Saskatchewan
Law Review

Shawanaga Bound: The Ontario Court of Appeal Decides *Hopton* v. *Pamajewon*

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I. INTRODUCTION

This is a tale about a trail: a trail that became a road named Shawanaga Road.[1] It features the stormy relationship between the common law and Aboriginal title, an appeal of a declaration by an Ontario Supreme Court Judge that a road across the Shawanaga Reserve had become public,[2] and the honour of the Crown in upholding its treaties with Aboriginal peoples. Like all good tales, though, it needs to be told from the start, so we will begin with a brief introduction to the geography and the history of Shawanaga Road.[3]

Although the history of the Shawanaga Band extends back far beyond the issues connected with the road, a point in that history worth noting is the moment in 1850 when Chief Muckatehmishoquot and other Chiefs and principal men of the Southeastern Ojibwa peoples signed the *Robinson-Huron Treaty*. The Treaty ceded much of their land on the north shores of Lake Huron and Georgian Bay to the English. They agreed that several areas including the land on which the Shawanaga Band lived would not be surrendered and these areas became known as reserves. The Shawanaga Band lives on Reserves 17 and 17B. It is the unsurrendered land in Reserve 17 containing the Shawanaga Road that was in issue in this case.

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* CD, BA, MA, LL.B, Law Clerk to the Justices of the Court of Appeal for Ontario. The author wishes to note the passing of Mr. Justice Tarnopolsky of the Ontario Court of Appeal while this decision was on reserve, and to record her hopes that his memory will continue to inspire others to "do the right thing."

1 A road that became the focus of the decision in *Hopton* v. *Pamajewon* by a panel of the Court of Appeal for Ontario consisting of Tarnopolsky, Krever and Arbour JJ.A., reported as *Skerryvore Ratepayers' Assn.* v. *Shawanaga Indian Band* (1994), 16 O.R. (3d) 390 (C.A.).

2 *Hopton* v. *Pamajewon* (1990), 71 O.R. (2d) 737 (H.C.J.), (sub nom. *Skerryvore Ratepayers' Assn.* v. *Shawanaga Indian Band*).

3 *Supra* note 1 at 392-96.

Looking at the map, it is easy to see that the Shawanaga Band lives on two areas of land: one small area directly on Georgian Bay (Shawanaga Landing Reserve 17B) and a slightly larger one inland to the east (Shawanaga Reserve Reserve 17). The main road that runs north through the Reserve 17 began as a colonization road and was built by the Government of Ontario to facilitate settlement in the area. Originally known as the "North West Road," it began in Parry Sound and was extended a short distance each year until it entered the reserve in 1879. Years later, it was replaced by Highway 559 and, although the land had not been properly surrendered, the matter was eventually resolved by the Band and the Department of Indian Affairs. Highway 559 travels north through the reserve to connect with the Trans-Canada Highway which crosses the north-east corner of the reserve; the Trans-Canada Highway was built on land formally ceded to the Crown for compensation.

The road with which we are concerned, however, was not an arterial road funded by the government, but an access road which, in those days, was considered a matter of local interest. Accordingly, Shawanaga Road was built and maintained by the Band and some other locals to provide a convenient route between the reserves, and between Highway 559 (then the "North-West Road") and Shawanaga Landing. As noted in the judgment of the Court of Appeal in this case, "[r]oads in the area are difficult to maintain because the terrain is rough and rocky, the underbrush grows up, the winters are severe and fires cause crosslay to burn and trees to fall across them."[4] Shawanaga Road was and continues to be an unpaved sand-based road. With the exception of the years 1890-91, the road received no government funding and was maintained by statute labour. Statute labour was the duty imposed on certain male residents to contribute their labour to the maintenance of roads and highways.

The only resident of the area in the early years, other than the Band members, was Ole Hanson, who settled on Georgian Bay a short distance north of Shawanaga Landing in 1892-93. In 1908, he built a hotel on the site and the Band derived revenue from tourists travelling from the Highway via Shawanaga Road to Shawanaga Landing and from there by boat to the hotel.

The advent of the automobile made road improvement important to many communities. In 1920, the Province of Ontario passed the *Highway Improvement Act*[5] (colloquially known as "The Good Roads Act") and began

4 *Supra* note 1 at 393.
5 R.S.O. 1914, c. 40.

to fund the improvement and maintenance of community roads. The next two decades saw a great deal of discussion between the Band, the local Indian Agent, and the provincial government over who should undertake the expense of upgrading and maintaining Shawanaga Road for motor traffic. The province provided grants in some years and the Band was authorized to make capital expenditures in others. However, it was not until 1938, when responsibility for northern roads was transferred to the Ministry of Highways, that Shawanaga Road began to benefit from regular subsidies provided under the "Good Roads Act". Statute labour was abolished, as required by the Act, and between 1939 and 1988 Ontario funded about 60% of the road works on Shawanaga Road. Correspondence in those years indicated that the road benefitted both tourist and personal traffic, although Band use accounted for about 90%. Since the 1950's there has been a tourist facility including rental cottages and a marina at Shawanaga Landing.

By the early 1960s, the site where Ole Hanson had built his hotel had come to be known as Skerryvore and it was owned by Bert Taylor. Planning to subdivide and develop the site, Bert Taylor built the Skerryvore Road in 1961-62 with a 50% subsidy from the province. Skerryvore Road connected Skerryvore to the stretch of Shawanaga Road that is between the Reserves. Between 1969 and 1972 the houses and cottages of Skerryvore were built and sold.

In the mid-'70s, some Skerryvore residents were staying there year-round and the Band began to receive complaints concerning the condition of Shawanaga Road. The Band was financially unable to improve the maintenance standards and various compromises were reached but public reliance on the road continued to inconvenience the Band. In 1976, the Band passed a by-law under Section 81 of the *Indian Act*[6] restricting the use of the road on the reserve. Two years later, Chief Margaret Jones wrote to the Skerryvore Local Roads Board stating that the Band considered Shawanaga Road to be a private road; she provided them with a draft form of a licence to be applied for by those wishing to use the road. This did not settle the matter and on April 13, 1981, the Band closed the road pending satisfactory arrangements for its use.

The Skerryvore residents obtained an interim injunction in May 1981 and then, at trial in February 1990, succeeded in having the road declared a public highway by virtue of the application of the common law principle of dedication.[7]

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6 R.S.C. 1970, c. I-6 (now R.S.C. 1985, c. J-5).

7 Montgomery J. also based his conclusion on the continuance in force of a pre-Confederation statute which held that all roads on Indian lands were highways. See *supra* note 2 at 748-49. On appeal, the Attorney-General for Ontario, conceded that Section 12 of the *Highway Act*,

Despite its humble beginnings and its relatively modest stature among roads (unpaved and barely five miles in length),[8] the determination of the fate of the Shawanaga Road gave the Ontario Court of Appeal an opportunity to build on some important recent pronouncements of the Supreme Court of Canada with respect to Aboriginal rights. This was done both in the substance of its findings and in its approach to the issues presented.

II. THE COMMON LAW AND ABORIGINAL TITLE

Montgomery J. of the Ontario Supreme Court had arrived at his conclusion that Shawanaga Road was a common and public highway through the application of the common law doctrine of dedication. Under this doctrine, the right in perpetuity of the public to travel a private road accrues upon the satisfaction of two conditions: (a) an intention on the part of the owner to dedicate, and (b) acceptance by the public of the road as a highway.[9] The case law had established that the intention to dedicate (or *animus dedicandi*) was a matter of fact that may be inferred in the light of the surrounding circumstances.[10] Consequently, the following findings of fact made by the trial judge, as recited in the decision of the Court of Appeal, may well have seemed to close the door on meaningful appellate review:

1. At all times from 1850 the public has had unimpeded use of Shawanaga Road. In 1978, but not before, the appellant Band took the position that the road is a private road and that the Band could and would prevent use of it by the public without payment to the Band.
2. Rather than object to public use of the road, the Band encouraged such use to 1978.
3. Statute labour on the road was abandoned by the Band in order to enable provincial expenditure for its repair and maintenance.

1810 (U.C.), c. 1 ("Act to provide for the laying out, amending, and keeping in repair the public highways and roads in this province, and to repeal the laws now in force for that purpose"), had been repealed by the *Indian Act*, R.S.C. 1886, c. 43, s. 5 and Sch. A: *supra* note 1 at 401-402. Accordingly, the continuance of the 1810 statute in s. 257 of the *Municipal Act*, R.S.O. 1980, c. 302 did not render the road public as determined by Montgomery J.

8 In fact, the portion of the road directly in issue, that which crosses Reserve 17, is barely two miles in length.

9 *Reed* v. *Lincoln (Town of)* (1974), 6 O.R. (2d) 391 at 395 (C.A.).

10 *Eyre* v. *New Forest Highway Board* (1892), 56 J.P. 517 at 517 (U.K.C.A.); *Rideout* v. *Howlett*(1913), 13 D.L.R. 293 at 296 (N.B.S.C.); *O'Neil* v. *Harper*(1913), 28 O.L.R. 635 at 644 (C.A.).

4. The federal Department of Indian Affairs has always considered the road to be a public road.
5. The Province of Ontario has spent money on the maintenance and repair of the road at the invitation of the chiefs of the Band and the federal Department of Indian Affairs over many years.[11]

On the basis of these findings, Montgomery J. found that both the Band and the Government of Canada had demonstrated an intention to dedicate that resulted in the road becoming a common and public highway. He enjoined the Band permanently from preventing the public from using it.

III. THE SHAWANAGA BAND AND THE INTENTION TO DEDICATE

Since a finding of *animus dedicandi*, as a finding of fact, can only be overturned when affected by "palpable and overriding error,"[12] at first blush it may have seemed that the conclusion in favour of dedication was inescapable. Moreover, the inevitability of the finding was further supported by the propositions that the common law applied to Aboriginal rights in reserve land[13] and that the dedication of a road was not an alienation as the owner retained property in the soil beneath it.[14]

As the Court pointed out, however, a finding of dedication results in a disposition of an interest in land and, consequently, it was important to assess the evidence in its entirety to ensure that the disposition was, in fact, intended. Accordingly, there were cases in which permitting the public to cross one's land had been regarded as merely "neighbourly" and not evidence of an owner's intention to dedicate.[15] And, in a 1987 British Columbia Court of Appeal decision,[16] it was found that the public expenditures on a trail across land that had once been public but was not part of a reserve "were just recognition of a public responsibility to, in the absence of roads, make travel over the trail a little easier"[17] and were insufficient to result in a dedication of the road to the public.

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11 *Supra* note 1 at 396.

12 *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 2 S.C.R. 570 at 574.

13 *Smith* v. *R.*, [1983] 1 S.C.R. 554 at 569-70; *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654 at 665, 670-71; *Ontario (A.G.)* v. *Bear Island Foundation* (1984), 49 O.R. (2d) 353 at 479 (H.C.J.), appeals dismissed without consideration of this point (1989), 68 O.R. (2d) 394 (C.A.), [1991] 2 S.C.R. 570.

14 *Taylor* v. *Clanwilliam*, [1924] 2 W.W.R. 1153 at 1161 (Man. C.A.). The Court rejected both submissions, see *infra* note 28.

15 *Bateman* v. *Pottruff*, [1955] O.W.N. 329 (C.A.); and *supra* note 9.

16 *Dunstan* v. *Hell's Gate Enterprises Ltd.* (1987), 20 B.C.L.R. (2d) 29 (C.A.).

17 *Ibid.* at 42.

Having cast some doubt on the apparent inevitability of the finding of dedication by the trial judge, the Ontario Court of Appeal embarked on a subtle but far-reaching analysis of the applicability of the common law to interests in land held through Aboriginal title. Citing the 1988 decision of the Supreme Court of Canada in *Canadian Pacific Ltd.* v. *Paul*,[18] the Court noted the long-standing judicial recognition of the *sui generis* nature of Aboriginal title. The Supreme Court in that decision observed that the purpose for the characterization of Aboriginal title as a "personal and usufructuary right" had changed over the years from a demeaning description to one that, emphasizing its general inalienability, served to protect "the Indian population lest they be persuaded into improvident transactions."[19] Now it was the Ontario Court of Appeal's turn to find further significance for such a characterization. The Court held that "[b]oth treaties and statutes reflect the concern that Aboriginal land customs might be construed [*sic*], and in particular, that failure by the Indians to assert proprietary rights against others might result in unintended transfers of those interests."[20]

Where the courts once saw the need to protect Aboriginal persons against *improvident* transfers of their land, there was now a recognition of the need to protect Aboriginal persons against *unintended* transfers of their land through misunderstandings regarding their intentions. In this regard, it may be said that the potential for misunderstanding on both sides arising out of the fundamentally different perspectives on ownership is notorious: in connection with occasions of sharing, it has led to the coining of unfair characterizations such as "Indian giver" and, in connection with agreements to transfer ownership, to equally unpleasant characterizations such as "speaking with forked tongue."

It is arguable that the application of the common law doctrine of dedication to unsurrendered land is a logical impossibility. Aboriginal title differs from the kind of ownership referred to in the case law on road dedication in at least two notable respects: first, Band members hold land as a collective and pass it from generation to generation without formal transfer; and second, their rights are inalienable in the broad sense except through formal transfer to the Crown. Accordingly, Band members do not regard themselves as individuals who hold land one against another, nor as individuals who may transfer their title in any formal or permanent sense. Concepts of title, such as exclusivity and transferability, do not shape their actions toward others in

18 *Supra* note 13 at 677.
19 *Ibid.*
20 *Supra* note 1 at 399.

respect of their land; consequently, it is difficult to imagine how an intention to dedicate their land to public use could be inferred from any action other than a formal surrender. It could equally be suggested by reviewing the history of the use of the road that the Band demonstrated no deliberation or intention in their actions toward others with respect to the use of the road, but simply shared it when it was feasible and mutually beneficial to do so and ceased to share it when it ceased to be feasible and mutually beneficial to do so. Whether this conduct is to be characterized as "neighbourliness," or whether it is characterized simply as their way, the Court summarized its findings regarding the inconsistency of the inalienability of Aboriginal title with the doctrine of dedication as follows:

> The Shawanaga Band were entitled to govern themselves in accordance with a reasonable belief that, in the absence of formal surrender to the Crown pursuant to the applicable treaty and statute law, their interests in their land were fundamentally inalienable. Thus, the common law doctrine of dedication is not applicable to unsurrendered land. Put differently, it can be said that the *sui generis* nature of Native title renders impossible an inference of an intention to dedicate, *i.e.*, to transfer permanently to the use of the public a previously private right of way.[21]

With this passage, the Court made it clear both that no evidentiary foundation existed on which to base a finding of intention to dedicate against the Shawanaga Band and that no such finding could ever be made with respect to land held by Aboriginal title.

IV. THE GOVERNMENT OF CANADA AND THE INTENTION TO DEDICATE

The *sui generis* nature of Aboriginal title then became the focal point for review of another issue before the court: Montgomery J.'s finding that Shawanaga Road had also become a public highway by virtue of the evidence of an intention to dedicate as shown by the actions of the federal government. The respondent Attorney General of Ontario had argued that the federal government was the "owner" of the land and that the actions of federal officials resulted in dedication of the road to public use.

In considering this issue, the Court noted that although the relationship between the Crown and Aboriginal persons with respect to their land had

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21 *Supra* note 1 at 400.

been characterized as one of trust, this was only a characterization. The Court referred to the Supreme Court of Canada's decision in *Guerin* v. *R.*,[22] in which the fiduciary nature of the relationship was itself held to be *sui generis*, and to the explanation by Professor Hogg that this fiduciary relationship differed from other relationships of trust in that there was an obligation by the "trustee" to consult the "beneficiaries" before their interests were affected.[23] On this basis, the Court of Appeal concluded that the independent actions of federal officials could not result in a disposition of land held through Aboriginal title by applying the doctrine of dedication.

While this conclusion regarding the effect of the actions of the federal government on Aboriginal title may seem relatively obvious in this context, especially following upon a finding that an intention to dedicate could not be inferred from the conduct of Band members, its significance should not be overlooked. It suggests, if not openly endorses, the claim frequently advanced by academics that, unlike common law title which is held *through* the Crown, Aboriginal title is an interest in land independent of, and opposable to, the Crown's underlying title.[24] As a legal burden on the underlying title of the Crown, Aboriginal title would prevent independent disposition of an Aboriginal interest in land by the federal government. This claim has received support on a number of occasions in findings on related issues. As the Court of Appeal noted, it was held in *R.* v. *Sparrow*[25] that the extinguishment of Aboriginal rights, whether by voluntary surrender, by statute or by constitutional amendment, would not be inferred from unclear language. In a concurring decision in *Guerin*, Wilson J. held that Aboriginal title:

> cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree....[26]

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22 [1984] 2 S.C.R. 335 at 387 [hereinafter *Guerin*].

23 P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 681.

24 See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 751. Professor Slattery based this view on the advice of the Board in *St. Catherine's Milling and Lumber Co.* v. *R.* (1888) 14 A.C. 46 at 58 (P.C.) (U.K.), 30 & 31 Vict., c. 3, that Indian title is an "Interest other than that of the Province" in lands allotted to the provinces by the *Constitution Act, 1867*, and that in *Canada (A.G.)* v. *Ontario (A.G.) (1986)*, [1897] A.C. 199 at 210-11, that this denotes "some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province". On the strength of these comments it would seem that the rights of the Shawanaga Band to their land have an independent source and are maintainable against the whole world including the Crown.

25 [1990] 1 S.C.R. 1075 at 1099 [hereinafter *Sparrow*].

26 *Supra* note 22 at 349.

> Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*...[and i]t would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band.[27]

Finally, this approach was implicitly endorsed by the Supreme Court of Canada in *Simon* v. *R.*[28] The decision recognized the mutually beneficial nature of the treaties, validly entered into between the British Crown and the Micmac people, as analogous to treaties contracted between sovereigns. Accordingly, the finding by the Court of Appeal that the doctrine of dedication was also inapplicable to the actions of the federal government constituted another small but significant step toward the charting of the *sui generis* nature of Aboriginal title and the fiduciary relationship it entails with the Crown.

V. CONCLUSIONS

There is one final point worth noting regarding the nature of this appeal in the context of the developing jurisprudence on Aboriginal title. The parties to the matter included the Attorney General for Canada as appellant and the Attorney General for Ontario as respondent. Although the federal government alone has the authority under the Constitution to enact legislation in relation to "Lands reserved for the Indians",[29] there is growing recognition of the principle that the fiduciary duty of the Crown binds both the federal and the provincial Crowns.

From a logical and historical standpoint, this would seem a foregone conclusion. After all, it must be remembered that when the original treaties, such as the *Robinson-Huron Treaty* of 1850, were signed, there was only one Crown for Mr. Robinson to represent. Furthermore, from an international law standpoint, there is little in the circumstances surrounding the treaty in question to indicate why successors (*i.e.*, the federal and provincial Crowns) to the government which entered into this treaty should cease to be bound to perform its terms in good faith. Nevertheless, it seems that the equitable ramifications for the provincial Crown did not gain clear recognition until 1990 when then Chief Justice Dickson commented in *Mitchell* v. *Peguis Indian Band* that the division of powers was an "internal" matter that did not change "the basic structure of Sovereign-Indian relations".[30]

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27 *Ibid.* at 352.
28 [1985] 2 S.C.R. 387 at 401.
29 *Constitution Act*, 1867 (U.K.) 30 & 31 Vict., c. 3, s. 91(24).
30 [1990] 2 S.C.R. 85 at 109.

While the provincial Crowns' fiduciary obligation may still be in the process of crystallizing in the jurisprudence, it has been foreshadowed for a number of years now in discrete passages in the case law criticizing "sharp dealing"[31] and recommending honour in governmental relations with Aboriginal peoples. As has been suggested by an increasing number of academics[32] and courts, it would be unfortunate if the two prongs of Canadian federalism served to undermine the integrity of the dealings between the Crown and Aboriginal peoples and to justify the criticism traditionally levelled at "white man's" speech. As Dickson C.J. and La Forest J. opined in *R.* v. *Sparrow*:

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of Aboriginal rights and interests.... The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.[33]

It is in this respect that this judgment of the Ontario Court of Appeal represents a step in the right direction and a fitting end to this tale. While the determination of rights in a two mile stretch of road in Northern Ontario may seem to be of little consequence to many Canadians, the declaration that Shawanaga Road could not become public through the common law doctrine of dedication represents an important milestone in the journey toward respect for Aboriginal rights.

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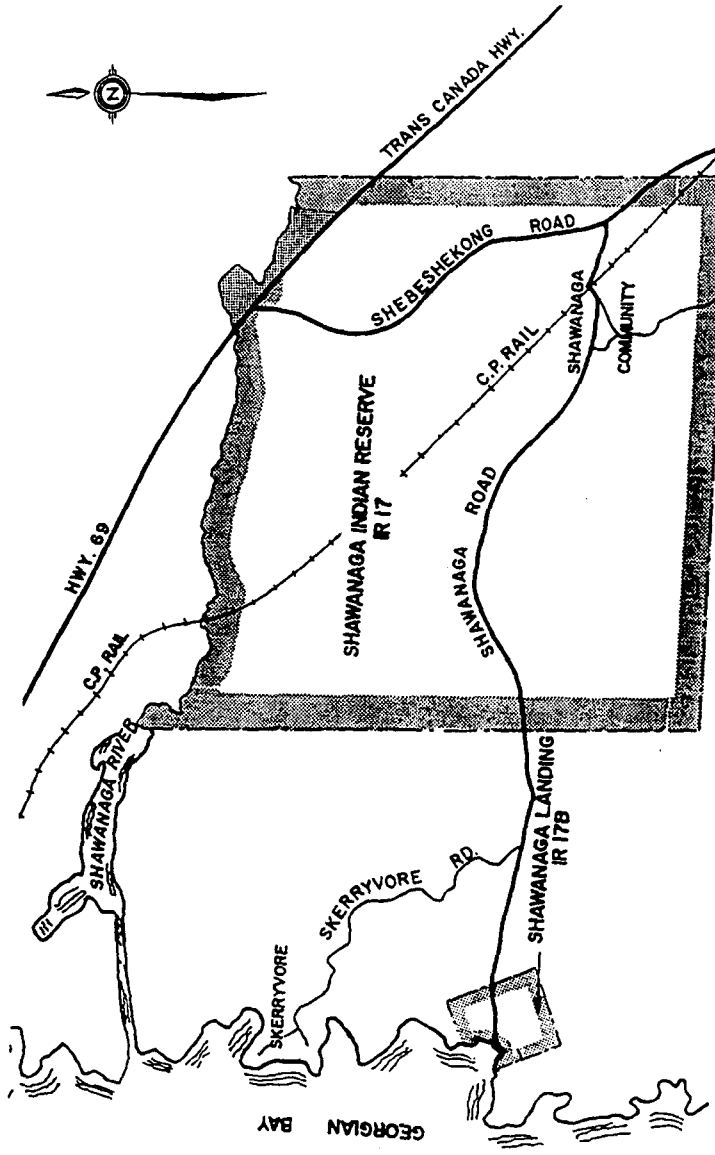
31 See the decision of Blair J.A. in *R.* v. *Agawa*, [1988] 3 C.N.L.R. 73 (Ont. C.A.) regarding "sharp dealing" by representatives of the Crown.

32 See R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53(2) Sask. L. Rev. 301 and W.A. McTavish, "Fiduciary Duties of the Crown in the Right of Ontario" (1991) 25 L.S.U.C. Gaz. 181.

33 *Supra* note 25 at 1110. It was in this spirit that the Ontario Court of Appeal recalled "the well established principle of interpretation that 'treaties and statutes relating to Indians should be construed liberally and doubtful expressions resolved in favour of the Indians' so that the terms are understood 'in the sense in which they would naturally be understood by the Indians.' " *Supra* note 1 at 299 citing *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29 at 36; *Simon* v. *R.*, *supra* note 28 at 402; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1031. Having recalled the principle, the Court rejected the "fine distinction urged by the Attorney General for Ontario between the dedication of a road and the 'alienation' or 'disposition' of property in the soil".



SHAWANAGA INDIAN RESERVE
TOWNSHIP OF THE ARCHIPELAGO
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