

**THE SURVIVAL OF NATIVE TERRITORIAL SOVEREIGNTY  
IN CANADIAN LAND CLAIMS LAW:  
Acknowledging an Historical Fact**

**By**

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## Summary

The thesis of this dissertation is that the sovereignty of Natives over their ancestral lands not transferred by treaty or conquest was always recognized by the various colonial Powers who successively claimed Canada. Moreover, it is suggested that recognition of the continued existence of Native territorial sovereignty has not been judicially foreclosed by Canada's highest court.

As argued for in this dissertation, Native sovereignty refers to a right of self-determination of an Indian people which is equal to that of any of the "civilized" nations of Europe who came to Canada in terms of the fullest control over itself, its laws, customs and constitution and, most importantly for present purposes, its territory, with the sole limitation, unique to Native societies in colonized territories, that while other nations may cede their sovereignty, or any aspect of that sovereignty, to whomever they chose, sovereign Indian nations may only do so in favour of the "colonial Power" who first "discovered" the particular territory, and so gained an exclusive sphere of influence there, or in favour of that Power's successor in right.

The focus of the paper is legal. The aim is to prove the maintainability at law, and specifically at *Canadian* law, of Native territorial sovereignty. But, beyond the very general parameters given in the preceding paragraph, the paper does not attempt to describe the qualities this legal sovereignty possesses. Thus, proving the legal existence of Native sovereignty, without defining it further than described above, is the study's purpose. Definition in detail must await other studies or judicial determination. Moreover, because the focus is legal, the study does not concern itself with the political aspects which would come into play upon the judicial recognition of Native territorial sovereignty at Canadian law.

To prove the thesis, the study takes a primarily historical perspective in determining what was the law of the various Powers at the relevant time as concerns the status of indigenous populations and their territories in newly discovered lands. Sometimes, as in the case of England which had generated jurisprudence on "colonial law", the relevant law can be distilled from existing legal precedent rendered contemporaneously with the Power's colonial activities. But, principally, the law of a particular Power will be determined by its own practice. Thus, the paper largely concerns itself with the practice of individual colonial Powers.

However, international legal norms are also relevant, both because these largely helped mould the internal laws of the various Powers regarding the acquisition of sovereignty to new territories and because municipal courts, in Canada at least, would look to international law to help clarify ambiguities in municipal law. Therefore, the dissertation begins, in chapter two, by examining international law. This law, too, is principally determined by the practice of States, but only to the extent that a practice is sufficiently uniform among States. But since practice is examined in later chapters in the context of the law applied by individual Powers, chapter two looks instead at other sources for determining the content of international law. These are primarily scholarly writings of the period and diplomatic statements made by the Powers themselves in the course of territorial disputes. The paper treats the rules revealed by such evidence as those to which the various Powers at least professed to adhere. It is concluded that the Powers all at least professed to respect the territorial sovereignty of the indigenous peoples of the Americas by accepting that their lands could only be brought under colonial sovereignty by either conquest or cession from the Natives. This applied no matter how "primitive" the culture, in exactly the same way as applied between the "civilized" States of Europe.

Chapters three, four and five then look at the practices, respectively, of Spain and Portugal, of France and of England as the principal Powers involved in the colonial history of Canada. This examination is necessary as the main element of proof of the content of Canadian municipal law, which is the central question with which a Canadian court would be concerned. Coincidentally, if this practice is sufficiently uniform between States, this would confirm the content of international law. These chapters reveal that each of the Powers studied in fact did respect the acquisitorial rules they themselves espoused. Each consistently recognized that Native societies were sovereign and that their territories could only be acquired by conquest or cession.

In chapter six, the study turns to the judicial arena and examines Canadian caselaw, and its American influences. It also engages in a comparative review of the caselaw in Australia and New Zealand. It is concluded that the question of the survival of Native sovereignty has never been judicially determined in Canada and remains open. Moreover, while courts in the United States and Australia have to a certain extent considered the issue, the bases they give for rejecting Native sovereignty are flawed in important respects. Because of the existence in New Zealand of the *Treaty of Waitangi*, that country's caselaw is concluded to be of little help in determining the issue of Native sovereignty.

Finally, having established that Native sovereignty is at least theoretically part of the law Canada inherited and that the issue has not been judicially foreclosed, chapter seven examines the treaty and comprehensive land claims agreement processes in Canada to show that the issue is indeed more than theoretical; it has a real sphere of application, namely vast parts of the country which were occupied by Indians at the time of European contact, remain so today,

and are not yet under treaty. These areas constitute territories over which Canadian sovereignty has wrongly been assumed to have extended and which potentially could be lost to Canada if not soon secured by treaty.

The general findings are summarized in the concluding chapter.

## **Acknowledgements**

I wish to express my gratitude to my thesis supervisor, Professor William F. Pentney, for his valuable advice and criticisms as well as to Dr. Peter Finkle for his kindness in providing very useful comments on early draft of this work. I am grateful as well to Mr. Dennis Madill and Ms. Cathy Hansen of the federal Department of Indian Affairs and Northern Development for providing me with much of the materials which were utilized in drafting the chapter on Canada's treaty process. Lastly, but certainly not least, I wish to express my unending thanks to Catherine Youssef, my wife and best friend, without whose tireless encouragement, support and assistance in typing and re-typing this manuscript the final product would not have the polished look that it does. If the substance is not as polished as the form, the fault is of course entirely my own and no one else's.

## **Dedication**

To Cathy...love, always and forever.

## **Editorial Note**

The paper makes extensive use of lengthy footnotes either to provide material substantiating a point made in the main text or to elaborate upon matters noted therein. The intent is to avoid distractions from the thesis sustained in the dissertation by not cluttering the main text with such extraneous, though important, material. However, this style, unfortunately but unavoidably, makes for a more complicated read than would otherwise be the case if the footnoted material were omitted entirely. On the other hand, its inclusion greatly reduces the need for the reader himself or herself having to seek verification from the supporting materials. Research for this study is current to January 1994.

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## INTRODUCTORY CHAPTER

Modern Canadian jurisprudence is not wanting for judicial decisions recognizing that many of Canada's First Peoples<sup>1</sup> retain a territorial interest to vast portions of Canadian territory. Such rulings are usually founded either on the basis of a specifically decreed, legislated or negotiated "grant" from the "white man" (a "treaty right") or on the basis of what has come to be called a "common law aboriginal title". Both of these bases effectively recognize the acquisition by the white man of the ultimate dominion, or sovereignty, over the land concerned and see the Indian interest as merely constituting a burden on the ultimate interest of the colonial Sovereign. Nevertheless, common law aboriginal title is a distinguishable concept in that, unlike the other class of Native land interest just noted, it is not seen as *emanating from or created by* the white Sovereign but rather as *surviving the advent of* white sovereignty.<sup>2</sup> Essentially, the court decisions which are based on common law aboriginal title recognize that the new Sovereign always had refused to deal with the land in any way, such as by issuing grants to settlers, unless the *pre-existing* Indian right was first extinguished, which could be done by unilateral enactment, force or peaceful surrender. The salient feature of common law aboriginal title for the purposes of this dissertation, however, is that under this doctrine sovereignty somehow passed from the

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<sup>1</sup> In this paper, the terms "First Peoples", "Natives", "Indians", "Amerindians", "aboriginal peoples" and "indigenous populations" will be used interchangeably and will refer to Indians and Eskimos (or Inuit Peoples) alike.

<sup>2</sup> In this dissertation the term "common law aboriginal title" will be used to refer both to the territorial interest properly known by that nomenclature and to the conceptually distinct notion of aboriginal "customary title". The principal distinction between common law aboriginal title and customary title is that the latter stems from a territorial right existing in a native legal system which is recognized by the new Sovereign as subsisting, while the former refers to a territorial right which the common law, and particularly the common law of property, ascribes to the natives by virtue of their possession of the soil at the moment of the introduction of the common law. For more on these two distinct concepts, the interested reader is referred to McNeil, K., *Common Law Aboriginal Title*, Oxford, Clarendon Press, 1989 [hereinafter cited as McNeil], which excellently explores both notions.

However, since both common law aboriginal title and customary title refer to aboriginal territorial rights *existing as a burden upon the sovereignty of a colonizing nation*, and so a loss of Native sovereignty is implicit therein, simplicity permits the confusion of the two notions under one name in order to juxtapose both to the higher right of aboriginal territorial sovereignty, the proof of which is the thesis of this study.

Indians to the white man or, alternatively, was claimed by the latter since the Indian was said to be incapable of possessing the land as a Sovereign.

While common law aboriginal title is often the cited rationale behind judicial pronouncements favourable to aboriginal claimants such that these decisions imply the existence of white sovereignty over the Indians, the basis upon which Native sovereignty was lost is not always clearly stated. But, it will be argued here, the evidentiary basis used by the courts to support findings of common law aboriginal title is often equally consistent with a finding that North America's original inhabitants were recognized, by the colonial Powers who settled the continent, to have originally held the land as sovereign peoples and to retain that status until freely relinquished or lost by force. If so, at least two questions beg asking: Could a court recognize the possibility of Native sovereignty? If so, does there exist any portion of territory thought to be part of Canada but which is actually beyond Canada's jurisdiction, in a technical legal sense, for having historically belonged to a sovereign Native entity and never having passed to a colonial or Canadian Sovereign?

Canadian courts have not generally been asked to consider the issue of the survival of Native territorial sovereignty. In fact, it will be seen (in chapter six) that most cases brought before Canada's appellate courts have usually been framed by the particular Indian claimants involved in the case so as to accept the loss of sovereignty and rely instead on the doctrine of common law aboriginal title or some statute, royal decree or treaty as a basis of land rights which are acknowledged by the claimants to be held *under the authority of the colonial Sovereign* by reason of their survival or creation after the advent of colonial sovereignty. Such cases, consequently, are not conclusive of the issue of Native sovereignty. The survival of Native territorial sovereignty, therefore, remains a theoretical possibility.

It is proposed to study this issue here. The premise of this dissertation is that Native territorial sovereignty was and is a part of Canadian native land claims law which remains to be "uncovered" by Canadian courts and potentially applies to important parts of Canadian territory; principally in British Columbia, Quebec and Labrador, but possibly also in other smaller areas. And, it will be argued, the Canadian judiciary, faced with compelling evidence to this effect accumulated by various scholars as well as with a virtual lack of judicial pronouncements squarely dealing with the issue of Native sovereignty both here and in other selected countries, may be compelled to recognize this concept in Canadian law should an appropriately framed case arise.

The impact such a finding would have is significant. It is certain that authorities in the Department of Indian Affairs and Northern Development would not find their task of treaty and comprehensive land claims negotiations thereby facilitated. At a minimum, a finding that some Native bands retain a claim of sovereignty over an identified territory would significantly enhance those groups' bargaining power when negotiating to secure greater self-determination and control over resources for the purpose of revenue generation *within* the Canadian federation since they could offer in exchange a cession to Canada of that sovereignty. At the other extreme, those groups would be empowered to consider the territory as outside of, and autonomous from, Canada.<sup>3</sup>

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<sup>3</sup> For instance, during the debate over the failed "Meech Lake" constitutional accord, when Quebec's separation from Canada was a real possibility (as it remains today, in fact), it was reported that Chief Billy Diamond of the Cree of northern Quebec, who have an outstanding territorial claim to vast portions of that area of the province, had suggested that his people, and not Quebec, own the land to which their claim applies:

He [i.e. Chief Diamond] says Robert Bourassa is going to be in for a shock when the time comes for Quebec to sit down and list its assets before heading into the divorce proceedings.

"Quebec is going to discover it does not own two-thirds of its province."

...

And they feel that they would have an excellent case in arguing that the separation of Quebec would automatically annul the 1975 James Bay and Northern Quebec Agreement.

(continued...)

Is it possible that Native territorial sovereignty survives as part of Canadian native land claims law? Or is there evidence that Canada (by its own post-Confederation actions or through England or one of its colonial predecessors) acquired ultimate dominion over all of Canadian soil through some means? If Native sovereignty was lost, how? These are the questions to be examined here.

But, before proceeding any further, it is appropriate now to explain what is meant by the concept of "Native sovereignty". As argued for in this paper, Native sovereignty refers to the right of an indigenous Canadian population to have the fullest possible control over itself, its laws, customs and constitution and, most importantly for present purposes, over its territory. In this sense, the sovereignty of an Indian "nation" is equal to that of any of the "civilized" nations of Europe who came to Canada. But Native sovereignty, as conceived of herein, does admit of one limitation not imposed on other sovereign States. It is that the usual power of a sovereign nation to cede its rights, including rights of sovereignty, to whatever other Sovereign it chooses is, in the case of a sovereign Native group, restricted by the rule that these rights can only be surrendered to the "colonial Power" who first "discovered" the particular territory or to the successor of that Power. Thus, to borrow the words of Mr. Justice Chapman in the leading New Zealand case of *The Queen v. Symonds*<sup>4</sup> (though he was referring to the lesser right commonly known today as common law aboriginal title), Native sovereignty as here intended implies "a

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<sup>3</sup>(...continued)

"Don't forget," Diamond says, "the Crees signed a constitutional agreement with Canada and with a Quebec that existed within Canada. We did not sign anything with an independent Quebec.

"The Crees could end up with control of all of Northern Quebec out of this."

From: MacGregor, R., "Angry Cree Pose Threat to Hydro Dams and Sovereignty Plans", *The Ottawa Citizen*, February 8, 1991, p. A2. Since the election of the Parti Québécois government in Quebec in 1994, the Cree have repeated this position on numerous occasions.

<sup>4</sup> *The Queen (on the prosecution of C. H. McIntosh) v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.), at p. 391.

modified dominion as residing in the natives". It implies, to again use the words of a judge in another foreign adjudication, "a 'maximization' of the native interest and a 'minimization' of the [discovering Power's] interest".<sup>5</sup>

Moreover, Native sovereignty is more than what is understood by the term "Native self-government". This latter concept consists of an inherent right of self-determination of Indian nations *within* Canada and *subject to* the ultimate Canadian sovereignty. It, along with other inherent "aboriginal rights", including the inherent right to common law aboriginal title, qualify the Crown's sovereignty.<sup>6</sup> Native sovereignty, on the other hand, goes further. To re-iterate clearly, it is contended that certain portions of territory thought to be part of Canada *are* actually outside of Canada because certain Native groups retain full sovereign power over these territories.

This is a startling proposition to be sure. But it is one the accuracy of which, it is hoped, the reader will be convinced at the conclusion of this argument. Moreover, it is a perhaps less alarming proposition considering that, as will be seen in chapter seven, the vast majority of the country has been brought under Canadian sovereignty through the treaty and comprehensive land claims processes, and the areas that remain "unsurrendered" are currently under negotiation. Indeed, as alluded to above, many aboriginal groups may prefer to formally join the Canadian family in exchange for greater "self-government" rights within it. In this case, the theoretical survival of their sovereignty would provide an added bargaining chip in their negotiations. But the possibility remains that certain groups, such as the Mohawks of

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<sup>5</sup> From *Milirpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia* (1971), 17 F.L.R. 141; [1972-73] A.L.R. 65 (N.T.S.C.), at p. 238 (F.L.R.), where Blackburn J. was commenting upon the views of Chapman J. in the New Zealand case of *The Queen v. Symonds*, *ibid.*.

<sup>6</sup> See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, Canada Communication Group, Ottawa, 1993.

Ackwesasne who have often denied being part of Canada and subject to its laws, may wish to exercise their unsundered sovereignty and formally declare independence.

As stated, then, it is the premise of this dissertation that Native sovereignty does survive with respect to certain parts of Canadian territory. To prove the point it will be necessary to take an historical perspective. In other words, it will be necessary to establish the original recognition by the colonial Powers that Indians were sovereign peoples from whom dominion over the land had to be obtained in some overt fashion before European sovereignty thereon could be claimed. Only if the Indians were sovereign to begin with could the issue of the *survival* of that sovereignty present itself. It will be necessary, consequently, to deal with the contention that the same rules applied for the acquisition of European sovereignty over a Canada inhabited by Indians than would have applied if it were an uninhabited country. If the initial sovereignty of the Indians can be established, it will also be necessary to consider whether the original recognition of Indian sovereignty was conceptually maintained through the years and through the successive colonial Powers who claimed Canadian soil at different times, so as to conclude that it survives today. Finally, it will be necessary to determine whether that sovereignty was not bargained away or otherwise lost in any area of the country.

The focus of this paper will at all times be on whether a claim to Native territorial sovereignty could be maintained as surviving at *Canadian law* and could be maintained in *Canadian courts*. While it is believed that those aboriginal "nations" who never surrendered their ancestral lands nor had ever suffered the conquest of their lands might maintain a claim to sovereignty before, or at least seek the "advisory opinion" of, international adjudicatory bodies

(perhaps even on a unilateral basis), as was done in the *Western Sahara* case,<sup>7</sup> the purpose of this study is instead to examine the maintainability of such a claim within the Canadian judicial system.

It might seem paradoxical, therefore, that this dissertation begins, in chapter two, with a study of the historical as well as modern rules of territorial acquisition *at international law*. But, given that no colonial Power developed its own internal law as concerns territorial acquisitions in a vacuum, but rather was influenced in this regard by the positions taken in disputes amongst themselves, and that these positions, in turn, were often influenced by the opinions of contemporary scholars of international law, the study of the relevant norms at international law are ultimately relevant in providing context to the internal laws of a country. International law is relevant, moreover, because while a country's municipal courts are generally unconcerned with the dictates of international law and are bound to apply only their own country's law, such courts can and do refer to international law to clarify any ambiguities in the municipal law. Where a municipal rule is clear, resort to international law is not permitted. But where the municipal rule is open to interpretation, the court will choose the meaning which most conforms to international law on the premise that a country would not easily breach its international obligations.

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<sup>7</sup> *Advisory Opinion on Western Sahara*, [1975] I.C.J. Reports 12 (Int'l Ct. of Justice). In this case, the General Assembly of the United Nations had posed certain questions to the International Court of Justice, the answer to which would assist the General Assembly in adopting a policy on the "decolonization" of Western Sahara. As part of the case, Morocco claimed that, at the time of the colonization of Western Sahara by Spain, Western Sahara had been under the sovereignty of the Sultan of the Kingdom of Morocco. A finding in its favour, Morocco believed, would force the adoption of a policy for decolonization which would require the re-integration of Western Sahara into the Moroccan State. The Court rejected the contention of Morocco as to ties of sovereignty to Western Sahara and based its rejection on an evidentiary basis rather than on a jurisdictional basis.

Thus, there is some cause to think that the advisory jurisdiction of the International Court of Justice might be invoked by Canada's Native groups. But the analysis presented in this note is necessarily preliminary and there may be jurisdictional impediments to such a course. (For example, there is the question of standing to bring the claim. Indeed, as to the request by the General Assembly for an advisory opinion despite the lack of consent of an interested party, Spain, see pages 13-20.) The study of the viability of proceeding in an international arena would itself be lengthy and is not attempted here since the focus of the dissertation is on adjudication within the Canadian system.

The study of the international law of territorial acquisition, then, is undertaken in chapter two. This chapter reviews the relevant rules of international law which prevailed between the colonial Powers themselves concerning the acquisition of sovereignty over both *each other's* territories and newly discovered lands, whether inhabited by Indians or not, in the sixteenth to eighteenth centuries (being the period during which North America's colonial period was at its zenith). The chapter also examines the evolution of international law in this regard through the centuries.

International law, as it existed from time to time, can be gleaned from various sources. Notably, these are the juristic opinions through the ages, international conventions, national laws which received international recognition, statements made in the course of diplomatic exchanges between colonial Powers and, most importantly, evidence of a practice uniformly adopted by the colonial Powers *vis-à-vis* the Indians and their lands. However, for reasons explained in the conclusion to chapter two, it is useful to consider States' practices separately. Thus, chapter two will consider international legal doctrine concerning the acquisition of sovereignty over territory strictly from the point of view of *the rules evinced by sources other than State practice*. And, it is proposed to consider the rules so deduced merely as being those *professed to be accepted* by the colonial Powers through the ages. Then, chapters three to five will be devoted to considering whether the Powers did (as some have argued) in their practice contradict their professed international rules of territorial acquisition.

What will emerge in chapter two as to the rules professed by the Powers to constitute rules of international obligation is that in the fifteenth to seventeenth centuries juristic opinions and diplomatic exchanges evince a professed doctrine which recognizes the initial sovereignty of indigenous peoples so that the dominion over their lands was considered obtainable only by

the adherence to certain principles. And it will further be seen that, contrary to the opinion of some scholars, the evidence from similar sources in subsequent centuries is consistent with the continued maintenance of such doctrinal recognition and requirements for the acquisition of sovereignty. The Spanish, Portuguese, French and English being the most important colonial Powers as concerns North America, the evidence from these countries will principally be featured, though similar evidence of the *professed* doctrine of other countries is occasionally noted.

As stated, the next phase of the study is that of considering whether the *practice* actually followed by a preponderance of colonial Powers through the years confirms or contradicts the conclusions regarding acquisitorial rules of international law revealed from the other sources discussed in chapter two. Consideration of the various States' practices also marks the commencement of this paper's consideration of the municipal laws of territorial acquisition in the various Powers, which is what is most relevant to determining the genesis of modern Canadian law on the topic of this paper. The practices of the Spanish, Portuguese, French and English will be the only ones examined in any detail for the same reason as noted in the preceding paragraph.<sup>8</sup> The practices of the Spanish and Portuguese form the topic of chapter three; that of the French is considered in chapter four; and that of the English, by far the one covering the longest period of time, is the subject of chapter five. It is necessary to review in proper chronological order the practice of each of the successive colonial Powers since, as the review of accepted international legal doctrine in chapter two will have shown, international law holds that the acts of a previous Power affect the territorial rights existing when a new one is substituted. This is also true, it will be seen, under the municipal law of the various Powers.

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<sup>8</sup> Dutch involvement in North America being of a brief duration and not involving Canadian soil, its practice will not specifically be examined; likewise for Russian practice.

Thus, it is not acceptable to limit the discussion only to the practice of the English as the last colonial Power in Canada.

Much of the documentary evidence reviewed in these chapters will have been similarly analyzed by prominent scholars elsewhere, but from the perspective of proving only the survival of common law aboriginal title. A fresh look at the elements highlighted by these scholars is warranted in order to determine whether the evidence goes further than is suggested by these writings and can actually support the thesis of the survival of Native territorial sovereignty.

What will be demonstrated in chapters three to five is that the practices of European States uniformly *conformed* to the rules of international law otherwise evinced (which, again, will have been seen in chapter two to support the survival of Native sovereignty). This study will also show, more importantly, that on an individual basis the Powers adhered to a municipal law identical to international law.

Having ascertained the practices of each of the colonial Powers concerning Native sovereignty and that these practices conformed to the rules of international law to which each professed to adhere or by which each alleged the others were bound, and having traced these practices and that doctrine through to modern times, the thesis will next consider, in chapter six, the modern judicial pronouncements, both in Canada and elsewhere, to determine what views have been expressed therein concerning Native land rights having regard to the historical evidence. It will be shown that Canadian courts progressively have moved from an initial denial of the survival (or, indeed, pre-existence) at Canadian municipal law of any Native territorial rights whatsoever, unless *created* under specific grant from the colonial Sovereign, to a position recognizing the *survival* of at least a pre-existing common law aboriginal title. It will then be argued that the evidence used by the Canadian courts to support a common law aboriginal title

is equally (and perhaps more) consistent with a finding of Native territorial sovereignty but that these courts have not yet had a clear case in which to consider the issue. It will also be seen that the judicial pronouncements in certain selected jurisdictions outside Canada are equally indeterminate as to the survival of Native sovereignty, though they contain much that is helpful to the present thesis and may in some instances evince a movement towards recognizing the possibility. The review will attempt to show, therefore, that a trend is emerging or is likely to emerge in Canadian law, as a result of the evidence and judicial trends both here and abroad adopting a more enlightened view of colonial history, towards recognizing the possibility of the survival, in some cases, of Native sovereignty. The issue only awaits a case in which it is properly framed.

Finally, chapter seven will give consideration to identifying which portions of Canadian territory are likely to be the subject of an Indian claim of territorial sovereignty. The intent here is not to give a complete and definitive catalogue of such lands. Indeed, this would involve not just the identification of all Native ancestral territories not under treaty to Canada but also the onerous work of reviewing every single treaty in history involving Canadian soil to determine from various analyses whether they import a loss of territorial sovereignty. To answer the questions necessary to such a study of every treaty is a task itself requiring extensive study.<sup>9</sup> It is therefore beyond the scope of this paper. Rather, the aim of chapter seven is primarily to demonstrate that the issue of the survival of Native territorial sovereignty in Canadian native land claims law is not just purely academic, but has real and tangible field of application by reason of the fact that parts of Canada are not subject to any treaties whatsoever and were never

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<sup>9</sup> For instance, such a study would examine issues such as: Does it contain a cession of territorial sovereignty? Over what territory? What was the Indian signatories' understanding of the words? Were all the rightful owners signatories to the particular treaty? Was any of the particular Indian band's territory specifically excepted from the surrender? How does "excepted territory" differ in status from territory surrendered but "reserved" by the colonial grantee for the Natives?

"conquered". Nevertheless, this chapter will also give brief consideration to the elements to be considered when construing existing treaties to determine whether or not they imply a loss of Native sovereignty over the territory of the treaty. This aspect of the chapter will concern the tools used in answering some of the necessary interpretive questions without undertaking the task of applying those tools to each treaty in existence.

General conclusions will round out the study.

**CHAPTER TWO:**  
**INTERNATIONAL LAW**  
**(AS PROFESSED TO BE ACCEPTED BY THE COLONIAL POWERS)**

In this chapter, the precepts of international law regarding the acquisition of sovereignty over territory will be explored. These are the norms which would be applied by international tribunals if asked to adjudicate upon conflicting claims to sovereignty over a particular territory. More importantly for present purposes, these are the norms which influenced the colonial Powers' municipal law of territorial acquisition and to which a Canadian court would look to construe any ambiguities in that municipal law.

The present focus is on international rules which either provide for the *creation* of a new sovereignty in a territory which was previously sovereignless or, what is more usual, provide for a *change or transfer* in sovereignty over a territory from one Sovereign to another. And, since it is possible that the international norms have changed over time, it will be necessary to trace the state of international law from that which was applicable at the time of America's discovery to that which is currently applicable, and any phases in between. It will then be possible to draw some conclusions as to the mode(s) of territorial acquisition under which international law would consider North America to have been appropriated to the sovereignty of any of the colonial Powers; or, if not considered appropriated by any Power under international law, to draw some conclusions as to what are the guidelines for its present-day appropriation.

It is the thesis of this chapter that international law has always recognized, from the earliest relevant period, the initial sovereign status of Canada's Indians. As a consequence, international law held, and still holds, that a *transfer* of sovereignty is required rather than the mere creation of a colonial sovereignty. International law always required that such transfer of

sovereignty occur either with the consent of the local population or through its overt subjugation by hostile means. To put it simply, international law from the colonial period to the present has never accepted the premise that Indian lands could be treated as land belonging to no Sovereign, or *terra nullius* as it is known legally.

Throughout this chapter attempt will be made to show that the particular colonial Powers which successively held pretensions to Canadian territories in fact accepted this legal doctrine as valid, at least to the extent that they professed its dictates to other Powers. Subsequent chapters will then show that these Powers did not just pay lip service to these rules but also applied them to themselves in their own practices.

Before proceeding to the substantive discussion of international law, the embryonic state of international law concepts in the late fifteenth century (when America was discovered) requires that some consideration be given here to identifying the sources which are generally relied upon by modern international bodies in ascertaining the rules of a given era.

With this information, the chapter then turns to an elaboration of the various modes asserted at various times for acquiring sovereignty over territory and the conditions for the applicability of each mode to a given territory. Some of the modes which will be discussed, while receiving a certain level of support by some Powers, in fact never became established rules of international law. Their inclusion in this discussion serves merely to give a complete picture of the debate carried on at various times.

Next, the legal effects of the various modes of acquisition are examined. Of course if, as is posited in this paper, no transfer of sovereignty from Natives to a colonial Power occurred in a given part of Canada then the effects of a change of sovereignty are not directly relevant

for our purposes. But these elements are important nevertheless in that, as will be seen, even when a change of sovereignty has occurred the applicable international law rules continue to reveal a high level of deference to indigenous societies. Moreover, they assist in understanding the concepts of common law aboriginal title and aboriginal self-government which are often claimed in lieu of Native territorial sovereignty.

Finally, specific attention is given to the basic condition applicable to acquisitions effected by "Occupation"; namely, the condition that the territory so acquired have previously belonged to no "State". How was defined, at international law, "lands belonging to no State" is the question examined in this last section of the present chapter.

Armed with this knowledge, it will be possible to better assess the thinking behind the various Powers' own practices which are detailed in subsequent chapters, and so to understand the context in which evolved the municipal laws which will be looked to by a Canadian court.

### **The Sources of International Law**

Ascertaining what were the requirements of international legal doctrine at any given time concerning the acquisition of sovereignty over territory is not always easy. To quote Lindley:

That Law 'rests upon a consensus of civilized States'; but it is only in a few instances, such as in the Final Act of the Berlin Conference [of 1884-85], that the assent of those States has been formally given to particular rules. Hence recourse must be had, as Lord Alverstone, C.J., pointed out in *West Rand Central Gold Mining Co. Ltd. v. The King* [[1905] 2 K.B. 391], to 'evidence of usage to be obtained from the action of nations in similar cases in the course of their history'.<sup>10</sup>

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<sup>10</sup> Lindley, M.F., *The Acquisition and Government of Backward Territory in International Law*, Negro University Press, New York, New York, 1969 (originally published in 1926 by Longmans, Greens and Co., Ltd.), Preface, at pp. vi-vii [hereinafter cited as Lindley].

Thus, the practice of colonial Powers as evinced in historical documents can form a source of proof as to what each of these Powers considered to be the acceptable method(s) of acquiring sovereignty over territory in a given situation. If that practice is sufficiently uniform between States, rules of international law can be derived therefrom. Sometimes the practice is so uniform between States that it can be used as the exclusive source of international law.<sup>11</sup> However, there are other sources to which, as Lindley further suggests, one might look as indicative of the doctrinal beliefs of these Powers.

One might consider the international conventions in force between nations from time to time, or the national legislation of a particular Power, or the rules that have been advanced officially on behalf of particular States during international controversies (even where the rule advanced conflicted with the advancing State's own practice), or "the decisions of arbitrators and judges, whose business it is to ascertain by the appropriate tests, what the law is in order to apply it in practice".<sup>12</sup> But, the most fruitful source of evidence of prevailing international law, other than an actual practice uniformly applied by a preponderance of States, will often be the opinions of jurists, and, as to the international law prevailing at a given time, especially the jurists of that particular time. However, as with the actual practice of States, to be useful at international law such juristic sources must form a preponderance of legal opinion in several (if not most) civilized countries.<sup>13</sup> Otherwise they constitute only *possible* evidence of the

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<sup>11</sup> The actual *practice* of the European Powers which were involved in the discovery and colonization of North America forms the subject matter of the third (Spanish and Portuguese practice), fourth (French practice) and fifth (English practice) chapters of this dissertation.

<sup>12</sup> Lindley, *op. cit.*, note 10, at p. vii.

<sup>13</sup> To again quote Lindley, *ibid.*:

[T]he mere opinions of jurists, however eminent or learned, are not in themselves sufficient to show that a particular proposition is binding as a rule of International Law, although...such opinions 'have done in the past,

(continued...)

particular jurist's own home State's beliefs.<sup>14</sup> In fact the need for quasi-uniformity in the evidence can be said to apply to all categories of evidence of international legal norms. Only to the extent that a preponderance of all sources (be they scholarly opinion, international conventions, diplomatic exchanges, or any other source referred to above) yields evidence of rules uniformly or quasi-uniformly accepted by colonial States can these rules then be relied upon as rules of international law and not just of individual national law. Even then, a "practical uniformity" in the *practice* of States may still contradict the other evidence and will be preferred as establishing the true international law. For this reason, the study of individual States' practices is segregated herein from the discussion of other sources of international law. Another reason for this is, of course, that a State's practice is equally relevant in determining that State's own municipal law.

The discussion in this chapter, therefore, will attempt to distil rules of international law by reference, principally, to juristic opinion, but also to diplomatic exchanges. The other non-practice sources noted, particularly international conventions and international adjudicatory rulings, are scarce or non-existent during the time-period relevant to the North American colonial experience.

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<sup>13</sup>(...continued)

and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged' [Per Lord Alverstone in *West Rand Central Gold Mining Co. Ltd. v. The King*]. In *R. v. Keyn* [(*The Franconia*) (1876), 2 Ex. D. 63], more authority was allowed by some of the members of the Court to the writings of jurists, which were considered to afford 'evidence of the agreement of nations'. 'To ascertain that law', said Amphlett, J.A., 'it is most important in this and all other cases to consult the published opinions of eminent jurists of different countries, for although, as has been justly said, those writers cannot make the law, still if there is found a practical unanimity or a great preponderance of opinion among them, it would afford weighty, and in many cases, conclusive evidence that their statement of the law has been received with the general consent of the civilized nations of the world'. [Emphasis added.]

<sup>14</sup> Especially where the particular scholar can be shown to have been in a position to influence his government's policies.

## Modes of Acquiring Sovereignty over Territory

In this section the various modes of acquiring sovereignty over territory which have appeared at various times since the fifteenth century will be listed and defined. Assessment will also be made as to whether a particular method ever received sufficient support among scholars and nations to become an established principle of international law.

The modes of territorial acquisition discussed in this section are not exhaustive since certain doctrines, such as that of acquisition by *accretion*,<sup>15</sup> have been left out as not relevant to the topic of this paper. Discussion is thus restricted to the methods of acquiring sovereignty over territory which are today referred to as *Papal Authority*, *Discovery*, *Occupation*, *Cession*, *Conquest* and *Prescription*.<sup>16</sup> Of these, it will be seen that Papal Authority in fact never received the support necessary to consider it an established norm in international law but that Discovery, while not becoming in and of itself an accepted method of acquiring sovereignty over territory at international law, was treated as giving the discoverer's State an inchoate right against all other States of *acquiring* the sovereignty to the territory by taking actual possession of the territory within a reasonable time after discovery. The method of that possession, it will be seen, was by Occupation if the land was previously *terra nullius* or by Cession, Conquest or Prescription, if it was not *terra nullius*.

Discussion of the various methods will follow the order of the evolution of international legal theory.

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<sup>15</sup> This refers, generally, to the acquisition of sovereignty over territory by reason of new formations, whether created artificially (such as by erecting embankments) or whether created naturally (such as can be caused by the change in the course of a river).

<sup>16</sup> Though this nomenclature can be said to be of relatively recent formulation in the international legal terminology regarding territorial acquisition—representing a breakdown *formally* established only in the nineteenth century writings—it nevertheless accurately represents the various methods discussed both by jurists and the colonial Powers beginning in the late fifteenth century.

### ***Papal Authority***

One of the earliest modes propounded for acquiring sovereignty over territory was that of acquisition by right acquired under papal grant. At the time of the "Great Discoveries", the Popes had long claimed the power to grant to Christian monarchs the right to acquire sovereignty over lands heretofore unknown to them, whether they be uninhabited or populated by non-christian peoples.<sup>17</sup> But this Papal authority was widely denied by the scholars of the day and cannot be said to have ever reached such a level of universal scholarly acceptance as to provide a basis for concluding it had ever formed a valid part of the Law of Nations. On the contrary, there is ample juristic authority to support the notion that Papal authority was not accepted as extending over non-christian countries.<sup>18</sup>

Moreover, many of the Christian governments--principally those colonial Powers who did not benefit from the Papal grants and where thereby denied access to the New World--also did not recognize such Papal authority. In fact, it seems even the Spanish and Portuguese, who were the beneficiaries of territorial donations by Papal grant in "Papal Bulls", did not regard

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<sup>17</sup> Lindley, *op. cit.*, note 10, at p. 124, tells us that this power was said to be based:

in part on the authority which Popes had for a long time claimed over things temporal as the Vicars of Christ on earth, in part upon the authority supposed to have been derived from the forged 'Donation of Constantine'...[by which] the Emperor Constantine was supposed to have ceded to Pope Sylvester I the sovereignty not only over Italy and the western regions, but also over all islands.

<sup>18</sup> For instance, in the Middle Ages St. Thomas Aquinas did believe that Popes could deprive non-christian rulers of their authority over those among their people who had converted to christianity but believed this was so "not upon any general power of disposing of the territories of the infidels, but upon the principle that the subjects have become the sons of God": Lindley, *ibid.*, at p. 125.

And Vittoria (called Victoria in some texts), himself a theologian belonging to the Dominican Order, was critical of the existence of such Papal authority, believing that no such power to take away the infidels' lands was vested in the Pope since he did not have over them "that spiritual power upon which his temporal authority was based". These are Lindley's words, *ibid.*, at p. 126. Vittoria did, however, accept that the Pope could commit the evangelization of infidels to a single nation to the exclusion of all others. Las Casas, also, would go only so far as to recognize Papal authority to convey sovereignty over lands discovered if they were uninhabited or, where inhabited, if the local inhabitants "voluntarily embraced Christianity, and not to the prejudice of authorities already existing there". Again, these are Lindley's words, *ibid.*.

Grotius, writing years after the other three (in 1712), similarly denied Papal authority in this regard: *ibid.*, at p. 127.

Papal authority as absolute but rather believed they could alter His dictates without Papal sanction.<sup>19</sup> If the very Powers who benefited from the Papal grants themselves did not view the Pope's authority as absolute and final, much less was such a Papal authority recognized by the other European rulers who were excluded from the New World by these Papal grants. Apart from the actual actions of these monarchs in sending out voyages of discovery in direct contravention of the Bulls, a denial of the authority of the Holy See in such matters is evident in diplomatic exchanges of the period. Both France and England, for instance, specifically filed diplomatic protests.<sup>20</sup>

It is difficult to say with certainty whether it was the opinions of contemporary scholars as to the validity of Papal authority which influenced the diplomatic postures of the day or vice

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<sup>19</sup> As Lindley, *ibid.*, at p. 126, has noted:

little more than one year after [Ferdinand and Isabella of Spain] had obtained the Bull ['Inter Caetera'], they varied one of its provisions in the Treaty of Tordesillas which they made with Portugal on the 7th June, 1494. By this Treaty, the line which the Pope had decreed was to mark the eastern edge of the region within which the Spaniards had the exclusive rights of navigation and discovery was moved two hundred and seventy leagues farther west—a variation which did not receive papal sanction until 1506.

<sup>20</sup> To cite but a few examples: Lindley, *ibid.*, at p. 127, quotes the following message which Queen Elizabeth I of England sent the Spanish ambassador to the effect that:

'she understood not, why hers and other Princes subjects, should be barred from the Indies, which she could not perswade her selfe the Spaniard had any rightfull title to by the Byshop of Romes donation, in whom she acknowledged no prerogative, much lesse authority in such causes, that he should bind Princes which owe him no obedience, or infeoffe as it were the Spaniard in that new World, and invest him with the possession thereof:...but that other Princes may trade in those Countries, and without breach of the Law of Nations, transport Colonies thither, where the Spaniards inhabite not'.

And, with respect to France, Lindley, *ibid.*, reports that:

Francis I of France asked to see the clause of Adam's testament which entitled Spain and Portugal to divide the New World between them.

Further, Slattery, B., "French Claims in North America, 1500-59", (1978) 59 *The Canadian Historical Review* 139, at p. 162, [hereinafter cited as Slattery, *French Claims...*], cites a French Diplomatic protest aimed directly at Papal authority. Referring to a diplomatic dispute which had erupted between France and Spain surrounding the former's grant of a Royal Commission to Jacques Cartier in 1540, Slattery quotes a passage from a letter to the Spanish King from his own ambassador summarizing the French monarch's position. That passage contains the following:

...and as to what I told him that permission to navigate these parts was conceded to your Majesty's predecessors by the Pope, and applied to them, he answered that *the Popes had spiritual jurisdiction, but that it does not lie with them to distribute lands among kings*, and that the King of France, and other Christians, were not summoned when the partition took place.... [Emphasis added.]

versa. Perhaps the best that can be said is that the two fed off each other.<sup>21</sup> What is clear is that the argument from Papal authority had become so repudiated and disregarded by the other European Powers that its beneficiaries, Spain and Portugal, were forced to at least impliedly abandon it as the basis (or, at least, the sole basis) of their claim to sovereignty in the New World. This abandonment is implicit in the fact that in their subsequent dealings with other European nations each sought to reinforce their claims under Papal grants with appeals to other grounds, such as Discovery.<sup>22</sup>

In sum, it can be concluded that Papal authority was never accepted in international law as a valid mode of acquiring sovereignty to new (non-Christian) territories since it never received wide scholarly support, was repudiated by many of the Powers in diplomatic exchanges and was not employed in the actual colonial practices of a preponderance of States (Spain and Portugal being the only proponents and short-lived practitioners thereof).

### ***Discovery***

With the waning in acceptance of claims based upon Papal grants, the European Powers (including the Iberian Powers) quickly began basing their exclusive claims to territories in the New World (as well as in the Far East) upon "Discovery" by their explorers. As noted above, the Spanish and Portuguese actually used the theory of Discovery, not independently, but as an argument to fortify their claims to the New World based upon the Papal Bulls, thereby still

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<sup>21</sup> Thus, such diplomatic protests as those of the French, English and also the Dutch have led Lindley to say, *ibid.*, that "Grotius", for example, "was only voicing the opinion generally held in England, France and Holland, when he denied that the Pope had any authority over the peoples occupying the hitherto unknown parts of the world". However, Grotius wrote in the early eighteenth century. The works of Vitoria and Las Casas were more contemporaneous with the diplomatic protests regarding Papal grants. There is no doubt that Las Casas and another scholar, Dominic Soto, were in a position to influence the opinions of King Charles V of Spain since they "had the King's ear" at various times: See Lindley, *ibid.*, at p. 12.

<sup>22</sup> Lindley, *ibid.*, at p. 127.

attempting to exclude all other nations except each other (to whom they recognized rights stemming from the Bulls and the Treaty of Tordesillas). England, France and Holland, meanwhile, based their claims foresquare upon the voyages of "Discovery" which they had each sponsored or sanctioned.<sup>23</sup>

But the theory of Discovery, too, ultimately failed to find favour among the contemporary jurists. And, the elements necessary to establish a title by Discovery were so disputed between the Powers themselves that, as a result of the juristic challenges and these diplomatic disputes, it cannot be said that the theory of Discovery was ever firmly admitted into the Law of Nations as an accepted mode of acquiring sovereignty over territory. In fact, it was soon abandoned by the colonial Powers themselves. The problems with the theory of acquisition based on Discovery were manifold.

Firstly, it was disputed that discovery without the taking of possession was capable of bringing a territory under the sovereignty of the discoverer's State. This was the view asserted by jurists such as Grotius, Pufendorf, Scott (who later became Lord Stowell), Twiss, and others.<sup>24</sup> The Powers appear to have taken a similar view. Indeed, history is not without evidence of diplomatic exchanges where one Power asserted as against another that the mere fact of having seen the coast of a land at particular points, even where this was capable of being substantiated as fact, was insufficient to exclude all other nations from that part of the world without there also being subsequent acts of possession.<sup>25</sup>

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<sup>23</sup> Lindley, *ibid.*, at p. 130.

<sup>24</sup> See Lindley, *ibid.*, at p. 131.

<sup>25</sup> O'Connell, D.P., *International Law*, vol. 1, London, Stevens and Sons Ltd., 1965, at p. 469 [hereinafter cited as O'Connell] wrote:

Secondly, when originally propounded as a mode of acquiring sovereignty over territory, Discovery was quickly said by some Powers to be proven, if not by mere visual detection, than at least by the performance of comparatively trivial (the word used was "symbolic") acts of possession.<sup>26</sup> And some relatively contemporaneous jurisprudential support can be found for the validity and effectiveness of such a practice.<sup>27</sup> But the jurists of the day do not appear to have agreed that symbolic acts were sufficient to confer title.<sup>28</sup> And while the various European States might, according to some interpretations, have claimed the benefit of the theory of Discovery for themselves, at least when accompanied by acts of possession (even symbolic

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<sup>25</sup>(...continued)

*There has also been a tendency to equate discovery with mere visual apprehension. In fact, visual apprehension has never been treated by States as a basis of title. The Spaniards and Portuguese, true to their understanding of their [Papal] mission, claimed territory with elaborate religious ceremonial. The other European Powers, if their ritual was not religious, did at least go through symbolic motions, whether they be Drake's nailing of a plate on a tree at 'New Albion' or the raising of flags and the reading of commissions or proclamations. [Emphasis added.]*

Slattery, *French Claims...*, *op. cit.*, note 20 at p. 162, cites a specific example of French attitudes towards mere visual detection as a mode perfecting a territorial acquisition. In the same letter from the Spanish ambassador to his King which was referred to in note 20 hereof, the ambassador reports, in part, as follows:

*Sire, I have not been able to settle anything but that his [the French King's] subjects shall not go to your lands or ports. In truth, I think he has in mind the populated and defended places, because he said that passing by and discovering with the eye was not taking possession. [Emphasis added.]*

Other examples, though of a slightly less remote era, are referred to in Lindley, *op. cit.*, note 10, at p. 132.

<sup>26</sup> See the passage from O'Connell quoted in the preceding note as well as Lindley, *ibid.*, at p. 139

<sup>27</sup> In *Penn v. Lord Baltimore* (1750), 1 Vesey's Reps. 444, 27 E.R. 1132 (Ch.), at 452 (Vesey's) and 1137 (E.R.) (Per Lord Chancellor Hardwick) it was said:

*It has always been taken that that European country, which has first set up marks of possession, has gained the right, though not formed into a regular colony. [Emphasis added.]*

<sup>28</sup> Lindley, *op. cit.*, note 10, at p. 139, has reported that:

*the sufficiency of such acts [as setting up a pillar, planting a flag, or fixing an inscription] was all along denied by jurists: 'Praeter animum possessionem desidero, sed qualemcunque, quae probet, me nec corpore desise possidere', wrote Bynkershock in 1702. 'Ce n'est pas sans raison', said G.F. de Martens in 1789, 'qu'on a souvent disputé entre les nations, comme entre les philosophes, si des croix, des poteaux, des inscriptions, etc. suffisent pour conserver la propriété exclusive d'un pays qu'on ne cultive pas'.*

ones),<sup>29</sup> there is clear historical evidence that they were in fact quick to deny the validity of the claims of others when based either upon such discovery alone<sup>30</sup> or upon such discovery coupled with only *symbolic* possession.<sup>31</sup> Rather, it was asserted between the Powers that to perfect a title to territory there had to be *real*, not symbolic, possession being exercised thereon. The planting of flags and crosses or the naming of places and rivers, therefore, were rejected by many Powers, at least in diplomatic exchanges, as insufficient to perfect a title based on Discovery.<sup>32</sup>

The rationale for the demise of the theory of territorial acquisition by Discovery is best explained by Lindley:

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<sup>29</sup> A few modern scholars have argued that some colonial States denied the validity of symbolic takings of possessions by other States even while, curiously, they themselves attempted to rely upon similar acts to support their claims. Whether this contradiction between a State's diplomatic position and its own practice in fact existed will be considered in subsequent chapters when considering the practices of the various States, particularly that of the French. But, whatever each State's own practice regarding symbolic acts of possession may have been, it is clear from the evidence presented herein that they at least *professed* that some more real act of possession was required.

<sup>30</sup> See evidence quoted, *op. cit.*, note 25.

<sup>31</sup> But see, *contra*, Keller, A.S., Lissitzyn, O.J., and Mann, F.J., *Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800*, New York, Columbia University Press, 1938 (reprinted by AMS Press Inc., New York, 1967) [hereinafter cited as Keller et al.], where it is argued throughout that the various states accepted the sufficiency of symbolic acts both for themselves and others.

<sup>32</sup> For example, Slattery, *French Claims...*, *op. cit.*, note 20, at pp. 143-5, contains the following evidence of French attitudes requiring *real* possession:

The Treaty of Madrid concluded on 14 January 1526 between France and Spain does not explicitly mention New World controversies; nevertheless it touches obliquely upon the sore points. In Article V, the French king renounces any pretensions to 'royaulmes, estatz, terres, pays et seigneries presentement tenues et possedées' by the king of Spain. '[T]he phrase 'presentement *tenues et possedées*', as applied to the New World, leaves ample room for argument as to the actual extent of Spain's possessions...

Slattery provides numerous other examples throughout this article to prove that France, at least in diplomatic pursuits if not in its own practice, advocated the need for real possession.

A much clearer example is given of English attitudes in this regard in Mills, D., *A Report on the Boundaries of The Province of Ontario*, Toronto, Hunter, Rose & Co., 1873, at p. 131 [hereinafter cited as Mills]. That author there relates that on the occasion of the Spanish Ambassador's protests against the expedition of Drake, Queen Elizabeth I replied (possibly this is the same message to which Lindley referred and which was quoted at note 20 hereof) that she did not recognize the Papal grants and further, as Mills quotes it,

'...that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no wise entitle to a propriety, *further than in parts where they actually settled, and continued to inhabit*'. [Emphasis is that of Mills.]

It was no more reasonable for a nation to claim a vast extent of territory upon the mere ground that a national ship had been the first to coast along its shores than to base similar pretensions upon a papal grant.<sup>33</sup>

But the rejection of Discovery as a mode sufficient in itself to acquire sovereignty over territory did not mean that it was thought of as having no place in the process of territorial acquisition. Indeed, it was believed by the Powers that Discovery and annexation by symbolic acts of possession, wherever made, did give an "inchoate title"; that is to say:

a title which, as Vattel seems to have been the first to point out, 'has been usually respected provided it was soon after followed by a real possession'—a right to *occupy* the territory discovered. But the title is evanescent, and if the occupation is not carried out within a reasonable time, it will lapse, and other nations will be free to annex and occupy the territory.<sup>34</sup>

With the taking of these positions by jurists and the concerned Powers themselves regarding Discovery in the early period of colonization of the New World, the seeds of the international legal doctrine concerning the modes of acquiring territorial sovereignty which would come to dominate the next four centuries were planted. As the Powers each asserted that some real form of possession of discovered territory was required to perfect a territorial acquisition, the first of the modern modes of acquiring sovereignty over new territories began to take shape. That mode is acquisition by *Occupation*. But, as shall be seen presently, acquisition by *Occupation* was stated both by jurists of the day and by the Powers themselves, in their diplomatic exchanges at least, to have a limited scope of application such that other modes of acquisition came to be concurrently propounded. These are today known as *Cession*, *Conquest*

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<sup>33</sup> Lindley, *op. cit.*, note 10, at p. 131.

<sup>34</sup> *Ibid.*, at p. 137. [Emphasis is in the original text.] See also Lauterpacht, H. (ed.), *Oppenheim's International Law*, 8th ed., vo. 1, London, T. and A. Constable Ltd., 1955, para. 223, at p. 559 [hereinafter cited as Lauterpacht].

and *Prescription*.<sup>35</sup> While these last three methods, for centuries before the discovery of America, had been relied upon as the legal basis for acquisition by the European powers of *each other's* territories, they gained renewed vitality in the acquisition of parts of the New World occupied by "backward civilizations".

All of these four modes of acquisition can be grouped according to whether they *create* a sovereignty where none existed beforehand (because the land was considered to be *terra nullius* and devoid of any pre-existing sovereign) or whether they effect a *transfer* of sovereignty from one sovereign to another. *Occupation* is the only one falling under the first class while *Cession*, *Conquest* and *Prescription* fall into the second class. Each of these four methods are discussed briefly below.

First, however, it is necessary to consider the doctrine of *Effective Possession*.<sup>36</sup> This concept refers to an element which is necessary to perfect all territorial acquisitions, be they by *Occupation*, *Cession*, *Conquest*, or *Prescription*.

***Effective Possession:      an Element of Acquisitions by Occupation,  
Cession, Conquest or Prescription***

It was stated, when discussing acquisition by Discovery, that jurists had contended that some act of possession beyond symbolic acts was required in order to perfect an inchoate title by Discovery and that the European Powers adopted this assertion regarding the claims of other

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<sup>35</sup> As stated earlier, this terminology is of relatively recent formulation, representing a breakdown formally established only in the nineteenth century writings. Nevertheless, it accurately represents the various methods discussed both by the jurists of this early colonial period and by the colonial Powers (in their diplomatic exchanges).

<sup>36</sup> This concept is sometimes referred to as *Effective Occupation*. However, so as not to confuse this doctrine with the mode of territorial acquisition called *Occupation*, the term *Effective Possession* is preferred here.

Powers, if not regarding their own—a matter to be considered in subsequent chapters. But, what forms of possession were regarded as sufficient to perfect an acquisition?

Some very early jurists looked to the ancient Roman law of Occupation for guidance. But that law offered little assistance since it principally referred to rules for acquiring *ownership of property*, be it real or personal property, and offered little guidance with respect to the acquisition of *sovereignty over territory*.<sup>37</sup> Thus, the best that can be concluded concerning the earliest juristic opinions on what acts of possession were sufficient to perfect a title of territorial sovereignty was, as noted in the previous section, that they believed something more than mere symbolic acts were necessary. But, over the centuries this question has been considered by jurists to the point where, as of the latter part of the nineteenth century, some very specific parameters came to be established in time for the African colonial period. Though these latter opinions are, strictly speaking, irrelevant as concerns the North American colonial period of the sixteenth to eighteenth centuries, nineteenth century juristic opinions were nevertheless informed by—and so were derived from—the statements and (as shall be seen in the subsequent chapters hereof dealing with the actual practice) the actions of the European Powers themselves during

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<sup>37</sup> As Lindley, *op. cit.*, note 10, at p. 10, explains:

The Roman law of Occupation deals only with the acquisition of property or *dominium*. It lays down that natural law gives to the first occupant *quod ante nullius est* [that which before was the property of nobody],...the theory of Occupation was not, however, applied by the Romans to the acquisition of sovereignty or *imperium*.

...

The principles underlying the rules the Romans found adequate for regulating the acquisition of property in *res nullius* are comparatively simple, and they are quite unequal to the task of settling any but the most general questions that arise in connection with rival claims to sovereignty over large tracts of territory.

And, he elaborates much later, at p. 139:

When it came to be recognized that possession was necessary to the perfection of the title, the Roman rules regarding possession could be appealed to. But although these rules...were of some slight assistance when the question to be determined was the size of the area over which the given act or series of acts might be considered to give possession, they tell us nothing with regard to the kind of act by which possession might validly be taken in the process of acquiring sovereignty; and, for a long time after it had been recognized that some such acts were necessary, no agreement was arrived at as to their nature.

the period of European colonialism in the Americas. Therefore, these latter-day opinions of scholars do shed some light on what the Powers had, in the sixteenth to eighteenth centuries, considered to be the requirements of international law regarding the perfection of a sovereign title by Effective Possession. Consequently, these nineteenth century opinions bear some consideration here.

While some, such as Savigny (1848), believed that possession is effective only when there is the exercise of physical power sufficient both to deal with the subject immediately and to exclude alien interference with it, "it is becoming generally recognized, from the abstract point of view, that the physical power of exclusion is not an essential element in possession...".<sup>38</sup> Moreover, while other jurists, "especially...the earlier jurists",<sup>39</sup> lay stress upon the actual use and cultivation of the soil, this too was soon regarded as insufficient. Rather, the doctrine of Effective Possession evolved, in juristic opinion at least, so that:

There is now a general agreement that the essential point to look to is not whether there is present sufficient force to repel foreign intrusion, or whether the land is in fact being effectively exploited, but whether there has been established over it a sufficient governmental control to afford security to life and property there. 'The taking of possession', says Bluntschli, 'consists in fact of organizing politically the recently discovered country, joined with the intention of there exercising power in the future'.<sup>40</sup>

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<sup>38</sup> *Ibid.*, at p. 140.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, at p. 141. Lauterpacht, *op. cit.*, note 34, at para. 222, p. 557 offers a similar definition of Effective Possession, saying that "possession and administration are two essential facts that constitute an effective occupation". For him, possession is established when the territory is brought under the sway of the new sovereign (*corpus*) and this is done with the intention of acquiring sovereignty over the territory (*animus*). "This", he writes, "can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty": see p. 557. Administration, he adds, must follow such possession in order to render it effective. Administration is proven by the establishment of "some responsible authority which exercises governing functions" in the territory: see p. 558.

As stated, though the foregoing is a relatively recent formulation of a definition for Effective Possession, it is actually derived from the political positions<sup>41</sup> and actual practices<sup>42</sup> of nations dating back to the earliest period of North American colonisation. As O'Connell has written:

The law is valueless unless it faces up to the realities, and the realities of territorial expansion in the past three centuries were such that only actual settlement and administration, couple with at least the presumption to exclude others by force if necessary, invited the sanction of law.<sup>43</sup>

Therefore, keeping in mind that effective possession has long been considered a constitutive element of territorial acquisition irrespective of what specific mode of acquisition is used, it is now possible to elaborate upon what were considered to be the other elements necessary to establish acquisition by either Occupation, Cession, Conquest or Prescription.

### ***Occupation***

Lauterpacht, in the eighth edition of *Oppenheim's International Law*, offers the following definition of territorial acquisition by *Occupation*:

Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State...And it must be emphasized that occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.<sup>44</sup>

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<sup>41</sup> See, for example: the account by the Spanish Ambassador concerning French views which was quoted at note 25 hereof, which view was that Spain could only validly claim as its own "the populated and defended places"; and also the Queen of England's view against symbolic acts referred to in Mills and quoted herein, *op. cit.*, at note 32.

<sup>42</sup> The actual practices of colonial nations are discussed in subsequent chapters hereof.

<sup>43</sup> O'Connell, *op. cit.*, note 25, at p. 471.

<sup>44</sup> Lauterpacht, *op. cit.*, note 34, para. 220, at p. 555.

Lindley, for his part, defines Occupation as "the normal process for the assumption of sovereignty over a part of the *territorium nullius*".<sup>45</sup>

What Lauterpacht means when he says territory acquired by Occupation must "at time not [be] under the sovereignty of another State" and what Lindley means when he refers to the concept of *territorium nullius* (also referred to here as *terra nullius*) will be discussed in a subsequent section of this chapter. For now, it will suffice to explain the effect of these terms, "State" and "*territorium nullius*", as meaning that only sovereignless territory may be acquired by Occupation.

### **Cession**

Lauterpacht provides the following definition of *Cession*:

Cession is the transfer of sovereignty over State territory by the owner-State to another State....

Since cession is a bilateral transaction it has two subjects--namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are states concern the Law of Nations. Cessions of territory made to private persons and to corporations by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law. Neither do cessions of territory by native tribes made to States which are members of the international community. On the other hand cession of territory made to an independent State by a State not yet recognized as such is, unless it is in the nature of total merger, a real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a State enjoying a certain position in international law.

The object of cession is sovereignty over such territory as has hitherto already belonged to another State...

The only form in which a cession can be effected is in an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be made with or without compensation.<sup>46</sup>

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<sup>45</sup> Lindley, *op. cit.* note 10, at p. 2.

<sup>46</sup> Lauterpacht, *op. cit.*, note 34, para. 213-216, at pp. 547-8.

The cession, he adds, may be of the whole or of only part of the ceding sovereign's territory. Again, though the quoted passage gives some indication thereof, what Lauterpacht considers to be a "State" will be discussed in more detail later.<sup>47</sup> By and large, most jurists would agree with Lauterpacht's (and, consequently, Oppenheim's) definition with the exception, as shall be elaborated upon below, that a much wider definition of what qualifies as a ceding State would be given than is the case in the Lauterpacht text.<sup>48</sup>

Though, as stated in the previous section, effective possession is technically also a requirement to retaining a sovereignty acquired by cession, it should be noted that ceded territories are often already possessed of an established local administration so that often very little need be done to render effective the acquisition. Moreover, since the new Sovereign, in any event, has a reasonable time to render his possession effective before the territory can be said to be vacant and open to acquisition by another, it has been held possible for the new Sovereign to re-cede the territory to another Sovereign without ever having effectively possessed it.<sup>49</sup>

### **Conquest**

"Conquest, as a title to territory, assumes the absence of any formal transfer on the part of the previous sovereign...and requires (1) the taking of possession of the territory by force, coupled with (2) the intention and (3) the ability to hold the territory as its sovereign".<sup>50</sup> A

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<sup>47</sup> It is at least evident from the quoted passage that he would not consider Native tribes as "States".

<sup>48</sup> See, for example: O'Connell, *op. cit.*, note 24, at pp. 502-8; and Lindley, *op. cit.*, note 10, at pp. 166 ff.

<sup>49</sup> See Lauterpacht, *op. cit.*, note 34, para. 217 and footnote 5, at p. 550, where the example is given of France, to whom Austria ceded Lombardy, in turn ceding that territory to Sardinia without previously having actually taken possession of it.

<sup>50</sup> Lindley, *op. cit.*, note 10, at p. 160.

conquest is not complete so long as the conquered sovereign retains the intention, coupled with the ability, to attempt to regain the lost territory.<sup>51</sup> The victorious conqueror often demands a formal cession of all or part of the conquered territory as part of the terms of peace. But in such a case the acquisition is by way of Cession (though extorted) rather than by way of Conquest. Only where hostilities end without a formal cession is an acquisition by way of Conquest effected,<sup>52</sup> and then only if the victor *intends* by the conquest to bring the territory under his sovereignty.<sup>53</sup> As with Occupation and Cession, Conquest is not perfected until the territory is "effectively possessed" in the sense given above to that term.<sup>54</sup> This usually involves the establishment of a local government (representative or otherwise) to replace the military government which ruled since the end of hostilities.

Thus, belligerent occupation, intention to hold the territory as sovereign, cessation of significant resistance, absence of capability and desire in the previous sovereign to regain the

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<sup>51</sup> *Ibid.*

<sup>52</sup> See Lauterpacht, *op. cit.*, note 34, at para. 239, at pp. 570-1.

<sup>53</sup> Thus, there is to some jurists a distinction between *Conquest* on the one hand, and what Lauterpacht, *ibid.*, at p. 566 *ff.* calls *Subjugation* and O'Connell, *op. cit.*, note 25, at p. 495 *ff.* calls *Annexation*, on the other. To these jurists, Conquest is only that preliminary step to forced acquisition of territory which consists of the belligerent occupation of territory. Until the intention to bring that territory under his sovereignty is expressed by the victor either by extorting a cession or by formally annexing the territory (which Lauterpacht calls *Subjugation* while O'Connell uses the term *Annexation*), the acquisition is not complete. However, as the Lauterpacht text itself proclaims, it is "quite usual to speak of 'title by conquest', and everybody knows that subjugation after conquest is thereby meant": Lauterpacht, *ibid.*, para. 236, at p. 567. It is in this narrowed sense that the term Conquest will hereinafter be used since that is the term most often found in the materials to refer to belligerent occupation coupled with the intent to annex. The use of the term Conquest in this narrowed sense is all the more required when one notes that the distinction between "Conquest" in the sense of mere belligerent occupation and "Subjugation" or "Annexation" is only a relatively recent phenomenon; becoming a fixture only after 1815 and stemming from the post-revolutionary period in France and, particularly, the Napoleonic redistribution treaties: See O'Connell, *ibid.*, at pp. 498-9. The occupation of southern Iraq by the Gulf War coalition forces is one recent example, as are the U.S. invasions of Panama and Grenada. In none of these cases did the belligerent forces intend to claim to have acquired sovereignty over the occupied territory.

<sup>54</sup> See notes 37 to 43 and accompanying text. To quote Lindley, *op. cit.*, note 10, at p. 160:

[The belligerent occupier's] title will be complete *when he signifies his intention to [annex] and effectively occupies the territory annexed.* [Emphasis added.]

territory, and effective possession by the new sovereign are all required to effect a change of sovereignty by way of Conquest.

### ***Prescription***

The last relevant mode of territorial acquisition, *Prescription*, can be defined as "the perfection of the title of a Sovereign to territory, due to that territory's having remained under his continuous and undisturbed dominion during a period sufficient to justify the assumption that the position has become part of the established international order".<sup>55</sup> In opposition to territorial acquisitions by *Occupation*, however, prescriptive title is acquired, not over land previously belonging to no sovereign State, but rather in direct opposition to another State's title to that same territory.<sup>56</sup> In this sense, Prescription may be likened to the municipal private law concept of Adverse Possession.

While both Occupation and Prescription require an intention to acquire dominion over the territory coupled with an actual possession of it (i.e. Effective Possession), possession of no man's land by Occupation may be consummated in a far shorter period of time than possession

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<sup>55</sup> Lindley, *ibid.*, at p. 2. Lauterpacht, *op. cit.*, note 34, para. 242, at p. 576, offers a similar definition.

<sup>56</sup> In this regard, it is interesting to note that O'Connell, *op. cit.*, note 25, advocates the existence of what might be qualified as an intermediary mode of territorial acquisition in between, as it were, Occupation and Prescription. That mode is *Historic Rights*. Though, as will become clear, this concept is not really relevant as concerns the acquisition of territory occupied by the North American Indians, it bears a brief notation here.

As Mr. O'Connell is understood by the present writer, he reserves the term Occupation to the acquisition of territory which, though legally capable of being possessed by a State, has heretofore (or, at least, recently) not been occupied by any State; and the term Prescription to the acquisition by adverse possession of territory currently under another State's sovereignty. Historic Rights, however, resembles Prescription in that it refers to the acquisition by possession over an extended period of time so as to become part of the established international order, but differs from Prescription in that it refers to territory which, though belonging to no State (and so resembling territory acquirable by Occupation), is, strictly speaking, *unacquirable at international law*. Thus, though the open sea is unacquirable by any State at international law, the universal or almost universal acquiescence of the world community in the exclusive appropriation by one or more States of a part of the open sea for, as an example, exclusive fishing rights, might constitute a title by Historic Rights in favour of that or those States. See O'Connell, *ibid.*, at pp. 465-8 and 485-6. Thus, in many of its elements, Historic Rights is almost indistinguishable from Prescription though, in the territory to which it applies, it is closer to, but not the same as, Occupation. In any case, since Historic Rights pertain to territory which is usually unacquirable at international law, it clearly does not pertain to North America, which is clearly territory over which one might hold sovereignty. Historic Rights will most usually be claimed over parts of the open sea.

of another State's land by Prescription. It is not possible to lay down any general rules as to what might constitute a sufficient length of time or sufficient acts of adverse possession to perfect a prescriptive title to territory. These questions are to be determined on the facts of each case.<sup>57</sup> This much, however, is clear: unlike the case of Occupation, for a title by Prescription to be perfected "[t]here must be, positively, an actual *assertion of sovereignty* supported by its exercise for a *long period*, and there must be, negatively, an *acquiescence* in the claim by the other party".<sup>58</sup> There may even be actual consent on the part of the dispossessed State. In any case:

As long as the other States keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protest and claims, if any, cease to be repeated, the actual possession

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<sup>57</sup> Lauterpacht, *op. cit.*, note 34, para. 243, at pp. 577-8, explains:

The question at what time and in what circumstances [the possession may be said to be undisturbed and to have become in conformity with international order] is not one of law but of fact...There are indeed immeasurable and imponderable circumstances and influences at work besides the mere lapse of time to create the conviction that in the interest of stability and order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.

And Lindley, *op. cit.*, note 10, at pp. 178-9, is to the same effect, though he states (and it is likely that Lauterpacht would agree) that at least effective possession is required for Prescription:

The nature of the régime that ought to be set up in order that Prescription may run in favour of the sovereign in possession will vary with the circumstances of the case.

...  
In any case, in view of the importance now attached to the effective occupation of any territory which a State wishes to appropriate to itself, it would appear that Prescription should not be considered to run in favour of a claimant who had not occupied the territory effectively in the sense, and subject to the variations to meet special cases, which we have considered [earlier].

And, just as the conditions which must be present for Prescription to run may vary in different cases, so also the length of time during which those conditions must operate before it can be said that they have become part of the established international order, will vary according to the circumstances.

See also O'Connell, *op. cit.*, note 25, at pp. 487-8, with respect to the required length of time.

<sup>58</sup> O'Connell, *ibid.*, at p. 488. [Emphasis is from the original text.] In discussing O'Connell's category called "Historical Rights" (see note 56), it was noted that acquiescence was also required to perfect such a title. The distinction between acquiescence for Historic Rights purposes and acquiescence for Prescription purposes is this: that, since Historic Rights may be claimed only with respect to territory which is legally unacquirable, there is no opposing owner to protest or acquiesce so that the acquiescence required to perfect a title by Historic Rights is that of the international community at large; for Prescription, it is that of the opposing owner specifically.

ceases to be disturbed and thus in certain circumstances matters may gradually ripen into that condition which is in conformity with international order.<sup>59</sup>

The rationale for the requirement of proof of consent or, at least, of acquiescence, is obvious. Implicit in this requirement, however, is the additional necessity that the adverse possession be open and evident.<sup>60</sup>

But the international law concept of Prescription is only of peripheral importance in construing Canadian municipal law. At international law, Prescription might well have been applied against Canada's First Peoples because (as will be seen in a subsequent section of this chapter) at all relevant times they were and are capable of being considered States at international law in that they fit the description of "political societies" which was the true pre-condition of statehood. But it is likely that international law would have found the requirement of acquiescence by the Indians was not proven since the history of Indian-European territorial relations in North America is anything but one of quiet acquiescence on the part of the former.<sup>61</sup> More importantly, moreover, the international law concept of Prescription loses importance in municipal law in that domestic courts are bound to give immediate effect to the will of their Sovereign without a prescriptive period or consideration of the former Sovereign's acquiescence

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<sup>59</sup> Lauterpacht, *op. cit.*, note 34, para. 243, at pp. 576-7.

<sup>60</sup> To quote O'Connell, *op. cit.*, note 25, at p. 490:

As Judge Huber said in the *Palmas Island* case [U.N. Rep., Vol. II, p. 829, at p. 867], no claim to sovereignty can be clandestine, and therefore the claimant State must have displayed its jurisdiction

long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

<sup>61</sup> Though some might argue that the Indian's occasional acceptance of "gifts" from the white man is proof of their acquiescence in white sovereignty, the more correct view is that such exchanges of gifts were more often meant merely to cement ties of friendship and allegiance between white and Indian nations and implied no commingling of territories under one white Sovereign.

or lack thereof. Thus, English colonial law, for example, has the concept of *Annexation* which, like Prescription, requires a clear intention to appropriate another Sovereign's territory but which, unlike the latter international law doctrine, requires neither acquiescence nor the passage of a reasonable time to be effective.<sup>62</sup>

### **The Legal Effects of Occupation, Cession, Conquest and Prescription**

Since the present dissertation is concerned with proving the *survival* of Native territorial sovereignty, the question of the effects of a *change* of sovereignty, by whatever mode it is carried out, is not of direct relevance here. If Native sovereignty existed *and survived* then there is no change of sovereignty for which to consider the effects. But understanding the effects of the various ways of acquiring sovereignty over territory at international law does serve to reinforce the conclusion reached herein that North America's Indian lands were lands the sovereignty to which, at international law, could be acquired by either Cession, Conquest or Prescription, but not by Occupation since, as will be seen, the legal consequences of Occupation presuppose the acquired territory was previously without an existing legal régime. Moreover, to understand the effects of the various modes of acquiring territorial sovereignty is to understand how it is that, if the Natives did lose their sovereignty, they can still claim rights of common law aboriginal title to their ancestral lands as a burden upon the underlying interest of the Canadian Sovereign.

International law ascribes to each mode of territorial acquisition its own set of legal consequences upon various matters, such as the national status of those already living in the newly acquired lands, and the survival of any pre-existing institutions, legal régime, laws and

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<sup>62</sup> See the discussion of Annexation in chapter five hereof.

acquired private interests (including interest in land). Of these, the issue of the national status of the inhabitants is of little importance to the present topic and will not be pursued here.<sup>63</sup>

The rules of international law did not evolve arbitrarily concerning the effects prescribed for the various modes of territorial acquisition. Rather, as with any legal rule developed for the convenient governance of a people, they evolved from practical considerations of stability and continuity. The effects of each mode of territorial acquisition are such that, once again, it is possible to group the modes into those which concern the acquisition of territory previously under no sovereignty at all (the only relevant one being Occupation) and those involving the transfer, whether voluntary or extorted, of sovereignty from one Sovereign to another (Cession, Conquest or Prescription).

Since (as will be explained in the next section, below) a territory which is open to acquisition by Occupation is by definition uninhabited or, at least, if inhabited, its population is made up of disconnected individuals and families not existing as a "political society", such territory is therefore devoid of any pre-existing legal system. Consequently, international law provides that when such a territory is acquired by a State the legal régime of that State is automatically infused into the territory, where it is applied to any settlers the acquiring State should choose to permit there. This only makes sense. Settlers would require the benefit of a legal system and would expect it to be similar to that which they knew in the Mother Country. The automatic infusion in the territory of the laws of the Mother Country avoids both the logistically impossible task of re-enacting all the laws anew for the colony and the existence of a legal void in the interim. It also ensures that the Crown's authority will be maintained over

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<sup>63</sup> The interested reader is referred to: O'Connell, *op. cit.*, note 25, at pp. 454-5; Lauterpacht, *op. cit.*, note 34, para. 219 and 219a, at pp. 551-4; and Lindley, *op. cit.*, note 10, at pp. 164-5 (on "Consequences of Conquest") and at p. 323, where it is stated that "[w]hen the territory...has been annexed...the natives become [the annexing State's] nationals".

those of its subjects who settle the new territory. However, international law does provide that the proprietary rights of the disparate inhabitants, if any, will be assumed to survive the acquisition, though the acquiring sovereign is free to specifically abolish such rights in the same way he is free to do so for any of his subjects at home (barring any constitutional restrictions).<sup>64</sup>

Thus, to say that North America was acquired by Europeans by Occupation is to say that the Indians were not "political societies" (defined in the next section) capable of holding their lands as sovereign States and of having an existing régime. In other words, it is to say that the continent was *terra nullius*. But it is also to acknowledge that the "disparate" bands of Indians retained, under the European Sovereign, the communal or individual interests in the land which they possessed (their common law aboriginal title) until extinguished by that Sovereign. However, as will be seen below, that is not the way either the international community at large or the individual colonial Powers viewed the indigenous populations of North America.

In the cases of territorial acquisitions by Cession, Conquest and Prescription (all of which imply a *change* in Sovereignty), on the other hand, the territory is pre-endowed with an existing "political society" having its own legal system, however rudimentary, and under which the individual inhabitants have (usually) acquired proprietary interests of a private nature (be they communal or individual property rights). For this reason, international law has provided for consequences of changes in sovereignty which take account of the existing society's need to avoid the anarchy which would result from an automatic substitution of systems and rights or, what would be worse, from an automatic abrogation of the old system and rights without any substitution whatsoever.

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<sup>64</sup> Lindley, *op. cit.*, note 10, is one scholar who maintained this was so. See, for example, the passage from Lindley quoted *infra*, at note 93 and accompanying text. McNeil, *op. cit.*, note 2 has made the same point regarding British colonial law.

The rules of international law in this regard have been the subject of progressive evolutionary development.<sup>65</sup> Originally, it was held that the successor State was obliged to uphold all of the obligations its predecessor had contracted. But, this proved unworkable since acquiring States often found these obligations ran counter to many of their own or were simply objectionable. For instance, the former State may have entered into a treaty which puts the acquiring State in conflict with one of its own treaties. This led some nineteenth century writers to propound a rule that:

[t]he successor State, in virtue of its sovereignty, was regarded as receiving the acquired territory without commitment of any sort...Hence, it was concluded, the successor State is not obliged to take upon itself the judicial consequences of its predecessor's acts.<sup>66</sup>

But this nineteenth century theory does not appear to have ever received wide support since it was "inherently anarchic"<sup>67</sup> and, therefore, does not seem to have ever become an accepted rule of international law. Rather, international law in this regard progressively has evolved from the practices of nations whereby each type of obligation owed by a predecessor State was examined to see "whether there is any cogent necessity for the successor State to undertake responsibility".<sup>68</sup> Consequently, the general rule as to the effects of Cession, Conquest and Prescription is that not every duty of the former Sovereign will be passed on to the successor State though, in the interest of social and economic stability, some duties are inherited from State to State.

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<sup>65</sup> See generally, O'Connell, *op. cit.*, note 25, at pp. 426-7.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, at p. 427.

<sup>68</sup> *Ibid.*

Thus, it is provided in international law that "[t]he transfer of sovereignty by cession or by subjugation [i.e. conquest] does not *ipso facto* affect rights of private property, though the subsequent legislation of the new sovereign may affect them".<sup>69</sup> The corollary to the rule of the survival of private property rights is that the successor State becomes possessed of all of its predecessor's public property, though encumbrances on that public property are unaffected by the change.<sup>70</sup> As O'Connell notes, apart from the promotion of stability and continuity from one régime to another, the rule that private property rights and burdens on public property are deemed to survive until specifically altered by the new Sovereign seems premised, at least in the case of Cession, in part on the rationale that:

the ceding State can transfer no more than it possesses in international law, so that territory burdened with servitudes or other real rights remains burdened under the new sovereign.<sup>71</sup>

Similarly, with few exceptions, in acquisitions by Cession, Conquest and, presumably, Prescription, "the legal system remains unaffected by State succession and the administering

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<sup>69</sup> Lauterpacht, *op. cit.*, note 34, at p. 550 (footnote 1). And, in para. 240, at p. 571, Lauterpacht writes, in relation to subjugation, that:

[A]s far as the Law of Nations is concerned, the subjugating State does not acquire the private property of the inhabitants of annexed territory. Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects—but subjugation itself does not by International Law affect private property.

See, to the same effect: O'Connell, *ibid.*, at pp. 436-42, especially at pp. 437-9, where it is noted that, though property rights survive the change of sovereignty until specifically altered, it is not always the case that such rights will be enforceable judicially—noting in this regard the English "Act of State" doctrine and its ambiguities; and Lindley, *op. cit.*, note 10, at p. 316 (concerning the private property of foreigners—i.e. citizens of a State other than the one extinguished by the cession or conquest) and at pp. 337-53 (concerning property—both community property and individual property—of Natives or "backward peoples").

<sup>70</sup> O'Connell, *ibid.*, at pp. 449-50.

<sup>71</sup> *Ibid.*, at p. 504.

authority continues to operate within the existing legal framework until it is substituted".<sup>72</sup> "It does not follow, however, that the successor State may not legislate to alter this law".<sup>73</sup>

But the effects of a change of sovereignty upon the treaty obligations of the predecessor State are not so absolute. "Personal" treaties--or "those which are essentially contractual and presuppose reciprocity between the parties with a view to an agreed end"<sup>74</sup>--do not generally bind the successor State while "impersonal" or "dispositive" treaties--or those "which impress a territory with some special legal status, and so limit the incidence of sovereignty upon it"<sup>75</sup>--do.<sup>76</sup>

In summary, it can generally be said that acquisition by Occupation infuses the new State's legal system into a territory previously devoid of any such structures but presumptively preserves the private property interests of the disparate individuals (if any) while acquisitions by Cession, Conquest or Prescription--which all presuppose the existence of a pre-established sovereign political society having its own laws, institutions and system of private property rights--

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<sup>72</sup> *Ibid.*, at p. 505. See also pp. 450-2, where O'Connell adds the qualification that "so much of the constitutional law of the predecessor State as is repugnant to that of the successor State does not survive the change of sovereignty, and so much as is not repugnant does"; leaving a general rule that "the legal relationship between private individuals *vis-à-vis* each other, and even between private individuals and the public authorities whose legal competence has survived the change, remain in full effect".

See also: Lindley, *op. cit.*, note 10, at pp. 374-7. It is also said that laws which are "contrary to God's laws" or, as is it is put by Lindley, which are "inhuman or of a grossly immoral nature", are automatically abrogated by the change.

<sup>73</sup> O'Connell, *ibid.*, at p. 451.

<sup>74</sup> *Ibid.*, at p. 427.

<sup>75</sup> *Ibid.*.

<sup>76</sup> See generally, O'Connell, *ibid.*, at pp. 427-36. This rule could be of relevance to the topic of Native sovereignty if, for instance, one European State ceded to another its *pretensions* to, or *sphere of influence* over, a territory while the ceding State had, by its avowed practice or by treaty with that territory's inhabitants, agreed to recognize the latter's sovereignty thereon until specifically surrendered; or, what is more usual, where the ceding State had actually previously brought a part of the territory under its sovereignty by treaty with the Natives, but by the terms thereof, recognized the remainder of the territory as being retained under the sovereignty of the Natives.

The rule regarding treaties is also relevant to the topic of Native territorial claims of a non-sovereign type. For instance, a ceding State may have recognized, by previous treaty or by Statute, a territory which is under its sovereignty as being reserved to the Indians who lived under that State's sovereignty.

generally do not result in any substitution of legal régimes or abrogation of property rights unless specifically enacted by subsequent order or legislation of the new Sovereign.

These rules, theoretically at least, would apply to North America. Therefore, for international law to hold that this continent was appropriated to the sovereignty of a particular European Power by Occupation it would have to be said that the Indian nations were not "political societies" capable of holding land as sovereign States and of having their own legal régime. In other words, it is to say that the continent was *terra nullius* at international law. But, on the contrary, it will be seen, in the next section and chapters three to five, that the international community and the individual colonial Powers have in fact always viewed the indigenous populations as "political societies", and therefore sovereign societies, whose lands were subject to appropriation only by Cession, Conquest or Prescription.

### **How to Define "Lands Belonging to No State"**

It will be readily noticed from the foregoing discussions of the scope and effects of the various relevant modes of territorial acquisition at international law that only Occupation concerns the acquisition of territory belonging to "no State" while Cession, Conquest and Prescription all pertain to the acquisition of sovereignty over a territory presently under the sovereignty of another State. What has thus far remained unexplored herein is what exactly constitutes a territory "belonging to no State" and, therefore, acquirable by Occupation. In other words, what is a "State"? The answer has much to do with the definition of *terra nullius*, another term which was noted above but which has thus far not been explained herein.

The term *terra nullius* is most often associated with territories devoid of any human inhabitants and thus "vacant". But, while *terra nullius* is a term clearly encompassing vacant

lands, it is universally accepted that lands in fact inhabited by human life can in certain circumstances also be considered as falling within that term. Where there is disagreement is on what circumstances qualify a land as *terra nullius* despite the presence of human inhabitants. To put it differently,

the point at issue is whether, having regard to the degree of political development and other characteristics of the inhabitants, the territory can be considered to be already under an effective sovereignty...<sup>77</sup>

Indeed, this is the central question dividing those who believe the North American Indians are and were "States" so that their territories, therefore, could be acquired only by Cession, Conquest or Prescription, from those who on the contrary believe those Peoples were not States so that their lands were part of the *territorium nullius* and the sovereignty (if not the title) could be acquired over these lands simply by Occupation.<sup>78</sup>

Considering first that class of scholars adhering to the latter, negative, view, research reveals that they "belong principally to a comparatively recent period",<sup>79</sup> namely the nineteenth century. Moreover, to quote O'Connell, the notion they espoused "was never more than an academic one".<sup>80</sup> Nevertheless, since at least one modern scholar has relied on these opinions

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<sup>77</sup> Lindley, *op. cit.*, note 10, at p. 10-1.

<sup>78</sup> There exists a group of scholars who advocated an intermediate position; that is to say, one recognizing the capacity of what Lindley calls "backward peoples" of qualifying as a State, and so capable of possessing territory as sovereigns, but *only under certain conditions*. However, these opinions have not received sufficient support from jurists or governments such that, as Lindley concludes, *ibid.*, at p. 17, "[n]one of these opinions appears to provide a satisfactory foundation for the formulation of a rule of International Law". This school of thought, therefore, will not be discussed further herein and the interested reader is referred to Lindley, at p. 17.

<sup>79</sup> *Ibid.*, at p. 18.

<sup>80</sup> O'Connell, *op. cit.*, note 25, at p. 470. The full passage bears quotation:

It was only the invention by the late nineteenth century authors [and, he adds at note 17, "Especially the English"] of the doctrine that uncivilized peoples have no capacity in international law that led to the characterisation of their territories as *terrae nullius*, and resort to the doctrine of *occupation* to explain title. The

(continued...)

as evincing a shift in international law which, he argues, affects the survival past the nineteenth century of any previously recognized Native sovereignty,<sup>81</sup> the gist of these nineteenth century opinions bears some notation here.

The nineteenth century scholars who advocated the negative view include such reputed legal theorist as Westlake, Oppenheim, Lawrence, Field and others.<sup>82</sup> While there are

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<sup>80</sup>(...continued)

result was the obliteration of the distinction, carefully preserved by Blackstone, between acquisition of inhabited and of uninhabited lands. Occupation then became the principle mode of legal acquisition. In fact, the supposed doctrine that only 'civilized' peoples may treat was never more than an academic one, and when the Privy Council came to deal with the question in *re Southern Rhodesia* [[1919] A.C. 211] it gave full effect, so far as the Crown's rights were concerned, to the cession of native territory...

<sup>81</sup> See: Brun H., "Les droits des indiens sur le territoire du Québec", 1969, as updated and reprinted in Brun, H., *Le Territoire du Québec*, Québec, Québec, Les Presses de l'université Laval, 1974, pp. 33-91, at pp. 42-4 [hereinafter cited as Brun]. The author argues (at p. 42):

Enfin, même si une souveraineté indienne avait survécu à la découverte du territoire québécois par les Français au XVI<sup>e</sup> siècle, grâce à la conquête et malgré celle-ci, cette souveraineté se serait fatalement heurtée aux états subséquents du droit international. Selon le principe de la "manifestation continue", dégagée dans l'affaire de l'île de Palmas [[1935] R.G.D.I.P. 172], une souveraineté initiale doit en effet se maintenir à travers les temps et les systèmes juridiques successifs.

A partir du XVIII<sup>e</sup> siècle, la théorie de la conquête fait place, progressivement, à la théorie de l'occupation. Les auteurs de droit international tentent alors de fonder la souveraineté d'États européens sur des territoires nouveaux, non plus sur la défaite militaire des autochtones, mais sur une occupation pacifique, à laquelle on procède comme s'il s'agissait d'un "pays déserts"...

The author then elaborates, at pp. 42-4, upon this "progressive" passage from doctrinal acceptance of the theory of conquest of Native lands to one of occupation of their lands by explaining that: the first stage of this progression was principally elaborated by Vattel and his followers from the late eighteenth century to well into the nineteenth century and simply said that Natives could be restricted to only so much land as they needed for their subsistence while the rest could be occupied by the overcrowded Europeans (which theory effectively recognized Native sovereignty, though over a much smaller territory); and the second stage of this progression was principally developed by English scholars in the late nineteenth century and essentially held that lands not under any State's sovereignty could be acquired by occupation, that Natives did not qualify as a State and that international law did not apply to Natives. Then he concludes, at p. 45:

*Il n'est pas sûr, en définitive, qu'une souveraineté indienne initiale, admise selon la doctrine apparemment dominante aux XVI<sup>e</sup> siècles,...aurait pu résister à la doctrine qui a prévalu à partir du XVIII<sup>e</sup> siècle...Il est sûr, en tout cas, qu'elle n'aurait pu survivre à la doctrine élaborée à la fin du XIX<sup>e</sup> siècle. (...)* [Emphasis added.]

Brun's article was a published version of a report he had presented to La Commission d'étude sur l'intégrité du territoire du Québec (the "Dorion Commission"). That Commission, in its *Rapport de la commission d'étude sur l'intégrité du territoire du Québec, Partie 4: Le domaine indien; vol. 4.1: Rapport des commissionnaires*, [hereinafter cited as *R.C.E.I.T.Q.*] essentially adopted Brun's arguments. To the extent that Brun is quoted herein without also specifically citing the *R.C.E.I.T.Q.*, the reader may assume a similarity of opinion between the two.

<sup>82</sup> For a specific discussion of the opinions of these and other scholars adhering to this belief, see Lindley, *op. cit.*, note 10, at pp. 18-9. For a more detailed review of the opinion of Oppenheim, see Lauterpacht's eighth edition of Oppenheim's treatise, *op. cit.*, note 34, para. 64, 214 and 221, at pp. 118-9, 547-8, and 557, respectively.

substantive differences in these opinions, nevertheless there can be distilled therefrom a general underlying principle. It is this: the only territorial sovereignties recognized by international law are those held by "organized" or "civilized" States. Populations organized under tribal structures are not considered "States", the usual reason given being that they are outside the "Family of Nations" of international law and are not States capable of being recognized in the future as part of the Family of Nations due to their uncivilized character. Many of these authors would deny the validity of cessions actually negotiated between Europeans and Native tribes or would rationalize such cessions as mere redundancies affirming the agreement of the Indians not to combat the acquisition which remains, the argument goes, as one by Occupation.<sup>83</sup>

Problems abound with the opinions of the nineteenth century authors. Most of these problems centre upon the failure to develop a definition of "State" on which they can agree.

Firstly, while those scholars held that only "civilized" societies can form a State they do not provide characteristics for distinguishing "civilized" from "uncivilized" peoples. It is true that Oppenheim can be cited as establishing four criteria of a State.<sup>84</sup> Yet many Native tribes would have little difficulty proving that they met his four criteria. Indeed:

No race is without organization of some kind, and if, with Salmond, we regard as a State every society which performs the functions of war and the administration of justice, many peoples usually regarded as savage would form a State. It is clear, however, that the writers who take as the criterion the existence of a State would not allow this wide meaning to the word.<sup>85</sup>

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<sup>83</sup> See, for example, the opinions of Martens-Ferrac and Heimburger in Lindley, *ibid.*, at p. 19, and that of Oppenheim in Lauterpacht, *ibid.*, para. 222, at p. 558 (and also at note 1 on that page).

<sup>84</sup> See Lauterpacht, *ibid.*, para. 64, at pp. 118-9.

<sup>85</sup> Lindley, *op. cit.*, note 10, at p. 19.

Secondly, if one accepted the opinion of those who hold that a State is an entity belonging to the Family of Nations, there would still result confusion. Some authors adhering to this position would include only present members and this has the problem of ambiguity since "[s]ome may be within [the Family of Nations] for some purposes but not for others, and the difficulty remains to determine which of them is within it for this particular purpose [of acquiring territory]".<sup>86</sup> Others would include not only present members of the Family of Nations but those which, though not yet admitted, are capable of being so in the future. However, these scholars provide no parameters for admission beyond those provided by Oppenheim, alluded to above.

Thirdly, by denying any effect to treaties of cession negotiated between Europeans and Natives, these scholars are engaging in pure sophistry. As Lindley has quite succinctly put it:

No doubt, in many of these cases of Cession, the native chief did not realize what he was transferring under the treaty; but the fact that the form employed was that of Cession shows that the Power concerned did not consider that the territory was one that belonged to nobody. No doubt, also, in many cases the treaties were obtained under compulsion, but forced treaties are not unrecognized in international affairs. The Powers themselves, as we have seen,<sup>87</sup> have in large number of cases accepted sovereign rights from the chiefs, and based their titles upon such cessions, and, unless one is prepared to argue that the maxim *Nemo dat quod non habet* has no application to such a case, it must be admitted that the chiefs themselves possessed those rights. 'The power of making an agreement', it was urged on behalf of Great Britain in the Delagoa Bay arbitration, 'implies the ability to refuse to make such agreement, and is a mark and test of independence'.<sup>88</sup>

Fourthly, these nineteenth century opinions have the disadvantage of being opposed by those, not only of many of their contemporaries, but also of scholars going back to the middle ages, when the contrary view was unopposed. (These are discussed immediately below.)

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<sup>86</sup> *Ibid.*

<sup>87</sup> And as shall be seen herein in subsequent chapters.

<sup>88</sup> Lindley, *op. cit.*, note 10, at p. 44.

Finally, the negative view appears to contradict the diplomatic positions of the colonial Powers who (as will be seen below) advocated the right of the Natives to treat as States with whichever European Power they chose. It also contradicts the actual practices (examined in subsequent chapters hereof) which each of the colonial Powers invariably employed for themselves when carrying out acquisitions in Indian-occupied lands, which practices implicitly recognized the presence of Native States with whom one had to treat for their lands or else conquer them.

Turning to the opinions holding that "backward peoples" do possess sovereignty over territory, one finds that there is a long history of support for such a notion. It is true that in the middle ages:

[t]he general trend of opinion was in the direction of denying sovereign rights to non-Christians, but even among those who held this view, it was put forward as legitimizing a war of Conquest and not as rendering the lands of non-Christians *territoria nullius* which could be acquired by Occupation.<sup>89</sup>

Moreover, there nevertheless were those during this period who specifically advocated the notion that infidels might possess sovereignty.<sup>90</sup> And, from the sixteenth to the twentieth centuries the dominant opinion was that of those scholars who recognized the capacity of backward peoples to hold territory as sovereigns. These range from the Spanish scholars Vittoria, Soto and Las Casas as well as Brunus (Germany), and Gentiles (England), all five of whom wrote in the sixteenth century, through Grotius, Pufendorf and others in the seventeenth century, Gunther and Blackstone and others in the eighteenth century, Heffter, Fiore, Woolsey, Salomon and others

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<sup>89</sup> *Ibid.*, at p. 11.

<sup>90</sup> See Lindley, *ibid.*, at p. 11, where the opinions of St. Thomas Aquinas and Sinibaldo (who later became Pope Innocent IV) are discussed.

in the nineteenth century, to Lindley, O'Connell and others in the twentieth century.<sup>91</sup> The differences in opinion between these authors are negligible.<sup>92</sup> It is clear, therefore, that the recognition of sovereign rights in "backward peoples" has always been, since the end of the middle ages, the dominant view among jurists.

But it cannot be said that these jurists believed that whenever a land had some inhabitants, no matter how sparsely dispersed and unconnected the ones were to the others, such territory was under some sovereignty. Lindley sums it up best when discussing the opinion of Despagnet:

Despagnet also considers that the lack of civilization is not a cause of forfeiture of sovereignty...Territory governed by any sovereignty, however, barbarous and rudimentary, should not be regarded as *territorium nullius*; but if it is inhabited by people without appreciable political organization and not having even the conception of sovereignty, then it may be considered as open to occupation, although even in such a case any rights of property or prior possession should be respected.<sup>93</sup>

Thus, according to the majority juristic opinion through the ages, infidels who are organized into a society, no matter how rudimentary and backward its structure, can possess sovereignty over territory. For the jurists adhering to this belief, therefore, the question resolved itself once again to this: At what point does an agglomeration of people possess the necessary "political organization" to qualify as a sovereign society? To answer this question Lindley proposed elements of analysis which seem eminently reasonable and likely to have received the

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<sup>91</sup> The specific opinions of some of these and other jurists are canvassed in Lindley, *ibid.*, at p. 12-7.

<sup>92</sup> It seems that the basic difference between the opinions of all the jurists just referred to was not whether lands occupied by uncivilized tribes were *terra nullius* and acquirable by Occupation, for clearly they all disagreed with this notion. Rather, they all recognized Native sovereignty so as to tacitly require the transfer of sovereignty by Conquest or Cession, and only disputed among themselves whether a war of Conquest against "uncivilized" Natives was just.

<sup>93</sup> Lindley, *op. cit.*, note 10, at p. 16.

concurrence of the earlier jurists who recognized the sovereignty of "backward peoples".<sup>94</sup> He proposes that:

so long as there is some kind of authoritative control of a political nature which has not been assumed for some merely temporary purpose, such as a war, so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied.<sup>95</sup>

Such permanent authoritative control of a political nature by some form of government is evidence of what he calls a "political society". But he rejects the notion that the control must be exercised by some identifiable person or persons smaller in number than the whole society, though proof of this would be sufficient to establish the existence of a political society. He notes that the power to compel obedience of individuals may reside in the community as a whole and thinks that such a situation is no less a form of government. Additionally, while obedience to community standards is an element, it need not always be compelled by threat of punishment. "[S]o long as the standards are habitually conformed to", he says, "the reason for conformity would appear to be of secondary importance",<sup>96</sup> noting that some tribal societies achieve this either by force of custom or from fear of supernatural consequences. Moreover, he does not see as an essential criterion of a political society that it have united itself for purposes of defence. Indeed, he notes, some societies may not historically have had to face external threats, citing as an example the hypothetical inhabitants of an island which had never been threatened from outside. Rather, the requirement is one of permanence. The society must have persisted for some time. Finally, a political society must have "considerable" numbers. But, to him, if the

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<sup>94</sup> See generally, Lindley, *ibid.*, at pp. 20-3.

<sup>95</sup> *Ibid.*, at p. 20.

<sup>96</sup> *Ibid.*, at p. 22.

other criteria are met, a political society would exist even if it were composed of merely a small number of families.

Having thus defined his criteria for a political society, Lindley integrates it into his overall definition of territory which is *territorium nullius* and, therefore, acquirable by Occupation:

[I]n order that an area not be *territorium nullius*, it would appear, from general considerations, to be necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.

It would follow that if a tract of country were inhabited only by isolated individuals [or, it should be added, isolated families] who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*.<sup>97</sup>

The foregoing discussion of the two prevailing lines of juristic opinion shows that the one acknowledging the sovereignty of "backward Peoples" extends over almost five centuries and is well developed. Writers of this school would, therefore, consider North America's various aboriginal groups as having initially held sovereignty over the lands on which they exercised "effective possession", to use the international law terminology, provided they qualified as "political societies". Moreover, this enlightened attitude appears to have been shared by the colonial Powers, as evinced both by the positions they held out in diplomatic exchanges (examined next, immediately below) and the practices each followed in North America and elsewhere (examined in the next three chapters).<sup>98</sup>

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<sup>97</sup> *Ibid.*, at pp. 22-3.

<sup>98</sup> But, see, *contra*, Keller et al., *op. cit.*, note 31, especially at pp. 6-22. At p. 6, they write:

It may be said that no European nation considered the natives of any territory in the New World as having capacity to possess or to transfer any dominion in the international-law sense, but this attitude was by no means universally held toward the native states in southern Asia.

As stated, the colonial Powers (or, at least, some of them) appear to have asserted the sovereignty of the Indians in their diplomatic exchanges amongst themselves. For instance, of the French attitudes expressed in diplomatic exchanges, Slattery comments:

Additional light on French attitudes is provided by an exchange between François I and the Portuguese ambassador late in 1541, where the French monarch is reported as saying that "he intended to proceed with *conquests* and *voyages*, which were his right as well as that of other princes of Christendom, and *intended to preserve friendship and good understanding with certain princes of the Indies.*" *The statement apparently assumes the independence and equality of the indigenous rulers.*<sup>99</sup>

If the foregoing evidence of juristic opinion and diplomatic positions concerning the status of Natives is not enough to convince the reader, consider that there appears to be a closer link than mere accidental conformity between juristic opinion of the positive view, on the one hand, and the diplomatic exchanges and actual practices of the colonial Powers, on the other. Indeed, there is some evidence to support the notion that the opinions of at least some scholars favouring Native rights of sovereignty held sway with the governments of the Powers. That evidence is the close ties some of them held with the various Powers. For instance, as alluded to earlier, Domic Soto was Confessor to Charles V of Spain while Las Casas maintained his beliefs in this regard before that same Charles V at a conference in 1542.<sup>100</sup>

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<sup>99</sup> Slattery, B., *The Land Rights of Indigenous Canadian Peoples*, D. Phil. Thesis, Oxford, 1979, at p. 77 [hereinafter cited as Slattery, *The Land Rights...*]. [Emphasis added.] This statement is also contained in Slattery, *French Claims...*, *op. cit.*, note 20, at p. 163. Moreover, at p. 144 of this latter source, Slattery relates another exchange, this time in 1527 and between a French admiral and the Portuguese ambassador, in which the former asserted (as the ambassador later reported it) that:

'au sujet du Brésil..., sans aucune doute, les indigènes de cette terre ont le droit de vendre leurs produits à qui ils veulent, s'ils sont libres et non pas vassaux. Quand ils [i.e.: the French] sont mécontents, ils disent la même chose en ce qui concerne les Indes'.

As concerns a similar diplomatic exchange coming from England, see the words of Queen Elizabeth I quoted herein, *op. cit.*, note 20.

<sup>100</sup> Lindley, *op. cit.*, note 10, at p. 12.

## Conclusion on International Law

It is clear from the foregoing that from the earliest years of the discovery of the New World the various colonial Powers professed, and continue to profess, to adhere to an international legal doctrine holding that lands occupied by an organized tribal society are under that society's sovereignty such that the territory can only be acquired by Cession, Conquest or Prescription in the same way as applies between "civilized" nations. Only lands forming part of the *territorium nullius*, that is to say which are uninhabited or populated by disparate groups of individuals not organized into a "political society", may be acquired by the method of Occupation.

The foregoing principles professed to be adhered to by the colonial Powers are distilled from the opinions of jurists, some of whom held sway with the European governments, as well as from the positions taken in diplomatic statements of some of the Powers *vis-à-vis* the territorial claims of some of the other Powers. Not specifically examined thus far is the question of whether the *practice* actually followed by each of the colonial Powers conformed to the doctrine to which they *professed* to adhere and by which, they argued, others were bound. That is the topic considered in the ensuing three chapters.

As noted at the outset of this chapter, to the extent that the practices of the colonial Powers during a given era evince a "practical unanimity" between countries this practice will be what establishes the state of international law at that time. This would be so even if the principles revealed from that common practice differ from those distilled from juristic opinions, diplomatic exchanges and other evidence. Indeed, so long as the practice can be said to be consistent, or practically consistent, between States, it does not matter that each of them purported to have validly acquired a territory by a practice the validity of which, in diplomatic exchanges, they denied when practised by other Powers. International legal doctrine would

nevertheless be expressed by the practice of nations, if sufficiently preponderant among them. Of course, if a uniform practice conforms to the rules otherwise evinced from other sources, then all of the evidence taken together would serve to establish the content of international law.

It is precisely upon this supposed dichotomy between the "professed rules" and the actual practices of States that some have rested their arguments that Native sovereignty was not a recognized principle of international law. They argue that, the practice of nations being uniform (or at least exhibiting a general uniformity among them) and it being at odds with juristic opinion, that practice forms the true basis of international law. Henri Brun is one modern jurist who adheres to this belief. He has written that while juristic opinion of the sixteenth and seventeenth centuries may well have recognized a "true aboriginal title" ("véritable droit aborigène") as existing in international law--by which he means a right to the land which is recognized to Natives in international law by virtue of their status under that law as independent nations having sovereignty over their lands--the actual international *practice* did not follow the legal *doctrine* but rather denied the existence of any Native sovereignty. It is, he argues, the practice of nations rather than the international doctrine which must be accepted:

A l'époque où fut découvert le territoire actuel du Québec, de même qu'au siècle suivant, la pratique des États, quant à la reconnaissance de souverainetés autochtones en territoires découverts, apparaît singulièrement éloignée de la doctrine. Et pour autant qu'il soit possible de conclure à une concordance générale de cette pratique, il faut bien admettre que là réside le droit positif d'alors.<sup>101</sup>

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<sup>101</sup> Brun, *op. cit.*, note 81, at p. 48. See also p. 39, where he says that "le droit positif réside davantage dans la pratique internationale des grands États colonisateurs d'alors que chez les auteurs du temps". And again, at p. 53, where he writes:

Il faut admettre, en définitive, que la pratique des États, aux XVI<sup>e</sup> et XVII<sup>e</sup> siècle, n'a jamais eu pour effet concret d'admettre une souveraineté aborigène à laquelle prétendait une doctrine de l'époque. Et cette pratique apparaissant générale et constante, elle permet de croire qu'elle reflète plus exactement l'état du droit international d'alors.

The proponents of this position rely on the various Instructions, Commissions and Charters issued by the various European States as establishing the split between international legal doctrine and the actual practice of the colonial Nations vis-à-vis the indigenous populations of colonized territories.<sup>102</sup> Thus, chapters three to five, by examining such materials, will test the assertion made by some scholars that the European nations uniformly adopted practices which denied Native sovereignty and so contradicted the rules which they themselves professed in diplomatic exchanges. It will be seen that, far from derogating from juristic notions of international doctrine, the various North American colonial Powers (the Spanish, Portuguese, French and English)<sup>103</sup> actually followed a practice which consistently adheres to that doctrine and, by so doing, strengthens the reliability of juristic opinion and diplomatic statements regarding that doctrine.

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<sup>102</sup> It is useful to quote at length from Brun, *ibid.*, at pp. 47-8:

C'est par l'entremise de particuliers ou de compagnies que s'effectuent ces découvertes et occupations fictives. Les lettres-patentes et les chartes, tant anglaises que françaises, attribuées aux explorateurs et aux compagnies, leur confèrent le droit d'occuper et de prendre possession de toutes les terres qu'ils découvriront, "qui ne sont occupées par aucun prince chrétien"; c'est là une formule consacrée. *L'on reconnaît ainsi la validité de la souveraineté des autres nations européennes sur les terres qu'elles auront découvertes et occupées (symboliquement selon le critère de l'époque); et l'on s'arroge le droit de disposer des autres terres, celles habitées par des autochtones.*

Il ressort d'autre part de la pratique des États la volonté de nier la souveraineté aborigène. Ainsi que Story l'affirme:

"As [sic] infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations."

Les lettres-patentes et chartes attribuées par les souverains demandent d'ailleurs au bénéficiaire de découvrir, d'occuper lesdits territoires et d'y établir l'autorité du souverain.

*"Les peuples européens refusent en effet d'entrer en rapport avec les indigènes sur un pied d'égalité; ils ne veulent pas reconnaître leur souveraineté; ils entendent les soumettre à leur joug[...]."* [He is quoting here from a work by Decencière-Ferrandière.]

*Les seuls rapports qui nécessitent une réglementation positive de droit international à cette époque sont ceux des colonisateurs entre eux ... Et les rapports des indigènes avec le colonisateur sont réglés uniquement par le droit interne de ce dernier et cela même lorsque des pactes sont conclus entre eux. [Emphasis added.]*

<sup>103</sup> Again, the practice of the Dutch and Russians are not examined herein.

## CHAPTER THREE:

### NATIVE SOVEREIGNTY UNDER THE PRACTICE OF THE SPANISH AND PORTUGUESE

As noted at the conclusion of the last chapter, some modern jurists have contended that despite what the colonial Powers might have said in the course of diplomatic exchanges regarding the status as sovereign nations of "backward peoples", especially the indigenous peoples of North America, each individual Power in fact acted in a way which showed their belief that the Natives were not sovereign peoples.<sup>104</sup> If this contention is true, and if this practice was practically uniform among the Powers, then the international law of the colonial period concerning territorial acquisitions in America would be wholly different from that which is suggested by the other evidence reviewed in the last chapter. Certainly the domestic law of any Power who followed such a practice would be dictated by its practice and not by international law considerations.

However, beginning with this chapter and concluding with chapter five, the erroneous nature of the conclusions of these modern jurists regarding the practices of the Powers will be revealed.

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<sup>104</sup> For example, Brun, *op. cit.*, note 81, at p. 49, has said of French practice:

La France n'a jamais agi, en Amérique du Nord, d'une manière signifiant la reconnaissance d'une souveraineté indigène. Ni à l'endroit des autochtones eux-mêmes, ni à l'endroit du territoire.

And, at p. 52, he said of English practice:

[L]es chartes, lettres-patentes ou commissions, octroyées par le roi d'Angleterre à ses divers découvreurs ou fondateurs, à l'époque, comportaient généralement des concessions territoriales ignorant invariablement toute souveraineté autochtones.

See also Keller et al., *op. cit.*, note 31, at p. 11, where the authors state:

In North America, for example, the claims of the savage inhabitants to prior sovereignty were universally disregarded by the French and English governments.

From the time of the "discovery" of America by Columbus in 1492,<sup>105</sup> the Americas were divided up and claimed by a succession of European powers. The Spanish and the Portuguese were the first. Consequently, in the present chapter the practices of the two Iberian Powers will be considered.

Since neither the Spanish nor the Portuguese colonial Powers ever established settlements in any part of the modern-day Canada, it cannot be argued that either of them acquired sovereignty by Cession, Conquest, Prescription or even Occupation. Each of these methods of acquisition, it was seen in chapter two, requires effective possession to perfect the title of Sovereign. Without it, these States could not have affected the *real* possession of the aboriginal populations then living here.<sup>106</sup>

Consequently, the only possible arguments to sustain any extinguishment of Native sovereignty on modern Canadian soil by either of the Iberian States would have to stem from the other, theoretically rejected, modes of territorial acquisition noted to in the chapter on the state of international law as it was professed by the Powers, including Spain and Portugal. In other words, it would have to be proven that the Iberian Powers did not *in practice* recognize the Indian's capacity to hold sovereignty over the land, and acted as if simply claiming the territory for themselves, based on either Papal grant or Discovery supported only by fictitious or symbolic possession, was sufficient to attach their sovereignty to a territory occupied by Indians. If such

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<sup>105</sup> Theories of prior visitations by the Vikings and others notwithstanding, 1492 is taken as the base year for the beginning of territorial conflict between the American aboriginal peoples and "outsiders". There is no evidence that visitors prior to this date made any territorial claims. In any case, the effect of such visits having disappeared well before Columbus' "discovery", Native territorial possessions must be considered as of that year.

<sup>106</sup> Thus, while it appears that the Spanish—who at one time laid claim to the vast Louisiana Territory and areas along the west coast of the continent—may have successfully waged war against or signed treaties with tribes whose territories spanned the present Canada-U.S. border, the lack of effective occupation by Spain negates any imposition of its sovereignty over these Indians and their lands by Cession, Conquest or Occupation. This would be so whether Spain considered the Indians as political societies (and, therefore, sovereign societies) or not since even Occupation requires effective possession.

a practice can be shown on the part of either Iberian Power, its sovereignty would be established, at least under its own domestic law, even though the Indians, never having had contact with that Power, lived totally unaware of such "paper" expropriations. Moreover, proof of such a practice by Spain and Portugal, if coupled by proof of a similar practice by a preponderance of other colonial Powers, would serve to establish international law to be other than that professed by them and contended for by the scholars of the day.

But, this is not the practice of the Iberian Powers which the evidence reveals. The several Papal Bulls which were issued invariably required the grantee (be it Spain or Portugal) to take actual, not symbolic, possession of the lands granted before a valid claim would be complete.<sup>107</sup> Moreover, that possession, according to the terms of the grants in the Bulls, could not be effected by simple occupation where the lands were already occupied by indigenous societies. It is true that, by the Papal Bulls, Spain and Portugal were authorized to divide up the non-Christian world overseas between themselves, thereby excluding all other European States. However, it is not the case that these Bulls considered non-Christian lands to be *territorium*

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<sup>107</sup> While the *Inter caetera* of 1493 contrasted with the previous Bulls in that it *prima facie* appeared to confer existing territorial rights rather than a mere authority to make acquisitions, it is clear from a closer inspection that it too grants a mere authority to acquire territories. By its wording, it is granted "to encourage Spanish monarchs 'to bring under your sway the said mainlands and islands with their residents and inhabitants...'. Future acts of acquisition are thus envisaged": Slattery, *The Land Rights...*, *op. cit.*, note 99, p. 67.

Slattery cites as further proof of this interpretation a subsequent Bull, issued September 26 of that same year, which confirms the earlier Bull of May 4 and confers, *inter alia*, full power to take possession of the said lands and to exploit them and trade there to the exclusion of other countries unless already actually occupied by other Christian Princes under previous Papal Bulls. Thus, he argues, "this presumes that such grants [via Papal Bulls] took effect only upon the grantee assuming actual possession. Mere casual discovery or exploration did not suffice": *Ibid.*, pp. 67-8.

Originally, Papal Bulls had granted to Portugal such rights exclusively. Thus, "upon Columbus' return from his first voyage to America, Portugal claimed that the lands discovered lay within its exclusive sphere": *Ibid.*, at p. 67. (Spain and Portugal are discussed at pp. 66-69 of Slattery's text.) However, Spain quickly succeeded in obtaining a Papal Bull, the *Inter caetera* of May 4, 1493, granting Spain, in Slattery's words, *ibid.*:

dominion over all past and future acquisitions beyond a meridian 100 leagues west of the Azores or Cape Verde Islands and exclusive rights of trade and travel there, with safeguard for rights acquired by Christian princes in "actual possession".

As noted in the chapter on international law (see note 19 and accompanying text), this line was subsequently altered by a treaty between Spain and Portugal (the *Treaty of Tordesillas* of 1494) which effectively gave Portugal exclusive rights of discovery, trade and conquest east of a meridian apparently running through Newfoundland and Brazil while Spain gained similar rights west of that line, thus leaving it most of the Americas.

*nullius* and acquirable by Occupation. As Brian Slattery has noted, conquest was required to perfect the title:

Most of the Bulls do not make outright grants of territory, as often assumed. Rather they extend recognition to past conquests and confer the faculty to make future ones. Neither do the Bulls treat infidel lands as *territorium nullius*, acquirable by mere discovery or occupation. While presuming that Christians may justly make war on infidels (or certain ones) and appropriate their territories, these instruments generally recognize that the actual assumption of factual control, by conquest or some other mode, was necessary for the lands to be acquired.<sup>108</sup>

Thus, a Papal grant which was not perfected by actual possession--and, in the case of lands inhabited by Natives this meant by Conquest or Cession--was insufficient according to its own terms. Therefore, since neither the Spaniards nor the Portuguese ever established permanent settlements on Canadian soil, these Bulls cannot be taken as the basis for establishing in Canada even a "paper" or unilateral extinguishment of aboriginal territorial rights by the Iberian Powers.

Neither did the Spanish or Portuguese consider that, notwithstanding the terms of the Bulls, they could acquire sovereignty without either actual Conquest or other means of effective possession. This is evident from the practice each State followed at that time in those parts of the world where they did in fact take effective possession of territory, particularly the practice followed in Central and South America. Far from evincing an attitude whereby they considered themselves to have sovereignty over Indian-occupied lands under the Bulls or, for that matter,

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<sup>108</sup> Slattery, *The Land Rights*, *ibid.*, at p. 66. The concepts of "conquest" and "*territorium nullius*" referred to in the quoted passage as well as their effects were discussed in the preceding chapter when dealing with international law and will be alluded to again in chapter five, *infra*, when considering British colonial law.

Lindley, *op. cit.*, note 10, at p. 26 is to the same effect:

The rights which the Popes purported to bestow were rights to conquer the territories named in the grant. The grant of Nicholas V to the King of Portugal in 1452 was to invade, conquer, storm, attack and subjugate (*invadendi, conquirendi, expugnandi, debellandi, & subjugandi*) the Saracens, pagans, and other enemies of Christ, and reduce them to perpetual servitude. And the Bull *Inter Caetera* of Alexander VI also assumes that Ferdinand and Isabella intend to subdue (*subjicere*) the lands and islands and their inhabitants and dwellers.

by reason of Discovery, without the need to effect conquests, the practices of Spain and Portugal in Central and South America from the end of the fifteenth century to the seventeenth century respect the conditions of both the Papal grants and the international legal principles regarding the merely preliminary effects of Discovery which their own prominent scholars had propounded.<sup>109</sup>

Consequently, it is clear that both Spain and Portugal accepted the authority of the Bulls as conferring only an inchoate title to be perfected by conquest of, or peaceful cession from, the sovereign non-Christian inhabitants, unless of course those lands were devoid of any organized tribal inhabitants. At the same time, the practice of effecting conquests reveals the true attitude of both Spain and Portugal regarding their assertion of rights based upon *Discovery*. That attitude was that Discovery was good as against other European States but provided no sovereignty over the inhabitants of the discovered territory unless conquests were effected or

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<sup>109</sup> In Spain, acting in the professed pursuance of the authority granted in the Bulls to effect conquests of non-Christian lands, King Ferdinand and Queen Isabella granted their first Commission to Christopher Columbus on April 30, 1492, which Commission referred to lands to be discovered and *conquered*: See Lindley, *ibid.*, at p. 27, where the text of the Commission is quoted. Similarly, rights of discovery and conquest appear to have been conferred in 1518-21 to Hernando Cortez with respect to Mexico: *ibid.*, at p. 28. Again, the Spanish Crown, in what Lindley calls the "capitulation", also granted to Francisco Pizarro in 1533 "the right of discovery and conquest in the province of Peru": *ibid.* [Emphasis added.] And these explorers appear to have acted accordingly. Indeed, the well known term "conquistadores", used to refer to the colonial Spaniards who took over Central America by force, speaks volumes of the Spanish attitude at that time towards the lands of non-Christians. It is true that the peoples conquered there were the Aztecs and the Incas whose empires were comparatively more advanced in civilization than the more primitive Latin American Indians "but", as Lindley argues, "the mode of acquisition was not different in kind from that by which the greater part of the rest of the continent was secured": Lindley, *ibid.*, at p. 28.

The reader interested in the Spanish conquests in the Americas is referred to, among others, the following: Prescott, W.H., *History of the Conquest of Mexico*, New York, New York, The Kelmscott Society, 1843, in 2 volumes; Prescott, W.H., *History of the Conquest of Peru*, New York, New York, The Kelmscott Society, 1847, in 2 volumes; Prescott, W.H., *History of the Reign of Ferdinand and Isabella the Catholic*, 3<sup>rd</sup> Edition, New York, New York, The Kelmscott Society, 1838, in 2 volumes; Markham, Sir Clements, *The Incas of Peru*, New York, New York, E.P. Dutton and Company, 1910; Anderson, A.J.O. and Dibble, C.E., *The War of Conquest: How it was Waged in Mexico; The Aztec's Own Story as Given to Fr. Bernardino de Sahagún, Rendered into Modern English by Arthur J.O. Anderson and Charles E. Dibble*, Salt Lake City, Utah, The University of Utah Press, 1978; Solís, Antonio De, *History of the Conquest of Mexico by the Spaniards*, translated from the original Spanish of Don Antonio De Solís, Secretary and Historiographer to His Catholic Majesty, by Thomas Townsend, Esq., 3<sup>rd</sup> Edition, New York, New York, AMS Press Inc., 1973, in 2 volumes; Pizarro, P., *Relation of the Discovery and Conquest of the Kingdoms of Peru*, translated into english and annotated by Philip Ainsworth Means, Boston, Mass., Milford House Inc., 1972, in 2 volumes; and Sancho, P., *An Account of the Conquest of Peru*, translated into english and annotated by Philip Ainsworth Means, Boston, Mass., Milford House Inc., 1972.

The practice of the Portuguese in Brazil during this same period appears to have been much the same. Conquests were effected. Cessions, however, were rarely negotiated since the Portuguese preferred force. See: Hemming, J., *Red Gold: The Conquest of the Brazilian Indians, 1500-1760*, Cambridge, Mass., Harvard University Press, 1978; and, to a much lesser extent, Nash, R., *The Conquest of Brazil*, New York, New York, Harcourt Brace & World, Inc., 1926 (reprinted in 1968 by Biblio and Tannen Booksellers and Publishers, Inc.).

cession negotiated. Discovery alone did not *ipso facto* displace the Natives as Sovereigns.<sup>110</sup> Nor could Discovery followed only by symbolic possession displace the local chiefs as Sovereigns.<sup>111</sup> Even if symbolic acts of possession were considered by the Iberian Powers as sufficient to perfect a title by Discovery, neither Spain nor Portugal appears to have performed such acts on Canadian soil (or, if they did, their claims based thereon were never followed up and therefore were since abandoned). The expansionism of either of these Powers, therefore, could have had no bearing upon the territorial rights of any of Canada's First Peoples.

Finally, it is useful to note that, even if neither country ever established any settlements on Canadian soil, the practices of both Spain and Portugal through the centuries regarding the

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<sup>110</sup> The following passage from Lindley, *ibid.*, referring to the attitude of European States in general towards Discovery, is apt to describe the attitude of Spain and Portugal specifically. At p. 26 he writes:

[T]he rule that discovery gave rights to the discoverer's State in respect of the land discovered was adopted to regulate the competition between the European Powers themselves, and it had no bearing upon the relations between those Powers and the natives. What the discoverer's State gained was the right, as against other European Powers, to take the steps which were appropriate to the acquisition of the territory in question. What those steps were would depend upon whether there was already a native population in possession of the territory; and if it became necessary for a State that had acquired rights by discovery to fight with the natives in order to turn those rights of acquisition into rights of possession, its new territory would be an acquisition by conquest, none the less because no other European Power had the right to make the Conquest.

And, at p. 28, he states the point even more clearly:

[T]he European Powers did not consider that the parts of the American continent which belonged to none of them were necessarily without an owner, and...they recognized that the fact that native tribes were in possession of, and prepared to fight for, their territories, made Conquest the only possible method of acquisition.

<sup>111</sup> It must be noted, however, that in Keller et al. the authors of that book did conclude (writing with respect to the period between the years 1400 and 1800), through numerous examples, that the Portuguese practice was "characterized by the erection of physical signs of possession...[so that] it seems indubitable...that in the opinion of the Portuguese a title was thus acquired...[And] there is nothing in the Portuguese materials to suggest that Portugal ever doubted the effectiveness of mere symbolic acts as creative of rights of sovereignty in *terra nullius*": Keller et al., *op. cit.*, note 31, at pp. 31-2. Portuguese practice is reviewed by them at pp. 23-32. They argue a similar practice and belief prevailed in Spain: See *ibid.*, at pp. 33-48. They do say, however, that "[a]t no time was mere sighting considered [by Spain as] sufficient to acquire title.(...)No instruction has been found permitting the taking of possession without landing (...) [Spain] likewise stated very definitively the view that mere discovery in the sense of sighting was insufficient to acquire title...[T]aking of possession was necessary" and, again, such possession could be by symbolic acts but not "mere presence on the land...without at least some formality": *ibid.*, at pp. 34-6. It is interesting, however, that when the authors review the use to which the Iberian Powers put their numerous symbolic acts of possession in the Americas during diplomatic controversies, these Powers' belief in the sufficiency of symbolic acts is admitted by Keller et al. to be less than categorical. Keller and his co-authors can only say that, regarding Portugal, "[t]here seem to have been no diplomatic controversies in which the Portuguese relied upon their symbolic takings of possession as establishing their title": *ibid.*, at p. 28. Portugal instead usually relied, during these controversies, on arguments of actual possession and control or on the Papal Bulls and the *Treaty of Tordesillas*: *ibid.*, at pp. 28-32. Similarly, regarding Spain, the authors merely support their assertion by pointing to certain diplomatic controversies in which the Spanish reliance upon symbolic acts appears, to the present writer, unclear at best: *ibid.*, at pp. 45-8.

acquisition of sovereignty over lands outside the Americas which were inhabited by organized indigenous populations (in Africa, for example) remained the same as outlined above up to the twentieth century, with the exception that negotiation of cessions rather than forceful conquests became the preferred method of proceeding.<sup>112</sup> This shift in tactic away from confrontation and towards consensual transfers of sovereignty is inconsequential, however, since under either mode of acquisition the recognition is implicit that the indigenous populations were sovereign to begin with. It is significant, moreover, that this Iberian practice was maintained notwithstanding the minority, predominantly English, juristic opinion of the nineteenth century to which reference was made in the chapter dealing with international law and which argued that lands possessed by "uncivilized peoples" were then to be considered part of the *territorium nullius*. It would seem that Spain and Portugal steadfastly rejected this nineteenth century notion in their practice as well as in their professed beliefs.

Consequently, for all purposes relevant to this paper, the explorations and discoveries of Spain and Portugal in the Americas support the assertion that Native sovereignty survived Spanish and Portuguese involvement unless cessions were negotiated or conquests effected. And, since neither country committed either of these acts in the Canadian portion of the continent, much less establish a presence here, Iberian colonialism may be viewed as not having affected Native sovereignty in Canada.

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<sup>112</sup> See generally Lindley, *op. cit.*, note 10. Throughout his book, Lindley refers to the practices of the Iberian Powers, as well as others, throughout the globe and from the earliest period of modern exploration to the twentieth century.

## CHAPTER FOUR:

### NATIVE SOVEREIGNTY UNDER THE PRACTICE OF THE FRENCH

To use the words of Brian Slattery, "[d]iverse opinions have been entertained as to the character of the claims advanced by France to New World territories, insofar as these affected the land rights of aboriginal peoples".<sup>113</sup> As stated earlier, some scholars, typified by Henri Brun, argue that France (and, in fact, the other colonial Powers) denied the existence of any Native *sovereignty*. They maintain that the result of the French experience in North America was that by their *practice* the French consistently denied the possibility of any pre-existing Native sovereignty over North America at international law.<sup>114</sup>

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<sup>113</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 70.

<sup>114</sup> See: Brun, *op. cit.*, note 81, especially the passages previously quoted in notes 101 and 102 hereof; and Keller et al., *op. cit.*, note 31, at p. 11. In fact, Brun, for one, would go much further than most scholars in that he says the French recognized no Indian rights whatsoever, territorial or otherwise, except those specifically emanating from grants by the French to the Indians. In other words, he would say that the French, upon acquiring sovereignty, denied the *survival* of any inherent rights such as are encompassed under the modern notions of common law aboriginal title and aboriginal self-government. This is because, firstly, a finding of the advent of French sovereignty means, to him, that any Native land claims surviving France's tutelage of Canadian territory would exist by virtue of French law. Brun writes, *ibid.*, at p. 50:

Les indiens étaient donc soumis au droit interne français, lequel permettait de les déposséder de leurs terres.

...

C'est donc dans un contexte interne que doit se rechercher le droit individuel à telle ou telle propriété découlant d'une possession de droit privé et non dans l'optique d'un droit collectif de caractère public qui n'a pu survivre à l'avènement d'une souveraineté d'un tel type.

Secondly, he argues that no general title to land was recognized under French law to have *survived* the imposition of French sovereignty. In other words, *French law* did not consider that though France had acquired sovereignty the Indians nevertheless retained an interest over the land as a burden on that sovereignty. At best, he concludes, the Natives were left, after the departure of the French, with only those territorial interests which, by virtue of specific grants, the French Crown had *created* in favour of the Natives under French law. And only very limited rights over very small and restricted portions of land appear to have been so granted. He states, *ibid.*, at p. 62:

Aucun texte ne permet de croire que le colonisateur français ait admis en faveur des Indiens de la Nouvelle-France quelque titre générale que ce soit sur le territoire. En tout cas, il n'en ait pas fait allusion dans les concessions faites sous le régime français. Il semble au contraire, bien que les indications à cet égard soient plutôt événementielles que formelles et juridiques, que les Français avaient l'habitude de réserver en faveur des Indiens des territoires délimités assez précisément. Ceci, du moins, en ce qui regarde la partie peuplée de la colonie.

As to the issue of sovereignty alone, Cornelius J. Jaenen may also be included with these authors. On that issue, he agrees that the French always claimed sovereignty over parts of North America and over the Indians living there but argues France admitted that the Natives retained what he calls their "nationhood". This "nationhood" is essentially comprised of the right to "self-government" and to common law aboriginal title. Jaenen believes that by the means of alliances with the Indians, sometimes imposed by force through treaties of peace following hostilities, "French sovereignty was exercised through native nationhood and self-government": See Jaenen, C.J., "French Sovereignty and Native Nationhood During the French Régime", in Miller, J.R. (ed.),

(continued...)

As will be seen in chapter six, there is jurisprudential support in Canadian law for such a view as to the sovereignty issue.<sup>115</sup> Taschereau J. of the Supreme Court of Canada stated as much in the seminal 1887 case of *St. Catherine's Milling and Lumber Co. v. The Queen*.<sup>116</sup> Furthermore, Paul Dionne has noted that there appears to be much jurisprudential support for this proposition emanating in the last few years from lower courts in Quebec.<sup>117</sup> However, notwithstanding this nineteenth century judicial support by the country's highest court, as well as by the lower court cases of the present century cited in the Dionne article, the conclusions put forward by Brun and others, particularly as they relate to the issues of the initial existence and subsequent loss of Native sovereignty, are clearly not supported by the evidence. In fact, as will also be seen in chapter six, the Supreme Court has itself recently radically revised the view that it had taken of French practice in the last century. But first, the evidence itself will be explored in the present chapter with a view to proving that the French recognized Native sovereignty and respected, not only in their diplomatic pronouncements (as seen in chapter two) but also in their own practice, the international law requirements for its acquisition.

## The Evidence

Contrary to the view just expounded, the evidence supports the thesis that French involvement in the Americas in no way had the effect of depriving the indigenous inhabitants of

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<sup>114</sup>(...continued)

*Sweet Promises: A Reader on Indian-White Relations in Canada*, Toronto, Ontario, University of Toronto Press, 1991, at pp. 19-42 [hereinafter cited as Jaenen]. The quoted passage is at p. 38.

<sup>115</sup> And even for the more doubtful position of Brun (outlined in the previous note) on the issue of Native title *under* French sovereignty.

<sup>116</sup> (1887), 13 S.C.R. 577. The case eventually went to the Privy Council. See (1888), 14 A.C. 46 (P.C.).

<sup>117</sup> See Dionne, P., "Les postulas de la Commission Dorion et le titre aborigène au Québec: vingt ans après", (Jan./Feb., 1991) 51 *Rev. du Barreau* pp. 127-71 and cases cited therein [hereinafter cited as Dionne].

territorial sovereignty. What's more, the French never *intended* to do any such thing. Two facts need to be kept in mind in construing the results of the French experience in North America on the status of the indigenous peoples.

The first is that the interest which the French had in North America was not, until rather late in their North American colonial period, one of territorial acquisitions. They were first concerned with the prosecution of fishing, walrus hunting and whaling off the Newfoundland coast, then with finding a western route to the orient, then with finding gold and other riches in the New World, then with the conversion of the Indians to Christianity, and finally with the establishment of a permanent presence and the pursuit of a profitable trade in fur with the Indians.<sup>118</sup> This latter goal would have required that the Natives retain their lands since it was on that land that the furs were trapped by them for sale to the French. Depriving them of the control of their lands would have hurt the hunt; not to mention the negative impact it would have had on the Indians' willingness to trade with France.<sup>119</sup>

The second fact to keep in mind is that even when the French did establish permanent settlements on Canadian soil, they generally did so without in any way impeding on the Natives' lands or their way of life.<sup>120</sup> And, "[e]ven when the pursuit of trade and missionary work

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<sup>118</sup> See Jaenen, *op. cit.*, note 114, at pp. 20-1.

<sup>119</sup> As Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 84-5, has stated:

Colonization in the service of trade, a fundamental motif henceforth in the French penetration of America, is a theme which profoundly affected French attitudes and policies towards indigenous peoples. *A flourishing commerce in furs depended upon several things. Foremost was the maintenance of friendly relations with both neighbouring and more distant nations, to the exclusion of other Europeans, if possible. Equally important, however, was the preservation of the interior as the hunting grounds of the Indians living there. To dispossess them would have meant, in effect, the end of the fur trade.* [Emphasis added.]

<sup>120</sup> Jaenen, *op. cit.*, note 114, at p. 20 writes:

resulted in deep penetration into the heartland of North America, neither was associated with land acquisition".<sup>121</sup>

Of course the facts that the French principally settled in previously unoccupied territories and that they were primarily interested in the Natives for the purposes of trade and their conversion to Christianity, does not preclude the possibility that the French claimed sovereignty over the Natives and their lands. The French might have considered themselves, as many have argued, as having the sovereignty over the land and its peoples while considering that the Indians retained the *possession* of their lands (and perhaps even title thereto) as well as the right to their customs, laws and way of life, but merely at the *sufferance of the French Crown*<sup>122</sup> which was the only Sovereign. This argument for mere Native title or possession has the advantage of taking account of the need to facilitate the practice of the fur trade, which was dependant upon continued occupation of the land by the Indians, while finding the existence of French sovereignty. To successfully maintain the thesis of this study it will, therefore, be necessary to disprove this possibility and establish that such was not the French view, as that view is revealed by the evidence.

To begin with, it was stated in chapter two that at international law a State acquires sovereignty over a territory, even a territory which is part of the *territorium nullius*, only if it has

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<sup>120</sup>(...continued)

[T]he French established beachheads for settlement in largely unoccupied lands. The valleys of the St. Lawrence and the Annapolis, where they started settlements in the early seventeenth century, were not at that time inhabited. ...In these restricted areas, the French, not unlike the Amerindians who had migrated from Asia to North America, were able to move into *terra nullius* from another continent. The immediate consequence of this rather unique situation was that from the outset there was no question of displacement of aboriginal residents or of concern about legitimate title to lands appropriated. The colonization of New France, therefore, began without evident concern about territorial occupancy as a factor in French-Amerindian relations.

<sup>121</sup> *Ibid.*, at p. 20. This quote completes the passage quoted in the previous note.

<sup>122</sup> That is to say, until required by the French for settlement.

authorized or subsequently ratified the acquisition by one of its officers. But early French contact with the Americas concerned Breton and Norman ships which, *without commission from the French Crown*, had come to Newfoundland to fish or hunt for walrus and whale from as early as the beginning of the 16th century. The lack of any Crown authority whatsoever for these French fishing expeditions coupled with the lack of subsequent ratification by the Crown of any territorial claims the fisherman and hunters might have made—none appearing to have been made—means that these fishing trips cannot form the basis of any French sovereignty claims to Canadian soil. Indeed, France does not appear to have seriously sought to base any territorial claims on these trips.

It was not until 1523 that the French Crown itself became involved in the Americas. The earliest authorized voyages were under Verrazano and, later, Cartier. Unfortunately, no Royal Commissions for some of these early voyages are extant such that it is not possible to know what authority was granted these explorers by the Crown. Nevertheless, with respect to Verrazano's voyage of 1524, it has often been argued that he took possession of North America for the French king by symbolic acts such as planting "les enseignes et armoiries du Roy de France".<sup>123</sup> Yet there is no clear proof that such plantings even occurred. The explorer's own account in his report to the king mentions no such acts and, as has been convincingly argued, this is "a surprising omission in a report addressed to the French king if any did occur".<sup>124</sup> Rather than intending to take possession of new lands, Verrazano states in his own account that

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<sup>123</sup> The phrase is quoted in Slattery, *French Claims...*, *op. cit.*, note 20, at p. 141 from the works of René Goulaine de Laudonnière; specifically, from the latter's account of French ventures in old Florida published in 1586, as collected by Suzanne Lussagnet (ed.), *Les Français en Amérique pendant la deuxième moitié du XVI<sup>e</sup> siècle: les Français en Floride*, Paris, France, 1958, at p. 38.

<sup>124</sup> Slattery, *French Claims...*, *ibid.*.

the trip's main goal was to find a route to the Orient.<sup>125</sup> "[T]he acquisition of territory did not figure among his declared goals".<sup>126</sup> Moreover, even if Verrazano's account of his voyage of 1524 did contain proof of territorial claims made by him, the sovereignty of the French Crown would depend on such actions having been previously authorized by it or ratified upon his return. The existence of neither of these facts, as stated, can be proven from the records extant. Finally, it seems that during this same period the French Crown was more concerned with establishing its right, in common with all European nations, to access to the New World and to trade with the *independent indigenous peoples* living there. France made no claims to exclusive possession during such diplomatic exchanges.<sup>127</sup>

Similarly, regarding the two early voyages of Jacques Cartier (those between 1534-1536), the evidence suggests an intention to pursue a passage to the East or to search for hoped-for mineral riches in the Americas rather than to acquire territories. It is true that, as stated earlier, no Royal Commission is extant for the first of these voyages (i.e.: that of 1533).<sup>128</sup> Even so,

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<sup>125</sup> Slattery, *French Claims...*, *ibid.*, quotes from an English translation of Verrazano's own account as follows:

'My intention on this voyage', writes Verrazano, 'was to reach Cathay and the extreme coast of Asia, but I did not expect to find such an obstacle of new land as I have found; and if for some reason I did expect to find it, I estimated there would be some strait to get through to the Eastern Ocean'.

<sup>126</sup> *Ibid.*.

<sup>127</sup> As noted earlier, France had engaged in diplomatic disputes with both Spain and Portugal wherein France contested the latter two's exclusive right to the Americas. These protestations coincided with the time span covering Verrazano's voyages and, as Slattery, *French Claims...*, *ibid.*, at p. 145, has said:

It seems significant that, in the course of these exchanges, there is no record that France countered Portuguese pretensions with exclusive claims of its own. It simply maintained a right of *access* to the New World, rejecting Iberian assertions of a monopoly on navigation and upholding the freedom of the seas and of commerce. It declined to respect territorial claims not backed by factual control, and affirmed that *independent indigenous peoples* might trade with whomsoever they pleased. [Emphasis added.]

<sup>128</sup> There is a reference, Slattery acknowledges, in the works of La Roncière, written in 1931, to a commission from Admiral Chabot dated October 31, 1533. However, Slattery states, it is unverified: *Ibid.*, at pp. 145-6. Even so, according to La Roncière's account of this commission, it authorized Cartier to "voyager, découvrir et conquérir à Neuve-France, ainsi que trouver, par le Nord le passage au Cathay": quoted in Slattery, *ibid.* [Emphasis added.] Therefore, if this accurately reflects the authority granted in the Commission, the power to *conquer* would support rather than negate the thesis that France recognized the Indians as independent (continued...)

it is likely the case that Cartier undertook this first voyage under royal orders even if it is not known authoritatively what these orders were. The fact that royal orders did exist can be deduced since there is extant the instrument giving a royal subsidy for the trip. That instrument states that the trip was intended as a quest for gold and other riches in the New World and is silent as to any intent to acquire lands.<sup>129</sup> Further, Cartier's own *Relation* with respect to the first of these two early trips indicates a similar intent to that of the trips of Verrazano: to find a passage to the East.<sup>130</sup> As for Cartier's second voyage (in 1534), while the Commission he received from Admiral Chabot<sup>131</sup> (note that it is not directly from the Crown) as well as a document concerning a subsidy for the voyage<sup>132</sup> are both "equally vague"<sup>133</sup> as to the trip's purpose, Cartier's own *Relation*<sup>134</sup> describes Cartier as pursuing his search for a strait to the East.<sup>135</sup>

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<sup>128</sup>(...continued)

people who had to be brought under French sovereignty by force or consent. It also reflects the continued intention to seek a passage to the East.

<sup>129</sup> Slattery, *The French Claims...*, *ibid.*, at p. 146 gives the following quotation from this instrument as to the trip's goal: "descouvrir certaines ysls et pays où l'on dit qu'il se doit trouver grant quantité d'or et autres riches choses". The document is reproduced in full in Biggar, H.P. (ed.), *A Collection of Documents relating to Jacques Cartier and the Sieur de Roberval*, Ottawa, 1930, at p. 42 [hereinafter cited as Biggar, *A Collection of Documents...*].

<sup>130</sup> Slattery, *French Claims...*, *ibid.*, at p. 146. In this first *Relation*, reproduced with English translation in Biggar, H.P., *The Voyages of Jacques Cartier*, Ottawa, F.A. Acland (King's Printer), 1924, at pp. 1-81 [hereinafter cited as Biggar, *The Voyages...*], Cartier refers several times to his inability to find a strait or other passage to the East through the continent. See: pp. 46, 48, 54-5, 71-2, 75.

<sup>131</sup> Reproduced in Biggar, *A Collection of Documents...*, *op. cit.*, note 129, at p. 45.

<sup>132</sup> Reproduced in Biggar, *A Collection of Documents...*, *ibid.*, at p. 53.

<sup>133</sup> Slattery, *French Claims...*, *op. cit.*, note 20, at p. 146.

<sup>134</sup> The *Relation* for Cartier's second voyage is reproduced, with English translation, in Biggar, *The Voyages...*, *op. cit.*, note 130, at pp. 83-246.

<sup>135</sup> *Ibid.*, at pp. 107, 108, 110-1.

Notwithstanding this evidence, some have maintained that these early trips by Cartier did result in the acquisition of territories in America. They point to Cartier's acts of planting crosses and standards and qualify them as symbolic takings of possession of Canadian soil for the French Crown.<sup>136</sup> This echoes arguments regarding Verrazano's voyage of 1524. But, unlike similar acts attributed to Verrazano's voyage of that year, Cartier's plantings during his first two voyages are conclusively known to have occurred. Yet, it has been convincingly demonstrated that these consistently either were intended by Cartier as navigational aids to indicate good harbours in which ships could safely set anchor, or were planted for religious purposes; no territorial pretensions seem to have been intended to be based on such acts.<sup>137</sup>

Significantly, there is a passage in one of the *Relations* where it is recounted that Natives who were present for one of the plantings had objected on the grounds that the Natives owned the land. To this, the passage recounts, Cartier simply explained that the cross was intended

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<sup>136</sup> See, among others, the authorities cited in Slattery, *French Claims...*, *op. cit.*, note 20, at: p. 147 (footnote 43); p. 148 (footnote 49); and p. 150 (footnotes 58 and 60). Also see Keller et al., *op. cit.*, note 31, pp. 105-8. This last source, in fact, points to similar acts by other French explorers and argues that these also were intended as takings of possession. But the arguments presented are unconvincing, usually amounting to a statement of the event followed by the assertion that "there intent cannot be doubted", or words to that effect. No detailed review of the explorers' own views of these acts, such as is conducted in Slattery, *French Claims...*, *ibid.*, is conducted in Keller et al.

<sup>137</sup> The declared purpose of some of the excursions during which crosses were planted was in fact to survey for harbours and this intent seems to be borne out (with one exception during his second voyage) by the passages in those pages of Cartier's *Relations* of the two trips where he discusses these events. For instance in his *Relation* of his first voyage (see Biggar, *The Voyages...*, *op. cit.*, note 130, at pp. 18-20) Cartier describes his undertaking of an excursion to 'découvrir et veoirs quelz hables il y avoit' and relates, that the next day they found 'vng bon hables', at which point they planted a cross. Similarly, in this same *Relation*, Cartier relates that he planted a cross at a place he called Gaspé Basin, which he described as 'vng bon hablé et seur', and that upon the Indian Chief's protestation that the land belonged to him, Cartier explained to him 'que ladite croix avoit esté plantée pour faire merche et ballisle, pour entrer dedans le hablé;...' (See Biggar, *The Voyages...*, *ibid.*, at pp. 60 and 66).

For similar first hand accounts as to the three crosses planted by Cartier during his second voyage, see Slattery, *French Claims...*, *ibid.*, at pp. 149-51 where passages of Cartier's second *Relation* are extracted from Biggar, *The Voyages...*, *ibid.*. The last of these three crosses was planted, not to indicate a harbour, but for the religious purpose of celebrating the feast of the Holy Cross. Therefore, even this exception fails to prove an intention that the crosses serve to establish a territorial claim. On the planting of crosses by Cartier and their significance, see generally, Slattery, *French Claims...*, *ibid.*, at pp. 146-52. At p. 151, after reviewing the evidence in Cartier's own *Relations*, Slattery concludes:

To review, the St. Nicholas cross is portrayed in the accounts as a sea-marker, that at Québec as a religious symbol, and that at Gaspé as both. Two others, at St. Sôrvan and 'Fouez' river, are not explained, but the circumstances suggest navigational relations. None of the crosses is presented as serving official purposes, much less as symbolizing territorial claims.

to mark the harbour, thereby implicitly denying any territorial pretensions.<sup>138</sup> This statement by Cartier has been dismissed by some as merely a deception on his part, perpetrated on the Natives; a story intended for Indian consumption only.<sup>139</sup> Yet, proponents of the opposite view of the plantings rejoin, the *Relation*, which was intended for *French* consumption, does not explain this but merely recounts the event. If the crosses were intended as establishing a territorial claim it is odd that Cartier does not say so in any of his *Relations*, particularly since other less significant purposes for the crosses are noted.

The most damning evidence against any interpretation of these plantings as constituting the establishment of territorial claims is the fact, previously noted, that France itself sought to deny to Spain and Portugal any effect in international law to such mere symbolic acts.<sup>140</sup>

Finally, as argued above:

Even assuming, however, that Cartier *intended* the royal arms to signify French territorial claims, and that the French crown authorized or adopted these acts, we still could not conclude, as do certain writers, that their *effect* in international law was to furnish France with title to the lands claimed. The legal effect of an act does not follow automatically from its intent. It has not been established that European state-practice of that period accepted the performance of symbolic acts as juridically sufficient to furnish title to a New World territory.<sup>141</sup>

In any case, neither Verrazano's voyages nor the two early voyages of Cartier resulted in any effective possession by France since neither explorer in fact established any settlements

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<sup>138</sup> See Slattery, *French Claims...*, *ibid.*, at p. 148. The full extract can be found in the *Relation* itself in Biggar, *The Voyages...*, *ibid.*, at pp. 64-7.

<sup>139</sup> See Keller et al., *op. cit.*, note 31, at p. 106, where the authors state:

In spite of this statement, therefore, patently intended for consumption by ignorant Indians only, the actual effect in law of the erection of this cross bearing the royal arms cannot be doubted....

<sup>140</sup> See, *op. cit.*, at note 32 and accompanying text.

<sup>141</sup> Slattery, *French Claims...*, *op. cit.*, note 20, at p. 153. [Emphasis is in the original text.]

on Canadian soil. It seems, therefore, that the indigenous populations experienced no *real* change in their territorial status as a result of these expeditions, even assuming the French had a demonstrated *intent* to thereby deprive them of land.

As for later French voyages and the eventual French settlements in Canada, there are documents of royal origin extant for these. Here again, however, the evidence fails to show an intention to deny the existence of Native territorial sovereignty. Rather, by expressly authorizing the grantees to negotiate the land's cession from the local inhabitants or else to conquer it from them, the historical documents appear to recognize Indian sovereignty, at least implicitly.<sup>142</sup> And the words contained in these grants must be taken as expressing the full extent of the authority granted by the Crown. Therefore, any act by the grantees going beyond that authority would be invalid and have no effect unless soon after ratified by the French Crown.

For instance, Cartier's commission of 1540 did not authorize him to acquire lands for France but to explore for riches,<sup>143</sup> while that of de Roberval, issued in 1541, authorized both the exploration for riches and the acquisition of lands from the Natives but only by means of conquest or cession<sup>144</sup> and then only so long as not *actually possessed*<sup>145</sup> by any princes

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<sup>142</sup> To quote Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 73-4:

The authorization to conquer implies the absence, not of existing territorial rights, but of ties of peace and friendship. Indeed, the modes of acquisition which the Commission contemplates—cession and conquest—indirectly acknowledge the presence of such rights, as these are derivative, not original modes of acquisition.

<sup>143</sup> Slattery, *French Claims...*, *op. cit.*, note 20, at pp. 158-9. The Commission is reproduced in Biggar, *A Collection of Documents...*, *op. cit.*, note 129, at pp. 128-31.

<sup>144</sup> Slattery, *French Claims...*, *ibid.*, at pp. 159-61. The Commission is reproduced in Biggar, *A Collection of Documents...*, *ibid.*, at pp. 178-85. While the commission to de Roberval did give power to grant lands "en fief et seigneurie", this power was restricted to "icelle terres qu'il nous pourra avoir acquises en icelluy voyage...": *ibid.*, p. 161. [Emphasis is his.] Moreover, such acquisition was to be perfected either by peaceful negotiation or by force. It authorized him to: "descendre et entrer en iceux, et les mettre en nostre main, tant par voye d'amitié ou amyables compositions, si faire se peult, que par force d'armes, main forte et toutes autres voyes d'hostilité": See Slattery, *French Claims...*, *ibid.*, at p. 159; also quoted in Lindley, *op. cit.*, note 10, at p. 27. It also authorized de Roberval to constitute officers "pour l'entretenement, conquete et tuition desdits pays": Lindley, *ibid.* It is clear, therefore, that the lands first needed to be conquered or acquired by cession from the Natives. Similarly, his power to legislate was restricted so as to apply only within those lands which he could acquire in these ways.

or potentates allied with the French Crown. Note that no distinction is made between Christian and non-Christian princes. The lack of any distinction in this Commission between non-allied *Christian* princes and non-allied *non-Christian* princes is important since it means that the territories of the former in America could also theoretically be acquired by conquest or cession. Consequently, it is not possible to argue that the authority to de Roberval to conquer tacitly denies Aboriginal territorial sovereignty since France clearly would not have denied the sovereign status of non-allied Christian princes.<sup>146</sup> In any case, both Cartier's voyage under the 1540 Commission and that of de Roberval under the 1541 Commission failed to establish any successful settlements.<sup>147</sup> This means that even if an *intention* to deprive the Natives of their territorial rights other than by conquest or cession could be shown in the grants, this intention was not carried out. It means, moreover, that there were no unauthorized acquisitions of territory which could be ratified after the fact.

Similar conclusions can be derived from an examination of the various documents evincing the authority of the French Crown for all French expeditions to the Canadian portions of North America which followed those of de Roberval and Cartier. The researcher's task is facilitated in this regard by the fact that these documents have survived through the centuries and have been extensively reproduced. In all of them there is to be found evidence that while the mission objectives may have shifted to the goal of territorial acquisitions these were to be

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<sup>145</sup>(...continued)

<sup>145</sup> In the requirement of *actual* possession can be seen an expression of France's view of the effect of symbolic possession in international law, discussed earlier.

<sup>146</sup> Both Slattery, *French Claims...*, *op. cit.*, note 20, at p. 160 and Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 73-4, put it this way:

It is sometimes thought that the Commission, by authorizing the conquest of indigenous peoples, or at least non-allied ones, tacitly denies them title to the lands they occupy. This appears inexact. The saving clause does not protect the territories of non-allied *Christian* princes either.

<sup>147</sup> Slattery, *French Claims...*, *ibid.*, at p. 161.

effected, where the land was occupied by Indians, only through wars of conquest or treaties of cession. None of these documents leave the impression that the lands occupied by the Natives were to be treated as vacant and, therefore, as belonging to the French Crown merely by virtue of Discovery. In fact, the various instruments all state that the grants contained therein operated *in futuro* and depended upon the grantees *bringing* that land under French dominion by conquest or cession, if occupied by Indians, or by occupation and settlement, if vacant. In other words, these documents show that the French Crown did not consider itself as Sovereign over the lands for which it issued grants unless and until these were taken by the grantees using the methods sanctioned in the granting instrument, namely Conquest or Cession. Indeed, many of these instruments show that the French Crown even contemplated the continued existence of *independent* Indian tribes near French settlements with whom the French settlers were to pursue peaceful relations and trade. This is not surprising given that the prosecution of a profitable fur trade, a constant French objective until its withdrawal from Canada in 1763, depended upon cordial relations with Indians who retained the very land upon which that trade depended. As with the earlier expeditions discussed above, many of those undertaken in these later years ultimately failed to bear fruit.

In the interest of brevity, it is not proposed to detail here the contents of these various instruments. These documents and the relevant elements thereof which support the present thesis are thoroughly reviewed by Slattery and their repetition here would be superfluous.<sup>148</sup>

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<sup>148</sup> See, generally, Slattery, *The Land Rights...*, *op. cit.*, note 99, chap. 5. It is nevertheless useful, without discussing them, to list these here:

-The Commissions of 1577 to the Marquis de la Roche: On these commissions, see Slattery, *The Land Rights...*, *ibid.*, pp. 79-80.

-The Commission of 1597 to the Marquis de la Roche: See Slattery, *The Land Rights...*, *ibid.*, at pp. 81-2.

Some will argue that the mere fact that the French grants referred to conquests of, or negotiation of cessions from, the Indians may not necessarily imply that France was respecting the international law norms for the acquisition of sovereignty over Indian-occupied land. It could mean, they might say, that France considered itself as the Sovereign of the territory it granted and was merely regulating the norms for expropriating the Native *title* which it recognized merely as *surviving as a burden upon its sovereign interest*.

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<sup>146</sup>(...continued)

-The Commissions of November and December 1603 to de Monts: The most relevant portion is quoted in Lindley, *op. cit.*, note 10, at pp. 27-8 and it is discussed in Slattery, *The Land Rights...*, *ibid.*, at pp. 84-5.

-The Letters Patent of 1627 to the Compagnie des Cent Associés: The Commission is reproduced in *Edits, ordonnances royales, déclaration et arrêts du conseil d'état du Roi concernant le Canada*, 3 volumes, Québec, Presse Fréchette, 1854-6, in vol. 1, at pp. 5 ff [hereinafter cited as *Edits, ordonnances royales...*]. It is discussed in Slattery, *The Land Rights...*, *ibid.*, at pp. 86-7.

-The Commissions of 1647 to Sieur d'Aulnoy de Charnisay and of 1654 to Nicolas Denys: Discussed in Slattery, *The Land Rights...*, *ibid.*, at p. 87.

-The Commission of November 1663 to Prouville de Tracy: The Commission is reproduced in *Edits, ordonnances royales...*, *ibid.*, vol. 3, at pp. 27 ff. It is discussed in Slattery, *The Land Rights...*, *ibid.*, at p. 88.

-The Commission of 1664 to the Compagnie des Indes Occidentales: Reproduced in *Edits, ordonnances royales...*, *ibid.*, at pp. 40 ff. It is discussed in Slattery, *The Land Rights...*, *ibid.*, at p. 89.

-The Commission of 1665 to de Courcelles, the general terms of which were largely reproduced in subsequent Commissions until the French cession of its Canadian territories to England in 1763: De Courcelles' Commission is reproduced in *Edits, ordonnances royales...*, *ibid.*, vol. 3, at p. 31 ff.

Even the *Instructions* to de Courcelles are instructive in that they set out two main objectives *vis a vis* the Indians. The first was to convert the Natives to Christianity by conciliatory and non violent means and, specifically, *without usurping their lands*. The second was to convince the Indians to *willingly become the King's subjects* and work towards greater commerce for their own interests. The implication in these Instructions, therefore, is clear: The Crown considered that if the Indians were not willing to become the King's subjects they and their lands would continue to be outside of his sovereign domain. The Instructions are reproduced in *Collection de Manuscrits contenant lettres, mémoires, et autres documents historiques relatifs à la Nouvelle-France*, 4 volumes, Québec, A. Côté et C<sup>o</sup>., 1883-85, in vol. 1, at p. 175. The relevant passage is as follows:

Le premier est de procurer leur conversion à la foy chrestienne et catholique le plus tost qu'il sera possible, et pour y parvenir;...son intention est que les officiers, soldats et tous ses autres sujets traitent les Indiens avec douceur, justice et équité, sans leur faire jamais aucun tort ny violence; qu'on n'usurpe point les terres sur lesquelles ils sont habituez sous pretext qu'elles sont meilleures ou plus convenables aux François.

Le second objet de Sa Majesté est de rendre dans les suites ces Indiens ses sujets travaillans utilement à l'accroissement du commerce qui s'establira peu à peu dans le Canada, quando il sera bien cultivé; mais son intention est que tout cela s'exécute de bonne volonté et que ces Indiens s'y portent par leur propre intérêt.

These Instructions are discussed in Slattery, *The Land Rights...*, *ibid.*, at pp. 89-90.

The answer to this lies, it is suggested, in remembering the position France took in diplomatic controversies with other colonial Powers during this same period. It will be recalled that France was then maintaining before Spain and Portugal that the Indians of the Americas were independent and could trade with whomever they chose.<sup>149</sup> Moreover, France expressed similar beliefs to the Indians themselves.<sup>150</sup> And the Indians who lived in territories that were within France's North American sphere of influence personally viewed themselves as totally independent nations such that when Nova Scotia passed from the French sphere of influence to that of the English in 1713, and Canada did likewise in 1763, the Indians of these territories expressed their belief in their independence under the French and even sought assurance of its perpetuation under the English.<sup>151</sup>

How, then, is one to reconcile these facts with the fact that even those modern scholars whose opinions are considered as generally favourable to the recognition of Native territorial

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<sup>149</sup> See, *op. cit.*, note 99 and accompanying text.

<sup>150</sup> As one example, one could cite the following incident related in Jaenen, *op. cit.*, note 114, at p. 32:

In the autumn of 1748 Governor Le Galissonnière and Intendant François Bigot met with eighty Iroquois delegates in the audience hall of the Château St. Louis in Quebec. As a result of this conference, officials at Versailles could reaffirm their belief that "these Indians claim to be and in effect are independent of all nations, and their lands incontestably belong to them". La Galissonnière was congratulated for having "induced them to maintain their rights" against British claims. "These nations govern themselves alone", said a report, noting that they were becoming "more friends and allies of the French".

<sup>151</sup> Jaenen, *ibid.*, at pp. 31-2, writes, in relation to the territories "ceded" by France in 1713:

[T]he native peoples themselves were explicit in their declarations. When British officers tried to get Micmac headmen to swear allegiance to King George I in 1715, they consulted their councils and concluded that "they did not want any King to say that he had taken possession of their land". They affirmed that the French could not have ceded their rights to Britain by the Treaty of Utrecht since they had always been allies and "brothers" of the French and independent. The Abenakis made the same affirmations ten years later, and as late as 1752 responded to the official delegate of the governor at Boston in these terms: "We are entirely free; we are allies of the King of France, from whom we have received the Faith and all sorts of assistance in our necessities; we love that Monarch, and we are strongly attached to his interests".

For an account of similar Indian views as to the territories ceded by France in 1763, see Jaenen, *ibid.*, at p. 36. As the passage quoted in the previous note shows, France actually encouraged such beliefs on the part of the Indians.

rights would not go so far as to say the French recognized Native sovereignty? Jaenen<sup>152</sup> and Slattery,<sup>153</sup> for example, both assert that the French claimed sovereignty over the Indians and their lands but otherwise respected the continuance of their territorial and other aboriginal rights as being a burden upon the French Crown's right as Sovereign. It is suggested that the answer can be found, with one important change however, in the words of Jaenen himself. He writes:

The French operated on different levels of diplomacy in dealing with members of the 'family of nations' and the native 'allied nations'. On the international level, France like other European powers involved in colonization of America asserted her sovereign rights over a vast continental expanse. At the regional level, dealing with 'independent' peoples she refrained from interference with original territorial rights, customs, and mode of life. (...)

The Janus-like French position can be understood only when account is taken of the two diplomatic levels or spheres in which French statements must be situated. Sovereignty was stressed in interactions with other nation-states, whereas independence was stressed in the context of continental coexistence. The genius of French native policy was therefore that no inherent contradiction was perceived between the two positions. (...) So long as this relationship was maintained it would appear that France could assume responsibility under international law for colonists and aboriginal peoples.<sup>154</sup>

There is much truth in the foregoing words. But it would be more accurate to say that at the international level France asserted, not *sovereign* rights, but *exclusive rights of acquisition*--or what would today be called an exclusive sphere of influence--over a vast continental expanse.<sup>155</sup> This view more closely accords with the evidence from the Charters

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<sup>152</sup> *Ibid.*

<sup>153</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99.

<sup>154</sup> Jaenen, *op. cit.*, note 114, at p. 38.

<sup>155</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 87, put it this way:

The true position would appear to be that while the French Crown claimed exclusive rights over the territories designated, these rights were asserted as against other European powers rather than the indigenous occupants. The autonomous status of the latter was admitted, and their acquiescence in the Crown's authority taken as a goal. *Until such submission might be secured, however, they were not subjects of France. At best, they were allies, and at worst, enemies.* [Emphasis added.]

and diplomatic statements. At the same time, it presents no inherent contradiction between France's position at the international level and its position *vis a vis* the local inhabitants. That the use by France of the word "sovereignty" at the international law level--if, indeed, it was in fact used--really meant only an exclusive right of acquisition is all the more evident when one remembers that "[t]here were no spectacular confrontations [with Indians] which might have indicated the degree to which the Amerindians understood and accepted French concepts of sovereignty".<sup>156</sup>

### **Conclusion on French Practice**

It will be evident from the foregoing that the French Crown, even when it was interested in expanding its sovereignty over new territories, never pretended to do so without consideration of Native sovereignty.

All of the voyages of exploration sanctioned by the French Crown prior to 1541 were motivated by goals other than the acquisition of territories for the Crown. Most often the goal was to locate a passage through the new continent to Cathay. However, the intention to seek mineral riches in America was also present, probably because the Spanish had made similar discoveries in Central and South America, but also because it was becoming evident that a passage to the East did not exist. But the salient fact with respect to these early French voyages is that the evidence fails to show any intention by the French Crown to extend its dominion over new territories. Such a Crown intention would not be exhibited until the middle of the sixteenth century.

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<sup>156</sup> Jaenen, *op. cit.*, note 114, at p. 37.

Only in 1541, in the Royal Commission to de Roberval, did the French Crown's desire to acquire new territories first find expression; and then acquisitions were only to be considered accomplished upon conquest of, or the receipt of cessions from, the Indians. This condition remained henceforth though, gradually between 1577 and 1760, of the two methods of cession or conquest, cessions resulting from peaceful negotiations became the preferred method of the French for acquiring territories from the Indians. But, as between the acquisitorial methods of peaceful cession or conquest it is immaterial which was the preferred one since either method tacitly acknowledges the prior existence of Native territorial rights. Peaceful alliances with the Indians, even without territorial concessions to France, were even contemplated and were in fact effected.

On the whole, therefore, one would have to say that, contrary to the view expressed by scholars such as Henri Brun and others as well as by the Supreme Court of Canada in the 1887 *St. Catherine's* case, the evidence establishes a constant French intention to recognize Native territorial rights over the land since the Crown adopted a policy that lands for colonies could only be acquired by conquest or cession. Further, requiring that acquisitions be made by either of these methods is tantamount to recognizing that such territorial rights are in the nature of Native *sovereignty* over their lands. This view is supported by the wording of the Charters as a whole and by the contemporaneous French and Indian statements. Therefore, the Natives necessarily retained, following the departure of the French, sovereignty over any of their ancestral lands not acquired by the French by either cession or conquest.

As the review of Canadian and foreign jurisprudence in chapter six will show, the Supreme Court of Canada is moving towards a recognition of this fact. The Court's 1990

decision in *R. v. Sioui*<sup>157</sup> rules, or comes very close to ruling, that the French (as well as the English) had considered the Natives as sovereign Peoples.<sup>158</sup> Further, as Dionne<sup>159</sup> has noted, a Quebec Superior Court decision contemporaneous with the *St. Catherine's* case had arrived at the same conclusion a hundred and twenty-three years before Canada's highest court.<sup>160</sup>

The foregoing conclusions, of course, beg the further question: Did the French in fact obtain sovereignty over any Canadian territories as a *result* of cessions from, or conquests over, any Indian nations? While answering this question is more properly the topic of chapter seven hereof, the instances of cessions to or conquests by the French are relatively few and involve insignificant expanses of territory. Therefore, they may conveniently be dealt with here.

Firstly, one must remember that, according to one scholar at least, the French principally established settlements in areas which were not inhabited by any Indians. These lands were, therefore, truly *terra nullius* and French sovereignty would have extended thereover merely by Occupation. That sovereignty, moreover, would be unburdened by any common law aboriginal title.<sup>161</sup>

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<sup>157</sup> [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427 (S.C.C.).

<sup>158</sup> See the discussion of this case in chapter six, particularly the passage quoted from the judgment of Lamer J., *infra*, at note 449 and accompanying text.

<sup>159</sup> *Op. cit.*, note 117.

<sup>160</sup> At p. 167 of his article (in note 168 thereof) he quotes *Connolly v. Wollich et al* (1867), 11 L.C. Jur. 197 (C.S.), at 203, where Judge Monk had this to say:

Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion.

See also p. 205 of Judge Monk's reasons for similar comments.

<sup>161</sup> This would be the case, according to Jaenen, *op. cit.*, note 114, at p. 20, with respect to French settlements along the St. Lawrence and Annapolis valleys. However, Jaenen ignores the possibility that at least some of these lands, while not inhabited by Indians, were used by some of them as part of their traditional hunting territories. If so, French sovereignty would only have extended over such parts if "effectively possessed" and if the possession without conquest or cession was authorized or subsequently ratified by the French Crown.

Having said this, the fact, as concerns Indian-French relations, is that few treaties were signed; and those that were signed generally involved no territorial transfers. In at least one case, however, an Indian nation arguably lost its sovereignty to the French while retaining its territorial and other rights as a burden upon the French Sovereign's title. Jaenen reports that:

[t]he several Iroquoian tribes found themselves obliged to adhere to a series of peace treaties in 1665-6 by which Louis XIV was acknowledged 'from this time as their Sovereign', the Huron and Algonkian allies of the King as being 'not only under his protection but also as his proper subjects'<sup>162</sup> and with whom they pledged 'to live fraternally for their mutual defense under the common protection of the said Lord the King.' This treaty...ended a war...and...involved no territorial appropriation...The language of the treaties would appear to substantiate the interpretation that the Iroquois, under the protection of His Most Christian Majesty, were bound by fealty and allegiance, while enjoying seigneurial rights under the crown.<sup>163</sup>

But the Iroquois, and apparently also The Fox, seem to have been unique in this history of war against, and peace treaties with, France.<sup>164</sup>

In the result, French involvement in North America created three classes of land in the territories under its influence.

Firstly, there were a series of territorial sectors over which France acquired a complete interest unburdened by any Native claim whatsoever. These are principally those areas settled by the French which had previously been vacant (e.g.: the St. Lawrence and Annapolis valleys-- ignoring for the moment the possibility that these areas were part of the Indians' traditional

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<sup>162</sup> Note that while the Iroquois acknowledged by this treaty that the Huron and Algonquin tribes were "proper subjects" of France, it is not clear that this is how these tribes viewed themselves. Certainly the evidence reviewed in this chapter shows that this is not how France generally viewed its Native allies.

<sup>163</sup> Jaenen, *op. cit.*, note 114, at p. 28.

<sup>164</sup> Jaenen, *ibid.*, at p. 30, writes:

Only with the Iroquois and Fox in the *pays d'en haut*, both of whom were regarded as being under British influence and against whom [the French] waged war, did they sign treaties.

This author contrasts the French's generally peaceful relations with the Indians of Acadia and Canada with France's more violent history of relations with the Indians of the lower Mississippi region which "emanat[ed] from the government of Louisiana, [and which] were of a different order, marked notably by military action directed at the Chickasaw and the Natchez": See p. 30.

hunting territories). But there might also be in this class territories conquered from or ceded by the Natives and from which the Indians were removed or removed themselves. In the course of researching this paper, no incidents of such conquests by France were encountered; the Iroquois and Fox wars having resulted in treaties involving no territorial appropriations. As for cessions, it seems that there were instances in which certain tribes ceded small parcels of land upon which French families could settle among the Indians in a sort of mutual exchange (certain Indian families going to live near French settlements).<sup>165</sup>

Secondly, there were certain territories over which the French, by treaty with the Indians, acquired a sovereignty which nevertheless continued to be burdened by aboriginal territorial and other rights. This is the case of the lands of the Iroquois and Fox nations who signed treaties with France after hostilities. This category of lands would also have resulted from an express reservation by the French Crown of lands for the Indians in areas clearly under French sovereignty. This is the case, for example, of "reservations" created by the French in the St. Lawrence valley for certain Indians who "accepted the hospitality of the reserves in the French seigneurial tract of the riverine colony"<sup>166</sup> and moved there from their ancestral lands.

Finally, there were sectors upon which Native sovereignty and complete independence survived due to the lack of conquests or cessions during the French regime. Only territories of this last type are the subject of concern here. They account for large portions of the territories under French influence.<sup>167</sup>

In closing this chapter it is worthy to note that, though not strictly relevant as concerns North America of the sixteenth, seventeenth and eighteenth centuries, later French practice and

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<sup>165</sup> See Jaenen, *ibid.*, at pp. 30 and 37.

<sup>166</sup> *Ibid.*, at p. 37.

<sup>167</sup> See, generally, chapter 7.

attitudes as to its colonial endeavours in other places inhabited by "uncivilized" Peoples (such as in Asia and Africa) was much the same, though cession had now virtually completely displaced conquest as the preferred option.<sup>168</sup> Thus, here too, an initial Native sovereignty was recognized by France.

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<sup>168</sup> See, generally, Lindley, *op. cit.*, note 10, especially at pp. 32 and 35.

## CHAPTER FIVE:

### NATIVE SOVEREIGNTY UNDER THE PRACTICE OF THE ENGLISH

To again quote Slattery, "[t]he character of original English territorial claims in America and their effects on Indian land rights are matters of controversy".<sup>169</sup> The present chapter will attempt to draw conclusions as to this character from the historical evidence and will consider briefly which of the modern scholarly opinions with respect thereto are the more accurate. However, before one can properly analyze English practice vis a vis British North America, it is first necessary to establish its historical starting point. This in fact differs for the several regions of Canada and is not to be taken universally as the year 1763, as some have suggested.

From the beginning of the seventeenth century, England had begun establishing colonies along the North American eastern coast so that by the early eighteenth century she possessed permanent settlements along most of that coast, including parts of the modern Canadian maritime provinces.<sup>170</sup> However, with the exception of the lands granted to the Hudson's Bay

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<sup>169</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 95.

<sup>170</sup> Excluding Iberian claims stemming solely from Discovery and Papal Bulls, England was the original and undisputed Colonial Power in most of the North American Atlantic seacoast area. However, in that part of the seacoast now falling within modern maritime Canada, England held possessions which were in fact contested by France. Most such disputes were settled by the signing of the *Treaty of Utrecht, 1713*. But the dispute over Cape Breton Island (known to the French as "Ile Royale") and St. John Island (now known as Prince Edward Island) persisted until 1763 and the signing of the *Treaty of Paris* between England, France and Spain (to which treaty Portugal later also subscribed).

Moreover, concerning the Canadian maritime territories clearly acquired by England under the treaty of 1713, there is some scholarly dispute as to whether the terms of the treaty are such that France was thereby *recognizing* the original validity of England's claim to the land or rather was agreeing to *cede* its allegedly more valid claim to England. For instance, despite previous English pretensions to "old" Nova Scotia (which, in opposition to the modern province of the same name, essentially refers to most of modern Nova Scotia—except Cape Breton Island—as well as to New Brunswick), most scholars would agree today that it is best viewed as an acquisition from France under the *Treaty of Utrecht* of 1713, though this has not been universally accepted: See, for example, the interesting evidence presented in support of this conclusion in Slattery, *The Land Rights...*, *ibid.*, at pp. 126-8, as well as the concurring authorities cited therein at pp. 128-9 and those *contra* at p. 129. French pretensions to Newfoundland were also relinquished in the *Treaty of Utrecht* though it is not clear whether it is to be considered more properly as a colony recognized by France as always having legally belonged to England or rather as one ceded to it by France. But, since no Indians remained on the island at the time of British settlement, the survival of any original Native territorial interest appears doubtful and Newfoundland's status as a cession from France or as an original English colony recognized as such by France in 1713 probably need not be considered further (unless, as noted in Chapter 7 hereof Newfoundland Micmacs are truly "pre-contract" occupiers). The question of Rupert's Land (which, of course, is not on the Atlantic seacoast but was also dealt with in the treaty of 1713) is more clear. Though it was relinquished by France by the same treaty in 1713, the provisions relating to this land are worded in terms unambiguously recognizing the validity of England's original claims thereto. A colony had been granted by the English Crown to the Hudson's Bay Company under a Royal Charter issued in 1670. Though France had until 1713 proclaimed the possession by it of competing territorial claims, the French abandoned such claims by the *Treaty of Utrecht* of 1713 in terms which accepted that England was the original and rightful colonial claimant to these lands. England had insisted that the treaty of 1713 state that France agrees to "restore" to Britain these lands rather than "cede" them. The implication is clear that England's original claim is being acknowledged by France as having been valid: See Slattery, *The Land Rights...*, *ibid.*, at pp. 152-3.

Company in 1670 and the territories covered by the colonies of "old" Nova Scotia and Newfoundland, England did not possess, prior to 1763, any actual settlements anywhere else within the modern Canadian boundaries. English settlements were not established in those parts until after England gained a claim thereto undisputed by France (or other European Powers, for that matter) following the British victory over France in the seven-year war which formally ended with the signing of a peace treaty at Paris in 1763.<sup>171</sup> That is not to say that, prior to that year, England did not express "pretensions" to large parts of Canada in addition to its Hudson's Bay and maritime holdings; for, in fact, she did.<sup>172</sup>

Be that as it may, the point being made here is that, were it not for Rupert's Land, Newfoundland and "old" Nova Scotia, the historical starting point as concerns the English Crown's actions respecting aboriginal land rights in Canada would ordinarily rightly be the year 1763. The existence of the older English holdings in maritime Canada and around Hudson's Bay means that a study of the early (i.e. pre-1763) treatment afforded by England to the indigenous populations existing in the original British possessions (principally along the Atlantic coast) is necessary; and is so for at least two reasons. Firstly, and most obviously, such a study is the necessary starting point as concerns the English practice as it relates to the modern situation prevailing in these older (i.e. pre-1763) Canadian colonies held under England. Equally important, however, is the fact that the pre-1763 history in the older English colonies would logically prove relevant as a barometer of English attitudes likely to have been extended to

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<sup>171</sup> By the treaty, France relinquished to England its remaining pretensions in North America except a small portion of Louisiana, which it had secretly transferred to Spain the preceding year. These relinquished territories comprised Cape Breton Island, the Island of St. John and, of course, the territories known under the French occupation as "Canada" or "Nouvelle France" (which potentially extended far into the Canadian west and northwest as well as far south into the modern United States below the great lakes). Despite prior English pretensions to these territories, it is generally accepted that England viewed them as cessions from France rather than as valid original British claims finally recognized by France as such: See Slattery, *The Land Rights...*, *ibid.*, at pp. 175-90.

<sup>172</sup> In the case of French "Canada" particularly, the conflicting pretensions stemmed from Letters Patent issued by the French on the one hand and from various Charters, particularly the Virginia Charter of 1609, issued by England on the other. Indeed these documents show that both countries held pretensions extending well into the modern Canadian north, northwest and west.

England's territorial pretensions in the territories to which clear colonial rights were acquired only after 1763.<sup>173</sup>

Consequently, this chapter will consider English treatment of Native land rights in North America as a whole from its earliest period; not just from the pivotal year of 1763 when the English finally became the undisputed colonial power in much of the territories of concern in this dissertation, meaning, generally, modern Canada west of Nova Scotia. Fortunately, the discussion of the survival of Native sovereignty under the English can conveniently be subdivided between three time periods: from 1492 to 1763; the year 1763 and the *Royal Proclamation* of that year; and, finally, the period from 1763 to the present.

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<sup>173</sup> However, as will be seen later in this chapter, some have argued that as a result of England's issuance in 1763 of its famous *Royal Proclamation* it is not necessary to look behind the provisions of this document to ascertain the status of Indian land rights in the eyes of the English, at least in the territories to which these scholars interpret the Proclamation to apply. For them, this document constitutes a new starting point, making all that came before it irrelevant. (This is, for example, the argument advanced by Brun, *op. cit.*, note 81, at p. 65.) This argument will be examined below, in the second substantive section of this chapter. For present purposes only a few comments on the *Royal Proclamation* will suffice to deal with these scholars' arguments on this point.

By that document, England organized large parts of the territories ceded to it by France and Spain in the *Treaty of Paris, 1763* and also made several substantial provisions affecting Native lands there. Importantly, however, the Proclamation also contained several provisions, including (as will be demonstrated in the second substantive section of this chapter) some concerning Indian land rights, which in fact affected virtually all of England's holdings, both in the older colonies and in the territories acquired under the *Treaty of Paris, 1763*. The scholars who see no need to look behind the Proclamation incorrectly interpret it as applying only to the territories newly acquired from France in 1763 and, equally erroneously, consider the provisions thereof concerning Natives and their lands to have an even narrower field of application—namely, that territory which is left "unorganized" by the Proclamation. Viewing matters in this way, these scholars argue that the Native provisions of the *Royal Proclamation* constitute the enactment by the Crown of a new *original source* of modern aboriginal land claims in these "unorganized" parts of the territories ceded by France and an abrogation of any Native land rights held under the French so that there are no longer any such rights in the "organized" rest of the newly acquired territories. Therefore, prior treatment of Indians is, for these scholars, irrelevant.

Moreover, these same scholars argue (as seen in chapter four) that in the territories ceded from France in 1763—the overall area to which they interpret the Proclamation to apply—no aboriginal territorial rights had been recognized under the previous French régime. This, they perceive, for reasons stemming from both international law (discussed earlier) and British colonial law (discussed later in this chapter), buttresses their claim that the *Royal Proclamation* was thenceforth the only source of Native territorial rights in these overall territories.

It has already been shown (in chapter four) that the view held by these scholars regarding French practice towards the Natives is wrong in fact. Their conclusions both that the Proclamation applies to only the territories newly acquired from France in 1763 and that it is, for these territories, *the only source* of Native land rights are equally incorrect. Indeed, a clear reading of the Proclamation (a task undertaken in the second substantive section of this chapter) will suffice to show that it also applied to the older English colonies. And their second conclusion (i.e.: that the Proclamation is *the source* of Indian land rights) has been rejected not only by other scholars, but by authoritative judicial pronouncements at the highest levels in Canada (as will be seen later in this thesis). Indeed, as will be seen, the *Royal Proclamation* does not create Indian land rights. Rather, it confirms pre-existing rights, thereby forcing an examination of what rights existed before its issuance.

## **Native Sovereignty Under the English from 1492 to 1763**

A review of the various sources of evidence from the period of English colonialism in North America spanning the years from its "discovery" in 1492 to the issuance of the *Royal Proclamation* in 1763 reveals that, *at the very least*, an Indian land right in the nature of what is here called a *common law aboriginal title* was recognized by England to be vested in the Indians during this period with regards to lands which were not surrendered to or forcibly taken by the English. Common law aboriginal title, by its very nature, presupposes the advent of an English sovereignty to which the Native title is subordinate. But the same evidence which supports the existence of common law aboriginal title, it is submitted, is equally consistent (perhaps even more so) with the recognition of Native *sovereignty*.

The Letters Patent or Royal Charters issued by the Crown and under which portions of North America were "granted" for settlement during the period under consideration in this section will first be considered here, followed by a consideration of what is revealed by other sources of evidence such as Pre-1763 British colonial law, treaties with Indians during the period from 1492 to 1763, Instructions to governors, and local and Imperial statutes.

### ***Letters Patent and Royal Charters from 1492 to 1763***

Regrettably, the pre-1763 Letters Patent and Royal Charters issued by the British Crown reveal little in the way of *explicit* directives on the treatment of the Indians and the lands upon which they were seated. This, in and of itself, should not be surprising since these documents were principally intended as statements of claims good as against *other Europeans* and statements as to the treatment to be meted out to the Indians would have had no place in a

document intended to be good as against *other Europeans*.<sup>174</sup> However, it is submitted that there are at least some slight indicia to be found in these documents concerning how the land was to be acquired from the Indians.<sup>175</sup>

These indicia are qualified here as slight because they provide only weak support for the thesis of the survival of Native sovereignty. But, since such support can be derived, perhaps more convincingly so, from historical sources other than these Charters, the examination contained herein concerning these Charters will be fairly cursory. This brevity is all the more warranted given that the Charters have more eloquently been discussed by others, though with the aim of showing merely the survival of Indian title rather than Indian Sovereignty.<sup>176</sup>

The very earliest English Charters and Letters Patent--those issued between the time America was discovered in 1492 and the end of the sixteenth century--are peculiar in that, unlike most of those issued by England in subsequent eras, they did not pertain to specifically delineated territories in the world but rather to any part of the newly discovered world (in the Americas or elsewhere, presumably) which was not yet in the possession of any other allied Christian princes. It was also implied in these documents that the lands in question were not yet

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<sup>174</sup> As Lindley, *op. cit.*, note 10, at p. 29, has said:

[W]hat the discoverer's State obtained, as against other European Powers, was the right to *acquire* the lands discovered--what in later times might have been called a 'sphere of influence'--and questions dealing with the *mode* of acquisition had no place in a statement of the grounds upon which one European Power based its claims as against the others. As the Supreme Court of the United States said in the case of *Worcester v. The State of Georgia* in 1832 [6 Peter's Rep. 515, at 546], the royal grants and charters "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned". The omission from the British grants of any reference to Conquest or Cession is, therefore, not surprising and it is not possible to infer therefrom what the actual mode of acquisition was or was not. [Emphasis is in the original text.]

<sup>175</sup> Consequently, a portion of Lindley's assertion in the passage quoted in the preceding footnote--the portion stating that it is "not possible to infer [from these documents] what the actual mode of acquisition was or was not"--must be rejected.

<sup>176</sup> To name but a few, see: Slattery, *The Land Rights...*, *op. cit.*, note 99; Narvey, K., "The Royal Proclamation of 7 October, 1763, The Common Law and Native Rights to Land Within the Territories Granted to the Hudson's Bay Company", (1973-74) 38 *Sask. L.R.* 123-233 [hereinafter cited as Narvey]; and Stagg, J., *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763*, Ottawa Research Branch, Department of Indian and Northern Affairs Canada, 1981 [hereinafter cited as Stagg].

part of British dominions. Their discovery and acquisition was the expressed goal since the documents generally empowered the Patent-holders or Charter-holders to *acquire* unspecified lands not actually possessed by any allied Christian princes. Therefore, these were grants which operated *in futuro*. Moreover, what is very significant for present purposes is that it was hinted in these documents that acquisition could take place *by conquering* the land from the indigenous inhabitants. Thus, these documents contain the clear indication that the Crown neither assumed that British sovereignty already extended to these vaguely defined territories nor purported to extend its sovereignty thereover by the simple expedient of issuing a Charter. Sovereignty had to be gained for the Crown by the Charter-holders who thereupon would automatically have a vested colonial title by Crown grant. And, where the lands were occupied by indigenous populations, sovereignty had to be gained by conquest.

For instance, Lindley has said of the Letters Patent issued by Henry VII in 1495<sup>177</sup> to John Cabot and his sons that these:

authorized them to seek out, discover and find any islands, countries, regions or provinces of any heathens and infidels in any part of the world which had been unknown to Christians, and to *subdue*, occupy and possess them, *getting unto the King the rule, title and jurisdiction thereof*.<sup>178</sup>

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<sup>177</sup> It is interesting to note that Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 97 gives the date as 5 March 1496, though this may be due merely to a difference between old and new Calendars.

<sup>178</sup> Lindley, *op. cit.*, note 10, at p. 25. [Emphasis added.] The Letters Patent themselves, in the original latin, are reproduced in Hazard, E. (ed.), *Historical Collections; consisting of State Papers and other authentic documents; intended as materials for an history of the United States of America*, in 2 vols, Philadelphia, 1792, reprinted by Books for Libraries Press, Freeport, New York, 1969, vol. 1, at p. 9 [hereinafter cited as Hazard].

The italicized word "subdue" arguably denotes instructions to conquer.<sup>179</sup> But this is not clear.<sup>180</sup> What is clear is that the italicized words "getting unto the King the rule"<sup>181</sup> would seem to imply that dominion to the land described was yet to be won.<sup>182</sup>

Similar indications can be found in other pre-seventeenth century English Letters Patent, namely, the Letters Patent to Richard Warde, Thomas Ashurst and others in 1501 and similar ones granted to Hugh Eliot, Thomas Ashurst and others in 1502<sup>183</sup>--which, according to Slattery, repeat "in more elaborate form the ideas expressed in Cabot's Patent"<sup>184</sup>--and the

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<sup>179</sup> Lindley, *ibid.*, at p. 27 in fact gives this interpretation to the use of this word in these Letters Patent.

<sup>180</sup> See, for example, Keller et al., *op. cit.*, note 31, at p. 50, who would discount this meaning, saying "[p]robably the performance of a formal ceremony of taking possession [i.e.: symbolic acts] would have been wholly acceptable to King Henry...". The original latin text (see Hazard, *op. cit.*, note 178, at p. 10) contained the words "subiugari, occupari at possideri". Further support for Lindley's interpretation comes from Slattery who, interestingly, gives the translation as "conquer, occupy and possess", a much clearer indication that conquests were a prerequisite where the lands were occupied by infidels, assuming his translation to be the more accurate of the two: Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 97. That is in fact the conclusion Slattery reaches when, at p. 97, he says:

The King, one notes, contemplates the acquisition of already-inhabited lands and assumes the necessity of conquest, occupation and possession.

<sup>181</sup> Slattery, *The Land Rights...*, *ibid.*, gives the translation as "acquiring for us the *dominion*, title and jurisdiction". [Emphasis added.]

<sup>182</sup> As was seen in a passage quoted above from Lindley, that is precisely the meaning Lindley ascribes to this document (and the other documents of its kind): See the passage quoted at note 174 hereof from Lindley, *op. cit.*, note 10, at p. 29, the operative part being "what the discoverer's State obtained...was a right to *acquire* the lands...". [Emphasis is in the original text.] Slattery would also agree with this interpretation of the Cabot instrument: Slattery, *The Land Rights...*, *ibid.*, at p. 97.

<sup>183</sup> These are reproduced in Biggar, H.P. (ed.), *The Precursors of Jacques Cartier 1497-1534*, Publications of the Canadian Archives, no. 5, Ottawa, Government Printing Bureau, 1911, at pp. 41-59, and 70-91, respectively.

<sup>184</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 98. They contain the specific authority to "'enter and seize' any towns or other places in the King's name, and to 'occupy, possess and subdue these'...": *ibid.*. The reference to towns coupled with the authority to enter and seize them necessarily implies the assumption that where infidels were seated upon the land their villages could be acquired by "subduing" these. That the acquisition was not automatic upon the issuance of the Letters Patent but rather operated, again, *in futuro* is clear from the further provision that (as Slattery relates it) "the King will grant and does thereby grant [to the grantees] the right to possess such lands as great as they 'are able to inhabit, take possession of, hold and maintain'...": *ibid.*. At pp. 98-9, in fact, Slattery too concludes that these grants operated only upon acquisition:

The grants are *in futuro*; they dispose of unspecified territories not as yet held by the Crown, and whose extent depended upon their [i.e.: the grantees'] efforts.

Letters Patent issued by Elizabeth I to Sir Humphrey Gilbert in 1578 and Sir Walter Raleigh in 1585.<sup>185</sup>

In any case, all of these five grants can in all probability be discounted since: with respect to the Letters Patent of 1495, they did not result in any permanent occupation of new territories and certainly not in any conquests of Natives; with respect to those of 1501 and 1502, "no efforts at settlement seem to have ensued";<sup>186</sup> and with respect to those of 1578 and 1585, "the ensuing efforts by the grantees to plant colonies in America did not prosper".<sup>187</sup> But if any account is to be taken of them, it is submitted that what indicia they do contain support rather than hinder the premise that Native rights of territorial sovereignty were thereby recognized as existing and were considered as removable only after conquest. It will be said by some scholars that the import of these various Letters Patent is in fact the assumption by England of sovereignty over newly discovered territory while recognizing in the indigenous populations merely the survival of territorial rights as subordinate to the overlordship of the English Crown (i.e., a mere common law aboriginal title). But, such an interpretation would ignore the clear statements in each of these documents that English dominion did not yet extend to these lands but was to be acquired *by the conquests authorized therein*. At the very worst, in any case, these documents either recognize the lesser territorial rights these other scholars

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<sup>185</sup> The texts of these may be found in Hazard, *op. cit.*, note 178, at pp. 24 and 33 respectively. Here too there are clear indications that the grants were to operate in the future and only upon conquest where there were indigenous inhabitants. For instance, in each of these documents the rights granted were contingent upon the establishment of a colony within six years; a provision inconsistent with a present territorial title. Moreover, indications of the necessity of conquests are more explicit. Both documents authorize the grantees to "encounter, expulse, repell and resist" anyone who without license of the grantees "shall attempt to inhabit" the lands so settled by the grantees unless they are subjects of any allied Christian Prince and were there first. See Hazard, *ibid.*, at p. 28 (Letters Patent to Sir Humphrey Gilbert) and at p. 35 (Letters Patent to Sir Walter Raleigh). It is true that this provision likely was meant to apply against Europeans who came and settled themselves upon the lands *after* the grantees, and so may be discounted as not constituting authority to conquer the Indians. More significant, however, is the fact that both instruments refer to the voyages thereby authorized as "journeys for discovery, or...journeys for conquest": *ibid.*, at pp. 26 and 36 respectively. Why refer to conquests if prior dispossession of the indigenous inhabitants was not seen as first required?

<sup>186</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 99.

<sup>187</sup> *Ibid.*, at p. 100.

argue for or are neutral as concerns the existence and/or treatment of Native land rights. These documents cannot be read as denying the existence of any kind of Native territorial rights at all.

In summary, it can be said that the very early pre-1763 Charters and Letters Patent (that is to say those issued prior to the year 1600), similarly to the French commissions discussed in the last preceding chapter, "neither assume[d] nor confer[red] existing rights to any lands. Rather they grant *the faculty to acquire [unspecified] territories* for the Crown, and bestow by anticipation certain rights in any countries actually won. The rights conferred operated *in futuro*".<sup>188</sup>

Turning now to the second group of Royal Charters or Letters Patent issued by England in the pre-1763 period, those between the years 1600 and 1763, it will be seen that indications similar to those just noted can be drawn therefrom.<sup>189</sup>

The colonies created after the year 1600 but before 1763 and which affected Canadian soil were principally established under Royal Charters or Letters Patent issued up to the year 1670.<sup>190</sup> The seventeenth century grants which are of concern here are *The First Charter for Virginia (1606)*,<sup>191</sup> *The Second Charter For Virginia (1609)*,<sup>192</sup> *The New England Charter of*

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<sup>188</sup> *Ibid.*, p. 109. [Emphasis added.]

<sup>189</sup> It is only possible in the limited space available here to discuss those Charters which covered portions of modern Canadian soil. But this group, it is submitted, is sufficiently numerous to be considered representative of English practice throughout North America during this period.

<sup>190</sup> Though other Charters continued to be issued into the eighteenth century, these seem to have concerned territory now part of the United States.

<sup>191</sup> Reproduced in Hazard, *op. cit.*, note 178, at pp. 50-8. By its terms, it granted parts of modern Nova Scotia: See Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 100-1.

<sup>192</sup> Reproduced in Hazard, *ibid.*, at p. 58-72. By some interpretations, it covered large parts of modern Ontario, Manitoba, and the North-West Territories as well as every part of Canada west of Manitoba: See Slattery, *The Land Rights...*, *ibid.*, at p. 103.

1620,<sup>193</sup> *The Nova Scotia Charter of 1621*<sup>194</sup> granted to Sir William Alexander, *The Charter for Canada of 1628*,<sup>195</sup> which constitutes a supplementary or expanded grant to Sir William Alexander under Letters Patent, and, lastly, *The Hudson's Bay Company Charter of 1670*.<sup>196</sup>

These (and other post 1600 English grants not discussed here) differ from their sixteenth century forebears, discussed above, in that, unlike the older English grants, they generally provided territorial concessions which were confined to relatively specific geographical limits.<sup>197</sup> On the other hand, like the older grants discussed above, there can be found within these documents indications that English interests in the territories, including interest in the nature of rights of sovereignty, had yet to be acquired and were dependent upon the actions of the grantees.<sup>198</sup> Of course, statements of this kind—that the Crown's sovereignty in the lands

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<sup>193</sup> Reproduced in Hazard, *ibid.*, at pp. 103-18. It takes in "the whole of modern Nova Scotia and possibly also Prince Edward Island, virtually all of New Brunswick, and large parts of southern Quebec and Ontario...In case of conflict with the boundaries of Virginia, it is provided that the latter shall prevail": per Slattery, *The Land Rights...*, *ibid.*, at p. 104.

<sup>194</sup> Reproduced, in the original latin, in Hazard, *ibid.*, at pp. 134-5. An English translation can be found in Slafter, E.F., *Sir William Alexander and American Colonization*, Boston, The Prince Society, 1873, at pp. 127-48 (reprinted by Burt Franklin, New York, New York, 1960) [hereinafter cited as Slafter]. "The Boundaries...take in the whole of present-day Nova Scotia, New Brunswick and Prince Edward Island, and Part of Quebec...The Charter encroaches upon the limits of New England, but it appears that the Plymouth Company had previously relinquished its rights to the area in question": per Slattery, *The Land Rights...*, *ibid.*, at p. 105-6.

<sup>195</sup> The writer could only locate an English translation of the original latin text thereof. See Slafter, *ibid.*, at pp. 239-49. In any case, "[t]his Charter covers an enormous swathe of Eastern Canada, including large parts of southern Quebec and Ontario...and was susceptible of virtually indefinite extension into adjacent territories": per Slattery, *The Land Rights...*, *ibid.*, at p. 107.

<sup>196</sup> Reproduced in Rich, E.E., *Minutes of the Hudson's Bay Company 1671-1674*, vol. V of *Hudson's Bay Company Series*, Toronto, The Champlain Society, 1942, at pp. 131-48 [hereinafter cited as Rich]. The territorial limits of this Charter, though clearly encompassing Canadian soil, have been the subject of intense debate. See generally, Slattery, *The Land Rights...*, *ibid.*, at pp. 107-3, 149-56 and 184-9.

<sup>197</sup> The Charter for Canada of 1628 represents a special case since it both described a geographically limited grant and authorized unlimited acquisitions outside of those limits upon conditions similar to the sixteenth century grants.

<sup>198</sup> For example, both the First Charter for Virginia (1606) and the Second Charter for Virginia (1609) referred to the grants contained therein as being of "Territories in America, either appertaining unto us, or *which are not now actually possessed by any other Christian Prince or People*". [Emphasis added.] The italicized phrase clearly indicates the existence of lands within the area of the grant which were considered as not yet appertaining either to England or to any other European Sovereign.

The New England Charter of 1620, while some passages seemingly denote a grant having present effect under an already acquired English Crown sovereignty thereon, is also clearly a grant operating *in futuro* when read as a whole. For instance, while it is stated as a fact that the settlers had already taken actual possession of the granted lands "in our Name and to Our Use, as Sovereign Lord thereof" (see Hazard, *op. cit.*, note 178, at p. 104), this is qualified by the following caveat: "Provided always, that the said Islands, or any of the Premises herein before mentioned, and by these present intended and meant to be granted, be not actually possessed or inhabited by any other Christian Prince or Estate": see Hazard, *ibid.*, at p. 111. Moreover, the grant is stated to be made in part with the view that "*by that Meanes to stretch out the Bounds of our Dominions, and to replenish those Deserts*"

covered by this group of Charters was not yet a fact but was to be acquired through the Charter-holders' actions and would be operative only upon actual possession by them—say nothing either way on the question of whether the English recognized the existence, or potential existence, of a Native sovereignty on the territories to be acquired under authority of the Charters. The English might have considered the lands granted as then being under no sovereignty, even if inhabited by Indians. In other words, they might have considered the Indians as incapable of holding the lands as sovereigns and might have made the grants applicable *in futuro* simply as a means of forestalling disputes with other Europeans already in possession or to recognize in the Natives only a mere title to the sovereignless land. This argument, in fact, is often made to negate arguments of Native sovereignty and must be dealt with here.

There would be an arguable case for such an interpretation were it not for other passages in these documents. The passages referred to here from these Charters, like the pre-1600 Charters discussed above, give some limited evidence that the English did in fact recognize that

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<sup>198</sup>(...continued)

with People governed by Lawes and Magistrates" [emphasis added]: See Hazard, *ibid.*, at pp. 103-4. And, later, the document describes the grant as tending "to the Inlargement of our Own Dominions": See Hazard, *ibid.*, at p. 105. Even taking each of these passages in isolation, it is difficult not to conclude that they "suggest that the acquisition of territory was an anticipated result of colonization rather than its premise": See Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 105.

The Nova Scotia Charter of 1621 contains similar indications in its references to "planting colonies in *foreign* and uncultivated regions" [emphasis added], to leading settlers forth into "new territories" and to the lands in question as being "a foreign colony": See Slafter, *op. cit.*, note 194, at p. 127 (as to the first-quoted reference) and p. 128 (as to the last two quoted references).

The fifth Charter discussed here, the Charter for Canada of 1628, granted lands "that shall be *found, conquered or discovered*, at any future time, by him or his successors...upon both sides of the whole bounds and passages foresaid [i.e. lying both within and without the specified limits]...*which are not yet really and actually possessed by other, our subjects, the subjects of any other Christian Prince, or constituted Orders in alliance and friendship with us...*" [emphasis added]: See Slafter, *ibid.*, at pp. 242-3. It will be seen that the condition is imposed that the lands not presently be occupied by other subjects either of the English Crown or of any other Christian Prince nor by any "constituted Orders in alliance and friendship with us". While the possible meaning of the words "constituted Orders in alliance and friendship with us" will be explored later, it is important to note in the present context that the entire condition, coupled with the description of the lands granted as those which "shall be found, conquered or discovered, at any future time upon both sides of the whole bounds", clearly indicates a grant of lands which, at least, were not yet under any European sovereignty, including English sovereignty. As will be seen later, it possibly also was restricted to lands not under any sovereignty at all, including that of allied (but not enemy) Natives. In any case, it is clear that English sovereignty was, under this Charter, a goal to be obtained rather than a fact assumed to already exist.

Lastly, the Hudson's Bay Company Charter of 1670 contains passages which "save" for the Crown the sovereignty over the territory described (see Rich, *op. cit.*, note 196, at p. 139). But that document had in fact described the lands in part as those within the limits noted but which "are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State...": See Rich, *ibid.*, at p. 139. This is indicative of the need for actual possession by the Company before its grant was perfected. Moreover, the Charter contains the authorization "to continue or make peace or Warre with any Prince or People whatsoever that are not Christians in any places where the said Company shall have any Plantacions Fortes or Factoryes or adjacent thereunto as shall be most for the advantage and benefit of the said Governor and Company and of their Trade...": See Rich, *ibid.*, at p. 146. This would seem to recognize the existence (or potential existence) of autonomous Native populations from whom the land would first have to be won by peaceful or hostile means.

the lands granted might be under the sovereignty of Indians from whom it would have to be obtained. The main difference with the older grants is that indications in the older grants of the necessity for conquest of the Natives were now usually replaced by words contemplating more peaceful means of bringing the Indians to accept English sovereignty. But the fact remains that acquisition of sovereignty, in some way, *from any indigenous population* continued to be a feature of English grants. It is not possible to interpret these passages as merely recognizing in the Natives a common law aboriginal title which is subordinate to English sovereignty; and this for two reasons.

Firstly the wording of these passages themselves seem to reflect a treatment of the Natives as independent peoples. The most striking example is the Charter for Canada of 1628. This document granted lands "that shall be found, *conquered or discovered*" both within and without certain bounds provided that they "are not yet really and actually possessed by others, our subjects, the subjects of any other Christian Prince, or constituted Orders in alliance and friendship with us".<sup>199</sup> The lands already possessed by other British subjects or by the subjects of other Christian Princes being specifically exempted,<sup>200</sup> the words "constituted Orders in alliance and friendship with us" can only refer to Indian peoples allied with England. In effect, lands of allied or friendly Indians are not part of the acquirable lands. In this respect, lands occupied by allied Indians are equated with lands occupied by other Christian Princes.<sup>201</sup> And since it is inconceivable that England would deny the sovereign status of another Christian Monarch—including its status as Sovereign over lands actually and effectively occupied by its subjects—is it not reasonable to assume that equating lands occupied by allied Indians with lands

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<sup>199</sup> Slafter, *ibid.*, at pp. 242-3. [Emphasis added.]

<sup>200</sup> Note that the words "in alliance and friendship with us" may well apply to "Christian Princes" as well as to "constituted Orders" so as to limit the exemption.

<sup>201</sup> Or, at least, *allied* Christian Princes.

occupied by such European Monarchs is tantamount to recognizing Native sovereignty as equal to the sovereignty of European Princes?

The concomittant effect of this interpretation, of course, is that the grant of lands "found, *conquered* or discovered" seems intended to permit simple occupation of discovered *vacant* lands but require *conquest* where already occupied by non-allied "constituted Orders" (i.e.: non-allied indians).<sup>202</sup>

Further evincing this recognition of Native sovereignty is the fact that this Charter incorporated by reference<sup>203</sup> all of the rights and powers encompassed in the Charter of Nova Scotia of 1621, including the instruction to "cultivate peace and quiet with the natives" and the authority to arrange alliances and treaties with them, upon the breach of which power the colony could wage war against them to reduce them to, and preserve, "our authority among them". The inclusion of this authority, coupled with the exclusion of the lands of allied "constituted Orders" from the scope of the grant, is interpreted by this writer as having a complicated, but significant, effect. It is this: Certain (unspecified) Indians are recognized as presently allied with England and their lands are not acquirable by the settlers. As to the lands occupied by Indians not presently allied with England, Sir William and his deputies are first instructed to attempt alliances with them. The conclusion of such pacts would have the effect of excluding the lands of these Indians from the scope of the lands acquirable by the settlers so long as the terms are respected by the Indians. Only upon breach of these pacts by the Indians could these lands revert to being acquirable. Where alliances could not be negotiated, it seems conquests were authorized.

In sum, this charter is strong evidence of the recognition of the sovereignty of the Indians. That sovereignty can be preserved by alliances or lost by either breach of a treaty of alliance

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<sup>202</sup> Again, it may also permit conquest of lands occupied by non-allied Christian Princes, though this is not clear.

<sup>203</sup> See the operative passage in Slafter, *op. cit.*, note 194, at pp. 243-6.

followed by conquest, or failure to negotiate a treaty similarly followed by conquest. In either case, conquest is a pre-requisite to the acquisition of English sovereignty over lands belonging to previously unallied Indians.

Other Charters similarly contain wording reflecting a treatment of Indians as independent nations.<sup>204</sup> Admittedly, some Charters do so more forcibly than others.<sup>205</sup>

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<sup>204</sup> Eight years before the Charter for Canada, England issued the New England Charter of 1620. It contains perhaps one of the best indications of all the Charters, at least up until then, that England considered the Indians as Peoples capable of holding sovereignty over the land. That document clearly considers the lands covered by the grant as devoid of any Indian sovereign. However, this was not because the English did not consider the Indians as sovereign Peoples. Rather, the English Crown had "been further given certainly to knowe..." that the lands covered by this Charter were depopulated of Indians by:

a wonderfull Plague, together with many horrible Slaughters, and Murthers, committed amongst the Savages and brutish People there, heretofore inhabiting,....so that there is not left for many Leagues together in a Manner, any that doe claime or challenge any Kind of Interest therein, nor any other Superior Lord or Sovereigne to make Claime thereunto, whereby We in our Judgment are persuaded and satisfied that the appointed Time is come...that those large and goodly territories, deserted as it were by their naturall Inhabitants, should be possessed and enjoyed by such of our Subjects and People as heeretofore have and hereafter shall...be directed and conducted thither. [Emphasis added.]

See Hazard, *op. cit.*, note 178, at p. 105. This assertion of belief is coupled with an earlier assertion of belief that the lands are not under the sovereignty of any other Christian Prince (see, *ibid.*, at pp. 104-5), thereby completing the belief that the lands were truly vacant. Evidently, therefore, these lands were considered as true *terra nullius*. The Charter goes on to acknowledge that there may remain in the chartered territory "such Savages as remain wandering in Desolacion and Distress": *ibid.*, at p. 105. (These words appear in the context of a directive to bring them to "Civil Societie and Christian Religion".) But this appears to be merely an application of the principle, seen in chapter two, that lands may be considered *terra nullius* where populated only by disparate inhabitants not organized into a "political society". Thus, this Charter provides evidence of English recognition of Native sovereignty because the English consider the land as acquirable, not because Indians cannot be sovereign, but because the previous sovereign political society of Indians is no more. *Ipsa facto*, it is reasonable to imply from this provision in the New England Charter of 1620 that the English Crown believed both that in territories covered by other Charters there were Indian societies subsisting (a fact made clear in those other documents by the grants of exclusive trade with Indians), and that the lands were believed to be under the sovereignty of these Indian societies.

Moreover, the Nova Scotia Charter of 1621 encompasses lands previously appertaining to the Plymouth Company under the New England Charter of 1620 but which that Company had relinquished. Yet, it does not appear that the belief expressed in the New England Charter that the lands had been depopulated of Indians by plague or internecine war extended to the lands now covered by the Nova Scotia Charter. In other words, it appears to now be acknowledged in this latest Charter that these lands, unlike (it seems) those remaining to the Plymouth Company, are indeed populated by Indian societies. This seems evident from the detailed attention given for the first time in the Nova Scotia Charter to relations between the settlers and the Indians. These provisions, in turn, appear to be clear evidence of English recognition that the Indian societies living within the granted lands were sovereign ones. This is implicit in the direction to Sir William Alexander and his deputies to "cultivate peace and quiet with the native inhabitants and savage aborigines of these lands" (see Slafter, *op. cit.*, note 194, at pp. 136-7), coupled with the grant to them of the power to arrange *alliances and treaties* with the Indians; and, only if the treaties so arranged be breached by the Indians, "to take up arms against them *whereby* they may be reduced to order...the stability, defence, and preservation of our *authority* among them": *ibid.*, at p. 137. [Emphasis added.] Thus, the primary authority was to negotiate treaties. Only upon breach of the treaties by the Indians could the grantees wage war "whereby" to "reduce" the Indians to the king's authority. This power to "reduce" Indians to the king's authority, when coupled with the authority first to attempt to negotiate treaties with the savage aborigines *and their chiefs and any others bearing rule and power among them* (see Slafter, *ibid.*, at p. 137), arguably imply that, until such time as they were conquered, they remained under their own sovereignty.

<sup>205</sup> The Virginia Charters of 1606 and 1609 as well as the Hudson's Bay Company Charter of 1670 provide only weak support for the thesis of the survival of Native sovereignty. Nevertheless, what evidence they do contain support rather than hinder the thesis.

For example, while it is true that the First Virginia Charter (1606) says nothing of conquering the natives nor of acquiring cessions from them, it does express the desire and hope of bringing them to Christianity and "to human Civility, and to a settled and

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The second reason why it is not correct to interpret the relevant passages of the English Charters here in question as passages which recognize the Indians as having possession of a mere Native title, but not of Native territorial sovereignty, is that when the directives given in these Charters, particularly as they relate to conquest of the Indians, are read with a knowledge of the British colonial law concepts of acquisition of sovereignty by *conquest*—which, the next section will show, were well developed at the time and would have been known to the drafters of these Charters—the conclusion in favour of Native sovereignty seems all the more inescapable.

To summarize the evidence derived from the six Charters just discussed, which span the years 1600 to 1763, all of them appear to have granted rights which operated in the future. But, as to whether Native sovereignty was thereby recognized to exist in the lands to which mere rights of acquisition were granted, it is fair to say that while some of these Charters contain references which can only rather weakly support the thesis of the survival of Native sovereignty (the two Virginia Charters are in this group, as is the Hudson's Bay Company's Charter) others contain references which support that premise in a much stronger way (the New England, Nova Scotia and Canada Charters being in this group).<sup>206</sup> It is submitted, in any case, none of them,

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<sup>205</sup>(...continued)

quiet government": See Hazard, *op. cit.*, note 178, at p. 51. Moreover, the monopoly on trade with the Indians granted in this Charter would have been dependent upon the Indians' continued presence in the territory. Admittedly, this last element could be interpreted as protecting for the Indians merely a common law aboriginal title, or even merely a non-proprietary right to use the land to hunt. But, whatever its meaning, the intention to trade with Indians implicitly carries with it the recognition of some undefined territorial rights in the Indians.

The second Virginia Charter (1609) grants only lands in the specified limits "which We...may or can grant, in as ample a Manner and Sort, as We, or any our noble Progenitors, have heretofore granted...": *Ibid.*, at p. 65. Given that the "manner and sort" of grant heretofore issued was conditional upon conquest of the Indians, a similar condition is, by these words, arguably included in this Charter. Moreover, like the 1606 First Charter for Virginia, the 1609 Charter contemplated that the settlers would engage in trade with the Natives living there (*ibid.*, at p. 68) and would work towards the conversion of the "Peoples in those Parts" (*ibid.*, at p. 72) to Christianity.

Finally, as to the Hudson's Bay Company Charter of 1670, reference has already been made to the authorization granted therein to make "Peace or Warre with any Prince or People whatsoever that are not Christians" in places within the territory where the Company has set up establishments: See note 198, last paragraph thereof. This and a grant (stated earlier in that document) of exclusive authority to trade with the Indians in the territory constitute the only references to Indians in the document. However, both arguably attest to the Indians' sovereignty or, at least, to the recognition of territorial rights of an undefined nature in their favour.

<sup>206</sup> As an aside, it is interesting to note that Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 110-1 cites references from the *Connecticut Charter of 1662* and the *Rhode Island Charter of 1663* (neither of which seem to have encompassed Canadian soil)  
(continued...)

when each is read as a whole, could be said to wholly deny the existence of Native territorial rights of some nature.

But the evidence so derived does not stand alone to support the premise sustained in this section of the present chapter. As stated earlier, support for the survival of Native sovereignty under the English between 1492 and 1763 can also be derived, perhaps more convincingly, from historical sources other than the Charters. Royal Instructions to the governors of the Colonies thereby created, local and imperial legislation, the pronouncements of English courts of the period under what is called British colonial law, and actual treaties with the Indians signed in the pre-1763 period might all be of interest here. Of these sources, only British colonial law and the actual treaties will be discussed in any significant detail here, though support could have equally been found in the other sources.<sup>207</sup>

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<sup>206</sup>(...continued)

which would place these two with the group of Charters evincing stronger support for the premise sustained by the present writer. For example, he relates that the Connecticut Charter:

recites that the colony, or the greatest part thereof, 'was Purchased and obtained for great and valuable Considerations, and some other Part thereof gained by Conquest', *thereby adding to His Majesty's dominions in America.* [Emphasis added.]

Similarly, Slattery notes that the Rhode Island Charter recited that the settlers who petitioned for the Charter:

are now 'seized and possessed, *by purchase and consent of the said natives*, to their full content', of certain lands there, and moreover have, 'by neare neighbourhoods to and friendlie societie with the greate bodie of the Narragansett Indians, given them encouragement, of their own accorde, *to subject themselves, their people and landes, unto us.*' [Emphasis added.]

The fact that this last Charter recites both that certain lands were purchased from the Indians and that the Indians had agreed to subject themselves *and their lands* unto the King's authority clearly shows that the Natives had previously held both territorial rights to lands, some of which they sold, and sovereignty thereon, the latter of which they now ceded.

<sup>207</sup> Spatial constraints do not permit detailed discussion of the other sources. By way of example, however, without conducting a comprehensive review of the various Royal Instructions issued to Colonial governors, one might cite in support of the present thesis the Instructions of 1719 to the governor of Nova Scotia (which contained a provision which remained in force with minor alterations until at least the 1770's). This provision provides strong evidence of the Crown's view of how English sovereignty over the Indians did not yet exist in that colony but was to be gained by gentle inducement. These Instructions state, in part, as follows:

And whereas we have judged it highly necessary for our service that you should cultivate and maintain a *strict friendship and good correspondence* with the Indians inhabiting within our said province of Nova Scotia, *that they may be induced by degrees not only to be good neighbours to our subjects but likewise themselves to become good subjects to us;*...

Quoted in Slattery, *The Land Rights...*, *ibid.*, at pp. 137-8.

### ***Pre-1763 British Colonial Law***

It was noted in chapter two that the internal courts of a nation do not consider international law except to the extent that it might be referred to in order to interpret an otherwise uncertain rule of municipal law (the local courts adopting the interpretation of an internal rule which best allows the Sovereign to meet its international obligations). Where an internal rule is unambiguous, however, the provisions of international law are ignored by internal courts.<sup>208</sup>

British colonial law is that portion of England's internal law establishing rules for the creation and governance of colonies. The rules of British colonial law of relevance to the present topic, in turn, are those which concern the acquisition of sovereignty over territory. These rules so parallel the provisions of international law as to be virtually indistinguishable.<sup>209</sup>

As in international law, in the British colonial law of the period here considered (i.e.: pre-1763) there existed several means by which the Crown could acquire sovereignty over new territories and the various modes of acquisition bear a similar nomenclature to that of international law. They are usually referred to as *Conquest*, *Cession*, *Settlement*, and *Annexation*. These terms have virtually the same meaning as in international law, with the

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<sup>208</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 63, expressed this notion in the context of discussing British colonial law. He said:

In British law, the dominions of the Crown comprise all those territories, and no more, which are authoritatively claimed by the Sovereign at a given time. Once the Crown has asserted sovereignty over an area, or performed acts which presuppose its dominion, that territory is British for municipal purposes. *The question of whether international legal criteria had been satisfied would not normally arise at the domestic level, and in any case would not entitle a municipal court to decline to give effect to an authoritative Crown claim. Where the Crown's territorial pretensions conflict with international norms, the former will prevail over the latter in the Sovereign's own courts. However, in the case of doubt, it appears that a court may refer to such norms for assistance in ascertaining the Crown's intent, on the principle that the Sovereign is presumed not to act in violation of international rules to which it subscribes.* [Emphasis added.]

<sup>209</sup> For a more thorough discussion of this area of British colonial law than can be conveniently undertaken here, see: Roberts-Wray, K.O., *Commonwealth and Colonial Law*, New York, New York, Frederick A. Praeger, Publishers, 1966, at pp. 99-112 (regarding categories of acquisitions), pp. 150-66 (regarding laws in effect in various categories of acquisitions), and pp. 625-36 (regarding proprietary interests in land in the various categories of acquisition); Blackstone, W., *Commentaries on the Laws of England*, in *Four Books*, 17<sup>th</sup> Ed., London, England, printed by Richard Taylor, 1830, vol. I, at pp. 106-7; *Halsbury's Laws of England*, 2<sup>nd</sup> Ed., London, England, Butterworth & Co. (Publishers) Ltd., 1933, vol. 11, at pp. 10-4 (regarding categories of acquisitions) and pp. 238-45 (regarding laws in effect in various categories of acquisitions); Clark, C., *A Summary of Colonial Law*, London, England, C. Roworth and Sons, 1834, at pp. 4-10; Taring, C.J., *Chapters in the Law Relating to Colonies*, London, England, Stevens and Haynes, Law Publishers, 1882, at pp. 3-23 (being Chapter I); and Slattery, *The Land Rights...*, *ibid.*, at pp. 10-65.

exceptions that "Settlement" appears to equate to the international law concept of "Occupation" while "Annexation" appears to *replace* "Prescription" since English municipal courts give immediate effect to acquisitions of another's territory by unilateral act without any need for a prescriptive period, notwithstanding the position at international law.<sup>210</sup> As in international law, moreover, all of these methods of acquiring territories are equally effective to give full sovereignty to the British Crown, but differ from one another concerning the *effects* they have on the Crown's Prerogative powers and on the survival of both the general laws and the private proprietary interests which obtained in the territory prior to its acquisition.<sup>211</sup> Lastly, as regards these effects there can once again be found a strong similarity between the dictates of British colonial law and those of international law (which were outlined in chapter two). This is at least the case concerning the effects under British colonial law of the various modes of acquisition on

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<sup>210</sup> Slattery, *The Land Rights...*, *ibid.*, at pp. 10-1 provides the following explanation of the meaning of these terms in British colonial law:

*Conquest* in the strict sense involves the military subjugation of a territory. But the mere fact of conquest does not in itself render the territory part of the Sovereign's domains. A clear expression of the Crown's intent to assume sovereignty on a permanent basis is requisite, such as the provision of a civil government to replace military rule. *Cession* normally entails the formal transfer of territory by treaty from one independent political entity to another. A domestic court will give effect to a cession in the Crown's favour without the necessity of any further Crown act or of legislation. Where an uninhabited foreign territory not recognized as pertaining to another state is *settled* by British subjects, the area occupied will be acquired for the Crown, provided that the Sovereign authorized the settlement or subsequently sanctioned it, and so doing clearly expressed (the intention to gain sovereignty thereby. Finally the Crown may simply *annex* a territory by unilateral act such as Order in Council, and a Domestic court will not look behind that act to ascertain the facts supporting it. [Emphasis added.]

Note that McNeil, *op. cit.*, note 2, at p. 113 (in note 22) has commented that, while some authors (such as Roberts-Wray, *ibid.*, at pp. 107-10 and Slattery, *The Land Rights...*, *ibid.*, in the passage just quoted) distinguish "Annexation" as one of the modes of territorial acquisition under British colonial law, he thinks it "is not a separate category for the purposes of constitutional colonial law".

<sup>211</sup> Slattery has written, *ibid.*, at p. 10:

[T]hey each constitute a manifestation of the intention of the Sovereign to assume full dominion over the area in question. So far as the acquisition itself is concerned, one mode is as effective as the other in municipal law. But the manner in which a country is gained affects the Crown's powers and the laws obtaining there.

the pre-existing laws<sup>212</sup> and, most relevantly for present purposes, on the pre-existing land rights.<sup>213</sup>

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<sup>212</sup> British colonial law provides, as concerns the pre-existing laws, that acquisitions by *Conquest, Cession or Annexation* result in no automatic change in the existing legal régime (except to the extent that a pre-existing law is unconscionable, contrary to God's law—i.e., *mala in se*—or is inconsistent with the change of sovereignty itself); but existing laws can be specifically altered by the British Crown using its Prerogative powers, as well as by the British parliament or the duly authorized local authority, if any. However, the Crown loses its Prerogative power to legislate without the concurrence of Parliament or the local authority once the Crown undertakes to call a representative (i.e. elected) assembly for the colony. At that point, the Crown may only legislate for the colony through Parliament or the local assembly: See *Campbell v. Hal*, *infra*, note 220.

Acquisition by *Settlement*, on the other hand, pre-supposes a total lack of pre-existing habitation or, at least, of a pre-existing "political society"—and, consequently, a total lack of pre-existing legal régime—and so results in the automatic infusion of British law into the territory (insofar as it is applicable to local circumstances) for the benefit of British settlers.

See Slattery, *The Land Rights...*, *ibid.*, p. 11 and, generally, the other authorities cited in note 209.

<sup>213</sup> These are described generally by Slattery, *The Land Rights...*, *ibid.*, at pp. 45-62. But, to state these briefly here, where a territory is acquired by *Conquest, Cession or Annexation* the Crown gains automatic and full title to the public property of the previous Sovereign and to unpossessed lands in that Sovereign's domain but only an underlying title to the lands which were, under the old Sovereign (and presumptively continue to be under the new British one), subject to a private proprietary interest. Again, as in international law, though private titles presumptively survive the change of sovereignty in conquered, ceded or annexed colonies, the Crown does have, at least until it grants the territory a representative assembly, powers to affect and even abrogate pre-existing private interests. Such acts are not reviewable by domestic courts. Once the country becomes part of the Sovereign's dominions and the inhabitants are received as British subjects, however, the Crown no longer has the ability to deal with either a territory or its inhabitants under its general authority in foreign affairs. Acts done by the Crown towards its own subjects in a British colony are governed by the law in force there and are reviewable by municipal courts. But it must be emphasized that during the interval when the Crown does possess the power to dispose of the private property of the conquered inhabitants, it is *presumed*, as a matter of British colonial law, that the Sovereign will respect the existing private property rights held by the inhabitants of a colony. Thus, in the absence of adverse Acts of State performed as an incident of the colony's acquisition, or of valid decree or legislation enacted subsequently, such rights will be considered to survive the change of sovereignty.

As to acquisition by *Settlement*, that mode pre-supposing as it does that the lands are uninhabited or occupied only by disparate groupings not formed into a political society, the new Sovereign obtains full title to the soil and complete powers of disposition (Slattery, *The Land Rights...*, *ibid.*, at p. 45) with the exception that the disparate inhabitants retain a common law aboriginal title to the lands they occupy as a result of the introduction of the British common law of property (see McNeil, *op. cit.*, note 2). In settled colonies the common law aboriginal title of the disparate inhabitants, if there be any, can only be taken away by act of Parliament or of the Colonial Assembly since the inhabitants automatically become British subjects against whom the Crown cannot act by Prerogative.

As an aside, it should be noted that though the private property rights of the conquered must be sufficiently precise so as to be susceptible of recognition and enforcement, there is no necessity that they be expressed by way of concepts known to English law, or that they be in their own terms freely transferable or susceptible of individual ownership. The Privy Council, in approving of such an approach in a 1921 case, put it thusly:

There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with... To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are often as not misleading.

See: *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), at pp. 402-4. This case was cited with approval by Hall J. in the Supreme Court of Canada. See: *Calder*, *infra*, note 232, at 175 (D.L.R.).

This last element is particularly relevant to North American Natives since, as Slattery, B., "Understanding Aboriginal Rights", (1987) 66 *Can. Bar Rev.* 727, at p. 741 [hereinafter cited as Slattery, *Understanding...*] has written:

Prior to the advent of Europeans, most of North America was actually possessed and used by native communities. But the map of aboriginal North America was not completely static. Native peoples migrated in response to such factors as war, epidemic, famine, dwindling game reserves, altered soil conditions, trade, and population pressure.

Thus, the rule allowing for the flexible recognition of various methods of holding title would benefit North American's nomadic tribes.

While the principles relied upon here as being those of British colonial law are in fact derived principally from the "classic" nineteenth and twentieth century texts on that law, the British law in this regard at the height of the North American colonial period--during the seventeenth and eighteenth centuries--was effectively the same. This is established both by Blackstone's 1765 treatise on the laws of England cited earlier<sup>214</sup> and, more importantly, by a series of judicial pronouncements commencing in 1608 with a case concerning the status of the Irish customary (*brehon*) law subsequent to English conquest of Ireland<sup>215</sup> and also the oft-noted report by Coke of *Calvin's Case*,<sup>216</sup> and including cases such as an *Anonymous* case of 1640,<sup>217</sup> *Blankard v. Galdy* in 1693,<sup>218</sup> *Omichund v. Barker* in 1744<sup>219</sup> and finally culminating in the still-leading case of *Campbell v. Hall* in 1774.<sup>220</sup> Of these, the second, fourth and sixth cases are the key ones and merit further discussion here.

In *Calvin's Case* it was established that:

if a King come to a Christian kingdom by conquest...he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ispo facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity...But if a King hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom,

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<sup>214</sup> *Op. cit.*, note 209.

<sup>215</sup> *The Case of Tanistry* (1608) Davies 28, 80 E.R. 516 (K.B.), at 520.

<sup>216</sup> (1608) 7 Co. Rep. 1a; 77 E.R. 377.

<sup>217</sup> (1640) 1 Salk. 46, 91 E.R. 46 (C.P.).

<sup>218</sup> See *Blankard v. Galdy* (1693), Holt 341; 90 E.R. 1089; 2 Salk. 411; 91 E.R. 356; 4 Mod. 222; 87 E.R. 359; Comb. 228; 90 E.R. 445 (K.B.).

<sup>219</sup> (1744) Willes 538 (Ch.).

<sup>220</sup> (1774) Lofft 655; 98 E.R. 848.

he cannot change those laws of himself, without consent of Parliament. Also, if a King hath a Christian kingdom by conquest,...after [the King has] given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament.<sup>221</sup>

This 1608 case, therefore, recognized three broad categories of territorial acquisitions: Conquests of Christian kingdoms; Conquests of infidel kingdoms; and acquisitions of a kingdom by "title of descent". No reference is made to acquisitions of vacant territories by settlement. Title by descent is not relevant to the present thesis (indeed, no person has ever pretended that America was acquired by descent) and this method of acquisition need not be discussed further. In the category of Conquest of a Christian kingdom one sees the recognition of the broad parameters of what was to evolve into the modern British colonial law category of *Conquest*, for the Court establishes: that such territories, once acquired, retain their laws until altered or replaced, which it is in the King's power to do equally with or without Parliament; but that once the King confers "the laws of England for the government of that country" he can no longer alter those laws without Parliament. But, it is with respect to the category of Conquest of an infidel kingdom that *Calvin's case* causes some difficulty to the present argument since it is there said that in countries conquered from infidels the existing laws are automatically abrogated and replaced with natural equity. However, since the distinction between the effects of conquests in infidel and in Christian kingdoms was "exploded" (to use the term employed in the cases) in subsequent cases, this difficulty is avoided.<sup>222</sup> But even if this were not so and the special

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<sup>221</sup> *Op. cit.*, note 216, at p. 398 (E.R.).

<sup>222</sup> In *Blankard v. Galdy*, *op. cit.*, note 218, it was said, at 90 E.R. 445, "where it is said in *Calvin's case*, that the laws of a conquer'd heathen country do immediately cease, that may be true of laws for religion, but it seems otherwise of laws touching the Government". See also 91 E.R. 356, at 357 where it was said:

also, held that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

Finally, in *Campbell v. Hall*, *op. cit.*, note 220, the Privy Council, per Lord Mansfield, referred, at 896 (E.R.), to the separate consequences in the conquest of an infidel country as "the absurd exception as to pagans, in *Calvin's case*" and added, at 897 (continued...)

category as to infidel lands set up in *Calvin's* case were still maintained today it could not affect the present thesis of the survival of Native sovereignty since that case merely established different legal consequences resulting from the conquest of infidel lands and did not say that such lands were appropriable to the Crown's sovereignty by means other than conquest, such as for example settlement; which arguably means the same as recognizing the infidels as sovereign until conquered.<sup>223</sup>

The 1693 case of *Blankard and Galdy*<sup>224</sup> re-affirmed the rule as to conquests of Christian kingdoms but applied it to Christian and infidel countries alike. The case also mentions the settlement of vacant lands.<sup>225</sup> In that case it was said:

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<sup>222</sup>(...continued)

(E.R.), "I omit the distinction between a Christian and infidel kingdom, which as to this purpose is wholly groundless, and most deservedly exploded".

<sup>223</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 13 put it this way:

The mode of acquisition [of infidel lands] envisaged is conquest. There is no suggestion that non-Christian or "barbarous" lands were appropriable by discovery, symbolic acts, or occupation, modes appropriate to *territorium nullius*.

<sup>224</sup> *Op. cit.*, note 218.

<sup>225</sup> Lester, G.S., "Primitivism Versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land", in Bryce-Bennett, C. (ed.), *Our Footprints are Everywhere: Inuit Land Use in Labrador*, Nain, Labrador (Nfld.), Labrador Inuit Association, 1977, pp. 351-74, at p. 372 (note 42) [hereinafter cited as Lester], traces the origin of the category of "Settlement" (which he calls "peaceful settlement") to a case decided in 1670 and possibly even to one decided in 1668:

The first clear hint that there might be a third method of acquisition is to be found in a dictum of Vaughan C.J. in *Craw v. Ramsay* (1670) Vaughan 274, at p. 279; 124 E.R. 1072, when he mentions that colonies might be founded by "new plantation". This suggestion can be traced through the following authorities up to 1774: it was possibly anticipated in *Geary v. Barecroft* (1668) 1 Sid. 346; 82 E.R. 1148; *Blankard v. Galdy* (1694) 2 Salk. 411; 91 E.R. [sic] 646; (see also, note K, 77 E.R. 398); this opinion was not widely known in the colonies, and had little effect in awakening lawyers to its possibilities; *Campbell v. Hall* (1774), Lofft 655; 98 E.R. 848.

It should be noted, however, that "peaceful settlement" was interpreted by Lester in the foregoing article (at p. 358) as having from the outset been:

predicated on the assumption that there might be territory which was *either literally unoccupied*, being waste and desert or *else occupied by savage and nomadic tribes who were in effect denied the attributes of any sort of legal personality*. In the nineteenth century this became more refined so that a civilized power was justified in asserting a territorial sovereignty over those people who were thought to have no settled system of law or *lex loci*, and hence no international status. [Emphasis added.]

Lester's point here, it seems to the present writer, is that upon discovery of the New World the law evolved to create a category of territorial acquisitions called "peaceful settlement" which applied equally to vacant lands and to lands occupied by uncivilized societies. These societies were denied legal personality, not because they were infidels (for he acknowledges later in his article that

(continued...)

1st, In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

2ndly, Jamaica being conquered,...the laws of England did not take place there, until declared so by the conqueror or his successors...[I]t was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force...<sup>226</sup>

By 1774, when *Campbell v. Hall* was decided by the Privy Council, the British colonial law categories of territorial acquisition and the specific effects of each had already taken the shape they retain today.<sup>227</sup> That case, which is now universally regarded as the leading case on the

<sup>225</sup>(...continued)

this criteria was "exploded" by *Blankard v. Galdy* and other cases) but because they are primitive and barbaric and have "no settled system of law". With the greatest of respect for Dr. Lester, however, it is contended that nothing in the early caselaw indicates that settlement was viewed as applying to anything but truly vacant lands. For instances, in the passage quoted *infra* (in the main text accompanying note 226) from the case of *Blankard* it is seen that reference is there made by the Court only to an "uninhabited country newly found out by English subjects". [Emphasis added.] See also passages in the arguments in *Campbell v. Hall*, *op. cit.*, note 220, as reproduced in the Report. Even the earliest case cited by Lester himself, *Geary v. Barecroft*, *ibid.*, at 1149 (E.R.) referred only to the first person to come to land which was unoccupied. In comparing property law as to land with the law of territorial acquisition as it existed in Natural law (which was also the international law of the day), the Court there said "*le ley de occupancy est found sur le ley de nature scil. quod terra manens vacua occupanti conceditur conceditur. Com sur le primer de inhabitants al novel pais' cesty que primer enter 3 tel part de ces poet 6 manure gain le propriety*" which (as unofficially translated by the present writer using the definitions of so much of the foregoing words as could be found in *Black's Law Dictionary*, Sixth Edition, Continental Edition (1891-1991), St. Paul, Minn., West Publishing Co., 1990) means: "The law of occupancy is founded on the law of nature by which whatever land lying unoccupied is given to the first occupant. As on the first to come of the inhabitants to a new country he who first enters such portion of this land and occupies (cultivates?) it gains the property". Thus the cases contemporaneous with the colonization of America made no reference to the uncivilized nature of the Indians as a reason to treat them differently. Conquest was seen as the method of acquisition. It is only in the nineteenth century cases that one starts to see rationales based on the Indians primitive state. This nineteenth century line of opinion appears, to the present writer, to smack of revisionist history-making concerning the views of the ancient courts. Consequently, so too does Lester's view on the point.

Moreover, Lester's view that peaceful settlement applied from its conception equally to lands occupied by primitive peoples as to vacant lands does not appear to have been the position taken by the Crown or the government at that early period, as is evidenced by the earlier discussion herein regarding the early charters and by the 1722 memorandum referred to *infra*, at note 227. Admittedly, Lester points to various scholarly opinions of the day which support the wider scope of the settlement doctrine during the North American colonial period. But it does not appear that the courts or the Crown accepted this scholarly opinion.

<sup>226</sup> *Blankard v. Galdy*, *op. cit.*, note 218, 91 E.R. 356, at 357. See also 90 E.R. 445, 90 E.R. 1089, and 87 E.R. 359, at 361.

<sup>227</sup> It should be stated that apart from the judicial opinions reviewed here there exists a memorandum dated August 9, 1722 written by the Master of the Rolls (quoted in both *Calvin's case*, at 398 (E.R.) and in *Blankard v. Galdy*, 87 E.R. 359, at 361-2) in which he says it to have been established by the Privy Council, upon appeal to the King in Council from the foreign plantations (which appears to be a reference to *Calvin's case* and to *Blankard v. Galdy*) that, quoting from the memorandum as quoted by the editor of *Blankard v. Galdy* in 87 E.R. 359, at 361-2, note (a):

first, that if there be a new and uninhabited country discovered by English subjects, such new-found country is to be governed by the laws of England, but that after it becomes inhabited it shall not be bound by English statutes unless specifically named. Secondly, that when the King of England conquers a country he may impose upon the inhabitants what laws he pleases; but thirdly, that until such laws be given by the conqueror, the laws and customs of the conquered country shall hold place, except where they are contrary to the established religion; or enact any thing *malum in se*; or are *silent*; for that in all such cases the laws of the conquering country shall prevail. [Emphasis is in the original.]

matter, concerned the question of the king's power to legislate for the Island of Grenada without the consent of Parliament. The jury in that case, upon a special verdict, found *inter alia* that Grenada was an island conquered, together with its French and native inhabitants, from the French in 1762. Consequently, the case did not concern the settlement by English subjects upon an uninhabited territory. It seems likely that it is for this reason that the formal judgment in the case<sup>228</sup> makes no mention of the rules applicable to the acquisition of vacant lands. But the fact that the rule relevant to uninhabited lands, as ultimately set out in *Blankard v. Galdy*, was mentioned repeatedly in the arguments (which are reproduced in the Report<sup>229</sup>) without negative comment by the Court seems to reflect the Court's acceptance thereof. The rules as to conquests, however, being germane to the case before him, were formally set down in the Judgment of Lord Mansfield as follows:

1st, a country conquered by the British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

2ndly, the conquered inhabitants once received into the conquerors protection become subjects; and are universally to be considered in that light, not as enemies or aliens.

3rdly, articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent.

4thly, the law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there.

5thly, laws of a conquered country continue until they are altered by the conqueror.(...)

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<sup>227</sup> (...continued)

The existence of this memorandum serves as additional proof that the British colonial law rules were well established by 1722, though there is admittedly a minor discrepancy between the rules as set out therein and as set out in *Blankard v. Galdy*: that case said that in conquered countries where an existing law is contrary to the law of God or where the existing law is silent on a matter *natural equity* shall apply; but the memorandum provided that in such cases the laws of *the conquering country*, not natural equity, shall apply. But this distinction is unimportant for present purposes.

<sup>228</sup> Which begins only late into the report. See at *op. cit.*, note 220, at p. 894 (E.R.).

<sup>229</sup> See, for example, *ibid.*, at pp. 864, 865, 874, 879 (twice), and 883 (E.R.).

6thly, if the King has power (and when I say the King, I mean in this case to be understood "without concurrence of Parliament") to make laws for a conquered country, this being a power subordinate to his own authority, as part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of Parliament, or privileges exclusive of his other subjects.<sup>230</sup>

A seventh rule, moreover, though not stated as such in the Judgment, can be distilled from that portion of it bearing the crux of the decision. It is this: relying on *Calvin's case* Lord Mansfield establishes that in a conquered country, once the King confers on it a representative assembly his power to legislate for it without the concurrence of Parliament is at an end unless specifically reserved in whole or in part in the instrument granting the assembly.<sup>231</sup> Of these rules, the 5th, 6th and putative 7th rules are the most relevant to the present discussion.

Thus, as the foregoing cases and the scholarly treatises cited earlier show, British colonial law had early on provided that sovereignty over territory could only be acquired by the Crown through either settlement of an uninhabited territory or conquest of lands inhabited by Christians or infidels (who are on an equal footing to one another). It appears that the rules as to cessions were always assimilated to those as to conquests since the former often resulted from the latter. It is not clear to the present writer on what date the method of Annexation was first conceived as part of British colonial law. In any case, with respect to all these methods of territorial acquisition there is the added requirement that the Crown's sovereignty is not established unless the Crown clearly intended to acquire the territory to its sovereignty. Consequently, though acquisition of inhabited lands could be by way of simple unilateral annexation, this could only occur if clearly intended. Otherwise conquest or cession was required. Settlement only applied to vacant land. These principles of British colonial law, as

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<sup>230</sup> *Ibid.*, at pp. 895-6 (E.R.).

<sup>231</sup> See, *ibid.*, at pp. 896-9 (E.R.). In the case, the King had purported to use his Prerogative powers over conquered Grenada to impose an export tax after issuing decrees granting it an assembly and the protection of English law but before the assembly was actually set up. In these circumstances the Court ruled that the King no longer had the power to impose the export tax without the concurrence of Parliament.

enunciated in *Campbell v. Hall*, and described above, received approval in two Supreme Court of Canada decisions.<sup>232</sup>

But, this British colonial law was not without its difficulties in terms of its application to the historical development of the North American British colonies. The list of various modes of acquisition suggests an ease of categorization of the potential situations. However, with the qualified exception of the territories ceded from France both in 1713 and in 1763,<sup>233</sup> the case of colonial North America is not capable of such easy compartmentalization. The foregoing rules of British colonial law were developed for application in relatively straightforward situations. The doctrines of *conquest*, *cession* and *annexation* were meant to apply to situations where pre-established communities were brought under British control and little immigration by British settlers would be envisaged. In such cases, the continuation of the existing laws and proprietary interests (until specifically altered) would be required to forestall the inevitable chaos in the pre-existing community resulting from the legal vacuum. *Settlement*, however, was developed for vacant territories acquired for new settlements by British subjects. In such cases the settlers would expect that the colonies would be established in the image of the Mother Country and the automatic infusion there of British law would be necessary to avoid enacting anew every basic law needed for the governance of the colony. In North America, however, settlers established British colonies in pre-inhabited lands and lived essentially side by side with the aboriginal populations.<sup>234</sup> Thus, to the extent that cessions were not negotiated from the Indians or

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<sup>232</sup> Strong J. (though he dissented on other grounds) approved of *Campbell v. Hall* in the *St. Catherine's case*, *op. cit.*, note 116, at p. 626 (S.C.R.); and Hall J. did likewise in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; 34 D.L.R. (3d) 144 (S.C.C.), at pp. 198-9 (D.L.R.), which will be discussed below.

<sup>233</sup> The "qualification" to this exception being that France could only cede that over which it itself was sovereign together with a mere "pretension" to unacquired Indian lands which it claimed to be under its influence.

<sup>234</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 27, put the resulting classification problem this way:

[t]he standard classification of colonial territories originating with *Blankard v. Galdy* was indeed inadequate to cope with the remarkable diversity of colonial situations encountered in practice. That classification in effect envisages two opposed cases: on the one hand, settlements planted in vacant lands by British subjects, and

(continued...)

conquests were not effected, England's North American colonies are factually a hybrid between settlements, on the one hand, and cessions and conquests, on the other. This is notwithstanding the fact that as prominent a legal authority as Blackstone affirmed in his *Commentaries on the Laws of England* of 1765 "that the American colonies are principally of the conquered variety".<sup>235</sup> And, as stated above, despite the existence in the colonial era of legal opinions by some of the scholars of the day (which are noted in Lester<sup>236</sup>), settlement could not apply since neither the Crown nor the courts of the day extended this doctrine to lands held by backward peoples.

A solution to the case of "hybrid" colonies similar to those of North America was judicially accepted in the *nineteenth* century for colonies established during that century in India.<sup>237</sup> But, this latter-day jurisprudential solution, even if reflective of some of the juristic opinions which began in the seventeenth and eighteenth centuries, cannot apply as pertains to colonial North America since it is the view of the courts and Crown regarding the North American colonies at

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<sup>234</sup>(...continued)

on the other, conquered or ceded countries inhabited principally by people of alien origins. The formula does not allow for the common hybrid case, where British settlers establish autonomous communities in already inhabited lands held by the Crown. Looked at from the point of view of the settlers, these colonies present many features in common with those founded in uninhabited places. Examined with particular regard to the original inhabitants, they bear more similarity to conquests. In the absence of explicit provisions, what laws should be viewed as applying within the settler communities, and what laws among the local peoples?

See also, Lester, *op. cit.*, note 225, at p. 355 for similar thoughts.

<sup>235</sup> These are Slattery's words found in his *The Land Rights...*, *ibid.*, at p. 23. Blackstone's assertion in this regard is quoted by Slattery at p. 40 and can be read in the original text by Blackstone cited, *op. cit.*, note 209.

<sup>236</sup> *Op. cit.*, note 225.

<sup>237</sup> Indeed, a series of cases and reports in the nineteenth century concerning just such hybrid cases of "autonomous settlements" established among indigenous populations in India resulted in the effective creation of a new category of acquired territories bearing its own legal effects. These materials held that English law would be infused into the colony so established but only as concerns the settlers. The local indigenous population would continue to be governed by their own laws and to retain their proprietary rights until expressly altered in conformity with the rule applicable to conquered territories: See *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305 (Ch.); the "Lex Loc" report by the Indian Law Commissioners in 1840; and *Advocate-General of Bengal v. Ranee Sumomoye Dossée* (1863), 2 Moo. P.C. (N.S.) 22 (P.C.). These are discussed in Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 27-9.

the time these were created which is relevant. This "hybrid" solution was not then accepted by either the courts or the Crown.<sup>238</sup>

Therefore, it appears that the seventeenth and eighteenth century colonial Charters for North America can only be interpreted as implying North America was territory conquered or to be conquered, ceded or to be ceded from the aboriginal populations for the reasons already noted above. Indeed, these documents imply that the British Crown held full power to legislate without the concurrence of Parliament with respect to the colonies established thereby until local representative governments were established. This Crown power was consistent with colonies acquired by means other than settlement.<sup>239</sup> Moreover, a series of cases from the seventeenth to nineteenth centuries held that the original British colonies in America were in fact *conquered* from the Indians.<sup>240</sup>

In summary, therefore, the provisions of British colonial law both explain and serve to buttress the conclusion reached earlier that the colonial Charters and Letters Patent invariably state (or, at least, contain some indication) that Native lands were to be conquered or obtained by cession before they would be considered part of the English Crown's dominions as Sovereign.

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<sup>238</sup> However, Slattery argues in *The Land Rights...*, *ibid.*, at pp. 41-4, that a similar viewpoint as that applied to India was eventually adopted with respect to the older American colonies (i.e.: the seaboard colonies). These cases, the present writer would argue, engage in revisionist legal history and do not reflect the view which prevailed in colonial times.

<sup>239</sup> Slattery has said in *The Land Rights...*, *ibid.*, at p. 37, that the early Charters "reflect the conviction that the Crown initially held in its American dominions powers as extensive as those (according to *Calvin's Case*) possessed in conquests". It will be remembered that, according to the principles discussed with approval in *Campbell v. Hall*, at note 220, the Crown holds no Prerogative power in a *settled* colony. All powers of governance rest in Parliament and the local governing body.

<sup>240</sup> See *inter alia*: *Smith v. Brown* (circa 1702-5), 2 Salk. 666, 91 E.R. 566 (K.B.); *Attorney-General v. Stewart* (1817), 2 Mer. 143, 35 E.R. 895 (Ch.). The correctness of the application of British colonial law in these cases will be questioned below when examining the possible survival of aboriginal sovereignty over their lands. This jurisprudence is noted here only to show that if British sovereignty was obtained and, consequently, British colonial law did apply, that law would consider North America to be *conquered* territories.

### ***Pre-1763 Treaties with the Indians***

As also stated above, the contemporaneous treaties entered into with the Indians in this pre-1763 period further support the conclusion that sovereignty was to be transferred only by conquest or cession. For instance, "[t]wo seventeenth century Treaties concluded by English authorities in Virginia with the Indians [what Slattery calls the "Early Virginia Treaties"] shed light upon the status which the latter were conceived to hold vis-à-vis the Crown".<sup>241</sup>

The first, concluded *circa* 1646, was said to be between a certain "King of the Indians" and the colony.<sup>242</sup> Importantly, the Indian Chief acknowledges "to hold his Kingdome from the King's Ma'tie of England" and agrees to pay an annual tribute. By its wording, it is unclear whether this constituted a *cession* of territorial sovereignty or an *acknowledgement of a pre-existing* English sovereignty. What is clear is that at least henceforth the Indian Chief's status is subordinate to the overall sovereignty of the English monarch.

The second of the two Early Virginia Treaties, dated 29 May 1677, is clearer on the question of prior Indian sovereignty since the Native signatory Chiefs are said to "*henceforth* acknowledge to have their immediate Dependency on, and owne all Subjection to the Great King of England Our now Dread Sovereaigne"<sup>243</sup> to whom they shall pay an annual rent of three arrows in exchange for recognition of their territorial title which they "*shall hold..., and have the same confirmed to them...by Patent under the seal of his Majestys Colony...in as free and firme*

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<sup>241</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 117. These treaties are discussed by him in more detail at pp. 117-9.

<sup>242</sup> For the text of this treaty see Hening, W. W. (ed), *The Statutes at Large; Being a Collection of all the Laws of Virginia (1619-1792)*, in 13 vols, New York, R. & W. & G. Bartow, 1809-1823, at vol. 1, pp. 323-6. See comments thereon in Robinson, W. S., *Indian Policy of Colonial Virginia*, Ph.D. dissertation, University of Virginia, 1950, at pp. 71-4.

<sup>243</sup> This Treaty is reproduced in Grant, W.L. and Munro, J. (eds), *Acts of the Privy Council of England, Colonial Series*, London, His Majesty's Stationery Office, 1908-1912 (reprinted in 1966), Vol. I (1608-1680), #1169, pp. 733-9. The quoted passage is at p. 734 (art. 1). [Emphasis added.]

manner as others his Majesty's subjects have and enjoy their lands and possessions."<sup>244</sup> The treaty also provides for the future Crown protection of the signatory Indian tribes.<sup>245</sup> Finally, the treaty provides that the Indians are yearly to tender their obedience to His Majesty's Governor and pay a tribute of twenty beaver pelts together with the rent of three arrows "in acknowledgement that they hold their Townes and Lands of the Great King of England".<sup>246</sup> As Slattery states, because this second treaty was published in Virginia *pursuant to an Order in Council issued from London* "the Treaty constitutes a peculiarly authoritative expression of the Crown's views as to the status of Indian peoples and their lands within American territories over which it claimed sovereignty".<sup>247</sup> It follows that the Crown's approval of the wording which provided that the signatory tribes "henceforth acknowledge" English sovereignty is authoritative evidence of the Crown's implicit acknowledgement of the existence of Native sovereignty *prior to the treaty*.

A similar conclusion may be derived, as concerns pre-1763 treaties, from the so-called "Iroquois deeds".<sup>248</sup> These consist of two "deeds" signed in 1701 and 1726 respectively. At a Colonial-Indian Congress held at Albany in 1754, colonial commissioners described the position of the Iroquois lands concerned under these deeds as follows:

*you did put this land under the King our Father, he is now talking care to preserve it for you;...for although, the land is under the King's Govern't, yet the property or power of selling it to any his Majesty's subjects having authority from him, we always consider as vested in you.*<sup>249</sup>

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<sup>244</sup> *Ibid.*, at pp. 734-5 (art. 2). [Emphasis added]. See also article 3 where allied Indians who do not have sufficient lands "to Plant upon" shall be *given* land.

<sup>245</sup> *Ibid.*, at pp. 735-6 (art. 5).

<sup>246</sup> *Ibid.*, at p. 738.

<sup>247</sup> Slattery, *The Land Rights...*, *op.cit.*, note 99, at p. 119.

<sup>248</sup> Discussed in Slattery, *The Land Rights...*, *ibid.*, at pp. 119-25.

<sup>249</sup> Quoted, *ibid.*, at p. 122. [Emphasis added.]

It appears that this qualification of the deeds received Crown approval the following year by the issuance of Royal Instructions to New York and Virginia in which, interestingly, the deed of 1726 is qualified as a "Treaty".<sup>250</sup> Slattery says of the 1726 deed that it "represents a cession by the Iroquois nations of the underlying or ultimate title of their territories to the Crown, while reserving exclusive possession and the beneficial use of that land to themselves" and that

[i]n general, this documentation [i.e.: the Iroquois deeds and surrounding documentation] tends to substantiate the view that the American Charters initially granted by the Crown, while asserting ultimate title and exclusive rights of access to designated territories *as against other European powers*, did not necessarily view these territories as juridically vacant or purport to deprive the local peoples of their lands *ipso facto*. These instruments in effect authorized the grantees to acquire lands within the limits specified, by settlement, when uninhabited, or by peaceful cession, purchase, or indeed conquest, when they were held by indigenous peoples. Prior to that event, the grantees' rights were held subject to the Indian title, where one existed.<sup>251</sup>

The present writer would go further and argue that the acknowledgment that "you did put this land under the King our Father" admits the prior sovereign status of the signatory Indians.

Similar treaties were entered into for lands in Nova Scotia. For instance, a treaty was signed at Boston on 15 December 1725 and later ratified at Annapolis Royal wherein the Indians formally submitted to the English Sovereign's authority by "acknowledge[ing] His said Majesty King George's jurisdiction and dominion over the territories of the said Province of Nova Scotia or Acadia, and mak[ing] our submission to His said Majesty *in as ample a manner as we have*

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<sup>250</sup> *Ibid.*, at p. 123.

<sup>251</sup> *Ibid.*, at p. 124. [Emphasis added.]

formerly done to the most Christian King [of France]".<sup>252</sup> This English treaty of 1725 was renewed by further treaty on August 15, 1749<sup>253</sup> and again in 1752.<sup>254</sup>

Significantly, an English Board of Trade report to the King in 1761 qualified previous Indian treaties (presumably including those discussed in the preceding paragraphs) as being "Solemn Compacts by which they [the Indians] had yielded to Us the Dominion but not the property of their lands".<sup>255</sup> The term "Dominion" seems to equate to "Sovereignty". If so, then this report would imply that, in territories *not* covered by a treaty, Native sovereignty was not "yielded". Further, Slattery tells us:

The Report was approved by the Privy Council Committee for Plantation Affairs and the King then ordered the Board of Trade to draft Instructions concerning land grants to be sent to New York and all other American provinces where such grants "interfere with Indians bordering on those Colonies". The Instructions drawn up by the Board were approved by Order in Council on 3 December 1761 and...were forwarded to a number of American colonies, among which figured the province of Nova Scotia.<sup>256</sup>

Consequently, it appears that the facts as stated in the Report were acknowledged by the highest authority in England, including the Crown itself.

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<sup>252</sup> Reproduced in *Indian Treaties and Surrenders*, in 3 volumes, Ottawa, King's Printer, 1891 (reprinted in 1971), Vol. II, at pp. 198-9 [hereinafter cited as *Treaties and Surrenders*]. The quote passage is at p. 198. [Emphasis added.]

Interestingly, it is at least arguable that the effect of the italicized phrase is actually to deny English sovereignty over Indian lands since, as was seen in chapter four, it is the present writer's conclusion that France had never claimed sovereignty over North American territories *as against the Indians* except where obtained by treaty. There does not appear to have existed any such French-Indian treaties of significant territorial scope, and particularly any French-Indian treaty covering Nova Scotia. But this reading of the treaty is tenuous and will not be pursued here since the present writer is willing to acknowledge that if the Nova Scotia Indians who signed the 1725 treaty had not bargained their sovereignty away to the French Crown the strong wording of this treaty likely shows that they had now done so in favour of the English Crown.

<sup>253</sup> *Ibid.*, Vol. II, at pp. 200-1.

<sup>254</sup> Reproduced in Akins, T. B. (ed.), *Selections from the Public Documents of the Province of Nova Scotia*, [Nova Scotia Archives, Vol. I], Halifax, Charles Annand, 1869, at pp. 682-5.

<sup>255</sup> Dated November 11, 1761. It is reproduced in Saunders, W. L. (ed.), *The Colonial Records of North Carolina (1662-1776)*, in 10 vols, Raleigh, N.C., P.M. Hale, 1886-90, at vol. VI (1759 to 1765), pp. 582-6. The quoted phrase is at p. 583.

<sup>256</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 145.

There is no clear evidence of any other pre-1763 English treaties affecting Canadian soil.<sup>257</sup>

### ***Conclusion on Pre-1763 English Practice***

What emerges from the above review of the English Charters, British colonial law, treaties with the Indians, and other sources not specifically reviewed here (such as Royal Instructions and local and Imperial legislation) is that England consistently acted in accordance with the international law dictates expounded in chapter two hereof by claiming to have acquired sovereignty over North American territory only to the extent that such sovereignty was conquered from or was ceded by any Native Potentates living there. This, in fact, was the thrust of its own colonial law. Of these two methods of acquiring sovereignty, as W.F. Pentney has written:

Extinguishment by military conquest of the native peoples probably does not apply in Canada, since we have no history of Indian wars comparable to that of the United States.<sup>258</sup>

Indeed, it was the avowed policy of the Crown and the Colonial office to seek peaceful relations and treaties with the Indians. Thus, acquisition of sovereignty by consent remained the only mode which was in fact practised by the English in Canada; at least, as has so far been proven herein, up to the year 1763. Indeed, as shall be shown in the next two sections, this continues to be so to this day. The lack of Indian wars in British North America and the fact that this

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<sup>257</sup> There do not seem to be any written treaties during the pre-1763 period considered here which would affect lands covered by the Hudson's Bay Company's Charter of 1670. This is probably because the main purpose of that grant was the establishment of a fur trade rather than the settling of the territory. Nevertheless, there are some reports of a limited number of treaties, though their extent is not clear and their existence unverifiable: See generally, Slatery, *The Land Rights...*, *ibid.*, at pp. 162-3. Without written treaties being extant, it is difficult to derive any conclusion as to what these might have revealed regarding England's view of the prior sovereignty (or lack thereof) of the Indians living in these parts. At the very least, as Slatery suggests, such evidence would serve to establish the recognition of a common law aboriginal title (under a presumed application of the doctrine of conquest coupled with the absence of subsequent Crown acts expressly removing Indian land rights): *ibid.*, at p. 163. But whether it can be said to go further and show recognition of the Indian's sovereign status is unknown.

<sup>258</sup> Pentney, W., "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part 1—The Interpretive Prism of Section 25 and Part II—Section 35: The Substantive Guarantee", (1988) 22 *UBCLR* 21 and 207, respectively, at Part II, p. 249 [hereinafter cited as Pentney]. This author cites as "a powerful account" of the U.S history of violent relations with Indians "from the Indian perspective": Brown, D.A., *Bury My Heart at Wounded Knee: an Indian History of the American West*, New York, New York, Holt Reinhard & Winston, 1970.

resulted from conscious efforts of the Colonial Office to seek peaceful relations with Natives has even been recognized by the Supreme Court of Canada.<sup>259</sup>

Consequently, when the extent of territory over which Canada now has clear sovereignty is considered herein (see chapter seven), the sole relevant measuring stick so far as the pre-1763 English period is concerned (and, as the next two sections will prove, also in 1763 and from 1763 to the present) will be the existence and territorial extent of treaties ceding sovereignty over specified land.

It remains, however, to authoritatively show that English practice did not subsequently change either in 1763, as a result of the issuance of the *Royal Proclamation*, or at any time subsequent to the issuance of that decree.

### **Native Sovereignty Under the English Royal Proclamation of 1763**

It is contended herein that far from altering existing English policy towards Indian land rights after the peace was signed with France in 1763, England quickly sought to affirm it by issuing its *Royal Proclamation* of 1763. To prove this, and because it is a seminal document in Native land claims law, it is necessary that this Proclamation be given detailed analysis here.<sup>260</sup>

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<sup>259</sup> Indeed, in the *St. Catherine's* case, *op. cit.*, note 116, at p. 609 (S.C.R.), Strong J. wrote:

[The] true origin [of the policy of negotiating peaceful surrenders from the Indians] was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent frontier wars,... . That the more liberal treatment accorded to the Indians ...was successful in its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all Indian tribes were in revolt, down to the date of confederation, Indian wars and massacres entirely ceased in British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories.

<sup>260</sup> A copy is appended as Appendix "A" to this Thesis. Because it is argued by Slattery to be the most authoritative version of this document--see Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 204, (footnote 1)--, the present dissertation will refer to the provisions of the *Royal Proclamation* of 1763 as reproduced in Brigham, C.S. (ed.), *British Royal Proclamations Relating to America*, vol. 12, Worcester, Mass., Transactions and Collections of the American Antiquarian Society, 1911, at p. 212 [hereinafter cited as (continued...)]

It has been noted earlier in this dissertation that by this Proclamation England sought to organize vast portions of its territories newly acquired from France. For instance, along with other new colonies, the Proclamation created the new colony of Quebec and gave that colony specific borders (which, as ultimately enacted in the Proclamation, are shown on the map at Appendix "B" hereof).<sup>261</sup> But this Proclamation also contained several very substantial and important provisions concerning Indians and their lands (referred to here collectively as the "Indian Part" of the Proclamation). These provisions, it will be seen, applied not only to the territories newly acquired from France, but to territories falling within the original English colonies as well.<sup>262</sup> Moreover, while the Proclamation left some of the new territories "unorganized" and also, in a sense, threw into this "unorganized" territory part of the territories belonging to the older colonies, the Indian provisions in fact applied not only to the territories left "unorganized" by the Proclamation but also to the territories falling within organized colonies, both old and new.<sup>263</sup>

As noted above, some have argued that there is no need to look behind this document as concerns Native land rights since it constitutes, they argue, the exercise of the Crown's prerogative to abrogate the previous laws of the ceded territory and replace them with a new régime. This proposition is in fact wrong. It will be shown in this section that the Proclamation's

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<sup>260</sup>(...continued)

Brigham]. Further, the artificial numbering of its various Parts given to this version by Slattery, *ibid.*, at pp. 363-9, will be used here. Consequently, the appended copy is from the Brigham version as numbered by Slattery. See also Shortt, A. and Doughty, A.G. (eds), *Documents Relating to the Constitutional History of Canada (1759-1791)*, 2nd Edition, Part 1, J. de L. Taché (King's Printer), 1918, at p. 163 [hereinafter cited as Shortt and Doughty].

<sup>261</sup> See Appendix "A", *The Royal Proclamation, 1763*, Part 1, Paragraphs 1 and 2.

<sup>262</sup> Indeed provisions other than those found in the "Indian Part" also clearly applied within both the new and old colonies. These are Part III, Paragraphs 1 and 2, which grant to "Reduced Officers" of the army and navy the right to seek lands, without charge, in both the new and the old colonies.

<sup>263</sup> As has been noted elsewhere herein, this fact has been denied by some writers. See, for example: Brun, *op. cit.*, note 81; and *R.C.E.I.T.Q.*, *op. cit.*, note 81. But the correctness of the assertion made here is eloquently shown by, among others: Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 191-349; Dionne, *op. cit.*, note 117; Narvey, *op. cit.*, note 176; and Stagg, *op. cit.*, note 176, at pp. 350-91.

provisions with respect to Native lands in fact actively recognize and affirm rather than alter the pre-existing Native claims and merely provide a new procedure for extinguishing them. Thus, the Proclamation could be said to merely codify the pre-existing rights. This fact renders moot for the present thesis several issues which have long been debated concerning the Indian Part of the Proclamation, some of which--such as the territorial scope of these provisions--will nevertheless be discussed briefly herein to provide some context regarding this important document. More importantly, however, if the Proclamation merely codifies pre-existing Indian land rights without modification to their nature and quality, then this would render the foregoing examination of whether Native sovereignty had been recognized up to the year 1763 more, not less, relevant after the issuance of this Royal decree. Thus, the effect of the Proclamation on the existence, nature and quality of aboriginal land rights will be the central issue in this section.

A consideration both of the immediate history leading to the issuance of the Proclamation and of the specific provisions of the Proclamation itself<sup>264</sup> will confirm in more clear terms the need to look behind this decree. A study of the history leading up to the issuance of the Proclamation invariably involves a consideration of what evidence one might look to in seeking to interpret the provisions of the Proclamation. This is the first of the two tasks which must be undertaken here relative to a consideration of the impact of this Proclamation.

### ***The "Travaux Préparatoires" and other Interpretive Aids***

It is suggested that the purpose of inserting into the Proclamation provisions concerning aboriginal land was to establish or maintain good relations with the Natives, both those who had

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<sup>264</sup> The relevant provisions are far too lengthy to reproduce here and the reader is referred to that portion of Appendix "A" labelled Part IV (from the "Preamble" of this Part to and including "Paragraph 5" thereof). Again, the artificial Part and Paragraph numbering contained in the appendix was introduced by Slattery, *The Land Rights...*, *op. cit.*, note 99 and is retained here for ease of reference.

long been English allies and those who had allied themselves with the French during the war.<sup>265</sup> If this is so, then these provisions should be interpreted with this end in mind.

In order to determine why the Crown inserted into the Royal Proclamation provisions concerning the Indians and their lands, one need turn to government correspondence discussing plans for the organization of the newly ceded territories after the signing of the Treaty of Paris. The so-called "Travaux Préparatoires" to the issuance of the Proclamation in fact reveal an intent on the part of the British Crown to achieve several results with respect to their North American territories, both those pertaining to the original colonies and those recently acquired, as well as with respect to relations with the Natives.<sup>266</sup>

To be sure, the Crown's plans for its North American territories, both old and new, after the end of the war in early 1763 did not evolve overnight. But they did develop in a relatively short period from March to September of that year.<sup>267</sup>

At an organizational level, the Travaux Préparatoires reveal the evolution of several plans principally related to the creation of new colonies out of some of the territories recently ceded

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<sup>265</sup> This is in fact the view which is taken by, *inter alia*, Stagg, *op. cit.*, note 176, at p. 356 *ff.*

<sup>266</sup> These "Travaux Préparatoires" are examined more thoroughly in Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 191-203 and Stagg, *ibid.*, at pp. 284-349.

<sup>267</sup> The seminal pieces of correspondence in the evolution of government policy for the colonies during this period are: 1) an unsigned and undated document (but which is generally thought to be the work of Henry Ellis, the governor-designate of Nova Scotia and trusted advisor to the Southern Secretary, Lord Egremont, and which Stagg, *ibid.*, p. 293 at note 31, suggests at least pre-dates the 24th of March 1763) entitled "Hints Relative to the Division and Government of the Conquered and newly acquired Countries in America" printed in *Papers of Charles, 1<sup>st</sup> Earl of Egremont*, London, Public Records Office, at 30/47/22/70-73 (original) and 74-80 (draft) [hereinafter referred to as *The Egremont Papers*]; 2) a letter of 5 May 1763 from the Secretary of State for the Southern Department, Lord Egremont, to the Board of Trade for Plantation Affairs, printed in Shortt and Doughty, *op. cit.*, note 260, pp. 127-31; 3) the so-called "Pownall Sketch", printed in *The Stevens transcripts of the papers of William Petty, 1<sup>st</sup> Marquis of Lansdowne, 2nd Earl of Shelbourne*, London, British Museum, Department of Manuscripts, Add. MSS. 42 257, folios 118-27 [hereinafter referred to as *The Shelbourne Papers*]; 4) a letter and Representation of the Board of Trade to Lord Egremont dated 8 June 1763 in response to his letter of 5 May 1763, printed in Shortt and Doughty, *ibid.*, at pp. 131-47; 5) Lord Egremont's reply letter to the Board of Trade dated 14 July 1763, printed in Shortt and Doughty, *ibid.*, at pp. 147-50; 6) the Board of Trade's reply letter and Representation to Lord Egremont dated 5 August 1763, printed in Shortt and Doughty, *ibid.*, at pp. 150-3; and 7) a letter from Lord Halifax, the new Secretary for the Southern Department, to the Lords of Trade dated 19 September 1763, containing final instructions for the plan for North America, printed in Shortt and Doughty, *ibid.*, at pp. 153-6.

from France and Spain and to the extension of some of the existing older colonies.<sup>268</sup> At this organizational level, moreover, the documents reveal also that the new colonies should be limited to establishing settlements only within their designated borders and that the existing colonies (those along the Atlantic coast) should be similarly limited to establishing settlements in the areas of their respective colonies lying east of the Appalachian ridge notwithstanding that the Charters for some of these colonies granted them borders extending west of those mountains.<sup>269</sup>

But it is in terms of what they reveal regarding British policy towards the Indians of North America and their lands that the Travaux Préparatoires are most relevant to the present thesis of Native sovereignty. It was posited in the opening paragraph to the present sub-section of this chapter that the purpose of inserting into the Proclamation provisions concerning aboriginal land was to establish or maintain good relations with the Natives of the continent, whether previously allied with England or with another Power. There is much in the pre-Proclamation documents to support this.

As soon after the signing of the Treaty of Paris as 27 January 1763, Lord Egremont wrote Sir Jeffrey Amherst, then commander-in-chief in North America, in which letter he stated that the King wished to:

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<sup>268</sup> It was proposed: to create the four new colonies of Grenada, East Florida, West Florida and Quebec from part of the territories ceded by France and Spain; to annex the ceded Islands of Ile Royale (now Cape Breton) and St. John (now P.E.I.) to the existing colony of Nova Scotia (then also comprising New Brunswick); to annex the Labrador coast to the colony of Newfoundland; and to expand the existing colony of Georgia by annexing thereto part of the territories ceded.

<sup>269</sup> Two of the reasons given for this were to encourage settlement along the coast, particularly in Nova Scotia, and also to avoid the settlers...

...planting themselves in the Heart of America, out of reach of Government, and where, from the great Difficulty of procuring European commodities, they would be compelled to commence Manufactures to the infinite prejudice of Britain.

Quoted in Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 191, from an undated paper prepared for the British Government after the *Treaty of Paris* (i.e. circa January, 1763). But, as will be noted below, another equally important reason related to Indian land rights in the interior.

conciliate the Affection of the Indian Nation, by every Act of strict Justice, and by affording them...Protection from any Incroachments on the Lands they had reserved to themselves for their hunting Grounds.<sup>270</sup>

Egremont had apparently been influenced to seek such a policy from the Crown in Council on the basis of a report he had commissioned and received on 15 December 1762 from his trusted advisor and governor-designate to Nova Scotia, Henry Ellis, who therein had commented, as Stagg reports it,

that withdrawal of the French and Spanish from the southern territories will 'undoubtedly alarm and increase the jealousy of the Neighbouring Indians' and 'it is understandably necessary to take the earliest steps for preventing it and gaining their confidence and good-will'.<sup>271</sup>

The Indians' concern stemmed from the fact that:

the French and Spanish in Louisiana had successfully 'inculcated' an idea among the Indians that the English:

'entertain a settled design of extirpating the whole Indian Race, with a view to possess and enjoy their lands; And that the first step towards carrying this design into execution would be to expell the Fr[ench] and Sp[aniar]ds, the real friends and protectors of the Indians'.<sup>272</sup>

Egremont would soon act on these remarks by Ellis and on the latter's further suggestion that there be a conference with all major tribes inhabiting the area concerned to explain the Treaty of Paris and the King's intentions towards the Indian nations<sup>273</sup> so that, as Stagg concludes,

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<sup>270</sup> Quoted in Stagg, *op. cit.*, note 176, at p. 288. The original can reportedly be found in Bates, A. (ed.), "Fitch Papers", *Collections of the Connecticut Historical Society*, in 22 vols., Hartford, Connecticut Historical Society, 1918-20, at vol. 18, pp. 224-5.

<sup>271</sup> Stagg, *ibid.*, at p. 289. Ellis' report, entitled "On the methods to prevent giving any alarm to the indians by taking possession of Florida and Louisiana", 15 December 1762, can be found in *The Egremont Papers, op. cit.*, note 267, at 30/47/22, folios 246-9.

<sup>272</sup> Stagg, *ibid.*, at pp. 289-90. See the full text of Ellis' report in *The Egremont Papers, ibid.*. This provides, therefore, an early indication that the provisions the Proclamation would ultimately contain would apply, at least, to the Indians who were previously the enemies of England and had allied themselves with Spain or France but now found themselves on territory claimed exclusively by England; for who else but these enemy Indians would be "alarmed" by the departure of the French and Spanish?

<sup>273</sup> Instructions for such a conference were contained in a circular letter of 16 March 1763 to the Southern Superintendent of Indian Affairs, John Stuart, and the four southern governors: See "Circular Letter to Superintendent Stuart, the Governors of Virginia, North Carolina, South Carolina, Georgia", 16 March 1763, in *The Egremont Papers, ibid.*, at 30/47/14/65-66.

by mid-March of 1763, the ministry was committed to an imperial policy of conciliation on matters of land and trade with the Indian tribes occupying the vast trans-Appalachian interior of the continent.<sup>274</sup>

This "conciliatory" British attitude towards the Indians would be referred to again throughout the discussion process which ultimately led to the Royal Proclamation of 7 October 1763.<sup>275</sup>

The means devised to pacify the Indians was the development of a plan to safeguard them in the possession of their unceded and unpurchased lands. As ultimately devised, this plan had two facets. Firstly, England had the intention to create a territory, usually referred to as the "Indian Territory" or the "Indian Country", which would not be available for settlement by the colonies (both old and new) and would be reserved for the Indians. On this territory no British settlement would be suffered "for the present". This was to be achieved by the decisions, referred to above, to limit settlement by the soon-to-be created new colonies to lands within their borders and to similarly limit settlement by the older colonies to those parts of their chartered territories lying east of the Appalachian mountains. Secondly, in one of the preliminary

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<sup>274</sup> Stagg, *op. cit.*, note 176, at p. 292.

<sup>275</sup> To mention but a few instances: In his letter of 5 May 1763 to the Lords of Trade instructing the Board to come up with a plan for the organization of the newly-ceded territories (see Shortt and Doughty, *op. cit.*, note 260, pp. 127-31) Lord Egremont instructs the Board, *inter alia*, to come up with a plan for the security of North America as regards military establishments, which plan would have as objects security of the continent against any European Power and "the Preservation of internal Peace & Tranquillity of the Country against any Indian Disturbances" (the second of these objects being specified as the more immediate and pressing); see p. 128. But, adds Egremont, in devising such a plan the Board should not simply provide for more security against Indians by suggesting the construction of more forts since (at pp. 128-9) he explains:

His Majesty's Justice & Moderation inclines Him to adopt the more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons & Property & securing to them all the Possessions, Rights and Privileges they have hitherto enjoyed, & are entitled to, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only; (...)

Similarly, the pacification of the Indians was a central theme for the proposal of an Indian Country in the Pownall Sketch, *op. cit.*, note 267: See the comments thereon in Stagg, *op. cit.*, note 176, at pp. 310-3.

Finally, in Lord Halifax's letter to the Board of Trade of 19 September 1763 approving the Board's August 5 recommendation that a Proclamation be issued, Halifax says that such Proclamation would also serve "other Objects, of much Importance to his [Majesty's] Service" including that "the Friendship of the Indians [would be] more speedily and effectually reconciliated": See Shortt and Doughty, *ibid.*, pp. 153-6, at p. 154.

discussions, namely Pownall's Sketch<sup>276</sup> it was proposed that there be exceptions on both sides of this no settlement zone--there being Indian-claimed lands east of the Appalachians as well as white settlements west of these mountains.<sup>277</sup> It appears, however, that this matter was ultimately addressed by the second facet of the plan ultimately devised for conciliating the Indians to Britain; which was that it was decided to provide that any purchases or cessions of previously unpurchased or unceded Native lands *wheresoever located*--that is to say whether within "settleable territories" or within the "Indian Territory"--could only be effected by the Crown or its agent or with their authority and license. No such purchases by, or cessions to, private persons acting without licence would be permitted.

Finally, at a procedure level, The Travaux Préparatoires reveal the intention to implement all of these policies within a Royal Proclamation rather than by Commissions and Instructions to the various Governors of the colonies (both old and new).<sup>278</sup> This in fact became the basis of the *Royal Proclamation of 1763*.

The content of the Travaux Préparatoires, therefore, reveal a clear intention to assuage the fears of the Natives who had allied themselves with the French that the English would dispossess them of their lands. They also reveal the intention of the British to assure their old Native allies that their grievances as to lands improperly taken away from them in the past by the actions of colonial governments or private settlers would be rectified and measures taken to prevent such occurrences in the future. As stated above, these intentions must be considered when construing the provisions actually enacted with the issuance of the *Royal Proclamation*. It will be seen that the policy decisions suggested in the Travaux Préparatoires were in fact

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<sup>276</sup> *Op. cit.*, note 267.

<sup>277</sup> See the discussions in Stagg, *op. cit.*, note 176, at p. 313.

<sup>278</sup> The only exception was that the annexation of the Labrador coast to Newfoundland was implemented by a revised Commission to that colony's Governor issued prior to the Proclamation.

implemented in this Proclamation. But the main question, as concerns the present thesis of Native sovereignty, is whether, despite these indications that Indian land rights were to continue to be respected, the Travaux Préparatoires give any indication that the nature or quality of such rights was to be changed in any way. Specifically, the relevant question is, if the conclusion reached earlier is correct that the English and French had thus far recognized Native sovereignty over their lands, were the English now proposing to alter the *status quo* and treat the Indians as holding their lands not as sovereign Peoples but as mere rights-holders under an English Sovereign?

In addressing this question it is important to note at the outset that the tenor of the entire discussions which preceded the issuance of the Proclamation, so far as the Indians and their lands were concerned, was towards assuaging their fears that their situation would change in any way with the departure of the French and Spanish. Viewed from this perspective, it is hard to find in any of the Travaux Préparatoires any indication of a changed status. So, if Native sovereignty had indeed been recognized thus far, as was contended earlier herein, it seems the plan was to perpetuate and formalize the *status quo ante*.

It is true that there can be found in some of the documents preparatory to the Proclamation some comments which might tend to indicate that the English viewed Indian lands as being held under English sovereignty.<sup>279</sup> But there are equally to be found therein

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<sup>279</sup> For instance, in its August 5<sup>th</sup> Representation to the King (addressed to Lord Egremont) the Board of Trade addressed several objections to the proposal of giving the new northern Province (then to be called Canada but ultimately called Quebec) civil jurisdiction over the proposed Indian Country. The first of the three objections is the relevant one for present purposes. It states [see, Shortt and Doughty, *op. cit.*, note 260, at p. 151]:

We are apprehensive that, should this Country be annexed to the Government of Canada, a Colour might be taken on some future Occasion, for supposing that Your Majesty's Title to it, had taken it's Rise, singly from the Cessions made by France, in the late Treaty, whereas *Your Majesty's Title* to the Lakes and circumjacent Territory as well as *to the Sovereignty over the Indian Tribes*, particularly of the Six Nations, rests on a more solid and even a more equitable Foundation; and perhaps nothing is more necessary than that just Impressions on this Subject should be carefully preserved in the Minds of the Indians, whose Ideas might be blended and confounded, if they should be brought to consider themselves as under the Government of Canada. [Emphasis added.]

This document goes on, at p. 152, to refer to the Indians in the Indian Country as "Subjects of Your Majesty".

statements supporting Indian sovereignty.<sup>280</sup> Moreover, the present writer is inclined to think that when the passages negating Native sovereignty are read in the context in which they are made their intent is made less obstructive to the present thesis.<sup>281</sup> This, when coupled with the fact that the whole tenor of discussions in government circles was concerned with assuring the Indians of the continued existence of the rights they held before 1763 to their fullest extent, supports the argument that the intended Proclamation would not affect Native rights, including rights of sovereignty, where these still existed.

Before turning to consider the Proclamation itself, some *caveats* should be stated with respect to utilizing the Travaux Préparatoires to interpret the provisions ultimately enacted. Firstly, it is the words of the Proclamation itself that must be determinative. The expressed policy may not in fact have been implemented.<sup>282</sup> It should be remembered, moreover, that the wording used may encompass matters not actually contemplated by the drafters or specified

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<sup>280</sup> For example, the Pownall Sketch, [see the *Shelbourne Papers*, *op. cit.*, note 267, at p. 260] had referred to the Indian Country he proposed as territory which "Should be considered as...belonging to the Indians, the *dominion* of which to be protected for them by forts and military establishments". [Emphasis added. This passage is taken as quoted in Stagg, *ibid.*, at p. 312.]

<sup>281</sup> For instance, with respect to the Board's August 5 Representation, and particularly the passage quoted at note 279, it must be remembered that this was in response to the suggestion of Lord Egremont and the Cabinet that the Indian Country be placed under the jurisdiction of the new northern Province, Canada, which suggestion was initially made out of a fear that this Country would otherwise be seen by other European Powers as having, with time, become abandoned or derelict and subject to being possessed by them anew: See Egremont's July 14<sup>th</sup> letter in Shortt and Doughty, *op. cit.*, note 260, at p. 148. Thus, the primary concern was in protecting England's "sovereignty" thereto *as against other European Powers*, what might today be called a sphere of influence. It said nothing of the status the Crown viewed the Indians to have. Moreover, the Board's objection, quoted in note 279, clearly explains that its own concern was that the entire Indian Country would be thought by the Indians to have come under English influence only as a result of the treaty with France if it were put under Canada's jurisdiction when in fact large parts of this territory had long been claimed by England on what the Board believed was a firmer footing. This is made clear with the words explaining that this was so for that part of the Indian Country which lay in "the Lakes and circumjacent Territory". Thus, when the Board expressed a concern for England's title to "Sovereignty over the Indian Tribes, particularly of the Six Nations" they may well have been referring only to an exclusive right which pre-dated the Treaty of Paris to treat with the Indians in these parts for the cession of their lands and sovereignty. There is no indication that the reference to an existing sovereignty over the Indians was given more thought or was meant to alter former policy in this regard.

<sup>282</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 214, put it quite succinctly:

From a purely historical viewpoint, it cannot be assumed that an instrument such as the Proclamation reflects in every particular policies recommended or agreed upon at an earlier stage. The very process of drafting, the transformation of general ideas into precise legal language, can reveal the need to elaborate or modify certain concepts, to co-ordinate others, or to fill gaps in the original plan. Moreover, changes in personnel can result in significant shifts in policy. In the case of the Royal Proclamation, two of the principal figures involved in the original formulation of policy – the Secretary of State for the Southern Department and the President of the Board of Trade – had departed the scene prior to the final drafting of the instrument. It cannot be assumed that their ideas were faithfully carried out. The final arbiter of this question can only be the wording of the Proclamation itself.

in prior policy papers such as the Travaux Préparatoires.<sup>283</sup> However, notwithstanding this, "[i]t seems equally clear that the Proclamation cannot be properly understood apart from the historical context in which it arose and to which it was addressed"--matters about which the Travaux Préparatoires constitute "a rich source of information".<sup>284</sup> Finally, in interpreting the various provisions of the Proclamation which are of relevance to Native land claims (and, indeed, in interpreting the Proclamation as a whole):

...It can hardly be assumed that the scope of one provision coincides with that of another. This point would not merit such emphasis, were it not that it has sometimes been overlooked.

Thus, it has been suggested that the Proclamation as a whole is restricted in application to territories acquired by cession in 1763... Were it true that the Proclamation covered only ceded territories, it would be difficult to make sense of provisions in Part III concerning military grants, which are stated to apply not only to the new colonies but also to all other British provinces in North America...The point is that an attempt to define the Proclamation's scope in a global manner leads to serious difficulties.

...What we wish to emphasize here is that the same attention should be devoted to the language used in each distinct provision of the Proclamation as would be normally given to the individual sections of a statute.<sup>285</sup>

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<sup>283</sup> Here too Slattery's words, *ibid.*, are instructive:

Again, where an act uses words referring to general categories or sets of things rather than to particular objects, the categories designated will normally encompass things not specifically contemplated by the maker, who cannot imagine all possibilities or anticipate every eventuality. If enactments were confined in scope to things which were explicitly envisaged, the effectiveness of most legislation would be seriously impaired.

<sup>284</sup> *Ibid.*, 214-5. For the same reason, the doctrinal opinions, local actions and jurisprudence which can be found to have been rendered soon after the issuance of the Proclamation must also be considered and are briefly discussed in the next section.

<sup>285</sup> *Ibid.*, pp. 210-2. Though Slattery was referring to a certain caselaw which committed the errors just warned of, it seems that he might equally have had in mind the works of other modern legal historians where such an error was committed. For instance, it has already been noted herein that Brun, *op. cit.*, note 81, is of the opinion that the lands on which Natives had any claim under the Proclamation were only those unceded and unpurchased lands as were located in the "Indian Territory" (defined negatively, it will be seen, as those ceded territories not within the new colonies of Quebec and the Floridas, or within the grant to the Hudson's Bay Company, or again within those lands which lie east of the Appalachian ridge and which belong to the old colonies). Thus, for Brun, no Indian lands were located within the new colony of Quebec as created in 1763. He would also argue, moreover, that no Indian territorial rights existed in the old colony of Rupert's Land (belonging to the Hudson's Bay Company): *ibid.*, at pp. 67-9. As will be argued, neither of these assertions are borne out by an examination of the text and would have been evident on a section by section reading of the Proclamation.

It is interesting to note in this regard an article recently co-authored by a geographer, a lawyer and an historian: Beaulieu, P., Cantin, C. and Ratelle, M., "La Proclamation royale de 1763: le droit refait l'histoire", 49 *Rev. du Barreau* 317 [hereinafter cited as Beaulieu *et. al.*]. The authors argue that Slattery's approach is contrary to the rules of statutory interpretation and leads to errors. At p. 328 they argue, to the contrary, that

la règle d'interprétation législative à l'effet d'étudier un texte de loi dans son ensemble, les paragraphes les uns par rapport aux autres, ait été oubliée dans cette [i.e. Slattery's] thèse. Le fait d'analyser un extrait isolément

(continued...)

With these materials as interpretive aids in mind, it is now possible to consider the Proclamation itself.

### ***The Terms of the Proclamation Itself***

Upon receipt of final instructions from Cabinet via Lord Halifax's letter of 19 September 1763,<sup>286</sup> the Board of Trade immediately set about the task of preparing the text of the Royal Proclamation.<sup>287</sup> It was presented to Cabinet on October 4<sup>th</sup>,<sup>288</sup> approved by the Privy Council the next day,<sup>289</sup> and signed by the King on 7 October 1763.

The plans for North America which were developed in the course of the preceding months, as evinced in the Travaux Préparatoires, are enacted therein. Part I<sup>290</sup> deals with the creation and delimitation of the four new colonies of Quebec, East Florida, West Florida and Grenada. This Part also refers to the previously-effected transference of the Labrador coast to the jurisdiction of the colony of Newfoundland and deals with the extension of the boundaries of Nova Scotia and Georgia. Part II deals referentially with the constitution of the new colonies as

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<sup>285</sup>(...continued)

constitue une brèche à cette règle.

Thus, they argue, the part of the Proclamation dealing with the Indians must be read together with the first three parts (which Slattery argued constituted separate and distinct matters). However, notwithstanding their admonition that "l'effet d'analyser un extrait isolément constitue une brèche à cette règle", it seems that the writers honour the rule they have enunciated more in its breach than in its observance. Respectfully, it seems that their article proceeds by an analysis of each provision of Part IV (the "Indian" part) in isolation from the other provisions of that part. This, it is apprehended, has led them to several conclusions which are unsupported either by the facts or by the jurisprudence. There is not the scope here to deal with their article in any great detail. However, many of the interpretations there given will be discussed in other contexts below.

<sup>286</sup> See Shortt and Doughty, *op. cit.*, note 260, at pp. 153-6.

<sup>287</sup> In fact, given that most of the plans to be implemented had been settled upon for some months, it is likely that preliminary drafts of the document had already been under preparation from the time the idea of using a Proclamation had first been suggested by the board on August 5<sup>th</sup>.

<sup>288</sup> See Shortt and Doughty, *op. cit.*, note 260, at pp. 156-7.

<sup>289</sup> *Ibid.*, at p. 157-8.

<sup>290</sup> Again, the Part and Paragraph numbers refer to the artificial numbering added by Slattery to the version published in Brigham: See Slattery, *The Land Rights...*, *op. cit.*, note 99, Appendix A thereof, at pp. 362-9. Slattery's numbered version of the Proclamation is reproduced herein as Appendix "A" for easy referral.

contained in the Letters Patent to be issued for the new colonies. Part III deals with grants of plots of lands to officers of the army and navy who served in North America as well as to private soldiers disbanded in America, which grants were intended to encourage settlement. Finally, Part IV deals with the matter central to the present thesis: Indians and their lands, principally the creation of an Indian Territory. This Part has been much discussed both in the literature and in judicial pronouncements. And its import has been the subject of heated controversy and debate.

In the past the issues which have been discussed as most controversial with respect to this "Indian Part" of the Royal Proclamation of 1763 have dealt with a variety of topics not always strictly relevant to the nature and quality of the territorial rights conferred by this document.

For instance, it has been pointed out that the Preamble to this Part refers to "the several nations or Tribes of Indians, with whom We are connected, and who live under Our Protection;"<sup>291</sup> and that on eleven subsequent occasions in this Part of the Proclamation the various provisions refer to the "said Indians", which in each case refers back to this description in the Preamble. A debate was at one time engaged in among scholars on the question of whether, on the one hand, these words meant that the provisions in the Indian Part were for the benefit of all Indians living on soil now claimed exclusively by Britain irrespective of whether those Indians had been previously allied with England or with another Power or even had previously been unknown to either, or whether, on the other hand, it meant that the Indian Part was for the benefit of previously English-allied Natives only.<sup>292</sup> It is not necessary to review the

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<sup>291</sup> See the full text of Proclamation in Appendix "A".

<sup>292</sup> Some works in which this question has been eloquently and thoroughly examined include: Slattery, *The Land Rights...*, *op. cit.*, note 99, at pp. 233-43; Stagg, *op. cit.*, note 176, at pp. 356-8; Narvey, *op. cit.*, note 176, at pp. 220-5; and Brun, *op. cit.*, note 21, at pp. 66-71.

arguments on either side of this issue<sup>293</sup> because this question would be relevant to deciding whether a particular Indian nation had lost its sovereignty only if it were the case that the Proclamation affected the nature and quality of Indian land rights. In this event, it would be necessary to determine whether the Proclamation applied to that nation. However, the position which is taken below is that the Proclamation in fact did not alter the nature and quality of Indian land rights but merely served to confirm them, whatever their nature. Suffice it to say that on the question of whether the Proclamation applied only to some Indians or to all, the present writer aligns himself with those scholars who argue that the provisions of the Indian Part applied to all the nations and tribes living in territory exclusively claimed, as between European Powers, by England, whether they were previously friends of England, in alliance with another Power or

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<sup>293</sup> It is useful, however, to mention here the strongest of the arguments for a broad interpretation of the Native beneficiaries of the Indian Part. It is this: Many of the substantive provisions of Part IV would receive absurd interpretations if the guarantees were not provided to all Indians. For instance, Paragraph 2—which reserves to the "said Indians" all lands not comprised within the three new continental colonies (Quebec and the two Floridas), the Hudson's Bay Company lands or the "settleable" parts of the older seaboard colonies (i.e. east of the Appalachians)—pertains to vast portions of land occupied only by Native tribes who had allied themselves with the French in the recent war (and some had even risen against the British in Pontiac's war in the year the Proclamation was issued, 1763, a full three years after the end of the war with France). "If par. 2 covers only Indians connected with the Crown", says Slattery, *The Land Rights, ibid.*, at pp. 234-5,

then either of two results follow: 1) the entire territory described is set aside for the exclusive use of connected Indians, thus dispossessing the unconnected groups actually living there; or 2) the text refers only to lands actually occupied by connected Indians within the area designated, and not those held by unconnected bands. The first result is improbable. There is no suggestion in the text of a *transfer* of lands from certain Indian groups to others. We turn to the second alternative, whereby par. 2, while referring to an apparently extensive territory, is interpreted to apply only to limited areas within it, inhabited by Indians connected with the Crown. This construction leads to difficulties in the application of paragraph 5, which provides for the arrest of accused persons taking refuge "in the said territory", that is, "the Territories reserved as aforesaid for the Use of the said Indians". If these territories consisted only of lands inhabited by connected Indians, then a criminal fleeing to the vast areas occupied by unconnected bands could not be touched, even though still on British soil.

Similarly, this same paragraph (Paragraph 2) would be interpreted as prohibiting private purchases of land from connected Natives while those from unconnected Natives would not be prohibited. This would leave these groups "open to the 'great Frauds and Abuses' mentioned [in Paragraph 4(a) of the Proclamation]": *ibid.*, at p. 235. As noted, it was one of the aims of the Crown to put an end to such abuses in private purchase by prohibiting them. It was also desired to conciliate *all* Natives to the Crown. Both these goals are stated in the Proclamation, most notably in, the opening words to Paragraph 4(a) of the Indian Part (see Appendix "A") which states:

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, (...).

Similar conciliatory words can be read in the Preamble to the Indian Part: See Appendix "A". This being the case, it would hardly do, therefore, to interpret that document as applying only to connected Natives since this would seem counter to these goals.

Further, such an interpretation would run counter to the British desire to keep the colonies close to the coast, and therefore dependant on England, since this interpretation would permit settlement in the parts of the Indian Territory occupied by unconnected Indians.

"hitherto unknown" to either. Indeed, as some of the authors who have discussed this issue have themselves observed, judicial opinion seems to have come down on this side of the debate.<sup>294</sup>

Another sometimes-noted issue surrounding the Indian Part of the Proclamation which should be mentioned in passing here, but which strictly speaking is not relevant to the present thesis, is whether the Eskimos (or "Inuit" as they are more appropriately called today) are also beneficiaries of these provisions. It was questioned at one time whether the term "Indians" used in this Part of the *Royal Proclamation* included the Eskimos. But this was authoritatively put beyond doubt by the Supreme Court of Canada when it decided in 1939 that the term "Indian" as used in section 91(24) of the *British North America Act, 1867*,<sup>295</sup> included Eskimos.<sup>296</sup> Though this case did not directly concern that term as used in the *Royal Proclamation*, the principle opinion rendered in the case did refer to the words of the Proclamation and rejected the argument that it did not cover Eskimos.<sup>297</sup> This case, therefore, puts the matter beyond doubt.

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<sup>294</sup> This is the conclusion advanced by Slattery who quotes passages from both the Privy Council decision in the *St. Catherine's Case* and the Supreme Court of Canada decision in *Caldor* which he interprets as treating "[t]he range of Indians covered" by the Preamble to the Indian Part of the Proclamation "as coextensive with the category of Indians living under British sovereignty": Slattery, *The Land Rights...*, *ibid.*, at pp. 235-6.

In this regard, however, it should be noted that the decision in the *Labrador Boundary* case contains *obiter dicta* supporting the restrictive interpretation first suggested: *Re Labrador Boundary*, [1927] 2 D.L.R. 401, (1926-27) 43 T.L.R. 289 (P.C.), at p. 421 (D.L.R.). The Privy Council was there considering whether Indians living on the Labrador peninsula were part of the "Indians with whom we are connected and who live under own protection" referred to in the Preamble to Part IV of the *Royal Proclamation*. Among other reasons for ruling in the negative on this issue, the Court stated:

Further, the Nascopies and Montagnais, so far as they had taken part in the Anglo-French conflict, had sided with France, and they were not connected with or under the protection of the King before the cession of the French territory to him.

But scholarly opinion would generally reject the *obiter dicta* in the *Labrador Boundary* case as having proceeded on a misapprehension of both the text and historical context of the Proclamation, which misapprehension possibly resulted from the fact that the court's ruling as concerns the issue of whether that document applied to unconnected Indians was not strictly necessary to the main issue discussed in that case: See, for instance: Slattery, *The Land Rights...*, *ibid.*, at p. 237; and Narvey, *op. cit.*, note 176, at p. 226.

<sup>295</sup> Now *The Constitution Act, 1867*, 30-31 Vict., c. 3 (U.K.).

<sup>296</sup> *Reference re Term "Indians"*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417 (S.C.C.).

<sup>297</sup> *Ibid.*, at p. 115 (S.C.R.).

A particularly perplexing question which has often been debated—and which begins to address the relevance of the Proclamation to the present issue of the survival of Indian territorial sovereignty—concerns the territorial application of the guarantees contained in the Indian Part. That question is whether the Proclamation guarantees Indian land rights to land only within the Indian Territory that it creates, or whether it in fact also guarantees such rights in the colonies (both old and new); in short, whether the guarantees apply to all British-claimed territory in North America or to just a specific part thereof.

The first reference to Indian lands contained in the Proclamation is labelled here the "Preamble" to "Part IV". It states:

And whereas it is just and reasonable, and essential to Our Interests and the Security of Our Colonies, that the several Nations or Tribes, 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;...<sup>298</sup>

This Preamble manifestly recognizes the existence in 1763 of unceded or unpurchased Indian lands in North America. But it says very little about the location of these unacquired Indian lands beyond that they are in "Our Dominions and Territories".<sup>299</sup>

To find out where exactly the Crown was recognizing the existence of unceded or unpurchased lands in North America, one must turn to the substantive provisions of the Indian Part.<sup>300</sup> The element of the Indian Part which is most often the object of focused analysis is

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<sup>298</sup> See the full text of the Proclamation in Appendix "A".

<sup>299</sup> For Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 218, "the preamble recognizes that Indians hold rights to unceded lands in their possession *throughout British dominions in North America*". [Emphasis added.]

Note that the question of whether the use of the possessive language "Our Dominions and Territories" [emphasis added] implies the Crown's view that it held sovereignty over the Indians and was merely recognizing the existence of some Indian land right less than sovereignty will, of course, need to be addressed below. But that is not the immediate question being dealt with here, which is whether the Preamble to Part IV gives any indication of the *location* of Indian lands.

<sup>300</sup> See Paragraphs 1-5, both inclusive, of the full text appended to this Thesis as Appendix "A".

the Indian Country that it creates (which had been part of the proposed plan for North America for quite some time, as the earlier review of the Travaux Préparatoires hopefully has shown). Reference has already been made to the interpretation of the Indian Part given by some whereby the recognition of any Indian interest in lands pertains only to these "unorganized territories"; no such interest being accepted by these scholars as existing within the organized colonies (both old and new).<sup>301</sup> However, the preponderance of scholarly opinion has concluded--quite correctly, in the present writer's respectful opinion--that the Indian Part contains land guarantees for Natives possessing unceded or unpurchased lands within what has been called the "settleable" parts of the colonies, both old and new, as well as within the Indian Country.<sup>302</sup> Indeed, many provisions in this Part of the Proclamation would make little sense if this were not so.<sup>303</sup> Given the abundance of published analyses demonstrating this point far more eloquently

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<sup>301</sup> This is argued by Brun, *op. cit.*, note 81, as well as in the *R.C.E.I.T.Q.*, *op. cit.*, note 81, to name but two. For instance the Dorion Commission, in *R.C.E.I.T.Q.*, Part 4, Vol. 4.1 (Le domaine indien), at p. 275, commented in the following manner upon the applicability of the "Indian provisions" of the Royal Proclamation within the limits of the colony of Quebec as that colony was delineated by the Proclamation itself:

On ne peut interpréter la Proclamation royale autrement que dans le sens suivant: ce territoire [i.e. Québec of 1763] était expressément exclu de l'aire d'application des dispositions particulières se rapportant à ce qu'on considère aujourd'hui comme le "titre indien" sur un "territoire indien" devant être éteint au moyen d'un "traité indien". Les droits territoriaux des Indiens y sont donc en principe inexistants.

Both Brun and the *R.C.E.I.T.Q.* also conclude that the "indian provisions" of the Proclamation did not extend to the Hudson's Bay Company Lands. Both these findings are summarized in the list of conclusions found at p. 387 ff of the *R.C.E.I.T.Q.*, Partie 4, Vol. 4.1 (see conclusions 4 and 10).

<sup>302</sup> See, *inter alia*: Slattery, *The Land Rights...*, *op. cit.*, note 99, esp. at pp. 208-12, pp. 221-7; and pp. 244-60; Stagg, *op. cit.*, note 176, at pp. 350-92; Narvey, *op. cit.*, note 176; and Dionne, *op. cit.*, note 117.

<sup>303</sup> For instance, the existence under the Proclamation of Indian lands outside the Indian Country seems clear from the words of Paragraph 3 of the Indian Part. The Crown there takes corrective measures to see to the removal of settlers who had "seated themselves" in the Indian Country by ordering them to leave forthwith. But this order goes beyond the Indian Country. Paragraph 3 in fact provides:

And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

The words "within the Countries above described" clearly refer back to the description of the Indian Country given in the immediately preceding paragraph (Paragraph 2). To what territories, therefore, do the words "or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians" refer? Clearly, they envisage the existence of unceded or unpurchased Indian lands outside the Indian Country and upon which settlers had unlawfully seated themselves. Otherwise the provision would not make sense. The question is: where do these other Indian lands lie? By necessary implication, it must refer to such lands either in the three new mainland colonies or in the area of the older colonies not encompassed in the Indian Country (i.e. east of the Appalachians) or in both of these areas.

(continued...)

than could succinctly be done here, it is not necessary to discuss (in any more detail than has already been done in the preceding footnote) the evidence for the conclusion that the Proclamation guarantees Indian land rights beyond the Indian Country.<sup>304</sup>

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<sup>303</sup>(...continued)

Similarly, support for the conclusion that the provisions of the Indian Part provide Indians with land guarantees beyond the Indian Country can be had by considering the terms of Paragraph 1 of this Part in light of what is revealed by the subsequent provisions as discussed above. Paragraph 1 forbids the Governors of the three new colonies to grant Warrants of Survey or pass any Patents for lands beyond their respective colonies and a similar prohibition is given to the Governor or Commander in Chief of any of the other Colonies or Plantations in America with respect to lands west of the Atlantic watershed "for the present, and until Our further Pleasure be known". The provision then continues: "or upon *any Lands whatever*, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them". Opinions at one time differed as to whether this last directive applied only to the governors or commanders in chief of the "other Colonies or Plantations" or whether it applied to those of the new colonies as well. Grammatical arguments were put forward in favour of the more restrictive interpretation. But this interpretation makes the Indian Part's various provisions lose a certain amount of symmetry: Why forbid purchases and settlements with respect to unceded Indian lands within both the *old* and *new* colonies (see Paragraph 2 of the Indian Part) but forbid Warrants of Survey and Patents for lands only with respect to unceded Indian lands in the old colonies alone? Indeed, many scholars argued eloquently for the broader reading: See: Slattery, *The Land Rights...*, *ibid.*, at pp. 261-7; Dionne, *ibid.*, at pp. 139-41; Narvey, *ibid.*, at p. 129; and Stagg, *ibid.*, at pp. 383-5. But even if the last clause of Paragraph 1 applied only to the "other Colonies and Plantations" this would at least mean that unceded or unpurchased Indian lands existed there, though not in the three new colonies, thus still disproving the contention that the provisions of the Indian Part applied only to the Indian Country. In any case, the question of whether the last clause of Paragraph 1 applied to the new colonies as well as the old or just to the latter no longer need be debated since judicial opinion has authoritatively supported the broader application of the last clause in Paragraph 1: The Privy Council in *St. Catherine's*, *op. cit.*, note 116, gave the provision such a reading. Lord Watson wrote, at p. 53 (A.C.):

...it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known", upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them.  
[Emphasis added.]

Judson J. in *Calder*, *op. cit.*, note 232, gave the clause an identical reading at p. 153 (D.L.R.).

<sup>304</sup> One might also have argued for this interpretation from the combined effect of provisions in Paragraphs 2 and 4 of the Indian Part. First, Paragraph 2 of the Indian Part provides, *inter alia*, that the Crown's subjects are prohibited from "making any Purchases or Settlements whatever, or taking Possession of any Lands above reserved", which description refers to the Indian Country reserved and delineated earlier in that same paragraph. Paragraph 4(a), however, also contains a prohibition from making purchases of land from the Indians, this time directed to "private Person[s]". This provision, unless it be redundant (which is not to be presumed lightly), would be expected to deal with private purchases of unceded or unpurchased Indian lands elsewhere than in the Indian Country since that is already covered by Paragraph 2. In fact, the location of the lands to which the prohibition in Paragraph 4(a) is addressed may be discerned from the ensuing words of that same provision, which states that the intended lands are "within those Parts of Our Colonies where We have thought proper to allow Settlement". Nowhere else in the Proclamation do the last-quoted words appear. Specifically, the Proclamation does not clearly say 'we think proper to allow settlement' in such and such places. But some light is cast upon the meaning to be attributed to these words by the specification therein that the settleable lands in question are constituted by parts of *Our Colonies* together with the stipulation in the very next phrase of Paragraph 4(a) which provides:

but that if, at any Time, any or 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 publick Meeting or Assembly of the said Indians to be held for that Purpose *by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie...*  
[Emphasis added.]

These references to "Our Colonies" and "Our Governor or Commander in Chief of Our Colonies respectively" clearly refer to the formal colonies which are either created by the Proclamation (i.e.: Quebec and the two Floridas) or are pre-existing (i.e.: Nova Scotia, Newfoundland, the thirteen southern colonies and, possibly, Rupert's Land).

Some writers have even used evidence outside the Proclamation itself, such as the Travaux Préparatoires, to prove that the Proclamation was meant to protect Indian land rights in areas outside of the Indian Country.

Yet, those who would argue that Indian territorial rights were extinguished by the Proclamation everywhere else *except* within the Indian Country would maintain (to paraphrase) 'why create an Indian Country closed to settlement if not to indicate that everywhere else Indian land rights were being denied?' The following is a succinct answer:

The Proclamation acknowledges Indian rights to unceded lands in their possession wherever located in British dominions, whether in the open area or closed. In both areas, unceded lands are protected by restrictions governing purchases, settlement and land grants. *What then is the difference between the two areas? The answer lies in the degree of control exerted by the Imperial Crown. In the regions open to occupation, the relevant local authorities might proceed to purchase and patent Indian lands in the stipulated manner, without specific approval of the British government. But in the closed sector, no purchases could be made or patents issued until the Imperial Crown permitted it, and so the pace of colonization there was controlled directly from Britain.*<sup>305</sup>

This interpretation is buttressed by the fact that the provision creating the Indian Country (Paragraph 2) states it to be "declared [to be so reserved]...*for the present*". Similarly, the ban in Paragraph 1 from granting Warrants of Survey or Patents for lands west of the Appalachians notwithstanding that some of these lay within the areas of the older colonies' original grants is also stated to be "for the present, and until Our further Pleasure be known".<sup>306</sup>

In the end, however, there are two significant reasons why the issue of the territorial scope of the Proclamation's Indian Part need not be considered further in the present study. The first is that, despite some initial judicial negation of this fact,<sup>307</sup> other Canadian courts have

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<sup>305</sup> Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 221. [Emphasis added.]

<sup>306</sup> See full text in Appendix "A".

<sup>307</sup> For example, in *Sigereak v. R.*, [1966] S.C.R. 645, at 650, the Supreme Court of Canada concluded that the Proclamation's Indian provisions did not apply to the territory belonging to the Hudson's Bay Company, saying:

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question [in the case at Bar] was within the area granted to the Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

And, in the majority decision written by Mr. Justice Judson in *Calder*, *op. cit.*, note 232, at p. 153 (D.L.R.), it was said that the Proclamation had no application to British Columbia.

said--more correctly in the present writer's opinion--that the Indian Part refers to the existence of Indian land rights in parts of Canada not located within the Indian Country.<sup>308</sup> The second, and most significant, reason why the territorial scope of the Proclamation's Indian Part need not be considered further than has already been done is that these provisions could only be of relevance to the issue of the survival of Native territorial sovereignty in either of two situations: if these provisions serve to *create* new territorial rights for Indians, the nature of which would then need to be examined here; or, alternatively, if these provisions serve to *alter the nature* or even *abrogate* the Native territorial rights which they implicitly recognize to have heretofore existed. If, on the other hand, the provisions of the Indian Part merely serve to *confirm* pre-existing Indian land rights without altering in any way their nature and quality, then these provisions could not affect the continued existence of the Native rights of sovereignty to places possessed by Indians, which rights this study has concluded were thus far recognized by both the English and the French wherever conquest of, or cessions from, the Natives were not effected. In fact, as shall now be shown, the Proclamation does indeed merely confirm existing Native land rights without affecting their extent or their nature or quality. The goal was to protect *existing* land rights and regulate their future extinguishment by fair means. Moreover, it shall be seen that the judiciary is increasingly accepting this as being the case.

The first thing to be noticed is with respect to the extent of the territorial rights being recognized as existing in the Indians. With the exception of the Indian Country which alone is clearly identified as reserved to the Indians by the Proclamation itself, the Proclamation does not

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<sup>308</sup> Such a conclusion, for example, was implicit in the Privy Council's findings, quoted *op. cit.*, at note 303, in the *St. Catherine's* case to the effect that the Proclamation declared that no governor or commander in chief in any of the new colonies could grant warrants of survey or pass any patents for lands beyond their respective boundaries as well as upon any lands whatever which have not been ceded by or purchased from the Indians.

Moreover, in his dissenting Judgment in *Calder, ibid.*, at pp. 203-8 (D.L.R.), Hall J. found that the Proclamation applied to British Columbia.

explicitly identify particular instances of lands which are reserved for the Indians.<sup>309</sup> The impression one gets is that such lands are already reserved to the Indians by the simple fact that they have never been "ceded to, or purchased by Us" and not by any new effect of the Proclamation. In any case, the lack of identification of such lands in the Proclamation forces a look behind this decree to find out where cessions or purchases have occurred in the past.

Nevertheless, those who would see in the Proclamation a Crown intent to have this document form the new starting point of Native claims argue that there is a difference between *re-enacting* previous claims and *merely incorporating* these into the new Act "by reference". To them the former creates a new starting point while the latter does not. And the Proclamation, they argue, falls into the former category.<sup>310</sup>

Respectfully, these scholars are wrong. Even adopting their distinction between "re-enactment" and incorporation "by reference", it will be evident that the Proclamation does in fact (at least implicitly) incorporate previous claims "by reference"; particularly as concerns Native lands recognized within the organized colonies. While (possibly) replacing the old scheme for *extinguishing* Native territorial rights to lands not ceded, purchased or conquered, the

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<sup>309</sup> Paragraph 2, of course, is the provision which creates and reserves for the first time the Indian Country for the Indians. It appears that lands within this area had in fact never been ceded to, or purchased by, the English from the Indians.

But other provisions refer to lands outside the Indian Country which are equally reserved to the Indians without, at the same time, providing precise listings of their boundaries. For example, in Paragraph 1, the words "or upon any Lands whatever, which not having been ceded to, or purchased by Us as aforesaid, are reserved to the Indians, or any of them" are not related to any particular territory beyond the fact that the lands in question, broadly speaking, are to be found in areas not covered by the first two parts of that Paragraph which deal with lands outside the boundaries of the three new mainland colonies and west of the Appalachians—which is to say the Indian Country. The same imprecise reference to unceded or unpurchased Indian lands outside the Indian Country is in both Paragraphs 3 and 4(a).

<sup>310</sup> Brun, *op. cit.*, note 81, at p. 65, put it this way:

En d'autres termes, réglementant en 1763 le droit collectif des Indiens sur la majeure partie du Territoire actuel du Québec, le gouvernement impérial abrogeait tacitement en cette matière le droit antérieur à la conquête relativement à ce territoire. Le droit interne britannique créait un droit nouveau, même si celui-ci se trouvait à coïncider en tout ou en partie avec un droit ancestral. A moins, évidemment, que la Proclamation royale ne se soit contentée d'une référence globale à un droit antérieur. Or elle ignore au contraire tout droit antérieur et s'emploie plutôt à indiquer les frontières du droit qu'elle fait naître. C'est à elle et à rien d'antérieur, ainsi qu'aux interprétations qui en ont été données, qu'il faut se référer pour connaître la signification et l'étendue du droit des Indiens sur le territoire visé par la *Proclamation royale de 1763*, c'est-à-dire, comme nous le verrons, tout le territoire devenu québécois au XVIII<sup>e</sup> siècle, soit la majeure partie du Québec actuel.

Proclamation never effected a material change in, or re-enactment of, the *extent* or *existence* of such unextinguished rights.<sup>311</sup> Indeed, as already said, the wording of the Indian provisions themselves renders an examination of the prior situation necessary to its proper implementation.

As Narvey acknowledged in 1973, "Canadian courts have been fairly unanimous, of late, in the view that in those areas to which the Proclamation applies its effect is to confirm rather than to create title to land".<sup>312</sup> Moreover, the argument made by Brun<sup>313</sup> to the effect that the *Royal Proclamation* implicitly abrogated any previous regimes as to Native land rights

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<sup>311</sup> Stagg, *op. cit.*, note 176, at pp. 373-4 makes this same point, saying:

No phrase or term within the introductory statement or in any part of the Proclamation, for that matter, states or implies that the Proclamation in and of itself created this reserved status or established Indian rights in reserved lands that did not already exist. Reserved lands already existed in North America by virtue of the presence in 1763 of territories which had never been "ceded to" or "purchased by" Great Britain. All the Proclamation purported to do was to outline measures to protect Indians from being disturbed in the quiet possession of these reserved lands.

In practical terms, the Proclamation is a confirmation rather than an originator of Indian interests in North American lands. (...)

A similar conclusion is in Slattery, *The Land Rights...*, *op. cit.*, note 99, at p. 217.

<sup>312</sup> Narvey, *op. cit.*, note 176, at p. 123 and authorities cited therein. Judicial doubt that the Proclamation was "an originator" of Indian interests in North American lands was first raised by the *St. Catherine's* case, *op. cit.*, note 116. Strong J. in his dissenting judgment in the Supreme Court of Canada had made it clear that he did not regard the *Royal Proclamation* as the only source of Native rights to land. He believed the pre-existing situation could still be looked to. He wrote, at p. 613 (S.C.R.):

I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such...

However, the Privy Council in that case, *ibid.*, seemed to disagree with Justice Strong when it ruled, at p. 54 (A.C.), that the possession of the land by the Natives there in question could "only be ascribed to the general provisions made by the royal proclamation in favour of the Indian tribes then living under the sovereignty and protection of the British Crown". This seemed to establish that the Proclamation was the sole source of Indian land rights and that it had thereby abrogated the prior situation prevailing at common law.

But, the *Calder* case, *op. cit.*, note 232, established authoritatively that Native rights to land under the common law had survived the Proclamation. Mr. Justice Judson, for the majority, was of the opinion that the *Royal Proclamation* had no application to British Columbia: *ibid.*, at p. 153 (D.L.R.). However, he was prepared to say that Native rights to land could still stem from the common law. In so doing, he "read down" the Privy Council's words in the *St. Catherine's* case by saying, at p. 152 (D.L.R.):

There can be no doubt that the Privy Council found that the Proclamation of 1763 was the origin of the Indian title...

*I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title.*

[Emphasis added.]

Hall J., while preferring to rule that the Proclamation did apply to British Columbia, agreed with Judson J. that the common law could also be looked to as a source of Aboriginal land rights.

Dickson J. (as he then was) confirmed this position in *Guerin*, *infra*, note 422, at pp. 335-7 (D.L.R.).

<sup>313</sup> See the passage quoted at *op. cit.*, note 310.

(whether they were under the common law or otherwise) was recently firmly rejected by the Supreme Court, in a series of decisions. The Court ruled that no British act, not the Proclamation, nor anything else, could have this effect without a clear expression of this intent being present.<sup>314</sup> As a result, it is now clearly necessary to look behind the Proclamation to ascertain which are the territories where those rights survived the tenure of prior European regimes.

Secondly, there remains the question of whether the Proclamation, while confirming the *extent* of Indian-held territories, effected a change in the *nature or quality* of such land rights. Is it possible that even if the English and French until 1763 had recognized Native sovereignty over any Indian-possessed territories which had not been the subject of a conquest, cession or purchase, and even if by the Proclamation the English were now recognizing the continued existence of Indian rights of some sort over those same territories, the English might nevertheless have been altering *the nature* of those rights via the Proclamation by claiming them to now be subject to English sovereignty? In other words, does the Proclamation evince a shift in English policy regarding the nature of Indian land rights?

Mention must be made, in this regard, of the use of the words "such Parts of *Our Dominions and Territories*" in the Preamble to the Indian Part. The words in Paragraph 2 of the Indian Part stating that the Indian Country there created is reserved for the Indians "under *Our Sovereignty, Protection and Dominion*" must also be noted.<sup>315</sup> These words might arguably

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<sup>314</sup> See: *R. v. Sioui*, *op. cit.*, note 157, at pp. 1059-64; and *Simon v. The Queen*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 (S.C.C.). Note that while the Ontario Court of Appeal in *A.G. Ont. v. Bear Island Foundation et al*, [1991] 2 S.C.R. 570, 83 D.L.R. (4th) 381 (S.C.C.); affg (1989), 69 O.R. (2d) 394, 58 D.L.R. (4th) 117 (Ont. C.A.); affg (1984), 49 O.R. (2d) 353, 15 D.L.R. (4th) 321 (H.C.), at p. 133 (58 D.L.R. 4th), ruled that the *Quebec Act, 1774*, R.S.C. 1970, App. II, No. 2, implicitly extinguished those parts of the *Royal Proclamation* which provide for purchases of land from Indians by the Crown at public meetings, that court also ruled that the *Quebec Act* "did not make void, vary or alter any right, title or possession" specified in the Proclamation or otherwise. In rejecting an appeal in this case, the Supreme Court of Canada made no comment upon this aspect of the Ontario Court of Appeal's decision.

<sup>315</sup> See full text in Appendix "A". [Emphasis added.]

be cited as evincing the English Crown's view that it held full sovereignty over the land covered--and, consequently, that the Indians' interests were subordinate to that sovereignty.<sup>316</sup> However, it is submitted that this Preamble must be understood in its historical context of territorial battles between England and France which terminated with the Peace of 1763. As has been pointed out throughout this study, what the Powers of Europe claimed as against each other was in reality not a sovereignty over territory possessed by Indians but an exclusive right--an exclusive "dominion" if you will--over the power to seek the extinguishment of Native sovereignty, and even Native title, by peaceful or hostile means. Understood in this context, the words of the Preamble refer strictly to the exclusive claim of England *vis-à-vis other European States*. This seems all the more clear when the opening words of the Proclamation--the Preamble to Part I--are considered. These explain that the Proclamation is in consequence of the fact that territories have recently been acquired from other European Powers in the treaty of Paris.<sup>317</sup> Moreover, one could just as easily point to the Proclamation's use of the noun

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<sup>316</sup> That is in fact the conclusion which Stagg, *op. cit.*, note 176, at pp. 374-5, explicitly reaches, going so far even as to say the Indians do not even have a proprietary title to their lands but only a usufructuary right subordinate to English sovereignty and title:

The obvious stress in the document on the intent to preserve Indian "Use" of the land as opposed to preserving Indian title to the land or Indian ownership of the land appears to confirm the idea that, as early as 1763, the British government recognized no other Indian interest in reserved lands than those of possession, occupancy and use. The notion that Britain held actual title to the soil, whether by conquest, discovery or whatever, is never challenged or undermined by language contained in the document. In fact, Britain's ownership of the land seems to be reinforced in at least two places in the Proclamation. In the Introductory paragraph of the Indian section, the phrase used to describe where reserved lands must be situated is "such Parts of Our Dominions and Territories". It is not termed Our shared Dominions or even the Dominions: it is Our Dominions. Again, in the second paragraph a commitment is made to keep reserved lands under "Our Sovereignty, Protection and Dominion". *This was not a commitment to preserve Indian Sovereignty or Dominion over the lands but rather to use British Sovereignty, British Protection and British Dominion to guarantee that the Indian interests in the land were not violated. In both instances, in the Introductory and in the second paragraph, the presumption is held that Indians have interests in land to protect. However, it is equally true that the language betrays the equally strong presumption or conviction that British rights in the land were greater than Indian rights upon it.* [Emphasis via italics is added. Emphasis via underlined text is that of Stagg.]

<sup>317</sup> This Preamble states:

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at Paris the Tenth Day of February last (...).

"Nations" in reference to the various Indian groups as providing evidence balancing the implications suggested by the words quoted above.<sup>318</sup>

In support of the interpretation that the Proclamation continued to recognize unchanged Native land rights in the nature of Indian sovereignty one can point to passages in the Instructions to the governor of the new colony of Quebec,<sup>319</sup> which were prepared by the Board of Trade shortly after the Proclamation itself. Clauses 60 and 61 of these Instructions contain indicia of the Indian's continued status as separate Nations not subject to British sovereignty.<sup>320</sup> The same wording is virtually duplicated in the Royal Instructions to the various governors of Nova Scotia issued both long before the Proclamation, as well as in its immediate aftermath and, indeed, for many years thereafter. The Royal Instructions for Nova Scotia, therefore, provide even stronger proof that the Indian land rights recognized in the Proclamation continued to have the same characteristics as they had before that decree.<sup>321</sup> Thirdly, mention must once again be made of the fact that there is no overt indication in the Proclamation of any shift in the nature

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<sup>318</sup> See the Preamble to Part IV in Appendix "A". It must be said, however that these seemingly irreconcilable terms in fact have been reconciled by at least one scholar in a way which, were it not for other considerations, would be irrefutable and would suggest a loss of Native Sovereignty: Pentney, *op. cit.*, note 258, at p. 52 would seem to be of the view that while the Proclamation asserted *English* sovereignty it protected for the Indians, as a result of their description as "Nations", a wide variety of rights beyond a mere right of use:

[T]he King asserts [in the Proclamation] ultimate sovereignty over the Indians and their lands, but also acknowledges their "semi-autonomous status" in the description of them as 'Nations or Tribes with whom We are connected and who live under Our Protection'. This when viewed in the context of the legal framework of the day has been alleged to support such principles as the recognition of the aboriginal peoples as nations, the necessity of mutual consent to the alteration of the relationship established by the Proclamation and an implied right to Indian self-government within lands not "ceded to or purchased" by the Crown.

The "other considerations" which negate Pentney's interpretation are discussed next in the main text above.

<sup>319</sup> The instructions to the governors of the new colonies of East Florida and West Florida were virtually identical. Specifically they contained the exact same clauses as are cited here as relevant to the present issue.

<sup>320</sup> These instructions are reproduced in Shortt and Doughty, *op. cit.*, note 260, at pp. 181-205. Indeed, clause 60 contains the directive to "cultivate and maintain a strict Friendship and good Correspondence" with the "several Nations and Tribes of Indians" within the Province of Quebec "so that they may be induced by Degrees, not only to be *good Neighbours* to Our Subjects, but likewise themselves to *become good subjects to Us*". [Emphasis added.] This indicates the Crown's view that the Indians were at that time still only "good Neighbours" and not yet subjects of England, but that the latter was to be sought. Moreover, clause 61 refers to the existence of Indian "Rules and Constitutions" and to the goal of "*uniting them to Our Government*". [Emphasis added.] Again, this arguably supports the notion that the acquisition of sovereignty over the Indians was not taken as established by any previous measures, including by the Proclamation itself.

<sup>321</sup> These various instructions are mentioned by Narvey, *op. cit.*, note 176, at p. 177, where the relevant clause is quoted.

of the relationship of the Natives either to their lands or to the Crown. And, as already noted,<sup>322</sup> the Supreme Court has established that no act, including the Proclamation, can have the effect of altering or abrogating Native land rights without a *clear* expression of this intent being stated therein. Finally, the Supreme Court seems to have recognized that whatever the nature of Native land rights were before the Proclamation, this situation was preserved intact by that document, which is simply "declaratory and confirmatory of the aboriginal rights".<sup>323</sup>

Thus the Proclamation not only incorporates by reference the *locations* where Native territorial rights exist, it also preserves unaltered the *nature* of those rights, whatever that may be. Consequently, if it is correct that neither the French (in "Canada" and its other possessions) nor the English (in the older colonies) in the period before the issuance of the Proclamation ever assumed sovereignty from the Indians except by conquests or treaties, there is no reason to assume a change of practice was implemented in this document.

### ***Conclusion on the Royal Proclamation***

The proclamation neither creates, nor abrogates, nor alters either the extent or the nature of existing Native land rights. Rather, it merely serves as a statement of the renewed policy of the Crown of respecting such of these territorial rights as have heretofore remained unceded to it with a view to conciliating the Indians (those who were previously enemies or unknown as well as old allies) to the Crown. The respect for such rights extends not just to the Indian Country, but to the "settleeable" parts of the old and new colonies.

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<sup>322</sup> See *op. cit.*, note 314 and accompanying text.

<sup>323</sup> The quoted words are actually those of Norriss J.A. of the British Columbia Court of Appeal in *R. v. White and Bob* (1965), 50 D.L.R. (2d), 52 W.W.R. 193 (B.C.C.A.), at p. 636 (D.L.R.) and 218 (W.W.R.). However, this categorization of the Royal Proclamation was quoted with approval in the Supreme Court of Canada by Hall J. in *Calder, op. cit.*, note 232, at pp. 204-5 (D.L.R.). Similar comments had been made in other lower court cases. See, for example: the comments of Sissons J. in *R. v. Koomungnak* (1963), 42 C.R. 143, 45 W.W.R. 282 (N.W.T. Terr. Ct.), at p. 160 (C.R.) and p. 302 (W.W.R.); and those of MacKeigan C.J.N.S. in *R. v. Isarc* (1975), 13 N.S.R. (2d) 460 (N.S.S.C.—App. Div.), at p. 478.

These are the conclusions to which both the text of the Proclamation and the content of the Travaux Préparatoires lead. These are also the conclusions Canada's judiciary have either reached or are moving towards.

The significant conclusion for present purposes is that nothing in the document could be viewed as clearly indicating that while the *territorial extent* of previously unceded Indian lands was being protected the *nature* of the Indians' rights thereto was being altered. On the contrary, the implication is that just as the Proclamation protects unchanged the territorial extent of previously unceded Native territorial rights, so too is it for the *nature* of such rights.

The Proclamation was meant, and must therefore be viewed, merely as the instrument by which the Crown both confirmed in the old colonies and extended to its new colonies its prior conciliatory Indian policy, and by which it could control the pace of implementing that policy in the future. That prior Indian policy, it was seen, was that English rights in the New World, including rights of sovereignty, were effective as against other Europeans and unlicensed English subjects, but required cession from, or conquest of, the Indians before being effective as against the latter.

Since the pre-1763 English practice of recognizing Native sovereignty until wrested by either cession or conquest was preserved by the Proclamation, there is only one question which remains regarding English practice: whether the situation prevailing both up to, and in, the year 1763 has in any significant way been altered by any legitimate means since then. In other words, has the character of Native territorial interests been altered in any general way (apart, of course, from treaties or conquests relating to specific lands) since 1763. This question is considered in the next section.

## Native Sovereignty Under the English from 1763 to the Present

In order to comprehensively review the situation obtaining between the year 1763 and the present, one would ordinarily be required to discuss the constitutional rules regarding the modifiability of the *Royal Proclamation of 1763* which, of course, was an instrument of the British Crown issued under its Royal Prerogative. This would involve several complex issues.<sup>324</sup> However, for the reason which will be stated presently, this laborious review of a very complex area of law may be avoided.<sup>325</sup>

The reason why it is not necessary to examine these questions is that it has been established by the highest judicial authorities that the *Royal Proclamation* (or at least the Part dealing with the location, character and, arguably, mode(s) of extinguishment of Native territorial rights) has in fact not been abrogated, as concerns Canada at least, by any competent authority

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<sup>324</sup> One would need to pose such questions as "Could it have been modified between the years here in question?", "By whom: The Crown or its colonial officers; the British Parliament; or the colonial legislatures?" "Where did the power lie to modify the Proclamation after Confederation?" "Where did it lie after the *Statute of Westminster, 1931*, 22 Geo. V., c. 4 (U.K.)?"

<sup>325</sup> The interested reader is referred to what Slattery has to say on the subject in *The Land Rights...*, *op. cit.*, note 99, Chapter 20.

in the period being considered here.<sup>326</sup> This fact renders moot for the present limited purposes questions regarding the modifiability of the Proclamation.

Moreover, whether the territorial rights still held by any of Canada's indigenous peoples are of the "sovereignty" type or of a "mere title" type--and it will be evident by now that it is a premise of the present dissertation that there exist some of each type, depending on the existence of conquests or treaties ceding only sovereignty--those rights have acquired constitutional protection since 1982. In other words, the English practice is now constitutionally regulated.

When the Canadian constitution was re-patriated and amended in that year, Natives saw their rights--including territorial rights--enshrined therein. Three provisions of the Constitution pertain to Canada's Native Peoples. They are sections 25, 35 and 35.1 of the *Constitution Act, 1982*.<sup>327</sup> A detailed discussion of these three provisions is outside the scope of this study.<sup>328</sup>

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<sup>326</sup> Firstly, in the *St. Catherine's* case, *op. cit.*, note 116, at p. 54 (A.C.), the Privy Council noted that from the passing of the Proclamation to the year of the Council's decision in that case (1888) the general provisions of that document were followed in British North America, first by the British Crown, then by the Provincial (i.e. Colonial) Governments, and then, since Confederation, by the Dominion. The Court clearly stated that:

Whilst there have been changes in the administrative authority, *there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands...* [Emphasis added.]

See also to the same effect the words of Strong J. in the Supreme Court of Canada decision in this same case, at pp. 623, 627, 628, 632 and 633 (S.C.R.). Though he was delivering dissenting reasons, there appears to have been no disagreement on this limited point.

Moreover, the Supreme Court of Canada in *Guerin*, *infra*, note 422, at p. 340 (D.L.R.), established the continued existence of the *status quo* to at least 1984 (the year of its decision in that case):

As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except under surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.

(The ruling in *Guerin*, it will be seen later, applied both to Native territorial rights under the *Royal Proclamation* and to similar rights at common law; confirming earlier caselaw in this second regard.)

<sup>327</sup> Being Schedule B to the *Canada Act 1982* (U.K., 1982, c. 11).

In any case, only section 35 is relevant here.<sup>329</sup> This section, as interpreted by a recent Supreme Court of Canada ruling, effectively abolishes the federal Parliament's power to extinguish, among other rights, aboriginal territorial rights, except by cession, while also implicitly providing that these rights are not absolute and can be limited, or even abrogated, when justified. Such justification can be present, for example, in cases of emergency or where necessary for nature conservation.<sup>330</sup> Of course, section 35 protects only "existing aboriginal

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<sup>328</sup> (...continued)

<sup>328</sup> For a complete analysis see, *inter alia*: Hogg, P.W., *Constitutional Law of Canada*, 3<sup>rd</sup> Edition (Supplemented), 2 vols., Toronto, Carswell Thompson Professional Publishing, 1992, vol. 1, at p. 27-5 to 27-35 [hereinafter cited as Hogg]; Slattery, B., "The Constitutional Guarantee of Aboriginal and Treaty Rights", (1982-83) 8 *Queens L.J.* 232 [hereinafter cited as Slattery, *The Constitutional Guarantee...*]; Slattery, B., "The Hidden Constitution: Aboriginal Rights in Canada", (1984) 32 *Am. J. of Comp. L.* 361 [hereinafter cited as Slattery, *The Hidden Constitution...*]; Patenaude, M., *Le droit provincial et les terres indiennes*, Montréal, Québec, Les Editions Yvons Blais Inc, 1986, 198 pp. [hereinafter cited as Patenaude, *Le droit provincial...*]; and Beaulieu, Cantin & Ratelle, *op. cit.*, note 285.

<sup>329</sup> Section 35.1 is merely a statement of principle concerning the participation of Aboriginal leaders in future constitutional changes affecting Natives and contains no substantive guarantees in and of itself. And section 25 is merely an interpretive provision of the *Charter*, directing that the substantive rights provided therein not be interpreted so as to abrogate or derogate from aboriginal, treaty or other rights or freedoms of Native peoples.

Curiously, however, Beaulieu *et al.*, *ibid.*, appear to ascribe to this section a substantive character. In affirming that the Royal Proclamation applies to Quebec, the authors make the following surprising statement concerning the effect of section 25 of the *Constitution Act, 1982* and of the *Charter*. At p. 318 they state:

En ce qui concerne le Québec, la Proclamation royale s'y applique définitivement; en conséquence, les droits reconnus par cet édit royal sont maintenus par le biais de l'article 25 de la Loi constitutionnelle. Cette disposition a pour but de préserver des droits et non d'en créer de nouveaux ni d'augmenter ou de modifier de quelque façon le statut constitutionnel ou légal des droits qui existent déjà ou qui pourraient être créés indépendamment de la Charte. [Emphasis added.]

The authors maintain throughout their article that Native land rights within Quebec stem only from the Royal Proclamation and not from a right existing from time immemorial. The former they call "titre indien" and oppose it to a common law aboriginal title ("titre aborigène"). They maintain that the rights granted by the Proclamation (their "titre indien") is *protected*, not by section 35, but by section 25 of the *Constitution Act, 1982*— thus ascribing to that section a role beyond that of interpretive clause.

<sup>330</sup> Since s. 35 is not within the *Charter*, s. 1 of the *Charter* [the so-called "reasonable limit" clause] cannot be utilized by the government to sustain breaches of s. 35 guarantees. This leaves only Parliament's emergency and conservation powers for this purpose. The Supreme Court of Canada appears to have said as much in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410 (S.C.C.), at p. 1109 and 1113 (S.C.R.). See also the discussion in Hogg, *op. cit.*, note 328, at pp. 27-9 to 27-30.

Prior to the Supreme Court's decision in *Sparrow*, there was a debate among scholars as to whether s. 35 provided any substantive guarantees for aboriginal rights or, rather, merely confirmed the pre-existing situation, leaving to Parliament all of the powers it held with regards thereto prior to 1982, including its power to unilaterally extinguish Native land rights. Micheline Patenaude, *Le droit provincial...*, *op. cit.*, note 328, was of the latter view. She wrote:

Nous ne partageons malheureusement pas l'enthousiasme de cette doctrine qui croit que seul un amendement à la constitution ou un abandon par les Indiens eux-même des droits que celle-ci dit reconnaître et affirmer peut mettre fin à un titre indien ou aux droits qui en découlent. Le texte même de l'article 35 c'est tout simplement que ces droits sont "reconnus et affirmés". Il ne dit pas qu'ils ne peuvent être abrogés ou même modifiés. L'article 35 pourrait n'être... qu'une simple déclaration demandant aux tribunaux de prendre avis que ces droits existent. Sa portée bien limitée expliquerait en partie l'opposition que les Indiens ont manifesté lors du rapatriement de la constitution et justifierait les propos de l'un deux:

"As a result, I am afraid that these amendments are not very substantial. What is needed is either a more sympathetic interpretation of the obligations of the government of Canada and of the Crown on the part of the Courts, or a creative act on the part of Parliament, not

(continued...)

and treaty rights". Thus, it seems clear that any such rights extinguished prior to 1982, whether it be by cession, purchase or valid unilateral expropriation, are not revived by section 35.<sup>331</sup>

The foregoing is but a perfunctory review of *The Constitution Act's* "aboriginal" provisions, meant only to establish that, since 1982, complete extinguishment of Native land rights may only be effected by voluntary cession or federal legislation which can be justified under the criteria discussed in *Sparrow*. Having said this, the question of whether Native sovereignty is, or even can be, among the Indian rights guaranteed in what is, after all, the *Canadian* constitution, remains unanswered. But it will not be pursued here.<sup>332</sup> It is not necessary to delve into this

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<sup>330</sup>(...continued)

just to affirm rights but to create rights." [Emphasis added.]

For a contrary view see Slattery, *The Constitutional Guarantee...*, *op. cit.*, note 328, pp. 235-6.

This issue could have been legitimately debated before the introduction in 1983 of s. 35(4). But, that Patenaude raises it after that time (her book being published in 1986) seems surprising given the statement in subsection 35(4) that "the aboriginal land treaty rights referred to in subsection (1) are *guaranteed* equally to male and female persons." One would have thought that the use of the word "guaranteed" in reference to subsection (1) would have indicated that subsection was more than a confirmatory provision. This same point is made by Pentney, *op. cit.*, note 258, at pp. 208-9.

In any case, the Supreme Court decided in *Sparrow* (to quote Hogg's explanation of the decision) "that s. 35 should be interpreted as a constitutional guarantee of aboriginal and treaty rights": See Hogg, *op. cit.*, note 328, at p. 27-29. But, as Hogg also notes, the Court held that the rights protected by s. 35, though not subject to governmental limitation under s. 1 of the *Charter*, were nevertheless not absolute "They were subject to regulation by the federal laws, provided the laws met a standard of justification not unlike that erected by the Court for s. 1 of the *Charter*": Hogg, *ibid.* This is a reference to the government's emergency and conservation powers.

For a brief moment it appeared that s. 35 might be interpreted as an absolute and inviolable guarantee of Native rights. This momentary situation resulted from Lord Denning's judgment in *The Queen v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 116, at p. 129. This case was launched by Canadian Natives in the period when the constitution was about to be repatriated. The Natives, unsatisfied with the Aboriginal Rights provisions, sought a ruling that the Queen would continue to be constitutionally responsible for Native affairs, which the Court denied. Lord Denning does make comments, however, supporting an interpretation of the provisions to the effect that aboriginal rights could be derogated from or even abrogated only by constitutional amendment. However, the other two Justices did not address this question.

In *Sparrow* the Supreme Court of Canada has now asserted a view more restrictive than the view outlined by Lord Denning. It effectively ruled that the federal government could still abrogate or derogate from the existing rights notwithstanding s.35 of the *Constitution Act, 1982*, but that the burden on the government of justifying any such action would be high: See *Sparrow, ibid.*, pp. 1109-10 (S.C.R.).

<sup>331</sup> *Sparrow, ibid.*, at pp. 1091-1093 (S.C.R.). However, the Supreme Court has also held that unextinguished rights protected by this section must be interpreted without consideration to laws or regulations "controlling" such rights. Such regulations do not result in a partial extinguishment of such rights without a clear intention to do so. While such regulation is still permissible, it must be in conformity with s. 35: See *Sparrow, ibid.*

<sup>332</sup> This is, of course, an interesting question. How can the Canadian constitution have any effect upon lands over which Canada is not sovereign? This is indeed a nice constitutional problem. The Royal Commission on Aboriginal Peoples, in its 1993 paper on aboriginal self-government and the Constitution, expressed the opinion that s. 35 did not guarantee Native sovereignty, but only self-government within Canadian sovereignty. In its report, *op. cit.*, note 6, at p. 36, the Commission wrote:

The Aboriginal right of self-government is recognized by the Canadian legal system, both under the constitutional common law of Canada and under section 35 [of the *Constitution Act, 1982*]. So, while the section 35 right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that,

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constitutional quagmire since examination of this question is beyond the scope of the present dissertation. The only point to be made here regarding these constitutional provisions is that the English practice vis a vis the aboriginal peoples of Canada and their lands has now become constitutionally mandated. This does not alter the fact that the practice itself has remained unchanged irrespective of the Constitution. That is to say that since 1763 the English and Canadian authorities, as a matter of practice and of common law, if not as a matter of constitutional law, have recognized the survival of full Native territorial rights, including rights of territorial sovereignty, unless acquired by express conquest, purchase or cession.

Therefore, such wholesale abrogation of Indian land rights--and particularly rights of sovereignty--under either the Proclamation or the common law not having occurred, one need only be concerned today with particular cases of territorial rights extinguishment. That is, to identify acts of cession and to see if they were validly effected by conforming to the rules under the Proclamation or at common law and if the specific acts in question include a cession of sovereignty. A cursory study of this topic will be undertaken later in this dissertation (see chapter seven).

But, before proceeding any further it may be useful to compare England's colonial practice in America to that which it followed elsewhere. Though not strictly necessary to the present thesis, it is instructive to note that the the English, like the other colonial Powers discussed earlier (the Spanish, Portugese and French), maintained the practice outlined above almost consistently in all other parts of the world--that is to say in the South Pacific, the Far East and in Africa--both at a time contemporaneous with its North American colonial period and also

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<sup>332</sup>(...continued)

*although Aboriginal peoples have the inherent right to govern themselves under section 35, this constitutional right is exercisable only within the framework of Confederation. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independant states are commonly thought to possess. Aboriginal governments are in the same position as the federal and provincial governments: their powers operate within a sphere defined by the Constitution. In short, the Aboriginal right of self-government in section 35 involves circumscribed rather than unlimited powers. [Emphasis added.]*

continuously since then until the early twentieth century. It is not feasible to review here the evidence in its entirety.<sup>333</sup> However, since the next chapter will consider, in part, the judicial opinions upon the question of Native sovereignty in both New Zealand and Australia, it is pertinent to make here some brief specific mention of England's actual practice in both of these places. The discussion, necessarily, will be relatively short and does not in the least pretend to represent a complete account of English actions in either New Zealand or Australia. Reference will frequently be made to what secondary sources have had to say regarding British actions, and primary historical sources are only referred to here where these were at hand.

### **English Practice in New Zealand and Australia – A Comparison**

The two islands forming New Zealand were first discovered in 1642 by the Dutch explorer Abel Tasman, who gave his name to the Australian island-state of Tasmania and also gave the name of the Dutch region of Zealand to New Zealand. It seems, however, that Tasman made his discovery "without apparently attempting to make a landfall or to take possession of [the New Zealand islands] for Holland".<sup>334</sup> More than a century later, in 1770, Captain James Cook, under secret instructions from the Commissioners for executing the Office of Lord High Admiral of the United Kingdom authorizing him to seek out the "Southern Continent" (Australia), made landfall in New Zealand and planted a flag-staff which, by his own account, was explained to one of the local people (known as the Maori) simply as proof of English visitation and not as establishing any territorial claim against the indigenous people. His account, though, does also say that he "took formal possession" of the country by this act.<sup>335</sup> But it seems that this was likely meant as possession good as against other explorer-nations, and not as against the local

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<sup>333</sup> See, generally, Lindley, *op. cit.*, note 10.

<sup>334</sup> Keller et al., *op. cit.*, note 31, at p. 137.

<sup>335</sup> *Ibid.*, at p. 90.

people, as his above-noted explanation to the individual Maori would suggest. This interpretation is further buttressed by the fact that Cook was under specific orders to take possession of territory only "with the consent of the natives".<sup>336</sup>

At any rate, it seems that England did not view its title to New Zealand as against the Natives as stemming from Cook's expedition. Despite Cook's actions in 1770, and notwithstanding the fact that many English colonists of their own initiative subsequently came to New Zealand, it seems the English Crown took no formal interest in the country until June 15, 1839. That is the date on which it annexed the New Zealand islands to its Australian colony of New South Wales by letters patent.<sup>337</sup> "In May 1841 the new Governor, Captain W. Hobson, declared New Zealand a separate colony by virtue of the authority vested in him by a new set of letters patent issued in November, 1840".<sup>338</sup> The South Island of New Zealand had been "largely uninhabited and certainly not generally under the rule of any chiefs"<sup>339</sup>--in other words, it lacked any political society which could exercise sovereignty over the island--so that it was viewed as fully appropriated to British sovereignty by mere discovery and settlement as *terra nullius*. Even so, it appears that England took the precaution of negotiating treaties of cession with the few chiefs it found on South Island.<sup>340</sup> But the North Island was inhabited by various

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<sup>336</sup> See the expanded excerpt from his Instructions quoted *infra*, at note 352 and accompanying text concerning English practice in Australia. Though this directive was given in terms applying to his hoped-for discovery of the "Southern Continent" of Australia, it is reasonable to suggest it would apply to any territory which he discovered. The wording of his Instructions, in fact, would seem to support this interpretation.

<sup>337</sup> McHugh, P.G., *Maori Land Laws of New Zealand*, studies in Aboriginal Rights No. 7, Regina, University of Saskatchewan Native Law Centre, 1983, at p. 17 [hereinafter cited as McHugh, *Maori Land Laws...*].

<sup>338</sup> *Ibid.*.

<sup>339</sup> O'Connell, *op. cit.*, note 25, at p. 470.

<sup>340</sup> Lindley, *op. cit.*, note 10, at p. 42, writes:

As regards the South Island, the British representative was instructed that, if he should find the Island inhabited only by 'a very small number of persons in a savage state, incapable, from their ignorance, of entering intelligently into any treaty with the Crown...the ceremonial of making such engagements with them would be a mere illusion and pretence', and that, in those circumstances, Her Majesty's sovereign rights over the South

(continued...)

large tribes of organized aborigines, known collectively as the Maori Peoples, whose native custom "extended traditional title to cover nearly every square inch of the North Island".<sup>341</sup> In these circumstances the authorities in London felt it appropriate to recognize the sovereignty of the Maori to the North Island and to seek a cession thereof by treaty with them.<sup>342</sup> In consequence, Governor Hobson successfully negotiated a treaty with the Native chiefs of the North Island at Waitangi in February of 1840, following which, in May of 1840, a British Proclamation was issued in which "the sovereignty of the Queen over the North Island was based upon the Cession from the chiefs".<sup>343</sup>

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<sup>340</sup>(...continued)

Island were to be asserted on the ground of discovery. In pursuance of these instructions, a second proclamation, also issued the 21<sup>st</sup> May, 1840, asserted 'British sovereignty over all the Islands of New Zealand'; *but steps had already been taken to obtain treaties of Cession with such chiefs as were found in South Island and Stewart Island.* [Emphasis added.]

<sup>341</sup> McHugh, *Maori Land Laws...*, *op. cit.*, note 337, at p. 18.

<sup>342</sup> Lindley, *op. cit.*, note 10, at p. 41 states the English view quite clearly:

In annexing New Zealand, the British Government gave full effect to the sovereignty of the native chiefs and tribes. Their attitudes was clearly set out in a dispatch which was written by the Secretary for War and Colonies in August 1839, shortly before annexation [to New South Wales Colony]. 'I have already stated', runs the dispatch,

that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as part of the dominions of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained.

Moreover, this recognition of Maori sovereignty had been evident for many years before 1839. The Imperial Act of 57 Geo. 3 c. 53 (the *Murders Abroad Act 1817*) made British subjects liable to trial on British soil for murders and manslaughters committed in New Zealand as well as in Honduras, Otaheite and "other places not within His Majesty's dominion". The implication was clear that New Zealand was not considered, in 1817, "within His Majesty's dominions". Similarly, Imperial Acts of 1823 (4 Geo. 4 c. 96 and 9 Geo. 4 c. 53), enabling the Crown's courts in Australia to try British subjects for serious offences committed in New Zealand, were based upon the lack of any British sovereignty over New Zealand. Finally, a Declaration of Independence signed by certain Maori chiefs at Waitangi on the 28th day of October 1835, and in which they clearly declared their independence and sovereignty, received the approval both of the Governor of New South Wales Colony in Australia and of the Colonial Office in London.

All of these matters are discussed in more detail in McHugh, P.G., *The Aboriginal Rights of the New Zealand Maori at Common Law*, D. Phil. thesis, University of Cambridge, 1987 (unpublished), at pp. 67-85 [hereinafter cited as McHugh, *The Aboriginal Rights...*].

<sup>343</sup> Lindley, *ibid.*, at p. 42.

Known as the *Treaty of Waitangi*, the treaty (or at least its English version) cedes Maori sovereignty to the English.<sup>344</sup> In exchange, the Crown "confirms and guarantees" to the Maori their common law aboriginal title with the proviso that, should the Maori wish to part with any portion of their territory, the Crown shall have the exclusive right of "Preemption".<sup>345</sup> The Maori are also guaranteed protection and are made British subjects.<sup>346</sup> Subsequent to its signing, the British authorities themselves (per James Stephen of the Colonial Office) noted that it was "in virtue of the treaty, and on that basis alone that Her Majesty's title to sovereignty in New Zealand at this moment rests".<sup>347</sup>

As stated above, the view of the New Zealand judiciary regarding the acquisition of sovereignty will be discussed in the next chapter.

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<sup>344</sup> *Treaty of Waitangi* (1840), reproduced in both the English and Maori text in schedule 1 to the *Treaty of Waitangi Act, 1975*, [1975] 2 N.Z.S. 825. Article 1 of the Treaty (English text) states:

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

<sup>345</sup> *Ibid.*, article 2 (English text).

<sup>346</sup> *Ibid.*, article 3 (English text).

<sup>347</sup> Quoted in McHugh, *The Aboriginal Rights...*, *op. cit.*, note 342, at p. 198. It must be said that whether the *Treaty of Waitangi* involved a full cession of Maori sovereignty is not a question clear of all doubt. There is some dispute arising out of differences between the English and Maori language versions of the treaty. While the English version refers to the cession of sovereignty "absolutely and without reservation", the Maori version refers to the cession of "*Kawanatanga*", reserving to the chiefs the "*Rangatiratanga*". The distinction between these two Maori concepts is not clear, but the cession of *Kawanatanga* seems to refer to the power over inter-tribal affairs such as the conduct of war or peaceful relations, as well as the power over foreign relations (i.e. with off-island Powers other than England). The retention of *Rangatiratanga* seems to refer to the power of each chief over their own respective tribes (i.e. intra-tribal affairs): See McHugh, P., *The Maori Magna Carta: New Zealand Land Law and the Treaty of Waitangi*, Auckland, New Zealand, Oxford University Press, 1991, at pp. 3-9 [hereinafter cited as McHugh, *The Maori Magna Carta...*].

It is suggested by the present writer that the Maori version cedes both the "external sovereignty" of the Maori and their ultimate or underlying interest in the soil while retaining "internal sovereignty" (what is today called powers of "self-government") as well as a mere common law aboriginal title over each tribe's own ancestral grounds upon which to exercise that internal sovereignty. But the issue is of little moment for present purposes. Whatever degree of sovereignty was ceded, it is clear that England traced its acquisition of dominion over the North Island of New Zealand from this treaty and not from the actions of Cook in 1770 nor from the pre-1839 unauthorized colonization by British subjects. Thus, its practice conformed both to its North American practice and to international law norms.

Moreover, as McHugh has implied, there may be pockets of New Zealand territory which, being under the authority of Maori chiefs who refused or failed to sign the treaty, might not be included in the treaty and its cession of territorial sovereignty: See McHugh, *The Aboriginal Rights...*, *ibid.*, at p. 94 and p. 96. But Hobson's two declarations of May 1840 declaring British sovereignty over the South Island by discovery and over the North Island by cession might be viewed as precluding any dispute on this point in domestic courts under the act of State doctrine (discussed in the next chapter).

Australia, the only other territory which will be discussed specifically here for a comparative view of English practice outside of North America, presents the only case of an anomalous English practice. It appears that only that portion of modern Australia today called Tasmania was discovered and explored by the Dutch as long ago as the late sixteenth century and (according to some scholars) symbolically claimed for Holland (though not until 1642) by Tasman.<sup>348</sup> In any case, Australia began to feel a permanent influence only with Cook's first and second voyages of exploration (in 1768-71 and 1772-75, respectively) for the English. Australia saw its first British settlement in 1788 with the landing of ships in Botany Bay containing prisoners to build a new colony. It appears that the British colonists (remembering that colonists are to be distinguished from the British Crown) treated this "Southern Continent" as *terra nullius* and appropriable by mere occupation,<sup>349</sup> "resulting in the dispossession and dispersal of the Aboriginal peoples".<sup>350</sup> But these actions were not sanctioned by London. As Morse has written:

The first British explorer in this region, Captain Cook, was under explicit instructions to pursue a policy of creating peaceful relations with any indigenous

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<sup>348</sup> See generally Keller et al., *op. cit.*, note 31, at pp. 132-41. But note that in Quick, J. and Garran, R.R., *The Annotated Constitution of the Australian Commonwealth*, Sydney, Legal Books, 1901 (reprinted 1976), at p. 23 [hereinafter cited as Quick and Garran], it is said:

No one man, no one nation, can exclusively claim the honour of having discovered Australia. Justice demands the acknowledgment that many brave mariners and the Governments of several pioneering and exploring countries assisted in the gradual unfolding of the situation and outlines of the great continent.(...)

<sup>349</sup> O'Connell, *op. cit.*, note 25, at p. 470 writes that "since the Australian aborigines were held incapable of intelligent transactions with respect to land Australia was treated as *terra nullius*". See also Lindley, *op. cit.*, note 10, at pp. 40-1.

It appears that this conception of the Australian Aborigines as too primitive to constitute a political society was prevalent in non-governmental circles even before the settlement of New South Wales. Indeed, in his proposal to the government entitled "A Proposal for Establishing a Settlement in New South Wales" dated 23 August 1783, James Maria Matras, a private citizen, commented:

Capt. Cook first coasted and surveyed the eastern side of that fine country...peopled only by a few black inhabitants, who, in the rudest state of society, knew no other arts than such as were necessary to their mere animal existence, and which was almost entirely sustained by catching fish.

See: Alexander Britton (ed.), *Historical Records of New South Wales*, vol. 1, Part 2,--Phillip 1783-1792, Sydney, Charles Potter, Government Printer, 1892, pp. 1-8, at p. 1 [hereinafter cited as *Historical Records of New South Wales*].

<sup>350</sup> From Morse, B., "Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad", an as yet unpublished article initially presented by that author in April of 1992 as a report for *La Commission d'étude sur toute offre d'un nouveau paternariat de nature constitutionnelle* and *La Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté*, at p. 34 of the manuscript [hereinafter cited as Morse].

peoples that he encountered. Subsequent colonial representatives were regularly instructed to respect the land rights of the Aborigines and to negotiate treaties to ensure peaceful relations and to acquire land for settlement. *These instructions were repeatedly ignored or resisted by local officials.*<sup>351</sup>

Indeed, Cook was under secret instructions, during both his first and second voyages, that upon discovery of Australia he was:

*also, with the consent of the natives to take possession of convenient situations in the country, in the name of the King of Great Britain, or, if you find the country uninhabited, take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.*<sup>352</sup>

And, Instructions to the various Australian colonies from the earliest date contained directives concerning respect for the Natives. The early ones are typified by the words contained in the Instructions to the first Governor of the first Australian colony of New South Wales, Hunter Phillip, which Instructions are dated 25 April 1787. The relevant portion states:

You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony.<sup>353</sup>

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<sup>351</sup> *Ibid.*. [Emphasis added.]

<sup>352</sup> From Cook's secret instructions for his first voyage. See "Additional Secret Instructions to Lieutenant James Cook, Commander of His Majesty's Bark the Endeavour", in Navy Records Society, *The Naval Miscellany*, vol. III, London, Publications of the Navy Records Society, vol. LXIII, 1928, p. 347, at p. 348 [hereinafter cited as The Navy Records Society]. The secret Instructions for Cook's second voyage repeated this directive. See The Navy Records Society, *ibid.*, vol. III, p. 351, at p. 353.

<sup>353</sup> See: Commonwealth of Australia, *Historical Records of Australia*, Series I, vol. 1 (1788-1796), Sydney, The Library Committee of the Commonwealth, 1914, pp. 9-16, at pp. 13-4 [hereinafter cited as *Historical Records of Australia*]; and *Historical Records of New South Wales*, *op. cit.*, note 349, pp. 84-91, at pp. 89-90.

Governor Phillip was first appointed Governor of New South Wales by a Commission dated 12 October 1786, which was very brief and said nothing regarding the Aborigines of Australia. See: *Historical Records of Australia*, *ibid.*, at pp. 1-2; and *Historical Records of New South Wales*, *ibid.*, at pp. 24-5. He received a more detailed second Commission dated 02 April 1787. See: *Historical Records of Australia*, *ibid.*, at pp. 2-8; and *Historical Records of New South Wales*, *ibid.*, at pp. 61-7. However, it too said nothing which can be construed as a recognition of the existence or survival of any territorial rights in the Aborigines, unless one can construe the power he was given to grant "such lands tenements and hereditaments as shall be in our power to dispose of them and them to grant..." as an oblique recognition that Australia was not *terra nullius* at the moment of settlement and so not all of it was "in our power to dispose of them and them to grant": The quoted passage is at *Historical Records of Australia*, *ibid.*, (continued...)

Apparently, however, when faced with the *de facto* treatment of Australia as *terra nullius* by the colonist, London ultimately acquiesced in this characterization, though not until many years later. Lindley reports that:

the Select Committee of the House of Commons on 'Aborigines' reported in 1837 that the British settlements in what was then called New Holland were 'brought into contact with Aboriginal tribes, forming probably the least-instructed portion of the human race in all the arts of social life. Such, indeed, is the barberous state of these people', the Report continued, 'and so entirely destitute are they even to the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded'.<sup>354</sup>

This attitude, however, has been relaxed under both federal and state governments of Australia which have legislatively conferred territorial rights upon the natives to certain portions of Australian territory,<sup>355</sup> though "[t]here has been no history of negotiating treaties between the Crown and the original owners of the land".<sup>356</sup>

Notwithstanding the treatment by the Australian colonists of the continent as *terra nullius* and the ultimate complicity of London in this characterization—or rather because of these events—it is submitted that English practice in Australia is still perfectly consistent both with its practice elsewhere and with international law. It will be evident that the ultimate acquiescence of London

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<sup>354</sup> (...continued)

at p. 7 and *Historical Records of New South Wales, ibid.*, at p. 66. [Emphasis added.]

Consequently it is to the above-noted Instructions that one must look to find the best indication that the Crown respected the Australian Aborigines no less forcefully than it did indigenous populations in its other colonies.

Phillip's second Commission and his Instructions of 25 April 1787 were virtually replicated in those of his formal successor as Governor of New South Wales, Governor John Hunter: See *Historical Records of Australia, ibid.*, at pp. 513-9 (Commission of 6 Feb. 1794) and pp. 520-7 (Instructions of 23 June 1794). (In between Hunter and Phillip, Lieutenant-Governor Francis Grose and then Captain William Paterson, governed the colony under the vacancy provisions of Phillip's second Commission. But their powers were derived entirely from these and from Phillip's Instructions—as well as from any subsequent instructions sent from England, none of which concerned Natives or their lands).

John Hunter was, in turn, succeeded as Governor by Phillip Gidley King who governed from September 1806 to August 1806 and by Governor Macquarie who took office in January of 1810: *Historical Records of New South Wales, ibid.*, at pp. xi-xii. No attempt was made by the present writer to ascertain who was Governor between 1806 and 1810. Moreover, though the present writer has not searched for the respective Commissions and Instructions of Governors King and Macquarie, it is likely these followed the patterns of those of Phillip and Hunter.

<sup>354</sup> Lindley, *op. cit.*, note 10, at p. 41.

<sup>355</sup> See generally Morse, *op. cit.*, note 350, at pp. 36-7 of the manuscript.

<sup>356</sup> *Ibid.*, at p. 34 of the manuscript.

in the characterization of Australia as *terra nullius* was premised, not upon the impossibility of backwards people of forming a cohesive sovereign society, but upon the failure of the Australian Aborigines to have so organized themselves. As Lindley put it:

As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever 'rudiments of a regular government' subsequent research may have revealed among the Australian tribes, Occupation was the appropriate method of acquisition.<sup>357</sup>

Again, the evolution in *judicial* thought both in Australia and London concerning the status of Australia as *terra nullius* will be discussed in the next chapter. It will be seen that prior beliefs have recently undergone radical reformation through the Australian judiciary.

### **Conclusion on English Practice**

Throughout the history of British (and, after 1867, Canadian) involvement with the Indians and their lands in North America there exists a consistent respect by the colonial authority for the territorial rights of the country's First Peoples, including rights of territorial sovereignty.

In the early period of English colonial involvement of North America (i.e.: pre-1763) this respect manifested itself in the recognition of the Indians as nations from whom the land had to be acquired, preferably by consent but also sometimes by conquest. There can be found proof of this in the Charters and Letters Patent issued by the Crown during this period as well as in the tenets of Britain's own colonial law as expounded by its judiciary, in which the method of acquiring sovereignty over a peopled territory (whether they be heathens or Christians) is said to be conquest while settlement is said to be reserved only for lands truly vacant. Similar indications can be found in early (pre-1763) English treaties with the Indians. All this evidence shows that at no time (with the exception, perhaps, of the New England Charter and the territory

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<sup>357</sup> Lindley, *op. cit.*, note 10, at p. 41.

covered thereby) did the English consider North America as generally *terra nullius*; that is to say under no sovereign authority. Rather, they considered it under the sovereignty of the various Indian nations.

In later time periods this policy of recognizing Native sovereignty and acquiring it only by conquest or cession was maintained. Despite arguments to the contrary, the *Royal Proclamation* of 7 October 1763 in no way altered either the extent or, more importantly, the nature of the rights England recognized to the Indians with respect to territory. That document merely served to confirm, unaltered, the pre-1763 rights the location and nature of which can only be ascertained by looking behind the Proclamation. And, since 1763, the guarantees in the Proclamation have been strictly adhered to by the English Crown and its successors. In fact, it has been constitutionally mandated since 1982 and the enactment of *The Constitution Act, 1982*.

If any limit was placed on Indian sovereignty it is merely that Natives could not alienate that sovereignty (and their underlying title) to anyone other than the Crown. This limitation, as will be argued in more detail in chapter six when discussing the U.S. caselaw, operated only indirectly since the positive prohibition was upon English subjects, other Powers and the subjects of other Powers, with respect to *receiving* cessions from the Indians living within England's sphere of influence. It was not a limitation on the power of Indians to grant such cessions. In essence, the Natives could cede their sovereignty (and title) to whomever they chose, but no party could accept such cession save the English Crown.<sup>358</sup> The one may amount to a practical limitation on the power of the other, but they are theoretically distinct limitations. In any case, the fact remains that, absent an express cession or a conquest, the aboriginal peoples of Canada would retain their territorial sovereignty over their respective ancestral lands.

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<sup>358</sup> McNeil, *op. cit.*, note 2, at p. 230 makes essentially the same argument and relies on the words of Chapman J. in the New Zealand case of *The Queen v. Symonds*, *op. cit.*, note 4, at 391.

Thus, the consistent English practice in North America has been that until cessions were negotiated with the Indians or until they were conquered, all that was claimed was a right to exclude other Europeans and to be either the sole beneficiary of any future Native territorial cessions, including cessions of sovereignty, or the sole European Power permitted to conquer Indians in this region and thereby bring them to English sovereignty. Simple Occupation (to use the international law term), or Settlement (to use the British colonial law term), of Indian-occupied land was not viewed as a legitimate means of acquiring the land to English sovereignty. This method applied only to truly vacant lands.

One sees, moreover, in England's practice in the rest of the world (both that which is contemporaneous with its North American expansionist period and that which came after) the continued application of this policy, be it in the South Pacific, the Far East or Africa. Even the anomalous practice of the colonists in Australia supports England's otherwise consistent practice of recognizing Native sovereignty (and of thereby consequently adhering to similar principles at international law) since that Australian practice was not then sanctioned by—was in fact contrary to—directives from London and since, moreover, once the fact of the practice was accepted in London it was justified not upon the erroneous legal basis that "backward societies" could not possess territorial sovereignty (for the Crown clearly ascribed territorial sovereignty to backward societies elsewhere) but upon the equally erroneous factual basis that the Aborigines of Australia did not possess the societal cohesiveness which is a necessary characteristic of a sovereign political society.

Thus, the evidence of practice shows that the English (as did the Spanish, Portuguese and French before them) consistently have acknowledged the survival of not just a common law aboriginal title, but in fact of Native territorial *sovereignty*, subject only to acts of extinguishment over specifically delineated territories by way of voluntary cession or overt conquest. But, has

the Canadian judiciary viewed the practice of the various colonial Powers in British North America in the way the present thesis suggests the evidence compels? What has the judiciary had to say regarding the nature of Native territorial rights to unconquered, unceded or unpurchased territory? Specifically, have the courts made any definitive pronouncements either way on the question of Native territorial sovereignty? These are the questions which will be examined in the next chapter.

**CHAPTER SIX:**  
**MODERN JUDICIAL POSITIONS ON THE NATURE OF NATIVE LAND RIGHTS**  
**IN CANADA AND ELSEWHERE**

The focus throughout the present paper has been on the possibility of an aboriginal claim to Native sovereignty being made in a Canadian court. It is essential, therefore, to examine whether the possibility of such a claim already has been authoritatively foreclosed by Canadian precedent notwithstanding the arguments mounted herein on the basis of the historical record. This task is undertaken in the present chapter. It will be seen that though Canadian courts have made some pronouncements which seem unfavourable to the survival of Indian sovereignty, these statements are *obiter dicta* in the cases in which they occur, at least as concerns the question of sovereignty. Moreover, it will be seen that recent court pronouncements show a judicial tendency towards a more favourable view of the nature of Indian land rights and that, therefore, a court before which a claim of Native territorial sovereignty were properly pleaded and documented might possibly be inclined to recognize it.

Before the Canadian judicial history is discussed, however, it might be useful to examine some of the early American cases which clearly have influenced Canada's judiciary. It will be seen that such cases should be relied upon only with caution since they exhibit dubious analyses of English colonial history and law. But it will also be seen that these cases nevertheless contain certain elements which would support the present thesis. In any case, discussion of these cases is essential since Canadian courts, at least early on, have indeed had recourse to them.

From this, the chapter proceeds to discuss what Canada's courts have said regarding the general nature and quality of Native territorial rights absent from treaty. The courts have had little specific to say on this question. But what they have written clearly evokes a right which, whatever its nature, exists only as a burden to the sovereignty of the Crown. However, it will be

argued herein that these decisions must not be viewed as foreclosing the possible judicial recognition of Native sovereignty. This is because the various courts in which the nature of Indian territorial rights have received judicial attention, by reason of the nature of the pleadings or the parties involved in the particular cases, have not had placed squarely before them the issue of Native sovereignty.<sup>359</sup>

After turning to the Canadian cases, moreover, the present chapter will present brief overviews of what the courts of Australia and New Zealand have had to say on the nature of Native land rights in the territories covered by their respective governments. The focus here is comparative and will show a similar liberalization of views as is taking place in Canada regarding the nature of Native land rights, though not yet a recognition of a surviving Native sovereignty.

### American Judicial Influences

While Canadian courts (and their colonial predecessors) did not begin to consider the question of Native territorial rights until the 1880's their American counterparts had been doing so for several decades, with a key series of pronouncements emanating from the U.S. Supreme Court in the years between 1823 and 1832. Given this American "head start", it is not surprising that when such questions came before Canadian courts these should have looked to the U.S. cases for inspiration. But, as has often been argued by scholars, the American position may not be entirely applicable to Canada and, indeed, may itself be based on wrongheaded ideas.<sup>360</sup>

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<sup>359</sup> A comprehensive review of Canadian caselaw is not possible given the limited space available here. Rather, focus will be placed only on a few cases which have reached the highest levels in the Canadian court system or are likely to do so soon.

<sup>360</sup> Lester, *op. cit.*, note 225, at p. 354, has written in this regard that the U.S. decisions,

might not only be irrelevant in terms of law, they might also have been incorrectly decided, or decided on principles which are not easily transferable to Canada, given the different constitutional set-up, political institutions, and legal history. In short, that the situation in Canada might be different. Under these circumstances the Canadian courts might well take the view that these differences are sufficiently weighty to start to lay down their own views.

In fact, one scholar has suggested that Canadian courts may now slowly be coming to this realization.<sup>361</sup> The present writer agrees that the early judicial decisions which form the basis of American law exhibit evidence "not only of bad law but bad history as well"<sup>362</sup> and that they should be resorted to in a Canadian context only with caution. Unfortunately, there is not the space here to fairly expound the various criticisms of the American cases.<sup>363</sup>

But, notwithstanding the arguments put forward against their use in Canada, there is no doubt that Canadian courts have looked to these cases for guidance, at least until recently. Moreover, it is suggested that the U.S. decisions, despite some factual and legal misconceptions as to English history and law, nevertheless contain statements which are true and accurate and which might be used to advance the present argument. For both these reasons, the U.S. cases merit discussion here.

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<sup>360</sup>(...continued)

Indeed, in his article Lester presents thoughtful criticisms of the American approach to Native land issues. Other sources presenting criticisms of the U.S. cases include: McNeil, *op. cit.*, note 2, at pp. 244-67; Pentney, *op. cit.*, note 258, Part II, at pp. 223-32; and the various sources cited in all three of these works.

<sup>361</sup> Lester, *ibid.*, continued the passage quoted in the preceding note by suggesting:

This, indeed, has been happening, *Calder's Case* merely being the latest development. For in this case Mr. Justice Hall (Spence J. and Laskin J. (as he then was) concurring) questioned the applicability of the recognition doctrine in Canada, a doctrine which is basic to American law in this context (...).

<sup>362</sup> Quoted from Lester, *ibid.*, at p. 361.

<sup>363</sup> The reader is referred to the materials cited *op. cit.*, at note 360. It shall only be said here that, in the various materials by writers who have commented negatively upon the applicability of the U.S. cases to other countries that have since been spawned by British colonialism, the following criticisms have been made: Lester, *ibid.*, criticizes the American caselaw's adoption of a "recognition doctrine" by which Indian land rights are unenforceable unless recognized by the federal State in legislation or by treaty; and for his part, McNeil, *op. cit.*, note 2, principally makes the point that the U.S. cases have abandoned the British colonial law rules governing the acquisition of territory and, in so doing, have failed to correctly apply the tenets of the British common law of property which would have been available as a consequence of the applicability of certain of these classifications of territorial acquisitions.

It should be noted that in attacking the U.S. cases neither Lester nor McNeil purports to examine the correctness of their assertion of English sovereignty (what McNeil calls a "territorial title"), though McNeil raises the spectre of problems in this area when he says, at p. 228, that "Marshall did not explain how discovery (*even assuming that territorial title was thereby acquired*) could give title to lands that the Indians occupied". (This comment is repeated at p. 265). The italicized phrase in the quoted passage makes clear that this "assumption" is far from clearly addressed in the cases. He did not pursue this only because his main focus was the study of common law aboriginal title and not Native sovereignty.

The American judicial view was almost exclusively formed by that eminent jurist of the U.S. Supreme Court, Chief Justice John Marshall, in cases such as *Johnson v. M'Intosh*,<sup>364</sup> *Cherokee Nation v. Georgia*,<sup>365</sup> and *Worcester v. Georgia*.<sup>366</sup>

The first of these cases, *Johnson*, in fact did not involve any Indian tribe or individual Indian as a party. The parties at bar, two American citizens, were disputing among themselves who had valid title to certain lands originally belonging to Indians. The Plaintiff, Johnson, could trace his title to a cession made by the Indians to certain individuals but which individuals had repeatedly failed to obtain confirmation of their title from Congress. Meanwhile, the Defendant, M'Intosh, had derived his title from the federal government who, in turn, had both received from Virginia its interest in the land and had obtained a cession of the Indian interest from the Indians as well.<sup>367</sup>

It is interesting to note, before discussing Chief Justice Marshall's ruling, several noteworthy admissions contained in the parties agreed statement of facts. In paragraph 3 of the stated case the parties agreed, firstly, that prior to the granting by the English Crown of a Charter for Virginia the Indians in those parts (with one small exception) were sovereign and independent nations and absolute owners of the soil, and secondly, that in making settlements there (as elsewhere in America) the English purchased, conquered or obtained by consent the right of soil

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<sup>364</sup> 21 US 681 (8 Weat. 543), 5 L Ed 681 (1823).

<sup>365</sup> 30 US 1 (5 Pet. 1), 8 L Ed 25 (1831).

<sup>366</sup> 31 US 483 (6 Pet. 515), 8 L Ed 483 (1832).

<sup>367</sup> That the U.S. government had obtained a cession of the Indian ancestral rights was not clear, at least to the present writer, from the statement of agreed facts contained in the report. However, this fact is expressly stated by Marshall C.J., *op. cit.*, note 364, at p. 693 (5 L Ed).

from the Indians.<sup>368</sup> Moreover, it was agreed, in paragraph 7 of the stated case, that the same situation had prevailed in areas claimed by the French and that this situation was inherited by the English unchanged after the French cessions of 1763.<sup>369</sup> Curiously, however, it seems that despite this agreed statement of facts, the Defendant proceeded to argue that Native sovereignty was universally denied by the European nations and that, alternatively, if the Indians had previously been sovereign they had since ceased to be so by virtue of the European discovery.<sup>370</sup>

It appears that Chief Justice Marshall disregarded the agreed facts, or considered them historically inaccurate. He ruled that in order to avoid conflicts amongst themselves the nations of Europe devised a principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession"<sup>371</sup> and that "[t]he exclusion of all other Europeans,

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<sup>368</sup> Found, *ibid.*, at p. 681 (5 L Ed), the relevant paragraph states:

3d. That at the time of granting these letters patent, and of the discovery of the continent of North America by the Europeans, and during the whole intermediate time, the whole of the territory, in the letters patent described, except a small district on James River, where settlement of Europeans had previously been made, was held, occupied and possessed, in full sovereignty, by various independent tribes or nations, who were sovereigns of their respective portions of territory, and absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever; and that in making settlements within this territory, and in all the other parts of North America, where settlements were made, under the authority of the English government, or by its subjects, the right of soil was previously obtained by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured.

<sup>369</sup> Found, *ibid.*, at p. 682 (5 L Ed), it states, in part:

7th. That at or before the commencement of the war [with France] in 1756, and during its whole continuance, and at the time of the treaty of February 10<sup>th</sup>, 1763, the Indian tribes or nations, inhabiting [certain named regions]...were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each, which they had ceded to France, and she held under them,...; and that these Indians, after the treaty [of 1763 with France] became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property;...and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil.

<sup>370</sup> See, *ibid.*, at p. 687 (5 L Ed).

<sup>371</sup> *Ibid.*, at p. 688 (5 L Ed).

necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it".<sup>372</sup> So far there is nothing said by the learned Chief Justice of any impact on Native sovereignty. However, he went on to rule that the above-stated principle left the relations which were to exist between the discoverer and the Natives to be regulated by these two without interference from other Powers and that the European nations all established relations with the Indians in which:

the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful *occupants* of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied...

While the different nations of Europe respected the right of the natives, as *occupants*, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian *right of occupancy*.<sup>373</sup>

Thus, it was his judgement that discovery had transferred to the discovering European nation the sovereignty previously held by the various Native tribes but that the Indians nevertheless retained some sort of territorial right. The words "occupants" and "right of occupancy" in the last-quoted passage were emphasized by italics added herein to point out that this residual right was apparently thought by him to be something even less than what is today called a common law aboriginal title. It was in no way equal to a title *in fee*. It was a mere right of occupancy and usufruct akin to the interest of a lessee.<sup>374</sup> But the salient feature of the

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<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*, at pp. 688-9 (5 L Ed). [Emphasis added.]

<sup>374</sup> See *ibid.*, at p. 692 (5 L Ed). As the U.S. caselaw ultimately developed, the Indian territorial interest would come to be described as non-proprietary unless it had received specific recognition by treaty or legislative enactment of Congress. The modern leading case on the nature of the Indian territorial interest existing as a burden on the U.S. interest as Sovereign is the U.S. Supreme Court's decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1954).

*Johnson* decision for present purposes is that Marshall ruled Native sovereignty to have been lost.

What is unclear in Marshall's decision is the method by which sovereignty passed. While some of the passages quoted above ascribe this loss to the principle of Discovery, there is no analysis of that principle and how it was viewed by scholars and governments, such as was conducted in chapter two hereof. This finding also must be confronted by the reality that the Indians certainly would not have understood that the mere advent of white men meant the loss of their sovereignty. If they had conceived of this possibility it is certain that our history would be a much bloodier one since they would have fought against such an end with every fibre of their souls. Moreover, elsewhere in his judgment the learned Chief Justice seems to ascribe the acquisition of North America to a theory of gradual conquest and Indian abandonment: This was the ongoing Indian-settler wars by which, he explains,

the white populations advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out accordingly to the will of the sovereign power...<sup>375</sup>

It is suggested that such Indian-settler wars, if condoned or acquiesced in by the State (in this case Congress), would amount to a valid conquest. The U.S. government, on the basis of the historical record, appears to have condoned such actions by its settlers. However, similar acts on Canadian soil were not as generally condoned by British or Canadian authorities as was done in the U.S. (though, undoubtedly, Canadian history probably exhibits a few examples of such governmental acquiescence).

What is to be said of the decision in *Johnson* today? It must be remembered that the ultimate decision in that case was to render void the Indian cession to individuals effected

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<sup>375</sup> *Johnson, ibid.*, at p. 692-3 (5 L Ed).

without government authority so that the title Johnson obtained from his antecedent grantees was null while that of McIntosh was upheld. Moreover, it must be remembered that the rule that no one may purchase a cession from the Indians without government license was always intended both to protect the Indians from the abuses occasioned by such direct purchases in the past by unscrupulous settlers and to prevent Indian-settler conflict. The same result as obtained in *Johnson*—the prevention of such individual unauthorized purchases—could have been obtained by construing the limitation on land alienation, not as constituting a limitation upon the power of alienation of the Natives, but as a limitation upon the power of acquisition of British settlers and foreign nationals alike. To put this argument in the words Marshall C.J. himself would later put it in the *Worcester* case, this limitation gave the discovering Power "the exclusive right to purchase, but did not found that right on the denial of the right of the possessor to sell".<sup>376</sup> By this interpretation the Indians could alienate their sovereignty and right of soil to whomever they wished but the rest of the world was effectively barred from accepting such a transfer.<sup>377</sup> It is telling, in this regard, that the words of the Royal Proclamation, mirrored in colonial legislation, impose restrictions on purchases by non-Indians rather than upon sale by the Indians.

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<sup>376</sup> See *Worcester, op. cit.*, note 366, at p. 495 (8 L Ed).

<sup>377</sup> Just such an interpretation had been suggested thirteen years earlier by Mr. Justice Johnson in his dissenting judgment in the American Supreme Court decision of *Fletcher v. Peck* 6 Cranch 87, 3 L Ed 162 (1810). In that case a purchaser (Fletcher) of certain lands within the boundaries of Georgia alleged breach of certain covenants in a deed of sale, one of which was that the state of Georgia had been "legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon" at the time the lands had been granted to the defendant (Peck)'s predecessor in title. The purchaser alleged that the federal government, and not the state of Georgia, had been seized in fee of the soil subject only to the extinguishment of the Indian title.

The majority opinion (which, interestingly enough, was written by Chief Justice Marshall) dealt only briefly with the question of the nature of the Indian title and whether it could exist alongside with the state's putative fee-simple estate. It was the majority's perfunctory opinion that there was no inconsistency between the existence of the Indian interest in the land and the existence of the state's seizin in fee on the same lands: see *ibid.*, at p. 180 (L Ed).

But Mr. Justice Johnson did not agree with this. To him, there were different types of Indian interests in land, depending on the particular history of relations with that particular Indian nation. One type was of Indians who "retain a limited sovereignty, and absolute proprietorship of their soil": see *ibid.*, at p. 181 (L Ed). He specified what he meant by limited sovereignty by saying that upon such lands "We legislate upon the conduct of strangers or citizens within their limits, but...acknowledge [the Indians] to be an independent people": *ibid.*. Thus, the various American states' interests upon such Indians' lands lying within their borders was, to Johnson J., "nothing more than what was assumed at the settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits": *ibid.*. And he added (in a passage which is suggested amounts to the interpretation suggested above of construing the limitation on land alienation—and thus upon the Indians' sovereign powers—not as a limit upon the Indians' power to sell, but as a limit upon the power of those he called "strangers or citizens" to buy): "All of the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves": *ibid.*

While the practical effect of the two interpretations is admittedly the same, that suggested here would permit the jurisprudence to conform to what in reality was the international legal doctrine, as well as to the practice and professed doctrine of the various Powers as shown throughout the preceding chapters. It would also avoid the vagueness in Marshall C.J.'s decision as to the exact method by which sovereignty was lost.

Turning now to the second of the three American cases noted above, the *Cherokee Nation*<sup>378</sup> case, this is the case wherein Chief Justice Marshall elaborated the still-dominant U.S. legal doctrine as to the status of the Indian nations as "domestic dependant nations". Decided eight years after *Johnson*, this case, unlike the earlier one, clearly involved Indians as litigants. The Cherokee Nation instituted an action in the U.S. Supreme Court as a foreign nation under a provision of the American Constitution which allows that court original jurisdiction in matters involving a foreign nation or its citizens or subjects. The Cherokee sought an injunction preventing the state of Georgia from enforcing its laws on Cherokee land, as well as orders declaring void certain specific laws of Georgia and upholding the Indian rights to land under treaties. The specific state laws mentioned were calculated to deny the Indians relief in state courts so as to prevent an ultimate appeal to the Supreme Court by way of writ of error in review. Thus, the only way of getting to the Supreme Court was under that court's original jurisdiction.

While the state could clearly be sued in the Supreme Court under that court's original jurisdiction as granted by another provision of the Constitution, the issue was whether the Cherokee Nation was a "foreign nation" so as to permit it to be a party to a case brought to that court under this original jurisdiction. Thus, the issue was principally procedural.

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<sup>378</sup> *Op. cit.*, note 365.

The majority of the Court, per Chief Justice Marshall, found that while the Cherokee Nation was clearly a "State" it was not a "foreign State" so that it could not claim the Court's original jurisdiction. He ruled that Indians "may, more correctly, perhaps, be denominated *domestic dependant nations*...they are [until their right of possession is terminated] in a state of pupillage. Their relation to the United States resembles that a ward to his guardian".<sup>379</sup> In ruling that the Cherokee were a State--but not a foreign, and therefore sovereign, State--Marshall expatiated his view of the Indian status by saying:

So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. (...)

...

The counsel have shown conclusively that they are not a State of the Union...

...

The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. (...) [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted<sup>380</sup> to compose part of the United States.

...

[T]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether these tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependant nations. (...) [T]hey are [until their right of possession is terminated] in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.<sup>381</sup>

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<sup>379</sup> *Ibid.*, at p. 31 (8 L Ed). [Emphasis added.]

<sup>380</sup> It seems clear that when Chief Justice Marshall says "The Indian territory is admitted to compose part of the United States" he is not ascribing this admission to the Plaintiffs--for indeed the contrary assertion was at the heart of the claim to the benefit of the Court's jurisdiction. Rather, it seems he derived such "admission" from the findings that "maps, geographical treaties, histories and laws" so considered it, and that "in all our relations with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States...": *Ibid.*, at p. 31 (8 L Ed).

<sup>381</sup> *Ibid.*, at pp. 30-1 (8 L Ed).

It is evident that, though he did not cite the earlier *Johnson* case, Marshall C.J. derived his notions concerning the loss of Native sovereignty from that case.

It is submitted that the special status of Indians stems not from their subjugation to the U.S., but from the closing off of their territories to acquisition by nations other than the United States. In this sense, and in this sense alone, they may be said to constitute something less than a completely sovereign nation. But, as argued above, this limitation on the Indians' right to alienate their lands to whomever they chose operated only indirectly; that is to say, as a necessary result of the prohibition against making purchases of Indian lands which operated directly on private subjects of the Crown (or, in the case of the post-revolutionary U.S., on private citizens of that country) as well as on foreign nations and their citizens. Moreover, apart from this limited hinderance upon Indian sovereignty, the American Natives retained the full measure of the powers which they held before the advent of the white man. Thus, the better description of them, it is submitted, would not have been as "domestic dependant nations"--a concept theretofore unheard of in law and not since adopted in other countries--but as nations that are in a relationship to the U.S. of "protectorates" or "protected states". This status, which recognizes the survival of an independent sovereign nation, could, it is submitted, have been found by the Court to equally evince a kinship between the two nations sufficient to exclude the Cherokee as a "foreign" nation, thereby providing the same result in the case, yet would have conformed to the evidence reviewed elsewhere herein as to the constant recognition that all that was acquired by England (and the U.S. after the revolution) was an exclusive right to treat with that sovereign protected State for its lands. In fact, Marshall himself would come to view the status of Indians as that of protected States one year later in *Worcester*.<sup>382</sup>

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<sup>382</sup> *Op. cit.*, note 366. See particularly the passage at p. 501 (8 L Ed) which is reproduced *infra* at note 396.

Significantly, Justice Thomson (with whom Justice Story concurred), in dissenting, would have ruled as suggested above.<sup>383</sup> In fact, he would have gone further and ruled that a protected yet sovereign State is also a "foreign" State within the meaning of the provision of the U.S. Constitution relied upon by the Plaintiffs in asserting the court's jurisdiction.<sup>384</sup> He believed that it was in this latter respect only that he differed from the majority.<sup>385</sup> Most importantly, he believed that the Cherokee's status as a sovereign nation, and indeed as a "foreign" sovereign nation, was in no way affected by the limitation placed upon their power of alienation or the fact that they were under U.S. protection.<sup>386</sup>

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<sup>383</sup> *Cherokee Nation, op. cit.*, note 365, at p. 44 (8 L Ed), where the leaned Justice said:

Every nation that governs itself, under what form soever, is a sovereign State. Its rights are naturally the same as those of any other State. (...)It is sufficient if it be really sovereign and independent; that is, it must govern itself by its own authority and laws. *We ought, therefore, to reckon in the number of sovereigns those States that have bound themselves to another more powerful, although by an unequal alliance. The condition of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent State. Consequently, a weak State, that, in order to provide for its safety, places itself under the protection of a more powerful one without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory States do not thereby cease to be sovereign and independent States so long as self-government and sovereign and independent authority is left in the administration of the State.* Vattel, c. 1, pp. 16, 17.

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion that they form a sovereign State. [Emphasis added.]

<sup>384</sup> *Ibid.*, at p. 44-5 (8 L Ed).

<sup>385</sup> He wrote, *ibid.*, at p. 44 (8 L Ed):

And, indeed, I do not understand it is denied by a majority of the court that the Cherokee Indians form a sovereign State according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the Constitution.

<sup>386</sup> *Ibid.*, at p. 44 (8 L Ed), where he wrote:

*And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted that this occupancy belongs to them as a matter of right, and not by mere indulgence. (...)*

In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were absolute owners of the soil. (...) [Emphasis added.]

Of the two remaining Justices on the panel, Baldwin J. substantially agreed with the majority and Johnson J., while concurring in the refusal of original jurisdiction, would have done so on the basis that the Cherokee were not even a State, let alone a foreign one.<sup>387</sup>

In the last of the three American cases noted herein, *Worcester v. Georgia*,<sup>388</sup> Marshall C.J. seems to recede in striking fashion from his judgment nine years earlier in *Johnson* and to propound a position very close, if not identical, to the one espoused in this dissertation. In *Worcester* a missionary priest from Vermont, while living among the Cherokee Nation by permission of these Indians and with the authority of the U.S. President, was arrested by authorities of the state of Georgia, within whose chartered limits the Cherokee lands were located. He was charged with violating a state law that forbade whites from living among the Cherokee without license from that state and without taking a pledge to support and defend that state's constitution and laws. Worcester defended on the basis that the state lacked jurisdiction to apply its law on Cherokee lands since the Cherokee were an independent nation and not subject to Georgian law. This was rejected at trial and he was convicted, whereupon he appealed to the U.S. Supreme Court on a writ of error in review. Thus, while no Indian tribe or individual was a party litigant, the status of the Indian nations, and the status of the Cherokee Nation in particular, was the central issue. In overturning Mr. Worcester's conviction and declaring the Georgian laws to be inapplicable to the Cherokee territory, Marshall C.J. made several key findings of fact.

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<sup>387</sup> Baldwin J.'s decision is found, *ibid.*, at pp. 36-43 (8 L Ed) and that of Johnson J. is *ibid.*, at pp. 32-6 (8 L Ed). It is to be noted that in deciding as he did in this case Johnson J. seems to have been retreating from his dissenting decision in *Fletcher v. Peck* commented upon *op. cit.*, at note 377. Indeed in *Cherokee Nation* he seemed to now view the limitation upon alienation of Indian lands as operating *directly* upon the Cherokee and so constituting one of the reasons why they are not a "State". At p. 34 (8 L Ed) he said:

And the right of soil is held by the feeble tenure of hunting-grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia.

They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this [Indian] State, if it be [a] State, is still a grade below them all; for not to be able to alienate without permission of the remainderman or lord, places them in a state of feudal dependence.

<sup>388</sup> *Op. cit.*, note 366.

First, he ruled that prior to the discovery of America the Indian tribes inhabited the continent as several distinct nations possessing independent status and that discovery itself did not *ipso facto* change the status. Rather, discovery merely gave the discovering European Power exclusive rights as against other European States *to obtain* the extinguishment of the Native right. It did not impose any direct limitation upon the Natives' status or rights, including their right to sell to whomsoever they chose.<sup>389</sup>

Second, the learned Justice stated that the discovering State was left, unimpeded by other European States, to determine according to its own wishes how the relations between it and the Natives were to be conducted as to the exercise of the former's power of extinguishment.

So far there is not much in which one might find a contradiction with what the Chief Justice had said in *Johnson*. However, he also ruled that England adopted a practice as to the conduct of its relations with the Natives on the matter of their lands and the issue of extinguishment—which practice he found was subsequently followed by its successor, the United

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<sup>389</sup> See *ibid.*, at pp. 494-5 (8 L Ed), where he wrote:

*America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.*

...

(...)To avoid bloody conflicts [between European colonial States], which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, *against all other European governments, which title might be consummated by possession*". [*Johnson v. McIntosh*] 8 Wheat. 573.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlement on it. *It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the Europeans, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on the denial of the right of the possessor to sell.* [Emphasis added.]

States "in every change through which we have passed" since the Revolution<sup>390</sup>—which essentially was to treat with the indigenous populations as independent and equal parties in negotiating the cession of land. This finding directly contradicted his finding in *Johnson*<sup>391</sup> that the English, along with the other European Powers, adopted a practice in regards to their relations with the Indians living in territories they had discovered, which practice denied Native sovereignty. The difference might be explained by the fact that, unlike his decision in *Johnson*, this time Marshall derived his conclusions as to the English attitude from an actual examination of its charters and the *Royal Proclamation* of 1763.<sup>392</sup> Similarly, he derived his conclusions as to U.S. attitudes, both during and after the Revolution, from its treaties with the Indians as well as from its laws.<sup>393</sup> It was his conclusion, in fact, that *all* European governments "[i]nstead

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<sup>390</sup> *Ibid.*, at p. 501 (8 L Ed).

<sup>391</sup> Quoted *op. cit.*, at note 373 and accompanying text.

<sup>392</sup> In *Worcester*, *op.cit.*, note 366, at pp. 495-6 (8 L Ed), he spoke of the English Charters as documents which:

were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood.

...

[The motives stated in some Charters for granting powers of war against Indians] demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of natives were concerned. The power of war is given only for defense, not for conquest.

It is interesting to note, in passing, that the words of Marshall C.J. in the second-to-last sentence of the passage quoted here were echoed by Taschereau J. of the Supreme Court of Canada in the *St. Catherine's* case, *op. cit.*, note 116, though to the opposite conclusion: See the passage quoted, *infra*, at note 403 and accompanying text from p. 644 (S.C.R.) of that decision. It is true that the Canadian judge was there referring expressly to France but his words, as with those of Marshall C.J. quoted here and expressly made with respect to England, seem to have been intended to be ascribed to all European nations' attitudes.

<sup>393</sup> The following statement, found, *ibid.*, at p. 497 (8 L Ed), may be taken as indicative of his views of the U.S. treaty practice, though he was there referring to one specific treaty:

This treaty, in its language and in its provisions, is formed as near as may be, on the model of treaties between the crowned heads of Europe.

As to U.S. legislation, he said, *ibid.*, at p. 499 (8 L Ed):

From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which the treaties stipulate. All these acts, ..., manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

of rousing [Indians'] resentments by asserting claims to their lands, or to dominion over their persons, [sought] their alliance...by flattering professions, and purchased presents".<sup>394</sup>

It is important to note, with respect to treaties with Indians, that Chief Justice Marshall established in *Worcester* that words therein which might imply the subordinate status of the Indians are not to be construed against them owing to their lack of understanding of the language while terms of art such as "treaty" and "nation" are to be construed against the white man, who knew their meaning and must have chosen them accordingly, such that they are indicative of the white man's understanding of the status of Indian tribes as equal to that of the nations of Europe.<sup>395</sup> The provisions in many of the treaties stipulating that the Indians were under the protection of the English or their American successors, as also similar provisions in treaties between Natives and other European nations, were also not to be construed as representing any loss of sovereign status by the Indians any more than treaties of protection between a powerful European State and a less powerful European State implied such loss of status.<sup>396</sup>

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<sup>394</sup> *Ibid.*, at p. 496 (8 L Ed).

<sup>395</sup> *Ibid.*, at pp. 496, 498 and 500-1 (8 L Ed). A similar approach has been adopted for Canada by the Supreme Court in cases such as *Sioui*, *op. cit.*, note 157, and *Nowegjick v. The Queen*, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, 46 N.R. 41 (S.C.C.), at p. 36 (S.C.R.), p. 198 (D.L.R.).

<sup>396</sup> The relevant passage, found in *Worcester*, *ibid.*, at p. 498 (8 L Ed), states:

The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggression on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependant ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokee ever understood it otherwise.

The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner.

And, at p. 501 (8 L Ed):

[T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self government, by associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory states", says Vattel, "do not thereby cease to be sovereign and independent states so long as self-government and sovereign and independent authority are left in the administration of the state".

The findings of this renowned American jurist which are set out in the last two preceding paragraphs constitute, it is submitted, a striking alteration of his earlier position in *Johnson* to the effect that the rights of the original inhabitants of America "were necessarily, to a considerable extent, impaired" by discovery and, specifically, that "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied" by virtue of discovery. How is this shift in his opinion to be viewed?

It is submitted that in *Johnson* Chief Justice Marshall's view had been that discovery imposed a limit *operating directly* upon the Indians' sovereignty to the effect that they could not alienate their lands to anyone but the discoverer's State and that this direct limitation, in turn, imparted a loss of Native sovereignty. In *Worcester*, however, he had come to understand that the true effect of discovery was that while the Indians themselves remained free and independent States capable of ceding their land to whomever they chose, the rest of the world (the discoverer-State's subjects and foreigners alike) had by mutual consent imposed upon themselves a prohibition from accepting any such cessions from the Indians without the discoverer-State's license. Discovery thus worked only *indirectly* a limitation upon the sovereignty of America's First Peoples. In this way, the rule against alienation other than to the U.S. might be viewed (as Thompson J. in *Cherokee Nation* might say) merely as one of the myriad of conditions a Protecting State might choose to impose on a Protected State as a condition of protection. While the practical result may be the same, the legal effect of Chief Justice Marshall's new view was to recognize the true legal status of the Indians as completely sovereign and independent States absent an express surrender of sovereignty or conquest.

As for the relationship between *Worcester* and the *Cherokee Nation* case of the immediately preceding court session, it is submitted that they are completely reconcilable the

one to the other. It is suggested here that in *Worcester* Marshall C.J. was simply expressing what Justice Thomson in his dissent in *Cherokee Nation* had said of the majority decision in that case; namely, that:

I do not understand it is denied by a majority of the court that the Cherokee Indians form a sovereign State according to the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the Constitution.<sup>397</sup>

By this interpretation, the result of the two cases would be that the Cherokee, being a protected State by treaty, would constitute a sovereign State, but would not, by virtue of their "protected" status, constitute a "foreign State" within the meaning of the provision of the U.S. Constitution at issue in *Cherokee Nation*.

It should be added here that a further result of the *Cherokee Nation* and *Worcester* cases is that Indian tribes who had not signed any treaty of protection might possibly constitute a "foreign State"; unless, as is likely, the Court were to say an obligation of protection was assumed unilaterally by the discoverer-State. In any case, whether or not a treaty of protection existed would have no bearing on the cession of land since all the world had agreed that they would forebear from accepting cessions of land found within the confines of a territory ascribed to a particular discoverer-State.

In summary, it is submitted that the true effect of these three cases (which, as noted earlier, came to be heavily relied upon in Canadian judgments) was in fact to recognize the complete and undiminished sovereignty of Indians over unsurrendered ancestral lands, even where a treaty of protection existed.<sup>398</sup> Unfortunately, that is not how this trilogy of cases is viewed in the U.S. today, as is evident from the *Tee-Hit-Ton* decision.<sup>399</sup> The "Domestic

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<sup>397</sup> *Cherokee Nation*, *op. cit.*, note 365, at p. 44 (8 L Ed).

<sup>398</sup> Of course, if a treaty of *surrender* of land or of sovereignty (or both) existed that would be another thing altogether.

<sup>399</sup> *Op. cit.*, note 374.

Dependant Nation" characterization is still the dominant position in that Country. But the relevant point here is not the use made of these early American cases in the U.S. itself, but how they have influenced Canadian judicial thinking when courts in this country have attempted to ascertain the existence and nature in Canadian law of Native territorial rights.

Having set out the American jurisprudence which was utilized as a basis for the early Canadian decisions, it is possible now to look at what Canadian courts have said regarding the nature of unceded or unpurchased Indian land rights, and particularly the issue of Native sovereignty and its loss or survival. Thereafter, the chapter will conclude with a comparative analysis of what other former English colonies' courts have said on this issue. This comparative analysis, by virtue of spacial constraints, can be but perfunctory. Therefore, only the jurisprudence of Australia and New Zealand will be looked at and, even then, only in a less than complete fashion.

### **Canadian Judicial Positions**

As stated at the outset of the preceding section, Canadian courts did not begin to consider the legal existence or nature of Native territorial rights until the second-to-last decade of the nineteenth century, more than fifty years after the *Worcester* decision was handed down by the U.S. Supreme Court. Since the beginning of Canadian judicial efforts in this regard, however, courts have progressively "liberalized" their view to the point where they now arguably recognize the legal existence of a common law aboriginal title. The Supreme Court of Canada has ruled in several cases that, to the extent that there exists no cession in favour of the French or English, Natives today possess a territorial right of as-yet unclear nature as a burden upon the ultimate Crown dominion. However, as to the survival of Native *sovereignty* over those lands, the country's highest court seems to have considered, at least in early cases, that the fact

of colonial settlement under the authority of Charters or other documents defining the territory of a colony is in and of itself enough to have extinguished it. The Supreme Court has often said that Natives living within the confines of a chartered colony were brought under colonial sovereignty. Nevertheless, a shift in judicial opinion may be emerging here as well.

The early negative Canadian viewpoint dates back at least to 1887. That year, in the *St. Catherine's* case,<sup>400</sup> the issue of the ownership of certain lands ceded by a Native tribe was at issue. The Dominion had succeeded in negotiating this cession and therefore claimed to own the land ceded. But, as the lands were located within the boundaries of Ontario, that province claimed the lands fell under its control. The issue arose because the Defendant, the *St. Catherine's Milling and Lumber Company*, had acquired from the federal government a license to cut and carry away timber from the lands in question. The province claimed the lands were public lands of the province and that it, not the federal government, was the proper licensing authority. It sought an injunction to prevent the cutting of timber.

The six-member panel of the Supreme Court of Canada decided by a 4-2 majority in favour of the Plaintiff, the Ontario Government, on the main issue of whether lands, once ceded by Indians in a treaty with the Dominion, belonged to the Crown in Right of Canada or the Crown in Right of the province in which they were located. Ontario, of course, had argued for the latter view. Of the four Justices in the majority, three delivered their own reasons, while both dissenting Justices, Strong and Gwynne JJ., each gave their own dissenting reasons. For present purposes, the relevance of the various reasons delivered lies in what each had to say as to the nature of the Native interest prior to its surrender. On this issue there was more unanimity among the learned Justices.

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<sup>400</sup> *Op. cit.*, note 116.

Indeed, Chief Justice Ritchie and Justices Henry and Taschereau, of the majority, as well as Justice Strong, who dissented on the main issue, all agreed in characterizing the unceded Indian territorial interest as merely a non-proprietary right to possess the land, a usufructuary interest, which exists at the sufferance of the Crown; in other words, as something far less even than what is encompassed in the modern notion of common law aboriginal title, let alone a sovereign territorial interest.<sup>401</sup> Of all the Justices in the Supreme Court, only Gwynne J. (dissenting) would have qualified the Indians' territorial interest as a legal title.<sup>402</sup>

Most important for present purposes is the fact that only one of the Justices gave any consideration to the issue of the survival of Native sovereignty. In dealing with the question of whether European states recognized aboriginal sovereignty over the land, Taschereau J. said this in the Supreme Court:

There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana in *Breaux v. Johns*, citing *Fletcher and Pecks*, and *Johnson v. McIntosh*, "that on the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves. *While the different nations of Europe respected the rights (I would say the claims) of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves*".(...)

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<sup>401</sup> *Ibid.*, at p. 599 (S.C.R.) Ritchie, C.J. three times called it a "right of occupancy" and said the crown owns the legal title subject to that right of occupancy. Henry J., at p. 639 (S.C.R.) said that "Indians were never regarded as having title". And at pp. 641-2, he said: "They [the lands] were always the property of the Crown. The Indians had the right to use them for hunting purposes, but not as property the title of which was in them. (...)". Taschereau J., at p. 647 (S.C.R.), said that the Royal Proclamation of 1763 conferred on the Indians "occupancy...by sufferance only". Even Strong J., otherwise dissenting, referred to the nature of unceded Indian land interests as "usufructuary" [see pp. 604 and 608 (S.C.R.)] or a "perpetual right of possession; but the ultimate fee was in the crown or its grantees, subject to this right or possession" [see p. 612 (S.C.R.) where he is quoting *Kent's Commentaries* with approval], or a right which was "usufructuary only" [p. 616 (S.C.R.)].

It must be added that in his reasons Strong J. did sometimes qualify the Indian interest as a "proprietary interest" [see pp. 615-6, 618, and 623 (S.C.R.)]. However, the entire flow of his reasons makes clear that he did not intend to imply the existence of a Native title, but only a right of usufruct.

<sup>402</sup> *Ibid.*, at pp. 663-4 (S.C.R.), he said that the Indians, at Confederation, had:

*an estate, title, and interest* in all lands in that part of the Province of Canada formerly constituting Upper Canada for the cession of which to the crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, (...) [Emphasis added.]

That such was the case with the French Government in Canada, during its occupancy thereof, is an incontrovertible fact. The King was vested with the ownership of all ungranted lands in the colony as part of the crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession. The contention, that the royal grants and charters merely asserted a title in the grantees against Europeans or white men, but that they were nothing but blank papers so far as the rights of the natives were concerned, was certainly not then thought of, either in France or in Canada.<sup>403</sup>

As stated earlier, Taschereau J. was one of the Justices who qualified the Indian interest as merely usufructuary, and so less even than aboriginal title. He reinforced this with respect to the experience under the French. After referring to a series of Charters and Letters Patent issued by the French Crown respecting North America and asserting that in none of them, or in any French grant, is there any allusion to even general Native *title*, Taschereau continues:

The King granted lands, seignories, territories, with the understanding that if any of these lands, seignories or territories proved to be occupied by aborigines, on the grantees rested the onus to get rid of them, either by chasing them away by force, or by a more conciliatory policy, as they would think proper. In many instances, no doubt, the grantees, or the King himself, deemed it cheaper or wiser to buy them than to fight them, *but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees.*<sup>404</sup>

As a consequence, the Learned Justice speaks of the effects of the French cessions to England in 1763 as follows:

Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada... it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the Crown domain, in as full and ample a manner as the King of France had previously owned it.<sup>405</sup>

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<sup>403</sup> *Ibid.*, at 643-4 (S.C.R.). [Emphasis added.] It is to be noted that it is in the last sentence of the second paragraph quoted that Taschereau J. echoes the words of Marshall C.J. in the U.S. case of *Worcester*, though to the opposite conclusion; where Marshall C.J. was saying the Charters *were* blank papers so far as the rights of Natives were concerned, Taschereau J. is saying they *were not* blank papers.

<sup>404</sup> *Ibid.*, at pp. 644-5 (S.C.R.). [Emphasis added.]

<sup>405</sup> *Ibid.*, at p. 645 (S.C.R.).

Moreover, as the first paragraph of one of the passages previously quoted<sup>406</sup> clearly shows, Taschereau J. felt that the negation of Indian sovereignty also applied to the territories England claimed under her own right, in addition to those territories which it received in cessions from France, since England, he believed, acquired title by discovery in the same way as had the French.

The Supreme Court of Canada's judgment was confirmed in the Privy Council's decision in that same case.<sup>407</sup> On the ancillary question of the nature of Native land rights prior to surrender the Privy Council, Lord Watson writing, sided with the five Supreme Court of Canada Justices in also characterizing Native territorial rights as "a personal and usufructuary right, dependant on the good will of the Sovereign"<sup>408</sup> (meaning the British Crown). By this Lord Watson clearly meant something far less even than Native *title* since he continued:

... there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.<sup>409</sup>

There can be no doubt that these comments clearly deny that Native sovereignty was ever recognized by the English.

Given the United States' prior judicial experience with construing Indian land rights, it is not surprising that the American cases were looked to by the Canadian Justices and the Privy Council for guidance. That Taschereau J. viewed these cases with approval is made clear by the passage previously quoted.<sup>410</sup> They were equally influential in the reasons of Strong J.<sup>411</sup>

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<sup>406</sup> See *op. cit.* note 403.

<sup>407</sup> *Op. cit.*, note 116.

<sup>408</sup> *Ibid.*, at p. 54 (A.C.).

<sup>409</sup> *Ibid.*, at p. 55 (A.C.).

<sup>410</sup> *Op. cit.*, note 403.

And, though none of the other Supreme Court Justices nor Lord Watson in the Privy Council specifically referred to the U.S. decisions in their own reasons, these precedents were clearly argued before them and would have influenced them.<sup>412</sup>

Faced with this seemingly authoritative Canadian pronouncement on the nature of Indian land interests prior to their surrender, one might be tempted to "throw in the towel" and assert that the possibility of a judicial pronouncement by a modern Canadian court recognizing the survival of Native sovereignty had forever been foreclosed by the *St. Catherine's* case. However, this case can easily be distinguished. One must remember that the Indian interest in question in that case had already been surrendered by treaty and the real question was who benefited from the surrender, the Dominion or the Province. On this issue, the nature of the previous interest could have only marginal relevance. The Privy Council seemed to recognize this, saying:

There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever, that title was surrendered or otherwise extinguished.<sup>413</sup>

Moreover, when one recalls that Natives did not participate in the case, the utility of the Judgement interpreting their rights is severely undermined. Consequently, it is submitted that the issue of Native sovereignty was not put to rest by *St. Catherine's Milling and Lumber Company v. The Queen*. Nor, for the same reasons, was the issue of the existence of the lesser

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<sup>411</sup>(...continued)

<sup>411</sup> See *St. Catherine's*, *op. cit.*, note 116, at pp. 608-12 (S.C.R.).

<sup>412</sup> See the oral arguments reproduced in the Supreme Court of Canada report, *ibid.*, at pp. 587, 588, 590, 593, 598 and 599 (S.C.R.); and in the Privy Council report at p. 48 (A.C.).

<sup>413</sup> See *St. Catherine's*, *ibid.*, at p. 55 (A.C.).

right of common law aboriginal title, which is a proprietary interest superior to a "right of usufruct". Indeed, a long line of more recent cases have in fact dealt with this latter issue.

The *St. Catherine's* view of Native sovereignty seemingly remained unmodified almost a century later when the judgment of the Supreme Court of Canada in the *Calder* case<sup>414</sup> was rendered in terms accepting the existence of British sovereignty. That case is universally regarded as a leading case on aboriginal land rights.

In *Calder*, a Band of British Columbia Natives unsuccessfully sought recognition of their ancestral rights to land which they alleged had never been extinguished by cession or sale in any treaty or otherwise. As already previously noted herein,<sup>415</sup> of the seven-member panel of the Supreme Court, three Justices ruled that the Royal Proclamation had no application to British Columbian territories such that the claimants could derive no benefit from its provisions. But, they acknowledged, this finding did not suffice to dispose of the Indians' claim since the law recognized the survival of a Native territorial interest in land occupied by them since "time immemorial" unless specifically extinguished by the new Sovereign. On this issue, however, the three Justices found evidence of extinguishment, ruling: 1) that local colonial proclamations and ordinances of the colony of British Columbia between 1858 and 1871 reveal a "unity of intention" to exercise, and the legislative exercise of, absolute sovereignty over all the lands of British Columbia inconsistent with any conflicting Indian interest such that whatever property right may have existed in the Indians had thereafter been extinguished; 2) that the governments of the colony and, after 1871, of the Province have made alienations in the area in question which are inconsistent with the existence of any aboriginal territorial right; and 3) that no treaty was ever signed with the Indians for the affected area but that the signing in 1899 of a treaty affecting

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<sup>414</sup> *Op. cit.*, note 232.

<sup>415</sup> See *op. cit.*, note 312 and accompanying text.

another part of the Province (treaty no. 8) could not be interpreted as a recognition of the existence prior to 1899 of an Indian interest in the province since the original Indian title had by then been extinguished by the said local proclamations and ordinances of the Colony prior to Confederation.

As to the question what was the exact nature of the Indian territorial interest between the date of the creation of the Colony of British Columbia and the date of the extinguishment of that Indian interest by the local proclamations and ordinances, the three Justices, Judson J. writing (with Martland and Ritchie JJ. concurring), had little specific to say. Indeed, the question was irrelevant given that they had found that interest to have been terminated. However, Judson J. does refer with approval to the *St. Catherine's* case and the U.S. precedents which influenced it, using terms which seem to signify his concurrence in the description of that interest as a non-proprietary right of possession existing only at the sufferance of the new Sovereign (i.e., not a proprietary right of common law aboriginal title, and certainly not a right of territorial sovereignty).

A strong dissent was delivered by Hall J. (Spence and Laskin JJ. concurring). As also previously noted herein,<sup>416</sup> this Justice ruled, firstly, that the Royal Proclamation did in fact extend to British Columbia both because "[i]t was a law which followed the flag as England assumed jurisdiction over newly acquired lands and territories [so that] the *Colonial Laws Validity Act*, 1865 (U.K.), c. 63, applied to make the Proclamation the law of British Columbia",<sup>417</sup> and because "[t]he wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains".<sup>418</sup> Therefore, the Indians could rely upon its provisions as well as the common law to attempt to show the survival of their rights. But the crux

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<sup>416</sup> See, *op. cit.*, note 312, and accompanying text.

<sup>417</sup> *Calder*, *op. cit.*, note 232, at p. 203 (D.L.R.).

<sup>418</sup> *Ibid.*, at p. 206 (D.L.R.).

of the dissent rested on the finding that an unambiguous intention to extinguish the Native territorial right must be shown. It was his belief the proclamations and ordinances issued by the Colony of British Columbia between 1858 and 1871, upon which the Province relied as showing that intention, in fact failed to show this. Moreover, to the extent that they did show such an intention, Hall J. would have ruled these acts *ultra vires* the colony.<sup>419</sup> But, on the issue of relevance to this thesis, the *nature* of the unextinguished Indian territorial right, Justice Hall's dissenting decision sheds little light. Like his brother judge, Judson J., he refers to the American precedents. But he makes no definitive statement as to the nature of the Indian right either as a mere non-proprietary right of possession and usufruct, or as a right of common law aboriginal title, or, indeed, as a right of territorial sovereignty. Nevertheless, there is in his reasons an undertone implying his concurrence that English sovereignty had been established. But, having said that if the cited proclamations and ordinances of the colony were meant to extinguish Indian *title* they must be considered *ultra vires*, the learned Justice does not state whether they are valid acts extending British *sovereignty* over the land (as the majority had found). Indeed, he fails to address at all the question of how, if not by these documents, British sovereignty was extended over British Columbia and its Natives. If he thought that British sovereignty extended over all of British Columbia by virtue of Governor Douglas' Commission, he did not say so. Nor did he give that document specific scrutiny in this regard or at all.

In summary, the Judson and Hall reasons in *Calder* represent a 3-3 split in the Court on the issue of whether the colonial proclamations and ordinances cited by the Province had validly extinguished the Native territorial interest. But neither Judgment adds much as to the nature of that interest if it is not extinguished. Rather the two sets of reasons exhibit a strong reliance on past precedents in this regard; namely, the *St. Catherine's* case and the U.S. precedents. Indeed, a final decision in the *Calder* case was only arrived at as a result of the fact that Judson

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<sup>419</sup> *Ibid.*, at p. 217 (D.L.R.).

J. and his concurring brethren joined Pigeon J. in rejecting the Indians' claim on a procedural point. It is on this point only, and not on the substance of the case, that a majority opinion exists. So far as is relevant to the issue of Native sovereignty, three Justices found that the local acts of the colony were sufficient to extinguish both it *and* any territorial right whatsoever (whether it be a common law aboriginal title or a mere right of usufruct) while the three dissenting Justices failed to address how sovereignty was passed from the Natives to the English and only addressed themselves to the effects of the colonial acts on Indian territorial interests of unspecified nature *existing under British sovereignty*.

But the decision in *Calder* may be discounted as to the issue of Native sovereignty for one basic reason: this issue was not squarely before the court and does not appear to have been fully argued before the Justices. It is clear from Hall J.'s reasons that the Plaintiffs sought recognition only of a territorial interest existing as a burden on the acknowledged sovereignty of the British Crown and were content to accept that British sovereignty had been established when British Columbia was colonized. Indeed, the Plaintiffs were even prepared to concede that the nature of that interest was usufructuary, and so far less even than common law aboriginal title. Hall J. expressly pointed this out:

When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada." ... *This is not a claim to title in fee* but is in the nature of an equitable title or interest... a usufructuary right and a right to occupy the lands and enjoy the fruits of the soil, the forest and the rivers and streams *which does not in any way deny the Crown's paramount title...Nor does the Nishga claim challenge the federal Crown's right to extinguish that title.* (...) <sup>420</sup>

Mr. Justice Hall seemed to realize the limitations which the manner the Plaintiffs had chosen to frame their case had placed on him. He pointed out that the main thrust of the claimants' case

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<sup>420</sup> *Ibid.*, at pp. 173-4 (D.L.R.). [Emphasis added.]

was that the aboriginal right, whatever its nature, had never been extinguished such that "[t]he exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation [but] would, of course, be most relevant in any litigation that might follow extinguishment in the future...".<sup>421</sup> This being the case, *Calder* seems of little value on the issue of Native sovereignty over land.

Some more recent cases are equally unhelpful as regards the issue of Native sovereignty. In *Guerin et al. v. The Queen*,<sup>422</sup> a leading case emanating from the Supreme Court of Canada, the Court considered a suit by the Musqueam Indian Band of B.C. against the federal Crown for damages. The Band had surrendered a part of its "reserve" to the Crown for lease by the Crown to a golf club to the profit of the Band. The actual terms of the lease being far less favourable than had been represented to the Band by the government, the Band sought damages in breach of trust before the Trial Division of the Federal Court of Canada and were ultimately awarded damages on this basis by that Court. The case eventually came before the Supreme Court of Canada. The majority of the Court, per Dickson J., (as he then was), Beetz, Chouinard and Lamer JJ. concurring, reinstated the damage award given to the Plaintiffs at trial and reversed by the Federal Court of Appeal, but in doing so based its ruling, not upon a breach of trust as the trial judge had done, but upon breach of a "fiduciary obligation" since the concept of trust was found inapplicable. The particular obligation which was said to have been breached arose principally out of the fact that the title was inalienable except by surrender to the Crown, whereby the Crown imposed upon itself an obligation, in the nature of a fiduciary's obligation, to act within the conditions set for a specific surrender. In this case, the specific conditions were those which had been agreed to by the Band. Estey J. and Wilson J. (with whom Ritchie and

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<sup>421</sup> *Ibid.*, at p. 173 (D.L.R.).

<sup>422</sup> [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.).

MacIntyre JJ. concurred) each delivered separate reasons concurring in the result, though they would have respectively relied upon the laws of Agency and Trust to find in favour of the Band.

In the course of rendering judgment for the plaintiff Indian Band, all three of the Justices who delivered reasons commented upon the nature of Indian territorial rights. However, the reasons of two of the Justices are perfunctory and essentially amount to a repetition of past judicial statements with no fresh examination. Estey J.'s analysis consisted simply of a reference to prior cases in a seeming approval of their characterization of the nature of Native land rights as a personal and usufructuary right existing only at the sufferance of the Crown.<sup>423</sup> He made no mention of whether there might be a distinction as to the nature of Indian land rights between those which were created when the Crown conferred a "reserve", as was the case in *Guerin*, and those which existed by virtue of the Indians' occupation of ancestral lands "from time immemorial". In sum, his reasons as to the nature of Indian land rights amount to nothing more than a repetition of past dogma with no fresh analysis. As for Wilson J., she also simply referred to two of the same cases as had Estey J. and to *Calder* in a seeming approval of the characterizations given therein,<sup>424</sup> though she did add her own personal characterization to the effect that "[t]he Bands do not have the fee in the lands; their interest is a limited one".<sup>425</sup> She, too, made no reference to whether the Indian interest by virtue of possession from time

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<sup>423</sup> He said simply, *ibid.*, at p. 346 (D.L.R.):

The nature of the interest of the Indian Band, the federal Crown and the Crown in right of the province has been long ago settled in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, affirmed in *Ontario Mining Co. Ltd. v. Seybold*, [1903] A.C. 73, affirming 32 S.C.R. 1, which affirmed 31 O.R. 386; all of which was, only in 1982, re-examined and affirmed in the unanimous decision of this court in *Smith et al. v. The Queen* (1983), 147 D.L.R. (3d) 237, [1983] 1 S.C.R. 554, 47 N.R. 132, *sub nom. Government of Canada v. Smith*.

<sup>424</sup> *Ibid.*, at p. 356 (D.L.R.), she wrote:

In that case [i.e.: *Calder*] the court did not find it necessary to define the precise nature of Indian title because the issue was whether or not it had been extinguished. However, in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, Lord Watson, speaking for the Privy Council, had stated at p. 54 that "the tenure of the Indians [is] a personal and usufructuary right". That description of the Indian's interest in reserve lands was approved by this court most recently in *Smith et al. v. The Queen* (1983), 147 D.L.R. (3d) 237, [1983] 1 S.C.R. 554, 47 N.R. 132, *sub. nom. Government of Canada v. Smith*.

<sup>425</sup> *Ibid.*, at p. 357 (D.L.R.).

immemorial had the same nature as the Indian interest to reserve lands created by the Crown. Thus, her comments also amount to no more than a reliance on past precedents without a fresh review.

In the reasons of Dickson J., however, unlike in those of his two colleagues, one finds a fresh look at the nature of Indian land rights. The future Chief Justice first went further than his two fellow Justices in reviewing the precedents, considering American as well as Canadian cases.<sup>426</sup> He identified therefrom two lines of thought: on the one hand, those cases which identified Native territorial rights as a "personal and usufructuary right" (per the *St. Catherine's* case<sup>427</sup>) or as a mere "Indian right of occupancy" (per the U.S. case of *Johnson*<sup>428</sup>); on the other hand, those cases which went so far as to qualify the territorial right as "a beneficial interest", apparently meaning a proprietary interest, and thus more than a personal usufructuary right or a right of occupancy, (per several cases).<sup>429</sup> He then appears to have effectively rejected both these descriptions of the nature of the Indian territorial interest, saying that though "[t]here is a core of truth in the way each of the two lines of authority has described native title, ...in neither case is the categorization quite accurate".<sup>430</sup> Instead, he advanced his own characterization of the nature of the Indian territorial interest, a characterization which has since become the leading description: He called it an interest which is *sui generis* or unique, and "is personal in the sense that it cannot be transferred to a grantee, but...gives rise upon surrender

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<sup>426</sup> See, *ibid.*, at pp. 337-339 (D.L.R.).

<sup>427</sup> *Op. cit.*, note 116.

<sup>428</sup> *Op. cit.*, note 364.

<sup>429</sup> The cases he cited are: *A.-G. Can. v. Giroux* (1916), 30 D.L.R. 123, 53 S.C.R. 172 (per Duff J., Anglin J. concurring; S.C.C.); *Cardinal v. A.-G. Alta.* (1973), 40 D.L.R. (3d) 553, [1974] S.C.R. 695, 13 C.C.C. (2d) 1 (per Laskin J., dissenting on another point; S.C.C.); *Western Industrial Contractors Ltd. v. Sarcoe Developments Ltd.* (1979), 98 D.L.R. (3d) 424, [1979] 3 W.W.R. 631, *sub nom. Western Int'l Contractors Ltd. v. Sarcoe Developments Ltd.*, 15 A.R. 309 (Alta. C.A.); the Federal Court of Appeal decision in *Guerin* itself, 143 D.L.R. (3d) 416, [1983] 2 F.C. 656, [1983] 2 W.W.R. 386, 13 E.T.R. 245, 45 N.R. 181 (F.C.—App. Div.); and *Miller v. The King*, [1950] 1 D.L.R. 513, [1950] S.C.R. 168 (per Kellock J.; S.C.C.).

<sup>430</sup> *Guerin*, *op. cit.*, note 422, at p. 339 (D.L.R.).

to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians".<sup>431</sup> Nevertheless, his description of the Indian land interest as *sui generis* was apparently circumscribed by his characterization of it, a few lines earlier, as "a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown".<sup>432</sup> Thus, whatever its nature, Dickson J. clearly had in contemplation a right which was subordinate to the title and sovereignty of the federal Crown. Moreover, the nature of the interest was, for him, the same irrespective of whether it existed by virtue of the Crown's creation of a reserve<sup>433</sup> or by virtue of what he called an "unrecognized aboriginal title in traditional tribal lands".<sup>434</sup> He cited in support *A.-G. Que. v. A.-G. Canada* (the Star Chrome case).<sup>435</sup>

Given Dickson J.'s description of the nature of Indian territorial rights, whether in a reserve or in "unrecognized aboriginal title to traditional tribal lands", as a *sui generis* right which is nevertheless restricted to "a legal right to occupy or possess certain lands, the ultimate title

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<sup>431</sup> *Ibid.*. Likewise, at p. 341, he characterized the *relationship* between the Crown and the Indians also as *sui generis*.

<sup>432</sup> *Ibid.*. At this point it may be useful to reproduce the entire passage in which the last three quotations appear. It reads, at p. 339 (D.L.R.):

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it as a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.

Indians have a real right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, (...).

<sup>433</sup> The lands in question in *Guerin* were in fact part of a "reserve...created by the unilateral action of the colony of British Columbia, prior to Confederation": See, *ibid.*, at p. 337 (D.L.R.).

<sup>434</sup> See, *ibid.*, at pp. 336-7 (D.L.R.) where he wrote:

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 land is the same in both cases (...).

<sup>435</sup> (1920), 56 D.L.R. 373 at pp. 378-9, [1921] 1 A.C. 401, at pp. 410-1.

to which is in the Crown", one would think that, if it was not closed before, the *Guerin* case firmly closed the judicial door to the possibility of a successful claim of Native territorial sovereignty. Notwithstanding Mr. Justice Dickson's statements in this case, however, the present writer would argue that *Guerin* is distinguishable on the basis of the case pleaded therein and that the question of Native sovereignty was therefore not put to rest by that case.

It will be recalled that the crux of the Indians' claim in *Guerin* was the existence of either a trust relationship, an agency relationship, or a fiduciary relationship between the Band and the federal Crown, the breach of which by the government gave rise to a claim for damages. In establishing that relationship the Band relied upon the fact that the lands in question were established as a reserve by the Crown and also, in part at least, on certain provisions of the federal *Indian Act*.<sup>436</sup> That statute, then as now, defined a reserve as "a tract of land, *the legal title to which is vested in Her Majesty*, that has been set apart by Her Majesty for the use and benefit of a band".<sup>437</sup> Therefore, the creation of a reserve, a territorial right undeniably stemming from, and subject to, the ultimate sovereignty of the Crown, was central to the Plaintiffs' case. Framed in this way, the Plaintiffs' case did not put in issue the question of who had sovereignty to the land. Moreover, even if the Plaintiffs had framed their case on the basis of their possession of the land from time immemorial, disregarding the existence of a reserve--which they might well have done given that the reserve was unilaterally created by the colony of British Columbia without the assent of the Musqueam Indians--they clearly would have had to accept as part of their case that sovereignty had somehow passed to the British.<sup>438</sup>

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<sup>436</sup> Now R.S.C. 1985, c. I-5.

<sup>437</sup> *Ibid.*, s. 2(1). [Emphasis added.]

<sup>438</sup> There is no indication in either the Supreme Court report of the case nor in any of the lower courts' decisions as to whether the Plaintiffs' ancient tribal territory, or any lesser part thereof encompassing at least the golf club lands, had ever been the subject of a treaty. As will be seen in chapter seven hereof, it does not appear that a treaty ever existed. Thus, a change of sovereignty, if it occurred, could only have happened as a result simply of discovery and settlement. While the Court stated that the reserve was created "by the unilateral action of the colony of British Columbia before Confederation"--likely as a result of a proclamation or  
(continued...)

Otherwise, there would have been no basis upon which they could establish the relationship to the Crown necessary to their claim for damages.<sup>439</sup> Because of this fact, moreover, it seems clear that when Dickson J. equated, as to their nature, the Indians' rights to a reserve and their rights to "unrecognized aboriginal title in traditional tribal lands" he was speaking in *obiter dicta* and in the context of a case in which the issue of Native sovereignty did not arise and had not been properly and fully argued. He was speaking only to the matter of the existence of a fiduciary relationship which the Plaintiffs themselves admitted and in fact needed to prove, and which, as framed by them in the case, was alleged to exist when the Crown is the Sovereign of the land, whether it be reserve land or ancestral land. Thus, *Guerin* is to be read strictly within the confines of the admissions made or implicitly made in the pleadings of this case. *Guerin* cannot be taken as a final statement of Native sovereignty in general.

For the same reason, the Supreme Court's words in *R. v. Sparrow*<sup>440</sup> seemingly denying Native sovereignty must be dismissed as mere *obiter dicta*. The Court there said:

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<sup>439</sup>(...continued)

ordinance of Governor Douglas of the kind discussed by both Judson and Hall JJ. in *Calder*, *op. cit.*, note 232—there is no discussion by the *Guerin* court of the validity of such a colonial act as concerns the acquisitions of sovereignty. (It will be recalled that in *Calder* Judson J. had based his findings of English sovereignty upon such acts while Hall J. (dissenting) seemed to accept English sovereignty almost as a given, perhaps by virtue of first discovery, and only discussed Douglas' acts in the context of saying they were *ultra vires* for the purpose of extinguishing the natives' lesser territorial interest of unspecified nature.)

<sup>439</sup> Unless, perhaps, if the Indians had chosen to rely on their ancestral rights instead of their Crown-conferred right to a reserve and, at the same time, they had chosen to raise the potentially compelling argument that they constituted a sovereign, but protected, State and that the fiduciary obligations which they asserted were equally attributable to Canada as a *Protecting State* by virtue of the latter's imposition of the rule against the alienation of Indian lands except to the Protecting State. Outside of framing their case in this way—which the Indians in *Guerin* did not do—it would have been contrary to the Plaintiffs' interests in this case if they had sought a recognition of their sovereignty.

The fact that Plaintiffs in *Guerin* did not plead their case in this way is clearly seen in the fact Dickson J., without explicit analysis of the question of sovereignty, nevertheless classified the Indian interest in the lands as one of occupation and possession while the ultimate title was in the Crown. The present writer's reasoning on this point is as follows: It is true that Dickson J. stated that the fiduciary relationship existed because the Crown had unilaterally imposed upon itself certain duties as a result of the fact that the Indian interest is inalienable to anyone except the Crown (by which he clearly meant the Crown as *Sovereign*). Now, it is possible that he might say that such a limitation exists also with respect to lands over which Indians are sovereign so long as they are within the Crown's acknowledged "sphere of influence" as Protecting State and that a fiduciary relationship exists in these circumstances as well. However, in such a case it is submitted that he would find it impossible to classify such lands as lands to which the Indians only have a legal right of occupation and possession while the ultimate title was in the Crown. To do so, he would have had to set aside long established notions of the rights of sovereign but protected states. More importantly, it would have required, in order to meet the Plaintiffs' putative sovereignty argument, that he give clear justification, beyond the brief consideration which he gave the point, for so characterizing the Indian interest.

<sup>440</sup> *Op. cit.*, note 330.

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, *there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown, (...)*<sup>441</sup>

This is certainly a strong and unambiguous statement denying the survival of Native sovereignty. But it must be remembered that the issue in *Sparrow* was whether Regulations under the federal *Fisheries Act*<sup>442</sup> restricting the length of driftnets violated the guarantee of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.<sup>443</sup> The issue of Native sovereignty did not arise in the case and no argument was heard with respect thereto such that little weight should be accorded to the statement quoted above as expressing a final decision on this complex question.

Essentially the same conclusion can be claimed regarding a 1991 decision of the Supreme Court. The case of *A.G. Ontario v. Bear Island Foundation et al*<sup>444</sup> is one where an Indian Band sought recognition of its rights to 4,000 square miles of northern Ontario. The Natives claimed their rights thereto had never been extinguished by any treaty entered into by them. The Crown argued that the Band had surrendered the land by the Robinson-Huron Treaty of 1850 or, alternatively, that they had subsequently adhered to the treaty and thus extinguishment had occurred, or in the further alternative, that the treaty constituted a unilateral Crown act of extinguishment (in other words an "Act of State" constituting "annexation", to use British colonial law terms). For present purposes, it is only important to note that at all court levels it was ruled that the band's aboriginal title, if it ever existed, had been extinguished in one or the other of the ways pleaded by the Crown. (The Supreme Court rested its finding of extinguishment upon proof of the Band's subsequent tacit adhesion to the treaty.) It is clear,

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<sup>441</sup> *Ibid.*, at p. 1103 (S.C.R.). [Emphasis added.]

<sup>442</sup> R.S.C. 1970, c. F.-14.

<sup>443</sup> *Op. cit.*, note 327.

<sup>444</sup> *Op. cit.*, note 314.

therefore, that within these facts (if not in some way prior to them) is to be found the passing of sovereignty in the particular case. However, while both the High Court of Ontario and that province's Court of Appeal qualified Native aboriginal rights to land as being dependant on the ultimate pleasure of the British Crown as Sovereign of the lands,<sup>445</sup> the Supreme Court, in affirming the lower court decisions, explicitly stated in its *per curiam* judgment that it was "unnecessary...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 the treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve...[T]he aboriginal right has been extinguished".<sup>446</sup> Thus, the Court left the issue of Native sovereignty open until the advent of an appropriate case.

Just a year before its brief decision in *Bear Island*, the Supreme Court released its decision in *R. v. Sioui*<sup>447</sup> in which the Court seemed to have opened the judicial door, if only by a crack, to the possibility of Native sovereignty. Unfortunately, the same reasoning which allowed the distinguishing of statements in the above-discussed cases when they seemed to contain rejections of Native sovereignty forces us to reject the passages in *Sioui* which seem to support Native sovereignty: Native sovereignty was not in issue in *Sioui* and the statements were thus *obiter dicta*. These passages nevertheless bear examination.

The Court's November 1990 decision concerned four Indians who had been charged and convicted at first instance of certain regulatory offenses alleged to have been committed in a provincial park in Quebec. Specifically, they were charged with offenses relating to the cutting

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<sup>445</sup> See in the High Court's comments quoted in the Court of Appeal decision, *ibid.*, at p. 123 (D.L.R.), as well as the Court of Appeal's own comments at p. 135 (D.L.R.).

<sup>446</sup> See the S.C.C. decision, *ibid.*, at 575 (S.C.R.).

<sup>447</sup> *Op. cit.*, note 157.

of trees, camping illegally and making fires. The Indians claimed to be entitled to engage in these actions by virtue of an ancient treaty with the English dating back to the last days of the latter's war in America with the French (specifically, the year 1760), and which treaty, by virtue of s. 88 of the *Indian Act*,<sup>448</sup> was claimed to exempt the Indians from the application of the particular provincial laws. The Quebec Court of Appeal agreed and overturned the convictions. This decision was affirmed on further appeal to the Supreme Court. In rendering the decision of the Court, and in the context of discussing whether the particular document relied upon by the defendant Indians was in fact a "treaty", Lamer J. (as he then was) rejected the government's contention that the document was a mere capitulation in the same sense as that signed by French and Canadians at both Montreal and Quebec, and made the following significant comments regarding the nature of Indian-European relations at that time:

I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian *nations* had sufficient *independence* and played a large enough role in North America for it to be a good policy to maintain relations with them *very close to those* maintained between sovereign nations.

The mother countries did everything in their power to secure the *alliance* of each Indian *nation* and to encourage *nations allied* with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of *alliance or neutrality*. This clearly indicates that *the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations*.<sup>449</sup>

Many of the italicized words in the above passage indicate the Court's view that the status of the Indians was that of free and independent nations capable of negotiating agreements of alliance or neutrality. True, on the other hand, Mr. Justice Lamer referred (in the above passage) to this treatment as being a matter of "good policy" and as being only "very close to"--not identical to--the type of relations maintained between what he called "sovereign nations", by which he clearly meant between "civilized nations". But it is possible, to a certain extent, to

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<sup>448</sup> *Op. cit.*, note 436.

<sup>449</sup> *Sioui*, *op. cit.*, note 157, at 1052-3 (S.C.R.). [Emphasis added.]

understand both these references as not diminishing the interpretation of this passage as recognizing Native sovereignty in law.

The first of these two references—that the treatment was a matter of "good policy"—would on the surface seem to have taken the treatment of the Indians as a requirement of the policy, not the law, of Britain and France. But was this a deliberate distinction by Mr. Justice Lamer? His Lordship, writing in 1990, would have been well aware of both the *Johnson* decision<sup>450</sup> in the U.S. and the *Symonds*<sup>451</sup> decision in New Zealand. In both of these the learned Justices rendering the judgments had found that a practice—or policy, to use Mr. Justice Lamer's word—of the European Powers towards North America's Indians could, from long usage, mature into a legal requirement.<sup>452</sup>

The second of Mr. Justice Lamer's two references just highlighted above—that the relations maintained with Indians were only "very close to" those maintained between sovereign nations—is less easily dismissed. It is possible, but not certain, that he was merely limiting his comparison of the two types of relations in recognition of the fact that, unlike in European-to-European relations, in European-Indian relations there was an accepted restriction against Indians alienating their lands to anyone but the governments of European nations who had wrested from

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<sup>450</sup> *Op. cit.*, note 364.

<sup>451</sup> *Op. cit.*, note 4.

<sup>452</sup> In *Johnson* Marshall C.J. hinted at this principle when he said, *op. cit.*, note 364, at p. 693 (L Ed):

However extravagant the pretension of converting the discovery of an inhabited country into a conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of community originates in it, *it becomes the law of the land, and cannot be questioned.* [Emphasis added.]

The correctness of Chief Justice Marshall's finding that any of the colonial Powers pretended to "convert the discovery of an inhabited country into a conquest" was questioned in the preceding section of this chapter. For present purposes, however, this passage does serve to show he thought a practice—or policy—could over time mature into a legal requirement.

In *Symonds, ibid.*, Chapman J. made similar remarks, at p. 390:

The practice of extinguishing Native title by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. *It is now part of the law of the land, (...).* [Emphasis added.]

the other Powers the exclusive right of acquisition. If this was what he had in mind, then perhaps he would have thought the nature of the European-Indian relations to be in all other respects the same as European-to-European relations. This is admittedly a speculative interpretation of His Lordship's words. But it does seem supported by a later passage where he discusses why the Court did not believe the document at issue could be equated with the French and Canadian "Capitulations". Lamer J. wrote:

Such a document [which contained wording resembling that of the Capitulations] could not be regarded as a treaty so far as the French and the Canadians were concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations for the signature of treaties affecting them. *The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory.*<sup>453</sup>

But, as stated at the outset of the discussion of this case, whatever might be the proper interpretation to put on the words of Lamer J. quoted above, whatever might have been his views on the issue of Native sovereignty, his words in *Sioui* cannot in all honesty be taken as a firm judicial recognition of that sovereignty for the same reason as previous judicial pronouncements seemingly rejecting the possibility of sovereignty were distinguished above: the *Sioui* case did not, and could not, place in issue the question of sovereignty. As the learned Justice himself noted, the defendants "have at no time based their argument on the existence of *aboriginal rights* protecting the activities with which they were charged".<sup>454</sup> The defendants asserted their rights as stemming strictly from the treaty, and hence as *emanating from* the Crown, since they declined to assert a previously-existing traditional aboriginal right. Moreover, the facts were such, in the case of the particular Indian band to which the defendants belonged, that no

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<sup>453</sup> *Sioui*, *op. cit.*, note 157, at p. 1056 (S.C.R.). [Emphasis added.]

<sup>454</sup> *Ibid.*, at p. 1067 (S.C.R.). [Emphasis added.]

ancestral right could in fact exist in their particular situation since their title was given to them by the French Jesuits only in 1650:

Let us look first at the relationship the Hurons had with the territory the respondents claim is covered by the treaty. No one claimed that area...was land over which there was an aboriginal title in favour of the Hurons. In fact, a group of about 300 people had been brought into the area around Québec by the Jesuits in 1650...and its relatively recent presence in the Lorette area suggests that Hurons did not have historical possession off these lands.<sup>455</sup>

Accordingly, it is clear that this case cannot have involved a consideration by the Court of a possible recognition on the part of the English and the French of even "common law aboriginal title", let alone Native sovereignty. Thus, the Court's comments regarding the nature of Native territorial rights absent a treaty, though encouraging to the premise sustained here, are nevertheless to be read within the confines of that case.

Finally, it should be noted that the Supreme Court may soon take the opportunity to once and for all enlarge or restrict the parameters of aboriginal land rights at Canadian law. Unfortunately, the case it will consider, because of the nature of the claims made therein, will again not result in any definitive pronouncements on the specific issue of whether Native sovereignty exists where there is no treaty.

The case is *Delgamuukw v. British Columbia*.<sup>456</sup> In this case the hereditary chiefs of the Wet'suwet'en Indians and most of the hereditary chiefs of the Gitsan Indians (those of the Kitwancool houses of the Gitsan refusing to join the action) were suing the province of British Columbia for judicial recognition of their aboriginal rights to their ancestral lands in central British Columbia. They specifically sought recognition of aboriginal rights of "ownership" (i.e. "title") of the land and "jurisdiction" (i.e. self-government) over both the land (that is to say its resources)

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<sup>455</sup> *Ibid.*, at p. 1070 (S.C.R.). See also the passage at p. 1032 (S.C.R.).

<sup>456</sup> [1993] 5 W.W.R. 97, 104 D.L.R. (4<sup>th</sup>) 470 (B.C.C.A.); *rev'g* [1991] 3 W.W.R. 97, 79 D.L.R. (4<sup>th</sup>) 185 (B.C.S.C.). Leave to appeal and cross-appeal to S.C.C. granted March 10, 1994: see file no. 23799.

and their respective peoples. The trial judge also agreed at trial to consider their claim as pleaded as sufficient to include an alternative claim to what he called "other aboriginal rights", which were taken to mean rights to an interest in the land less than that included in "ownership" and "jurisdiction". Certainly, these claims, in the aggregate, come closer to a pure claim to sovereignty than any previous claim made in a Canadian court. And, no doubt, anything the Supreme Court will have to say in this case will have profound ramifications for many aboriginal land claims. But the salient fact which renders this case of less value to the present issue of the survival of Native sovereignty is that the Crown's sovereignty over the Indians' lands was not challenged; it was in fact admitted by the Plaintiffs.<sup>457</sup> Thus, anything the lower courts may have said in their judgments in this case which seemed to affirm Crown sovereignty in British Columbia, and anything the Supreme Court of Canada might say in this regard when it in turn considers this case, must be tempered by the Plaintiffs' admission. That is not to say that *Delgamuukw* is a case of marginal importance in Native land claims law. On the contrary, given the findings in the lower courts, and particularly the diverging opinions expressed in the Court of Appeal, on the questions of aboriginal title, jurisdiction and "lesser rights",<sup>458</sup> this case will

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<sup>457</sup> The fact that British sovereignty was not placed in issue is made clear in several passages of both the trial and appeal decisions: See, for example, in the reasons at trial, *ibid.*, at p. 126 (3 W.W.R.); and, on appeal, see *ibid.*, at pp. 465, 565-6, 591, 694, and 714 (104 D.L.R. (4<sup>th</sup>)).

<sup>458</sup> At trial, McEachern C.J.B.C. (as he then was) rejected as unproven the Indians' claims to "ownership" and to jurisdiction of the lands in issue. But he accepted as proven, at least over a smaller portion of the claimed territory, an ancestral aboriginal right to live in their villages and to have non-exclusive use of "adjacent lands" for the purpose of gathering the products of the lands and waters for sustenance and ceremonial purposes. However, he also found that this right, together with all other aboriginal rights of Indians in the province, had been extinguished in the colonial period before Confederation by virtue of the same thirteen local ordinances and proclamations as had been in issue in *Calder*, *op. cit.*, note 232. Despite this extinguishment, however, he ruled that the Crown's fiduciary obligations as well as its honour, as ruled in *Guerin*, *op. cit.*, note 422, imposed on it a duty to permit the plaintiffs a non-exclusive right of use over vacant Crown lands (which the territory had become upon extinguishment) for aboriginal purposes in common with such use as non-Indians may legally make of it. This right was enforceable by law but was also subject to the general laws of the province. It lasted only until such time as the lands were required for other valid and non-compatible provincial purposes.

By the time the Court of Appeal heard arguments in the case a new provincial government which was more receptive to Native aspirations had been elected. As a result, the Crown abandoned the argument, successful at trial, to the effect that the colonial enactments had extinguished aboriginal land rights existing from time immemorial. Because of this, the Court appointed *amici curiae* to argue the aspect of the case the Crown had chosen to abandon. Nevertheless, the different Justices who rendered reasons in the appeal all concurred in accepting that extinguishment had in fact not occurred by virtue of the colonial acts.

Though the Crown now admitted no extinguishment had occurred, they maintained the correctness of the trial judge's findings on other points. Specifically, they maintained the correctness of the ruling that "ownership" and "jurisdiction" had not been proven such that the surviving aboriginal rights were non-exclusive rights of user over the lesser territory identified by the trial judge.

(continued...)

be closely watched by all sides. It is to say, however, that the case does not serve to advance the arguments either for or against the present thesis.

In the next two sections, it is intended to briefly consider, for purposes of comparison, what courts in Australia and New Zealand have said on the question of Native sovereignty. It will be seen that there too, despite a gradual liberalization of views, the judiciary has not authoritatively determined their answers to the issue of Native sovereignty.

### Australian Caselaw

It was found, in chapter five, that despite instructions from London to the contrary the colonists and local authorities "on the ground" in Australia flagrantly disregarded the rights of the indigenous people and asserted that Australia had been *terra nullius*, owing to the low scale of civilization of its Natives. This allowed the colonists and local authorities to assert that Australia was properly appropriated to British sovereignty by mere occupation and settlement and, moreover, that no aboriginal interest in land whatsoever existed thereafter. It was also stated in that chapter that, with time, authorities in London came to acquiesce in these notions. But what of the judiciary? What view did it take concerning the position of Australia's Aborigines?

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<sup>458</sup>(...continued)

The many aspects of the various judgments in the Court of Appeal are too complex to summarize here. But it can generally be said that a majority of the Justices essentially agreed with the Crown's arguments for upholding the trial judgment in every respect except the question of blanket extinguishment: See the judgments of Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A. who both refused to interfere with the trial judge's assessment of the evidence in ruling that it failed to establish aboriginal "ownership". Also, both Justices thought that the complete division of powers between the provinces and Canada in the country's constitution precluded any determination by the Court on the issue of "jurisdiction". Both relied on *Guerin* in classifying the surviving aboriginal rights as *suis generis* and in agreeing with that case that it was unwise to classify those rights in terms of property law concepts as either a "beneficial interest" or a mere "personal and usufructuary right".

Hutcheon J.A., dissenting in part, would have ruled the aboriginal right to be proprietary in nature. But, he agreed that it is non-exclusive. And, he too would have refused to interfere with the trial findings on the claim to jurisdiction.

Only Lambert J.A., dissenting, would have found that aboriginal rights, including rights of ownership and jurisdiction, have their origin in aboriginal society, were proven in this case, and continue to exist after the assumption of sovereignty by virtue of the Doctrine of Continuity unless inconsistent with that sovereignty or unless specifically extinguished by an act clearly and plainly exhibiting the intention to do so. In this case, he would have found no such specific extinguishment.

Owing to their lack of understanding of the British judicial system, the Australian Aborigines were not very litigious during the first century and a half of white settlement on that southern continent. Australian case reports of the nineteenth century do not reveal any instance (at least so far as the present writer could discover) in which the judiciary was asked by the Natives themselves, or indeed by anyone, to rule directly upon the existence and nature of Native territorial rights. Nevertheless, there exist many cases in that century involving disputes between British subjects or between a British subject and the Crown, or even between the Crown and itself, which cases usually involved issues far removed from Native territorial concerns (for example, issues of property law such as claims of adverse possession against the Crown) but in which were made statements subsequently relied upon as shedding some light as to the existence or non-existence of Native territorial rights. These statements were invariably interpreted as inimical to the existence of such rights (whatever be their exact nature).

For instance, it was often stated in such cases that Australia, or one of its predecessor colonies, was a "settled", not a "conquered" or "ceded" colony.<sup>459</sup> Such pronouncements, however, were usually given in the context of establishing the applicability of a property law principle of English common law to the particular colony.<sup>460</sup> No question of Native rights was raised in these cases and the courts' attentions were not directed to this question in any of the cases cited here.

Another statement often made in these early cases of Australian property law which would later come to be cited as authority for the denial of the existence of Native land rights was that under English common law, introduced into the Australian colonies by virtue of their

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<sup>459</sup> This was most authoritatively stated by the Privy Council in *Cooper v. Stuart* (1889), 14 A.C. 286 (P.C.), at 291. Other early cases stating this are: *Attorney-General v. Brown* (1847), Legge 312, 2 S.C.R. (N.S.W.) App. 30 (N.S.W.S.C.), at 317 (Legge), *Doe d. Wilson v. Terry* (1849) Legge 505 (N.S.W.S.C.), at 508-9, where the finding that New South Wales was a "settled" colony is only implied; *White v. McLean* (1890) 24 S.A.L.R. 97; and *Winterbottom v. Vardon & Sons Ltd.*, [1921] S.A.L.R. 364, at 369.

<sup>460</sup> See: *Attorney-General v. Brown*, *ibid.*, at 318 (Legge); *Cooper v. Stuart*, *ibid.*, at 291-2; and *Council of the Municipality of Randwick v. Rutledge* (1959), 102 C.L.R. 54 (H.C.), at 71.

acquisition by settlement, the King was the proprietor of all ungranted waste lands. No person could show a valid title unless it was obtained by valid grant from the Sovereign.<sup>461</sup> Again, such statements, while undoubtedly correct as concerns the titles of British subjects, were made in contexts where Native land rights were not an issue, and so not considered. Moreover, they are reliant upon the correctness of the cases saying Australia was a *settled* country, which cases, again, did not involve Native participation as parties or Native rights as an issue.

As a result of these judicial statements—that Australia was acquired by settlement and that the Crown was the original proprietor of all the soil as of its settlement such that all grants must emanate from the Crown—it came to be stated that the judicial view had in fact been expressed to the effect that no Native territorial interest survived the settlement of Australia. Indeed, one of these cases, though not involving in any way Aborigines as parties nor Native rights as an issue, contained *dicta* which might well have expressed this belief.<sup>462</sup>

Assuming a judicial negation of the survival of any Native territorial rights after settlement in fact exists in the early cases, this would import a rejection of what has been called here the doctrine of common law aboriginal title. And, certainly, no issue of Native sovereignty would have existed since a finding that Australia was acquired by settlement would have negated such a sovereignty. But, as stated above, these cases were not concerned with Native land issues and the rules expounded therein were not directed to such concerns. It is suggested, therefore,

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<sup>461</sup> See: *R. v. Steel* (1834) Legge 65 (N.S.W.S.C.), at 68-9; *Attorney-General v. Brown*, *op. cit.*, note 459, at 316-8 (Legge); *Hatfield v. Alford*, (1846) Legge 330 (N.S.W.S.C.), at 336; *Doe d. Wilson v. Terry*, *op. cit.*, note 459, at 508-9; *Williams v. A.G. for New South Wales*, (1913) 16 C.L.R. 404 (H.C.), at 428 and 439; and *Council of the Municipality of Randwick v. Rutledge*, *ibid.*, at 71.

<sup>462</sup> In *Attorney-General v. Brown*, *ibid.*, at 324 (Legge) the Court rejected, as contrary to the notion of the Crown as original proprietor of the soil, the argument that an *allodial* title—that is to say a title not held of the Crown—could exist. This rejection was made in these terms:

Whether the term [*allodium*] implies a property acquired by lot, or a conquest, or one left in the occupation of the ancient owners, (that is, of the original inhabitants, see *Steph., Com. title Tenures, and the authorities there cited*) it equally rejects the supposition of a title, in or from the Sovereign. That objection, therefore, is only another mode of disputing that title [of the Crown]. [Emphasis added.]

that these cases are of little use either way on the issues of Native sovereignty or, indeed, of Native territorial rights of a lesser nature.

While the early cases did not involve as parties any Aborigines and were not concerned with issues of Native territorial rights, much more recent cases do contain these characteristics.

In 1971 the Supreme Court of the Northern Territory released its decision in *Milirpum v. Nabalco Pty Ltd. and the Commonwealth of Australia*<sup>463</sup> in which the territorial rights of various aboriginal groups inhabiting the Northern Territory were clearly put in issue by the Aborigines themselves. While only a trial court decision, this judgment was long considered to have "a status as the ruling decision on this issue [of aboriginal title] for the whole country".<sup>464</sup> However, on the question most relevant to the present thesis, that is to say whether British sovereignty had in fact been extended over Australia, the case is of little significance since the Native plaintiffs in *Milirpum* did not contest, but rather fully admitted, that British sovereignty had been extended to New South Wales (out of which was later carved the Northern Territory). Instead, they relied upon the contention that their traditional Native title stood as a burden to the Sovereign's radical title.<sup>465</sup> Therefore any consideration by the Court of the issue of sovereignty was *obiter* and without the benefit of full argumentation. Nevertheless, it is significant that in the course of his judgment Blackburn J. cited, apparently with approval, caselaw expounding the "act of State" doctrine to the effect that the acquisition by a State of sovereignty over new territory is an act of State, the validity of which domestic courts cannot enquire into.<sup>466</sup> While the use of the act of State doctrine in this and other Australian cases

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<sup>463</sup> (1971), 17 F.L.R. 141, [1972-73] A.L.R. 65 (N.T.S.C.).

<sup>464</sup> From Morse, *op. cit.*, note 350, at p. 35.

<sup>465</sup> This is made plain in the report of the decision, *op. cit.*, note 463, at p. 149-150.

<sup>466</sup> See, for example, *ibid.*, at p. 226, where the Indian case of *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 Ind. App. 357 (J.C.P.C.) was cited to this effect.

is examined more closely below, it need only be observed for the moment that it appears from his reference to this doctrine that Blackburn J. would have refused to hear as non-justiciable any argument on the survival of Native sovereignty, had it been argued. Moreover, the fact that Blackburn J. repeatedly classified Australia as, in law, a "settled" colony (despite the factually incorrect assumption of earlier cases that its Aborigines were not organized into societies with their own law) shows that he believed that British sovereignty had been extended to Australia in this way. His likely rejection of any aboriginal sovereignty, had it been argued, is all the more evident given that on the principal question at issue in that case, whether a "traditional native title" (i.e. a Native territorial right of a lesser nature than territorial sovereignty) co-existed alongside with the Crown's radical title as Sovereign, he ruled, for reasons which need not be noted here but which are dubious in many respects,<sup>467</sup> that no such title existed under the common law of England or Australia (or, for that matter, under the common law of any other former British colony--the U.S., Canada, India, Africa and New Zealand being specifically considered). As shown below, Blackburn J. would later be overruled on this issue. But it does show the extent of his rejection of aboriginal interests in land, whatever be their nature.

In the next case considered here, *New South Wales v. Commonwealth*<sup>468</sup> there is again reference to the act of State doctrine in these terms:

The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.<sup>469</sup>

However, this was a case in which the several states of Australia were suing the federal government with respect to the validity of a Commonwealth statute expressing federal jurisdiction over territorial seas. Native territorial rights--and certainly Native sovereignty--were not in issue

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<sup>467</sup> See generally the analysis in McHugh, *The Aboriginal Rights.... op. cit.*, note 342, at chapter 8 thereof.

<sup>468</sup> (1975), 135 C.L.R. 337, 8 A.L.R. 1 (H.C.).

<sup>469</sup> *Ibid.*, at 388 (C.L.R.) and 28 (A.L.R.).

and the Aborigines were not a party to the action. Thus, again, consideration of the issue of sovereignty as against the Natives and, more particularly, of the applicability of the act of State doctrine to the Natives' situation was not undertaken by the Court.

In *Coe v. The Commonwealth of Australia*<sup>470</sup> the issue of Native sovereignty was clearly pleaded; as was, in the alternative, the survival of a common law aboriginal title existing as a burden upon the new Sovereign's radical title. On the latter issue, the Court unanimously expressed the willingness to consider the question of Native title in an appropriate case despite its earlier rejection by the lower court in *Milirpum*. However, due to deficiencies in the pleadings, this was not the proper case. But on the alternative argument presented, the High Court expressly rejected the possibility of the survival of Native sovereignty. At first instance, Mason J. of the High Court found the survival of Native sovereignty was "unarguable"; basing his decision upon "the accepted legal foundations of Australia" as well as upon the non-justiciability in domestic courts of the international law concept of *terra nullius*.<sup>471</sup> A four-member panel of the same court, sitting in appeal, based its rejection of the sovereignty arguments on the act of State doctrine.<sup>472</sup> Thus, assuming the Court correctly applied the act of State doctrine—a matter about which, again, comment will be made below—*Coe* would appear to constitute a final judicial pronouncement on the issue of Native sovereignty in Australia.

In *Re Phillips; Ex parte Aboriginal Development Commission*<sup>473</sup> Neaves J. applied the various rationales expressed in *Coe*, including the act of State doctrine, for rejecting the possibility that aboriginal sovereignty could be claimed in Australian courts. As in *Coe*, an

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<sup>470</sup> (1979), 24 A.L.R. 118 (H.C.); *affg* (1978), 18 A.L.R. 592 (H.C.).

<sup>471</sup> *Ibid.*, 18 A.L.R. 592, at 596.

<sup>472</sup> *Ibid.*, 24 A.L.R. 118, at 128 (per Gibbs J.; Aickin J. concurring) and 131 (per Jacobs J.; Murphy J. *apparently* concurring in this regard).

<sup>473</sup> (1987), 72 A.L.R. 508 (Fed. Ct. of Aust.—Gen'l Div.).

Aborigine was a party to this proceeding such that it would lend more judicial authority to the principle upon which it relies.

The High Court having invited, in *Coe*, a reconsideration in an appropriate case of the issue of whether at common law a traditional Native title could have survived the acquisition of the continent to British sovereignty, such an opportunity arose in *Mabo v. Queensland*.<sup>474</sup> This decision has been widely hailed as a major leap forward in Australian aboriginal law in that by a 6-1 majority it rejected the long-held-to fiction that Australia was legally *terra nullius* at the time of its settlement by whites and also firmly accepted the survival of a traditional Native title at common law after the advent of British sovereignty (thereby finally rejecting this aspect of *Milirpum*). But, on the issue of sovereignty, the Court unanimously found that English sovereignty had been established in Australia. What is less clear in the judgment is how, if the territory was not *terra nullius* but was populated by organized political societies of Aborigines, did British sovereignty extend itself over the Aborigines and their territory. The Court simply based its decision on this matter upon the act of State doctrine.<sup>475</sup> The acts of State relied upon consisted of the various acts which created New South Wales Colony, separated therefrom the colony of Queensland and, as to the particular islands at issue, annexed the islands to the latter colony. But these acts are not specifically examined with a view to ascertaining their true nature as concerns the extension of British sovereignty over the Aborigines and their territories.

However, there is to be found within some of the judgments delivered in *Mabo* an explanation for the Court's cursory examination of, and finding for, the extension of British sovereignty to Australia by act of State: As was the case in many of the Canadian precedents and in the earlier *Milirpum* case in Australia itself, the Native plaintiffs readily admitted English

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<sup>474</sup> (1991), 175 C.L.R. 1, 107 A.L.R. 1 (H.C.).

<sup>475</sup> See, *ibid.*, at A.L.R. 20 (per Brennan J.), A.L.R. 58 and 71 (per Deane and Gaudron JJ.), A.L.R. 92 (per Dawson J., dissenting on other issues), and A.L.R. 140-2 (per Toohey J.).

sovereignty and based their claim instead upon the ultimately successful argument of a surviving common law aboriginal title.<sup>476</sup> Thus, once again the Court's pronouncements on the issue of sovereignty were not necessary. But, the *Mabo* court's pronouncements against Native sovereignty at least have the virtue of being supported by one high level decision, *Coe*, in which the issue was clearly pleaded. Thus, the real issue to be considered here is whether the act of State doctrine was correctly applied in *Coe*.

In consequence of the foregoing cases, and especially *Coe*, it seems that the act of State doctrine is now the accepted basis in the law of Australia for refusing to consider the possibility of Native sovereignty. But that doctrine simply holds that if the Crown, by act of State, says it is assuming sovereignty over a given territory, then its own courts cannot enquire into the *validity* of that act but must respect the Crown's will. The present writer concurs with McNeil, who has argued that domestic courts can enquire into the existence in fact of an act of State<sup>477</sup>. Likewise, it is submitted that domestic courts can enquire into the actual effect of that act of State, if it be an act of State, without questioning its validity. The latter enquiry, in other words, is into the intended and actual nature of a particular act of State. This would be determined from the available evidence of what the Sovereign was doing when it issued the pronouncements constituting the act of State. If the Crown intended to extend its sovereignty over the territory notwithstanding the presence there of aboriginal societies, then domestic courts could not rule on whether such act accorded with either British colonial law or international law. On the other hand if, as has been argued herein with respect to the Crown's actions in North America, the Crown was simply assigning to the colonial authorities its right to wrest the sovereignty from the

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<sup>476</sup> This is made plain by Brennan J., *ibid.*, at A.L.R. 19, by Toohey J. at A.L.R. 137-8 and 142, and by Dawson J. at A.L.R. 92.

<sup>477</sup> See McNeil, *op. cit.*, note 2, at p. 163 (note 111), where that scholar writes: "But though courts have no jurisdiction over acts of sovereign power, they do have jurisdiction to decide whether a given act really is an act of state." See also the cases he cites in support.

Aborigines by cession or conquest, then domestic courts should be permitted to so find. In this respect, the act of State doctrine should not stand in the way of the justiciability of the issue of Native sovereignty in domestic courts.

The Privy Council decision in the New Zealand case of *Nireaha Tamaki v. Baker*,<sup>478</sup> though concerning the extinguishment of Native title rather than of Native sovereignty, is support for the proposition that simply pleading an act of State is not enough to take the case out of judicial cognizance. In that case, the Commissioner of Crown Lands for the New Zealand provincial district of Wellington defended an action based on an unextinguished Native title by pleading that he had extinguished it by statutory authority and that such act constituted the exercise of Crown Prerogative (i.e. an act of State) into the validity of which the courts could not enquire. The Privy Council rejected this defence, saying that defendant (and the lower court in New Zealand) had misconstrued the nature of the plaintiff's pleading. The plaintiff, it said, was not challenging the *validity* of a prerogative act of the Crown, but its *existence*. The plaintiff was stressing that the defendant was not "the Crown" and was not acting with the authority of the Crown. The Board accepted that the defendant had not acted within his statutory authority such that the Native title had not been validly extinguished by an act of State. In these circumstances, the issues of whether Native title could be extinguished by the exercise of the Prerogative and of whether the courts could enquire into the validity of the use of the Prerogative in this way *by the Crown or its duly authorized agent* did not, strictly speaking, arise.<sup>479</sup> Thus, *Nireaha*

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<sup>478</sup> [1901] A.C. 561 (J.C.P.C.).

<sup>479</sup> See, *ibid.*, at 575-6, where it is stated:

Their Lordships think that the learned judges [of the New Zealand Court of Appeal] have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. (...)

...[I]t was held in *Musgrave v. Pulido* [(1879) 5 App. Cas. 102] that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State".

(continued...)

*Tamaki* established that courts can enquire into the *existence* of an act of State. By the same token, it is submitted that courts can enquire into the *effect*, that is to say the *nature*, of an act of State. But it can never enquire into its *validity*.

Moreover, it is significant in this regard that in *Mabo* the High Court did not regard the act of State doctrine as precluding an examination by domestic courts of whether the particular pronouncements which constituted the act of State contained any directive extinguishing the traditional Native *title* which would otherwise survive an extension of British sovereignty and constitute a burden upon the new Sovereign's radical title. By the same token, domestic courts should be permitted to enquire whether there is anything in the particular pronouncements which might indicated whether or not Native *sovereignty* was meant to be superseded by a British sovereignty. Instead, the Australian courts seem to have taken it for granted that the Crown's intent was to extend its sovereignty over that continent irrespective of the presence there of aboriginal societies which, as the *Mabo* court itself finally recognized, had theretofore been sovereign societies.

In summary, it is submitted that the Australian cases and the act of State doctrine often referred to therein do not foreclose the possibility that Natives might again argue, in a proper case, that no act of State exists by which British sovereignty was extended to Australia. It would be necessary, as first step, to distinguish *Coe* on the basis that the *nature* of the acts of State was not considered therein. If, on the other hand, an act of State having this affect were to be proven, its validity could not then be contested in Australian courts. Any remedy in this regard

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<sup>478</sup>(...continued)

...[T]here is no suggestion [in this case] of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such right still exists.

And, at p. 580:

Their Lordships, of course,...express no opinion on the question which was mooted in the course of argument, whether the native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.

would then rest only in the International Court of Justice and in international law principles applicable only in that forum, where there is no act of State doctrine to preclude the Court's consideration of the issue. Examination of this possibility is beyond the scope of this paper.

Having dealt with the Australian cases and how one might deal with their rejection of Native sovereignty on the basis of the act of State doctrine, it should be noted that recent political developments in Australia, consequent upon the *Mabo* decision, may lead to the issue of Native sovereignty finally being put to rest in that country.

As stated above, *Mabo* firmly rejected once and for all the notion that Australia had been *terra nullius* when first visited and settled by the English in the late eighteen century. The case then asserted that Native title therefore survives in Australia if it has not been expressly extinguished. As a result of this decision, an "historic agreement" was recently reached between federal and state governments (except the state of Western Australia), Aborigines, miners, farmers and other industry groups which will lead to legislation implementing a means to reconcile Native title with existing and future grants of land burdened by recognized or unrecognized Native title.<sup>480</sup> While the outline of the proposed legislation<sup>481</sup> itself says nothing concerning either the doctrine of *terra nullius* or the question of sovereignty itself, the Australian Prime Minister, Mr. Paul Keating, said in the course of a statement upon this legislation:

The crux of the matter is that the High Court has formally recognized what should have been accepted long ago--that Australia was not Terra Nullius, a land belonging to no-one when the Europeans arrived. There were prior owners. They were often dispossessed.<sup>482</sup>

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<sup>480</sup> See Christopher Zinn, "Aborigines win land deal: 'Historic' law recognizes native title", *Ottawa Citizen*, October 20, 1993, p. D12.

<sup>481</sup> At the date of this writing the final first-reading version of the Bill was expected soon.

<sup>482</sup> "Statement by the Prime Minister, The Hon. P.J. Keating, MP, *Mabo* legislation", Canberra, 2 September 1993.

And he promised that "[a]s a second stage in our response to Mabo, I expect to make announcements about these wider matters later in the year".<sup>483</sup>

In a "Policy Note" of October 7, 1993, moreover, he is quoted as saying that the proposed legislation would be "recognizing in law the fiction of *terra nullius* and the fact of native title".<sup>484</sup> If by this is meant that the agreement and legislation will provide that British sovereignty was (or will formally be) extended to Australia by the fictional application of the doctrine of *terra nullius* while Native title will be preserved, then it may thereafter be impossible to again raise the issue of Native sovereignty in Australia. This will be determined by the final version of the proposed law.

In any case, the arguments presented here against the use in Australian cases of the act of State doctrine would hold and could be used to counter a similar use in jurisdictions such as Canada where no such legislation addressing the issue of sovereignty exists.

### **New Zealand Caselaw**

It was noted in chapter five that despite Captain Cook's actions during his voyages to New Zealand in 1769-70 and notwithstanding that British subjects, without official sanction, had planted themselves on New Zealand soil by the 1830's, the official position of the English Crown was declared by 1839 to be that it considered New Zealand (or, at least, the north island thereof) to then be under the dominion of the sovereign and independent Maori peoples of those islands.<sup>485</sup> It was also explained in that chapter that in consequence of this policy the Crown

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<sup>483</sup> *Ibid.*

<sup>484</sup> "Policy Note: Australian Government decides native title policy", Australian High Commission, Policy Note 56/93, October 7, 1993.

<sup>485</sup> See the elements of proof given in chapter five, particularly the dispatch from the Secretary of War and Colonies issued in August 1839, which was quoted, *op. cit.*, at note 342.

negotiated the *Treaty of Waitangi* in 1840, in which the Maori chiefs (at least according to the English text of the treaty) ceded their right of sovereignty over New Zealand to the British monarch.<sup>486</sup>

Given this factual background, one would have expected the New Zealand judiciary to unanimously trace the acquisition of British sovereignty in that country to the act of cession of 1840, that is to say the *Treaty of Waitangi*, and no earlier. Yet, some oft-cited judgments have denied that the treaty was the instrument by which English sovereignty attached to New Zealand and have instead declared sovereignty to have been acquired by discovery and settlement prior to 1840; perhaps as long before as Cook's visits in 1769-70. Some judgments have gone so far as to treat those provisions of the treaty which concern sovereignty as "a simple nullity" since the natives were savages and not a sovereign people.<sup>487</sup> It appears, moreover, that some scholarly opinion has concurred in the assessment of the treaty's sovereignty provisions as a nullity.<sup>488</sup>

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<sup>486</sup> See, *op. cit.*, at notes 344 to 347 and accompanying text.

<sup>487</sup> In *Wi Parata v. Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 72 (S.C.), at pp. 77-8, Prendergast C.J. wrote:

On the Foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilized community.

...

So far indeed as [the *Treaty of Waitangi*] purported to cede the sovereignty—a matter with which we are not here directly concerned—it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.

See also: *Tamihara Korokai v. Solicitor-General* (1913), 32 N.Z.L.R. 321, 15 G.L.R. 95 (C.A.), at 354 (N.Z.L.R.) and 111 (G.L.R.); and *In re Ninety-Mile Beach*, [1963] N.Z.L.R. 461 (C.A.) per North J. One might also mention here an 1858 decision by acting Chief Justice Stephen which was mentioned in support (but not named or cited) by Prendergast C.J. in *Wi Parata* (see p. 78 thereof) and of which Prendergast C.J. said it "imports that the title of the Crown to the Country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages".

<sup>488</sup> In the report of *In re Ninety-Mile Beach*, *ibid.*, at p. 463, the Solicitor-General, in arguing that "the weight of opinion of Judges, historians and constitutional writers is that sovereignty came by settlement or annexation" rather than by virtue of the *Treaty of Waitangi*, cites in support both the *Wi Parata* and *Tamihara Korokai* cases as well as the following scholarly sources: (1) *Foden's Constitutional Development of New Zealand*, Chap. 11; 26, 188 (which appears to be a reference to N.A. Foden, *The Constitutional Development of New Zealand in the First Decade (1839-1849)*, Wellington, New Zealand, L.T. Watkins Ltd., 1938); and (2) *The British Commonwealth (New Zealand)*, Vol. 4, pp. 3-4. See also the scholars quoted by McHugh, *The Aboriginal Rights...*, *op. cit.*, note 342, at pp. 98-100. It is interesting to note that despite the Solicitor-General's argument on the issue of sovereignty in the  
(continued...)

Such characterization of the Treaty of Waitangi as "as simple nullity" was roundly criticized by McHugh, in a recent book, as "doubtful" and as having been "influenced by a narrow, unrepresentative group of English publicists (or academic writers) of international law...[who had] developed [their] narrow approach in the last half of the nineteenth century, many years after the Treaty of Waitangi [such that] Prendergast's dismissal of the Treaty was therefore misplaced on several grounds".<sup>489</sup> In this criticism, McHugh echoed, and indeed relied upon, the much earlier work of Lindley.<sup>490</sup>

To such arguments against Chief Justice Prendergast's approach to the sovereignty provisions of the Treaty of Waitangi in *Wi Parata* many more can be added; but one above all. The treatment of the treaty as a nullity (at least as far as sovereignty is concerned) seems to fly in the face of the doctrine of "act of State". As noted in the last section when dealing with the Australian cases, that doctrine holds that whenever the Sovereign acts by "act of State" the validity of such act cannot be challenged in the Sovereign's own courts. In essence, if the Sovereign declares, by act of State, a thing to be, domestic courts cannot declare that thing not to be so, irrespective of what the courts perceive the true fact or law to be. It is submitted, therefore, that because the *Treaty of Waitangi* constitutes an act of State, and is one in which the Crown clearly declares its acceptance of the cession of Maori sovereignty, the fact of the prior existence of such sovereignty must be accepted by domestic courts.<sup>491</sup> In other words, as argued above in the context of the Australian cases, while the validity of an act of State, once

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<sup>488</sup>(...continued)

*Ninety-Mile Beach* case, the issue is not decided therein, with only one of the two Justices who rendered a decision—T.A. Gresson J.—addressing the issue at all, saying simply, at p. 475: "For the purposes of this case it is, I think, immaterial whether sovereignty was assumed by virtue of the Treaty of Waitangi in 1840, or by settlement or annexation before this date".

<sup>489</sup> See McHugh, *The Maori Magna Carta...*, *op. cit.*, note 347, at pp. 113-4.

<sup>490</sup> *Op. cit.*, note 10, at pp. 18-9.

<sup>491</sup> This point is also made, though slightly differently, by McHugh. See: McHugh, *The Aboriginal Rights...*, *op. cit.*, note 342, at pp. 102-3.

its existence is proven, cannot be doubted, its *nature* is always open to judicial determination. And, as just stated, the *Treaty of Waitangi* clearly expresses the Crown's recognition of prior Maori sovereignty. The "nature" of the act of State is clear to any court examining it. Its "validity", therefore, should not have been justiciable in *Wi Parata* or the other cases following it.

Be that as it may, the characterization of the treaty as a mere nullity as concerns the issue of sovereignty was rejected by subsequent decisions of the New Zealand courts.<sup>492</sup> It has also been rejected by many scholars.<sup>493</sup>

It must be noted, in closing this section, that the New Zealand caselaw regarding Maori land issues are principally concerned, not with debating the Crown's sovereignty, but rather with, firstly, establishing the existence and scope of the Maori's Native title which constitutes a burden upon the British Sovereign's interest in the land until extinguished, and, secondly, with the question of whether such a right is *created* or merely *confirmed* by the *Treaty of Waitangi*.<sup>494</sup>

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<sup>492</sup> See *Mangakahia v. The New Zealand Timber Company, Limited* (1881), 2 N.Z.L.R. 345 (S.C.), at p. 350, where the Court referred to "the treaty of Waitangi which is no 'simple nullity' as it is termed in *Wi Parata v. The Bishop of Wellington*, quoted in argument in this case".

In *Nireaha Tamaki v. Baker*, *op. cit.*, note 478, the Privy Council did not specifically reject Prendergast, C.J.'s statements in *Wi Parata* on the "simple nullity" of the *Treaty of Waitangi's* sovereignty provision. Nor did the Board expressly affirm that British Sovereignty in New Zealand emanated from that provision. However, it did cast doubt on *Wi Parata's* conclusion that subsequent legislative recognition of some of the treaty's provisions could not "call what is non-existent into being". By implication, the treaty's recognition of prior Maori sovereignty must equally be accepted on face value. At p. 577 of *Nireaha Tamaki* Lord Davey, referring to *Wi Parata*, wrote:

[I]t is rather late in the day for such an argument to be addressed to a New Zealand court. It does not seem possible to get rid of the express words of the 3<sup>rd</sup> and 4<sup>th</sup> sections of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being".

<sup>493</sup> See McHugh, *The Aboriginal Rights...*, *op. cit.*, note 342, at pp. 101-3, and the authors he cites at p. 101 (note 215).

<sup>494</sup> The leading case is *The Queen v. Symonds*, *op. cit.*, note 4, wherein Chapman J. ruled that one of the "established principles of law" which had been adopted and affirmed by colonial courts as applying to the "intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries" (quoted from p. 388) was that (p.390):

It cannot be too solemnly asserted that it [i.e. Native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But, for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it.

(continued...)

Indeed, as Prendergast C.J. himself recognized in *Wi Parata*, the issue of sovereignty was not before him even in that case.<sup>495</sup> Therefore, it is submitted, his comments with respect thereto were, strictly speaking, mere *obiter*. So too, are the statements in the other cases referred to above which tend to support the validity of the treaty's recognition of Maori sovereignty. The best that can be said of judicial statements in New Zealand on the issue of Native sovereignty, therefore, is that the more recent of them would seem to indicate that if the issue of sovereignty were mooted today the New Zealand courts would likely bow to the Crown's recognition of it in the *Treaty of Waitangi*. But in the end no definitive judicial statement either way seems to have yet emerged in New Zealand.

### Conclusion on Judicial Positions in Canada and Elsewhere

One may conclude from the foregoing that the issue of Native sovereignty has never been authoritatively determined by a Canadian appellate court. Nor, for that matter, should the pronouncements in foreign courts stand in the way of a Canadian court's consideration of Native sovereignty in the future. This is particularly so with respect to those early cases in the U.S. which are criticized as ignoring fundamental principles of British colonial law and those cases in Australia which apply the act of State doctrine without properly considering its applicability to a given case.

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<sup>494</sup>(...continued)

From this principle of law, Chapman J. continued, "[i]t follows":

(...)that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

For a comprehensive review of New Zealand cases dealing with the survival at common law of a Native title burdening the interest of the British Sovereign see McHugh, *The Aboriginal Rights...*, *op. cit.*, note 342, especially at chapter 8 thereof.

<sup>495</sup> See the second paragraph of the passage quoted, *op. cit.*, note 487.

On the other hand, it appears that as a result of the *obiter dicta* which have emerged in the cases Natives may well have a difficult task in convincing the courts to accept that, in some instances, their sovereignty over (and not just their title to) lands survived the advent of the British domination of North America. Aboriginal claimants will need to marshal all the relevant historical evidence to establish that British domination operated only as against other European States. But this task may be eased by the fact that modern opinions, judicial or otherwise, both in Canada and in places such as Australia, on Native issues at large are evolving towards a more balanced view of history, generally reversing past injustices caused by self-serving views of history. Indeed, the recently rejected "Charlottetown Accord"<sup>496</sup> containing various proposals for inclusion into the Canadian constitution would have created, among other things, a scheme of aboriginal self-government as a "third level of government in Canada". While "aboriginal self-government", as there intended, likely meant far less than the concept of "Native sovereignty", the large consensus for inclusion of the former into the Constitution evinces a shift in attitudes towards the indigenous peoples of this country.

Having reviewed in preceding chapters the historical evidence in support of the survival of Native sovereignty under the colonial influences of the various Powers, and having established in the present chapter that the judicial door has not firmly been closed in Canada to a consideration of this issue in domestic courts, the only matter which remains is to consider briefly whether, as a result of the treaty-making process over the centuries, there is in fact any Canadian territory subject to a Native territorial claim of the "sovereignty" type. Is the survival of Native sovereignty a purely theoretical issue in Canada today or does it have a real sphere of application? That is the topic of the next, and final, substantive chapter.

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<sup>496</sup> See "Consensus Report on the Constitution", Charlottetown, August 28, 1992, Final Text. See also the "Draft Legal Text", October 9, 1992.

## CHAPTER SEVEN:

### THE TREATY-MAKING PROCESS AND SURVIVING SOVEREIGN INDIAN TERRITORY

What has been argued thus far is that, firstly, in matters of acquisition of sovereignty over new territories both international law and the domestic law of the various States which were involved in the colonial history of Canada are determined largely by reference to the practice of States (though scholarly opinion and diplomatic postures are also relevant). In the case of international law it is the practice of a preponderance of States which matters while in the case of any particular State's domestic law it is that State's own practice which largely determines the content of its law. Secondly, it was argued that both international law and the law of the States involved in the colonization of Canada, as determined principally by the relevant practice, consider the acquisition of sovereignty over territory already occupied by indigenous populations to be effected only upon conquest or cession. Thirdly, it was stated that conquest of Canada's Indian populations, or their lands, clearly was not part of the history of this portion of the continent (whether colonial or post-colonial), though the opposite is perhaps true concerning the post-revolutionary United States. As a result, it was concluded that Canadian sovereignty would extend today only to such portions of what is generally considered as Canadian territory as can be shown to have been acquired by cession or which were truly *terra nullius* at the time of colonialization.

Consequently, in order to prove the thesis sustained in this dissertation—the survival in fact and in law of a Native sovereignty having a practical sphere of application—it is only necessary to show that there exist today geographical areas of the country which are within traditional Native territories and yet are not the subject of any cession whatsoever. This is best accomplished here by process of elimination, that is to say by identifying those territories which are covered by treaties. That task is the focus of the first section of the present chapter.

But identifying an area as covered by some cession (either by way of "treaty" or by way of so-called "comprehensive land claims agreement") is not the final step in ascertaining the loss of Indian sovereignty (or, for that matter, the loss of any lesser territorial interests) over the territory covered by the document. One need look at the particular transaction in question and determine, according to certain accepted criteria to be noted in this chapter, what was the intended object of the document.<sup>497</sup> Given the large number of treaties and comprehensive land claims agreements in existence in Canada—there are literally hundreds of treaties (including so-called "surrenders") for example—it is not possible to look in any detail into each and every one to ascertain their effect as concerns the issue of sovereignty. Such a study would be a monumental task unto itself. Instead, it is proposed to discuss in general terms, in the second substantive section of this chapter, some of the interpretive criteria necessary to the construction of these documents. While some specific reference to particular treaties will be made in the context of some of the various rules, this will be only to highlight the possible effect of the particular criterion in its application to a specific treaty. Any conclusions asserted in a given case in this section will necessarily be preliminary and are not intended to be definitive conclusions on the effect of the particular treaty.

But, to repeat, in order to prove the practical importance of the theoretical survival of Native sovereignty one need go no further than to show herein the present existence of traditional Native lands in Canada which have not been ceded. It is to that task to which attention will now be given.

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<sup>497</sup> As one example, one might mention here the so-called "Peace and Friendship" treaties (discussed *infra*) which affected a large portion of the present-day maritime provinces and yet imported no transfer of territorial interests whatsoever (though, as will be noted, it might be argued that the Indians thereby surrendered their sovereignty and retained only a common law aboriginal title).

### Surviving Native Sovereign Territory (Shown by Reference to Existing Treaties)

Unlike, for example, Australia, the British (and Canadian) experience in Canada is replete with incidents of successful signings of treaties with the indigenous populations. The result, it will presently be seen, is that the vast majority of Canada is today the subject of some treaty or comprehensive land claims agreement. There remain essentially three geographical areas of the country not presently affected by any agreement. These are: 1) most of British Columbia; 2) all of the province of Quebec south of the territories assigned to that province by legislation of 1898 and 1912 (i.e. south of "Nouveau Québec"); and 3) Newfoundland and Labrador. Cape Breton Island and Prince Edward Island might well be included here, though there exists some argument to the contrary. The rest of the country is affected by either a treaty or a comprehensive land claims agreement, and sometimes both.<sup>498</sup> These documents shall be referred to here in approximate chronological order.

"Old Nova Scotia" (which, as seen in chapter five, refers to all of modern New Brunswick together with modern Nova Scotia except for, until 1763, Cape Breton Island and P.E.I.) is the subject of various treaties signed with the British Crown between 1693 and 1779, and known collectively as the "Peace and Friendship" treaties.<sup>499</sup>

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<sup>498</sup> Though, as noted, the scope of any particular agreement may not be such as to amount to a loss of sovereignty over either all or part of the territory which is its subject matter, this aspect of the problem will await discussion until the next section of this chapter.

<sup>499</sup> While some of the earliest of these concerned only the then-"provinces" of Massachusetts Bay or New Hampshire and, in some, "other of her Majesty's Territories in New England", every one of the Peace and Friendship treaties signed after 1725 concerned old Nova Scotia either exclusively or in conjunction with other English colonies along the Atlantic seaboard. Pentney, *op. cit.*, note 258, at p. 32 (note 31 thereof), has said: "There are at least nineteen of these treaties which related to what is now Canadian territory". These treaties are compiled in the Appendix to Daugherty, W.E., *Maritime Indian Treaties in Historical Perspective*, Treaties and Historical Research Centres, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, Ottawa, 1983, at pp. 68-93 [hereinafter cited as Daugherty]. Of these treaties, moreover, that of 15 December 1725 together with the renewals thereof of 15 August and 04 September 1749 can be found reproduced collectively as document 239 in *Treaties and Surrenders*, *op. cit.*, note 252, vol. 2, at pp. 198, 200 and 201, respectively. None of the other treaties reproduced in Daugherty, *ibid.*, whether they expressly affect old Nova Scotia or not, appear to be reproduced in *Treaties and Surrenders*, *ibid.*

Regrettably, unlike with most of the other treaties and comprehensive land claims agreements to be referred to herein, no map small enough to fit in the appendices to this dissertation could be located showing the territories covered by these various "Peace and Friendship" treaties, either individually or compendiously. But the interested reader might consult the wall map, numbered MCR 4552 and titled "Canada Indian Treaties", produced by the Department of Energy, Mines and Resources Canada,

Next, vast portions of modern southern Ontario are affected by a large number of pre-Confederation treaties composed of the so-called "Upper Canada treaties"<sup>500</sup> and the two treaties of September 1850 known as the Robinson-Superior treaty and the Robinson-Huron treaty.<sup>501</sup> Moreover, the areas covered by the pre-Confederation Upper Canada treaties continued to be the subject of many treaties (or so-called "surrenders") after Confederation. These concerned cessions of land either reserved by the earlier treaties or overlooked therein.<sup>502</sup> (The territories covered by the treaties noted in the present paragraph are shown in the map found at Appendix "C" hereof which shows the territory of the "Upper Canada treaties" as areas labelled "C".)

Also negotiated in the pre-Confederation years are the fourteen Vancouver Island Colony treaties between various Indian bands of that island and James Douglas, acting in his capacity both as governor of the Colony (until 1858) and as chief factor of the Hudson's Bay Company (1851-1858). All fourteen treaties were signed between 1850 and 1854.<sup>503</sup> Eleven of the fourteen treaties are clustered around the southern end of the island (nine signed in 1850 and two in 1852). Two more are at Fort Rupert on the northeast corner of Vancouver Island (both signed in 1851). The remaining one (signed in 1854) is at Nanaimo. (See the map at Appendix

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<sup>499</sup>(...continued)

which shows the area covered by the compendium of the Peace and Friendship treaties. It also shows the territories covered by most of the other treaties which will be discussed below, but not the territories covered by any of the "comprehensive land claims agreements negotiated to date.

<sup>500</sup> The Upper Canada treaties generally span the period between 1763 and 1867. Thirty-two of the most significant of these are discussed—but not reproduced—in Surtees, R.J., *Indian Land Surrenders in Ontario 1763-1867*, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, Ottawa, February 1984 [hereinafter cited as Surtees, *Indian Land Surrenders...*]. Moreover, those of the pre-Confederation Upper Canada treaties which remain extant are generally collected in the three volumes of *Treaties and Surrenders*, *op. cit.*, note 252.

<sup>501</sup> Dated September 7th and 9th, 1850, respectively, they are reproduced as documents 60 and 61 in *Treaties and Surrenders*, *ibid.*, vol. 1, at pp. 147-9 and 149-52, respectively. They are also discussed in Surtees, *Indian Land Surrenders...*, *ibid.*

<sup>502</sup> Some are discussed by Surtees, *Indian Land Surrenders...*, *ibid.*. They are also generally reproduced in the three volumes of *Treaties and Surrenders*, *ibid.*

<sup>503</sup> They are reproduced, with one exception, in the Appendices to Madill, D.F.K., *British Columbia Indian Treaties in Historical Perspective*, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, Ottawa, 1981, at pp. 67-73 [hereinafter cited as Madill].

"D" hereof.) But, these "deeds of conveyance" (as they are sometimes called) cover only about one-fourtieth of the land mass of Vancouver Island.<sup>504</sup> Consequently, the vast majority of the island is not affected by any treaty. And, Vancouver Island is in fact populated in part by several Indian bands who continue to claim an interest in unceded ancestral lands. The Department of Indian Affairs and Northern Development (D.I.A.N.D.) maintains an ongoing dialogue with these bands on this issue as part of its comprehensive land claims negotiation policy.

In the post-Confederation period Canadian government authorities vastly accelerated the treaty-making process. In addition to continuing the acquisition of "left-over" parcels within the general area of the Upper Canada treaties, the government signed, between 1871 and 1921, eleven so-called "numbered treaties". Often, these were followed by "adhesions" on the part of Indian bands who, though living in the territories covered by the numbered treaties, were not originally parties thereto. In some cases, moreover, the adhesion actually expanded the area covered by the particular numbered treaty. This is the case of the adhesion of 1906 to Treaty Five, of the adhesion of 1889 to Treaty Six and of the adhesions of 1929 and 1930 to Treaty

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<sup>504</sup> From Madill, *ibid.*, at p. 9.

Nine.<sup>505</sup> (The present territorial scope of these eleven treaties is shown on the map at Appendix "C" hereof.)

As noted above, the pre-Confederation years saw the negotiation of treaties covering vast portions of southern Ontario. These were the Upper Canada treaties and the two Robinson treaties of 1850. But, as Madill has written:

At the time of Confederation, the Indians retained only three substantial sections of territory within the bounds of present-day Ontario: the lands of the Hudson's Bay Company which lay beyond the height of land; the central portion of the province lying south of Lake Nipissing between the Ottawa River and Northern Georgian Bay; and the several small pieces of land, reserved for Indian use [i.e. by virtue of the Upper Canada and Robinson treaties], which were scattered throughout the province and which, taken together, constituted a substantial territory.<sup>506</sup>

The first of these "sections of territory" (that of the Hudson's Bay Company) was the subject of Treaty Nine in 1906 and the extension thereof resulting from the adhesions in 1929 and 1930. The third section mentioned by Madhill, it has already been said, continued to be the subject of piecemeal "surrenders" throughout the pre- and post-Confederation period. As to the second

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<sup>505</sup> Note that Treaty Three is also known as the "Northwest Angle Treaty" while Treaty Nine is often called the "James Bay Treaty". Treaties One to Eight, together with most of the adhesions thereto, are reproduced in the three volumes of *Treaties and Surrenders*, *op. cit.*, note 252, as follows:

Treaty One	(3 Aug. 1871)	doc. 124, Vol. I, p. 282
Treaty Two	(21 Aug. 1871)	doc. 125, Vol. I, p. 291
Treaty Three	(3 Oct. 1873)	doc. 131-132, Vol. I, p. 303
Treaty Four	(15 Sept. 1874)	doc. 135, Vol. I, p. 313
Treaty Five	(20 & 24 Sept. 1875)	doc. 149A, Vol. II, p. 16
Treaty Six	(23 & 28 Aug. and 9 Sept. 1876)	doc. 157A, Vol. II, p. 35
Treaty Seven	(22 Sept. 1877)	doc. 163, Vol. II, p. 56
Treaty Eight	(various dates in 1899)	doc. 428, Vol. III, p. 290

Treaty Nine (various dates in 1905 and 1906), with adhesions, can be found reproduced as Appendix "A" in Morrison, J., *Treaty Research Report: Treaty Nine (1905-06): The James Bay Treaty*, Treaty and Historical Research Centre, Department of Indian and Northern Affairs Canada, Ottawa, 1986, at p. 105 [hereinafter cited as Morrison].

Treaty Ten (various dates in 1906 and 1907), there being no adhesions thereto, is reproduced as Appendix "A" in Coates, K.S. and Morrison, W.R., *Treaty Research Report: Treaty Ten (1906)*, Treaty and Historical Research Centre, Department of Indian and Northern Affairs Canada, Ottawa 1986, at p. 69 [hereinafter cited as Coates and Morrison, *Treaty Ten*].

Treaty Eleven (various dates in 1921), with adhesions, is reproduced as Appendix "A" in Coates, K.S. and Morrison, W.R., *Treaty Research Report: Treaty Eleven*, Treaty and Historical Research Centre, Department of Indian and Northern Affairs Canada, Ottawa 1986, at p. 66 [hereinafter cited as Coates and Morrison, *Treaty Eleven*].

Similar "Treaty Research Reports" are available concerning treaties One to Eight but it is not necessary to cite them here.

Finally, all eleven numbered treaties, with any adhesions, are published separately by the Department of Indian Affairs and Northern Development in Ottawa.

<sup>506</sup> From Madill, *op. cit.*, note 503, at pp. 1-2.

section, which involved a significant amount of contiguous territory, it formed the topic of two treaties negotiated by Angus Seymour Williams and others, on behalf of the Crown, with the Chippewa and Mississauga Indians in 1923 which are generally referred to as "the Williams treaties".<sup>507</sup> (The territories covered by these treaties are identified on the map in Appendix "C" hereof as areas "A" and "B".<sup>508</sup>)

With the signing of the Williams treaties in 1923 came the end of the treaty-making phase of Indian-Canadian relations. While the extinguishment of unceded Indian land rights continued to be a governmental goal, later land surrenders were to be covered in more lengthy and detailed "comprehensive land claims agreements". To date, only a handful of such agreements are finalized while numerous "comprehensive claims" remain at various stages of negotiation. In those agreements which are finalized, it must be noted that a certain degree of territorial overlap exists between some of the comprehensive agreements and one or more of the numbered treaties. In this connection, it is useful to juxtapose the map at Appendix "C" hereof with the "unofficial" map at Appendix "E" hereof.<sup>509</sup>

The first two comprehensive land claims agreements to be successfully negotiated were both in Quebec. The "James Bay Northern Quebec Agreement" (J.B.N.Q.A.) of 1975,<sup>510</sup>

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<sup>507</sup> These are dated 31 October and 15 November 1923, respectively. Copies are reproduced as Appendices "B" and "C", respectively, in Surtees, R.J., *Treaty Research Report: The Williams Treaties*, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, Ottawa, 1986, at pp. 37 and 45, respectively. Moreover, each of these two treaties is published separately by the Department of Indian Affairs and Northern Development in Ottawa.

<sup>508</sup> Note that while the map at Appendix "C" may show two distinct areas, one covered by each of the Williams treaties, the text of both treaties in fact describe the exact same two areas. In effect, both the Chippewa and the Mississauga Indians ceded rights they each held or claimed concerning both areas.

<sup>509</sup> While there is not one "official" map showing the total territories covered by all comprehensive land claims agreements which have been finalized to date, the present writer was able to procure, courtesy of officials at the federal Department of Indian Affairs and Northern Development, an unofficial "rough sketch" map which had been prepared for a briefing of the new Minister and which shows the general territories covered by all currently finalized comprehensive land claims agreements. In addition, where available, "official" maps of the territory covered by particular comprehensive land claims agreements are appended hereto.

<sup>510</sup> It was signed on 11 November 1975. See *The James Bay and Northern Quebec Agreement*, Éditeur officiel du Québec, 1976.

signed by the James Bay Cree, the Quebec Inuit and the Inuit of Port Burwell, and the "Northeastern Quebec Agreement" (N.Q.A.) signed a little over two years later<sup>511</sup> by the Naskapis of Schefferville both concern the cession of broad ancestral rights over the exact same overall territory<sup>512</sup> (shown on the maps at Appendices "E" and "F" hereof) in exchange for certain guaranteed rights. The only territorial distinction between these two documents<sup>513</sup> is that by the terms of these Agreements the various Native signatory bands retain certain rights to distinct subsections of this overall territory. For instance, under the N.Q.A. the Naskapis retain hunting and fishing rights over an area in the eastern portion of the general territory.

The signing of the two comprehensive land claims agreements affecting northern Quebec were not immediately followed by further comprehensive land claims agreements. However, in the last decade, the following final agreements have been signed:

- 1) the Inuvialuit (Western Arctic) Final Agreement of 5 June 1984 whereby the signatory Natives gave up all Aboriginal claims in and to the Northwest Territories and the Yukon in exchange for specifically defined rights to a smaller area (see the territory shown on the maps at Appendices "E" and "G" hereof);<sup>514</sup>

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<sup>511</sup> It is dated 31 January 1978. See *The Northeastern Quebec Agreement*, Department of Indian and Northern Affairs Canada, Ottawa, 1978.

<sup>512</sup> Section 1.16 of the J.B.N.Q.A. and Section 1.16 of the N.Q.A. both define "Territory" as follows:

"Territory": the entire area of land contemplated by the 1912 Quebec boundaries extension acts (an Act respecting the extension of the Province of Québec by the annexation of Ungava, Qué. 2 Geo. V. c. 7 and the Québec Boundaries Extension Act, 1912, Can. 2 Geo. v. c. 45) and by the 1898 acts (an Act respecting the delimitation of the Northwestern, Northern and Northeastern boundaries of the Province of Québec, Qué. 61 Vict. c. 6 and an Act respecting the Northeastern, Northern and Northeastern boundaries of the Province of Québec, Can. 61 Vict. c. 3).

The Native parties to these two agreements "cede, release, surrender and convey" to the crown all their Native claims whatever in this territory and the James Bay Cree, the Quebec Inuit and the Naskapis of Quebec further cede all similar rights anywhere in Quebec (see Section 2.1 of both the J.B.N.Q.A. and the N.Q.A.) while the Inuit of Port Burwell further cede all similar rights anywhere in Canada (see Section 2.3 of the J.B.N.Q.A.).

<sup>513</sup> Apart from the one noted in the previous note.

<sup>514</sup> *The Western Arctic Claim: The Inuvialuit Final Agreement*, Indian and Northern Affairs, Ottawa. The cession is contained in section 3(4). Note that while the territory involved partially overlaps the area of Treaty Eleven, the Inuvialuit Agreement concerns different Natives.

- 2) the Gwich'in Comprehensive Land Claim Agreement of 22 April 1992 whereby the signatory Natives gave up all Aboriginal claims in and to territories anywhere in Canada in exchange for specifically defined rights to a smaller area (see the map at Appendix "E" as well as the area which is labelled as the "Gwich'in" area at the top left of the map in Appendix "H" hereof),<sup>515</sup>
- 3) the Sahtu Dene and Metis Comprehensive Land Claim Agreement which was initialled 4 March 1993 and signed on Labour Day (September 6) 1993 whereby the signatory Natives gave up all Aboriginal claims in and to territories anywhere in Canada in exchange for specifically defined rights to a smaller area (see the map at Appendix "E" as well as the area which is labelled the "Sahtu Settlement Area" on the map at Appendix "H" hereof),<sup>516</sup>
- 4) the Nunavut Final Agreement of 25 May 1993 whereby the signatory Natives gave up all Aboriginal claims in and to lands anywhere in Canada in exchange for specifically defined rights to a smaller area (see the map at Appendix "E" as well as the map at Appendix "I" hereof),<sup>517</sup> and
- 5) the Yukon Inuit Final Umbrella Agreement of 29 May 1993 whereby the signatory Natives gave up all Aboriginal claims in and to lands anywhere in Canada, except the Northwest Territories and British Columbia, in exchange for specifically defined rights to smaller areas in the Yukon Territory to be negotiated in Final Agreements with each different Yukon First Nation.<sup>518</sup> Under this "umbrella agreement", the following four specific "final agreements" were signed on the same date, with several more still under negotiation:

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<sup>515</sup> *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Gwich'in as Represented by the Gwich'in Tribal Council*, published in two volumes by Indian Affairs and Northern Development, Ottawa, 1992. The cession is contained in section 3.1.12. Note, once again, that the territory involved partially overlaps the area of Treaty Eleven. In fact the Gwich'in were signatories to that treaty. The Agreement was signed to give greater certainty in matters related to the treaty and the Gwich'in Metis were included because after Treaty Eleven was signed they received certain cash grants. These two facts are set out in the Preamble and section 1.

<sup>516</sup> *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Dene of Colville Lake, Fort Franklin, Fort Good Hope and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as Represented by the Sahtu Tribal Council*, published in two volumes jointly by the Sahtu Tribal Council, the Department of Indian Affairs and Northern Development and the Office of Intergovernmental and Aboriginal Affairs of the Government of the Northwest Territories, 1993. The cession is contained in section 3.1.11. Once again, the territory involved overlaps with part of the territory of Treaty Eleven. The Sahtu Dene were signatories to that treaty. The comprehensive land claim agreement was negotiated to give greater certainty in Native rights. The Metis were included in the Agreement because in the period following Treaty Eleven they received cash grants. These two facts are set out in the Preamble and section 1.

<sup>517</sup> *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, published under the joint authority of the Tungavik and Indian Affairs and Northern Development, Ottawa, 1993. The cession is contained in section 2.7.1(a).

<sup>518</sup> *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, Indian Affairs and Northern Development, Ottawa, 1993. The cession is contained in section 2.5.1.

- a) the Champagne and Aishihik First Nations Final Agreement (roughly covering the territory so labelled on the unofficial map at Appendix "E" hereof),<sup>519</sup>
- b) the Vuntut Gwitchin First Nation Final Agreement (roughly covering the territory so labelled on the unofficial map at Appendix "E" hereof);<sup>520</sup>
- c) the First Nation of Nacho Nyak Dun Final Agreement (roughly covering the territory so labelled on the unofficial map at Appendix "E" hereof),<sup>521</sup> and
- d) the Teslin Tlingit Council Final Agreement (roughly covering the territory so labelled on the unofficial map at Appendix "E" hereof).<sup>522</sup>

Mention should also be made of a comprehensive land claim agreement "in principle" between Canada and the Dene Nation and the Metis Association of the Northwest Territories, which agreement subsequently collapsed because it failed to receive the approval required by the assemblies of the concerned Native groups.<sup>523</sup> This failure subsequently led to the signing of the Gwich'in and Sahtu Agreements just noted (numbered 2 and 3 above) while the remaining Native bands involved in this failed agreement continue discussions with the federal government.

As the compendium of the maps at Appendices "C" to "I" hereof, and especially the maps at Appendices "C", "D" and "E", will clearly illustrate (keeping in mind the "Peace and Friendship" treaties covering "old Nova Scotia" for which no maps are enclosed), there are yet large portions

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<sup>519</sup> *Champagne and Aishihik First Nations Final Agreement Between the Government of Canada, the Champagne and Aishihik First Nations and the Government of the Yukon*, Indian Affairs and Northern Development, Ottawa, 1993.

<sup>520</sup> *Vuntut Gwitchin First Nation Final Agreement Between the Government of Canada, the Vuntut Gwitchin First Nation and the Government of the Yukon*, Indian Affairs and Northern Development, Ottawa, 1993.

<sup>521</sup> *First Nation of Nacho Nyak Dun Final Agreement Between the Government of Canada, the First Nation of Nacho Nyak Dun and the Government of the Yukon*, Indian Affairs and Northern Development, Ottawa, 1993.

<sup>522</sup> *Teslin Tlingit Council Final Agreement Between the Teslin Tlingit Council, the Government of Canada and the Government of the Yukon*, Indian Affairs and Northern Development, Ottawa, 1993.

<sup>523</sup> *Comprehensive Land Claim Agreement in Principle Between the Government of Canada and the Dene Nation and the Metis Association of the Northwest Territories*, Indian Affairs and Northern Development, Ottawa, 1988.

of Canada which remain outside of any treaty or comprehensive land claims agreement. In many of these cases, however, negotiations are ongoing or else the process preparatory to negotiations is underway. In any case, the areas presently unaffected by treaties or agreements generally are: most of British Columbia except the northeast corner of the province covered by Treaty Eight and the small portions of Vancouver Island covered by the fourteen Douglas treaties; all that part of Quebec lying south of the territories transferred to Quebec in 1898 and 1912; parts of the Yukon Territory; parts of the Northwest Territories; all of Newfoundland and Labrador; and both Prince Edward Island and Cape Breton Island (which were not part of old Nova Scotia when most of the "Peace and Friendship" treaties were signed).

As concerns British Columbia, mention has already been made of the land claim in the *Delgamuukw case*<sup>524</sup> (covering an area shown on the map at Appendix "J" hereof). While the Court of Appeal of British Columbia in that case, as has been argued above, was not called upon to specifically consider the issue of Native sovereignty, it did uphold the survival of traditional or ancestral land claims without specifying their nature. As a result, the *Delgamuuk* claim is currently under negotiation and is but one of many comprehensive claims being pursued to British Columbian soil.

Comprehensive land claims are also in various stages of negotiations with respect to the remaining areas of both the Yukon Territory and the Northwest Territories.

Newfoundland is generally thought of as having been devoid of any pre-contact Indians by virtue of the annihilation (by violence and disease) of the Beothuck Indians<sup>525</sup> such that British sovereignty would exist thereon by mere settlement or by conquest. However, the Micmac Indians currently living on the island of Newfoundland claim to have settled it in the pre-

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<sup>524</sup> *Op. cit.*, note 456.

<sup>525</sup> See Upton, L.F.S., "The Extermination of the Beothuks of Newfoundland", pp. 68-89 in Miller, *op. cit.*, note 114.

contact era and, consequently, assert the survival of ancestral rights thereto by virtue of prior occupation.<sup>526</sup>

Labrador is a different matter. There clearly continues to live thereon bands of pre-contact aboriginal populations. These are: the Inuit, whose claim is under negotiation;<sup>527</sup> the Innu, who have recently entered negotiations; and the Metis, who have only recently received federal funding to research their claim as a preparatory step to negotiations.<sup>528</sup>

On Prince Edward Island and Cape Breton Island, the Micmac population assert that they were parties to the "Peace and Friendship" treaties.<sup>529</sup> This might well be true at least as concerns those treaties signed after P.E.I. and Cape Breton were annexed to "old Nova Scotia" by the Royal Proclamation of 1763. But it is difficult to see what advantage this might have in terms of territorial rights given that the treaties did not concern the cession of any rights to territory. Indeed, the Indians in these territories may have something to lose by taking this position since, as will be discussed in the next section, there is an argument to be made that the Peace and Friendship treaties impart a loss of Native sovereignty such that all that the Indians retain in the area covered thereby is a common law aboriginal title as a burden upon the radical title of the new sovereign. This consideration might well affect strategies for possible litigation being considered by New Brunswick Indians.

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<sup>526</sup> Information provided by Professor Bradford Morse, Faculty of Law, University of Ottawa, in a conversation with the writer on August 12, 1993. See also Upton, *ibid.*, at pp. 68, 79-83.

<sup>527</sup> In fact, in Ian Bailey, "Wells offers Labrador Inuit land settlement", *Ottawa Citizen*, October 13, 1993, at p. A3, it was reported that the Newfoundland government has proposed to the Inuit a land settlement agreement whereby the Inuit would "be awarded an area almost twice the size of Prince Edward Island". The proposal is in answer to one made by the Inuit in March of 1993. The report explains that while the federal government "walked away from the talks in 1992" it was "hoped to negotiate the federal government's return to the talks".

<sup>528</sup> Again, this information was provided by Professor Bradford Morse, Faculty of Law, University of Ottawa, in a conversation with the writer on August 12, 1993.

<sup>529</sup> *ibid.*

Finally, as concerns southern Quebec, there exist no surrender agreements whatsoever. Though there are some treaties of peace and alliance with the French or the English, these do not concern the cession of any territorial rights.<sup>530</sup> Moreover, while several Indian "reserves" dot the area (as, for example, reserves at Kahnawaque, Akwesasne and Kanasatake) these were all created by unilateral Crown acts either for religious missions or, again, in acknowledgement of an actual Indian presence. There was no *quid pro quo* on the part of the concerned Indian Band either by way of territorial concessions or otherwise.<sup>531</sup> In fact, in many such cases, the Indians do not accept that their right to the land is based on the creation of the reserve but rather rely on their ancestral occupation. Consequently, the Indian claims based upon historical rights would arguably survive. As a consequence, the federal government has accepted to fund preliminary research by many of these First Nations, such as the Algonquins of the Ottawa Valley, in preparation for negotiations towards comprehensive land claims agreements.

In summary, there are vast portions of Canada which have never been the subject of a treaty. Native sovereignty might therefore be claimed in most of British Columbia, in parts of the Yukon Territory and Northwest Territories, in pre-1898 Quebec, in Labrador and, possibly, also Newfoundland, Cape Breton Island and Prince Edward Island.

As for those areas which are the subject of some treaty or comprehensive land claim agreement, the enquiry into the possible survival of Native sovereignty does not end with the identification of a treaty. Consideration must then be given to the treaties themselves; to interpreting their effects in accordance with certain established criteria. These criteria will briefly be discussed next.

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<sup>530</sup> The treaty at issue in *Sioui*, *op. cit.*, note 157, provides but one example of such treaties. See, generally, *Treaties and Surrenders*, *op. cit.*, note 252.

<sup>531</sup> Again, this information was provided by Bradford Morse of the Faculty of Law, University of Ottawa, in a conversation with the author on August 12, 1993. A list of Native reserves in Quebec can be found in La Commission d'étude sur l'intégrité du territoire du Québec (the "Dorion Commission"), *Rapport de la commission d'étude sur l'intégrité du territoire du Québec, Partie 4: Le domaine indien, vol. 4.5: inventaire des réserves et établissements indiens*, Québec, Éditeur officiel, 1970.

## Interpretive Criteria in Determining a Treaty's Effect on Native Sovereignty

While it is not possible here to engage in an examination of the effect of each and every treaty or agreement, it is possible to elucidate the interpretive questions which will need to be asked and, to a limited extent, to show how some of these might be relevant to the present thesis in the case of some of the treaties noted above. It is to this task that this second substantive section of this chapter is dedicated.

### *Are all the Proper Parties Signatories?*

The obvious first question which must be answered when construing the effect of a treaty or agreement upon a particular Indian Band's traditional territorial rights is whether that Band is in fact bound by the document, either by being a party thereto or by having subsequently adhered to it expressly or tacitly. In other words, does the treaty involve all the proper parties? If not, then some Bands in the area covered by the treaty may well remain unaffected by the treaty's provisions. The Plaintiffs' claim in the *Bear Island* case is one clear example of a Band arguing, though unsuccessfully, that it was neither a party to the relevant treaty nor had become a party by subsequent adhesion.<sup>532</sup> The government's practice of securing later adhesions to many of its "numbered" treaties, for example, is witness to its acceptance of the applicability to Crown-Indian relations of this basic principle of contract law.

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<sup>532</sup> *Op. cit.*, note 314. The Supreme Court of Canada found that the Plaintiffs had subsequently adhered to the treaty (tacitly, it seems) by accepting a reserve and the payment of annuities as required by the treaty.

Lindley, *op. cit.*, note 10, at p. 86, provides an interesting example of the seriousness with which colonial governments viewed this obligation. He recounts that, during the course of its colonization of territories along the River Niger in Africa, the English Crown signed a treaty of cession with a particular tribe while the French claimed that the treaty should have been with another, more paramount chief who had authority over the tribe who signed the treaty. He recounts that the English engaged in a virtual cross-country race with the French to obtain his signature first. The English won that battle and secured the confirmation of the treaty.

### ***Was Sovereignty Ceded?***

Another obvious question directly concerning the survival of Native territorial sovereignty is ascertaining the object of the treaty. The key questions for present purposes, of course, are whether the treaty concerns a cession of territory and whether that cession is broad enough to include a cession of sovereignty.

Most treaties and comprehensive land claims agreements contain wording which arguably is broad enough to involve the cession to England of Native territorial sovereignty.<sup>533</sup> Indeed, it would be a difficult argument to maintain to say that a cession of land was not intended to impart a cession of sovereignty, at least to the extent of the territory ceded. But, as will be discussed in more detail below, the Indian signatories may have been ceding all rights, including sovereignty, over a portion of their territory while retaining such rights over another.

Moreover, not all the treaties are clear on the cession of sovereignty and, indeed, some are mere treaties of alliance, imparting no general territorial cessions of any nature. For example, the "Peace and Friendship" treaties in old Nova Scotia were intended (as their collective appellation implies) principally as statements of mutual non-aggression and protection.<sup>534</sup> They contain no general territorial cessions of any significance,<sup>535</sup> though most

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<sup>533</sup> For instance, while the Vancouver Island treaties all contain merely a cession of the specified territories "entirely and for ever", the use of the word "entirely" would seem broad enough to cover all interests in land, including territorial sovereignty. This is reinforced by the statement therein "that the land itself, with these exceptions, becomes the entire property of the white people for ever".

Virtually all of the other treaties (including most of the Upper Canada treaties, the Robinson treaties, the Numbered treaties, and the Williams treaties) and most (if not all) of the comprehensive land claim agreements, are more explicit in the use of language covering the cession of all kinds of territorial interests whatsoever. They usually contain words such as "do freely, fully and voluntarily, surrender, cede, grant, and convey to Her Majesty, Her Heirs, and successors forever, all their right, title and interest...". [Taken from the Robinson treaties.]

<sup>534</sup> In fact, Pentney, *op. cit.*, note 258, at p. 32 has written: "A common view of these 'treaties of Peace and Friendship' is that they are unenforceable political documents." And, at note 32 on the same page: "The Maritime provinces have been referred to as 'non-treaty areas'."

<sup>535</sup> This was expressly recognized in *Simon v. The Queen*, *op. cit.*, note 314, at p. 409 (D.L.R.). It is significant in this regard, moreover, that land claims in the nature of a common law aboriginal title continue to be maintained in this area of the country. For instance, in "Natives take tax fight to court", *Ottawa Citizen*, September 23, 1993, at p. A3, it was reported:

contain a promise by the Indians not to interfere with the settlers in the lands they have settled; a promise which is sometimes coupled with an express abandoning of all Indian claims to lands already settled by whites.<sup>536</sup> Notwithstanding that these treaties involve no general cessions of territory, however, one object reflected therein might arguably have been the acceptance of England's sovereignty over the signatory Indians and their lands. If this argument is sustainable, it means that the Indians would have been accepting that their territorial possessions would henceforth be held under the English Crown—in other words, as what is today expressed as a burden on the Crown's radical title or as common law aboriginal title. Such a conclusion would rest upon the fact that most of the Peace and Friendship treaties contain an express acknowledgement of, and submission to, the King's sovereign authority over old Nova

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<sup>535</sup>(...continued)

New Brunswick natives take their battle against the provincial sales tax to court today in a challenge that may ultimately question New Brunswick's status as a province. The Union of New Brunswick Indians is fighting the province's decision to make natives pay the 11-per-cent sales tax on off-reserve purchases. A spokesman for the union said the proceedings may include the question of land claims because land in the province was never surrendered by treaty. Legally, it could all be a reserve, he said.

<sup>536</sup> For instance, the treaty of 1693 (reproduced in Daugherty, *op. cit.*, note 499, at p. 68), though probably not affecting old Nova Scotia, contains the following Indian promises:

That at all time and times for ever...we will cease and forbear all acts of hostility towards the subjects of the crown of England, and not offer the least hurt or violence to them, or any of them, in their persons or estates...

...

That their Majesties' subjects the English shall and may peaceably and quietly enter upon, improve, and for ever enjoy all and singular their rights of lands, and former settlements and possessions within the eastern parts of the said province of the Massachussets Bay, without any pretensions or claims by us, or any other Indians, and be in no wise molested, interrupted, or disturbed therein.

The treaty of 1713 (*ibid.*, at p. 70), though again probably not affecting old Nova Scotia, contains very similar wording. So, too, does the treaty of 1725 (*ibid.*, at pp. 76-7 and p. 78) which expressly applies to old Nova Scotia.

In the treaty of 1717 (*ibid.*, at p. 73) the Indians "freely consent that our English friends shall possess, enjoy & improve all the lands which they have formerly possessed and all which they have obtained a right & title unto...". See also, to the same effect, the treaties of 1760 with the Micmac (*ibid.*, at p. 86), of 1761 with the Merimichi tribe (*ibid.*, at p. 90) and of 1779 "with the Indians of Nova Scotia" (*ibid.*, at p. 92).

Scotia.<sup>537</sup> It is for this reason that it was suggested above that the Indians of Cape Breton and P.E.I. may have no advantage in claiming to be parties to the Peace and Friendship treaties.

### ***What did the Indians Understand the Treaty to Mean?***

Directly related to the issue of a treaty's object as revealed by its text is the issue of the Indians' understanding of the impact of the document at the time they signed it. The courts, it was noted earlier, have consistently directed that the focus when interpreting a treaty must remain on the Indians' understanding of what they were signing rather than on a strict common-law-based construction of the words used.<sup>538</sup> Thus, in the case of the Nova Scotia Peace and Friendship treaties an equally arguable case might be made to counter the wording seemingly proving the acceptance of and submission to English jurisdiction and dominion. It might be argued that as the principal object of these treaties was mutual non-aggression and assistance no loss of sovereignty was contemplated any more than was a general transfer of land beyond lands already settled by whites. This argument might be buttressed by the fact that the 1725 treaty asserts the submission to the English crown's jurisdiction and dominion to be only "in as ample a manner as we have formerly done to the most Christian King [of France]". If what has been asserted in chapter four hereof is correct, the Indians would have understood the extent of that "former" submission to the King of France to have been merely that the French would be their sole allies and the only whites allowed to treat for the transfer of territorial rights. The

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<sup>537</sup> See, for example, the treaty of 15 December 1725 (in Daugherty, *ibid.*, at p. 78 as well as in *Treaties and Surrenders, op. cit.*, note 252, at p. 198), which states:

Whereas His Majesty King George by concession of the Most Christian King [of France] made at the Treaty of Utrecht, is become the rightful possessor of the Province of Nova Scotia or Acadia according to its ancient boundaries: We...acknowledge His said Majesty King George's jurisdiction and dominion over the territories of the said Province of Nova Scotia or Acadia, and make our submission to His Majesty in as ample a manner as we have formerly done to the most Christian King [of France].

<sup>538</sup> The words of Chief Justice Marshall of the U.S. Supreme Court in *Worcester* to this effect were cited at note 395 hereof. In the Canadian context, see *Simon v. The Queen, op. cit.*, note 314, at p. 402 (D.L.R.), where Dickson C.J.C. referred to "the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians". See also *Nowegijck, op. cit.*, note 395.

Indians would not have seen in this submission any loss of their status as free nations since that was neither their understanding of their relations with France nor was it the attitude of France itself.

As concerns the other treaties and agreements noted herein, however, it appears at least at first blush, that since these were treaties of land cession the Indians' understanding would have been such as to comprehend that a loss of sovereignty was being effected—at least as concerns the territory *surrendered* in the treaty, if not always as concerns the territory retained. This last comment leads directly to the next criterium of interpretation.

***Does the Treaty "Reserve"/"Except" Land, or  
Does it "Exchange Land" for a Reserve?***

An interesting interpretive question is whether, under a given treaty or agreement, any lands expressly put in the possession of the Indians are held "of the Crown" or rather are held by virtue of the fact that they formed no part of the cession. For instance, the Robinson treaties, some of the Upper Canada treaties and the Williams treaties are worded such that certain lands are "excepted" or "reserved" from the general transfer. In such cases, it is arguable that the treaty, if it imported a transfer of sovereignty at all, did not import such a transfer with respect to the reserved lands.<sup>539</sup> Thus, full Indian rights, including sovereignty, would survive thereon.

On the other hand, those of the "numbered" treaties in which reserves are provided for, as well as most comprehensive land claim agreements containing similar provisions, stipulate

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<sup>539</sup> Support for this argument can be derived from these words of Gwynne J. of the Supreme Court of Canada in *St. Catherine's*, *op. cit.*, note 116, at pp. 664-5 (S.C.R.):

When the Indians in the deeds or treaties by way of cession of land to the crown reserved from out of the general description of the lands given in the instruments of cession, as they often did certain particularly described portions of the lands so generally described, for the special use, occupation or residence of particular bands, the parts so reserved did not come under the operation of the deed or treaty of cession, but were reserved or excepted out of it and so continued to be just as they were before, lands not ceded to, or purchased by, the Crown, (...).

a general transfer of territorial rights over a region *in exchange for* the Crown setting aside land for "Indian Reserves", usually (put not necessarily) from part of the territory ceded. In such cases, there is actually a time (in some instances by legal fiction, perhaps) when the full title is in the Crown such that the Indian right to a reserve is held "of the Crown" rather than by ancient occupation. However, it is submitted that in such cases, or at least in the case of such treaties negotiated in an era when Natives were at a tactical disadvantage from lack of legal counsel, it would have to be shown that the Indians appreciated the significance of the difference between *excepting or reserving* land from a transfer, on the one hand, and *the giving and getting back* of land, on the other. The white man would clearly have understood this, and it is significant in this regard that the authorities switched to the latter formula after the Robinson treaties of 1850 (though the Williams treaties of 1923 appear to be an exception to this newer practice).

### ***Is the Treaty Fully Operative?***

The final interpretive criterium which will be canvassed here is the question of whether all of the conditions of implementation of the treaty or agreement have been met. If not, the cessions contained in the treaty might well be ineffective.

For instance, the federal government has stated, with respect to the J.B.N.Q.A. and the N.Q.A.:

Agreements-in-principle on implementation issues were signed between the federal government and the Inuit and Naskapi in 1989. These implementation agreements were finalized and signed in September 1990.

Despite the success of negotiations with the Inuit and Naskapi, an implementation agreement has not been reached with the James Bay Cree.<sup>540</sup>

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<sup>540</sup> *The James Bay and Northern Quebec Agreement, and the Northeastern Quebec Agreement, Cree-Inuit-Naskapi, Annual Report 1990*, Department of Indian Affairs and Northern Development, Ottawa, 1991, at p. 10.

The situation appears to have been the same as recently as 1992, though some progress in negotiations with the Cree was reported.<sup>541</sup> Perhaps this state of affairs explains the comments of Chief Billy Diamond of the Cree of northern Quebec which were quoted in the introduction to this dissertation, whereby he cast doubt upon Quebec's (and Canada's) claim to northern Quebec notwithstanding that his People signed the J.B.N.Q.A..<sup>542</sup>

### **Conclusion on Surviving Sovereign Indian Territory**

What the treaties and comprehensive land claim agreements (and especially the maps appended to this study) show is that vast portions of Canada, principally in British Columbia, southern Quebec, Newfoundland and Labrador, and parts of the two Territories, have never been the subject of a formal Indian cession. Therefore, if it is accepted that colonial and Canadian practice has always required a treaty before the Indians' sovereignty was supplanted by that of white authorities, then Native sovereignty would survive and could be asserted today by the appropriate aboriginal societies in those territories.

Moreover, even where treaties or agreements do exist, it is necessary to examine closely the transaction to determine its object and extent. In some cases, Native sovereignty might well have been retained by virtue of "exceptions", "reservations" or a particular Band's non-adhesion to the transaction.

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<sup>541</sup> See *The James Bay and Northern Quebec Agreement, and the Northeastern Quebec Agreement, Cree-Inuit-Naskapi, Annual Report 1992*, Department of Indian Affairs and Northern Development, Ottawa, 1993, at p. 15 where it is stated:

Discussions with the Cree continued throughout 1992. The Cree wish to resolve all operational questions before opening up implementation issues. However, progress has been made. A final agreement [on certain matters] worth \$60 million over five years was signed with the Oujé-Bougoumou Cree in May 1992. (...)  
Discussions continued during 1992 with the Cree toward the establishment of a negotiation strategy.

<sup>542</sup> See, *op. cit.* note 3.

## **CHAPTER EIGHT: GENERAL CONCLUSIONS**

It has been the premise of this paper that the issue of the survival of Native territorial sovereignty is one which remains open to the Canadian judiciary to consider. If a proper case were brought, carefully documented and argued, there is every reason to believe that an open-minded court would find the evidence compelling.

Such a case would be argued in terms of Canada's municipal rules for the acquisition of territorial sovereignty, which principally are to be found, for example, in British colonial law. But in such a case the international law rules would also be looked to for guidance. These latter rules would tell the court that, at international law at least, the colonial Powers universally recognized that, if a territory were peopled by a "political society", sovereignty over this land and its people could only be acquired by Cession, Conquest or Prescription, not by simple Occupation. It would show, moreover, that these guidelines were recognized as extending to territories peopled by aboriginal communities since a European-style government was not required. Indeed, so long as some level of communal living were exhibited the community would be viewed as a political society no matter how "primitive".

But, international legal norms can only have a peripheral importance to the present topic since, in the putative court case here considered, the central basis upon which a decision would be founded would not be international law but internal legal imperatives. These are principally dictated by the practices and diplomatic statements of the Power in question. When such evidence is looked at, however, the only conclusion possible is once again that the initial sovereign status of Canada's aboriginal peoples was recognized by the various Powers who successively claimed Canada and that these Powers all accepted that ultimate sovereignty over

the land and its peoples had to be acquired by the subjugation or consent of the local inhabitants. The evidence from practice is particularly enlightening in this regard.

That is not to say that the Powers did not advance conflicting claims to "Dominion", or even "Sovereignty", over Canadian soil. Rather, understanding the Powers' recognition of Native sovereignty allows for an understanding of the true nature of their pretensions as claims to what is today called an exclusive sphere of influence and an exclusive power to *acquire* the ultimate sovereignty over the soil and its inhabitants, and not as an overriding claim to that sovereignty at the expense of Canada's Indians.

One possible aspect of the case *against* the survival of Native sovereignty which has not been dealt with in the present dissertation would follow the lines of the ultimately successful argument presented in the *Bear Island* case. It might be argued that, having effectively lived as part of the Canadian State and accepted a myriad of benefits from Canada such as those under the *Indian Act*, Indians have tacitly forfeited their legal claim to sovereignty. There is a short three-fold answer to this argument.

Firstly, it is possible to argue that Protected States often receive from the Protecting State various benefits. Consequently, the Indians' receipt of benefits from Canada should not preclude the survival of their sovereignty. Admittedly, this argument requires further development than has been given here. However, this cannot be undertaken here and must await another researcher's efforts.

Secondly, and in addition to the argument just outlined, it can honestly be replied, at least as concerns certain Indian communities such as the Mohawks of Kahnasatake, that they have always accepted, if at all, any benefits offered by Canada "without prejudice" to their inherent aboriginal rights.

Finally, just as the Crown must, both at international law and at British colonial law, clearly intend to acquire sovereignty over a territory and its people, so too could it be argued that, when it is suggested Indians have voluntarily given up that sovereignty, the Indians' intent to do so must be clear. Indeed, as seen, Canadian courts have ruled that the extinguishment of aboriginal rights must be effected in clear and unambiguous terms. And, unlike the situation in the *Bear Island* case, the tacit submission here in question would not be to the terms of an existing treaty of cession such that it would not be clear and unambiguous that by accepting benefits the Indians were transferring sovereignty.

As chapter six has shown, it remains possible to present the sovereignty argument and its evidentiary underpinnings before Canadian courts. Indeed, despite some negative *obiter dicta*, the issue has never authoritatively been judicially considered in Canada. And while it has been presented in the courts of other countries born of the colonial era, the rulings which exist are often flawed. The Act of State doctrine, for example, is often at the centre of negative rulings on Native sovereignty. But these courts invariably have misapplied this doctrine and failed to examine the nature, or even the existence, of the alleged Act of State extinguishing Native sovereignty. This is the situation in Australia while, in the United States, still-prominent nineteenth century jurisprudence of the Supreme Court under Chief Justice Marshall exhibits the difficulty of often confusing or ignoring the very concepts of British colonial law upon which the rulings purport to be based. A critical view of foreign jurisprudence on the topic of Native territorial sovereignty is therefore called for when the putative case suggested here is eventually brought to court.

Though it is submitted a strong case for Native territorial sovereignty exists, this prospect need not be as frightful as it might be to Canadians who would fret over Canada's own territorial integrity. The amount of Canadian territory susceptible of being recognized as being under

Native sovereignty, and so "outside of Canada", is not as great as the bald proposition at first suggests. The treaty and comprehensive land claims processes in which Canada and its predecessors have engaged with the various Indian nations has greatly reduced the territorial scope of Native sovereignty.

Moreover, as was suggested at the outset of this study, it may well be that many of the aboriginal societies in Canada who could potentially mount a successful claim of Native sovereignty might prefer instead to use this claim as a bargaining chip in exchange for greater self-government powers or other rights *within* the Canadian federation. Some might do so out of a deep-felt allegiance to Canada; others, out of a pragmatic view of the relative economic weakness their small independent nations would labour under by living surrounded by two large economic giants at the dawn of the twenty-first century; still others, out of motives not anticipated here.

But the potential remains that some few First Nations would prefer to have their sovereignty recognized and to strike out on their own. Given this potential, the only sure way to guarantee Canada's territorial integrity to its current extent is to negotiate in good faith with the remaining Indian nations not yet under treaty for finally and irrefutably transferring sovereignty to their territories. Ultimately, then, the greatest good that studies such as the present one might achieve is to contribute to an awareness by governments and the general populace of the validity of certain Indian peoples' negotiating positions on the issue of sovereignty so that the former might better realize just what is at stake should they be too intransigent, causing negotiations to fail. The stakes are no less than the choosing between two paths for certain Indians and the potential loss of vast portions of Canada.

## APPENDIX "A"

THE ROYAL PROCLAMATION OF 7 OCTOBER 1763<sup>543</sup>

1763, October 7.

[Establishing New Governments in America.]

BY THE KING.

## A PROCLAMATION

GEORGE R.

PART I

## Preamble

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to Our Crown by the late Definitive Treaty of Peace, concluded at Paris the Tenth Day of February last;<sup>1</sup> and being desirous, that all Our loving Subjects, as well of Our Kingdoms as of Our Colonies in America, may avail themselves, with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce,

- 1) Manufactures, and Navigation; We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation,<sup>2</sup> hereby to publish and declare to all Our loving Subjects, that We have, with the Advice of Our said Privy Council, granted Our Letters Patent under Our Great Seal of Great Britain, to erect within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida, and Grenada, and limited and bounded as follows; viz.
- 2) First. The Government of Quebec, bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John to the South End of the Lake nigh Pissin;<sup>3</sup> from whence the said Line crossing the River St. Lawrence and the Lake Champlain in Forty five Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence, from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of

<sup>1</sup> Text of treaty can be consulted in Chalmers' *Collection of Treaties*, i, 467.

<sup>2</sup> The events leading up to the issuing of this proclamation have been so thoroughly treated in C. W. Alvord's "Genesis of the Proclamation of 1763" in *Michigan Pioneer and Historical Collections*, vol. xxxvi, p. 20, and in G. E. Carter's *Great Britain and the Illinois Country* (Prize Essay of the Amer. Hist. Assoc., 1910) that any explanatory notes in this place seem unnecessary.

<sup>3</sup> *Nipissim* in proclamation as printed in the *London Gazette*.

<sup>543</sup> The present version is that given in Brigham, C.S. (ed.), *British Royal Proclamations Relating to America*, vol. 12, Transactions and Collections of the American Antiquarian Society, Worcester, Mass., 1911, at p. 212, as reproduced and artificially numbered in Slattery, B., *The Land Rights of Indigenous Canadian Peoples*, D. Phil. Thesis, Oxford, 1979, at pp. 363-9. Another version can be found in Shortt, A. and Doughty, A.G. (eds), *Documents Relating to the Constitutional History of Canada (1759-1791)*, 2<sup>nd</sup> Edition, Part 1, 1918, at p. 163.

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St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

- 3) Secondly. The Government of East Florida, bounded to the Westward by the Gulph of Mexico, and the Apalachicola River; to the Northward, by a Line drawn from that Part of the said River where the Chatahouchee and Flint Rivers meet, to the Source of St. Mary's River, and by the Course of the said River to the Atlantick Ocean; and to the Eastward and Southward, by the Atlantick Ocean, and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.
  - 4) Thirdly. The Government of West Florida, bounded to the Southward by the Gulph of Mexico, including all Islands within Six Leagues of the Coast from the River Apalachicola to Lake Pentchartrain; to the Westward, by the said Lake, the Lake Mauripas, and the River Mississippi; to the Northward, by a Line drawn due East from that Part of the River Mississippi which lies in Thirty one Degrees North Latitude, to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.
  - 5) Fourthly. The Government of Grenada, comprehending the Island of that Name, together with the Grenadines, and the Islands of Dominico, St. Vincents, and Tobago.
  - 6) And, to the End that the open and free Fishery of Our Subjects may be extended to and carried on upon the Coast of Labrador and the adjacent Islands, We have thought fit, with the Advice of Our said Privy Council, to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the Care and Inspection of Our Governor of Newfoundland.
  - 7) We have also, with the Advice of Our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton or Isle Royale, with the lesser Islands adjacent thereto, to Our Government of Nova Scotia.
  - 8) We have also, with the Advice of Our Privy Council aforesaid, annexed to Our Province of Georgia all the Lands lying between the Rivers Attamaha and St. Mary's.
- And whereas it will greatly contribute to the speedy settling Our said new Governments, that Our loving Subjects should be informed of Our Paternal Care for the Security of the

PART II  
Preamble

*Royal Proclamations.*

- 1) Liberties and Properties of those who are and shall become Inhabitants thereof; We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under Our Great Seal of Great Britain, by which the said Governments are constituted, given express Power and Direction to Our Governors of Our said Colonies respectively, that so soon as the State and Circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of Our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America, which are under Our immediate Government; and We have also given Power to the said Governors, with the Consent of Our said Councils, and the Representatives of the People, so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Publick Peace, Welfare, and Good Government of Our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies: And in the mean Time, and until such Assemblies can be called as aforesaid, all Persons inhabiting in, or resorting to Our said Colonies, may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England; for which Purpose, We have given Power under Our Great Seal to the Governors of Our said Colonies respectively, to erect and constitute, with the Advice of Our said Councils respectively, Courts of Judicature and Publick Justice, within Our said Colonies, for the hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in Our Privy Council.
- 2) We have also thought fit, with the Advice of Our Privy Council as aforesaid, to give unto the Governors and Councils of Our said Three New Colonies upon the Continent, full Power and Authority to settle and agree with the Inhabitants of Our said New Colonies, or with any other Persons who shall resort thereto, for such Lands, Tenements, and Hereditaments, as are now, or hereafter shall be in Our

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Power to dispose of, and them to grant to any such Person or Persons, upon such Terms, and under such moderate Quit-Rents, Services, and Acknowledgments as have been appointed and settled in Our other Colonies, and under such other Conditions as shall appear to Us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and Settlement of our said Colonies.

PART III

## Preamble

- 1) And whereas We are desirous, upon all Occasions, to testify Our Royal Sense and Approbation of the Conduct and Bravery of the Officers and Soldiers of Our Armies, and to reward the same, We do hereby command and empower Our Governors of Our said Three New Colonies, and all other Our Governors of Our several Provinces on the Continent of North America, to grant, without Fee or Reward, to such Reduced Officers as have served in North America during the late War, and to such Private Soldiers as have been or shall be disbanded in America, and are actually residing there, and shall personally apply for the same, the following Quantities of Lands, subject at the Expiration of Ten Years to the same Quit-Rents as other Lands are subject to in the Province within which they are granted, as also subject to the same Conditions of Cultivation and Improvement; viz.

To every Person having the Rank of a Field Officer, Five thousand Acres. — To every Captain, Three thousand Acres. — To every Subaltern or Staff Officer, Two thousand Acres. — To every Non-Commission Officer, Two hundred Acres. — To every Private Man, Fifty Acres.

- 2) We do likewise authorize and require the Governors and Commanders in Chief of all Our said Colonies upon the Continent of North America, to grant the like Quantities of Land, and upon the same Conditions, to such Reduced Officers of Our Navy, of like Rank, as served on Board Our Ships of War in North America at the Times of the Reduction of Louisbourg and Quebec in the late War, and who shall personally apply to Our respective Governors for such Grants.

PART IV

## Preamble

- And whereas it is just and reasonable, and essential to Our Interest and the 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
- 1) Grounds; We do therefore, with the Advice of Our Privy

Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

- 2) And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.
- 3) And We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
- 4a) And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that

1763, October 7.

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- 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 publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of Our Colonies respectively, where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by Ourselves or by Our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade; And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited, in Case the Person, to whom the same is granted, shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.
- 4b) And We do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who, standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Tryal for the same.
- 5)

Given at Our Court at St. James's, the Seventh Day of October, One thousand seven hundred and sixty three, in the Third Year of Our Reign.

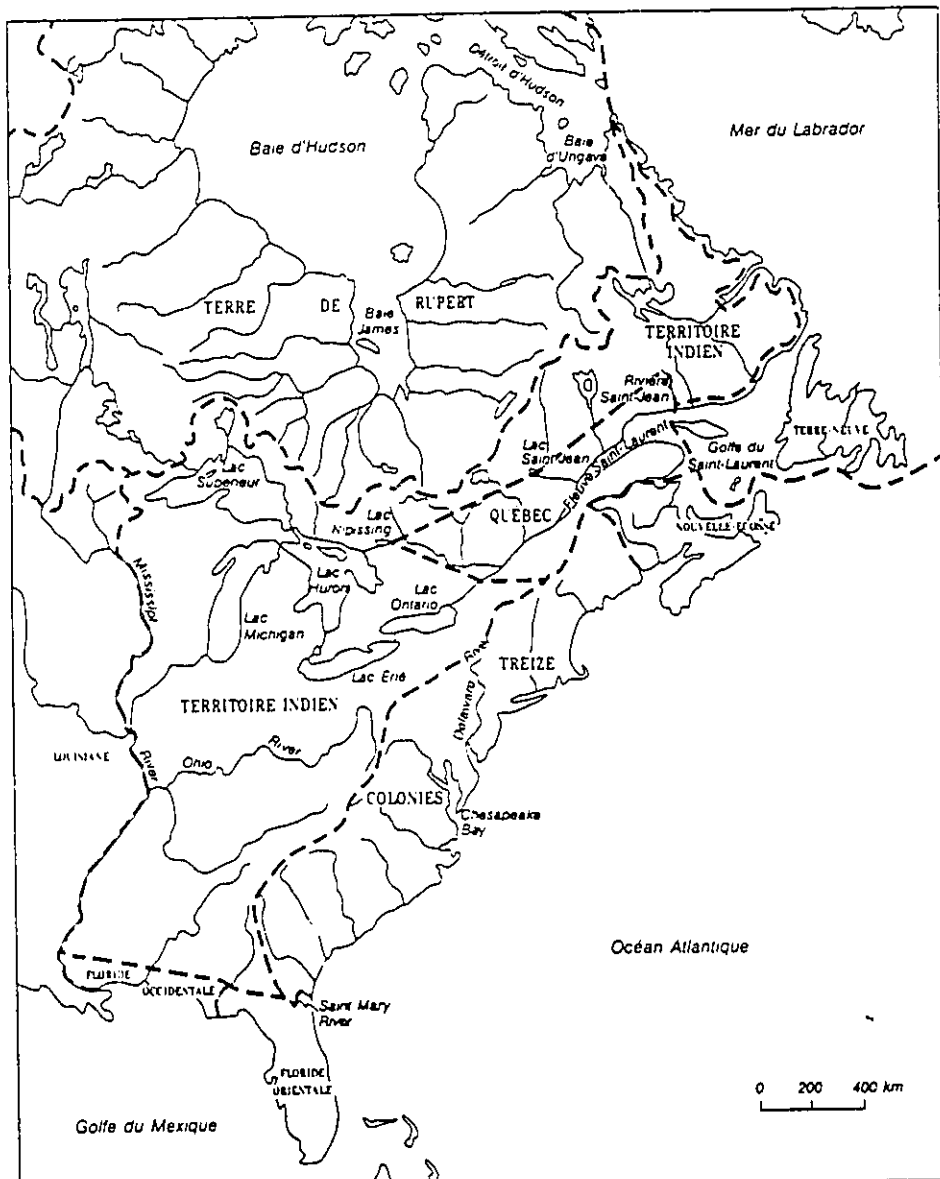
GOD SAVE THE KING.

London: Printed by Mark Baskett, Printer to the King's most Excellent Majesty; and by the Assigns of Robert Baskett. 1763.

*1 p. folio. Copies in Antiq., and P. C.; also in Mass. State Archives, and John Carter Brown Library. Entered on Patent Rolls; entered in Privy Council Register, III Geo., vol. 3, p. 102. Printed in "London Gazette," October 8, 1763, and in several of the colonial newspapers, as the "Providence Gazette," December 17, 1763; also in the "Annual Register," vi, 208, Knox, "New Collection of Voyages," 1767, ii, 265, and elsewhere.*

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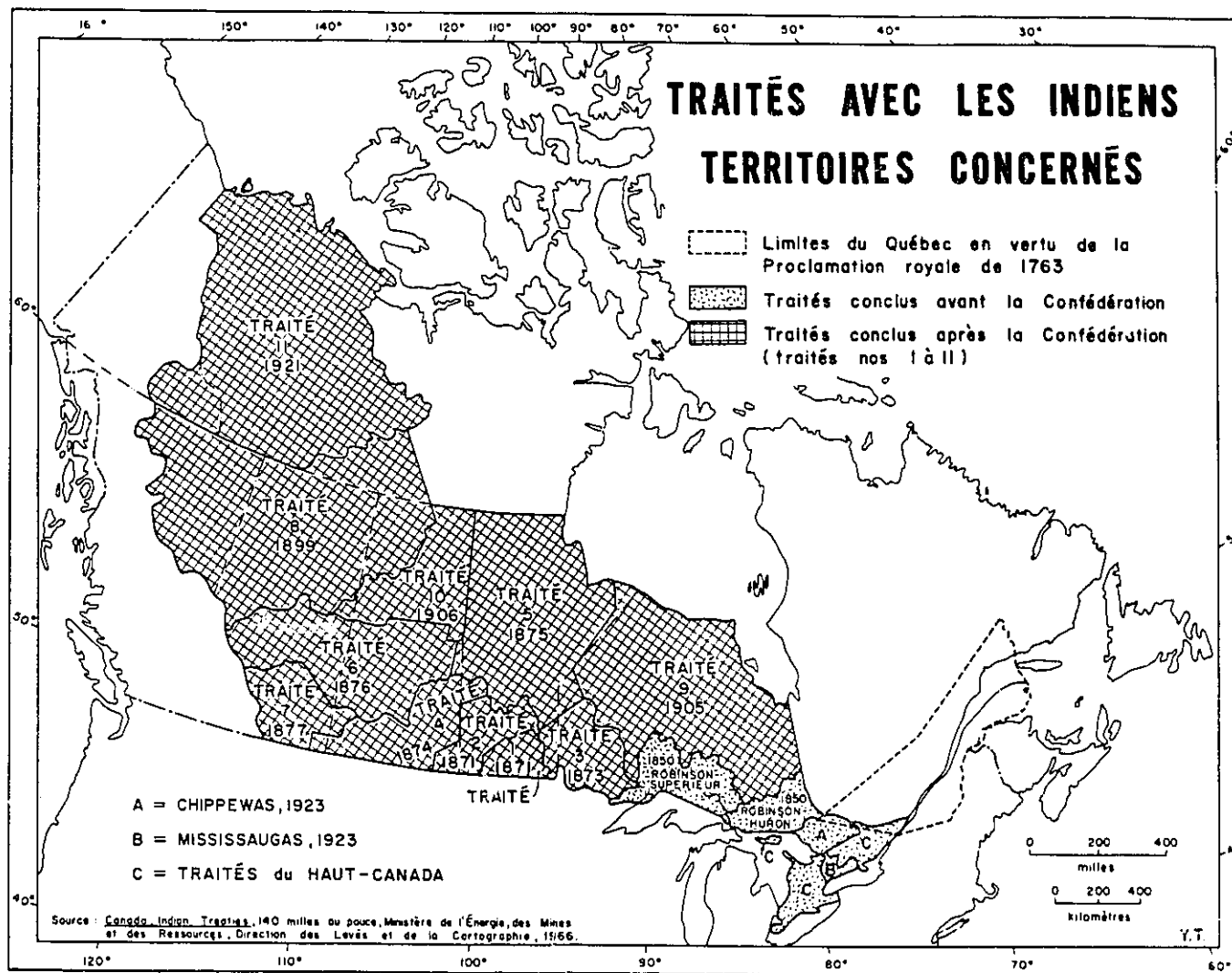
## APPENDIX "B"

MAP SHOWING DIVISIONS UNDER ROYAL PROCLAMATION OF 1763<sup>544</sup>

**Sources:** Canada, *Statuts révisés du Canada*, 1970, *Appendices*, Appendice II: Lois et documents constitutionnels, pp. 123-128;  
 Jonathan Carver, *A new Map of the Province of Quebec according to the Royal Proclamation of the 7th of October 1763*, London, 1776. APC., Coll. Nat. Cartes et Plans. H2 300-1776;  
 J.W. Chalmers, W.J. Eccles et H. Fullard, *Phillip's Historical Atlas of Canada*, London, George Philip and Son Limited, 1966, planche 3A, 1:30 000 000.

<sup>544</sup> From Beaulieu, J., Cantin, C. et Ratelle, M., "La Proclamation royale de 1763: le droit refait l'histoire", (1989) 49 *Rev. du Bar*, 317, at p. 341 and sources cited at that page. The map has been enlarged here. Note that it is inaccurate in as much as the line of division between the Indian Territory and the coast of Labrador (which was assigned to the colony of Newfoundland) does not reflect what the Privy Council said in 1927 had historically been the boundary: See *Re Labrador Boundary*, [1927] 2 D.L.R. 401, 43 T.L.R. 289 (P.C.). Note also that the southwestern boundary of the Indian Territory is derived, not from the terms of the Proclamation itself, but from the terms of the Treaty of Paris of 1763 which delineate the boundary between the territories of England and Spain in America.

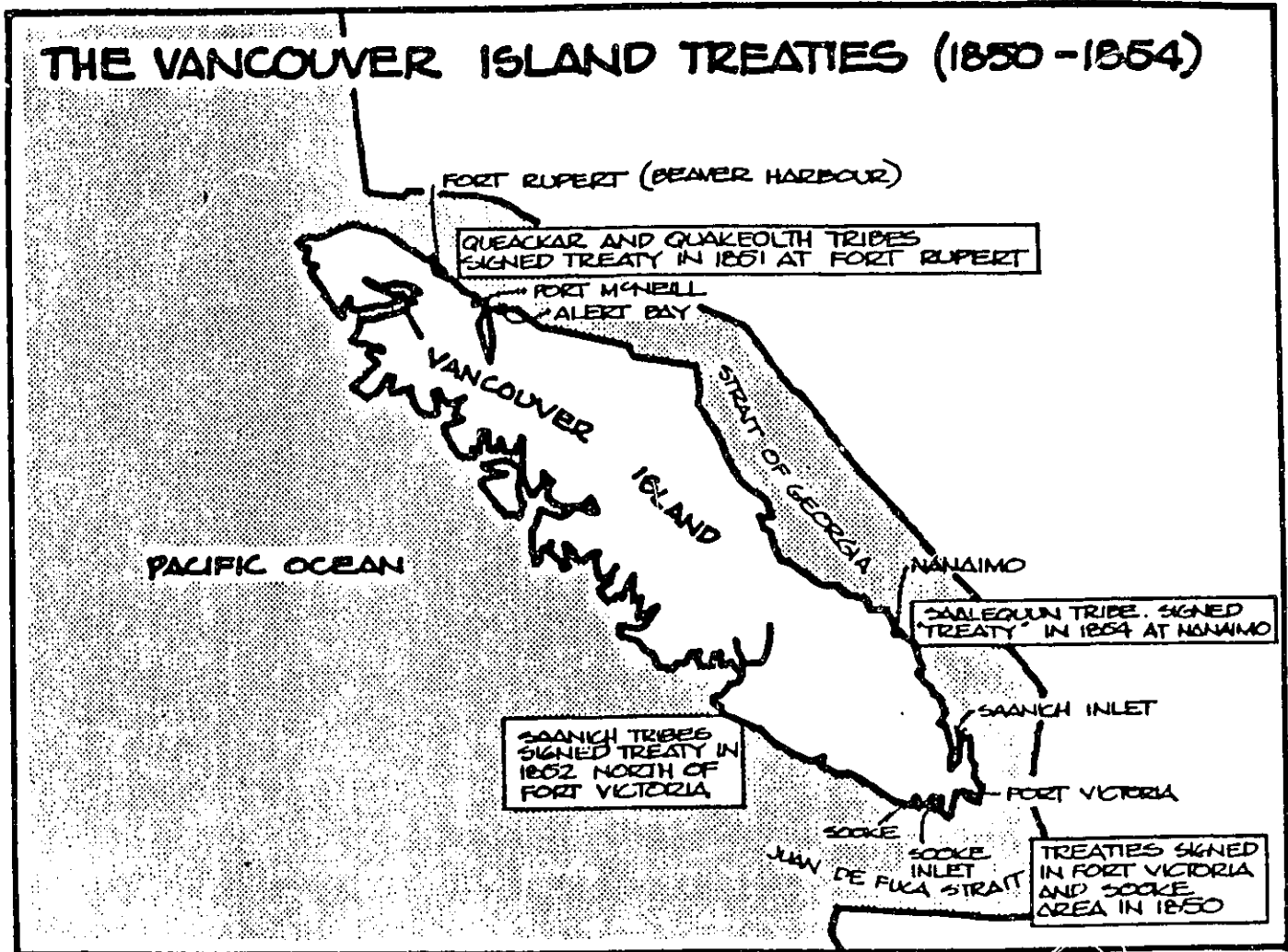
## APPENDIX "C"

MAP SHOWING MOST OF THE CURRENT TREATY AREAS<sup>545</sup>

<sup>545</sup> From La Commission d'étude sur l'intégrité du territoire du Québec (th "Dorion Commission"), *Rapport de la commission d'étude sur l'intégrité du territoire du Québec, Partie 4: Le domaine indien, vol. 4.1: Rapport des commissaires*, Québec, Éditeur officiel, 1971, at p. 67. The map has been reduced here.

APPENDIX "D"

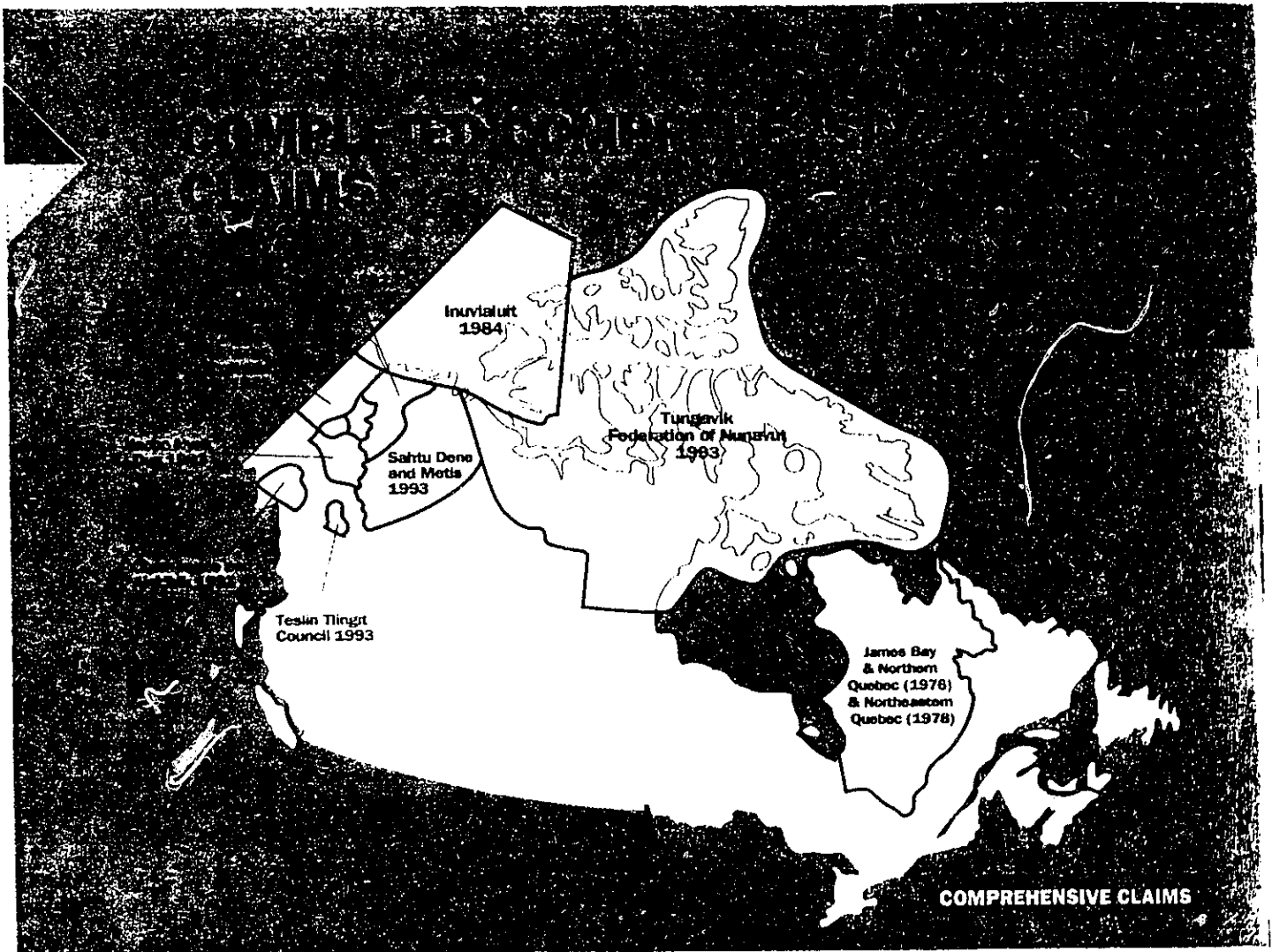
MAP OF VANCOUVER ISLAND TREATY AREAS<sup>546</sup>



<sup>546</sup> From Madhill, D.F.K., *British Columbia Treaties in Historical Perspective*, Research Branch, Corporate Policy, Department of Indian and Northern Affairs, Ottawa, 1981, at p. 10.

## APPENDIX "E"

UNOFFICIAL "ROUGH SKETCH" MAP SHOWING  
 AREAS OF COMPLETED COMPREHENSIVE LAND CLAIMS AGREEMENTS<sup>547</sup>



<sup>547</sup> This "unofficial" map was originally prepared by officials in the federal Department of Indian Affairs and Northern Development (DIAND) for a briefing of the new Minister. It was provided to the writer courtesy of Cathy Hansen, Executive Assistant to the Assistant Deputy Minister, Claims and Indian Government Directorate, DIAND. It shows only in a general way the areas covered by all comprehensive land claims agreements which have been completed to date. The map has been reduced here.

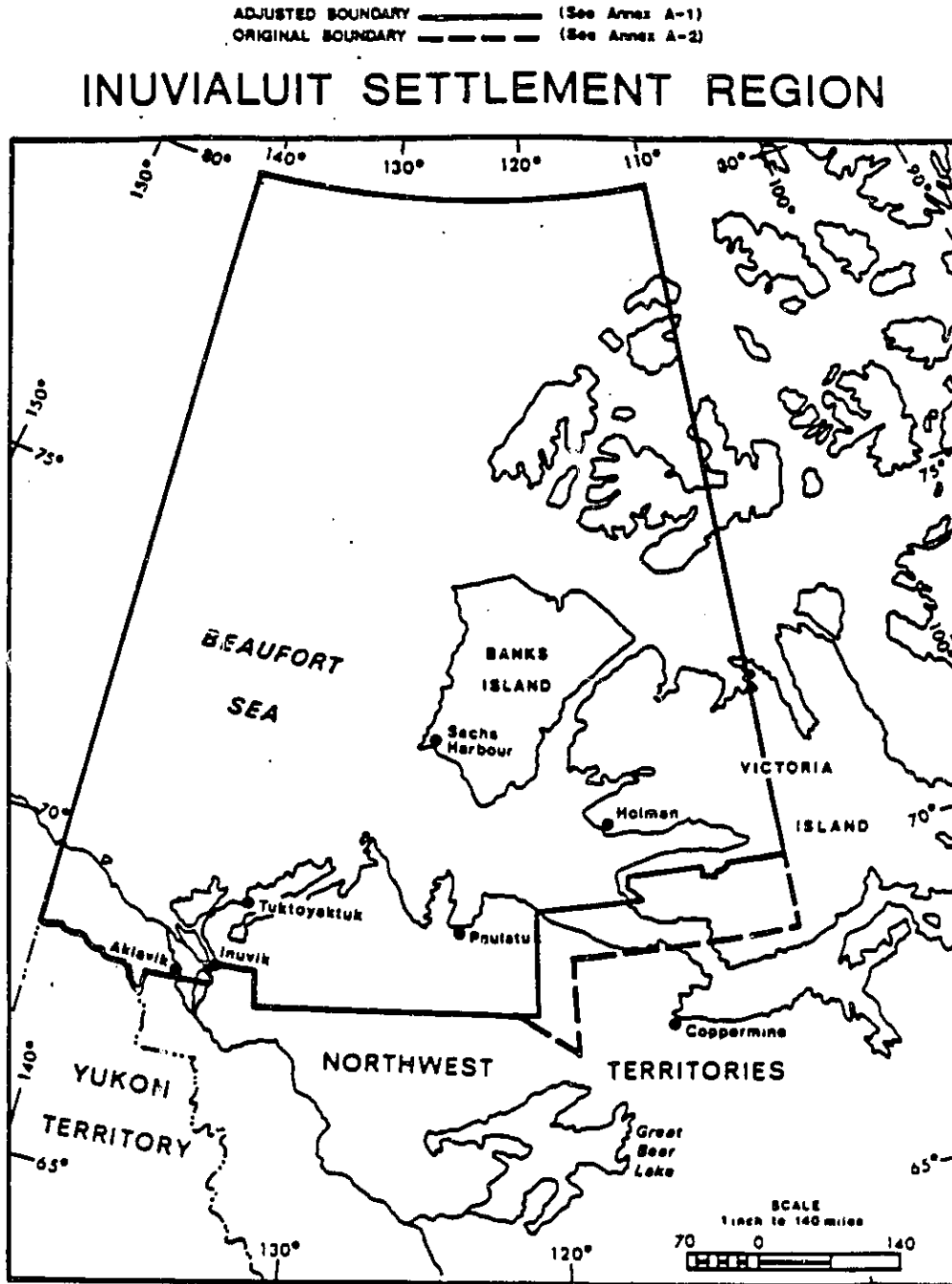
## APPENDIX "F"

MAP OF TERRITORY COVERED BY THE J.B.N.Q.A. AND THE N.Q.A.<sup>548</sup>

<sup>548</sup> From *The James Bay and Northern Quebec Agreement*, Éditeur officiel du Québec, 1976, at p. VIII. The map has been reduced here. Also, a dark line and shading within that line have been added to better show the area concerned. Because the reproduction here is in black and white only, the divisions indicated in the boxed legend are not discernable and may be ignored for present purposes.

APPENDIX "G"

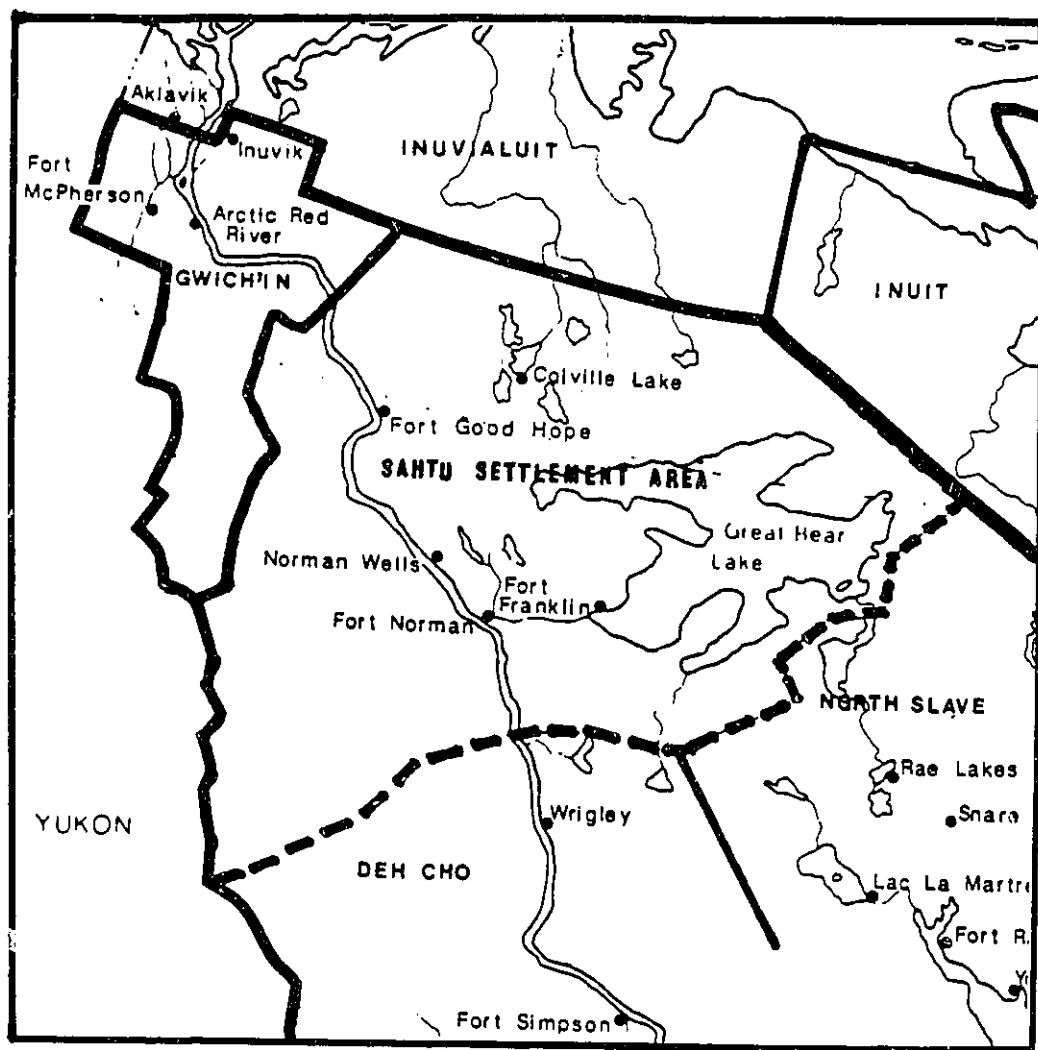
MAP SHOWING AREA OF THE INUVIALUIT (WESTERN ARCTIC) AGREEMENT<sup>549</sup>



<sup>549</sup> From *The Western Arctic Claim: The Inuvialuit Final Agreement*, Indian and Northern Affairs, Ottawa, at p. 38 (Annex "A"). The map has been reduced here.

## APPENDIX "H"

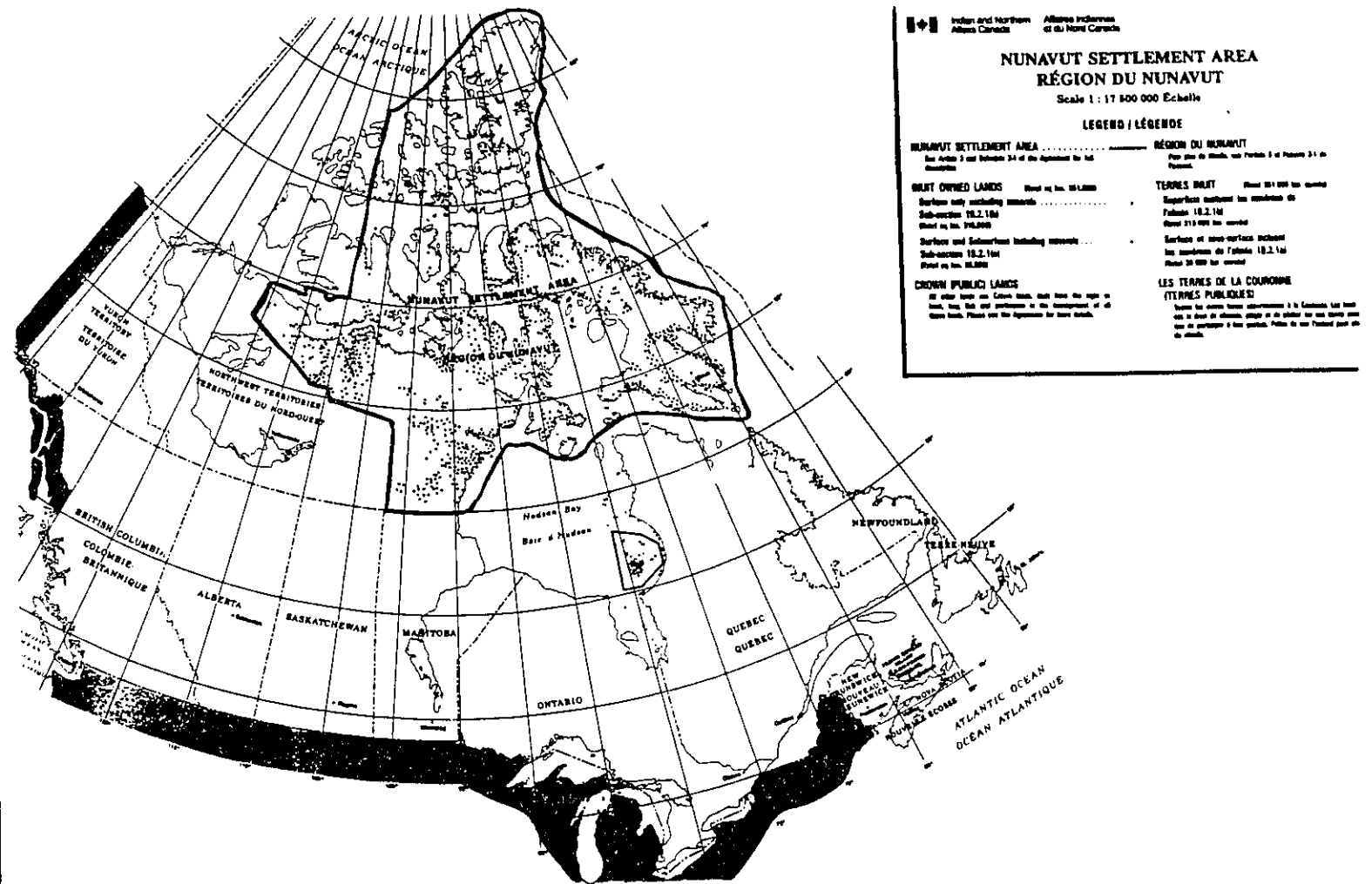
MAP SHOWING AREAS COVERED BY THE GWICH'IN AGREEMENT  
AND THE SAHTU DENE AND METIS AGREEMENT<sup>550</sup>



<sup>550</sup> From the *Comprehensive Land Claim Agreement Between Her Majesty Queen in Right of Canada and the Dene of Colville Lake, Fort Franklin, Fort Good Hope and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as Represented by the Sahtu Tribal Council*, published in two volumes jointly by the Sahtu Tribal Council, the Department of Indian Affairs and Northern Development and the Office of Intergovernmental and Aboriginal Affairs of the Government of the Northwest Territories, vol. 1, at p. 127 (Appendix "A"). Note that the southern boundary of the Sahtu Settlement Area is still under discussion.

APPENDIX "I"

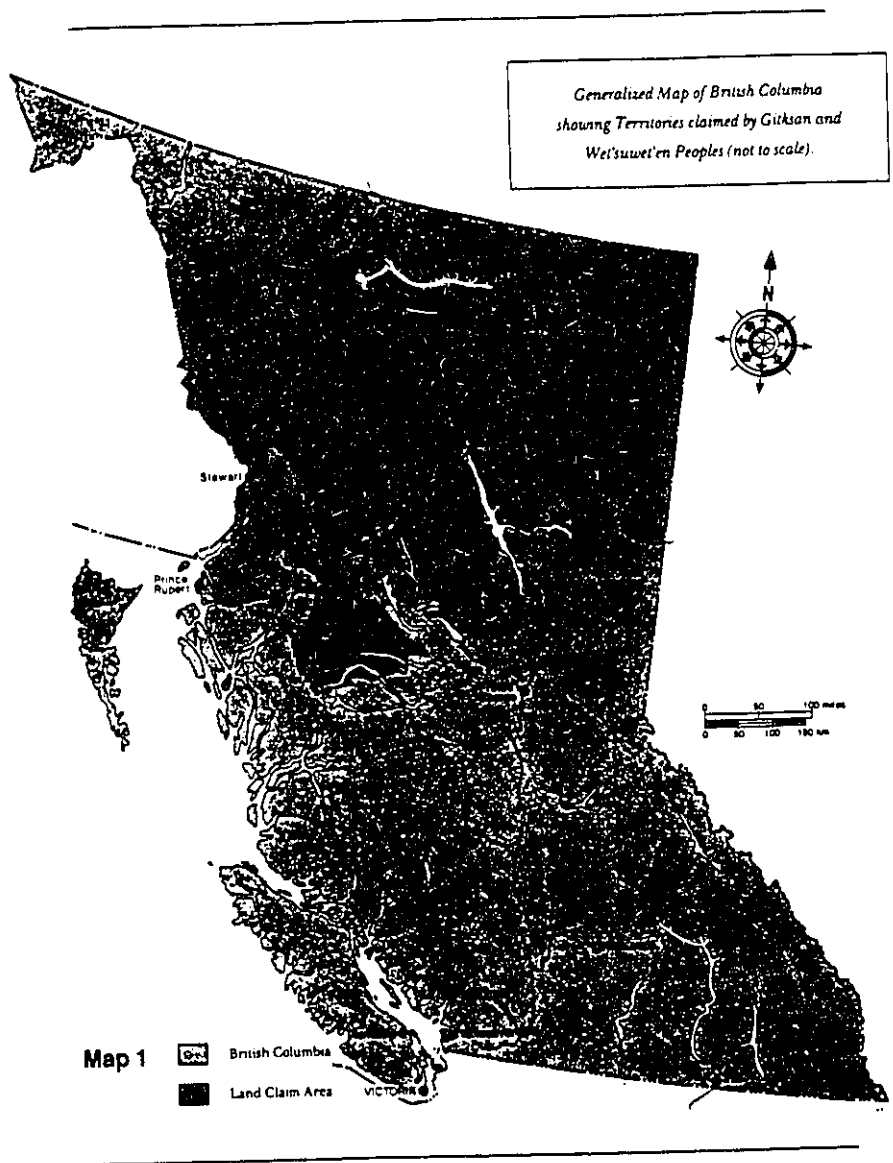
MAP SHOWING THE AREA COVERED BY THE NUNAVUT AGREEMENT<sup>551</sup>



551 Map provided by the Department of Indian Affairs and Northern Development. It has been reduced here. See also the map in the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, published under the joint authority of the Tungavik and Indian Affairs and Northern Development, Ottawa, 1993, at p. 21 (schedule 3-1), which shows only the relevant area enlarged.

APPENDIX "J"

MAP SHOWING AREA CLAIMED IN THE DELGAMUUKW CASE<sup>552</sup>



<sup>552</sup> From the Appendices to the trial level decision in the Delgamuukw case: *Delgamuukw v. B.C. et al.*, [1991] 3 W.W.R. 97, 79 D.L.R. (4<sup>th</sup>) 185 (B.C.S.C.).

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