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COURT OF APPEAL FOR ONTARIO

OSBORNE A.C.J.O., FINLAYSON, DOHERTY, CHARRON and SHARPE JJ.A.

BETWEEN:

THE CHIPPEWAS OF SARNIA BAND	*Plaintiff Appellant/Respondent*
- and -	
ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OFONTARIO, and CANADIAN NATIONALRAILWAY COMPANY, DOW CHEMICALCANADA INC., THE CORPORATION OFTHE CITY OF SARNIA, AMOCO CANADA RESOURCES LTD., AMOCO CANADAPETROLEUM COMPANY LTD., ONTARIO HYDRO NETWORKS COMPANY INC., UNION GAS LIMITED, INTERPROVINCIALPIPE LINE INC., THE BANK OF MONTREAL, THE TORONTO-DOMINIONBANK, and CANADA TRUSTCO MORTGAGE COMPANY individually and as class representatives	*Defendants Respondents/Appellants/ Cross-Appellants*

Earl A. Cherniak, Q.C., Elizabeth K.P. Grace and H. Sandra Bang, for the appellant

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Kenneth R. Peel, for Canadian National Railway Company

M. Philip Tunley and Jane A. Langford, for Dow Chemical Canada Inc. and Union Gas Limited

Gerard T. Tillmann and Norman W. Feaver, for The Corporation of the City of Sarnia, Bank of Montreal, The Toronto-DominionBank and Canada Trustco Mortgage Company

Jeff G. Cowan, for Amoco Canada Resources Ltd. and Amoco Canada Petroleum Company Ltd.

Joseph Agostino, for Ontario Hydro Networks Company Inc.

Brian A. Crane, Q.C., for Interprovincial Pipe Line Inc.

M. Celeste McKay and Alan Pratt, for the Intervener Chief Lisa Eshkakogan Ozawanimkeon behalf of the Algonquin Nation in Ontario

Paul Williams, for the Intervener Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames et al.

Heard: June 19-29, 2000

On appeal from the judgment of Justice Archie Campbell dated April 30, 1999.

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I. Overview of the Proceedings

A. The Chippewas' Claim

[1] The Chippewas of Sarnia Band ("the Chippewas") claim ownership of a parcel of land located in and around the City of Sarnia ("the disputed lands"). Prior to 1827, the disputed lands were part of a vast tract of land over which the Chippewa Nation[1] had dominion. By 1827, the Chippewas had surrendered almost all of that territory to the Crown. They had, however, retained four reserves, including one referred to as the Upper Reserve located on the St. Clair River near present-day Sarnia. The ancestors of the Chippewas of Sarnia lived on the Upper Reserve. The Upper Reserve originally occupied 10,280 acres. The disputed lands are the 2,540 acres located at the rear or back of the reserve furthest from the St. Clair River, and are presently occupied by over 2,000 different individuals, organizations, and businesses.

[2] In November 1839, Malcolm Cameron, a politician and land speculator, purported to purchase the disputed lands from the Chippewas. The lands were eventually conveyed to him by Crown patent in 1853 ("the Cameron patent"). The present occupants of the disputed lands trace their title to the Cameron patent. The Chippewas claim that their ancestors never surrendered the disputed lands and that their interest in the land is the same now as it was in 1827.

[3] The Chippewas started this action in 1995. In essence, they seek declaratory relief recognizing their right to the disputed lands and damages for trespass and breach of fiduciary duty. If the Chippewas obtain the declaratory relief claimed, they would be entitled to possession of the land, although they have made it clear that they are ready and willing to negotiate with the federal and provincial governments and do not seek the wholesale eviction of the present occupiers of the property.

[4] The individual defendants, other than the Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), occupy parts of the disputed land. They also represent the defendant class certified by Adams J. in 1996 under the Class Proceedings Act, 1992, S.O. 1992, c. 6. In this decision we refer to them collectively as the landowners.

B. The Motions for Summary Judgment

5] Canada brought a motion for summary judgment asking that the parts of the Chippewas' claim seeking declaratory relief be dismissed. The landowners also brought a motion for summary judgment seeking the dismissal of the action against them on the grounds advanced by Canada in its motion and on other grounds applicable only to the individual defendants.

[6] Ontario supported both motions.

[7] The Chippewas responded with a cross-motion seeking summary judgment against all defendants on the parts of the claim seeking a declaration as to the Chippewas' rights to the disputed lands.

[8] None of the motions for summary judgment touched the parts of the claim seeking damages against Canada and Ontario. The trial of those claims awaits the result of these proceedings.

[9] The motions judge, Campbell J.:

- dismissed Canada's motion for summary judgment;
- allowed in part the landowners' motion for summary judgment, dismissed the action against them and declared that they held title free and clear of any aboriginal title or treaty right; and
- allowed the Chippewas' motion to the extent that it sought a declaration of invalidity with respect to the letters patent issued to Malcolm Cameron in 1853, but dismissed the Chippewas' motion for a declaration that they continued to enjoy "aboriginal, treaty and constitutional rights" in the disputed lands.

[10] The motions judge's main findings were:

- There was no evidence that the Chippewas ever surrendered the disputed lands.
- The sale of the disputed lands by three chiefs of the Chippewas to Malcolm Cameron in 1839 was a private sale without formal surrender and as such was prohibited by common law and by the Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1 ("Royal Proclamation").
- There was no evidence that the Chippewas ever expressed a free, voluntary and fully informed collective intention to release their interest in the lands or to consent to the sale to Cameron.
- The Governor General, Lord Elgin, had no authority to issue a patent for the disputed lands in 1853. Therefore, the patent issued to Cameron was void ab initio and of no force and effect.
- The Chippewas' interest in the lands continued to this day, unless extinguished by some constitutionally applicable statute, rule of law, or principle of equity.
- None of the limitations statutes relied upon by the parties operated to extinguish the Chippewas' interests in the lands or to bar the Chippewas' action for recovery of the lands.
- The doctrines of laches, acquiescence and estoppel by election did not bar the Chippewas' action.
- The defence of good faith purchaser for value without notice was a fundamental aspect of the applicable real property regime. This defence could, in appropriate cases, bar an aboriginal claim against an innocent third party purchaser.
- Against ordinary property, the good faith purchaser for value without notice defence operated immediately upon purchase. Such an abrupt application, if applied to land subject to aboriginal title, would ignore the legal priority to be accorded to aboriginal rights and would result in the extinguishment of the Chippewas' title immediately in 1861.
- The competing interests of the Chippewas and the innocent purchasers without notice would best be balanced by allowing the good faith purchaser without notice defence to operate only after sixty years. A sixty-year equitable limitation period would protect aboriginal property interests against immediate extinguishment on sale to a good faith purchaser for value without notice.
- The sixty-year equitable limitation to the claim against the good faith purchaser began on August 26, 1861 and ended on August 26, 1921. As of August 26, 1921, no action had

been commenced against any good faith purchaser. Therefore, the defence of good faith purchaser for value without notice operated to extinguish the Chippewas' aboriginal title and treaty rights in the lands on August 26, 1921.

- The aboriginal rights which were extinguished as of August 26, 1921 have crystallized into a damage claim against the Crown.

[11] Based on his findings, the motions judge directed that the following order should issue:

(a) Canada's motion to dismiss the Chippewas' claim on the basis that the Cameron patent was valid was dismissed.

(b) The landowners' motion in respect of the validity of the 1853 Cameron patent was also dismissed.

(c) The Chippewas' motion in respect of the invalidity of the Cameron patent was allowed. A declaration was issued to the effect that the patent issued to Malcolm Cameron on August 13, 1853 was void ab initio and of no force and effect because there was no lawful surrender. Neither the orders-in-council of March 19, 1840 and June 18, 1840 which approved the sale to Cameron, nor the subsequent letters patent extinguished the Chippewas' unceded, unsurrendered, common law, and aboriginal interests in the lands.

(d) The Chippewas' motion for a declaration that they enjoyed continuing and unextinguished common law, aboriginal, treaty and constitutional rights in the lands was dismissed.

(e) The Chippewas' action for damages against the Crown was permitted to continue.

(f) The motion by the landowners was allowed. The Chippewas' claim against the landowners was dismissed on the basis that the defence of good faith purchaser for value without notice protected the landowners' title and that the application of an equitable limitation period of sixty years worked to extinguish all right, title and interest of the Chippewas in the disputed lands as of August 26, 1921. A declaration was issued to the effect that the present landowners held their title free and clear from any aboriginal title claims.

C. The Appeals and Cross-Appeals

[12] The motions judge's decision gave rise to six appeals and cross-appeals, all of which were argued during the last two weeks of June 2000. In particular:

- Canada appealed from the dismissal of its motion for summary judgment, the order dismissing in part the landowners' motion for summary judgment, and the order allowing the Chippewas' motion. Canada sought an order dismissing that part of the Chippewas' claim in which the Chippewas asserted that the Crown had no authority, right or jurisdiction to issue the patent to Malcolm Cameron and a further order dismissing that part of the claim which alleged that the patent was void ab initio and unenforceable at law.

- The Chippewas appealed from the orders allowing the landowners' motion for summary judgment and from the dismissal of the Chippewas' cross-motion for summary judgment. They sought an order declaring that they enjoyed continuing and unextinguished common law, statutory, aboriginal, treaty and constitutional rights in the disputed lands. Canada, Ontario and the landowners are respondents on the Chippewas' appeal.
- The landowners cross-appealed in the Chippewas' appeal, seeking:

(a) an order declaring that the letters patent issued to Cameron were valid and created a valid interest in the lands in question;

(b) a declaration that the effect of the patent was to extinguish any aboriginal title or treaty rights in the lands; and

(c) a declaration that any right of action that the Chippewas may have had for recovery or enforcement of any interest in the land was barred by the operation of limitations statutes or by various equitable doctrines.

[13] Ontario cross-appealed in the Chippewas' appeal and sought an order granting the landowners' motion for summary judgment and an order dismissing the Chippewas' cross-motion. Ontario contended that the Cameron patent was valid and conveyed the lands to Cameron free of any interest of the Chippewas. Ontario also claimed that the doctrine of good faith purchaser for value without notice extinguished any claim that the Chippewas had from the time of the purchase rather than sixty years after the purchase.

[14] On January 27, 2000, the Chippewas moved to quash Ontario's appeal from the dismissal of Canada's motion for summary judgment and Canada's cross-appeal in the Chippewas' appeal. These motions were dismissed.[2]

[15] The following representatives of First Nations appeared as interveners on the appeals: Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames, Chief Mary Jane Wardell on behalf of the Ojibways of Thessalon, Martin Bayer on behalf of the United Chiefs and Councils of Manitoulin and Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario.

[16] The appellate proceedings were case-managed by Goudge J.A. who, among other things, determined the order of, and time allocations for, oral argument after consulting with all counsel. It was agreed by all parties that, given the nature of the judgment appealed from, none of the appeals and cross-appeals related to interlocutory orders and that, consequently, the proceedings were properly before this court. We are grateful to Goudge J.A. for his assistance. We are also grateful to counsel, not only for the quality of their oral arguments, but also for their cooperation in adhering to the times allocated for hearing the appeals.

D. Our Decision in a Nutshell

[17] In our view, these appeals and cross-appeals give rise to two main issues. First, was there a surrender of the disputed lands by the Chippewas to the Crown? Second, if there was no surrender, what remedies, if any, are the Chippewas entitled to?

[18] Although the first issue gave rise to questions that were essentially factual, much of the argument was focussed on whether the surrender provisions in the Royal Proclamation had the force of law at the relevant time, and if so, what effect would any failure to comply with these provisions have on the Cameron transaction. The motions judge held that the surrender procedures in the Royal Proclamation had the force of law at the relevant time, that these procedures were not followed and that the Chippewas never consented to or affirmed the Cameron transaction. Consequently, the following points were argued before us:

1. Did the surrender procedures set out in the Royal Proclamation have the force of law at the time of the sale to Cameron in 1839 and the subsequent letters patent in 1853?

2. Did the Chippewas surrender the disputed lands to the Crown?

3. If the lands were not surrendered, did the Chippewas nonetheless consent to or affirm the sale to Cameron?

[19] The first question has been authoritatively determined by this court in Ontario (A.G.) v. Bear Island Foundation et al. reflex, (1989), 68 O.R. (2d) 394 (C.A.), aff'd 1991 CanLII 75 (S.C.C.), [1991] 2 S.C.R. 570. This court held that the surrender provisions of the Royal Proclamation were revoked by the Quebec Act, 1774, R.S.C. 1985, App. II, No. 2. The motions judge was bound by this decision and, consequently, he erred in departing from its authority when he determined otherwise. However, we are of the view that, in this case, little turns on whether the surrender provisions of the Royal Proclamation had the force of law at the relevant time. Instead, we adopt the view that surrender was necessary as a result of the established protocol between the Crown and First Nations peoples that aboriginal title could be lost only by surrender to the Crown. The precise legal status of the Royal Proclamation at the time of the Cameron transaction is therefore of no consequence to our decision.

[20] On the second point, we accept the proposition that a surrender required a voluntary, informed, communal decision to give up the land and we agree with the motions judge that the Chippewas never surrendered the disputed lands to the Crown. However, we disagree with a number of the motions judge's findings relating to the Chippewas' participation in the Cameron transaction. This brings us to the third point.

[21] In our view, the evidence leads to the inescapable conclusion that, notwithstanding the absence of a surrender, the Chippewas accepted the sale to Cameron. This finding becomes important in our determination of the appropriate remedies.

[22] The following points were argued with respect to the remedies sought by the Chippewas:

4. Is the Chippewas' claim barred by any statutory limitation periods?

5. In the absence of a surrender, is the Cameron patent void ab initio or is the remedy subject to the exercise of the court's discretion?

6. Do the equitable defences of laches and acquiescence apply to bar the Chippewas' claim to the disputed lands?

7. Does the equitable defence of good faith purchaser for value apply to defeat the Chippewas' claim? If so, was the motions judge correct in finding that the defence of good faith purchaser for value was subject to an equitable sixty-year limitation period before it can operate to extinguish the Chippewas' claim to the land?

8. If the Chippewas enjoy continuing and unextinguished rights in the disputed lands, should this court order that the Crown has a duty to negotiate in good faith with the Chippewas?

[23] The motions judge held that the Chippewas' claim was not barred by any statutory limitation period. He held further that in the absence of surrender, the Cameron patent was void ab initio and that the defences of laches and acquiescence could not be relied upon. The motions judge concluded, however, that the present occupiers of the land could rely on the doctrine of good faith purchaser without notice subject to a sixty-year "equitable limitation period" which in effect postponed the application of the doctrine.

[24] We agree with the motions judge that the Chippewas' claim is not barred by any statutory limitation period. However, we do not agree that the Cameron patent was void ab initio. In our view, the patent was valid on its face and continues to have legal effect unless and until a court decides to exercise its discretion to set it aside. We are of the view that the principles governing the availability of the relevant public and private law remedies militate against a court exercising its discretion in this case. Finally, we are of the view that the imposition of a sixty-year "equitable limitation period" is not supportable in law. In the result, we are of the view that the Chippewas have no entitlement to the remedies they seek for the return of the disputed lands and that they are left with their claim in damages against Canada and Ontario.

II. Preliminary Issues

[25] Two preliminary issues were raised by the parties. First, the Chippewas sought to introduce fresh evidence on their appeal. Second, Ontario challenged the motions judge's authority to decide the case on motions for summary judgment.

A. Chippewas' Motion to Introduce Fresh Evidence

[26] The Chippewas sought to introduce fresh evidence which generally fell into two categories:

(a) new evidence relating to sales of property within the disputed lands that occurred after the decision below; and

(b) further evidence of the circumstances surrounding the sale of Indian lands which was already addressed in the existing record.

[27] It was agreed that we would deal with the fresh evidence issue on the basis of counsel's written material. No oral submissions were made.

[28] The test for the admission of fresh evidence on appeal is that set out by the Supreme Court of Canada in Public School Boards' Assn. of Alberta v. Alberta (A.G.), 2000 SCC 2 (CanLII), [2000] 1 S.C.R. 44. See also R. v. Palmer, [1980] S.C.R. 759. The requirements for the admission of fresh evidence are as follows:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the proceeding.

3. The evidence must be credible in the sense that it is reasonably capable of belief.

4. The evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

[29] In our view, the proposed fresh evidence does not meet these requirements. In particular, it is not evidence that if believed could reasonably, when taken with the other evidence, affect the result.

[30] The motion to admit fresh evidence is therefore dismissed.

B. The Summary Judgment Issue

[31] Ontario submits that the motions judge "significantly overstepped" the narrow role of a motions judge when he dealt with the motions that were brought before him. Ontario asserts that in his 241-page reasons for judgment, the motions judge assessed credibility, weighed evidence, made findings of fact on disputed evidence and generally dealt with the summary judgment motions in such a way as to conduct what was essentially a paper trial.

[32] Ontario accepts that, pursuant to Rule 20.04 of the Rules of Civil Procedure, the motions judge was entitled to determine questions of law and to "… grant judgment accordingly". In particular, Ontario accepts that the motions judge could grant judgment on discrete issues of law such as the application of the doctrine of good faith purchaser for value without notice. However, Ontario submits that where the resolution of discrete issues of law required the motions judge to make findings of fact on evidence that was in conflict, the motions judge exceeded the jurisdiction given to him by Rule 20.

[33] We are prepared to accept that in some instances, the motions judge made findings of fact and drew inferences from evidence which was to some degree conflicting. We are, nonetheless, not disposed to give effect to Ontario's submissions on the summary judgment issue for the following reasons.

[34] Ontario participated fully in the summary judgment proceedings. None of the parties, including Ontario, took the position that, having regard to the voluminous evidence placed before the motions judge and the issues of law raised by the material, it was not appropriate to deal with the matter under Rule 20. To the extent that the parties, including Ontario, participated in what Ontario asserts was a paper trial, they got precisely what they agreed to: a resolution of clearly identified issues of fact and law on the basis of a paper record. In addition, Ontario filed no material on the motion that would in any way suggest that this was not an appropriate matter to be decided under Rule 20.

[35] Apart from the expert witnesses, there are no living witnesses who could give relevant evidence. Thus, if the action were to proceed to trial, the trial judge would be in no better position to deal with the issues than the motions judge, unless one were to accept Ontario's late submission that the trial judge would have an advantage from seeing and hearing the expert witnesses testify. In our opinion, absolutely nothing would be gained by sending this matter to trial.

[36] We are authorized by s. 134(1)(c) of the Courts of Justice Act, R.S.O. 1990, c. C.43, to make a decision on appeal that "… is considered just". It would not, in our view, be "just" to accede to Ontario's position on the summary judgment issue, particularly where Ontario did not see fit to raise the issue below: see Re National Trust Co. and Bouckhuyt reflex, (1987), 61 O.R. (2d) 640 (C.A.); Scarborough Golf & Country Club v. Scarborough (City) reflex, (1988), 66 O.R. (2d) 257 (C.A.), leave to appeal to S.C.C. refused [1989] 2 S.C.R. vi; Shaver Hospital for Chest Diseases v. Slesar (1979), 27 O.R. (2d) 383 (C.A.), leave to appeal to S.C.C. refused [1981] 1 S.C.R. xiii.

[37] We would not give effect to this ground of appeal.

III. The Facts

A. Introduction

[38] The summary judgment motions raised complex legal issues, turning in part on the interpretation of old statutes and documents, the nature and scope of arcane remedies, and traditional property law concepts, some of which seem to have more relevance to 17th century England than to present-day Ontario. Despite the many difficult legal issues raised, however, this case is first and foremost a factual one. The determination of the Chippewas' claim is necessarily site-specific and primarily fact-driven. As the motions judge noted:

This decision affects these lands only. As noted below in response to the argument in terrorem, this decision turns on the unique story that unfolded around these four square miles and the specific terms of the instruments affecting it; above all, the site-specific provisions of Treaty 29.

[39] The events giving rise to these proceedings spread over more than 200 years and are found in the thousands of historical documents filed by the parties and analyzed in the affidavits and cross-examinations of various experts. There was no viva voce evidence presented on the motions. The motions judge undertook an exhaustive review of the massive record. He told the

story underlying this dispute with extraordinary clarity and vitality. We have borrowed liberally from his reasons (which unfortunately are not reported) in setting out the relevant facts.

[40] The motions judge made numerous findings of fact. Many were primary findings of fact based directly on information contained in the historical documents or found in the uncontested parts of the evidence of the various experts. Others findings were in the nature of inferences drawn from one or more of the primary findings of fact. The primary facts as found by the motions judge are not challenged. Some of the inferences he drew from those facts are, however, very much in dispute. In the unusual circumstances of these summary judgment proceedings, justice dictates that we approach the motions judge's findings of fact as though they were made at trial. We defer to the inferences he drew except where we conclude that they are based on a misapprehension of the evidence, a failure to consider material evidence, or where in the light of the totality of the undisputed primary facts, we conclude that the inferences the motions judge drew were unreasonable. As will become evident, we do not accept some of the inferences drawn by the motions judge.

B. The Occupants of the Disputed Lands: Then and Now

[41] At the turn of the 18th century, the disputed lands were in Chippewa territory. The Chippewas were established over a vast expanse of land, including present-day southwestern Ontario. The Chippewa Nation consisted of three distinct groups who occupied different territories, but shared a common language and similar customs and traditions. The Mississauga Chippewas occupied southwestern Ontario. By 1760 they had established several seasonal villages in southwestern Ontario, including one on the St. Clair River near present-day Sarnia.

[42] The Chippewas lived in relatively small groups spread out over their vast territory. They survived by hunting, fishing, gathering, growing corn, and harvesting maple sugar. To do so they moved from place to place within their lands on a seasonal basis. Groups of families, referred to as bands, shared a territory which supplied them with the necessary food, shelter and clothing. Within these regional bands, there were a number of smaller traditional bands consisting of thirty to sixty people. In the late 1820s after the Chippewas had given up most of their land and began to settle on reserves, traditional distinctions between various bands became somewhat blurred and those who lived on particular reserves were seen as having a communal interest in that reserve. The evidence indicates that as of 1839 there were approximately six regional bands of Chippewas in southwestern Ontario, each of which had 250 to 350 members. The St. Clair regional band, the ancestors of the Chippewas of Sarnia, included approximately eight to ten traditional bands.

[43] Each traditional band had a chief. The chief was usually the eldest son of the former chief, however, the band could choose someone else if it decided that the eldest son was not up to the task. The chief acted with the concurrence of the band as expressed at meetings of the principal men in the band, and had little authority to act on his own. The actual power of any particular chief depended in large measure on his own leadership abilities. The regional Chippewa bands came to recognize one chief as the Head Chief. The Head Chief was the primary spokesman in dealings with the Crown but within the Chippewa community had no more power than the other chiefs.

[44] The traditional bands managed their own local affairs at Local Councils attended by the principal men of the band. Matters of general importance to the region were resolved at General Councils attended by the chiefs and principal men of the traditional bands within the region. Traditional bands within a region would come together on occasion at a principal village within the region, like the one near present-day Sarnia, to engage in various social activities and decide matters of regional importance.

[45] Today, the Chippewas live on what is left of the Upper Reserve. Their reserve occupies some 3,000 acres adjacent to the disputed lands. The disputed lands themselves have been divided into 2,276 properties. The properties are zoned for various uses ranging from agricultural to industrial. There are over 2,000 residences, five schools, five churches and a number of commercial and industrial properties located on the disputed lands. The Canadian National Railway Company's main line between Ontario and western Canada runs through the disputed lands.

[46] The individual defendants and the defendant class are the present occupants of the disputed lands. Until this action was commenced in 1995, they had no way of knowing or discovering the existence of the claim made by the Chippewas of Sarnia. They and their predecessors in title since 1861 are innocent of any illegality or prohibited act. They acquired the land in good faith for good value with no knowledge of and no reason to believe the Chippewas of Sarnia had any claim to the land. The individual defendants and their predecessors in title have developed the property at considerable expense. The motions judge described their investment in the property as being in the "hundreds of millions of dollars". He also observed that those who now live and work on the disputed lands have a "deep connection" with those lands.

C. The Time Line

[47] Before examining the relevant events in some detail, it is helpful to set out a chronology of the central events:

Date	Event
1756-1763	Southwestern Ontario, including the disputed lands, was under the dominion of the Chippewa Nation. Both the French and English, who were at war, claimed the area as part of their North American empires. The white men in the area were primarily involved in military operations or fur trading.
1763	The Treaty of Paris ended the seven-year war between France and England. The French Crown ceded New France to England and also relinquished any other claim to present-day Ontario. Southwestern Ontario, including the disputed lands, became part of British North America and fell under the control of the English Crown.
October 7, 1763	George III, by order-in-council, issued a Royal Proclamation. The Proclamation created four new colonies, including Quebec, from the land ceded to the English Crown by France in the Treaty of Paris, established governments for those colonies, and addressed the status

	of Indian lands throughout British North America. Southwestern Ontario was not part of any of the established colonies and was instead part of what was referred to in the Proclamation as the "interior" Indian territory.
1764	William Johnson, the Superintendent of Indian Affairs for the northern district, convened a large meeting with the First Nations chiefs at Niagara. Many Chippewa chiefs were present. The English Crown and the chiefs entered into the Treaty of Niagara. William Johnson read the 1763 Proclamation as it related to Indian lands and the regulation of trade. The chiefs promised to keep the peace and deliver up any prisoners taken during the previous hostilities.
1774	The British Parliament passed the *Quebec Act*. The *Act* expanded the boundaries of the colony of Quebec to include southwestern Ontario, introduced French civil law into that colony, guaranteed religious freedom and altered the form of colonial government. The effect, if any, of the *Quebec Act* on the provisions relating to Indian lands in the Royal Proclamation is the subject of dispute in this litigation.
1791	By the *Constitutional Act, 1791*, R.S.C. 1985, App. II, No. 3, the British Parliament divided Quebec into the provinces of Upper and Lower Canada. Southwestern Ontario was part of Upper Canada.
1818 to 1825	The Chippewas and the Crown conducted a series of negotiations aimed at the surrender of a large part of the Chippewas' territory to the Crown for settlement purposes.
April 1825	The Chippewas and the Crown entered into Provisional Treaty 27 ½ whereby the Chippewas gave up their rights to some 2.2 million acres of land referred to as the Huron tract. The Chippewas, however, maintained their rights to four specific areas (reserves) one of which, the Upper Reserve, included the disputed lands.
July 10, 1827	The land surrendered by the Chippewas to the British Crown in provisional Treaty 27 1/2 and the four reserves were surveyed and the Chippewas and the British Crown entered into Treaty 29, which finalized the agreement reflected in the provisional Treaty.
August 12, 1839	Malcolm Cameron, a businessman, land speculator and politician, wrote to Lieutenant Governor Arthur proposing that part of Upper Reserve be purchased and opened for settlement.
October 1839	Cameron received permission from Samuel Jarvis, Chief Superintendent of Indian Affairs, to enter into negotiations with the Chippewas for a sale of part of a reserve "subject to the approval of the Lieutenant Governor and the Council".
November 9, 1839	Cameron met with Joshua Wawanash, the Head Chief of the St. Clair Regional Chippewas, and two other chiefs. They reached an agreement whereby Cameron would purchase 2,540 acres at the rear of the Sarnia reserve [the Cameron transaction]. These are the

	disputed lands.
November 9, 1839	Cameron wrote to Lieutenant Governor Arthur and Jarvis, reporting that he had reached an agreement with "the Indians". He sought approval of the transaction.
November 9, 1839	William Jones, the resident Superintendent of Indian Affairs at Sarnia, wrote to his superior Samuel Jarvis, telling him that the three chiefs had advised Jones of the agreement with Cameron and had asked that he "propose to the government the sale" of the part of the reserve referred to in the Cameron transaction.
November 16-18, 1839	In correspondence, Jarvis took issue with the terms of payment proposed by Cameron and observed that where similar transactions had been approved, the Crown first took a surrender of the land from the Indians and then made a grant of the land to a stated party.
March 19 and June 18, 1840	Two orders-in-council were passed, approving the Cameron transaction on terms as modified by the proposal of Jarvis. Neither order-in-council referred to a surrender to the Crown by the Chippewas.
1840	By the *Union Act, 1840*, R.S.C. 1985, App. II, No. 4, the British Parliament unified Upper and Lower Canada to form the province of Canada. The Indian Department was reorganized to reflect the Union.
February 27, 1841	Cameron made the first payment against the purchase price to the Crown.
June 1841 to June 1842	Discussions were ongoing concerning the survey of the land referred to in the Cameron transaction. Jarvis favoured a survey of the entire reserve, however, the Chippewas refused to agree to a survey of any land other than the land encompassed in the Cameron transaction.
June 1842	John O'Mara surveyed the lands referred to in the Cameron transaction. He was on site for about fifteen days.
December 1846	Cameron wrote to Resident Superintendent Clench stating that he had "just put sixteen settlers on 1600 acres."
January 1851 to May 1851	A dispute arose as to whether the Cameron transaction included certain road allowances. Eventually, the dispute was resolved in favour of the Chippewas and they surrendered a single road allowance through the reserve.
January-November 1851	Cameron sold off large parts of the disputed lands.
August 11, 1853	Cameron paid the rest of the purchase price. He had not made any payments since the first payment in 1841.[3]
August 13, 1853	Letters patent for the disputed lands were granted by the Crown to Cameron. The letters patent were in the form used when the land referred to in the patent was surrendered land. The validity of this Cameron patent is in dispute.

September 1853 to 1861	Cameron continued to sell parts of the disputed lands.
August 26, 1861	Cameron sold off all of the disputed lands and was no longer on title.
August 1979 August 1979	William Plan, an amateur historian and researcher for the Chippewas, wrote to an official in the Indian Affairs Department in connection with an ongoing dispute over a road allowance claim. Mr. Plan contended that the disputed lands were never surrendered to the Crown by the Chippewas and that the Chippewas maintained their original interest in those lands. This was the first indication that the Chippewas asserted a continuing interest in the disputed lands.
October 18, 1995 October 18, 1995	The Chippewas commenced this action.

D. Crown-First Nations Relations

[48] In the first half of the 18th century the English Crown showed little interest in the First Nations of North America. Unlike its Catholic counterparts in France and Spain, the English Crown did not pursue active efforts to "civilize" the First Nations peoples and convert them to Christianity. Relationships between the First Nations and English colonies in North America were left primarily to the individual colonies and developed on an ad hoc basis. By the 1750s, however, French imperialist ambitions, aided and abetted by First Nations allies, threatened the security of English interests in North America. Those who shaped imperial policy came to see the military need to develop better relations with First Nations peoples in North America.

[49] An Indian Department under the control of English ministers of the Crown was established in the 1750s. Sir William Johnson was appointed Superintendent of the Northern District. His district encompassed present-day southwestern Ontario. Johnson and members of his family played a key role in the administration of English-First Nations relations in the latter part of the 18th and the early part of the 19th century. All were familiar with First Nation customs and appear to have been well regarded by the First Nations.

[50] At first, the Crown's policy was aimed at gaining the military support, or at least the neutrality of First Nations in England's ongoing war with the French. When that war ended with an English victory in 1763, English control over the territories it had won from France depended in part on maintaining good relations with the First Nations. The English Crown continued its wartime Indian policy in the hope of forging new military alliances with First Nations who had supported the French (e.g. the Mississauga Chippewas) and avoiding further uprisings like that led by Chief Pontiac of the Odawa in 1763.

[51] The Indian Department underwent many changes between 1750 and 1860. The lines of responsibility and the titles of various officials changed repeatedly. As the bureaucracy grew, responsibility for different aspects of the policy fell to various Crown agencies. Despite these many bureaucratic changes, two fundamental tenets of the Crown's policy towards First Nations

remained constant until 1860.[4] First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative. Like all imperial policies, Indian policy was formulated in England and those responsible for the implementation of it in North America reported to Crown officials. Indian affairs were no concern of the colonial legislatures.

[52] Second, the English Crown, primarily for military reasons, actively pursued the support of the First Nations. In doing so, it sought to address First Nations' grievances. Those grievances had arisen out of incursions by white settlers onto Indian lands and the dishonest actions of some of those who traded with the First Nations. In an effort to gain First Nations support, the Crown sought to assure the First Nations that they would not be deprived of their lands or cheated in their (trade) dealings with the white man. The Crown pursued these goals by recognizing First Nations' land rights, taking steps to protect those rights against white settlers, and regulating trade between the white man and First Nations.

[53] The Royal Proclamation was an important, albeit not the first, manifestation of Crown imperial policy as it applied to Indian lands. The Royal Proclamation:

- recognized that First Nations had rights in their lands;
- established imperial control over settlement on Indian lands whether those lands were within or beyond the boundaries of the established British colonies in North America;
- prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands be by way of surrender to the Crown; and
- established a process by which surrenders of Indian land would be made to the Crown. The surrender process accepted that Indian rights in their lands were collective and not individual.

[54] After setting out its policy in the Royal Proclamation, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the Royal Proclamation would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the Royal Proclamation respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the Royal Proclamation to the First Nations can be traced to this extraordinary assembly and the treaty it produced.[5]

[55] The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown's promise to all of the First Nations who were parties to the Treaty that they would not be

molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.

[56] The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.

[57] Between 1764 and 1774, the commanders of the British forces in North America who were responsible for Indian relations emphasized the applicability and the importance, not only of the specific terms of the Royal Proclamation, but also of the policies underlying it.

[58] In 1774, the English Parliament passed the Quebec Act. That Act radically changed the government of the province of Quebec and extended the boundaries of that province to include what is now southwestern Quebec. The effect of that Act on the terms of the Royal Proclamation relating to Indian lands will be addressed later in these reasons. It is safe to say, however, that those responsible for First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation. The historical record is replete with references to the Royal Proclamation and its policies. For example, in August 1791, Lord Dorchester, the Governor General of Canada, advised a delegation of First Nation chiefs, including Chippewa chiefs, that the King had no right to their lands save where it had been:

fairly ceded by yourself with your consent by public convention and sale…

and that further:

… bargains with private individuals were forbidden and considered as void.

[59] Lord Dorchester's comments make it clear that the Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

[60] The Crown policy towards the First Nations was reflected not only in official documents like the Royal Proclamation, but also in the day-to-day conduct of those relations. People like Sir William Johnson had long-standing connections with First Nations peoples and long-standing associations with them. They were aware of and respected the manner in which First Nations peoples conducted business. Formal meetings between Crown officials and First Nations were held at public Council meetings attended by the chiefs and other members of the First Nations. Certain formalities became an accepted part of these meetings and served to emphasize the nation-to-nation nature of the dealings. Many of those formalities reflected aboriginal customs and usages. The First Nations peoples attached considerable importance to compliance with these formalities and the Crown representatives were aware of the importance of these formalities to the First Nations.

[61] By the turn of the 19th century, the procedures associated with the surrender of land by First Nations to the Crown were well established. Those procedures blended aboriginal and British customs and usages and came to be reflected in various orders issued by responsible Crown officials (e.g., the Dorchester Regulations of 1794). The surrender of First Nations land to the Crown involved the following:

- All surrenders were made "in public council with great solemnity and ceremony, according to the ancient usages and customs of the Indians".
- The Crown representatives at the meeting included the Governor or his designate, representatives from the Indian Department, and military officers.
- An interpreter was present and explained the "nature and extent of the bargain" to the Indians in their language. The consideration for the sale was clearly stated.
- If a surrender was agreed upon, a deed of conveyance surrendering the land to the Crown was prepared in triplicate and executed at the Council meeting by the Indian chiefs who would place their totems on the deed and by the Superintendent of the Indian Department or his designate.
- A descriptive plan of the land to be surrendered was attached to the deed and signed and witnessed in the same manner as the deed.
- The Head Chief received one of the copies of the deed.

[62] These formalities recognized the importance of the surrender of lands by First Nations and the collective nature of the First Nations' interest in the land. The procedures also reflected the common law concern that certainty attach to the transfer of land. Certainty was achieved by requiring that the conveyance of land be fully documented, that the documents be placed in the appropriate records and that they be preserved for future reference.

[63] Surrender was the first step toward making Indian land available for settlement. After the surrender deed was executed, it was submitted to the Governor in Council for approval. If approved, an order-in-council would issue and the surrender deed could be registered in the appropriate colonial land registry record. At this stage, the surrendered land could be granted by the Crown to third parties by way of letters patent. Over time, the patents were standardized and made reference to the fact that the land had been acquired from a First Nations people. Where the First Nations were to be paid from the proceeds of the grant to the third party, the Crown held those proceeds for the benefit of the First Nations.

[64] Although a surrender could only be authorized by a General Council meeting of the First Nations people, Crown Indian policy also depended on the development of strong working relationships between Crown officials and influential chiefs of regional bands. Indian Department officials worked at obtaining the confidence and support of key chiefs. The relationship with these chiefs became even more important as the Indians surrendered much of their lands and took up residence on reserves.

[65] Indian Department officials would meet with key chiefs prior to Council meetings in an effort to gain their support on the matters that were to be considered at the Council meeting. If the Crown official and those chiefs could reach an agreement, the chiefs would become the spokesmen for the proposed agreement at the subsequent Council meeting.

E. The Surrender of Chippewa Lands Before the Sale to Cameron

[66] By 1815, the military importance to the English Crown of alliances with First Nations, including the Chippewas, had diminished significantly. The war of 1812 had ended and there was no real risk of continued hostilities in the British North American colonies with either the United States or any European power. Soldiers returning from the war of 1812 were looking for land and the pressure to open Indian land to settlement increased dramatically.

[67] As the military significance of alliances decreased and demands for settlement increased, the Crown became more receptive to those who petitioned for the opening of Indian land for settlement purposes. Imperial Indian policy also began to reflect objectives other than military ones. The "civilization" of those First Nations whose land stood in the path of white settlement became a priority. The Crown's "civilization" policy encouraged First Nations to live, farm and worship like the white man, in and around permanent sites located on lands reserved for the First Nations.

[68] Despite the change in focus of the Crown's Indian policy, the Crown continued to control access by settlers to Indian lands by insisting that Indian land could not be sold directly to settlers but had to be surrendered to the Crown first. This policy reflected both the Crown's desire to control settlement and to protect aboriginal people as the harmful effects of contact with the white man became more obvious.[6]

[69] The Crown's continued recognition of Indian rights to their lands, the prohibition against alienation of land to anyone except the Crown by way of surrender and the requirement that the surrender be accompanied by a public manifestation of the First Nations' agreement to surrender are all evident in the extensive land dealings between the Chippewas and the Crown between 1818 and 1827. Those dealings resulted in the surrender of some 2.2 million acres of Chippewa land and the retention by the Chippewas of four reserves within that tract of land.

[70] The possibility of acquiring a large part of the Chippewas' land in southwestern Ontario for settlement purposes was first raised by the Surveyor General of Upper Canada in 1815. In October 1818, an official of the Indian Department met with numerous Chippewa chiefs at Amherstburg to discuss the possibility of a surrender of Chippewa land. The Chippewas advised that they were not opposed to the surrender in return for an annuity but were anxious to retain enough land to permit them to continue to enjoy their traditional lifestyle and maintain their viability as a people. The Chippewas were concerned that they not suffer the fate of their American brothers who had failed to retain sufficient reserves when surrendering their land. In the initial discussion, the Chippewas referred to five possible reserves, including one on the St. Clair River which came to be known as the Upper Reserve on which the disputed lands are located.

[71] Discussions between the Crown and the Chippewas went on for several years. Progress was slow. The Chippewas' lifestyle was still quite transitory and it was sometimes difficult to arrange for the attendance of the necessary chiefs at Council meetings to discuss the proposed surrender. Various provisional agreements were made and in July 1822, the Crown and the Chippewas

concluded their first confirmatory treaty whereby the Chippewas surrendered some 500,000 acres of land along and near the Thames River.

[72] This surrender did not satisfy the ever-increasing needs of the white settlers. In 1824 the Canada Company was formed and received a million acre grant of land in Upper Canada for settlement purposes. Part of that land was to come from the Chippewas' land. In March 1825, an official of the Indian Department was directed to assemble the chiefs of the Chippewas in Council "with the least possible delay" to finalize the surrender of over 2,000,000 acres of Chippewa land. This land came to be known as the Huron Tract.

[73] A General Council of the Chippewas was held at which the Chippewas and the Indian officials observed the usual formalities. The Crown requested a surrender and the chiefs, "after consultation among themselves", said that they were prepared to make the surrender on behalf of the Chippewas. Provisional Treaty 27½ was signed by James Givens, Superintendent of Indian Affairs, representing the Crown and twenty named "chiefs and principal men" of the Chippewas. These chiefs represented the various bands who lived on the affected lands.

[74] Under the terms of Provisional Treaty 27½, the Chippewas agreed to "freely, fully and voluntarily … surrender and convey" to the Crown some 2.2 million acres of land in consideration for a perpetual annuity of 1,100£. The treaty identified 440 Chippewas who were affected by this surrender and provided for a reduction in the annuity if the population decreased.

[75] Under the terms of the Provisional Treaty, the Chippewas did not surrender all of their lands. They retained four reserves, including the Upper Reserve, for themselves and future Chippewa generations. The Provisional Treaty provided that the reserves were retained by the Chippewas for their "exclusive use and enjoyment".

[76] Upon receipt of the agreement the Lieutenant Governor forwarded it to the Colonial Secretary in London who in turn advised that the Crown accepted the terms.

[77] The Crown and the Chippewas could not conclude a final agreement in 1825 because there was no descriptive plan of the surrendered lands available. Under established procedures, a surrender could not be made unless a descriptive plan was attached to a deed of surrender. In 1829, after the land had been surveyed, the Crown and Chippewas entered into Treaty 29 which confirmed the terms of the 1825 agreement.

[78] Treaty 29 complied with all the formalities attached to a surrender of Indian land to the Crown. A written document acknowledging the Chippewas' rights in the land and describing the surrender was signed by Superintendent of Indian Affairs George Ironside, for the Crown, and by eighteen named chiefs and principal men of the part of the Chippewas inhabiting and claiming the lands affected by the surrender. Those chiefs, on behalf of the bands they represented, surrendered to the King all their rights, title and interest in the land save their rights and title in the four reserves. Their rights in those four reserves were held by them for their exclusive use and enjoyment for all time.

[79] The Chippewas do not question the validity of the surrender made by Treaty 29. As the motions judge observed, it bore all the indicia associated with a valid cession of First Nations land to the Crown. It was the product of direct negotiations between the Crown and the chiefs of the Chippewas. The terms of the surrender, including the annuity to be paid, were put to the Chippewas at a General Council meeting at Amherstburg in July 1827 and approved at that Council. The surrender was formalized in a written document executed by the appropriate officials on both sides. The document recognized pre-existing Chippewa rights in the land and acknowledged that the Chippewas were surrendering those rights to the Crown. The consideration for the surrender was set out in the deed and a descriptive plan attached to it.

[80] By July 1827, the face of the map of what is now southwestern Ontario had changed dramatically. The Chippewas had surrendered 2.2 million acres of land to the Crown. They had retained four reserves, including the Upper Reserve. Those four reserves were protected not only by the Chippewas' pre-existing land rights as acknowledged by the Crown, but also by the solemn promise of the Crown in Treaty 29. The land on the reserves, including the disputed lands, belonged to the Chippewas.

[81] It would appear that Crown officials initially regarded the four reserves set out in Treaty 29 as held in common by all the various bands who were signatories to Treaty 29. By the late 1830s, however, the St. Clair Regional Band, which included the ancestors of the present Chippewas of Sarnia Band, were regarded as the owners of three of the reserves, including the Upper Reserve. The Walpole Indian Regional Band was seen as the owner of the fourth reserve. Best estimates suggest that by 1839 there were as many as eight to ten chiefs of the St. Clair Regional Band.

[82] One of the chiefs for St. Clair Regional Band was Joshua Wawanosh. Wawanosh had a remarkable and checkered career as a leader of the St. Clair Chippewas. He became a chief shortly after the war of 1812 in part because of his military service on behalf of the Crown in the war of 1812. By the mid-1820s, Crown officials and other Chippewa chiefs recognized Wawanosh as the Head Chief. He was the first to sign Provisional Treaty 27½ on behalf of the Chippewas, received a copy of the deed and was described by Joseph Clench, a superintendent in the Indian Department, as the "principal chief".

[83] By the 1830s, there was opposition to Wawanosh's leadership on the four reserves. That opposition grew during the 1830s reaching its zenith in 1844 when Wawanosh was removed as Head Chief after a public inquiry by Indian Department officials. He remained a chief. Within four years, however, Wawanosh had regained the confidence of the other chiefs on the reserves and recovered from the ignominy of his removal. At the suggestion of the man who had replaced him as Head Chief, Wawanosh was restored to the position of Head Chief.

[84] Throughout his long tenure, Wawanosh, who had converted to Christianity, favoured the "civilization" policy. He believed that the Chippewas should establish a permanent farming community on the Upper Reserve and learn the white man's ways. He also had a keen eye for opportunities and sought to increase his influence and personal wealth whenever the opportunity arose.

[85] Wawanosh's position as the spokesman for the Chippewas on the Upper Reserve is evident in discussions between himself and William Jones, the resident Indian Superintendent, in 1830. At the request of the Lieutenant Governor, Jones broached with Wawanosh the possibility of the Chippewas surrendering their land along the river and moving inland to establish permanent farming communities. Wawanosh advised Jones that the Chippewas were firmly against moving from their "present residence on the Upper River", but that they were "pleased with the idea of having their children educated and learning to live like white people …".

[86] The Indian Department accepted Wawanosh's position and did not seek a surrender of any part of the reserve, but did step up efforts to establish a permanent village and farming base on the reserve for the Chippewas.

[87] Wawanosh spoke for the bands on the Upper Reserve again in 1834 when Jones was directed to approach the Chippewas for permission to allow the private cutting of timber on part of the Upper Reserve. Jones sought out Wawanosh's view on the matter and reported back to Jarvis.

[88] Wawanosh's discussions with Jones typified the kind of preliminary discussions that Indian Department officials would have with influential chiefs when important matters arose. There is no suggestion that Wawanosh did not speak for the Band on the Upper Reserve in 1830 or 1834, or that he did not accurately convey the collective position of the Chippewas to Jones.

F. The Cameron Transaction

[89] By 1839, responsibility for Indian matters was divided among various Crown departments. Those departments were under the control of the Lieutenant Governor of Upper Canada. The department was headed by a chief superintendent who had a number of deputy superintendents. Various resident superintendents lived at or near reserves and were responsible for overseeing relations with the First Nations people on those reserves. As the bureaucracy grew, those at the top ceased to have any kind of direct, long-standing relationship with First Nations chiefs. Subsequent inquiries (e.g. the Bagot Inquiry in 1844) also demonstrated that the Department was in many respects dysfunctional by 1839.

[90] The Indian Department was responsible for mediating disputes between white men and aboriginals, keeping the Crown advised of the views and attitudes of the Indians, ensuring that white settlers did not intrude onto Indian lands, supervising the surrender of Indian lands, administering payments due to First Nations under the terms of surrenders, and promoting the "civilization" policy. These responsibilities often brought Indian Department officials into conflict with white settlers. As often as not, those officials found themselves aligned with positions taken by First Nations people and opposed to positions advanced by white settlers.

[91] Samuel P. Jarvis was appointed Acting Chief Superintendent of Indian Affairs in Upper Canada in 1837 and remained in that post until his dismissal in 1845 following the revelations of the Bagot Commission. Jarvis, a Tory and member of the Family Compact, appears to have been an honest and well intentioned person who had virtually no hands-on experience with the First Nations prior to 1837. He was an abject failure as an administrator.

[92] William Jones was the Resident Superintendent at Port Sarnia from March 1830 until June 1845 when, like Jarvis, he was dismissed as a result of the findings of the Bagot Commission. Jones' relationship with the principals of the Cameron transaction (Cameron and Wawanosh) was far from friendly as of November 1839.

[93] Resident Superintendent Jones had many dealings with Chief Wawanosh. He recognized Wawanosh's influence and the need to maintain Wawanosh's support. He also came to regard Wawanosh as dishonest, greedy and intent upon advancing his own interests over those of the Chippewas on the Upper Reserve. Jones's mistrust of Wawanosh increased during the rebellion of 1837 when Wawanosh, unlike many Chippewa chiefs, refused to support the Crown but insisted on a position of neutrality. By November 1839, Jones had no reason to favour Wawanosh or to assist him in promoting his personal interests.

[94] The mistrust of Wawanosh did not stop with Jones. Chief Superintendent Jarvis and even the Lieutenant Governor had reason to doubt Wawanosh's honesty and the reliability of statements he purported to make on behalf of the Band.

[95] Malcolm Cameron, a businessman, politician and land speculator from eastern Canada, took up residence in Port Sarnia in the early 1830s. As an accomplished businessman with political connections, he quickly became one of the town's most influential citizens. Cameron was a reformer, a Methodist, and a strong proponent of the "civilization" policy. He took the forefront in attempts to secure parts of the Upper Reserve for white settlement, taking the position that the Chippewas could use the proceeds from the sale of parts of their land to finance the development of the rest.

[96] Wawanosh, like Cameron, was a Methodist and shared Cameron's entrepreneurial spirit. The two developed a close working relationship. Cameron lent money to Wawanosh from time to time. On various occasions, to the consternation of officials in the Indian Department, Cameron assisted Wawanosh in making direct representations to the Lieutenant Governor or, after 1840, the Governor General.

[97] Although Cameron had strong political support in 1839, including that of the reform-minded Lieutenant Governor Arthur, Cameron did not enjoy good working relations with the officials of the Indian Department. As a Methodist reformer, he had nothing in common with High Anglican Tories like Superintendent Jarvis. His support of Wawanosh also brought him into conflict with Jones.

[98] The residents of Port Sarnia had from time to time after 1827 petitioned the government to obtain the surrender of parts of the Upper Reserve. They felt that the reserve was blocking key trade and communication channels along the St. Clair River and inhibiting the development of their town. In the late summer of 1839, Wawanosh, speaking for the Chippewas on the Upper Reserve as he had in 1830 and 1834, made it clear that the Chippewas were not prepared to sell any part of the front part of the Upper Reserve running along the St. Clair River. This was the part of the reserve coveted by the white settlers at Port Sarnia. As in 1830 and 1834, Wawanosh spoke for, and accurately expressed the position of the Chippewas on the Upper Reserve.

[99] At almost the same time that Wawanosh told Jones that the Chippewas were not prepared to give up any land along the front of the St. Clair River, Wawanosh advised Jarvis that the Chippewas were inclined to sell part of the rear of the Upper Reserve. A document found in the papers of Jarvis and purporting to be a translation and transcription of an address given by Wawanosh in September 1839 reads in part:

You recommended to us last year to cultivate the soil and proposed that, workmen should be hired to put our fields in proper condition for sowing crops. We have thought of this & think the advice good, but are unwilling that the expense should be defrayed from our annuity. We wish your advice on a plan which we think would please us all. We propose to sell a mile in depth off the rear of our Reserve, and with the money produced by this sale to cultivate the front. What is your opinion?

[100] The exact circumstances in which Wawanosh made this purported address have been lost in time. It cannot be said whether he made the address at a Council of the Chippewas, or at some public gathering of the St. Clair Regional band. It is, however, clear that his proposal was consistent with the ongoing development of a permanent agricultural settlement on the Upper Reserve. Most of the land at the back of the reserve which Wawanosh indicated the Chippewas were prepared to give up was not as well suited for farming as the front of the reserve. Nor, contrary to the finding of the motions judge, was there any inherent contradiction between the Chippewas' refusal to sell off any part of the front of the reserve and Wawanosh's indication that they were prepared to sell off parts of the back of the Upper Reserve. The Chippewas sold off pieces of the Upper Reserve from time to time after 1827.

[101] Cameron advanced his proposal that the Upper Reserve be opened for settlement in a letter to Lieutenant Governor Arthur in August 1839. Cameron argued that the lands within the reserve exceeded those needed by the Chippewas to establish a permanent farming settlement. He suggested that the proceeds of the sale of a considerable part of the reserve could be used to improve the remaining land so that it could be effectively farmed by the Chippewas. Cameron suggested that the money could be realized either by a purchase by the government or a purchase by private individuals with government approval.

[102] In the fall of 1839 Cameron met with Lieutenant Governor Arthur and subsequently with Chief Superintendent Jarvis to promote the acquisition of a large part of the Upper Reserve. Jarvis told Cameron that he, Cameron, could negotiate with the Chippewas and, if possible, strike a bargain, subject to the approval of the Governor in Council. Cameron travelled to the Upper Reserve, met first with Jones, and later with Wawanosh and two other chiefs.

[103] Cameron advised both Lieutenant Governor Arthur and Jarvis in letters dated November 9, 1839 that he had met with Wawanosh and "other chiefs". He explained that the chiefs were reluctant to give up any part of the reserve because they feared that their agreement to give up part of the reserve would be seen by land-hungry settlers as an invitation to take more land than the Chippewas had agreed to sell. According to Cameron, he had the "confidence" of the chiefs and was able to convince them that he would adhere to any bargain they made. Cameron advised that he had concluded a bargain for the purchase of four square miles at the rear of the reserve furthest from the St. Clair River. According to Cameron, the Chippewas also agreed to provide

four roads running from that block of land through the reserve to the river. Cameron said that he had agreed to pay the Chippewas 10 shillings per acre with an initial payment of 250£. The rest of the purchase price (1,020£) was to be paid in nine annual instalments. Cameron observed that the price was two shillings higher than the "government price", but that he had agreed to the higher price in lieu of paying any interest on the unpaid part of the purchase price. Cameron attached a rough map of the land which he said the Chippewas had agreed to give up. The map showed four roads running through the reserve to the river.

[104] In his letter to Lieutenant Governor Arthur, Cameron stressed the "public good" of the transaction and urged Arthur to approve it if he thought it to be a "fair and advantageous bargain for the Indians".

[105] Resident Superintendent Jones also wrote to Jarvis on November 9, 1839. He advised that Cameron had met with the only three chiefs who were on the Upper Reserve (Wawanosh, Chibigun and Corning).[7] Those chiefs had later called on Jones and asked that he propose to the government on their behalf "the sale of one mile in depth by the whole length of the reserve off the rear of the Upper St. Clair Reserve". Jones reported the terms of the agreement as told to him by the chiefs. He also indicated that, under the bargain, a road was to run from each concession line through the reserve to the river. Jones said that the Chippewas expected to be paid for the land used for these roads.

[106] The correspondence outlined above demonstrates that all concerned appreciated that the transaction could not be completed without the approval of the Crown. Cameron and the chiefs both notified the Crown of the bargain and sought Crown approval. Neither believed that they could deal with the disputed lands without the intervention of the Crown.

[107] Chief Superintendent Jarvis was asked by the Lieutenant Governor's office to comment on the proposed sale. In correspondence delivered in late November 1839, Jarvis opined that the purchase price appeared to be "fair and reasonable", but went on to observe that Cameron should be required to pay interest on the unpaid balance of the purchase price.[8] Jarvis also noted that there was some suggestion that the purchase price would be paid directly to the Chippewas. He pointed out that this was not Crown policy and that the money should be paid to the Crown to be invested for the benefit of the Chippewas. Jarvis' recommendations were accepted by the Lieutenant Governor and incorporated into two orders-in-council approving the sale.

[108] The first order-in-council, dated March 19, 1840, began with the following:

The Executive Council are respectfully of the opinion that it would be a great public advantage as well as a benefit to the Indians were the tract of land above mentioned disposed of to white settlers at an adequate price.

It also set out the price, required the payment of interest on the instalments, and provided for an allotment of land for clergy reserves.

[109] Cameron objected to both the payment of interest and the allotment of lands for clergy reserves. Eventually he agreed to pay interest but persisted in his objection to the clergy reserves.

In June 1840 a second order-in-council was passed in the same terms as the March order-in-council save that the requirement for clergy reserves was deleted.

[110] Both orders-in-council referred to the proposed purchase by Cameron of the land and neither referred to a surrender or recommended that a surrender of the lands be accepted. In contrast, orders-in-council issued at or about the same time as the Cameron order-in-council and referring to the sale of other parts of the Chippewa reserves made reference to the surrender of the land to the Crown.

[111] It is helpful at this stage to summarize the substance of the Cameron transaction.

- Cameron had approached Crown officials for permission to negotiate the purchase with the Chippewa chiefs.
- Negotiations were conducted with the authorization of the senior Crown official responsible for Indian Affairs in Upper Canada.
- Cameron negotiated through an interpreter with three of the chiefs on the Upper Reserve, including Head Chief Wawanosh. The record is clear that no other chiefs were present but is unclear as to who, if anyone else, was privy to the negotiations.
- The bargain arrived at by Cameron and the three chiefs was made known to Crown officials by Cameron and the chiefs separately. Both sought government approval for the transaction.
- The negotiated purchase price was a reasonable one.
- The appropriate official in the Indian Department considered the proposed bargain, altered two of the terms to add further protection of the Chippewa interests, and recommended the approval of the transaction.
- The Lieutenant Governor, the representative of the Crown in Upper Canada, approved the transaction as altered by the Indian Department.
- The land which was the subject of the transaction was not on the part of the Upper Reserve the Chippewas had refused to part with in earlier discussions with the Crown in 1839. Much of it was not ideal for farming. If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with some success by November 1839.[9]

[112] It is equally important to bear in mind, as did the motions judge, what did not occur as part of the Cameron transaction prior to the issuing of the order-in-council.

- Crown officials were never directly involved in the negotiations with the Chippewas.
- The transaction was never explained, discussed, or approved at a General Council of the regional bands of the Chippewas affected by the transaction.
- Although three chiefs approved the transaction, the approval of the other chiefs (possibly five to seven) was neither sought nor obtained.
- The bargain struck between Cameron and the chiefs was never reduced to writing in a deed, contract, or treaty signed by the necessary chiefs and the Crown representative.

Consequently, there was no formal document in which the Crown acknowledged the Chippewas' rights in the land and the Chippewas agreed to surrender those rights.
- There was no descriptive plan of the lands signed by the appropriate Crown officials and chiefs of the Chippewas.

[113] We agree with the motions judge that the exchange of correspondence in November 1839 combined with the meetings involving the Chippewa chiefs, Jones and Cameron did not amount to a surrender. As the reasons of the motions judge demonstrate, there was in this transaction a failure to follow virtually every established procedure attendant upon the surrender of Indian land. As the motions judge observed, the failure to follow these procedures makes the Cameron transaction unique among the many land dealings between the Chippewas and the Crown in the 19th century.

[114] Although we accept the motions judge's conclusion that there was no surrender in November 1839, we do not agree with his description of the Cameron transaction as a "private sale" between Cameron and three chiefs. The negotiations were conducted with the knowledge of and under the authority of Crown officials in the Indian Department. The terms of the transaction were reviewed and changed by Superintendent Jarvis and only then approved by the Crown. The ultimate terms were dictated by the Crown for the protection of the Chippewas.

[115] The motions judge also repeatedly referred to the meeting between Cameron and the three chiefs as a "private meeting". We can accept this characterization if it means only that the meeting between Cameron and the chiefs was not a General Council meeting as that phrase would be understood in the context of the surrender of Indian lands. We do not, however, accept the characterization if it is meant to suggest that the three chiefs were the only Chippewas who were aware of the negotiations or the bargain reached. Although only three chiefs met with Cameron, nothing in the record suggests that they were the only Chippewas who were privy to the meetings, or that the negotiations or the bargain reached were in any way secret from Chippewas who were on the Upper Reserve. Subsequent events lend no support to either of those suggestions.

[116] It is not surprising, in the context of Indian land negotiations, that there was no actual surrender as of the end of November 1839. As indicated above, discussions between Indian Department officials and individual chiefs in which agreements were worked out subject to approval at a General Council were quite common. It would have been entirely consistent with established practice had the terms of the Cameron transaction, as agreed upon by Cameron and the three chiefs and as modified by Jarvis, been put to a General Council of the Chippewas for approval at some point after November 1839 and before the land was actually granted to Cameron.

[117] There is, however, no evidence that a surrender occurred between November 1839 and the issuing of the orders-in-council in March and June of 1840. The only reference to a surrender in the correspondence preceding the orders-in-council appears in Jarvis' letter to the Lieutenant Governor's office in November 1839. He wrote:

Should the government think proper to permit the Indians to dispose of a part of their reserve the course heretofore pursued in similar transactions has been to require as a first step a surrender of the land to the Crown after which the Crown will grant the same, on such terms as may be agreed upon, and will take care that the purchase money is safely invested.

[118] No one in the Department followed up on Jarvis' statement. The failure of the Department to obtain a surrender and follow the well established practices relating to surrenders is not explained by any conspiracy to deprive the Chippewas of their land, or even by a desire within the Indian Department to assist Cameron and allow him to circumvent established procedures and accelerate settlement of the land. Jarvis carried no brief for Cameron and had in no way supported or associated himself with the success of Cameron's negotiations with Wawanosh and the other two chiefs.

[119] Resident Superintendent Jones also had no reason to help Wawanosh or Cameron. By November 1839, Jones and Wawanosh were engaged in a heated vilification of each other involving a series of charges and counter-charges. It is unlikely that Jones would facilitate a fraudulent transaction involving Wawanosh or knowingly turn a blind eye to any legal requirements of that transaction. It is also unlikely that Jones, given his view of Wawanosh, would accept without question whatever Wawanosh told him about the Chippewas' wishes with respect to the sale of their land.

[120] Although neither Jarvis nor Jones acted to secure the appropriate surrender, there is no evidence that they or anyone else in the Indian Department had any reason to believe that a surrender would not be forthcoming if requested.

[121] True, the two orders-in-council do not refer to a surrender of the land. The language of these orders-in-council stands in stark contrast to others pertaining to land transactions involving Chippewa land, including one issued on the same day as the second Cameron order-in-council (June 18, 1840). All other orders-in-council referable to Chippewa land make reference to a surrender. However, the Cameron orders-in-council refer instead to a "proposed" sale suggesting that the transaction would close at some time in the future thereby allowing for a surrender before closing. We agree with the motions judge's conclusion that the language of the order-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future.

[122] The Crown had ample opportunity to obtain a surrender. The disputed lands were not granted to Cameron in fee simple by way of letters patent until some fourteen years later in August 1853. There were several reasons for the delay, some of which will be examined below. Despite the passage of fourteen years, however, the Indian Department did not arrange for surrender of the land. There was no General Council of the Chippewa bands affected by the transaction at which the details of the transaction were explained and approval of the surrender given.[10] There was also no formal surrender document prepared and executed by the appropriate Crown official and the Chippewa chiefs. In short, none of the established procedures were followed.

[123] There were few references to a surrender in the documents touching on the Cameron transaction between 1840 and 1853. By 1851, officials in the Indian Department, none of whom had been involved in the Cameron transaction in 1839 and 1840, had come to believe that a surrender had in fact been made and that a surrender document existed. Although the existence of the document was questioned on one occasion, no one bothered to check the actual records. The form of the letters patent issued in 1853 was consistent with a surrender having been obtained.

[124] The failure to take the steps necessary to obtain a proper surrender prior to the issuing of the letters patent was explained by the motions judge in terms which we adopt:

There is no evidence that Jarvis' recommendations of November 18, 1839 that there should be as a first step a surrender to the Crown of the disputed land, was deliberately rejected. But it was uncontradicted that it was neglected. While there is no evidence that any particular official was asleep at the switch, it is uncontradicted that Jarvis' surrender recommendation simply fell between the cracks in the general chaos and lack of accountability that prevailed in the five separate bureaucracies that then dealt with Indian land. No one was in charge and no one was accountable.

[125] Cameron did nothing to encourage the Indian Department to obtain the appropriate surrender. The record suggests that he never concerned himself with obtaining a proper surrender. His attention between 1839 and 1853 was directed to several other problems, including difficulties he encountered in raising the funds to pay the purchase price. He made the initial downpayment in February 1841, but did not make the annual payments as he had promised. It was not until August 11, 1853 that he paid the outstanding amount owing on the purchase price.[11]

[126] Cameron's disregard for the legalities associated with the transaction is evident from the fact that he sold large parts of the land and placed settlers on it years before he received the patent and the fee simple. He was a businessman in a hurry.

[127] There is no direct evidence of the Chippewas' reaction to the Cameron transaction, and, in particular, the Chippewas' reaction to the failure of the Indian Department to obtain the necessary surrender. The Chippewas' tradition is an oral one and direct evidence of their response to the Cameron transaction has been lost over the 160 years since the transaction.

[128] The Chippewas' position may, however, be inferred from events which occurred between November 1839 and 1855. After reviewing some of those events, the motions judge concluded that by 1840, the Chippewas were aware that there was an agreement to sell part of their reserve to Cameron. He further concluded, however, that the Chippewas were never made aware of the details of the sale and may well have expected that before the transaction was consummated the Crown would seek a surrender in accord with the established practice.

[129] The motions judge also found that there was no evidence that the Chippewas made any complaint that Wawanosh and the other chiefs had acted without authority in their dealings with Cameron, or that any representative of the Chippewas ever repudiated the transaction. We accept

those findings. The motions judge went on, however, to hold that the absence of any complaint, combined with the Chippewas' knowledge of the transaction, did not constitute any evidence that the Chippewas as a community agreed to surrender their lands.

[130] The evidentiary significance of the absence of any complaint about the transaction or any repudiation of it must be assessed in the context of the entire record. There is overwhelming evidence that the Chippewas were an intelligent people who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights. By 1839, the Chippewas were well accustomed to addressing grievances to the Crown by way of petitions. Those petitions were prepared at General Council meetings and addressed many issues, including complaints with respect to land transactions. On various occasions, the Chippewas' petitions specifically repudiated earlier transactions to which they had allegedly agreed. For example, the strong objection by the Chippewas to the proposed Saugeen surrender in 1836 demonstrates that even where a proposed land transaction was initiated by the Lieutenant Governor himself, the Chippewas could and would voice strong opposition to it if it did not accord with their wishes.

[131] There can also be no doubt but that many chiefs of the St. Clair regional bands, both on and off the Upper Reserve, were not reluctant to complain to the Indian Department and the Lieutenant Governor or Governor General about the conduct of Chief Wawanosh. Complaints about Wawanosh began in the early 1830s, grew more vigorous as time went on and reached a crescendo in early 1844 when Wawanosh was removed as Head Chief following a public inquiry into his conduct. The many complaints against Wawanosh included allegations that he abused his authority as chief, misappropriated band assets, and showed gross favouritism towards friends and allies. There were also allegations that Wawanosh sold, or at least tried to sell, Chippewa land without authority. For example, in October 1836, a number of Chippewas petitioned the government complaining among other things that Wawanosh was "disposing of land reserved for us, our wives and children without our consent". A similar allegation was made in 1841 when various chiefs complained that Wawanosh was trying to sell land without authority.

[132] In August 1843, a petition signed by about 200 Chippewas was directed to the Governor General. It contended that Wawanosh was not the hereditary chief, took more than his proper share of the annuity, and favoured his friends and relatives leaving the rest of the band in poverty. The petition concluded with these strong words:

We are not neither children or foolish. We know perfectly well who either wrongs us or does us good, and we can complain of the former and thank the latter, we therefore beg your Excellency will attend to what comes from ourselves only, and not to the unsolicited and obnoxious interference of white men with whom we neither have nor wish to have any concern; … [Emphasis added.]

[133] The Chippewas requested a General Council at Port Sarnia at which their complaints against Wawanosh could be aired. The Governor General decided to hold a formal public inquiry into the charges against Wawanosh. That inquiry was held in late 1843. Witnesses for and against Wawanosh testified and Wawanosh replied in detail to the allegations made against him. Summaries of the testimony have survived and provide a detailed account of the accusations

against Wawanosh, and insight into the level of animosity that many of the Chippewa chiefs had developed toward Wawanosh.

[134] Superintendent Clench presided over the inquiry and prepared a report for Jarvis summarizing his findings. According to Clench, the charges against Wawanosh related to mismanagement of his office as chief, the appropriation of more than his share of the annuities due to the Chippewas, gross favouritism, and making a false claim to being an hereditary chief. Clench reported that over 75 percent of the Chippewas on the four reserves were against Wawanosh.

[135] It was determined that Wawanosh should be removed as Head Chief but should remain as a chief. Despite the efforts of Wawanosh and Cameron to prevent the removal of Wawanosh, he was in fact removed as Head Chief and not restored until 1848.

[136] The complaints made against Wawanosh between 1830 and 1844 are set out in considerable detail in various affidavits filed by the parties. None of the complaints refer to the Cameron transaction, although it occurred and was known to other Chippewas at the very height of their displeasure with Wawanosh (1839-1843). In our view, it is significant that despite the many general and specific complaints directed at Wawanosh's conduct, there was never any suggestion by the other Chippewa chiefs that Wawanosh had acted beyond his authority in reaching a bargain with Cameron, or that the purported sale was contrary to the wishes of the Chippewas.

[137] In assessing the significance of the absence of any reference to the Cameron transaction in the onslaught of complaints made against Wawanosh at the inquiry, we bear in mind that by the fall of 1843, the Chippewas knew the full extent of the lands involved in the Cameron transaction. Those lands had been surveyed into lots in the summer of 1842. The Chippewas knew by the fall of 1843 that the Cameron transaction involved about one quarter of the land on the Upper Reserve.

[138] The absence of any reference to the Cameron transaction among the litany of complaints made against Wawanosh defies explanation if the other Chippewa chiefs looked on the Cameron transaction as a "private" deal whereby Wawanosh disposed of one quarter of the Upper Reserve against the wishes of the Chippewas affected by that transaction. The explanation advanced by one witness for the Chippewas that the Chippewas' culture was such that complaints against Wawanosh would be indirect (a contention neither accepted nor rejected by the motions judge), does not hold up. By the fall of 1843, there was a concerted attack underway on Wawanosh's leadership in the years before and following 1839. That attack included specific allegations against him by other Chippewa chiefs. Furthermore, the formal inquiry of 1843 was a trial-like inquiry conducted by Superintendent Clench. The inquiry was directed into any and all allegations that witnesses wished to advance against Wawanosh. Surely, had there been any reason to suspect that Wawanosh had acted improperly in connection with a transaction involving one quarter of the Upper Reserve, some reference to that transaction would have been made in the many complaints brought forward against Wawanosh.

[139] The motions judge found, however, that the absence of any complaint about the Cameron transaction had no evidentiary value because in his words:

… The first question is when, and exactly of what, the Chippewas should be expected to have complained. Lack of complaint about lack of surrender cannot be expected until lack of surrender becomes apparent. The legal status of the Cameron lands, between November 1839 and August 13, 1853 was unclear. … If the Crown officials could not know the status of the disputed lands one would hardly expect the Chippewas to know enough detail to be in a position to complain specifically. … Lack of complaint of lack of surrender has no evidentiary significance when future surrender is reasonably to be expected. [Emphasis added.]

[140] The motions judge missed the evidentiary significance of the absence of any complaint about the Cameron transaction by characterizing it as a failure to complain about the lack of a surrender. It is not the Chippewas' failure to complain about the lack of a surrender which is significant. What is significant is that even though the other chiefs were aware that Wawanosh had agreed to sell one quarter of the Upper Reserve, they made no complaint about that transaction in an inquiry, the purpose of which was to air any and all complaints about Wawanosh's conduct as Head Chief. The failure to complain about Wawanosh's actions in connection with the Cameron transaction, or to repudiate that transaction, constitutes evidence from which it can be reasonably inferred that Wawanosh acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known.

G. Post-Cameron Transaction Events

[141] The inference of approval or at least acceptance of the Cameron transaction by the Chippewas flowing from the absence of any complaint about it in the avalanche of complaints made against Wawanosh is strengthened by the evidence of several events which occurred between 1840 and 1855. These events shed further light on the Chippewas' attitude towards the Cameron transaction.

[142] In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English.[12] In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of those who may have voiced any opposition to Wawanosh's actions.

[143] The first reference in the Indian Department correspondence to the Cameron transaction after November 1839 was a letter from Jones to Jarvis in early May 1840. Jones advised Jarvis that the Chippewas wanted approval for the purchase of 300 acres of land in Enniskillen. The

Chippewas, including those on the Upper Reserve, had been interested in acquiring Enniskillen land for many years. There were maple groves at Enniskillen which were ideal for sugar-making, a traditional Chippewa activity which had taken on commercial importance as the number of white settlers increased.

[144] Jones advised Jarvis that the Chippewas proposed that the purchase price "be paid out of the money which they are to receive from the tract to be sold to Mr. Cameron and co., or, in the event of much delay, the first instalment to be paid out of their annuity".

[145] The proposal made by the Chippewas through Jones in May 1840 was the latest of several proposals the Chippewas had made concerning the acquisition of Enniskillen land. Some involved the exchange of reserve land (not land on the Upper Reserve) for Enniskillen property, and others involved the outright purchase of Enniskillen property. These proposals were advanced by the chiefs after Council meetings and reflected the consensus of the Chippewa bands. There is no reason to doubt but that the proposal put forward through Jones in May 1840 also represented the community consensus. Jones refers only to "the Indians" in his letter, however, given his relationship with Wawanosh, we think that had the plan been advanced by Wawanosh, Jones would have said so.

[146] The motions judge concluded that the letter from Jones in May 1840 was evidence that the Chippewas on the Upper Reserve had a general awareness of the Cameron transaction as of May 1840 and knew that the land was to be sold to Cameron. We think the letter shows more than that. It indicates a communal awareness of the Cameron transaction as early as May 1840 and a communal acceptance of the transaction. The Chippewas saw the Cameron transaction as providing a source of funds with which they could develop the sugar-making resources on the Enniskillen property. In doing so, they would be pursuing a traditional practice, while at the same time improving their economic base by developing a commercial relationship between themselves and the white settlers. Far from repudiating the Cameron transaction in May 1840, the Chippewas embraced it as a means of acquiring the Enniskillen property, a long held and actively pursued community goal.

[147] The Enniskillen lands were eventually purchased by the Chippewas, but not from the proceeds of the Cameron transaction. Those proceeds were not available. The fact that the Cameron transaction did not fund the purchase has no effect on the inference to be drawn from the Chippewas' position as set out in Jones' letter of May 1840.

[148] The events leading up to the survey of the disputed lands in the summer of 1842 also shed light on the Chippewas' attitude towards the Cameron transaction. In June 1841, Cameron complained that he could not commence a settlement of the land until it was surveyed and set out in lots. In October 1841, the Surveyor General suggested that it would be more economical to survey the entire Upper Reserve rather than just the lands affected by the Cameron transaction. Jarvis agreed with his suggestion but observed:

I entirely concur in your view of the matter but as the Chief of the tribe of Indian who live on the Reserve is not on very good terms with his people I should recommend a reference being first made to them, to ascertain whether they have any objection to the land being laid out into lots.

[149] Jarvis understood that the Chippewas might well be opposed to having the entire Upper Reserve surveyed. From the Chippewas' perspective, a survey setting out lots was a precursor to settlement by the white man. Before taking that provocative step, Jarvis wanted to be sure that the Chippewa community would not oppose it. Given the relationship between Wawanosh and many of the Chippewas on the Upper Reserve by the fall of 1841, Jarvis was not prepared to act on Wawanosh's word alone.[13]

[150] The motions judge contrasted Jarvis' careful approach to obtaining a Chippewa consensus in relation to the survey with the absence of any concern about the existence of a Chippewa consensus in connection with the Cameron transaction. With respect, the two situations were not analogous. In so far as the survey was concerned, Jarvis had no reason to think that the Chippewas were agreeable to a survey and given the significance of a survey to the Chippewas, very good reason to think that they would be opposed to the survey. With respect to the Cameron transaction, it was brought to the Indian Department representative, Jones, as a concluded bargain by three chiefs of the Chippewas.

[151] In October 1842, Jones was told of the proposal to survey the entire reserve and was asked to determine the views of the "chiefs of the tribes generally". Two weeks later, Jones wrote back to Jarvis indicating that he had had some difficulties getting the chiefs together and that it had taken them some time to determine whether they were agreeable to a survey of the entire reserve. Jones indicated that the chiefs did not wish to have the entire reserve surveyed.

[152] As the motions judge observed, the Chippewas' consideration of whether to permit a survey of the entire reserve would have necessarily entailed knowledge of the fact of the Cameron transaction and the extent of the land involved in that transaction. The Chippewas' response to the survey request leads to two other conclusions. First, the Chippewas were perfectly capable of resisting attempts to intrude on their land. Second, there was no suggestion that the Crown was not entitled to survey the disputed lands and set out lots on that land. Acceptance of the Crown's right to survey implied recognition of imminent settlement by the white man. Such settlement was inconsistent with any claim by the Chippewas that the Cameron transaction was unauthorized by them, or at least unacceptable to them as of 1842. We infer from the Chippewas' response to the request for a survey of the entire reserve that by the fall of 1842, the Chippewas on the Upper Reserve distinguished between the disputed lands and the rest of the reserve, saw it as their right to prohibit surveys of the latter but not the former, and knew that white settlement of the disputed lands was imminent.

[153] Jarvis was inclined to press for a survey of the entire reserve despite the position of the Chippewas, but in January 1842 it was concluded that the benefits of surveying the entire reserve were not worth the harm that the survey would cause to the relations with the Chippewas on the Upper Reserve. The entire reserve was not surveyed until 1855 when the chiefs consented to the survey.

[154] Even after the proposal to survey the entire reserve was abandoned, there was a further delay in surveying the lands which were subject to the Cameron transaction. The delay was due in part at least to some confusion over road allowances. That confusion resulted from the absence of proper documentation of the transaction.

[155] In May 1842, John O'Mara, a surveyor, went to the Upper Reserve and spent some two weeks doing a detailed survey of the disputed lands. He divided the lands into three blocks, set out a road between blocks A and B, a road between blocks B and C and two roads running from the western limit of the disputed lands through the reserve to the St. Clair River. In referring to the actual making of the survey, the motions judge said:

This is an important piece of evidence because the band was sensitive to the implications of any survey. The open and notorious presence of surveyors on the disputed land and the visible survey monumentation in the form of stakes and blazed trees would bring home to the band very vividly the fact that their land was being prepared for settlement.

[156] We agree with the conclusion of the motions judge. In our view, there were two reasonable inferences to be drawn from the Chippewas' inaction in the face of the survey. Either Wawanosh and the other chiefs acted with the approval of the Chippewas affected by the sale when they made the bargain with Cameron; or even if they did not have their approval, the Chippewas accepted the bargain when it came to their attention, did not seek to repudiate it or otherwise assert any right to the disputed lands.

[157] The failed attempt by residents of Port Sarnia to acquire part of the Upper Reserve in February 1843 was the next event discussed in some detail by the motions judge. He accurately observed that the officials in the Indian Department regarded a surrender of the land as a condition precedent to any acquisition of it by the residents of Port Sarnia. He also suggested that the aborted transaction demonstrated:

the ease with which enthusiastic purchasers can convince government officials, wrongly, that the Chippewas had agreed to sell part of the reserve.

[158] With respect, the evidence does not support this conclusion. The government officials were not convinced of anything by the residents of Port Sarnia. Rather, Jones was instructed to convene a meeting of the principal men and determine whether a surrender could be agreed upon. Within a month, the Chippewas indicated they were not prepared to surrender the land at that time, and that ended the matter as far as Jarvis was concerned.

[159] The reference to the aborted transaction involving the residents of Port Sarnia provides little insight into the Cameron transaction. Unlike that transaction, there was no bargain presented to the Indian Department in 1843 by chiefs of the Chippewas, but rather a petition to that Department by the land-hungry residents of Port Sarnia asking the Department to obtain a surrender.

[160] The attempts by the residents of Port Sarnia to acquire part of the Upper Reserve in 1843 do, however, provide yet another example where Chief Wawanosh, speaking through his son, conveyed the position of the Chippewas on the Upper Reserve to the Indian Department. As with the earlier occasions set out above, there is no suggestion that Wawanosh inaccurately conveyed the community consensus to the Indian Department.

[161] The incident in 1843 also demonstrates that the Chippewas' objections to intrusions onto their lands were acknowledged and accepted by the Indian Department even over the opposition of settlers.

[162] The Bagot Commission Report in 1844 also deserves brief reference. That Commission examined in detail the affairs of the Indian Department, and was highly critical of the operation of that department. The Commission heard many complaints about unjust land transactions in the 1830s, but recorded no complaints or disputes with respect to the Cameron transaction. The Commission was well aware of the transaction and examined its monetary details at some length. The Commission concluded that Jarvis had placed the initial payment made by Cameron in the wrong bank account and the Commission was highly critical of Jarvis' record-keeping. Nowhere, however, is there any suggestion that the transaction did not have the approval of the Crown and the Chippewas, or that it was regarded by anyone as a "private deal" between Cameron and Wawanosh.

[163] The next reference by the Chippewas to the Cameron transaction appeared in correspondence from Peter McGlashan, the clerk of the Magistrate's Court at Port Sarnia to resident Superintendent Clench in August 1847. McGlashan, who was involved in yet another attempt by the residents of Port Sarnia to acquire land on the Upper Reserve, wrote to Clench to tell him that the Chippewas were not prepared to give up any of their land. He said:

… To all these arguments the Indians have but one answer viz, that they were induced some eight years ago to consent to the sale of a large part of the reserve to Mr. Cameron of this place, for which he agreed to pay them within five years, in annual instalments but that to this time they have not received any part of the purchase money, and that they will not dispose of any more of their land for fear that they should be served in the same manner in receiving payment for it.

[164] The motions judge found that the letter was further evidence of the Chippewas' knowledge of the transaction albeit that they were mistaken as to the number of annual instalments to be paid. He went on, however, to conclude that McGlashan could not be relied on to accurately convey the Chippewas' attitude towards the transaction, and that it "has little evidentiary weight in determining whether Wawanosh on November 8, 1839 acted with the consent and authority of the band".

[165] While it is not unreasonable to conclude that the letter could not be relied on to show that Wawanosh had the consent of the affected bands when he agreed to the transaction, we see no reason to discount the value of the letter as evidence of the Chippewas' attitude towards the transaction in 1847. Their comments to McGlashan do not suggest a repudiation of the agreement. Quite the contrary, they signal a willingness to comply with the agreement and a complaint that the purchaser was not complying with it. The attitude of the Chippewas, as expressed to McGlashan, is inconsistent with the claim that the Chippewas viewed the disputed lands as having been unilaterally taken from them by Cameron. It is equally inconsistent with the claim that, as of 1847, the Chippewas did not accept that the disputed lands were no longer theirs.

[166] The Chippewas maintained this same position in subsequent communications with the Indian Department. For example, in 1850, a local Indian Department official reported that the chiefs were concerned that Cameron was issuing deeds for parts of the disputed land when they had not yet been fully paid. As in 1847, the Chippewas' complaint was with Cameron's failure to comply with the bargain, not with the bargain itself.

[167] The lengthy dispute over road allowances across the Upper Reserve, between the residents of Port Sarnia and the Chippewas on the Upper Reserve, provides further evidence of the Chippewas' attitude towards the Cameron transaction. In 1849, the residents of Port Sarnia petitioned the government to open a road through the reserve. Some settlers wanted a road through the middle of the reserve, to the river. In August 1849, the provincial land surveyor recommended that a road be built through the reserve. In September 1849, the Chippewas, through their interpreter Henry Chase, responded to the proposed road as follows:

The chiefs had granted a road should be opened for the use of their white neighbours direct from Sarnia Village, cutting diagonally the northeast corner of the Indian reserve of three quarters of a mile, as the Honourable Malcolm Cameron had proposed to be opened, to his lot of land on the rear of the reserve.

[168] Mr. Chase also reported that the chiefs would not agree to a second road being opened through the reserve. In early 1850, the residents of Port Sarnia filed a further petition with the government complaining that the Chippewas' opposition was due to "a child-like ignorance of what is really for their benefit".

[169] In July 1850, the residents of Port Sarnia changed tactics. They now contended that three roads had been granted to Cameron as part of the 1839 transaction. They petitioned the town Council of Port Sarnia to create a road along those allowances and indicated that the Indian Department should "order the agreement with the Honourable Malcolm Cameron to be fulfilled".

[170] An exchange of correspondence ensued dealing with the road allowances, if any, that had been granted in the Cameron transaction. The lack of proper documentation respecting the transaction fuelled the controversy. It was in the course of this correspondence that an Indian Department official asked whether a surrender of the land had been made at the time of the sale to Cameron. That question went unanswered.

[171] After making inquiries, the Indian Department advised the Port Sarnia municipal Council that:

On the authority of an existing order of the Governor General in Council that as the land through which you wish the road to pass is an Indian reserve which has never been surrendered to the Crown, no part of it can be considered under the jurisdiction of the municipal Council as a public highway.

[172] The municipal Council was not prepared to accept this position and indicated, relying on the letter of Jones to Jarvis of November 9, 1839, that the municipality would press ahead and "abide the consequences if they overstep their authority".

[173] Clench responded with equal vigour, advising the municipality that if the road concessions were not provided for in the surrender, the letter of Jones would have no value. Clench assumed that a surrender existed. In fact, there was none.

[174] Eventually, the municipality resiled from its threats to proceed with the roads despite the position of the Indian Department. An agreement was reached with the Chippewas whereby the Chippewas agreed to permit a road running diagonally across the corner of the reserve. This was the offer the Chippewas had made in 1849 when they first indicated they were willing to allow their "white neighbours" to run a road through the Upper Reserve from the disputed lands to the river.

[175] The Chippewas' attitude throughout the road dispute was one of acceptance of the fact of the Cameron transaction. The back of the reserve was described as Cameron's lands. The Chippewas were also willing to co-operate with their white neighbours in road construction, but insisted that the co-operation be on their terms if the road was to run over their land. Their position was supported throughout by officials at the Indian Department.

[176] The road allowance dispute is a good example of the tripartite nature of disputes involving Indian lands in southwestern Ontario in the middle of the 19th century. The settlers stood on one side of the dispute and the Chippewas on the other with the Indian Department in the middle. That Department did not see itself as a promoter of the interests of white settlers. Where, as in the case of the road allowance dispute, the Department concluded that the Chippewas were correct, they fully supported the Chippewas' position.

[177] The willingness of the Indian Department to support the Chippewas' position even against the persistent claims of the white settlers in Port Sarnia was not unique and would not have been lost on the Chippewa leadership. Their failure to take issue with the Cameron transaction cannot be explained on the basis that they assumed that such complaints would not receive a fair hearing at the Indian Department. As the road allowance dispute demonstrates, officials in that department were prepared to support the Chippewas in contentious matters involving lands on the Upper Reserve.

[178] The final event which must be examined in considering the Chippewas' attitude towards the Cameron transaction is the General Council meeting of the Chippewa chiefs in March 1855. The chiefs addressed a number of questions to Superintendent Talfourd, Clench's successor. Talfourd's notes indicate that the questions were directed to several transactions involving reserve lands. Talfourd's cryptic notes of the questions put by the Chippewa chiefs included the following reference to the Cameron transaction:

To what amt. the principal the sale of the parcel of land brought by Mr. Cameron and the amt. of land to have the exclusive use of the money?

[179] Talfourd's report on the General Council meeting included the following:

… I attended a Council … of the Chippewas of Sarnia when it was decided that I should communicate to Your Lordship their wants and wishes on the following subjects …

(Firstly) the sum that will be realized by the late surrender of land at Sarnia Village, the block sold to Honourable M. Cameron in the rear of the reserve, and one lot in Bosanquet sold to Mr. Kennedy, and at what time they may expect the interest on the payments already made.

[180] After referring to these documents, the motions judge held:

… The documents show that the band knew of the sale to Cameron, did not know the amount of the sale price, did not know the amount of land sold, knew there was some interest owing, and did not know when it would be paid.

[181] We cannot accept some of these conclusions. In our view, it is not reasonable to infer from these notes that the Chippewas were unaware of the purchase price. In his report, Talfourd refers to "the sum that will be realized". This is a very different matter than the purchase price since an interest calculation was involved. Nor is it reasonable to assume that the Chippewas did not know the amount of land that had been sold. As indicated above, a detailed survey of the land had been carried out in 1842. A further more detailed survey was made before 1850. While the Chippewas might not have known how many white man's acres were involved in the transaction, they knew exactly what part of the Upper Reserve had been given up in the Cameron transaction. Lastly, the Chippewas' question concerning when they would pay the accumulated interest does not reflect any ignorance of the terms of the bargain made with Cameron. Actual payment to the Chippewas depended on the Crown who held the money for the benefit of the Chippewas and not on the terms of any bargain struck between Cameron and the three chiefs.

[182] We take the queries posed by the chiefs at the General Council in 1855 as strong evidence that the Chippewas accepted the transaction, no longer regarded the disputed land as theirs, were prepared to abide by the terms, but were also determined to get what was due to them under the terms of the transaction. As with the previous events outlined above, the Chippewas did not seek to repudiate the agreement, but rather sought compliance with the terms of the agreement by the purchaser.

[183] By 1861, some twenty-two years had passed since the Cameron transaction. Cameron was no longer on title and those who had purchased the land had no involvement in the transaction. They could look to an apparently valid Crown patent issued some eight years earlier for the root of their title.

H. Summary of Findings

[184] We summarize our relevant findings with respect to the Cameron transaction and the events in the ensuing twenty-two years as follows:

- Crown officials responsible for First Nations relations continued throughout the relevant time to follow the central policies underlying the Royal Proclamation. The Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

- Cameron, with the approval of the Crown, negotiated the transaction with three chiefs of the Chippewas, including Head Chief Wawanosh. The chiefs and Cameron reached a bargain, the terms of which were modified by Jarvis and then approved by the Crown. The bargain was consistent with the goals of the "civilization" policy of the Crown.
- By 1851, the Crown believed that a surrender of the disputed lands had been made and issued a patent on that basis in 1853.
- There was in fact never a surrender of the disputed lands to the Crown.
- The Chippewas were never asked by the Indian Department to surrender the disputed lands to the Crown. Consequently, there is no evidence of the existence of a communal intention to surrender the disputed lands to the Crown at any time.
- The failure to request and obtain the necessary surrender is explained by the dysfunctional state of the Indian Department and the neglect of those charged with the responsibility of obtaining the surrender.
- It cannot be said whether Head Chief Wawanosh and the two other chiefs negotiated the bargain with Cameron with the authority of those Chippewa bands affected by the transaction. It is, however, clear that those bands knew of the transaction shortly after it was made. They chose not to repudiate the agreement, but rather accepted the transaction, sought to obtain the proceeds from it, and sought to apply those proceeds to other well established communal interests.
- In the twenty years following the transaction, those Chippewas affected by it both acknowledged and accepted it. They regarded the disputed lands as no longer part of their Upper Reserve, and insisted that they obtain what was due to them under the terms of the transaction.
- The Chippewas' repudiation of the Cameron transaction and their claim that they retain their interests and rights in the disputed lands first occurred some 140 years after the Cameron transaction when it was discovered that there was no documentation evincing the surrender of the lands by the Chippewas to the Crown.

IV. No Surrender of the Disputed Lands

[185] It follows from our review of the evidence that we agree with the motions judge's finding that the Chippewas never surrendered the disputed lands to the Crown. As stated earlier, this issue, which is central to this case, is first and foremost a factual one. However, since the arguments of all parties on this issue were essentially focussed on the surrender provisions of the Royal Proclamation and the effect of the Quebec Act on those provisions, we will examine the question of surrender in that light.

A. The Royal Proclamation of 1763

[186] The Royal Proclamation of 1763 was an expression of the royal prerogative. It was used as a mode of imposing the imperial power on conquered colonies in North America including New France. In accordance with its stated intention to "Establish New Governments in America" it created four new colonies including the province of Quebec on which it imposed the laws of England until the pre-conquest French Law was restored in Quebec by the Quebec Act, 1774: see P. W. Hogg, Constitutional Law of Canada, 4th ed., looseleaf (Scarborough: Carswell, 1997) at 2-7 to 2-8.

[187] Stripped to its essentials, the Royal Proclamation states that the King has acquired territories in America secured by the Treaty of Paris and has seen fit, with the "Advice of Our Privy Council" to grant letters patent under the Great Seal of Great Britain to create within the territories four distinct and separate governments (i.e., Quebec, East Florida, West Florida and Grenada). The territorial boundaries are then set out; they do not include within Quebec the contested Chippewa lands. The letters patent issued pursuant to the Royal Proclamation provide that the Governors of the colonies shall call General Assemblies and that the Governors, with the consent of the assembly, are given the power to make laws for the public welfare and to constitute courts of law. The Governors and councils were also given authority and power to settle and agree with the inhabitants of the New Colonies for such lands, tenements and hereditaments as shall be in "Our Power" to dispose of and to grant certain lands to officers and men of the army and navy who have disbanded in America.

[188] The Indian provisions of the Royal Proclamation begin with the following declaration:

And whereas it is just and reasonable, and essential to our Interest and Security of our Colonies, 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 having been ceded to, or purchased by Us, are reserved to them or any of them, as their Hunting Grounds. …

[189] The Indian provisions of the Royal Proclamation are found in the next five paragraphs of the proclamation and are contained in what the motions judge calls "Part IV" (Reasons of the motions judge, paras. 250-257). Paragraph 1 creates an interior Indian territory beyond the colonies and the western settlement barrier. It prohibits government land grants of any kind in this territory and prohibits government land grants in the colonies of unceded Indian land. Paragraph 2 reserves the interior Indian territory including (until 1774) what is now the disputed land "for the use of the said Indians" and prohibits any settlement or land purchase "without Our especial Leave and Licence for that Purpose first obtained". The leave and licence provisions are of little application and have no significance to this case. Paragraph 3 is a removal provision that required any persons settled in the interior Indian territory or on unceded Indian lands within the colonies to remove themselves immediately.

[190] Paragraph 4 deals with two distinct provisions; the first, part 4a, prohibits private purchases and sets requirements for the surrender to the Crown of Indian lands within colonies open to settlement. The second, part 4b, regulates the fur trade.

[191] The private purchase prohibition and the surrender procedures are introduced with a preamble noting the "great Frauds and Abuses" that have been committed in private purchases from the Indians and the need to prevent such private purchases in order to convince the Indians of the justice of the Crown and to remove sources of discontent. Paragraph 4a provides that, in areas with colonies open to settlement, Indian lands can be acquired only if they are first surrendered to the Crown by the Indians at a public meeting of the nation or tribe held for that specific purpose:

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, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; …

[192] These are the surrender provisions of the Royal Proclamation. The Chippewas submit that these provisions survived the Quebec Act and had the force of law until replaced in 1860 by the Legislature of the Province of Canada: see An Act Respecting the Management of the Indian Lands and Property, S. Prov. C. 1860, 23 Vict., c. 151, s. 6. They submit that the Crown could only acquire legal title to Indian lands by following the letter of the surrender provisions in the Royal Proclamation. Otherwise, they say, the transaction was a private sale and void ab initio leaving the present landowners without title.

[193] The motions judge accepted the Chippewas' position. He found that: (1) there was no formal surrender of the disputed lands; (2) the sale to Cameron was a private sale; (3) the private sale of unsurrendered aboriginal land was prohibited by the Royal Proclamation and by common law; and (4) the letters patent to Cameron were illegal and void ab initio.

[194] The motions judge's reasons, in summary form, for deciding the surrender issue were as follows: the surrender procedures in the Royal Proclamation had the force of law in 1839 and accordingly any sale of Indian lands had to comply with these procedures; the disputed lands had never been surrendered by the Chippewas because the mandatory surrender procedures set out in the Royal Proclamation had not been complied with; absent a formal surrender, the Chippewas did not and could not have consented to or affirmed the sale of the disputed lands. The motions judge therefore decided the surrender issue in the Chippewas' favour and characterized their interest in the disputed lands in the nature of an "unceded unsurrendered common law aboriginal interest and title guaranteed by Treaty 29".

[195] The motions judge held that the Royal Proclamation had the force of law in 1839 and that its full surrender requirements were directly in force in the disputed lands at the material time. He also noted that "[t]he surrender procedures incorporated into the Proclamation, quite apart from the Proclamation itself, reflect fundamental aspects of Indian title at common law" and accordingly that the surrender requirements themselves were "in force in 1774 and thereafter in the area of the disputed lands as fundamental conditions precedent for the valid alienation of Indian land" (para. 286). He concluded that any surrender of Indian lands in 1839 had to comply with the Royal Proclamation and common law surrender requirements.

[196] The motions judge rejected the various defendants' arguments that the surrender provisions of the Royal Proclamation had been repealed by the Quebec Act and thus rendered inoperative. He concluded, as a matter of statutory interpretation, that the Quebec Act was not intended to, and in fact did not, repeal or abrogate the surrender procedures of the Royal Proclamation. He further noted that the Quebec Act, which made no reference to Indians at all, did not evidence the "clear legislative intent" required to derogate from Indian title or treaty rights. Following a

chronological review of the relevant case law, he distinguished the Bear Island case, in which this court held that “the Quebec Act repealed the surrender procedures of the Royal Proclamation" and that there was no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown (para. 333). He supported his decision to not follow the Bear Island "repeal dictum" on the basis that the case was "fact-driven", that it was overruled by subsequent Court of Appeal authorities, and that although the Supreme Court of Canada upheld this Court's decision, the Supreme Court expressly stated that it did not necessarily agree with all the legal findings of this Court.

[197] In the submission of the Chippewas, these findings of the motions judge support the legal conclusion that the Crown had acquired no title to the disputed land and could grant no title to Cameron. The Chippewas further submit that because they have a constitutionally entrenched right to the occupation of these lands that continues to this day, the court is not in a position to grant any relief to the present landowners.

[198] In the light of our findings on the evidence before us that whatever the formal legal status of the Royal Proclamation subsequent to the passage of the Quebec Act, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57-65 above), little turns in this case on whether the surrender provisions per se of the Royal Proclamation had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the Royal Proclamation and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.

[199] As we accept the proposition that aboriginal title could be lost only by surrender to the Crown, and that a surrender required a voluntary, informed, communal decision to give up the land, it is not necessary to our analysis that we determine the precise legal status of the Royal Proclamation at the time of the Cameron transaction.

[200] On the one hand, the record contains evidence that, historically, the Royal Proclamation was intended to be a provisional arrangement which, in so far as Quebec was concerned, was replaced by the Quebec Act and that the temporal limitations of the Royal Proclamation also applied to the Indian provisions. For example, we refer to certain statements to this effect made by the Lords of Trade,[14] the drafting of legislation for Parliament in 1764 entitled “Plan for Future Management of Indian Affairs”, and the provisions of the Quebec Act itself. Further, one Crown expert, Dr. Paul Gerald McHugh, posits that the government of the day did not regard the Royal Proclamation as being operative even before the passage of the Quebec Act. According to his evidence, it would appear that instructions as to the treatment of Indians, including the formalities for the surrender of Indian lands, were treated as an ongoing exercise of the royal prerogative. He further asserted that while the spirit of the Royal Proclamation was respected in

that all surrender procedures were to be of a public nature, the specific procedure in each case was a matter to be determined on a case-by-case basis by the Governor in Council.

[201] On the other hand, the evidence shows that while the Royal Proclamation was a unilateral declaration of the imperial Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that the Crown took extraordinary steps to make the First Nations aware that the policy set out in the Royal Proclamation would govern Crown-First Nations relations and the importance attached to the Royal Proclamation by First Nations as their Charter. There can be little doubt that from the aboriginal perspective, the Royal Proclamation was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the Royal Proclamation were still in effect even after the passage of the Quebec Act. Moreover, the Royal Proclamation is expressly referred to in the Canadian Charter of Rights and Freedoms, s. 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11[15] and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the aboriginal people of Canada.

[202] As stated earlier, in view of our findings of fact, we do not find it necessary to make any final determination on the precise legal status of the Royal Proclamation. We note as well that the importance of the Royal Proclamation as the source of aboriginal title has been much diminished by recent decisions of the Supreme Court of Canada. That Court has made clear that, contrary to the suggestion of earlier case law, aboriginal rights, including aboriginal title, are pre-existing rights. As was stated by Dickson J. in Guerin v. The Queen, [1984] S.C.R. 335 at 379:

Their [the Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or any other executive order or legislative provision.

[203] In Delgamuukw v. British Columbia, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010 at 1082, Lamer C.J.C. stated:

Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the Royal Proclamation, 1763: see St. Catherine's Milling [St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46]. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.

And at 1091-1092:

Aboriginal title at common law is protected by s. 35(1) [of the Constitution Act, 1982]. This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" [emphasis added by Lamer C.J.C.]. On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which

aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g. Calder [Calder v. British Columbia (A.G.), 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313]), s. 35(1) has constitutionalized it in its full form. [Emphasis in original.]

[204] Lamer C.J.C. also stated that "the same legal principles governed the aboriginal interest in its reserve lands and lands held pursuant to aboriginal title" (at 1085). He quoted with approval from 379 of the reasons of Dickson J. in Guerin (at 379):

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . . [Emphasis in original.]

[205] This last statement is important to this case where the Chippewas and the motions judge made much of the language of Treaty 29, consummated at Amherstburg on July 10, 1827, expressly reserving to the Indians from the lands surrendered a reservation covering the disputed lands.

B. The Quebec Act, 1774

[206] In light of these recent pronouncements by the Supreme Court, it would appear that the Quebec Act, 1774 could not and did not effect any change in the nature and extent of aboriginal title to the extent that it did revoke the Royal Proclamation. In any event, we are not concerned so much with the nature and extent of aboriginal rights, as with the question of their surrender. On that subject, we are bound by our own decision that the surrender provisions of the Royal Proclamation were revoked by the Quebec Act: see Ontario (A.G.) v. Bear Island Foundation, supra, at 410.

[207] In Bear Island, it was argued that the members of the Temagami Band were not bound by the Robinson-Huron Treaty of 1850 because the surrender procedures followed by the Crown were contrary to the Royal Proclamation. As to this argument, this court said at 410:

It is at least questionable whether these provisions affected the Temagami lands since they may not have been "within those parts of Our Colonies where We have thought proper to allow Settlement". It is, however, not necessary to resolve this question since the relevant procedural aspects of the Proclamation were repealed by the Quebec Act, 1774 (U.K.), c. 83 [R.S.C. 1970, App. ll, No.2]. Section 3 of the Quebec Act, 1774 makes it clear that it does not make void, vary or alter any right, title or possession. Therefore, whatever right, title or possession the Temagami Band may have had pursuant to the Royal Proclamation was not affected by the Quebec Act, 1774. We think it clear, however, that the procedural requirements for purchase "at some public Meeting or Assembly . . ." was repealed. Thus, at the relevant times there was in existence no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown.[Emphasis added.]

[208] It is argued that these remarks were obiter dictum. They were not. The entire thrust of the judgment was that it was not necessary to determine whether that Band had acquired aboriginal

rights because any rights they had were extinguished either by being parties to the Robinson-Huron Treaty or because the Band's subsequent conduct amounted to adhesion to the Treaty.

[209] The Supreme Court of Canada dismissed the appeal of the Temagami Band: 1991 CanLII 75 (S.C.C.), [1991] 2 S.C.R. 570. The Supreme Court recognized that the case was largely fact-driven and that there were concurrent findings of fact in the two lower courts with which it would not take issue. It then said at 575:

It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see in this context Simon v. The Queen, 1985 CanLII 11 (S.C.C.), [1985] 2 S.C.R. 387; R. v. Sparrow, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

[210] This court did not accept this legal conclusion either, and proceeded on the assumption that the Band had established aboriginal rights over the disputed lands. In effectively taking the same approach, the Supreme Court said at 575:

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

[211] In our view, these passages cast no doubt on the legal conclusions reached by this court. In particular, the Supreme Court's acceptance of the proposition that "arrangements subsequent to the treaty" amounted to a surrender indicate that it was no longer necessary to follow the letter of the procedure prescribed by the Royal Proclamation.

[212] Nor do we accept the contention that this court "impliedly" reversed Bear Island in Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band (1993), 16 O.R. (3d) 390 (C.A.), leave to appeal to S.C.C. refused [1994] 2 S.C.R. v, and Chippewas of Kettle and Stony Point v. Canada (A.G.) 1996 CanLII 753 (ON C.A.), (1996), 31 O.R. (3d) 97 (C.A.), aff'd 1998 CanLII 824 (S.C.C.), [1998] 1 S.C.R. 756. Neither case mentions Bear Island nor the Quebec Act. The only references to the Royal Proclamation were made in an historical context. There was no suggestion that it was still in force as the operative surrender procedure.

[213] In Skerryvore, the Shawanaga Indian Band was the respondent to an action for a declaration that a road, which ran through its unsurrendered Indian lands, was a public road. The public had used the road from 1850 to 1978 when the Band took the position that it was a private road. The trial judge declared the road to be a public highway by reason of the common law doctrine of dedication and in addition, or in the alternative, by virtue of s. 257 of the Municipal Act, R.S.O. 1980, c. 302 [now R.S.O. 1990, c. M.45, s. 261] which provides that "all roads passing through Indian lands … are common and public highways". The Band appealed and the trial judgment was set aside.

[214] This court held that the doctrine of dedication is inapplicable to unsurrendered Indian lands because the sui generis nature of Indian title renders impossible an inference of intention to dedicate. This court also held that s. 257 of the Municipal Act cannot mean that lands passing through Indian lands become public highways by the simple operation of that section because that would be legislation within the exclusive legislative jurisdiction of the Parliament of Canada and, as such, would be ultra vires the province. The section can do no more than declare public, for provincial purposes, those highways that have become public highways pursuant to the provisions of the Indian Act, R.S.C. 1985, c. I-5, which provides for the surrender to the Crown and transfer of administration and control of the lands to the provinces.

[215] The only reference to the Royal Proclamation is in the holding by the court that the doctrine of dedication is inapplicable to unsurrendered Indian land. Putting the matter in historical perspective, the court stated at 399:

The Royal Proclamation, the Robinson-Huron Treaty and the successive Indian Acts all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown.

[216] As we understand this passage, it says no more than that the aboriginal rights of the Band have been recognised by the Crown over time starting with the Royal Proclamation and continuing with regard to this Band with the Robinson-Huron Treaty and with the Indian Act thereafter. While the court followed with quotes from both the Royal Proclamation and the Robinson-Huron Treaty, in its disposition of this issue, it confined its authorities to those applicable from 1850 to 1978 and relied solely on its interpretation of "treaties and the statutes relating to Indians".

[217] In Chippewas of Kettle and Stony Point Indian Band v. Canada, supra, the Band surrendered reserve land to the Crown in 1927. The Band complained in 1992 that the voluntary surrender provisions of the Indian Act, R.S.C. 1906, c. 81 had not been complied with. Laskin J.A., in delivering the judgment of the court, reviewed the history of surrender provisions relating to Indian lands, starting with the Royal Proclamation. He stated that the "underlying rationale" for the Royal Proclamation and the Indian Act was to prevent aboriginal peoples from being exploited. He then held that the mere presence of one of the subsequent purchasers from the Crown at the surrender meetings conducted pursuant to the Indian Act did not violate the language of the Indian Act or the "rationale" of the Royal Proclamation. It has never been suggested that the surrender procedures in the Royal Proclamation survived once they were codified in the Indian Act or its predecessor statutes and that it was necessary for the Crown to comply with both the Indian Act and the Royal Proclamation. As stated, the issue in the case was whether the surrender provisions of the 1906 Indian Act had been complied with.

[218] A further appeal to the Supreme Court of Canada was dismissed: 1998 CanLII 824 (S.C.C.), [1998] 1 S.C.R. 756. Cory J. who, as a matter of interest, had been a member of the panel of this court that decided Bear Island, delivered the Court's brief reasons. He said at 757:

On this appeal we are not concerned with the issue of the Crown's fiduciary duty. The sole question before us is the validity of the surrender and on this issue we are in agreement with the reasons of Laskin J.A.

[219] We are not persuaded that this court or the Supreme Court of Canada has overruled Bear Island, implicitly or otherwise. However, we do not regard the fact that Bear Island remains a binding authority as dispositive of the issues raised in this appeal. Simply put, this is not a case where the validity of the surrender turns on whether the appropriate procedures, whatever their source, were followed. Here, there was no surrender at all. Since we accept the proposition that aboriginal title can be lost only by surrender to the Crown, the issues that remain are whether, in the absence of a surrender, the Chippewas have a right to the relief they seek, and whether their claims are barred by the application of any statutory limitation periods or equitable doctrines.

V. Statutory Limitation Periods

[220] Canada and Ontario concede that no limitation period bars the Chippewas' claim against the Crown for breach of fiduciary duty, a cause of action for which there is no statutory limitation period in Ontario. The landowners, however, moved for summary judgment to dismiss the action on the basis, inter alia, that the claims asserted against them by the Chippewas were barred by the provisions of eighteen different statutes, as listed at paragraph 445 of the motions judge's reasons. The motions judge held that none of the statutes in question applied to bar the action, and the landowners and Ontario appeal from this aspect of the decision. For reasons that follow, however, we would not interfere with the motions judge's conclusions on this issue.

A. Issues on Appeal

[221] The motions judge first determined that, for the purpose of any limitation period, the time started to run, subject to any question of capacity and discoverability, from the date of the issuance of the Cameron patent on August 13, 1853. No appeal is taken from this finding.

[222] The motions judge then considered the scope and effect of a multitude of Ontario statutes and concluded that Ontario legislation, because of constitutional restrictions on provincial power, could not of its own force extinguish Indian title. Again, no appeal is taken from this finding.

[223] The motions judge next considered the alternative argument that, if the Ontario statutes did not apply directly of their own force, they applied because they were incorporated in federal law by reference through various provisions. In the first instance, the landowners relied on s. 88 of the Indian Act, R.S.C. 1985, c. I-5; s. 39(1) of the Federal Court Act, R.S.C. 1985, c. F-7; and s. 22 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (as am. by S.C. 1990, c. 8). The motions judge considered each statutory provision and concluded, for various reasons, that none of them applied. The landowners take issue with this finding but restrict their appeal to the applicability of the Crown Liability and Proceedings Act.

[224] Finally, the motions judge considered the effect of a number of pre-Confederation statutes: the English "Nullum Tempus Act" of 1769[16] which applied to the disputed lands by virtue of the statutory reception of English law in 1792; the 1834 Upper Canada limitations statute[17]; and the 1859 Province of Canada (Canada West) limitations statute[18]. Although the motions judge did not deal specifically with the Nullum Tempus Act in his analysis, his reasoning with respect to the other two pre-Confederation statutes would necessarily apply to this statute as well.

[225] The motions judge held that the 1834 and 1859 pre-Confederation statutes were continued as if they were laws of the Parliament of Canada in respect of matters within the constitutional authority of Parliament by virtue of s. 129 of the Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The question then became whether these statutes effectively extinguished the Chippewas' Indian title to the lands.

[226] The motions judge recognized that Parliament had the power before 1982 to extinguish aboriginal title unilaterally by specific legislation plainly evidencing a clear specific intent to do so, but held that this power did not extend to the extinguishment of treaty rights. Even if Parliament had the power to extinguish both aboriginal and treaty rights unilaterally, the motions judge concluded that the 1834 and the 1859 pre-Confederation statutes did not evidence any specific intent to do so and hence that they were of no effect. He further held that, in any event, the colonial legislatures that enacted these statutes had no power to affect or extinguish either aboriginal or treaty rights as these were matters exclusively within the Imperial authority and beyond the colonial legislative power at the time.

[227] The landowners and Ontario both appeal from the motions judge's finding with respect to pre-Confederation statutes. Canada does not rely on any statutory limitation defence and took no part in the argument of this issue.

[228] The following questions are raised with respect to statutory limitation periods:

1. Does s. 22 of the Crown Liability and Proceedings Act incorporate any Ontario limitations statute in federal law?

2. Does the Nullum Tempus Act of 1769 have any application to this litigation?

3. Were the 1834 and 1859 pre-Confederation statutes continued under s. 129 of the Constitution Act, 1867 as if they were statutes of the Parliament of Canada or as if they were provincial statutes?

4. Did Parliament before 1982 have the power to extinguish treaty rights unilaterally by statute?

5. Do the 1834 and 1859 pre-Confederation statutes evidence the required intention to extinguish the Chippewas' aboriginal or treaty rights?

6. Did the colonial legislatures that enacted the 1834 and 1859 statutes have the power to extinguish aboriginal or treaty rights?

[229] It is only necessary to answer questions 1, 2 and 5 to dispose of the question of statutory limitation periods in this case. Our view, stated succinctly, is as follows. The applicability of the Crown Liability and Proceedings Act and the Nullum Tempus Act is dependent upon the argument that the Chippewas' claim against the landowners for the recovery of land is in effect a "proceeding by the Crown" within the meaning of either of these statutes. The simple answer is that it is not. In so far as the 1834 and 1859 limitation statutes are concerned, it is our view, regardless of the answers to the other questions, that the motions judge was correct in his

conclusion that neither statute evidences the clear and plain intent necessary to extinguish aboriginal or treaty rights and that, consequently, the statutes do not affect the disputed lands.

B. The Crown Liability and Proceedings Act

[230] Section 32 of the Crown Liability and Proceedings Act, first enacted in the Crown Liability Act, S.C. 1952-53, c. 30 in a slightly different form, incorporates by reference the Ontario limitations laws with respect to proceedings by or against the federal Crown. It reads as follows:

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. [Emphasis added.]

[231] Since this statute only extends to the federal Crown, Ontario does not rely on this provision and, as stated earlier, Canada does not raise any limitations defence. It is therefore not necessary to consider the application of this provision to the Chippewas' action "against the Crown". The landowners, however, argue that the Chippewas' action is, in effect, a claim made on behalf of the federal Crown and hence "a proceeding by the Crown" within the meaning of s. 32. In support of this argument, the landowners rely on the Chippewas' pleadings wherein, amongst other relief, they claim vesting orders in the Crown in trust for the Band.

[232] The motions judge rejected this argument and, in our view, rightly so. The Chippewas' claim for recovery of the land is not "a proceeding by the Crown" regardless of the form of relief sought. Even if the fact that the Crown itself would be barred from claiming the same remedy from the landowners could arguably be relevant to the court's decision whether or not to grant the relief sought by the Chippewas, it does not turn the Chippewas' action into a "proceeding by" or on behalf of the Crown so as to trigger the application of s. 32.

C. The Nullum Tempus Act

[233] The Nullum Tempus Act of 1769 is lengthy and is drafted in the cumbersome legislative language of the time. However, it is not necessary for the purpose of these reasons to reproduce its terms nor to consider any of its precise language because there is no dispute as to what its effect would be if it were applicable. The Nullum Tempus Act barred actions and other proceedings by the Crown with respect to any land claim commenced more than sixty years after the cause of action accrued. If applicable, it would therefore bar any action by the Crown for the recovery of land commenced after 1913, sixty years after the issuance of the Cameron patent.

[234] Ontario and the landowners contend that the Nullum Tempus Act was in force in Upper Canada and Canada West from 1792 to the date of confederation and that it was continued thereafter by s. 129 of the Constitution Act, 1867. They argue that the Chippewas' action for recovery of land on behalf of the Crown is therefore barred, having been commenced after 1913. The Chippewas do not dispute that the Nullum Tempus Act provides for a sixty-year limitation

period but they argue that the Act was not in force and that, in any event, it does not apply to their action.

[235] We do not find it necessary to determine whether the Nullum Tempus Act was in force during any part of the relevant period because, in our view, it has no application to the proceeding brought by the Chippewas. As stated earlier, this action is not a proceeding brought by or on behalf of the Crown. It is therefore not affected by the Act's provisions.

D. The 1834 and 1859 pre-Confederation limitation statutes

[236] The 1859 statute re-enacted the earlier 1834 statute and the relevant provisions are identical. It is therefore only necessary to consider the language of the later statute. The relevant sections are 1 and 16, the first barring the remedy and the second extinguishing the right and title of ownership. They read as follows:

s. 1 And be it further enacted by the authority aforesaid, That after the first day of July, one thousand eight hundred and thirty four, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same.

s. 16 And be it further enacted by the authority aforesaid, That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing an action or suit, the right and title of such person to the Land or Rent, for the recovery whereof such entry, distress, action or suit, respectively, might have been made or brought within such period, shall be extinguished.

[237] Hence, these provisions provide for a twenty-year limitation period with respect to actions for the recovery of land. The equivalent sections are found in sections 4 and 15 of the current Ontario Limitations Act, R.S.O. 1990, c. L.15, except that the period is now ten years.

[238] It is common ground that, prior to 1982, Parliament could unilaterally extinguish aboriginal title by statute. It is also agreed that Parliament could only do so, however, by the use of clear and plain language. While it would appear from recent decisions of the Supreme Court of Canada that, contrary to the motions judge's finding, Parliament's power in this regard extended to the extinguishment of treaty rights as well (see R. v. Marshall, 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456 at 496), it is not necessary to decide the matter because there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test. In our view, it does not.

[239] The jurisprudence has evolved considerably in recent years in the direction of narrowing the concept of extinguishment of aboriginal rights. In Delgamuukw, supra, Lamer C.J.C., in

considering whether provincial laws of general application could extinguish aboriginal rights, referred to the "clear and plain" test in these words (at 1120):

…a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being ultra vires the province. That standard was laid down in Sparrow, supra, at p. 1099, as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (Gladstone, [1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723] at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

[240] If the pre-Confederation statutes are considered to be continued as if they were laws of Parliament, of course no issue arises as to the constitutional division of powers. Nonetheless, these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right. McLachlin J.'s comments in R. v. Van der Peet, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 at 652 (dissenting, but not on this point) are also helpful to understand what is required to meet the "clear and plain" test:

For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": Sparrow, supra at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in United States v. Dion, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test'] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

[241] While in an appropriate case a general limitations statute can bar a claim for damages arising from the loss of aboriginal or treaty rights (see e.g., Blueberry River Indian Band v. Canada, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344), different considerations apply where it is contended that the statute itself extinguished the aboriginal or treaty right. In this case, we agree with the motions judge's conclusion (at paras. 595-96) that the 1834 and 1859 pre-Confederation limitations statutes did not evidence any intent to affect or to extinguish the aboriginal title or treaty rights of the Chippewas in the disputed land. Consequently, we would not interfere with the motions judges' conclusions.

[242] To summarize, we agree with the motions judge that there are no statutory limitations to bar the Chippewas' claims in this case.

VI. Remedies and Equitable Defences

A. Introduction

[243] As we have concluded that there was no proper surrender and that the Chippewas' actions are not barred by any statutory limitation periods, the issue becomes whether, on the facts of this case, the Chippewas are entitled to the remedies they seek, namely, a declaration that the Cameron patent is void and a declaration that they are entitled to possession of the disputed lands. In particular, the issue is whether it is appropriate, in deciding whether or not to accord the Chippewas a remedy, for the court to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Cameron patent.

[244] The issue of remedies and equitable defences, like the other issues in this case, has both public and private law dimensions. The aboriginal right asserted by the Chippewas has been described as sui generis in nature. The sui generis nature of aboriginal title reflects the interaction between traditional aboriginal values and those of European settlers and consequently, aboriginal title is not readily classified in the conventional categories of the English common law tradition. In some respects, aboriginal title draws upon the concepts of public law. The rights it embraces are communal in nature and can only be understood in the context of the unique relationship between the Crown and the aboriginal community asserting the right. At the same time, aboriginal title has been held on the highest authority to be a right of property and it cannot be described or understood except in relation to the concepts of traditional common law private property rights.

[245] The remedies claimed by the Chippewas reflect the dual public and private law dimensions of aboriginal title. As against the Crown, the Chippewas impugn the validity of the exercise of the Crown prerogative, invoking the principles of public law and the remedies available to challenge the legality of governmental action. At the same time, the Chippewas assert a claim to a property right against the private citizens who are the present occupiers of the property, invoking the legal principles governing the reconciliation of competing claims to private property. It follows that defences bearing upon the availability of remedies in both the public and private law settings must be considered.

[246] As we have already noted, the issue of the Chippewas' right to damages against the Crown for breach of its aboriginal rights is not before us. The damages claim was not the subject of the motions for summary judgment and it was common ground that it would proceed to trial. Accordingly, we confine our attention to the Chippewas' claim for a remedy related to the return of the lands themselves and we do so on the basis that the Chippewas have a right of action against the Crown for damages.

B. Public Law Remedies

[247] The Cameron patent was in the usual form and, on its face, was apparently valid. As is apparent from the record before us, it required extensive archival research to determine that there was any reason to suspect that there had not been a proper surrender of the lands covered by the patent. For well over 100 years, no one could have had any reason to doubt its validity.

[248] The patent was issued as an exercise of Crown prerogative. The issuance of Crown patents to land was a routine governmental act. A Crown patent has been accepted from the earliest days of European settlement until the present as the foundation for title to land. For almost 150 years, successive purchasers have bought lands that were included in the Cameron patent without having any reason to suspect that the patent, and consequently their root of title, was in any way defective.

[249] Public law remedies are derived from both common law and equitable sources. The common law remedies were the prerogative writs. While the prerogative writs have now been replaced by the statutory application for judicial review, the principles governing their availability continue to apply by analogy. Since the early years of the 20th century, the equitable remedy of the declaratory judgment has been an accepted public law remedy. Whatever their origin, public law remedies are discretionary in nature. As will be explained in greater detail below, delay in asserting a claim to a public law remedy, combined with reliance by innocent third parties on the impugned act or decision, is a well-established basis for refusing a remedy.

1. The Prerogative Writ of Scire Facias

[250] The common law prerogative writ to challenge the validity of a Crown patent, grant, charter or franchise was the prerogative writ of scire facias: See Evans, de Smith's Judicial Review of Administrative Action 4th ed. (London: Stevens, 1980) at 585; Wade and Forsyth, Administrative Law 7th ed. (Oxford: Clarenden Press, 1994) at 615; 1(1) Hals. (4th) at para. 279. While today in Canada, the writ of scire facias is an unfamiliar relic of the common law's past, it was an accepted and recognized remedy in the 19th century. It was described in the following terms by the Judicial Committee of the Privy Council in The Queen v. Hughes (1865), 1 L.R. (P.C.) 81 at 87-88 per Lord Chelmsford:

The writ of Scire facias to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record….All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of Scire facias. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For as was said by Chief Justice Jervis, in the case of The Eastern Archipelago Company v. The Queen [2 E. & B. 94] "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by Scire facias by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General.

[251] The writ of scire facias has fallen into disuse, but it is mentioned in de Smith and Wade, supra, as falling in the same category as the more familiar prerogative writs of certiorari, mandamus, prohibition and habeas corpus.

[252] In modern times, in the domain of administrative law, the prerogative writs have been replaced by statutory remedies for judicial review, yet the principles they embrace continue to apply. A party may no longer seek a prerogative writ to challenge the validity of official or governmental acts, but the availability of the modern remedy of judicial review will be

determined by reference to the foundational principles developed under the earlier regime of the prerogative writs.

[253] One of those foundational principles is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs. The fact that the writ of scire facias, like the other prerogative writs, were said to issue "as of right" did not detract from the court's discretion to grant relief to the party invoking its jurisdiction. There is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case. A person aggrieved is entitled "as of right" to invoke the writ to bring the matter before the court. It remains for the court to decide how to dispose of the complaint, and in deciding the matter, the court does have a discretion to exercise. This point is explained by Wade, supra at 718: "the fact that a person aggrieved is entitled to certiorari ex debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy." Similarly, Beetz J. observed in Harelkin v. University of Regina, 1979 CanLII 18 (S.C.C.), [1979] 2 S.C.R. 561 at 575-6:

The use of the expression ex debito justitiae in conjunction with the discretionary remedies of certiorari and mandamus is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.

Ex debito justitiae literally means "as of right", by opposition to "as of grace" (P.G. Osborne, A Concise Law Dictionary, 5th ed.; Black's Law Dictionary, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue ex debito justitiae simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.

[254] The statement in Hughes, supra, that the writ of scire facias issues "as of right" must be read together with the statement that the purpose of the remedy of scire facias is that grants of letters patent "may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons." If the patent may be repealed on scire facias, it must equally be the case that it may not be repealed or revoked even "when contrary to law".

2. The Discretionary Nature of Public Law Remedies

[255] From the discretionary nature of the prerogative remedies, there has developed and ripened a general principle of Canadian public and administrative law. That principle received clear expression in Immeubles Port Louis Ltée v. Lafontaine (Village), 1991 CanLII 82 (S.C.C.), [1991] 1 S.C.R. 326. The case involved an action in nullity under the Code of Civil Procedure, R.S.Q., c. C-25, art. 33, to quash municipal by-laws that had adopted a loan scheme that also imposed a tax on property owners. The by-laws were attacked on the ground that the municipality had failed to give affected landowners the notice required by statute. It was argued that since the statutory procedure had not been followed, and the landowners had been denied the fundamental right to be heard, the by-laws had not been properly enacted and that they should be

declared a nullity. The action was brought five years after the by-laws were enacted, after the municipal bonds had been issued and the improvements had been made. Writing for a unanimous Court, Gonthier J. accepted the submission that the municipality's failure to give the required notice violated the audi alteram partem rule, and thereby rendered the by-laws vulnerable to review, but he held that the court had a residual discretion to refuse the remedy of a declaration of nullity. While the case involved detailed considerations of the principles developed under the Quebec Code of Civil Procedure, Gonthier J. made it clear that the direct action in nullity derived from the same inherent power exercised by the superior courts to supervise the legality of the acts of all public authorities. At page 360, he described this inherent power of judicial review as "the cornerstone of the Canadian and Quebec system of administrative law" and as a "necessary consequence of the rule of law". At the same time, Gonthier J. emphasized that the power of judicial review was "essentially discretionary" in nature.

[256] As Gonthier J. noted, the same point had been made in earlier decisions of the Supreme Court of Canada. In Harelkin v. University of Regina, supra, the Court upheld the discretion of the superior courts to refuse certiorari on grounds of delay. See also Homex Realty and Development Co. v. Corporation of the Village of Wyoming, 1980 CanLII 55 (S.C.C.), [1980] 2 S.C.R. 1011, at 1034-35. In Friends of the Oldman River v. Canada, 1992 CanLII 110 (S.C.C.), [1992] 1 S.C.R. 3 at 77, La Forest J. put it as follows:

There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case…

[257] The underlying rationale for the discretionary nature of public and administrative law remedies in general, and the consideration of delay and its consequences for third parties in particular, reflects the polycentric nature of the rights and interests implicated. There is more at stake than the rights of the individual or group asserting the claim and the applicable legal principles must reflect that element. As explained by Brown and Evans, Judicial Review of Administrative Action in Canada (looseleaf) (Toronto: Canvasback Publishing, 1998) para. 3:1100:

the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. The public interest in good government, including the principle that it should be conducted according to law, has always been an equally important factor in the development of the law of judicial review.

[258] Apparently valid acts of public officials are relied upon by the members of the public at large in planning their affairs. Official documents are taken at face value. The purported exercise of a statutory or prerogative power creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration. Accordingly, as explained by the Immeubles Port Louis case and by the leading texts, (see Brown and Evans, supra at para. 3:5100; de Smith, supra, at 579; Jones and de

Villars, Principles of Administrative Law 3rd ed. (Scarborough, Ont.: Carswell, 1999) at 583), a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision.

[259] A Crown patent, apparently granting the fee simple in land, provides a classic example of an official act that will be relied on by innocent third parties. A Crown patent is accepted by all as the basis for rights to real property and no purchaser would consider it necessary to go behind the patent to determine whether or not it had been validly granted. It is for this reason that the courts have for long hesitated to invalidate patents that have created third party reliance. See, for example, Bailey v. Du Cailland, [1905] 6 O.W.R. 506 (Div. Ct.) at 508 per Falconbridge J.:

It was held in McIntyre v. Attorney-General, 14 Gr. 86, that where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, although it may to some extent involve proof of a negative. 'Patents are not to be lightly disturbed. They lie at the foundation of every man's title to his property.'

[260] To a similar effect is the following statement from Fitzpatrick v. The King (1926), 59 O.L.R. 331 (C.A.) at 342 quoting from Boulton v. Jeffrey (1845), 1 E. & A 111 (C.A.):

It is difficult indeed to conceive a more prolific source of litigation than would be opened in this Province, if the patentees of the Crown were exposed to be attacked upon supposed equities acquired by other parties, while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the Crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this lies at the root of every man's title.

[261] The motions judge analyzed this aspect of the case in terms of whether the Cameron patent was "void". He held that the Cameron patent was "void". A "void" patent is said to be one that has no legal effect whatsoever, while a "voidable" patent is one that does have effect unless and until it is set aside. Whatever its merits for other purposes, the language of "void" and "voidable" seems to us to be not a particularly apt or helpful analytic tool in the present context. From a remedial perspective, the inherent discretion of the court is always in play. As Wade has explained, supra at 343-4, the term "void" is "meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation." Wade adds, at 718, in relation to the discretionary nature of judicial review, "a void act is in effect a valid act if the court will not grant relief against it." See also Jones and de Villars, supra at 404. Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside. In our view, the issue is more clearly put and understood in terms of the discretion to grant or withhold a remedy and the factors that must be considered in relation to the exercise of that discretion. In fairness to the motions judge, it should be mentioned here that the arguments regarding the discretionary nature of public law remedies do not appear to have been presented to him with the same force and clarity as they were in this Court.

3. Discretion and Aboriginal Rights

[262] The Chippewas submit that there is no place for the exercise of discretion in the present case. Aboriginal property rights are fundamental constitutionally protected rights. We fully accept that courts do not have an open-ended discretion to enforce or deny aboriginal property rights as seems to suit the convenience of the case. In particular, it would plainly be wrong to deny a remedy to vindicate a valid claim to aboriginal title purely on the grounds that recognition of the claim would be troublesome to others: see R. v. Marshall, 1999 CanLII 666 (S.C.C.), [1999] 3 S.C.R. 533 at 565.

[263] On the other hand, aboriginal rights are an integral aspect of the Canadian legal landscape. Their shape, definition and enforcement do not and cannot exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights: see R. v. Nikal, 1996 CanLII 245 (S.C.C.), [1996] 1 S.C.R. 1013 at 1057-1058; R. v. Agawa 1988 CanLII 148 (ON C.A.), (1988), 65 O.R. (2d) 505 at 524 (C.A.). As the Supreme Court of Canada has made clear, aboriginal rights "must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (R. v. Van der Peet, supra, at 539) and "with the rest of Canadian society" (R. v. Gladstone, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723 at 775). See also Delgamuukw, supra, at 1065-1066, 1096, 1100, and 1107-1108. The same need for reconciliation between the aboriginal rights, and the rights of the Crown and third parties is applicable in the case of treaty rights: R. v. Sioui, 1990 CanLII 103 (S.C.C.), [1990] 1 S.C.R. 1025 at 1070-1072. In aboriginal title cases, the rules of the common law tradition must be adapted and applied by analogy. Accordingly, as explained by Lamer C.J.C. in Van der Peet, supra, at 550-1, "a court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each". The accommodation is to be done in a manner that does not strain "the Canadian legal and constitutional structure".

[264] Is it possible to reconcile the fundamental nature of aboriginal rights, and the overarching importance of according due recognition to those rights, on the one hand, with the discretionary nature of public law remedies, on the other? The answer lies in the nature of the discretion that is involved. Simply put, the discretion is narrowly circumscribed, only to be exercised on the basis of established legal principles. As explained by Wade, supra, the "discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care." The discretion to grant or withhold a public law remedy does not mean that the court is free to do as it pleases with the case, without regard to the governing legal principles. The principle of legality and the rule of law require that a priori consideration be given to the party whose rights have been taken, especially where the rights at issue are as fundamental in nature as the right of aboriginal title. However, it is a basic principle of our legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim. It is for this reason that the established principles governing the availability of public law remedies require that, before a remedy is granted, consideration be accorded to the rights and interests of others who may have had every reason to rely upon the apparent validity of the impugned act.

[265] In Immeubles Port Louis, supra at 370, Gonthier J. provided the following helpful analysis of this point:

I would point out that discretion and arbitrary action should not be confused. While arbitrary action means power exercised at will, just as the person likes, discretion, though it removes the strict duty to act, is subject to certain rules. A judge hearing a direct action in nullity does not decide to do what he feels like doing, but must exercise his power of review in a judicial manner, direct himself correctly in law and observe the applicable principles.

[266] Gonthier J. went on, at 372, to explain the manner in which the discretion should be exercised:

First, the judge must take into account the nature of the disputed act, the nature of the illegality committed and its consequences, and second, the causes of the delay between the disputed act and the bringing of the action. The nature of the right relied on is a factor relevant to the exercise of the discretion, but is not the only one. The court must also consider the plaintiff's behaviour.

[267] In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

4. Application of Discretionary Factors

[268] The first factor to consider is "the nature of the disputed act, the nature of the illegality committed and its consequences". See Immeubles Port Louis, supra at 372. As our review of the facts demonstrates, the circumstances both before and after the grant of the Cameron patent plainly demonstrate acceptance and acquiescence on the part of the Chippewas. The facts are flatly inconsistent with any suggestion that the lands were taken, either by Cameron or by the Crown, without the acquiescence of the Band members. While the Chippewas' acceptance of the Cameron transaction does not amount to a formal surrender, it is a fact that may be considered in the exercise of the court's discretion to grant or withhold a remedy.

[269] In Immeubles Port Louis, supra at 372, Gonthier J. indicated that the discretion to refuse a remedy could be exercised "apart from situations where there is a total absence of jurisdiction". We do not accept the submission that the nature of the illegality committed here fell into that category or that it was sufficient to require a court to set aside the Cameron patent without taking into account third party interests. The Governor in Council had jurisdiction to grant patents and there was not "a total absence of jurisdiction". The error in failing to obtain a formal surrender was, in our view, akin to the failure of the municipality to provide its municipal electors with the required statutory notice. If anything, the error in the present case was less significant.

[270] While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings.

[271] The transaction did not occur without the interposition of the Crown between the Chippewas and Cameron to ensure that the Chippewas' interests were protected. The terms Cameron first negotiated with the Chippewas were not acceptable to Crown officials who insisted that provision be made for the payment of interest on the unpaid portion of the purchase price. The transaction was approved by the Governor in Council. The consideration did not flow between Cameron and the Chippewas, but rather the proceeds were paid by Cameron to the Crown, held in trust for the Chippewas, and Cameron acquired his title by way of Crown patent.

[272] There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: "It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal for the Chippewas, and simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy" (para. 752) (emphasis added). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties.

[273] The second factor is the nature of the delay and its consequences for third parties. We are not satisfied that there has been any adequate explanation for the delay that should lead us to excuse its impact. In assessing the delay, due consideration must be given to the motions judge's findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal claims until the late 1970s or early 1980s. However, the delay here went well beyond failure to take legal proceedings. The motions judge found that as early as 1851, the Chippewas knew that their lands had been taken without a formal surrender. The Chippewas knew that the lands had been sold, as confirmed by their inquiries about payment of the price. Despite the obvious fact that settlers were on what had formerly been reserve lands, there was not a whisper of complaint from the Chippewas. Moreover, with respect to other matters affecting their interests, the Chippewas demonstrated both the ability and the willingness to bring grievances to the attention of the appropriate officials. A court cannot ignore the fact that for more than 150 years, the Chippewas made no complaint whatsoever of the evident possession by others of lands formerly within their reserve. The Chippewas gave no indication of any dissatisfaction with that state of affairs and gave every indication that they fully accepted and acquiesced in the transfer of their lands. A delay of this nature and length brings the Chippewas' situation squarely within the category of case where, on established legal principles, the court will refuse to grant a remedy.

[274] The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and

was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third party reliance than that presented by the landowners.

[275] We have found that there was no proper surrender of the aboriginal title to the lands. As already mentioned, aboriginal title is a fundamental and constitutionally protected right. It will require exceptional circumstances for a court to withhold a remedy to protect or vindicate aboriginal title. For the foregoing reasons, we are persuaded that exceptional circumstances exist in the present case. The interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.

C. Private Law Remedies

[276] From the perspective of the private law of property, discretionary factors are traditionally associated with the determination of equitable claims and the availability of equitable remedies. Until the fusion of law and equity in the mid-19th century, a rigid line was drawn between law and equity, and discretion was associated with claims arising from equity as distinct from purely legal claims. That rigid dichotomy has since broken down, but historical factors continue to influence the applicability of equitable principles to claims traditionally associated with the common law. The issue to be addressed here is whether, from the private law perspective, the remedies claimed by the Chippewas are subject to the discretion traditionally associated with equity.

[277] The Chippewas submit that a finding that there was no surrender of the lands covered by the Cameron patent must inevitably lead to the conclusion that their aboriginal title to the lands remains unextinguished and that they have a present entitlement to possession of the lands. The Chippewas rely on the nemo dat quod non habet principle – no one gives what he does not have. The Chippewas submit that as there was no surrender, the Crown had nothing to grant and that the Cameron patent did not and could not convey the fee simple to the lands unencumbered by the aboriginal title. The Chippewas contend that given the nature of aboriginal title, it is not subject to the discretionary factors governing the availability of equitable relief. There are two aspects to this submission. First, the Chippewas submit that aboriginal title is strictly legal rather than equitable in nature. Second, it is submitted that application of equitable doctrines to preclude the Chippewas' claim to the lands would constitute an unauthorized extinguishment of aboriginal title in favour of private interests, contrary to the fundamental rule that aboriginal title can only be surrendered to the Crown.

1. Equitable Nature of Remedies Sought

[278] In our view, the Chippewas' position that equitable principles have no bearing upon their claim cannot be accepted. To the extent that the Chippewas claim the lands as distinct from

damages, they assert a claim for an equitable remedy. Before the motions judge, the Chippewas asserted a claim for declaratory relief. In the factum filed on this appeal, the Chippewas reiterated that claim and sought as well an order requiring the Crown in right of both Canada and Ontario to enter negotiations with a view to resolving the Chippewas' claim. In oral argument before this court, Mr. Cherniak on behalf of the Chippewas maintained the position that the primary relief sought by the appellants was for a declaratory judgment, accompanied by a claim for an order directing the negotiations. However, Mr. Cherniak also pointed out that the statement of claim contained a claim for an immediate vesting order, and on behalf of his clients, he asserted that claim should this court consider that a declaratory order should not be granted on discretionary grounds.

[279] It is well established, and not disputed before us, that the remedy of a declaratory judgment is equitable in origin and that its award is subject to the discretion of the court: see HongKong Bank of Canada v. Wheeler Holdings Ltd., 1993 CanLII 148 (S.C.C.), [1993] 1 S.C.R. 167 at 189-92; Sarna, The Law of Declaratory Judgments (2nd ed., 1988), in particular at 17-19; Zamir, The Declaratory Judgment (1962) at 7-9; Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438; Operation Dismantle Inc. v. R., 1985 CanLII 74 (S.C.C.), [1985] 1 S.C.R. 441 at 481-2; Dyson .v A.G., [1911] 1 K.B. 410.

[280] The power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100 which provides as follows:

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. (Emphasis added.)

[281] Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly: see McGhee, Snell's Equity 30th ed., (London: Sweet and Maxwell, 2000) at 41-42. As explained by Proudfoot V.C. in Robertson v. Robertson (1875), 22 Gr. Ch. 449 at 456, the statute gives the court the power "to make a vesting order whenever it might have ordered a conveyance to be executed". Quite apart from its equitable origins, by the very terms of s. 100, the power to grant a vesting order lies in the discretion of the court. Cases decided under s. 100 explicitly refer to the power to grant a vesting order in discretionary terms: see Ontario Housing Corp. v. Ong reflex, (1988), 63 O.R. (2d) 799 (C.A.); Holmsten v. Karson Kartage Konstruction Ltd. reflex, (1977), 33 O.R. (3d) 54 (Gen Div.).

[282] Assuming, without deciding, that such an order could be made, an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right. However such a remedy should be classified in the traditional terms of law and equity; its award must therefore necessarily be subject to the discretion of the court.

[283] In our view, the Chippewas cannot escape the fact that, from a private law perspective, they are claiming remedies that are discretionary in nature and subject to equitable defences.

2. Aboriginal Title and Equitable Principles

[284] Nor do we accept the submission that a claim to aboriginal title is strictly legal in nature and immune from the overriding principles of equity, particularly where equitable remedies are being claimed.

[285] The Chippewas rely on recent decisions of the Supreme Court of Canada elaborating the nature of aboriginal title as a sui generis legal property right: see for example Guerin, supra, at 382; Delgamuukw, supra, at 1081-97. These statements must not be taken out of context. They reflect the repudiation by the Supreme Court of Canada of the view that aboriginal title is a mere interest, held by grace and at the pleasure of the Crown. The important recognition of the legally enforceable nature of aboriginal title does not, however, reflect a rigid classification of aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of a common law origin. By insisting that aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify aboriginal title in terms more relevant to the 19th century, pre-Judicature Act, pre-fusion of law and equity phase of our legal development.

[286] The submission that aboriginal title is a strictly legal interest, untouched and untouchable by equitable considerations, ignores several important factors. As stated above, the Supreme Court of Canada has insisted that aboriginal title must not be considered in the strictly formal and traditional terms of the common law tradition, but rather that it must be seen as sui generis in nature. The Supreme Court has also held that in aboriginal title cases there is a "necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle" (Guerin, supra at 380). The court has also stated that "native land rights are in a category of their own, and as such, traditional real property rules do not aid" and that courts "do not approach [a case involving assertion of aboriginal title] as would an ordinary common law judge, by strict reference to intractable real property rules" (St. Mary's Indian Band v. Cranbrook (City), 1997 CanLII 364 (S.C.C.), [1997] 2 S.C.R. 657 at 667). Moreover, in this area, courts "must ensure that form not trump substance" (Delgamuukw, supra at 1090).

[287] There can be no doubt that the juridical character of aboriginal title has been influenced and shaped by equitable principles. The very nature of aboriginal title, in particular the core concept that aboriginal lands are inalienable except to the Crown, gives rise to a fiduciary duty. The fiduciary relationship imposed upon the Crown to deal with surrendered Indian lands for the benefit of the Indians is a central and fundamental aspect of aboriginal title. In Guerin, the case that identified and imposed the fiduciary duty upon the Crown, Dickson J. stated at 376 that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title".

[288] It is difficult to see why a right having these characteristics and drawing so heavily upon the principles of equity for its shape and definition should be entirely immune from the

principles of equity from a remedial perspective. Surely, a sui generis right should draw freely upon all otherwise relevant principles of our law, whatever their historic origin. An analogy may be drawn from Cadbury Schweppes Inc. v. FBI Foods Ltd., 1999 CanLII 705 (S.C.C.), [1999] 1 S.C.R. 142 at 179 where the sui generis nature of breach of confidence was found to support the argument for modifying the remedial strictures of the categories of common law and equity. Referring to the line of authority, discussed in the next paragraph, to the effect that "[e]quity, like the common law, is capable of ongoing growth and development," Binnie J. held that the authority to award damages is "inherent in the exercise of general equitable jurisdiction" and is no longer dependent upon the "niceties" of specific statutory authority to award damages in lieu of an injunction. He added, at 179-80:

This conclusion is fed, as well, by the sui generis nature of the action. The objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach. To that end, the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation.

[289] To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law and equity by this Court, the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in LeMesurier v. Andrus (1986), 54 O.R. 1 at 9 with reference to the legislative direction that the courts "shall administer concurrently all rules of equity and the common law" (now found in the Courts of Justice Act, s. 96(1)), "the fusion of law and equity is now real and total". In Canson Enterprises Ltd. v. Boughton & Co., 1991 CanLII 52 (S.C.C.), [1991] 3 S.C.R. 534 at 582 La Forest J. adopted Lord Diplock's assertion in United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904 at 924-5 that the merger of law and equity is complete and that "the waters of the confluent streams of law and equity have surely mingled now."

[290] While no doubt the categories that were shaped by the historical influences of common law and equity of law remain relevant for certain purposes, the spirit of the fusion of the two streams is the dominant theme and influence in the modern era. In our view, the modern conception of our private law as a fusion of equitable and legal principles provides added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. For these reasons, we reject the contention that the sui generis right of aboriginal title should be rigidly classified as falling exclusively into one of the historic streams of our legal history, completely immune from the influence of the other. Accordingly, as the Chippewas seek remedies that are discretionary in nature to vindicate a sui generis right that draws upon both common law and equitable sources, we conclude that it is appropriate to consider the effect of the Chippewas' 150-year delay in asserting a remedy and the consequent impact upon third parties of granting the Chippewas the remedies they seek.

[291] On the facts of this case, we do not accept the submission that holding the Chippewas bound by the rules that govern the availability of equitable remedies constitutes an unauthorized extinguishment of aboriginal title. First of all, it is the Chippewas who invoke the principles of equity by their claim for the remedies described above. It is difficult to see a case for granting those remedies other than on the well-established principles governing their availability. Second,

as indicated in our analysis of public law remedies, we are satisfied that although formal surrender procedures were not followed, the purpose of the surrender procedure – to protect the aboriginal interest – was fully met by the interposition of the Crown in the Cameron transaction.

3. The Nemo Dat Principle

[292] The Chippewas submit that as there was no surrender of aboriginal title to the Crown, the Crown had nothing it could grant to Cameron by way of patent. It follows, in the submission of the Chippewas, that the Cameron patent was void and that nothing was conveyed. We have already dealt with the submission that the patent was "void" and concluded that established legal principles require the court to take into account the interests of innocent third parties before declaring a patent "void". In our view, the nemo dat principle, as it was applied to Crown patents, is entirely consistent with that view.

[293] An early Canadian case, Malloch v. The Principal Officers of Her Majesty's Ordnance (1847), 3 U.C.Q.B. 387 at 394 dealt with a patent of land already set aside for another purpose. The judgment of Robinson C.J. was to the effect that at common law, the question whether such a patent was void or voidable was unsettled, although he was inclined to the view that it was merely voidable.

[294] Other cases show that the nemo dat principle did not render void all Crown patents of lands to which the Crown lacked title. Alcock v. Cooke (1829), 5 Bing. 340 (C.P.) states that in the case of the Crown, the nemo dat rule was based on the notion that in making a subsequent grant of lands the Crown had already conveyed to another, the Crown must have been deceived. As Crown grants were "enrolled", in other words, officially recorded, the subject had the means of determining what grants had been made and was under a duty to inform the King of the existence of the prior grant before accepting a subsequent grant. It followed that the recipient of the grant previously made to another could assert no claim under the subsequent grant. However, where the Crown granted lands that were not subject to an "enrolled" grant, the court stated that the doctrine had no application. The following example was given by Best C.J. at 349:

The attention of the court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where the subject cannot be deceived, and he must be deceiving the king; for if the king's prior lease be enrolled, the subject has the means of knowing of the existence of that lease, and it is his duty to inform the king of its existence.

[295] These authorities show that competing claims between subjects were reconciled according to concepts akin to modern registry systems and equitable doctrines of constructive notice. The nemo dat principle did not automatically invalidate Crown patents. As we have already explained, where the validity of a patent is impugned, established legal principles require that the interests of innocent third parties must be considered.

4. Nature of Discretion to be Exercised

[296] Accordingly, it is our view that whether the case is considered from the perspective of public law principles or from the perspective of private law, the discretion of the court is engaged. The discretionary factors bearing upon the availability of public law remedies is closely paralleled by equitable considerations applicable as between private parties in respect of proprietary claims. As with public law remedies, the discretion to grant or withhold an equitable remedy is constrained and is closely defined by established principles. Although the tradition of equity requires that the decision-making process be described as discretionary, upon analysis, it is apparent that there are well-defined rules and doctrines that shape the decision and control the result. Discretion is, as Lord Mansfield explained in R. v. Wilkes (1770), 4 Burr. 2527 at 2539, a "sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful but legal and regular." Birks, "Rights, Wrongs and Remedies" (2000), 20 Oxford Journal of Legal Studies 1 at 16 aptly describes the orders rooted in the Court of Chancery as "weakly discretionary" in that the court acts upon firm discretionary rules that have "been settled over the centuries".

5. Laches and Acquiescence

[297] Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The test for these defences was explained in the following terms by La Forest J. in M. (K.) v. M. (H.), 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6 at 77-8:

A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, [Equitable Doctrines and Remedies, (1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:

It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb….

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as in the case with any equitable doctrine.

[298] The doctrine of laches has been applied to bar the claims of an Indian band asserting aboriginal land rights: Ontario (A.G.) v. Bear Island Foundation reflex, (1984), 49 O.R. (2d) 353 (H.C.) at 447 (aff'd on other grounds reflex, (1989), 68 O.R. (2d) 394 (C.A.); [1991] 2 S.C.R. 570); Wewayakum Indian Band v. Canada reflex, (1995), 99 F.T.R. 1 at 77 and 79. There are also dicta in two decisions of the Supreme Court of Canada considering, without rejecting,

arguments that laches may bar claims to aboriginal title: Smith v. The Queen, 1983 CanLII 134 (S.C.C.), [1983] 1 S.C.R. 554 at 570; Guerin , supra at 390.

[299] The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here. In our view, those facts bring this case squarely within the principles governing laches set out in M. (K.) v. M. (H.), supra. The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the status quo. This is a situation that would be unjust to disturb.

[300] The motions judge refused to apply the defence of laches on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction and that "[i]t is clear from Guerin that laches cannot bar an aboriginal claim unless the claimant has knowledge of the actual terms of the disputed transaction." The relevant passage from Dickson J.'s judgment in Guerin appears at 390:

Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March 1970; and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

[301] On the facts of Guerin, the terms of the transaction were essential elements of the claim and without knowing the specific terms, which had been concealed by the Crown, the Band would not know it had a claim. The specific terms of the Cameron transaction are not an integral element of the Chippewas' claim in the present case. The claim is not based on the terms of the transaction, but on the assertion that the lands were transferred without a proper surrender. At para. 653, the motions judge found that the Chippewas had full knowledge of the facts essential to their claim in the 1850s:

The Chippewas knew by 1851 that their unsurrendered land was occupied openly and notoriously by disagreeable settlers. They confirmed this knowledge, and more, in 1855 by their inquiries about the price and terms of payment. About the actual loss of their land, as opposed to the particulars of the Cameron transaction, there was nothing hidden or unknown. By January 9, 1851 at the latest their loss was clear and obvious. They knew with certainty that the disputed lands had been taken from them without a surrender. There is no evidence as to the point in time that this knowledge was lost to the plaintiffs.

[302] In our view, this amounts to a finding that the Chippewas had knowledge of the facts necessary to assert a claim, and in view of that knowledge, Guerin is distinguishable. As we have already noted in the discussion of delay in relation to public law remedies, we are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds. On these facts, we can see no reason why the equitable defences of laches and acquiescence should not apply.

6. Good Faith Purchaser for Value

[303] The second equitable doctrine that bears upon the claim advanced by the Chippewas is the protection accorded a good faith purchaser for value. As the motions judge held: "the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner." The motions judge described the defence in the following way (at paras 686-7):

The defence of good faith purchaser for value without notice has been a fundamental element of our law for centuries. It protects the security of title to land acquired without notice of claim. It reflects a basic social value that protects the rights of innocent parties. Based in simple fairness, it provides a strong defence for the truly innocent purchaser. As Lord Justice James said over a hundred years ago in the case of Pilcher v. Rawlins [(1872), L.R. 7 Ch. App. 259 per Sir W. M. James, L.J. at p. 268]:

… according to my view of the established law of this Court, such a purchaser's plea of purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in his plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase, and also the presence of the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

[304] Mellish L.J. in the same case said [at 273]:

The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice....

[305] The motions judge found that while it was arguable that Cameron had knowledge of the failure of the Crown to secure a proper surrender of the lands, there was no evidence to suggest that any subsequent owner knew or ought to have known that the Cameron lands were unsurrendered Indian lands. Moreover, the motions judge found that there was no evidence of equitable fraud on the part of Cameron that would defeat the operation of the defence in favour of those who acquired title from Cameron. He found that a prudent purchaser and conveyancer would consider that the Cameron patent, regular on its face, was a good root of title and would make no further inquiry.

[306] The good faith purchaser defence is an equitable doctrine and the Chippewas assert that their interest in the lands is a purely legal one not caught by purely equitable defences. For reasons already given, we do not accept this argument. To the extent that the Chippewas assert a

claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences.

[307] The good faith purchaser for value defence applies to the benefit of any purchaser who satisfies its requirements. On the findings of the motions judge, all purchasers from Cameron, the last of whom acquired lands in 1861, were good faith purchasers for value. However, the motions judge held that a rigid and unqualified application of the defence to cut off the Chippewas' claims in 1861 was too drastic given the nature of the aboriginal claim that was being asserted. He concluded that the need to reconcile the aboriginal and treaty rights with the rights of the landowners precluded the immediate application of the defence as of 1861, and, relying on M.(K.) v. M.(H.) supra, he imposed an "equitable limitation period" of sixty years, during which the aboriginal right would survive. The practical implication of this finding was that the Chippewas' damages claim against the Crown would have crystallized in 1921 rather than in 1861.

[308] In our view, the imposition of a strict sixty-year "equitable limitation period", extending the time within which the Chippewas could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence, is not supportable in law. A limitation period prescribes the time within which a claim must be brought. M.(K.) v. M.(H.) goes no further than affirming that, in some circumstances, to prescribe a claim that was concurrently legal and equitable, a court of equity would apply by analogy a legal limitation period. Properly understood, the sixty-year period created by the motions judge is not a limitation period at all. On the findings of the motions judge, the good faith purchaser defence would have defeated the Chippewas' claim in 1861. The sixty-year period he imposed was an "extension period", suspending the operation of a valid defence, and allowing a claim to be asserted after the point at which, by operation of ordinary legal principles, it would have been defeated. There is nothing in M.(K.) v. M.(H.) supra, that would support this.

[309] On the other hand, we accept that the factors that motivated the creation of the sixty-year "equitable limitation period", namely the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right. It is unnecessary to consider that possibility on the facts of the case before us. As we have concluded that the Chippewas accepted the terms of the Cameron transaction at the time it was entered, we can see no reason why the good faith purchaser for value defence should not be applied to preclude the Chippewas from asserting their claim against the landowners.

D. Conclusion on Remedies

[310] For these reasons, we conclude that established rules governing the availability of public and private law remedies require the court to take into consideration the Chippewas' delay in asserting its claim and the reliance of innocent third parties on the apparent validity of the Cameron patent. On the facts of this case, it is our view that the Chippewas' delay, combined with the reliance of the landowners, is fatal to the claims asserted by the Chippewas.

VII. Disposition

[311] For these reasons, we would allow the appeals and cross-appeals by Canada, Ontario and the landowners and we would dismiss the appeal by the Chippewas. Consequently, paragraphs 1, 2, 5 and 6 of the motions judge's order dated April 30, 1999 are set aside, and in substitution therefor, this court orders that:

1. The landowners' motion for summary judgment dismissing the Chippewas' claim in respect of the invalidity of the Cameron patent is allowed.

2. The Chippewas' motion for summary judgment in respect of the invalidity of the Cameron patent is dismissed.

[312] In all other respects, the judgment of the motions judge is confirmed. The parties can submit written submissions on costs and they are directed to confer with Goudge J.A. to make the necessary arrangements.

(signed) "C. A. Osborne ACJO"
(signed) "G D Finlayson J.A."
(signed) "Doherty J.A."
(signed) "Louise Charron J.A."
(signed) "Robert J. Sharpe J.A."

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[1] The white man had various names for the Chippewas (Ojibway, Saulteux). In their own language, the Nation is referred to as Anishnabek. We will use the name Chippewas as it appears to be the appellation most commonly used in the record. We also use the words Indian, aboriginal and First Nations people interchangeably as did the parties to the appeal.

[2] Chippewas of Sarnia Band v. Canada (A.G.), [2000] O.J. No. 138 (C.A.).

[3] There is a dispute over whether Cameron paid the full amount of the principal owed and whether he paid all of the interest owed. The affidavit of James Wells traces the documentary record of the payments. This dispute will figure in the outstanding damages claim advanced by the Chippewas against the federal and provincial Crowns.

[4] In 1860, the imperial government approved provincial legislation transferring control over the Indian Department to the provincial government: An Act respecting the management of the Indian lands and property, S.C. 1860, 23 Vict. C. 151.

[5] Some eighty years later in the Bagot Report (1844), it was observed that the First Nations had kept a copy of the Proclamation and described it as their "Charter".

[6] The continued Crown policy against sale of Indian land to individuals is exemplified by Superintendent Jarvis' refusal to sanction a private sale of 100 acres of the Upper Reserve in 1841 despite the fact that the chiefs supported the sale.

[7] It appears that these two chiefs were allies of Wawanosh in November 1839, although at other times they were opposed in interest to Wawanosh.

[8] Jarvis also overstated the amount of land involved, indicating that Cameron had agreed to buy some 4,000 acres. In fact he had agreed to buy 2,540 acres. There is no explanation for the mistake.

[9] There is evidence that the policy of establishing permanent farming settlements on the reserves had the support of some 39 Chippewa chiefs in 1840. The Chippewas on the Upper Reserves had cleared some 100 acres for farming by 1841.

[10] There is a reference in a letter written by Cameron in February 1850 to a Council having been held. The motions judge dismissed this letter as a self-serving characterization of events some eleven years after the fact. That finding is not unreasonable.

[11] See, supra, n. 3.

[12] The only document authored by a Chippewa was an August 22, 1840 letter from David Wawanosh, the teenage son of Chief Wawanosh. He went to school at Upper Canada College and spoke and wrote English. The letter expressed regret that the Chippewas had sold so much of their land to the white man, but also affirmed commitment to the "civilization" policy.

[13] There is no indication in the evidence that Wawanosh favoured a survey of the entire reserve or would have agreed to the request that the entire reserve be surveyed.

[14] The Lords of Trade formed the committee of the Privy Council responsible for the conception, drafting and making of the Royal Proclamation.

[15] Section 25 provides in part:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763…

[16]An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, entitled, An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever (1769), 9 Geo. III, c.16 (U.K.).

[17] An Act to Amend the Law Respecting Real Property, and to Render the Proceedings for recovering possession thereof in certain cases, less difficult and expensive (1834), 4 Will. IV, c.1 (U.C.).

[18] An Act respecting the Limitation of Actions and Suits relating to Real Property, and the time of prescription in certain cases, S. Prov. C. 1859, 22 Vict., c. 88.