Complex Research, Simple Answers: Puzzling out Mineral Ownership on the Mnjikaning (Rama) Indian Reserve

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Abstract:

An analysis of Crown reservations of gold and silver in patented lands, of re-purchases and reconsolidation of patented land by the Crown, of establishing Reserves in the absence of formal documents and of three case studies suggests that the Rama Indian Reserve includes minerals. The Reserve parcel, therefore, has three-dimensions. Further research would not, however, go amiss.

Introduction:

Determining mineral ownership is a tricky endeavor. The starting point since at least the 13th century has been the *cujus est solum, ejus est usque ad coelum et ad inferos* doctrine, or as it is more popularly known, the carrot or snow-cone doctrine (property extends below to the centre of the earth, and above to the heavens). As ancient (and overly Latin) as the *cuius est solum* doctrine is, it is still accepted today. In 2009, the Supreme Court of Canada observed that the doctrine defined trespassing and informed privacy;[2] in 2010, the UK Supreme Court affirmed that the doctrine "still has value in English law as encapsulating, in simple language, a proposition of law which has commanded general acceptance".[3]

While our proverbial carrot doctrine is our starting point, it is by no means the ending point. The doctrine has been discredited for being "imprecise and…mainly serviceable as dispensing with analysis"[4] and "a colourful and fanciful phrase of limited validity."[5] As but three examples: 1) air space rights stretching to the heavens were regarded as absurd beginning with the first hot-air balloon flight in 1783[6]; 2) precious minerals (gold and silver) have always been considered reserved to the Crown unless specifically granted;[7] and 3) in 2010 the Province of Alberta passed the *Carbon Capture and Storage Statutes Amendment Act* which declared that the pore space[8] "is vested in and is the property of the Crown".

Indeed, mineral rights can be alienated from surface land owners in a variety of ways. Such alienations are common in Canada. All of this points to the need for specific research to determine mineral ownership. The Mnjikaning (Rama) Reserve of the Chippewas of the Rama First Nation provides an excellent case study of the complexities and value of mineral ownership research, demonstrating that a parcel is not necessarily merely a two-dimensional polygon, bereft of depth.

Chippewas of Rama – a very brief early history

In the late 1700s to early 1800s, the three Ojibwa bands occupied the lands on the shores of Lake Simcoe and Huron. In particular:

1) Yellowhead Band – "lived mainly near the Narrows between Lakes Simcoe and Couchiching"
2) Snake Band– "resided mainly at Holland Landing and on Snake Island"

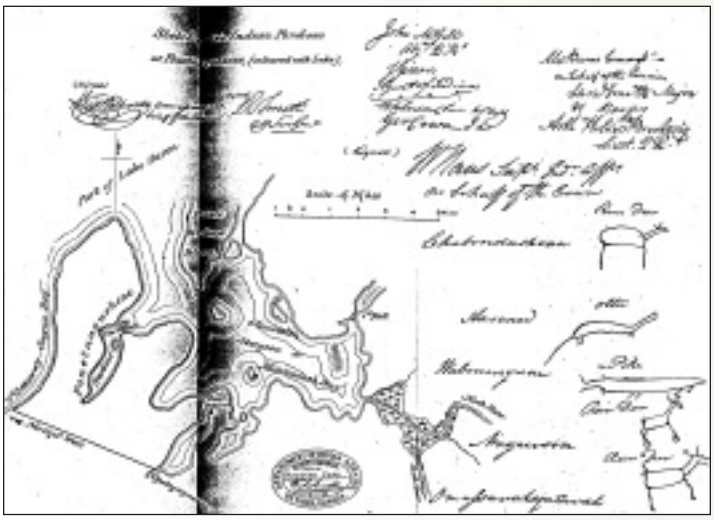

Figure 1 – Map of the 1798 Treaty (Penetanguishene Bay purchase) that surrendered part of the traditional hunting territories of the three Ojibwa bands

[1] This paper does not necessarily reflect the views of the Government of Canada
[2] *R v. Patrick*, 2009 SCC 17.
[3] *Star Energy Weald Basin Limited v. Bocardo SA* [2010] UKSC 35
[4] *Commissioner for Railways v Valuer-General* [1974] AC 325.
[5] Ziff, quoted in *R v. Patrick*, 2009 SCC 17, at para 44.
[6] Banner. 2008. *Who owns the sky? The struggle to control airpace from the Wright brothers on.* Harvard University Press
[7] Rogers. 2010. *Subsurface south of 60* in Ballantyne (ed), *Surveys Parcels and Tenure on Canada Lands.* Government of Canada
[8] Pore space is the tiny fissures between rocks in the subsurface. Apparently such fissures have the potential to hold massive amounts of CO^2

3) Aisance Band– "were settled at Coldwater, near Penetanguishene"[9]

The traditional hunting territories of all three bands ranged from "the Georgian Bay Islands, the Muskokas, the Haliburton Highlands, and south of Lake Simcoe seasonally"[10]. Much of this land was ceded in the Upper Canada treaties. Most notably in 1798, 1805 and 1818.[11]

In 1830, the Lieutenant Governor of Upper Canada (Sir John Colborne) attempted to create a farming community for all three bands and established the 10,000 acre Coldwater Narrows Reserve. The Yellowhead and Snake bands settled in a village near the Narrows on Lake Simcoe, while the Aisance Band settled at Coldwater near Lake Huron. All three bands constructed a road between the two settlements (today this road is Ontario Highway 12). The road and the population explosion in Ontario at the time brought a lot of settler interest in the Coldwater Narrows area. In 1836, under very dubious circumstances, the Coldwater Narrows Reserve was surrendered.[12]

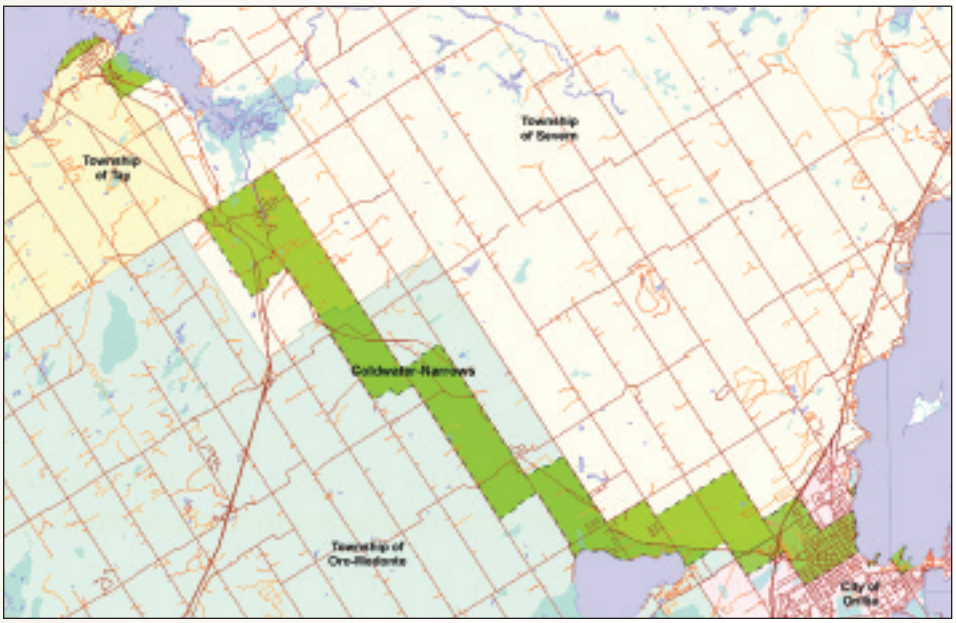

Figure 2 – Map of the Coldwater Narrows Reserve (green)

Now absent of land, the Yellowhead band proposed the purchase of 1000 acres of land on the east side of Lake Simcoe in the Rama Township. Permission to purchase was approved by Order-in-Council in 1838.

The Rama Purchase

Chief Yellowhead signed a requisition for money to be taken from the Chippewa Tri-Council annuity fund in late 1838 to enable the "Chief Superintendent of Indian Affairs

Date			Cr. Sterling 4/4 per Doll.	Halifax Currency.
1838				
Dec. 22	By Cash	S. P. Jarvis, Ch.S.I.A. to pay part of the price of 1621 Acres, purchased for the Tribe.....	666.13.4	800.0.0.

Figure 3 – Extract of the Chippewa Tri-Council Annuity funds in 1838

(Samuel Jarvis) to pay for Certain Lands purchased in the Township of Rama".[13]

Samuel Jarvis purchased various parcels of patented land from 1838-1848. All the patents purchased contained the reservation to the Crown of precious minerals (gold and silver) and white pine trees. The patents, however, were conveyed to "her majesty Queen Victoria". By purchasing the patents, all the minerals were reconsolidated into a single estate. Or in other words, the Crown had full title to all minerals in the Rama purchase area.

Creating the Mnjikaning (Rama) Reserve

Indian Reserves can come into being through a variety of methods. By far the most common Reserve creation methods in Ontario are through Treaty or Executive Order (order in council). The Rama Reserve, however, has no clear document that sets aside the purchased lands as a Reserve. This omission was recognized by Aboriginal Affairs and Northern Development Canada (AANDC) in 1965, when a Ministerial Order was passed recommending that the Rama Reserve be formally recognized. There is no record of this recommendation ever being acted upon.

This leaves us in a bit of a quandary because, generally speaking, determining mineral ownership hinges on assessing the intent of the original documents.[14] Lacking any original documents, the best alternative is an assessment of comparable documents of the same time period. To do this comparison, a reasonably accurate Reserve creation time period for Rama is required.

The *Ross River* case[15] defines the criteria for how a Reserve can exist without any formal document setting the land aside. The relevant principles for Reserve creation are:

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[9] Indian Claims Commission. *Chippewa Tri-Council Inquiry.* pg 7. March 2003.
[10] Wesley-Equimaux. *The Coldwater-Narrows Reservation.* Report for the Chippewa Tri-Council. pg. vii. October 1991.
[11] Surtees. Indian Land Surrenders in Ontario 1763-1867. AANDC. 1984.
[12] The validity of the surrender was the subject of a Specific Land Claim. A settlement was reached in 2012 that included $307 million in financial compensation.
[13] Indian Claims Commission. Chippewa Tri-Council Coldwater Narrows Claim. Pg. 405. 1996
[14] Bartlett. Mineral Rights on Indian Reserves in Ontario. *The Canadian Journal of Native Studies.* III, 2. pg. 245-275. 1983
[15] *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816, 2002 SCC 54

Figure 4 – Excerpt from Plan B495A, showing some of the purchased land in the Rama Township (1877)

1) Crown must have the intention to create a reserve;
2) That intention must be possessed by Crown agents holding sufficient authority to bind the Crown;
3) Steps must be taken in order to set land apart for the benefit of a band, i.e. Order in Council (OIC); and
4) The band itself must accept the setting apart and to begin to make use of those lands.[16]

The best available evidence for evaluating the Rama Reserve against the *Ross River* principles is as follows:

1) The Crown's intent to create a reserve is reflected in the 1838 OIC which recommended purchasing 1000 acres of land in the Township of Rama for the "Principal Chief and his followers".
2) The agent who did the purchasing was Samuel Jarvis, the Superintendent of Indian Affairs (or his delegate) - who had sufficient authority to bind the Crown.
3) The purchases of the patented land were made for "the express use and enjoyment of the Tribe of Chippewa Indians of Lakes Huron and Simcoe…". This language suggests that steps were taken to set the land aside for the benefit of the band.
4) The funds that purchased the patents at Rama came out of the Tri-Chippewa Council's own funds. They also settled the lands at Rama immediately after the purchase (having recently surrendered the land at Coldwater-Narrows). Both of these facts speak to the Bands explicit acceptance of the lands being set apart as a Reserve.

Given all of this, it is reasonable to assume that the Rama Reserve was created sometime between the initial purchase and the first transactions being made in the Indian Lands Registry. This would place the Rama Reserve creation date sometime between 1838 (purchase) and 1873 (first transactions). With this Reserve creation date established, we can now attempt to establish what the intent of the Crown was during this same time period with regards to mineral rights.

Establishing the Mineral Link - Comparable Circumstances:

Three comparable situations are relevant for evaluating the extent of minerals at the Rama Reserve:

<u>Mineral Comparison #1 - The Robinson-Huron and Robinson-Superior Treaties (1850)</u>

- The Robinson treaties were established as a "consequence of the discovery of minerals on the shores of Lake Huron and Superior".[17]
- Explicit reference to mineral rights was included: "Should the said Chiefs…at any time desire to dispose…of **any mineral or other valuable production thereon**, the same will be sold or leased at their request"[18] (my emphasis).

Conclusion: Reserves created pursuant to the Robinson treaties contained all minerals (including gold and silver). Given the proximity, both geographically and chronologically, to the Rama Reserve this comparison should be considered a strong one.

<u>Mineral Comparison #2 – Treaty 3 (1873)</u>

- There is no explicit mention in Treaty 3 of mineral rights to Reserves;
- The minutes of the treaty negotiations, however, contained explicit promises: "if **any important minerals** are discovered on any of their reserves the minerals will be sold for their benefit with their consent"[19] (my emphasis);
- The promises in the treaty negotiations have been found to be binding, even if they are omitted from the final written treaty;[20]
- In 1873, however, Canada did not have possession of the lands or minerals to grant to Reserves in Treaty 3;[21]

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[16] These principles were invoked in *Wewaykum Indian Band v. Canada*, 2002 SCC 79.
[17] Morris. *The Treaties of Canada with Indians of Manitoba and the North-west Territories.* pg. 16. 1880
[18] Robinson Treaty with the Ojibeway Indians of Lake Huron. pg. 3. 1964 (copy).
[19] Morris. *The Treaties of Canada with Indians of Manitoba and the North-west Territories.* pg. 70. 1880
[20] *R v. Taylor and Williams* (1981), 62 C.C.C. (2d) 228 (Ont C.A.)
[21] *St. Catherines Milling and Lumber Co. v. The Queen* (1889) 14 A.C. 46 (JCPC)

- The ownership of minerals would have transferred to Ontario at Confederation pursuant to section 109 of the *British North America Act:* "All lands, mines, minerals, and royalties…shall belong to the several provinces of Ontario, Quebec…";
- In 1894, Canada and Ontario came to agreement with regards to Treaty 3.[22]

Conclusion: All Reserves created via Treaty 3 should include all minerals (including gold and silver). Further, the two other numbered Treaties that cover Ontario - Treaty 5 (1875) and Treaty 9 (1909) - are nearly verbatim to Treaty 3, so the same mineral analysis applies.

Although Treaty 3 is separated somewhat in time and space from the Rama Reserve it is still a valid comparison as it corroborates the intent of the Crown (from the Robinson Treaties) to include all minerals in Reserves, and establishes a pattern of what would likely be granted to the Rama Reserve.

Mineral Comparison #3 – *Indian Act* (1876) & numbered Treaties across the Prairies (1870-1930)

- The original Indian Act had a very explicit definition of a Reserve that included "all the trees, wood, timber, soil, stone, **minerals, metals, or other valuables** thereon or therein" (my emphasis).[23] This definition remained until 1951.
- The numbered treaties across the prairies make no reference to minerals despite the fact that the Robinson treaties "shaped the course" of the numbered treaties development.[24]
- Canada retained full ownership of all lands and resources across the prairies (even after the Prairie Provinces entered confederation) until the Natural Resources Transfer Agreements in 1930.

Conclusion: Based on the explicit definition of a Reserve from the original *Indian Act* and that Canada had full ability to grant such rights until 1930, Reserves established pursuant to the numbered treaties across the Prairies (prior to 1930) have all minerals (including gold and silver).

Both the original *Indian Act* and the numbered treaties across the prairies are separated even further in time and space from the Rama Reserve. The comparison, however, is still a valid one. As in Treaty 3, this example further corroborates the intent of the Crown (3 separate examples now) and establishes a concrete pattern for minerals being granted at the Rama Reserve.

Conclusions

This research leads to the conclusion that all mineral rights belong to the Rama Reserve. However, this is not to suggest that further research should be spurned. The following questions should guide such inquiry:

1. What did the negotiations around the 1923 Williams Treaty say about minerals? Although the Treaty appears to be silent as to gold and silver, the negotiations surrounding the Treaty might shed some light on the question of gold and silver intentions, either among the three parties, or between the two Crowns.
2. What is Canada's position about minerals in the William Treaty area in general and at Rama IR in particular? Are AANDC research reports instructive as to Canada's implicit or explicit policy?
3. What is Ontario's position as to minerals in the Williams Treaty area in general and at Rama IR in particular? That is, has the province conceded – implicitly or explicitly – that minerals vest in the Reserve?
4. Are there principles or findings about minerals for other Reserves in the Williams Treaty area that are useful?

[22] *Agreement with respect to lands encompassed by Treaty 3.* S.O. 1894, s. 4, Vic, c. 3
[23] *Indian Act.* S.C. 1876, c. 18
[24] Morris. 1880

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