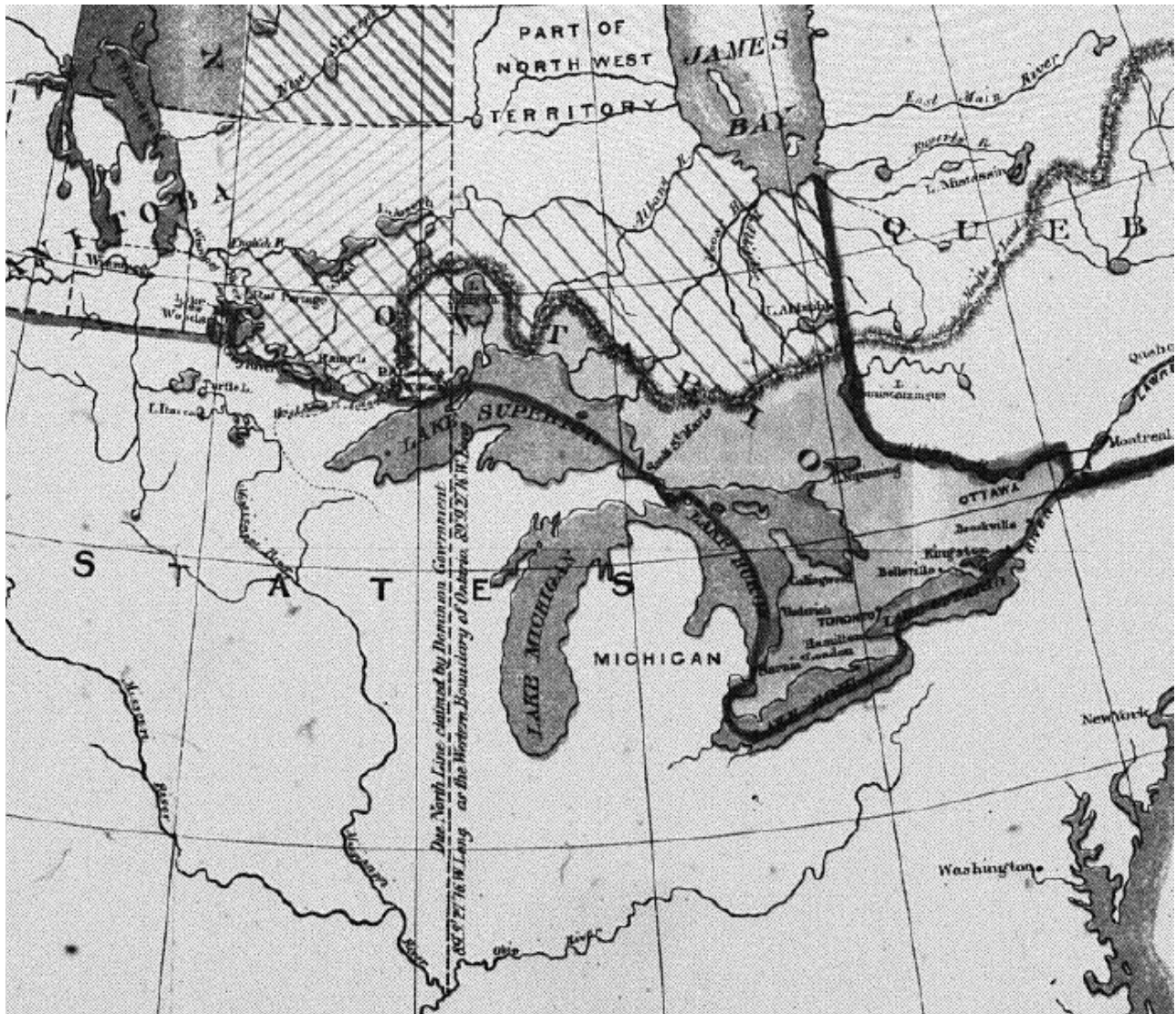
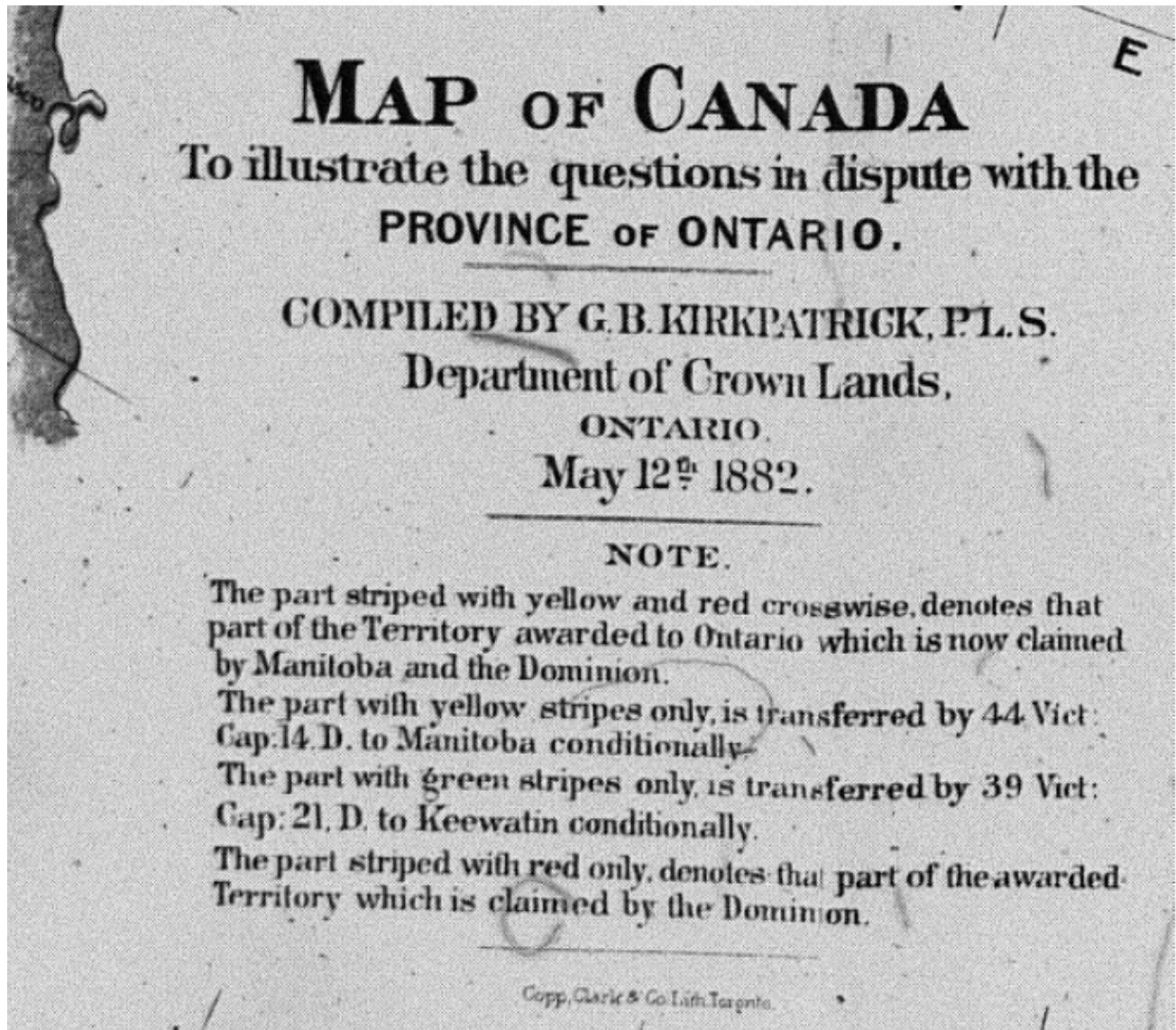




Figure 3: Legend for Map 4 (Enlarged)<sup>144</sup>



<sup>144</sup>Ibid. Figure 3 presents an enlargement of the map legend segment of Map 4.

Map 6: Province of Ontario Map (Enlargement of Lakehead Region)<sup>145</sup>



<sup>145</sup>Ibid. Map 6 presents an enlargement of the Lakehead region portion of the “Province of Ontario Map to Illustrate Questions in Dispute.” It reveals the juxtaposition of the Dominion Government’s proposed eastern Manitoba boundary, the height-of-land and the present day Port of Thunder Bay that it bisects.

J.C.P.C. saw the absence of logic in the Dominion positioning and endorsed the Ontario position that had extensive historical documentary support and analysis behind it.

Map 5 also portrays several other important facts. First of all the height of land is clearly depicted on the Map. The northern border of Ontario determined by the arbitrators' decision of 1878 and endorsed by the J.C.P.C. decision of 1884 is also shown in Map 5, located north of the height of land, running in an East-West direction down the centre of the Albany River. This marked the northern limits of the territory covered by Treaty 9 in the treaty negotiations conducted in 1905.

The second point arises from consideration of the territory shown in Map 5, located east of the proposed Dominion boundary line running through Port Arthur, in relation to the territory covered by Treaty 3 depicted in Map 3. All of the territory located west of Port Arthur extending to the Lake of the Woods would be Dominion territory, if the Act to extend the Manitoba boundary were allowed to stand, thereby making all of the Treaty 3 territory located within the territorial limits of the Province of Manitoba. The national government would as a result own the mineral and other natural resources in the region, rather than the Province of Manitoba, that was not invested with the constitutional authority over mineral resources granted to Provinces by the *BNA Act* until 1930. The J.C.P.C. no doubt recognized this, rather than any legitimate basis of argument rooted in the analysis of historical documents, as the basis for the Dominion position. The stage was therefore set for Ontario to initiate the *St. Catherine's Milling and Lumber Company* court action to protect its territorial claim and constitutional authority over land and mineral and lumber resources within its territory.

The *St. Catherine's Milling and Lumber Company* case is a complex and fascinating one that was an important contributor to the Province of Ontario assuming a role in Treaty 9 in 1905.

Analysis of the prelude to this case contained in Rhonda Telford's dissertation provides important insights into the circumstances that led the Attorney General of Ontario to initiate legal action against the company. As part of Prime Minister Macdonald's civil disobedience against and resistance to accepting the 1878 award by the arbitrators in the Ontario Boundary Dispute, Dominion Government Crown timber agents had issued permits to lumber companies in the disputed territory west of the Lakehead. St. Catherine's Milling and Lumber Company was one such Company. It received a permit on May 1, 1883 from the Dominion Government Crown Timber Agent to cut and remove timber in the region south of Wabigoon Lake, just south of the Canadian Pacific Railway line between Dryden at the western end of Lake Wabigoon<sup>146</sup> and the Denorwic CPR station point located near the eastern end of the lake. The timber was to be used to support construction of the CPR line that was finally completed in 1885. George MacMartin and his Treaty 9 Commissioners party were later to disembark from the CPR transcontinental train at Denorwic in early July of 1905 and head north to commence their Treaty 9 negotiations meetings with First Nation representatives north of the height of land. Map 7 and its enlarged version displayed in Map 8 show the precise location south of Wabigoon Lake that the St. Catherine's Milling and Lumber Company's Dominion timber cutting and removal permit pertained to. If Map 5 is viewed together with Map 3 of the territory covered by Treaty 3, it will become apparent that Wabigoon Lake is located south of the CPR mainline, roughly in the centre of the Treaty 3 map area.

Telford emphasized that the Dominion Government attempted as part of its resistance effort to the Ontario Boundary award to distinguish between the location of the boundary and the

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<sup>146</sup>*St. Catherine's Milling and Lumber Company v the Queen (Ontario)* [1888], (1889) LR 14 App Cas 46, [1888] UKPC 70, 14 App Cas 46, <http://www.bailii.org/uk/cases/UKPC>, (accessed May 23, 2015), 2.

beneficial interest in or ownership of resources. In emphasizing this point in her dissertation, Telford stressed that when Britain issued an Order-in-Council on 11 August, 1884 confirming the JCPC boundary award decision, “It did not specifically state that beneficial interest in land, timber and minerals rested solely with Ontario.”<sup>147</sup> This issue was therefore unresolved and the Government of Ontario realized that another court action would be needed to precipitate a judicial clarification of this matter. Enter the St. Catherine’s Milling and Lumber Company. The Crown initiated legal action on October 30, 1884, against the company, “on the advice of the Attorney-General for Ontario.” The action sought “to have it declared that the defendants have no rights in respect of any timber cut by them on a certain timber birth situated in the District of Algoma in the Province of Ontario, and to procure delivery of such timber to the plaintiff, & also for an injunction and damages.”<sup>148</sup> An initial judgment in favour of the plaintiff was rendered in the Ontario High Court of Justice (HCJ) on 10 June, 1885 by Chancellor the Hon. John Alexander Boyd.<sup>149</sup> The Chancellor’s judgment was upheld in the Court of Appeal for Ontario (judgment on 18 April, 1886) and before the Supreme Court of Canada (judgment

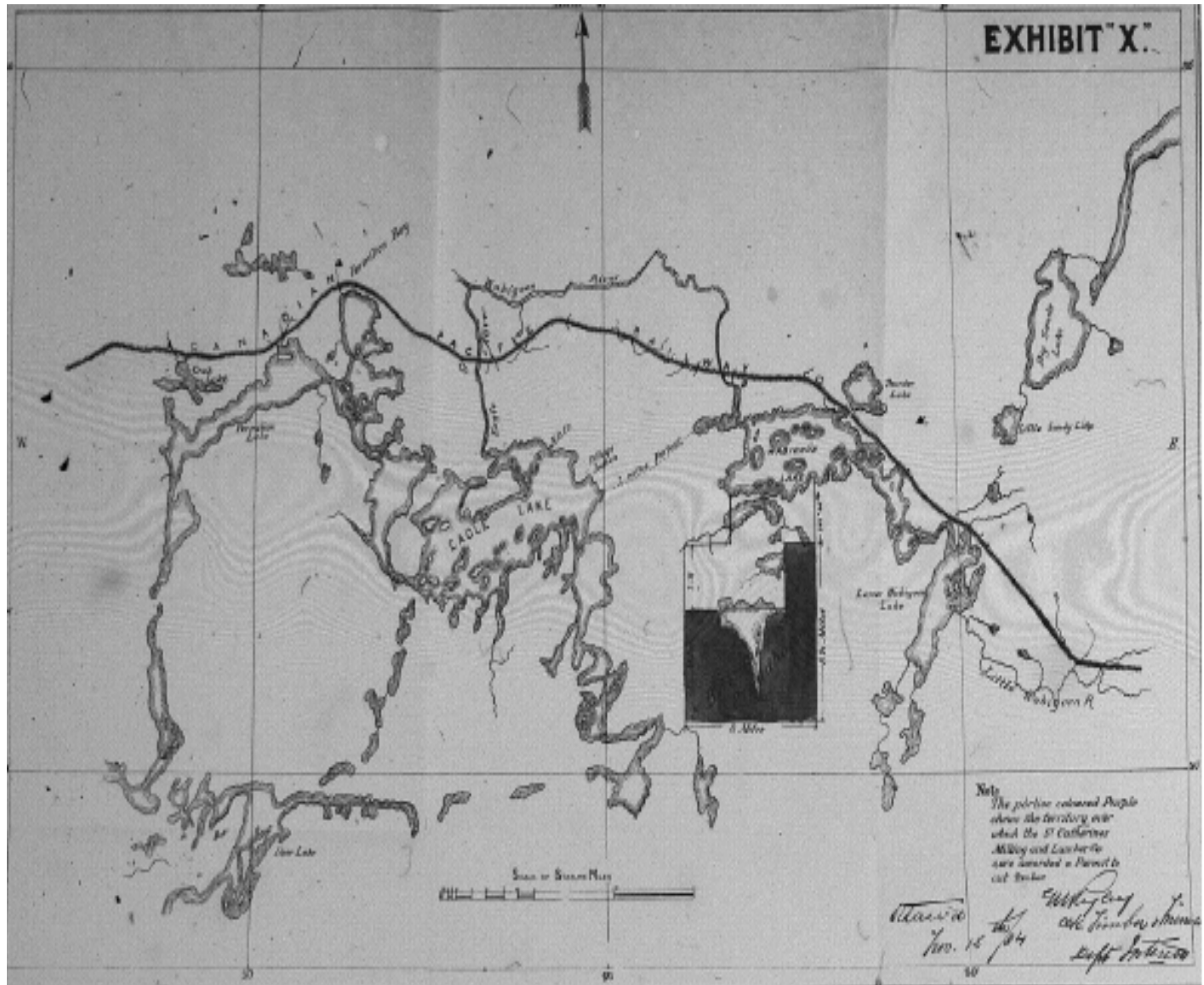
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<sup>147</sup>Rhonda Mae Telford, “‘The Sound of the Rustling of the Gold Is under My Feet Where I Stand: We Have a Rich Country’: A History of Aboriginal Mineral Resources in Ontario,” 244. Telford pointed out that the uncertainty surrounding the boundary issue had led to severe cutbacks in mining activity in the area and that the St. Catherine’s Milling Company was virtually the only lumber company cutting timber in the area. This she emphasized was a major factor leading the Ontario Government to take action against the company in order to protect and assert its interest in preserving its beneficial interest in the land, lumber and minerals in the disputed territory. For her discussion on this point, see Telford, “‘The Sound of the Rustling of the Gold Is under My Feet Where I Stand,” 244-249.

<sup>148</sup>The case summary that follows is based on information contained in the above referenced Appeal Book and in the decision in J.C.P.C. decision in the case. See Appeal Book, *Queen vs. St. Catherine’s Milling and Lumber Co.*, in Court of Appeal, 1885, printed, (41/41/01), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2577, AO, 3.

<sup>149</sup>A graduate of Upper Canada College and the University of Toronto, Sir J.A. Boyd received a DCL from Trinity University in Toronto in 1902. In 1881 the Supreme Court of Judicature was formed in Ontario and organized into the Court of Appeal and the High Court of Justice, one of the divisions of which was chancery and Justice Boyd became its head or President at that time. See Peter G. Barton, “Boyd, Sir John Alexander,” in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/boyd\\_john\\_alexander\\_14E.html](http://www.biographi.ca/en/bio/boyd_john_alexander_14E.html) (accessed April 18, 2015).

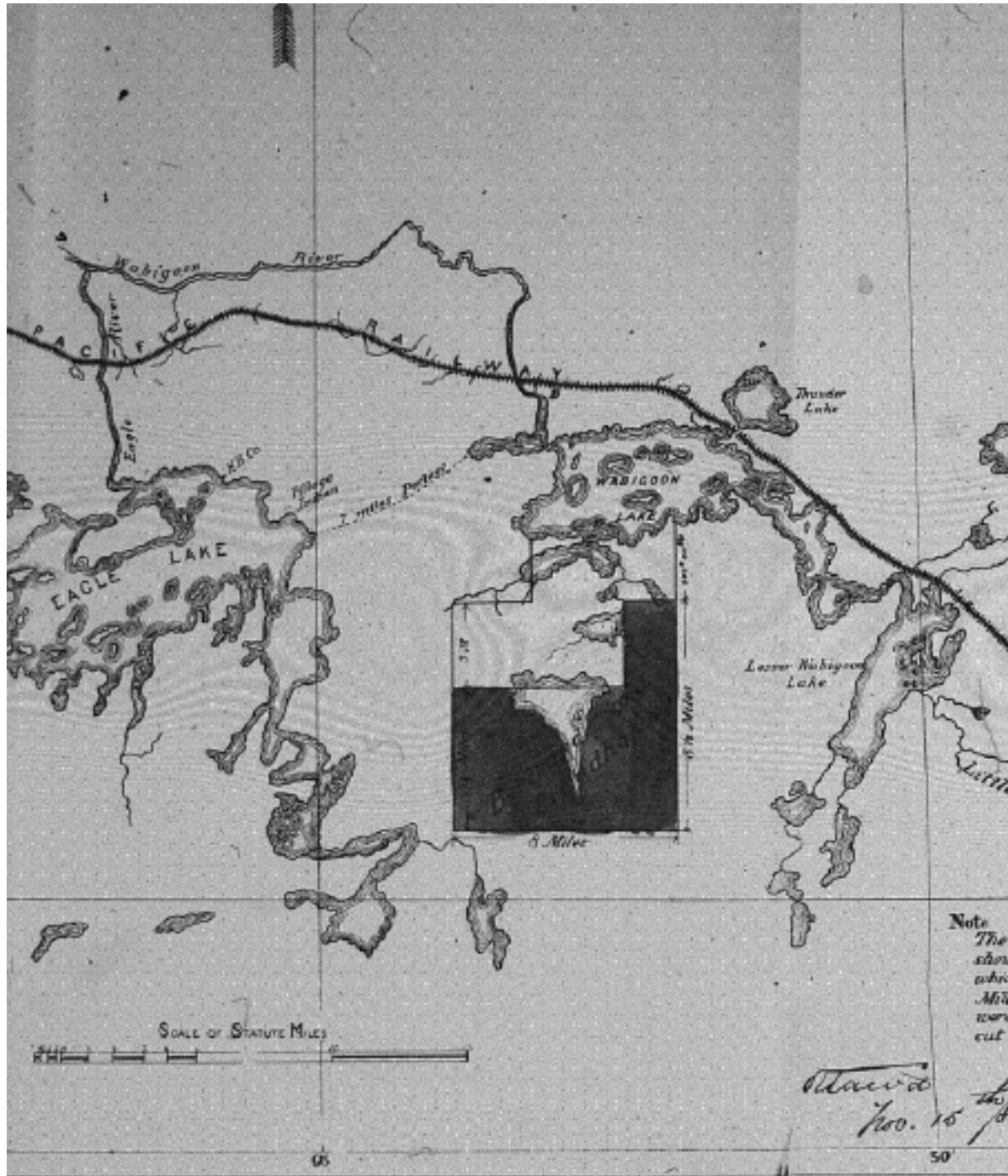
Map 7: Showing Location of Timber Limit Mentioned in Permit<sup>150</sup>



<sup>150</sup>The permit referred to above is the timber cutting permit issued by the Dominion Government to St. Catherine's Milling and Lumber Company. See Appeal Book, *Queen vs St. Catharine's Milling & Lumber Co.*, in Court of Appeal, 1885, printed. (41/41/01), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F-1027, Microfilm MS 2577, AO, 14a.



Map 8: Showing Location of Timber Limit Mentioned in Permit (Enlarged)



on 20 June, 1887) before proceeding to a hearing before the Judicial Committee of the Privy Council on 20 July, 1888. The decision of the J.C.P.C. in the case was rendered on 12 December, 1888.

There were two key issues in the case. One was which level of government in Canada had ownership of, or a “beneficial interest” in, the lands and associated resources in the land surrendered to the Crown by Treaty 3. The second and associated issue was what the nature of the Aboriginal title to the land was. Justice Boyd’s decision in the HCJ held that the Indian title to the Treaty 3 lands in question was extinguished by the Dominion in 1873 and “...enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer...The territorial jurisdiction of the Dominion extends only to the lands reserved for Indians.”<sup>151</sup> Boyd’s decision amounted to a narrow interpretation of the *B.N.A. Act* section 91 (24) allocation of legislative authority to the national government with respect to “Indians and Lands reserved for Indians.” In making this decision, Boyd completely embraced the argument presented by Ontario Attorney General and Premier Oliver Mowat when the case was heard in the HCJ on May 18, 1885. Mowat argued there that, “The territory now claimed as Indian reserves is practically equivalent to half the whole country. There is no inconsistency in letting the Dominion deal with Indians, and yet give the lands when surrendered to the particular Province.”<sup>152</sup> Lord Watson also embraced the concept presented by Premier Mowat before the HJC in his writing of the J.C.P.C. decision:

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<sup>151</sup>“Regina v. The St. Catharines Milling and Lumber Company,” in *The Ontario Reports: Reports of Cases Decided in the Queen’s Bench, Chancery, and Common Pleas Divisions of the High Court of Justice for Ontario*, Volume X, ed. James F. Smith (Toronto: Rowsell & Hutchison, King Street East, 1886), 196.

<sup>152</sup>*Ibid.*, 203. In his statement of reasoning for this decision, Justice Boyd made an important distinction between the meaning of the term “reservations” used in the Royal Proclamation of 1763 and in the *B.N.A. Act* section 91 (24) respectively. He said that “the proclamation views the Indians in their wild state” whereas the Act, “though giving



The fact that the power of legislating for Indians, and for lands which are reserved for their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.<sup>153</sup>

On the second key issue of the nature of the First Nations' title to the land, Justice Boyd concluded that the Crown held absolute title to the land surrendered by them, who before that possessed only "a present right as to the exclusive and absolute usufruct" or usage of the surrendered lands, "upon the bounty and benevolence of the Crown."<sup>154</sup> This usufructory right of usage was considered to be a "mere burden" on the Crown's underlying title in the land that was removed by the surrender accomplished through Treaty 3. As for the immediate issue of the timber cutting activities of the St. Catherine's Milling and Lumber Company, Boyd concluded "that the lands upon which the timber was cut were lands of the Province of Ontario, and the defendants had no right, or title, or authority whatever entitling them to enter upon the said lands and cut the timber as aforesaid."<sup>155</sup>

There are also two overlooked elements of the J.C.P.C. decision that deserve emphasis. One of these is that Lord Watson stated that since the benefit of the surrender of land in Treaty 3 accrued to Ontario, "Ontario must, of course, relieve the Crown, and the Dominion, of all

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jurisdiction to the Dominion over all Indians, wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large. The territorial jurisdiction of the Dominion extends only to lands *reserved* for them." See *Ibid.*, 228.

<sup>153</sup>*St. Catherine's Milling and Lumber Company v the Queen (Ontario) [1888]*, UKPC 70, 12. Lord Watson's decision of the J.C.P.C. stated that the jurisdictional question at issue in the case was "wholly dependent upon" the statutory provisions of the B.N.A. Act and concluded that "The enactments of Section 109 are...sufficient to give each province...the entire beneficial interest of the Crown in all lands within its boundaries." See *Ibid.*, 9.

<sup>154</sup>"*Regina v. The St. Catharines Milling and Lumber Company*," in *The Ontario Reports, Reports of Cases Decided in the Queen's Bench, Chancery, and Common Pleas Divisions of the High Court of Justice for Ontario*, 196,

<sup>155</sup>*Ibid.*, 197.

obligations, involving the payment of money, which were undertaken by Her Majesty.”<sup>156</sup> The national Liberal Government of Prime Minister Laurier was to later take up the invitation of Lord Watson and initiate legal action in 1903 to recover the cost of annuities and other treaty-related expenses from Ontario. The second issue relates to the Treaty 3 commitment to First Nations of a continued right to “pursue their avocations of hunting and fishing throughout the surrendered territory” subject to those portions that “...may, from time to time, be required or taken up for settlement, mining, lumbering and other purposes.”<sup>157</sup> This is both the very first substantive issue addressed by Lord Watson in his decision, as well as the final one. In cumbersome language Lord Watson said in concluding his judgment that, in essence, there may be questions relating, “...to what extent, and at what periods, the disputed territory...is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.”<sup>158</sup> This remains an open question to some extent in 2015 as Lord Watson recognized that it was in 1888. Some aspects of the issue have been clarified in the recent *Grassy Narrows First Nation v. Ontario (Natural Resources)* case, but not the specific extent and scope of consultation obligations owed by the Crown to treaty First Nations before the taken up authority is exercised by the Crown. It is in this sense that the questions posed by Lord Watson in 1888 remain open questions in 2015.

The *St. Catherine’s Milling and Lumber Company* case is of tremendous significance for relations between the national and provincial governments and for government policy towards First Nations in Canada, as well as for Aboriginal law in this country and for the constitutionally

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<sup>156</sup>*St. Catherine’s Milling and Lumber Company v the Queen (Ontario)* [1888], UKPC 70, 13.

<sup>157</sup>*Ibid.*, A-2.

<sup>158</sup>*Ibid.*, 13.

affirmed Aboriginal and treaty rights of Canada's Aboriginal peoples. Full explication of the implications of this decision is beyond the scope of this thesis, although some further discussion of the issues raised by the case occurs in Chapter 6. Historians have also offered various perspectives on the case. Anthony Hall and Donald Smith have stressed how the case reveals the racist underpinnings of Canadian Aboriginal law and government policy and of "hardening attitudes" towards First Nations, respectively,<sup>159</sup> with Dr. Smith emphasizing the importance of the concurrent events during 1885 of the Northwest Rebellion and the start of judicial proceedings in the *St. Catherine's Milling and Lumber Company* case. S. Barry Cottam emphasized the role of David Mills in providing the analytical basis for Ontario's successful arguments in the case and pointed out the "mysterious" aspects of the usufruct concept and asserted that, "...the courts did not use the concept of usufruct to clarify the Indian title as such but to establish its position relative to the title of the Crown."<sup>160</sup> The J.C.P.C. decision in the *St. Catherine's Milling and Lumber Company* case may therefore be as important perhaps for what issues that it either flagged (questions regarding the conditions for exercise of the taken up clause) or dodged (defining the precise nature of Aboriginal title), as for the issues that it definitively ruled upon.

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<sup>159</sup>See Anthony Hall, "The *St. Catherine's Milling and Lumber Company versus the Queen*: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada," in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, edited by Kerry Abel and Jean Friessen, 267-285 (Winnipeg: University of Manitoba Press, 1991), and Donald Smith, "The *St. Catherine's Milling Case* of 1885 Hardened Attitudes Toward Native Land Claims, *The Beaver*, V. 67 (February-March 1987): 5-15.

<sup>160</sup>S. Barry Cottam, "Indian title as a "Celestial Institution": David Mills and the *St. Catherine's Milling Case*," in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, 261. Cottam further fleshed out this point as follows: "The courts could leave the Indian right in vague terms once it was established as less than fee simple ownership, for the survival of the Indian and the land claim problems of today were not anticipated. Thus the legacy of that narrow vision remains, for in the process of removing the 'cloud' from the Crown title, the *St. Catherine's* case cast a long shadow over Indian title," Ibid.

As a result of the J.C.P.C. decision upholding the essence of the HJC decision in the *St. Catherine's Milling and Lumber Company* case, the premise upon which Prime Minister Macdonald's strategy of asserting claim to the territory covered by Treaty 3 no longer existed. That strategy had been based on a contention of Dominion ownership of the lands surrendered to the Dominion in the course of its negotiation of Treaty 3. This contention was definitively and finally rejected through the judicial process of consideration of the *St. Catherine's Milling and Lumber Company* case. An impetus was thus created for the Dominion Government and the Government of Ontario to come together to determine a process for handling the outstanding issues between them relating to Treaty 3, to future treaties with First Nations and regarding Indian Lands generally.

### **3.5 1891 Enabling Legislation, 1894 Canada-Ontario Agreement, and the 1895 Robinson Treaties Annuities Case**

The first step in this process was a high-level meeting between representatives of the two governments held in Toronto on November 28, 1890, featuring prominent government leaders on both sides. Ontario Premier Oliver Mowat led the Ontario Government delegation and future Prime Minister and current Dominion Justice Minister Sir John Thompson led the Dominion Government delegation.<sup>161</sup> A Memorandum by Sir Aemilius Irving on the results of this meeting confirms that Premier Mowat proposed several key items relating to Indian treaties and lands that

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<sup>161</sup>A former judge of the Nova Scotia Supreme Court, Sir Thompson had been recruited by Prime Minister Macdonald to join his Conservative government as Minister of Justice in 1885 and in 1886 he handled the debate in Parliament for the government regarding the execution of Louis Riel. When Prime Minister Macdonald died in 1891, Sir Thompson's conversion to Roman Catholicism "prevented" his immediate succession to the position of Prime Minister, but he did become Prime Minister in 1892, following the resignation of incumbent Sir John Abbott. See W. Stewart Wallace, *The MacMillan Dictionary of Canadian Biography*, Third Edition – Revised and Enlarged (Toronto: The MacMillan Company of Canada Limited, 1963), 746.

were later to be embedded in both enabling legislation in 1891 and in the first of three Ontario-Dominion agreements respecting Indian Lands in 1894. Mowat proposed the following:

- conclusion of future treaties "to require the concurrence of the Province in which the lands lie;"
- "that all Reserves under Morris Treaty shall be deemed to have required and to require the concurrence of the Province;" and also that
- "The Ontario Government shall be a party to the selection of Reserves hereafter."

Premier Mowat also proposed an arbitration process be established for dealing with "All questions relating or incident to the accounts between the Dominion and the Provinces of Quebec."<sup>162</sup>

These proposals of Premier Mowat became embedded in two important pieces of enabling legislation passed by the Legislative Assembly of Ontario,<sup>163</sup> both of which were assented to on the 4<sup>th</sup> of May, 1891 and the content of which is summarized in Table 7 and in Tables 8 & 9, respectively. Existing historiography has been inconsistent in its reference to the Indian Lands enabling legislation and most often the arbitration procedures legislation has been ignored. It is

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<sup>162</sup>Memo of matters discussed at Toronto conference, on which the agreements for arbitration were founded, November, 1890, (19/25/04), Settlement of Accounts Arbitration, F 1027-1-1, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2572, AO, item 3 & item 14. Sir Aemilius Irving later confirmed that "The draft memorandum drawn up on that occasion 28<sup>th</sup> November, 1890, formed the basis of the Statutes passed by the three several Governments in 1891 by virtue of which the present arbitrators are acting." See (History of) Arbitration Proceedings, to June, 1896, 88 pp., typescript, (19/25/18), Settlement of Accounts Arbitration, F 1027-1-1, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2572, AO, 2.

<sup>163</sup>"An Act respecting the settlement, by arbitration, of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said two Provinces," Chapter 2 in *Statutes of the Province of Ontario Passed in the Session held in the Fifty Fourth Year of the Reign of Her Majesty QUEEN VICTORIA, Being the First Session of the Seventh Legislature of Ontario* (Toronto: Lud. K. Cameron, Printer to the Queen's Most Excellent Majesty, 1891), 6-7; and "An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands," Chapter 3 in *Statutes of the Province of Ontario Passed in the Session held in the Fifty Fourth Year of the Reign of Her Majesty QUEEN VICTORIA, Being the First Session of the Seventh Legislature of Ontario*, 7-9.

significant in that it confirms that the issue of responsibility for paying treaty annuities for both the Robinson Superior Treaties of 1850 and Treaty 3 were long-standing and continuing concerns of Ontario, carrying through to the objectives of the Province in regard to Treaty 9.

The question of responsibility for payment of the increased annuities due to be paid pursuant to the “escalator clause” of the Robinson Treaties went before the arbitrators appointed pursuant to the 1891 arbitration process enabling legislation.<sup>164</sup> The initial award by the arbitrators in February of 1895 made Ontario responsible for paying these annuities, endorsing the Dominion Government view that the annuity payments were deemed to qualify as an “Interest” under Section 109 of the *B.N.A. Act* that carried with the land that the J.C.P.C. confirmed in the *St. Catherine’s Milling and Lumber Company* case passed to Ontario through Treaty 3. Premier Mowat activated the appeal provisions of clause 6 that he had effectively written into the 1891 arbitration process enabling legislation and Ontario appealed selected portions of the arbitrators’ ruling that related to the constitutional question of what constituted an “Interest” under section 109 of the *B.N.A. Act*. The Supreme Court of Canada overturned the initial arbitrators’ ruling and amended the order to absolve Ontario of the responsibility for paying the increased annuities due pursuant to the “annuities escalator” clause. The J.C.P.C. upheld this view, confirming the Supreme Court’s rejection of the Dominion Government’s

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<sup>164</sup>Hon. John A. Boyd of *St. Catherine’s Milling and Lumber Company* case fame was appointed as the Ontario arbitrator nominee, with Hon. George W. Burbidge, Judge of the Exchequer Court of Canada appointed as the Dominion Government nominee and the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec, appointed as the Quebec nominee. See *Province of Ontario v. The Dominion of Canada and the Province of Quebec: In re Indian Claims*, [1895] S.C.J. No. 96 (Q.L.), (1895) 25 SCR 434, at 442.

Table 7: Summary of Act Respecting Settlement By Arbitration of Dominion, Ontario and Quebec Accounts

| Clause # | Content   |
|----------|---|
| 1.       | <i>Arbitration reference:</i> Final & conclusive settlement of accounts with reference to three arbitrators.  |
| 2.       | <i>Appointments:</i> Arbitrators to be appointed one each by Dominion, Ontario and Quebec, with each government to approve all three arbitrators.   |
| 3.       | <i>Constitutional questions:</i> Arbitrators shall not assume to decide any disputed constitutional questions, but are to report any raised with their award.   |
| 4. & 5.  | <i>Powers of arbitrators:</i> Any two empowered to make awards.   |
| 6.       | <i>Principles to guide arbitrators:</i> Not bound to decide according to strict rules of law. When they do proceed on their view of a disputed question of law their award shall specify so and it shall be subject to appeal to the Supreme Court and thence to the J.C.P.C. |
| 7.       | <i>After successful appeal:</i> Either arbitrators, Supreme Court or J.C.P.C. may make changes to the arbitrators' award.   |
| 8.       | <i>Award binding.</i>   |
| 9.       | <i>Arbitrator Vacancies:</i> To be filled through the same process as appointments.   |

argument regarding the meaning of an “Interest” under Section 109.<sup>165</sup> One by one, the legs of the stool upon which the strategy of the Dominion Government for utilizing the constitutional division of powers to appropriate territory and natural resources and off-load treaty-related expenses at the expense of Ontario was based were collapsing.

The 1894 agreement between Ontario and the Dominion that is appended to the written version of The James Bay Treaty – Treaty No. 9, was appended in draft form to the 1891 “Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands.”<sup>166</sup> Table 8 summarizes the content of the Act and the components of the appended draft agreement are summarized in Table 9. There is only one clause in the Act that simply empowers the Lieutenant Governor in Council to enter into a proposed agreement with the Government of Canada in accordance with the terms of a draft agreement that is appended as a Schedule to the Act. For some reason, the full contents of this agreement are not appended to the original written version of The James Bay Treaty – Treaty No. 9, that only references clause 6 of the 1894 agreement, stipulating that Ontario’s concurrence is required for any future treaties. Historians have focused on this clause without considering any of the other clauses, all of which

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<sup>165</sup> The J.C.P.C. decision stated: “Their Lordships have been unable to discover any reasonable grounds for holding that, by terms of the treaties, any independent interest of that kind was conferred upon the Indian communities.” See *The Attorney General for the Dominion of Canada v The Attorney General for the Province of Ontario and the Attorney General for the Province of Ontario (Canada)* [1896], UKPC 51, accessed 5 June, 2015, <http://www.bailii.org/uk/cases/UKPC/9>.

<sup>166</sup> In discussion of the 1894 agreement and the 1891 enabling legislation in her dissertation, Rhonda Telford omitted an explanation of why an agreement reached and appended to Ontario legislation passed in 1891, reappears appended to the written version of Treaty 9 labelled as an agreement of April 16, 1894. The explanation for this is that the 1891 draft agreement did not become finalized until 1894, following considerable inertia that occurred following passage of the enabling legislation in the process of the three governments concerned selecting and confirming the appointment of arbitrators to address the “Indian Lands” questions that they had agreed to refer to the arbitrators for resolution.



are easily available for analysis either in *The Statutes of Ontario* or in the Sir Aemilius Irving fonds housed at Archives of Ontario.<sup>167</sup>

Clause 1 of the agreement displayed in Table 9 is equally important as clause 6. The two clauses need to be considered as a package, together with the confirmation of the intent behind and origin of these agreements that is recorded in the notes recorded by Sir Aemilius Irving of the meeting that occurred in Toronto on November 28, 1890. Such analysis confirms agreement that the concurrence of the Government of Ontario is required for *both* the signing of future treaties and for the selection of the reserves to be selected pursuant to both Treaty 3 and to future treaties in Ontario. This was to form part of George MacMartin's otherwise apparently unwritten mandate as Ontario's Treaty 9 Commissioner in 1905. He was to be the agent of Ontario carrying out the agreement that Ontario should be involved in the selection of the reserves. A second significant aspect of clause 1 is that it states a role for Ontario in the exercise of the Treaty authority to "take up" land from the surrendered territory and also makes an important statement exempting lands taken up by Ontario from the surrendered territory from application of the Treaty 3 Indians' hunting, fishing and trapping treaty rights. This aspect of clause 1 is:

1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes...it is hereby conceded and declared that, as the Crown lands in the surrendered treaty have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the Reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario.<sup>168</sup>

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<sup>167</sup>See Agreement between Canada and Ontario for settlement of certain questions respecting Indian lands, 1894, and memoranda regarding the Agreement, (30/36/21), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving fonds, F 1027, Microfilm MS 2574, AO.

Table 8: Summary of An Act for the settlement of Indian Lands Questions Between the Governments of Canada and Ontario

| Component | Content  |
|-----------|--|
| Clause 1  | Enables Lieutenant Governor in Council to enter into an agreement with the Government of Canada in accordance with the terms of a proposed agreement contained in a schedule to the Act. |
| Schedule  | Contains draft of a 6 clause agreement between Ontario and the Dominion (See Table 8 for a summary of the elements of the draft agreement)   |

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<sup>168</sup>See “An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands,” Chapter 3 in *Statutes of the Province of Ontario Passed in the Session held in the Fifty Fourth Year of the Reign of Her Majesty QUEEN VICTORIA, Being the First Session of the Seventh Legislature of Ontario*, 9.

Table 9: Summary of Draft Agreement Between the Dominion & Ontario Appended as a Schedule to 1891 “Act for the settlement of questions between Canada and Ontario re Indian Lands”

| Clause #  | Content  |
|-----------|--|
| <b>1.</b> | As Crown lands in Treaty 3 have been decided to belong to Ontario, <i>rights of hunting and fishing by the Indians do not continue with reference to lands taken up by the Government of Ontario.</i><br><br><i>The concurrence of Ontario is required in the selection of the reserves.</i> |
| <b>2.</b> | To avoid dissatisfaction and discontent among the Indians, Ontario to make a full enquiry as to the reserves, with a view to acquiescing in the location and extent thereof.   |
| <b>3.</b> | If Ontario is dissatisfied with the reserves, a joint commission or commissions is to be appointed to settle and determine any or all questions.   |
| <b>4.</b> | Water and lands covered by water lying between the projected headlands of any lake or sheets of water to form part of the reserve.   |
| <b>5.</b> | Agreement is made without prejudice to Parliament of Canada jurisdiction over fisheries.   |
| <b>6.</b> | <i>Any future treaties shall be deemed to require the concurrence of the Government of Ontario.</i>  |

This is another illustration of the “Trick or Treaty?” phenomenon, but with a new twist. This is the first time that there is explicit reference to the Government of Ontario or its designate being invested with the “taken up” authority. The text of Treaty 3 provides this authority to the “Government of the Dominion of Canada.” Moreover, the written version of the taken up clause appearing in Treaty 9 in 1905 also explicitly identifies “the government of the country” as being given the taken up authority. This aspect of the side agreement between Ontario and the Dominion affects the treaty First Nations’ members’ right to practice “their avocation of hunting, fishing and trapping” over the territory surrendered by the treaty. Neither the original text of the taken up clause nor this feature vesting the Ontario Government with the “taken up” authority was discussed with either Treaty 3 or Treaty 9 First Nations when the oral commitment was made to them regarding their ability to continue their traditional activities over the territory surrendered by the treaty.

But what about the Government of Ontario? Is the Ontario Government “the government of the country”? Was Ontario authorized by Treaty 9 or by its predecessor the North West Angle Treaty, #3 to exercise this “taking up” authority? The Province believed so. A segment of one of Ontario’s pre-Treaty 9 agreements negotiated with the Dominion indicates this. But these agreements, which are part of and in part appended to the written Treaty 9 document, were not discussed with the First Nation representatives who signed Treaty 9. This would appear to be at variance with the spirit and intent of the Royal Proclamation. It also appears to be at variance, as well, with the exigencies required of adherence to the principle of the Honour of the Crown that informs both the Royal Proclamation and the whole treaty-making process that is required by it.

Appearances can be deceiving. The 2014 S.C.C. decision in the *Grassy Narrows First Nation v. Ontario (Natural Resources)* case has confirmed that in fact, “Ontario and Ontario

alone has the power to take up lands under Treaty 3.”<sup>169</sup> By extension, Ontario also has this power under Treaty 9 that contains essentially the same “taken up” clause. This matter will be returned to in Chapter 6 in discussion of the legal and constitutional implications of the MacMartin diary. The *Grassy Narrows First Nation v. Ontario (Natural Resources)* decision does *not* mean that the S.C.C. has moved away from the Honour of the Crown principle as the foundation for Aboriginal and treaty law in Canada. Quite the contrary is the case. The *Grassy Narrows First Nation v Ontario (Natural Resources)* decision is consistent with *both* the constitutional division of powers between the national and provincial governments set out in the *Constitution Act, 1867* (the *B.N.A. Act*), as confirmed by the 1888 J.C.P.C. decision in the *St. Catherine’s Milling and Lumber Company* case, as well as with s. 35 (1) of the *Constitution Act, 1982*, that affirms existing treaty rights of Canada’s Aboriginal people. Such rights include the commitments made to Treaty 9 First Nations in 1905 that are confirmed by the content of the MacMartin diary. An explanation of this apparent conundrum will be provided in Chapter 6, with reference to the “off-shoot” Crown obligations identified above in Table 1, that are associated with the principle of the Honour of the Crown that informs S.C.C. Aboriginal and

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<sup>169</sup>*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447, at 449. This case involved an action brought by the Grassy Narrows First Nation, descendants of the Ojibwe signatories of Treaty 3, challenging a forestry licence issued by Ontario to a large pulp and paper manufacturer. The trial judge ruled that Ontario did not have this authority and was required to first obtain Canada’s approval. On appeal, this ruling was overturned based on the fact that s. 109 of the *Constitution Act, 1867*, “...gives Ontario beneficial ownership of Crown lands within Ontario.” The case was then appealed to the S.C.C., that summarized the essence of this case as follows: “The central question on this appeal is whether Ontario has the power to take up lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether this is subject to Canada’s approval.” See *Ibid.*, 448-449. The appeal was dismissed and the appeal court decision was upheld by the S.C.C. based on the same s. 109 constitutional authority rationale upon which the appeal court decision was made.

treaty law jurisprudence. The principal such obligation is the “duty to consult” that is now the primary such “off-shoot” Crown obligation.<sup>170</sup>

### 3.6 Ontario Mining Company Case and the 1902 Counsels’ Agreement

The second agreement reached between Ontario and the Dominion that prepared the way for Ontario’s involvement in the negotiation of Treaty 9 was an agreement reached in 1902 among Dominion and Ontario counsel made when the *Ontario Mining Company v. Seybold* case came before the J.C.P.C. for final determination. The case can be considered in some ways as a *St. Catherine’s Milling and Lumber Company* case, *part deux*. It involved a dispute “...between rival claimants under grants from the Governments of the Dominion and of Ontario respectively” pertaining to lands located on Sultana Island in the Lake of the Woods region of Ontario “and the minerals thereunder.”<sup>171</sup> The Ontario Mining Company had purchased a previously obtained patent for the land granted by the Dominion and the other rival claimant, Seybold et. al, possessed a patent issued by the Province of Ontario. The lands in question had been removed out of lands set aside as Treaty 3 reserves to form a special reserve pursuant to terms of Treaty 3. A request was made by residents of the special reserve under terms of the *Indian Act* to sell the

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<sup>170</sup>See Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 1. See also the detailed explanation of the origin and content of the “duty to consult” presented in two foundational analyses of the concept by University of Saskatchewan Law Professor and the Canada Research Chair in Indigenous Rights in Constitutional and International Law, Dwight G. Newman. These are Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon, SK: Purich Publishing Limited, 2009) and a recent update of this, Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon, SK: Purich Publishing Limited, 2014). Selected reference is made to Professor Newman’s work in the analysis of the legal and constitutional implications of the MacMartin diary that is presented in Chapter 6.

<sup>171</sup>See *The Ontario Mining Company Limited and the Attorney General for the Dominion of Canada v The Attorney General for the Province of Ontario (Canada)* [1903] AC 73, [1902] UKPC 46, <http://www.bailii.org/uk/cases/UKPC> (accessed 23 May, 2015), 2.

lands on Sultana Island with the proceeds retained for the benefit of the area First Nations people residing on the special reserve.

The case first came before the High Court of Justice of Ontario and was decided by Justice J.A. Boyd in December of 1899, who rejected the claims of the Ontario Mining Company, based on the same reasoning upon which the *St. Catherine's Milling and Lumber Company* case was decided.<sup>172</sup> Once the land in question was removed from the reserve, the Province of Ontario obtained beneficial interest in it and the associated mineral resources. This decision was upheld by Divisional Court in Ontario on 12 December 1900 and subsequently at the Supreme Court of Canada as well in June 1901. A dissenting opinion at the Supreme Court by Justice John Wellington Gwynn, however, raised the issue of the Honour of the Crown. He based his opinion on the need to follow this principle that he said was established by the Royal Proclamation of 1763 and he specifically pointed to the report made by Governor Morris on the Treaty 3 negotiations and the specific verbal commitment that he had made to the Saulteaux that minerals found on the reserve would be to their benefit.<sup>173</sup> This dissenting decision of Justice Gwynn proved influential.

The Province of Ontario and the Dominion of Canada had intervened in the *Ontario Mining Company vs. Seybold* case before it was heard by the J.C.P.C. The likely prospect of the J.C.P.C. finding Justice Gwynn's argument on the Honour of the Crown issue compelling led the

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<sup>172</sup>See *Ontario Mining Company v. Seybold*, Copy of Judgment of Boyd, C. delivered December 1899, (41/40/05), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving Fonds, F 1027, Reel 2577, AO.

<sup>173</sup>See Judgment of J. Gwynne, Supreme Court of Canada, *Ontario Mining Company vs. Seybold*, (41/40/09), North-West Angle Treaty, #3, F 1027-1-3, Sir Aemilius Irving Fonds, F 1027, Reel 2577, AO. Justice Gwynn was appointed to the Supreme Court by Sir J.A. Macdonald and has been described by Paul Romney as, "the foremost judicial exponent of Macdonald's centralist conception of Confederation." See Paul Romney, "Gwynn, John Wellington," in *Dictionary of Canadian Biography*, vol. 13, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/gwynne\\_john\\_wellington\\_13E.html](http://www.biographi.ca/en/bio/gwynne_john_wellington_13E.html) (accessed May 2, 2015).

Province of Ontario to consider making a concession to the Dominion before the case proceeded to the J.C.P.C. for decision.<sup>174</sup> The Dominion too was motivated to negotiate an agreement, given that the case had been decided in Ontario's favour at every other preceding stage of the judicial process. As a result, counsel for the two sides reached an agreement on July 7, 1902, before the case proceeded to the J.C.P.C. for decision styled, "Agreement between Dominion & Ontario Counsel, intervening upon appeal to Judicial Committee in the case of Ontario Mining Co. vs. Seybold." Unlike the 1894 agreement, this counsels' agreement of 1902 is appended in its entirety to the written text version of Treaty 9 and is summarized in Table 10.<sup>175</sup> It is significant in several respects. Ontario by this agreement consented that precious metals located on Treaty 3 reserves "shall be considered to form part of the reserves," whereas this commitment was not made with respect to precious metals located on other reserves in Ontario. For these reserves, Ontario took the position that "it depends" on the circumstances of each case. Both parties to the agreement, the Dominion and the Province, also agreed that the counsels' agreement did not represent a concession by either of their legal rights "as to the sale or title to Indian reserves or precious metals."<sup>176</sup> In short, the counsels' agreement amounted merely to a convenient policy measure taken by the two governments to facilitate progress toward confirmation of the Treaty 3 reserves set aside by the Dominion.

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<sup>174</sup>This was later confirmed by Sir Aemilius Irving in a Memorandum to the Ontario Deputy Minister of Mines, Lands and Minerals, dated 25 May, 1910. Irving wrote: "The concession 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 negotiations ask for and that the Commissioners who were representing Her Majesty did give them, assurances contemporaneously with the written treaty that, if precious metals were found on the special reserves they should belong to them." See Draft Memorandum and Opinion re Indian Treaties, 1910, (30/36/20), F 1027-1-3 North-West Angle Treaty, #3, Sir Aemilius Irving Fonds, Reel 2574, AO.

<sup>175</sup>The summary of the agreement in Table 9 is based on the content appearing in the version appended to the written version of Treaty 9. See *The James Bay Treaty – Treaty No. 9*, 27-28.

<sup>176</sup>*Ibid.*



Table 10: Content of the 1902 Dominion and Ontario Counsels' Agreement

| Item                                      | Content   |
|---|---|
| 1. Indian Reserves in Ontario             | <ul style="list-style-type: none"> <li>• <b><i>Ontario agrees to confirm the titles heretofore made by the Dominion.</i></b></li> <li>• Dominion to have full power &amp; authority to sell or lease &amp; convey title in fee simple.</li> </ul> |
| 2. Proceeds of lands converted into money | <ul style="list-style-type: none"> <li>• Dominion agrees to hold the proceeds of such lands...subject to such rights of Ontario thereto as may exist in law.</li> </ul>   |
| 3. Precious Metals on Treaty 3 Reserves   | <ul style="list-style-type: none"> <li>• <b><i>Ontario agrees precious metals on Treaty 3 reserves form part of the reserves &amp; may be disposed of by the Dominion</i></b> for the benefit of the Indians.</li> </ul>                          |
| 4. Precious metals on other reserves      | <ul style="list-style-type: none"> <li>• The question whether other reserves in Ontario include precious <i>metals to depend on the instruments &amp; circumstances and law affecting each case respectively.</i></li> </ul>                      |
| 5. Constitutional and legal rights        | <ul style="list-style-type: none"> <li>• Nothing conceded by either party re constitutional or legal rights of the Dominion or Ontario “as to the sale or title to Indian reserves as precious metals.</li> </ul>                                 |

### 3.7 Federal Government Treaty 9 Preparations and the influence of the Major Court Cases

Both before and after the 1902 counsels' agreement, the Dominion Government had been carefully considering the implications of the judicial decisions relating to Indian Lands and the constitutional authority of the national and provincial governments for its emerging plan to initiate treaty discussions for Treaty 9 with First Nations located north of the height of land in Ontario. A Memorandum prepared by Department of Indian Affairs Law Clerk Reginald Rimmer of June 24, 1901, reviewed in detail the decisions and reasoning in the *St. Catherine's Milling and Lumber Company* case in particular and the results of the Robinson Treaties annuities case. In regard to the former he noted that it had been conclusively determined that the beneficial interest in the land ceded by treaty to the Crown enured to the Province. In regard to the annuities case, Rimmer highlighted that the judicial decision in this case held that the annuity, "...covenants that the Crown entered into by that treaty were merely in the nature of personal covenants which did not attach to the land ceded."<sup>177</sup> He also emphasized the tendency of Ontario courts to support the position of Ontario on Indian treaty and lands questions and concluded his Memorandum by distinguishing between questions of law and policy.

Rimmer recommended seeking the concurrence of the provinces for any treaties as a matter of good policy. While distinct from the questions of the applicable law, he considered this to be good policy in view of the thrust of the judicial decisions of the 1880s and 1890s. Rimmer also made the prescient suggestion in the final sentence of his Memorandum: "I may, however, suggest the desirability of some definite determination being reached as to what shall be the attitude of the Department upon the questions still in dispute between the Dominion and Ontario

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<sup>177</sup>Proposed New Treaty with Ontario and Quebec, Reginald Rimmer, June 24<sup>th</sup>, 1901, The James Bay Treaty: Reports, Correspondence, drafts, Memoranda, Order in Council, RG 10 "Red Series", Volume 3033, File 235, 225, Part 1, LAC, 3.

in relation to Indian Affairs.”<sup>178</sup> Rimmer was a man before his time in this respect. He was recommending a carefully thought out and integrated issues management plan for the national government in regard to the many Indian policy and lands issues that the government had with Ontario. His directional advice was embraced by the government, however, and the 1902 counsels’ agreement was a reflection of this, as was a subsequent agreement made with Ontario that resulted in the appointment of George MacMartin as Ontario’s Treaty 9 Commissioner to work together with Dominion Government appointees in negotiation of Treaty 9.<sup>179</sup>

### **3.8 Summary and Conclusion**

This chapter has reviewed the various major issues that constituted “stepping stones” between Confederation and 1905 that established the basis for involvement of the Government of Ontario in the 1905 Treaty 9 negotiations. The multi-decade conflict between the Dominion Government and the Government of Ontario confirmed the position of the Province of Ontario as a co-sovereignist within Canada’s federal system of government, with constitutionally defined responsibilities and authority pertaining to the management of public lands and mines, minerals, timber and other natural resources within the Province.

The analysis in this chapter has also revealed Ontario’s concern about limiting its exposure to cost obligations associated with the payment of treaty annuities. Ontario’s objectives in becoming involved in the negotiation of Treaty 9 with the Dominion Government were to

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<sup>178</sup>Ibid., 4.

<sup>179</sup>Deputy Superintendent of Indian Affairs, Frank Pedley, took up the integrated issue management strategy idea aired first by Rimmer in an August 11, 1903 draft Indian policy Memorandum to Minister Clifford Sifton. After first emphasizing the practical advantages of liaison with the province(s) in advance of treaty negotiations in terms of “finance and setting apart reserves,” Pedley also suggested, “It is a matter worth considering whether in taking these questions up with the Province of Ontario we should do so independently of or in conjunction with the other questions that are now undisposed of.” See Pedley to Sifton, 11 August, 1903, The James Bay Treaty: Reports, Correspondence, drafts, Memoranda, Order in Council, RG 10 “Red Series”, Volume 3033, File 235, 225 Part 1, LAC, 5.

ensure that it was involved in the selection of reserves, to protect its ability to develop the abundant resources located in the area of “far northern Ontario” to be covered by Treaty 9 and to limit the scope of its treaty annuity payment obligations resulting from the treaty. Resolution of the various issues discussed in this chapter led to three agreements between Ontario and the Dominion, the timing of which is identified in Table 3. It is the third of these agreements in July of 1905 that led to George MacMartin’s selection as Ontario’s Treaty 9 Commissioner. The next chapter discusses this agreement, the process and key players involved in the selection of MacMartin for this role and also provides an explanation of his unique family background and presents a biographical profile of George MacMartin himself.

## **Chapter Four: D.G. MacMartin – His Treaty 9 Commissioner Appointment & Family, Biographical and Personal Profile**

### **4.1 Introduction**

This chapter focuses on D. George MacMartin and his family and on the Ontario Government decision-making process that led to his appointment as Ontario's Treaty 9 Commissioner, that was made pursuant to one of the terms of the 1905 Agreement between Canada and Ontario. The chapter begins with a summary of this third entry in the trilogy of agreements made between the Government of Ontario and the Dominion Government that led to George MacMartin's appointment as Ontario's Treaty 9 Commissioner. George MacMartin's dual nationality family heritage and his personal, family and educational background will then be discussed, following the summary of the 1905 Canada-Ontario agreement. The Ontario government decision-making process and key players involved in the selection of George MacMartin as Ontario's Treaty 9 Commissioner that resulted from this is then explained.

This chapter has two main objectives. The first is to add to the good start Dr. Long has made in *Treaty No. 9* in establishing elements of some of the basic census information-based biographical information regarding George MacMartin. This existing biographical profile will be significantly expanded by adding a description of George MacMartin's post-secondary education and of his complete professional experience up to the point of his assuming the role of Treaty 9 Commissioner in 1905 and beyond. His very unique and important family background will be explained and a portrait provided of three key family members who had a significant influence on his personal growth and development. This will explain who George MacMartin was. It will also provide part of the factual foundation for explaining why he was appointed as Ontario's Treaty 9 Commissioner. The analysis of MacMartin's personal and family background

will be presented first, following an overview of the main elements of the 1905 Canada-Ontario agreement.

The second objective of the chapter is to explain the decision-making process and key players involved in the Ontario Government Executive Council decision-making structure and process that resulted in George MacMartin's appointment as Ontario's Treaty 9 Commissioner. This will entail presentation of an alternative characterization of the appointment to the one expressed by Dr. John Long in *Treaty No. 9*, referencing James Morrison as a source, that the appointment of George MacMartin as Ontario's Treaty 9 Commissioner representative was "a patronage appointment."<sup>180</sup> A characterization that aligns more closely with the available archival source evidence is that the appointment was relationships-based and a manifestation of what S.J.R. Noel has referred to as the "operative" dimension of Ontario political culture.

Noel admits that his analysis of Ontario/Upper Canadian political culture "is at variance with the approaches of other writers." It is based on two distinctions – between the study of "contemporary and historical" political culture and between its "ideational and operative" dimensions. Noel's analytical approach is the study of the "operative" dimensions of historical political culture. This is defined as "the unarticulated assumptions, expectations, and

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<sup>180</sup>John Long, *Treaty No. 9*, 115. There is no historical evidence that George MacMartin was active in partisan politics. If this is the context within which James Morrison intended to explain MacMartin's appointment as constituting a "patronage appointment," in order for his appointment to fit this characterization, it would have to be either accompanied by an expectation of specific services provided (in exchange for the appointment) that would be of political benefit to the Government of Ontario, or would be a reward to the appointee for past such services provided. As there is no evidence that MacMartin was active in partisan politics, there is no evidentiary basis for characterization of the appointment as a "political patronage appointment." James Morrison made a tenuous linkage between the fact that Ontario Premier Whitney had established a law office in Morrisburg and the fact that George MacMartin's grandfather had previously resided in the area, as the apparent basis for his characterization of MacMartin's appointment as a "patronage appointment." At best, this is a considerable stretch of logic. George MacMartin's grandfather, Malcolm MacMartin, died in 1813, whereas Premier Whitney was elected Ontario Premier in 1905. An alternative characterization of MacMartin's appointment as Ontario's Treaty 9 Commissioner in 1905 will be presented in Chapter 4 of this thesis, based on a detailed analysis of the available and applicable archival source evidence.

understandings of the people of that society about the way the political system actually works.”<sup>181</sup>

The process of selection of Ontario’s Treaty 9 Commissioner will be shown to not only reflect the “operative” dimension of Ontario political culture, but to also be analogous to the process followed in 1850 by the Province of Canada in the selection of W.B. Robinson as Treaty Commissioner for the Robinson-Superior Treaties. Professor Leighton’s research regarding the Robinson Treaties has shown that a committee of the Executive Council was responsible for the appointment of W.B. Robinson as Commissioner to negotiate these treaties.<sup>182</sup> A similar process resulted in George MacMartin’s appointment as Ontario’s Treaty 9 Commissioner in 1905.

#### **4.2 Ontario-Dominion 1905 Treaty 9 Agreement**

The first task, however, is to briefly discuss the agreement reached between Ontario and the Dominion on July 3, 1905. Table 11 presents a summary of the components of this agreement that culminated in negotiations that occurred between Ontario and the Dominion in May and June of 1905. These negotiations have been thoroughly explained by Dr. John Long and the analysis of them will not be replicated here.<sup>183</sup> The fourth element of this agreement shown in Table 11 stipulated that one of the Treaty 9 Commissioners was to be appointed by “the Lieutenant Governor of Ontario in Council,” that in practice meant that the Ontario Government Cabinet would appoint this Commissioner. This is the authority upon which George MacMartin was appointed as Ontario’s Treaty 9 Commissioner.

Several other aspects of this agreement are deserving of emphasis. The number and scope of items in the agreement dealing with the reserves to be established by Treaty 9 that are arrayed in

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<sup>181</sup>S.J.R. Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1896* (Toronto Buffalo London: University of Toronto Press, 1990), 2.

<sup>182</sup>Douglas Leighton, “The Historical Significance of the Robinson Treaties of 1850,” 9.

<sup>183</sup>See John Long, “Planning and Negotiating, 1901-1905,” Chapter 3 in *Treaty No. 9*, 48-67.

Table 11: Summary of Ontario-Dominion Treaty 9 Agreement of July 3, 1905<sup>184</sup>

| <b>Elements</b>             | <b>Content</b>   |
|-----------------------------|--|
| 1. Treaty 9 Content         | <i>Ontario gives consent &amp; concurs in treaty terms</i> proposed to be entered into, subject to the following conditions...   |
| 2. Annuity payments         | On & after the payment to the Indians of present of \$8, <i>Ontario promises to pay annuity payment sums upon request to the Dominion</i> , free of any costs of distribution.   |
| 3. Reserves                 | <p><i>Ontario concurs in the setting aside of reserves</i> not greater than 1 square mile per family within the territory surrendered.</p> <p><i>Locations chosen</i> “by the commissioners negotiating the said treaty,” subject to the approval of the Lieutenant Governor-in-Council.</p> <p><i>No part of the expense</i> of survey and location of the reserves.</p> <p><i>No site suitable for development of water power exceeding 500 horse-power</i> shall be included within the reserve boundaries.</p> |
| 4. Ontario Commissioner     | <i>“one of the said Commissioners to be appointed by the Lieutenant Governor of Ontario in Council.”</i>   |
| 5. Treaty negotiation costs | none to be borne by Ontario.   |

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<sup>184</sup>The James Bay Treaty – Treaty No. 9, 26-27.



the description presented of this element of the agreement is notable. It confirms that details associated with selection of the reserves to be set aside from the surrendered lands in which Ontario had “beneficial interest” was a prime motivation for Ontario’s involvement in the treaty negotiations. Agreement by Ontario to reimburse the Dominion Government for the payment of treaty annuities reflected recognition by the Ontario Government of the need for it to provide compensation for the benefit that it was obtaining through the treaty, of confirmation of its beneficial interest in and constitutional authority to manage the huge tract of land that was being surrendered to the Crown by Treaty 9.

#### **4.3 George MacMartin’s Dual Family Heritage**

George MacMartin’s parents were Malcolm Daniel MacMartin, who went by the name Daniel, and the former Charlotte Morgan, who was a member of one of the founding and prominent families of Oswego, New York. Oswego is located on the shores of the southeast corner of Lake Ontario, due south of Kingston, Ontario. His parents met in Kingston in 1836<sup>185</sup> and they were married in Oswego on August 28, 1839. They had four children including George, (see Figure 4).<sup>186</sup> How his parents met in Kingston is unclear. Local history material shows that one of Charlotte MacMartin’s uncles was Matthew McNair, who was involved in shipping on

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<sup>185</sup>Ontario Ministry of Culture and Recreation, “Daniel McMartin House: 1830,” (undated pamphlet), McMartin Papers - McMartin Family Genealogy, MU 1974, Malcolm and Daniel McMartin fonds, F 912, AO. The pamphlet was researched and written for the Ontario Heritage Foundation by Ontario free-lance researcher and writer, Ms. Dianne Newell. See Dianne Newell, “The McMartin House and Inge-Va: Two Early Perth Houses,” *Canadian Collector* (July/August 1975): 8-11.

<sup>186</sup>See The Edwin Clarke “Family Tree” Manuscript, binder of photocopies of photographs of the original Oswego County Historical Society collection compiled by Nat J. Siembor, Oswego County Historical Records Office, Oswego County, N.Y., Dec. 2003. Permission of the Oswego County Historical Society to include this chart here is acknowledged with thanks. Mr. Clarke was the President of the Oswego County Anti-Slavery Society. Justin White, Oswego County Historian, in person conversation with this writer at the Oswego County Historical Records Office, Oswego County, N.Y., October 1, 2014.

Lake Ontario and freight forwarding, together with Charlotte's father.<sup>187</sup> Perhaps Miss Morgan had accompanied her uncle on a trip to Kingston. Perusal of the Archives of Ontario Daniel MacMartin correspondence files reveals that Daniel's professional responsibilities as a lawyer in Perth frequently required him to travel through Kingston en route to Toronto, so it is probable that they met at Kingston harbour when the vessels carrying each of them docked there.

Daniel MacMartin's picture appears in Figure 5.<sup>188</sup> He was born in Williamsburg, Upper Canada in 1798, the son of Malcolm MacMartin, who was an original member and officer of the King's Royal Regiment of New York (KRR NY). It was formed following the exodus of Scottish expatriates from the Mohawk Valley region of the Province of New York in the spring of 1776. This exodus was led by Sir John Johnson, son of the late Sir William Johnson, who had managed a huge plantation in the Mohawk Valley and who was the Superintendent for Indian Affairs for the Northern section of the British American colonies. The fact that Malcolm MacMartin was part of this exodus from the Mohawk Valley with Sir John Johnson is confirmed by the fact that records show that MacMartin's date of entry into the KRR NY is listed as June 19, 1776. This is the same date that Sir Guy Carleton authorized establishment of the regiment at Montreal.<sup>189</sup>

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<sup>187</sup>Information at the Oswego County Historical Records Office shows that McNair and T.S. Morgan were engaged in freight forwarding activity associated with a tannery established in 1818. See John C. Churchill, ed., *Landmarks of Oswego County New York* (Syracuse, N.Y.:D. Mason and Company, Publishers, 1895), 362.

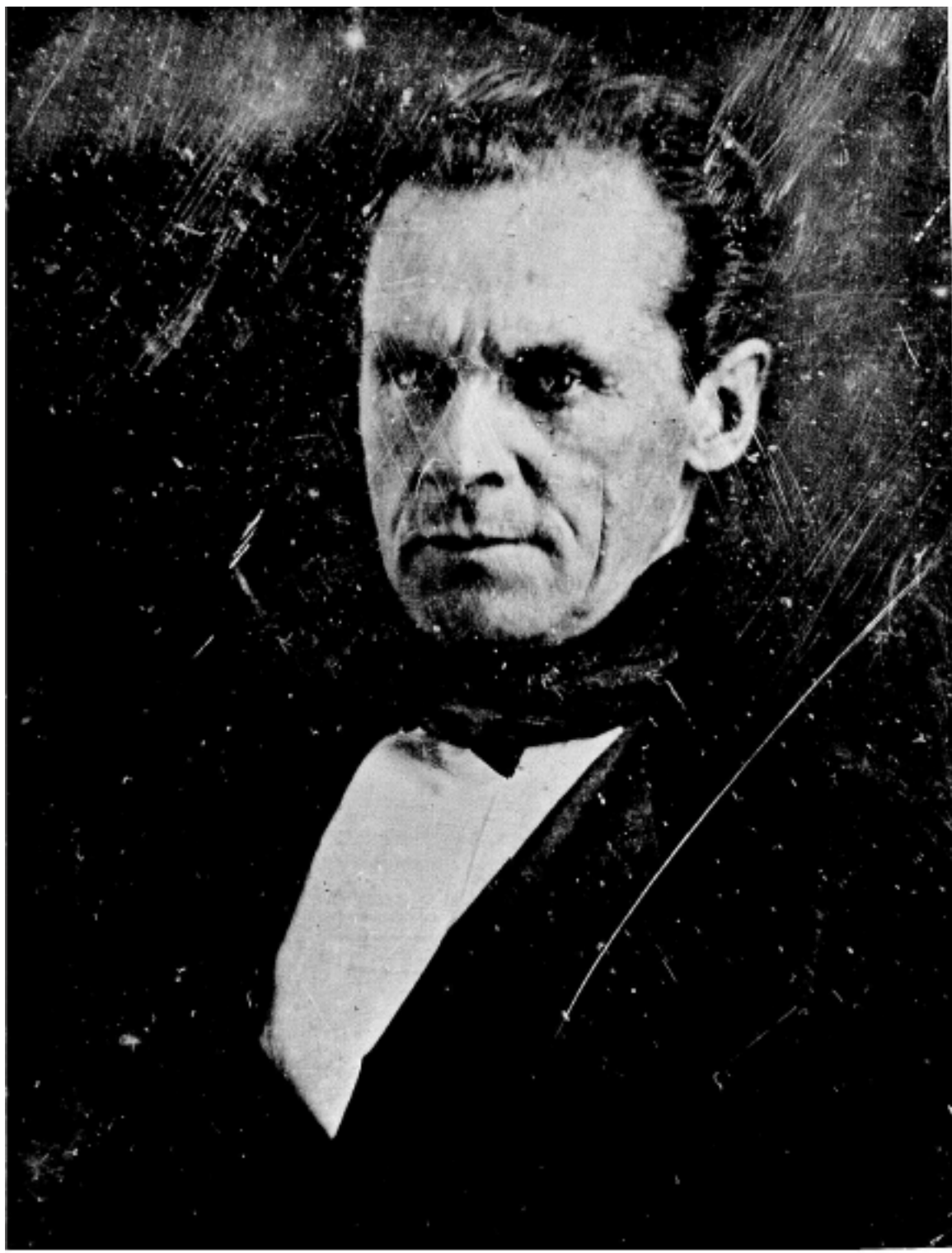
<sup>188</sup>Malcolm and Daniel McMartin fonds photograph – Daniel McMartin, accession 10449, Malcolm and Daniel McMartin fonds, F 912, AO. The kind permission of the Archives of Ontario to include this picture in this thesis is acknowledged.

<sup>189</sup>See Brigadier General Ernest A. Cruikshank, *The King's Royal Regiment of New York, with the additions of an Index, Appendices and a Master Muster Roll*, Reprinted 1984, edited by Gavin K. Watt (Toronto: The Ontario Historical Society, 1931), 10, 240.

Figure 4: Daniel and Charlotte MacMartin Family

| Mrs. Charlotte M. Morgan, nee MacMartin 36 years old |              |                      |                  |      |
|--|--------------|----------------------|------------------|------|
|  | Born         | Married              | Date of Marriage | Died |
| Charlotte Matilda Morgan                             | May 25 1815  | Daniel Mc. Martin    | Aug. 28 1839     |      |
| D. Mc. Martin Esq.                                   |              |                      | " " July         | 1869 |
| Their Children                                       |              |                      |                  |      |
| 1 Malcolm Morgan                                     | Oct. 24 1841 |                      |                  |      |
| 2 Daniel Geo. M.                                     | May 9 1844   |                      |                  |      |
| 3 Harriet Trophila                                   | Feb. 13 1846 | John Frederick Baker | Feb. 26 1866     |      |
| John F. Baker  |              | " " "                | " " "            |      |
| 4 Maude Morgan                                       | May 18 1847  |                      |                  |      |

Figure 5: Daniel McMartin, c. 1850



Daniel MacMartin's father Malcolm had died in 1813. Evidently Daniel had been taken into John Strachan's Cornwall Grammar School, perhaps through a linkage between Malcolm MacMartin and the Bethune family. There is evidence of a triangular relationship involving Reverend John Bethune, Lt. Malcolm MacMartin and Rev. John Strachan, who established the Cornwall Grammar School. John Harkness has reported that Lt. MacMartin's name appeared along with several other former officers of the KRR NY on a petition to Sir Guy Carleton dated 2 December 1786, petitioning for "the blessing of British laws and British government." Along with Lt. MacMartin's name on this petition were those of Major John Gray, Captain Richard Duncan and many other officers of the former KRR NY. Harkness also reported on Lt. MacMartin squiring around a guest to the Williamsburg area, whom he took to the home of former senior KRR NY officer, Captain James (John) Munro. This report confirms that Lt. Malcolm MacMartin was part of a community of former KRR NY officers who maintained close social connections when they resettled in the Cornwall area of Upper Canada in the late 1780s. This presents one piece of the puzzle of establishing a linkage with Rev. Strachan and his Grammar School.<sup>190</sup>

This is where the Bethune part of the connection comes in. Rev. John Bethune "...became the Chaplain of the 1<sup>st</sup> battalion of the Royal Highland Immigrants" in 1775, a role through which he would later connect with the KRR NY officers in Upper Canada. More importantly, "During the years 1803-1812, Mr. Bethune had as a near neighbour at Cornwall the Reverend John Strachan, the future Bishop of Toronto, who, like himself, had received his collegiate training in Aberdeen." Bethune had virtually a lifelong and close relationship with

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<sup>190</sup>See John Graham Harkness, *Stormont, Dundas and Glengarry: A History*, (Oshawa, Ont. : Mundy-Goodfellow Printing Co., 1946), 53, 57.

Rev. John Strachan and was described by biographer John Irwin Cooper as “on intimate terms with John Strachan.”<sup>191</sup> Lt. Malcolm MacMartin being part of the former KRR NY officer community near Cornwall he would have been part of the social circle of such officers in the Cornwall area. Upon his death, it is not inconceivable that his associate and pastor Reverend Bethune could have been the conduit for orphan Malcolm Daniel MacMartin to be taken in by his friend Reverend Strachan and educated at his Cornwall Grammar School.<sup>192</sup>

Daniel began his legal studies in 1818 articling with Chief Justice Levius P. Sherwood in Brockville and later with D’Arcy Boulton in Toronto. He later served as a Bencher of the Law Society of Upper Canada from 1859 until his death in 1869.<sup>193</sup> MacMartin was trained from the point of his Grammar School education through to and including his legal training and apprenticeship by leading members of the elite of the Province of Upper Canada. He then assumed a position of leadership among the members of the elite of the provincial legal community, reflecting his stature as one of the leading lawyers of Perth.

According to local historian Jean McGill, Daniel MacMartin “...was Perth’s third lawyer and proved himself one of the cleverest at court...”.<sup>194</sup> He located in Perth in 1823 after it was designated as the administrative centre of the newly established Upper Canada Bathurst District in 1822. MacMartin apparently arrived there with two other lawyers that year, James Boulton and Thomas Radenhurst, all three of whom had attended John Strachan’s Grammar School in

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<sup>191</sup>See A.H. Young, “The Bethunes,” *Ontario History* 27 (1931) 553-554, 560.

<sup>192</sup>J.D. Purdy described the aim of the Grammar School training as, “...an education that would awaken and develop the latent academic abilities of young men, would prepare these youths to enter public life and assume positions of leadership, and would, of course, encourage the emergence of correct religious and moral principles.” See J.D. Purdy, “John Strachan’s Educational Policies, 1815-1841,” *Ontario History* 64 (1972), 49.

<sup>193</sup>See John D. Ayre, “The Crown Attorneys of Ontario 1857-1957: A Biographical Survey,” First edition, (unpublished manuscript, 2005), 75 and “McMartin, Daniel,” *Past Member Database*, 2014, Law Society of Upper Canada Archives. Sherwood and Boulton were prominent Family Compact members.

<sup>194</sup>Jean S. McGill, *A Pioneer History of the County of Lanark* (Toronto: T.H. Best Printing Company Limited, 1968), 135.

Figure 6: The MacMartin House in Perth, Ontario



Cornwall. Evidently, “He quickly gained prominence with a clientele that stretched east to Ottawa and north to Renfrew and Pembroke.”<sup>195</sup> Perhaps as a reflection of both this business success and a desire to display and project it, he initiated construction of a mansion in Perth in 1830 that is pictured in Figure 6. The home was built in the U.S. Federal style and, “McMartin, it is reported, was very anti-Canadian and pro-American. With this attitude McMartin had all the material used in the construction shipped from the U.S. Labourers were brought in from across the border.”<sup>196</sup> This seems like an odd thing for someone trained for and adopted into the Loyalist elite of Upper Canada to have done, but it is a reflection of MacMartin’s unique personality. Larry Turner has claimed of the McMartin House that, “It has been described as one of the most pretentious homes in Canada.”<sup>197</sup> Regardless of how the home has been characterized, the fact that MacMartin constructed it while in his early thirties clearly reflects the position that he had carved out for himself within the legal community of Perth and Bathurst District at an early age.

Due to rivalry with James Boulton based on MacMartin’s business success and also his upbringing as the son of a pioneer from the Mohawk Valley, the two lawyers frequently were engaged in conflict. This resulted at one stage in Boulton horse-whipping MacMartin during one of their disputes. Larry Turner attributed this to differences in the family backgrounds of MacMartin and Boulton, that he characterized as follows: “A backwoods ruffian like McMartin born in the country, even if educated by the eminent Dr. Strachan, did not have the same station

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<sup>195</sup>Larry Turner, *Perth: Tradition and Style in Eastern Ontario*, 2<sup>nd</sup> Printing Edition (Toronto: Natural Heritage, 1998), 35.

<sup>196</sup>“McMartin House is a historical landmark in the heart of Perth,” *Perth Courier*, July 16, 1980. The picture of McMartin House displayed in Figure 11 was taken by David MacMartin on September 2, 2014.

<sup>197</sup> Larry Turner, *Perth: Tradition and Style in Eastern Ontario*, 36.



as true bloods such as they.”<sup>198</sup> This is an odd explanation that suggests that a capacity for horse whipping professional rivals was reflective of a man having attained top social standing in Upper Canada. MacMartin devised and executed a strategy for retaliation to this demonstration of upper class social standing by Boulton.<sup>199</sup>

Despite his apparent “ruffian” background and demonstrated propensity for publicly “mixing it up” with his professional rivals, Daniel McMartin demonstrated other characteristics in his role as a father. He was quite insistent in instilling in his sons George and Malcolm (who like George also attended Trinity College)<sup>200</sup> the personal skills of dedication and commitment to their studies. This is evident in a letter that he wrote to his wife Charlotte in 1856 when George was 12 years of age, in which he stated: “I hope the children are paying strict attention to their studies and that they go to Mr. Wilson’s in the afternoon as formerly.”<sup>201</sup> This letter excerpt may be typical of a time when parents encouraged their children to diligently study. As such, it may illustrate that George MacMartin was taught the importance of personal discipline, attention to his studies and to detail at an early stage of his life. These were skills that he was to further

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<sup>198</sup>Ibid., 38.

<sup>199</sup>Edward Shortt has summarized the situation as “the two leading lawyers of Perth” having “exchanged picturesque insults.” In reference to Boulton, MacMartin’s initial public broadsheet broadside stated: “I am left no alternative, but to proclaim him to the world, a LIAR, a COWARD, and a SCOUNDREL.” Daniel McMartin, “To The Public,” April 18<sup>th</sup>, 1833, quoted in Edward Shortt, *The Memorable Duel at Perth* (Perth, Ontario: The Perth Museum, 1970), 8. James Boulton’s immediate response was equally direct: “He seems by this admission to be perfectly aware of his own imbecility.” James Boulton, “To the Public,” April 18<sup>th</sup>, 1833, quoted in Edward Shortt, *The Memorable Duel at Perth*, 9.

<sup>200</sup>See *The Calendar of the University of Trinity College, Toronto, For the Year of Our Lord 1862* (Toronto: Henry Roswell, 1862), 42.

<sup>201</sup>Daniel MacMartin to Charlotte MacMartin, 26<sup>th</sup> October, 1856, 1847, Acc. No. 6145 & 10449, (Daniel) McMartin Papers, Correspondence n.d. 1827-1890, Malcolm and Daniel McMartin fonds, F 912, AO. The reference made by Daniel to a “Mr. Wilson” that he wanted to ensure that his boys visited “as formerly” was Ebenezer Wilson, who conducted private tutoring in Perth. Wilson’s stature in the community was significant, as described by Edward Shortt: “That Ebenezer Wilson was of superior standing is indicated by his appointment to the Court of Quarter Sessions for the District of Bathurst, a position he occupied for many years.” See Edward Shortt, *The Memorable Duel at Perth* (Perth, Ontario: The Perth Museum, 1970), 10.

develop in his educational and professional career. He was trained to be thorough and to pay attention to detail.

His mother Charlotte and her side of the family also contributed to George's upbringing and in particular to his taking up the opportunity to participate in the U.S. Civil War. Before discussing this, Charlotte's family background will be briefly discussed. Her picture is displayed in Figure 7.<sup>202</sup> Charlotte MacMartin consistently demonstrated a strong sense of independence of action. Daniel MacMartin's correspondence contains numerous examples of Daniel expressing exasperation in his letters to Charlotte over her independent travels home to Oswego and elsewhere in New York. Some of this was family related and some was health related, as Charlotte had a spinal condition that required medical treatment at American locations that Daniel was able to finance due to his success as a lawyer. Here are two excerpts from letters written by Daniel that reveal both his exasperation towards and his love for and devotion to his wife Charlotte:

If the Dr. can do any thing for your spinal affliction have it attended to – now is the time, while you are within his reach...You are always preaching about the expense. You must not allow that to give you any uneasiness – The restoration to health is the main object. If that can be gained I shall not attach any importance to the expense – I can soon make it up by three or four months extra exertions in my office.<sup>203</sup>

We heard of your being at Prescott last Sunday (the 23<sup>rd</sup>) and wondered what could have become of you little dreaming. That you had retraced your steps to Oswego. If it tends to benefit your health so much the better & it will not be regretted.<sup>204</sup>

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<sup>202</sup>Malcolm and Daniel MacMartin fonds photograph – Charlotte MacMartin, accession 10449, Malcolm and Daniel MacMartin fonds, F 912, AO. Permission of the Archives of Ontario to include this picture in this thesis is acknowledged with thanks.

<sup>203</sup>Daniel MacMartin to Charlotte MacMartin, 16<sup>th</sup> August, 1847, Acc. No. 6145 & 10449, (Daniel) MacMartin Papers, Correspondence n.d. 1827-1890, Malcolm and Daniel MacMartin fonds, F 912, AO.

<sup>204</sup>Daniel MacMartin to Charlotte MacMartin, Saturday morning, 29<sup>th</sup> September, 1866, Acc. No. 6145 & 10449, (Daniel) MacMartin Papers, Correspondence n.d. 1827-1890, Malcolm and Daniel MacMartin fonds, F 912, AO.

Figure 7: Charlotte Morgan MacMartin



One very noteworthy illustration of Charlotte's independence is the fact that in July of 1864 she accepted an invitation from her cousin General Hatch to attend a dinner party at Hilton Head, S.C. This was at the time a war zone. This trip indicates both Charlotte's independence as well as her connections to the American military elite through her cousin Jonathon P. Hatch.

Charlotte was not a ruffian as her husband has been described as being. She grew up in a prominent family in the community of Oswego, New York. The members of her immediate family are listed in Figure 8<sup>205</sup> Her father Colonel Theophilus Morgan (1789-1849) settled in Oswego in 1809 and descended from some of the earliest settlers of New England. He was a colonel of the local militia and also held positions as County Clerk from 1828 to 1831 and for eight years as Supervisor of Scribia, adjacent to the Town of Oswego. He was also a member of the Legislature of the State of New York and in 1833 was one of the Presidential Electors for Andrew Jackson from the State of New York, reflecting his stature as one of the founders of the Democratic Party.<sup>206</sup> He married Harriet Reed who was Charlotte Morgan MacMartin's mother. Harriet Reed's sister Sally Reed married the father of Jonathon P. Hatch, who descended from a Kentish family that came to the American colonies in 1634.<sup>207</sup> Hatch was admitted to the United States Military Academy at West Point as a cadet on July 1, 1840, graduated from West Point July 1, 1845, standing number 17 in a class of 41 and had a long and distinguished career in the

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<sup>205</sup>See the Col. Theophilus Sherman Morgan page, The Edwin Clarke "Family Tree" Manuscript. Permission of the Oswego County Historical Society to include this chart here is acknowledged with thanks.

<sup>206</sup>See Freeman E. Morgan, Jr., *Updated Morgan Genealogy: A History of James Morgan (1607-1685) of New London, Connecticut and His Descendants from 1607 to 1997*, 153.

<sup>207</sup>Anthony Slosek, "John Porter Hatch, 1822-1901: West Point, General, United States Army, Medal of Honour." (unpublished material, draft type-written biographical notes), private collection, 4. The late Anthony Slosek formerly was the Oswego Historian. The present Oswego Historian is his son, Mark Slosek, who very kindly provided this writer with copies of his father's private collection of biographical notes and related material concerning Jonathon P. Hatch, which is greatly appreciated and noted with thanks.

Figure 8: Charlotte Morgan MacMartin's Oswego Family

|                                |               |                                 |                |                |
|--------------------------------|---------------|---------------------------------|----------------|----------------|
| Col. Theophilus Sherman Morgan |               |                                 |                | 1809           |
| Theophilus S. Morgan           | Jan. 18, 1789 | Harriet Reed                    | Nov. 17, 1814  | Nov. 20, 1849  |
| Mrs. Harriet R. Morgan         |               |                                 |                | July 12, 1830  |
| <u>Their Children</u>          |               |                                 |                |                |
| 1 Charlotte Matilda            | May 25, 1815  | Daniel M <sup>c</sup> Martin    | Aug. 28, 1839  |                |
| D. M <sup>c</sup> Martin Esq   |               |                                 |                | July 1869      |
| 2 Theophilus Charles           | Nov. 31, 1817 | Elsey Wilcox                    |                |                |
| Mrs. E. W. Morgan              |               |                                 |                |                |
| Mrs. M. E. J. Morgan           |               | Nelson E. Greenleaf             |                |                |
| 3 Robert Chaffee               | Apr. 25, 1820 | Elizabeth M. Wood               | Oct. 9, 1856   |                |
| Mrs. E. W. Morgan              |               |                                 |                |                |
| 4 George Elliott               | Nov. 26, 1825 | William "Lionel" Lieut U.S.N.   |                | Jan. 6, 1856   |
| Mrs. M. E. J. Morgan           | Dec. 24, 1814 | Mary E. Lyon                    | Sept. 12, 1838 |                |
| <u>Their Children</u>          |               |                                 |                |                |
| 5 Anne Christine               | Nov. 3, 1841  |                                 |                | Sept. 10, 1841 |
| 6 James Sherman                | Sept. 4, 1843 | Lieut of Dragoon, under Sherman |                | Killed         |

U.S. Army.<sup>208</sup> As Charlotte's cousin he provided the entry point for George MacMartin to join the U.S. Army in 1864. Several of her brothers were active members of the U.S. military and her brother James Sherman Morgan was killed in action on 16 November, 1864, "in Georgia, in a desperate cavalry charge, in which he was Lieut. Of the Dragoons, in General Sherman's celebrated 'march to the seaboard.'"<sup>209</sup>

George MacMartin had a unique, dual nationality family background. Family and other relationships relating to both of his American and Canadian family backgrounds seem to have influenced both his career opportunities and career choices. The first such choice was to attend Trinity College University in Toronto. It had been established by John Strachan, whose Grammar School in Cornwall his father had attended as a youth and who had attained a position of leadership within the elite of the legal community of Upper Canada and Canada West. This provided an entrée for George MacMartin into Trinity College. The overview of his career presented in section 4.4 shows that his American family connections also provided career opportunities that he chose to pursue, but his Trinity College experience will be discussed first.

#### **4.4 George MacMartin's Educational Background at Trinity College University and Career Overview**

Both George MacMartin and the Ontario Provincial Treasurer in 1905, A.J. Matheson, were young men of Perth, Ontario who attended Trinity College University in Toronto in the early to mid 1860s. Figure 9 displays the archway at the entrance to the original Trinity College

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<sup>208</sup>Ibid., 1. Jonathon P. Hatch's Obituary in the *New York Times* highlighted Hatch's having descended from a family member who served during the American Revolution on the staff of Benedict Arnold. See "Gen. John P. Hatch Dies From Heart Disease. Served in the Mexican, Indian, and Civil Wars – A Descendant of Major Porter, an Aide de Camp on Benedict Arnold's Staff," *New York Times*, Sunday, April 14, 1901. George MacMartin was therefore directly descended from a King's Royal Regiment of New York (KRR NY) officer, as well as indirectly related to an officer who served one of the top officers on the American side during the same American Revolutionary War during which his grandfather served in the KRR NY.

<sup>209</sup>Freeman E. Morgan, Jr., *Updated Morgan Genealogy: A History of James Morgan (1607-1685) of New London, Connecticut and His Descendants from 1607 to 1997*, 153.

building located in Toronto on what is now the campus of the University of Toronto.<sup>210</sup> This archway is not just a gateway providing a point of transition from Hoskin Avenue into the main Trinity College building. It also represents a point of transition into the elite of Ontario and into a training institution famous for preparing its students for membership into this elite by providing the proper education and cultivation.

Figure 10 displays the page from the Trinity College Matriculation Register that identifies the dates that A.J. Matheson and George MacMartin entered the College.<sup>211</sup> The top part of the page shows that George MacMartin entered the college in October, 1861, a year before A.J. Matheson did, but their tenure there overlapped for about three years. As fellow natives of Perth away at college in Toronto, they could be classified as having been “college buddies.” This page is deserving of some closer scrutiny. A perusal of the names of George MacMartin’s classmates who matriculated with him in November 1861 reads like a “Who’s Who” of families associated with the Upper Canadian Family Compact. The surnames of several students recognizable as families associated with this ruling elite include Jarvis, Sherwood, Harman, Jones and Bethune. A similar story emerges upon perusal of the names on the list of students who matriculated with A.J. Matheson in 1862. Notable in this context are the names of Salter Mountain Jarvis and Charles Henry Mockridge.

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<sup>210</sup>This picture was taken by David MacMartin on March 16, 2015. Permission to include it here from Trinity College Archives Archivist, Sylvia Lassam, is acknowledged with thanks.

<sup>211</sup>Matriculation Register 1852-1959, 1930-1951, accession 990-0053. Office of the Registrar, F 1005, Box 39, Trinity College Archives. Permission provided by Trinity College Archives to include this picture of the Matriculation Register in this thesis is acknowledged with thanks.



Figure 9: Trinity College University Entrance





Figure 10: Trinity College Matriculation List, 1861 & 1862

| DATE OF MATRICULATION | STUDENT'S NAME            | AGE |
|-----------------------|---------------------------|-----|
| Sept 1861             | Ward Deane Farmer         | 21  |
|                       | John L. Lacy              | 19  |
|                       | Adoring                   | 18  |
|                       | Edward Allen Spragg       | 18  |
| Oct 1861              | Samuel Nelson             | 20  |
| Dec 1861              | Robert Henderson          |     |
| Jan 1862              | Isaac B. B. B.            |     |
| Feb 1862              | Thomas Smith              |     |
|                       | George Fredrick Norman    |     |
|                       | John Hamilton             |     |
|                       | Isaac B. B. B.            |     |
|                       | Richard Lacy              |     |
|                       | John C. Coe               |     |
|                       | Samuel Bruce Laman        |     |
|                       | Henry Thomas Jones        |     |
|                       | Samuel George Paul Martin |     |
|                       | Donald Shearer            |     |
|                       | William K. K.             |     |
| Dec 1862              | Joseph L. L.              |     |
| Jan 1863              | Daniel Spedding           |     |
|                       | John M. M.                |     |
|                       | Charles Henry Hockridge   |     |
|                       | Charles Albert Matheson   |     |
|                       | John M. M.                |     |
|                       | William B. B.             |     |
|                       | A. A. A.                  |     |
|                       | John F. F.                |     |
|                       | Ralph W. W.               |     |
|                       | A. A. A.                  |     |
| Mar 1863              | John Alexander            |     |
|                       | John L. L.                |     |
| Apr 1863              | Henry H. H.               |     |
|                       | William Wilson            |     |

Two names can be selected from the list of George MacMartin's fellow matriculators for specific illustration of the linkages between the Trinity College students and families associated with the Family Compact. These are Frederick Bethune and Samuel Bruce Harman. Frederick Bethune<sup>212</sup> was the son of Anglican clergyman and bishop, Alexander Bethune (1800-1879) and the grandson of Reverend John Bethune (1800-1879) whom biographer John Irwin Cooper said, "...was on intimate terms with John Strachan."<sup>213</sup> Samuel Bruce Harman was the son of lawyer Samuel Bickerton Harman (1819-1892), who was a member of the Council of Trinity College<sup>214</sup> and as a partner of John Hillyard Cameron, "did much legal work for the corporation of Trinity College."<sup>215</sup> These profiles are but two from the list of names of students with whom George MacMartin entered Trinity College with in October, 1861. They illustrate, however, that George MacMartin was associating with members of the families of the elite of Canada West while he was a teenager and that he was making these connections in tandem with his Perth confederate, A.J. Matheson. MacMartin's training at Trinity College no doubt helpful for his future career endeavours on both sides of the Canada-U.S. border. But for reasons of a national emergency south of this border, George MacMartin departed Trinity College University after three years of study there.<sup>216</sup>

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<sup>212</sup>A.H. Young, "The Bethunes," *Ontario History*, V. 27 (1931), 560.

<sup>213</sup>John Irwin Cooper, "Bethune, John (1791-1872)," in *Dictionary of Canadian Biography*, vol. 10, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/bethune\\_john\\_1791\\_1872\\_10E.html](http://www.biographi.ca/en/bio/bethune_john_1791_1872_10E.html) (accessed April 15, 2015).

<sup>214</sup>Edward Marion Chadwick, *Ontarian Families: Genealogies of United Empire Loyalist and Other Pioneer Families of Upper Canada*, Reprint, Lambertville, New Jersey: Hunterdon House, 1970), 185.

<sup>215</sup>Philip Creighton, "Harman, Samuel Bickerton," in *Dictionary of Canadian Biography*, vol. 12, University of Toronto/Universite Laval, 2003-, [http://www.biographi.ca/en/bio/harman\\_samuel\\_bickerton\\_12E.html](http://www.biographi.ca/en/bio/harman_samuel_bickerton_12E.html) (accessed April 15, 2015).

<sup>216</sup>The summary of George MacMartin's career presented in Table 12 is based on the variety of sources consulted in the preparation of this thesis. They include primary source documents referenced at Trinity College Archives, Archives Lanark, the National Archives in Washington, D.C., and the microfilm collection of past issues of the *Perth Courier*, housed at the Perth, Ontario campus of Algonquin College.

Table 12: Career Overview of George MacMartin (1844-1923)

| <b>Item</b>  | <b>Timing</b>                     |
|--|-----------------------------------|
| Local schooling, Perth, Canada West.   | 1844-1860                         |
| <i>University education</i> , enrolled as a Bachelor of Arts Degree candidate, <i>Trinity College University</i> , Toronto, Ontario. | 1861-1864                         |
| <i>First Lieutenant, 21<sup>st</sup> Regiment, United States Coloured Troops (U.S.C.T.).</i>   | <i>1864-1866 (U.S. Civil War)</i> |
| <i>Manager of phosphate and later mica mine, North Burgess, Lanark County, Ontario.</i>  | <i>1870- c 1910</i>               |
| <i>Ontario Treaty 9 Commissioner.</i>  | 1905-1906                         |
| Sheriff, Lanark County, Ontario.   | C 1910 – death                    |

The overview of the educational and professional career of George MacMartin in Table 12 indicates that his professional experience featured two main roles. The first was an early career tour of duty as an officer in the 21st Regiment of United States Coloured Troops (U.S.C.T.) participating in the U.S. Civil War from 1864 to 1866. Following his military service he eventually became involved in mining in the area near his hometown of Perth, Ontario. Both of these aspects of MacMartin's professional experience are important to review as part of the presentation of a personal and experiential profile aimed at answering the question – “Who was George MacMartin?”. MacMartin's Civil War experience will be considered first.

#### **4.5 George MacMartin's U.S. Civil War Service and Mining Experience**

George MacMartin left Trinity College in 1864 before completing his Bachelor of Arts Degree to join the Union Army. This decision arose because of the national emergency of the Civil War raging in America and his family's tradition of military service. A specific opportunity was presented to him arising from his American family connections through his mother and their cousin Jonathon P. Hatch, who at the time was commanding the 21<sup>st</sup> Regiment of U.S. Coloured Troops (U.S.C.T.). This was one of the regiments of African American troops established by the U.S. Army. Officers for these regiments were white. They were usually selected from families with an abolitionist background. One of the early such regiments was the “54<sup>th</sup> Regiment of Massachusetts” that has been profiled in the feature film *Glory*. Officers selected to lead the men of the 54<sup>th</sup> “...were the very distillation of New England education, culture and class distinction. Andrew sought these officers from `those circles of educated Anti-Slavery Society, which next to the colored race itself have the greatest interest in the success of

this experiment'.<sup>217</sup> There is very strong evidence that the Town of Oswego at the time of the Civil War and for years prior to that was a centre of anti-slavery advocacy. Several anti-slavery petitions had been sent to the U.S. Congress by leading residents of Oswego that included the signatures of some members of the Morgan extended family.<sup>218</sup>

What has been clearly established, however, is that Oswego was the end point of a branch line of the Underground Railroad network that before and during the Civil War coordinated the logistics for transporting escaped former slaves from the U.S. South through Oswego and on to freedom over Lake Ontario to Canada. A picture of a map of this route, taken from a display at the Oswego Public Library, appears in Figure 11.<sup>219</sup> The successful operation of the Underground Railroad would have required the active participation of many Oswego residents, as the logistics required to move escaped slaves across the water from Oswego to Canada were complex.<sup>220</sup> There is evidence of the Morgan family having come from a community with a then established and now proudly celebrated culture and tradition of anti-slavery advocacy and Underground Railroad logistical support.<sup>221</sup>

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<sup>217</sup> Willie Lee Rose, *Rehearsal for Reconstruction: The Port Royal Experiment* (New York: Oxford University Press, 1964), 249.

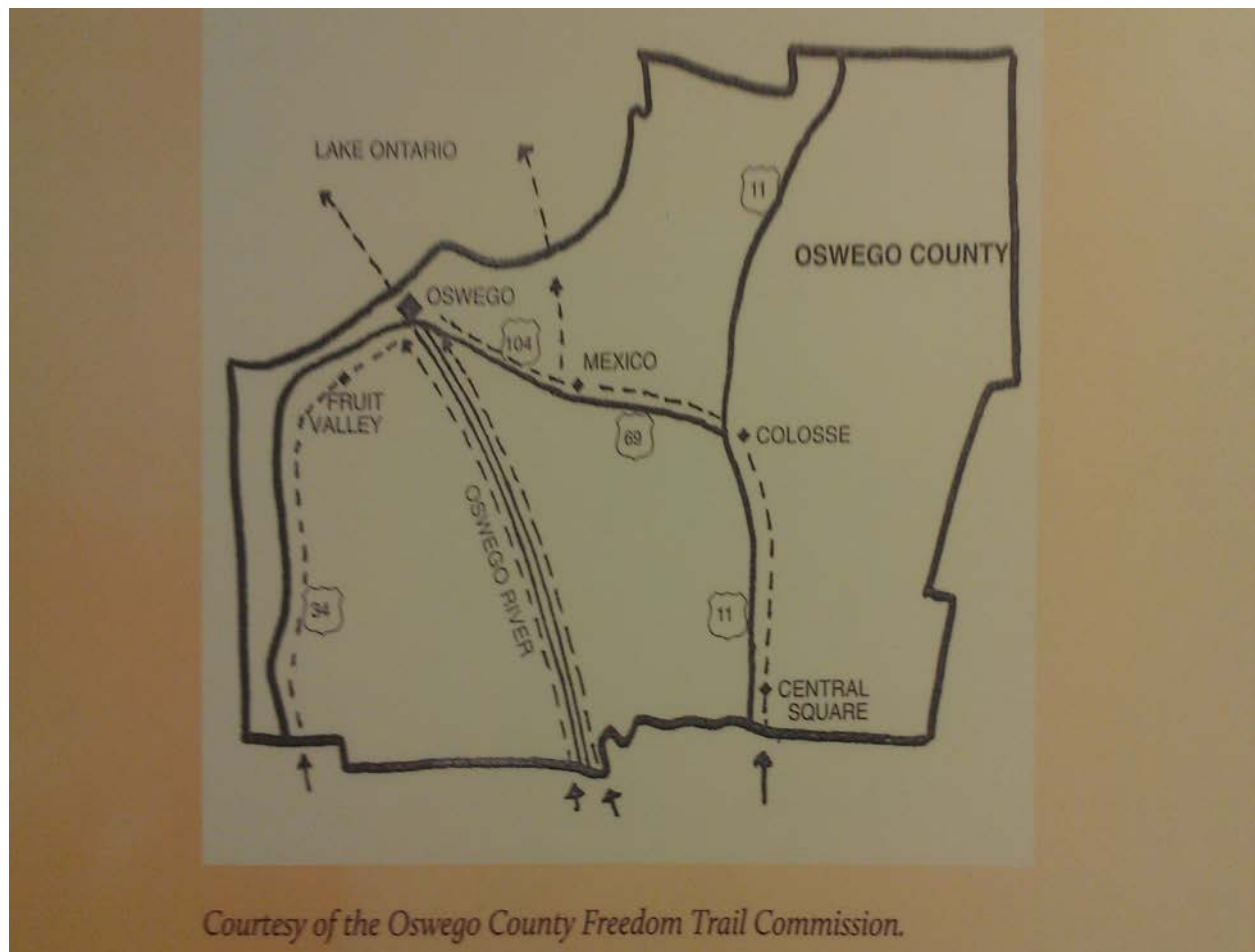
<sup>218</sup>This is based on a cross-reference reading of the last names of people who signed the petition and the last names of Morgan extended family members whose last names appear on the family genealogical charts that appear in the Edwin Clarke "Family Tree" Manuscript.

<sup>219</sup>The map was prepared by the now defunct Oswego County Freedom Trail Commission. Permission provided for it to be included in this thesis by the Oswego County Historical Society is acknowledged with thanks.

<sup>220</sup>There presently is a driving tour in Oswego and associated guide maps that detail the specific locations involved in the logistics of the movement of escaped slaves by water from Oswego to freedom in Canada.

<sup>221</sup>There presently is a driving tour in Oswego and associated guide maps that detail the specific locations involved in the movement of escaped slaves by water from Oswego to freedom in Canada.

Figure 11: Oswego as a Branch Line of the Underground Railroad



## General Hatch and MacMartin's Civil War Service

This community background no doubt contributed to the appointment of General Hatch to command the 21<sup>st</sup> Regiment of U.S.C.T. in the spring of 1864. The fact that he had distinguished himself at the Battle of South Mountain in mid-September 1862 in advance of the Battle of Antietam to such an extent that he was later awarded the Congressional Medal of Honour for his actions likely did not hurt his prospects also.<sup>222</sup> His “gallantry” in being wounded while riding back and forth along the line of his troops exhorting them to press forward up Turner’s Gap in the face of heavy fire from Confederate soldiers in sheltered positions led to a Union Army victory in this engagement. In October of 1893, Hatch was awarded the Medal of Honour for his actions during the Battle of South Mountain. The location that these actions occurred is pictured in Figure 12.<sup>223</sup>

The leadership and gallantry aspects of General Hatch’s character demonstrated at Turner’s Gap were accompanied by his possessing, like Daniel MacMartin, a propensity for theatrics. Following his participation in the Mexican-American War in 1848, General Hatch “liberated” a chair from the presidential palace in Mexico City and transported it all the way back to Oswego, New York, where it still resides as a present from the General to the City of Oswego for the use of the Mayor in Council Chambers (see Figure 13 for a picture of the plaque on this

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<sup>222</sup>The Battle of South Mountain was of strategic significance in containing the Confederate Army of Virginia and halting and turning it back in Confederate General Robert E. Lee’s first major incursion north of the Potomac River during the Civil War. The key to accomplishing this containment of General Lee was plugging the gaps in the South Mountain range, one of which was Turner’s Gap. General Hatch had just ascended to the position of Divisional Commander under Major General George McClellan as the battle was enjoined.

<sup>223</sup>John David Hoptak, *The Battle of South Mountain*, Third Printing (Charleston, S.C.: The History Press, 2012), 118. The picture of Turner’s Gap was taken by David MacMartin, September 21, 2014.

Figure 12: Turner's Gap



Figure 13: Plaque on General Hatch's "Liberated" Chair from Mexican Presidential Palace

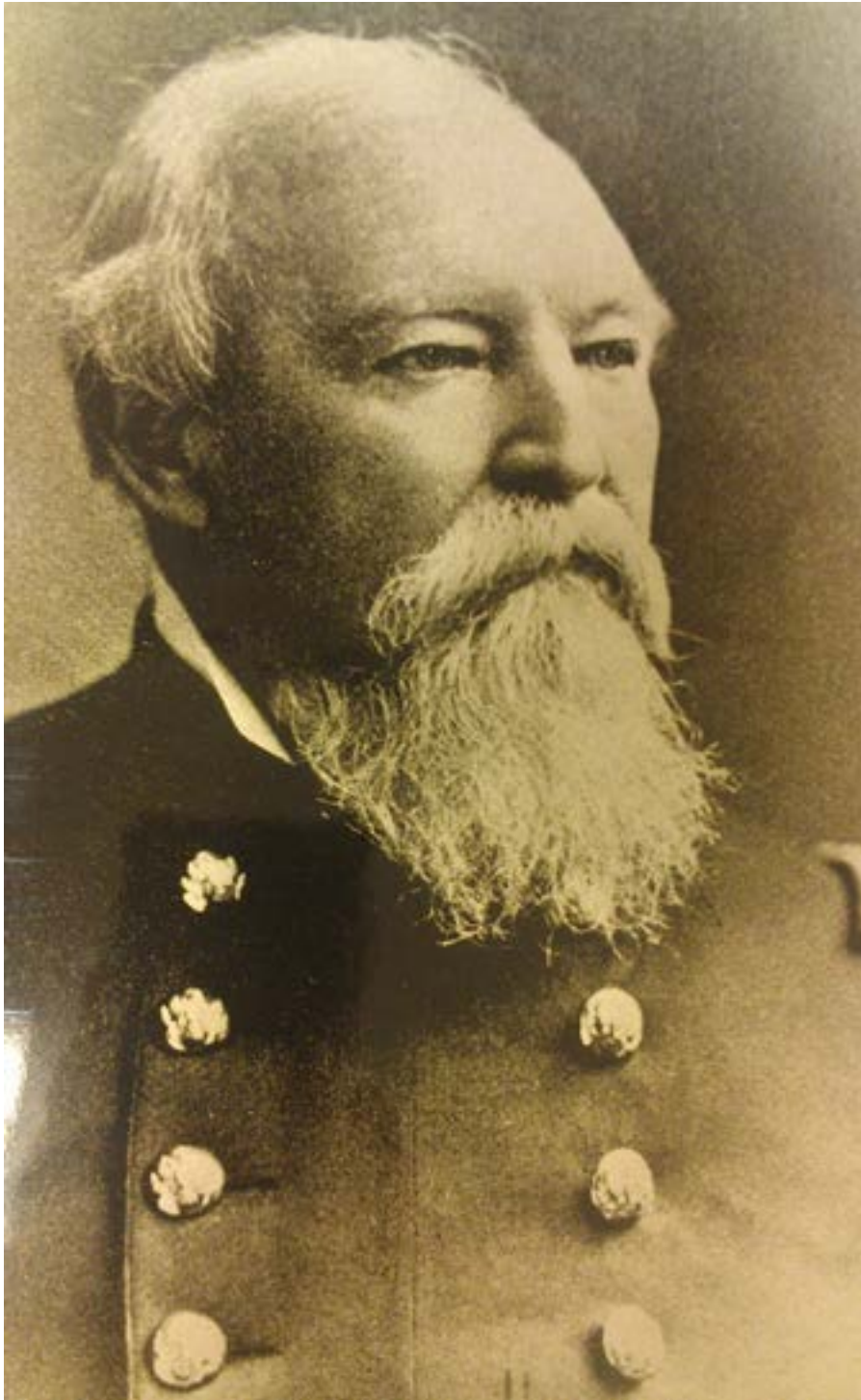




Figure 14: General Hatch' Mexican Presidential Palace Chair



Figure 15: General Jonathon P. Hatch



chair, Figure 14 for a picture of the chair<sup>224</sup> and Figure 15 for a picture of Hatch<sup>225</sup>). General Hatch's personal character and accomplishments are important for assessing important Morgan family influences on George MacMartin at an early stage in his personal development. These influences are relevant for consideration of the personal "tools" that he later brought with him in the exercise of his responsibilities in 1905 as Ontario's Treaty 9 Commissioner.

General Hatch likely had an important influence on George MacMartin's personal and professional development, an influence that is significant when assessing his selection and role as Treaty 9 Commissioner for two reasons. The first is because he spent eleven months serving under Jonathon Hatch's immediate command during the Civil War at an age and time in his life that personality theorist Erik Erikson has identified as of crucial importance in a person's character development, at the end of adolescence and the start of young adulthood.<sup>226</sup> MacMartin was twenty years old when he was appointed Aide de Camp to General Hatch. The second reason is that MacMartin had an important, daily cross-cultural leadership and orientation experience as Aide de Camp to General Hatch commanding a regiment comprised entirely of African American enlisted men. He also had direct company command experience leading Company G during the latter stages of his service. General Hatch later made reference to this in a letter to MacMartin pointing to this as attesting to his leadership ability, stating:

Soon after I was relieved from duty in South Carolina, I recommended you  
For a commission in the Regular Army when an increase should be made.  
Your service since that time of eight months in command of your company,

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<sup>224</sup>These pictures were taken by David MacMartin and were arranged with the kind assistance of the Oswego Historian, Mark Slosek, who also graciously gave permission for the inclusion of these pictures in this thesis.

<sup>225</sup>Jonathon P. Hatch photograph, M-1395, Letters Received by the Appointment, Commission and Personal Branch, Adjutant General Office, 1871-1894, Records of the Adjutant General's Office, 1780s-1917: Appointment, Commission and Personal Branch, RG 94, Fiche # 069, card 1, National Archives (NA).

<sup>226</sup>See Erik Erikson, *Childhood and Society*, Second Edition, Revised and Enlarged (New York: W.W. Norton and Company Inc., 1963), esp. chap. 7, "Eight Ages of Man," 247-274.

will I doubt not facilitate the obtaining a commission if you desire one.<sup>227</sup>

Most officers who were appointed to U.S.C.T. regiments had to be appointed following the completion of candidate exams and review by specially established review boards. George MacMartin had by-passed this process, however, due to his connections to a war hero within the U.S. military leadership, General Hatch, who appointed MacMartin directly to an officer's position with the 21<sup>st</sup> Regiment U.S.C.T. by a General Order dated May 21, 1864.<sup>228</sup> Data contained in the annual reports of the United States Coloured Troops located at the National Archives in Washington, D.C., show that as of October 1865, only 11% of the officers appointed to positions within U.S.C.T. regiments to that point in the Civil War were appointed in this manner.<sup>229</sup> George MacMartin was therefore unique in having membership in elites on both sides of the Canada-U.S. border. In this way he can be considered as being a personification of the evolving dual culture in Upper Canada infused with both American and British/Canadian based elements that Jane Errington has discussed in *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology*.<sup>230</sup>

A picture of George MacMartin in his U.S. Army uniform appears in Figure 16. Prior to his disbandment from the 21<sup>st</sup> Regiment, U.S.C.T. in April of 1866, George MacMartin had been positively influenced by his experience as an officer in the U.S.C.T. and applied for appointment in one of the regular divisions of the U.S. Army that were planned to be raised following the

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<sup>227</sup>Jonathon P. Hatch to D. Geo. MacMartin, Esqu., August 2, 1866, M1174 CB 1867, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M1064, Microfilm Roll #355, NA.

<sup>228</sup>General Orders No. 69, May 21, 1864, General Orders, Jan-Dec 1864 & Aug 1866-March 1869, Vol. 31, RG 393, NA.

<sup>229</sup>C.W. Foster Letter to the Adjutant General's Office, Bureau for Colored Troops, October 20, 1865, Annual Reports of the Adjutant General Relating to the Colored Troops Division, 1864-65, 1867, Records of the Adjutant General's Office, 1780s -1917: Appointment, Commission and Personal Branch, RG 94, NA.

<sup>230</sup>Jane Errington, *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology*, Second Edition (Montreal & Kingston: McGill-Queen's University Press, 2012).

Civil War. He expressed this sentiment in a letter to the Secretary of War in February of 1864, saying:

I have the honour to apply for an appointment in one of the new Regular Regiments to be raised for the Army. I have served nearly two years in the field, and as to my fitness and Character, I beg leave to refer you to the records of my Regiment, and the reports of the officers whom I have served.<sup>231</sup>

After waiting for over a year, General Grant directed that his application be put on file.<sup>232</sup> No doubt the fact that MacMartin's cousin General Hatch had been a strong personal supporter of Major General George McClellan who had unsuccessfully contested the Presidency running as the candidate of the Democratic Party in the 1864 Presidential election contributed to the filing of his application for an officer's position by General Grant.

We saw in the discussion above that MacMartin's family and educational background and training featured an emphasis on development of a sense of dutifulness and conscientiousness. Evidence that MacMartin had displayed this trait during his Civil War service was noted by General Hatch in a letter of recommendation that he wrote in March of 1866, in support of MacMartin's application for an officer position with the Regular Army of the United States after the end of the Civil War. Here is the full text of General Hatch's letter of recommendation addressed to the Adjutant General of the U.S. Army on March 18, 1866:

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<sup>231</sup>Daniel George MacMartin to the Hon. Sec'y of War, February 24<sup>th</sup>, 1866, M 253 CB 1866, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M1064, Microfilm Roll #278, NA.

<sup>232</sup>D.G. MacMartin, late Lieut 21<sup>st</sup> U.S.C.T. For Appointment – By Gen's Ingalls and Hatch and Major R.C. Morgan, M 1174 CB 1867, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M 1064, Microfilm Roll #355, NA. The following hand-written directive appears on the papers containing George MacMartin's application for an officer's position: "Respectfully referred to the Adjutant General for file by command of General Grant," Asst. Adjt Genl, Oct. 3/67.

Figure 16: D. George MacMartin, Aide de Camp, 21<sup>st</sup> Regiment, U.S.C.T.<sup>233</sup>



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<sup>233</sup>Malcolm and Daniel McMartin fonds photograph – D.G. McMartin, accession #10449, Malcolm and Daniel McMartin fonds, F 912, AO. Permission of the Archives of Ontario to include this picture in this thesis is acknowledged and appreciated.



General...First Lieut, D. Geo. MacMartin of the 21<sup>st</sup> U.S.C.T. served on my staff as Aide de Camp about one and a half years in the Department of the South. I found him an educated and intelligent gentleman and an active brave and efficient officer. He is now applying for a commission in the regular Army, and I take pleasure in recommending him to the notice of the War Department...Very Respectfully, Your obedient, John P. Hatch.<sup>234</sup>

Similar comments about MacMartin and his dispositional traits as demonstrated through his performance as a Union officer serving under his cousin General Hatch were made by his uncle, Robert Chaffee Morgan, who also served under General Hatch as a supply officer in a Quarter Master's function in the Department of the South during the Civil War. He wrote the following letter to the Republican Party Senator from Wisconsin, Judge Thomas Otis Howe:

My dear Judge, Enclosed are some papers of my nephew, Lieut D Geo MacMartin for an app't to one of the new Regt's. I believe that George, who is a graduate of the University of Toronto, is better educated & better qualified for an app't than four fifths of those who will receive one. He is steady, intelligent, brave & cool in action, & I believe a good young man. Gen'l Hatch recommends him & I add my recommendation, feeble in effect, though it may be. Will you be kind enough to forward these papers to the Adj't Genl, with any endorsement that you may deem proper.<sup>235</sup>

Senator Howe did endorse and forward George MacMartin's officer position application papers as requested to the Adjutant General of the U.S. Army. Morgan followed up with a letter in June of 1867 to his departmental superior, General Rufus Ingalls, in which he stated:

I have to request that you will do me a favour. Early in 1863 my nephew, Daniel George MacMartin, a Canadian by birth, left College & joined the Army serving as Aid to Gen'l John P. Hatch. He...was appointed a Lieutenant in the 21<sup>st</sup> Reg't Colored Troops, serving with that Reg't from May 26<sup>th</sup> 1864 to April 25, 1866, as will appear from the accompanying

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<sup>234</sup>Jonathan P. Hatch to Adjutant General of the U.S. Army, 18 March, 1866, M 253 CB 1866, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M 1064, Microfilm Roll # 278, NA.

<sup>235</sup>Bvt. Major R.C. Morgan to the Hon. T.O. Howe, U.S. Senate, M 253 CB 1866, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M 1064, Microfilm Roll # 278, NA.

Commission & Muster Rolls. I also enclose a letter from Gen'l Hatch as to Lieut MacM's gallantry in action, strict attention to detail, ability, etc etc,"<sup>236</sup>

These observations about George MacMartin's dispositional characteristics do not constitute absolute proof that the characteristics noted by General Hatch and by R.C. Morgan were dominant aspects of George MacMartin's personality. It is a very strong indication, however, especially in the absence of any evidence to the contrary, that George MacMartin demonstrated characteristics of intelligence, braveness, gallantry and strict attention to detail, during the exercise of his responsibilities as Aide-de-Camp to General Hatch while he served as First Lieutenant in the 21<sup>st</sup> Regiment, U.S.C.T. Such evidence also provides the basis for identifying some of the possible dispositional tools that MacMartin may have brought with him in his canoe as he journeyed down the Albany River in far northern Ontario during the summer of 1905.

The Morgan family's advocacy effort in support of George MacMartin's application for an officer's position in one of the new regiments being raised for the U.S. Army following the Civil War was quite astute in terms of political strategy. Knowing that family member General Hatch, who was George MacMartin's main "sponsor," had been closely associated with unsuccessful 1864 Democratic Party Presidential candidate Major General George McClellan, the family reached out to two other potential sponsors for MacMartin's application who had close political and personal associations with Ulysses S. Grant, the General commanding the U.S. Army who would have to approve George MacMartin's application. One of these key contacts was Senator Howe who had been an early abolitionist advocate. The other was R.C. Morgan's departmental

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<sup>236</sup>Major R.C. Morgan to General Rufus Ingalls, June 6<sup>th</sup>, 1867, M 1174 CB 1867, Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870, National Archives Microfilm Publication M 1064, Microfilm Roll # 355, NA.



superior and Quarter-Master General of the U.S. Army, Rufus Ingalls, who was a close friend of General Grant. Ingalls had been a member of Grant's 1843 West Point graduating class, had served with him at Fort Vancouver in 1852, and had also served as Aide-de-Camp for Major General George McClellan after the first Battle of Manassas. This background and the associated relationships he had with both General Hatch through their common link with George McClellan and with General Grant made Rufus Ingalls a prime candidate for targeting. His name appears on the papers referenced above associated with George MacMartin's officer position application that went forward to General Grant in 1867 for decision.<sup>237</sup>

The fact that the Morgans identified Senator Howe as a target to enlist the help of in support of George MacMartin's officer application is quite significant. It was most likely that Oswego's abolitionist advocacy efforts and profile was the basis for the Morgans making the linkage with him. Oswego had submitted a petition to the United States Congress in 1837 calling for the abolition of slavery in the District of Columbia<sup>238</sup> and Senator Howe, "...was an early advocate of universal emancipation and of negro suffrage for the District of Columbia."<sup>239</sup> Despite having enlisted the support of these strategically important political advocates for George MacMartin's application for an officer position in one of the new regiments to be raised by the U.S. Army following the Civil War, General Grant directed that MacMartin's application

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<sup>237</sup>For biographical details concerning Rufus Ingalls, see Patrick E. Fairburn, "Brigadier General and Chief Quarter-Master of the Army of the Potomac: Rufus Ingalls," in *The Confederation of Union Generals*, <http://www.uniongenerals.org/site/?s=Rufus+Ingalls.html> (accessed September 16, 2015).

<sup>238</sup>Petition for the abolition of slavery in the District of Columbia and the international slave trade, January 23<sup>rd</sup>, 1837. On October 1, 2014, this writer reviewed a photocopy of the original petition document that is available for viewing at the Oswego County Historical Records Office, Oswego County, New York. While no Morgan last names appear on the petition containing 161 signatures, there are last names on the petition that a cross reference with the content of The Edwin Clarke "Family Tree" Manuscript reveals are part of the Morgan extended family.

<sup>239</sup>William H. Russell, "Timothy O. Howe, Stalwart Republican," *The Wisconsin Magazine of History*, Vol. 35, No. 2 (Winter, 1951), 94. Russell also pointed out in his article that in December 1861 Senator Howe had introduced a bill for the repeal of the Fugitive Slave Act of 1850.

be filed. This effectively ended the prospects for George MacMartin pursuing his preferred career after the Civil War of continuing as an officer in the U.S. Army.

This action by General Grant was fortuitous, both for George MacMartin and for the Treaty 9 First Nations in Canada. Had MacMartin's application been accepted, he no doubt would have continued serving as an aid to General Hatch, who after the Civil War was assigned to New Mexico where he resolutely carried out his duties campaigning against "renegade Indians." His actions were described in an Arizona newspaper article at the time as follows:

Our New Mexico exchanges inform us that Gen. Hatch, commanding the Department of New Mexico, is now organizing a vigorous campaign against renegade Indians, and that by the earnest solicitation of the General, the War department has granted him authority to follow any of these renegades upon reservations and fight them wherever found.<sup>240</sup>

### **MacMartin's Mining Experience**

The bulk of George MacMartin's professional career following his studies at Trinity College and his Civil War service was involved in mining of the minerals phosphate and mica in the region near Perth, Ontario. There is evidence that upon returning to the Perth area following his Civil War service, MacMartin rekindled and maintained a continuing association with A.J. Matheson throughout the years that he was engaged in mining in the Perth region.

Perth, Ontario is located within the southern end of the Canadian Shield geological region. The North Burgess area southwest of Perth is part of "the phosphate zone in Ontario that stretches 100 miles through the Shield north of Kingston into North Burgess in Lanark

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<sup>240</sup>"Don't Disturb our Indians," *Arizona Album*, Tuscon, Arizona Territory, January 30, 1880. The assistance of Oswego Historian Mark Slosek in providing this article and many other sources about General Hatch from the files of his father Anthony Slosek is greatly appreciated.

County.”<sup>241</sup> Phosphate rock is a term used for sedimentary rocks that contain high percentages of phosphate usually in the form of mineral apatite (calcium fluorophosphate). Apatite “occurs as crystals in vein-like and irregular bodies in altered or crystalline limestone” and “is often found in calcite in conjunction with phlogopite mica.” In her 1970s study of minerals in south-eastern Ontario, Marilyn Miller said that phosphate proved to be a good cash crop for farmers in the Frontenac County and Lanark County areas, as it was labour intensive and lent itself to effective small-scale mining operations. The industry evolved in the 1860s whereby larger companies entered the business and “took the industry out of the farmer’s hands.”<sup>242</sup>

At this stage British and American investors entered the business in the region. As part of this effort, an English mining engineer named John Frederick Baker entered the scene, made the acquaintance of George MacMartin’s sister, “Harriett Theophilia,” married her on February 26, 1866 and remained active in phosphate mining until his death in 1874.<sup>243</sup> After completing his Civil War service, George MacMartin entered the phosphate mining business through his association with his brother-in-law, Mr. Baker, and evolved into a role as mine manager for the mine located on Lot 1, 6<sup>th</sup> Concession in North Burgess Township. By the mid 1870s the market for phosphate began to “dry up” due to international competition and downward pressure on prices, rendering the small scale mining operations in the North Burgess area uneconomical. The mine was then switched to the mining of mica, “a silicate of aluminum” that was co-located with

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<sup>241</sup>Marilyn G. Miller, *Small Scale Mining in the South Shield Region of Eastern Ontario* (Kemptville: Study completed under the auspices of the Ministry of Culture and Recreation for the Ministry of Natural Resources, 12 March 1976), 65.

<sup>242</sup>*Ibid.*, 65-66.

<sup>243</sup>See The Edwin Clarke “Family Tree” Manuscript, 36, and *Bathurst Courier*, March 2, 1866.

the phosphate in the area and which had economically lucrative application as an insulator in various products due to its resistance to heat.<sup>244</sup>

George MacMartin made submissions on the mining of both phosphate and mica to the 1890 Ontario Royal Commission on the Mineral Resources and Measures for their Development. In discussing his mining experience involving these two minerals in his presentation to the Commission in 1890, MacMartin slyly made reference to his Civil War services as follows: “I have been interested in mineral development in the Perth district for twenty years, with the exception of three years when I was away.”<sup>245</sup> After coming back to Perth from his sojourn of “being away” serving in the Union Army during the U.S. Civil War, MacMartin evidently had re-established and maintained contact with A.J. Matheson during this period. The signature of A.J. Matheson, by then a trained and experienced lawyer in the Perth area, is found as witness on two legal documents pertaining to the very lot on which the mine that George MacMartin managed was located. These are an “Agreement for the sale of plumbago mines” and a related “Deed of Plumbago Mines,”<sup>246</sup> drawn up between a John F. Torrance of Montreal and Henry Gallagher, who owned the land on which George MacMartin was managing the mining operations.

This Mining Agreement is important in several respects. It proves that George MacMartin and A.J. Matheson had a very long-standing relationship dating from their common

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<sup>244</sup>See Marilyn Miller, *Small Scale Mining in the South Shield Region of Eastern Ontario*, 71 and John E. Udd, *A Guide to Mineral Deposits of Southeastern Ontario and Southwestern Quebec* (Ottawa: CJ Multi-Media Inc., 2005), 323, 414.

<sup>245</sup>George MacMartin statement to the Royal Commission on Mineral Resources, recorded in Royal Commission on the Mineral Resources of Ontario And Measures for Their Development, *Report of the Royal Commission On the Mineral Resources of Ontario, And Measures for Their Development* (Toronto: Printed by Marwick & Sons, 1890), 175.

<sup>246</sup>See Mining Agreement: Henry Gallagher and John F. Torrance, October 13, 1892, Instrument No. 1362 and Deed of Plumbago Mines in North Burgess, January 11, 1893, Instrument No. 1374, Land Abstracts, North Burgess Township, Archives Lanark.

childhood in Perth, through their time spent together at Trinity College and that later extended to include business dealings. Moreover, this Agreement also shows that there was a triadic business relationship between Matheson, MacMartin and Sir Alexander Morris, who's home had been across the street from the home of George MacMartin's father and who had distinguished himself as perhaps Canada's greatest Treaty Commissioner. Although Morris had died in 1889, the party to the 1892 Mining Agreement noted above was a relation of Morris's former law partner in Montreal, Mr. Justice Torrance, who at the time of his association with Morris had been "then the foremost exponent of commercial law in Canada."<sup>247</sup> Where there is smoke, there is usually fire. The point of the analysis of this 1892 Mining Agreement is to establish clearly the existence of a continuing, multi-year and multi-faceted personal and business relationship that existed between George MacMartin and A.J. Matheson. This relationship was no doubt a contributing factor in Matheson's decision to nominate his friend and long-time associate George MacMartin to the Committee of Executive Council for appointment in June of 1905 as Ontario's Treaty 9 Commissioner.

The final entry in the summary of George MacMartin's career in Table 12 is his tenure as Sherif of Lanark County, a position he assumed about 1910 upon the death of the previous incumbent, Sherif McGarry. MacMartin demonstrated the diligence and sense of commitment to duty developed throughout his life by carrying on with his responsibilities as Sherif in the

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<sup>247</sup>R.G. Babion, "Alexander Morris: His place in Canadian History," MA Thesis, Queen's University, 1945, 12. Robert Talbot has provided further details regarding the Torrance-Morris business relationship: "He remained with the firm for ten years. Torrance was an old acquaintance of Morris's father. A member of a well-connected Montreal family, he was also one of the city's leading lawyers. The Torrance-Morris partnership was in essence a commercial law firm, which included the two lawyers, a clerk, a bookkeeper, and the occasional law student. Its day-to-day business involved the 'service or management of a large portfolio of family business enterprises and investments in the Montreal-based forwarding, retail, transportation, and financial sectors.' This included providing legal advice and drafting legal agreements for commercial enterprise and land speculation. The firm occasionally engaged in criminal law." See Robert J. Talbot, *Negotiating the Numbered Treaties: An Intellectual & Political Biography of Alexander Morris* (Saskatoon, SK: Purich Publishing Limited, 2009), 36.

weeks leading up to his death in April 1923. His obituary in the *Perth Courier* addressed this, stating that, “For the past few years the Sherrif had been afflicted with a distressing complaint, but he bravely attended to his office duties even when the shadow of his approaching dissolution became very dark.”<sup>248</sup> This action of MacMartin’s in essentially carrying out his job responsibilities virtually to his death bed provides evidence of a personal orientation towards diligence and commitment to duty.

#### 4.6 George MacMartin’s Appointment as Ontario’s Treaty 9 Commissioner

The very first sentence in the first chapter of this thesis quotes from Ontario Treasurer Arthur James Matheson’s telegram of June 29, 1905 to Frank Pedley, Deputy Superintendent of Indian Affairs, advising that “Orders in Council have been passed approving of agreement with the Dominion as to Indian Treaty No. 9 and appointing D. George MacMartin Commissioner on behalf of the Province...”.<sup>249</sup> In this telegram he was confirming the step taken by the Ontario Government pursuant to the July 3, 1905 agreement between the Province and the Dominion. But why was action taken on June 29, 1905, pursuant to an agreement between Ontario and the Dominion that was to only be concluded formally on July 3, 1905, four days later? Dr. John Long’s comment on this in *Treaty No. 9* was that, “The order may have been passed, but it was not officially approved until 3 July, 1905.”<sup>250</sup> There is another piece to this puzzle.

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<sup>248</sup>Obituary, MacMartin, *Perth Courier*, April 23, 1923.

<sup>249</sup>See page 1.

<sup>250</sup>John Long, *Treaty No. 9*, 66.

Figure 17: D. George MacMartin diary - June 30, 1905 Entry

1905  
June 30<sup>th</sup> Friday. In accordance with instructions recd from Col. Matheson, Prov. Treasurer to proceed to Ottawa, to meet the Hon<sup>ble</sup> Commr. who has been empowered by the Hon<sup>ble</sup> Govt to make a Treaty with the Indians. styled Treaty No. 9. I left Prov. on C.P.R. train at 7.50 June 30<sup>th</sup> On arrival of train at Ottawa - 9 45. I called upon Mr. Pedley Deputy Sup<sup>t</sup> of Indian Affairs, who introduced me to Mr. Scott and Mr. Stewart both of the Dept of Indian Affs. who had been appointed by the Hon<sup>ble</sup> Govt as Com<sup>s</sup> to negotiate the Treaty, No. 9. with the Indians. In company with these gentlemen and two Prov. Policemen who had been assigned to accompany the Commissioner, I left Ottawa via C.P.R. at 1.15 P.M. On arrival of train at Mattawa Mr. McInnis joined

Figure 17 indicates that the very first sentence of the very first entry made by George MacMartin in his 1905 Treaty 9 diary mentions that he obtained his direction from Treasurer Matheson.<sup>251</sup> The significance of these two references to and by A.J. Matheson was not immediately apparent to this researcher, until the original diary was inspected for the third time in late September, 2014, at Queen's University Archives in Kingston, Ontario. The Ontario Government Minister who signed the July 3, 1905 agreement between Ontario and the Dominion was Minister of Lands and Mines, Frank Cochrane, not A.J. Matheson. What then was A.J. Matheson's role in this process, as Treasurer, and how did it relate to the role played by Minister Cochrane who signed the agreement with the Dominion?

Dr. Long was partly correct in his observation, but his reference in the singular to the passage of *the* Order in Council must be corrected. Treasurer Matheson used very precise language in his telegram to Frank Pedley and used the word "Orders" in Council, in the plural. This reference by Treasurer Matheson to the existence of more than one Order in Council required further exploration. A manual search of the Archives of Ontario physical records of the paper versions of the original Orders in Council for the period from June 29, 1905 to July 3, 1905, passed by the Executive Council, revealed that there were in fact *two* Orders-in-Council passed on June 3, 1905 pertaining to George MacMartin's appointment. The title page of one of these Orders in Council is presented in Figure 18. This is an Order, "appointing Daniel George MacMartin Commissioner to Act with commissioners of the Dominion of Canada re negotiation

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<sup>251</sup>Daniel George MacMartin diary entry for June 30, 1905, Daniel George W. MacMartin ,Diary, MC 2999, QA. Permission to include this picture of the MacMartin diary in this thesis provided by Queen's University Archives is acknowledged and greatly appreciated.



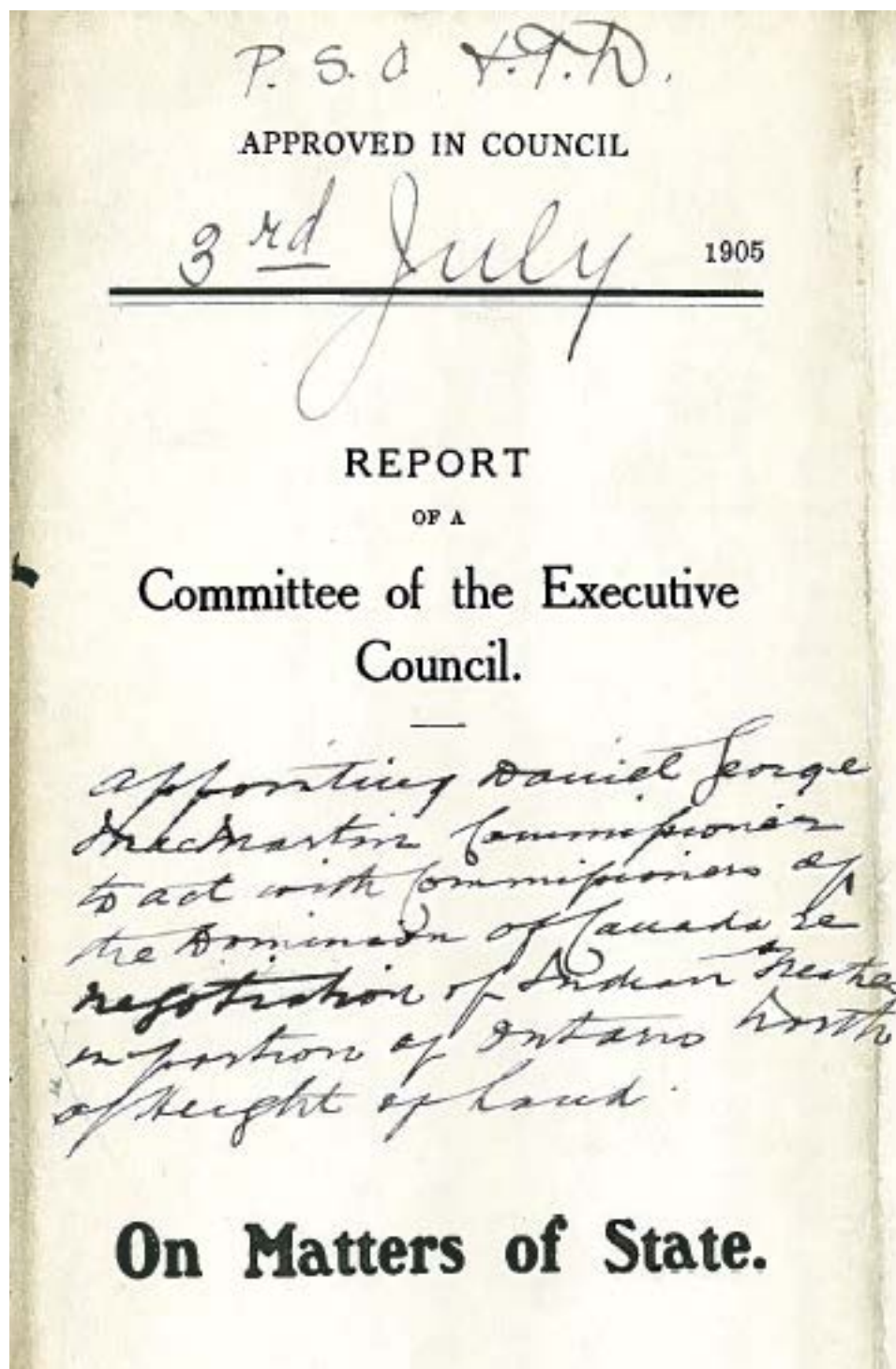
of Indian treaties in portion of Ontario north of the height of land.”<sup>252</sup> It is interesting to note that the word “treaties” appears in the plural, rather than the singular form. This is a recognition that individual adhesions to a common treaty document would be negotiated with representatives of various First Nations that the Commissioners would meet with at various locations during the course of their journey through far northern Ontario.

Perusal of the information on the face of this document provides some clarification of the point noted by Dr. Long that Mr. Matheson’s telegram of June 29 advised that *Orders* in Council had been passed. The document is a “Report of A Committee of Executive Council” that was “Approved in Council,” or the full Cabinet, on July 3. The detail of the Order is contained on the inside page of the document and this appears in Figure 19. It provides further information relevant to clearing up the uncertainty noted by Dr. Long. It identifies the chair as J.J. Foy (Attorney General) and other members of the Committee of the Executive Council that “passed” the order and the signature of J.J. Foy appears at the bottom of the Order, dated June 29. Both A.J. Matheson and Frank Cochrane are identified as members of the Executive Council Committee. This confirms that both Ministers were working together on the Treaty 9 file as part of their membership on this Committee. There is also a notation on the upper left-hand corner of the Order signifying that it was passed by the Committee of Council and recommended to the full Lieutenant Governor in Council or Cabinet and was approved July 3.

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<sup>252</sup>Order in Council appointing D.G. MacMartin [3<sup>rd</sup> July 1905], Orders in Council Issued by the Executive Council Office, RG 75-57, B431527, Container 170, AO. Permission provided by the Archives of Ontario to include this image of the Order in Council in this thesis is acknowledged with thanks.

Figure 18: Ontario Order in Council Appointing Treaty 9 Commissioner



Report of a Committee of the Executive Council on matters referred to their consideration.

PRESENT:

The Honourable

Mr. *Frederick* in the Chair.

Mr. *McIntosh*

Mr. *McGowan*

Mr. *Cochrane*

Mr. *McDonald*

Mr.

Mr.

ON MATTERS OF STATE.

May it please your Honour

Upon the recommendation of the Honourable the Treasurer, the Committee of Council advise that Daniel George MacMartin of the Town of Perth, Esquire, be nominated to the Government of the Dominion as Commissioner on behalf of the Province of Ontario to act with the Commissioners appointed by the Dominion in negotiating Treaty No. 9 with the Indians settled in that part of the Province north of the Height of Land, and of the territory ceded by the Robinson Superior Treaty of 1850, and the Robinson Huron Treaty of 1850 and East of the territory ceded by the North West Angle Treaty No. 3.

Respectfully Submitted

*J. J. Joy*  
Chairman

29th June 1905  
*Frederick*

The detailed text of the inside part of the document provides an answer to the question as to Treasurer Matheson's role specifically in regard to the appointment of George MacMartin, relative to Minister Cochrane's role as the Minister who negotiated the July 3, 1905 agreement between Ontario and the Dominion. The text states:

May it please your Honour upon the recommendation of the Honourable the Treasurer, the Committee of Council advise that Daniel George MacMartin of the Town of Perth, Esquire, be nominated to the Government of the Dominion as Commissioner on behalf of the Province of Ontario to Act with the Commissioners appointed by the Dominion in negotiating Treaty No. 9 with the Indians settled in that part of the Province North of the Height of Land, and of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson Huron Treaty of 1850, and last of the territory ceded by the North West Angle Treaty No.3.<sup>253</sup>

This statement and the fact that Treasurer Matheson is the one who gave George MacMartin the instructions to proceed to Ottawa to join the Dominion Commissioners indicates that George MacMartin was nominated to the Ontario Government Committee of Executive Council by Treasurer Matheson. This is confirmed in a letter addressed to "His Honour, the Lieutenant-Governor-in Council" dated June 29, 1905, signed by Provincial Treasurer A.J. Matheson in which Matheson recommends the appointment of George MacMartin. This letter is contained in the Archives of Ontario Box 170 that contains the original Orders in Council that were passed on July 3, 1905.

The second Order in Council that was also passed by the Committee of Council on June 29, 1905 and approved by the full Cabinet on July 3 appears in Figure 20. This Order is entitled, "With reference to obtaining extinction of the Indian title to certain portions of the Province of

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<sup>253</sup>Ibid.

Ontario.”<sup>254</sup> The first page of the accompanying detail segment of the Order that runs to three pages appears in Figure 21. This lays out the terms of the treaty that the Ontario Government had agreed upon with the Dominion Government and conveys the authority to enter into negotiations for the treaty. Once again it is the Treasurer A.J. Matheson who recommended that the Order be approved, signifying the concurrence of the Government of Ontario with the terms of the proposed Treaty 9. Such concurrence was required pursuant to clause 6 of the 1894 Ontario-Canada agreement that was discussed in Chapter 3. The detailed portion of the Order also states that Ontario considered the purpose of entering into treaty negotiations for Treaty 9 to be, “...in order to maintain the friendly relations which has existed between the Government of Canada and the Indian tribes, and to promote quiet settlement and colonization, and to forward the construction of railroads and highways within the northern part of the Province of Ontario.”<sup>255</sup> In short, the goal for Ontario was to prepare the way for implementation of what H.V. Nelles described as Ontario’s own National Policy, “a provincial equivalent to the opening of the west,”<sup>256</sup> by preparing the way for the laying out of the rail and road infrastructure needed to facilitate the development of natural resources in the region and put in place the envisaged “New Ontario.”

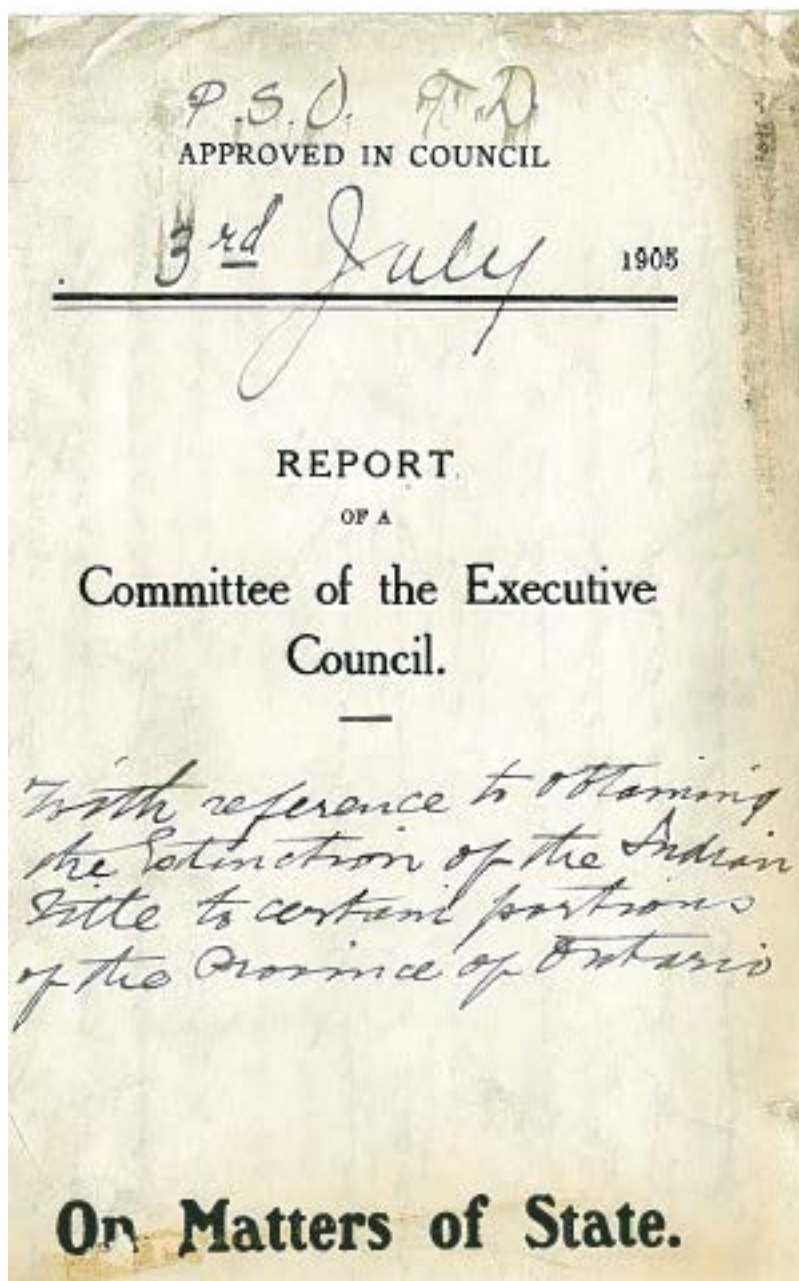
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<sup>254</sup>Order in Council with Reference to obtaining the extinction of the Indian Title to certain portions of the Province of Ontario [3r July, 1905], Orders in Council Issued by the Executive Council Office, RG 75-57, B431527, Container 170, AO. Permission of the Archives of Ontario to include this image of the Order in Council in this thesis is acknowledged with thanks and great appreciation.

<sup>255</sup>Ibid. Permission of the Archives of Ontario to include this image of the Order in Council in this thesis is acknowledged.

<sup>256</sup>H.V. Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941*, Second edition, 109.

Figure 20: Ontario Order in Council re Obtaining Extinction of Indian Title





TO HIS HONOUR  
The Honourable Charles Mores Administrator of the Government  
William Mortimer Clark, &c., &c., &c., Lieutenant Governor  
of the Province of Ontario.

Report of a Committee of the Executive Council on matters  
referred to their consideration.

PRESENT:

The Honourable

Mr. T. J. [unclear] in the Chair.  
Mr. [unclear]  
Mr. [unclear]  
Mr. [unclear]  
Mr. [unclear]  
Mr. [unclear]  
Mr. [unclear]

ON MATTERS OF STATE.

May it please your Honour

Referring to the agreement entered into between  
the Government of the Dominion of Canada represented  
by the Honourable T. D. [unclear] and the Government  
of the Province of Ontario represented by the Honourable  
W. M. [unclear], dated 16<sup>th</sup> day of April, 1894, in pursuance  
of the Statute of Canada, passed in the 54<sup>th</sup> and 55<sup>th</sup> years  
of Her Majesty's reign, chaptered 5 and intitled, "an  
act for the settlement of certain questions between the  
Governments of Canada and Ontario, respecting Indian  
lands" and the Statute of Ontario passed in the 54<sup>th</sup>  
year of Her Majesty's reign, chaptered 3, and intitled  
an act for the settlement of certain questions between  
the Governments of Canada and Ontario, relating to the

A.J. Matheson, Frank Cochrane and Committee Chair James Joseph (J.J.) Foy were the three leading members of the Committee of Council that “passed” the recommendation for the appointment of George MacMartin as Ontario’s Treaty 9 Commissioner through the process outlined above. J.J. Foy was chosen by Premier Whitney as Chair of the Committee, given his portfolio as Attorney General and given the constitutional issues entailed in the Ontario Government working together with the Dominion Government within the framework of the three agreements that were reached between them regarding “Indian lands” and treaties dated 1894, 1902 and 1905. Foy was a graduate of St. Michael’s College, represented the South Toronto constituency in the Ontario legislature and was a leader in the Ontario legal community, having served as a “Bencher” in the leadership group of the Law Society of Upper Canada from 1881-1891 and from 1901-1906. He served as Attorney General of Ontario within the Conservative Government of Premier James Whitney from 1905 until his death in 1916.<sup>257</sup> Foy also covered the position of Ontario Commissioner of Crown Lands from the time Premier Whitney’s Conservative Government was elected in early 1905 until Frank Cochrane was able to join the Ontario Cabinet in late May of that year.

Frank Cochrane was a close personal and political associate of Premier Whitney. He was specifically cultivated and recruited by the Premier to join the Cabinet of his new government after the 1905 Ontario election to take on responsibilities as the “political Minister” for the strategically important “New Ontario” region. Cochrane was a “self-made businessman,” having started off working in the hardware business of Dunlap and Chapman in Pembroke and in 1882 married Alice Dunlap of Pembroke, Ontario. Cochrane later established a hardware and

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<sup>257</sup>See W. Stewart Wallace, *The MacMillan Dictionary of Canadian Biography*, Third Edition – Revised and Enlarged, 243; and “Foy, James,” *Past Member Database*, Law Society of Upper Canada Archives, 2015.



mining supply store in Sudbury, the centre of the evolving nickel mining industry and he moved his family there in 1890. As he became further established he made successful investments in the hydroelectricity field in the area.<sup>258</sup> Of significance for the later appointment of George MacMartin as Ontario's Treaty 9 Commissioner is the fact that Cochrane's wife Alice's brother was David Dunlap, a lawyer from Pembroke. Dunlap had acquired a controlling interest in the La Rose mine in Cobalt in partnership with George MacMartin's cousin and future Member of Parliament, John McMartin, and Dunlap later became vice-president and treasurer of Hollinger Gold Mines, Ltd. There was therefore an indirect family and business link between George MacMartin and Minister Cochrane.<sup>259</sup>

The circumstances surrounding the delay in Cochrane's appointment as Minister of Lands and Mines in the Whitney Government in late May 1905 are worth recounting, to provide an indication of the strength and character of Frank Cochrane. He had unsuccessfully contested the riding of West Nipissing in the 1902 Ontario election, during which he had met and become friends with then Ontario Conservative Party leader James Whitney. They had maintained frequent dialogue and Cochrane did not personally contest election during the 1905 general election in Ontario, but campaigned actively for the party. During the subsequent January 1905 Ontario election Mr. Whitney had campaigned for inclusion of a strong northerner in his Cabinet if elected. He was elected and afterwards invited William Hearst and Frank Cochrane to meet

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<sup>258</sup>See R. Mathew Bray, "Cochrane, Francis," in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Université Laval, 2003-, [http://www.biographi.ca/en/bio/cochrane\\_francis14E.html](http://www.biographi.ca/en/bio/cochrane_francis14E.html) (accessed February 28, 2015).

<sup>259</sup>For David Dunlap's background, see W. Stewart Wallace, *The MacMillan Dictionary of Canadian Biography*, Third Edition – Revised and Enlarged, 206. For the Cobalt mine story, see D.M. LeBourdais, "Cobalt," Chapter VII in *Metals and Men: The Story of Canadian Mining* (Toronto: McClelland & Stewart Limited, 1957), 127-146. John McMartin descended from John McMartin, the brother of George MacMartin's grandfather, Malcolm MacMartin. See special request files regarding McMartin, RG 17-21, Reference Number: A-2014-00328, AO.

and decide which of the two of them would accede to his request to join the Cabinet and serve as his Minister for “New Ontario.”<sup>260</sup> Frank Cochrane emerged from this *confrere* as the “volunteer,” but while en route back to Sudbury by train he sustained a serious injury while attempting to board a train. According to his biographer Alice Marwick:

He attempted to board the train after it had started to move, and missed his footing. A gust of steam...induced his fall between the two cars. Gripping the handrail he was dragged a hundred yards or more before the train was stopped. He hung on with incredible tenacity, enduring agony that must have been unbearable. His pluck, however, saved his life, but the wheels of the following car injured his leg to such an extent that on arrival at Victoria Hospital at Copper Cliff it was found necessary to amputate it.<sup>261</sup>

Due to the serious injury sustained by Mr. Cochrane, the plans for his joining the Whitney Government were delayed until May 29, 1905, when he was named to the newly integrated portfolio of Minister of Crown Lands and Mines. Minister Cochrane signed the July 3, 1905 Dominion-Ontario Agreement, because it was his newly combined Lands and Mines portfolio that had responsibility for the issue of surrendered “Indian Lands,” as well as for mines and their development that was a centre-piece of the Province’s “New Ontario” economic development strategy.

It is also noteworthy that immediately upon assuming his new portfolio, Frank Cochrane retained George Yates on his office political staff as his Private Secretary. Yates had held the same position on the staff of the Minister of Crown Lands under the previous Liberal Government of former Premier Hardy. Mr. Yates was later to write that, “For a Conservative Minister to take over the private secretary of a Liberal predecessor was a unique event at the

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<sup>260</sup>See Scott Young and Astrid Young, *Silent Frank Cochrane: The North’s First Great Politician* (Toronto: MacMillan of Canada, 1973), 10-17.

<sup>261</sup>Alice Marwick, *The Honourable Frank Cochrane: A Tribute* (Cochrane, Ontario: Alice Marwick, June 19<sup>th</sup>, 1950), 7.

time, particularly so in view of the political animosities aroused during the protracted struggle of the Conservatives to retain power after the thirty-three year Liberal tenure just ended.”<sup>262</sup> The evidence presented above underscores the fact that Minister Frank Cochrane was a man of great personal strength and integrity. While a fierce and active Conservative Party partisan, he was also very practical and pragmatic, as evidenced by his retention of Mr. Yates as his Private Secretary following the change in government at Queen’s Park in 1905. It is this practical and pragmatic orientation, not considerations of political partisanship, that Minister Cochrane brought to his role within the Committee of Executive Council that appointed George MacMartin as Ontario’s Treaty 9 Commissioner in 1905.

The fact that MacMartin’s appointment stemmed from personal and family relationships with key decision-makers within the Ontario Government Executive Council will become even more evident upon consideration of the background of Treasurer A.J. Matheson. His picture and that of his father Roderick Matheson appear in Figure 22.<sup>263</sup> Like George MacMartin, A.J. Matheson was a native and resident of Perth, Ontario. His father was one of Canada’s first Senators and had become a wealthy merchant after founding one of the first general stores in Perth, following distinguished and gallant service during the War of 1812.<sup>264</sup> For his military service Matheson was to ultimately be granted in the range of 1,250 acres of land that he leveraged to considerable wealth through land speculation in the area. Matheson reinvested some

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<sup>262</sup>George Yates, “A Word of Appreciation from Mr. Yates,” in Alice Marwick, *The Honourable Frank Cochrane: A Tribute*, 15.

<sup>263</sup>See Donald F. Sherwin, *Roderick Matheson – Pillar of 19<sup>th</sup> Century Perth Society* (Perth, Ontario: Perth Museum, 2006), 1,15. Permission provided by the Matheson House Museum in Perth, Ontario, to include the pictures of Roderick Matheson and A.J. Matheson in this thesis is acknowledged with thanks.

<sup>264</sup> Donald Sherwin stated in his biographical paper on Mr. Matheson that, “By his own admission, he fought in thirty-three separate engagements during the War of 1812-1814,” *Ibid.*, 2. These included engagements at York, Fort George, Lundy’s Lane, Fort Erie and the first British assault on the key American harbor for its Lake Ontario naval force at Sackets Harbour, south of Kingston. He was twice wounded.

Figure 22:Roderick Matheson (top:1793-1873) & A. J. Matheson (bottom:1845-1913)



of this wealth in a mica and phosphate mine in North Burgess Township, southeast of the Town of Perth, from which the first commercial shipment of phosphate for fertilizer was recorded in 1870. This is significant because George MacMartin was to manage a phosphate and later mica mine operation in North Burgess on land near the location of the mine owned by Roderick Matheson, from about that same time until and after his tour of duty as Ontario's Treaty 9 Commissioner. Local Perth historian Donald Sherwin estimated that by 1860, Roderick Matheson would have attained a net worth of an amount equivalent to millions of dollars in today's currency and amassed land holdings totalling 8,000 acres of land. He also stated that, "Roderick Matheson was a strong believer in learning, particularly as it applied to his own family."<sup>265</sup>

Matheson's success in assembling wealth as a merchant and land speculator led to his becoming prominent in the community and having this prominence reflected in important political appointments. He served as one of the first magistrates appointed in 1823 when Perth was established as the administrative centre of the new Bathurst District, established by a division of the former Johnstown District.<sup>266</sup> He was also appointed a lifetime member of the Legislative Council of Canada on May 27, 1847.<sup>267</sup> This review of Roderick Matheson's business and political profile in Perth is important to show how his experience is reflective of an

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<sup>265</sup>Ibid., 6, 8.

<sup>266</sup>The original Johnstown District of Upper Canada extended northwards from the St. Lawrence River to the Ottawa River. Population growth in the region led to the establishment of the Bathurst District in 1822, comprising the northern half of the former Johnstown District, that was the name retained for the southern half of the bisected District. See George Spragge, "The Districts of Upper Canada, 1788-1849," in *Profiles of a Province*, ed. Edith G. Firth, 34-42 (Toronto: Ontario Historical Society, 1967); and Larry Turner, *Perth: Tradition and Style in Eastern Ontario*, 2<sup>nd</sup> Printing Edition (Toronto: Natural Heritage, 1998), see esp. Chap. 3 "District Town." Before 1842 when Township and County Councils and School Boards were established in Upper Canada, the local magistrates were responsible for implementing and administering at the local level, laws that had been passed by the Legislative Assembly of Upper Canada. See Ron Shaw and Irene Spence, *Alexander Fraser (1789-1872): Forgotten Hero* (Perth, Ontario: Ron W. Shaw & M.E. Irene Spence, 2012), 75.

<sup>267</sup> Donald Sherwin, *Roderick Matheson – 19<sup>th</sup> Century Pillar of Society*, 8.

important “operative” dimension of Ontario political culture that developed during the early 19<sup>th</sup> century that established a tradition of entailing the formation of local elites and interaction between these elites and those at the centre of the governing structure of the Province.

Ontario historian S.F. Wise has argued that Ontario has always had an elite political culture from its origins. He characterized the study of Ontario political culture as being in its early stages and stated, “...a fuller understanding of it will require the efforts of both political scientists and historians.”<sup>268</sup> A central, foundational feature of this political culture of what he called Upper Canadian Toryism, “...was an alliance, or rather a system of alliances, between the bureaucratic elite attached to the government of the province and local elites and their followers.”<sup>269</sup> This alliance between local elites and the governing elite at the centre in the early 19<sup>th</sup> century involved what had been termed the “Family Compact”, the members of which dominated management of the machinery of government in Upper Canada. Robert Saunders has described the Family Compact as a “power elite” that controlled the governance of the Province through dominance and control of the executive branch of government and of the Legislative Council component of the legislative branch of government.<sup>270</sup> People from the local elites such as Roderick Matheson were appointed to the Legislative Council and could aid the Family Compact and serve as a check on measures emanating from the elected Legislative Assembly. Saunders identified Reverend John Strachan as the leader at the centre of this power elite, accompanied by John Beverley Robinson and D’Arcy Boulton. He said that the core leadership

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<sup>268</sup> S.F. Wise, “The Ontario Political Culture: A Study in Complexities,” Chapter 12 in *God’s Peculiar Peoples: Essays on Political Culture in Nineteenth Century Canada*, ed. A.B. McKillop and Paul Romney (Ottawa: Carleton University Press, 1993), 227.

<sup>269</sup> S.F. Wise, “Upper Canada and the Conservative Tradition,” Chapter 9 in *God’s Peculiar Peoples: Essays in Political Culture in Nineteenth Century Canada*, 176.

<sup>270</sup> Robert E. Saunders, “What Was the Family Compact?”, *Ontario History*, Vol. XLIX (1957), 171.

of the Compact also included an outer ring, “a larger coterie of associates and friends at the centre of government,” that he called “the elite of office.” Among others, this included “the Sherwoods” and “Jarvis,” referring to William Jarvis.<sup>271</sup>

S.J.R. Noel has analysed how the evolution of the economy and society of Upper Canada developed in the 19<sup>th</sup> century following the *Constitutional Act*, 1791, producing local merchants such as Roderick Matheson who emerged as leaders of integrated local community business and political elites. It is this group that the Compact had to ally with in order to ensure continuity of the governance model that they had established. The result of this alliance according to Noel was, “...the growth of a tradition of local political leadership and the entrenchment of local elites, which would become such striking features of the Upper Canadian political system.”<sup>272</sup> Education played a key role in providing candidates for entry into the ruling power elite of the Province, as Saunders stated in his analysis of the Family Compact that, “If there was a single attribute determining who was suitable material for the Compact, it was probably education and ‘cultivation.’”<sup>273</sup>

This portrait of the alliance and relationship between local elites and the oligarchical power elite at the centre of the provincial governing structure is a core element of what Noel has characterized as an “operative” dimension of Ontario political culture. It provides a basis for explaining that the Ontario Government decision-making process for the appointment of George MacMartin as Ontario’s Treaty 9 Commissioner in 1905 was a manifestation of the continuation of this core and long established “operative” dimension of Ontario political culture. This is

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<sup>271</sup> Ibid., 167-168.

<sup>272</sup> S.J.R. Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1896*, 64.

<sup>273</sup> Robert E. Saunders, “What Was the Family Compact?”, 175.

evident upon consideration of the educational backgrounds of George MacMartin and of the key Executive Council Committee decision-maker A.J. Matheson. The key to this association is their common educational background as students at Trinity College University in Toronto and their overlapping tenure there as students. The experience of these selected members of the local elite of Perth indicates that education in general and Trinity College University in particular appear to have played a role facilitating upward career mobility by members of this local elite from their communities into significant positions within the power elite at the centre of the machinery of government, or at least to positions as members of the “outer ring” of this central power elite.

Reflecting the priority that his father placed on education for his immediate family, A.J. Matheson was educated initially at Upper Canada College and then Trinity College University in Toronto. Upper Canada College is an exclusive private school for grade school education of future members of the Ontario elite. Matheson graduated from Trinity College twice. He first graduated with a Bachelor of Arts (BA) Degree in 1865 and later was awarded a Master of Arts (MA) Degree in 1889. Like his father Roderick, he had also distinguished himself in military service for Canada during the Fenian Raids of 1866 and 1870. He also studied law in Perth and was called to the bar in 1870. He prepared for the role of Minister in the Ontario Government by serving on the Perth Town Council and as Mayor from 1883-1884 and as owner and publisher of a local Conservative newspaper.<sup>274</sup>

By the time of his appointment as Provincial Treasurer of Ontario in 1905 A.J. Matheson was a well-established member of the local elite of Perth. He was first elected as MLA for Lanark South in 1894, representing the Conservative Party and was returned five times.

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<sup>274</sup>See Donald Sherwin, *Roderick Matheson – 19<sup>th</sup> Century Pillar of Society*, and Trinity College: Degree Book, Accession 1996-0025, Office of the Registrar, F 1005, Trinity College Archives.



Matheson continued serving as Treasurer in the Whitney Conservative Government from the time it was elected in 1905 until his death in 1913.<sup>275</sup> His position within the Ontario Government Executive Council decision-making structure and process and his long-standing relationship with George MacMartin were the key factors in MacMartin being nominated by Matheson for appointment as Ontario's Treaty 9 Commissioner in 1905. The decision to nominate him was made by Ministers A.J. Matheson and Frank Cochrane, who were very capable and very experienced leaders. The structures and processes of decision-making involved were also innovative for the time, given that prior to World War Two, "Although Cabinet operations varied from administration to administration, organization and procedures were at best informal and at worst disorganized."<sup>276</sup>

This episode is suggestive of the very high quality of political and governmental leadership exhibited in this instance by Premier James Whitney and by the entire leadership group within the Ontario Executive Council decision-making process at the time. Premier Whitney identified the best Ministers for the jobs of Treasurer and Minister of Lands and Mines and Attorney General. He organized them in a unique way and left them to use their skills and experience to make the best decision regarding the candidate to nominate to the full Executive Council for appointment as Ontario's Treaty 9 Commissioner. This incident provides evidence that Premier James Whitney's leadership satisfied the criterion for quality leadership identified by the classical theorist of political power and decision-making Niccolo Machiavelli, who stated:

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<sup>275</sup> Donald Sherwin, *Roderick Matheson - 19<sup>th</sup> Century Pillar of Society*, 15. Matheson's military service involved serving first as a Lieutenant in the Militia during the First Fenian Raid of 1866 and as a Militia Captain during the Second Fenian Raid of 1870. He was decorated for his service during the Fenian Raids and continued his military service throughout most of his career as a leader of the 42<sup>nd</sup> Battalion of Lanark Militia.

<sup>276</sup> Richard A. Loreto, "The Cabinet," in *The Government and Politics of Ontario*, 2<sup>nd</sup> Edition, ed. Donald MacDonald (Toronto: Van Nostrand Reinhold Ltd., 1980), 26.

Of no little importance to a prince is the choice of ministers, and these are good or not, according to the prudence of the prince. The first conjecture one can make of the brain of a ruler comes from looking at the men he has around him, and when they are competent or faithful, one can always repute him to be wise because he has known how to recognize them as sufficient and to keep them faithful.<sup>277</sup>

#### 4.7 Summary and Conclusion

This chapter began with a review of the third agreement reached between Ontario and the Dominion that led to the Ontario Government appointing George MacMartin as its Treaty 9 Commissioner representative in June of 1905. This appointment can best be interpreted as the product of an innovative and sophisticated Ontario Government Executive Council committee decision-making process. It was made by very capable Ministers who were selected for the job of working together as a team to handle Ontario's issues regarding "Indian Lands" and "Indian Treaties." The appointment decision reflected continuation of an operative dimension of Ontario political culture. This was the practice of decision-makers within the central Provincial Government decision-making structure looking to local elites to identify suitable people for appointment to important jobs to represent Ontario's interests. They selected the right person for the job in George MacMartin. This chapter has added to the body of historical knowledge about this interesting man whose diary record of the 1905 Treaty 9 discussions is now of considerable importance. The next chapter will focus on the text of his diary itself.

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<sup>277</sup>Niccolo Macchiavelli, *The Prince*, trans. Leo Paul S. de Alvarez (Long Grove, Illinois: Waveland Press, Inc., 1989), 138.

## **Chapter Five: The George MacMartin Diary Content and Provenance Trail**

### **5.1 Introduction**

This chapter deals with the content of the MacMartin 1905 Treaty 9 diary, with reference being made primarily to the original copy of the diary housed at Queen's University Archives in Kingston, Ontario. After beginning with a review of the diary's "discovery" or provenance trail, an analysis will be presented of differences that are evident in the content of the entries made by George MacMartin in his diary and the entries made in the Treaty 9 Commissioners' Official Report written in November, 1905. Issues pertaining to health care and the role played by the Treaty 9 doctor while the Treaty 9 negotiations were taking place will be highlighted, as these activities could be significant in terms of the oral tradition understanding of what was transpiring at the 1905 meetings. The chapter will close with a summary identification of the main differences between the diary content and the content of the written version of Treaty 9 and an assessment of what the analysis presented indicates about the significance of the diary as a record of the 1905 Treaty 9 negotiations.

### **5.2 Diary Provenance Trail**

The first task is to review the trail of provenance of the George MacMartin diary that will explain, in part, why it has recently taken on considerable prominence in the treaty rights advocacy and Aboriginal law spheres in Canada. The sequences in steps from 1905 that have led to the "discovery" of the diary appear in Table 13. Following the death of George MacMartin at Perth on April 12, 1923, the diary remained in the possession of immediate members of George MacMartin's family. It is likely that that family member was George MacMartin's son, Allan Grant MacMartin. Several pieces of evidence point to this. Allan G. MacMartin is mentioned in

Table 13: MacMartin Diary Trail of Provenance

| <b>Date</b> | <b>Event</b>   |
|-------------|--|
| 1905        | <ul style="list-style-type: none"> <li>D. George MacMartin (DGM) recorded diary notes.</li> </ul>  |
| 1923        | <ul style="list-style-type: none"> <li>DGM death (12 April).</li> </ul>  |
| <i>1951</i> | <ul style="list-style-type: none"> <li><i>DGM relative took diary to “Abbey Dawn” Library of poet Wallace H. Robb (WHR).</i></li> </ul>  |
| <i>1968</i> | <ul style="list-style-type: none"> <li><i>WHR donated diary to Queen’s University Archives (April).</i></li> </ul>   |
| 1996        | <ul style="list-style-type: none"> <li>Rhonda Telford dissertation, “History of Aboriginal Mineral Resources in Ontario” cites diary.</li> </ul>                                   |
| 2006        | <ul style="list-style-type: none"> <li>David Calverley article on HBC &amp; Treaty 9 cited diary.</li> </ul>   |
| <i>2010</i> | <ul style="list-style-type: none"> <li><b>John Long, <i>Treaty No. 9</i> published.</b></li> </ul>   |
| <i>2011</i> | <ul style="list-style-type: none"> <li><i>CBC Radio Ideas Program: “George MacMartin’s Big Canoe Trip” (December 19.)</i></li> </ul>   |
| 2013        | <ul style="list-style-type: none"> <li>Mushkegowuk Council Treaty 9 Conference, features diary “visit.”</li> </ul>   |
| <i>2014</i> | <ul style="list-style-type: none"> <li><i>Alanis Obomsawin NFB documentary, “Trick or Treaty?” featured at Toronto International Film Festival (TIFF), (September).</i></li> </ul> |

George MacMartin's obituary in the *Perth Courier* as having been at his father's bedside in hospital when he died. His name also appears on the official death certificate for George MacMartin as having reported his death. The other major piece of evidence is the fact that the donation of the MacMartin correspondence files and accompanying pictures to the Archives of Ontario in 1974 are indicated in the Archives' on-line file record for these papers as having been made by Georgina Relyea, who was George MacMartin's daughter. If Georgina had the MacMartin 1905 diary in her possession she would have likely donated it to the Archives of Ontario at that time. She did not, so this writer contends that the "family member" who donated the diary to the private library of poet Wallace H. Robb near Kingston, Ontario, was more than likely Allan MacMartin. The question arising from this is who is Wallace H. Robb and why did Allan MacMartin take the diary to his private Library?

A portrait of Robb appears in Figure 20.<sup>278</sup> An image of a note that he inscribed and inserted into the diary when he donated it to Queen's University Archives appears in Figure 21.<sup>279</sup> Robb was a very independent thinking Canadian nationalist poet who had researched the history of the Mohawk people whose traditional territory encompassed the Belleville area where Robb grew up. Robb had authored an epic poem published in 1948 entitled *Thunderbird* that profiled the Mohawk history in the area. As a result of this work, the Mohawk Nation invested

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<sup>278</sup>Wallace H. Robb Portrait, file # 32 Portrait, Box 3 Personal, Wallace H. Robb fonds, 3736.1, QA. Permission of Queen's University Archives to include this Portrait of Wallace Havelock Robb in this thesis is acknowledged with appreciation.

<sup>279</sup>Wallace H. Robb personal, hand written note inserted into the George MacMartin 1905 diary, April 1968. See Daniel George W. MacMartin, Diary, MC 2999, QA. Permission of Queen's University Archives to include this picture of Mr. Robb's note is acknowledged with thanks.

Figure 20: **Wallace H. Robb Portrait**



him with the title, “Pine Tree Chief” within the Mohawk Nation. A report on Mr. Robb’s investiture appearing in *The Kingston Whig-Standard* noted the appreciation expressed by the Mohawk Nation for Robb’s work as follows: “Tribute of the Mohawks of the Kente (Bay of Quinte) voiced in verse by Mrs. Henry A. Brant, Indian poetess and direct descendant of Capt. Joseph Brant, referred to Mr. Robb’s research into Indian culture and his installation of the poet’s bell.”<sup>280</sup> As significant is the following report in the same paper that was contained in an article a few days earlier that previewed Robb’s investiture as a Mohawk “Pine Tree Chief”:

This chieftanship is said to be the highest honour the Indians can confer upon a poet, orator, statesman and so on, and is rarely given. In this case Mr. Robb has after a labour of research and writing for almost 20 years restored to the Mohawks much of their forgotten lore and proud past of the Bay of Quinte.<sup>281</sup>

A sense of the flavour of Robb’s *Thunderbird* is captured in a 1950 newspaper article that said Robb’s work, “...combines fact and fancy to pattern a life so different from ours that more and more students are beginning to realize the greatness of the aborigine.”<sup>282</sup> This description of Robb’s work and the fact that Robb was invested as a Mohawk Chief demonstrate two things. First, they illustrate that Robb was a champion of Aboriginal Canadian history and a participant in portraying it in poetic form and was highly regarded by the Mohawks. Moreover, Robb himself identified the “indigenous quality” of his work as what he considered to be the ultimate significance of his career, “the effort to express the spirit of my native land, self-reliant, lofty and

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<sup>280</sup> See “Wallace Havelock Robb Made a Chief of Mohawk Tribe: Poet Gets Name of White Eagle In Ceremony at Abbey Dawn,” *The Kingston Whig-Standard*, Monday, October 25, 1948, Page Fourteen.

<sup>281</sup> “Will Honour Havelock Robb,” *The Kingston Whig-Standard*, Saturday, October 23, 1948, Page 2.

<sup>282</sup> Florence Carver, “Thunderbird Lyrical Combination Of Legend and Fact of Early Indian Life in Bay of Quinte District,” review of *Thunderbird* by Wallace H. Robb, *Belleville Intelligencer*, Saturday, February 11, 1950.

strong.”<sup>283</sup> Secondly, the considerable news coverage that Robb was receiving around the time of 1951 when the MacMartin family member (likely Allan MacMartin) chose to take the diary to Wallace H. Robb’s Library explains why he chose to take it to him.

One of the outstanding questions or mysteries of history surrounding this decision to take the diary to Robb is why Allan MacMartin did not take it to the Archives of Ontario or merge the diary with the other material that his sister Georgina had. That material was not donated to the Archives of Ontario until more than twenty years following Allan MacMartin’s decision to donate the diary to Wallace H. Robb’s private library at Abbey Dawn near Kingston, Ontario, in 1951. There is no explanation for this provided in any of the relevant historical source evidence. Perhaps in the future some new evidence will arise that sheds light on this point. For now, it remains a mystery. As such, it adds to the intrigue associated with the George MacMartin 1905 diary. In any event, Allan’s decision to take the diary to Wallace H. Robb had a fortuitous effect for future historians, when Robb in turn donated it to Queen’s University Archives. At the time he included with it a note inscribed on his stationery that he inserted inside the diary (see Figure 21).

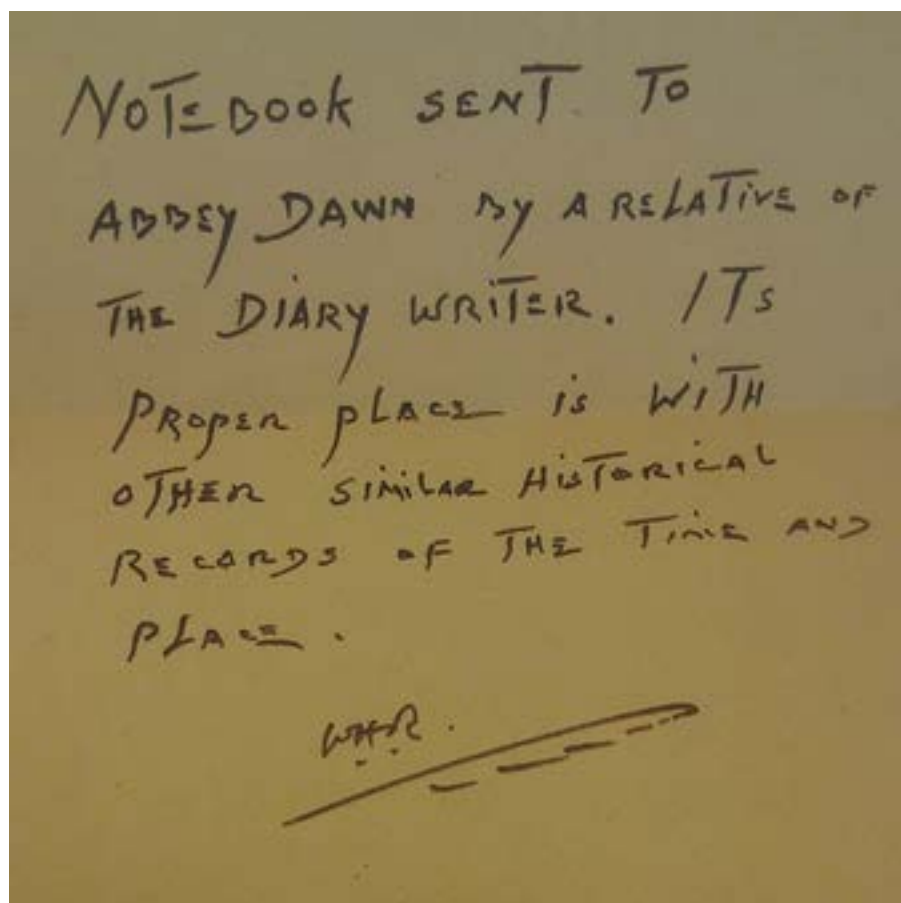
As an independent minded Canadian nationalist poet who had always demonstrated a flair for the unconventional and who marched to the beat of his own drummer, Robb decided to fall back on his long-established relationship with Queen’s University and to take the diary there,

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<sup>283</sup>Wallace H. Robb, quoted in Colin Sabiston, “The Spirit Of The Mohawks Is Being Treasured By An Adopted Son – Robb: Poet of Abbey Dawn,” *The Globe Magazine*, November 14, 1959, page 10. Sabiston also made a significant observation in his article about a certain affinity that Robb perceived between his own Scottish ancestry and the Mohawk people. Sabiston wrote: “Like many other Canadians of Scottish descent, he soon discovered an essential affinity between his inherited tradition and that of the industrious, peace-loving Mohawks, who could become fearsome warriors when their villages faced desolation, and their tribes extinction,” *Ibid.*, Page 10.



Figure 21: Wallace H. Robb Note in MacMartin Diary, 1951<sup>284</sup>



NOTEBOOK SENT TO  
ABBEY DAWN BY A RELATIVE OF  
THE DIARY WRITER. ITS  
PROPER PLACE IS WITH  
OTHER SIMILAR HISTORICAL  
RECORDS OF THE TIME AND  
PLACE.

WHR.

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<sup>284</sup> Daniel George W. MacMartin, Diary, MC 2999, QA. Permission of Queen's University Archives to include a picture of this note in this thesis is acknowledged and appreciated.

so as to reside “with other historical records of the time and place.” Robb made a good choice, as it was there at Queen’s University Archives that various academic researchers “discovered” the diary and began to incorporate it into their work. These researchers are identified in Table 12 and their work has been discussed in the review of Treaty 9 historiography presented in Chapter 2 of this thesis. The attention being paid to the diary gained considerable momentum with the publication of John Long’s book in 2010. This momentum has been further reinforced by the 2011 CBC Radio *Ideas* program dealing with the diary and most recently with the release of the Alanis Obomsawin *Trick or Treaty?* National Film Board documentary. Academic researchers, lawyers, government officials and First Nations leaders and analysts are all taking considerable interest in the diary to support their work. It is hoped that this thesis will further contribute to the already well-established profile and momentum that the diary has attained.

### **5.3 Comparison: Diary and Official Report**

John Long’s book *Treaty No. 9* has done a superlative job of profiling and dissecting the contents of the MacMartin diary and of those prepared by the other Treaty 9 Commissioners. This work can be added to by taking a different analytical tack in approaching the same material. The following will highlight some interesting differences that appear upon a review of the way that the events of the Treaty 9 negotiations were recorded by George MacMartin in pencil in his diary and the way that they were treated in the typed, official report of the Treaty 9 Commissioners prepared in November of 1905. Table 14 displays the various locations that the

Table 14: Treaty 9 Meeting Locations, 1905

| <b>Location</b>                   | <b>Date</b>         |
|-----------------------------------|---------------------|
| Osnaburgh                         | July 11             |
| Fort Hope                         | July 18-21          |
| Marten Falls                      | July 25             |
| English River                     | July 29             |
| Fort Albany                       | August 3            |
| Moose Factory                     | August 8-11         |
| Travel: Moose Factory to New Post | August 12-August 18 |
| New Post                          | August 19-21        |
| Abitibi                           | August 31           |

Treaty 9 Commissioners stopped in the summer of 1905 to conduct treaty negotiations with representatives from area First Nations. The overall conclusion that can be drawn from a comparative analysis of these two documents is as follows. As the Commissioners' journey progressed, the record of what was discussed at each location – particularly regarding the key issue of protection of the First Nations' right to continue to practice their traditional hunting, fishing and trapping activities, became more detailed and more thoroughly recorded in the MacMartin diary and much less so in the "official report". In fact, this writer can only conclude that a sanitation process was engaged in when the official report was completed. Consider the following illustrations of this.

The official record of the first stop at Osnaburgh is quite specific about the commitment made to First Nations about their traditional activities. The response to concerns expressed by Chief Missabay about the treaty possibly resulting in the First Nations being "deprived of the fishing and hunting privileges which they now enjoy," is recorded in the official report as follows:

On being informed that their fears in regard to both of these matters were groundless, as their present means of making a livelihood would in no way be interfered with, the Indians talked the matter over among themselves, and then asked to be given till the following day to prepare their reply.<sup>285</sup>

For his part, George MacMartin entered a synopsis of what transpired in his diary, but made no mention of the "reassuring" part of what was said to the First Nations. He did provide details regarding the reserves selected, reflecting his likely guidance from A.J. Matheson, for which no written evidence has to date surfaced.

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<sup>285</sup>Treaty Commissioners Report, Ottawa, 6 November, 1905, Correspondence re Treaty No. 9, file RG-1-273-5-1.1, RG 1-273-5, AO, 5.

The same pattern emerged at the next stop at Fort Hope. The official report states, "...that hunting and fishing, in which occupations they were not to be interfered with, should for many years prove lucrative sources of revenue."<sup>286</sup> Again, George MacMartin recorded considerable detail about the reserve land selected and also mentioned that Sinclair Ritch of the HBC provided interpreting of the address made by D.C. Scott. This is not mentioned at all in the official report that says that Catholic missionary Father Fafard intervened in the negotiations to explain that "...for giving up their title to a large area of land of which they could make no use, they received benefits which served to balance anything which they were giving up."<sup>287</sup> George MacMartin made no mention of this whatsoever in his diary. At least not in the part that has survived some evident editing and erasure of what he wrote initially. The words "treat with the Indians" can be deciphered as having been erased and it is apparent that these words follow a reference made to Fafard that is evident in the text of the diary. This perhaps explains why the official report of the commissioners refers to Father Fafard's translation activities whereas George MacMartin's diary does not. Perhaps the erased portion dealt with some role Father Fafard played in regard to the erased phrase, "treat with the Indians."<sup>288</sup> Oral interviews with descendants of Treaty 9 First Nation members who were present at the meetings could possibly shed some light on this matter.

The evident emphasis by MacMartin in making much more detailed records of the meetings starting at the July 18-21 stop at Fort Hope is deserving of further consideration. Was he growing sceptical at that point of the line that was being given to the First Nation

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<sup>286</sup>Ibid.,8.

<sup>287</sup>Ibid.

<sup>288</sup>Queen's University Archives has been working with some new equipment and technology in an effort to restore to legible form the erased portions of the George MacMartin 1905 diary. This approach has not proven to be effective. Queen's University Archives is presently exploring an alternative method of accomplishing the objective of restoring the erased portions to legible form. Paul Banfield, Queen's University Archivist, e-mail message to this writer, September 17, 2015.

representatives at these meetings? It is also noteworthy that different interpreters were doing the interpreting. This could have contributed to some confusion for the First Nation participants, as it seems to have done for the Commissioners as well. George MacMartin began to make very detailed notes about what he was learning about the importance of hunting and fishing. Nearing the end of the Commissioners' stay at Fort Hope, on the morning of July 21, he recorded learning from the local HBC manager that due to poor soil in the area, "...the only source from which the Indians and he himself derived means of subsistence was from fish and rabbits."<sup>289</sup>

A close visual examination of the original diary account of the meetings at Fort Hope on July 19, 1905, also reveals some very interesting and mysterious things regarding the notes made by MacMartin about the translation issue. Figure 22 and Figure 23 show some excerpts from the MacMartin diary pertaining to the notes inscribed for the Fort Hope stop meetings that went from July 18-21. First of all, MacMartin's notes commence in the middle of the page. Why is this? Previously inscribed notes from the night before, July 18<sup>th</sup>, are erased. What happened that night and why did MacMartin erase his notes on this? Figure 23 shows another excerpt for July 19 from the diary.<sup>290</sup> One interesting clue to ponder in considering a possible answer to this question is that the word "grilled" is decipherable with the aid of a magnifying glass from the imprint of the scratched out pencil records that MacMartin first made in his diary about this. Further detailed knowledge about what may have transpired at a meeting that occurred the night of July 18, 1905, can only be obtained through a targeted oral interview research initiative which is recommended to add to historical knowledge about this point.

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<sup>289</sup>George MacMartin diary entry for July 18, 1905, Daniel George W. MacMartin Diary, MC 2999, QA.

<sup>290</sup>Ibid. Permission of Queen's University Archives to include these pictures of the diary content in this thesis is acknowledged and appreciated.

Figure 22: MacMartin Diary, July 19, 1905

Wednesday 19<sup>th</sup>  
This morning the representative Indian  
has not been absent from the Fort  
sembled and a conference was held  
Scott his an Interpreter (Sinclair Ritt  
told to them that the thing had been  
a Commission to see how his peo  
re and to enter into a treaty with  
em, and that the thing wished  
up his subject and see that  
a happy and comfortable, giving  
in on a present this year 8.

Figure 23: MacMartin Diary, July 19, 1905 – "Explanation"

Explanation, he along with  
others signed "his"  
the treaty was signed.  
They departed to keep  
East and to talk of  
of Chief and Council.  
In the afternoon the pa  
been completed. Mr. S  
paying the Indians  
up in families and  
the Indians receive  
of money with that  
characteristic of the



MacMartin also may have made some notations in his diary about the explanation provided by D.C. Scott to address confusion expressed by Chief Moonias at the Fort Hope meetings. The current historical record shows the MacMartin did not address this until he made notes on the Marten Falls meeting. Figure 23 shows, however, that MacMartin's misspelled word "explanation" was inscribed over previously erased content. Did George have some interesting comments to make that we cannot decipher?

Things changed at the next stop at Marten Falls, in terms of the level of detail that appears in the official report and in the MacMartin diary, respectively. Remarkable for its brevity, the official report states: "The Treaty, after due explanation, was signed and the payment made immediately." The official report also presented a sanitized summary of a speech given in the evening by Chief Whitehead, reporting as follows: "At the feast Chief Whitehead made an excellent speech in which he described the benefits which would follow the treaty and his gratitude to the King and the Government in extending a helping and protecting hand to the Indians."<sup>291</sup>

Perhaps because of what he was learning and the possibility of his feeling some empathy for those he had been meeting with, George MacMartin began to make very detailed notes on what was being said about the key issue of hunting, fishing and trapping. He recorded at Marten Falls exactly what was being said by way of the "explanation" given to the First Nations by Dominion Treaty Commissioner, D.C. Scott. Perhaps importantly, MacMartin also scratched out and rewrote his diary account of the speech made by D.C. Scott. He also recorded dollar for

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<sup>291</sup> Treaty Commissioners Report, 6 November, 1905, AO, 10.

dollar the amounts paid out to “Dominion Indians” and to “Ontario Indians” respectively. He then recorded the following about Chief Whitehead’s speech:

Chief Whitehead delivered an oration, in which he said pointing up and down the river that they were being cornered by not being allowed both banks of the river for miles to fish and hunt on but that they must accept what was offered from these who had given them presents and provided a feast for them. When it was explained to them that they could hunt and fish as of old and that they were not restricted as to territory, the reserve, merely being a home for them wherein which no white man could interfere or trespass upon, that the land was theirs forever; they gladly accepted the situation, and said they would settle the reserve question later on.<sup>292</sup>

Were these two reports written by people who attended the same meeting? The detailed account quoted above that was entered by George MacMartin in his diary was the first time that he had recorded the substance of the “explanation” that D.C. Scott had been providing to First Nations representatives. This had been offered by Scott in response to concerns expressed by the First Nations representatives at each meeting about their ability, after the treaty was signed, to carry on unimpeded with their traditional activities of hunting, fishing and trapping. The notes and comments recorded by MacMartin about this are very clear. They contain no evidence of anything having been erased. A question that arises from this further mystery associated with the George MacMartin diary is what the reason may be for why MacMartin recorded his observations on this point so clearly and unequivocally, yet felt compelled to erase significant portions of his diary notes that he had recorded about other things that he had observed at essentially the same time.

Perhaps George MacMartin made more precise notes about the hunting, fishing and trapping issue because with each stop of the Commissioners as they proceeded with their tour

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<sup>292</sup> George MacMartin diary entry for July 25, 1905, Daniel George W. MacMartin Diary, MC 2999, QA.

across far Northern Ontario, he was learning more about the conditions being faced by the area First Nations and about the importance to them of practicing their traditional hunting, fishing and trapping as means of subsistence to ensure their survival. Perhaps too he began to feel empathy towards the First Nations people whom he had been listening to and started to record in detail the substance of what was being said at the meetings.<sup>293</sup> Elements of both of these factors could have influenced MacMartin to take the step of making more detailed notes about hunting, fishing and trapping as he heard the speech given by D.C. Scott repeated at each location and observed the consistent reaction to this among First Nations representatives at each of the stops made by the Treaty 9 Commissioners.

A similar pattern of dissonance between the diary notes of MacMartin and the content of the official report of the Commissioners emerges upon consideration of the reports made about the meetings at Moose Factory. George MacMartin made detailed notes about the reservation and what was said to the people there, recording the following:

...that a reservation would be set aside for them, giving each family of 5 a square mile that they were not obliged to live on it until they felt inclined, that they could follow their custom of hunting where they pleased; the area of land simply being set aside as their own on which no white man could trespass or enter upon, without their permission.<sup>294</sup>

The official report of the Treaty 9 Commissioners made no mention of this detailed account of what was said about the reservation.

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<sup>293</sup>Dr. John Long has also pointed to psychological factors as possibly important in having induced George MacMartin to make the detailed records in his diary that he did following the Osnaburgh meeting: "Perhaps as a young man, long before embarking for the north, he had discussed treaty-making with former treaty commissioner Alexander Morris, who lived in Perth across the street from MacMartin's father. I wonder if MacMartin's conscience bothered him after witnessing the so-called negotiations at Osnaburgh...Whatever the reason, we are indebted to MacMartin for recording his post-Osnaburgh observations." See John Long, *Treaty No. 9*, 335.

<sup>294</sup> Daniel George MacMartin entry for August 9<sup>th</sup>, 1905, Daniel George W. MacMartin Diary, MC 2999, QA.

## 5.4 Health and Translation

During the 1905 Treaty 9 Commissioners tour it also appears from the differing entries made in the MacMartin diary and the Commissioner's Report that there may have been some confusion about who was doing the translating at the meetings. There are several instances where MacMartin noted one individual as doing this, whereas either another individual was noted as doing the translating in the official report or no mention was made about translation at all. MacMartin also made frequent entries about the activities of the doctor assigned to the Commissioners' tour. The official report is strangely silent on this point. Table 15 and Table 16 below summarize the information on these two matters that is contained in the MacMartin diary and the official report of the Treaty 9 Medical Attendant, Dr. Alex George Miendl.

These two issues of translation and health care are important and provide candidates for further research. On the translation issue, most of the people recorded by MacMartin as having provided translation services were HBC employees. Perusal of the Hudson's Bay Company Archives records for the names of the HBC employees identified by MacMartin as having provided translation services in 1905 is not encouraging. Only Samuel Iserhoff from among this group had extensive experience in a role that was specifically defined as a translation role.<sup>295</sup>

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<sup>295</sup>Samuel R. Iserhoff, Biographical Sheets, Hudson's Bay Company Archives (HBCA). See also Iserhoff, Samuel R., Guide and Interpreter, Rupert's House, Appointments and Service, 1892-1893 (D. 33/1 fo. 23), and Iserhoff, Samuel R., Interpreter, Rupert's House, Appointments and Service, 1893-1895 (D. 33/1 fo. 63; D. 33/2 fo. 15). It is also notable that the HBC file on Indian Treaties contains very detailed information on the identity of the person employed by the HBC to provide translation services for Treaty 8 and the associated precise cost for this that was billed to the Dominion Government, whereas there is no corresponding information in this file whatsoever on the many and various HBC employees who conducted translation services during the Treaty 9 tour, nor on the amounts billed for their services. See HBCA, Indians – destitution, treaties with government, etc., 1894-1908 (A.12/ FT 243/1). David Calverley's article on the role of the HBC in facilitating the negotiation of Treaty 9 has made a start on addressing the HBC translation role, but further detailed research on this issue is necessary. The above noted difference between the HBC file entries regarding translation services provided for Treaty 8 and for Treaty 9 respectively may provide support for an argument that the HBC Treaty 9 translation services effort was rushed and inconsistent in the quality of such services provided at each location where the 1905 Treaty 9 negotiations were

Table 15: Principal Translators: Treaty 9 Meetings, 1905

| Date/Location  | Translator/Affiliation   |
|--|--|
| July 6, Lac Seul.  | J.D. McKenzie (HBC)  |
| July 11, Osnaburgh.  | James Swain, (HBC)   |
| July 19, Fort Hope.  | William Sinclair Ritch (HBC)<br>Father Farfard (RC Church)                 |
| <i>July 25, Marten Falls.</i>  | <i>Sam Iserhoff (HBC)</i>  |
| August 3, Fort Albany.   | James Linklater (HBC)  |
| August 8-11, Moose Factory.  | George McLeod (HBC)<br>Jeff Mowat (HBC)<br>Bishop Holmes (Anglican Church) |
| New Post, August 19.   | John Luke (First Nation)   |
| <b>Legend:</b> “HBC” – Hudson’s Bay Company;<br>“RC Church” – Roman Catholic Church. |  |

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conducted. If further research were to confirm this, it would provide further evidentiary support for the Treaty 9 First Nations’ contention that their oral history account of what constitutes the agreement reached in Treaty 9 is the “real agreement” of Treaty 9 and that the written Treaty 9 document is, at best, an incomplete record of the agreement.

Table 16: Incidence of Tuberculosis (TB) & Vaccinations at Treaty 9 Meeting Locations, 1905<sup>296</sup>

| Location      | Incidence of TB among cases examined | # of people vaccinated |
|---------------|--------------------------------------|------------------------|
| Osnaburgh     | 65%                                  | 107                    |
| Fort Hope     | 35%                                  | 201                    |
| Marten Falls  | 45%                                  | 47                     |
| Albany        | 20%                                  | 268                    |
| Moose Factory | 20%                                  | 146                    |
| New Post      | 10%                                  | 23                     |
| Abitibi       | 10%                                  | 98                     |

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<sup>296</sup> Alex George Meindl, Report to Superintendent General of Indian Affairs, 2 September, 1905. Correspondence re Treaty No. 9, RG 1-273-5, (AO).

He was not a lawyer, however and while he may have ably translated what he heard as best he could, the fact that complex legal issues of land surrender were being negotiated suggests that it is probable that these legal concepts at issue during the discussions were not adequately explained. This is an area that is a prime candidate for further research that could involve analysis of differences in dialects involved at the different meetings, as well as oral interviews with descendants of people who were at the specific meetings. The aim would be to clarify the level of comprehension that prevailed at the meetings and whether this varied from meeting to meeting.

The Marten Falls post Treaty 9 meeting location, and the HBC employee Samuel Iserhoff (who was an experienced translator and who did the translation at that meeting) could be selected for specific focus as a case study analysis. Such a case study would be compelling for two reasons. First, the HBCA archival records show that only Mr. Iserhoff from among the HBC employees identified by George MacMartin in his diary as having been Treaty 9 translators, had been employed by the HBC during his career with them serving explicitly in a translation function. Secondly, the Marten Falls meeting is of extreme importance, given that it is the meeting location for which MacMartin first described the explanation given by Commissioner D.C. Scott regarding the effect of the proposed treaty on the First Nations' members' ability to continue to practice their traditional harvesting activities in an uninterrupted fashion.

The information displayed from Dr. Meindl's report is also important. MacMartin's references in his diary to the activity of the doctor at the various Treaty 9 negotiation meetings are important. In view of John Long's thorough explanation of the components of oral tradition in *Treaty No. 9*, it may be that when the First Nations people observed the doctor busily attending to the health needs of First Nations people who had gathered at the various meeting locations,

they may have assumed that by signing the treaty, this kind of medical service being provided to them would be ongoing. Again, oral interview research with descendants of people who participated in the various Treaty 9 negotiations would be the best place to start to clarify what those First Nations people in attendance at the meetings in 1905 actually perceived.

### **5.5 Comparison: Diary and Written Version of Treaty 9**

Many of the major contributions to the historiography of Treaty 9 that were discussed above in Chapter 2 have emphasized the differences between the oral undertakings made to First Nations during the summer of 1905 Treaty 9 “negotiation” meetings and the content of the written Treaty 9 document. Dr. John Long’s *Treaty No. 9* is the most comprehensive illustration of this. What may be a useful contribution to this work is to visually isolate and juxtapose some of the key specific points of dissonance between the written Treaty 9 document and the oral record of the 1905 Treaty 9 negotiations that is verified by the written entries made by George MacMartin in his diary. Table 17 presents such a summary and juxtaposition.

Several of the key elements presented in Table 17 are deserving of particular emphasis in advance of the discussion presented in Chapter 6 of the legal and constitutional implications of the MacMartin diary. The most glaring point of dissonance is the absence in the MacMartin diary of any mention having been made to First Nations negotiators at any of the 1905 Treaty 9 discussion meetings of the detailed agreements that had been reached between Ontario and Canada. Nor was any explanation presented about why Ontario was involved in representing the Crown in the negotiations. No doubt had the Commissioners addressed this issue it would have



Table 17: Comparison of MacMartin Diary Content and Written Treaty 9 Document

| Issue                                | D.G. MacMartin <sup>297</sup>   | Written Treaty <sup>298</sup>  |
|--------------------------------------|---|--|
| <i>Hunting, fishing and trapping</i> | <p>First Nations can continue hunting, fishing and trapping “as of yore.”</p> <p>“Taken up” clause not discussed during 1905 treaty negotiations meetings.</p>  | <p>The right of First Nations to practice their traditional activities of hunting, fishing and trapping is subject to limitations. Portions of First Nations’ traditional territory “surrendered” through the treaty may be “taken up” for...</p> <p>“settlement, mining, lumbering, trading or other purposes,” under the “taken up” clause, &amp;</p> <p>“public works, buildings, railways, or roads of whatsoever nature” under the “infrastructure” clause.</p> |
| <i>Ontario-Canada Agreements</i>     | <p>Specific reference made to his being dispatched to Ottawa by order of A.J. Matheson.</p> <p>No indication of the Ontario-Canada agreements pertaining to Treaty 9 having been mentioned at all or explained.</p> | <p>Details of the agreements are appended to the Treaty 9 document, but not completely.</p> <p>Only clause 6 of the 1894 Agreement is appended. Clauses 1 through 5 of the 1894 agreement are omitted.</p>   |
| <i>Reserves</i>                      | <p>MacMartin recorded that First Nations were advised that the Reserves established by Treaty 9 would be “a home for them” that the white man could not enter without their permission.</p>                         | <p>Reserves to be set aside “for each band” “not to exceed one square mile for each family of five.”</p> <p>Location “arranged” between Commissioners and Chiefs and Headmen.</p>  |

<sup>297</sup> Daniel George W. MacMartin Diary, MC 2999, QA. The term “First nation” is substituted in this Table for the term “Indians” used in the diary.

<sup>298</sup> *The James Bay Treaty – Treaty No. 9*. The term “First Nations” is substituted here for the terms “Indians” or “bands” that appear in the written Treaty 9 document.

raised suspicions among the First Nations negotiators. The late Dr. Stan Louttit emphasized this saying, "...if they were told there would be a ring of fire to test us, they never would have signed the treaty. They would have said 'Take a hike'." <sup>299</sup>

Related to this is the absence of any discussion of the "taken up" clause at the meetings. The MacMartin diary contains no mention of this having been discussed at the 1905 meetings. In view of this, it is highly suspicious that clauses 1 through 5 of the 1894 Ontario-Canada agreement were not either referenced or appended to the written Treaty 9 document. Clause 1 of this agreement stipulates that Ontario has the right to exercise the "taken up" clause and that the First Nations' treaty right to hunt, fish and trap did not apply to any such land "taken up." Such lack of full disclosure is contrary to the requirements of government representatives of the Crown to at all times comport themselves in a manner that will bring honour to the Crown. The legal rights and obligations of the Government of Ontario that are addressed in Chapter 6 must be viewed through the prism of realization that both the Dominion Government and the Ontario Government were, to put it kindly, less than fully forthcoming with the truth during the "explanation" provided to First Nations negotiators during the "negotiation" meetings held in the summer of 1905. George MacMartin, however, recorded what was said, for later generations to assess.

## **5.6 Summary and Conclusion**

This review vividly demonstrates the significance of the George MacMartin diary. As the Treaty 9 negotiation meetings were conducted sequentially in the summer of 1905, George MacMartin began to record exactly what was being said to the First Nation representatives.

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<sup>299</sup> Dr. Stan Louttit, "Remarks to the NAN First Nations Treaty Conference" (lecture, Thunder Bay, Ontario, March 18, 2014).

These statements are now constitutionally entrenched and protected treaty rights as a result of section 35 (1) of the *Constitution Act, 1982*. The Supreme Court of Canada case law that has developed regarding oral treaty commitments is discussed in Chapter 6. The First Nations' constitutionally entrenched and protected treaty rights to hunt, fish and trap are legally actionable if violated. It is in this context that the primary significance of the George MacMartin 1905 Treaty 9 diary arises.

## **Chapter Six: Conclusions & Legal and Constitutional Implications of the George MacMartin Diary**

### **6.1 Introduction**

This chapter addresses the legal and constitutional implications of the analysis of the MacMartin diary and the role of the Government of Ontario and associated decision-makers in the negotiation of Treaty 9. It will commence with a discussion of the two dominant aspects of current Supreme Court of Canada Aboriginal law case law relative to consideration of the significance of the MacMartin diary and of Ontario's role in Treaty 9. These are oral history and Crown obligations pursuant to the central place of the Honour of the Crown principle as the dominant paradigm informing current Aboriginal and treaty rights law in Canada. This is followed by discussion of a specific Treaty 9 First Nation treaty rights legal initiative in regard to which the MacMartin diary is highly relevant. The Conclusions section follows and states the overall conclusions from this thesis and also identifies some areas for further research that arise from it.

### **6.2 Supreme Court of Canada, Oral History, the Honour of the Crown & the MacMartin Diary**

The fact that the Honour of the Crown principle has now been established as the dominant paradigm informing Aboriginal and treaty rights law in Canada was established in Chapter 2. Table 1 in Chapter 2 also identified that there are associated "off-shoot" Crown duties and obligations. First of all, it is important to establish the nature of Supreme Court of Canada case law relating to oral history and oral testimony. The Court has confirmed that oral undertakings made at the time treaties were concluded are part of the treaty, confirming that a continuing right to hunt, trap and fish in their traditional territories is a constitutionally protected right for Treaty 9 First Nations. This is the foundation for determining the legal and

constitutional significance of the MacMartin diary. The importance of oral evidence for the court was emphasized in the key *Delgamuukw v. British Columbia* case of 1997 and in several other cases. Applicable case law and the key elements from each decision are summarized in Table 18.

The importance of oral history accounts to the S.C.C. in this context is directly linked to some basic principles of treaty interpretation that the Court has established. Two key treaty interpretation principles were identified in the case of *R. v. Horseman*:

- 1) should be given a fair, large and liberal construction in favour of the Indians; and
- 2) must be construed...in the sense in which they would naturally be understood by the Indians.<sup>300</sup>

The Court's elaboration on the rationale for establishing these principles pinpoints its interest in establishing a clear understanding of the historical context in which the treaty was agreed to as a basis for making decisions in individual cases. It is to oral history and to secondary analyses in which written versions of oral history accounts of First Nation elders are contained that the Court will look to in order to enlighten itself as to the nature of the historical context for treaty making.<sup>301</sup> In addition to the two treaty interpretation principles noted above, the Court has also added "that treaties should be interpreted in a manner that maintains the integrity of the Crown."<sup>302</sup>

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<sup>300</sup> [1990] *R. v. Horseman* 1 S.C.R. 906.

<sup>301</sup> John Borrows argues that First Nation elders have an important role to play not just as the source of oral evidence for the Court, but also as a source of "expert input and help in interpreting Aboriginal oral evidence." See John Borrows, "Listening for a Change: The Courts and Oral Tradition," *Osgoode Hall Law Journal* 39 (2001), 29.

<sup>302</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 2 C.N.L.R. 77, 781 at para 9.

Table 18: Supreme Court of Canada on Oral History/Oral Agreements

| Supreme Court of Canada decisions re oral agreements | Details  |
|--|--|
| [1996] <i>R. v. Badger</i>                           | Treaties as written documents recorded an agreement that had been reached orally and they did not always record the full extent of the agreement. <sup>303</sup>   |
| [1997] <i>Delgamuukw v. British Columbia</i>         | <i>The laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing</i> with the types of historical evidence that courts are familiar with. <sup>304</sup> |
| [1999] <i>R v. Marshall</i>                          | Acquittal on fishing offences based on 1760 treaty rights arising “from oral terms of the treaty.” <sup>305</sup>  |
| [2005] <i>Mikisew Cree v. Canada</i>                 | <i>Oral promises can give rise to treaty rights and if no meaningful right to hunt remains...to a potential action for treaty infringement.</i> <sup>306</sup>   |
| [2006] <i>R v. Morris</i>                            | “the oral promises are as much a part of the treaty as the written agreement.” <sup>307</sup>  |
| [2009] <i>Ermineskin Nation v. Canada</i>            | Oral representations made by government agents during treaty negotiations constitute “oral terms” of the treaty. <sup>308</sup>  |

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<sup>303</sup> *R. v. Badger*, [1996] 1 S.C.R.771, 772 at para 52.

<sup>304</sup> *Delgamuukw v.. British Columbia* [1997] 3 S.C.R. 1010, 153 D.L.R. (4<sup>th</sup>) 193, at para 85.

<sup>305</sup> *R. v. Marshall*, (1999), 177 D.L.R. (4<sup>th</sup>) 513, [1999] 3 S.C.R. 456.

<sup>306</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 259 D.L.R. (4<sup>th</sup>) 610, at para 48.

<sup>307</sup> *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, at para. 24.

<sup>308</sup> *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at paras. 53-56.

University of Saskatchewan Law Professor Dwight G. Newman has analyzed the Supreme Court of Canada jurisprudence regarding treaty rights. He has pointed to an important “trilogy of cases” that he said “...have set Aboriginal rights in Canada and Aboriginal/non-Aboriginal relations, on a fundamentally different course than they were on before” and “have shaped the modern form of the duty to consult.”<sup>309</sup> The *Haida Nation* case is the most significant case within the trilogy of key cases identified by Professor Newman as “having shaped the modern form of the duty to consult.” It involved an appeal by the Haida Nation of a lower court decision to deny its application to have set aside a provincial government decision to transfer a Tree Farm Licence to Weyerhaeuser without being consulted. The Haida Nation appeal was upheld and in the reasoning for the decision, Supreme Court Chief Justice McLachlin emphasized that the duty to consult:

...flows from the honour of the Crown...the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake.<sup>310</sup>

The *Mikisew Cree First Nation* case extended the process of Supreme Court case law development to a treaty-specific case involving a Treaty 8 First Nation. This case involved the failure of the federal government to consult with the First Nation about a change in the alignment

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<sup>309</sup>Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon, Sk, Canada: Purich Publishing Limited, 2009), 9-10. Professor Newman is also the Canada Research Chair in Indigenous Rights in Constitutional and International Law. The three cases that constitute the “trilogy” referred to by Professor Newman are the *Haida Nation* case, the *Taku River Tlinget First Nation* case and the *Mikisew Cree First Nation* case.

<sup>310</sup>*Haida Nation v. British Columbia* (Minister of Forests) [2004] 3 S.C.R. 513. The Chief Justice further elaborated on this point in the detailed argument section of the *Haida Nation* decision and said, “negotiation is a preferable way of reconciling state and Aboriginal interests.” She also stressed that the Honour of the Crown “gives rise to different duties in different circumstances” and extended to “making and applying treaties,” where “the Crown must act with honour and integrity, avoiding even the appearance of ‘sharp dealing.’ ” See *Haida Nation v. British Columbia* (Minister of Forests), 522, 514, 523.

of a road within the Mikisew First Nation reserve where the Crown was still obligated by the duty to consult with the affected First Nation and seek to “substantially address” their concerns.<sup>311</sup> The Supreme Court also added that a government seeking to exercise its treaty right to “take up” reserve lands for public purposes, must also consult First Nations about the impact of these plans on their treaty rights to hunt, fish and trap and seek to accommodate these impacts.<sup>312</sup> Most importantly, the Court made a further ruling:

If the time comes that in the case of a particular Treaty 8 First Nation, ‘no meaningful right to hunt’ remains over its traditional territories, the significance of the oral promise that ‘the same means of earning a livelihood would continue after the treaty as existed before’ would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.<sup>313</sup>

In short, the Court’s emphasis on the importance of oral history and oral commitments not only reveals the understandings of First Nations at the time, but also has created obligations for governments. It is in this context that the legal and constitutional significance of the MacMartin diary arises. It identifies and confirms the oral commitments made to Treaty 9 First Nations about their continued ability under the Treaty to practice their traditional hunting, fishing and trapping rights, such that these commitments are now entrenched parts of Canada’s constitution. Professor Newman has emphasized that, “Fully historic impacts do not trigger a duty to consult because the duty to consult is proactive and forward-looking and not geared to

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<sup>311</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388, at 391. This was presented as a de facto “no brainer,” as the decision stated: “It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price,” 416.

<sup>312</sup> *Ibid.*, at 391.

<sup>313</sup> *Ibid.*, 414 at para 48.



solve every problem of the past.”<sup>314</sup> Despite this, the duty to consult obligations of governments applies to the situation faced by Treaty 9 First Nations. This is due to the nature of the historical, numbered treaties and to the fact that there are widely differing interpretations between the First Nations’ oral history-based understanding of the content of the “real Treaty 9” and the version of the treaty reflected in the written Treaty 9 document. In this situation, the duty to consult clearly applies. According to Professor Newman:

The Mikisew Cree extension of *Haida Nation* into the treaty rights context was in the context of a historical treaty, one of the numbered treaties dating from the Victorian era. The historical treaties have certain shared characteristics in so far as they tend to be fairly schematic in form and to have been negotiated in a context of unequal bargaining power and of Aboriginal communities without legal representation...Where the treaty leaves room for differences of interpretation, the constitutional duty to consult can continue to operate.<sup>315</sup>

The duty to consult is also a *Crown* obligation and it is not restricted to the national government.

It also extends to the Government of Ontario in the Treaty 9 context.

Jamie Dickson emphasized in his recent Master of Laws thesis that “Crown/Aboriginal Law in Canada was fundamentally redesigned in *Haida Nation* around the principle that the Honour of the Crown must always be upheld in applicable government dealings with Aboriginal peoples.” As he also noted, “this central *legal* principle operates doctrinally to give rise to enforceable ‘off-shoot’ Crown legal obligations.”<sup>316</sup> Dickson has fleshed out the identity of the specific Crown obligations that have emerged as “off shoot” obligations flowing from the

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<sup>314</sup>Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon, SK: Purich Publishing Limited, 2014), 49.

<sup>315</sup> *Ibid.*, 42-43.

<sup>316</sup> Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 1. The existence of such obligations was noted in Chapter 2 of this thesis and is displayed as the fourth item presented in Table 1 (p. 28).

Honour of the Crown principle. These are identified in Table 19 that reveals that the primary such obligation is to consult and possibly accommodate Aboriginal interests. Both the national and provincial governments that represent the Crown in Canada must fulfill this obligation in their dealings with Canada's First Nations regarding their treaty rights.

It is in this context that the recent Supreme Court of Canada *Grassy Narrows First Nation v. Ontario (Natural Resources)* decision must be considered. This decision conveys two key messages of relevance to interpretation of the significance of the George MacMartin 1905 diary. The first is that in stating that "Ontario and Ontario alone" has the authority to "take up" land pursuant to the "taken up" clause of Treaty 3 (and by extension the "taken up" clause in Treaty 9 as well) the Court has reinforced the core argument advanced by the Government of Ontario throughout its co-sovereigntist campaign of 1867-1905. That is that Ontario has the constitutional authority and responsibility for the management of land and associated resources within the boundaries of the Province of Ontario. The *Grassy Narrows First Nation v. Ontario (Natural Resources)* decision reflects Canada's "compound monarchy." What may remain an open question, however, is the validity of the treaty-based "taken up" authority, given that the whole issue of the Crown authority to "take up" land was not discussed with Treaty 9 First Nations during the "negotiation" meetings held by the Treaty 9 Commissioners with First Nations representatives during the summer of 1905.<sup>317</sup>

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<sup>317</sup> This is a matter that merits "taking up" examination of the questions noted by Lord Watson as arising in his J.C.P.C. *St. Catherine's Milling and Lumber Company* decision of 1888 regarding the circumstances under which the Crown's treaty-based "taken up" authority can be exercised.

Table 19: section 35 (1) of the Constitution Act, 1982 & “Off-Shoot” Crown Legal Obligations<sup>318</sup>

| Crown Duties & Obligations  | Details  |
|---|--|
| 1. <b><i>Duty to consult and possibly accommodate</i></b> Aboriginal interests.   | <p><b><i>The Crown has a duty to consult and possibly accommodate applicable Aboriginal interests</i></b> before contemplating action that could adversely affect their interests.</p> <p><b><i>Principal among such interests are treaty rights of Aboriginal people to hunt, trap and fish</i></b> throughout their traditional territory.</p> <p><b><i>There is a wide range and continuum of possible Crown obligations.</i></b></p> |
| 2. <b><i>Duty to bring a demonstrably purposive and diligent approach</i></b> to fulfilment of constitutional obligations.  | This duty was acknowledged and articulated in <i>Manitoba Metis Federation Inc. v. Canada (Attorney General)</i> . <sup>319</sup>  |
| 3. <b><i>A residual fiduciary duty</i></b> to act with best interests of an Aboriginal community when the Crown has assumed discretion over cognizable legal interests of that community. | Dickson argues this duty is “fundamentally unresolved” and preceded development of the now core honour-based principle and was “vaguely reconceptualised” in <i>Haida Nation</i> . <sup>320</sup>  |

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<sup>318</sup>See Jamie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 1-2, and Chief Justice McLachlin’s *Haida Nation* decision.

<sup>319</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, 355 D.L.R. (4<sup>th</sup>) 577.

<sup>320</sup> Jaimie Dickson, “The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada,” 2.

The second main message conveyed in the *Grassy Narrows First Nation v. Ontario (Natural Resources)* Supreme Court of Canada decision is that the position of the Honour of the Crown's as the foundational paradigm and prime directive for Crown/Aboriginal Law in Canada is preserved. This is accomplished by the reference in the Court's decision to the conditions that it has established for protection of treaty First Nations' rights to hunt, fish and trap throughout their traditional territory. These conditions are those set out in the *Mikisew Cree First Nation v. Canada* decision that pertain to the potential bases for treaty infringement, if actions taken by the Crown to take up land within the treaty First Nations' traditional territory effectively prevent the members of their Nation from exercising their hunting, fishing and trapping treaty rights. This is clearly expressed in the following element of the 2014 *Grassy Narrows First Nation v. Ontario (Natural Resources)* decision:

Ontario's power to take up lands under Treaty 3 is not unconditional. When a government – be it the federal or a provincial government – exercises Crown power, the exercise of that power is burdened by the Crown obligations towards the Aboriginal people in question. Here, Ontario must exercise its powers in conformity with the honour of the Crown....for Treaty 3 land to be taken up, the harvesting rights of the Ojibway over the land must be respected. Any taking up of land in the Keewatin area for forestry or other purposes must meet the conditions set out by this Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. If the taking up leaves the Ojibway with no meaningful right to hunt, fish and trap in relation to territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.<sup>321</sup>

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<sup>321</sup>*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 450.

This statement illustrates how the Court’s decision is both consistent with the division of powers set out in the *Constitution Act, 1867*, as well as with the body of Aboriginal and treaty law jurisprudence that it has articulated since passage of the *Constitution Act, 1982*, that includes the section 35 (1) protection of existing Aboriginal and treaty rights. In short, the Court affirms the “judicial shield” role of First Nations’ treaty rights that was identified in Table 1 of Chapter 2 of this thesis.

The next section discusses a case presently being advanced within the court system in Ontario by the Treaty 9 Taykwa Tagamou Nation (TTN). It is a tangible example of the legal and constitutional significance of the MacMartin diary in potentially reinforcing the “judicial shield” role of section 35 (1) of the *Constitution Act, 1982*. The diary both provides evidence of treaty rights itself and also confirms the veracity of Treaty 9 First Nations’ assertion of treaty rights based on their own oral tradition record of what they agreed to during the 1905 negotiation.

### **6.3 Archibald v. Attorney General of Canada & the MacMartin Diary**

The Statement of Claim in the Treaty 9 treaty rights case, *Archibald v. Attorney General of Canada*, integrates and builds upon the Treaty 9 First Nations’ treaty public advocacy strategy that was developed and implemented in recent years. The late Grand Chief of Mushkegowuk Council, Dr. Stan Louttit, was a principal architect of this strategy that emphasized that the “real treaty” agreed to by Treaty 9 First Nations in 1905 was based on the oral assurances given to First Nation leaders at the time by treaty commissioners that their people could continue their traditional harvesting activity unimpeded. The Taykwa Tagamou Nation (TTN)<sup>322</sup> Statement of

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<sup>322</sup> As a reminder, the TTN is the First Nation formerly known as “the New Post Band.” It’s geographical location is near Cochrane, Ontario.

Claim extensively integrates the Treaty 9 First Nations' oral history account of the original treaty discussions, together with the written record of these discussions contained in the Daniel George MacMartin diary discussed above in the service of multifaceted objectives.

There is an assertion in the document that “the people of TTN were promised in the Treaty that their Harvesting rights would continue undiminished.”<sup>323</sup> Yet as the document details, these rights have been diminished over time by mining exploration and development activity. The Statement of Claim seeks to convert the action by Mr. Archibald, who is an individual Trap Line holder, into a class action on behalf of all TTN members, so as to collectively seek protection for the treaty harvesting rights that they share as TTN members, both individually and collectively.<sup>324</sup> The document bridges from this to assert that, “The commissioners’ oral assurances of continued and undiminished Harvesting Rights were critical to the New Post representatives’ deciding to formally agree to a Treaty.”<sup>325</sup>

The document also emphasizes that there are contrasting perspectives between the governments and Treaty 9 First Nations over the “taken up clause” of Treaty 9. TTN is seeking confirmation that TTN Treaty 9 beneficiaries possess a treaty right of consultation on all government efforts to take up land. TTN is also seeking a strengthening of the duty to *consult* obligation, to include a duty to achieve TTN *assent* and *consent*. They allege that the governments act from an assumption that they have a right to “take up” land without

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<sup>323</sup>Statement of Claim, Peter Archibald on his own behalf and on behalf of all other members of Taykwa Tagamou Nation and Attorney General of Canada, Her Majesty the Queen in Right of Ontario, Northern Shield Resources, Inc., and Lake Shore Gold Corp. (*Archibald v. Attorney General of Canada*), Court File No. CV 13 488403, Ontario Superior Court of Justice, para 5, 4. Permission provided by the late Dr. Stan Louttit for counsel to provide this Statement of Claim to David MacMartin for his academic research and analysis purposes is graciously acknowledged with thanks.

<sup>324</sup>*Ibid.*, para 11, 5.

<sup>325</sup>*Ibid.*, para 38, 11.

consultation. The Statement of Claim draws in the terms of the *Rupert's Land and North-Western Territory Order* in support of this contention, arguing that "The Crown's asserted right to 'take up' TTN lands whenever it pleases is inconsistent with the protection of the interests and well-being of the people of TTN."<sup>326</sup>

The issues brought forward in the TTN Statement of Claim are important. Court decisions on these issues will provide further clarification as to the scope and content of legal rights, requirements and obligations under the duty to consult that arises from Supreme Court of Canada jurisprudence pertaining to section 35 (1) of the *Constitution Act, 1982*. Does it extend to a duty or requirement to negotiate? Do treaty rights holders have the right to require that their *consent* be obtained before development projects affecting their harvesting rights are allowed to proceed? Court decisions on these questions will have a significant effect on defining the scope and content of First Nations treaty rights.

The MacMartin diary is part of the foundational evidence presented in the TTN Statement of Claim for reinforcing the Treaty 9 First Nations' oral account of the Treaty 9 discussions. Specific reference is made to the MacMartin diary as the first piece of evidence in support of the TTN claims of a treaty right to continued practice of their traditional hunting, fishing and trapping activities presented under the heading, "Promises of Undiminished Harvesting Rights." George MacMartin's entry in his diary for the August 21, 1905 meeting at New Post is cited specifically (and underlined), which states that the New Post representatives "...were also allowed as of yore to hunt and fish where they pleased."<sup>327</sup> The Statement of Claim builds on

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<sup>326</sup>Ibid., para 45, 13

<sup>327</sup> Ibid, para 32. The Statement of Claim mentions that three New Post representatives met with the Commissioners on August 21, 1905 – Angus Weenusk, William Gull and John Luke.

this piece of evidence to argue that this commitment was part of a pattern of similar oral commitments made at the other 1905 Treaty 9 meetings and was a key basis for TTN agreement to the treaty proposed by the Treaty 9 Commissioners:

37. In conveying the First Nations' representatives' agreement to the Treaty after the negotiations, Angus Weenusk of TTN explicitly articulated the First Nation representatives' understanding of the oral nature of the Treaty agreement to the Commissioners, indicating that they "accepted the terms as *stated*" (as described in the personal diary of Commissioner MacMartin).<sup>328</sup>

This excerpt and further argumentation presented in the Statement of Claim<sup>329</sup> underscore the significance of the MacMartin diary as a unique and significant historical document. It confirms in written form the oral understanding of First Nations of the foundational element of the "real" treaty agreement of Treaty 9, that the First Nations were guaranteed that they could continue to practice their traditional activities of hunting, fishing and trapping throughout their traditional territory. As such, the MacMartin diary bridges and fuses both oral and written records of the 1905 Treaty 9 negotiations. It also confirms that the Treaty 9 First Nations' right to continue their traditional harvesting activities throughout their traditional territory is a treaty right that is now constitutionally entrenched under section 35 (1) of the *Constitution Act, 1982*.

## 6.4 Conclusions

The assertion of this thesis is that the 1905 Treaty 9 diary of Daniel George MacMartin and the Ontario Government's Treaty 9 involvement that led to his appointment as Ontario's

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<sup>328</sup> Ibid, para 37.

<sup>329</sup> The TTN Statement of Claim builds on the evidence it presents from the MacMartin diary to further argue that the TTN did not agree in 1905 that their traditional territory could be "unilaterally `taken up' " and that the Crown's interpretation that they have a treaty-based right to "...unilaterally restrict the TTN Treaty right to hunt, trap and fish ("Harvest") on lands inside Taykwa Tagamou Nation's traditional territory simply by `taking up' land (other than reserve lands) for activities such as mining or logging" is "...Unconscionable and Contrary to the Honour of the Crown and the Rupert's Land Protection Pledge." See Ibid, para 3, para 39-42 and para 43-45, 12-13.



Treaty 9 Commissioner, are highly significant. The diary itself is significant in two major respects. As detailed in this thesis, the diary's primary significance lies in the legal and constitutional realm. It has been demonstrated that the diary confirms the oral tradition based historical record of Treaty 9 First Nations about what transpired during the 1905 Treaty 9 negotiations.

The diary is also significant in historiographical terms. This thesis has used the diary content as a basis for a process of historical source triangulation analysis focusing on the role of the Ontario Government in regard to Treaty 9. The aim has been to add to the existing body of historical knowledge about Treaty 9 and about the people and decision-making processes involved in the Ontario Government's issue management strategy for dealing with Treaty 9, and also of a series of precursor issues. Ontario's involvement in Treaty 9 has been positioned within a long term context. It can best be seen as a manifestation of Ontario's decades long campaign in support of establishing and protecting its position as a co-sovereignist within the Canadian Confederation. It has been argued that the appointment of George MacMartin as Ontario's Treaty 9 Commissioner reflected long-standing aspects of Ontario political culture and that it was not a political patronage appointment. Details have been provided about MacMartin's personal, professional and family background, so as to enhance the existing body of historical knowledge about this important historical actor.

Inconsistencies between the *James Bay Treaty – Treaty No. 9* written treaty document and the terms of several of the Ontario-Canada agreements that led to Ontario's involvement with Treaty 9 suggest that there is a need for further clarification and confirmation of the rights and obligations of the Ontario Government. Such clarification is specifically required with respect to Ontario's exercise of the Crown authority to "take up" land pursuant to the treaty. The

recent Supreme Court of Canada decision in *Grassy Narrows First Nation v. Ontario (Natural Resources)* confirms that “Ontario and Ontario alone” has the authority as part of the Crown in Canada to “take up” land pursuant to the terms of Treaty 3 and, by extension, of Treaty 9 as well. However, the decision does *not* absolve the Government of Ontario of the requirement to also fulfill the *obligations* of the Crown under the treaty. The analysis presented above suggests that there are now attendant obligations for Ontario in the exercise of the Crown “taken up” clause authority due to the Honour of the Crown paradigm that informs Aboriginal and treaty rights law in Canada. It will therefore behove Ontario to develop a strategy for spending the next 30 years putting the same degree of effort into the exercise of its Crown obligations towards Treaty 9 First Nations associated with the now defined duty to consult, as it exercised in the late 19<sup>th</sup> century in asserting its rights as a co-sovereignist, Crown entity.

There are several areas of potentially fruitful further research arising from this thesis. One of these is oral interview research with descendants of Treaty 9 First Nation representatives who were present at the 1905 Treaty 9 negotiation sessions. The research could focus on several issues. These could include the veracity of translation services provided in 1905, whether or not there was a perception among First Nations participants in the 1905 meetings that health care services would be provided as part of the treaty deal, as well as on specific points of uncertainty about what actually happened during the 1905 treaty negotiation sessions as have been noted above. On the translation issue, analysis combining archival research with oral interviews research with descendants of First Nation members who were present at the 1905 Treaty 9 discussions, that could be focused on HBC employee Samuel Iserhoff and the Marten Falls meeting as a case study, has the prospect for generating important insights and new historical knowledge.

There also is a need for historians to extend the geographic range of their search for primary documents dealing with treaties involving Ontario. There is a wealth of material resident at the Archives of Ontario and at smaller-scale archives such as Queen's University Archives, Trinity College Archives, the Archives of the Law Society of Upper Canada and other locations that historians could put more emphasis on utilizing, in addition to consulting local history books, papers and files in local community libraries and historical society records collections.

This would be especially useful in exploring in two other areas for future research arising from this thesis. One of these would be case study research at the local community level of the interaction between local political and business elites in Ontario and Upper Canada and those resident at the centre of the government decision-making process of the Province. Another arises from the research undertaken for this thesis dealing with cross-border interactions and family linkages between the MacMartins in Canada West and the Morgans and Hatches of Oswego, New York. A specific community level study could be undertaken of collaboration between Canadians in Kingston and Americans in Oswego, working together to support the ideals of personal freedom and human rights to manage the logistics of Underground Railroad operations that delivered escaped former slaves, through Oswego to Kingston. Such a study could add to the historical knowledge and heritage of both of these communities and the countries of which they are a part. It might also clarify why a young Charlotte Morgan was in Kingston at the dockyards passenger terminal at the age of 21 in 1836 to meet her future husband Daniel MacMartin.

Finally, support for the principle of the Honour of the Crown can be provided through research assessing the extent to which the Dominion Government and the Ontario Government

have adequately fulfilled their specific obligations under the *Rupert's Land and North-Western Territory Order* of 1870. As this thesis has shown, the two governments have taken an approach of engaging in the symbolic or ritualistic aspects of the requirements set down in the *Royal Proclamation of 1763* to guide dealings by representatives of the Crown with the Aboriginal people of North America. There needs to be greater emphasis now on focusing on the *substance* of such interactions and on meaningfully addressing these issues, as George MacMartin did in 1905, rather than on persisting in the perpetuation of ritualistic interactions.

This has implications for the Government of Ontario in particular. Being a co-sovereignist within Canada's compound monarchy comes with obligations as well as with rights. Members of Her Majesty's governments in Canada – both the national government and the provincial governments, are required to act as representatives of the Crown in their dealings with Canada's Aboriginal peoples in a manner that will unassailably bring honour to the Crown. Governments that together represent the Crown in Canada need to address in a substantive rather than a ritualistic way issues of concern to Treaty 9 First Nations regarding their treaty rights to continue their traditional hunting, fishing and trapping activities. Assessing the impact on these of the Ontario government exercising its now confirmed treaty right to "take up" land is an issue requiring priority attention.

The Government of Ontario now has an obligation as the Crown representative possessing the "taken up" authority to put priority emphasis now and in the future on faithfully and resolutely seeking to fulfill its obligations as part of "the Crown" in Canada. It is what the Honour of the Crown demands. Through his actions in recording what he did in his diary, Ontario's own Treaty 9 Commissioner George MacMartin brought honour to the Crown and to his family name and heritage. George MacMartin's truthful and accurate recording of oral

commitments made to First Nations representatives during the 1905 Treaty 9 discussions across far northern Ontario and preservation of his diary embodies a model of conduct for government representatives to emulate in their dealings with Aboriginal peoples – the Honour of the Crown.

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## Appendix A: Permission Letters