CHAPTER 2: LAW, POLICY, & RIGHTS

In order to understand the events of the Ardoch-Mud Lake conflict it is important to understand the evolution of resource and Aboriginal policies that have placed limits on Aboriginal rights over time. At time of contact, Aboriginal peoples lived in organized societies and had complex systems of rules and norms that guided and defined the control of lands and natural resources. Despite these complex cultural relationships with natural environments and the resources within them, non-aboriginal society disregarded, devalued, and attacked those relationships, and drastically affected their continuity.

Resource and identification policies are two interconnected components of this process. Principally, lands and resources had first to be extricated from Aboriginal control. In addition, Aboriginal peoples' continuing relationships with natural resources threatened the jurisdiction, management, and control of those resources by state agencies. Thus, the eventual assimilation, or extinction, of Aboriginal peoples had the effect of freeing lands and territories of prior encumbrances. It was the intent of these policies to eliminate any obstruction to non-aboriginal access and control of Aboriginal lands and resources. Since Aboriginal interests have been recognized, to a considerable degree, as interests in lands and resources, the result is that resource policy engages directly with discourses on *Aboriginal Right*[1].

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[1] I do not consider *Aboriginal Right* to be a right of use alone. *Aboriginal Right* in my view cannot be separated from *Aboriginal authority*. Otherwise, the use is always conditional and problematic. However, I do not intend by this to suggest that this constitutes the idea of Self-Government currently under consideration. Rather *Aboriginal Right* is constitutive of the authority and right to govern that was present prior to contact with European Peoples and the subsequent denigration and assault on that authority by European, and later Canadian society. It is this original Aboriginal Right that forms the basis for the push for Self-Government today. However, I would suggest that the term Self-Government is articulated and defined differently by various players, and is itself worthy of examination.

The legislation, treaties, and court cases that have defined resource policy historically, have done so in a way that has placed limits on Aboriginal peoples' authority over lands and resources within their territories. Furthermore, they have dictated the application of rules and regulations that have limited Aboriginal peoples' use, and access of those lands and resources. The most critical pieces of legislation, treaty, or court processes which have defined early Aboriginal/State relations in regard to natural resources in Ontario are the *Royal Proclamation of 1763*, the *Constitution Act 1867* (otherwise known as the *British North America Act (BNA) 1867*), the *St.Catharine's Milling case 1889*, *An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands 1891*, and the *1924 Canada-Ontario Indian Lands Agreement*. While these are not the only pieces of legislation that are relevant to contemporary resource disputes, they are, strictly speaking, the foundational pieces governing Aboriginal resource access and control in 1980 at the point of the Mud Lake conflict.

While these events establish a base for the development of Aboriginal resource policy, there are many other events that are just as important in illustrating the chronology of Aboriginal dispossession from their authority and access to resources in Ontario. The various Indian Acts were themselves a vehicle for manipulating Aboriginal resource rights, especially related to reserve lands. Some of this legislation dictated that authority over reserve lands were to be administered by the Indian agent or other Crown representative, while some provided for the alienation of 'Indian' lands from reserve territories. Assessing these less dramatic events illustrates the evolution of ideas relative to Aboriginal peoples and resources.

In addition, *Indian Act* definitions of an 'Indian' served to exclude certain members from 'Indian' status, and thus any special right or access which may have

been tied to that status. Aboriginal identification policy in Canada, prior to the Constitutional amendments of 1984, has been increasingly restrictive, seeking to limit, through definition, the legal position of Aboriginal peoples relative to land, as well as the numbers of people for whom the Crown had responsibility (Tobias 1991). In the post-Confederation period, Non-status and Métis peoples have been seen as on their way to 'civilization', and thus no longer requiring the special assistance of the Crown. For all intents and purposes, these people were seen as Canadian citizens with no special rights (RRC 1975; Tobias 1991).

These changes culminated in the *Indian Act, 1951*, which, while addressing some negative aspects of the previous Acts, provided for the application of Provincial laws on reserve lands**,** the criminalization of many aspects of native harvesting, and drastically focused criteria for the qualifications for 'Indian' status. Together, these changes formed a Provincial policy of exclusion and restriction that came close to annihilating Aboriginal resource rights.

The post-WWII years dramatically altered the social climate in Canada. This period spurred a critical reinterpretation of social policy, providing a climate for the reconceptualization of Aboriginal policy generally. In this time frame, the Calder case (1973), the implementation of a comprehensive claims policy (1973), and the repatriation of the Constitution (1984) forever changed the legal position of Aboriginal people, and reopened the debate surrounding Aboriginal rights in Canada (Brock 2000). While the Provincial government made some effort to respond to these changes they remained hesitant to advance Aboriginal rights. Aboriginal resource policy continued to be influenced by Provincial economic development and resource concerns.

The Evolution of Aboriginal/State relations: land, resources, and identification

1780 – 1889: Protection of Aboriginal Lands and Definition of Indianness

In 1760, after the British defeat of the French, Article 40 of the French capitulation guaranteed Aboriginal peoples' protection for their lands. This guarantee was, however, difficult to enforce, and colonial governments showed little interest in evicting squatting settlers (Dickason 1997:153). Seeking peaceful relations in response to Aboriginal concerns over protection for their lands, the British government's *Royal Proclamation, 1763* recognized, at least partially, the territorial rights of Aboriginal peoples (Dickason 1997:155, also Bartlett 1990; Imai 1993; Surtees 1994; Isaac 1995). Under the *Royal Proclamation*, the bulk of Ontario, excluding the Hudson Bay territory was reserved for Aboriginal peoples as 'Indian' lands (Bartlett 1990:52) (Figure 1 – The Royal Proclamation line, 1763). Subsequent treaties sought to make accommodations with Aboriginal peoples for access to their lands. The *Robinson Treaties* set aside reserves for 'residence and cultivation' clearly indicating a preference that Aboriginal people become settled and take up a farming culture. However, as Bartlett states, reserves were not intended to deprive Aboriginal people of their traditional means of sustenance, but as an inducement to developing a settled and civilized lifestyle (1988:19-20). Treaty promises included guarantees of hunting rights on all ceded territory, providing little force to this preference. This is the case in 91% of reserve lands in Ontario (Bartlett 1988:148).

Figure 1

It was also recognized that reserved lands were exclusively for the Aboriginal signatories, "for their own use and benefit" including the "sole use and benefit [of] any mineral or other valuable productions" on the reserves (Bartlett 1990:107). This understanding is a significant marker for understanding early thought regarding Aboriginal interests and rights in lands.

Regardless of this point, the prevailing view by non-aboriginal people in this time frame was that Aboriginal people and their life ways were inferior to European ways, and that action was needed in order to protect and improve the 'Indian' condition (Tobias 1991:128; Ratkoff-Rojnoff 1980a:9-12). This concept became an important part of the 'civilizing' mission. The notion of protection and assistance began with the reserve system and developmental aid that was extended to Aboriginal communities through training in European skills (Milloy 1991:145). *An Act for the Protection of the Lands and Property of Indians in Lower Canada (10 Aug, 1850),* (otherwise known as *the Indian Protection Act*), extended that protection, legislating the protection of 'Indian' reserve lands from trespass by non-Indians (Tobias 1991:129). Since this act provided that non-Indians were not permitted to reside on reserve, it meant that control of the reserve environment could be managed, to some degree, from the outside. Thus, the identification of *who* qualified as an 'Indian' suddenly had greater importance.

While the treaties opened up large tracts of land for non-aboriginal use and control, they did not directly interfere with the Aboriginal way of life, seeking to contain Aboriginal habitation to a smaller geographic area. However, this was seen as a natural part of cultural improvement. Settlement was considered to be in their best interest, and reserve lands were thought to be areas where Aboriginal people could be protected from the harmful influences of European culture. However, in

association with the civilizing mission, reserves provided a central location where Aboriginal people could be 'assisted' with religious and other training to allow them to ease into a 'civilized' way of life. Thus, the treaties became vehicles for this mission (Milloy 1991).

Unfortunately, promises that were extended regarding Aboriginal rights to hunt and fish on the whole of the ceded territory were not effective. Little was done to protect Aboriginal interests in the ceded territory. Rather, these lands were opened up for development and settlement. Naturally, this had an impact on Aboriginal interests. Non-aboriginal hunting and development (settlements, logging, mining, etc…) reduced habitat, and caused significant reductions in game and other food sources. Also, the sale of lands to third parties reduced the areas that people could enter. As Brock states, "the absence of a significant body of jurisprudence in the nineteenth century of Aboriginal rights and title attests to a form of benign neglect or disregard by colonial authorities (2000:3).

Métis people were not explicitly included in the *Robinson Treaties,* but were not explicitly excluded either. Rather, the *Indian Protection Act, 1850* (13 & 14 Victoria, Ch. 74) defined an 'Indian' as including 'all persons intermarried with [Indians] and residing among them' (McNab 1999:31). Thus, 'Indianness' was circumscribed, not by 'blood', but by community and lifestyle. Surtees states that, for a time, some Métis were included in the Robinson Treaties' annuity payment lists (1994:107). Once again, this illustrates only a superficial involvement in internal Aboriginal community matters. For the most part, people of mixed blood were still considered Aboriginal if they continued to practice an Aboriginal way of life.

However, as early as 1857, the *Gradual Civilization Act* set about to introduce Aboriginal people to the concept of individualized property in an effort to encourage

their evolution towards a civilized and settled existence. This Act provided that, where Aboriginal people who were deemed of good moral character, debt free, and educated could apply for enfranchisement whereby 'he' would be granted 20 hectares of land alienated from reserve lands. This piece of legislation clearly links the idea of identification with that of land rights. If Aboriginal people could be persuaded to *give up their status* as 'Indians' and to *take up European status* with the concurrent systems of land ownership and tenure, then their 'wandering' ways would be eliminated, and their lands would be freed of any encumbrance. The granting of lands from reserve properties was thought to be a key in the dissolution of reserve communities through the assimilation and eventual elimination of Aboriginal communities, leading to the gradual erosion of reserve lands '20 hectares at a time' (Milloy 1991:146-8).

In this context, the protections that were offered to people with 'Indian' status were seen as an encumbrance or disability offered only until such time as the Aboriginal people were ready to become members of a civilized society. While there was no explicit engagement in defining Aboriginal peoples in an exclusionary manner at this time, there was a sense that a 'civilized' Indian could lay down the burden of *Indianness,* and become a fully functioning member of society. Enfranchisement then, meant the removal of any unwanted distinctions or disabilities that were attached to 'Indian' status for their own protection (Bartlett 1980:12).

The *Constitution Act 1867* was a fundamental move that drastically affected Aboriginal interests in their traditional lands. The Act designated the responsibility for 'Indians' and lands reserved for 'Indians' to the Federal government. In addition, section 109 of the Act awarded ownership of land and resources to the Provincial governments (O'Reilly 1988; Bartlett 1990; Wagner 1991; Imai 1993; Surtees 1994;

Isaac 1995; Dickason 1997). Thus, reserve lands came under Federal jurisdiction, while all other ceded lands (those currently viewed as Provincial territories) became the property and jurisdiction of the Provinces. In addition, section 109 provided for the interest of the Crown in Crown lands, mines, minerals, or royalties stating that they belong to the Provinces but are subject to existing trusts and interests (O'Reilly 1988:40). Sections 92(5) and 92(13) awarded Provincial governments the authority to legislate concerning management and sale of public lands and resources (Hessing & Howlett 1997:54). Also, section 88 made Provincial laws applicable to Aboriginal peoples. Thus, legislation regulating resource use on Provincial Crown lands impeded Aboriginal access to off-reserve resources regardless of the promises provided in the Robinson Treaties (Sampson 1992:12). It is worthy of note that neither government was assigned responsibility over Aboriginal use of natural resources (Wagner 1991:24). This set the stage for Provincial control of Aboriginal lands, and the gradual degradation of land and resource rights (Sampson 1992:12).

The provisions of Treaty 3 made specific statements regarding Aboriginal rights to their lands and resources. Firstly, reserve locations were to be chosen by the Aboriginal peoples themselves, and then confirmed by the Federal government (Surtees 1994:107). In addition to this point, the treaty stipulated that all reserve resources - including precious minerals - were for the benefit of the Aboriginal signatories (Bartlett 1990:108). This point was confirmed by Ontario in 1902 (Surtees 1994:108). Another provision stipulated by this treaty was that the Ojibwa were to retain their right to "pursue their avocations of hunting and fishing on the lands which they had ceded" (McNab 1983:147). However, these points would later be challenged. As a point of interest, Ojibwa lands were not yet seen to be part of Ontario at the time of the signing of Treaty 3 in 1873 (McNab 1983, 1999). Rather,

they were part of the Hudson Bay Territory lands, acquired by Canada in 1870, and whose jurisdiction remained contested until the *1889 St. Catherine's Milling* court decision (see below). Thus, while the Province of Ontario was kept informed of the treaty making process they did not actually participate in the drafting of the treaty (McNab 1999:79). However, this fact did have relevance for subsequent developments.

A further significant aspect of Treaty 3 was its inclusion of local Métis peoples. There were several mixed blood families living in the Ojibwa communities at the signing of the treaty. Alexander Morris, the Crown negotiator, was asked to include them. In Morris's official statement on Treaty 3, October 14, 1873, he reports that he told the Ojibwa that "the treaty was not for whites, but I would recommend that those families should be permitted the option of taking either status as Indians or whites, but that they could not take both" (McNab 1999:29). Upon his recommendation a special negotiating team was sent to treat with Métis residents. This statement, and the separate negotiations, indicates a movement towards a narrowing of definition. However, their inclusion still recognizes the community's and individual's right to choose a particular identification.

The Half-breed adhesion to Treaty 3 was signed in 1875, stipulating reserve allotments and the same resource rights as the rest of Treaty 3. Furthermore, their right to hunt and fish off-reserve continued to exist including "hunting, fishing, trapping, gathering and harvesting wild rice and other products" (McNab 1999:30). Treaty 3 states that, "whereas the Half-breeds above described, by virtue of their 'Indian blood', claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake or Rainy River, for the commutation or surrender of which claims they ask compensation from the government" (McNab 1999:30). As McNab states, this

statement affirmed the Aboriginal and treaty rights of Métis people. However, this approach was not to continue. Treaty 3 was, until recently, the only treaty to formally include Métis people and to recognize their interest in lands (McNab 1999).

The subsequent years reflected a narrowing of attitudes towards people of mixed ancestry, and a hardening of attitudes towards Aboriginal peoples' interests (Boisvert & Turnbull 1985). By 1874, enfranchisement policy was formalized, and made mandatory. Treaty 5 (1875), and Treaty 9 and its adhesions (1905 and 1929), (Figure 2 – Major Canadian Treaties) provided nearly identical rights to those provided for in Treaty 3 (Bartlett 1990:107; RCNE 1978:19). However, there were no Métis inclusions. While Treaty 3 Métis had recognition as 'Indian' people with defined sets of rights, Treaty 5 and 9 Métis were seen to have none. Furthermore, Métis who had previously been included in Treaty 3 were offered script in an attempt to remove them from treaty clearly marking a transition in the governments approach to Aboriginal identification (Boisvert & Turnbull 1985).

Thus, in the twenty-five years from 1850 to 1875 the approach to Aboriginal identification had been formalized. In 1850, Aboriginal people were those who lived in Aboriginal communities and were recognized by others as being part of that community. In 1873 (Treaty 3), Aboriginal peoples of mixed ancestry could still be recognized as 'Indian', but also had the choice to be recognized as 'white' with full

Figure 2

citizenship rights as Canadian citizens. And by 1875 (Treaty 5), people of mixed blood were no longer recognized as being 'Indian', or having a valid interest in lands.

The first comprehensive *Indian Act* in 1874 merely consolidated past legislation (Bartlett 1980; 1990). However, it provided a consolidated reference to the extensive control of reserve lands and Aboriginal peoples that had previously been established (Milloy 1991). Under this act, reserves were surveyed into lots that were then assigned to *qualified* 'Indians' through the assignment of a 'location ticket'. After a probation period, or through the acquisition of a suitable level of education (degree of law, medicine, clergy, etc…), the *qualified* 'Indian' was enfranchised and granted full ownership of the lands defined through his location ticket (Tobias 1991). In this way, the alienation of land from reserve territories was formalized (Tobias 1991). This act also legislated an attack on the sexual, marriage, and divorce mores of Aboriginal communities because of the belief that these practices were interfering with the necessary task of converting the 'Indians' to Christianity and a civilized existence (Tobias 1991).

This act also formally barred settlement by non-Indians on reserve lands and provided for their expulsion. Thus, Métis or 'non-status Indian' people residing with their families on reserve were no longer legally allowed to do so. Surrenders of lands could be made to the Crown through the assent of the majority of male members of the band. Extensive powers to manage, dispose of, and protect reserves were vested in the minister. These provisions did not stop the disposition of reserve lands, however. Rather, those lands described as being in excess of Aboriginal needs by European standards, were readily disposed of when their presence conflicted with settler interests (Bartlett 1990).

Beginning in 1879, an additional series of changes to the *Indian Act* further extended the powers of the Crown agent to manage reserve lands. The first of these granted the power to allot reserve land to the superintendent general (Tobias 1991). Aboriginal leaders had been loath to divide up reserve lands in the European fashion. This legislation allowed the Superintendent general the power to divide up the reserve territories, and assign the areas to individual Aboriginal people. This power was extended in 1884 and 1894. These *Indian Act* revisions also allowed the superintendent general to lease reserve lands without surrender or band authorization (Tobias 1991).

1889 – 1951: The Negation of Aboriginal Authority and the Advancement of Provincial Authority

The previous period saw increasing intrusion into Aboriginal authority. However, the *St. Catharine's Milling court case, 1889*, while reflecting the ideas already taking place, was to have tremendous consequences for Aboriginal authority (McNab 1983; Bartlett 1990; Hall 1991; RCAP 1994; Brock 2000). This case became the leading case on lands and resources for the next century, and set the scale for the development of resource policy until the 1970s (Brock 2000). The case challenged Federal control of the Hudson Bay Company (HBC) lands, including Treaty 3, 5 and 9 lands, which had recently been acquired by Canada in 1870. The case dealt with several critical assertions that had bearing on Aboriginal rights relative to their lands and resources, and has been referred to as Canada's first Aboriginal rights case (RCAP 1994).

The Federal argument hinged on the fact that the Royal Proclamation had recognized an Aboriginal interest in lands that could be characterized as 'ownership'

(Hall 1991). They argued that full powers of ownership had passed, with the signing of the relevant treaties, from the Ojibwa to the Federal government, who had paid for the lands in question, with the signing of the treaty. Thus, while the Federal government recognized that Aboriginal people 'had' owned their lands, they argued that that ownership was now vested in the Federal government.

The Provincial government however, argued that 'the dominion' was a confederation of Provinces that did not supersede the powers that each Province had exercised before 1867 and thus did not have the authority to dictate Provincial authority (Hall 1991). In addition, in keeping with the Social Darwinist concepts of the time, the Province argued that Aboriginal peoples at time of contact were in a primitive state of development (Hall 1991; Usher et al. 1992). As Hall puts it, the Provincial argument claimed that Aboriginal peoples "were incapable of holding any sort of legal property rights in the land where they and their ancestors before them lived, because they had no laws or binding rules of conduct among themselves" (Hall 1991:275). Furthermore, they argued that, based on the notion of Christian right over the pagan nations, even if any possession and law had existed, it had been "subjugated once their homelands were discovered by agents representing a higher law vested in the authority of a Christian monarch" (Hall 1991).

This devaluation of Aboriginal life ways had much to do with the evolution of events. As Usher et al. state, "the prevailing settler ideology, with its social Darwinist tenets and deeply embedded notions of progress based on economic development, viewed native people not only as a physical impediment to white settlement, but also as 'utter savages'" (1992:121). This vision drastically influenced policy directions. The obligations to treat with Aboriginal peoples inherent in the *Royal Proclamation* were seen to be perfunctory. Aboriginal and Treaty rights were increasingly seen

through a restrictive lens. The effect was "to bring both reserve land entitlements and resource rights on Crown lands under intensifying assault from all levels of government from the late nineteenth century onwards" (Usher, et al… 1992:121). Thus, it was not Aboriginal right or authority that was at stake in the *St. Catharine's Milling Case*. Rather, the case sought to determine which level of government could legally claim authority over the newly acquired lands, and thus the right to collect taxes and revenue from resource development on those lands (Hall 1991).

It was determined that the Province owned, and had powers over, the ceded territory, while Federal powers were restricted to reserve lands only. At the same time, Aboriginal title was determined to be of a usufructory nature only, and dependent on the good will of the sovereign (Hall 1991). The *St. Catharine's Milling* decision eventually led to the *1891 (1894) Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands* (Bartlett 1990). This agreement stipulated that, because of Ontario's ownership of lands within its bounds as prescribed in section 109 of the *Constitution Act*, Ontario's concurrence was required in order to obtain consent for reserve locations in order to guarantee any interest that the Province may have in the lands. It should be noted that those interests included hydroelectric potential, thus influencing Aboriginal access to river locations, and water resources. Since promises were made at the signing of Treaty 3 that the Ojibwa would choose reserve locations, this agreement directly impeded the authority of Aboriginal peoples to select lands based on their own interests (Bartlett 1990).

This point is further supported by the 1899 decision of the Ontario Chancery to recognize an underlying interest of the Province in a Treaty 3 reserve (Hall 1991). This recognition suggested that the precious metals in Ontario, under section 109 of

the *Constitution Act 1867*, had passed to the Province at that time. Since Treaty 3 was not signed until 1873, any mineral resources belonged fully to the Province and could not have been set apart as part of the reserve (Bartlett 1990).

Based on this recognition, the Federal government and Ontario entered into a new agreement - the *1924 Canada Ontario Indian Lands Agreement (1924)*. While this agreement did recognize reserve lands as granting “full and entire possession, use, benefit, and advantage” (Bartlett 1990:74) to the Aboriginal peoples, it also defined Aboriginal title as a “personal or usufructory right dependent on good will of sovereign” (Bartlett 1990:74-5). The purpose of the agreement was to accommodate the Province’s claim to a share in reserve lands and resources. It suggested that while the treaties had recognized Aboriginal interest in natural resources, and while the *BNA* had entrenched Federal administration, that administration was subject to Provincial powers and interests over lands and resources. Thus, even reserve lands were not free from Provincial intrusion.

The implication of this agreement was that, while the Federal government had the authority to administer the resources on reserve lands on behalf of ‘Indians’, it could do so only within Provincial guidelines (i.e. application of Provincial laws regarding licensing, permits, etc.…) (Bartlett 1990). In addition, the agreement declared that the Province was entitled to one half of any “consideration payable with respect to mineral disposition on reserves set apart by treaty or agreement” (Bartlett 1990:110). The only exception to this decision was Treaty 3 because of a 1902 agreement by Ontario that, for the purposes of policy, precious metals would be seen as part of Treaty 3 reserves (Bartlett 1990). Thus, all other treaty lands within Ontario could no longer claim full ownership of lands. Rather, they were conditional rights subject to Provincial interests. A final aspect of the 1924 agreement provided

that reserve lands would revert to Provincial control upon the extinction of the band. This idea accommodates the belief that, in time, Aboriginal people would be assimilated or would expire.

Changes in the 1874 *Indian Act* had kept pace with these developments. By the 1890s, the superintendent general had power to lease land for revenue purposes (Tobias 1991). This included licenses or permits to harvest timber (Bartlett 1990). In 1895, the *Indian Act* allowed any 'Indian' to apply for the lands upon which he lived to be leased, regardless of band authorization to do so. This moved the allotted lands further into the realm of 'private' ownership (Bartlett 1990; Tobias 1991). Finally, the 1898 *Indian Act* was amended to allow for the survey of reserves without the consent of the Aboriginal nations (Telford 1998). This allowed for exploration to locate resources of interest for development purposes, regardless of Aboriginals interests in the matter. By 1918, the superintendent general was granted the authority to lease uncultivated reserve lands without surrender (Bartlett 1990). Thus, by 1924, Federal and Provincial authority over Aboriginal lands and resources was nearly complete.

By this time, it became apparent that the reserve system, and the many coercive attempts to encourage the civilization of Aboriginal peoples, was not working. As Cottam states,

> by 1939, the non-disappearing Indian was being recognized by the assimilative forces, gathered at a conference in Toronto on the eve of the Second World War. There, to an audience that included Native leaders… government officials, educators and others concerned with overseeing their Native wards, confessed at last their failure to turn Native people into whites (1992/3:202).

This failure was seen, at least in part, to be the result of the protections that the reserve system afforded. As a result, the early 1900s were characterized by an

increasing move towards the removal of those protections, and an increase in the direction of exclusions and restrictions (Tobias 1991). Throughout this period Aboriginal people had almost no authority or control over matters that directly influenced their lives. Aboriginal life ways were severely circumscribed by Provincial and Federal legislation and policies.

The assault on Aboriginal access to resources, however, did not stop there. The 1930 changes to the *BNA (1867),* with inclusion of the Prairie Provinces, introduced some new ideas into Aboriginal rights discourses. This legislative change introduced the notion that *Aboriginal right* to hunt and fish was *for food* (Wagner 1991:24). Treaties before this time made no mention of restrictions. Rather, Aboriginal people had always traded resource commodities. This change became a profound point of contention throughout the 1900s.

The power was so stacked against Aboriginal communities that a 1933 policy within the Department of Indian Affairs dictated, "Indian complaints and enquiries had to be routed through the [Indian] agent" (Getty & Lussier 1983:169). Aboriginal communities complained that, "if we do not get a square deal from the agent how can we report it if we have no recourse except to the agent himself?" (Getty & Lussier 1983:169).

The movement towards restrictions in identification as well as resource rights, access, and control culminated in the *Indian Act of 1951*. While the aim of this Act was to meet the needs of Aboriginal communities, it conformed in structure to the framework of assimilation implicit in earlier policy (Smith 1992). The primary component of the *1951 Indian Act* was the application of Provincial laws on reserve lands (Bartlett 1990; Tobias 1991; Usher et al. 1992). Prior to this time, reserve lands were seen, at least to some extent, as zones where Aboriginal people had free access

to resources, even if the lands were largely controlled from outside. Through these provisions it was clear that hunting, trapping, and fishing rights were no longer seen as fundamental guarantees of Native livelihood. Rather, they were seen as a proprietary right at the pleasure of the Crown. Fish and wildlife became common property resources regulated by the state for all of its citizens, while many aspects of native harvesting were criminalized (Usher et al. 1992). Aboriginal hunters were required to apply for licenses to harvest just like other users. As McNab states "Aboriginal and treaty rights have been denied or rendered valueless because of settlement of the frontier and controlling legislation, regulation or enforcement of existing laws or by adverse court judgements" (McNab 1992:29). In this way, Provincial control over reserve lands drastically affected the lives of Aboriginal peoples.

This Act also attacked Aboriginal identification criteria. At this time, the lists from the various departments from across the country were consolidated. Anyone on the 'Indian' register that did not fit the newly imposed strict criteria was withdrawn from the list. Many previously 'status' Aboriginal peoples were excluded at this time, drastically increasing the numbers of un-recognized (Métis or 'non-status Indian') Aboriginal peoples. Rather than focusing on the characteristics a person needed for 'inclusion' in the register, the new criteria focused primarily on exclusions. The Act stated that,

> People excluded from Indian register are: People whose mother and father's mother are not Indians; a woman married to a non-Indian; an illegitimate child born to an Indian woman when the Registrar is 'satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered
> *An Act Respecting Indians (20 June, 1951).*

These criteria formally attacked the notion of mixed ancestry. It required any person to have Aboriginal parentage on both sides of their family tree. It was not enough to be the child of an Aboriginal person. The other parent must also have been registered with Aboriginal parentage as well. Enfranchisement of qualified members was also given further incentive with the granting of a share of band capital and revenue, plus a twenty years share of treaty money to any 'Indian' who became enfranchised.

Clearly, at this point in history Aboriginal people were the least in control of their lives. There was a consolidation of State control over Aboriginal peoples, and their lands and resources, including on and off reserve lands. Yet the post-WWII period and the attitudes of equality being embraced in the 1960s were a double-edged sword. Increasingly, Aboriginal people co-ordinated protests and activities to bring their issues into public awareness. Part of the *1951 Act* eliminated the section which prevented Aboriginal People from hiring a lawyer, making it possible to file suit against the crown. Also, in 1954, Ontario extended the franchise to Aboriginal peoples (RCAP 1994). These amendments planted a seed of change that eventually had a significant impact on Aboriginal resource issues.

1950 – 1980: The Period of Social Advocacy and Court Action

The 1950s and 1960s were characterized by a movement towards Provincial servicing of Aboriginal needs. The justification for this move was that many of the services needed by Aboriginal residents of the Province were also offered to other non-aboriginal residents (blind persons allowance, old age pension, health care, housing, social services, education, child welfare, etc…). Provincial agreement was obtained in return for Federal cost-sharing, or special reimbursement, for these programs (MNR 1981; RCAP 1994). It was argued that there was a redundancy of

servicing costs inherent in separate service provisions, and that consolidation would ensure an equality of servicing (MNR 1981; Angus 1991). As reasonable as this may seem, many people questioned the Federal government's motives suggesting that it was part of an overall move to withdraw from their responsibilities towards Aboriginal peoples (Tobias 1991; Angus 1991). It would seem that this move foreshadowed the developments yet to come.

In 1969 Trudeau's *White Paper* proposed abolishing the 'Indian' department entirely, and special status along with it (Tobias 1991). The paper argued that the exclusionary nature of 'Indian' status was itself racist, and contrary to the doctrines of equality being embraced by Canada at the time. Yet the effects of its recommendations would have been far from equalizing. Aboriginal peoples stated that eliminating their special status would mean entrenching the *status quo* with Aboriginal peoples on the lowest rungs of Canadian society, and completely eradicating their rights to land and resources based on historical and legal precedent. Although the *1969 White Paper* is generally recognized as the impetus for Aboriginal peoples' resistance, this resistance was nothing new. Yet the shock of the *White Paper*, and the publicity created around the very public displays of anger and resistance by Aboriginal people, dramatically raised Aboriginal issues in the minds of the public. This dramatic effect may well have been the crucible of change.

The 1960s and 1970s was characterized by a greater attention to Aboriginal issues in Ontario (Sampson 1992; RCAP 1994). The Province began to negotiate on Aboriginal resource disputes, and undertook a consultative approach with reserve communities (RCAP 1994). In 1972, in response to the Royal Commission on the Northern Environment (RCNE) recommendations, the Province established the Ontario Tripartite Process (OTP). This group was a joint commission between the

Federal and Provincial governments, and Aboriginal representation. Furthermore, the Indian Commission of Ontario (ICO) was formed on September 28, 1978 to 'function as a facilitator, conciliator, and mediator' (Sampson 1992:20; OC 2731/80). Part of this was done through working groups that addressed specific issues (RCAP 1994). The Wild Rice Working Group was established at this time. While these initiatives were an obvious effort on the part of the Province to more fully address Aboriginal issues, the efforts represented by the OTP and ICO were limited by the Province's refusal to consider formative change wherever Aboriginal and Provincial economic interests conflicted (RCAP 1994).

National scale politics also influenced Ontario policy development relative to Aboriginal peoples. For instance, the Calder case (1973) prompted significant changes to Federal and Provincial policy. The Calder case found that Aboriginal title continued to exist, unless validly extinguished (Isaac 1995). For the first time, Canadian law recognized that Aboriginal title predated British law (Brock 2000). The Calder decision established that,

> notwithstanding either the course of Canadian history as understood by the descendants of the settlers, immigrants, and colonists or legal precedent derived from British colonial law, the Canadian state was required to recognize the self-evident yet hitherto ignored fact that Aboriginal peoples lived in societies prior to the arrival of Europeans and that, as a consequence, there was a likelihood that their institutions, tenures, and rights to government remained in place despite the presumption of Canadian sovereignty (Asch 1997:ix; see also Hall 1991).

This decision created a tension that continues to have an effect today.

Later that year, in response to the Calder case, the Federal government established a formal claims policy. Ontario responded by seeking to co-ordinate Aboriginal policy in its various departments. In 1976, the Province assigned a Minister without portfolio to be responsible for this co-ordination (Sampson 1992:18-19). In 1977, indicating the close link in the Provincial mind between resource and

Aboriginal concerns, this Minister was appointed the Provincial Secretary for Resource Development, keeping his duties with respect to native affairs. In 1978, the Office of Indian Resource Policy was established (RCAP 1994:16), and in the same year, the Province established a 'leniency' policy 'for Native Persons Violations' which sought to accommodate the interests of status 'Indians' relative to natural resources (RCAP 1994:16).

However, Provincial attitudes to Aboriginal resource needs continued to flow from the perspective that resources belonged to the Province. This point was clearly stated at the RCNE hearings in 1977 where the Ontario government stated its position that the natural resources of the Province "belong to, and will be developed for all of the people of Ontario, including the Native people" (RCNE 1978:20). Aboriginal people, however, argued that the Province failed to recognize their unique relationship to the land, or the interrelationships between different resource uses (RCNE 1978:20). The power differential was enormous. While the Ministry of Natural Resources (MNR) was responsible for the management of Crown lands in Ontario, it was "also responsible for determining Ontario's response to Indian requests for Indian access to natural resources" (Spiegel 1988:104). Ontario statements in 1980 affirmed the Province's intention to continue to limit Aboriginal resource access through legislation. Ontario held to the position that unrestricted use of resources by any one group of peoples would be tantamount to anarchy, and that they would continue to retain final authority over resource uses regardless of Aboriginal claims regarding the infringement of treaty promises (MNR 1980a).

OMNSIA requests for negotiations or special consideration were met with a clear statement that 'Non-status Indian' and Métis people were to be given no special consideration based on their ancestry (MNR 1978a). Rather, they were recognized

as holding a status no different from that of other Canadians. While the Government of Canada had assumed special responsibilities for education, health, welfare, and economic development for status Indians, the non-status and Métis people had to rely on the same agencies as other Canadians for these services. The *British North America Act* assigned to the Dominion Government responsibility for 'Indians' and Lands reserved for the 'Indians', but gave no clearer specification of those terms. 'Non-status Indians' and Métis argued that the government did not have the constitutional authority to limit these responsibilities by restricting the meaning of 'Indian' only to those defined in the *Indian Act*. This question of status and membership in the status group was therefore an important element in the consideration of native claims and grievances (RRC 1975).

In spite of these facts, the Calder case began a process of recognition that allowed for a movement towards Aboriginal involvement in defining the conditions of their lives. The *James Bay Agreement* signed two years later made provisions for self-management and community governance of lands within the agreement (Bartlett 1990). Two years after that, Sandra Lovelace brought her complaint regarding sex discrimination in the existing 1951 and previous *Indian Acts,* which excluded Aboriginal women who married non-aboriginal men from the register, to the UN Human Rights Committee. It was not until 1985 that this matter was addressed through the passage of Bill C-31, which provided for the reinstatement of women who had lost their status unwillingly through this component of the enfranchisement provisions. In 1982 revisions to the Constitution Act provided that 1) existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed; and 2) that Aboriginal peoples (of Canada) are defined as including 'Indian', Inuit and Métis. This monumental change was a stunning victory

for Aboriginal peoples which has spurred further favourable court case decisions which have drastically altered Aboriginal rights in post-1982 Ontario (see Guerin 1984; Sparrow 1990; Delgamuukw 1997; and Marshall 1999).