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The Land Rights of Indigenous Canadian Peoples

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THE LAND RIGHTS OF INDIGENOUS CANADIAN PEOPLES,

AS AFFECTED BY

THE CROWN'S ACQUISITION OF THEIR TERRITORIES

BY

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WADHAM COLLEGE

OXFORD

A thesis submitted for the degree of Doctor of Philosophy in the University of Oxford

Trinity term 1979
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COLLEGE OF LAW, UNIVERSITY OF SASKATCHEWAN

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ABSTRACT

THE LAND RIGHTS OF INDIGENOUS CANADIAN PEOPLES,
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The problem examined in this work is whether the land rights originally held by Canada's indigenous peoples survived the process whereby the British Crown acquired sovereignty over their territories, and, if so, in what form. The question, although historical in nature, has important implications for current disputes involving aboriginal land claims in Canada. It is considered here largely as a matter of first impression. The author has examined the historical evidence with a fresh eye, in the light of contemporaneous legal authorities. Due consideration is given to modern case-law, but the primary focus is upon the historical process proper.

Despite the importance of the subject, little detailed legal research has been done in this area, due, perhaps, to the relative inaccessibility of the documents concerned and the difficulties of interpreting such documents at several centuries remove, involving, as it does, the resurrection of a long-dead legal ethos.

The work begins with a review of the basic principles of British law governing the acquisition of colonial territories and its effect on private property rights. It then examines the original territorial claims advanced concerning Canada by Spain and Portugal, France, and England, discussing their implications for Indian land rights. It proceeds to trace the steps by which the British Crown acquired title to its Canadian territories up to 1763, dealing separately with old Nova Scotia, Rupert's Land, French Canada, and the far west and north-west. Finally it examines in detail the provisions concerning Indian lands in the Royal Proclamation of 1763, discussing their historical evolution, scope, validity, legal effects, modifiability and continuing application. The conclusion reached is that Indian peoples generally retained recognizable rights to unsurrendered lands in their possession throughout Canadian territories following the Crown's acquisition of sovereignty, and that these rights were considered inalienable save to the Crown or its assignees.
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Passages quoted from old documents are faithful to the originals, in spelling, grammar, punctuation and accentuation, except where otherwise indicated. This accounts for what otherwise in certain cases, might appear to be typographical errors.

Abbreviations are used to cite many of the documentary sources employed. A complete list of such abbreviations is found on the following pages.

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<th>Description</th>
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<tr>
<td>APC</td>
<td>Grant and Munro, eds. Acts of the Privy Council of England. Colonial Series</td>
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<tr>
<td>BAFSP</td>
<td>Great Britain, Foreign Office. British and Foreign State Papers</td>
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<tr>
<td>BRP</td>
<td>Brigham, ed. British Royal Proclamations Relating to America</td>
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<tr>
<td>CCHS</td>
<td>Collections of the Connecticut Historical Society</td>
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<td>CCR</td>
<td>Trumbull and Hoadly, eds. Public Records of the Colony of Connecticut</td>
</tr>
<tr>
<td>CD</td>
<td>Shortt and Doughty, eds. Documents Relating to the Constitutional History of Canada, 1759-1791</td>
</tr>
<tr>
<td>Charters</td>
<td>Charters, Statutes, Orders in Council, etc., Relating to the Hudson's Bay Company</td>
</tr>
<tr>
<td>CHBE</td>
<td>Cambridge History of the British Empire</td>
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<tr>
<td>CNW</td>
<td>Oliver, ed. Canadian North-West</td>
</tr>
<tr>
<td>CTS</td>
<td>Parry, ed. Consolidated Treaty Series</td>
</tr>
<tr>
<td>DCHB</td>
<td>Dictionary of Canadian Biography</td>
</tr>
<tr>
<td>DNY</td>
<td>O'Callaghan, ed. Documentary History of New York</td>
</tr>
<tr>
<td>EB</td>
<td>Encyclopaedia Britannica</td>
</tr>
<tr>
<td>Edits</td>
<td>Edits, ordonnances royaux, déclarations et arrêts . . . concernant le Canada</td>
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<tr>
<td>EIC</td>
<td>Charters Granted to the East-India Company</td>
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<td>HBC Minutes, 1671-4</td>
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<tr>
<td>HRRA</td>
<td>Historical Records of Australia</td>
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<tr>
<td>JCT</td>
<td>Journal of the Commissioners for Trade and Plantations</td>
</tr>
<tr>
<td>JP</td>
<td>Sullivan, Flick et al., eds. Papers of Sir William Johnson</td>
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<tr>
<td>LBC</td>
<td>Great Britain, Privy Council. Judicial Committee. In the Matter of the Boundary between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula [Appendices]</td>
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<tr>
<td>MA</td>
<td>Massachusetts Archives</td>
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INTRODUCTION

We begin with a continent inhabited by perhaps 30 million people of indigenous origins, people free of outside influences, and organized in a variety of ways, from the family units of the far north to the sophisticated states of Meso-America.\(^1\) We end, in modern times, with a continent ruled in every sector by states of European origins and largely European stock, states in which the indigenous peoples have in many instances been reduced to minority groups of inconsiderable numbers and strength, largely bereft of their original political structures, laws and territories, and increasingly even languages and ways of life.

This transformation of North America from a continent isolated from the outside world to one dominated by European peoples and institutions was virtually complete by the close of the nineteenth century. The process began earlier and proceeded more swiftly in some areas than in others. Canada was at most stages less advanced than its southern neighbour in the degree and extent of European penetration. In certain respects it remains so today, with vast northern regions occupied largely by native Canadians, and a relatively small total population of some 23 millions, of which over 1 million may be counted as wholly or partially of indigenous origins.

The number of indigenous people living in Canada in pre-European times is debated, with estimates ranging from the traditional figure of around 220,000 to more recent calculations yielding several millions.\(^2\) The matter is complicated by the fact that the native population of America entered upon a period of drastic decline with the advent of Europeans. This was due in part to the effects of war, alcohol and similar factors, but primarily to the

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1 For discussion of the aboriginal population of North America in pre-European times, see Driver, Indians of North America, 63-5; Dobyns, "Estimating Aboriginal American Population". The estimate given here includes Meso-America.

2 Compare Jenness, Indians of Canada, 1; Handbook of Indians of Canada, 389-90; Driver, Indians of North America, 63; Dobyns, "Estimating Aboriginal American Population".
introduction of diseases such as smallpox and measles, to which the Indians had little immunity and succumbed in staggering numbers.

By and large, the indigenous peoples of Canada lived by hunting, fishing and food-gathering. Agriculture was not generally practised except in the area of the St. Lawrence Valley and the Great Lakes. This was due in part to such factors as climate, the nature of the terrain, and the absence of an advanced farming technology. Even today the greater part of Canada is not used for agricultural purposes.

Most indigenous groups claimed exclusive rights to the lands whose resources they exploited, although in some cases such lands were shared with allied neighbouring peoples. Title to land was normally vested in a group, be this a family, lineage, village or tribe, with members having rights to use and enjoy the lands in question. Title was thus usually "communal" rather than "individual". In cases where a single person was said to be owner, his title was often nominal or held in trust for a group, whose members enjoyed rights of use.

The land-holding unit among indigenous Canadian peoples was frequently identical with the main political unit. Territorial claims flowing from the independent status of the political unit consequently tended to merge with claims to the land asserted by the same group in its land-holding capacity. The principal communal unit for land-holding and political purposes was often relatively small, and generally smaller than the linguistic and cultural groupings whose names are familiar to most Canadians. There were no unified political organizations for the Montagnais, the Micmac or the Inuit, such as existed, say, among the Iroquois.

It may be thought that the extent of territory originally claimed by indigenous Canadian peoples was excessive, considering their relatively small population and the limited use made of the land. This may or may not be so, but one must avoid double standards in making such judgments. By comparison,

3 See: Driver, Indians of North America, passim; Jenness, Indians of Canada, passim.
at the end of the year 1763, Great Britain had laid claim to virtually all
the territories encompassed by modern Canada, some 3,800,000 square miles,
at a time when the total European population of the country numbered less
than 100,000 and was concentrated on the shores of the St. Lawrence River and
the coasts of old Nova Scotia and Newfoundland (see Map 1.24). Only a minute
proportion of the total area claimed was actually farmed, while political con-
trol outside the few settled areas was at best minimal and in most cases non-
existent.

Again, the Hudson's Bay Company by virtue of its Royal Charter of 1670
asserted proprietary rights and a monopoly on trade within a vast territory
which at its greatest purported extent, as claimed by the Company in the
period 1713-1763, comprised the whole of Western Canada (including British
Columbia, the North-West Territories and the Yukon), as well as the greater
part of Ontario and roughly half of Quebec, an area of over three million
square miles.4 Yet the original proprietors under the Charter numbered eight-
een people, none of whom resided in the region claimed. In 1749, the Company
had some 120 regular employees, and four or five coastal forts in Hudson's
Bay. At that era, virtually none of the territories claimed were used for
agriculture. They were exploited only indirectly through the fur trade, which
depended upon hunting and trapping conducted by indigenous peoples.

When one considers the metamorphosis of Canada from initial European
contact to modern times, several questions arise: to what extent did the
original land rights of native Canadians survive the expansion of European
states into the New World; and further, where these rights were extinguished,
in what manner was this accomplished. Such questions have come before Cana-
dian courts with increasing frequency over the past decade, and they promise
to give rise to more litigation in future.

The reasons are simple. On the one hand there has been a growing feel-
ing among indigenous Canadians that their rights and interests, as they see
them, have been ignored and overridden in the past, and a determination to

4 See Chapters 8 and 10.
prevent this from recurring. At the same time it happens that extensive areas of Canada hitherto inhabited principally by Indians and Inuit now show signs of a significant resource potential, or are required for large-scale development projects. For both reasons, the question of indigenous title has important political and economic implications.

Recent court cases on aboriginal rights have been indecisive. Two suits of major significance relating respectively to British Columbia and the Northwest Territories were ultimately decided in the Supreme Court of Canada on procedural grounds. Another important case, arising from Quebec, was eventually settled out of court. A host of lesser cases on related issues have given rise to a well-nigh impenetrable thicket of conflicting judicial pronouncements.

Any survey of Canadian decisions dealing with Indian land rights reveals certain areas of weakness on the Canadian bench, for these cases pose historical, anthropological and legal questions well beyond the range of a normal court's experience. Judicial day-excursions into relatively unvisited spheres of learning do not always produce happy results. It was possible, in 1970, for the Chief Justice of the British Columbia Court of Appeal to discuss a land claim advanced by the Nishga people in the following terms:

in spite of the commendation by Mr. Duff, a well known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property. . . I see no evidence to justify


6 Kanatewat v. James Bay Development Corporation, (unreported) Que.C.A., case no. 09-000890-73, 21 November 1974; (unreported) Que.S.C. at Mt1., case no. 05-04841-72, 15 November 1973. See account in Richardson, Strangers Devour the Land.

a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them. . . 8

The peremptory dismissal of indigenous legal concepts, the contrasting of "our" civilized notions with those of "these primitive people", does not suggest a very complete grasp of the issues at stake. 9

An example of a different sort is furnished by a recent judgment from New Brunswick, where Ayles J. states that the Royal Proclamation of 1763, which contains basic provisions governing Indian land rights, obviously had no effect whatsoever upon the colonies of Nova Scotia, New England, or Virginia. 10 To the contrary, it is clear that the Proclamation was intended to apply, and was in fact put into force in all three areas. 11 The point has been so profusely documented with respect to New England and Virginia, and features so prominently in standard historical works, that it is difficult to explain the court's remarks. 12 Such is the basis upon which questions of Indian land rights are not infrequently considered in Canadian courts today.

The subject needs a fresh look, one which combines detailed historical analysis with a sensitivity to contemporaneous legal norms, an inquiry which, while taking due notice of modern case-law, looks beyond the often conflicting remarks encountered in the reports, to the historical process itself. Despite the need for legal research of this kind, remarkably little has found its way into print. The major existing work in the area, Native Rights in Canada (2nd ed.), is a pioneering effort, the product of a joint research project conducted over a twelve week period in 1971. 13 As such it breaks new ground, and opens avenues for further inquiry. Unfortunately most of these

9 See the comments made on appeal by Hall J. in the Supreme Court of Canada; (1973) 34 D.L.R. (3d) 145 at 169-70.
11 On the Proclamation's application in old Nova Scotia see Chapter 15.
12 See, e.g., Alvord, Mississippi Valley in British Politics (1917); Sosin, Whitcomb in the Wilderness (1961).
13 Cumming and Mickenberg, eds., Native Rights in Canada, 2nd ed. (Toronto: 1972); see their acknowledgment at p. viii.
avenues have remained unexplored.\textsuperscript{14}

The present work attempts to remedy that deficiency, if only partially. The legal status of lands possessed by indigenous Canadians varies considerably from area to area, and depends in each case upon factors often peculiar to the region. In order to assess the validity of particular indigenous land claims, it is often necessary to undertake a comprehensive examination of the anthropological, historical and legal materials pertaining to that area from the date the Crown or its predecessor-in-title first asserted sovereignty up to the present day, a time-span for some regions of several centuries. To do this for any one section of Canada -- say Nova Scotia or Quebec -- would be a task in itself. To accomplish it for the entirety of Canada with any claim to thoroughness and accuracy would require a work several times the length of this treatise.

In many instances, however, the legal status of Indian lands hinges upon a common factor, namely the effects flowing from the initial assumption of jurisdiction by the British Crown or its predecessor-in-title, and the acts attending that event and regulating its consequences. Did the land rights asserted by the indigenous inhabitants survive that process, or did they pass into the realm of legal non-entities? The answer given will often determine our interpretation of subsequent events. So the issue is an important one. True, its resolution would not supply a universal key to indigenous land disputes in Canada today. However it would furnish the necessary legal basis for resolving many such disputes. Our aim, then, is to determine the legal impact which the original assumption of sovereignty by the Crown (or its predecessor) had upon the land rights claimed by indigenous Canadians. The detailed history of Indian lands in each area from that time onward to the present day will not be attempted.

The sequence of events whereby the British Crown obtained title to Canada falls into three parts: 1) the era of exploration and initial penetration prior

\textsuperscript{14} See, by way of exception, Narvey, "The Royal Proclamation of 7 October 1763. The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company" (1973-74) XXXVIII Sask.L.R. 123.
to 1713; 2) the period of expansion, from the Treaty of Utrecht of 1713 to the conquest and cession of French Canada in 1763; and finally 3) the period of consolidation, from the Treaty of Paris to modern times.

The opening phase witnessed France and England establishing bases on the St. Lawrence river and the Atlantic seaboard respectively, while making competing claims to Newfoundland, Acadia and Hudson's Bay. At Utrecht in 1713, France recognized Britain's title to Newfoundland and Hudson's Bay, and also ceded Acadia to the Crown, while retaining Canada and the islands of St. John (Prince Edward) and Cape Breton.

The boundaries of Acadia and Hudson's Bay were not described in the Treaty, and were disputed throughout the next phase. Anglo-French rivalry assumed new dimensions with a struggle for the American interior centering on the Ohio valley, which led eventually to the Seven Years' War. The Peace concluded at Paris in 1763 decided these matters in Britain's favour. France ceded the whole of Canada and the eastern sector of Louisiana to the English Crown, while Spain surrendered Florida. The Treaty marked the elimination of France as a serious territorial rival in North America. In the previous year the French Crown had agreed to transfer to Spain the rest of Louisiana, west of the Mississippi.

In 1763, British claims to sovereignty over the whole of modern Canada were virtually complete. Henceforth the process was one of consolidation and definition, particularly in the far west and north-west. In that same year, the Crown issued a Proclamation regulating the effects of the recent cession, and containing detailed provisions concerning Indian lands throughout the whole of British North America. For both reasons, then, the year 1763 provides us with a fitting point to close our inquiry.

We will begin, in Part I, with a review of the basic principles of British law governing the acquisition of colonial territories, and the effects of acquisition on private property rights. We will proceed in Part II to examine the original territorial claims advanced by European powers regarding

15 The point is documented in Chapter 10.
Canada, from earliest times to the end of the seventeenth century, discussing their implications for Indian land rights. Our next task, in Part III, will be to trace in detail the steps by which the British Crown acquired title to its Canadian territories, ending with the Treaty of Paris of 1763. Four areas will be examined: old Nova Scotia, Rupert's Land, former French Canada, and the far west and north-west.

We will then move to a consideration of the Royal Proclamation of 1763. This instrument both confirms and, as it were, codifies the legal principles governing Indian lands in many old possessions of the Crown, and extends these to the recent French acquisitions. It is without doubt the single most important legal document affecting aboriginal title in Canada today. Its meaning, scope, and precise legal effects are all objects of controversy, and we will devote Parts IV and V to discussing them.

Our inquiry ends with the Proclamation. The task of tracing the detailed history of Indian lands in the various Canadian regions from 1763 onwards will not be attempted. However the inherent modifiability of the Proclamation, and its ability to adapt to the successive constitutional changes which Canadian territories underwent, are matters germane to our subject, and will be considered in Part VI.

The status of Indian lands on the island of Newfoundland prior to 1763 will not be examined here. The last few descendants of its original inhabitants, the Beothuck people, died in the early 19th century, the race as a whole having succumbed to the combined onslaught of war and disease. The present Indian inhabitants of Newfoundland island are comparative newcomers, arriving at periods when European states had already staked claims there. Their inability to trace title to an era prior to European penetration excludes them, strictly speaking, from the scope of our inquiry. However, these more recent Indian arrivals stood to benefit from the Proclamation of 1763, and so its application to Newfoundland will be examined in the later parts of this work.

16 See Upton, "Extermination of the Beothucks".
The status of aboriginal title in post-Revolutionary United States, in New Zealand, and Australia (to say nothing of Africa and India), all have relevancy to our topic. Yet the situation in each of these places is sufficiently different to render a liberal recourse to their case-law at best a hazardous undertaking, without an accompanying historical analysis. The latter assignment cannot be fulfilled within the limits of this work. So we have excluded from consideration all but the most important cases emanating from these areas, cases of direct bearing upon the position of Indian lands in Canada.

The limit on length stipulated for dissertations has also necessitated the curtailment or elimination of discussion of certain subjects in the final version of this work. These include: the customary land systems of indigenous Canadian peoples; the views of European writers on international law; early French voyages to Canada;17 and the legal effects of the Capitulation of Montreal of 1760.

A final point must be made about terminology. For the sake of convenience, the indigenous peoples of Canada, both Indian and Inuit, will be referred to simply as "Indians", a word which in Canadian legal usage, if not in ordinary parlance, extends to aboriginal peoples generally.18

17 See the author's article, "French Claims in North America, 1500-59" [1978] Canadian Historical Review 139.
18 See Chapter 14.
PART I

PRINCIPLES OF BRITISH COLONIAL LAW
CHAPTER 1

ACQUISITION OF COLONIES

There are, at common law, several distinct methods by which the Crown may acquire title to a colonial territory. 1 Although they differ in their factual aspects, they each constitute a manifestation of the intention of the Sovereign to assume full dominion over the area in question. 2 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. We will examine these matters shortly. First let us review the main modes of acquisition. They are usually stated to be: conquest, cession, settlement, and annexation.

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. 3 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


2 The particular positions of protectorates and protected states will not be considered here.

3 See Roberts-Wray, Commonwealth Law, 105-7; Wong Man On v. The Commonwealth (1952) 86 C.L.R. 125 (Aust.H.C.) at 130-3. But see: Foltina, Julina (1814) 1 Dods. 450 (Adm.).
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.  

The significance of these various modes is this. In territories acquired by conquest, cession or annexation, the Crown initially holds full prerogative powers of legislation and may alter any existing laws or abrogate them entirely and introduce new ones, subject to the overriding legislative authority of Parliament and perhaps to certain fundamental principles. However in the absence of such acts the original laws of the place remain in force, except to the extent that they are unconscionable or inconsistent with the change of sovereignty itself. By contrast, in colonies acquired by settlement English law is introduced ipso facto, insofar as it is applicable to local circumstances. The Crown has no greater prerogative powers of legislation in a settled colony than it possesses in the mother country, and so may not legislate there apart from Parliament. Such then is the classic distinction between "settled" and so-called "conquered colonies". The latter phrase is conventionally used to refer to colonies gained not only by conquest, but also by cession or annexation, and we will follow this usage here.

The modern law on the subject is the result of a long and complex historical process, during which several distinct phases may be observed. The various territories now comprising Canada were acquired by the British Crown at different stages and in different ways, for the most part during the seventeenth and eighteenth centuries. A proper understanding of this process presupposes some awareness of contemporaneous formulations of the governing rules. In this chapter we will trace their evolution from the earliest days of imperial expansion to the mid-nineteenth century, when they received their classic expression. It may be noted that the origins and genesis of many of the relevant principles are obscure, and the authorities conflicting. The British

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4 See especially the remarks of Viscount Haldane in Sobhuza II v. Miller [1926] A.C. 518 (P.C.) at 525.

empire at its height was a remarkably diverse and untidy collection of possessions, and the views taken in the courts over several centuries in every way reflect this fact. We will focus here mainly upon the American colonies, both because of their particular relevance to our subject, and because they provided the original context for the growth of many colonial doctrines.

1) Calvin's Case

Our survey begins with a passage in Coke's report of Calvin's Case, decided in 1608. Coke distinguishes between aliens and subjects, and says that the former are either friends or enemies, and if enemies either temporary or perpetual. Among alien friends he classifies the subjects of Christian sovereigns in league with the Crown. The common law, he states, permits alien friends to acquire and maintain actions for personal goods within the realm. But they cannot acquire lands or houses, except for habitation. Moreover, continues Coke, when aliens become enemies (as all alien friends may temporarily) they are disabled from obtaining anything or maintaining actions. Certain aliens are considered perpetual enemies and so suffer a permanent incapacity, even though there be no war "by fire and sword" with their sovereigns. "All infidels", states Coke,

are in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace;...

This remark provides the occasion for a passage which demands quotation in full.

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath vitae et necis potestatem, 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 ipso 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

6 (1608) 7 Co.Rep. 1a at 17a-17b; 77 E.R. 377 at 397-8.
7 He later mentions a third type of alien enemy, namely inimicus permittus, one who enters the realm under the King's safe-conduct; ibid., at 18a.
Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a King hath a kingdom by title of descent, there seeing by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself, without consent of Parliament. Also if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had 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. 8

Two distinct matters are discussed here: the status of infidels, and the modes and consequences of territorial acquisition. We will deal with these separately.

2) The position of infidels

Coke describes infidels as perpetual enemies and states that upon the Crown's acquisition of sovereignty their laws are automatically abrogated. The mode of acquisition 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. Again, although infidel laws cease upon conquest, a legal vacuum does not ensue. The country is ruled according to natural equity until other laws are provided.

It is difficult to assess how far these propositions represent the accepted law of the era, or indeed how literally they can be taken. The authorities cited for the rule that infidels are perpetual enemies seem surprisingly weak. Coke quotes a scriptural passage which asks: "What agreement is there of Christ with Belial, or what part has the believer with the infidel?" 9 The text, it would appear, refers to spiritual rather than temporal discord. 10 Coke then cites an excerpt from the Register, which he renders thus: "Infideles sunt Christi et Christianorum inimici". The quotation stems from a writ of protection granted to the Hospital of St. John at Jerusalem. In reality the writ merely states that the hospital was founded for the defence of the Church

8 At 17b. 9 2 Corinthians 6, 15. 10 See the argument of Sir George Treby (afterwards Chief Justice) as counsel in East India Company v. Sandys (1683-5) 10 State Tr. 371 (K.B.) at 391-2.
"contra Christi & christianor inimicos", hardly affirming that all infidels are enemies.\(^{11}\) The third authority is an opinion delivered in 1520 by Justice Brooke in an action concerning trespass for beating a servant and taking away a dog. The judge remarked that if a lord beats his villein, or a husband beats his wife, or a man beats an outlawed person, or a traitor, or a pagan, they shall have no action because they are not able to sue an action.\(^{12}\) The status of pagans was not at issue and the reference to them is incidental and cursory.\(^{13}\)

If infidels were by law perpetual enemies, it would appear to follow that the Sovereign could not conclude valid and effective treaties of peace and commerce with non-Christian states.\(^{14}\) Yet there seems to be no contemporaneous legal authority for the latter proposition. In fact Elizabeth I had in 1580 secured consular and trading privileges with the Ottoman Empire, the very infidel state considered most threatening to the Faith. These privileges were renewed and extended in 1593 and again in 1606, and were in force when Coke drafted his report.\(^{15}\) Nor were relations with the Turks maintained at an insignificant level. The first English resident ambassador arrived in the Porte in 1583, and was, after 1589, one of only three permanent

\(^{11}\) The phrase appears in this context: "qd' quidem hospitale in tuitionem & defensionem universalis sacrosanctae ecclesiae contra Christi & christianor inimicos institutum est pariter & fundatum,, ..."; Registram Brevium, 282 (overleaf). See counsel’s arguments in East India Company v. Sandys (1683-5) 10 State Tr. 371 (K.B.) at 374, 392, 442-3.

\(^{12}\) The original reads as follows: "si le snr bate son villein, ou le bat sa fee, ou hoe bater vn hoe vtilage ou traitour, ou pagane, ilz nauont acc, pur c q ilz ne sot p abl de suer acc,, ..."; (1520) Year Book, Trinity Term, 12 Henry VIII, fol. iii at iii.

\(^{13}\) See the comments of counsel in East India Company v. Sandys (1683-5) 10 State Tr. 371 (K.B.) at 392, 443. Coke also quotes a further authority, without giving its source. It states: "Judaeo Christianum nullum serviat municipium, nefas enim est quem Christus redemit blasphenum Christi in servitutis vinculis detinere."

\(^{14}\) Under the principle, recognized in Calvin’s Case at 17b, that the Crown can exercise its prerogative powers only in accordance with the law, which it cannot alter save in Parliament. See also the Proclamation’s Case (1610) 12 Co. Rep. 74; 77 E.R. 1352.

\(^{15}\) Liebentw, "Western Judicial Privileges", 318-20; some of these capitulatory agreements are reproduced in B&PSP, 1812-4, I, Part I, 747 ff.
envoys maintained abroad by the Queen.16

Coke himself affirms in his Institutes that a Christian prince may con-
clude treaties of peace, consolation and commerce with infidel rulers, although
not pacts of mutual assistance.17 But where a treaty of peace existed with
such a sovereign, his subjects presumably could not be treated as enemies. It
follows that infidels would not be perpetual enemies, but either temporary
enemies or temporary friends depending upon the circumstances, as was the case
with Christians.18 Elsewhere in his Institutes Coke appears to adopt this
viewpoint, stating in effect that alien Christians and infidels occupy the
same position so far as their ability to acquire property within the realm is
concerned.19

The statement in Calvin's Case that infidel laws cease automatically
upon conquest also bears examination, in particular because no supporting
authorities are cited. It derives from the unstated premise that upon the
conquest of a state any laws contrary to Christianity or the laws of God and
nature are ipso facto abrogated. However it is improbable that all the laws
of an infidel country would ever meet this description. One need only think
of laws for the security of private property or the observance of contracts.
Coke's statement should perhaps be taken to refer only to laws which are
essentially "infidel" in their repugnancy to Christian norms. As we will see,
this was the position eventually adopted by the common law.

The views expressed in Calvin's Case were questioned by Sir Edward
Littleton in a judgment delivered probably circa 1640, when he was Chief
Justice of the Common Pleas.20 He held:

16 Vaughan, Europe and the Turk, 169; Mattingly, Renaissance Diplomacy, 205,
311-2 note 10.
17 4 Institutes 155.
18 See also Michelborne v. Michelborne (1609) 2 Brownl. & Golds. 296; 123
E.R. 952 (Common Bench) where Coke in effect recognizes that the King
might permit trade with infidel realms.
19 "If an alien Christian or infidel purchase houses, lands, tenements, or
hereditaments to him and his heirs, albeit he can have no heirs, yet
he is of capacitie to take a fee simple but not to hold"; 1 Institutes
2a-2b.
20 Sir Edward Littleton (1589-1645) was successively Chief Justice of Wales
(1621), Solicitor-General (1634), Chief Justice of the Common Pleas (1640),
and Lord Keeper (1641).
Turks and infidels are not perpetui inimici, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice Brooke; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons.\textsuperscript{21}

However the dicta in Calvin's Case were not so easily put to rest. They exercised a continuing and substantial influence throughout the seventeenth century. Thus it was argued before a Parliamentary Committee in 1647 that the law regarded infidels as perpetually at war with Christians. A subject could not have peaceful dealings with the Crown's enemies, and so lands purchased from native chief's in the New World were forfeit to the King.\textsuperscript{22} A private legal opinion written in 1683 by a distinguished Virginia lawyer, William Fitzhugh, maintains with respect to the colony:

There is great difference between Ireland & us, they having the Kingdom of Conquered Christians, we of Conquered infidels. They were to be governed by their antient municipal laws, till an alteration made amongst them, ours if we had had any were ipso facto abrogated, because not only against Christianity, but against the Law of God & nature, contained in the Decalogue. For Infidelis sunt Christi et Christianorum Inimica. . .\textsuperscript{23}

The status of infidels was discussed by counsel in the case of East India Company v. Sandys (1683-5).\textsuperscript{24} At issue was the validity of the trade monopoly enjoyed by the East India Company under Crown grant. The Company contended that, even assuming that the Crown had no general prerogative power to restrict overseas trade, it held this authority over commerce with infidels, they being perpetual enemies and a danger to the faith of Christians. No less than three future Chief Justices appeared as counsel and made submissions on the point. The arguments presented by Treby and Pollexfen against the doctrine of perpetual enmity are particularly distinguished.\textsuperscript{25} Nevertheless the case ultimately turned on the Crown's power to control foreign trade in general, and the judgments (which uphold the Company's chartered rights)

\textsuperscript{21} Anonymous (circa 1640) 1 Salk. 46, 91 E.R. 46 (C.P.).

\textsuperscript{22} The Committee, which was considering rival claims to Barbados and St. Christopher, dissolved without reaching a decision; Williamson, Caribbee Islands, 126-9.

\textsuperscript{23} Text in Davis, Fitzhugh, 152 at 158.

\textsuperscript{24} 10 State Tr. 371 (K.B.).

\textsuperscript{25} At 390-2, 440-50.
are not enlightening on the particular position of non-Christians, affirming that the King may regulate overseas commerce, especially with infidels. Jefferies C.J., whose opinion alone is reported at length, states that it was irrelevant whether the East Indies were inhabited by Christians or infidels at the time of the grant.26 Nevertheless he later makes remarks approving the contention that the East Indians, being infidels, were by law esteemed common enemies.27

We have moved rather far from the question of the fate of infidel laws upon conquest. That point came before the Court of King's Bench in Blankard v. Galdy (1693).28 The issue was whether a statute of 5 & 6 Edward VI, c. 16 was in force in Jamaica, which had been conquered from Spain in 1655. The parties agreed that Jamaica was to be treated as a conquered country,29 and moreover that it was inhabited upon conquest by both Spaniards and natives.30 The plaintiff argued that Jamaica since acquisition had been governed by its own laws. In reply the defendant contended that upon conquest the lex loci was replaced by English law (including the statute in question), citing the statement in Calvin's Case that the laws of heathen kingdoms are nullified upon acquisition.31 His argument seems to assume that Jamaica could be considered an infidel country, perhaps on grounds that native peoples once possessed it and still partially inhabited it. Chief Justice Holt, speaking for the court, rejected the defendant's contention, holding that upon conquest the old laws of Jamaica remained in force until new laws were given, and that English law as a whole had never been introduced. So doing, he observed that,

26 At 520. 27 At 545. See also 537-8.
29 4 Mod. at 222.
30 Thus the plaintiff stated that the island had been conquered "from the Indians and Spaniards" (2 Salk. at 411), and the defendant referred to the question of what laws the "Spaniard or natives" should be governed by there (4 Mod. at 224; note that the reporter mistakenly attributes this remark to plaintiff's counsel). It is now thought that the indigenous peoples had disappeared by the time the English assumed control (Roberts-Wray, Commonwealth Law, 851).
31 4 Mod. at 224; for the author of this argument see note 30 above.
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 the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. 32

The basic principle underlying Coke's view is retained, but the extreme conclusion drawn from it is dismissed.

That principle was restated in an anonymous case decided circa 1722 by the Privy Council on an appeal from the colonies (Privy Council Memorandum). It was said that the laws of a conquered country remain intact until altered "unless where these are contrary to our religion, or enact anything that is malum in se, or are silent; for in all such cases the laws of the conquering country shall prevail." 33 The rule is applied to infidel and Christian countries alike, and the a priori distinction drawn in Calvin's Case is abandoned. One innovation may be noted. The judgment holds that unconscionable laws are replaced by the laws of the conquering country (that is, English law), rather than natural equity.

These rulings, however, did not hold the field unchallenged, if an opinion given in 1730 by Francis Fane, Counsel to the Board of Trade, is representative. This affirms that all British statutes passed prior to the settlement of Newfoundland were in force there, it being a settlement in an infidel country. 34 While the ruling proper is unexceptionable, the rationale given comes close to adopting the very proposition argued and rejected in Blankard v. Galdy, namely that infidel laws were automatically superseded upon acquisition by English law.

The general issue of the status of infidels was reagitated in Omichund

32 2 Salk. at 412. The report in Comb. 228 puts it differently: "and 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." Cf. East India Company v. Sandys, (1683-5) 10 State Tr. 371 (K.B.) where Holt had argued as counsel for the Company that infidels were perpetual enemies whose laws, upon conquest, immediately ceased (at 373-5).

33 2 P. Wms. 75 at 76; 24 E.R. 646 (P.C.).

34 Reeves, History of Newfoundland, 111.
v. Barker, which came before the Court of Chancery in 1744. The question was whether depositions made by Hindus resident in the East Indies, sworn in accordance with their religion, could be admitted in an English court. So important was the point, that the Lord Chancellor requested the assistance of Chief Justices Lee and Willes, and Chief Baron Parker. They decided unanimously that the depositions were admissible in the circumstances. Willes in particular branded Coke's suggestion that infidels were perpetual enemies as contrary not only to scripture but to common sense and humanity, remarking that even the devils, whose subjects Coke said heathens were, could not have worse principles.

So in 1774, when Lord Mansfield reviewed the rules governing conquests in Campbell v. Hall, he was able to describe the views expressed regarding infidel countries in Calvin's Case as "wholly groundless, and most deservedly exploded", remarking that Coke's "strange extrajudicial opinion, as to a conquest from a pagan country, will not make reason not to be reason, and law not to be law...". Lord Mansfield was not a newcomer to the question. Some thirty years previous, when Solicitor-General, he had argued the point in Omichund v. Barker.

It is difficult to assess with accuracy either the extent or the precise nature of the influence exerted by Calvin's Case on the subject of infidels in the seventeenth and early eighteenth centuries. However one general point may be made. Although Coke does not state this explicitly in Calvin's Case, it could easily be inferred from the dicta there that the Crown necessarily held an initial power of legislation in "infidel lands", whatever their precise mode of acquisition. The East India Company case lent indirect support to this notion, in allowing to the King broad powers to regulate trade with infidel countries. A certain amount of early colonial doctrine and practice seems explicable only on some such basis.

35 Willes 538, 125 E.R. 1310; 1 Atk. 21, 26 E.R. 15 (Ch.).
36 Willes at 542; see also 551. Parker C.B. adopts a similar view, reported in 1 Atk. at 42.
37 (1774) Lofft 655 at 744; 98 E.R. 848.
38 (1744) 1 Atk. 21 at 30-6, esp. 36; 26 E.R. 15 (Ch.). He was then Wm. Murray.
3) Early concepts of territorial acquisition

We have noted that Calvin's Case envisages only two modes of acquisition, namely descent and conquest. Curiously there is no mention of cession, perhaps on the view that it was usually preceded by conquest. In fact cession did not begin to feature prominently in Britain's diplomatic life until later in the century. \[40\] Even then, examples of "pure" cession, as opposed to cession upon conquest, were comparatively rare. \[41\]

Likewise settlement does not figure in Coke's analysis. The Crown's desultory efforts to found colonies in America over the past century had come to nothing, and there was no assurance that the Virginia enterprise, chartered in 1606, would not meet a similar fate. Although colonial schemes were in the air when Calvin's Case was decided, \[42\] and Bacon refers hypothetically to acquisitions in the Indies "by conquest or occupation" during his speech as Calvin's counsel, \[43\] the common law as presented in Coke's report remained unaffected by these as yet uncertain eventualities.

Nevertheless the Crown lawyers were more advanced in this respect. A reference to occupation as a mode of extending the King's domains occurs as early as 1610 in the Charter granted to the London and Bristol Company for the colonization of Newfoundland. \[44\] The King affirms that the island in question "remayneth soe destytute and soe desolate of inhabittance that scarce any one savage p'son hath in manye yeares byn seene...". Since the lands are thus vacant,

by the lawe of nature and natons wee maye of our Royall authoritie possease our selves and make graunt thereof without doinge wrong to any other Prince or State considering they cannot instlye p'tend any Sovaignete or right thereunto in respecte that the same remayneth soe vacant and not actually possessed and inhabited by any Christian or any other whomsoever.

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\[40\] Dunkirk, put into Britain's hands by France in 1658, and sold back to the French in 1662, furnishes an early example; see CTS, V, 45 and VII, 257.

\[41\] The acquisition of Bombay and Tangier in the marriage treaty of 1661 with Portugal may be cited; see CTS, VI, 327.

\[42\] See Smith, Appeals, 467, notes 5-6.

\[43\] 2 State Tr. 575 at 590-1.

However occupation as a mode of acquiring colonies did not, so far as is known, receive judicial recognition until later in the century. In Geary v. Barecroft (1667) it was remarked that the law of occupancy is founded upon the law of nature; so, as with the coming of inhabitants to a new country, he that first enters upon such part and manures it gains the property. Likewise Craw v. Ramsey (1669) refers incidentally to dominions "acquired by conquest, or new plantation". A parallel between the doctrines governing waste lands within the realm and those pertaining to overseas acquisitions is drawn by Jefferies C.J. in East India Company v. Sandys (1683-85). He states that in most societies the law provides that things which do not belong to anyone, such as deserts, uninhabited places, and islands in the sea, are gained and disposed of by the sovereign. In virtue of this universal law, "his majesty and his predecessors have always disposed of the several plantations abroad, that have been discovered or gained by any of their subjects...".

Despite these references, there seems to be no indication that an overseas territory acquired by occupation or settlement was considered at this era to hold a different legal status than a conquest, so far as the Crown's powers and the laws obtaining there were concerned.

4) The rule in Blankard v. Galdy

The first reported case to attribute legal consequences to the distinction between occupation and conquest is Blankard v. Galdy (1693), noted earlier. Holt C.J. held:

In case of an uninhabited country newly found out by English subjects, all laws in force in England, are in force there; but Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England; the laws of England did not take place there, 'till declared so by the conqueror or his successors.

45 1 Sid. 346; 82 E.R. 1148 (B.R.).
46 (1669) Vaughan 274 at 279; 124 E.R. 1072 (C.P.).
47 (1683-85) 10 How.S.T. 371 (K.B.) at 526. See also counsel's opinion of circa 1675 in NYCP, XIII, 486 at 487.
The court envisages two modes of acquisition. The first occurs where Englishmen discover and settle a previously vacant land. The second mode is conquest. In the first instance, English law obtains *ipso facto*. By contrast where a country is gained by conquest, although the conquering sovereign may make new laws, the old ones necessarily remain in force until others are supplied. 49

These rules are restated in the *Privy Council Memorandum* of 1722. 50 The court holds that "if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them," and therefore such a country is to be governed by English law. But where the King conquers a country, he may impose upon the inhabitants whatever laws he pleases. However until he does, their laws and customs remain. We note that settled colonies are confined to establishments in new and uninhabited lands, and Barbados is cited as an example.

The same classification is adopted by Blackstone in his *Commentaries on the Laws of England* of 1765. 51 He states that colonies in distant countries are of two sorts: those where the lands are claimed by right of occupancy only "by finding them desert and uncultivated, and peopling them from the mother country", and those which, when already cultivated, have either been gained by conquest or ceded by treaty. It might be argued from the wording that Blackstone means that a country must actually be cultivated for it to be considered inhabited, by which criterion lands held by pastoral or hunting peoples might be deemed vacant. 52 But this does not seem to be his

49 4 Mod. 222 at 225; 2 Salk. 411 at 412. See counsel's argument to the contrary in 4 Mod. 222 at 223–4.

50 2 P. Wms. 75, 24 E.R. 646 (P.C.). See above at note 33.


52 Blackburn J. remarks in *Mlirrump v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 (Aust.N.T.S.C.) at 201, that the words, desert and uncultivated, as used by Blackstone "have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society". He cites no authority for this interpretation. It is hardly consistent with Blackstone's own remarks regarding America.
meaning, for he cites Blankard v. Galdy for the proposition that "if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force", and later affirms that the American colonies are principally of the conquered and ceded variety.

In a similar fashion Chitty, in his Prerogatives of the Crown of 1820, distinguishes between a country obtained by conquest or treaty, where the King holds an exclusive power of legislation, and an uninhabited country discovered and peopled by English subjects where English law, to the extent appropriate, is immediately in force. Forbes v. Cochrane, decided four years later, makes the same distinction. Clark's Colonial Law of 1834 recognizes three modes of acquisition: conquest, cession under treaty, and occupancy. The last is described as a case where an uninhabited country is discovered by British subjects, and upon discovery is adopted or recognized by the Crown as part of its possessions. The point was taken as settled by the Privy Council in Mayor of Lyons v. East India Company, decided in 1837. Lord Brougham, speaking for the court, stated that it was agreed on all hands that a settlement made in an already inhabited country won by conquest or cession stands in a different position to a settlement made by colonizing an uninhabited country.

5) Settlement as a vehicle of English law

All of these authorities limit the category of colonies acquired by settlement to instances where the territory was initially uninhabited. However the concept that settlers carry with them English law was a potent one. It pre-dated Blankard v. Galdy and could not easily be confined within the

53 This statement was qualified in later editions by the proviso that only so much of English law was imported as was applicable to the situation of an infant colony; see the 3rd edition of 1768, I, 107.
54 See discussion later in this chapter.
55 Chitty, Prerogatives, 29-30.
56 (1824) 2 B. & C. 448 at 463; 107 E.R. 450 (K.B.).
57 Clark, Colonial Law, 4.
58 (1837) 1 Moo.Ind.App. 175 at 270-1 (P.C.).
narrow limits assigned to it there. From an early stage one encounters suggestions that whenever Englishmen form colonies overseas, in the absence of any other laws appropriate to their needs, they must be governed by English law, regardless of the precise manner in which the territory was acquired and whether it was uninhabited at the time.

The phraseology of the early American Charters could be construed as supporting this view, for they frequently provided that the powers of legislation conferred therein were to be exercised in a manner as agreeable as might be convenient to the laws and statutes of England. The precise meaning of such clauses was, and still is debated. But they clearly assumed that English law was in some manner relevant to the situation of the settlers, and provided support to those who argued that a general introduction of English law had occurred within the settler communities.

A remarkably developed formulation of the latter view can be seen in a legal opinion written for a private cause by the Virginia lawyer, William Fitzhugh, in 1683. He points out firstly that Virginia must be governed by some laws, as the existence of courts of justice testifies. But, he argues, We have no Original Laws amongst us derived from the Natives here, for we found them at our first coming, (& they yet continue little better) so barbarous & rude that they had no other direction & Government amongst them but the Law of Nature. . .

Moreover, there existed no complete legal system in the colony derived from local acts, which were directed only to particular subjects. Therefore, he concludes, the laws of England must of necessity apply, and he supports this inference by references to various royal instruments and acts of assembly, and to the continual practice and usage of the country.

59 The earliest example appears to be a clause in Gilbert's Patent of 1578; text in Slaper, Gylberte, 95 at 100. See also Raleigh's Charter of 1584 (in Tarbox, Raleigh, 95 at 102), the Second Charter for Virginia of 1609 (in Thorpe, Charters, VII, 3790 at 3801), and subsequent charters. A remarkable variation may be seen in the Charter issued to Alexander for Nova Scotia in 1621, which provides that laws instituted there shall be as consistent as possible with those of Scotland; text in Slaper, Alexander, 127 at 132-3.

60 See in particular the discussion in Smith, Appeals, 465-9; Smith, "English Criminal Law", 7-8; Brown, "British Statutes in North America", 96-100.

61 Text in Davis, Fitzhugh, 152, esp. at 153-4.
made is that, in the absence of some other provision, Britishers settling in a conquered land (as Fitzugh deems Virginia to be) must be governed by their own laws where the lex loci is inapplicable.

Such arguments involved, in effect, an adaption of the ancient concept of personality of laws, whereby the laws of a national group adhere to its members wherever they happen to be located, so as to govern their internal affairs. The principle had long operated in expatriate communities of merchants established in the great trading centres of Europe and the Mediterranean, whether by virtue of treaty provisions, grants from the local sovereign, or long-standing custom. England had little occasion to avail itself of this practice in medieval times. But as early as 1404 we find Henry IV granting Englishmen settled in the Hanseatic ports permission to elect their own consuls, whose responsibilities may have included settling internal disputes according to English notions of justice. Again in 1485, Richard II appointed a consul for English merchants in Pisa, "observing from the practice of other nations the necessity of their having a peculiar magistrate amongst them for the determining of all disputes, etc., between merchants and others, natives of England." Similar privileges were secured for English traders in the Ottoman Empire in 1580, and subsequently in other commercial entrepots of North Africa, India and the Far East. If English law applied within merchant communities established on the territories of recognized foreign sovereigns, it could also be viewed as governing British settlers in conquered lands, where the lex loci was incompatible with English mores.

62 Ibid., at 158, quoted at note 23 above.
63 Liebesny, "Western Judicial Privileges", 309-15; Khadduri, "International Law", 360-1; Ganshof, Moyen Age, 297; Bewes, Law Merchant, 85-6.
64 Bewes, Law Merchant, 81, note c.
65 Quoted in ibid., 84, citing Rymer, Foedera, XII, 261.
66 Liebesny, "Western Judicial Privileges", 318; and see Article XVI of the Capitulation reproduced in BrFSP 1812-14, Vol. I, Part I, 747 at 750.
67 See The "Indian Chief" (1801) 3 C. Rob. 12 at 28-31; 165 E.R. 367 (Adm.).
A number of eighteenth century authorities reflect this flexible outlook. A legal opinion rendered in 1720 by Richard West, Counsel to the Board of Trade, affirms broadly:

The common law of England is the common law of the plantations, and all statutes, in affirmance of the common law, passed in England, antecedent to the settlement of any colony, are in force in that colony, unless there is some private act to the contrary; . . .

West does not stipulate that the colony must have been planted in uninhabited lands, and he later says, for good measure: "let an Englishman go wherever he will, he carries as much of law and liberty with him as the nature of things will bear; . . .". 68 From this he concludes that the common law applied in the American plantations generally and New England in particular, thus extending the principle to countries which were already inhabited at the time of acquisition. 69

The Chief Justice of New York, James De Lancey, in the course of a jury charge in 1733, stated that the binding force of English law in the colony derived either from "a right Inherent in us as Englishmen", or from the supposition that our ancestors agreed to be governed by it "for want of another Law". 70 Again in 1757 we find the Crown law officers, Pratt and Yorke, holding that where the East India Company acquired territories in India by treaty with local princes, the Crown would hold rights of sovereignty over any settlements there and their inhabitants, who, as English subjects, "carry with them your majesty's laws wherever they form colonies". 71 The fact that the lands in question were acquired by cession was not treated as affecting the issue.

Lord Mansfield put a brake upon the inordinate extension of this principle in the great case of Campbell v. Hall (1774). He reiterates the rule in Calvin's Case that the laws of a conquered country continue in force until

68 20 June 1720; Chalmers, Opinions, II, 200, at 202, 209, spelling modernized. This appears to be the source of the extract printed in ibid., I, 194-5. See also Robereau v. Rous (1738) 1 Atk. 543 at 544; 26 E.R. 342 (Ch.).
69 Ibid., esp. 208-10. Note that West uses "West Indies" to include all the American colonies, by implied contrast with the "East Indies".
70 Quoted in Smith, "English Criminal Law", 45 note 25. See also the authorities given in ibid., 15-6, 21-2.
71 Ibid., I, 195. See also Gipson, British Empire, XI, 484-5.
altered by the conqueror, and takes pains to explain that the law of every
dominion equally affects all persons and property there: "An Englishman in
Ireland, Minorca, the Isle of Man, or the plantations, has no privilege dis-

tinct from the natives". However Lord Mansfield himself demonstrates how
liberally the rules might be applied in his suggestion that Jamaica, con-
quered from Spain in 1655, should now be regarded as a settled colony, upon
being planted by English subjects after the departure of the old inhabitants.

The 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 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 com-
munities in already inhabited lands held by the Crown. Looked at from the
point of view of the settlers, these colonies present many features in com-
mon with those founded in uninhabited places. Examined with particular re-
gard to the original inhabitants, they bear more similarity to conquests.
In the absence of explicit provisions, what laws should be viewed as apply-
ing within the settler communities, and what laws among the local peoples?
These questions were considered in a number of nineteenth century authorities
concerning the British possessions in India, which we will now examine.

In Freeman v. Fairlie (1828), James Stephen, Master in Chancery,
adverts to the general distinction between new countries, discovered and settled by English subjects, who carry with them English law, and colonies acquired by cession or conquest where the *lex loci* remains in force until changed. The true basis of this distinction, he suggests, is this. In the first class of colonies, there are no existing civil institutions or laws, and so British settlers necessarily resort to their own, while in the second class there is an established *lex loci* which cannot conveniently be abrogated all at once. In the former case, also, there are no new subjects to be governed, but in the latter case there are new subjects, who will be unfamiliar with English law and unprepared to receive it. The settlements founded by the East India Company in Bengal, while technically conquests, present anomalous features preventing the full application of the normal rules. These territories were not, on the one hand, newly discovered or uninhabited, but well peopled, and by a civilized race governed by long-established laws, which could not immediately be changed. However these laws were so interwoven with local religions that they could not possibly be applied to Christians. In many important matters there was no uniform *lex loci*, Muslims and Hindus being governed by different laws. Some new course had to be taken, he concludes,

and the course actually taken seems to have been, to treat the case, in a great measure, like that of a new-discovered country, for the government of the Company's servants, and other British or Christian settlers using the laws of the mother country, as far as they were capable of being applied for that purpose, and leaving the Mahomedan and Centoo inhabitants to their own laws and customs, but with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse.

A parallel view was adopted in the celebrated "Lex Loci" Report made by the Indian Law Commissioners in 1840. The Report recognizes that upon the conquest or cession of a country, its laws remain in force until altered by the conqueror, and bind all persons residing there. But, the Commissioners maintain, this rule requires limitation when the laws of a country are essentially inapplicable to strangers. Thus the laws of the Muslim and Hindu

76 The following summary and quotations are derived from *Nāoroji Beraṃji v. Rogers* (1867) 4 Bomb.H.C.R. 1 (Bomb.H.C.) at 17 seq., and Rankin, *Indian Law*, 22 seq.
communities in India, while remaining in force within those groups, were unsuited to Christians and persons of other faiths settling there. So, suggests the Report,

when any part of British India became a possession of the British Crown, there being in it no lex loci, but only two systems of rules for the government of two religious communities, the English law became ipso jure the lex loci and binding upon all persons who do not belong to either of these two communities.

While conceding that this doctrine lacked express authority, the Commissioners point out that

if it be admitted that neither the Hindu nor the Mahomedan law can be considered as lex loci, then British India must, we think, be considered with regard to all persons not Hindus nor Mahome-
dans as an uninhabited country colonised by British subjects.77

The view exemplified in these authorities was considered by the Privy Council in Advocate-General of Bengal v. Ranee Surnomoye Dossee (1863).78

Lord Kingsdown states:

Where Englishmen establish themselves in an uninhabited or barba-
rous country, they carry with them not only the laws, but the sov-
ereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

The court recognizes that settlers carry English law with them not only to uninhabited countries but also to "barbarous" lands, that is countries where the local laws are presumably unsuitable for the settlers. In the latter case, English law governs both the settlers and others assimilated to their community; nevertheless by implication it does not extend ipso facto to local inhabitants who maintain an autonomous life under their own customs. However the court goes on to hold that the first settlement in India was not of this character:

it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

It is true, concedes the court, that the settlers retained their own laws within the "factories" they established. However this came about only because

77 Quoted in Rankin, Indian Law, 29.
78 2 Moz.P.C. (N.S.) 22 (P.C.) at 59-61.
the local sovereigns allowed it.

But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them... If English laws did not apply to Hindus upon the first settlement of the country, reasons the court, the Crown's subsequent acquisition of sovereignty there could not in itself change things. It might enable the Crown to alter the laws of the country, but until so altered they remained unchanged.

There is no suggestion in these authorities that settlement, acting as a vehicle of English law in an already inhabited territory, has the effect of depriving the country's original residents of their proper laws. Rather, they generally acknowledge that the original laws of a place remain in force as regards the local people, until altered by competent authority. The reception of English law envisaged takes effect principally as regards the settler communities, and persons incorporated within them. As we will see, a similar viewpoint was eventually adopted in the American colonies.

One concluding point may be made. The diversity of situations in which English law has been held to have been introduced into colonies, and the variety of reasons advanced to explain or justify its introduction, renders this branch of colonial law a remarkably complex one, not easily reduced to formulas. As the Commissioner appointed to inquire into the administration of justice in the West Indies stated in his Report of 1826: "the principle, upon which certain laws of the mother country are operative and held binding in her colonies, far from being clear and precise... is involved in considerable obscurity, and often found very difficult of application." 79

6) The Crown's legislative powers in colonies

Calvin's Case affirms that the King may legislate for a conquest, but that where he grants "the laws of England for the government of that country"
he cannot alter those without Parliament. Whether Coke means English law in a general sense, or more specifically English constitutional law, is unclear. Nevertheless this statement, and the subsequent remark that Englishmen who establish themselves in conquests "have the like privileges and benefits there, as they may have in England" could easily be invoked in the cause of limiting the Crown's legislative powers over colonies of Englishmen planted abroad.

Likewise, Blankard v. Caldy (1693), in stating that settlers carried English laws to uninhabited lands, allowed for the argument that in doing so they forfeited none of their essential rights and liberties, including freedom from legislation by the Crown. The point was quickly appreciated in some quarters, for it figured shortly afterwards in the elaborate (and unsuccessful) submissions made by Shower in Dutton v. Howell. It was argued there that the basis for the Sovereign's authority to prescribe laws for a conquest was the general power of life and death held over the conquered people. But this rationale, it was contended, could not apply to an uninhabited land colonized by Englishmen, where there were no people to subjugate. The settlers carried English law with them as their birthright, and no new laws could be made for them by the Sovereign save with their consent. Whatever the intrinsic merits of these arguments, they failed to lead the House of Lords to the particular conclusion sought in that case. However Shower's submissions were reported at length, and appear to have had a substantial influence.

As seen earlier, the Privy Council stated (circa 1722) that Englishmen

80 (1608) 7 Co.Rep. 1a at 17b; 77 E.R. 377.
81 On the meaning of Coke's remarks, see Forsyth, Opinions, 17, and Smith, Appeals, 468-9; and cf. Holdsworth, History of English Law, XI, 235, n. 3.
82 At 18a.
83 (1693) Show. 24; 1 E.R. 17 (H.L.). The decision was handed down in January 1693/4; Smith, Appeals, 471.
84 Show. at 31-2.
85 The reasons for the decision are not reported.
86 See also below at notes 119-21.
carried their own laws with them, as their birthright, to uninhabited countries. However where the King conquered a country that was a different matter: "for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases". 87 The limited rationale given for the Crown's legislative powers in conquests, and the explicit contrast with settled colonies, combine to suggest that in the latter instance the Crown held no such powers.

In 1724, the Crown law officers, Yorke and Wearg, reported that the question of the power of taxation in Jamaica depended on whether Jamaica is now to be considered merely as a colony of English subjects, or as a conquered country; if, we apprehend, as a colony of English subjects, they cannot be taxed, but by the parliament of Great Britain, or by and with the consent of some representative body of the people of the island, properly assembled by the authority of the crown; but, if it can now be considered as a conquered country, in that case, we conceive, they may be taxed by the authority of the crown. 88

The law officers recognize that the Crown may not levy taxes in what they term a "colony of English subjects", but they do not explain how a territory achieves that status, nor do they decide to which category Jamaica belongs.

The question arose in the case of Campbell v. Hall (1774). 89 The issue was whether the Crown retained the prerogative power to impose a duty upon the conquered island of Grenada after having granted English laws and a representative assembly. Lord Mansfield held that although the Sovereign initially possesses the power to make laws for a conquest (within certain limits), this authority ends upon the undertaking that an assembly shall be called. 90 The court does not specifically consider the related question of what effects flow from the introduction of English law. However

87 Anonymous (circa 1722) 2 P. Wms. 75 at 75-6; 24 E.R. 646 (P.C.); see above at notes 33 and 50.
88 18 May 1724; Chalmers, Opinions, I, 222-3. On the constitutional history of Jamaica, see Roberts-Wray, Commonwealth Law, 851-3.
89 Lofft 655; 98 E.R. 848 (K.B.).
90 Lofft at 741-2, 746-7. The same doctrine appears to underlie a law officers' opinion of 1685 that the inhabitants of New England retained the right to consent to laws and taxes made there, despite the forfeiture of the Charter; SP, 1685-8, #333, p. 81.
Mansfield quotes the statement in Calvin's Case that after King John's grant of English laws to Ireland no succeeding King could alter these without Parliament, and he then remarks: "Which is very just, and it necessarily includes that King John himself could not alter the grant of the laws of England." 91

In any case, during the early nineteenth century it appears to have been increasingly accepted that the Sovereign held no power to legislate for settled colonies. However at the same time it was far from clear which colonies held that status, and upon what basis. In 1820, the Chief Justice of Newfoundland, Forbes, held in Jennings v. Hunt that "the King holds a legislative power over conquered or ceded countries, but that no such power is held over countries originally settled by British subjects". 92 Newfoundland, he affirmed, was a settled colony, and so regulations issued by the Governor under proclamation were not enforceable as law. Interestingly, the court also invokes the fact that English law had been introduced into Newfoundland and Labrador by imperial legislation, and states that these statutes "are affirmative of what was before the common law of all the English colonies; over which it has been solemnly recognized in the celebrated West Indian case of Campbell v. Hall, that His Majesty holds no legislative authority." 93 Despite the court's assurance on these points, it may be noted that Newfoundland had been governed without benefit of an assembly since its earliest days, and that the decision, as it applied to that colony, upset the existing order.

One year previous, the Crown law officers, Shepherd and Gifford, had come to a parallel conclusion regarding New South Wales. They held that, as that territory had not been acquired by conquest or cession, but had been appropriated as desert and uninhabited and subsequently colonized from Britain, the King held no prerogative right to levy taxes in the colony, but that such taxes could only be imposed by Parliament, in the absence of a

91 At 744-5. Note that the reporter mistakenly attributes these words to Lord Coke, when in fact they are Lord Mansfield's own.
92 (1820) 1 Newf.L.R. 220 (Newf.S.C.) at 225.
93 Ibid.
local representative assembly. Again, this opinion challenged the legality of established patterns of government in the colony. Founded in the late 1780s as a penal settlement, New South Wales had been ruled from the start by proclamation and decree of the Governor, who acted without the assistance of an executive or legislative council, let alone an assembly.

In 1834, Clark affirmed that a colony acquired by occupancy was not subject to the legislation of the Crown, for the King could not pretend in that case to the rights of a conqueror, and the settlers carried with them English law as their birthright. The Privy Council implicitly confirmed this view in Kielley v. Carson (1843). Newfoundland, they stated, was a settled colony, not a conquest, and to such colony the settlers carried not only English law but also "the rights and immunities of British subjects". In such a country the Crown "possesses the same prerogative and the same powers of Government that it does over its other subjects". The inference is that, as the Crown held no prerogative authority to legislate in England, the same held true of settled colonies.

If the principle was thus authoritatively recognized, its application was in practice surrounded by confusion. The extent of uncertainty is indicated by the divergent views of two standard authorities, Clark and Forsyth, writing respectively in 1834 and 1869. Clark lists a total of 32 British overseas possessions. He affirms that three of these, namely Newfoundland, New South Wales and Van Dieman's Land (Tasmania), were acquired by discovery or simple occupation and so were not subject to Crown legislation. Sierra Leone and the West African settlements he treats as anomalous. The remaining


95 See Melbourne, Constitutional Development, 1-36, esp. 8-11.

96 Clark, Colonial Law, 7-8.

colonies he classifies as acquired by conquest or cession. By contrast, Forsyth, in a similar list drawn up some thirty years later, arrives at a total of 25 colonies acquired by settlement, only eight of which are colonies not dealt with by Clark. Both lists are open to criticism. However, the discrepancy between them graphically illustrates the difficulties in determining the original constitutional positions of many colonies.

7) The status of the old American colonies

What, then, was the constitutional position of British colonies in America in the seventeenth and eighteenth centuries? We leave aside colonies, such as Jamaica and Nova Scotia, acquired by conquest or cession from other European powers. Our concern is with colonies founded under an original claim advanced by the British Crown.

As seen earlier, Calvin's Case mentions only two modes of acquisition: conquest and descent. In the first case, the King may legislate for the territory, whereas in the second he cannot change the local law apart from Parliament. It does not necessarily follow, of course, that the two modes referred to were considered exhaustive, or that others such ascession and occupation were ruled out. However there is reason to think that throughout the seventeenth century, and indeed later, overseas territories which were gained otherwise than by descent were generally assimilated to the legal position occupied by conquests, in particular when located "in infidel parts". This view has been advanced by several noted scholars of

98 Clark, Colonial Law, 18-27. However elsewhere he states that Nevis was gained by occupancy (ibid., 9, n. 6). It is unclear why such colonies as Barbados and Bermuda are not treated as settled by origin; compare his remarks at 175-6, 181, and 388-9.

99 Namely Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, Barbados, Bermuda, Nevis, Turk's Island, Gambia, Antigua, Montserrat, St. Christopher, St. Helena, Gold Coast, Virgin Islands, Sierra Leone, Australian colonies (New South Wales, Western Australia, South Australia, Victoria, Queensland), Tasmania, New Zealand, Falkland Islands, British Columbia (colonies not dealt with by Clark are underlined); Forsyth, Opinions, 26-7.

100 7 Co.Rep. 1a at 17b; 77 E.R. 377.
American legal history. The present writer's inquiries appear to bear it out.

From the earliest Royal Charters issued regarding the New World to that granted for Georgia in 1732, the Crown proceeded upon the premise that it held, initially at least, plenary powers of legislation in the American territories it claimed or aimed to acquire, and that these powers were held not merely as regards the indigenous peoples, but more particularly over British settlers. In certain cases the Crown retained this legislative authority for itself, but often it delegated it to nominees or non-representative bodies. An instance of this occurs as early as 1501, when in Letters Patent granted to Richard Warde and others authorizing conquests and colonization in newly discovered lands, the King explicitly empowers the patentees to govern and make laws for any subjects of the Crown settling in the territories acquired. The same power is specified in the Patent issued to Hugh Eliot and associates the following year. It also figures in the Charters granted to Sir Humphrey Gilbert in 1578 and to Sir Walter Raleigh in 1584. The first Charter issued for Virginia in 1606 states that any colonies founded under its terms shall be ruled according to laws given directly by the King under the Sign Manual. The second Charter of 1609 provides for legislation by a Council resident in London, initially nominated by the Crown and thenceforth by members of the London Company in assembly. A similar arrangement is specified in the Newfoundland Charter of 1610. The Charter issued to Sir William Alexander for Nova Scotia in 1621 reverts to an earlier type in

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101 Goebel and Naughton, Law Enforcement, 1; Smith, "English Criminal Law", 7; Smith, Appeals, 468-76; Brown, British Statutes in American Law, 13. See also the remarks in Fowler, Laws of New York, xlv-xlvi.

102 Text in Biggar, Precursors of Cartier, 41 at 51-2, dated 19 March 1501.

103 Text in ibid., 70 at 82, dated 9 December 1502.

104 Texts in Slapper, Gylberte, 95 at 100, dated 11 June 1578, and Tarbox, Raleigh, 95 at 102, dated 25 March 1584.

105 Text in Thorpe, Charters, VII, 3783 at 3785, dated 10 April 1606.

106 Text in ibid., VII, 3790 at 3797-8, 3801, dated 23 May 1609.

107 Text in LBC, IV, 1701 at 1705, citing Patent Roll 8 James I, Part VIII, No. 6, dated 2 May 1610.
conferring upon the grantee personally full power to govern and make laws in
the territory granted. A half-century later, we find the Crown authorizing
the Hudson's Bay Company, in the Charter of 1670, to make laws governing both
its employees in Rupert's Land and also, it appears, any settlers introduced
there. Likewise the constitution provided for Georgia by Royal Charter in
1732 makes no provision for a representative local legislature, and empowers
the Corporation to legislate for the colony with the King's consent. In
fact, Georgia was governed without benefit of any assembly until the surrender
of the Charter in 1752. By parallel, the island of St. Helena, which was
uninhabited when occupied by the East India Company in 1659, was granted to
the Company in 1673 by a Royal Charter which empowered it to legislate in the
most ample manner for the inhabitants.

These provisions, and others like them, 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. This same outlook is
reflected in a series of legal authorities, extending from the late seven-
teenth century to the early nineteenth, which suggest that the American col-
onies were in general to be classified as conquered or ceded lands by origin.

The case of Process into Wales (circa 1668-74) affirms that the Western
Islands, Barbados, St. Christophers, Nevis, and New England, along with
Ireland and the islands of Guernsey and Jersey, may all be bound by Acts of
Parliament, and further that all, or most of them, may be bound by laws made
by the King's letters patents. The judgment mentions not only New England
but also Barbados, which was uninhabited when first colonized by the British

109 Text in Rich, HBC Minutes, 1671-4, 131 at 140-1, 146-7, dated 13 May 1670.
110 Text in Thorpe, Charters, II, 765 at 772.
111 Keith, First Empire, 170-1.
112 Text in EIC Charters, 96 at 101-3, dated 16 December 1673 (incorrectly
dated in the text as 1674); for the history of the island, see EB, (1960), XIX, 832-4, and Roberts-Wray, Commonwealth Law, 803-4. By mid-
nineteenth century standards, the island was reckoned as a settled col-
ony; see the law officers' opinion of 1854 in Forsyth, Opinions, 11.
113 Vaughan 395 at 400-1; 124 E.R. 1072 (C.P.)
in 1627.\textsuperscript{114} A legal opinion delivered \textit{circa} 1675, signed by eight counsel including such eminent figures as John Holt, Henry Pollexfen, and Richard Wallop, states in relation to America that "by the Law of Nations if any people make Discovery of any Country of Barbarians the Prince of that people who make the Discovery hath the Right of the Soil and Government of that place" so that no one can settle there without his consent.\textsuperscript{115} Although this opinion refers to discovery as the mode of acquisition, it attributes to the Crown general powers of government in the new country. We have already seen that the American lawyer, FitzHugh, refers to the colony of Virginia as a land of "Conquered infidels" within the rule in \textit{Calvin's Case} in his opinion of 1683.\textsuperscript{116}

The views of Chief Justice Holt on this question are particularly interesting, as emanating from the author of the doctrine that settlers in vacant lands carry English laws with them. The rule could arguably have been applied, by extension, to the American colonies. However this does not seem to have been Holt's own position. His remarks concerning settlements in \textit{Blankard v. Caldy} are made in a purely hypothetical fashion, neither garnished with examples nor given concrete application. More remarkably, he refers to the colony of Barbados as a land governed by its own laws and not those of England, implicitly treating it as "conquered", despite the fact that, as an uninhabited island colonized by Englishmen, it was a prime

\textsuperscript{114} The original inhabitants, Arawak Indians, had disappeared by the time the British arrived; Roberts-Wray, \textit{Commonwealth Law}, 844-5.

\textsuperscript{115} Undated opinion printed in \textit{NYCD}, XIII, 486 at 487, where it is placed among documents dating from 1675; spelling and punctuation have been partially modernized. The precise circumstances in which it was elicited are not known, but it is signed by Wm. Leck, Wm. Williams, Jo. Holles, John Hoyle, Jo. Holt, Wm. Thomson, Richd Wallop, and Hen. Pollexfen. Among these, John Holt was to become Chief Justice of King's Bench, Henry Pollexfen was to be Chief Justice of Common Pleas, Richard Wallop was to be Cursitor Baron of the Exchequer, and William Williams seems to be the personage of that name who became Solicitor-General in 1687.

\textsuperscript{116} Printed in \textit{Davis, Fitzhugh}, 152 at 158. See above at note 23.
candidate for the application of the rule regarding settlements. This apparent anomaly may be due to unfamiliarity with the colony's origins. However it tends to suggest that in Holt's view the American plantations were in general conquests.

This interpretation is borne out by Holt's judgment in the later case of Smith v. Brown (circa 1702-5) where he held that "the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases...". The ruling is of no little significance, as it concerns the colony of Virginia, in many ways the prototype American plantation.

The position of Barbados was canvassed by counsel in the case arising from the actions of Sir Richard Dutton, as Governor of the island, in detaining his Deputy-Governor for alleged misconduct. In the case's first phase, reported as Wytham v. Dutton (1688), the defendant's counsel advanced the argument, among others, that the King was not bound to govern Barbados by any particular law, nor indeed by the common law, but might rule by whatever law he pleased, "for those islands were gotten by conquest or by some of his subjects going in search of some prize, and planting themselves there," no distinction being taken between conquests and plantations in this respect. However the King's Bench held for the plaintiff. No reasons for judgment are reported, and so it is unclear whether this particular argument was disapproved of. The case later reached the House of Lords under the name Dutton v. Howell (1693). Respondent's counsel, in meeting the appellant's arguments made in the court below, contended that Barbados was not a conquest but a new settlement established by Englishmen with the King's

117 "In Barbadoes all freeholders are subject to debts, and are esteemed as chattels, till the creditors are satisfied, and then the lands descend to the heir; but the law is otherwise here; which shews, that though that island is parcel of the possessions of England, yet it is not governed by the laws made here, but by their own particular laws and customs"; 4 Mod. 222 at 226.

118 2 Salk. 666; 91 E.R. 566 at 567 (K.B.). See also: Holt 495, 90 E.R. 1172. The exact date of the decision is unclear. Smith, Appeals, 470, note 14, gives it as post June 1702; Keith, First Empire, 14 mentions 1705.

119 3 Mod. 159 at 161; 87 E.R. 103 (K.B.).
consent in an uninhabited country, where the common law necessarily prevailed. Counsel for the appellant argued, contrariwise, that the laws of Barbados were different from those of England although their foundation was the common law, and declined to discuss the question of how the colony was first acquired. The House of Lords reversed the judgment in the court below and so held for the defendant-appellant. Once again no reasons are reported. However the decision is consistent with the view taken of Barbados in Blankard v. Cally, decided only several months previous.

The doctrine that the American colonies were, in general, conquests received authoritative expression in the period just prior to the American Revolution. As seen earlier, Blackstone distinguishes between uninhabited countries planted by English subjects where English law is introduced, and on the other hand conquered or ceded countries where existing laws remain in force until altered. He adds:

Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there. . .

The influence of Blackstone's work may be gauged from the fact that his work ran to seven editions within ten years, and that it had reached its thirteenth edition by the turn of the century, and its twenty-third by 1854. In this latter edition, the statement that the American plantations were chiefly acquired by conquest or cession appears substantially in its original form. The same statement is repeated by Stokes in his Constitution of the British Colonies, published in 1783, and it is worth noting that the author had colonial experience, having lived several years in America

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120 (1693) Show. 24 at 31 seq.; 1 E.R. 17 (H.L.). The case was argued in January 1693/4, after the decision in Blankard v. Cally; Smith, Appeals, 471.
121 3 Mod. at 27-8, 34.
122 Blackstone, Commentaries, 1st ed., I, 105; the first volume was published in 1765.
124 At 11-2, 30.
and the West Indies, and served as Chief Justice of Georgia.

Blackstone's views gained indirect judicial sanction in Attorney-General v. Stewart (1817), a case concerning Grenada which was later regarded as a leading authority on questions of reception. The Master of the Rolls, Grant, cited with approval the relevant passage from the Commentaries, including the part concerning the American plantations, thus giving it further currency. 125

Interesting remarks on the subject are made by Chitty in his Prerogatives of the Crown of 1820. He says: "Our plantations or colonies in America, and in other parts of the globe, were of course obtained either by conquest or treaty, or by our taking possession of, and peopling them, when we found them uninhabited." 126 Chitty allows for either mode of acquisition, but specifically sets forth the criterion upon which the question turns, namely whether or not the territory was inhabited at the time.

Nevertheless, if the American plantations were by origin conquests, in a technical legal sense allowing for an initial royal power of legislation, it was clear that the settler communities planted there (or most of them) had over time gained the constitutional status of "colonies of English subjects", and had come to enjoy, in various ways, much of English law. As we have seen, the former proposition is implicit in the Yorke-Wearg opinion of 1724, and the latter is argued in Fitzhugh's memorandum of 1683, and adopted in West's opinion of 1720. As Sir William Keith observed in a memorandum on the American colonies presented to the King in 1728: "It is generally acknowledged in the Plantations, that the subject is intitled by birthright unto the benefit of the Common Law of England". 127

A mature assessment of the position of the American plantations appears in an Appendix written by St. George Tucker to his American edition of 1803 of Blackstone's Commentaries. 128 Tucker questions Blackstone's statement

125 2 Mer. 143 at 159; 35 E.R. 895 (Ch.). 126 At 29.
127 SP 1728-29, #51311, p. 266. The author was a former Governor of Pennsylvania; Smith, "English Criminal Law", 15.
that English law as such did not prevail in the American colonies, they being conquered or ceded lands. He agrees that some of the American dominions were obtained by purchase or cession from the Indians, and others by conquest. However he points out that in both cases the persons by whom the colonies were settled were neither those who were conquered nor those originally residing on the ceded lands, but the conquerors themselves or colonists brought in under their auspices. These settlers were free citizens of the acquiring state, the indigenous inhabitants having uniformly withdrawn themselves from the conquered or ceded territory. The rule that the old laws of a place remain in force could not apply to any colony settled by English immigrants after the original residents had departed, however applicable it might be in situations where the latter stay on, as with the Dutch in New York. Rather the settlers, he concludes, must in the absence of any other laws be deemed to have carried with them so much of English law as applies in the circumstances. It may be noted that the logic of Tucker's argument only goes so far as to support the introduction of the common law among the settlers, not among the Indians. He does not state what law applied to the latter, but the inference is that their ancestral customs remained intact except where altered by competent authority.

This view reflected more accurately the situation of the American colonies than that put forward by Blackstone. On the one hand, large portions of the common law had, in some manner, come to prevail among the settlers there, and this could not be explained entirely by the effect of loosely worded clauses in Royal Charters, Commissions and other instruments. On the other hand it was not conceived that English law extended, to any significant extent, to Indian peoples living within the colonies' boundaries. Generally speaking, they were thought to retain their own customary systems of law, with the exception, perhaps, of small groups of Christianized Indians living in settled areas.129 The Crown asserted and continuously exercised

129 In addition to the cases discussed below, see: Holland v. Pack (1823) 1 Pack's R. 151 (Tenn.S.C. of Err.); Fisher v. Allen (1837) 2 Howard's R. 611 (Miss.H.C. of Err.); Boyer v. Dively (1875) 58 Missouri S.C.R. 510 (Mo.S.C.); Connolly v. Woolrich (1867) 11 L.C.Jur. 197 (Que.S.C.); (1869) 1 R.L.O.S. 253 (Que.C.A.); R. v. Nan-e-quis-a Ka (1889) Vol. 1,
the prerogative right to deal with Indians, their affairs, and their lands, and this power was admitted in the colonies, except to the extent that local assemblies had curtailed it by laws governing certain aspects of Indian affairs (notably trade).\textsuperscript{130} These points cannot be fully explored in this chapter and a few examples will have to suffice.\textsuperscript{131}

The question of the status of the Oneida Indians, one of the six nations of the Iroquois, was discussed by Chancellor Kent in the New York case of Goodell v. Jackson (1823).\textsuperscript{132} The Iroquois tribes, he notes, were originally free and independent nations. It was contended that they had now ceased to be a distinct people and become wholly incorporated with other Americans. However, states Kent, he had been unable to discover evidence of this. "Do our laws", he asks,

even at this day, allow these Indians to participate equally with us in our civil and political privileges... Do we interfere with the disposition, or descent, or tenure of their property, as between themselves? Do we prove their wills, or grant letters of administration upon their intestate's estates? Do our Sunday laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them... Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend, that every one of these questions must be answered in the negative... They have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion, so far as the public safety required it, and no further.

The validity of a marriage contracted by two Indians of the Choctaw tribe according to tribal law and custom was considered by the Alabama Supreme Court in Wall v. Williamson (1845).\textsuperscript{133} Goldthwaite J. said that the issue was whether at the time of the marriage the laws of the Choctaw

\begin{itemize}
\item See esp.: Johnson v. M'Intosh (1823) 8 Wheat. 543 (U.S.S.C.) at 596-7; Keith, First Empire, 220-1, 246, 319-21.
\item Further documentation is presented in subsequent chapters.
\item 20 Johns.R. 693 (N.Y.Ct.Err.) at 709-10.
\item 8 Alabama R. 48 (Alab.S.C.) at 51-2.
\end{itemize}
tribe had been superseded, or whether they still composed a distinct community, governed by their own chiefs and laws. It was not alleged, he observes, that any statute with this effect had then been passed, so the question turned upon whether the Choctaws had lost their laws by the mere fact of living within the territorial limits of the United States. "It may be difficult", the judge concludes,

to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then, there can not be said to be a merger. It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war, produces no such effect. It may therefore be considered, that the usages and customs of the Choctaw tribe continued as their law, and governed their people, at the time when this marriage was had. The consequence is, that if valid by those customs, it is so recognized by our law.

In sum, the old American colonies appear to have occupied a middle ground between conquests and settlements. Regarded initially as conquests by the Crown, they eventually in most instances assumed the characteristics of settled colonies, with English law and representative institutions, at least so far as the settler communities were concerned. However the Indians stood in a different position. Generally speaking, they retained an autonomous status, living under their own laws and political structures and dealing directly with the Crown and its emissaries on a communal basis. They were not governed by English law inter se in most respects, nor did they participate in the colonial legislatures. The Crown conducted its relations with them under the prerogative. As such, the status of the Indian communities cannot easily be described in terms of the standard constitutional categories. However if such categories are employed, it might be said that their position bore similarity to that held by the inhabitants of a ceded or conquered territory.
CHAPTER 2

THE STATUS OF ACQUIRED RIGHTS OF PRIVATE PROPERTY
IN NEW COLONIES

What powers and rights does the Crown possess in respect to land and other property in a new colony under the common law?\(^1\) The case of a totally uninhabited country does not present difficulties. Here the Crown is immediately vested upon acquisition with full title to the soil and complete powers of disposition. Incoming settlers can make good against the Sovereign only such rights to the land as derive from the Crown itself.\(^2\) The position differs in colonies which are inhabited at the time of acquisition. Here the Crown ipso facto assumes title to all property held by the former executive or sovereign in a public capacity. It also obtains title to lands which are not subject to existing private interests, and an underlying or ultimate title to those which are.\(^3\) The status of private property rights and the Crown's powers relative to them, are more complex matters, governed by the joint operation of a number of independent principles, whose relation to the subject and mutual interaction have not always been fully appreciated. We will view them first as a group, and then examine the most important ones in greater detail.

A major difficulty in defining the Crown's authority in a new colony is that the subject-matter falls between two different sets of rules: those governing the Crown's powers respecting aliens on foreign soil, and those defining its competence with regard to its own subjects on British territory. At some point in the process of acquisition, the territory concerned ceases to

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1 We will not consider here the position obtaining in protectorates or protected states, nor that flowing from statutes such as the British Settlements Acts and Foreign Jurisdiction Acts.

2 See e.g., Falkland Islands Company v. R. (1864) 2 Moo.P.C. (N.S.) 266 (P.C.) at 272.

3 See Roberts-Wray, Commonwealth Law, Chap. 14, esp. at 636; see also Amudu Tijani v. Secretary, Southern Nigeria [1921] 2 A.C. 399 (P.C.) at 407, and St. Catherine's Milling and Lumber Co. v. R. (1888) 14 A.C. 46 (P.C.) at 53.
be foreign and becomes part of the Sovereign's dominions, while its inhabitants are transformed from aliens to British subjects. The subject-matter moves from a realm largely beyond the competence of municipal courts to one squarely within their jurisdiction, and from an area in which the Crown's powers are virtually unlimited under municipal law (though not under international law) to one where its powers are clearly circumscribed at the domestic level.

The subject, then, possesses inherent difficulties, which decided cases have done little to lessen. We will confine ourselves here to setting out those principles which have been recognized by courts of high standing in the Commonwealth, and in particular the Privy Council, attempting to present them in a consistent fashion, so far as the cases themselves allow this.

1) Basic principles

a) British law assigns to the Sovereign broad powers of conducting international affairs. These include dealing with foreign states and their subjects, concluding treaties, engaging in war, acquiring territory, and so on. The Crown holds these powers by virtue of the prerogative in the broadest sense, but acts done pursuant to them are normally termed "acts of state" rather than "prerogative acts". 4

b) In the exercise of its powers in foreign affairs, the Crown is subject to international law. However the common law is generally silent as to the Sovereign's conduct in this sphere. In the absence of rules of municipal law governing the Crown's exercise of its powers in the international arena, domestic courts will not presume to review its acts, declining to enforce international norms in this area. 5 But a municipal court may determine whether or


not an act ostensibly done under the Crown's powers in foreign affairs was in fact an act of that character. Domestic courts will also recognize and give effect to certain consequences flowing from acts of state, as in the case of an acquisition of territory by conquest or treaty of cession.

c) As an incident of its power to acquire territory, the Crown is considered competent, in domestic law, to appropriate any property pertaining to the former sovereign or government (where one exists), including property held by the head of state in a purely private capacity. The Crown also possesses a general power to dispose of the private property of the inhabitants, at least if they are aliens and not British subjects, and may in the exercise of this authority modify or confiscate any existing property rights. Acts of this character performed as an incident of the acquisition are considered acts of state and are, in common law, not reviewable in domestic courts.

d) The Crown's ability to deal with a territory and its inhabitants


under its general authority in foreign affairs ceases after the country becomes part of the Sovereign's dominions and the inhabitants are received into its protection as British subjects. Acts done by the Crown toward its own subjects in a British colony are governed by the law in force there and are reviewable in municipal courts. As between the Sovereign and a subject it would appear there can be no act of state on British territory.\textsuperscript{12} It is not clear at what precise point the Crown's actions towards the inhabitants of a newly acquired colony become subject to the constraints of municipal law. However it would seem that this occurs once several conditions are satisfied: namely, hostilities have ceased, military rule has been replaced by civil government, the country has become part of the Crown's dominions, and the inhabitants have ceased to be alien enemies and become entitled to the Crown's protection as subjects.\textsuperscript{13} It may be noted, however, that where, by an act of state performed at the time of acquisition, the Crown explicitly elects to place at its future disposal all existing property rights, or a restricted category of such rights, it will seemingly retain that power of disposal even after municipal law comes to govern its acts.\textsuperscript{14}

e) It has been held that municipal courts have no authority to enforce, as against the Crown, a treaty concluded with another sovereign state, the


\textsuperscript{13} See counsel's arguments in Elphinstone v. Bedreechund (1830) 1 Knapp 316 (P.C.) esp. at 335-9, 342-8, 351-6, and the decision at 360-1. See also Sprigg v. Sigcau [1897] A.C. 238 (P.C.).

\textsuperscript{14} See East India Company v. Syed Ally (1827) 7 Moo.Ind.App. 555 (P.C.); Sirdar Bhagwan Singh v. Secretary of State for India in Council (1874) L.R. 2 Ind.App. 38 (P.C.); Secretary of State for India in Council v. Bai Rajbai (1915) L.R. 42 Ind.App. 229 (P.C.).
terms of which have not been incorporated in municipal law. This same principle has been applied to treaties of cession containing guarantees of the property rights of the inhabitants. Such rights may be modified or abrogated by valid legislation passed subsequent to the cession. However, there is some authority for the proposition that the prerogative power of the Crown to legislate for a newly conquered or ceded territory is constrained by any undertakings made in the articles of capitulation or treaty under which the country was obtained.

f) It is presumed as a matter of British law that the Sovereign will respect the rights of private property held by the inhabitants of a new colony. So, in the absence of adverse acts of state performed as an incident of the colony's acquisition, or of valid legislation enacted subsequently, such property rights will be taken to have survived the change of sovereignty. The rights in question must be sufficiently precise so as to be susceptible of recognition and enforcement; however, there is no necessity that they be rendable in terms of concepts known to English land law, or that they be in their own terms freely transferrable or susceptible of individual ownership. Property rights of a communal or non-transferrable character are equally


16 Vajesingi Joravarsingi v. Secretary of State for India in Council (1924) L.R. 51 Ind.App. 357 (P.C.) at 360.


capable of recognition.\textsuperscript{21}

g) The same does not hold true of rights of a contractual character
held as against the former sovereign or government. In British law, the Crown
does not automatically assume the obligations of its predecessor, which, in
the absence of confirmatory acts or legislation, are not enforceable against
the Crown in its own courts.\textsuperscript{22}

h) Where a colony is obtained by conquest or cession, the Crown has the
power to legislate there under the prerogative.\textsuperscript{23} In the exercise of this
power, it may modify or abrogate existing laws of property and any private
rights held thereunder\textsuperscript{24} (subject, it is sometimes said, to stipulations made
in the articles of capitulation or treaty of cession).\textsuperscript{25} In the absence of
such legislation, however, the original laws of property remain largely intact,
and it would appear to follow that private rights admitted under those laws
will be recognized by the courts administering them.\textsuperscript{26}

This completes our survey of the basic principles governing the position
of private property in newly acquired colonies. We will now consider
several of these principles in detail.

2) The doctrine of continuity and the "act of state" doctrine

The principle favouring the continuity of existing laws and private
property rights in a newly acquired colony has two principal branches. The
first is usually stated as a presumption operating in English law that, upon
acquisition of a territory inhabited by people holding rights of private

\textsuperscript{21} Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 A.C. 399 (P.C.) at
402-5, 409-10. See also Calder v. Attorney-General of British Columbia

\textsuperscript{22} See, e.g., West Rand Central Gold Mining Co. Ltd. v. R. [1905] 2 K.B. 391
(K.B.); Attorney-General v. Nissan [1970] A.C. 179 (H.L.), per Lord Reid
at 210.

\textsuperscript{23} Campbell v. Hall (1774) Loftr 655, 98 E.R. 848; 1 Cwp. 204, 98 E.R. 1045;
20 Howell's State Trials 239 (K.B.).

\textsuperscript{24} Oyekan v. Adele [1957] 2 All E.R. 785 (P.C.) at 788.

\textsuperscript{25} See authorities in note 18, above.

\textsuperscript{26} See Oyekan v. Adele [1957] 2 All E.R. 785 (P.C.) at 788.
property under local systems of law and custom, the Crown will respect such rights. So, in the absence of confiscatory acts incidental to the acquisition or subsequent legislation, these rights are presumed to subsist intact. This branch of the doctrine, it may be seen, addresses itself specifically to the position of private property, and applies in its terms to all colonies irrespective of their mode of acquisition, be it conquest, cession, or settlement. A second branch of the doctrine of continuity is concerned more particularly with the position of conquered and ceded colonies, and consists of the rule that upon conquest or cession existing systems of private laws and consequential rights remain generally in force until altered by legislation. This principle, first enunciated in Calvin's Case and sanctioned in Campbell v. Hall, has been examined in the previous chapter.

Here we will focus on the first branch of the doctrine of continuity. In Amodu Tijani v. Secretary, Southern Nigeria (1921), the Privy Council considered the effects of the cession of Lagos by treaty with the local king in 1861. The court noted that the cession involved the transfer to the Crown of both the sovereignty and also the ultimate title to the land, but that it appears to have been made on the footing that "the rights of property of the inhabitants were to be fully respected". This principle, affirmed the court, is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. ... Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

Their Lordships summed up the position in the following principle: "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly." It may be remarked that although the situation under consideration involved a cession, the principle is stated as applicable to changes of sovereignty generally.

Nevertheless it may be argued that this doctrine cannot be reconciled

27 [1921] 2 A.C. 399 (P.C.) at 407.
with a series of well-established propositions often collectively labelled the "act of state doctrine". These affirm, it is contended, that upon the Crown's acquisition of a colony, all existing rights of private property held in respect to land are at an end. The Crown is automatically vested with title (and not merely a power of disposal) as regards all lands, both private and public. A local inhabitant can make good in the courts of the new Sovereign only such rights as have been allowed to him, whether by Crown grant or equivalent acts of recognition, or by legislation, and it is incumbent upon the claimant to prove such acts for a court to give effect to his alleged title. Whatever rights of private property the claimant held prior to the change of sovereignty are irrelevant. These arguments require close examination.

We will consider the implications of the act of state doctrine regarding the following matters: a) obligations undertaken by the Crown in treaties of cession; b) obligations contracted by the former sovereign; c) confiscatory acts performed by the Crown at the time of acquisition.

a) It has been held that municipal courts have no authority to enforce, as against the Crown, a treaty concluded with another sovereign power, the terms of which have not been incorporated in municipal law. This principle has been applied to treaties of cession containing guarantees of the property rights of inhabitants. In Vajesingji Joravarsingji v. Secretary of State for India in Council (1924), the appellants sued the Indian government for a declaration that they were the proprietors of certain lands comprised within a territory previously ceded to the British government by treaty with its former sovereign. One of the treaty provisions specified that the British government "shall give to its new subjects sanads in perpetuity for the rent-free lands -- the jaghirs the perquisites and the hereditary claims. . . which


29 See cases cited in notes 15-17 above.

30 (1924) L.R. 51 Ind.App. 357 (P.C.) at 360.
they enjoy at present. . .". In dismissing the appellants' claim to derive rights from the treaty, the Privy Council held that

if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties.

Similarly in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board (1941), 31 the chief of a Maori tribe in New Zealand challenged the validity of a charge imposed on tribal lands under local legislation, arguing that it violated the Treaty of Waitangi, 1840, under which the Crown guaranteed to the inhabitants of the territories full, exclusive and undisturbed possession of their lands. The Privy Council rejected this argument: "It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law."

This rule, assuming its validity, 32 does not impinge upon the principle favouring the continuity of private property upon a change of sovereignty. It has two aspects: i) treaty provisions, not implemented in municipal law, cannot furnish a title to property enforceable or recognizable in a municipal court; ii) such provisions, moreover, cannot prevent a domestic court from giving effect to valid enactments. The first branch of the rule does not bar a court from recognizing pre-existing property rights in a newly-acquired territory, so long as the basis for recognition is municipal law, and not treaty provisions. The principle of continuity, as a rule of municipal law, is not affected. The second branch merely reaffirms the rule that rights of private property, however derived, may in general be modified or extinguished by valid legislation. The doctrine of continuity does not, of course, profeas to limit the power to legislate for a given colony, whether this be vested in the Crown, the Imperial Parliament, or a local legislature. Rather, it assists a court in ascertaining in what respects the regime of property rights prevailing in a territory prior to its acquisition continues to exist after that event.

31 [1941] A.C. 308 (P.C.) at 324.
b) It is also said that where the Crown succeeds to another sovereign, even if under international law it is bound to assume the legal obligations of the former sovereign, municipal courts have no power to enforce that duty. The point is illustrated by the case of West Rand Central Gold Mining Co. Ltd. v. The King (1905). The suppliants contended that, prior to the outbreak of the Boer War, some gold belonging to them was appropriated by the government of the South African Republic, which it was bound to return; the Crown, upon conquering the Republic's territories, had succeeded to the Republic's obligation. Rejecting this contention, the Court noted:

We asked [suppliants' counsel] whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered State and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory.

c) Apart from these questions, the act of state doctrine has been invoked to bar a municipal court from enquiring into the propriety of an expropriation of private property effected by the Crown as an incident of the acquisition of a territory. Again, this does not detract from the doctrine of continuity, which merely sets forth what implications may be drawn in cases where the Crown has not seized such property, without purporting to curtail its powers in this area. However, certain cases have been thought to go beyond this, and to throw doubts upon the principle of continuity itself.

33 Cook v. Sprigg [1899] A.C. 572 (P.C.) at 578; and see cases cited in note 22 above.
34 [1905] 2 K.B. 391 (K.B.) at 411.
35 See authorities in notes 9-11, above.
Cook v. Sprigg, decided by the Privy Council in 1899, is a case in point. At issue were certain concessions made to the appellants by Sigcau, the Paramount Chief of Pondoland in Southern Africa. These grants were executed prior to the annexation of Pondoland to Cape Colony in 1894, which followed upon a deed of cession signed by Sigcau and other chiefs. The nature of the concessions is unclear from the report. They are said to involve certain "railway, mineral, township, land, forest, trading, and other rights". Whether they were merely rights held as against the former sovereign, or, in some cases, perfected rights to land, is unsure -- a crucial point. Yet it is significant that counsel for the appellants himself characterized them as obligations attaching to Sigcau as Paramount Chief, and argued that a civilized government succeeding to a barbarian ruler was bound by such engagements.

It is also noteworthy that the court of first instance held that the concessions did not comply with native custom, and moreover that Sigcau might at any time have repudiated them. At some point after the cession of Pondoland, the government apparently refused to recognize the concessions. There is no indication when precisely the repudiation occurred or what form it took. The appellants then sued the Prime Minister of Cape Colony under a Local Crown Liabilities Act, asking for a declaration of right and damages. The Privy Council rejected the claim on the narrow grounds that the statute did not allow for a declaration of right as against the Crown. However, it went on to affirm that the government's refusal to recognize the concessions was (apparently) an act of state connected with the assumption of sovereignty over the territory, the justice of which no municipal court might inquire into.

Several remarks may be made. Firstly, the appellants were at all times British subjects, and the court fails to consider whether as between the Crown and its subjects there can be any act of state in such circumstances. Secondly, it is unclear whether the concessions were contractual obligations held against the former ruler, or rather property rights. If the former, the decision

37 At 572.
38 At 574-5.
merely illustrates the rule of non-succession to such obligations, and recent remarks of the highest authority explain the case on this basis. 39

Finally, one is left in doubt as to the nature of the act by which the concessions were nullified or refused, and when it took place. In view of these uncertainties, Cook v. Sprigg appears to be, as Lord Wilberforce has said, "a case of doubtful authority". 40

Nevertheless there is one passage in the judgment which, because of its frequent citation, demands consideration. Their Lordships state:

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. 41

The passage affirms that a domestic tribunal has no power to compel the Crown to respect private property upon its acquisition of a territory, whether on grounds of international law or otherwise; consequently, acts derogating from private rights in the course of acquisition are not subject to judicial review. As such it reiterates familiar doctrine. The passage does not, it is submitted, go beyond this to assert that upon acquisition all private rights of property are nullified ipso facto and without any further Crown act.

The second major authority is the case of Vajesingji Joravarsingji v. Secretary of State for India in Council, decided in 1924. 42 The appellants claimed proprietary rights to certain lands in the Panch Mahals, over which, in the government's view, they held no more than temporary leases. The issue arose in the following manner. In 1860 the Panch Mahals were ceded by the former sovereign to the British government. At that time, the appellants held by grant from the former government certain rights termed pattas, the character of which was one of the matters in dispute. Upon the cession, the new

41 At 578.
42 (1924) L.R. 51 Ind.App. 357 (P.C.).
government set out to inquire what estates had been transferred and what tenures were held by the residents, and appointed an officer for this purpose. In the officer's report, the appellants were entered as leaseholders for an unexpired term, and not as proprietors. When the pattas expired in 1863, they were renewed as a matter of grace for a certain term, and thereafter were renewed from time to time. At various points during this period, the appellants advanced the claim that they were not mere lessees but proprietors. The government, after inquiry, denied this contention. Finally in 1907, the appellants refused to accept renewals of the leases on the terms offered, and sued as proprietors. The Privy Council treated the case as falling within earlier precedents, and decided against the claimants. For our purposes it is essential to note that upon the cession there was an official determination of the character of the appellants' rights, which was consistently maintained thenceforward by the government. In seeking to overturn this characterization, the appellants were forced to submit that it was inaccurate, and to appeal to rights held under the old regime. Yet it is clear that in British law property rights held by the residents of a new accession may be modified by the executive upon acquisition, and the court apparently considered that such a modification might occur even in the course of an official "characterization" of existing rights.

The sweeping language employed in the judgment might be thought to go beyond these conclusions. The Privy Council states:

when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.43

Clearly a municipal court cannot force the Crown to respect existing private rights upon acquisition, but it can, and indeed must on occasion, inquire whether such rights have in reality been respected by the acquiring sovereign.

43 (1924) L.R. 51 Ind.App. 357 (P.C.) at 360.
This distinction was made by the Privy Council in the earlier case of Bai Rajbai (1915). Speaking of holders of certain land rights in an area acquired by cession, the court held:

The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights . . ., and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry in this case.44

It is in the context of a specific inquiry by a municipal tribunal as to whether the Crown has explicitly or implicitly elected to respect prior rights that the principle of continuity has its operation. In the absence of other significant evidence, or where the evidence is ambiguous, the presumption will normally be that the sovereign has elected to affirm such rights.

This interpretation is supported by the judgment of the Privy Council in Oyekan v. Adele (1957).45 In question was the ownership of the traditional royal palace of the Oba of Lagos. This turned in part upon the effect of the 1861 cession of Lagos by the Oba to the Crown. Lord Denning, speaking for the Judicial Committee, held as follows:

Their Lordships desire to point out that the Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos . . . In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. . . In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the Inhabitants are to be fully respected.

In summary, the position is as follows:

(1) municipal courts cannot enforce against the Crown customary international rules or treaty obligations enjoining the respect of private property

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44 (1915) L.R. 42 Ind.App. 229 (P.C.) at 237, emphasis added.
45 [1957] 2 All E.R. 785 (P.C.) at 788, emphasis added.
rights in newly-acquired territory;

(2) however, where the Crown, upon or following the acquisition, implicitly or explicitly elects to respect such rights, municipal courts will follow suit;

(3) if it is disputed whether property rights have survived an acquisition, a court is entitled to undertake an inquiry;

(4) in conducting such an inquiry, the court will be aided by the presumption that, where an inhabited territory is acquired, rights of private property held by the inhabitants will be respected by the Crown.

3) Property held by tribal or kinship groups

It has on occasion been suggested that the presumption of continuity applies only in favour of "civilized" peoples, and not as regards peoples variously described as "savage", "barbarous", "uncivilized", or "primitive". Whether such terms are susceptible of interpretation and application in a reasonably precise and uniform way is open to doubt. Moreover, as anthropological evidence has confirmed, the degree of cultural or technological sophistication possessed by a society bears no necessary relation to the precision and complexity of their concepts of property.

The question was reviewed by the Privy Council in the case of In Re Southern Rhodesia (1918), where the position of certain communal land rights asserted by the indigenous people of Southern Rhodesia was considered. Lord Summer indicated that the legal status of these rights depended in part upon whether they "belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has

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46 See, for example, comments made by Boyd C. in Ontario Chancery Division in St. Catherine's Milling and Lumber Co. v. R. (1885) 10 O.R. 196 at 206; nevertheless other passages support a different view, see esp. at 209. See also respondent's argument in the same case before the Supreme Court of Canada, (1887) 13 S.C.R. 577 at 596-7, and Calder v. A.-G. of B.C. (1970) 13 D.L.R. (3d) 64 (B.C.C.A.) per Davey C.J. at 66-7.

respected them and forborne to diminish or modify them". He then sets out the governing criteria as follows:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

At one point in this passage the Committee appears to suggest that in order to benefit from the presumption of continuity the conceptions of property in question must be reconcilable with the legal ideas of "civilized society". However it later corrects this idea, stating in effect that so long as such conceptions are sufficiently precise and susceptible of being enforced in their own terms then they qualify.

The latter point was discussed by the same court in *Amodu Tijani v. Secretary, Southern Nigeria*, decided several years later. Viscount Haldane warned against the tendency, in interpreting native title to land, to render that title in terms which are appropriate only to systems which have grown up under English law. A very usual form of native title, he notes, is that of a usufructuary right subsisting as a burden on the radical title of the sovereign, and he goes on to refer in this connection to the Indian title to reserve lands in Canada. Another feature of native title, he states, is that it may be held by a community rather than an individual.

Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. 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 as often as not misleading.

The court clearly considered that such rights benefited from the principle of continuity, concluding that the native right in question was a communal

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48 [1921] 2 A.C. 399 (P.C.) at 403-4, 410.
one and "must be presumed to have continued to exist unless the contrary is established by the context or circumstances."

These propositions derive support from the decision of the Supreme Court of Canada in Calder v. Attorney-General of British Columbia (1973).\textsuperscript{49} The appellants, who were representatives of the Nishga Indian people, residing in the area of the Nass River Valley, British Columbia, sued the Attorney-General of the Province for a declaration that their title to the lands they had occupied from early times had never been lawfully extinguished. Their appeal from the lower court's dismissal of the action was rejected by the Supreme Court of Canada by a majority of four to three, but on the narrow procedural ground, which alone united the majority, that the court lacked jurisdiction, the plaintiffs having failed to obtain a fiat under a local Crown Procedure Act.\textsuperscript{50} Nevertheless two major opinions were delivered on substantive points, each supported by three judges, which collectively lend weight to the doctrine of continuity.

Justice Hall, with the concurrence of Justices Spence and Laskin, expressed the view that the acquisition of sovereignty by the Crown over a territory occupied by indigenous peoples did not as such extinguish their land rights, which were presumed to be respected in the absence of a clear expression of the opposite intent. These rights subsisted as a burden upon the underlying title of the Crown, unless or until extinguished by some specific act emanating from a competent authority. Therefore, "...the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoveror... is wholly wrong as the mass of authorities... establishes."\textsuperscript{51} Rather, argues Hall,

\textsuperscript{49} 34 D.L.R. (3d) 145 (Can.S.C.).
\textsuperscript{50} Per Judson J., with Martland and Ritchie JJ. concurring at 168; and per Pigeon J. at 223-6.
\textsuperscript{51} At 218.
...when the Nishga people came under British sovereignty... they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.\textsuperscript{52}

Justice Judson, whose opinion was supported by Justices Martland and Ritchie, while not expressing definite views on the matter, intimated that, in his opinion, Indian land rights did not necessarily find their exclusive source in explicit acts of recognition by the Crown, such as the Royal Proclamation of 1763.\textsuperscript{53} He noted: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."\textsuperscript{54} Judson went on to hold, however, that whatever rights the Indians originally possessed were, in the circumstances, extinguished by valid legislative acts subsequent to acquisition.

\textsuperscript{52} At 208. \textsuperscript{53} At 152. \textsuperscript{54} At 156.
CHAPTER 3

DETERMINING WHETHER TERRITORY HAS BEEN ACQUIRED

What standards does a municipal court apply in ascertaining whether, and at what date, the Crown has acquired title to a territory? The key to the matter can be stated simply. 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.\(^1\) Where the Crown's territorial pretensions conflict with international norms, the former will prevail over the latter in the Sovereign's own courts.\(^2\) However, in 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.\(^3\)


\(^2\) R. v. Kent Justices [1967] 1 All E.R. 560 (Q.B.D.) at 564 per Lord Parker C.J.: "No doubt any declaration of sovereignty will in general, if not always, be made within the international law current at the time, though if the Crown did exercise sovereignty over a greater area, these courts would have to enforce it...". See also Moore, Act of State, 35-6.

\(^3\) This, at least, was laid down as regards treaty obligations by Riddell J.A. in Re Arrow River and Tributaries Slide and Boom Co. Ltd. (1931) 66 O.L.R. 577 (Ont.S.C.App.Div.) at 578-9. On further appeal to the Supreme Court of Canada, [1932] 2 D.L.R. 250, the decision was reversed, but the principle of interpretation adopted by Riddell J.A. was not overruled. For further discussion and British authorities, see O'Connell, International Law, 2nd ed., I, 51-2.
It might be thought that the Crown cannot claim territories which are unknown and unexplored, or which have not at least been sighted or traversed by its emissaries. Such considerations have persuaded certain judges that the Crown could not have asserted title to the western coast of Canada prior to 1763. Speaking of lands held by the Nishga Indians in British Columbia, Justice Tysoe said in the Calder case:

I do not think the Crown could have had in contemplation the Nishga territory when it made the Proclamation of 1763. It had not then been discovered by the British and, not having been discovered, it could not be said it was claimed by and was part of the Dominions and Territories of the British Crown.\(^4\)

If this passage affirms that a municipal court cannot recognize a Crown claim to an undiscovered or unexplored region, it is, with respect, incorrect as a matter of law. If, as seems more likely, the judge means that the Sovereign does not or did not generally assert sovereignty over unknown areas, he appears to misread the history of Britain's expansion overseas.

From the early 17th century onwards, the Crown made grants of vast stretches of territory in North America, often extending from the Atlantic Ocean to the Pacific.\(^5\) Most of the lands covered were unknown to Europeans, let alone Englishmen. The Hudson's Bay Company's Charter of 1670, for example, featured a grant of territory comprising as much as half of modern Canada (see Map 1.4). Only a small portion of the area granted had been explored in 1670, and most of it was still unknown in 1763 (see Maps 1.5-1.7).

Such far-reaching claims were not confined to the 17th century. In 1786, the Crown commissioned its first Governor for the Colony of New South Wales, whose designated limits encompassed an area of some one and a half million square miles, roughly the eastern half of Australia. The colony did not have a single settler at the time. Most of its southern coast had not been navigated by Europeans, and would remain unexplored until Flinders'.


\(^5\) See Chapters 6 and 10.
voyage of 1801-02. In fact it was not realized that Van Diemen's Land (now Tasmania), which fell within the colony's designated boundaries, was an island. 6 European explorers penetrated the interior of the continent only during the 19th century, dispelling hopes of discovering an inland sea.

Nevertheless in Williams v. A.-G. for New South Wales, Isaacs J. termed it unquestionable that when the Governor first received his Commission in 1786 the whole of the lands of Australia were already in law the property of the King of England. 7 The subject arose more recently in Milirrpum v. Nabalco Pty. Ltd., where Blackburn J. observed that when the Governor of New South Wales hoisted the flag at Sydney Cove in 1788 the lands described in his Commission became part of New South Wales. 8

Other examples might be given. However what has been said is perhaps sufficient to indicate that the British Crown did not confine its pretensions to regions actually explored by its agents, or known to the outside world. Meagre coastal explorations often formed the basis for claims to vast uncharted hinterlands. In the case of North America, as we will see in detail later, the hinterland principle was employed to justify claims stretching west to the Pacific Ocean. 9 However excessive such pretensions may now appear, it is the authority with which they were advanced and not the factual evidence adduced in their support which determines their weight in a municipal court.

7 (1913) 16 C.L.R. 404 (Aust.H.C.) at 439.
9 See Chapters 6 and 10.
PART II

ORIGINAL EUROPEAN CLAIMS
CHAPTER 4

SPANISH AND PORTUGUESE CLAIMS

From the earliest stages of modern European exploration overseas, Spain and Portugal claimed exclusive rights in the new regions, and sought to prevent other European states from invading their asserted spheres. These pretensions stemmed from a remarkable series of Papal Bulls, and from various acts of discovery, settlement and conquest. 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.¹ 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.

The Bull *Dum diversas* of 1452 grants to the King of Portugal the faculty to invade, search out, capture, vanquish and subdue all Saracens, pagans and other enemies of Christ whatsoever and their dominions.² Romanus pontifex of 1455 confirms the earlier Bull and extends its terms to Ceuta and all provinces, islands, harbours and seas whatsoever which the Portuguese sovereign subsequently acquires from the hands of infidels or pagans in adjoining or more distant parts.³ Specifically it grants a "right of conquest" extending from Capes Bojador and Nao in West Africa through all Guinea and beyond

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³ Text in *ibid.*, 20 seq.; the passages discussed are at 23-5.
toward the southern shore. This right is said to pertain to the King of Portugal "and not to any others". Interestingly the text stipulates that acquisitions made under the present "letters of faculty" shall pertain to the King "after they shall have been acquired", thus distinguishing between the authority to acquire conferred in the Bull and the process of acquisition itself.⁴ The Bull also empowers the Portuguese sovereign to trade with Saracens and infidels in the regions designated, except in prohibited articles, and forbids all other Christians to trade there, navigate the seas, or even fish without Portugal's license, on pain of excommunication or interdict.

Upon Columbus's return from his first voyage to America, Portugal claimed that the lands discovered lay within its exclusive sphere.⁵ The Spanish monarchs quickly procured from a well-disposed Pope the famous Inter caetera of 4 May 1493. This grants Spain 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".⁶ By contrast with earlier Bulls, this instrument, prima facie, appears to confer existing territorial rights rather than a mere authority to make acquisitions. However on closer inspection the text reveals ambiguities. The Pope states that the grant is made to encourage the Spanish monarchs "to bring under your sway the said mainlands and islands with their residents and inhabitants and to bring them to the Catholic faith". Future acts of acquisition are thus envisaged. Further evidence is provided by the Bull Dudum siquidem, issued to Spain on 26 September that same year.⁷ This confirms the instrument of 4 May, and among other things confers full power "to take corporal

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⁴ See also the references in the Bulls Inter caetera of 1456, ibid., 31, and Aeterni regis of 1481, ibid., 53.
⁵ See Davenport's discussion in ibid., 9, 56.
⁶ Text in ibid., 75 seq. See also the two related Bulls, Inter caetera and Eximiae devotionis, both issued the previous day, on 3 May.
⁷ Text in ibid., 82 seq.
possession of the said islands and countries and to hold them forever, and
to defend them against whosoever may oppose". It also prohibits all persons
not licensed by Spain from going to those regions, whether "for the purpose
of navigating or of fishing, or of searching for islands or mainlands", not-
withstanding any Papal grants previously made to other princes or parties,
providing however these grants have not gone into effect through
actual and real possession, even though it may have happened that
the persons to whom such gifts and grants were made, or their en-
voys, sailed thither at some time through chance.

This presumes that such grants took effect only upon the grantee assuming
actual possession. Mere casual discovery or exploration did not suffice. 8

The respective rights of the two Iberian powers were subsequently ad-
justed by the Treaty of Tordesillas of 1494, which describes a meridian 370
leagues west of the Cape Verde Islands, 270 leagues beyond the line fixed
in the Bull Inter caetera the previous year. 9 Portugal was to enjoy ex-
clusive rights of discovery, trade, and conquest east of the divide, and
Spain the same rights west of it. Given the uncertain state of geographi-
cal knowledge at that era, the line's location was a matter of doubt; but
it was often considered to run through Newfoundland and Brazil, thus leav-
ing most of the Americas to Spain. 10

A distinctive feature of the rights asserted by the Iberian powers
was their exclusivity. Spain and Portugal claimed a total monopoly on ac-
cess, trade, exploration, colonization, conquest, conversion and indeed all
other activities within certain spheres, as against the rest of Christendom.
These claims are distinguishable from assertions of territorial title, for
on the one hand they do not necessarily presuppose title, nor on the other
hand would title necessarily entail such claims. European states normally

8 It is interesting that Columbus himself described the Bull Inter caetera
of 1493 as granted to the Spanish monarchs "to conquer new countries";
quoted in Hanke, Spanish Struggle for Justice, 25.
9 Text in Davenport, Treaties, 1, 93 seq.
10 The demarcation line is shown on the Cantino chart of 1502; Wroth, Ver-
razzano, plate 3. Its location in relation to Canada is discussed in
Canong, "Boundaries of New Brunswick", 155.
allowed the subjects of allied and friendly sovereigns access to their territories for commerce and other peaceful purposes. For the Iberian powers to do likewise in their asserted overseas preserves would have involved abandoning their principal claim, which, although entangled with pretensions to actual dominion, boiled down to the contention that these areas were, for the rest of Christendom, closed spheres. In effect, Portugal and Spain were asserting an exclusive right to exploit certain maritime routes which they had pioneered, and to engage in trade and conquests in regions which they, as among European powers, were the first to discover. To pretend that the Pope had somehow disposed of title to vast and populous overseas territories was to invite the sort of derision which the monarchs of France and England later showed. But to assert that the Pope had granted Spain and Portugal sole admittance as among Christian states to the new regions was to take more defensible ground.

Whatever the intrinsic merits of Iberian pretensions, they could hardly be ignored, for Spain and Portugal were prepared to back them by force, exercised on certain occasions with considerable ruthlessness. Throughout the sixteenth century, they managed to maintain a virtual monopoly on American colonization (if not on fishing and trade), though this was as much due to the lassitude of other powers as to their own efforts. Only in the next century did France and England succeed in establishing permanent settlements in North America, which were to lead in time to their domination of that continent.
CHAPTER 5

FRENCH CLAIMS

Diverse 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 the aboriginal peoples. Taschereau J. of the Supreme Court of Canada gives voice to one common view in the case of St. Catherine's Milling and Lumber Co. v. R. (1887). He affirms that in Canada under the French regime the King was vested with the ownership of all ungranted lands 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.

Taschereau then refers to a series of Charters and letters patent issued by the French King respecting North America and asserts that in none of them, or in any French land grant, is there any allusion to Indian title. "The King", he continues,

granted lands, seigniories, territories, with the understanding that if any of these lands, seigniories, 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.

In consequence, concludes Taschereau, when France ceded Canada to Great Britain in 1763, full title thereto was vested in the new sovereign, who owned it in allodium as part of the crown domain in as full a manner as the King of France had held it previously.

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Another point of view is presented by Monk J. in the Quebec case of
Connolly v. Woolrich (1867).\(^2\) "Neither the French Government", he states
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 per-
suasion. . .

Even assuming for the sake of argument, he continues, that French law existed
in the area in question

will it be contented that the territorial rights, political organiza-
tion such as it was, or the laws and usages of the Indian tribes, were
abrogated. . .? In my opinion, it is beyond controversy that they did
not -- that so far from being abolished, they were left in full force,
and were not even modified in the slightest degree in regard to the
civil rights of the natives.

The territorial rights, then, of the Indians survived, along with their poli-
tical structures and domestic laws.

Which of these views more accurately reflects the position prevailing
under French rule in Canada is the question which we will now consider. We
cannot in this brief chapter attempt a comprehensive survey of the abundant
historical evidence. However a more limited task may not be without utility,
namely a review of the principal constitutional instruments issued by the
French Crown for New France. Here, in Justice Taschereau's view, lies strong
authority for the view that the French monarch treated America as vacant land,
disregarding the rights of the local peoples. Here, in any case, may be
found a considered expression of French views, drafted by Crown officials of
high standing, and carrying the King's approval.

1) The Commissions of Cartier and Roberval, 1540-1.

The first Commission known to have been issued regarding America by
the French Crown proper is that granted to Jacques Cartier on 17 October 1540.\(^3\)

\(^2\) (1867) 11 L.C.Jur. 197 (Que.S.C.) at 203-5; confirmed on appeal, (1869) 1

\(^3\) Text in Biggar, Documents, 128-31.
If similar Royal instruments were issued in connection with Cartier's earlier voyages of 1534 and 1535-6, they have not come to light. The Commission names Jacques Cartier "capitaine general et maistre pillotte" of an expedition to the lands of "Canada et Ochelaga et jusques en la terre de Sagueneay, s'il peut y aborder...". The aims are described thus:

pour plus avant entrer esditz pays, converser avenques leadictz peuples d'icteux et avenques eux habiter, si besoin est, affin de mieux parvenir à nostredicte intencion et à faire chose aggréable à Dieu nostre createur et redempteur et qui soict à l'augmentacion de son sainct et sacré nom et de nostre mère saincte eglise catho-
lique... The Commission does not authorize Cartier to acquire lands for France, nor does it assume pre-existing French rights in Canada. Iberian claims are not mentioned, and the lands in question are viewed as possessed in part by indigenous people. The Commission refers specifically to Cartier's previous voyages. But there is no suggestion that he had laid claim to Canada and Hochelaga for France.

On 15 January 1541, a new Royal Commission was issued to Jean François de La Rocque, Sieur de Roberval. This took precedence over Cartier's Commission and transformed the enterprise from a voyage of exploration to one of conquest and colonization. Roberval is named lieutenant-general of the expedition, with full power over all men and ships. The instrument does not assert pre-existing French rights to the territories mentioned: "pays de Canada et Ochelaga et autres circonjacens..." Rather their acquisition is presented as the central aim. Hence the mandate:

... de passer et rapasser, aller venir esdits pays estranges, de descendre et entrer en icueilx et les mettre en nostre main tant par voye d'amicitie ou amyables compositions, si faire se peut, que par force d'armes, main forte et toutes autres voyes d'hostilité...
This is the earliest official expression known of the French Crown's intention to acquire American territories. Only two modes of acquisition are envisaged: peaceful agreement and war, — in classical terminology, cession and conquest. There is no reference to acquisition by discovery, or symbolical acts. Other passages make it clear that the Crown envisages no less than the reduction of the inhabitants to French control, the imposition of French law, and the founding of settlements, forts and missions.

The text poses one major limitation on the authority to acquire lands:

Pourveu toutesfoys que ce ne soient pays tenus, occupez, possedez et dominez ou estans souzb la subjection et obeissance d'aucuns princes ou potentas, nos alliez et confederez, et mesmezement de voz tres-chers et amez freres l'empereur et le Roy de Portugal...

While disclaiming French designs on the territories of other rulers, the clause confines its protection to lands actually controlled by them. Iberian pretensions are implicitly rejected. 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. 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

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8 See the present author's article "French Claims in North America, 1500-59", [1978] Canadian Historical Review 139.

9 See especially Biggar, Documents, 178, 180.

10 Ibid., 180. There are precedents for this formula; the Papal Bull Inter Caetera of 4 May 1493 grants to Spain all lands beyond a certain line, with the proviso that none of them "be in the actual possession of any Christian king or prince" as of Christmas 1492; Davenport, Treaties, I, 77. See also the English Letters Patent to Hugh Elliot and others of 9 December 1502; Biggar, Precursors of Cartier, 82.

11 The saving clause would cover indigenous allies, as well as Christian ones. However the preamble speaks of sending the expedition to "pays de Canada et Ochelaga et autres circonjacentes, mesmoes en tous pays trans-marins et maritimes, inhabitez ou non possedez et dominez par aucun princes cresteniens .." (Biggar, Documents, 178), referring to Christian princes, rather than allied ones. Verreau's contention that the formula protects all indigenous Canadian groups, allied or not, is unsustainable; "Jacques Cartier: Questions de droit public", 83.

12 E.g., Henri Brun implies this in "Droits des Indiens", 426 and 428-9.
of such rights, as these are derivative, not original modes of acquisition. The justification given in the Commission for American conquests is religious, -- the spreading of Christianity. Contemporary observers did not take this rationale very seriously, nor do modern historians. \(^{13}\) The French Crown, while repudiating, as we shall see, the authority of the Papal Bulls favouring Spain and Portugal, sought to legitimize its own imperialist ventures by invoking the doctrine which those instruments enunciated, namely that it is pleasing to God "that barbarous nations be overthrown and brought to the Faith itself."\(^{14}\)

The Commission gives Roberval full authority with respect to land, including the power to grant it "en fief et seigneurie", and on other terms. The precise wording merits attention. The King grants "plaine puissance et auctorité de icelles terres qu'il nous pourra avoir acquises en icelluy voyage."\(^{15}\) Note the future tense. Roberval's powers extend only to such lands as he is able to acquire for the Crown. Similar thinking underlies an earlier passage, in which Roberval is authorized to "statuer, enjoindre et commander à toutes les choses qu'il verra estre bonnes, vtilles et convenables... et tant sur la mer que en terre ferme, es lieux et en droitz qui seront raduitz soubs nostre obeissance."\(^{16}\)

Cartier set sail for Canada on 23 May 1541, with five ships and a large company of men.\(^{17}\) Roberval departed the following year with some 200 souls, the nucleus of an intended settlement.\(^{18}\) On reaching Newfoundland he met

\(^{13}\) Among the various motives which Spanish officials thought might explain the French expedition, the religious one was apparently not even considered. The Cardinal of Seville commented: "Their motive is that they think, from what they learn, that these provinces are rich in gold and silver, and they hope to do as we have done, but, in my judgment, they are making a mistake..."; Letter of 10 June 1541, Biggar, \textit{Documents}, 325. For recent views, see: Trudel, \textit{Histoire}, I, 129-31; Julien, \textit{Voyages}, 138-41, 147, 149; Lanctot, \textit{History}, I, 67-8.

\(^{14}\) \textit{Inter Caetera}, 4 May 1493; Davenport, \textit{Treaties}, I, 76. Of course, this view represented only one stream of contemporaneous Christian thought.

\(^{15}\) Biggar, \textit{Documents}, 181, emphasis added.

\(^{16}\) \textit{Ibid.}, 179, emphasis added.

\(^{17}\) Relation of Cartier's Third Voyage; Biggar, \textit{Voyages}, 251, n. 2.

\(^{18}\) Relation of Roberval's Voyage; \textit{Ibid.}, 263-4.
Cartier's ships destined for France, bearing gold and "stones like Diamants, the most faire, polished and excellently cut that it is possible for a man to see." 19 When Roberval ordered Cartier to accompany him back to Canada, the latter slipped away at night, and returned to France. 20

The "gold" and "diamonds" proved worthless, and the hopes of François I collapsed. With them died French interest in Canada for the time being. Roberval and the remnants of his colony were brought back the following year.

2) Diplomatic exchanges, 1540-41

The granting of a Royal Commission to Cartier precipitated a diplomatic storm. The Spanish Ambassador remonstrated with Montmorenci, the French Constable, who replied that Cartier's destination lay in new lands not held by the Spanish or Portuguese Crowns, adding that "to uninhabited lands, although discovered, anyone may go." 21 Spain protested that the Commission violated the Truce of Nice and the Papal Bulls. 22 But, related the Spanish Ambassador, the French King replied as before, that he could not desist from giving the said licence to his subjects for any place whatever, but at least they will not touch at places belonging to your Majesty, nor go to the parts not discovered by his predecessors, and belonging to his crown more than thirty years before the ships of Spain or Portugal sailed to the new Indies; 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 hold spiritual jurisdiction, but that it does not lie with them to distribute lands among kings, and that the Kings of France, and other Christians, were not summoned when the partition took place; and in conclusion, Sire, I have not been able to settle anything but that his 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 the eye was not taking possession. 23

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19 Cartier's Third Voyage; ibid., 255; Roberval's Voyage, ibid., 264.
20 Roberval's Voyage; ibid., 265.
21 Spanish Ambassador in France to Emperor, 8-10 November 1540(?), Biggar, Documents, 135-6; Emperor to Cardinal of Toledo, 11-13 November 1540(?), ibid., 140-1.
22 Letter of 11-13 November 1540(?); ibid., 141.
23 Spanish Ambassador in France to Emperor, 27 December 1540; ibid., 169-71. See also Cardinal of Toledo to Emperor, 27 January 1541; ibid., 190.
The Spanish monarch decided to seek the Pope's intervention, arguing that the French action contravened the 1538 Truce, concluded under Papal auspices, and further that it was "to our prejudice, and that of the said most Serene King of Portugal, holding, as we do hold, the title and right to the Indies from the Apostolic See..."\textsuperscript{24} The Cardinal of Toledo was unenthusiastic about the latter point. He advised the Emperor that, in making an approach to the Pope,

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\ldots\text{the claim [to the Indies] should be chiefly based on the fact that your Majesty discovered, conquered and has settled, at great cost, these lands, and continued in peaceful possession, and also the proximity of your Majesty's lands with these lands; and not insist too much upon the concession or permission of his Holiness, both because this might give rise to difficulties, and especially because of the little importance the French King attaches to it. }\] 
\textsuperscript{25}

Replying, Charles V agreed that the Papal concession should be downplayed and that stress should be laid on the other grounds mentioned.\textsuperscript{26}

It would be interesting to learn how the Pope disposed of the matter. Unfortunately we know only that, in the sanguine opinion of the Spanish Ambassador in Rome, the Pontiff's initial reaction seemed "very favourable" and that he showed "a disposition to maintain justice for his Majesty [the Spanish King] and uphold the concession of the Apostolic See...", but prudently requested to see the texts of the Truce of Nice and the Papal Bulls before deciding.\textsuperscript{27} Copies were forwarded to the Spanish Ambassador in Rome, but we hear no more after that.\textsuperscript{28} The French Crown apparently became involved, for the Emperor earlier mentioned to the Cardinal of Toledo that "although we have learnt that his Holiness has approached the said King [of France] through the medium of his nuncio in France, we have no news

\textsuperscript{24} Emperor to Cardinal of Toledo, 5 February 1541; \textit{ibid.}, 197. See also Comendador Mayor (Los Cobos) to Luis Sarmiento, 16 March 1541; \textit{ibid.}, 235.
\textsuperscript{25} Letter of 24 March 1541; \textit{ibid.}, 242-3. See also Cardinal of Toledo to Emperor, 26 June 1541; \textit{ibid.}, 318.
\textsuperscript{26} Letter of 7 May 1541; \textit{ibid.}, 283-4.
\textsuperscript{27} Spanish Ambassador in Rome to Comendador of Leon (Los Cobos), 14 April 1541; \textit{ibid.}, 268-9. See also the same to Emperor, 17 April 1541; \textit{ibid.}, 270-1.
\textsuperscript{28} Los Cobos to Aguilar, 6 July 1541; \textit{ibid.}, 329-30.
of the decision come to. . ."\(^{29}\)

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."\(^{30}\) The statement apparently assumes the independence and equality of the indigenous rulers.

These fragmentary representations of French views, once or even twice removed from source, must be used with caution. However they suggest the following outlook regarding the New World: a) territorial title cannot be derived from Papal Bulls, because the Pope's jurisdiction is spiritual not temporal; b) title cannot be based on mere visual apprehension, -- "passing by and discovering with the eye"; nor can this furnish even an inchoate title adequate to exclude other powers, for in the phrase attributed to the French Constable, "to uninhabited lands, although discovered, anyone may go"; c) a territorial claim, to merit respect, must involve a substantial and continuing exercise of authority, whether by way of settlement or military control; only the "populated and defended places", in the Spanish Ambassador's view, are recognized as Spanish domains; d) wherever independent princes exist in the New World, France is entitled to find allies. Nevertheless the French position, as reported, has its twists. Witness the French monarch's undertaking to confine his activities to parts "discovered by his predecessors, and belonging to his crown more than thirty years before the ships of Spain and Portugal sailed to the new Indies. . ." This is the first positive assertion by the French Crown of territorial rights in the New World known so far. Paradoxically it is linked with French discoveries

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29 Letter of 7 May 1541; ibid., 284.

30 Spanish Ambassador in France to Emperor, 3 November 1541; ibid., 404. The word translated as "princes" is "príncipes" in the original text, and is also used there for Christian monarchs.
supposedly made years before Columbus, this in the course of a statement rejecting the efficacy of "passing by and discovering with the eye", an illustration, perhaps, of the tendency to arrogate for oneself the benefit of principles denied to others. Still, the main French point remains clear: the rejection of Iberian claims to exclusive access to the New World, and to dominion over territories neither settled nor controlled.

3) The abeyance of French interest in Canada, 1544–1576

With the first French colonizing effort in North America a failure, France did not press territorial claims there. A separate article to the Treaty of Crépy-en-Laonnois of 18 September 1544 between France and Spain refers to the fact that the Spanish Emperor "maintient que a luy et au Roy de Portugal, son beaufrère, appartiennent a bon et juste titre selon la division de traictez dentre eulx, toutes les terres des Yndes, tant en isles que de terre ferme, descouvertes et a descouvrir. ..." France, neither admitting nor denying this claim, agrees to leave the Iberian powers in

31 The King perhaps refers to early voyages by fishing vessels, but none are known prior to 1504; ibid., 170, n. 1; Lanctot, History, I, 45–6; Julien, Français en Amérique, 1–3; Trudel, Histoire, I, 34.

32 Certain writers have stressed the similarity between French views on the Papal Bulls and those of the Spanish theologian, Franciscus de Victoria; see Julien, Voyages, 114–5, 145; Trudel, Histoire, I, 67; Lanctot, History, I, 53. A discussion of European doctrinal writings is beyond the scope of this work, but it may be noted that the comparison is misleading. True, Victoria holds that the Pope "is not civil or temporal lord of the whole world" and so could not grant the Spanish King dominion over indigenous Americans and their lands. But he goes on to affirm that the Pope may entrust the task of spreading the Gospel in America exclusively to the Spaniards, and forbid others to preach and even to trade there; he thus effect supports Spanish claims to a monopoly on access to America based on the Papal Bulls, which is far removed from the French position. See: Victoria, De Indis, ed. by Ernest Nys, pp. 134–36, 1st Rel., Sect. II, pars. 2–5; and pp. 156–7, 1st Rel., Sect. III, pars. 9–10. It seems unlikely that Victoria's views could have influenced France's position at this period, as they were expressed in lectures delivered only in January 1539, and did not appear in print until the Lyon edition of 1557. The old date of 1532 given for the lectures is no longer generally accepted. See: Beltran de Hesedia, Francisco de Victoria, 82–91; Hadrossek, Introductory note to Franciscus de Victoria, De Indis, xv, xvi note 12; the older view is found in the Nys edition of De Indis, 191.

33 Davenport, Treaties, I, 208, emphasis added.

34 Cf. Folmer, Rivalry, 63.
peace "en tout ce qui concerne lesdites Yndes, descouvertes et a descouvrir, sans directement ou indirectement y faire emprises quelconques, en quelque lieu ou endroit que ce soit..." A proviso allowing French trade there aroused suspicion, and Spain apparently never ratified the article. Nevertheless it is interesting that France should be willing to concede, if not the entirety of Iberian pretensions, at least the absence of a competing French claim. And in 1545, on Spain's insistence, François I forbade expeditions to Spanish dominions overseas.

War resumed between France and Spain in 1552, and the five-year truce concluded at Vaucelles on 5 February 1556, provided in a separate article that, for the duration, French subjects would not sail to or trade in the Spanish Indies without Spain's licence. Within a year hostilities recommenced, to cease with the Treaty of Cateau-Cambrésis on 3 April 1559. The question of French travel to the Indies was discussed at length in the preliminary negotiations. Spain claimed a monopoly on western navigation, citing the Papal concession and the expenses of discovery. France urged in response that "la mer soit commune", professing willingness to exclude its subjects from lands actually possessed by Spain or Portugal, but not from "lieux que si bien ilz sont descouvertz, toutesfois nobeissent ny au royaulme de Castille ny a celluy de Portugal." In the end, the treaty did not mention the Indies, and the earlier French insistence on factual control as a prerequisite of title in the New World had reappeared.

4) Renewed efforts, 1577-1602

In March 1577, the Marquis de la Roche, with hopes of making his fortune in the fur-trade, secured a Royal Commission regarding Canada. The

35 Davenport, Treaties, I, 207. For Portugal's views on these negotiations, see Guénin, Anço, 222-3.
36 La Roncière, Marine, III, 302-3. A similar ban on navigation to lands discovered by Portugal was issued in October 1547; Ibid., 303-4.
38 Ibid., 220, n. 9.
document authorizes him to go to

Terres neufves, et autres adjacentes, et illec faire descante, s'appartrier, investir et faire siennes toutes et chacunes les terres dont il se pourra rendre maître, pourvu qu'elles n'appartenient à nos amis, alliez et confédérés de cette couronne... 39

La Roche receives no more than the power to conquer or otherwise make himself master of whatever lands he can, lands not as yet belonging to the French Crown. The Commission envisages the acquisition of territory as a process involving settlement and the establishment of effective French rule. La Roche is empowered "de faire bâtir, construire et édifier, fortifier et remparer telles forteresses que bon lui semblera pour les garder et conserver, icelles occuper, tenir et posséder sous nostre protection, et en jouir et user..." 40 No mention is made of the indigenous people, nor is the Marquis explicitly authorized to conquer and rule them. But as much is implied. A supplementary commission issued to La Roche on 3 January 1578 makes this plain, stating "il a moyen de conquérir et prendre quelques terres et pays nouvellement découverts et occupez par gens barbares..." 41 Later in the Commission La Roche is named "Gouverneur et nostre Lieutenant général et Viceroy esdites Terres neues et pays qu'il prendra et conquestra sur lesdites barbares..." 42 La Roche was Governor by anticipation; his realms were still to be won. The title remained a hollow one. It appears that La Roche's expedition of 1578 never managed to reach America. 43

Ten years later Jacques Noéî, in association with one Chaton de La Jannaye, secured Royal Letters Patent granting a twelve-year monopoly on trade with Canada and adjacent lands, both in furs and minerals. This document, dated 14 January 1588, refers to the voyages made by Jacques Cartier and proceeds to renew the powers granted in the Commission of 1540. 44

39 Michelant and Ramé, Relation originale du voyage de Jacques Cartier au Canada en 1534; Documents inédits sur Jacques Cartier et le Canada, nov. ser. (1867), II, 6, emphasis added.
40 Ibid.
41 Ibid., 8, emphasis added.
42 Ibid., 9, emphasis added.
43 Lanctot, History, I, 80; Trudel, Histoire, I, 218.
44 Michelant and Ramé, Voyage de Jaques Cartier; Documents inédits, (1865), II, 41.
The text deals mainly with trade and mining and merely touches on the territorial question. The grantees are instructed to "converser et traiter par toutes voies de douceur, avec ces lesdictz sauvages", and to work towards their conversion. They are authorized generally "de faire toutes les ouvres et ouvertures de conquêtes soubz nostre nom et auctorité par toutes les voices deues et licites pour rendre ledict pays en notre obeissance".

This monopoly excited such protests from the merchants of Saint-Malo, that on 9 July Henry III rescinded it (except as regards mines), and it was never put into effect.

In 1597, La Roche once again secured the King's blessing for an expedition to Canada, which apparently was successful. On 12 January 1598 he secured fresh Letters-Patent appointing him Lieutenant-General in the countries of Canada, Hochelaga, Terre-neuves, Labrador, rivières de la Grande Baye de Norembègue et terres adjacentes des dites provinces et rivières, lesquels étant de grande longueur et étendue de pays, sans icelles être habitées par sujets de nul prince chrétien.

Again we meet a variant on the formula first seen in Roberval's Commission. The wording appears to assume that the territories mentioned are already French domains. Other sections of the instrument correct this impression. In a preamble, the King refers to the early voyages to Canada and the power given to Roberval "pour la conquête des dits pays". With respect to this proposed enterprise of conquest, the King observes:

Ce que n'ayant été exécuté dès lors pour les grandes affaires qui seroient survenues à cette couronne, nous avons résolu, pour perfection d'une si belle œuvre et de si sainte et louable entreprise, au lieu du dit feu sieur de Roberval, de donner la charge de cette conquête à quelque vaillant et expérimenté personnage.

The French Crown looked on conquest as essential to territorial title and

45 Ibid., 42, emphasis added.  
46 Ibid.  
47 Text in ibid., 48-51.  
49 Edits, III, 8.  
50 Ibid.  
51 Ibid., emphasis added.
admitted the failure of earlier attempts. La Roche is authorized to reduce ports, towns, forts, and habitations to the obedience of the King "tant par voies d'amitié ou amiable composition, si faire se peut, que par force d'armes, main forte et toutes autres voies d'hostilité...". He is also given powers of disposal over lands "qu'il nous pourrait avoir acquise". In fact, he managed only to maintain a small colony for five years on Sable Island, a rib of sand in the Atlantic some hundred miles off the coast of Nova Scotia.

On 22 November 1599, Pierre Chauvin de Tonnetuit obtained from the King the grant of a trade monopoly "au pays de Canada, coste de l'Acadie et autres de la Nouvelle-France". La Roche protested, and in January 1600, Henri IV commissioned Chauvin anew as one of La Roche's lieutenants, and confined his monopoly to the St. Lawrence River. That year, Chauvin built a small establishment at Tadoussac and left a handful of colonists. Most failed to survive the winter, and the rest were brought back the next year.

These renewed efforts were followed with some concern in Spain, whose claims to the New World, now merged with those of Portugal, continued undiminished. The Spanish ambassador to France, Juan Tassis, officially protested to the French King in July 1601, arguing that the establishment of a Spanish fort in Florida meant possession of the whole land, even if it was "somewhat far" from the St. Lawrence River, since their soldiers could not cover the entire territory. He requested that the French sailings cease. But Henry IV replied that "Nature allowed him to look for conquests as well as anyone else, provided it were not land that belonged to his friends."

He pointed out that in Canada the only inhabitants were the native peoples, so that the French could go there as they pleased. God, after all, had not given the whole world to Spain.

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52 Ibid. 53 Ibid., 9.
55 In 1580, Philip II of Spain had seized the vacant Portuguese throne.
56 Tassis to the Council of State, 9 July 1601; text in Vigneras, "Spanish Documents", 221.
5) The founding of a colony, 1603-1626

On 8 November 1603, a Royal Commission was granted to Pierre Du Gua, Sieur de Monts, which spells out in unusual detail the official attitude of the French Crown with respect to the acquisition of American lands and relations with their inhabitants. De Monts is named the King’s Lieutenant-General, to represent him in the territories of Acadia, extending from the fortieth degree of latitude up to the forty-sixth, that is, on a modern map, from New Jersey north to the mid-point of Cape Breton Island (Map 1.1). The King does not presuppose his title to the lands in question, nor does he grant them as such to de Monts. Rather he empowers the latter, as his deputy, to extend the King’s authority as far as possible within the stated limits and to subdue the inhabitants, thereby bringing them to the true knowledge of God. As with earlier instruments, what is conferred is in effect a faculty to acquire territories not as yet held by the Crown.

De Monts is empowered to pass laws for any countries thus gained, as close as possible to those of the King, and further "traiter & contracter à même effet paix, alliance & confederation, bonne amitié, correspondance & communication avec lesdits peuples & leurs Princes, ou autres ayans pouvoir & commandement sur eux". Treaties with the indigenous peoples are viewed as a principal means for extending French influence and authority. Significantly, the Crown acknowledges the present independent status of these peoples and the capacity of their rulers and leaders to conclude not only treaties of peace and friendship but also alliances. De Monts is instructed to observe scrupulously such treaties, provided that the Indians do likewise. On their default, he is empowered to wage war against them.

57 Text in Lescarbot, Nouvelle-France, II, 490 seq.
58 Ibid., 490. Ganong points out that on maps of the period the fortieth parallel is shown as running north of Cape Cod, while the forty-sixth cuts Cape Breton; "Boundaries of New Brunswick", 158-60.
59 Lescarbot, Nouvelle-France, II, 490. The original words are these: "Et en icelle étendue ou partie d'icelle, tant & si avant que faire se pourra, établir, étendre & faire conoître notre nom, puissance & autorité. Et à icelle assujetir, submettre & faire obéir tous les peuples de ladite terre, & les circonvoisins: Et par le moyen d'icelles & toutes autres voyes lícites, les appeller... à la conoissance de Dieu..."
in order to bring them to such reason as is judged necessary for the honour of God and the establishment and preservation of the King's authority among them, "du moins", explains the text, "pour hanter & frequenter par vous, & tous nos sujets avec eux en toute assurance, liberté, frequentation & communication, y negocier & trafiquer amiablement & paisiblement". Thus if the outright submission of the indigenous groups cannot be secured, de Monts should strive at least to maintain sufficient influence among them to enable the French to settle nearby, and trade with them in peace and security. De Monts is also authorized to confer honours and offices upon the Indians, apparently with a view to bringing indigenous systems of rank and authority within an overall structure dependent upon the French King. The Commission goes on to empower de Monts to appropriate as much land as he sees fit for his own purposes, and to grant it to others:

tenir, prendre, reserver, & vous approprier ce que vous voudrez & verrez vous être plus commode & propre à votre charge, qualité & usage desdites terres, en departir telles parts & portions, leur donner & attribuer tels titres, honneurs, droits, pouvoirs & facultez que vous verrez besoin être, selon les qualitez, conditions & merites des personnes du pais ou autres.

Leaving aside the proclaimed religious motivation, the principal purpose given for establishing a settlement in Acadia is to facilitate and service the fur-trade. The King refers in the preamble to how fruitful and useful the possession and settlement of these places could be for himself and his subjects, in view of "le grand & apparent profit" obtainable from contacts with the peoples found there, and "le traffic & commerce qui se pourra par ce moyen seurement traiter & negocier".

60 Lescarbot, Nouvelle-France, II, 491.
61 These ideas are reiterated in the supplementary letters-patent issued to de Monts on 18 December 1603, which recites that he has been empowered to settle the lands specified "et là établir nostre autorité et aultrement s'y loger et assurer en sorte que nos sujets y puissent désormais y estre reçus, habiter, trafiquer avec les Sauvages habitant les dits lieux, et y résider..."; Collection de manuscrits, I, 46.
62 Lescarbot, Nouvelle-France, II, 491. This was in accordance with de Monts' petition, which requested power to bestow "graces et privileges tant à ceux du pais qu'aux gens qui yront y habiter"; Collection de manuscrits, I, 40.
63 Lescarbot, Nouvelle-France, II, 491. 64 Ibid., 490.
service of trade, a fundamental motif henceforth in the French penetration of America, is a theme which profoundly affected French attitudes and policies towards the indigenous peoples. A flourishing commerce in furs depended upon several things. Foremost was the maintenance of friendly relations with both neighbouring and more distant Indian 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.

The de Monts Commission, in its phraseology and approach, was adopted as the model for certain subsequent instruments. The operative sections of the text relating to the establishment of the King's authority and relations with indigenous peoples are reproduced virtually word for word in Champlain's Commissions of 1612 and 1625. It was in this period that the French first succeeded in establishing small permanent settlements in Canada.

6) The Compagnie des Cent Associés, 1627-1663

The 1603 Commission to de Monts marked an advance on previous Royal instruments in that, while it granted in effect no more than the authority to acquire territory, it laid down clear geographical limits in the form of parallels of latitude, apparently the first time this device was used in North America. With the Act establishing the Compagnie des Cent Associés of 29 April 1627, we witness the apparent transition to an actual disposition of American territory. In Article IV, the King grants to the Company "en toute propriété, justice et seigneurie" the fort of Québec along with the whole country of New France called Canada, from Florida to the Arctic Circle, and from Newfoundland westward to "la mer douce", a reference to one of the Great Lakes. The French Crown thus implicitly asserts

65 Commissions issued by the Comte de Soissons, 15 October 1612, and by the Duc de Ventadour, 15 February 1625; Edits, III, 11-14.
66 Text in Edits, I, 5 seq.
67 On Champlain's map of 1632, two large adjoining lakes are shown as sources of the St. Lawrence River, described as "Grande Lac" and "Mer douce". They correspond respectively to Lake Huron and Georgian Bay. The map is reproduced in Kerr, Historical Atlas, 18-9; compare with the map of Champlain's explorations on 16-7.
title to the entire eastern sector of North America. The Company is also
given complete authority to dispose of the lands granted to it, and a mono-
poly on the fur and skin trade in New France. 68

Despite the amplitude of the grant, there are indications that the
lands concerned were in some sense yet to be brought under the Crown's
authority. The preamble affirms that the main motive for establishing a
colony was to convert the local inhabitants. To this end, the country should
be peopled with French Catholics who might attract the Indian nations to
Christianity and a civil life, "et même y établissant l'autorité royale"
draw from the country some commercial advantage. Those previously entrusted
with this task had succeeded only in establishing a small settlement. The
present Act was designed to remedy this, so that by founding a powerful col-
ony in the country "la Nouvelle-France soit acquise au roi avec toute son
étendue, pour une bonne fois, sans crainte que les ennemis de cette couronne
la ravissent aux François, comme il pourrait arriver s'il n'y étoit pourvu".
Thus, while the French Crown purported to be entitled to the territory as
against other European powers, the land had not as yet been acquired in the
fullest sense. This ambivalence is perpetuated in the words of the grant
proper, which, after describing the limits of the country granted, adds "et
généralement toute l'étendue du dit pays au long et au large et par de là,
tant et si avant qu'ils pourront étendre et faire connaître le nom de Sa
Majesté". 69 The extension of the Crown's authority is still taken as a
basic goal.

What about the indigenous occupants of these vast regions? Their am-
biguous status is reflected in the provision that any Indians who have been
converted to the Faith, shall be deemed natural Frenchmen, with all attend-
ant rights. 70 As has often been remarked, this clause enunciates an offi-
cial French policy of assimilation. Less generally noted is the fact that

68 Articles V and VII.
69 Article IV, emphasis added.
70 Article XVII.
the clause leaves undefined the status of the vast majority of indigenous peoples, namely those as yet unconverted. If they are not legally "French-men", are they nevertheless theoretically subjects of the French Crown? And if they are not subjects, what are we to make of the Crown's apparent claim to dominion over their territories?

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.

This is confirmed by the terms of two similarly-worded Royal Commissions issued in 1647 and 1654 to the Sieur d'Aulnay de Charnisay and Nicolas Denys respectively, which in effect reiterate the basic concepts set out in de Monts' Commission of 1603.\(^71\) The instrument of 1647, which we will take as our example, confirms d'Aulnay as the King's Governor and Lieutenant-General in Acadia, from the St. Lawrence River south to Virginia "tant et sy avant que faire se pourra". He is instructed to establish the Crown's authority, and to subdue the local peoples, bringing them to the knowledge of God. D'Aulnay is also authorized to

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\begin{align*}
\text{traitter et contracter paix, alliance et confédération avec les dits} \\
\text{Peuples, leurs Princes, ou aultres ayans pouvoir et commandement sur} \\
\text{eulx, leur faire guerre ouverte, pour establir et conserver nostre} \\
\text{authorité, et la liberté du traffic et négocxe entre nos subjets et} \\
\text{ceulx et aultres cas qu'il jugera à propos.} \\
\end{align*}
\]

The Commission empowers him to appropriate and dispose of such lands as he sees fit "tant à ses dits subjets qui s'y habitueront qu'aux dits originaires.". The King's overall aims are succinctly stated in a clause granting the power to do everything necessary for "la conquête, peuplement, habitation et conservation" of the country.\(^73\)

\(^71\) Texts in Collection de manuscrits, I, 120 seq. and Edits, III, 17 seq.
\(^72\) Collection de manuscrits, I, 122.
\(^73\) Ibid., 123.
7) Consolidation and extension of French rule, 1663-1760

In 1663, the Compagnie des Cent Associés was required to relinquish its rights in New France to the Crown. The precarious nature of its achievements are pointedly referred to by the King in his acceptance of the cession, where he regrets that "non seulement le nombre des habitants étoit fort petit, mais même qu'ils étoient tous les jours en danger d'en être chassés par les Iroquois...".75

The Commission issued in November that year to Prouville de Tracy, as the King's Lieutenant-General in South and North America, strikes a clear expansionist note.76 It recites how the King desires not merely to conserve those places in America which were already under his obedience, but also to make fresh discoveries and found new colonies. To this end, Tracy is empowered to make "paix ou trêves, soit avec les autres nations de l'Europe établies dans le dit pays, soit avec les barbares". He is also authorized to seize new countries and erect colonies, and in general to extend the King's boundaries as far as possible, with full power to establish the Crown's authority, and to subdue and exact obedience from the local peoples.

The following year, in May 1664, the Compagnie des Indes-Occidentales was founded.77 The relevant Act grants to the Company for a period of forty years a monopoly of trade and full proprietary rights with respect to certain territories in Africa and the Americas, including as regards Canada, "l'Acadie, Isles de Terreeneuve, et autres Isles et terre ferme depuis le nord du dit pays de Canada, jusqu'à la Virginie et Floride", but with the qualification,

tant et si avant qu'elle pourra s'étendre dans les terres, soit que les dits pays nous appartennent pour être ou avoir été ci-devant habités par les François, soit que la dite compagnie s'y établisse en chassant ou soumettant les Sauvages ou naturels habitants des dits pays ou les autres nations de l'Europe, qui ne sont dans notre alliance. .78

74 Texts in Edits, I, 30-1.
75 Text in ibid., 31-2, dated March 1663.
76 Text in Edits, III, 27 seq.; an English translation is given in NYCD, IX, 17 seq.; the document is dated 19 November 1663.
77 Text in Edits, I, 40 seq. 78 Ibid., 41.
The Act grants full rights over lands already belonging to the French, and a right to appropriate lands held by indigenous nations or European nations not allied with the French. In the latter case the mode of acquisition envisaged is conquest, and no differentiation is made in this respect between indigenous peoples and non-allied Europeans. The requirement of a conquest or actual settlement is reemphasized later in the Act. Article XIX provides that the Company shall hold "en toute seigneurie, propriété et justice, toutes les terres qu'elle pourra conquérir et habiter pendant les dites quarante années en l'étendue des dits pays ci-devant exprimés et concédés..."79 These clauses adopt a somewhat bellicose attitude towards the Indians. But peaceful relations are also envisaged. The Company may "traiter de paix et alliance en notre nom avec les rois et princes des pays où elle voudra faire ses habitations et commerce, et convenir avec eux des conditions et des traités qui seront par nous approuvés. . ."80 The independent status of certain indigenous nations and the capacity of their rulers to conduct international relations are acknowledged. However "en cas d'insulte", war may be declared against them.

In March 1665, the Sieur de Courcelles was commissioned as Governor and Lieutenant-General in "Canada, Acadie et Isle de Terreneuve, et autres pays de la France Septentrionale", under Tracy's overall authority.81 His Commission contains nothing remarkable, being largely an abbreviation of that issued to Tracy. It generally empowers him to do all that is necessary "pour l'étendue et conservation des dits lieux sous notre autorité et notre obéissance". Around the same time, the King sent Courcelles specific instructions concerning the indigenous peoples, which set forth two principal objectives:

Le premier est de procurer leur conversion à la foi christienne et catholique le plus tost qu'il sera possible, et pour y parvenir,... son intention est que les officiers, soldats et tous ses aultres

79 Ibid., 44, emphasis added. Similar provisions are found in Article XL, p. 47.
80 Ibid., Article XXIX, p. 46. 81 Text in Edits, III, 31 seq.
The ultimate goal, then, is to bring the Indians under the King's sway as his subjects. But this is to be achieved without violence if possible, drawing the Indians into the French camp by fair treatment and appeals to their own self-interest. At no point should they be deprived of the lands which they inhabit.

The Compagnie des Indes-Occidentales was abolished by Royal Edict in December 1674, and its proprietary rights were resumed by the Crown. French territories in what is now Canada were henceforth held directly by the King and governed by his appointed officers. Royal Commissions granted to the Governors of New France, from the instrument issued to Frontenac in 1672 up until that of Vaudreuil de Cavagnal in 1755, follow the basic pattern set by Courcelle's Commission of 1665 and do not merit individual examination.

Conclusion

From the evidence considered here, it does not appear that the French Crown viewed North America as _territorium nullius_, vacant land appropriated by mere discovery, symbolic acts or occupation. Rather the fact that most American lands were held by independent indigenous nations was acknowledged, and the capacity of such peoples to enter into treaties with France upon an apparent basis of juridical equality was also admitted. There is no trace

82 Text in _Collection de manuscrits_, I, 175.
83 Text in _Edits_, I, 74 seq.
84 With the possible exception of a small section of present-day western Canada which may have been part of Louisiana. See Chapter 10, text following note 10.
85 Texts in _Edits_, III, 40-81; see also Chapter 10, text at notes 14-16.
of the notion that peaceful relations with infidel peoples were precluded for Christian monarchs. Indeed treaties of alliance were contemplated along with pacts of peace, friendship and commerce. Nevertheless the French Crown assumed that it might justifiably seek to subdue native American peoples, using peaceful means wherever possible, but also force if necessary, upon the grounds that Christians had a duty to bring infidel nations to the true knowledge of God. Only two modes of acquisition were apparently contemplated, namely conquest and cession, the latter mode including the voluntary submission of a nation or group to the French Crown's authority.

Consistent with these principles, France from an early stage denied that other European states held either title or exclusive rights to any territories in America other than those actually settled or controlled. Pretensions to sovereignty or exclusive rights of access based upon the Papal Bulls were rejected, as were claims founded upon mere discovery or token occupation.

France sought to advance its own territorial interests in America both by founding settlements there and also by extending its influence among the indigenous nations, with the aim of eventually securing their acquiescence in the overlordship of the French Crown. There was little thought of exterminating the Indians, driving them away, or otherwise depriving them of their lands, except with respect to such overtly hostile groups as the Iroquois, -- and even this proved impossible to achieve. The French colony was poor in numbers, and little land was required for settlement. If large areas were to be won and held as against other European powers, this could be achieved only through the mediation of the indigenous peoples, for by themselves the French were incapable of occupying or controlling extensive territories. France thus sought allies and (wherever possible) vassals among the Indians, and its eventual claims to sovereignty over vast sectors of North America were founded in part upon the acquiescence (genuine or fictive) of the indigenous peoples.

The relative absence of French-Indian treaties involving cessions
of territory or land rights has often been remarked. By contrast, such treaties are frequently encountered in English practice. From this, some conclude that France did not acknowledge any sort of Indian interest in the soil. The true explanation seems somewhat different. France was primarily concerned with extending its dominions in America by incorporating Indian nations under French rule, rather than in acquiring lands for settlement. This extension of French authority could best be accomplished by cementing links with independent groups through treaties of friendship and alliance, to be followed hopefully by their acquiescence in the Crown's rule. Wherever necessary, force might be resorted to. But in general dispossession of the Indians was not the goal. To the contrary, the aim was to attach the Indian nations to the French Crown as subjects and vassals, and thereby obtain dominion over their territories. The Crown's rights to the soil were to be held, not to the exclusion of the indigenous peoples, but through them. This approach was consonant with the economic gains initially sought from the establishment of French colonies in America, which centred upon the fur trade, and depended upon the Indians' retention of their hunting territories.

Where relations of vassalage were established, it may be inferred that the Indians were considered to hold their lands from the French King and under his ultimate dominion. As vassals they might in certain circumstances be deprived of their lands by the Crown, in particular for acts of disobedience. Otherwise their rights to the lands they held would remain intact, subject to the King's ultimate title.

This then is the principal hypothesis emerging from our study, one requiring detailed validation by a review of France's extensive relations with various Indian peoples. Such a review cannot be undertaken here. However some indication of the juridical mold into which the French sought to press their links with Indian groups is furnished by the terms of a formal treaty of peace concluded at Québec on 13 December 1665. The pact was drawn up between Seigneur de Tracy, Lieutenant-General in North and
South America, acting for the French Crown, and the representatives of four Iroquois nations: the Onondagas, Cayugas, Senecas, and Oneidas. The preamble states that former French Kings had, at some trouble and expense, sent their subjects to discover unknown countries "occupez par les Nations Sauvages, Barbares & Infidèles", however with so little success that until recently, the arms of His Majesty had been carried only as far as the Island of Montréal. But during the present reign, the road to the four upper Iroquois nations had been opened, and Frenchmen introduced into these countries "tart pour y établir le nom de Christ, que pour y assujettir à la domination Françoise les Peuples Sauvages qui les habitent".

The present treaty, recites the text, is not intended to establish a new peace, but merely to confirm an already-existing one, whereby the French shall continue to accord to the Iroquois nations the same protection which they have hitherto received from his Majesty's arms.

The first article embodies a mutual forgiveness of past offences, including those committed against the Iroquois, whether by the Hurons or by "Algonquins Sujets dudit Seigneur Roy, ou vivant sous sa Protection"—an interesting distinction. The matter is reverted to in the next article. This provides that the Hurons and Algonquins living to the north of the St. Lawrence River, extending from the Eskimos and Bersiamites westward to Lake Huron or Mer douce and areas north of Lake Ontario, shall not in future be disturbed in their hunting by the four Iroquois nations or troubled when going to trade with the French, "Ledit Seigneur Roy déclarant dès à présent qu'il les tient tous, non seulement sous sa Protection, mais comme ses propres Sujets, s'estans une fois donné à Sa Majesté à titre de

86 A version of the original French text is given in CTS, IX, 363 seq., reproduced from Léonard, Recueil des Traitez de Paix, V, from which source Dumont also derives the text found in Corps Universel, Vol. VI, Part III, 133. This text incorrectly dates the document as 13 December 1666. The correct date is given in the English translation found in NYC0, III, 121 seq., which also appears to be derived from a more complete text. The treaty was subject to ratification by the nations concerned.

87 A small Algonquin tribe living some 75 miles below Tadoussac; Handbook of Indians, 62.
sujettion & vasselage". All hostilities between the Iroquois and the Algonquins and Hurons shall cease, and the nations shall live in mutual friendship and assistance "sous la protection dudit Seigneur Roy". Thus the treaty declares that the Indian peoples referred to shall be considered not merely protected nations but subjects by right of subjection and vassalage. It is important to note that France also in effect stipulates that the Hurons and Algonquins shall be protected in their hunting grounds vis-a-vis the Iroquois. The overall picture presented is of a number of distinct Indian groups living at peace under the French Crown's overall suzerainty as subjects and vassals, each within its own territory.

The fact that the Indian nations are viewed as retaining their own countries is further indicated in succeeding provisions. In Article V the King undertakes to send some French families among the Iroquois nations "pour s'habiter dans leur Païs", on condition that fields shall be granted suitable for the erection of cabins and for planting Indian corn, and further that communal rights of hunting and fishing shall be extended to the French families. In return, Article VI provides that each of the four nations shall send two families to Montréal, Trois Rivières and Québec where they shall be given fields and corn and the privilege of hunting and fishing in common. These provisions assume that the rights held by the Iroquois over lands in their own countries parallel those held by local French authorities within their proper settlements.
CHAPTER 6

ENGLISH CLAIMS

The character of original English territorial claims in America and their effects on Indian land rights are matters of controversy.

One school of thought holds that Great Britain, along with other European states, treated North America as territorium nullius, land subject to no recognizable jurisdiction or rights, and open to appropriation by discovery or symbolic acts. The Indians, as "pagan and uncivilized" peoples, were not thought to be sovereign entities, or to hold title or jurisdiction over the countries they inhabited. Their land rights were ignored. Consequently when the Crown assumed sovereignty over an American territory, it obtained (in domestic law) full and unencumbered title to the soil and complete powers of disposal, as in an uninhabited country. The only land rights which the Indians were considered to hold were those subsequently granted or recognized by the Crown.¹ True, the British Crown and various colonial authorities in America made a practice from early times of entering into treaties with the Indians for the purpose of "purchasing" lands from them. But this was merely a policy born of prudence and benevolence, and did not entail recognition of any indigenous rights to the lands in question.²

Another argument may be made to the same end. Where the Crown, upon assuming sovereignty over an American territory, issued Charters conferring rights to the soil to individual or corporate proprietors with no reservation for indigenous title, any rights held hitherto by the Indians were

¹ See, e.g., Chalmers, Political Annals, I, 28; St. Catherine’s Milling and Lumber Co. v. R. (1885) 10 O.R. 196 (Ont.Ch.Div.) at 206, but see qualification at 209.

extinguished.³ Virtually the whole of North America (including most of Can-
ada) was affected by Charter grants of this kind. Within these areas, it is
contended, no rights arising from aboriginal possession exist today.

These arguments, despite their differences, are basically similar in
character. They correctly attribute to the Crown the power to abrogate or
disregard indigenous property rights upon acquisition, and assert that in
fact the Crown ignored these rights and treated America as a vacant territory,
disposing of it by Charter.

Other authorities have adopted a quite different view, best exemplified,
perhaps, in the judgment of Chief Justice Marshall of the United States Supreme
Court in Johnson and Graham's Lessee v. M'Intosh (1823).⁴ Marshall contends
that in the early eras of American exploration, the great European powers, to
minimize internecine conflict, agreed upon the following principle: discovery
of a territory gave title to the discovering state against all other European
governments, which title was consummated by possession. The discovering na-
tion gained sole rights of settling the territory and of acquiring the soil
from the natives, whether by purchase, cession or conquest. The indigenous
peoples were admitted to be the rightful occupants of the soil, with a legal
right to retain possession and to use it. However, their rights to complete
sovereignty, as independent nations, were necessarily diminished, and their
power to dispose of their lands to whomsoever they pleased was restricted.
The discovering European states, while respecting the rights of the native
peoples, asserted that ultimate dominion lay with them, and claimed the right
to grant the soil while still in the possession of the Indians. These grants
and charters have been universally understood as conveying a title to the
grantee, subject to the Indian right of occupancy.

at 203.

⁴ 8 Wheat. 543. See also Marshall v. Clark (1791) 1 Kentucky R. 77 (Ken-
tucky C.A.) at 80-1; Fletcher v. Peck (1810) 6 Cranch 87 (U.S.S.C.) 142-3,
146-7; Worcester v. State of Georgia (1832) 6 Peters 515 (U.S.S.C.);
Mitchel v. United States (1835) 9 Peters 711 (U.S.S.C.); E. v. Symonds
(1847) [1840-1932] N.Z.P.C.C. 387 (N.Z.S.C.); St. Catherine's Milling and
Lumber Co. v. E. (1887) 13 S.C.R. 577 (S.C.C.) per Strong J. esp at 612-3;
Story, Commentaries, 5th ed., I, 5 seq.; Kent, Commentaries, 9th ed., III,
*377 seq.
Which of these opposing views more accurately represents the true position is a question to be resolved in the light of the historical record. We will begin by examining a series of Royal Charters issued over the period 1496 to 1670, which relate in their terms to territories now forming part of Canada, and which also reflect the various types of American Charters granted by the Crown.

1) Royal Charters concerning Canada, 1496-1670

a) Early initiatives, 1496-1600

On 5 March 1496, Henry VII issued a Letters Patent to the Venetian John Cabot and his sons, empowering them to sail to all parts of the eastern, western and northern seas to discover and investigate heathen and infidel lands "in whatsoever part of the world placed, which before this time were unknown to all Christians".\(^5\) The instrument authorizes them to erect the royal banners and ensigns in any town, city, castle, island or mainland newly found by them, and also to "conquer, occupy and possess"\(^6\) such places "as our vassals and governors lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction. . .". The patent also grants exclusive rights of access to places discovered, prohibiting Englishmen to sail there without licence on pain of confiscation. The King, one notes, contemplates the acquisition of already-inhabited lands, and assumes the necessity of conquest, occupation and possession. Any territories gained are acquired for the sovereign and held by the patentees as his vassals. The patent does not embody territorial claims, or indeed relate to specific lands; it is a general faculty to conquer new territories.

Cabot sailed west in 1497 and made a landfall somewhere in North America, perhaps in Maine, Nova Scotia or Newfoundland, where he raised the banners of

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5 Text in Biggar, Precursors of Cartier, 7 at 9. Cabot was a Venetian by naturalization, but was born elsewhere; DCB, I, 146.

6 The operative words in the Latin original are "subiugari, occupari et possideri"; ibid., 7.
both England and Venice. He was apparently lost at sea during a second voyage the following year. A contemporary unofficial source recounts that Cabot set up the royal standard on the new land, thereby taking possession for the King. However there appears to be no evidence that the Crown itself adopted or advanced such a claim at the time.

The Letters Patent granted to Richard Warde, Thomas Ashurst and others in 1501 repeats in more elaborate form the ideas expressed in Cabot's Patent of 1496, as does the instrument issued in 1502 to a similar group including Hugh Eliot and Thomas Ashurst. They authorize the patentees to discover infidel lands hitherto unknown to Christians anywhere in the world, to raise the royal banners and to "enter and seize" any towns or other places in the King's name, and to "occupy, possess and subdue these" as the King's vassals, governors and lieutenants, "the property, title, dignity and suzerainty of the same being always reserved to us". The second instrument specifically excludes infidel lands first discovered by the King of Portugal or any other princes whatsoever, friends or confederates, "and in possession of which these same princes now find themselves". This proviso suggests that discovery carries no rights without possession, and implicitly clips the wings of Iberian pretensions. Both Letters Patent state that after the grantees have found, acquired and subdued any lands, the King will grant and does thereby grant them the right to possess such lands as great as they "are able to inhabit, take possession of, hold and maintain", to be held of the Crown by fidelity alone. The grants are in futuro; they dispose of unspecified territories not as yet held by the Crown, whose acquisition was

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7 On the location of his landfall, compare DCE, I, 149-50 and Morison, Discovery of America: Northern Voyages, 170 seq. For the flag-raising, see the Pasquale Peggio letter of 23 August 1497 in Biggar, Precursors of Cartier, 14.

8 The Royal Letters Patent issued for this voyage on 3 February 1498 are of little juridical interest; text in Biggar, Precursors of Cartier, 22-4.

9 Raimondo di Soncino to the Duke of Milan, 18 December 1497, in ibid., 19-20.

10 Texts in Biggar, Precursors of Cartier, 41-59, 70-91; they are dated 19 March 1501 and 9 December 1502.

11 Ibid., 51, 81-2. 12 Ibid., 82. 13 Ibid., 55, 86.
the task of the grantees, and whose extent depended upon their efforts. Both instruments also provide for the establishment of colonies of Englishmen. Although voyages were subsequently made, no efforts at settlement seem to have ensued.  

Elizabeth I's Letters Patent to Sir Humphrey Gilbert of 1578, and its near twin issued to Sir Walter Raleigh in 1584, are just as unspecific. They authorize the acquisition of any remote, heathen and barbarous lands which are not "actually possessed", in the sense of being already "planted or inhabited", by any Christian prince or people in amity with Her Majesty. Again emphasis is placed upon factual possession, and the Charter envisages that upon discovery of new lands the patentees shall proceed to possess and inhabit them, or if necessary conquer them. Indeed their rights are contingent upon the establishment of a colony within six years. When such a colony is founded, the patentees will hold exclusive rights of colonization and trade within a two-hundred league radius. The instruments confer rights to "all the soyle of all such lands, countries, & territories so to be discouered or possessed as aforesaid", with full power to dispose thereof in fee simple or otherwise according to English law, as near as may be convenient, to be held of the Crown by homage and the payment of a fifth part of all gold and silver gotten. The grant, it may be seen, is conditional and operates in futuro. These two Charters envisage primarily the planting of colonies of Englishmen overseas, rather than the conquest of infidel peoples, although the latter is not ruled out. The powers of government and legislation bestowed on the grantees relate principally to settlers, and it is stipulated that all laws shall be agreeable, as near as may be convenient, to the laws and policy

14 Ibid., 51-2, 82; DCB, I, 302, 304-5, 343.
16 Slafter, ibid., 95, 97; Tarbox, ibid., 95, 98.
17 See the references in Slafter, ibid., 97, 98, 99, 102; Tarbox, ibid., 97, 98, 99, 101, 105.
18 Slafter, ibid., 97-8; Tarbox, ibid., 98.
19 Slafter, ibid., 96-7; Tarbox, ibid., 97
of England. However the ensuing efforts by the grantees to plant colonies in America did not prosper.

The Charters reviewed here presuppose that title to New World territories was obtainable only upon their reduction to actual control, whether by conquest, in the case of inhabited countries, or by settlement, as with vacant lands. When the Spanish ambassador protested in 1580 at Drake's penetration of Spain's asserted sphere, Elizabeth I gave the following reply. The Pope, she stated, had no prerogative to grant the New World to Spain, or to bind princes who did not owe him obedience, "and that only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory: acts which cannot confer property". This donation of res alienae was void, and Spain's imaginary proprietorship could not prevent other princes from trading in these regions or from founding colonies where Spaniards were not residing. Without possession, the Queen remarked, prescription was of no avail. 21

b) The Virginia Charter of 1606

The instruments just considered envisage future territorial acquisitions in unspecified areas, and spell out the relative rights of Crown and grantee to any lands obtained. The Royal Charter of 10 April 1606 for Virginia is the first English instrument to assign geographical limits to such enterprises. 22 The London Company is authorized to plant a settlement at any coastal point between thirty-four and forty-one degrees of north latitude, and the Plymouth Company receives similar powers between thirty-eight and forty-five degrees. The most northerly parallel intersects the eastern coast of modern Nova Scotia north of Halifax and cuts across the peninsula and the Bay of Fundy to meet the mainland near the modern U.S.A.-Canadian border (see

20 Slatter, ibid., 99-100; Tarbox, ibid., 101-2.
21 Quoted in Goebel, Falkland Islands, 63, citing Camden, Annales Rerum Anglicaee et Hiberniae, (1717), II, 359-60. See also Elizabeth's exchanges with the Portuguese ambassadors in 1561, 1562 and 1564, where she declines to recognize their sovereign's exclusive rights to any places in Africa not under his actual authority and control; CHBE, I, 45-7.
22 Text in Thorpe, Charters, VII, 3783 seq.
Map 1.26). The Charter conveys exclusive rights over territories lying fifty
miles north and south of the initial settlements and one hundred miles in-
land.\(^{23}\) However these rights take effect only upon the establishment of a
colony, and their precise location also depends upon that event.

The Charter refers to "Territories in America, either appertaining unto
us, or which are not now actually possessed by any Christian Prince or People".\(^{24}\)
One purpose of the settlements is the acquisition of new territory for the
Crown. The process is apparently assumed to be peaceful. The instrument does
not speak of conquering the local peoples, although it permits the grantees
to defend themselves.\(^{25}\) The Crown expresses the hope that the colonists may
bring the true knowledge of God to the "Infidels and Savages, living in those
parts" and in time lead them "to human Civility, and to a settled and quiet
Government".\(^{26}\)

The Crown also authorizes the expulsion of any people who, without the
grantees' license, attempt to settle within the colonies' precincts or trade
there.\(^{27}\) These exclusive rights of settlement and trade are held against
other English subjects, and Europeans in general. However they are not held
as against the indigenous inhabitants. The monopoly on trade with the Indians
is one of the privileges bestowed and this depended upon the Indians' contin-
ued residency in the area.\(^{28}\)

The London and Plymouth Companies are granted certain rights over the
territories comprised within the boundaries of their future colonies, includ-
ing "all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Min-
erals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever".\(^{29}\)
Peculiarly, this grant apparently does not import powers of disposal, for it
is later provided that the King himself shall by Letters Patent grant to

\(^{23}\) Note that these rights could have extended north beyond the forty-fifth
parallel, because had a settlement been established at that precise
latitude, the colony's limits would have run fifty miles farther north-
ward; see Paulin, Atlas, 26.

\(^{24}\) Thorpe, Charters, VII, 3783.

\(^{25}\) Ibid., 3787.

\(^{26}\) Ibid., 3784.

\(^{27}\) Ibid., 3786-7.

\(^{28}\) Thus the grantees are empowered to mint coins for greater ease of trade
and bargaining "between and amongst them and the Natives there"; Ibid.,
3786.

\(^{29}\) Ibid., 3784.
persons designated by the local Council lands lying within the colony's precincts, to be held as of the Manor at East-Greenwich in free and common socage. 30 We will discuss at a later stage the effect of such provisions upon the property rights of the indigenous peoples, but it may be noted that there was apparently no intent to drive them away. Royal Instructions of 20 November 1606 ordain, on threat of severe punishment, that His Majesty's subjects shall "well entreat" the Indians, and further that "all just, kind and charitable courses, shall be holden with such of them as shall conforme themselves to any good and sociable traffique and dealing", whereby they may be brought to the knowledge of God and the obedience of the King. 31

c) The Virginia Charter of 1609

The first Virginia Charter was superseded, so far as the London Company was concerned, by a second instrument issued three years later. As with its predecessor, the Virginia Charter of 1609 describes the territories to be colonized as either pertaining to the Crown or not actually possessed by any Christian prince or people, and so does not necessarily assume that they formed part of His Majesty's dominions at the time. 32 Paradoxically, and by contrast with the 1606 instrument, the Charter grants the London Company title to all lands within the limits specified, and also powers of disposal. The operative words refer comprehensively to "all the Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones" and so on, stipulating that the lands shall be held as of the Manor of East-Greenwich, and providing that the London Company may under its own Seal convey particular portions of the lands granted to subjects and others. 33 The Crown grants all rights "which We, by our Letters Patents, may or can grant" in as ample a manner as has heretofore been granted to any party undertaking discoveries, plantations or trade in foreign parts. 34

30 Ibid., 3789. See CHBE, I, 79.
31 Text in Brown, Genesis of United States, I, 64 at 74.
32 Thorpe, Charters, VII, 3790.
33 Ibid., 3795-6.
34 Ibid., 3796.
The colony is assigned determinate limits, defined by coastal points located two hundred miles north and south of Cape Comfort, and drawn thence "up into the Land throughout from Sea to Sea, West and Northwest". On one common interpretation, while the southern boundary ran due west to the Pacific, the northern boundary extended in a north-westerly direction. The latter limit, as described on a modern map, runs from a coastal point near Delaware Bay due north-west to Lake Erie, which it traverses near the eastern end, and then cuts across southern Ontario, through Lake Huron and Lake Superior, and finally across Manitoba and the Northwest Territories to meet the Arctic Ocean (see Maps 1.1 and 1.19). The colony thus takes in a large part of the continent, and the major portion of western Canada.

How are we to interpret this remarkable instrument? Is it, like its predecessors, a mere conditional grant, dependent upon actual appropriation at some future date? Or should we construe it rather as an annexation of those territories by the Crown and their grant to the Company, which grant takes effect eo instanti. There are passages in the Charter to support either view.

On the one hand, as already noted, the Charter explicitly envisages that some of the territories covered may not as yet pertain to the Crown, and in- deed only recognizes the rights of other Christian princes to territories "actually possessed". Again, the King refers to rights conferred upon previous adventurers as similar in character. Yet these earlier grants were dependent upon an actual conquest or settlement. On the other hand, the King lays down definite boundaries for the colony and authorizes the Company to expel persons settling or trading there without licence, thus asserting exclusive rights as against other European powers, if not the Indians themselves.

Viewed as a whole, then, the Charter represents a Royal assertion, vis-à-vis other Christian states, of exclusive rights of colonization, trade and territorial expansion within a designated area, rights which in turn are

35 Ibid., 3795. 36 See discussion in Chapter 10.
37 Ibid., 3790. 38 Ibid., 3796. 39 Ibid., 3799-800.
conferred upon the Company. In reaction to the monopolistic pretensions of Spain and Portugal, England carves out an exclusive sphere of its own in the New World. But its claims arguably stop short of an assertion of a complete existing title to the lands named. On this view, the right to acquire such title is one of the exclusive privileges claimed against the rest of Christendom, and the responsibility of doing so is entrusted to the Company.

d) The New England Charter of 1620

Meanwhile the Plymouth Company, the second of the two companies founded under the Charter of 1606, had failed to establish a permanent colony. The enterprise was recommenced on a new footing by a Royal Charter issued in 1620. This grants to a Council established at Plymouth powers and rights similar to those conferred on the London Company in 1609 with respect to a territory named New England, extending from forty to forty-eight degrees of latitude, throughout the mainland from sea to sea. These limits take 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 (see Map 1.1). In case of conflict with the boundaries of Virginia, it is provided that the latter shall prevail. Many provisions of the Charter resemble those of the Virginia instrument of 1609 and do not require separate examination. The Crown grants to the Council all lands within the defined precincts "not actually possessed or inhabited by any other Christian Prince or Estate", to be held as of the Manor of East-Greenwich, with power of disposal. It also empowers the Council to purchase, take, and receive lands, whether from the Crown itself or other persons in "any other Place or Places whatsoever". The wording is broad enough to cover purchases of Indian lands.

The provisions granting land rights read as though the territories affected were already part of His Majesty's domains. However the preamble qualifies this picture. The King mentions two main reasons for issuing the

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40 Thorpe, Charters, III, 1827.  
41 Ibid., 1829.  
42 Ibid., 1834.  
43 Ibid., 1834-5.  
44 Ibid., 1831. By contrast the 1609 Charter refers only to lands in England or Wales; Thorpe, Charters, VII, 3795.
Charter: namely to advance the Christian religion, and also "to stretch out the Bounds of our Dominions, and to replenish those Deserts with People governed by Lawes and Magistrates". The same idea is referred to later when the King speaks of the enterprise as tending "to the Inlargement of our own Dominions". These references suggest that the acquisition of territory was an anticipated result of colonization rather than its premise. The connection between title and actual possession is stressed in the Charter, which asserts that the subjects of no other Christian sovereign are, by authority, "actually in Possession" of the lands in question, whereby any right might accrue to them. It recites how plague and warfare among the Indians have depopulated the territory, so that for many leagues there remain no people "that doe claime or challenge any Kind of Interests therein, nor any other Superiour Lord or Souveraigne to make Claime thereunto". The time has now come, concludes the King, for these large and goodly territories, "deserted as it were by their naturall Inhabitants", to be possessed by His Majesty's subjects.

e) The Nova Scotia Charter of 1621

In 1621, James I granted to Sir William Alexander the barony of Nova Scotia or New Scotland in America. The boundaries are described as running from the southern tip of the Nova Scotia peninsula, across the Bay of Fundy, up the St. Croix River and north-westwards to the St. Lawrence River, and thence following the shore east to the Gaspe peninsula, cutting across to the headland of Cape Breton, and finally running south-westerly along the Nova Scotia coast back to the starting point. The boundaries thus take in the whole of present-day Nova Scotia, New Brunswick and Prince Edward Island, and part of Quebec (see Map 1.2). The Charter encroaches upon the limits of New England, but it appears that the Plymouth Company had previously

48 An English translation of the original Latin Charter is found in Slafter, Sir William Alexander, 127 seq.
49 Ibid., 129-30.
relinquished its rights to the area in question. As with the instruments of 1609 and 1620, the King grants to Alexander all lands within the defined precincts, with full powers of disposal.

A distinctive feature of this Charter is the elaborate treatment of Indian-white relations. The King states that his subjects should "cultivate peace and quiet with the native inhabitants" and grants Alexander and his deputies free and absolute power of arranging and securing peace, alliance, friendship, mutual conferences, assistance, and intercourse with those savage aborigines and their chiefs, and any others bearing rule and power among them; and of preserving and fostering such relations and treaties as they or their aforesaid shall form with them; provided those treaties are, on the other side, kept faithfully by these barbarians; and, unless this be done, of taking up arms against them, whereby they may be reduced to order, as shall seem fitting to the said Sir William and his aforesaid and deputies, for the honor, obedience, and service of God, and the stability, defence, and preservation of our authority among them.

These provisions recognize that the Indians possess an autonomous status under their own rulers, and assume that relations with them are, at least initially, to be governed by treaties, entered into by mutual consent. At the same time the Charter asserts a certain Royal "authority" over the Indians, to be maintained by force if necessary. The principal objective, however, is to live in peace with the local peoples. There is no indication of the intent to drive them away or to seize their lands. It is interesting that, contrary to certain views expressed in England at this period, the King holds that treaties of peace, friendship, and even mutual assistance may properly be concluded with infidels. One finds no evidence of the doctrine that such people are perpetui inimici.

f). The Charter for Canada of 1628

Alexander's potential domains in America were enlarged by a Royal Charter issued on 2 February 1628, perhaps the most extraordinary instrument

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50 See the documents cited in Ganong, "Boundaries of New Brunswick", 166-7.
52 Ibid., 136-7. These clauses are so close to those found in the French Letters Patent to De Monts of 1603 that it seems probable that they were modelled on the latter. See Chapter 5.
53 See discussion in Chapter 1.
of its type. This confers rights and powers identical to those of the 1621 Charter over a territory dubbed "Canada", encompassing all lands within fifty leagues of the area drained by the St. Lawrence River and its tributaries, as well as within fifty leagues of a passage leading from that River's source to the Gulf of California, and all lands adjacent to the Gulf on the west and south. Alexander is also granted all other lands "that shall be found, conquered or discovered, at any future time by him or his successors" upon both sides of the territories described above, which are not yet "really and actually possessed" by other subjects of His Majesty, or by those of any allied Christian sovereign or state. This Charter is a hybrid between colonial grants of the newer type, which assign definite boundaries to the lands allocated, and older grants which confer a general faculty to conquer or appropriate any overseas territories whatsoever, saving those actually possessed by allied princes. Arguably it attests to a fundamental similarity between the two types, in that both relate to territories as yet to be won for the King, the difference being that in the newer type the Crown claims in advance certain exclusive rights as against other European states.

This Charter covers an enormous swathe of Eastern Canada, including large parts of southern Quebec and Ontario (see Map 1.1), and was susceptible of virtually indefinite extension into adjacent territories.

g) The Hudson's Bay Company Charter of 1670

The principal English Charter issued regarding Canadian territories during this period are completed by that conferred upon the Hudson's Bay Company in 1670. This instrument grants to the Company the colony of Rupert's Land, described as "all the Landes and Territoryes upon the Countryes Coastes and confyynes of the Seas Bayes Lakes Rivers Creekes and Soundes" of whatsoever latitude, lying "within the entrance of the Streightes commonly called

54 An English translation of the Latin original is given in ibid., 239 seq. The date is incorrectly given there as 2 February 1628/29, rather than 1627/28 (i.e. 1627 old style, 1628 new style).
55 Ibid., 243, 246.
56 Ibid., 241-3.
57 Text in Rich, HBC Minutes, 1671-4, 131 seq.
Hudsons Streightes". It excludes any lands which are "already actually pos-
sessed by or granted to any of our Subjectes or possessed by the Subjectes
of any other Christian Prince or State".\(^{58}\) The text apparently envisages not
merely lands bordering directly upon the sea, but in general all territories
whose waters eventually reach the seas lying within Hudson Strait, and pos-
sibly regions even further afield.\(^{59}\)

This instrument is unique among American Charters in that it views the
territory granted primarily as a vast hunting preserve, within which the Com-
pany is granted a monopoly on the fur trade, rather than as a country earmarked
for settlement. The text is modelled for the most part on Charters issued to
the East India Company and owes little in inspiration to the instruments con-
sidered above.\(^{60}\) Nevertheless the Crown asserts its sovereignty over the
territory described, providing that it shall henceforth be reckoned "one of
our Plantacions or Colonyes in America".\(^{61}\) On the other hand, the text recog-
nizes that the fur trade depends upon the continuing presence of the local
peoples,\(^{62}\) and the Company is authorized to make peace or war with "any Prince
or People whatsoever that are not Christians" in places where the Company is
established, and also to "right and recompence themselves upon the Goodes
Estates or people of those partes" from whom any loss or injury had been sus-
tained.\(^{63}\) These provisions acknowledge the autonomous status of the local
peoples, as well as their ownership of "Estates".

h) Resumé

Among the Charters reviewed here, those issued prior to 1600 are of par-
ticular interest, for they provide clues to the nature of the later, better-
known Charters under which America was successfully settled. These early in-
struments generally empower the grantees to conquer and take possession of
unspecified infidel territories overseas, not actually possessed by any Chris-
tian prince in amity with the Crown; further to govern these countries as the

\(^{58}\) Ibid., 138-40. \(^{59}\) See Chapters 8 and 10.
\(^{60}\) See Chapter 8. \(^{61}\) Ibid., 139.
\(^{62}\) Ibid., 141. \(^{63}\) Ibid., 146.
sovereign's vassals or lieutenants, to found settlements there, to appropriate lands for themselves to be held of the Crown, and to exercise exclusive rights of trade. The Charters neither assume nor confer existing rights to any lands. Rather they grant the faculty to acquire territories for the Crown, and bestow by anticipation certain rights in any countries actually won. The rights conferred operate in futuro.

The seventeenth century Charters are of a somewhat different type. They generally designate, with more or less precision, the territories to which they refer. Within the areas specified, the Crown tacitly claims rights of what might be termed "external sovereignty", that is as among Christian powers the exclusive right to conduct or control activities there, to trade with the inhabitants, to hold relations with their rulers, to found colonies and to acquire lands. The Charters serve both to broadcast these claims to other European sovereigns, and, hopefully, to give them greater substance, by authorizing the grantees to exercise most of the asserted royal powers in the territories concerned. The ample grants of proprietary interests made in the Charters delineate in advance the respective rights of Sovereign and grantee in any lands actually acquired by the latter, and take full effect only upon such an acquisition. They also prevent other British subjects from acquiring lands in the areas designated, except through the medium of the Charter-holders.

So far as the indigenous peoples are concerned, the prominent references to conquest in the early Charters generally give way in later instruments to phraseology which contemplates peaceful settlement and friendly relations with the Indians, and views force primarily as an instrument of self-defence or just retaliation. There is little evidence of a generalized intent to drive away the Indians or to seize their lands. The fact that the indigenous peoples form autonomous communities under their own rulers is, on occasion, recognized, and the hope is expressed that English authority and influence may gradually spread among them.

It has been said that the Charters proceed on the premise that America was, juridically, a vacant territory, and that Indians held no rights to their
lands. It would be more correct to observe that these instruments do not, in general, deal with the question of Indian rights; they are drafted with the aim of delineating the relative rights of Crown and grantee, vis-à-vis both each other and other Christian states. However, incidental references in the Charters indicate that a more realistic view prevailed than that suggested. America was recognized to be, for the most part, in the possession of the Indians. Certain areas which were uninhabited might be gained simply by occupation and settlement. But lands held by Indians could be secured only with the cooperation and consent of their possessors, or by force. In such cases, a cession or conquest from the indigenous occupants was requisite to bring the Charter provisions into full effect, for the title conferred there was contingent upon actual acquisition. It may be noted that when such a cession or conquest was effected, the grantee's title to the lands secured would, strictly speaking, derive from the Crown through the Charter, not from the Indians. The reason is that such acquisitions would, in British law, operate in the Crown's favour, and not that of private subjects, save by virtue of Crown grants.

These inferences are supported by the terms of instruments issued after the Restoration to regularize the position of the colonies of Connecticut and Rhode Island, neither of which held Royal Charters. The Connecticut Charter of 1662 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.64 Again, the Rhode Island Charter of 1663 relates that the petitioners, upon arriving in America, settled amidst certain Indians "who, as wee are informed, are the most potent princes and people of all that country".65 The petitioners 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

64 Text in Thorpe, Charters, I, 529-36.
65 Text in ibid., VI, 3211-22; also in RICR, II, 3-21.
neighbourhoode to and friendlie societie with the greate bodie of the Narragansett Indians, given them encouragement, of theire owne accord, to subject themselves, theire people and landes, unto us". Significantly, the instrument also empowers the province's assembly to dispose of all matters relating to "the makinge of purchases of the native Indians, as to them shall seeme meete".

Other Charters are not this explicit. But there is evidence that they were generally interpreted as taking full effect only upon the extinguishment of native title. In 1664 the King named special Royal Commissioners to visit the New England colonies. Their Commission refers, inter alia, to Indian complaints of ill-treatment, and grants full power to hear and determine complaints and appeals in all cases whatsoever.66 The Commissioners performed several acts of interest during their stay. In determining rival claims to former Indian lands at Misquamucuck, they declared: "no colony hath any just right to dispose of any lands conquered from the natives, unless both the cause of that conquest be just, and the lands lie within those bounds which the King by his charter hath given it". They ruled that any land grants made in the area by Massachusetts or the United Colonies were void.67 It follows, a fortiori, that Indian lands which had never been conquered (or gained by peaceful cession) could not validly be granted away, even though located within a colony's chartered limits.

The Commissioners spell this out in written observations made concerning the laws of Massachusetts.68 One such law provided that the Indians had a just right to any lands within the colony which they possessed and also had improved "by subduing the same", citing Genesis 1:28 and 9:1, and Psalm 115:16.69 The unspoken implication was apparently that Indians had no title to "unsubdued" lands, which, if interpreted to mean "uncultivated", would

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66 Text in NYCD, III, 64-5; dated 25 April 1664.
68 See Private Royal Instructions of 23 April 1664; NYCD, III, 57 at 58. Article 4 provides that the Commissioners are to peruse colonial laws for any points "which are contrary to our dignity and to the lawes and customs of this realme, and to the justice thereof".
69 MCL, 160 (p. 40 in 1660 ed.).
deprive them of their hunting grounds. The Commissioners took exception to this, commenting that the provision implied that the Indians "were dispossessed of their land by Scripture, which is both against the honor of God & the justice of the king". They noted that the command to subdue the earth in Genesis 1:28 should be read in the light of the succeeding injunction to "have dominion" over the fish of the sea. Likewise with respect to the divine command in Genesis 9:1 ("Be fruitful, and multiply, and replenish the earth"), the word "replenish" relates to generation, not husbandry. Similarly regarding Psalm 115:16 ("the earth hath he given to the children of men"), "children of men' comprehends Indians as well as English". The Commissioners' conclusion is striking: "no doubt the country is theirs [the Indians'] till they give it or sell it, though it be not improoved".70

We will now turn to a variety of other evidence concerning the legal status of Indian lands within areas covered by the original Charter grants, in the period prior to 1763. Most of the evidence stems from the Thirteen Colonies, now part of the United States, -- necessarily so, for here the Crown's designs came earliest to fruition.

2) Private purchases of Indian lands

From early periods in the colonization of the Atlantic seaboard, laws were passed by various colonial legislatures controlling the purchase of Indian lands by private individuals. These acts make a number of interesting suppositions. We will focus on legislation passed in the New England colonies.71

In 1634 the Massachusetts Court ordered that "no Person whatsoever shall henceforth buy Land of any Indian without License first had and obtained of the General Court." Any land purchased in contravention of this rule was to be forfeited to the colony.72 These provisions were substantially reiterated

70 MR, IV, Part II, (1661-74), 211 at 213; dated 24 May 1665.
71 For general accounts, see MacFarlane, "Indian Relations in New England", Chapter V, pp. 180-232; Akagi, Town Proprietors of New England Colonies, 5-30; Egleston, Land System of New England Colonies, 6-10.
72 MCL 1672, 72; quoted in MacFarlane, "Indian Relations in New England", 200.
in an Act of 1694. In 1701, a further Act provided that all deeds of purchases made from Indians since 1633 without the General Court's permission were null and void. The preamble referred to the earlier Acts and stated that these were passed so that the Indians "might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands".

The colony of Plymouth passed similar legislation in 1643, forbidding the purchase of lands from the Indians without the consent of a magistrate, upon penalty.

The Connecticut Court enacted in 1663 that no person in the colony should buy or otherwise obtain rights to any lands from the Indians in future, except where he bought the same for the use of the colony or of some town with the Court's permission. Supplementary legislation penalizing and voiding such transactions when conducted without licence was passed in 1687. The legislature relented somewhat in 1706, and provided that if irregular purchasers of Indian lands sent an accurate account of their purchases to the General Assembly, they should not be penalized under the law, but the Court should treat them justly. However, this Act was soon found to have harmful effects and was repealed the following year. An Act of 1717 declares that all lands in this government are holden of the King of Great Britain as the Lord of the fee; and that no title to any lands in this Colony can accrue by any purchase made of Indians on pretence of their being native proprietors thereof, without the allowance or approbation of this Assembly.

It was resolved that no conveyance of Indian title concluded without the

73 MA, XXX, 348-9; MacFarlane, ibid., 200.
74 Mass. Acts and Resolves, I, 471-2; quoted in MacFarlane, ibid., 200-1. For subsequent legislation with substantially the same effect, see ibid., II, 104; III, 306, 679; IV, 163-4, 530, 974; V, 175, 459, 1122; Akagi, Town Proprietors of New England Colonies, 28, n. 25.
75 Plym. Col. Rec., XI, 41; MacFarlane, ibid., 202.
76 CCR, I, 402; quoted in Akagi, ibid., 28, and MacFarlane, ibid., 202.
77 CCR, III, 422-3; MacFarlane, ibid., 203.
78 CCR, V, 4, 30; MacFarlane, ibid., 203. See also the Act of 1702, CCR, IV, 397; Akagi, ibid., 28-9.
approval of the Assembly should be admissible as evidence of title in any court.\footnote{79}{OCR, VI, 13; quoted in Akagi, \textit{ibid.}, 29, and MacFarlane, \textit{ibid.}, 204.}

A New Haven Act of 1639 outlawed the purchase of Indian lands for private use or advantage, but authorized their purchase with the Court's permission in the name and for the use of the whole plantation.\footnote{80}{NHCR, I, 27; Akagi, \textit{ibid.}, 28, and MacFarlane, \textit{ibid.}, 205. The latter author gives the date as January 1640.}

Shortly after, in 1641, New Hampshire provided that "whoever buys the Indian Ground by way of purchase, is to tender it first to the town before they are to make proper use of it in particular to themselves."\footnote{81}{NHDR, I, 142; MacFarlane, \textit{ibid.}, 205.} In 1686 the purchase of Indian lands without the Governor's licence was penalized, and in 1718 such transactions were declared invalid, if effected without the approval of the General Assembly.\footnote{82}{NHDR, II, 17; NHL 1761, 121-3; MacFarlane, \textit{ibid.}, 205.}

In Rhode Island, it was ordered in 1651 that "no purchase shall be made of any Land of ye natives for a plantation without the consent of this State, except it bee for the clearinge of the Indians from some particular plantations already sett down upon". All lands bought in violation of this order should be forfeit to the colony.\footnote{83}{RICR, I, 236.} This order seems to have been forgotten, however, and in 1658 the Court noted that there had been a number of private purchases of Indian lands "which, for want of a law thereaboute in the collony, cannot be now made voyde or hindered. . . but must bee and are allowed and confirmed as lawfull as purchased from the Indians if it were not bought before". Yet for the future it is ordered that no such transactions shall take place without the express permission of the commissioners, upon penalty of fine and forfeiture.\footnote{84}{RICR, I, 403-4. For further legislation of 1676 and 1727 see RICR, IV, 396 and RIAL, 148.}
of the authorities. The penalty sometimes stipulated is forfeiture to the colony, a provision which would have little meaning if the colony already held a complete title to the lands in question. It is normally provided, however, that where such purchases are accompanied by official approval, they are valid.

The precise nature and extent of Indian title is not clearly indicated. There was clearly some diversity of opinion on this score. One encounters indications, as in the Connecticut Act of 1717, that since the Crown was the ultimate source of title to land so far as settlers were concerned, a transfer of Indian rights was inherently incapable of conferring title to the lands concerned, in the absence of a grant deriving from the Crown, or official approval. It could be inferred that the ultimate title to land was held by the Crown or its grantees, and Indian rights subsisted as a burden on that title until extinguished by cession or purchase. Complete title would result from a combination of official grants and Indian purchases.

The question is discussed in a legal opinion given around 1675 by a group of English counsel including John Holt, Henry Pollexfen, and Richard Wallop. This concerned British settlers who had purchased lands from the Indians within territories granted by the Crown to the Duke of York in 1664. The question posed to counsel was whether a grant from the Indians was sufficient to furnish title to a settler without a grant from the King or his assignees. The reply given was negative, and several reasons were invoked. It is stated that by the law of nations a sovereign whose subjects discover a country of barbarians has "the Right of the Soil and Government of that place and no people can plant there without the Consent of the Prince" or his assignees. The opinion goes on to recognize that it has been the usual practice of all proprietors "to give their Indians Some Recompence for their Land and So Seem to Purchase it of them yet that is not done for want of Sufficient title from the King... but out of Prudence and Christian Charity".

85 Text in NYCD, XIII, 486-7; for further information see Chapter 1, note 115. Spelling and punctuation have been partially modernized in the following quotations.
Finally, the opinion observes that no English subject can plant in an English colony without leave of the Crown or its assignees, and therefore, although some planters have made purchases from the Indians, yet having done so without the consent of the colony's proprietors "the title is good against the Indians but not against the Proprietors without a Confirmation from them upon the usual terms of Other Plantations".

In two major respects the opinion reflects the rules commonly embodied in colonial legislation. It holds that private purchases of Indian lands per se do not furnish good title to the purchasers as against the King or the colony's proprietors. However such purchases, if made with the consent of the relevant colonial authorities or afterwards confirmed, give good title. Significantly, the authors state these principles as a matter of unwritten law, invoking at various points the law of nations, colonial practice, and both common and civil law. The same result, it may be noted, would be achieved by an application of the terms of the Royal Charters, which, on virtually any construction, grant to the proprietors exclusive rights as against other British subjects.

The opinion's treatment of the nature of rights held by Indians is ambivalent. At one point the authors maintain that the purchase of Indian lands by the proprietors of a colony adds nothing to the title already held from the Crown. However later on they affirm that a private Indian purchase may confer rights against the Indians themselves, which necessarily presupposes the existence of an Indian title, if only under indigenous law and custom. They also acknowledge that such a private purchase may give good title in British law if done with official consent or confirmed afterwards, a result which cannot easily be explained on the theory that Indian title is a complete non-entity in law.

A more flexible point of view is exhibited in a legal opinion given in 1731 by Yorke A.-G. and Talbot S.-G., which upholds the rights of certain petitioners claiming lands in the area between the Kennebec and St. Croix rivers by virtue of conveyances "from Indians, pretending to be owners
thereof". The law officers remark that, although objections had been advanced as to the nature of these conveyances, the same regularity could not be expected in land matters in the New World as in England, and that in such cases principal regard should be had to actual possession and the expenses incurred in settling and cultivating the land.\textsuperscript{86} The opinion, then, goes some way toward acknowledging that the rule holding the Crown to be the sole source of title to land is not always applicable in America.

3) Early Virginia Treaties

Two seventeenth century Treaties concluded by English authorities in Virginia with the Indians shed light upon the status which the latter were conceived to hold vis-à-vis the Crown.

The first Treaty is set forth in an Act of the Virginia Assembly of October 1646, which provides that the articles are to be duly and inviolably observed.\textsuperscript{87} It was concluded between one Necotowance, described as "King of the Indians", and the people of the colony. Necotowance acknowledges "to hold his kingdome from the King's Ma'tie of England" and agrees that his successors will be appointed or confirmed by the King's Governors. He also undertakes to pay an annual tribute of twenty beaver skins "att the going away of Geese". In return, the Assembly promises to protect him against any rebels or enemies. The Treaty provides that Necotowance and his people shall be free to inhabit and hunt on the north side of York River without interruption from the English, and that they reciprocally shall leave a tract of land between the York and James Rivers for the English to inhabit. We see here a distinct acknowledgment that the Indians in question occupy an autonomous status under their own ruler and within their own territories, subordinate to the overall sovereignty of the English Crown. The relationship between the Indian King and the Crown is conceived to be analogous to that

\textsuperscript{86} Chalmers, Opinions, I, 78 at 109-10; dated 11 August 1731.

\textsuperscript{87} Text in Hening, Virginia Statutes, I, 323-6. See comments in Robinson, "Indian Policy", 71-4.
of a vassal and a feudal overlord.

The second Treaty was concluded at Middle Plantation on 29 May 1677 between, on the one hand, the Queen of Pamunkey, the King of the Nottoways, and various other Indian rulers, and, on the other hand, Lieutenant-Governor Jeffreys of Virginia, in the presence of special Commissioners sent by the King and the Virginia Council of State. The Treaty establishes peace with the Indian signatories, and undertakes to confirm "their just rights" and to redress their wrongs and injuries. The Indian Kings and Queens "henceforth acknowledge to have their immediate Dependancy on, and owne all Subjection to the Great King of England". In return they and their subjects shall hold their lands, and have the same confirmed by Patent under the colony's Seal, without fee, and in "as free and firme manner as others his Majestys subjects have and enjoy their lands and possessions", paying only an annual rent of three arrows. Further, all other Indians in amity with the English who have insufficient lands shall be provided for.

The Treaty goes on to affirm that, whereas the recent Indian disturbances were occasioned "by the violent Intrusions of divers English into their Lands", henceforth no English shall settle or plant nearer than three miles of any Indian town, and whoever encroaches on their lands shall be removed and proceeded against. The Indians shall in general be secured and defended "in their Persons; Goods; and Propertyes" against English wrongdoing. In the case of any injury, the aggrieved Indians should first repair to the Governor who will punish the malefactors according to English law.

It is provided that "each Indian King and Queene have equall Power to Governe their own People". None shall have greater power than the other, save for the Queen of Pamunkey, to whom several scattered nations have renewed their ancient subjection, and agreed to come and plant themselves under her government. These nations are also included in the present Treaty and are to observe peace towards the said Indian Queen "as her Subjects".

as well as towards the English.

Every year in March, the Indian monarchs shall tender their obedience to His Majesty's Governor and pay the accustomed tribute of twenty beaver skins, and also their aforesaid quit rent "in acknowledgement that they hold their Townes and Lands of the Great King of England".

This Treaty was concluded by virtue of Royal Instructions sent to the Governor and Lieutenant-Governor of Virginia, directing them to make peace with the neighbouring Indians, and "in managing and concluding a treaty with them" to make use of special Royal Commissioners sent from England to the colony, among whom the Lt.-Governor, Herbert Jeffreys, numbered. As noted above, the Treaty was entered into by Jeffreys in consultation with the other Royal Commissioners.

On the Commissioners' return to England, the Treaty was referred by the King's orders to the Lords of Trade for their opinion. They reported that the Treaty appeared to be for the service of His Majesty and the security of his subjects, and recommended that it be printed and that copies be sent to Virginia for the better publication and observance of its terms. An Order in Council was accordingly issued directing that the text be sent for printing, which was done. As such, 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.

4) The Iroquois deeds

In July 1701, the sachems of the Five Nations of the Iroquois met in conference at Albany with Lieutenant-Governor Nanfan of the colony of New

89 Text in RI, II, #675, pp. 470-1; dated 13 October and 11 November 1676. For the Commissioners' Instructions, dated 11 November 1676, see SP, 1675-76, #1130, p. 492.
90 See APC, I, #1169, at p. 733.
91 SP, 1677-80, #272 I, p. 97; 23 September 1677.
92 APC, I, #1169, p. 733; 19 October 1677. See also SP, 1677-80, #442, 444, pp. 168-9.
93 SP, 1677-80, #445, p. 169; ibid., #273, p. 97.
York. In his opening address, Nanfan assured the Indians of the King's kindness and protection, and reminded them of their duty, as subjects, to adhere to the Crown as against the French. The Indian delegates, in reply, promised to be faithful to the Crown and to obey the Lt.-Governor. Nanfan then inquired whether the Iroquois were not aware that the French were building a fort at Detroit. "You must not", he exhorted, "suffer it by any means. I am inform'd it is your Land and you have won itt with the sword at the cost of much blood, and will you lett the French take itt from you without one blow".

The Iroquois responded to this point, complaining of French encroachments upon their territories, and requesting that the British King prevent these. To this end they offered to "give and render up all that land where the Beaver hunting is which wee won with the sword eighty years ago to Coraghkoo our great King [the British Crown] and pray that he may be our protector and defender there". They further undertook to sign an instrument to that effect.

A deed was accordingly drawn up and executed by the Iroquois sachems. This significant document recites that the Five Nations had at an earlier era conquered a large territory lying about the lower Great Lakes, and had thereby become sole masters and owners of the land. Recently, however, they had been disturbed in their possession by certain other Indians along with the French, who threatened to deprive them of their hunting grounds. In consequence, states the deed, the Iroquois had decided to surrender the territory in question to the English King, on condition that they retain free hunting in perpetuity there under the Crown's protection.

The deed was required to be accepted and confirmed by the King. It is unclear whether in fact this was ever done, and the instrument appears to have been overtaken by the ensuing war with the French. In 1726 the

94 Text in NYCD, IV, 896-911.
95 NYCD, IV, 908-11, dated 19 July 1701.
96 See the interesting remarks made in a Report of the Board of Trade of 1 June 1759, DHNY, (4th ed.), II, 452; and also those of the Governor of New York to the Iroquois on 14 September 1726, NYCD, V, 799.
subject came up again at a conference between Governor Burnet of New York and the Iroquois.97 There the sachems of three of the five main Iroquois nations agreed to confirm the proposal made in 1701 and signed a deed in trust which granted designated Iroquois territories around Lakes Ontario and Erie to the Crown, the land in question to be protected and defended by His Majesty for the use of the Iroquois.98

In the following decades, however, France gradually consolidated its hold upon much of the territory concerned. The matter was again discussed at the famous Colonial Congress held at Albany in the summer of 1754.99 This was called by the colony of New York at the instance of the British government, which had instructed the Governor to hold a meeting with the Iroquois nations to bestow presents on them and to renew the alliance, with directions being sent to the Governors of other colonies to appoint Commissioners to attend the proceedings.100 In attendance at the Congress were representatives from New York, New Hampshire, Massachusetts, Connecticut, Rhode Island, Maryland, and Pennsylvania, altogether a distinguished and unique colonial gathering.

In their letter to the Governor of New York, the Lords of Trade mention how significant the friendship of the Six Nations was to all the colonies, and refer to the fatal consequences which must inevitably follow from their neglect.101 They instruct the Governor to inquire into Indian complaints of being defrauded of their lands and "to take all proper and legal methods to redress their complaints and to gratify them by reasonable purchases". The Board particularly recommends that the Governor should not make land grants on the basis of

97 Text in NCYD, V, 783-801.
98 NCYD, V, 800-1, dated 14 September 1726 at Albany. Some doubts arise as to the deed's validity, for as Gov. Burnet relates, the deed was not proposed publicly to the Indians, but was discussed in private with a few of the "most trusty" chiefs of only three of the nations. It was not mentioned to the Mohawks or Oneidas. Burnet affirms his intention of getting the Indians to confirm the deed publicly at a subsequent meeting, but it does not appear whether this was done; NCYD, V, 784-5.
100 Lords of Trade to Sir Danvers Osborne, Governor of New York, 18 September 1753, NCYD, VI, 800-1; circular letter from Lords of Trade to the Governors in America, 18 September 1753, NCYD, VI, 802.
101 NCYD, VI, 800-1.
of private purchases from the Indians, for this practice could lead to great mischief and inconvenience. Rather "when the Indians are disposed to sell any of their lands the purchase ought to be made in His Majesty's name and at the publick charge".

The opening speech to the Iroquois deputies was delivered by De Lancey, Lt.-Governor of New York, speaking for all the Commissioners. The Indians were reminded that in the previous century they had conquered an extensive country, which they later put under the protection of the British Crown. But now the French were endeavouring to seize this country. Were they doing this, inquired the Governor, with the Indians' consent?

Hendrick of the Upper Mohawks, replying for all the Iroquois nations, denied that his people had sold lands to the French or given them permission to build forts. He remarked that both English and French are "quarrelling about lands which belong to us, and such a quarrel as this may end in our destruction". 102

A written reply to the Iroquois speech was then drafted and, after consideration, was agreed upon by the Commissioners. This significant document describes the position of the Iroquois lands in question as follows:

you did put this land under the King our Father, he is now taking care to preserve it for you; for this end, among others, he has directed us to meet you here, for although, the land is under the King's Governt, yet the property or power of selling it to any of his Majy's subjects having authority from him, we always consider as vested in you. 103

Hendrick, in response, expressed gratitude for the promise to protect the Indians in their lands, and "the acknowledgement that the right of selling it is in us". 104

At the close of the Congress, a joint Representation to the British government was drawn up and approved by the assembled colonial delegates. This notes, among other things, that private purchases of Indian lands for trifling sums have caused much Indian discontent, and expresses approval of the laws passed in some colonies to nullify purchases made without the government's prior consent. The Representation makes two recommendations on this subject,

102 NYCD, VI, 870. 103 Ibid., 872. 104 Ibid., 876.
firstly that "all future purchase of lands from the Indians be void unless made by the Govern't where such lands lye, and from the Indians in a body in their public councils", and secondly, that Indian complaints regarding "any grants or possessions of their lands fraudulently obtained be enquired into and all injuries redressed".  

The following year the Crown took direct action along lines recommended by the Congress. Royal Instructions were sent to the Governor of New York containing detailed provisions concerning the treatment and status of Indian lands, certain of which provisions were subsequently repeated in Instructions sent to Virginia. The King notes that in 1726 the Five Nations granted to the Crown by deed all their lands around the lower Great Lakes "to be protected and defended by His said Late Majesty... for the use of the said Nations". He directs the Governor to give the most explicit assurances to the Iroquois Nations of the King's resolution inviolably to observe this Treaty on His part, and "to defend and support them in the quiet Possession of their said hunting Grounds". He forbids the Governor, upon any pretence whatever, to grant any lands within the limits described in the Deed of 1726, and orders that utmost endeavours be made to prevent settlements from being made there.

The Instructions also refer to complaints made by the Five Nations concerning fraudulent purchases of their lands. In order that the Indians be convinced of "His Majesty's Intentions to Support and protect them in their just Rights", the Governor should make a strict and impartial inquiry into these complaints, and take quick and effective steps under the law to redress Indian grievances.

Finally the Instructions affirm that the practice of purchasing lands from the Indians without a licence from His Majesty or a royal official is inconsistent with the Crown's rights. The King therefore directs that no

105 Ibid., 888.
106 Text in JP, I, 528-30, dated 20 May 1755. Also in RI, II #667, 669, 671, 672, pp. 465-9. For the background to these Instructions see Lords of Trade to Lords Justices, 22 April 1755, NYCD, VI, 949.
107 See RI, II, #672, 671, pp. 467-9.
grants be made of any lands purchased from the Indians without a licence obtained from the Governor for such purchase. He goes on to lay down detailed rules governing the issue of such licences, and the purchase of lands under them.

These documents, then, extending over more than half a century, express with some consistency the view that the Indians held recognized rights to their lands, within the limits of territories claimed as British dominions and covered by the original Charter grants. The rights in question, it may be noted, arise from aboriginal possession, not from Crown grants. The Deed of 1726 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. The source of the rights reserved lies outside the Deed. Particularly striking is the fact that the recognition of Indian title encountered here emanates not only from local officials in a single colony, but from the delegates of a representative group of colonies, and what is more important, from the British government as represented by the Board of Trade, and ultimately from the Crown itself.

The foregoing review covers only a small portion of the available evidence regarding the position of Indian peoples and their lands in the American colonies, evidence which, unfortunately, cannot be fully considered in the space available to us here. In general, this 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 they were 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.

In any case, the Charter-holders could claim no greater rights against
the Indians in possession than those asserted by the Crown itself. Yet, as
the evidence considered here indicates, the Crown and its official representa-
tives generally recognized the existence of Indian land rights in British terri-
tories. That recognition, it may be noted, was often phrased in terms leaving
little doubt that the source of the rights acknowledged was not the Crown.

There appears to have been some uncertainty, in the early days of coloni-
zation, as to whether individual settlers could obtain good title to Indian lands
by private deed with the Indian occupants. Such transactions, however, were
eventually outlawed in many colonies, and the view which ultimately prevailed
was that the Crown alone, or its assignees, could acquire Indian lands. Pri-
vate individuals could do so only with official licence or approval.

The Crown, however, did not confine its efforts to securing Indian lands
by cession, purchase or conquest. Like the French Sovereign, it sought to ex-
tend its authority within the notional limits of the colonies by obtaining allies,
and hopefully also vassals, among the indigenous peoples. Relations with such
peoples were generally regulated by treaties concluded with their leaders. As
we have seen with the Virginia treaties, the Crown aimed at establishing quasi-
feudal relations with Indian peoples, whereby the latter acknowledged the sov-
ereignty or suzerainty of the British Crown, while retaining their original
group-identities, leaders, political structures, and customs, as well as their
lands.

Our conclusions, then, coincide in many respects with the views expressed
by American judges following the Revolution, most notably by Chief Justice Mar-
shall of the Supreme Court. This result is not altogether surprising. The
American courts were heir to a developed legal system well adapted to local
circumstances, a system which the Revolution, in many respects, did little to
disturb. In this area, as in others, the American judges gave expression to
the law as it had been understood in the days of British rule. They did not
state new doctrine in their views on the status of Indian peoples and their
lands; they reaffirmed a long-standing position.
PART III

INDIAN LANDS IN BRITISH TERRITORIES

PRIOR TO 1763
CHAPTER 7

OLD NOVA SCOTIA

1) Acquisition and territorial extent

The British Crown asserted sovereignty over most of the maritime region of Canada as early as 1620 in the New England Charter and once again the following year in the Nova Scotia Charter issued to Sir William Alexander. Part of this area fell within the limits designated in the Commission issued by the French monarch to De Monts in 1603, and the entire region was comprised within the grant made to the Compagnie des Cent Associés in 1627. These rival claims led swiftly to armed clashes and the reciprocal seizure of colonists and settlements. However in 1632, in the Treaty of St. Germain-en-Laye, Great Britain undertook to give up and restore to France all places occupied by its subjects in New France, Acadia, and Canada, thus implicitly acknowledging France’s exclusive rights in those areas.

The British monarch was reluctant to recognize the implications of this act and the following year secured the confirmation of Alexander’s Charter of 1621 by an Act of the Scottish Parliament. This, however, did not lead to a permanent English presence in Acadia, and the field was effectively left to the French, who planted some one or two hundred settlers

1 The best review of this difficult subject is still Ganong, "Boundaries of New Brunswick", despite a number of inaccuracies found there.
2 See Chapter 6 and Maps 1.1 and 1.2.
3 See Chapter 5 and Map 1.1. 4 See Chapter 5.
5 See Brebner, New England’s Outpost, 23-6; Davenport, Treaties, I, 300-1, 316.
there during the 1630s, the original stock from which grew, with only minor additions, the Acadian people. English interest in the region was revived in 1654 when a naval force from Boston captured the major French positions in Acadia, a victory which Cromwell sought to consolidate in a grant made in 1656 to La Tour, Temple and Crowne covering parts of modern Nova Scotia and perhaps Prince Edward Island, as well as the whole of New Brunswick.

This English phase was, however, short-lived. In 1667 Britain undertook in the Treaty of Breda to restore to France "the country which is called Acadia" which the French Crown "formerly possessed". How much territory this covered was open to doubt. But the English King specified in subsequent letters patent that the country included the forts and habitations of Pentagoet (Penobscot), St. John, Port Royal, La Hève, and Cape Sable, thus clearly assuming that Acadia comprised lands not only on the peninsula but also on the mainland in present-day New Brunswick. This treaty established that, so far as Britain was concerned, Acadia was the rightful possession of France, and that not by virtue of cession from Britain (for the treaty speaks of restoration not cession), but by virtue of the original title asserted by France. The position was not disturbed by the Treaty of Whitehall of 1686 or the Treaty of Ryswyk of 1697, both of which contain reciprocal guarantees of the parties in their territorial possessions.

Modern British title to the maritime region of Canada originates with

8 Brebner, New England's Outpost, 28.
9 Map 1.2. See also Ganong, "Boundaries of New Brunswick", 182-3, and Paullin, Atlas, 29.
10 Treaty of 21/31 July 1667, Article 10, translation of Latin original; Davenport, Treaties, II, 139.
11 Royal letters patent of 1668, quoted in ibid., II, 133. Pentagoet was located at the mouth of the Penobscot River in what is now the state of Maine, and St. John at the mouth of the St. John River in modern New Brunswick.
12 Treaty of Whitehall, 6/16 November 1686, Articles 4-5; text in ibid., II, 320. Treaty of Ryswyk, 10/20 September 1697, Articles 4, 7; text in ibid., II, 362.
the Treaty of Utrecht of 1713, in which Acadia was ceded by France to Great Britain. The text speaks of "la cession faite a perpetuité a la Reyne et a la Couronne de la Grande Bretagne... de la Nouvelle Ecosse, autrement dite Acadie, en son entier, conformement a ses anciennes limites". The term "cession" derives special significance from the fact that, at British insistence, Article X of the same treaty employs "restore" rather than "cede" in providing for the surrender of Hudson Bay to Britain. Prior to the treaty, Queen Anne had observed the same distinction in announcing to Parliament the terms of the future peace, stating that "France consents to restore to us the whole Bay and Streights of Hudson, to deliver up the island of Newfoundland with Placentia, and to make an absolute cession of Annapolis, with the rest of Nova Scotia or Acadie." Despite, then, the claims advanced by Great Britain to the maritime region of Canada in the early seventeenth century, French rights there had been acknowledged by the English Crown as early as 1632, and were generally recognized from 1667 onward. It follows that the country described as Nova Scotia or Acadia in the Treaty of Utrecht was in British law a ceded colony acquired by virtue of that treaty.

This point has been generally, if not universally, acknowledged. Clark, in his Colonial Law of 1834, treats Nova Scotia as a ceded territory, as do several Canadian Supreme Court Justices in Re Provincial Fisheries, along with a handful of other authorities. The

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13 Treaty of Utrecht, 31 March/11 April 1713, Article 12, emphasis added; text in ibid., III, 212. The French text was the original; CTS, XXVII, 475.

14 Statement of June 1712, quoted in Rich, "Treaty of Utrecht", 199. See also the stipulations made by the English in the negotiations of early 1712; ibid., 197-8.

15 Clark, Colonial Law, 454; see also general remarks on p. 27, viewed in the light of the list on pp. 18-9 and subsequent treatment.

16 (1896) 26 S.C.R. 444, per Strong C.J. at 530 (with King J. concurring at 545); Girouard J. appears to adopt the same view at 552.

17 The famous representation of the Board of Trade to the King of 8 September 1721 dealing with the state of the British plantations in America refers to Nova Scotia as having been acquired at Utrecht by cession; NYCD, V, 592. A subsequent report of the Board composed around
question would not merit further consideration were it not that some other commentators treat the province as a settled colony. Forsyth, writing in 1869, affirms that Nova Scotia was acquired by settlement in 1497, along with Newfoundland, New Brunswick and Prince Edward Island.\footnote{18} The date is apparently based on Cabot’s voyage to America. One wonders only that Forsyth does not claim the entire continent for England on the strength of this enterprise. However it does not appear that the English Crown authoritatively laid claim to American lands following Cabot’s voyage, and it is uncertain what territories he actually visited.\footnote{19} Similarly Halsbury’s Laws states that Nova Scotia, Prince Edward Island and New Brunswick are settled colonies.\footnote{20} The root of this view is likely the fact that old Nova Scotia, following the expulsion of the Acadians in 1755, became a predominantly English province. A local assembly was summoned in 1758, and the colony, in some manner, came to enjoy the benefits of English law. It can thus be said without inaccuracy that the colony eventually assumed the main attributes of a settled colony, with an English population, English laws, and English representative institutions, and this fact is reflected in subsequent judicial decision.\footnote{21} However it remains true that old Nova Scotia, whatever its ultimate constitutional status, was initially acquired by cession in 1713.

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18 Forsyth, Cases and Opinions, 26.
19 See Chapter 6.
20 4th ed., VI, par. 926, p. 409. The same view is found in the 3rd ed., V, par. 1084, p. 488. No authorities are cited on this point in either place. The inclusion of Prince Edward Island along with Nova Scotia and New Brunswick appears misconceived. The Island was excepted, together with Cape Breton Island, from the cession effected in 1713, and remained French until 1763 when it was ceded to Great Britain along with Canada. Cf. Delima v. Paton (1971) 1 Nfld. & P.E.I.R. 317.
21 See, for example, Uniacke v. Dickson (1848) 2 N.S.R. 287 (N.S.Chan. Crt.), esp. at 288-91, 299-300.
One might argue, to the contrary, that in 1713 Nova Scotia resumed the status which it held when the Crown first asserted sovereignty there, namely that of a settled colony. This theory has several difficulties. It is doubtful whether Nova Scotia was classified as settled in the 1620s, when the first English Charters were issued. The concept of a settled colony was not explicitly recognized in English law until the late 17th century, when it was described as applicable to lands which were initially uninhabited.\textsuperscript{22} Under the latter rule, Nova Scotia would have been a "conquest". And in fact the country was treated as such in the Charter issued to Alexander in 1621. This authorizes Alexander to establish such laws and forms of government as he sees fit and to alter these at his pleasure, provided that the laws should be as consistent as possible with those of Scotland.\textsuperscript{23} The advocates of the "revivalist" theory presumably do not have these provisions in mind.

True a settled colony, conquered by a foreign power but soon restored to Britain, does not lose its original status merely by a brief experience of foreign rule. But it is another matter to suggest this of a territory originally claimed by Britain but never permanently settled by its subjects and later recognized as French, and which upon cession was inhabited entirely by French subjects and indigenous peoples. Such an argument would have profound implications for French Canada as ceded in 1763, for a large portion of that country had been claimed by the English Crown in its Charter for Canada of 1628.\textsuperscript{24} Yet it has never been thought that in 1763 Canada\textit{ipso facto} resumed the status assigned to it in that Charter.

\textit{Gumbes' Case (1834)}\textsuperscript{25} might be taken as a contrary authority, for its headnote states broadly that "a country reconquered from an enemy

\textsuperscript{22} See Chapter 1.


\textsuperscript{24} See Chapter 6.

\textsuperscript{25} 2 Knapp 369, 12 E.R. 524. See also \textit{Halsbury's Laws}, 4th ed., VI, par. 1018.
reverts to the same state that it was in before its conquest." 26 This is based upon remarks made by the Privy Council during argument; there is nothing in the judgment on the point. 27 The case concerned the application of an Anglo-French treaty which granted certain rights to subjects living in the dominions of the other party. 28 The court held that British subjects residing in a country which was French when the treaty was signed, but was later conquered by the Dutch and subsequently retaken by France, were entitled to the treaty's provisions upon reconquest. The situation, it must be said, is somewhat removed from the case of Nova Scotia.

The boundaries of Nova Scotia or Acadia are not described in the Treaty of Utrecht, which refers only to the province's "ancient limits". In consequence the landward extent of Nova Scotia was later disputed, with France asserting that the ceded countries were confined to the peninsula proper, and the English claiming extensive areas on the mainland, including the whole of modern New Brunswick. 29 The dispute was not resolved until the Treaty of Paris in 1763 when the French King renounced any pretensions to Nova Scotia in all its parts, 30 and simultaneously ceded all adjacent French territories. Thus the boundary question became a purely domestic British issue. The southern border of the new colony of Quebec was drawn along the height of land between the St. Lawrence River and the Atlantic Ocean to Chaleur Bay, 31 while the limits of Nova Scotia were described as, on the north, the southern boundary of Quebec and on the west a line following the St. Croix River to its source and then proceeding due

26 2 Knapp at 369.
27 At 382. See also appellant's submissions at 379.
28 See provisions quoted in 2 Knapp 7-8.
30 Article 4; CD, I, 99.
31 Proclamation of 7 October 1763, Part I, par. 2, in Appendix A; Commission of Governor of Quebec, 21 November 1763, in CD, I, 173.
north to the border of Quebec (Map 1.8). 32

The territories ceded at Utrecht did not include either Cape Breton Island or St. John (Prince Edward) Island, which remained French under the Treaty's express provisions. 33 They did not become British until 1763 when they were ceded along with Canada, 34 whereupon the Crown annexed them to the colony of Nova Scotia. 35

This larger Nova Scotia, then, was composed entirely of ceded lands, some acquired in 1713 and others in 1763. It would be difficult to say at which date the continental portion became British, for although the Crown claimed it by virtue of the Treaty of Utrecht, it did not actually gain possession until the latter era. For our present purposes, however, nothing turns on this issue.

2) Effects of cession

In general, and in the absence of confiscatory acts incidental to the acquisition, the laws and private property rights prevailing in a territory prior to its acquisition by conquest or cession remain in force subsequently, until modified by a competent authority. However the Crown gains full power to legislate for the new territory and may alter existing laws or modify acquired rights of property. 36

The Treaty of Utrecht contains no stipulations concerning the lands of Nova Scotia's inhabitants. Article 14 provides only that French subjects may remain there or leave within a year, taking with them their moveable effects. 37 Presumptively, then, the existing regime of private law and

32 Commission of Governor of Nova Scotia, 21 November 1763, quoted in CD, I, 162.
33 Article 13 states that "l'isle dite Cap Breton, et toutes les autres quelconques situées dans l'embouchure et dans le Golphe de St. Laurent, demeureront a l'avenir a la France. . ."; Davenport, Treaties, III, 212-3.
34 Treaty of Paris, 10 February 1763, Article 4; CD, I, 99.
35 Royal Proclamation, 7 October 1763, Part I, par. 7, reproduced in Appendix A; Commission of Governor of Nova Scotia, 21 November 1763, quoted in CD, I, 162.
36 See Chapters 1 and 2.
37 Davenport, Treaties, III, 213.
rights continued generally undisturbed. To determine the extent to which Indian land rights survived the cession, it might be necessary to ascertain their precise position under French rule. This cannot be undertaken here, nor, in view of subsequent developments, is it necessary for our purpose. However, in light of our earlier survey of French practice, it appears unlikely that the French Crown or its delegates abrogated wholesale the rights of Acadian Indians to their ancestral lands. The general policy of France was to extend its influence among the indigenous peoples by ties of friendship and trade, and to attach them to the French Crown as allies or vassals. The dispossession of the Indians would have run counter to this policy, and would have served little purpose, for French settlers in Acadia were few in number.

It could be argued that since the French Crown asserted the power to dispossess the Indians of their lands, it follows that where land was granted in a manner inconsistent with the subsistence of other rights thereto any Indian title in those specific tracts was extinguished. However, even assuming that this held true in French law, the position appears to have been altered by a Nova Scotia Act passed in 1759 to deal with the aftermath of the expulsion of the Acadians.38 This statute provides that no action shall be retained in any Nova Scotia court for the recovery of any lands in the province "by virtue of any former right, title, claim, interest, or possession of any of the former French inhabitants" or by virtue of any right derived from them, and directs the courts to dismiss such actions with costs. One effect of this Act is to debar a court from upholding rights derived from French grants in any contest regarding title to land or possession thereof. The rationale for the Act, as described in its title and recital, was to ensure that persons to whom Acadian lands were granted would not be troubled by asserted rights deriving from former French possessors. However the operative sections are broadly phrased

38 An act for the quieting of possessions to the Protestant grantees of the lands formerly occupied by the French inhabitants, and for preventing vexatious actions relating to the same, (Nova Scotia) 33 Geo. II, c. 3 (1759).
and would equally prevent actions being taken by persons deriving title from French grants to recover possession of Indian lands. It follows that if the beneficiary of a French grant could not himself invoke that grant in asserting title as against Indians in possession, then no third party could do so either. Consequently in actions concerning aboriginal title to Nova Scotia lands, it would not appear open to a party to argue extinction of such title by virtue of French grants. Where the lands in question were subsequently regranted by the British Crown, of course, distinct issues arise.

We may conclude that the rights of indigenous peoples to Nova Scotian lands in their possession presumptively survived the cession of 1713, not having been abrogated in any extensive manner by the French Crown prior to transfer, nor by the incoming sovereign in the process of acquisition. Our conclusion coincides in this respect with the views presented by MacKeigan C.J. in R. v. Isaac (1975) 39 where he states that original Indian land rights in Nova Scotia were not modified by any treaty or ordinance during the French regime, and "must be deemed to have been accepted by the British on their entry."

A different opinion is expressed by Patterson, Acting Co. Ct. J. in the case of R. v. Sylibooy (1928):40

A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

With respect, the judge misconstrues the nature of original French claims in North America. It does not appear that France, in asserting sovereignty over the Indians, purported to deprive them of all rights to their lands.41

40 50 C.C.C. 389 (N.S.Co.Crt.) at 396, emphasis added.
41 See Chapter 5.
Anglin J. approaches the question from yet another angle in Warman v. Francis (1958). He states that there is no evidence that the Crown recognized the Indians of Nova Scotia as holding any proprietary rights. The history of the province, he reasons, "does not differ materially from that of the eastern coast of North America colonized by the British", and he quotes the American case of Johnson v. M'Intosh (1823) to the effect that in British law all vacant lands were vested in the Crown, and no distinction obtained in this respect between vacant lands and lands occupied by the Indians. He states that following the Treaty of Utrecht the Indians of Nova Scotia became subjects of the Crown; as such "they came under the law of the country, and any interest they might thereafter have in land was only what the law of the new regime afforded them." The judge's view that Nova Scotia can be equated with the thirteen colonies to the south seems, with respect, an exaggeration, for the province was of course originally a French territory. Upon cession, the former regime of laws and rights presumptively remained undisturbed. If the judge means to say that when Nova Scotia was acquired in 1713, English law was ipso facto introduced, thereby rescinding any land rights not deriving from the British Crown, this contention appears incorrect. The court, in any case, appears to misunderstand the purport of Johnson v. M'Intosh, which holds that the British Crown generally recognized an Indian right of occupancy in American lands, while asserting for itself an ultimate title to the soil.

3) The period 1713-1748

Assuming that after cession the legal position of private property rights in Nova Scotia remained largely undisturbed, the question arises what the Crown did subsequently to alter or confirm that position.

The first major piece of evidence is a letter sent by Queen Anne,

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42 20 D.L.R. (2d) 627 (N.B.S.C., Q.B. div.) at 630-1.
43 8 Wheaton 543 (U.S.S.C.) at 588, 595, 596.
dated 23 June 1713, to Francis Nicholson, Governor of Nova Scotia and Commander-in-Chief of Newfoundland. 44 The Queen states that in return for the French King having at her request released certain people detained in his galleys for professing Protestantism, she in return being willing to show by some mark of our favour towards his subjects how kind we take his compliance therein, have therefore thought fit hereby to signify our will and pleasure to you, that you permit such of them as have any lands or tenements in the places under your government in Accadie and Newfoundland, that have been or are to be yielded to us by virtue of the late treaty of peace, and are willing to continue our subjects, to retain and enjoy their said lands and tenements without any molestation, as fully and freely as other our subjects do or may possess their lands or estates, or to sell the same, if they shall rather choose to remove elsewhere.

This instrument refers to all former subjects of the French Crown holding lands in Acadia and Newfoundland. It may be supposed that the Queen had in mind primarily subjects of French descent; however the text does not distinguish between Indians and whites. The letter's legal effect is uncertain, as the precise form which it took is not clear. 45 But it manifests a general Crown intent to respect existing rights of private property in the ceded lands.

The second relevant piece of evidence is a set of Royal Instructions sent to Richard Philips as Governor of Nova Scotia on 14 July 1719. 46 Philips was directed by the Crown to draft a report concerning the province and its inhabitants with a view to the eventual establishment of a civil government. 47 But until such a government could be set up, he was told to

44 Printed in Murdoch, History of Nova Scotia, I, 333. The present writer has not been able to examine the Commission issued to Governor Nicholson on 20 October 1712, or his Instructions of 1 April 1713; see Brebner, New England's Outpost, 63.

45 An opinion of Richard West, Counsel to the Board of Trade, dated 10 March 1719/20 doubts whether this letter in itself had the effect of enabling departing French inhabitants of Newfoundland to convey valid title to their lands and houses to British subjects; Chalmers, Opinions, I, 77-8.

46 The Instructions can be pieced together from the separate clauses printed in Labaree, RI. They appear similar in most respects to the set issued by the Crown for Nova Scotia on 1 July 1729, printed in Can. Sess. Papers, 1883, No. 70, pp. 25 seq.

47 RI, II, #1022, p. 742.
conduct himself according to enclosed Instructions issued for Virginia, as near as circumstances might admit. In the interval, states the instrument, "you are not to take upon you to enact any laws till his Majesty shall have appointed an assembly and given you directions for your proceedings therein." This provision, which remained in force unaltered until 1749, withholds from the Governor the power to legislate for Nova Scotia and thus to alter the legal regime obtaining there. It might be argued that in consequence the Governor had no authority to modify property rights recognized under that regime, insofar as that required the exercise of a legislative, as distinct from executive, power.

This inference is supported by a clause found in the enclosed Virginia Instructions, which states:

You are to take care that no man's life, member, freehold, or goods be taken away or harmed in the said province under your government otherwise than by established and known laws, not repugnant to but as near as may be agreeable to the laws of this kingdom.

This clause reaffirms what was in effect the general constitutional position, namely that the King and his servants were under the law, so that no man might be deprived of his property except in accordance with the laws prevailing in a territory.

The Instructions of 1719 also contain several articles dealing with Indians, one of which is of particular interest. This article, which remained in force with minor alterations until at least the 1770s, provides, in full, 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 neighbors to our subjects but likewise themselves to become good subjects to us; we do therefore direct you upon your arrival in

48 RL, I, §136, p. 85. 49 Ibid. 50 RL, I, §414, p. 291. This clause occurs in all Virginia Instructions from 1682 to 1761. The set of Virginia Instructions sent to the Nova Scotia Governor in 1719 appears to have been that drawn up in 1715 for the Earl of Orkney; RL, I, p. 85, note 57; II, p. 808. The identical provision was afterwards inserted in the instructions issued for Nova Scotia in 1749, where it remained until 1764; RL, I, §414, p. 291.
Nova Scotia to send for the several heads of the said Indian nations or clans and promise them friendship and protection in his Majesty's part; you will likewise bestow upon them in our name as your discretion shall direct such presents as you shall carry from hence for their use.  

The provision reflects awareness of the strategic importance of the Indians, and the need to wean them from their ties with the neighbouring French. It recognizes that they are organized in distinct groups, described as "nations" or "clans", with their own heads. The Governor is to enter into relations with these nations on the Crown's behalf with a view to cultivating friendship and good correspondence. This implicitly envisages the conclusion of pacts or agreements with the Indians. Indeed in the period after 1749, the Instructions were amended so as to specifically direct the Governor to enter into a treaty with the Indians, promising them His Majesty's friendship and protection.  

While no mention is made of Indian lands, it would be difficult to read these provisions as contemplating the dispossession of the Indians.

On the other hand, a later article concerning the Governor's powers to grant lands might be interpreted differently. This provides that whereas it will be highly beneficial to British trade if Nova Scotia is peopled and settled as soon as possible, as an encouragement to all his Majesty's good subjects that shall be disposed to settle themselves and their families there, you are hereby directed to make grants of such lands in fee simple as are not already disposed of by his Majesty to any person that shall apply to you for the same.  

On the one hand this clause might be read as withholding recognition of any land rights not held under Crown grant, as it authorizes the granting of all lands not already disposed of by the Crown. On the other hand, it might be said that the provision does not address itself to the question

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51 RI, II, #673, p. 469; for variant readings see the Instructions of 1729 referred to above.

52 RI, II, #673, p. 469. Patterson Atg. Co. Ct. J. overlooked these clauses in stating that the Nova Scotia Governors were not authorized to sign treaties with the Indians; R. v. Sylibo [1929] 1 D.L.R. 307 (N.S.Co.Ct.) at 314.

of the land rights of the old inhabitants, either Indian or French, and employs stock phrases which should not be read as a complete treatise on the subject. If the clause were read in the former sense, it would assume the dispossession of both Acadians and indigenous peoples, in effect the entire population of the province, which does not tally with the Queen's letter of 1713.

The position of the Indian tribes of Nova Scotia was confirmed and regulated by a Treaty drawn up at Boston on 15 December 1725, and later ratified at Annapolis Royal. On the recital that the British monarch, by concession of the French King at Utrecht, has become the rightful possessor of Nova Scotia, the Indian signatories then formally submit to the new sovereign's authority in the following terms:

We, the said Sanquaaram alias Loron Arexus, Francois Xavier and Meganumbe, delegates from the said tribes of Penobscott, Naridg-wack, St. Johns, Cape Sables and other tribes inhabiting within His Majesty's said territories of Nova Scotia or Acadia and New England, do, in the name and behalf of the said tribes we represent, 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 said Majesty in as ample a manner as we have formerly done to the most Christian King [i.e. the French Crown].

The Indian delegates then promise (inter alia) that their peoples shall not molest any of His Majesty's subjects "in their settlements already made or lawfully to be made" or in carrying out their trading and other affairs. If any Indians commit robbery or outrage, the tribe or tribes to which they belong shall make satisfaction to the injured parties. In case of any dispute or injury between English and Indians no private revenge shall be taken, "but application shall be made for redress according to His Majestie's laws". The treaty was ratified at Annapolis Royal.

54 Texts of treaty and ratification are printed in Indian Treaties and Surrenders, II, 198-9; also in Cumming and Mickenberg, Native Rights, 302-3, and Murdoch, History of Nova Scotia, I, 429-30. This instrument must be distinguished from the more comprehensive Treaty drafted on the same occasion in Boston on 15 December 1725 between the colonies of Massachusetts Bay, New Hampshire and Nova Scotia and certain Indian tribes, most of whose articles only concern the Indians of the first two colonies; text in Cumming and Mickenberg, Native Rights, 300-2.
on 13 May 1728, where it was signed by "Chiefs and others of the St. Johns, Cape Sables and other tribes of Indians" inhabiting Nova Scotia, acting for themselves and their respective tribes.

A significant feature of this treaty (and indeed of most other Indian treaties) is the fact that the Indians are dealt with as organized bodies of people, with their own leaders and internal systems of control. Thus the submission to the Crown is made by whole "tribes" through their appointed delegates. By contrast the British government, in dealing with the Acadians sought submissions to the Crown on an individual basis. The same feature may be seen in the article providing that each tribe is collectively responsible for damage caused by an individual member. Finally the clause stipulating that the government's laws shall govern disputes between settlers and Indians recognizes the existence of conflictual situations arising from the presence of several distinct systems of law and custom in the territory. No mention is made of the law applying to disputes within a given Indian community (or indeed to quarrels between disparate indigenous groups), the assumption apparently being that such situations are regulated by Indian custom. In sum, while the treaty confirms that in British law the Indians of Nova Scotia were regarded as subjects of the Crown, it also suggests that the relationship between an individual Indian and the King was mediated by the collective entity to which the Indian belonged.

It remains to characterize this agreement in terms of British law. Nova Scotia was, as we have seen, a ceded territory, where the Crown was free to retain or alter existing laws and constitutional structures. Under

55 It seems that the treaty was also ratified on an earlier occasion, at Annapolis Royal in June 1726; see the Treaty of 22 November 1752, Article 1, in Akins, NSA, 683.

56 See for example the account given by Governor Philip in a letter to the Duke of Newcastle dated 3 January 1730 (1729 O.S.) concerning the administration of an oath of submission and allegiance to the French inhabitants of Annapolis River and the enclosed papers containing lists of individual subscribers; Akins, NSA, 83-4, and infold at 84.
the French regime the Crown sought to secure the submission of Indian
tribes as its vassals, and dealt with them on a collective basis. Here
the British Crown, in its first major treaty with the Nova Scotia Indians,
substitutes itself for the French sovereign, and establishes a similar set
of relationships. The treaty can be characterized, on the governmental
side, as a prerogative act which confirms that certain indigenous groups
are accepted as protected entities and their members as subjects, leaving
their internal structure and customs largely intact, but subjecting their
relations with the settlers to certain norms.

4) The period 1749-1761

In 1749, Governor Cornwallis was authorized by his Commission to
summon a general assembly of all freeholders and planters according to the
usage of other American plantations, and to make laws with the advice and
consent of assembly and council.\footnote{Text in Akins, \textit{NSA}, 497 at 498, 499, 500.} After some delay, an assembly was event-
ually summoned in 1758.\footnote{See documents in Kennedy, \textit{Constitutional Documents}, 9-18.} Under the rule later laid down in \textit{Campbell v. Hall},\footnote{(1774) Lofft 655, 98 E.R. 848. See our earlier discussion.} these provisions (or at least the calling of the assembly) deprived
the Crown of its prerogative power to legislate henceforth for the colony.\footnote{See also the opinion of Murray A.-G. and Lloyd S.-G. of 29 April 1755
to the effect that the Governor and Council of Nova Scotia did not have
the power to enact laws apart from an assembly, under the Commission
and Instructions issued for the province; Chalmers, \textit{Opinions}, I, 261-2; see also related documents in \textit{Can. Sess. Papers}, 1883, No. 70, 11 seq.} The King's power to grant lands at his disposal was not of course affected.\footnote{The Commission of 1749 grants the Governor full power to settle and
agree with the inhabitants of Nova Scotia for such lands as are at the
Crown's disposal and to grant them upon suitable terms; Akins, \textit{NSA}, 504.}
of Great Britain," It also authorizes the establishment of courts to hear all matters both criminal and civil "according to Law and Equity". It could be maintained that these clauses have the effect of introducing English law into the colony, or presume its introduction at some prior time. The question of when and how English law came to prevail in Nova Scotia is complex, and cannot be resolved here. However there is some doubt whether the above provisions were responsible. The first clause does not affect the laws generally in force in the province, but simply prescribes that any new laws conform in some degree to the laws of England. Again it is unclear whether the phrase "Law and Equity" in the second clause refers to English law, or the *lex loci*, or indeed some combination of the two. The fact that most inhabitants of Nova Scotia at the time were Acadians or Indians suggests that the *lex loci* cannot have been disregarded.

However, assuming that these provisions imported English law into Nova Scotia, the question arises whether this in itself would invalidate any existing land rights which did not meet English standards. It could be maintained that henceforth to establish a legal interest in land it would be necessary to prove that it derived mediatelly or immediately from the Crown, this being the standard English rule. In the result, those inhabitants whose rights rested upon French grants or aboriginal possession would find themselves divested of their lands.

This contention fails to distinguish between existing rights and those created in the future. The normal rule is that, absent explicit provisions to the contrary, new laws do not operate retroactively so as to invalidate rights arising under the former laws. Thus the introduction of English law would hardly have the effect of annulling existing marriages or illegitimizing children of such unions on the grounds that the new rules had not been observed. While English law would apply to future marriages,

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64 See discussion in Brown, "British Statutes in North America", 101 seq.
the validity of existing unions would generally be governed by the laws in force at their formation. By parallel, existing land rights would, in the absence of clear provisions to the contrary, remain valid so long as the rules applying at their inception had been satisfied. It follows that even if English law was introduced en bloc to Nova Scotia in 1749, this would not in itself deprive the inhabitants of acquired land rights.

The period under review witnessed a series of Indian treaties, which in varying degrees hearken back to the Treaty of 1725. In articles drawn up in Chibucto Harbour on 15 August 1749, the deputies of the Chinecto and St. Johns Indians renewed the former treaty in all its clauses, without any alterations or reservations. Negotiations conducted in the fall of 1752 led to a similar result, with, however, the addition of certain provisions. In September, the chief of a group of Micmac Indians, Jean Baptiste Cope, arrived in Halifax bearing a proposal to renew the peace. One of the propositions which Cope put to the Governor and Council was that "the Indians should be paid for the land the English had settled upon in this Country", the reference being, no doubt, to practices long prevailing in New England. No specific answer to this request is recorded. However in a written response to the general proposal of peace and friendship, the Governor agreed to bury the hatchet of war, and made this promise:

We will not suffer that you be hindered from Hunting, or Fishing in this Country, as you have been used to do, and if you shall think fit to settle your Wives & Children upon the River Shibenaccadie, no person shall hinder it, nor shall meddle with the lands where you are. . .

This undertaking was made under the Governor's Seal and was formally accepted by the Indian deputy. It has the air less of a novel provision than of one confirming an existing situation.

65 Text in Indian Treaties and Surrenders, II, 200-1. The agreement was formally ratified by the chiefs and captains of the St. John River area on 4 September 1749, ibid., 201.
66 Akins, NSA, 671.
67 Ibid.
68 Dated 16 September 1752; ibid., 673.
The Indian deputy undertook to return to his own people and also to visit other bands, informing them of what had taken place, and persuading them to renew the peace. Later that year he returned to Halifax with other Indian representatives, and on 22 November 1752 a formal treaty was concluded between the Governor and Council on behalf of the Crown and what are described as the chief sachem and delegates of the tribe of Micmac Indians inhabiting the eastern coast of Nova Scotia. 69 This treaty renews the terms of the Treaty of 1725 and provides for a mutual forgiving of past transgressions, stating that the Indians shall have "all favour, Friendship & Protection shewn them from this His Majesty's Government." The Crown in particular undertakes that the tribe of Indians in question "shall not be hindered from, but have free liberty of Hunting & Fishing as usual...". The phrase "as usual" is worthy of note. The instrument was sealed with the Great Seal of Nova Scotia. 70

5) The period 1761-1763

The great war which overtook the American continent in the mid-1750s heightened imperial awareness of the strategic role which the Indians played between the contending forces. Thus when a New York proposal to grant lands in areas uncomfortably close to the Iroquois territories came before the Board of Trade in 1761, that body took the opportunity to write a comprehensive Report to the King setting forth basic policies to be pursued as regards the Indians generally. 71 The Report states that the main reason prompting the Indians to make war on the English has been "the Cruelty and Injustice with which they had been treated, with Respect to their Hunting Grounds, in

69 Text in ibid., 682-5. In a Proclamation issued following the Treaty, the Indians are also referred to as the Chibenaccadie tribe of Micmac Indians; ibid., 685.

70 See also the Treaty of 25 June 1761 concluded with the Merimichi Indians, which basically renews the terms of the Treaty of 1725; Akins, NSA, 699-700.

71 Dated 11 November 1761; complete text in NCCR, VI, 582-6; a slightly less complete text is found in NYC 7, VII, 472-5.
open Violation of those Solemn Compacts by which they had Yielded to Us the Dominion but not the property of their Lands". The Indians, continues the Board, await only the war's end, which will enable the King to renew those compacts "by which their property in their Lands shall be Ascertained" and also to introduce a reformed system which, while it redresses Indian complaints and "Establishes their Rights", will give equal security and stability to the rights of all British subjects in America. Under these circumstances, the Lords of Trade reason, it would be a most dangerous measure to begin granting lands in frontier areas before the claims of the Indians are ascertained.72 In a matter so essential to the Crown's interest and the welfare of the colonies, they conclude, it may be advisable for the King to make his views known not only in New York but all other American colonies as well.73

This Report, then, recognizes that the Crown's claim to dominion over Indian territories, and the Indians' formal submission to the Crown's authority did not as such affect Indian land rights. The Board's reference to compacts in which the Indians yielded up the dominion but not the property of their lands would appear applicable to the Treaty concluded at Boston in 1725, and renewed on several subsequent occasions.

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 the Indians bordering on those Colonies".74 The Instructions drawn up by the Board were approved by Order in Council on 3 December 1761 and, on the Board's recommendation, were forwarded to a number of American colonies, among which figured the province of Nova Scotia.75 The Instructions bear detailed examination.

72 NCCR, VI, 583. 73 Ibid., 586.
74 NYC, VII, 472 at 475-6; the Order is dated 23 November 1761.
75 Lords of Trade to King, 2 December 1761, in NYC, VII, 477 seq.; Order in Council of 3 December 1761, in LBC, VI, 3101, summarized in APC, IV, 500. The other colonies were New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia.
The King refers first to his constant determination to support and protect the Indians "in their just Rights and Possessions" and to honour the treaties concluded with them. He goes on to forbid the Governor and other officials from making grants of "any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property [or] Possession of which has at any time been reserved to or claimed by them." Proclamations should be issued in the King's name commanding all persons who have settled on Indian lands without lawful authority to move away. Furthermore any person who has purchased lands from the Indians without licence from the Crown or its representatives shall be prosecuted and the lands recovered by due course of law. The Instructions proceed to suspend the granting of such licences by local authorities, requiring that all applications to purchase Indian lands first be transmitted to the Crown for scrutiny and approval. The text closes with directions that the Instructions be made public not only in settled areas but also amongst the Indian tribes: "to the end that Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprized of Our determin'd Resolution to support them in their just Rights, and inviolably to observe Our Engagements with them."

The precise legal effect of Royal Instructions is unclear. However the question need not detain us, for the provisions in question were subsequently overshadowed by the Royal Proclamation of 1763, which applied to Nova Scotia. What we wish to note is that these Instructions confirm, in an authoritative manner, that the Indians of Nova Scotia already held recognizable rights to lands in their possession, rights which the Crown fully intended to respect.

The Instructions, as already noted, required each Governor to issue a Proclamation ordering people squatting on Indian lands to depart. In Nova Scotia, this prompted the Lieutenant Governor and Chief Justice of the

76 Text in NYCD, VII, 478-9; also in RL, II, #687, pp. 476-8.
province, Jonathan Belcher, to publish a Proclamation with far-reaching provisions. This instrument, dated 4 May 1762, refers to the King's determination to protect the Indians in their "just Rights and Possessions", and also to observe the treaties concluded with them, and goes on to command all persons who had settled without authority upon "any Lands so reserved to or claimed by the said Indians" to move away. Belcher then states that whereas the Indians have claimed the coast stretching from Fronsac Passage to the Bay Des Chaleurs and from the environs of Canso to Mushkoodabwet (or Musquodoboit, located just east of Halifax) and "so along the Coast" for the purpose of hunting, fowling and fishing, in consequence all persons should avoid molesting the Indians in these claims "till His Majesty's pleasure in this behalf shall be signified" (see Map 1.9). Further if any persons have unlawfully taken possession of any of these lands claimed, they are required to remove upon pain of prosecution. The Proclamation was issued by the Lieutenant Governor under his Seal. Although it brought down the British government's disapproval, it does not appear to have been repealed in the succeeding period.

In summary, then, it would appear difficult to hold that by 1763, when the period reviewed in this chapter closes, the aboriginal land rights of Indian peoples in Nova Scotia had ceased to exist. The evidence suggests, to the contrary, that such rights had never been generally extinguished, whether by the French Crown prior to 1713, or by the English Crown subsequently, and so presumptively continued to exist. In the years 1761-62, Indian land rights in the province received explicit and authoritative recognition. What precise form these rights took and the Crown's powers over them are different questions, which would require extended

78 Text in PAC, micro. reel B-1028, C.O. 217, Vol. 19, pp. 27-8, sent as an enclosure in Belcher to Board of Trade, 2 July 1762; also printed in Cumming and Mickenberg, Native Rights, 287-8.

79 See Brebner, Neutral Yankees, 74.

80 See: observations of Board of Trade, 3 December 1762, in JBT 1759-63, 308; Board of Trade to Gov. Wilmot of Nova Scotia, 20 March 1764, PRO C.O. 218/6, 363 at 385-8; Wilmot to Board of Trade, 24 June 1764, PRO C.O. 217/21, Part 1, 188 at 201.
consideration. We are relieved of this task by the detailed provisions of the Royal Proclamation issued in October 1763, whose meaning and legal effects will be treated in later chapters.
CHAPTER 8

RUPERT'S LAND

1) Acquisition and boundaries

On 13 May 1670, the King granted to the Governor and Company of Adventurers of England Trading into Hudson's Bay certain exclusive rights in respect to a vast territory within Hudson Strait denominated Rupert's Land. The Charter clearly asserts, or presumes, His Majesty's sovereignty over the area in question, providing that it shall henceforth be reckoned as one of the King's plantations or colonies in America. So far as municipal law is concerned, the territories covered became as of that date dominions of the Crown, if they had not achieved that status earlier.

How extensive was Rupert's Land? As seen earlier, the Charter confers

upon the Company

the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streightes commonly called Hudsons Streightes together with all the Landes and Territoryes upon the Coun-

tryes Coastes and confyenes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that 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. . . .

To determine the Charter's geographical scope it would be necessary not only to assign some precise meaning to the text's vague geographical references but also to ascertain how much of the area described was already held by the French Crown -- tasks of remarkable difficulty.

The question is complicated by the struggle which ensued between

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1 The Royal Charter is given in Rich, HBC Minutes 1671-74, 131-53.
2 Ibid., 139.
3 Ibid.
4 See our discussion in Chapters 6 and 10.
France and England for control of the Hudson Bay region. By 1680, the Hudson's Bay Company had established itself at three locations on the shores of James Bay: Charles Fort, Moose Factory, and Fort Albany (see Map 1.10). In 1682-3, there was a confrontation between French and English parties attempting to set up establishments near Nelson River on the western coast of the Bay. The French proceeded to erect Fort Bourbon and to defeat their rivals. But the victory was short-lived, and the place soon fell to the British, who renamed it York Fort. A retaliatory expedition sent from New France in 1686 failed to recover the Fort but succeeded in taking the three English forts on James Bay. When the Treaty of Whitehall was concluded between France and Britain later that year, the Hudson's Bay Company had physical possession only of York Fort and Fort Severn, both on the western coast of Hudson Bay, while the French were entrenched in the bottom of the Bay.

The Treaty provides that each King shall retain for himself all dominions, rights, and prerogatives in the seas of America "with the same amplitude which belongs to each by right and in the same manner in which he now enjoys them" and further that the subjects of both parties shall refrain from trade and fishing "in all places which are occupied or shall be occupied by one or the other party in America", specifically stating that British subjects shall not traffic or fish in the "ports, rivers, bays, estuaries, stations, shores, or places which there are possessed by the Most Christian King [the King of France]". The text appears to take actual occupation as a prerequisite for the enjoyment of territorial rights under the Treaty and in effect guarantees the parties in all lands possessed at

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6 Treaty of neutrality in America between Great Britain and France, concluded at Whitehall, 6/16 November 1686; text in Davenport, Treaties, II, 319 seq.

7 Articles 4 and 5 in ibid., II, 320 (translation of Latin original).
the time of signature. By this criterion, the upper bay would fall to the
British, and the lower bay to France. But the Treaty does not rule out is-
sues of title, referring to what belongs to each party "by right". And in
fact discussions ensued between English and French commissioners concern-
ing the rival claims to the Hudson Bay region. Each side asserted rights
to the entire area, but since the question of title proved irresoluble, the
French proposed various compromise solutions, including an exchange of York
Fort for the three forts on James Bay, or alternately a division of the Bay
into equal parts, neither of which proposals met with English approval.8

War intervened in 1689, and Hudson's Bay was the scene for a series
of encounters. When peace was reestablished by the Treaty of Ryswyk in
1697, the positions of the parties were reversed, the British having seized
or destroyed the three forts on James Bay, and the French now holding Forts
York (or Nelson) and Severn in the western Bay. The Treaty provides that
the pre-war position shall be restored, with each state returning places
seized during the conflict which formerly were possessed by the other par-
ty.9 As applied to Hudson Bay, this provision required England to reinstate
the French in their former position at the bottom of the Bay, and the return
of the western Bay to the British. But the Treaty also specifies that com-
missioners shall be appointed to adjudge the parties' reciprocal rights to
places in Hudson Bay which had been taken by the French in the peace pre-
ceding the war, retaken by the English during the war, and were now due to
be returned to France under the Treaty, -- referring to the three forts on
James Bay.10 The question of title to these forts was distinguished from
that of possession, so that while France was to be put in possession for
the duration, the matter of proprietorship would ultimately be settled by

8 Account in ibid., II, 324-6.
9 Treaty of peace between Great Britain and France concluded at Ryswyk, 10/20 September 1697, Article 7; text in ibid., II, 362-3.
10 Article 8; ibid., II, 363.
the commissioners. 11

The treaty provisions regarding return of territory in the Bay were never implemented; the western forts remained in French hands, while the bottom of the Bay was retained by Britain. Nevertheless the joint commission met. Once again each side pressed initially for recognition of its title to the entire area. But given the impossibility of resolving the question on this basis, compromise solutions were put forward. France revived its earlier proposal that the Bay be divided by a line drawn mid-way between Port Nelson (Fort York) and Fort Albany, with the English choosing either sector. The Hudson’s Bay Company, in response, submitted that the boundary be drawn at 53° north latitude, or at the Albany River on the west and Rupert River on the east, with lands south of the line falling to France. The Company later offered to set the eastern boundary farther north, at the Canuse River, the modern Eastmain (see Map 1.11). 12 These proposals are significant because they arguably represent an official statement by the Company as to the extent of territory received under its Charter, given the fact that countries possessed by the French Crown are excluded.

War once again intervened, and negotiations ended. The question was dealt with in Article X of the Treaty of Utrecht in 1713, which provides that France "restituera" to Great Britain "pour les posséder en plein Droit & à perpétuité, la Baye & le Détroit d’Hudson avec toutes les Terres, Mers, Rivages, Fleuves, & lieux qui en dépendent & qui y sont situez, sans rien excepcter de l’étendue desd. Terres & Mers possedez présentement par les Français." 13 The term "restore" was employed at British insistence, in place of the word "cede" found in the original French proposal, 14 and on

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11 Rich is therefore incorrect in asserting that the Treaty gave to the French a de jure right to the three posts in James Bay; in reality the question of right was held in abeyance; see Rich, "Treaty of Utrecht", 187-8.


13 Treaty of Peace and Friendship between France and Great Britain, signed at Utrecht, 11 April 1713; text in Parry, Treaty Series, XXVII, 475 at 484.

this point the terminology differs from that used elsewhere in the Treaty regarding Acadia. Britain's aim was to secure recognition of its asserted original title to the Bay. However the phrasing had unanticipated repercussions. The Treaty does not describe the boundaries of the territory in question, providing for their settlement by joint commission. The use of the term "restore" allowed France to argue that it was obliged to hand over only those lands which Britain had previously held title to, whereas the word "cede" would have obviated that contention.

Commissioners were in fact appointed in 1719, but failed to reach agreement, and the boundary between the Hudson Bay territories and French Canada remained unsettled. The British representatives were directed to claim all lands north of a line drawn from the coast of Labrador at 58½° north latitude running in a south-westerly direction so as to bisect Lake Mistassini, and thence indefinitely west along the 49th parallel. The French, by contrast, asserted that the British were confined to a relatively narrow strip of land around the coast of the Bay and Strait proper (see Map 1.12). Upon the cession of French Canada to Britain in 1763, the principal stimulus for determining the boundaries of Rupert's Land disappeared. When the Hudson's Bay Company relinquished its proprietary rights to the Crown in 1869, the boundaries of the territory were still uncertain. Latterly, however, the Company claimed that Rupert's Land comprised all lands draining into Hudson Bay and Strait, as shown on a map drawn up in 1857 by Arrowmith, the Company's geographer (see Map 1.4).

The issue of the limits of Rupert's Land was far from dead. It played a significant role in a boundary dispute arising after 1870 between Ontario on the one hand and the Dominion of Canada and Manitoba on the other, which

15 Article XII; see Chapter 7, text following note 13.
17 See Chapter 10, text following note 40.
18 Nicholson, Boundaries of Canada, 61.
was finally resolved by the Privy Council in 1884. The northern boundary of Ontario derived from that formerly enjoyed by Upper Canada, which in turn stemmed from that assigned to the colony of Quebec in the Quebec Act of 1774. In that Act, the northern limit of the colony was defined as "the Southern Boundary of the Territory granted to the Merchants Adventurers of England, trading to Hudson's Bay". An Imperial Order in Council of 1791 divided old Quebec into Upper and Lower Canada by a line drawn due north from Lake Temiskaming until it struck "the boundary line of Hudsons Bay", once again apparently referring to the limits of Rupert's Land. Ontario contended that its northern boundary followed the Albany River, which drains easterly into James Bay, in effect adopting the line proposed by the Hudson's Bay Company in the negotiations following the Treaty of Ryswyk of 1697. Canada and Manitoba asserted that the true boundary lay farther south along the watershed between Hudson Bay and the Great Lakes, reiterating more recent claims advanced by the Company (see Map 1.13).

The question was eventually submitted to the Privy Council, where the historical evidence was thoroughly canvassed. There were a number of related issues:

19 14 Geo. III, c. 83 (Imp.).
20 Reproduced in Doughty and McArthur, Constitutional Documents, 1791-1818, 3 at 4; issued in conjunction with the Constitutional Act, 31 Geo. III, c. 31 (Imp.).
21 See the discussion in Nicholson, Boundaries of Canada, 60-4.
22 The arguments are given in extenso in Proceedings Respecting the Western Boundary of Ontario.
23 See the opinion of the Crown law officers of July 1857 on the Hudson's Bay Company Charter, where Bethell A.G. and Keating S.G. considered the criteria applicable in determining the extent of territory granted by the Charter, without deciding the question proper. They stated: "In the case of grants of considerable age, such as this Charter, when the words, as is often the case, are indefinite or ambiguous, the rule is, that they are construed by usage and enjoyment, including in these latter terms the assertion of ownership by the Company on important public occasions, such as the Treaties of Ryswick and Utrecht, and again in 1750." The law officers added that it must also be considered whether any of the territory concerned could have rightfully been claimed by France at the time of the grant. Reproduced in Report from the Select Committee on the Hudson's Bay Company... [31 July 1857], printed by order of the House of Commons, 1857 (Imp.Parl.), Appendix No. 9, 403 at 404.
1) What were the limits of the territory granted in the Charter of 1670. This involved two sub-issues:
   a) How much territory fell within the scope of the geographical expressions employed in the Charter.
   b) How much of that land was already possessed by other British subjects or the subjects of other Christian princes, and so was excluded from the grant.
2) Was the extent of the Company's lands altered by the factual possession subsequently taken of certain areas by France in the period 1670-1713, and the limited recognition afforded to such possession in the Treaties of Whitehall and Ryswyk.
3) What was the extent of the territory "restored" to the British Crown by France under the Treaty of Utrecht in 1713.
4) To the extent that part or all of the "restored" lands were among those originally granted to the Company in 1670, did the Company's rights therein revive in 1713, or were they treated as extinguished, so that the Crown obtained a title unencumbered by rights conferred in the Charter.
5) Similarly, if any of the territories ceded by France in 1763 were comprised within those originally conferred in 1670, did these fall to the Company or to the Crown.

The Privy Council reported that the true northern boundary of Ontario was a line drawn from a point north of the Lake of the Woods eastward through Lac Seul to Lake St. Joseph, and thence along the Albany River which flows easterly to James Bay (see Map 1.13). This opinion was accepted by all parties. Regrettably, no reasons were given for the decision. However the Judicial Committee apparently acted upon the premise that the territories of the Hudson's Bay Company, as held at the time of the Quebec Act in 1774,

24 The Privy Council's findings are embodied in an Imperial Order in Council of 11 August 1884; see Proceedings Respecting the Westerly Boundary of Ontario, Appendix C, 416 seq. They were given effect to in the Canada (Ontario Boundary) Act of 1889, 52-53 Vict. c. 28 (Imp.).
...did not extend farther south than the Albany River and related headwaters, in effect accepting the boundary proposed by the Company following the Treaty of Ryswyk. One might speculate that the Board took account of the long-standing French presence in regions south of the Bay, and concluded that either a) these areas were already in France's possession in 1670, and so were excluded from the grant; or alternately b) when the French later occupied these countries and the Company failed to dislodge them, the latter's rights were extinguished. It is significant that the northern boundary of Quebec, which also depended upon that of Rupert's Land, was ultimately fixed by agreement in 1898 at the Eastmain or Canuse River, as proposed by the Company after the Treaty of Ryswyk.25

In conclusion there is reason to think that the boundaries of the Hudson's Bay Company territories, as these existed after 1763, extended no farther south than the Albany River on the west side of James Bay and the Eastmain River on the east. This leaves open, however, the question of how far Rupert's Land extended in the west and northwest of the continent, a matter which we will consider in Chapter 10.

2) Constitutional status

What status did Rupert's Land occupy in British colonial law; should it be viewed as settled, conquered, or ceded territory? This involves ascertaining the initial position obtaining under the Charter of 1670, and the effect of subsequent treaties.

Under rules obtaining in 1670, it would appear that overseas dominions of the Crown which had not been gained by descent were deemed to be "conquests" for purposes of determining the extent of the royal authority there. The concept of a settled colony was not articulated in English case law until 1693 (so far as can be determined), and it was held applicable

25 See Nicholson, Boundaries of Canada, 64-6, and an Act Respecting the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec, 61 Vict. c. 3 (1898) (Can.).
only to territories which were uninhabited at the time of settlement. On such grounds, the American colonies were often treated as conquests in point of origin, and Blackstone's emphatic statement on this point is witness to the continued existence of such views in the period immediately prior to the American Revolution. We have discussed these matters at length in Chapter 1, and will not dwell upon them here.

It would seem to follow that in 1670 Rupert's Land constituted, under prevailing law, a "conquered" colony, where the Crown held full powers of legislation, but where existing systems of private laws and rights remained in force until modified. The extensive legislative authority conferred upon the Company in the Charter reflects this view. Even granting that the category of a settled colony, which made its formal appearance some two decades after the Charter grant, was already part of English law at the colony's inception, it would appear to have been inapplicable in its own terms to Rupert's Land. The territory was, of course, not uninhabited, but populated by considerable numbers of people. Indeed, the trading monopoly conferred on the Company depended for its exercise upon the existence of a substantial local population, and the Charter specifically empowers the Company to make peace or war with non-Christian princes or peoples in places where it established itself. 26 The only Englishmen to inhabit the territory prior to 1763 were Company employees, and they were a meagre and transient collection of individuals. The first true settlers arrived only in 1812, when

26 Charter of 1670, 146. See also the clause in the Royal Commission issued to Captain John Marsh, as Governor in the bottom of Hudson's Bay, 8 June 1689, authorizing him "to enter into what Leagues and Alliances you Can or shall think necessary with the Native Indians... And to protect and assist all such Indians as are freinds to and trade with the said Company against any Nations of the Indians that are in Alliance or Confederacy with the French"; Rich, HB Copy Booke, 1688-96, 70 at 71. A similar clause is found in the Royal Commission of the same date to Capt. George Geyer as Governor in the northern sector of the Bay (ibid., 73 at 74), and also in the Royal Commission to Capt. James Knight as Governor in the bottom of the Bay (ibid., 253 at 254).
the Red River colony was founded. Whether Rupert's Land eventually gained the status of a settled colony is considered in Chapter 18.

Assuming that part of the territory granted to the Hudson's Bay Company was later seized by France and then returned to Britain under the Treaty of Utrecht in 1713, the question arises whether the restored lands should thenceforth be treated as gained by cession from France. It would appear that, despite some slight authority to the contrary, the answer is negative. The terms of the Utrecht Treaty clearly reflect the British view, acquiesced in by France, that the lands in question were the rightful domains of the Crown, which had never abandoned its original title or recognized that asserted by France. As such, the lands cannot easily be viewed, for municipal purposes, as ceded territories in the normal sense. Upon their restoration to the Crown, they would appear to have resumed the status which they originally held, merging in that respect with the remainder of Rupert's Land.

In a conquered colony, the old laws and property rights enjoyed by the inhabitants remain for the most part intact, until altered by a competent authority. By virtue of this rule, it would appear to follow that when the Crown asserted sovereignty over Rupert's Land in 1670, prima facie the customary laws and proprietary interests of the indigenous peoples were not affected, except to the extent that these conflicted with the change of sovereignty itself or presented unconscionable features. However the Crown holds the power in its prerogative to legislate for a conquest, and so doing to modify or abrogate existing laws and rights. We must look, then, to

27 The Company was not directly involved in that venture, which was initiated by the Earl of Selkirk acting by virtue of a sub-grant from the Company.

28 In the Supreme Court case of In Re Provincial Fisheries (1896) 26 S.C.R. 444 at 530-1, Strong C.J. suggested that the then province of Manitoba and the North-West might be thought to constitute territories ceded from France, so far at least as they were acquired under Article X of the Treaty of Utrecht.

29 See Chapters 1 and 2.
the terms of the Royal Charter of 1670, and to subsequent acts of the Crown and the Hudson's Bay Company, to determine to what extent the position presumptively prevailing in Rupert's Land was in fact departed from. We will consider first the question of laws, and then examine the position of land rights.

3) Government and laws

The Charter of 1670 authorizes the Hudson's Bay Company, assembled in its Court, to make laws and ordinances for the good Government of the said Company and of all Governors of Colonies Fort and Plantacions Factors Masters Mariners and other Officers employed or to bee employed in any of the Territoryes and Landes aforesaid and in any of their voyages and for the better advancement and contynuance of the said Trade or Traffick and Plantacions subject to the proviso that these laws be reasonable and not repugnant but as near as may be agreeable to the laws, statutes, or customs of England. 30

One point requires special notice. The legislative powers of the Company are explicitly confined to the Company proper and its officers. They do not extend to persons not employed by the Company, and in particular the indigenous inhabitants of the region. In this respect the instrument follows the wording of the Charter granted in 1600 to the East India Company, which initially was expected, not to found colonies of its own, but to carry on its trading operations in the territories of established local rulers. 31

The Hudson's Bay Company Charter goes on to provide that all lands, plantations, forts, or colonies where the Company's factories or trade are

30 HBC Charter, 140-1.

31 Thus the Charter granted to the East India Company on 31 December 1600 empowers the Company in its Court to make laws "for the good Government of the same Company, and of all Factors, Masters, Mariners and other Officers, employed or to be employed in any of their Voyages, and for the better Advancement and Contiuance of the said Trade and Traffick", so long as these are reasonable and not repugnant to the laws of England; EIC Charters, 3 at 13-4. Similar provisions are found in the Letters Patent granted to the East India Company on 3 April 1661; ibid., 54 at 63-4. See also the comments in Keir, Constitutional History, 9th ed., 450.
located within the designated limits shall be under the power of the Company, which may appoint Governors and other officers to govern them. The Governors and Councils of such places are empowered to judge "all persons belonging to the said Governor and Company or that shall live under them" in all cases, both civil and criminal, according to the laws of England. 32 Again these provisions substantially replicate those found in an earlier East India Company Charter, 33 and the powers conferred are restricted in their exercise to persons belonging to the Company or actually living under its rule, thus excluding local peoples living under their own rulers and laws. As if to sharpen the point, the Hudson's Bay Company Charter of 1670, following the lead of the East India Company Letters Patent of 1661, authorizes the Company to make peace or war with any non-Christian prince or people in places where it has plantations, forts or factories, thus envisaging the existence of autonomous political groups within the Charter's territorial limits. 34

The Charter of 1670, then, has the effect of introducing English law into Rupert's Land so far as Company officers and employees are concerned, as well as among settlers and other people living under the Company. The limited powers of justice conferred on the Company are to be exercised in accordance with English law, and the authority to legislate is qualified by the requirement of non-repugnancy to the law of the realm. The latter provision, it might be argued, merely lays down a general legislative standard, but the former one unmistakably presumes the introduction of English law in both civil and criminal matters, at least to the extent appropriate

32 HBC Charter, 145.
33 Letters Patent granted to the East India Company on 3 April 1661; EIC Charters, 54 at 75.
34 HBC Charter, 146. Compare with the provisions of the EIC Letters Patent of 1661, in EIC Charters, 54 at 76.
to the circumstances prevailing in the territory. It seems equally clear that English law did not supersede customary laws prevailing in autonomous local communities, any more than it did in the territories where the East India Company carried on its trading operations, where personality of laws was the accepted rule. This indeed was the view expressed in the celebrated case of Connolly v. Woolrich (1867-9), where the question involved the validity of a marriage concluded under indigenous custom between a white man and a Canadian Indian woman in a remote area of western Canada, possibly located within the scope of the Charter of 1670. Justice Monk stated in the Superior Court that the portion of the common law prevailing in Rupert's Land had a very restricted application:

it could be administered and enforced only among, and in favor of, and against those 'who belonged to the Company or were living under them'. It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately -- it did not abrogate the Indian laws and usages.

These views were unanimously approved on appeal, and have been adopted in a number of subsequent cases.

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35 See: Sinclair v. Mulligan (1866) 3 Man.L.R. 481 (Man.Q.B.) per Killam J. at 487; (1888) 5 Man.L.R. 17 (Man.Q.B., on appeal) per Taylor C.J. at 20-3, per Dubac J. at 23. See also Brown, "British Statutes in North America", at 120-1 et seq.. In July 1857, Bethell A.G. and Keating S.G. gave their opinion that the Company had power, under the Charter, to make ordinances in the nature of by-laws for the government of their employees, but that no such ordinance would be valid that was contrary to the common law; reproduced in Report from the Select Committee on the Hudson's Bay Company. . . [31 July 1857], printed by order of the House of Commons, 1857 (Imp. Parl.), Appendix No. 9, 403 at 404.

36 See Chapter 1.

37 (1867) 11 L.C.J. 197 (Que.S.C.).

38 At 213-4. See also the comments at 204-5.

4) Land rights

We saw earlier that Royal Charters conferring proprietary rights in North America were generally understood to bestow an underlying title to the lands designated subject to the rights of the indigenous occupants, and an exclusive right to extinguish Indian title by cession or purchase. Such grants were not construed as in themselves abrogating aboriginal rights.40 This would appear to have held true of the Hudson's Bay Company's Charter of 1670, as it did of Charters granted for Virginia, New England, and other places.

The activities of the Company in Rupert's Land over the next century were conducted on a small scale and were mainly concerned with trade. Land was not required for purposes of settlement. This may explain why no texts have yet been uncovered of treaties concluded with local peoples for the purchase or cession of lands, such as are available in profusion for the colonies on the Atlantic seaboard. However this is not to say that no such treaties were concluded. There is evidence that the Company was, at least in the early years, anxious to secure land cessions from the indigenous peoples, and transactions of this kind may in fact have been entered into.

We find the Company instructing Governor Nixon in 1680 that

There is another thing, if it may be done, that wee judge would be much for the interest & safety of the Company, That is, In the severall places where you are or shall settle, you contrive to make compact wth. the Captns. or chiefs of the respective Rivers & places, whereby it might be understood by them that you had purchased both the lands & rivers of them, and that they had transferred the absolute propriety to you, or at least the only freedome of trade, And that you should cause them to do some act wch. by the Religion or Custome of their Country should be thought most sacred & obliging to them for the confirmation of such Agreements.41

Similar instructions were given to other Governors in the same period.42

40 See Chapter 6.
42 See: Instructions for Mr. John Bridgar, Governor of Port Nelson, 15 May 1682, ibid., 34 at 36; Instructions for Governor Nixon, 15 May 1682, ibid., 37 at 46; Instructions for Henry Sergeant, Governor, 27 April 1683, ibid., 72 at 79.
It was also stated on a number of occasions that land purchases had been secured from the indigenous inhabitants. A memorial presented to the King by the Company in 1683 in response to French claims to Hudson Bay affirms that some fifteen years previous Zachary Gillam discovered Rupert River in the bottom of the Bay, where he met with the native people, made a league of friendship with their leader, and "firmly purchased both the river it selfe & the Lands there aboute". This agreement, states the memorial, was later repeated and confirmed by Governor Baily, and since that time the Company has erected other forts upon the Bay, "still making solemn compacts and Agreements with the Natives for their Rivers & Territories". These claims (which remain unconfirmed by documentary evidence) were reiterated in a memoir delivered later that year by Sir Leoline Jenkins, the Secretary of State, to the French ambassador.

Whether or not such compacts were actually concluded, the fact that the Company instructed its officers to purchase lands from the original occupants and officially asserted that purchases had been made, tends to suggest that the Company in practice recognized that the indigenous peoples held subsisting land rights within the area of the Charter grant. The same conclusion is supported by certain comments made in the case of Connolly v. Woolrich, where Monk J. affirmed that in his opinion, the political and territorial rights of the Indians along with their laws and usages remained in full force in the Hudson Bay region, both prior to the Charter of 1670, and also after it was issued.

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43 Reply prepared by Sr. James Hayes to a memorial delivered by the French ambassador, circa 24 January 1682/83; ibid., 69 at 70-1.
44 Dated 3 March 1682/83; ibid., 90-2.
45 (1867) 11 L.C.J. 197 (Que.S.C.) at 204-7. See also the remarks of Badgley J. in the Court of Appeal; sub nom. Johnstone v. Connolly (1869) 1 R.L.O.S. 253 (Que.C.A.) at 356.
5) Conclusion

The documentary evidence presently available concerning the legal position of Indian lands in Rupert's Land prior to 1763 is exceptionally meagre. Any conclusions on the matter must rest largely upon inferences drawn from general principles of colonial law and views adopted in other American colonies affected by similar proprietary grants. In essence, the position suggested by these sources is this. Rupert's Land was initially deemed to be a conquered colony, in which the laws and property rights of the inhabitants remained in force until modified. The Charter of 1670 effected a partial introduction of English law, but only as regards Company employees and others living under their rule; the customary laws of the indigenous peoples were otherwise unaffected. The grant of proprietary rights in the Charter vested in the Company no more than what the Crown itself purported to hold in the territory, namely an underlying title to the soil subject to subsisting aboriginal interests, along with an exclusive right to extinguish such interests by cession or purchase.
CHAPTER 9

CANADA, CAPE BRETON ISLAND AND
PRINCE EDWARD ISLAND

1) Acquisition

Following the British subjugation of the French colony of Canada, marked by Articles of Capitulation signed at Quebec City on 18 September 1759 and at Montreal on 8 September 1760, a Treaty was concluded by Great Britain, France, and Spain at Paris on 10 February 1763 whereby France ceded to Great Britain Canada with all its dependencies, as well as the islands of Cape Breton and St. John (Prince Edward) and the sector of old Louisiana lying east of the Mississippi River. It also renounced any pretensions to Nova Scotia, and renewed as regards Newfoundland Article 13 of the Treaty of Utrecht, which left the whole of that island to Britain, saving certain French fishing rights. The islands of St. Pierre and Miquelon south of Newfoundland were ceded to France. This Treaty had the clear effect in British law of establishing the Crown’s title to that part of present-day Canada which stretches from the Maritime Provinces in the east as far west and north-west as French Canada extended in 1763. We have

1 The texts are printed in CD, I, 1-36. Articles of capitulation of lesser importance were also concluded at the surrender of Fort Beauséjour (1755), Fort Niagara (1759), and presumably other places. Those signed at Fort Niagara may be seen in JP, X, 121-5.

2 Portugal also acceded to the Treaty on the same day.

3 Text in CD, I, 97 seq.; see Articles 4 and 7. The Island of St. John is not specifically named, but is covered by a general phrase referring to all islands in the Gulf of St. Lawrence.

4 Articles 4 and 5.

5 Article 6.
already discussed the location of Canada's boundaries with old Nova Scotia on the east and Rupert's Land on the north. How far French territories extended in the west and north-west will be considered in the next chapter.

The question whether Britain obtained French Canada and related territories by cession under the Treaty or rather by virtue of their earlier conquest has never been resolved. Most authorities are content to assume that title was acquired by virtue of the Treaty of Paris. This view is supported by references in the Capitulations of Quebec and Montreal which imply that the status of Canada would be settled only at some future date by agreement between the parties. The Treaty itself speaks of cession, and the Proclamation issued by the King in October 1763 refers in its preamble to "the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace". A similar conclusion is suggested by the fact that Canada remained under military rule until after the Treaty was concluded. However the matter is not clear-cut. The British reply to a proposed article in the Capitulation of Montreal states flatly that the French inhabitants remaining in the colony become subjects of the King, and the Crown law officers, Pratt and Yorke, affirmed in independent opinions delivered in 1759 that Guadeloupe, taken by British arms earlier that year,

6 See Chapters 7 and 8.
8 See esp. Arts. 5 and 6 in the Capitulation of Quebec and compare Arts. 13 and 36 in the Capitulation of Montreal.
9 Article 4.
10 Part I, preamble (in Appendix). Later in the same paragraph, the text refers to the countries "ceded and confirmed" by the Treaty. The latter term would appear to refer to areas to which the Crown had always asserted title.
12 Article 41. See also Article 42.
became British territory immediately upon conquest. Moreover the Constitutional Act of 1791 refers to "the Conquest and Cession of the Province of Canada", thus contemplating both possibilities. It is not necessary for our purposes to resolve the question, and we will merely adopt the view that while the Treaty officially confirms British title to Canada, it does not necessarily constitute the sole basis of title.

In this chapter we will consider the position of existing systems of laws and property rights in French Canada (including the islands of Cape Breton and Prince Edward), as these were affected by the change of sovereignty itself, apart from the Royal Proclamation of October 1763, whose provisions will receive detailed examination later.

2) Status of laws and property rights

We saw earlier that in conquered and ceded territories, under principles of British colonial law, laws and private property rights existing at the time of acquisition generally remain intact, unless or until modified by competent authority. This rule has been held applicable to French Canada. In the leading case of Stuart v. Bowman (1852-53), the question, which involved a land dispute, turned in part upon whether English civil law had ever been introduced in Lower Canada, at the time of acquisition or subsequently. This elicited opinions from seven judges in two different courts, some of which deal elaborately with the effects of the acquisition itself. In the trial court, it was held that English civil law had never been introduced in that part of Canada later to become Lower Canada,

13 Chalmers, Opinions, II, 355-61. The island was returned to France by Article 8 of the Treaty of Paris, 1763, which provides that Britain shall "restore" to France certain countries, with their fortresses in the same state as they were when conquered by British arms.

14 31 Geo. III, c. 31, Art. IV.

15 (1852) 2 L.C.R. 369 (Mont. S.C.); (1853) 3 L.C.R. 309 (Q.B.).
whether in 1763 or later on.\textsuperscript{16} Vanfelson J., delivering the judgment of the Court, stated:

It is true that the Crown has the right, by virtue of its prerogative, to provide for the Government of, and administration of justice in, a conquered or ceded country, but in the silence of the Crown upon the point, the laws of the conquering country are not introduced, but those of the conquered people remain in force.\textsuperscript{17}

Mondelet J., in a separate concurring opinion, adopts the proposition advanced in a report on Quebec made in 1766 by the Attorney-General and Solicitor-General, which states: "There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws."\textsuperscript{18} He also adverts to a statement made by the Attorney-General in a report on Canada in 1773, which affirms:

The Canadians seem to have been strictly entitled by the jus gentium to their property, as they possessed it upon the capitulation and treaty of peace. . . It seems a necessary consequence that all those laws, by which that property was created, defined and secured, must be continued to them.\textsuperscript{19}

On appeal to the Court of Queen's Bench, three of the four judges expressed opinions on the effects of the cession.\textsuperscript{20} Rolland J., addressing himself to the question of whether English law governing land tenure had been introduced in Canada, declares:

\textit{j'exprime mon opinion qu'il n'a pas été introduit par la cession du pays à la Grande-Bretagne; qu'il fallait une manifestation authentique et formelle du nouveau souverain, un acte de législation à cet effet, et qu'il n'y a rien eu de tel jusqu'à la passation du Statut de la 14e Geo. III [the Quebec Act].}\textsuperscript{21}

\textsuperscript{16} See the first reason for judgment, (1852) 2 L.C.R. at 443-44, which, while referring specifically to the effects of the Royal Proclamation of 1763 and the Quebec Act of 1774, affirms broadly that the Civil Laws of England had not ever been introduced. This conclusion was supported by two of the three judges, namely Vanfelson and Mondelet JJ. The third judge, Smith J., who dissented, apparently did not hold that the cession itself abrogated existing laws, but attributed this effect to the Proclamation of 1763; see his remarks at 394.

\textsuperscript{17} At 401-02.

\textsuperscript{18} (1852) 2 L.C.R. at 408. The original opinion by Yorke and De Grey is given in CD, I, 251 at 255, dated 14 April 1766.

\textsuperscript{19} (1852) 2 L.C.R. at 409. The original report by Thurlow, dated 22 January 1773 is given in CD, I, 437 seq.

\textsuperscript{20} Namely Rolland, Aylwin and Mondelet JJ. No opinion on the point was expressed by Panet J.

\textsuperscript{21} (1853) 3 L.C.R. at 348.
Aylwin J. quotes Chitty on Prerogatives to the effect that "it is necessary and fit that the conquered Country should have some laws, and therefore until the laws of the Country thus acquired are changed by the Sovereign, they still continue in force."\(^22\) However he goes on to hold that English law was introduced by subsequent acts.\(^23\) Mondelet J. gave his opinion that "the Canadians were fully entitled to the preservation of their property, and... their laws and usages remained intact, until abrogated by competent authority...."\(^24\) Similar views were expressed in the subsequent case of Wilcox v. Wilcox (1858),\(^25\) where the question of the law prevailing in Canada following the cession was also at stake. While the issue does not directly arise in other reported judgments, there are indications in the case law that this represents the accepted position.\(^26\)

The specific proposition which emerges from these cases is that the act of cession did not, of itself, abrogate the existing system of French private law in Canada, which subsisted largely intact. Remarks can be found in the judgments favouring a similar conclusion regarding private property rights, even if the issue of property does not arise as such. Absent the expression of a contrary intent by the Crown, it is reasonable to assume that if the old laws remain, so too will the legal consequences flowing from their application, and thus private property rights will survive.

The proposition that upon the cession of Canada the laws and property rights of the inhabitants continued to exist until abrogated, extended prima

\(^{22}\) Ibid., at 378-79. The passage quoted is found in Chitty, Prerogatives of the Crown, 29-30.

\(^{23}\) (1853) 3 L.C.R. at 379 seq.

\(^{24}\) Ibid., at 398. The statement is made as an explicit \textit{obiter dictum}.

\(^{25}\) 8 L.C.R. 34 (Q.B.) \textit{per} Lafontaine C.J. at 38-42; \textit{per} Duval J. at 77-79.

facie to all inhabitants of Canada who became subjects of the Crown, whatever their ethnic origin, religion, type of social organization, culture or way of life, provided that they did in fact possess recognizable systems of law and property. Presumptively, then, the principle covered French and indigenous inhabitants alike.

We saw in an earlier chapter that under the French regime in Canada the customary laws and land rights of the indigenous peoples over whom the French Crown asserted sovereignty would appear to have remained for the most part undisturbed. Presumptively then, and in the absence of acts to the contrary, this position was maintained under the new regime. The question arose in the leading case of Connolly v. Woolrich (1867), where it was contended that upon the cession of Canada to Britain in 1763, English law was ipso facto introduced so as to supersede Indian laws and usages. Monk J. held that as a matter of fact and public law the Treaty of Paris did not change the laws of the country, and that no such change could take place in either the French laws or the Indian usages except by the express will of the incoming sovereign. It is significant that the Royal Instructions issued in December 1763 to James Murray, first Governor of Quebec, direct him to gather information concerning the several bodies of Indians inhabiting the colony, "of the manner of their Lives, and the Rules and Constitutions, by which they are governed or regulated", which appears to presume the survival of indigenous systems of internal government and laws. The provision continues: "And You are upon no Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess. . .".

This, then, appears to be the position of laws and private property obtaining under principles of British colonial law, apart from provisions in the instruments under which the country was obtained. However these

27 See Chapter 5.
28 (1867) 11 L.C.J. 197 (Que.S.C.) at 214.
29 Text in OD, I, 181 at 199; Article 61.
instruments contain several pertinent undertakings, which we will now consider.

3) Terms of the acquisition

a) The Capitulations

Article 2 of the Capitulation of Quebec, 1759, provides: "Que Les habitants soient Conservés dans La possession de leurs maisons, biens, effets et privileges", to which the reply was: "Accordé en mettant les armes Bas." 30 This provision extends to all inhabitants of the lands covered by the Capitulation, and so in its terms appears to protect the property of Indian and white alike. The geographical extent of the area affected is unclear. Certainly the city of Quebec proper was covered, including its outlying districts. One would further assume that any surrounding countryside actually dependent upon the garrison of Quebec would fall within the Capitulation's terms, but how extensive that area was cannot easily be determined.

The Articles of Capitulation signed at Montreal in 1760 are more detailed and comprehensive, and relate in certain sections to the whole of French Canada, not merely Montreal. Article 37 provides:

Les Seigneurs de Terres, Les Officiers Militaires et de Justice, Les Canadiens, Tant des Villles que des Campagnes, Les Francois Etablis ou Comerçant dans toute l'Etendue de La Colonie de Canada, Et Toutes Autres personnes que ce puisse Estre, Conserveront L'Entiere paisible propriete et possession de leurs biens, Seigneuriaux et Roturiers Meubles et Immeubles, Marchandises, Pelleteries, et Autres Effets, même de Leurs batimens de Mer; Il n'y Sera point touché ni fait le moindre domage, sous quelque pretexte que ce Soit:— Il leur Sera Libre de les Conserver, Louer, Vendre, Soit aux Francois, ou aux Anglois, d'En Emporter Le produit En Lettres de Change, pelleteries Espences Sonantes, ou autres retours, Lorsqu'ils Jugeront à propos de passer en france, En payant le fret, Comme à L'Article 26. 31

The British reply reads: "Accordé comme par L'Article 26." The response to

30 CD, I, 2. See also Article 5 which states: "Que les dits habitans ne seront point transferés, ni tenus de quitter Leurs maisons Jusqu'à ce qu'un traité definitif entre S.M.T.C. [the French King] & S.M.B. [the British King] aye règle leur etat", with the response: "accordé". Thus the parties possibly anticipated that the arrangements made on this matter in the Capitulation might be modified in the final treaty.

31 Ibid., 18-9.
the latter Article, which provides for the maintenance of the property of the Compagnie des Indes, states: "Accordé pour ce qui peut appartenir à la Compagnie ou aux particuliers, mais Si Sa Majesté Très Chrestienne [the French King] y a aucune part, Elle doit être au profit du Roy."32 In effect these Articles indicate that while the moveable and immovable property of private persons is to be maintained, the British Crown will step into the shoes of the French Crown so far as the latter's rights are concerned.

Do these provisions govern the property rights of indigenous peoples? The phrase "Toutes Autres personnes que ce puisse Estre" in Article 37, which follows specific mention of such groups as "Les Canadiens" and "Les francois", could hardly be more comprehensive, and prima facie would extend to people of all ethnic backgrounds, including Indians and Métis. The question is not the national or racial identity of a person but simply whether or not he holds rights of property. To take a clear example, a person vested with land under a direct grant from the French King would be protected, whatever his racial extraction, be it French or Indian. Article 37 would clearly apply to the various tracts of land specifically set aside for Indian use from time to time during the French regime by virtue of grants from the King or his representatives, or under sub-grants and cessions from seigneurs, some given directly to the Indians themselves, others to religious groups on their behalf.33 Tracts of this kind existed at the time of conquest at such places as St. Regis, Lac des Deux Montagnes, Sault St. Louis, and Lorette. It would also arguably cover lands held by Indian nations by virtue of aboriginal possession, whose title had not been extinguished by France, and who were recognized by the French Crown as holding their territories as vassals or allies.

The latter point is clarified by Article 40 of the Capitulation which reads in its relevant parts as follows:

32 Ibid., 15.
33 See Stanley, "First Indian 'Reserves'", 178.
Les Sauvages ou Indiens Alliés de Sa Majeure très Chrétienne Seront maintenus dans Les Terres qu'ils habitent, S'ils Veulent y rester; Ils ne pourront Estre Inquiétés Sous quelque prétexte que ce puisse Estre, pour avoir pris les Armes et Servi Sa Majeure très Chrétienne. 34

The contrast in terminology with Article 37 may be noted. While the earlier provision refers to people conserving "L'Entiere paisible proprieté et possession de leurs biens, Seigneuriaux et Roturiers Meubles et Immeubles...", Article 40 avoids terms suggestive of strict legal rights in favour of words with factual connotations -- the Indians will be maintained "dans Les Terres qu'ils habitent". It has been suggested that this article contemplates only the specific tracts of land granted for Indian use. 35 But the language used extends beyond lands to which the Indians held clear titles to include all lands which they actually inhabited.

These articles of the Capitulation of Montreal would appear to apply in their terms to the entirety of the territories over which France asserted title as part of Canada, as indeed the reference to "toute l'Etendue de La Colonie de Canada" in Article 37 suggests. Whether the islands of Cape Breton and St. John (Prince Edward) would also be covered is less clear, but it would seem that specific evidence would be required to justify their exclusion.

b) The Treaty of Paris

By contrast with the Capitulations, the Treaty of Paris contains no comprehensive provisions governing the property rights of the inhabitants of Canada, French or Indian. Nevertheless certain inferences can be drawn from the text. In Article 4, Great Britain undertakes to permit "les Habitants François ou autres, qui auraient été Sujets du Roy Très Chrétien en Canada" to leave Canada within eighteen months, with the promise that they "pourront vendre leurs Biens pourvu que ce soit à des Sujets de Sa Majesté Britannique, & transporter leurs Effets, ainsi que leurs Personnes, sans être genés dans

34 CP, I, 20. This part of the stipulation was accepted by the British.
35 Brun, "Droits des Indiens", 440-1.
leur Emigration... "

This engagement appears to presume that property rights in general will survive the change in sovereignty, otherwise the departing vendor of an estate could not pass title. Nor does it seem (as might be argued) that continuity of property rights is assumed only within the eighteen-month period of grace. Any automatic break on expiry of the period would affect not only the property of original inhabitants who remained behind, but also the estates purchased from emigrants by British subjects. This was also the understanding of the Attorney-General, Norton, who in an opinion of 1764 stated that the inhabitants of Canada who had remained there after the Treaty of Paris, and had taken the oaths of allegiance, enjoyed by virtue of the Treaty "a permanent transmissible interest in their land there." 37

The Treaty of Paris, then, contains nothing inconsistent with the notion of a general survival of private property rights held under the French regime, while the Capitulation of Montreal contains detailed undertakings in that regard, including an article relating specifically to Indian lands. The legal effect of this provision is a question which, for reasons of space, we cannot pause to consider here. In any case the matter is rendered academic by the terms of the Royal Proclamation issued in October 1763, which we will examine shortly.

36 CD, I, 100.
37 Dated 27 July 1764; Chalmers, Opinions, II, 364 at 366.
CHAPTER 10

THE WEST AND NORTH-WEST

In the foregoing chapters we have attempted to ascertain the position of Indian lands in old Nova Scotia, Rupert's Land, and the ceded French colony of Canada as of 1763. In considering the latter two areas, we have noted how uncertain their boundaries were, particularly in the west and north-west. It remains for us in this chapter to determine how extensive British territories were in the western sector of the continent in 1763, whether by virtue of original British claims or of those inherited from France by way of cession. In answering this question, it must be remembered that for municipal purposes British territories comprised all those lands officially claimed by the Crown, not merely those recognized under international law as British.¹

1) European exploration

In 1763, substantial portions of the north-west had yet to be explored by Europeans. Parts of the western coast had been navigated by Drake in 1579 while searching for a passage to the Atlantic. His precise course is debated, but it seems that he reached the western shores of Vancouver Island at 48° latitude, where he anchored in a "bad bay", before returning southwards.²

Juan de Fuca, a Greek mariner in the service of Spain, sailed up the north-west coast of America in 1592 with similar aims. According to his story, which has been doubted, he entered an inlet between 47-48° latitude (possibly the Juan de Fuca Strait between Vancouver Island and the mainland) through which he proceeded as far as the "North Sea". His account was propa-

¹ See Chapter 3.

² Bishop, "Drake's Course", 173; DGB, I, 280.
gated in England in the late 1590s by Michael Lok, a merchant-promoter of explorations, and the strait which now bears his name figured on many subsequent European maps. Further exploration of the north-west coast did not occur until the 18th century, when the Russian explorers, Bering and Chirikov, navigated the shores of what is now southern Alaska between roughly 55° and 60° latitude (see Map 1.7). Their voyages were influential in establishing the coastline shown on many maps of the 1750s and 60s. The Spanish explorers, Pérez and Bodega y Quadra, in voyages undertaken in 1774 and 1775, navigated the entire western coast of what is now Canada, and Cook repeated this feat in the course of his expedition of 1778-79. Detailed exploration of the coastline was subsequently undertaken by Vancouver in 1792-94 (Map 1.14).

By contrast, the lands bordering upon Baffin Bay and Hudson Bay were familiar to British mariners by the end of the 17th century, due to the efforts of such men as Frobisher, Davis, Baffin, Hudson, Button, James and others (Map 1.6). But only in the 19th century were the shores extending west of Hudson's Bay and north into the Arctic archipelago explored (Map 1.15). Knowledge of the latter region was consequently meagre in 1763.

More was known of the western interior. French forts and trading posts had been established as far west as the Manitoba lakes, and the explorations of such men as La Vérendrye and Hendry had extended into the foothills of the Rocky Mountains (Maps 1.7 and 1.10). In the early 1770s, Hearne penetrated west from Hudson's Bay to the Great Slave Lake, and north to the mouth of the Coppermine River on the Arctic Ocean (Map 1.14).

Cartographic representations of the western coast of Canada in the period prior to 1763, a representative collection of which is appended, fall into two main groups. The first group rely upon such knowledge as might be gleaned from the coastal explorations of Drake, Juan de Fuca, Bering and Chirikov, and either show a continuous coastline running from Alaska to Oregon, or more conservatively leave gaps representing unexplored areas.

3 DCB, I, 677.
A remarkable example is the Nouvelle carte des decouvertes faites par des vaisseaux Russiens of 1758, which was printed in London in 1761, and given wider circulation in a pirated version reproduced in the London Magazine of 1764 (Maps 2.11 and 2.23). No less interesting is the map of Canada by Thomas Jefferys of 1762, which shows the continent from coast to coast, and features Drake's New Albion, the strait discovered by Juan de Fuca, as well as the more recent Russian discoveries, displayed on a continuous coastline (Map 2.17). The second group of maps incorporate a number of spectacular but mythical geographical features, notably the famed Mer de l'Ouest, and present a quite different and altogether misleading portrait of western Canada. The best example is the map published by Delisle at Paris in 1752, and reproduced in the Gentleman's Magazine of 1754, which was based in part upon the supposed discoveries of the apocryphal Admiral De Fonte (Maps 2.5 and 2.6).

2) Original French claims

In the Treaty of Paris of February 1763, France ceded to Britain the entirety of Canada with all its dependencies, as well as the portion of Louisiana lying east of the Mississippi River. Great Britain thereby inherited the territorial claims originally advanced by France for its Canadian colony. How far west did they extend?

Article 4 of the Treaty provides that the cession comprises:

le Canada avec toutes ses Dependances, ainsi que l'Isle du Cap Breton, & toutes les autres Isles, & Côtes, dans le Golphe & Fleuve St. Laurent, & généralement tout ce qui depend des dits Pays, Terres, Isles, & Côtes, avec la Souveraineté, Propriété, Possession, & tous Droits acquis par Traité, ou autrement, que le Roy Très Chretien et la Couronne de France ont eus jusqu'à présent sur les dits Pays, Isles, Terres, Lieux, Côtes, & leurs Habitants. . .

Canada was thus ceded in its fullest possible extent. But there is no indication how much of the west was thought to be covered. Article 7 states that the confines between British and French dominions in North America

4 See ibid., 677. 5 Articles 4 and 7.
6 CD, I, 99-100.
shall be fixed by a line drawn along the middle of the Mississippi River from its source south to the Iberville River, and thence to the Gulf of Mexico. However the Mississippi rises south of the modern Canadian border, and so this Article cannot assist us.

We turn to official British descriptions of the ceded territory. The question, we must remember, is not how much territory France held clear title to in international law, but rather how much it purported to cede, and how much the British Crown claimed to have received. The Royal Proclamation of October 1763 makes no attempt to draw boundaries for the new accessions in the north-west, and the narrow limits provided for the colony of Quebec are of little help. Nevertheless it seems significant that in describing the Indian country created there the Crown refers generally to all lands located west of the Atlantic watershed, as if these extended indefinitely toward the Pacific. This impression is reinforced by a Board of Trade Report of June 1763 which states: "Canada as possessed and claimed by the French consisted of an immense Tract of Country including as well the whole Lands to the westward indefinitely which was the Subject of their Indian Trade. . .". The authors add: "It is needless to state with any degree of precision the Bounds and Limits of this extensive Country. . .". The Annual Register for 1763 makes similar observations, remarking that the cession "stretched the northern part of our possessions on the continent of America from one ocean to the other."9

How did France itself originally view the matter? We must first ascertain the limits between New France proper and Louisiana. The point is important because Louisiana west of the Mississippi was excluded from the cession to Britain, and had already been transferred to Spain in a secret treaty concluded at Fontainebleau in 1762.10 The treaty does not delimit

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7 See Chapter 17.
8 Ibid., 140, emphasis added.
9 (1763) VI Annual Register 1st ed., 18, published in London in 1764.
10 Dated 3 November 1762; CTS, XLII, 239-41.
the ceded territory, referring simply to "tout le pays connu sous le nom de la Louisiane", however its boundaries can be determined from other instruments. The Royal Edict of 1712 granting a commercial monopoly to Sieur Crozat describes Louisiana as comprising the Mississippi River from the Gulf of Mexico north to Illinois, together with the Missouri and Wabash Rivers, with all lands lying upon rivers falling directly or indirectly into that part of the Mississippi.\textsuperscript{11} This description was repeated in the Letters Patent establishing the Compagnie d'Occident in August 1717.\textsuperscript{12} An Order in Council of the following month annexed to Louisiana "le pays des Sauvages Illinois",\textsuperscript{13} which is located south of Lake Michigan between the Illinois and Wabash Rivers (shown on Map 1.16). Even if these instruments are interpreted to include all lands draining into the Mississippi, Wabash, Illinois and Missouri Rivers, they cover only a sliver of modern Canada where the Missouri Basin extends into southern Saskatchewan and Alberta (see Map 1.17). Generally speaking, then, whatever lands were claimed by the French Crown in present-day western Canada formed part of New France proper rather than Louisiana, and so passed to Great Britain in 1763.

How much of the modern Canadian west did France claim? Official instruments concerning New France are often indefinite as to the extent of territory covered, avoiding precise geographical descriptions in favour of regional names and catch-all expressions. Royal Commissions issued for the Governors and Intendants of New France in the period 1665-1713 follow the wording found in the initial Commission of 1665 to Governor Courcelle, which refers to "Canada, Acadie et Isle de Terreneuve, et autres pays de la France Septentrionale...".\textsuperscript{14} The cession of Acadia and Newfoundland to Britain

\textsuperscript{11} \textit{Edits}, I, 328, dated 14 September 1712.
\textsuperscript{12} \textit{Ibid.}, 378, Article 5.
\textsuperscript{13} \textit{Ibid.}, 388.
\textsuperscript{14} \textit{Edits}, III, 32, dated 23 March 1665; see also the Commissions dated 23 March 1665 (for the Intendant), 8 April 1668, 7 April 1672, 5 June 1675, 1 May 1682 (bis), 1 January 1685, 24 April 1686, 15 May 1689, 20 April 1699, 1 April 1702, 1 August 1703, 1 January 1705 (bis), 31 March 1710; \textit{Ibid.}, 33-63. A similar formula is also employed, seemingly inadvertently, in a Commission of 23 November 1725; \textit{Ibid.}, 65.
in 1713 necessitated a change in the standard formula, which in 1726 reappears as "pays de la Nouvelle France et autres pays de la France Septentrionale dans l'Amérique." 15 Succeeding instruments feature a number of variations. Thus in 1755 the formula becomes "Canada, la Louisiane, Isle-Royale, Isle Saint-Jean et autres isles, terres et pays de l'Amérique Septentrionale." 16 Such descriptions were susceptible of virtually indefinite extension, and so suited French expansionist policies. But they give us little idea of the precise scope of France's claims.

Nevertheless French forts and trading posts had been established as far west as the modern Manitoba-Saskatchewan border (Map 1.10), and it appears probable that official claims reached further, without any definite bounds. We see an example of this in a ceremony of taking-possession performed in 1671 at Sault Ste. Marie by the explorer Saint-Lusson, acting upon instructions from the Intendant Talon. Planting a wooden cross and a post bearing the royal arms, he proclaimed aloud three times to an assembled crowd of Indians and Frenchmen that he took possession of the area, as well as Lakes Superior and Huron

et de tous les autres pays, fleuves, lacs et rivières contiguës et adjacentes, iecux tant descouverts qu'à descouvrir, qui se bornent d'un costé aux mers du Nord et de l'Ouest, et de l'autre costé à la mer du Sud, comme de toute leur longitude ou profondeur. . . 17

A number of unofficial sources express similar ideas. Lescarbot, in his well-known Histoire de la Nouvelle France of 1617, describes the limits of New France as "on the western side the lands as far as the sea called the Pacific. . . and on the north that land called Unknown, towards the icy sea as far as the Arctic pole." 18 Boucault, writing in 1754, states that Canada

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15 Commission to the Marquis de Beauharnois, Governor, 11 January 1726; ibid., 67-9.
16 Commission to M. de Vaudreuil de Cavagnal, Governor, 1 January 1755; ibid., 79-81. See also the variations in the instruments of 21 February 1731, 15 March 1746, 10 June 1747, 1 January 1748, 1 March 1752; ibid., 69-77.
17 Procès-verbal de la prise de possession, 14 June 1671; Margry, Decouvertes des Français, 1, 98, emphasis added.
"n'est proprement borné au Nord que par la Baye d'Hudson... [et] à l'Ouest par les terres espagnoles et par des terres ou des mers inconnues...". 19

Mitchell remarks in a work of 1757 that French claims, as shown on their maps "extend from the Apalachean mountains to the south seas...". 20 Indeed, these maps suggested that Canada stretched indefinitely westward (Maps 2.1-2.5, 2.7).

3) Original British claims

Dr. John Mitchell, author of the well-known map of North America of 1755, wrote in 1757 that "Britain has a real and original right to that whole continent, except the south-western parts that belong to Spain, and a small part of it in Canada, which of right only belongs to France", 21 arguing that the English had first discovered and seized the entire continent. 22 He refers to a manifesto published by Queen Anne in 1711 in which she maintains "her just and incontestable rights and titles to all North America -- except a part yielded to France -- which was held in fief from the crown of Britain, and ought to revert to it." 23

There can be little doubt that the British Crown had at one time or another authoritatively laid claim to virtually the whole of North America, both explored and unexplored, and indeed had granted Charters for large parts of it (Map 1.1). Many of these grants were continental in scope, extending from designated points on the Atlantic coast westward to the Pacific Ocean. The Second Charter of Virginia of 1609 confers rights to all lands situated upon a sector of the east coast stretching two hundred miles north and south of Cape Comfort "up into the Land throughout from Sea to Sea, West and Northwest;". 24 The Charter of New England, 1620, covers all those territories in America

20 Mitchell, Contest in America, 193. 21 Ibid., 195.
22 Ibid., 198, note. 23 Ibid., 199, note.
24 Thorpe, Charters, VII, 3795.
between the 40th and 48th parallels "and in length by all the Breadth aforesaid throughout the Maine Land, from Sea to Sea...". The Charter of Massachusetts Bay, 1529, encompasses lands within defined precincts "throughout the mayne Landes there, from the Atlantick and Westerne Sea and Ocean on the East Parte, to the South Sea on the West Parte;...". The Connecticut Charter of 1662 runs a line from "Narraganset-Bay on the East, to the South Sea on the West Parte...". Both the Charter of Carolina of 1663, and that of Georgia of 1732 delineate the limits of those colonies by means of lines drawn directly west as far as "the south seas". These Charters illustrate the fact that Crown claims did not depend upon exploration or settlement of the territories covered, and suggest that Britain viewed its American dominions as stretching indefinitely westward to the Pacific Ocean.

Two of the early English charter grants merit closer attention, as they covered large sections of present-day western and north-western Canada. These are the Virginia Charter of 1609, and the Hudson's Bay Company Charter of 1670.

a) The Virginia Charter of 1609

The first Charter issued for Virginia in 1606 relates to lands extending only one hundred miles inland from the coast. But the revised Charter issued three years later greatly enlarges the area covered, referring to all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and North-west... A later Charter issued in 1611-12 confirms this part of the 1609 grant. In 1624, the corporation holding the Charter was disbanded and its powers and rights were resumed by the Crown, which henceforth ruled Virginia as a royal

25 Thorpe, Charters, III, 1829. 26 Ibid., III, 1850.
27 Ibid., I, 535. 28 Ibid., V, 2744, and II, 771.
29 Ibid., VII, 3784. 30 Ibid., VII, 3795. 31 Ibid., VII, 3802.
colony with the same territorial limits as those described in the Charter of 1609.\textsuperscript{32}

If we examine the terms of that Charter, we can see that the colony extends from the Atlantic coast to the Pacific. But the northern boundary does not proceed directly west. This is ruled out by the Charter's terms, which refer to territories extending "up into the Land throughout from Sea to Sea, West and Northwest". A common interpretation of these words involves a southern boundary running due west and a northern one running northwest,\textsuperscript{33} as shown on Maps 1.1, 1.3, and 1.18. If this northern limit is extended to the Pacific, as the Charter specifies, it takes in a considerable portion of western Canada, including the entire coast of British Columbia (Map 1.19).

Virginia's claims in the northwest were very much alive in the 18th century, although necessarily reduced by other colonial grants. We find a number of official descriptions of them in the period prior to 1763. A report on the limits of Virginia drawn up for the government of the colony in 1751 by the surveyor and map-maker, Joshua Fry, and later sent to the Board of Trade, states that Virginia's northerly limit follows the bounds of the adjacent provinces, Maryland and Pennsylvania, as far as they extend westward, "and then a Northwest Line drawn from a Point of the Seacoast, which is two hundred miles north from Point Comfort to the Pacific Ocean; . . .".\textsuperscript{34}

Another report made to the Board of Trade by Dr. John Mitchell in 1752 remarks that the limits of Virginia lying beyond Pennsylvania "are entirely undetermined to the Northward". He adds that Virginia and New York meet at some point in this region, and suggests that Lake Erie might be the most convenient point to draw a boundary between the two provinces.\textsuperscript{35}

\textsuperscript{32} Johnson v. M'Intosh (1823) 8 Wheaton 543 (U.S.S.C.) at 545.
\textsuperscript{33} See discussion in Paullin, Atlas, 26, 35.
\textsuperscript{34} C.O. 5: 1327, p. 365; quoted, in part, in Gipson, British Empire, IV, 225, note 1. The report, dated 8 May 1751, was made on the direction of Lewis Burwell, President of H.M.'s Council of Virginia, and was enclosed in a letter from him to the Board of Trade of 21 August 1751.
\textsuperscript{35} Quoted in Gipson, British Empire, IV, 225-6, note 1, citing C.O. 5: 1327, pp. 429-40.
Instructions sent to Virginia in 1756 appear to assume that the colony held jurisdiction over areas in the northwest, and prohibit grants of Iroquois lands upon the south shores of Lakes Erie and Ontario, such as lie "within the limits of our colony of Virginia". 36

The American Revolution did not put an end to Virginia's claims, with the province's advocates contending for a northern boundary drawn in a northwesterly direction from the Atlantic coast. 37 Finally in 1784 Virginia agreed to transfer its northwest claims to the United States. The act of cession describes the area in question as "the territory or tract of country within the limits of the Virginia charter, situate... to the northwest of the river Ohio..." 38 (Maps 1.18, 1.20 and 1.21).

The eventual extension of the international boundary between British North America and the United States westward from the Lake of the Woods along the 49th parallel involved the relinquishment of any claims by the United States in areas north of that line, derived from the Virginia Charter or otherwise. This does not appear to affect the question of whether these areas were in fact among those originally granted by the Crown in 1609, and still claimed by Great Britain in 1763.

b) The Hudson's Bay Company Charter of 1670

The Royal Charter of 1670 grants to the Hudson's Bay Company "all the Landes and Territories upon the Countryses Coastes and confynces of the Seas Bayes Lakes Rivers Creekes and Soundes" of whatsoever latitude, lying "within the entrance of the Streightes commonly called Hudsons Streightes". It excludes from this grant any lands which are "already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other


38 Hening, Virginia Statutes, XI, 574.
Christian Prince or State. The references to lakes, rivers and creeks suggest that the text envisages not merely lands bordering directly upon the sea, but all territories whose waters drain into the seas lying within Hudson Strait. The geographical region referred to thus potentially encompasses the various drainage basins lying within the Strait, both on the continent proper and on the Arctic archipelago, a matter to be discussed later (Map 1.17). Whether the whole of this geographical area actually passed to the Company is, however, open to question because the Charter excludes two types of lands from the grant: 1) those already possessed by or granted to British subjects; and 2) those possessed by the subjects of other Christian sovereigns.

For our purposes here it is unnecessary to determine how much territory the Company actually received in 1670. It follows from the terms of the Charter that whatever portions of the geographical region designated which did not pass to the Company either 1) were held directly by the Crown or 2) pertained originally to France and were ceded to Great Britain in 1763, if not earlier. This can be seen upon examination of the two categories of land excluded from the grant. 1) Lands already possessed by or granted to British subjects necessarily fell under the Crown's dominion, because a subject acquires land for his sovereign, and holds it from him. 2) The only other Christian state entertaining serious claims within the designated region was France, and by the end of 1763 all territories claimed by France in the area had been ceded to Britain. On either count, then, it follows that after the Treaty of Paris the British Crown asserted sovereignty over the entire geographical area described in the Charter of 1670.

How extensive was that area? The language of the Charter is remarkably flexible. But if we restrict our gaze for the moment to drainage areas lying within Hudson Strait, two principal options emerge. Either the Charter is confined to the lands draining into Hudson Strait, Hudson Bay and Foxe Basin (which would include the southwesterly portion of Baffin Island), or
it also extends to the Arctic drainage basins lying farther west through the
Gulf of Boothia, and so comprise the territories draining into the Arctic
Ocean from the continent and the far northern islands, including the Macken-
zie River basin (see Map 1.17). Considering the close association between
the Charter of 1670 and the earlier attempts at discovering a northwest pas-
sage, there would seem to be some basis, *prima facie*, for adopting the latter
view, as it seems possible that lands lying upon a passage leading westwards
from the Hudson Bay area to the Pacific would have been contemplated. It must
also be noted that, whatever reasons may be advanced for defining Rupert's
Land by reference to watersheds, the Charter itself does not explicitly adopt
such a principle, and more generous modes of construction might be argued for.

Here we are less concerned with arriving at a definitive interpretation
of the Charter than with determining what claims were *advanced* in association
with this instrument by the British Crown and the Hudson's Bay Company in the
period prior to 1763. A convenient starting point is the Treaty of Utrecht
of 1713 which provides in Article 10 that France should restore to Great Bri-
tain: "la Baye & le Détroit d'Hudson avec toutes les Terres, Mers, Rivages,
Fleuves, & lieux qui en dépendent & qui y sont situez, sans rien excepter de
l'étendue dead. Terres & Mers possedez présentement par les François;..." 39
The boundaries of the territory described are unclear, and the wording supports
diverse interpretations. The treaty recognizes this difficulty, specifying
that commissaries shall be named by both parties to settle the limits between
Hudson's Bay and areas belonging to France. Commissaries were eventually ap-
pointed in 1719, but failed to resolve the matter. 40 As shown on Map 1.12,
the British delegates were instructed to claim as the boundary between Hud-
sen's Bay and the French territories a line drawn from the coast of Labrador
at latitude 58½° north, running in a south-westerly direction through Lake

39 CTS, XXVII, 484. For a review of the conflicting French and British claims
prior to this time, see Savelle, "Forty-Ninth Degree", 183-190.
40 LBC, VIII, 4071. See the accounts in Savelle, *Origins of American Diplo-
macy*, 356-61; Savelle, "Forty-Ninth Degree", 190-201.
Mistassini to the 49th parallel, where "another line shall begin, and be extended westward from the said lake, upon the 49th degree of northern latitude", and the French "shall be prohibited to pass to the northward of the said 49th degree of latitude. ...". 41 This claim corresponded to that advanced by the Hudson's Bay Company on its own behalf in earlier representations to the government. 42 But it is important to remember that what was at issue here was not merely the extent of the Company's lands, but in fact the boundary between British territories surrounding Hudson's Bay and those held by France. The line claimed by the British Crown is stated to follow the 49th parallel running west of Lake Mistassini. The Instructions do not say where this line should end, nor do they envisage a further boundary running north from the 49th parallel so as to provide a western limit to British claims. The line, in effect, ran indefinitely westward, and the Crown asserted sovereignty over everything north of it. In 1719, then, we find Great Britain laying claim to the virtual entirety of the territories now comprised within Canada from the Lake of the Woods westward along the 49th parallel to the Pacific. France did not accept these claims, proposing much narrower limits, and the matter was left unresolved. 43

The territorial claims advanced at this period by the British government were sustained by the Hudson's Bay Company until the Treaty of Paris, as several representations made by the Company to the Government testify. A memorial to the Board of Trade dated 3 October 1750 is particularly interesting. This was drawn up in response to a request from the Board for a

41 Instructions to Commissary Bladen, 1719; LBC, VIII, 4075-6. The claim actually advanced to the French by the English Commissaries follows that given in the Instructions, except that the line commences at 56° on the Labrador Coast, rather than at 58°; Boundaries claimed by the English Commissaries, 1719, ibid., 4080.

42 Representation of H.B.C. to Lords of Trade, 4 August 1714; ibid., 4067-8; Memorial of H.B.C. to Lords of Trade, August 1719; Statutes etc. Regarding Ontario Boundaries (1878), 358-9. The latter proposes generally that a boundary be drawn "so as to exclude the French from coming anywhere to the northward of the latitude of 49, except on the coast of Labrador;...".

43 See documents in LBC, VIII, 4083 seq.
description of the limits of the territory granted to the Company. The

memorial describes the Company's territory as follows:

All the Lands lying on the East side or Coast of the said Bay [Hudson's
Bay], and extending from the Bay eastward to the Atlantick Ocean &
Davis's Straights and the Line hereinafter mentioned on the East and
South-Eastward Boundaries of the said C.0s Territories — And towards
the North all the Lands that lye at the North end or on the North side
or Coast of the said Bay and Extending from the Bay Northward to the
utmost Limits of the Land there towards the North Pole but where or how
those Lands Terminate is hitherto unknown — And towards the West all
the Lands that lye on the West side or Coast of the said Bay, and Ex-
tending from the Bay Westward to the utmost Limits of those Lands, but
where or how those Lands terminate to the westward is also unknown, tho'
probably it will be found they terminate on the great South Sea — And
towards the South all the Lands that lye at the South end or South side
or coast of the said Bay the extent of which Lands towards the South to
be Limited & Divided from the places appertaining to the French in
those parts by a Line to be drawn for that purpose to begin from the
Atlantic Ocean on the East side at an Island called Grimington's Island
otherwise Cape Perdrix in the Latitude of 59° 9' on the Labrador coast
and to be drawn from thence Southwestward to the great Lake Miscosinke
otherwise called Mistoseny, and through the same dividing that Lake in-
to two parts down to the 49th Degree of North Latitude, as described in
the said Map or Plan delivered herewith, and from thence to be continued
by a Meridian Line of the said Latitude of 49° Westwards. 44

This passage clearly specifies that the Company laid claim to lands north of
the 49th parallel as far west as the Pacific Ocean and north to the North
Pole.

Such extensive pretensions suited the interests of both the Company and
the Crown so long as they were made at the expense of France. The Treaty of
Paris changed this. The Company's claims now encroached upon the territories
at the Crown's disposal under the cession, and prudence dictated a more mod-
est construction of the Charter. In the 19th century the Company generally
confined its asserted title to the areas draining directly into Hudson's Bay
and Strait, as shown on Map 1.4. 45 For our purposes, however, it remains
true that the modern boundary between Canada and the United States running
west of the Lake of the Woods to the Pacific is identical with that first
claimed by the Crown in 1719 as the southern limit of British territory lying

44 Ibid., 4094. See also H.B.C. to Sir Thomas Robinson, Secretary of State,
19 February 1755, in ibid., 4101, and H.B.C. to Board of Trade, 6 Decem-
ber 1759, in ibid., 4103-4.

45 See Governor of H.B.C. to Earl Bathurst, 8 June 1815; ibid., 4116.
Conclusion

In the century and a half preceding the Peace of Paris, the British Crown issued a series of Charters and Commissions which together, as interpreted, covered virtually the whole of North America north of Mexico and Florida. Very little of this territory had actually been explored by Great Britain at the time, and most of it was unknown to the outside world. The larger grants generally comprised a stretch of familiar coastline, backed by a vast and unexplored interior. In many instances, the hinterland was stated to extend as far west as the Pacific Ocean. The Charters for Virginia of 1609 and for the Hudson's Bay Company of 1670 between them could be read as covering most of western and north-western Canada.

France actively disputed these pretensions and from the 17th century onwards established its own settlements in Acadia and the St. Lawrence Valley, while making ample counter-claims. The Treaty of Utrecht of 1713 recognized British title to Newfoundland, Nova Scotia and the Hudson's Bay territories, but disputes as to the boundaries of the latter two areas persisted. France asserted that British domains were confined to peninsular Nova Scotia and to a strip of land around the Bay. The rest of eastern Canada it claimed for itself, while in the west its claims extended indefinitely westward and northward beyond the French posts on the Manitoba Lakes.

The British Crown for its part gave an extended interpretation to the treaty clause concerning Hudson's Bay and in 1719 officially presented to France a claim to all territories north of the 49th parallel west of Lake Mistassini. This was rejected, and the issue was left unresolved.

In 1763, the major outstanding territorial disputes between France and Great Britain in America were settled with the cession of Canada and the adoption of the Mississippi River as the boundary between Louisiana and the British colonies. French claims in western and north-western Canada
were thus merged with Britain's own pretensions.

In assessing how much of modern Canada the Crown laid claim to in the period succeeding the Peace of Paris, one basic fact must be kept in mind. It is improbable that the Crown would assert dominion over less territory by virtue of its combined Franco-British title than it did formerly by virtue of the British title standing alone. *Prima facie*, then, Great Britain claimed in 1763 no less than it did in 1719, when it asserted exclusive rights to the whole of western Canada north of the 49th parallel, which for the most part constitutes the present U.S.A.-Canadian border west of the Lake of the Woods.\(^ {46} \) The only basis upon which a municipal court might justifiably reduce the scope of British claims in western and north-western Canada for the period after 1763 would be evidence either that the Crown explicitly placed narrower boundaries upon its territories during that period, or that it specifically recognized the title of some other state in the region concerned.

\(^ {46} \) For judicial views consistent with this view, see *R. v. White and Bob* (1964) 50 D.L.R. (2d) 613 (B.C.C.A.) at 639, per Norris J.A. See also: *Calder v. A.G. of British Columbia* (1973) 34 D.L.R. (3d) 145 (S.C.C.), per Hall J. at 204 seq.; *Re Paulette and Registrar of Titles (No. 2)* (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.) at 24-5.
PART IV

THE ROYAL PROCLAMATION OF 1763:

PROVISIONS
CHAPTER II

EVOLUTION

1) The government formulates its plans

With the signing of the Treaty of Paris on 10 February 1763, the British government turned its mind to several questions arising from the peace, in particular the disposal of the newly acquired territories, and the establishment and maintenance of satisfactory relations with the Indians.

The first subject was succinctly discussed in a paper prepared for the Ministry and passed on to the Lords of Trade. Entitled "Hints relative to the Division and Government of the conquered and newly acquired Countries in America", it was probably the work of Henry Ellis, in colonial matters perhaps the most influential adviser of Lord Egremont, Secretary of State for the Southern Department. The paper proposes that Canada be divided into two provinces, and that the Labrador coast, from Anticosti Island to Hudson Strait, should be annexed to Newfoundland. "It might also be necessary", remarks the memorial, "to fix upon some Line for a Western Boundary to our ancient provinces, beyond which our People should not at present be permitted to settle...". Thus constrained, they would emigrate to Nova Scotia or the southern provinces, "instead of 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." The country west of this boundary should be placed under military control. The report further recommends the annexation of the Islands of St. John and Cape Breton to Nova Scotia, and the extension of Georgia southward. The peninsula of Florida should be made a separate province, as should

1 Crane, "Hints", 368, n. 6; Gipson, British Empire, IX, 44; Sosin, Whitehall, 56-7; Alvord, Mississippi Valley, I, 159. The text is printed in Crane, "Hints", 370-3. Its date of composition is not known.

2 Crane, "Hints", 371.
the country between St. Mark's and the Mississippi River. The paper's influence is demonstrated by the fact that every one of these proposals was later adopted by the Government, save only that regarding Canada.

The first recommendation to be carried out concerned Labrador. After consultation with the Board of Trade and the Hudson's Bay Company, Egremont announced on 24 March 1763 the decision to annex to Newfoundland all the coast of Labrador from Hudson Strait to the River of St. John's opposite Anticosti Island, including that island and other adjacent ones (see Map 1.8). This decision was implemented in the Commission granted to the Newfoundland Governor on 25 April. The remaining proposals in the paper were not acted on until later in the year.

In the meantime, Egremont had been giving some thought to the Indian question. Writing in January to Sir Jeffrey Amherst, Commander in Chief in North America, he refers to the threat of an Indian war erupting over settlements made on Indian lands near the Susquehannah River, and states that the King had it

much at heart to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the Lands they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation.

He adds: "I may inform You that a Plan, for this desirable End, is actually under Consideration."  

The first step was taken on 16 March, when Egremont sent a circular letter to the Governors of Virginia, North Carolina, South Carolina, and Georgia, and the Superintendent for Southern Indians. Egremont notes that the departure of the French and Spaniards from the ceded territories will "undoubtedly alarm, & increase the Jealousy of the Neighbouring Indians". He speaks of the need to gain their confidence and goodwill, and to dispel the false notion.

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5 Egremont to Amherst, 27 January 1763, "Fitch Papers", CCHS, XVIII, 224.
that "the English entertain a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their Lands". To this end, Egremont orders the officials concerned to call a joint meeting with the chiefs of all the major southern tribes, so as to inform them of the changeover and generally manifest Britain's good intentions. The officials should announce the forgiving of past offences and the reopening of trade, and promise "a continual Attention to their Interests, & . . . a Readiness upon all Occasions to do them Justice".6

These documents set the scene for the general inquiry addressed by Egremont to the Board of Trade on 5 May 1763 concerning the newly-ceded territories.7 The Board is instructed to consider, among other things, what new governments might be established in North America. No mention is made of the territorial arrangements already under consideration. However Egremont encloses a copy of the memorial "Hints relative to America".8 The Secretary of State also raises the subject of ensuring the security of North America against Indian disturbances. Although he solicits suggestions on the matter, he goes on to spell out in a fairly complete fashion the policy favoured by the government:

Tho' in order to succeed effectually in this Point, it may become necessary to erect some Forts in the Indian Country, with their Consent, yet 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 . . .

This important passage indicates that the major tenets of the Indian policy later embodied in the Proclamation had already been adopted by the government at this stage, namely the general recognition of the Indians' property rights, the protection and securing of those rights, the prevention of any invasion of their hunting grounds, and the acquisition of Indian lands by means of fair purchase only. Nothing is said, however, about how these policies are to be implemented.

6 NCCR, VI, 974-6; also in LBC, X, 23-5. 7 CD, I, 127 seq. 8 See the list of enclosures in JMT, 1759-63, 362-3.
2) The Lords of Trade consider the matter

The Board of Trade addressed itself to the questions raised by Egremont, and by early June had prepared its reply. A valuable insight into the evolution of the Board's thinking is provided by a draft report written in May by the Secretary to the Board, John Pownall. This sketch adopts the idea of restraining the westward expansion of the old colonies, as expounded in "Hints relative to America", and fuses it with the policy enunciated by Egremont of protecting the Indians in their hunting grounds. It proposes the creation of an exclusive Indian country which "should be considered as lands belonging to the Indians, the dominion of which to be protected for them by forts and military establishments" with free access for trading purposes to all subjects. This area would be bounded on the south by the sources of rivers running into the Gulf of Mexico, on the east by the Appalachian Mountains, and in the northeast by the proposed limits of Canada. The latter which approximate those eventually adopted for Quebec, would follow the height of the land from Cape Rozier in the St. Lawrence Gulf to Lake Champlain at 45° north latitude, then run west along that parallel to the St. Lawrence River, and finally make a northern loop around the valleys of the Ottawa River and the St. Lawrence, returning east to the St. John's River. Beyond these boundaries no settlement should for the present be permitted. Thus defined, the Indian territory would comprise

all the country lying between the ridge of the Appalachian mountains and the river Mississippi as low down to the Gulph of Mexico as the settlements and claims of the Indians extend, as also all the country lying around the Great Lakes as far as the heads of every river or water that falls into them,

as well as all lands beyond the proposed limits of Canada "to the west and south west and beyond the heads of the rivers which fall into the river St. Lawrence from the north and north west".10

Interestingly enough, there is no reference to Rupert's Land. The Indian country is specifically described as including lands north of the St.

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9 Printed as an appendix to Humphreys, "Proclamation of 1763", 258-64. It may be dated, by an internal reference on p. 258, to sometime in May 1763. On Pownall's authorship see p. 258, no. 2.

10 Ibid., 260-1.
Lawrence drainage basin, in effect the very lands claimed by the Hudson's Bay Company under its Charter. The proposal of the Appalachian ridge as the eastern limit of the Indian country and the western limit for settlement is qualified by reference to certain exceptional cases. These are the claims of the Creeks, Cherokees, Catawbas, and Six Nations to lands east of the mountains, and also some Virginian settlements west of them, none of which should be disturbed. The draft report remarks, somewhat naively, that these constitute, in the authors' belief "the only cases that can be brought as an exception to the general rule and may we hope and conceive be easily provided for."11

The final report of the Board of Trade was submitted to the King on 8 June 1763.12 It embodies a number of features found in Pownall's draft, and in other respects borrows heavily from the memorial "Hints relative to America". The report proposes the erection of three new governments on the American continent, namely Canada, East Florida and West Florida, each to be ruled by a Governor and Council. It further recommends the annexation of the Islands of St. John and Cape Breton to Nova Scotia, the extension of Georgia south to the St. John's River, and the creation of an Indian country in the American interior.

The Board affirms that civil governments should be established in all places where settlement is envisaged, but not in localities "where no perpetual Residence or planting is intended". In the latter areas, it will suffice "to provide for the free Trade of all Your Majesty's Subjects under such Regulations, and such Administration of Justice as is best suited to that End". The report mentions two American territories as falling into the last category: a) the Labrador coast, already annexed to Newfoundland; and b) the Indian country, referred to as "that Territory in North America which in Your Majesty's Justice and Humanity as well as sound Policy is proposed to be left, under Your Majesty's immediate Protection, to the Indian Tribes for their hunting Grounds". The limits of this territory, which will be "open to Trade, but not to Grants and Settlements", are described as abutting upon the boundaries

11 Ibid., 260. 12 CD, I, 131 seq.
of Canada and Florida on the north and south, the Mississippi on the west, and on the east "certain fixed Limits" to be given to the old colonies.\footnote{13}

The report proposes that Canada, which as claimed by the French consisted of an immense country extending indefinitely westward, should be restricted so as to leave "all the Lands lying about the great Lakes and beyond the Sources of the Rivers which fall into the River St. Lawrence from the North, to be thrown into the Indian Country".\footnote{14} The proposed new limits of Canada are described in a manner similar to that in Pownall's sketch.\footnote{15}

Enclosed with the report is a map, which the Lords of Trade describe as offering "a clearer Conception than can be conveyed by descriptive Words alone" of the proposed limits of Canada and Florida "and of the Country we think right to be left as Indian Territory."\footnote{16} The document is a copy of a printed map of North America by Eman. Bowen, the particular copy having been hand-coloured so as to show the boundaries suggested (see Map 2.20).\footnote{17} No western or northern limits are indicated for the Indian country, however the eastern limit is shown by a line running roughly parallel with the Appalachian Mountains, but departing from their actual course in several respects. In particular, the line runs west to the junction of the Ohio and Great Conaway [Kanawha] Rivers, apparently so as to take account of the settlements in the area, mentioned in Pownall's sketch.

The description of the limits of the Indian country given in the report does not take any account of Rupert's Land. The Lords of Trade speak at one point of throwing into the Indian country all the lands lying beyond the sources

\footnote{13} Ibid., 138-40. \footnote{14} Ibid., 140. \footnote{15} \textit{CD, I, 141.} \footnote{16} Ibid. \footnote{17} "An Accurate Map of North America Describing and distinguishing the British, Spanish and French Dominions on this great Continent; According to the Definitive Treaty Concluded at Paris 10th Feb., 1763... by Eman Bowen Geog.r to His Majesty and John Gibson Engraver", (London: Printed for Robert Sayer, undated); PRO, M.R. 26. There is also a copy in the PAC transcripts of C.O. 5, Vol. 65, p. 152. In PAC Map Division there is yet another copy (unnumbered and unclassified) which was made for the purposes of the Labrador boundary case, with the printed inscription "This Map is the chart which accompanied the Report from the Lords of Trade and Plantations to the King dated 8 June, 1763 (See Joint Appendix, Vol. III, p. 910)"). A reproduction of the latter is shown in Map Appendix 2.
of rivers falling into the St. Lawrence from the north, which would include, of course, large areas claimed by the Hudson's Bay Company.\textsuperscript{18} The point is confirmed by the accompanying chart which, despite a printed line representing the southern boundary of Rupert's Land, apparently shows the region as falling within the Indian country.\textsuperscript{19} The Board's seeming indifference to the Company's supposed rights is not, in itself, remarkable, for it was paralleled by a similar lack of concern for the claims advanced by many other colonies to lands lying west of the Appalachians, pretensions which, as with the Company, were founded upon early Royal Charters.

While the Report devotes considerable attention to the Indian country, it does not propose measures for protecting Indian lands outside that area or for regulating the purchase of Indian lands in general, such as were suggested in Egremont's letter and later featured in the Proclamation. There is in fact no reference to a Proclamation as such at all. It was assumed that the new colonial boundaries would be established by Governors' Commissions, as was normal practice.\textsuperscript{20} As for the Indian country, its limits will be sufficiently ascertained by the Bounds to be given to the Governors of Canada and Florida on the North and South, and the Mississippi on the West; and by the strict Directions to be given to Your Majesty's several Governors of Your ancient Colonies for preventing their making any new Grants of Lands beyond certain fixed Limits to be laid down in the Instructions for that purpose.\textsuperscript{21}

There was no thought, at this juncture, of issuing a single instrument giving a complete description of the Indian territory. Its boundaries were to be defined negatively by references in a variety of Commissions and Instructions.

3) The decision to issue a Proclamation

The government's response to this Report came over a month later, in a communication dated 14 July from Lord Egremont to the Board of Trade.\textsuperscript{22} It

\textsuperscript{18} CD, I, 140.
\textsuperscript{19} The areas excluded from the Indian country, that is Canada, the Floridas and the areas east of the Appalachians, are all hand-coloured, but Rupert's Land is not.
\textsuperscript{20} See the Report's references to such Commissions at CD, I, 142, 145, 146.
\textsuperscript{21} Ibid., 140.
\textsuperscript{22} CD, I, 147 seq.
expressed approval of the plan to erect three new governments in America under Governor and Council, and also of the suggested additions to Georgia and Nova Scotia. Egremont states that

His Majesty entirely concurs in your Lordships Idea, of not permitting, for the present, any Grant of Lands, or New Settlements, beyond the Bounds proposed in your Report; And that all the Countries, beyond such Bounds, be also, for the present, left unsettled, for the Indian Tribes to hunt in; but open to a free Trade for all the Colonies.

However, he expresses reluctance to leave such a large area "without being Subject to the Civil Jurisdiction of some Governor, in Virtue of His Majesty's Commission, under the Great Seal of Great Britain". Two reasons are mentioned: the difficulties of bringing to justice criminals taking refuge there, and the fear that such lands, if left in an unorganized state, might be treated as derelict by other powers and appropriated. Egremont states that, unless the Board can suggest a better alternative, the Commission issued to the Governor of Canada should comprise "all the Lakes, viz', Ontario, Erie, Huron, Michigan, and Superior... with all the Country, as far North, & West, as the Limits of the Hudson's Bay Company, and the Mississippi", as well as "all Lands whatsoever, ceded by the late Treaty, and which are not already included within the Limits of His Majesty's ancient Colonies, or intended to form the Governments of East and West Florida...".  

The government, then, distinguishes the question of colonial jurisdiction from that of settlement and land grants, and maintains that to forbid the latter in the Indian country need not, and should not preclude the former. It thus recommends that the entirety of the ceded territories, save only the Floridas and lands belonging to the ancient colonies, be brought within Canada. But the latter proposal concealed a difficulty of truly formidable proportions, for a good part of the ceded territories were already claimed by the ancient colonies in one way or another. Who was to draw the limits between the old English colonies and the newly ceded lands?

We also remark the absence of any reference to a Proclamation. The boundaries of Canada are to be established by Governor's Commission, as are

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23 Ibid., 148.
those of the Floridas, Georgia, and Nova Scotia.\textsuperscript{24} Since the entirety of the Indian country would now be brought within colonial limits, the boundaries for settlement and land grants would be set by Instructions issued to the Governors.\textsuperscript{25}

One further point may be noted. The Board's Report of 8 June refers in passing to the desirability of encouraging officers and soldiers from the late war to settle in Nova Scotia.\textsuperscript{26} The government adopts this idea and generalizes it, proposing that a clause favouring the grant of lands to such men should be inserted in Instructions issued to all the colonies.\textsuperscript{27}

Egremont's letter was read and considered by the Lords of Trade in mid-July,\textsuperscript{28} and on 5 August their representation was ready.\textsuperscript{29} The report agrees that the Indian territory should be placed under a particular government, by virtue of a Commission which describes the country's boundaries and confers powers to deal with the Indian trade and criminal fugitives.\textsuperscript{30} However, the Board objects to annexing the territory to Canada, stating that this would confuse the basis of Britain's title there and make the Governor of Canada virtual Commander-in-Chief. It would also give that colony an unfair advantage in the Indian trade. As an alternative, the Board proposes that the Commander-in-Chief of North America be made Governor of the Indian country, by virtue of a Commission specially adapted to the role of protecting the Indian tribes and managing the fur trade. However, the preparation of his Commission and Instructions would require additional information, and so this should be postponed. In the meanwhile, the problem of criminal fugitives might be handled by Instructions empowering the Commander-in-Chief to return them to their colonies of origin. In addition, a Proclamation should immediately be issued by the Crown. This would prohibit land grants or settlements within certain fixed bounds, leaving the protected territory free for Indian hunting grounds and the fur trade; it would also declare the King's intention

\textsuperscript{24} \textit{Ibid.}, 148-9. \textsuperscript{25} \textit{Ibid.}, 148, 149. \textsuperscript{26} \textit{Ibid.}, 142. \textsuperscript{27} \textit{Ibid.}, 149. \textsuperscript{28} \textit{JBT} 1759-63, p. 374. \textsuperscript{29} \textit{Ibid.}, p. 380. \textsuperscript{30} \textit{CD}, I, 150 at 151.
of encouraging the settlement of the Floridas and Nova Scotia, with lands to be granted to soldiers from the late war.

This change in the Board of Trade's proposals results, then, from the government's desire to put the Indian country under some definite jurisdiction, and from the Board's own wish to retain it as an entity distinct from the other colonies. A compromise is achieved by recommending that the Commander-in-Chief be commissioned, eventually, to govern the territory. In the interval, its status as an Indian country should be defined by Royal Proclamation.

The Lords of Trade do not give precise grounds for preferring a Proclamation over other prerogative instruments. But several may be suggested. The Board was faced with the problem of establishing the status and boundaries of a newly-acquired country, pending the drafting of a proper Commission. The instrument chosen should be adequate to the task of authoritatively affirming the Crown's sovereignty there, while simultaneously preventing the infiltration of settlers and the patenting of lands from colonies holding ancient claims to the region. A Proclamation was an obvious and appropriate choice. As an instrument under the Great Seal, it carried a legal authority at least equal to that of a Commission, and superior to that held by such lesser instruments as Royal Instructions. It was also an essentially public document, and well-suited to the role of warding off potential intruders. The Board intended that the widest publicity be given to the provisions encouraging settlement in the Floridas and Nova Scotia, and here again a Proclamation had clear advantages over Instructions, which were in effect private communications from the King to his officers, and only disclosed to a wider audience by exception.31

The Board's recognition of the need both for effective legal protection of Indian lands and also for publicizing any measures adopted for this purpose may have been heightened somewhat by a growing awareness of the outbreak of an

31 Thus a Royal Proclamation was employed for purposes of promoting settlement in Grenada and other West Indian islands the following year; see the Proclamation of 26 March 1764 in BRP, 218 seq.
Indian war in the American interior, the famous "Pontiac's Rebellion", partial reports of which were reaching England in the latter part of July, when this Report was being drafted. The Board, in justifying its proposal to issue a Proclamation, refers to "the late Complaints of the Indians, and the actual Disturbances in Consequence", apparently showing some cognizance of the events in America.

One other aspect of the Board's Report of 5 August must be mentioned. The Board refers to the government's approval, as expressed in Egremont's letter of 14 July,

of Our Idea, that that large Tract of Country bounded by the Mississippi and the Limits of the Hudson Bay Company on the one hand and on the other by the Limits of Canada, East and West Florida and His Majesty's ancient Colonies, should for the present be made subject to no grants of Lands nor to any Settlements.

Significantly, the Hudson's Bay Company territories are now described as providing limits for the Indian country.

4) The final stages

Egremont died suddenly on 21 August, and was replaced by Lord Halifax. It was not until mid-September that the cabinet formally considered the Board of Trade's new proposals. Their decisions were communicated to the Board in a letter from Halifax dated 19 September, the full importance of which has not been appreciated. The government agrees to drop the idea of attaching the Indian country to Canada or any other colony, and accepts the Board's advice that a Proclamation be issued prohibiting, for the present, grants and settlements within the Indian reserve. It is less enamoured with the proposal to commission the Commander-in-Chief as Governor of this territory, remarking that such a Commission need be drafted only if "upon Experience, & future Information" it should still appear expedient, thus postponing any decision to the indefinite future. However, the government directs that the scope of

32 On 16 July, the London Chronicle published news of an Indian insurrection at Fort Pitt, Sandusky and Detroit; Peckham, Pontiac, 178.
33 CD, I, 151.
34 Sosin, Whitehall, 63.
35 CD, I, 153 seq.
36 Ibid., 155.
the Proclamation be expanded, so that several other important objects might be dealt with simultaneously: the rapid settlement of the new colonies should be promoted, "the Friendship of the Indians more speedily and effectually reconciled", and provision made for remedying the lack of civil jurisdiction in the interior. The Proclamation, originally conceived as an interim measure, is now elevated to a position of more permanent significance and given certain additional functions.

In particular, Halifax specifies that the Proclamation should be extended to cover the following matters. It should make known the boundaries of the new colonies and the additions to the old, as well as the constitutions of the new governments and their powers of granting lands. These became the subjects of Parts I and II of the Proclamation. More important are Halifax's orders that the Proclamation should "prohibit private Purchases of Lands from Indians", that it should "declare a free Trade for all His Majesty's Subjects with all the Indians, under Licence, Security, and proper Regulations", and further empower all officers within the Indian country to seize fugitives and send them to the colonies for trial. We see here the direct origin of what became paragraphs 4a, 4b and 5 of Part IV of the Proclamation. The letter goes on to approve, with minor changes, the Board's recommendations regarding military land bounties, later embodied in Part III. Thus a major part of the Proclamation's contents, namely the whole of Parts I and II, and a portion of Part IV, owe their presence in that instrument to the government's decision at this stage.

The measures regarding purchase of Indian lands and trade were not, of course, new, but in certain respects they represented significant extensions or clarifications of the policies previously discussed. Thus Egremont, as far back as May, had announced a policy whereby Indian lands were to be acquired "by fair Purchase only". The Board had recommended, on 5 August, that the Proclamation should prohibit all grants and settlements within the Indian country "under pretence of Purchase or any other Pretext". The government

37 Ibid., 154.
38 Ibid.
40 Ibid., 152.
transforms these somewhat woolly concepts into a direct prohibition of all private purchases, and extends it to cover Indian lands generally. Secondly, it had never been entirely clear whether the provision for a free trade with the Indians was to operate only within the Indian country or also in the colonies, and the Board’s proposals of 5 August seemed to suggest the former. The government, on the other hand, calls for free trade "for all His Majesty's Subjects with all the Indians", later referring once more to the trade with "all the Indians of North America", indicating that this should operate within the colonies as well as the Indian reserve. Interestingly, no reference is made to the asserted trade monopoly of the Hudson's Bay Company, and it is a nice point to decide whether the failure to make provision for their claims was inadvertent or deliberate.

With the abandonment of the proposal to put the interior under the jurisdiction of Canada, Halifax expresses the government’s acceptance of the boundaries of that province, as "marked out in your first Report of the 8th of June last, and in the Map thereto annexed" and directs that the colony be called Quebec, presumably to differentiate it from the former French territory.

The basic policies were thus settled, and the Board set to work drawing up the requisite instruments. Drafts of the Proclamation, along with Commissions for the Governors of Quebec, East and West Florida, Grenada, and Nova Scotia, were ready by early October and considered by the Privy Council. The Proclamation received immediate approval and was issued on 7 October. The Commissions were also approved at that time, but the addition of new clauses delayed their appearance until later that year. A revised Commission for Georgia extending its southern boundaries received the Crown's approval in early November.

41 Ibid., 151-2.
42 Ibid., 154-5.
43 Ibid., 154.
44 Ibid., 157-62.
46 Ibid., 170.
47 Ibid., 172-3.
48 Ibid., 170-1.
CHAPTER 12

GENERAL PROVISIONS

1) An overview

The Royal Proclamation is a composite document dealing with a number of heterogeneous matters and falling into four discrete parts, each with its own preamble and subject-matter, and each in turn subdivided into a series of distinct provisions. These vary considerably, not only in subject-matter but in geographical scope — a point worth stressing. Certain provisions are concerned with the newly ceded territories, others with the old American colonies, and others with both alike. They range in coverage from a single colony to the entirety of British territories in America. It cannot be assumed that the scope of one provision is identical with that of another; each requires separate examination.

For convenience of reference, we will discuss the Proclamation in terms of the numbered parts and paragraphs indicated in the text reproduced in Appendix A. This numeration is not found, of course, in the original document, but it facilitates discussion of an otherwise cumbersome text.¹

¹ The original text of the Proclamation, as entered on the Patent Roll for the regnal year 4 Geo. III, may be seen in PRO: c. 66/3693 (back of roll). Many printed versions of the Proclamation's text exist, containing numerous minor, and several major variations in spelling, punctuation and format. The most authoritative version appears to be that given in Brigham, ed., British Royal Proclamations Relating to America, 212, reproduced here in Appendix A, and quoted throughout the remainder of this work. This text is transcribed from the broadside printed in 1763 in London by Mark Baskett, King's Printer, and the assignors of Robert Baskett. Another version is found in Shortt and Doughty, Constitutional Documents, I, 163. It is described as follows: "Taken from the text as contained in the 'Papers Relative to the Province of Quebec', 1791, in the Public Records Office. Copied in the Canadian Archives. . .". Thus it derives from a collection of papers made only in 1791, and possibly from a copy of a copy. Aside from numerous minor variations, this text exhibits two major deviations from the Brigham text, namely: 1) par. 2 of Part IV is divided into two distinct paragraphs, the second one commencing with the words, "And We do hereby strictly forbid, . . .", 2) par. 4 is also split into two
The first part of the Proclamation announces the measures taken by the Crown for the disposition of the former French and Spanish territories acquired in the Treaty ofParis. Portions of these territories are brought within four new colonies, whose boundaries are described. Others are annexed to existing colonies. The remaining areas, by far the largest part, are left in an unorganized state. The four new colonies are styled Quebec, East Florida, West Florida, and Grenada. As shown on Map 1.22, Quebec centres upon the St. Lawrence valley, while East Florida comprises the Florida peninsula, West Florida a strip of territory along the Gulf of Mexico, and the colony of Grenada the Caribbean island of that name along with Dominico, St. Vincent, Tobago, and the Grenadines.

The boundaries of Quebec are defined so as to take in only a limited portion of the St. Lawrence valley, from the St. John River and Gaspe on the east to the Ottawa valley and Lake Nipissing on the west. They exclude the Great Lakes and indeed most of the territory claimed by France as Canada (see Map 1.8). The status of the residual area is left unresolved, and its precise extent undefined. Parts of it had long been contested between France and Great Britain and were claimed by existing English colonies under their charters. The Proclamation makes no attempt to resolve these controversies.

After describing the limits of the new colonies, the Proclamation announces the expansion of several old ones. The Labrador coast, from the St. John River to Hudson Strait, has been put under the "Care and Inspection" of Newfoundland. St. John's (Prince Edward) Island and Cape Breton Island have been annexed to Nova Scotia. Finally Georgia has been extended to cover all lands between the Altamaha and St. Mary's Rivers (Maps 1.8 and 1.22).
The second part of the Proclamation is devoted to the constitutions of the new governments. It recites that the Governors of these colonies have been empowered to summon assemblies as soon as circumstances admit, and, in conjunction with council and assembly, to make laws for the peace, welfare and good government of the colonies concerned, "as near as may be agreeable to the Laws of England". In the mean time the inhabitants "may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England". Courts are to be erected for the hearing of civil and criminal causes "according to Law and Equity, and as near as may be agreeable to the Laws of England". The final paragraph describes the powers given to the Governors to settle land matters with the colonies' inhabitants, and to make land grants on moderate terms.

On the face of it, these provisions appear to have the effect of introducing English law in a qualified form, so that existing laws are, pro tanto, superseded, and this seems to have been the view taken in Grenada. But as regards Quebec, so drastic was the effect on the large settled French population, and so great the resulting confusion, that this intent was soon doubted by relevant authorities, later denied by a party to the Proclamation's drafting, and long after disputed in the courts. Whether customary

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2 See discussion in Attorney-General v. Stewart (1817) 2 Mer. 143 at 157-8, 35 E.R. 895 (Ch.).


4 See the letter sent by the Earl of Hillsborough, Secretary of State for the Colonies to Lieut.-Governor Carleton of Quebec, 6 March 1768, CD, I,297.

systems of Indian law were likewise affected is a still more complex ques-
tion. Whatever the effect of the Royal Proclamation on existing laws in
Quebec, the original position in civil matters was largely restored by the
Quebec Act of 1774.6

As for the section of Canada beyond Quebec, no provision was made for
its government nor for the laws applicable to its inhabitants, most of whom
were indigenous peoples living, in fact, under customary law. Thus the po-
osition resulting from the cession presumptively remained unchanged. This
means that as English law was not introduced, existing laws subsisted in-
tact, except for modifications flowing from the change of sovereignty it-
self. What these "existing laws" consisted of is a matter requiring fur-
ther research, but they presumably were a mosaic of French law and indi-
genous laws. In the leading case of Connolly v. Woolrich (1867),7 Monk J.
considered the effects of the Treaty of Paris and the Proclamation upon
the laws obtaining in former French territories outside the colony of
Quebec. He held that he saw nothing there
abolishing or changing the customs of the Indians or the laws of
the French settlers, whatever they may have been; nothing which
introduced the English common law into these territories. When
Connolly went to Athabaska, in 1803, he found the Indian usages
as they had existed for ages, unchanged by European power or
Christian legislation.

Part III of the Proclamation differs from preceding parts in subject-
matter and scope, providing for free land grants to military men who served
in the war in America. The provisions are addressed to the Governors of
"Our said Three New Colonies", namely Quebec and the two Floridas, and also
to "all other Our Governors of Our several Provinces on the Continent of
North America". Thus their scope extends beyond the ceded territories to
include all established British provinces in America. The wording is com-
prehensive and prima facie would cover Nova Scotia, Newfoundland and Rupert's
Land, as well as the Thirteen Colonies to the south.

6 14 Geo. III, c. 83, ss. 8-11.
7 11 L.C.Jur. 197 (Que.S.C.) at 214.
The fourth and final part of the Proclamation deals with a variety of matters relating to Indians. It is longer than any other part and more complex, comprising six distinct provisions, which vary significantly in content and coverage. As with certain other sections of the Proclamation, this part poses several difficult interpretative problems. But its main lines are simple. It begins with a preamble reciting that it is just and reasonable that the Indians living under British protection should not be 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; ...". The text then enunciates three related measures designed to protect Indian lands which involve structures upon land grants, settlement and purchase. In addition, the Proclamation designates a certain area as an Indian reserve.

In paragraph 1, the King prohibits the Governors of Quebec, East Florida and West Florida from granting survey warrants or patents for lands beyond their colonies' boundaries, and stipulates that no Governor "in any of Our other Colonies or Plantations in America" shall presume to grant survey warrants or 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.

This paragraph, then, applies not only to the new colonies erected on ceded territories, but also to all the old colonies in America, including, prima facie, Nova Scotia, Newfoundland and Rupert's Land. Three categories of land are protected from grants: 1) lands beyond the bounds of Quebec and the Floridas; 2) lands west of the Atlantic watershed; and 3) unceded Indian lands generally. The manner in which these categories interact is not clearly indicated.

Paragraphs 2 and 3 contain measures designed to protect Indian lands from unwarranted encroachment by settlers. Paragraph 2 reserves for
Indian use

all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Terri-
tory 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 afore-
said; . . .

It goes on to forbid British subjects from making any purchases or settle-
ments in respect of these reserved lands without the Crown’s licence. Para-
graph 3 orders the removal of all persons who have settled in this reserved
area "or upon any other Lands, which not having been ceded to, or purchased
by Us, are still reserved to the said Indians as aforesaid. . .". Thus the
categories of land protected from unwarranted settlement in pars. 2 and 3
are: 1) lands beyond the limits of Quebec, the two Floridas, and Rupert's
Land (the territory granted to the Hudson’s Bay Company); 2) lands west of
the Atlantic watershed; and 3) unceded Indian lands generally. These coin-
cide with the categories of land protected from land grants in par. 1, ex-
cept that Rupert's Land has been added to colonies in the first category.
Once again the manner in which these categories and their attendant provi-
sions interrelate is left unclarified.

The question of purchase of Indian lands, already mentioned in par. 2,
is dealt with more extensively in the first part of par. 4. Referring to
the frauds and abuses associated with such transactions in the past, the
King forbids private persons from making purchases "of any Lands reserved
to the said Indians, within those Parts of Our Colonies where We have
thought proper to allow Settlement. . .". He then provides that such lands
shall only be purchased in Public assembly for the Crown or, in the case of
Proprietary Governments, for the Proprietaries. The provisions appear to
apply to all British colonies in North America, both proprietary and non-
proprietary, including, one assumes, Nova Scotia, Newfoundland and Rupert's
Land, the latter being a proprietary colony.

These, then, are the measures adopted by the Crown to protect the
Indians from being molested or disturbed in their lands. The remaining
provisions in Part IV deal with questions of trade and jurisdiction. In the second part of par. 4, the King declares that the Indian trade shall be open to all British subjects, on condition that a licence be obtained and certain regulations observed. He authorizes and requires the Governors "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. Once again, on the face of it, these provisions have application to all British colonies in North America. The effect on the trade monopoly of the Hudson's Bay Company in Rupert's Land is unclear. Finally in par. 5 the text makes provision for the apprehension of persons who, standing charged with criminal offences, take refuge "within the Territories reserved as aforesaid for the Use of the said Indians", and for their return "to the Colony where the Crime was committed" to stand trial. It would appear that all British colonies in America benefit from this provision.

2) Scope

Enough has been said, perhaps, to indicate the diversity of measures making up the Royal Proclamation of 1763, a diversity as pronounced in subject-matter as in the range of persons and territories affected. 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 the territories acquired by cession in 1763. Patterson, Actg. J., in R. v. Syliboys stated: "If that proclamation be examined it will be found that it deals only with those territories or

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8 [1929] 1 D.L.R. 307 (N.S.Co.Crt.) at 310. The Judge's further assertions that the Indians referred to in the Proclamation are confined to Quebec and the Floridas, and that Cape Breton is not one of the ceded territories covered are, with respect, not supported by either history or the Proclamation's text.
countries, of which Nova Scotia was not one, that had been ceded to Great Britain by France." This view is presumably based upon the preamble opening Part I:

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. . . We have thought fit, with the Advice of Our Privy Council, to issue this Our Royal Proclamation. . .

However this is merely the first of five recitals found in the Proclamation, which enunciate distinct purposes and introduce provisions of varying scope. Were it true that the Proclamation covered only the ceded territories, it would be difficult to make sense of the provisions in Part III concerning military land grants, which are stated to apply not only to the new colonies but also to all other British provinces in North America. Again, how would one interpret the restrictions on grants of Indian lands found in Part IV, par. 1, which are framed to cover Quebec and the Floridas and in addition "any of Our other Colonies or Plantations in America"? Other examples might be given. The point is that an attempt to define the Proclamation's scope in a global manner leads to serious difficulties.

Similar attempts have bedeviled the extended judicial controversy over the extent to which Part IV of the Proclamation applies to Rupert's Land -- the territory originally granted to the Hudson's Bay Company. The most authoritative judgment to date in a long string of decisions9 is that of the Supreme Court of Canada in Sigeareak v. R.10 Hall J., speaking for the court, stated:

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to 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.

The Proclamation mentions the territories granted to the Hudson's Bay Company only once, in par. 2 of Part IV, where it explicitly excepts them from the Indian country described there. This is the specific exclusion to which the judge refers, and his remarks are perhaps best understood as directed to that paragraph alone. Certainly it would be unusual to interpret restrictions embodied in only one provision in a series of sections as governing the series as a whole, in the absence of explicit language or necessary inferences. To the contrary, the explicit exclusion of Rupert's Land from the scope of one paragraph might well suggest its implicit inclusion elsewhere. The correct approach would seem to involve an examination of the words used in each provision. Thus it appears unlikely that the provision in Part IV, par. 5, allowing for the arrest of criminal fugitives and their return "to the Colony where the Crime was committed" should be construed as excluding criminals fleeing from Rupert's Land. The same holds true of the restrictions on land grants in Part IV, par. 1, which in their terms apply to the three new colonies and also to all other British colonies in America. We will consider these questions in more detail later. 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.

3) Interpretation

Something should be said about the role of certain extrinsic aids to interpretation which we will have occasion to use in interpreting the Proclamation's terms in subsequent chapters, namely travaux préparatoires and contemporanea expositio.
It might be thought that in construing the Proclamation the best method of ascertaining the "true" historical intentions of the Crown is to consult the plentiful official documentation preceding its issue. In reality, of course, a textual ambiguity often reflects a lack of clarity in the thinking which preceded it, so that the quest can be in vain. But there are more fundamental objections to such an approach, which are reflected in the limitations placed upon the use of travaux préparatoires in the courts. Under present rules, documents leading up to an enactment are not admissible for the purpose of determining the intentions of the makers, which are to be ascertained from the language of the enactment itself. However, such documents can in certain instances be referred to for insight into the historical situation giving rise to the enactment, and the mischief or unsatisfactory state of affairs which it was designed to remedy.\(^{11}\) This rule has been formulated primarily to deal with official public reports giving rise to Acts of Parliament. However it would appear equally applicable to documentation preceding an executive act, such as the Royal Proclamation.

The rule is a controversial one, and we are not in this inquiry bound by it with the same strictness as a court of law. To the extent that it might forbid mere consultation of the travaux préparatoires of the Royal Proclamation, it seems unnecessarily rigid. But it must be recognized that there are inherent limits to the usefulness of anterior documentation.

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. Last minute changes are always possible. 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 coordinate 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.

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. The point is illustrated by an exchange between bench and counsel in oral proceedings before the Privy Council in St. Catherine's Milling and Lumber Co. v. R. Mr. Blake, for the Province of Ontario, was contending that an Act of 1868 did not apply to a certain territory. He said: "No one thought of touching this particular area, which was at that time disputed between Canada and the Hudson's Bay Company; and there were no other lands to touch." The Earl of Selborne interjected: "What difference would that

12 The Secretary of State for the Southern Department, the Earl of Egremont, died suddenly on 21 August 1763, and Lord Shelburne resigned as President of the Board of Trade on 2 September 1763.

13 (1888) 14 A.C. 46.
make? The legislature does not think of every item to which the language may apply. It uses general language. If these lands fall within that language, that language applies to them...". Counsel later replied: "I have failed to state my proposition clearly. My proposition was that it was not in the mind of the legislature to touch these lands at that time, although the language may be broad enough to touch them." To which the Earl of Selborne rejoined: "We know nothing about the mind of the legislature, and in point of fact no legislature has any mind, except that which is expressed in the words which it has used."

Finally, it would be improper to construe an act in a manner dictated by documents not available to the general public, who perforce must rely upon the words of the act itself in regulating their behaviour. As was said by Lord Diplock in the case of Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG:

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.

Much of the historical documentation pertaining to the drafting of the Proclamation was inaccessible not only to the general public at the time, but also to the courts, and to officers required to enforce its provisions. It can hardly be contended that the meaning of the instrument would be subject to reinterpretation upon such materials becoming generally available.

It seems equally clear that the Proclamation cannot be properly understood apart from the historical context in which it arose and the matters to which it was addressed. The venerable age of the instrument and the

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14 The St. Catherine's Milling and Lumber Company v. The Queen, Argument of Mr. Blake, of Counsel for Ontario, 39.

15 [1975] 1 All E.R. 810 (H.L.) at 836. Lord Diplock was dissenting, but not on this point. See also the remarks of Lord Simon at 842.
extensive changes which have occurred since its issue call for greater attention to historical circumstances than would be necessary with an act of more recent vintage or more enduring subject-matter. In this context, the official reports, correspondence and other documents available to the Crown's servants in the course of the Proclamation's drafting are a rich source of information on the situation in America in 1763 as perceived in official British circles. In particular they furnish valuable insight into the "mischief" or state of affairs which the various provisions of the Proclamation were drafted to deal with.

The question of contemporanea expositio is more easily handled. In the case of an old statute or executive act, the modern observer lacks that easy familiarity with the context and objects of an act possessed by knowledgeable contemporaries. Thus considerable interest attaches to the opinions of such persons on the act's meaning, which varies according to the individual's authority, and the circumstances of his opinion. However the views of contemporaries are useful primarily to suggest possible lines of interpretation and to check against naively anachronistic constructions, than to provide definitive guidance. Contemporary observers are not proof against errors of prejudice, ignorance and carelessness, and a wrong construction is no less wrong for being contemporary.

CHAPTER 13

RECOGNITION OF INDIAN LAND RIGHTS

The Proclamation of 1763 recognizes in Part IV that lands possessed by Indians anywhere in British North America are reserved to them unless or until ceded to the Crown or its representatives, and protects such lands by strictures on grants, settlement, and purchase. It also temporarily closes to colonization a large sector of the American interior and reserves it for Indian use and for the fur and skin trade. For the time being, settlement is restricted to the new colonies of Quebec, East Florida and West Florida, to Rupert's Land, and to the areas east of the Appalachian Mountains along the Atlantic seaboard.

1) The recognition of Indian land rights

The first reference to Indian lands occurs in the recital to Part IV, which states:

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 Grounds; . . . 1

The phraseology merits attention. The preamble does not speak of reserving lands to Indians, at least not directly. Rather it refers to the justice and expediency of protecting Indians from being disturbed in their possession of reserved lands. In effect, the text assumes an already-existing situation whereby certain lands are reserved for Indian use, and states the

1 See the full Proclamation text in Appendix A.
necessity of safeguarding them from invasion. 2 Which lands are viewed as reserved? They are described as "such Parts of Our Dominions and Territories" as have not "been ceded to, or purchased by Us", and are in Indian "Possession". The conjuncture of these factors is taken to characterize the lands in question. This presupposes that lands possessed by indigenous peoples which have not been ceded to or purchased by the Crown are reserved for their use. The references to cession and purchase likewise presume the existence of interests susceptible of being ceded and bought, that is interests amenable to legal transfer, at least to the Crown. In sum, the preamble recognizes that Indians hold rights to unceded lands in their possession throughout British dominions in North America. 3

This is confirmed at several points in the ensuing provisions. In par. 1, the colonies are forbidden to issue survey warrants or patents "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."

Again in par. 3, the text orders the removal of settlements "upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid". In both passages, reserved lands are identified as unceded lands, and the words "as aforesaid" refer us back

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3 See St. Catherine's Milling and Lumber Company v. R. (1887) 13 S.C.R. 577, where Strong J. (dissenting) said, at pp. 623-4, that under the Proclamation of 1763, "Indian lands not ceded to or purchased by the king, i.e., lands not surrendered, are expressly described in terms as lands 'reserved to the Indians'; the two expressions, 'lands not ceded to or purchased by the king', and 'lands reserved to the Indians', being expressly treated as convertible terms". See also his further statement at pp. 626-7, and the parallel remarks made by Gwynne J. (dissenting) at pp. 664 and 674. Counsel for Ontario argued against this proposition on further appeal to the Privy Council; see The St. Catherine's Milling and Lumber Company v. The Queen, Argument of Mr. Blake, of Counsel for Ontario, 49. But the Privy Council, as will be seen below, seems to have favoured the views expressed on this point by Strong and Gwynne JJ. in the Supreme Court.
to the more complete description given in the preamble. Finally, in par. 4(a) the Crown prohibits the private purchase of "any Lands reserved to the said Indians" in areas open to settlement, and lays down the procedure governing their purchase by public authorities.

The operative words in the passages quoted above were not chosen without care, as a perusal of the final working draft of the Proclamation shows. In each case they owe their presence in the text to deliberate emendations of the existing wording, most likely made by John Pownall, Secretary to the Board of Trade.\(^4\) The preamble to Part IV, as originally phrased, referred to Indians in possession of "such Parts of Our Dominions and Territories, as are occupied by or reserved to them, as their Hunting Grounds". This was altered to read "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". Corresponding changes were made in paragraphs 1, 3, and 4(a), as quoted above. The new wording emphasizes that lands reserved to Indians are precisely those in Indian possession which are as yet unceded.

2) The containment of settlement

In addition to recognizing and protecting Indian lands generally, the Crown calls a temporary halt to the indiscriminate movement of settlers into the American hinterland. Specific areas are designated as open to settlement. The remainder of British North America is sealed off for the time being, as an Indian Country.

The regions closed to settlers are described in par. 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.

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\(^4\) The draft may be seen in PRO, CO 324/21, pp. 180-90, enclosed in a draft letter from the Lords of Trade to Halifax, dated 4 October 1763. On the author of the alterations, see Alvord, Mississippi Valley, I, 201, n. 361; Humphreys, "Proclamation of 1763", 254.
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.

The Indian Country is defined in a negative fashion as encompassing all territories lying beyond certain stipulated limits. These limits are: a) the boundaries of the three new colonies, that is Quebec, East Florida and West Florida; b) the limits of the Hudson’s Bay Company’s territories, namely Rupert’s Land; and c) the sources of rivers falling into the Atlantic Ocean from the west and north-west, which refers to the watershed formed by the Appalachian mountain chain. Areas beyond these confines are set aside for Indian use, and barred to settlers. It follows that the lands open to occupation are exclusively those comprised within Quebec, the Floridas and Rupert’s Land, as well as areas lying between the Appalachians and the Atlantic.

These provisions are reinforced by others found in the opening paragraph. There the Crown prohibits Quebec and the Floridas from granting lands beyond their boundaries (a statement of the obvious), and the other colonies from patenting lands beyond the Appalachian barrier. The latter restriction, unlike the first, had teeth. Such colonies as New York, Pennsylvania, Maryland, Virginia, North Carolina, and Georgia had respectable claims to extensive territories lying west of the Appalachians, and asserted the power to grant lands there.

The text indicates that this barrier to settlement was not considered permanent. The restriction on trans-montane grants in par. 1 is said to be “for the present, and until Our further Pleasure be known”, and the description of the Indian Country in par. 2 is accompanied by the proviso “for the present as aforesaid”. The inference is that at some future stage the Crown would begin to open these regions to colonization, subject to the provisions requiring cession of Indian lands. In fact, portions of the

5 See discussion in Chapter 17.
Indian Country were released for occupation as early as 1768 by virtue of separate Indian treaties concluded at Hard Labour and Fort Stanwix.

One aspect of this scheme requires particular attention. As we will see, the lands recognized as reserved for Indians are not confined to the Indian Country. 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 the 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 the 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.

3) The geographical scope of the recognition

Which territories are covered by the recognition of Indian land rights in the preamble? We will deal here only with the position in October 1763, deferring to later questions arising from subsequent British expansion. The preamble treats as reserved lands "such Parts of Our Dominions and Territories" as are unceded. The phrase is not confined to any specific sector of British North America. No area or colony is excluded a priori; the question turns upon whether Indians still possess unceded lands there. Thus the rule potentially covers the new colonies of Quebec and the Floridas, the old colonies of Rupert's Land, Newfoundland, Nova Scotia, and the Thirteen Colonies to the south, as well as the unorganized territories lying to the west and north, claimed by the Crown but not falling within the limits of any colony.

6 See Chapter 21.
It might be thought, nevertheless, that the reserved lands referred to in the preamble are limited to the area set aside for the Indians in the second paragraph (the Indian Country), which is defined so as to exclude Quebec, the Floridas, Rupert's Land and large parts of the Atlantic colonies. Several factors speak against this interpretation. The preamble treats the Indian possession of reserved lands as an already-existing situation, not one resulting from the Proclamation. But a reference in the third paragraph seems decisive. The text here orders the removal of settlements upon "any Lands within the Countries above described", which refers to the Indian Country delineated in par. 2, and also "upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid". This indicates that reserved lands are not exhausted by those described in par. 2, and directs us back to the preamble for a complete description.

Similarly, the first paragraph forbids the old colonies to grant patents not only for "Lands beyond the. . . Sources of. . . Rivers which fall into the Atlantick Ocean from the West and North-West", which anticipates the description of the Indian Country, but also "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". Again the text assumes that reserved lands are not restricted to the Indian Country and takes the absence of a cession to the Crown as the mark of continuing Indian rights.

Finally par. 4(a) prohibits private persons from purchasing "any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement". As seen above, the areas considered proper for settlement were precisely those excluded from the Indian Country. If no reserved lands existed outside of this Country, the provision would make no sense.

7 Emphasis added. 8 Emphasis added.
We will consider, in subsequent chapters, detailed historical evidence that the Indians were considered to hold reserved lands under the Proclamation in areas excluded from the Indian Country. Here we will briefly review certain evidence concerning the Proclamation's application in Quebec shortly after its issue. This concerns a dispute over the right of British subjects to trade freely with the Indians at certain posts (called the "King's Domain") established under the French regime at such places as Tadoussac, Chicoutimi, and Sept Isles, situated on the north shore of the St. Lawrence River within the boundaries of the colony. The right to trade there had been leased out in the past by the French government, and similar leases were issued by the British authorities after the conquest. The Proclamation's declaration of a free trade with the Indians cast doubt on the leases' validity. So certain Quebec merchants, Messrs. Allsopp, Chinn and others, decided to ignore them and to establish their own posts at the places in question. The Council at Quebec responded on 3 June 1766 with the order that "if Mr. Allsopp or any other person erect Buildings upon the Lands reserved to the Savages in this province by His Majestys Proclamation they shall be prosecuted with the utmost Rigour of the Law". The Attorney-General of Quebec was then requested to consider legal methods by which such buildings might be destroyed. His reply to the Governor is enlightening:

I have read and considered His Majestys said Proclamation, and as it is his pleasure to reserve under his Sovereignty, Protection and Dominion for the use of the Indians all the Land & Territory called the Kings Domaine possessed by the Indians and has Strictly forbid on pain of his Displeasure all his Subjects from making any purchases or Settlements whatever or taking possession of any of those Lands without especial Leave and Licence for that purpose first obtained; I am of opinion that the persons who have presumed to erect any Buildings

9 See the materials relating to Nova Scotia in Chapter 15 and to Quebec in Chapter 16.
10 See the account given in Governor Murray to the Lords of Trade [?], 26 May 1767; LBC, VI, 2760-3, citing PAC, C.O. 42/6, p. 117 seq.
11 Minutes of Quebec Council (typed transcripts); PAC, RG 1, EL, Vol. 3, p. 217.
12 Ibid., p. 261; Minutes dated 31 July 1766.
on the said Lands, should be ordered by the government to take down
the same immediately and carry away the Materials; and as the
kind of offences are not only very daring but may be attended with
very dangerous Consequences, which were by the proclamation intended
to be prevented, ... I think the government may, ... legally issue
a warrant ... directed to such Number of persons as may be thought
necessary to pull down the same, and in Case of opposition the per-
sons ... may be empowered to apprehend the Delinquents and bring
them hither to be punished in the ordinary Course of Justice.13

In consequence the Council resolved that Allsopp be ordered to take down
the houses "erected on the Kings Domaine, contrary to His Majestys Procla-

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mation being lands possessed by the Indians". An explanation given of these actions by Governor Murray of Quebec

the following year is equally revealing. Writing to the Lords of Trade

he states:

The lands of the Kings Domain were never ceded to nor purchased
by the French King, nor by His Britannick Majesty; but by compact
with the savages inhabiting the said lands, the particular Posts or
Spots of ground, whereon the Kings buildings are erected and now
stand, were ceded to the French King, for the purpose of erecting
storehouses & other conveniences for the Factors, Commis or Servants
employed to carry on the trade; and the savages residing within the
limits of the Domain, & who resort to the said Posts of His Majesty
at certain seasons of the year, were adopted as Domicile Indians
under the sole & immediate protection of the King, & so remained
till the reduction of the Province, & a Missionary was sent to re-
side constantly among them. The lands of the Domain therefore, are
to all intents & purposes reserved, as hunting grounds to the savages,
of which they are ever jealous, on the least appearance of an en-
croachment even amongst themselves.

With what propriety therefore, could the Governor have complyed
with Mr. Alsops petition for grants of land there? would it not have
been in direct contradiction to His Majs. Proclamation? & I flatter
myself the contempt he has shown to the said Royal Proclamation &
his Maj's. Government; will be far from entitling him to the favour
he claims from the Kings servants here.15

The Governor and Council of Quebec, then, took the view that lands
recognized as reserved to the Indians in the Proclamation were not confined
to the Indian Country described in par. 2, but included unceded Indian
lands within the colony of Quebec.

13 Opinion of Suckling A.-G. Que., dated 1 August 1766; ibid., pp. 264-5.
14 Order of 8 August 1766; ibid., p. 266.
15 Governor Murray to Lords of Trade, 26 May 1767; LBC, VI, 2766. The
Quebec Council's action was eventually approved and confirmed by Im-
perial Order in Council dated 26 June 1767, published in Quebec Ga-
zette, 20 October 1768; PAC, RG 4, D1, Vol. 2.
4) Judicial authorities

Case-law on this point is mixed. In the early case of *Mitchel v. U.S.* (1835), the United States Supreme Court held that the Proclamation's recognition of Indian land rights applied to the colonies of East and West Florida, thus holding, in effect, that it extended beyond the Indian Country, from which the Floridas are specifically excepted. Baldwin J., speaking for the court concluded:

The proclamation of October, 1763, ... must be taken to be the law of the Floridas till their cession by Great Britain to Spain in 1783. ... It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize.

The scope of the Proclamation was considered by the Privy Council in *St. Catherine's Milling and Lumber Company v. R.* (1888). The question there was whether a cession made to the Crown by the Salteaux Indians of their interests to an area partly within Ontario redounded to the benefit of that Province (as regards the Ontario sector), or rather the Dominion, which had concluded the treaty of cession. Following the treaty, the Dominion issued a timber license to the appellant company for part of this area, acting in pursuance of rights purportedly deriving from the cession. Ontario disputed the Dominion's right to do so. In determining the effects of the cession, the Privy Council examined the nature and origins of the Indian title ceded, tracing it back to provisions of the Proclamation of 1763. Lord Watson, speaking for the Board, gives a detailed summary of the preamble and first two paragraphs of Part IV, and describes the regulation of Indian land purchases in par. 4(a). He concludes:

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17 *14 A.C. 46 (P.C.).
18 Dominion Treaty No. 3 of 1873, known as the North West Angle Treaty.
The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. 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 surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. 19

Lord Watson attributes the Indian land interests in question to "general provisions" favouring "all Indian tribes" living under British sovereignty. This suggests reliance upon the general recognition afforded to Indian land rights in the preamble and par. 1, which he quotes. He cannot be referring simply to par. 2, which covers only a restricted area.

It seems relevant that the Privy Council does not discuss the geographical scope of par. 2, or attempt to locate the disputed lands in terms of the area delineated there, as an exclusive reliance on that paragraph would have suggested. 20 Indeed it is not entirely clear whether the lands fell within the Indian Country. The timber license in question covered territories situated south of Wabigoon Lake, between Lake Superior and Eagle Lake. 21 The area falls within the drainage basin of Hudson's Bay, and prima facie within the territories bestowed upon the Hudson's Bay Company by its Charter of 1670. The area was claimed by the Company during the nineteenth century, and was commonly attributed to them. Whether their claim to this area was valid is another question, which we have reviewed earlier. 25 The point is that the Privy Council does not even mention the matter; yet were the Company's claims good, the lands in dispute would not be covered by par. 2 of the Proclamation, which excludes "the Territory granted to the Hudson's Bay Company". We may infer that the

19 At 54; emphasis added.
20 By contrast, Boyd C. in the trial court, states that the lands in dispute are embraced within the area delineated in par. 2; (1885) 10 O.R. 196 (Ont.Ch.Div.) at 226. In the Supreme Court, Strong J. (dissenting) specifically adopts the same view; (1887) 13 S.C.R. 577 at 627-8.
21 (1885) 10 O.R. 196 (Ont.Ch.Div.) at 203, and also 197-8.
22 See Map 1.13, which shows the location of Wabigoon Lake in terms of the watershed.
23 See Map 1.4. 24 See Map 1.23. 25 See Chapter 8.
Privy Council based its recognition of an Indian title to the disputed lands upon general provisions of the Proclamation viewed as applicable throughout British dominions in America.

More recent cases dealing with the effects of the Proclamation in Rupert's Land and old Nova Scotia (which was implicitly excluded from the Indian Country), have adopted conflicting interpretations. In Warman v. Francis (1958), it was said that while the Proclamation of 1763 was mainly concerned with the boundaries and governments of Quebec, the Floridas and Grenada, it "also dealt with the treatment of and Reserves for Indians in all other territories in North America and therefore included Nova Scotia as it then was". Remarks to the contrary found in Doe d. Burk v. Cormier (1890) were treated as erroneous. The Chief Justice of Nova Scotia, MacKeigan, has lent support to this view. In R. v. Isaac (1975), he held that

the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital, acknowledged that in all colonies, including Nova Scotia, all land which had not been 'ceded to or purchased by' the Crown was reserved to the Indians as 'their Hunting Grounds'.

Nevertheless this opinion has not enjoyed unanimous support. As seen earlier, the decisions regarding Rupert's Land embody a similar mixture of views.

26 The old province of Nova Scotia fell within the drainage area excluded from the territory delineated in par. 2; see discussion in Chapter 17.
27 20 D.L.R. (2d) 627 (N.B.S.C., Q.B.div.) 2 at 634.
28 30 N.B.R. 142 (N.B.S.C.) at 148. The remarks concerned New Brunswick, which in 1763 was part of Nova Scotia, and was largely excluded from the scope of par. 2.
29 20 D.L.R. (2d) 627 at 639.
32 See discussion in Chapter 12, Section 2.
5) The legal character of the recognition

Assuming for present purposes the Proclamation's validity, what weight does its preambulatory recognition of Indian title carry? Generally speaking, the reference to a legal rule or juridical state of affairs in the recital of an enactment constitutes good authority on the matter, but is not absolutely binding on a court, which may disregard erroneous references.

An interesting parallel is afforded by the case of Oyekan v. Adele (1957), where the Privy Council examined the consequences of the cession of Lagos to the Crown in 1861. Lord Denning, speaking for the Committee, quoted the preamble to a Nigerian ordinance which recites:

And whereas the effect of the said Treaty [of 1861 between Great Britain and the Oba of Lagos] was that, while the private rights of property of the inhabitants were to be fully respected, there passed to the Crown whatever rights the Oba possessed including whatever proprietary rights the Oba possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects,

Lord Denning commented: "Their Lordships regard that recital as an authoritative statement by the British Crown of the effect of the treaty." By parallel reasoning, the recital in the Proclamation of 1763 of a state of affairs whereby unceded lands possessed by Indians are reserved for their use, might be regarded as an authoritative statement of the effects attending the Crown's acquisition of American territories, whether by the cession of 1763 or by virtue of prior acts.

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33 See Chapters 18 and 19.
37 As found in the original; the part quoted in the judgment is slightly abbreviated.
38 At 789.
In fact, the Proclamation's recognition of indigenous rights over unceded lands is not confined to the recital, but is reiterated in several operative provisions. Paragraph 1 prohibits land grants "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."\(^{39}\) Similarly, par. 3 orders the removal of settlements "upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid. . .\(^{40}\) These limitations pertain in their terms to lands reserved for Indians, which are characterized as lands not ceded to the Crown. Their scope and concrete application are determined by that characterization.Were it not true, as a matter of law, that unceded Indian lands constituted reserved lands, these provisions could not be put into effect.

Where a statutory provision assumes the existence of a juridical situation or rule and draws therefrom its sense and efficacy, a court must normally give effect to that assumption so far as is necessary to implement the provision, even where the correctness of the assumption may be doubted. In Norton v. Spooner (1854),\(^{41}\) the Privy Council, in determining the question whether adultery was an actionable wrong in British Guiana, considered the effect of a local enactment providing for jury trials in actions for, \textit{inter alia}, "criminal conversation with any wife". The Board held that when an Act declares that an action for a certain wrong shall be tried in a particular way, it would appear impossible to hold that the cause of action thus recognized should be treated as no cause of action at all. "This goes far beyond a recital in an Act of legislation", remarked the Board, "which may, according to circumstances, be of more or less weight, and be often not conclusive. This is an express and distinct enactment. . .\(^{42}\)."

\(^{39}\) Emphasis added. \(^{40}\) Emphasis added.

\(^{41}\) 9 Moo.P.C. 103 at 128-9, 14 E.R. 237 (P.C.).
Likewise, in *Labrador Company v. R.* (1893), the Privy Council was called upon to decide whether a supposed seigneurie located at Mingan in Quebec had any legal basis. So doing, it considered the effect of the following section of the Seigniorial Amendment Act of 1856:

Inasmuch as the following fiefs and seigniories, namely: Perthuis, Hubert, Mille Vaches, Mingan, and the island of Anticosti, are not settled, the tenure under which the said seigniories are now held by the present proprietors of the same respectively, shall be and is hereby changed into the tenure of franc aleu roturier.

The Board found that prior to 1854 there was little evidence of the existence of the Mingan seigneurie. Nevertheless it considered itself bound by the above-quoted section, observing:

This is an absolute statement by the legislature that there was a seigneurie of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it.

The provision applied by the Board consists of a recital referring to certain seigneuries, and an operative portion altering their tenure. The recital, strictly speaking, does not state that a seigneurie of Mingan exists, but clearly assumes that it does. The operative part acts on this assumption and regulates the seigneurie's status. In a similar fashion, the preamble to Part IV of the Proclamation of 1763 presupposes that unceded lands possessed by Indians are reserved to them, and the operative sections proceed to regulate their position.

We may conclude that the recognition of Indian title expressed in the preamble and embodied in paragraphs 1 and 3 is valid and binding, at least to the extent that the Crown possessed the prerogative power to bind the territories in question, a question to be discussed later.

43 Prov. of Canada, 19 Vict. c. 53, s. 10.
44 [1893] A.C. 104 at 123.
45 At 122.
46 At 123.
47 See Chapter 18.
CHAPTER 14

THE INDIGENOUS PEOPLES AFFECTED

In determining the scope of the provisions in Part IV of the Proclamation, we must first ascertain the identity of the persons affected. The preamble refers to "the several nations or Tribes of Indians, with whom We are connected, and who live under Our Protection". On eleven subsequent occasions, the text speaks of the "said Indians",\(^1\) in each case referring back to this description and incorporating whatever limits are implicit in it. Several questions arise: 1) does the term "Indians" comprehend indigenous Americans generally, including Eskimos or Inuit,\(^2\) or are the latter excluded; 2) does the description extend to all Indians inhabiting North American territories held by the Crown, or is it confined to certain groups among these.

1) The Eskimo peoples

In modern parlance the word "Indians" is generally taken to refer to indigenous Americans other than Eskimos.\(^3\) But it appears that this restricted usage was not current in the 18th and 19th centuries, when the term "Indian" was applied to indigenous American groups generally. Thus in Reference re Term "Indians",\(^4\) the Supreme Court of Canada, after an extensive

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1 In paras. 1, 2, 3, 4 (seven times) and 5.

2 The latter term, which in the Eskimo language means "people", and more specifically the Eskimo people, is now coming into common usage, and will be used here interchangeably with the more traditional term; see Crowe, History of Original Peoples, 20-1.

3 Thus the Oxford English Dictionary, V, (part 2), 205 gives the following applicable meaning for "Indian": "A member of any of the aboriginal races of America or the West Indies; an American Indian", with the subsidiary note: "The Eskimo, in the extreme north, are usually excluded. . . ."

historical review, held unanimously that "Indians", as used in section 91 (24) of the British North America Act, 1867,\(^5\) encompassed Eskimos. Significantly the principal opinion\(^6\) considered and rejected the contention that the phrase, "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection", as used in the Proclamation of 1763, did not cover Eskimos.\(^7\) The latter discussion is obiter, perhaps, but the evidence reviewed in the judgment amply supports the finding.\(^8\) Numerous examples are given, drawn from official documents of the 18th and 19th centuries, where Eskimos are explicitly described as Indians, or where the hybrid expression "Eskimo Indians" occurs. Eighteenth century documents cited include the following:\(^9\) reports of the Lords of Trade to His Majesty of 8 June 1763 and 16 April 1765; proclamations issued by various Governors and Commanders-in-Chief in Newfoundland, dated 1 July 1764, 8 April 1765, 10 April 1772, 14 May 1779, 30 January 1781, and 15 May 1784;\(^10\) a report by Captain Crofton to the Governor of Newfoundland of 1798; and a report by a Special Committee of the Council to the Governor of Quebec, Nova Scotia and New Brunswick of 1788. The reference found in the Lords of Trade Report of 8 June 1763 to "the Esquimeaux Indians"\(^11\) is of particular

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5 30-31 Victoria, c. 3.

6 This is the joint opinion of Duff C.J., Davis J., and Hudson J. Separate opinions were written by Cannon J. and Kerwin J., while the sixth judge, Crocket J., concurred with all three opinions.

7 At 115. The judgment dismissed the contentions a) that the words "nation" and "tribe" were not normally used in reference to Eskimos, and b) that the latter were not connected with or under the protection of the Crown at the time.


9 Excerpts can be found in the judgment, [1939] S.C.R. 104 at 110-2.

10 This date is misprinted in the judgment, at p. 112, as 15 May 1774; the proclamation in question can be seen in *LBC*, III, 1307.

11 See the text in *CD*, I, 134-5.
interest, because later in the Report the authors discuss "that Territory in North America which... is proposed to be left, under Your Majesty's immediate Protection, to the Indian Tribes for their hunting Grounds",\textsuperscript{12} the very proposal subsequently embodied in the Royal Proclamation.

It is also noteworthy that Webster's American Dictionary of the English Language of 1855 defines the "Esquimaux" as a "nation of Indians inhabiting the northwestern parts of North America",\textsuperscript{13} and that certain other 19th century dictionaries and scholarly works classify Eskimos similarly.\textsuperscript{14} Only in the 1913 edition and certain subsequent editions of Webster's New International Dictionary are Eskimos excepted from the definition of Indians.\textsuperscript{15} The restricted sense of the term thus appears to have developed comparatively recently.

2) "Connection" and "Protection"

The preamble to Part IV states that it is just and reasonable that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

The description clearly advert to Indian groups who inhabit British territories, and excludes those who do not, as the reference to possession of "Parts of Our Dominions" indicates. It is less apparent whether all such groups are encompassed, or only some. Two main interpretations are possible. The first holds that the description covers groups "with whom We are connected" and also those "who live under Our Protection." Either characteristic suffices. The former phrase envisages, perhaps, a factual link with British authorities, but the latter extends the coverage to all Indians.

\textsuperscript{12} Ibid., 139.
\textsuperscript{13} Quoted in Reference re Term "Indians" [1939] S.C.R. 104, per Kerwin J. at 119.
\textsuperscript{14} Ibid., 120-1.
\textsuperscript{15} Ibid., 120-1. The 1923, 1925 and 1927 editions likewise exclude Eskimos, but the 1934 edition reinstates them as Indians.
inhabiting territories over which the Crown asserted sovereignty. Under the second interpretation, the description covers only Indians living under the Crown's sovereignty, who in addition possess some factual connection with the Crown, whether by way of formal alliance or informal links of friendship and trade. Both characteristics are required. Indigenous groups unknown to the Crown or on unfriendly terms with it might be excluded, despite their occupation of British territories.

Grammatically there is not much to choose between the two interpretations. The manner of expression, nevertheless, suggests an intention to protect all Indians who in fact possess "such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them...", irrespective of their factual ties with British authorities. This construction is supported by a review of certain subsequent provisions in Part IV which refer back to the description of Indians given in the preamble. Paragraph 2 reserves under Crown sovereignty "for the Use of the said Indians" all the lands not comprised within Quebec, the two Floridas and Rupert's Land, and lying westward of the Atlantic watershed. Most of this territory was comprised within the cession effected in the Treaty of Paris, and was occupied by Indians previously connected with the French, some of whom had, earlier in 1763, risen in arms against the British in Pontiac's War. If par. 2 covers only Indians connected with the Crown, then either of two results follow: 1) the entire territory described there 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 to 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.

Other peculiar consequences would flow from a construction limiting the Indians covered to those factually connected with the Crown. Under par. 4, while private purchases of land from connected groups would be prohibited, unconnected Indians would be left open to the "great Frauds and Abuses" mentioned there. Again the provision in par. 4 declaring the Indian trade open would not apply to many Indian groups within the ceded territories, in whose hands the bulk of the fur trade lay. Thus a view under which the preamble to Part IV refers only to a restricted category of Indian groups among those actually inhabiting British territories cannot easily be reconciled with the ensuing provisions in Part IV, which clearly envisage a broader context.

3) Judicial views

The question has elicited varying opinions in the courts. The most authoritative is that enunciated by the Privy Council in St. Catherine's Milling and Lumber Co. v. R., where Lord Watson, speaking for the Board, paraphrased the preamble of Part IV as referring to "the several nations and tribes of Indians who lived under British protection". Later he described the interest in land held by the Indians in question "to the general provisions made by the royal proclamation [of October 1763] in favour of all Indian tribes then living under the sovereignty and protection of the British Crown". The range of Indians covered is treated as coextensive with the category of Indians living under British sovereignty. These views

16 (1888) 14 A.C. 46 (P.C.) at 53, emphasis added.
17 Ibid., 54, emphasis added.
were echoed by the Supreme Court of Canada in Calder v. Attorney-General of British Columbia. In particular, Judson J., with Martland and Ritchie JJ. concurring, quotes the latter passage from the Privy Council's decision in the St. Catherine's case, and goes on to describe the preamble to Part IV of the Proclamation as referring to "the several nations and tribes of Indians, who lived under British protection."

A different emphasis is displayed in a dissenting opinion by Sheppard J.A., in R. v. White and Bob, which has been cited in a number of discussions. He acknowledges that "the Proclamation refers to lands to the west used by 'said Indians', and therefore to lands used by Indians with whom the Crown was then connected or who lived under the Crown's protection", but in effect holds that the Proclamation only covered Indian groups and territories actually known to the Crown in 1763. If this view rests on the assumption that lands not specifically known to the Crown could not have been British, this appears incorrect. Legally there is nothing to restrain the Crown from laying claim to territories not as yet explored by its representatives, and in fact many colonial charters did precisely that. If the learned judge means to say that the Proclamation could not apply to indigenous peoples not known to British authorities at the time, this seems equally doubtful. It can hardly be contended that general words in an enactment describing a class of persons apply only to individuals of that class known to the enactors at the time, in the absence of language to that effect. So long as an individual is covered by the words used, the act applies to him, even if the enactors could not have been aware of his

19 Ibid., 152. 20 Ibid., 153.
21 (1964) 50 D.L.R. (2d) 613 (B.C.C.A.) at 620-1.
23 At 621, emphasis added.
24 See discussion in Chapter 3.
existence. A contrary view would cripple most legislation.

Another interpretation is advanced by the Privy Council in Re Labrador Boundary. Viscount Cave L.C., speaking for the Board, states there that the Nascopie (Naskapi) and Montagnais inhabiting the coast of Labrador did not number among the Indians described in the preamble. Several reasons are given, two of which are relevant here. The first is this:

it appears from the report of the Lords of Trade, dated June 8, 1763, on which the Proclamation was based, that the Indians so described consisted of those tribes of the Six Nations who were settled round the great lakes or beyond the sources of the rivers which fell into the River St. Lawrence from the north.

The second reason is somewhat different:

Further, the Nascopies and Montagnais, so far as they had taken any 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.

The first rationale has a number of deficiencies: 1) The location of the Six Nations, or Iroquois Indians, is misconceived. Their main area of settlement in 1763 lay south of Lakes Ontario and Erie, and certainly not beyond the sources of rivers falling into the St. Lawrence river from the north. 2) The proposition that general words employed in a public legal instrument can be restricted in scope by confidential ministerial correspondence preceding it cannot be sustained under ordinary rules of statutory construction. 3) The Report of the Lords of Trade of 8 June 1763 does not in fact refer to the Six Nations Indians in its discussion of Indian lands, speaking there generally of "the Indian Tribes". The Six Nations are mentioned earlier in the Report, but in a description of the advantages attending the fur trade, and then only incidentally. 4) The view that the preamble to Part IV refers exclusively to the Six Nations Indians finds nothing to support it in the wording of the Proclamation itself or indeed, as we will see shortly, in the travaux préparatoires, or in contemporary exposition.

26 Ibid., 421.
27 CR, I, 139-40.
28 Ibid., I, 136.
The second argument presented by the Privy Council implies that the preamble to Part IV covers only Indians who were connected with or protected by the Crown prior to the cession of 1763, and excludes Indians residing in the ceded territories who were formerly allied with or protected by France. This remarkable proposition ignores the fact that the Proclamation was issued eight months after the Treaty of Paris was signed and explicitly addresses itself to the situation arising from that instrument. Its reference to Indians under the protection of the Crown cannot be construed, in the absence of specific words, to refer only to those fulfilling that criterion prior to 10 February 1763.

4) Travaux préparatoires

These conclusions are supported by an examination of the documentation connected with the Proclamation's drafting. As mentioned above, it would be improper to restrict or extend the scope of that instrument by reference to such papers. But they furnish useful insights into the historical situation to which the Proclamation was addressed, and the mischief it was designed to remedy. In a letter of 27 January 1763 from the Earl of Egremont, Secretary of State for the Southern Department, to Sir Jeffery Amherst, Commander in Chief in North America, Egremont explains that the King has it

much at heart to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the Lands they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation: and I may inform You that a Plan, for this desirable End, is actually under Consideration.

At the heart of the plan, then, is a perception of the need to reconcile what are broadly termed "the Indian Nations".

29 Davey C.J.B.C. appears to misunderstand the effect of this argument when he cites the Labrador Boundary case as authority for the proposition that the preamble covers both the former French allies and the British ones; but his words are somewhat unclear. See Calder v. Attorney-General of British Columbia (1970) 13 D.L.R. (3d) 64 (B.C.C.A.) at 68.

30 "Fitch Papers", CCHS, XVIII, 223.
On 16 March 1763, Egremont sent a circular letter to the Superintendent of Indian Affairs for the Southern Department and the Governors of Virginia, North Carolina, South Carolina and Georgia. The letter commences:

As the Removal of the French & Spaniards from the Countries which extend from the Colony of Georgia to the River Mississippi, & which are now ceded to His Majesty, will undoubtedly alarm, & increase the Jealousy of the neighbouring Indians, the King judges it to be indispensably necessary to take the earliest steps for preventing their receiving any Impressions of this kind, & for gaining their Confidence and Good Will, without which it will be impossible for this Nation to reap the full benefit of it's Acquisitions in that part of the World.

Egremont states that the Spaniards and French had inculcated the idea among the Indians "that the English entertain a settled Design of extirpating the whole Indian Race, with a View to possess & enjoy their Lands...". In order to dispel this impression, which the recent cession might seem to confirm, Egremont directs that the officials concerned should invite the Chiefs of the Creeks, Choctaws, Cherokees, Chickasaws and Catawbas to a meeting, there to quiet their apprehensions and, among other things, assure them of "a continual Attention to their Interests" and "a Readiness upon all occasions to do them Justice". It is interesting that the disaffection of Indians in the southern district was thought to extend to all the main groups in that area, including not only tribes formerly connected with France or Spain, but also those holding long-standing ties with the English, such as the Catawbas and Cherokees.

This circular letter was referred to in a communication sent by Egremont to the Board of Trade on 5 May 1763, formally initiating the process leading to the Board's drafting of the Royal Proclamation later that year. Egremont solicits advice on, among other things, preserving the internal peace of North America "against any Indian Disturbances". He indicates that the method favoured by His Majesty of "conciliating the Minds of the Indians" involves

protecting their Persons & Property & securing to them all the Possessions, Rights and Priviledges 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. . .

Once again the need for conciliation and for protection of the Indians and their property is seen as a generalized problem requiring comprehensive measures. The question is described as among those which "relate to North America in general", and although the communication is primarily concerned with the newly ceded territories, it seems clear that the problem of security was viewed as extending beyond those areas to the old territories as well.

John Pownall, Secretary of the Board of Trade, in a draft report prepared in May 1763, discusses the interest of Great Britain relative to its commerce and political relations with what are termed "the various nations and tribes of Indians now under your Majesty's dominion and protection". In the ensuing report to the Secretary of State of 8 June, the Board of Trade speaks of the fur and skin trade as involving "all the Indians in North America", again "all the Indians upon that immense Continent", and again "all the Indian Tribes upon the Continent of North America". These phrases reflect the broad perspective in which the question was perceived. The report later refers to the territory which is proposed to be left "under Your Majesty's immediate Protection, to the Indian Tribes for their hunting Grounds" and in which "a free Trade with the Indian Tribes" should be allowed.

Egremont responded to this report in a letter to the Board of Trade of 14 July 1763. He expresses there His Majesty's approval of the proposal that for the present all the lands beyond certain bounds be left unsettled "for the Indian Tribes to hunt in; but open to a free Trade". Replying to this on 5 August, the Board recommended that a Proclamation be immediately

33 Ibid., 129.
34 See text in Humphreys, "Proclamation of 1763", 241 at 259.
35 CD, I, 136. 36 Ibid., 139. 37 Ibid., 148.
issued stating that all the territory within certain fixed bounds would be left "free for the hunting Grounds of those Indian Nations Subjects of Your Majesty, and for the free trade of all your Subjects". 38

Writing on the same date to the Superintendent of Indian Affairs for the Northern District, Sir William Johnson, the Lords of Trade refer to "the great number of hitherto unknown tribes and nations, which are now under His Majesty's immediate protection", and make known their proposal to issue a proclamation creating a territory closed to land and settlements, and "free for the hunting grounds of the Indian Nations", and for trade. 39 It is noteworthy that the Board speak of Indian tribes which, although unknown up to that time, have fallen under the Crown's protection. Thus for an Indian group to be "protected", it was not thought essential that it be actually known to the authorities, so long as it occupied lands claimed by the Crown.

The new Secretary of State, the Earl of Halifax, replied to the Board of Trade on 19 September, expressing His Majesty's approval of the idea of issuing a proclamation to establish an Indian reserve, and conveying His opinion that the instrument should also, inter alia, "prohibit private Purchases of Lands from Indians" and "declare a free Trade for all His Majesty's Subjects with all the Indians, under Licence, Security, and proper Regulations". 40 He later emphasizes how important it is that "a free Trade with all the Indians of North America" 41 should be swiftly established. It was this letter which led to the drafting of the Royal Proclamation in its final form.

In summary, then, the Proclamation's travaux préparatoires do not support the view that the problems relating to North American Indians were perceived by the Crown as confined to one or more particular areas or groups of indigenous peoples. Rather they suggest that the "mischief" was considered to be generalized, and common to all Indians living under British protection.

38 Ibid., 152. 39 NYC, VII, 535.
40 CD, I, 154, emphasis added. 41 Ibid., 155, emphasis added.
5) Contemporanea expositio

The question of which Indian groups were covered by the preamble to Part IV apparently did not arise in the period immediately following its appearance, and little has been found in the way of contemporaneous exposition. Nevertheless a Proclamation respecting trade with the Indians issued by Governor Murray of Quebec in January 1765 makes a number of interesting assumptions. The instrument provides that whereas His Majesty has declared in the Proclamation of 1763 "That the Trade with the several Nations or Tribes of Indians, with whom he is connected, and who live under his Protection, should be free and open to all his Subjects whatever", and further that whereas "all Hostilities with the several Indian Nations who lately appeared in Arms against His Majesty, are ceased, and a friendly Intercourse between His Majesty's Subjects and them is thereby happily restored", it has been thought fit to issue this Proclamation declaring, among other things, "all Intercourse and Trade with the several Indian Nations living under His Majesty's Protection, free and open to all his Subjects; under the Restrictions mentioned in His Majesty's said Royal Proclamation". Two points may be noted. While the recital refers to Indians connected with the Crown and living under its protection, the ensuing provision speaks only of Indians living under the King's protection and drops the reference to "connection", apparently on grounds of redundancy. The second point is that the trade provisions of the Proclamation of 1763 are interpreted as extending to Indian groups who participated in Pontiac's War, and who, in that respect, were hardly "connected" with the Crown at the time the Proclamation was issued. It is also significant that the licence form used in Quebec for the

42 The Proclamation, which is undated, was presented in the Council at Quebec City on 22 January 1765 and printed in the Quebec Gazette on 31 January 1765; see the Minutes of the Council at Quebec, typed transcripts, PAC, RG I, E I, Vol. I, pp. 116-7, and RPAC, 1918, Appendix C, pp. 402-3. The latter text is followed here.

43 Emphasis added.

44 Emphasis added.
Indian trade in 1766 describes the effect of the Governor's Proclamation of January 1765 in the following terms: "all intercourse and Trade with the Several Indian Nations living under His Majesty's Protection was declared to be Free and open to all His Subjects, under the Restrictions mention'd in His Majesty's Royal Proclamation". 45

In conclusion, then, the category of Indian groups described in the preamble to Part IV of the Proclamation encompasses all indigenous groups occupying territories claimed by the British Crown in North America in October 1763, irrespective of whether these were specifically known to the Crown, allied with it, or factually connected with it. This interpretation flows naturally from an examination of the various provisions in Part IV incorporating the preambulatory description, and it has been accepted in a number of authoritative judicial decisions. It is consistent with the extent of the "mischief" perceived by the Crown in North America and is supported by contemporaneous exposition. The question of whether the preamble covers not merely Indians living on British territories at the time of the Proclamation's issue but also any Indians in that position at any time during the Proclamation's life is a distinct matter which will be considered in a later chapter. 46

46 See Chapter 21.
CHAPTER 15
THE COLONIES COVERED

Which American colonies does Part IV of the Royal Proclamation apply to? With a few exceptions, the provisions do not refer to colonies by name, but designate them by phrases of general scope. The restrictions upon land grants in par. 1 are said to cover Quebec and the Floridas, as well as "any of Our other Colonies or Plantations in America". Paragraph 4(a) prohibits private purchases of Indian lands "within those Parts of Our Colonies where We have thought proper to allow Settlement", and provides for their purchase for the Crown "by the Governor or Commander in Chief of Our Colonies respectively", or where these lands are located "within the Limits of any Proprietary Government" for the Proprietaries thereof. In par. 4(b), the Crown declares the Indian trade open to all its subjects, provided that a licence be obtained "from the Governor or Commander in Chief of any of Our Colonies respectively", and directs "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. Finally par. 5 provides that accused persons who are apprehended in the Indian Country shall be sent for trial "to the Colony where the Crime was committed".

What is the scope of the terms "colonies" and "plantations" as used here? Do they cover the entirety of British territories in North America, or only areas falling within the limits of colonial governments, thus excluding the unorganized hinterland? In the latter case, are British possessions with only a skeletal governmental structure, such as Newfoundland and Rupert's Land, included? It is useful, in answering these questions, to view the Proclamation against the background of contemporaneous imperial enactments.

Such expressions as "Our Colonies or Plantations in America", or more simply, "Our Colonies", far from being original, were in fact stock-phrases of
imperial legislation, with a tolerably well-understood meaning. The Act of 2 Geo. III, c. 25, (1761), refers in section 1 to certain soldiers who pur- chase estates "in any of his Majesty's colonies in America". The Act of 2 Geo. III, c. 31, (1761), extends a previous act concerning seamen to "all his Majesty's colonies in America" (section 2). Similarly 4 Geo. III, c. 11, (1764), s. 3, renews an earlier statute relating to the import of wood, "from any of his Majesty's British plantations or colonies in America". The statute 4 Geo. III, c. 15, (1764), makes numerous references to "any British colony or plantation in America", or variants on this. Likewise, 4 Geo. III, c. 26, (1764), s. 1 refers to "any of his Majesty's English colonies or plantations in America", and 4 Geo. III, c. 27, (1764), s. 5, speaks of "any of the British American colonies or plantations". Such examples might be multiplied, but enough has been said to show the highly conventional character of these expressions.¹

As any survey of such legislation indicates, the terms "colonies" and "plantations" were generally used, separately and in conjunction, in a sense broad enough to cover the full range of non-European overseas dominions held by the Crown. This is reflected in Blackstone's familiar statement that plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties.²

Blackstone treats the terms "plantations" and "colonies" as synonymous, and considers them applicable to all overseas acquisitions. Holt is explicit on this point, stating: "The legal meaning of a colony or plantation is, any land, territory, island, or possession, beyond the sea, belonging to, or under the dominion of the crown of Great Britain; . . .".³ Clark follows suit: "The British Colonies or Plantations are remote possessions or provinces of this realm,

¹ See, for example, 4 Geo. III, c. 29; 4 Geo. III, c. 34; 5 Geo. III, c. 12; 5 Geo. III, c. 45; 6 Geo. III, c. 12.
² Blackstone, Commentaries, 1st ed., I, 104 (spelling modified). The first volume was published in 1765.
occupied for the purposes of trade or cultivation." In both passages, "colony" and "plantation" are treated as interchangeable terms referring to all British dominions overseas.

Nevertheless, these terms could also derive more restricted meanings from the context. This holds true of the Proclamation of 1763 which, in several places, implicitly refers to "colonies" in the sense of territories possessing colonial governments, as opposed to the unorganized territories claimed by the Crown but not brought within any particular jurisdiction. A clear example occurs in Part IV, par. 5, which speaks of the return of criminal fugitives from the Indian Country to the colony where the crime was committed. Similarly the provisions in pars. 1, 4(a), and 4(b), which are addressed to Governors or Commanders in Chief of the American colonies, envisage the existence of at least a minimal governmental apparatus.

The expression, "Our Colonies", then, as used in the Proclamation refers either to the entirety of British territories in North America, or, in specific contexts, to those encompassed within the limits of colonial governments. On either count, it covers the entities which we are concerned with here, namely Quebec, Nova Scotia, Newfoundland and Rupert's Land. This conclusion is supported by the evidence relating to each of these colonies.

1) Quebec

The Royal Proclamation explicitly describes Quebec as one of His Majesty's colonies; thus Part IV, par. 1 speaks of "Our Colonies of Quebec, East Florida, or West Florida". The Instructions sent to Gov. Murray of Quebec on 7 December 1763 order him to implement the Proclamation's provisions protecting Indian lands, as well as its trade regulations. We know that the

4 Clark, Colonial Law, (1834), 1.
6 CD, I, 200, Article 62.
Proclamation was published at Three Rivers early in 1764, and the same was probably done elsewhere in Quebec. Further indications of the Proclamation's implementation in the colony are presented in other chapters.

2) Nova Scotia

Imperial documents of the period testify that Nova Scotia was normally referred to as a "colony". The statute 2 Geo. III, c. 24, (1761) regarding the import of salt from Europe speaks of "the colony of Nova Scotia in America". The report of the Board of Trade to the King of 8 June 1763, which led up to the issue of the Royal Proclamation, refers to "Your Majesty's Colony of Nova Scotia", and a representation from that body to the King of 5 June 1764 employs a similar expression.

We learn from a letter sent by Montagu Wilmot, Governor of Nova Scotia, to the Board of Trade on 28 January 1764 that the Proclamation of 1763 was forwarded to the colony and published there. He writes:

A few days since, I had the Honour of Your Lordship's letters dated the 10th and 11th of October; the former containing His Majesty's Commands, for publishing the Royal Proclamation relative to the new conquer'd Countries in America: which was immediately done here, and will very shortly be effected in the distant and remote parts of this Government.

Various provisions of the Proclamation were implemented in Nova Scotia. Part I, par. 7, of course, deals explicitly with the colony, providing for the annexation of the Islands of St. John's (Prince Edward) and Cape Breton. But it is particularly significant that the provisions in Part III regarding free grants of land to military men were given widespread application in Nova Scotia. The first paragraph there is addressed to "Our Governors of Our said Three New Colonies, and all other Our Governors of Our several Provinces on the Continent of North America" and the second paragraph to "the Governors and Commanders in Chief of all Our Said Colonies upon the Continent of North America", thus anticipating the terminology used in paragraph 1 of Part IV.

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7 28 January 1764, Ordonnances 1759-64, pp. 322-9; for location of publication see pp. 198-9.
8 See Chapters 13 and 16.
9 CD, I, 135.
10 LBC, V, 2215.
There is no doubt that these measures were thought to apply to Nova Scotia, and were in fact carried out there.

A representation by the Board of Trade to the King of 23 March 1764 recommends that grants of land be made on the Island of St. John (Prince Edward) to the Earl of Egmont and his family, along with a great number of land and sea officers, "due regard being had to the Intentions & abilities of the several Memorialists, as well as to Your Majesty's Proclamation of the 7th of October last; . . .".\textsuperscript{12} The Board is probably referring here to the various quantities of land stipulated for different military ranks in Part III, but it may also have in mind the measures safeguarding Indian lands in Part IV. A letter from Governor Wilmot of Nova Scotia to the Board of Trade dated 24 June 1764 requests information as to whether recent Instructions regarding land grants in any way affect the provisions regarding distribution of lands to military personnel in the Proclamation of 1763.\textsuperscript{13} There are numerous references in the minutes of Council and elsewhere to lands applied for or granted in Nova Scotia under the terms of Part III of the Proclamation.\textsuperscript{14} We find the Council resolving, on 10 September 1766, that "for the future all reduced Officers claiming lands under the King's Proclamation shall be required to make Oath that they have not obtained that Bounty in any of the Provinces, before they shall obtain the Grant."\textsuperscript{15}

Royal Instructions addressed to Governor Legge on 3 August 1773 forbid him and the Commander in Chief of the province for the time being upon the pain of our highest displeasure and of being immediately removed from your and his office to issue any warrant of survey or to pass any patents for lands in the said province, or to grant any license for the purchase by private persons of any lands from the Indians without especial directions from us for that purpose, under our signet or sign manual or by our order in our Privy Council, excepting only in

\textsuperscript{12} C.O. 218/6, p. 399; also found in LBC, V, 2228.

\textsuperscript{13} C.O. 217/21, Part I, p. 199 (overleaf).


\textsuperscript{15} C.O. 220/9, p. 258.
the case of such commissioned and non-commissioned officers and soldiers who are entitled to grants of land by virtue of our royal proclamation of the 7th of October, 1763, to whom such grants are to be made and passed in the proportion and under the conditions prescribed in our said proclamation.16

This instruction explicitly contemplates the application of the military grants provisions of the Proclamation in Nova Scotia. Interestingly it stipulates that all such grants are to be made "under the conditions prescribed in our said proclamation". While the primary reference is clearly to the particular conditions governing these grants laid down in Part III, it seems possible that the restrictions on the patenting of unceded Indian lands imposed in Part IV, par. 1, are also adverted to. We further note that the instruction forbids, for the time being, the granting of licences for the purchase of Indian lands. This apparently envisages a system whereby the Governor's powers to accept cessions under the Proclamation are delegated by licence to certain individuals, and suspends the operation of that system pending further instructions. These temporary restrictions were replaced by a new system of patenting lands embodied in circular instructions sent to a number of American colonies, including Nova Scotia, on 3 February 1774. This instrument ordains compliance with the terms laid down there,

except only in the case of such commissioned officers and soldiers as are entitled to grants of land in virtue of our royal proclamation of the 7th of October, 1763, to whom such grants are to be made and passed in the proportions and under the conditions prescribed in the said proclamation.17

There is also direct evidence that the measures concerning Indians in Part IV were thought applicable to Nova Scotia. The restrictions on grants of Indian lands are reflected in several representations of the Board of Trade and Imperial Orders in Council relating to the province. On 15 December 1763 the Board advised the King in respect to a petition for lands in Nova Scotia by the Sieur de Stumpel that the Governor should be directed to grant a tract of 20,000 acres on the St. John River, or between there and the St. Croix River, "in such a situation as the Petitioner shall Chuse (taking care that it shall

16 RI, II, #764, p. 533; for date, see p. 806.
17 RI, II, #765, p. 536.
not be upon any Lands occupied by the Indians or used as their hunting Grounds)."
An Order in Council of 10 February 1764 acted upon this advice, reiterating word for word the proviso in favour of Indian lands. A variation on this formula can be seen in several other representations made by the Board in 1764 regarding land grants in Nova Scotia, where it is said that the lands should be located in parts "not already granted or Surveyed to others, and not possessed or Claimed by the Indians." The same proviso appears in fourteen Orders in Council issued on 17 February 1766 regarding land grants in Nova Scotia, and twenty-three similar Orders in Council of 3 December 1766. This formula is of especial interest because it brackets Indian lands along with lands patented by the Crown.

We also learn from the minutes of the Council of Nova Scotia for 23 September 1766 that the trade provisions of the Proclamation were considered applicable there. On the representation that "many irregularities were committed by several persons in the Indian commerce" it was resolved that "notice be given of the King's Proclamation requiring all Traders with the Indians to take out Licences."

In the case of Nova Scotia, then, there cannot be much doubt that it was a "colony" to which the Proclamation of 1763 applied.

18 C.O. 218/6, pp. 254-8; also found in LBC, V, 2211-2.
19 LBC, V, 2219-20.
20 See the following representations by the Board of Trade to the King: 5 June 1764, C.O. 218/6, p. 423, also in LBC, V, 2215; 10 July 1764, C.O. 218/6, p. 444; 10 July 1764, ibid., p. 445.
21 LBC, V, 2221; see the list of thirteen other orders on p. 2222.
22 LBC, V, 2223; see the list of twenty-two other orders on p. 2224.
23 Nevertheless it may be noted that such provisions are not found in certain other imperial documents of this period regarding Nova Scotia land grants. See the Order in Council of 10 February 1764 regarding a land grant to John Martelhe, LBC, V, 2213-4, and the representation by the Board of Trade to the King, 15 May 1766, C.O. 218/6, pp. 496-504. This writer has not uncovered any instances where the Council of Nova Scotia explicitly adverted to the restrictions in Part IV, par. 1 of the Proclamation in making land grants during the period October 1763 - December 1766, as recorded in their Minutes; see C.O. 220/7 and 220/9.
24 C.O. 220/9, 259.
3) Newfoundland

It can be argued that Newfoundland, although clearly part of His Majesty's dominions in the broad sense, was not in 1763 considered a "colony" in the strict sense of the term, and not one of the colonies in America contemplated by the Royal Proclamation. Although Newfoundland possessed a Governor and Commander in Chief appointed by the Crown, he was only in residence during the fishing season, usually from June to the end of October. It had no council or assembly, and only a rudimentary system of justice. Settlement of Newfoundland was impeded by obstacles laid down in the Act to Encourage the Trade to Newfoundland of 1698, which treated the island more as a fishery than as a settled colony, and still constituted the virtual "constitution" of Newfoundland in 1763. The policy implicit in that statute had been reiterated by the Board of Trade as recently as 8 June 1763, in the report to the King leading up to the issue of the Proclamation. Their Lordships remark that

as no such regular civil Government is either necessary or indeed can be established, where no perpetual Residence or planting is intended; it will there be sufficient to provide for the free Trade of all Your Majesty's Subjects under such Regulations, and such Administration of Justice as is best suited to that End. Such We apprehend to be the case of Newfoundland, where a temporary Fishery is the only object. ... Thus, it may be suggested, Newfoundland can hardly be viewed as a "colony" or "plantation", if those terms are understood to designate territories in which settlement from the mother country was encouraged or at least envisaged. Thus William Grenville stated in 1789 that

Newfoundland is in no respect a British colony and is never so considered in our laws. On the contrary, the uniform tenor of our laws

25 Thus Lord Warrington remarked, in the course of the oral proceedings before the Privy Council in the Labrador Boundary Case, that Part IV of the Proclamation "did not refer to Newfoundland at all, or to any Indians there"; LBC, XI, 404-5.
27 Ibid., 52-61; Keith, First Empire, 171-2.
28 Cited in Statutes at Large (Pickering) as 10 & 11 Will. III, c. 25, under the year 1699, but listed in the Chronological Table of Statutes as 10 Will. III, c. 14, for the year 1698; McLintock, Government in Newfoundland, 5-9.
29 CD, I, 139.
respecting the fishery there, and of the King's Instructions founded upon them, goes . . . to restrain the subjects of Great Britain from colonising that island. 30

The indigenous population of Newfoundland was small, even after the annexation of Labrador, and their main areas of habitation were generally remote from white settlements. 31 Their lands were in no danger of being granted away by the Governor, who was not at this period authorized under his Commission and Instructions to issue land patents. 32 So it can be argued that there was no reason for the Indian provisions of Part IV to be applied to Newfoundland. Moreover it can hardly be supposed that Newfoundland was meant to figure among the colonies which are directed, in Part III, to grant lands to military men, as this would have been a reversal of the government's policy of discouraging settlement there.

These arguments merit careful consideration. We begin with the observation that Part IV of the Proclamation gives legal expression to policies which, as stated in the preamble, are designed to protect Indian lands throughout His Majesty's dominions and territories in North America, among which, beyond any doubt, figured Newfoundland. The measures set out there are, with a few exceptions, framed in general terms. They apply to a range of colonies differing significantly in situation, population and constitutional status, and are hardly tailored to the specific needs of any one entity. Accordingly, the degree to

30 Grenville was Home Secretary, and in charge of colonial affairs; quoted in McIntosh, Government in Newfoundland, 24-5, citing W. Grenville/Lord Fitz-Gibbon, 2 December 1789, Hist. MSS. Comm. Dropmore Papers, 13 Report, Vol. I, p. 548.

31 On the regions inhabited by the indigenous peoples of Labrador, see Gov. Palliser's answers to heads of inquiry regarding Labrador, 19 March 1766; printed in LBC, III, 959, citing B.T. Nfldl. Vol. 18, T. 80.

which these measures suit the conditions in a given colony and the manner of
their application there must vary considerably. Provinces with sparse indi-
genous populations or relatively little unceded Indian land, such as Rhode
Island or New Hampshire, would obviously be affected differently from such col-
onies as Virginia, Pennsylvania or New York. Again, indigenous peoples in
some areas clearly stood in greater need of protection than in others. These
considerations cannot affect the fact that the provisions in question are drafted
so as to apply to all colonies alike. The only question open to us is not whe-
ther a measure is suitable or politic for a given territory such as Newfoundland,
but whether the territory in question is in fact a "colony" within the meaning
of the instrument.

Despite the absence of a fully constituted civil government in Newfound-
land in 1763, or of a substantial settled population (estimated to be in the
region of 6,000 souls in the 1750s),33 there can be little doubt that it was
a "colony" of His Majesty in the technical legal sense of the word. This is
established by a variety of evidence: references in imperial acts, opinions of
law officers and others, administrative practice, and judicial decisions.

The Act of 25 Chas. II, c. 7, (1672), for the encouragement of the Green-
land and Eastland trades, etc., refers in section 1 to the import of train-oil,
blubber or whale-fins, the produce "of Greenland and parts adjacent, and those
seas, or of Newfoundland, or of any other his Majesty's colonies and plantations",
and sets out the duties payable thereupon. The statute, 4 Geo. III, c. 29,
(1764), for the encouragement of the whale fishery provides in section 1 for
the import in British ships of fins taken from whales caught "in the gulph or
river of Saint Lawrence, or in any seas on the coasts of any of his Majesty's
colonies in America", without payment of any duties except for those imposed in
25 Chas. II, c. 7, (1672), referred to above. The later statute, like the ear-
lier one, clearly includes Newfoundland among the American colonies referred to.
Again, the Act of 9 Geo. III, c. 28, (1768), speaks, in section 1, of transport-
ing goods "to Newfoundland, or to any other of the British colonies or plantations

33 McLintock, Government in Newfoundland, 9.
in America". Finally, the 1775 Act for the encouragement of the fisheries (15 Geo. III, c. 31) makes provision, in section 34, for suits and prosecutions regarding "the Penalties and Forfeitures inflicted by any Act of Parliament relating to the Trade or Revenues of the British Colonies or Plantations in America, which shall be incurred in the said Island of Newfoundland". So far as Royal Proclamations are concerned, that issued by George III on 27 October 1760 for continuing persons holding office "in any of Our Plantations" upon the decease of George II, must certainly have extended to Newfoundland.

The earliest legal opinion upon the status of Newfoundland discovered by the present writer date from the late 17th century. The question which gave rise to them was whether a certain ship, a French prize which had not been legally condemned and was owned and manned by English, had contravened the Act of 7 & 8 Will. III, c. 22, (1696), by importing fish and oil from Newfoundland. Section 2 of that statute forbids the export of goods from "any colony or plantation to his Majesty, in Asia, Africa or America, belonging, or in his possession." except in ships built in England, Ireland, or the colonies, and owned by the people thereof, or in ships taken as prize and condemned in an admiralty court. Both Sir Thomas Trevor, Attorney-General, and Sir John Hawles, Solicitor-General, held that the act had been violated because the ship had not been condemned. This could only hold true if Newfoundland qualified as a "colony or plantation".

Hawles' view is particularly interesting. He writes, in Reeves' summary, that

he should have thought Newfoundland was neither a colony nor a plantation belonging to his majesty, having no settled governor there, nor the king pretending to any dominion therein, as he could be informed of; but since stat. 15 Car. 2. c. 7 and 25 Car. 2. c. 7 reckoned Newfoundland among his majesty's plantations, he thought this ship...was forfeited.

The doubts expressed here were in part resolved by Article 13 of the Treaty of Utrecht (1713), where Britain's title to Newfoundland was recognized by France.

34 See also the recital in s. 9.  
35 BRP, 210-1.  
36 Reeves, Law of Shipping, 123-4. He gives the date 24 January 1698 for Hawles' opinion (possibly 24 January 1699, new style).  
37 Ibid., 124. The latter statute is quoted above.  
38 CTS, XXVII, 486.
and in part by the commissioning of a governor there in 1729. 39

In 1730, Francis Fane, Counsel to the Board of Trade, held in effect that Newfoundland was a settled colony, giving the opinion that "all the statute laws made here, previous to his majesty's subjects settling in New-
foundland are in force there; it being a settlement in an infidel country". 40 Again in a case where beaver-skins were brought to Great Britain from New-
foundland via Gibraltar, they were held by Mr. Willes, to be forfeited under the Act of 8 Geo. I, c. 15, (1721), which in section 24 provides that all beaver-skins, the product of "any of the British plantations in America, Asia or Africa", shall be imported directly from there into Great Britain, and not elsewhere. 41

Around 1764, when it was resolved by the commissioners of customs to es-
tablish custom-house officers in Newfoundland, a ship was seized there for lacking a register. In Reeves' description,

it appeared to the commissioners of the customs that Newfoundland had hitherto been looked upon merely in the light of a fishery, and ves-
sels going thither were not thought liable to the same regulations as those going to the other British colonies and plantations. 42

They referred to the treasury for advice on the matter, which passed it on to the Lords of Trade. The latter reported that "they saw no reason to doubt [Newfoundland's] being a part of his majesty's plantations", and thought that its commerce "should be under the same regulations as in the other plantations" and that the laws of navigation should be executed there. 43

39 SP 1728–9, #708, pp. 375–9.
40 Reeves' summary of an opinion dated 30 March 1730; History of Newfoundland, 111. Keith refers to a similar opinion by Fane, which he places in the year 1764; First Empire, 172. The date appears incorrect as Fane acted as counsel to the Board of Trade from 1725 to 1746, and as a full member from 1746 to 1756; Chalmers, Opinions, I, xiii; NYCD, III, xvii.
41 Opinion of 29 May 1736, summarized in Reeves, Law of Shipping, 125; in-
accurately described in Chitty, Laws of Commerce, I, 205.
42 Reeves, History of Newfoundland, 127–8. Lounsbury refers to the curious practice whereby the Commissioners of Customs classified Newfoundland among foreign countries in their ledgers during the period 1697–1780, rather than among the plantations; Newfoundland Fishery, 202.
43 Summary of opinion of 5 June 1765, in Reeves, History of Newfoundland, 128; see also Reeves, Law of Shipping, 125, and Clark, Colonial Law, 422. Ans-
pach refers to an opinion of 1772 by the Crown law officers that Newfoundland customs officers were entitled by act of parliament to legal fees on entering and departing vessels, and to a decision of the Vice-Admiralty
Among legal authors expressing an opinion on the matter, Reeves, Chitty, Clark and Keith all hold that Newfoundland, at the period in question, constituted a "colony" or "plantation" of His Majesty. The opinion of John Reeves carries particular weight, as he was legal adviser to the Committee for Trade (1787), later first Chief Justice of Newfoundland (1791), and author of works on the laws of navigation, the history of English law, and the history of Newfoundland. The historian, Lounsbury, in a study of the Newfoundland fishery during the period 1634-1763, takes a different view, holding that it was uncertain whether or not Newfoundland was covered by the laws of trade and navigation applying to colonies of the West Indies and continental North America. However the documentary sources which he cites do not appear to bear out his views for the period we are concerned with. While it is true that some confusion existed on the question in the seventeenth century, there appears to have been no real doubt as to the legal status of Newfoundland by 1763.

From an administrative point of view, it is reasonably clear that the laws of trade and navigation were held to apply to Newfoundland, as to other colonies and plantations in America. Despite an early and somewhat ambiguous declaration by the Commissioners of Customs that Newfoundland was not a plantation like the other plantations, in 1692 we find the Lords of Trade ordering the seizure of all foreign vessels trading illegally with the English parts of Newfoundland. Among the papers sent out with the first Governor of Newfoundland

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44 Reeves, Law of Shipping, 125-6; Chitty, Laws of Commerce, I, 635-6; Clark, Colonial Law, 422; Keith, First Empire, 121, 172.

45 McLintock, Government in Newfoundland, 70.

46 Lounsbury, Newfoundland Fishery, 195-6, 202, 205, 257.

47 For an assessment of Lounsbury's views, compare his remarks on pp. 195-6 with the sources APC 1613-80, 339-40, 341, 530; the statements on p. 205 with the source APC 1613-80, 623; and his reference to "legal authorities" on p. 257, with the opinion cited there, in Chalmers, Opinions, II, 275-6. See also his references to evidence in the contrary sense, at pp. 196-7, 219, 326-7.

48 SP 1685-8, #1,097, p. 309.

49 SP 1689-92, #2,298, p. 661, and #2,305, p. 662.
Henry Osborne, were copies of the acts of trade and navigation, which the
Governor was directed to enforce. In their Report to the King of 8 June
1763, the Lords of Trade recommended that the Governor of Newfoundland be in-
sstructed to put the laws of trade "into strict Execution".

From all these sources it can be deduced that at the time the Royal
Proclamation was drafted, Newfoundland was viewed in imperial law and practice
as one of His Majesty's colonies of plantations in America.

The present writer has not discovered much in the way of contemporary
documentation bearing upon the question of the Proclamation's application to
Newfoundland. It is not known definitely whether a copy of the Proclamation
was sent there for publication. However this can be inferred, as Part I, par.
6 of the instrument deals directly with the annexation of Labrador to New-
foundland. Moreover, Governor Palliser speaks, in 1769, of consulting the
Proclamation along with his Commission and Instructions.

We know from Royal Instructions of the period that the Crown intended
to pursue as regards indigenous peoples of Newfoundland the same broad policy
of conciliation taken in the other American colonies. The Newfoundland Gov-
ernor was directed to use his best efforts to gain the affections of the In-
dians and to induce them to trade, reporting back on their numbers, their
places of frequentation, and the character of the commerce they engage in.

50 SP 1728-92, #708, pp. 375, 377, 377-8; Reeves, History of Newfoundland,
73-4; Clark, Colonial Law, 422. For the efforts of a later Governor at
enforcement, see the reports of Capt. Lee of 1735-7; SP 1735-6, #119,
p. 66, and #389, p. 279; SP 1737, #503, p. 248.
51 CD, I, 135-6. See the draft Instructions to Gov. Graves of 29 March 1763,
52 See also the cases holding Newfoundland to have been a "settled" (as op-
posed to "conquered") colony: Yonge v. Maitland (1822) 1 Newf.L.R. 277
(Newf.S.C.), at 283; Kielley v. Carson (1843) 4 Moo.P.C. 63 (P.C.), at
84-5; Walbank v. Ellis (1853) 3 Newf.L.R. 400 (Newf.S.C.) at 402-3. The
latter case also suggests that Newfoundland came within the terms of 5 Geo.
II, c. 7, (1732), entitled "An act for the more easy recovery of debts in
his Majesty's plantations and colonies in America."
53 Petition of Gov. Palliser to Lords of Trade, January 1769; LBC, III, 1039,
1041, citing BT. Newfoundland, W1. 20.
54 Draft Instructions to Gov. Graves, 29 March 1763, Art. 9, in LBC, II,
393-4, citing C.O. 195/9, pp. 164-216; Instructions to Gov. Palliser, 10
This policy is reflected in a series of Proclamations and orders issued by various Governors over the period 1764-1784 designed to protect the native inhabitants of Newfoundland island and Labrador from white hostilities, and to establish friendly relations with them.\textsuperscript{55}

While the pattern of settlement in Newfoundland did not provide much opportunity for application of the rules set out in Part IV of the Proclamation, instances in which they are invoked can be found. In regulations governing the Labrador fishery of 10 August 1767, Governor Palliser declares:

\begin{quote}
All Inhabitants, Settlements and possession upon this Coast of Labrador, between the Limits of the Government of Quebec, and the Limits of the Hudson's Bay Companies Charter, are forbid by His Maj's Proclamation of the 7th Octr 1763, and all Persons who had then made any Settlements here, under pretended Grants from any of the Governors of the Colonies, or on any other pretence, are by the said Proclamation warned to withdraw and quit the same. . .\textsuperscript{56}
\end{quote}

In this, and related instances discussed in a later chapter,\textsuperscript{57} the Newfoundland Governor furnishes evidence of his conviction that the Indian provisions of the Proclamation were relevant to the territories within his jurisdiction.

In summary, while it is reasonable to suppose that Newfoundland, with its new dependency, Labrador, was not a prime "target" for the provisions of Part IV of the Proclamation, in view of the small numbers of both settlers and Indians there, nevertheless it was not excepted from the measures set forth in Part IV, which apply to all His Majesty's colonies in America. It follows that Newfoundland was governed by the rules laid down there, to the extent applicable.

4) Rupert's Land

It might be questioned whether the vast territories granted to the Hudson's Bay Company by Royal Charter in 1670 constituted a "colony" or

\textsuperscript{55} See the Proclamations of 1 July 1764, 8 April 1765, 10 August 1765, 5 July 1769, 10 April 1772, 4 May 1772, 14 May 1779, 30 January 1781, 15 May 1784, in LBC, III, 930-1, 1297-8, 1301-7.

\textsuperscript{56} LBC, III, 1011, citing C.O. 194/18.

\textsuperscript{57} See Chapter 17.
"plantation" within the meaning of Part IV of the Royal Proclamation. In 1763, these lands were as yet unsettled and uncultivated, the preserve of the indigenous hunters upon whom the Company's trade depended. The territory had virtually no governmental apparatus and was, in most respects, hardly a colony of the normal type. Nevertheless it appears from the original Charter that Rupert's Land was, in the technical legal sense, a colony of His Majesty. The text provides that the lands concerned shall be "from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America called Rupert's Land." 58 One reason for this specific declaration may have been to remove any doubt as to whether the territory would be subject to the navigation acts. In the result, the Hudson's Bay Company instructed Governor Marsh in 1688 to seize any foreign vessels trading or sailing within Charter limits, "as lawfull prize by Vertue of the act of Parliamte. for encouragmt. of Navigation", and similar instructions were issued to other officers in the same period. 59

When Parliament passed an act temporarily confirming the Hudson's Bay Company in its privileges (2 W. & M. c. 23 (1690) ), the Charter of 1670 was ratified as if "word for word recited", and the status of Rupert's Land as a colony was thus implicitly affirmed, at least for that period. 60 It is interesting that the Company itself interpreted the statute as "allowing our Lands & territories to be a Colonie belonging to the Crowne of England". 61

The Act of 8 Geo. I, c. 15, (1721), ordains in section 24 that "all beaver-skins, and other furs of the product of any of the British plantations in America, Asia or Africa" shall be imported directly into Great Britain and not elsewhere. Rupert's Land, as a principal source of beaver skins, was clearly one of the plantations referred to, and was treated as

59 Instructions of 18 June 1688, in Rich, HB Copy Booke 1688-1696, 41; see also various instructions of 1688-9 to Captys. Young, Bond, Ford, and Edgcombe, ibid., 27-8, 46-7, 67, 70.
60 Charters Relating to HBC, 75-8.
61 HBC Committee to Thomas Walsh, Deputy Governor of Port Nelson etc., 22 May 1690, in Rich, HB Copy Booke 1688-96, 105.
subject to the statute's terms. Significantly, copies of a draft Proclamation of 1760 for proclaiming the new King, George III, in "his Majesty's respective Plantations in America" were sent to the Hudson's Bay Company which accordingly had them published in Rupert's Land.

If, then, from a purely technical viewpoint, Rupert's Land qualified as one of Great Britain's colonies and plantations in America in 1763, it also appears to have been an appropriate object of the provisions set forth in pars. 1 and 4(a) of Part IV of the Proclamation. Those measures, it may be recalled, were designed for the protection of unceded Indian lands throughout British dominions in North America, as the preamble to Part IV explains. There appears to be no reason to think that the indigenous peoples of the Hudson's Bay territories were any less the objects of the Crown's solicitude than those in other provinces, among them such proprietary colonies as Pennsylvania. It has been suggested, nevertheless, that the exclusion of Rupert's Land from the Indian Country described in par. 2 indicates that, for some reason, the Crown did not intend the other provisions of Part IV to apply to it. This contention overlooks the fact that both pars. 1 and 4(a) are drafted in terms leaving no doubt that they extend in scope beyond the Indian Country.

CHAPTER 16

RESTRICTIONS ON GRANTS

The first paragraph of Part IV provides as follows:

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.

Why does the text deal separately with the new colonies and the old? One might have thought that the prohibition of land grants beyond colonial boundaries, as applied to Quebec and the Floridas, would have served equally well with the older colonies. The explanation seems to be that whereas the limits of the new colonies, as set out in the Proclamation itself, were relatively clear, those of established colonies were often uncertain and disputed. Such provinces as Georgia, the Carolinas, Virginia, Pennsylvania, Connecticut, Massachusetts, and New York, invoking charters and other instruments, asserted territorial or jurisdictional rights extending westwards far beyond the Appalachian Mountains. For these colonies, a provision confining grants within existing boundaries would not have posed any barrier to westward expansion, -- thus the Proclamation's choice of a geographical frontier, in the form of the Atlantic watershed.

The separate treatment of old and new colonies gives rise to a curious ambiguity in the text. Do the restrictions upon grants of unceded Indian lands, found at the end of the paragraph, apply exclusively to the established
colonies, or do they extend to the new ones as well? As applied to the older colonies, the prohibition extends the Proclamation's protection so as to cover not only areas west of the Atlantic watershed, but also any unceded Indian lands lying east of the watershed. If the provision also applied to Quebec and the Floridas, those colonies would be prohibited from granting, not only lands beyond their boundaries, but unceded Indian lands within their limits as well.

Let us examine the text more closely. Paragraph 1 consists of a single extended sentence, introduced by a main clause ("We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure. . ."), followed by twin subordinate clauses, each commencing with the conjunction "that", and separated from each other by a semicolon. The first clause deals with the new colonies, the second with the old. The phrase, "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", is appended to the second clause, and follows logically from it. The natural inference is that the restriction which it embodies governs only the old colonies mentioned in the second clause. However the paragraph can also be read, with somewhat less felicity, so that the final phrase governs the first clause as well: We declare it to be Our pleasure that no Governor of Quebec, East Florida, or West Florida, pass any patents for lands beyond the bounds of their governments. . . or upon any lands whatever which not having been ceded to us are reserved to the Indians. This reading treats the semicolon in mid-paragraph as setting off the second clause from the first in a manner allowing for the final phrase to apply to both, a practice more common, perhaps, in ages less given to grammatical orthodoxy, but still prevalent enough to merit denunciation in a modern manual. 1

If paragraph 1 is read in the context of Part IV as a whole, the

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1 Fowler, Modern English Usage, 2nd ed., 589.
second interpretation gains in weight. The restrictions on land grants are paralleled closely, in paragraphs 2 and 3, by limitations on settlement. Thus par. 2 prohibits settlement on lands beyond the bounds of the new colonies and also west of the Atlantic watershed, while the succeeding paragraph orders the removal of settlers upon unceded Indian lands generally, using words substantially identical to those in the final phrase of par. 1. Yet the injunction in par. 3 must include unceded lands within the boundaries of the new colonies, which suggests that par. 1 has a similar scope. Again, the provisions in paragraph 4 governing the purchase of Indian lands has application within the American colonies generally; the new colonies are not excepted.

Judicial opinion also tends to support the second interpretation. The Privy Council effectively adopts this construction in the St. Catherine's case, summarizing paragraph 1 as follows:

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.  

The same construction is adopted by Judson J. of the Supreme Court of Canada in the Calder case.  

Chief Justice Marshall of the United States Supreme Court takes a similar view in the well-known case of Worcester v. State of Georgia:

The proclamation issued by the King of Great Britain in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the King), as aforesaid, are reserved to the said Indians, or any of them.  

The issue arose before the Mississippi High Court in relation to the former colony of West Florida in Montgomery v. Doe d. Ives. In question

2 (1888) 14 A.C. 46 at 53.
4 (1832) 6 Peters 515 at 548.
5 (1849) 13 Smedes & M. 161 (Miss.H.C.).
was the validity of a land grant made in 1772 by the Governor of West Florida on behalf of the Crown. The lands affected were located outside the limits of West Florida as described in the Proclamation of 1763, but within those set out in the Governor's Commission of 1770.\(^6\) The Indian title to the lands had not been extinguished at the time the grant was made. After quoting extensively from the Indian section of the Proclamation, Clayton J. held:

Unless we hold that the extension of the limits of Florida, by the commission to her governor, which took place some years before this relinquishment by the Indians, abrogate the provision in the proclamation against grants of land to which the Indian title had not been extinguished, to the extent of the new bounds, we must hold that the grant to Campbell, in 1772, had in itself no intrinsic validity, because the lands were not subject to be granted, until their title was relinquished. On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." Fletcher v. Peck, 6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. Danforth v. Wear, 9 Wheat. 676.\(^7\)

Earlier the judge had stated that it was not necessary for him to decide whether or not the Commission of 1770 had the effect, in law, of extending the colony's boundaries.\(^8\) Thus he held, in effect, that on either supposition the Proclamation invalidated the grant. If the lands in question lay outside West Florida's boundaries, the grant was presumed to be void under the provision prohibiting patents beyond those limits. If they fell within the colony, it was void under the provision "against grants of land to which the Indian title had not been extinguished". Sharkey C.J. came to similar conclusions, stating:

I concur in holding that the grant from the British governor of West Florida, dated 11th February, 1772, to the ancestor of the plaintiffs below, was invalid for want of power in the governor to make it. This result seems to follow, whether the land in dispute was or was not, at the date of the grant, within the limits of West Florida.\(^9\)

In construing paragraph 1, some weight may be given to the Capitulation

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6 This is implied in the opinion of Clayton J. at pp. 172-73, and specifically stated by Sharkey C.J. at pp. 179-80.
7 At p. 175.
8 At pp. 173-74.
9 At p. 179.
of Montreal (1760), Article 40 of which provides that the Indians of New France shall be maintained in the lands they inhabit if they wish to remain there. This would apply to Indian lands within the new boundaries of Quebec. It would appear that a textual ambiguity in the Proclamation should be resolved in a manner consistent with the Capitulation's terms, on the presumption that the Crown intended to fulfill its treaty obligations.

Even assuming, however, that the Proclamation was drafted with an intent to observe the Capitulation, it might be said that the drafters supposed that no unceded Indian lands existed within the new limits of Quebec. This view is not supported by the historical documentation. General Murray's Report on the State of the Government of Quebec of 5 June 1762 describes the Indian nations residing within his government. He mentions among others the Montagnais Indians, who inhabited "a vast tract of Country from Labrador to the Saguenay" and the "Miamies", who are settled "about the Bay des Chaleurs, and upon the Coast and Bays in the Gulph", along with the "Abenakies" who "wander about the South shore, and range the woods". Most of these Indians came within the new boundaries of Quebec. This Report was among the papers enclosed with the letter from Egremont to the Board of Trade of 5 May 1763, which initiated the process leading to the Royal Proclamation's appearance.

The Royal Instructions sent to Governor Murray of Quebec on 7 December 1763 clearly indicate that the Crown intended to protect Quebec Indians in their lands. Article 60 recites that "Our Province of Quebec is in part inhabited and possessed by several Nations and Tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict Friendship and good Correspondence". The succeeding Article directs Murray: "You are upon no Account to molest or disturb them in the Possession of such

12 Ibid., 74.  13 Ibid.  14 Ibid., 131.  15 Ibid., 199.
Parts of the said Province, as they at present occupy or possess. Moreover Article 62 provides as follows:

Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with. . .

An official French version of the Royal Proclamation published at Three Rivers on 28 January 1764 translates the first paragraph of Part IV in a manner suggesting that the general injunction against the grant of unceded Indian lands applies within Quebec. It provides that "aucun gouverneur ou Commandant en chef dans quelles de nos Colonies que ce puisse être, soit de Québec, Floride orientale, floride occidentale" should grant lands beyond their colonies' bounds, "comme aussi qu'aucun gouverneur ou commandant en chef de nos Colonies, ou plantations en Amérique" should make grants beyond the Atlantic watershed, or of any other unceded lands whatsoever. The latter restriction is phrased so as to cover all colonies or plantations in America, not excepting Quebec and the Floridas.

The Executive Council at Quebec interpreted the Proclamation as prohibiting the grant of lands occupied or claimed by Indians within the colony. On 23 December 1766, a Committee of Council, which included the Chief Justice, William Hey, rejected a petition of Marie Joseph Philebot for a grant of 20,000 acres of land at Restigouche, on the grounds that "the lands so prayed to be assigned are, or are claimed to be the property of the Indians, and as such by His Majestys express command as set forth in his proclamation in 1763, not within their power to grant. . .". This

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16 Ibid.
17 Ibid., 200.
18 Ordonnances, Proclamations, etc., émises par les Gouverneurs Militaires de Québec, Montréal et Trois-Rivières, RPAC, 1918, Appendix B, p. 326. For the place where the Proclamation was published, see p. 198.
was not an isolated incident. On 16 May 1767, the same Committee, with the Chief Justice once again in attendance, turned down a petition of Hugh Finlay, on behalf of certain Acadians, for a grant of land upon or near the River Restigouche in the Bay of Chaleur, stating: "The Committee are of opinion that the Lands mentioned in the Petition are Lands claimed by the Indians, whose Right has not yet been ascertained till it is no grant should be given that may prejudice their Claim." 20 A petition of Joseph Phillibot (presumably the Philebot seen earlier) for a land grant on the north shore of the Restigouche River in the Bay of Chaleur, was considered by Council on 18 August 1768, with Lt. Gov. Carleton and the Chief Justice both present, and was refused on the ground that "the Lands petitioned for cannot be granted, being claimed by the Indians." 21

The conclusion appears to be that the first paragraph of Part IV should be construed so as to prohibit the Governors of Quebec, East Florida and West Florida from making grants of land beyond their boundaries and also upon any lands whatever which, not having been ceded to or purchased by the Crown, are reserved to the Indians within the boundaries of these colonies.

20 Committee Minutes of 16 May 1767, embodied in Council Minutes of 16 July 1767; PAC, RG1, E1, Vol. 3, pp. 335–6, typed transcripts.

21 Council Minutes of 18 August 1768; PAC, RG1, E1, Vol. 4, p. 50, typed transcripts.
CHAPTER 17

RESTRICTIONS ON SETTLEMENT:

THE INDIAN COUNTRY

The second paragraph of Part IV of the Proclamation states the Crown's intent to reserve for Indian use

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; . . .

The wording is unfortunate. The passage, read literally, describes two areas of reserved lands: the first encompasses all territories lying beyond the limits of the new governments of Quebec, East Florida and West Florida, as well as Rupert's Land, while the second comprises everything west of a specified watershed, which as we will see, can be identified as the Appalachian Mountains. The difficulty is that the first area appears to include lands excluded from the second area, and the second area to encompass lands excluded from the first. This was obviously not the intention. The passage must be understood as describing a single residual area comprising all British territories in America, except for Quebec, the Floridas, Rupert's Land, and the lands lying between the designated watershed and the Atlantic Ocean. ¹

Paragraph 2 constitutes a single sentence, divided into two parts by a semicolon, and should be read as a unit. ² The link between the first

¹ The peculiar wording of the passage seems to have led Strong J. in the St. Catherine's case to think that the lands west of the watershed referred to are excluded from the reserved territory, whereas the reverse, of course, is true; see his remarks at (1887) 13 S.C.R. 577 at 627-8.

² This point is obscured in certain secondary versions of the text, where the two parts of par. 2 are arranged in distinct paragraphs; see for example CD, I, 163 seq.; R.S.C. 1952, VI, App., 6127 seq.; R.S.C. 1970, App., 123 seq. The original text, as printed by Mark Baskett, the King's
and second parts indicates that the principal reason for delineating an Indian Country is to lend precision to the ensuing restrictions upon settlement:

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 license for that purpose first obtained.

The main purpose of the boundaries set out in par. 2, then, is to halt the spread of white settlement westwards from the seaboard colonies. This explains why the Indian country is defined negatively. It also explains why no western boundary for the country is given, as the pressure to colonize it came from the east.

Paragraph 3 reinforces and extends these measures:

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.

A curious anomaly arises from the fact that par. 3 is apparently more comprehensive than par. 2, ordering the removal of settlements not only in the Indian country, but also upon "any other lands, which, not having been ceded to, or purchased by us, are still reserved to the said Indians as aforesaid...". So a settlement upon unceded Indian lands located outside the Indian country (say in Quebec or East Florida) seemingly complies with the terms of par. 2, but is forbidden under the next paragraph. Careless drafting set apart, the joint effect of these provisions is apparently to outlaw settlements on unceded Indian lands anywhere in British North America, and more specifically, but not so as to exhaust the former category, within the Indian territory described in par. 2.

Printer, in London: 1763, places them in a single paragraph; see BRP, 212 seq. reproduced in Appendix A, and our earlier discussion of the text in Chapter 12.
1) The identity of the watershed

The first paragraph of Part IV, as we have seen, refers to certain "Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West". A similar geographical configuration features in the second paragraph, linked to the earlier description by the words "as aforesaid". The intention, clearly enough, is to indicate that areas west of a certain watershed are closed to colonization and reserved for Indian use, while lands lying east of that divide are open for settlement. Our task is to identify that watershed. The difficulty is that continental North America possesses five major drainage basins whose waters eventually reach the Atlantic Ocean, as the following map illustrates:

![Map of North America showing drainage basins](image)

Area 1, which covers the eastern seaboard south of the Gulf of St. Lawrence, and whose western limits lie in the Appalachian Mountains, clearly falls within the passage's terms of reference. Most of the area's major rivers, such as the Altamaha, Savannah, Pee Dee, Neuse, Tar, James, Potomac and so on, fall into the Atlantic from the west and north-west,

3 Derived from *Encyclopedia Britannica World Atlas*, Section 1, Plate 19.
notable exceptions being the Delaware, Hudson, and Connecticut, which flow from the north. Moreover lands lying westward of the Appalachians were threatened by expansion from the Thirteen Colonies, with their growing populations and increasingly scarce lands.

Area 2, which encompasses the region drained by the Gulf and River of St. Lawrence and the Great Lakes, does not meet the Proclamation's description. The St. Lawrence flows from a south-westerly direction, rather than from the west or north-west, and many of its tributaries originate in the south and south-east. This conclusion is supported by a passage earlier in the Proclamation, which delineates the southern boundaries of Quebec by reference to a line which "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." 4 The St. Lawrence drainage basin is specifically contrasted with the area draining into the sea, and the latter is described in terms resembling those in paragraphs 1 and 2 of Part IV.

As for Area 3, which comprises the region draining onto the coast of modern Labrador, there are several reasons for thinking that it does not satisfy the Proclamation's terms. The reference to rivers falling into the sea from the west and north-west hardly seems appropriate for a coast which itself runs in a north-westerly direction, envisaging rather a north-easterly tending coastline, such as that in Area 1. Many notable rivers in Labrador originate in the south-west, such as the Paradise, Eagle, Kenamu, Hamilton, Big, Canairiktok, and so on. Moreover most of the lands lying westward of Area 3 fall within Rupert's Land, which is excluded from the Indian Country. Finally, if Area 3 formed part of the lands withdrawn from the Indian territory, it would by implication be open to colonization. But the Proclamation, in an earlier section, announces the annexation of Labrador to Newfoundland, 5 a colony in which settlement was discouraged as

4 Part I, par. 2. 5 Part I, par. 6.
a matter of both law and policy, and whose Governor was not empowered to
make land grants.\footnote{See Chapter 15.}

It is clear that Area 4, which encompasses the drainage basin of
Hudson's Bay, is not designated. Many of its rivers originate in the
south, south-east and east, and in any case none of them empties direct-
ly into the Atlantic Ocean proper.

Area 5, comprising the drainage basin of the Mississippi River and
its tributaries, likewise does not seem to be covered, as the Mississippi
flows from the north into the Gulf of Mexico. The latter, we may infer,
was not considered part of the Atlantic Ocean, because earlier in the
text the two geographical designations are used in a single paragraph
with distinct meanings.\footnote{This occurs in Part I, par. 3 of the Proclamation where the Government of East Florida is described as "bounded to the Westward by the Gulph of Mexico, and the Apalachicola River; . . . and to the Eastward and Southward, by the Atlantick Ocean, and the Gulph of Florida, . . ."}

But, most convincingly, were Area 5 added to
Area 1, no practical limits would be posed to land grants and settlement
originating from the old colonies.

In sum, it seems reasonable to conclude that the drainage area re-
ferred to in pars. 1 and 2 is that shown as Area 1 on our map, namely the
lands lying between the Atlantic Ocean and the Appalachian Mountains, and
extending from Florida in the south to the St. Lawrence Gulf in the north.\footnote{See Lord Warrington's comment to the same effect in the oral proceed-
ings before the Privy Council in the Labrador Boundary case; LBC, XI, 402.}

The effect of these paragraphs, then, is to delineate a boundary line run-
ing in a north-easterly direction along the Appalachian divide at the back
of the old English colonies, beyond which land grants are forbidden in
par. 1, and settlements and purchases prohibited in par. 2.

The phraseology employed in the Proclamation to describe this bound-
ary line appears to originate in the sketch written in May 1763 by John
Pownall, Secretary to the Board of Trade, preparatory to the report of
the Board of 8 June. This draft recommends, in respect to both old and
new colonies, that

the limits of their settlements and jurisdiction should not, for
the present, extend beyond the sources of those rivers and waters
which discharge themselves directly into the Atlantick Ocean on
the one side, and the Gulph of Mexico on the other; and that all
the country lying between the ridge of the Apalachian mountains
and the river Mississippi as low down to the Gulph of Mexico as
the settlements and claims of the Indians extend, as also all
the country lying around the Great Lakes as far as the heads of
every river or water that falls into them, should be considered
as lands belonging to the Indians. . . .9

The sources of the rivers falling into the Atlantic are identified as
located in the Appalachian mountains. There is no indication that either
Labrador or the St. Lawrence drainage basin was contemplated in this con-
nection. Indeed the area draining into the Great Lakes is described as
coming within the Indian territory.10

The report issued by the Board of Trade in June incorporates this
recommendation, specifying that the Governors of the ancient colonies be
strictly directed not to make grants "beyond certain fixed Limits".11 But
it does not attempt to describe these limits, referring instead to an en-
closed map, which shows a line running at the back of the old colonies,
following the general trend of the Appalachian mountains, although depart-
ing from their actual course in several respects. 12 There is no corre-
ponding line to delineate the height of land on the Labrador coast (shown
partly on the main map and partly in an inset in the upper left corner),
or to encircle the St. Lawrence drainage basin. What the Board of Trade
had in mind, then, was a boundary running from Florida to Nova Scotia,
restraining the movement of settlers into the American interior. When the
Proclamation came to be drafted, Pownall's original description of this
line was apparently resurrected and pressed into service.

9 Text in Humphreys, "Proclamation of 1763", Appendix, at 259-60.
10 The reference to rivers falling into the Gulf of Mexico was a first
attempt at providing limits for what later became the colony of West
Florida, and did not find its way into the Royal Proclamation.
11 OP, I, 140.
12 Ibid., 141. See our earlier discussion of this point in Chapter 11,
and Map Appendix 2.
It was widely recognized at the time the Proclamation was issued that the watershed referred to was the Appalachian mountains. A map illustrating the effects of the Proclamation published in the Gentleman's Magazine in October 1763 features a line drawn along the Appalachians, and describes areas west of the line as "Lands reserved for the Indians." 13

Another map printed in London that year shows a similar boundary running from the border between East and West Florida north to the southern boundary of Quebec. 14 The same line appears on a 1766 map among the Shelburne Papers, which also displays the inscription, "Lands reserved for the Indians", running between the boundary line and the Mississippi and extending north into the area between Quebec and Rupert's Land. 15

Royal Instructions sent to the Governors of Virginia and Pennsylvania on 24 October 1765 interpret the Proclamation as forbidding settlement west of the Allegheny Mountains, a subordinate part of the Appalachian range. They refer to the fact that people from those provinces "have migrated to the westward of the Alleghany Mountains and there have seated themselves on lands contiguous to the River Ohio, in express disobedience to our royal proclamation of the seventh of October, 1763" and order the governors concerned to secure their evacuation. 16

A public notice was issued on 22 June 1766 at Redstone Creek, a tributary of the Monongahela River, in the part of Pennsylvania west of the mountains, by one Alexander Mackay, 17 acting for the Commander-in-Chief. This speaks of complaints made by the Indians against people "who have presumed to Inhabit some part of the Country west of the Allegania Mountain,

13 See Map Appendix 2.
14 "Carte des Possessions Angloises & Francaises du Continent de l'Amerique Septentrionale", by Jean Falair (London: 1763); PAC, H3-1000-1763, copy of a map in the Library of Congress, Washington. The map appears to be an up-dated edition of a pre-1763 map. There is no inscription identifying the boundary as that laid down in the Proclamation, but that is the natural inference.
15 See Map Appendix 2.
16 RL, IT, #682, pp. 473-4; PCR, IX, 321.
17 Commanding a party of the 42nd regiment.
which by Treaty belong to them [i.e. the Indians], and had never been pur- 
chased, and which is contrary to his Majesty's Royal Proclamation", and 
orders people settled in the locality to return to their own provinces. 
If they fail to do so, 
the Commander in Chief, will order an armed Force to drive you from 
the Lands you have taken possession of to the Westward of the Alle-
gania Mountain, the property of the Indians, till such time as his 
Majesty may be pleased to fix a further Boundary.18 
Governor Fauquier of Virginia took a similar view of the Royal Procla-
mation's terms. In a Proclamation issued on 31 July 1766, he makes refer-
ence to information received concerning Virginians who have settled on 
lands belonging to the Indians, to the westward of the Allegheny 
mountains, and contiguous to the river Cheek, in disobedience to 
his Majesty's commands (notified by two proclamations of the 7th 
of October, 1763, and the 10th April, 1766) 
and commands these settlers to remove themselves.19 

2) The geographical extent of the Indian Country 
We return to the question of the precise extent of the Indian Coun-
try described in par. 2. This territory is defined negatively, as a resi-
duum. We are told what areas are excluded from it, rather than what it 
incorporates. Excluded areas are as follows: 1) to the south, the new 
colonies of West and East Florida, situated along the coast of the Gulf of 
Mexico, from the Mississippi River to the Florida peninsula; 2) on the east, 
the settled areas of the ancient colonies lying between the Appalachian 
Mountains and the sea, from East Florida north to Nova Scotia; 3) the new 
government of Quebec, a geometrical wedge encompassing most of the St. Law-
rence valley; and finally 4) the lands granted to the Hudson's Bay Company 
on the north, of ill-defined extent.20 It can be seen that, while the 

18 PA, 1st series, IV, 251-2. 
19 PA, 1st series, IV, 255. The proclamation of 1766 referred to appears 
to have been a local instrument. 
20 See discussion in Chapter 8.
areas left open for colonization form a continuous strip, running from West Florida in the south-west to Quebec and Nova Scotia on the north, a gap is left between the boundaries of Quebec and those of Rupert's Land (even at their most extensive), and no mention is made of the Labrador coast.

The Indian Country is said to comprise "all the Lands and Territories" not included within these four areas. A reference in the same paragraph confines this to lands under British sovereignty. No further limitations are posed. The Country thus includes the entirety of British territories in North America, saving only the four regions mentioned above.

This leaves a number of problem areas. These are: a) that part of old Nova Scotia (including modern New Brunswick) which drains into the Gulf of St. Lawrence; b) the islands of Prince Edward and Cape Breton; c) the coast of Labrador; d) the island of Newfoundland; e) the corridor between Quebec and Rupert's Land; and f) the "unlimited" west.

a) The northern coast of old Nova Scotia

As a detailed map of the drainage basins located in the region of old Nova Scotia shows, it is not immediately clear where the northernmost segment of the Appalachian boundary line ends its course. The problem is that the northern part of the Nova Scotia coast, from Chaleur Bay to George Bay, drains into the Gulf of St. Lawrence rather than into the Atlantic Ocean proper, while the description in Part IV, par. 1 (incorporated by reference in par. 2), speaks of rivers falling into the "Atlantick Ocean". It could be argued that the Gulf of St. Lawrence is excluded from this expression, and so the boundary line encircles the drainage area of the St. John River, leaving the Miramichi basin to the north, and then follows the height of the land eastwards down the Nova Scotia peninsula to the shore opposite Cape Breton Island. If, on the

21 Part IV, par. 2: "to reserve under Our Sovereignty, Protection, and Dominion".
22 See Map 1.17.
other hand, the St. Lawrence Gulf is understood to form part of the Atlantic, then the Appalachian boundary line would follow the southern boundary of old Quebec to meet the Gulf of St. Lawrence at Chaleur Bay. 23

The question is resolved by an earlier passage in the Proclamation describing the southern limits of Quebec. 24 This provides for a boundary running from a point east of Lake Champlain at 45° north latitude "among 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...". The reference to rivers falling into the sea covers those emptying into the Gulf of St. Lawrence, as well as those falling into the Atlantic proper. It may be inferred that the similar phrases found in pars. 1 and 2 of Part IV are used in the same sense, and that the northernmost segment of the Appalachian Indian boundary merges with the southern boundary of Quebec at the point of encounter, 45° north latitude, and follows it along the height of the land to Chaleur Bay.

b) The islands of Prince Edward and Cape Breton

Part 1, par. 7, announces the annexation of Prince Edward and Cape Breton Islands, along with lesser adjacent ones, to the government of Nova Scotia. They do not fit easily into the scheme described in par. 2 of Part IV, as they are not strictly part of the Atlantic drainage area. However these islands are near enough to the continent to be assimilated to it, and clearly lie east of the Appalachian boundary line. Like other small coastal islands such as Martha's Vineyard, Nantucket, Long Island and so on, they are excluded from the Indian Country.

23 See Map 1.8. 24 Part I, par. 2.
c) The coast of Labrador

The Commission issued to the Governor of Newfoundland on 25 April 1763 enlarges his jurisdiction so as to include "all the Coasts of Labrador from the Entrance of Hudsons Streights to the River Saint Johns...",25 and the Royal Proclamation of 7 October confirms this.26 The Privy Council, in Re Labrador Boundary,27 held that the "Coasts" in question comprise all lands lying between the seaboard and the inland watershed, a substantial piece of territory.28

If we reexamine the Proclamation's terms in the light of a map, we are drawn to the conclusion that Labrador forms part of the Indian Country described there. The two immediate neighbours of Labrador along the coast, Quebec and Rupert's Land, are both specifically excluded from that Country, and yet Labrador is not mentioned. Again, it would be difficult to view Labrador as lying east of the Appalachian Mountains, in any normal sense. It appears to follow that Labrador falls within the residual area designated as closed temporarily to colonization.

It might be contended that the annexation of Labrador to the government of Newfoundland rules this out. The Privy Council expressed such a view in the Labrador Boundary case. The court noted that certain clauses in Instructions issued to the Newfoundland Governor during the period 1763-1774 called for reports regarding trade with the Labrador Indians. They remarked that "such a direction would have been out of place if the Indians settled in Labrador had been altogether excluded from the Governor's jurisdiction".29 The argument rests on the supposition that the inclusion of Labrador in the Indian Country would have removed its indigenous inhabitants from the jurisdiction of the Newfoundland government.

This appears to involve a misunderstanding. The purpose of creating the Indian Country was temporarily to seal off areas from colonization, not

26 Part I, par. 5.
28 See Map 1.8.
necessarily to remove them altogether from colonial jurisdiction. Large sectors of the Indian Country came within the existing boundaries of such provinces as Georgia, North Carolina, Virginia and Pennsylvania. While the Proclamation temporarily suspends the powers of their Governors to grant lands there, it does not alter their jurisdiction in other respects, least of all as regards Indians. There was no incompatibility between a territory's inclusion within the Indian Country and its status as part of an existing colony.

The argument must in the end affirm that the reference in Part I to the annexation of Labrador to Newfoundland excludes it, by implication, from the Indian Country created in Part IV. Part I also describes the boundaries of Quebec, East Florida and West Florida, yet Part IV takes pains to specify that they do not come within the Indian Country. The failure to do likewise with respect to Labrador is telling.

The travaux préparatoires of the Proclamation do not furnish much enlightenment, save only to indicate a curiously ambiguous attitude on the part of the Lords of Trade. In their Report of 8 June 1763, they refer to Labrador as among those territories "where no perpetual Residence or planting is intended", and yet speak of it as if it were distinct from "that Territory in North America which... is proposed to be left... to the Indian Tribes for their hunting Grounds". At this time, it may be remembered, there was no thought of issuing a Proclamation. The bounds of the Indian Country were to be defined by the limits assigned to the new colonies in their Governors' Commissions, and by Instructions sent to the ancient colonies preventing them from granting lands beyond certain bounds.

30 A similar point is made in Fletcher v. Peck (1810) 6 Cranch 87 (U.S. S.C.) at 142 where it is said in regard to the Proclamation of 1763: "The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony."

31 CD, I, 139. 32 Ibid., 140.
The Governor of Newfoundland was not empowered to make any land grants whatsoever at this period, and so this colony, with its new adjunct, Labrador, occupied an anomalous position. When the decision to issue a Proclamation was made, the necessity of describing the Indian Country's limits in a comprehensive way forced the drafters to determine whether Labrador was to be left in or out. But to exclude it from the Indian Country would have amounted to treating it as an area open to settlement, which was far from the government's intention. This consideration may explain why it was not named along with Quebec. By default, Labrador fell into the residual area comprising the Indian Country.

It is interesting that Governor Palliser of Newfoundland interpreted the Royal Proclamation as prohibiting settlement upon the coast of Labrador. In a letter of 9 February 1767 to Lord Shelburne, Secretary of State for the Southern Department, he denounced the fact that certain places along the Labrador seaboard had been appropriated by people from Quebec under concessions made by the Quebec Governor, stating that he considered "such Settlers and Possessions (in that Country in particular) as contrary to the Kings Proclamation of the 7th October 1763". Regulations issued by the Governor on 10 August 1767 for the Labrador fishery are more explicit:

All Inhabitants, Settlements and possession upon this Coast of Labrador, between the Limits of the Government of Quebec, and the Limits of the Hudson's Bay Companies Charter, are forbid by His Maj's Proclamation of the 7th Octr 1763, and all Persons who had then made any Settlements here, under pretended Grants from any of the Governors of the Colonies, or on any other pretence, are by the said Proclamation warned to withdraw and quit the same.

d) The island of Newfoundland

This poses a difficult problem. On the one hand, paragraph 2 does not explicitly exclude the island of Newfoundland from the Indian Country,

33 See our earlier discussion.
34 LBC, III, 1000, citing C.O. 194/27.
unless it be argued that, as with the islands of Prince Edward and Cape Breton, it was viewed as lying east of the Appalachian divide. In one respect it would not be surprising were Newfoundland brought within the closed-off area, as it was long-standing imperial policy to discourage colonization there. On the other hand, the island possessed at this period a considerable settled population, numbering some 6,000 souls. However much the government may have frowned upon permanent settlements in Newfoundland, it is most unlikely that they contemplated the wholesale evacuation of the island. There is nothing in contemporaneous documentation to support such an interpretation of the Proclamation's terms. The true view would appear to be that the description of the Indian Country was directed at the American mainland, from which Newfoundland was automatically excluded.

e) The corridor between Quebec and Rupert's Land

As is shown on Map 1.8, the limits of Quebec were defined in such a manner as to leave a sizeable gap between its northern boundary and the southern boundary of Rupert's Land, even at its fullest possible extent. There can be little doubt that the intermediate lands fell within the Indian Country. The explicit exclusion of Quebec and Rupert's Land indicates that adjacent lands not comprised in either colony were included.

f) The "unlimited" West

Under the Treaty of Paris, the western boundary of British territories in North America followed the Mississippi River to its source, which lies south of the modern Canadian border. No boundary was stipulated for more northerly latitudes, and here, as we have seen, British domains were viewed as extending indefinitely westward to the sea. It would appear that all lands falling under British sovereignty in the west and north west, not comprised within Rupert's Land, fell within the Indian territory.

37 See discussion in Chapter 10.
If the claims of the Hudson's Bay Company at their most extensive were given credence, then the southern boundary of Rupert's Land would lie at the height of the land, close to the source of the Mississippi River. \(^{38}\) It could be argued that this provides a western limit to the Indian territory, and that any British regions farther west must be viewed as excluded. However it is a matter of considerable doubt whether the lands held by the Hudson's Bay Company in 1763 actually extended so far south. \(^{39}\) Even if they did, it must be remembered that the Indian Country is described, not as an area enclosed on all sides within clearly defined boundaries, but as a residual area, encompassing all British territories not otherwise spoken for. Upon this basis, western territories not comprised in Rupert's Land would fall within the Indian Country.

In summary, then, the Indian territory described in par. 2 consists of all North American territories held by the Crown in October 1763, with the exception of 1) the two Floridas, Quebec and Rupert's Land, and 2) lands lying east of the Appalachian Mountains, including old Nova Scotia, and the islands of St. John (Prince Edward), Cape Breton, and Newfoundland. Among those territories falling within the Indian Country, the coast of old Labrador and the corridor between Quebec and Rupert's Land call for special note, as well as British territories in the far west and north-west, not encompassed within Rupert's Land. The position of any western territories acquired by the Crown at a period subsequent to the Proclamation's issue will be discussed later. \(^{40}\)

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38 See discussion in Chapter 8.
39 Ibid.
40 See Chapter 21.
PART V

THE ROYAL PROCLAMATION OF 1763:

LEGAL STATUS AND EFFECTS
CHAPTER 18

VALIDITY

A number of long-standing judgments of considerable authority have upheld the validity of the Proclamation of 1763, while others have given effect to its provisions concerning Indian lands as these affect Canada. An inquiry into its legal status at this stage may seem presumptuous. Yet the variety of effects which the instrument sought to achieve and the constitutional differences prevailing among the territories affected make this task essential. To hold, as in Campbell v. Hall,¹ that the Proclamation's grant of assemblies to certain colonies binds the Crown is not necessarily to say that its recognition of Indian title has the same effect. Moreover what holds true in the ceded territories, where the Crown's prerogative was extensive, may not apply to the older colonies, where that power was often closely circumscribed.

Several distinct matters demand attention. We must first determine what formal requirements govern royal Proclamations, and whether the instrument in question satisfies them. We will then consider whether the Crown in 1763 possessed the power to provide for Indian lands in its American possessions by prerogative instrument. Finally, in succeeding chapters, we will examine the precise legal effects of the Proclamation's measures concerning Indian lands, and their modifiability.

There is a basic distinction between the question of the validity and effects of royal Proclamations per se, and that of the Crown's power to provide, by Proclamation or other prerogative instrument, for a given subject matter in a particular territory. Although clear in principle, the distinction is not always observed in textbook discussions, where the

¹ (1774) Lofft 655, 98 E.R. 848.
constitutional limitations upon the exercise of the Crown's prerogative power in Great Britain are at times treated as if they posed absolute limits upon the use of Proclamations. This overlooks the fact that the Crown's powers in its overseas dominions often differed from those held in the mother country. Restrictions upon the use of Proclamations in Britain, as laid down in the Proclamations Case, do not necessarily apply to the colonies. The question in each case turns upon the scope of the Crown's powers in the territory concerned.

1) Formal validity

A Proclamation is an official public announcement of an act of the Crown effected by Order in Council. To be valid, it must pass the Great Seal, and be published. Under common law, publication need not be effected in any special manner or place, or by any particular personage, and may be made by anyone acting under the Crown's authority. Requirements as to the extent of publication were uncertain in the eighteenth century, especially in respect to Proclamations affecting the colonies. Normally, copies were printed and distributed to the Governors of the colonies concerned for publication. However it is not clear whether an imperial Proclamation would fail to take effect in a colony to which it applied if not published there. It may be doubted whether this was true of a Proclamation duly published in the mother country, in the London Gazette or elsewhere. No authority to that effect can be discovered, and none of the cases dealing with the Proclamation of 1763 treat proof of its publication in the


4 Keyley v. Manning, Cro. Car. 180 (K.B.). The matter was also raised in Howard v. Slater, 2 Rolle 172, 81 E.R. 731.

5 Chitty, Prerogatives of the Crown, 106-7; Steele, Bibliography of Royal Proclamations, xvii.
colony concerned as essential.

Chitty remarks in reference to Great Britain that publication in
the market-place or streets of each large town would be sufficient, and
that a proclamation invariably appears in the Gazette. 6 But he does not
discuss the consequences of failure to publish in one particular place or
another, or raise the question of the colonies. By way of parallel, a
statute of 1863 provides that letters patent shall not take effect in a
colony until signified there by proclamation or other public notice. 7 The
need for such a statutory provision suggests a deficiency in the common
law on this point.

At any rate, the Proclamation of 1763 satisfies the requirements
attending the issue and publication of such documents. A draft was pre-
pared by the Lords of Trade at the King's command, and was laid before
the Attorney-General, Charles Yorke, who reported on 3 October 1763 that
in his opinion "it contains nothing contrary to Law, and that it is pro-
perly prepared in Form". 8 The draft was then sent to the Secretary of
State, Lord Halifax. 9 On 5 October, the King in Council approved the text,
and ordered it prepared for His Majesty's signature. 10 It was signed by
the King on 7 October. 11 At his command, the Proclamation was printed and
passed under the Great Seal in the usual form, and subsequently was entered
on the Patent Rolls. 12 Printed copies were sent by Halifax to the Board

6 Chitty, Prerogatives, 107.
8 Yorke to the Board of Trade, 3 October 1763, PRO, C.O. 323/16, p. 337.
9 Lords of Trade to Halifax, 4 October 1763, CD, I, 156.
11 Ibid., 158, marginal note.
12 Halifax to Lords of Trade, 8 October 1763, CD, I, 163; Patent Roll, 4
Geo. III (1763-4), PRO, c. 66/3693 (inscribed on back of roll); Lord
Mansfield refers to the Proclamation as being "under the Great Seal" in
of Quebec, in a draft report prepared for the Governor of Quebec in
February 1769, speaks of the Proclamation as "this very solemn and im-
portant instrument, passed under your Majesty's great seal of Great Bri-
tain"; CD, I, 327 at 339. We are told by historians that Lord North-
ington was the person who affixed the great seal to the Proclamation; Hum-
phreys and Scott, "Northington and Laws of Canada", 47.
of Trade, with orders to transmit them "to the Governors of His Majesty's several Colonies & Plantations in America & to the Agents for Indian Affairs", which was done by them.\(^{13}\) Unfortunately the list of recipients is not available.\(^{14}\) But we know at least that, leaving aside colonies now part of the United States, copies were received by the Governors of Quebec, Nova Scotia and Newfoundland, as well as by Sir William Johnson, the Indian Superintendent for the North.\(^{15}\) Whether the Hudson's Bay Company was sent a copy is not at present known.\(^{16}\)

The Proclamation was published in the London Gazette for 8 October, as well as in the Annual Register, and a number of colonial newspapers, such as the Providence Gazette.\(^{17}\) We have record of its official publication by the governments of Quebec and Nova Scotia, by the Indian Superintendent for the Northern District, and by a number of governments to the south.\(^{18}\) No doubt it was published by all colonies which received

\(^{13}\) Halifax to Lords of Trade, 8 October 1763, CD, I, 163; JBT 1759-63, entries for October 10-11, pp. 389-90.

\(^{14}\) The records disclose a letter from the Board of Trade to the Governor of Jamaica of 10 October 1763 enclosing the Proclamation, and directing that it be published in the several parts of his government; a marginal note states that "a like Letter was sent to the Governors of all his Majesty's Colonies and Plantations", but no list is given; PRO, C.O. 324/17, p. 304. A similar communication was drafted to Sir William Johnson, Superintendent for Northern Indian Affairs, with the notation that a like letter was sent to John Stuart, Superintendent for Indian Affairs in the Southern district; PRO, C.O. 324/17, p. 305. See also: LBC, X, 39; JP, IV, 214; CCHS, XVIII, 255; PCR, IX, 79.

\(^{15}\) See the evidence regarding publication, below. That a copy of the Proclamation was at some point sent to the Governor of Newfoundland can be inferred from the fact that Gov. Palliser, in a petition to the Board of Trade of January 1769, speaks of "consulting his Commission, The Kings Instructions and Royal proclamation", referring to the Proclamation of 1763, discussed earlier in the document; LBC, III, 1041, 1039.

\(^{16}\) The present writer has searched through the following materials in the Hudson's Bay Company Archives (PAC microfilm copies) without success: London Correspondence between H.B.C. and H.M. Government, 1683-1837, A. 13/1, for the period 1763 onwards; Minute Book, 1762-1766, A. 1/42, for the period 13 Oct. 1763 - 2 Nov. 1763; London Correspondence Book Outwards -- General Series, 1753-1776, A. 5/1, for the period 6 Sept. 1763 - 9 June 1764; London Correspondence Book Outwards -- H.B.C. Officials, 1761-1767, A. 6/10, for the period 31 May 1763 - 23 May 1764.

\(^{17}\) BRP, 218.

copies. We also know that the Proclamation's provisions regarding Indian
lands were reissued in 1774 by the acting Commander-in-Chief in America,
Maj.-Gen. Haldimand.19 The Proclamation's terms appear to have become
familiar to Indian groups in contact with the British. In 1844 it was
officially reported that the Indians looked upon the instrument as their
Charter, and that they "have preserved a copy of it, to the present time,
and have referred to it on several occasions in their representations to
the Government."20

2) Binding force

To what extent did the Crown hold the power to make binding provi-
sions governing Indian lands in American colonies, as it purported to do
in the Proclamation of 1763? The answer depends upon the character of
the provisions in question, and the constitutional status of the colonies
concerned.

As we saw earlier, under common law the Crown has the prerogative
power to legislate for a conquered or ceded colony, but not for one ac-
quired by settlement, where the settlers are held to carry with them the
laws and essential rights of Englishmen. Where the Crown grants an assem-
bly to a conquest, it loses its initial prerogative authority to make laws
there.21 This authority, then, in the absence of special circumstances or
provisions, is confined to conquered and ceded colonies which do not pos-
sess representative legislatures.

The Crown's power to dispose of lands in a colony rests upon a dif-
ferent basis.22 In an uninhabited country acquired by settlement, the
Crown obtains full title to the soil and unrestricted powers of disposal.

19 10 March 1774 at New York; texts of partially destroyed documents in
20 Report on the Affairs of the Indians in Canada, Journals of the Legis-
labile Council of Canada, 1844-5, Vol. 4, Appendix EEE, (Sessional
Papers, No. 2), Section 1 (no pagination).
21 See discussion in Chapter 1.
22 Reviewed in Chapter 2.
In a conquered or ceded land, or in an inhabited country deemed to have been acquired by settlement, the Crown is automatically vested with full rights to any lands not subject to existing private interests. It also gains an underlying title to lands affected by private rights, along with an initial power to extinguish those rights by acts of state and (in conquests) the continuing power to modify them by legislation under the prerogative. In the absence, however, of adverse acts of state or valid legislation, acquired rights of private property presumptively continue undisturbed. Where an assembly is summoned in a colony, the Crown's prerogative authority to legislate (in the case of a conquest) ceases. However the Crown's rights as regards land are otherwise unaffected by the calling of an assembly, 23 although they may be modified by legislation which is passed by such a body and duly assented to.

Turning to the relevant clauses of the Proclamation, we observe that they purport to do the following: a) recognize exclusive Indian rights within a defined territory and more generally to unceded lands in their possession; b) characterize those rights as inalienable, except to the Crown or proprietaries; c) forbid colonial officials to grant such lands; and d) prohibit settlement upon them.

So far as (a) and (b) are concerned, it may be observed that so long as the Crown retained the power to dispose of waste lands in the colonies concerned, it necessarily held the power to recognize and define Indian rights to such lands. Where the lands in question were already burdened by a recognized Indian interest consistent with that allowed by the Proclamation, then that instrument confirmed such interests in an authoritative way. Where the lands affected had already been granted to others with no provision made for Indian rights, the effect of the Proclamation would depend upon whether the Crown retained a power to legislate for the colony in question. Where it held such a power, the Proclamation's recognition of

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23 See comments in O'Connell and Riordan, Opinions, 329.
an Indian interest might have the effect of qualifying rights held under previous Crown grants. 24

With respect to (c), it is clear that the Crown may in general prescribe limits to the exercise of powers conferred upon its officers, in this case the authority of the Governor of a colony to grant lands. 25 In the case of a proprietary colony, however, different considerations arise, which will be considered later in relation to Rupert's Land.

The final measure (d) merely articulates a natural consequence of (a). To the extent that the Crown held the power to recognize Indian rights in certain lands, it was capable of rendering them exclusive. The prohibition of settlement on such lands merely confirms the exclusive character of the rights recognized. However the prohibition could not validly impose duties upon subjects beyond those flowing from the land rights recognized, except in areas where the Crown retained a prerogative power of legislation.

The distinction between the Crown's legislative powers in a colony and its powers over lands was implicitly recognized in the case of Campbell v. Hall (1774). 26 Lord Mansfield held that the Crown lost its authority to legislate for the colony of Grenada upon the grant of an assembly in the Royal Proclamation of October 1763. So a Royal Letters Patent of July 1764 imposing a customs duty on the island was void. Nevertheless he treats as valid a Royal Proclamation of March 1764 which sets forth terms for the disposal of lands in the colony. 27 In fact, he refers to it as one of the

24 See North Charterland Exploration Company (1910) Ltd. v. R. [1931] 1 Ch. 169 (Ch.), discussed below.
25 As Cockburn A.-G. stated in argument before the Privy Council in R. v. Clarke (1851) 7 Moo.P.C. 77 (P.C.) at 83: "A Governor of a Colony is not invested with all the prerogative of the Crown. The power of granting land is part of the prerogative of the Crown. The Governor's power is limited by his Commission, and the Royal instructions." See also the authorities considered in Chapter 19.
26 Lofft 655, 98 E.R. 848.
27 The full text is found in BRP, 218-24; an extract is given in the special verdict in Lofft 655 at 661-2.
instruments whereby the Crown lost its legislative powers, in inviting settlers to come and take up lands in Grenada.\textsuperscript{28}

The question whether the Crown had the prerogative power to make provision for Indian lands in a colony where it lacked legislative authority was dealt with in the leading case of \textit{Johnson v. M'Intosh} (1823).\textsuperscript{29} There it was argued for the plaintiffs that the Proclamation of 1763 could not restrain private individuals from purchasing Indian lands in Virginia "because the king had not, within the limits of that colonial government, or any other, any power of prerogative legislation, which is confined to countries newly conquered...", and \textit{Campbell v. Hall} was cited in support.\textsuperscript{30} Marshall C.J. rejected this contention, stating that in British constitutional law all vacant lands were vested in the Crown, and the exclusive power to grant them was admitted to reside there as a branch of the royal prerogative. This power, he affirms, was fully recognized in the American colonies. "All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony."\textsuperscript{31} This held true not only of vacant lands, but also of lands occupied by the Indians, the ultimate title to which, subject to the Indians' right of occupancy, was held by the King, along with the power to grant that title.\textsuperscript{32} "These grants", explains Marshall in an earlier passage, "have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."\textsuperscript{33} So, he concludes, the lands covered by the Royal Proclamation of 1763 were lands which the King had the right to grant or to reserve for the Indians.\textsuperscript{34}

The Chief Justice goes on to hold that the Proclamation's validity may also be justified on another basis. In British constitutional law,

\textsuperscript{28} Loftt 655 at 747. \textsuperscript{29} 8 Wheaton 543 (U.S.S.C.). \textsuperscript{30} At 564. The reply of the defendants on this point may be seen at 571. \textsuperscript{31} At 595-6. \textsuperscript{32} At 596, 574. \textsuperscript{33} At 574. \textsuperscript{34} At 596.
the Crown holds extensive prerogative powers to conduct relations with foreign nations. The peculiar situation of the Indians, considered in some respects as dependent groups and in other respects as distinct peoples, occupying a country claimed by Britain, yet too powerful not to be feared as formidable enemies, required that some means should be adopted for the preservation of peace, by quieting the Indians' apprehensions for their lands. "This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown". 35

Since the expulsion of the Stuarts, concludes Marshall, the power of imposing taxes by proclamation has never been claimed under the royal prerogative. However the powers of granting or refusing to grant vacant lands, and of restricting encroachments on the Indians have always been admitted. "The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts." 36

A similar view was taken in New York of the Royal Proclamation's effect. In Jackson v. Porter (1825) it was said that "the authority of the king to regulate and control purchases from the Indians within his colonies, was not questioned on the argument, and cannot be denied." 37 The Kentucky Court of Appeal adopted the same position in 1823 as regards lands originally claimed by the colony of Virginia, holding that "all purchases by individuals from the Indians, were expressly forbidden by the royal proclamation of 1763, which remained in force until the revolution, by which the then American colonies became independent states. . .". 38

The legal effects of the Proclamation in the particular Canadian territories under consideration is our next topic.

35 At 596-7. 36 At 597.

37 13 Fed. Cas. 235 at 241 (N.Y.Cir.Ct.).

38 Halloway v. Doe d. Buck (1823) 14 Kentucky Reports 293 at 294. (Kentucky C.A.).
3) The ceded territories

Upon the cession of French territories in February 1763, the Crown was automatically vested with full rights and powers of disposal over lands not subject to existing private interests, along with the power to confirm or extinguish existing property rights. It also held a general authority to legislate under the prerogative for the colony. Whichever head of authority is chosen, there would appear to be no doubt that the Proclamation's provisions regarding Indian lands constituted a valid exercise of the Crown's powers in the ceded lands, and, as Canadian courts have subsequently held, had the force of a statute there. 39 The ceded territories include, it may be noted, not only the new colony of Quebec and the western and northern hinterland (as far as French lands extended), but also Labrador and the islands of Prince Edward and Cape Breton, whose annexation to the colonies of Newfoundland and Nova Scotia is announced in the Proclamation. 40 Labrador occupies a peculiar position, as it was attached to the government of Newfoundland prior to the Proclamation's appearance, and so arguably had acquired the status of that colony. 41 But, as we will see in dealing with Newfoundland, this would not affect the Proclamation's validity in Labrador.


40 Part I, pars. 6-7.

41 See Chapter 11.
Old Nova Scotia

Nova Scotia, or Acadia, was by origin a ceded colony acquired from France under Article XII of the Treaty of Utrecht, 1713. The Governor was authorized in his Commission of 1749 to summon a general assembly of freeholders, and in 1758 such a body was finally called. Whatever powers the Crown once possessed to legislate for the colony had, by 1763, come to an end.

However the Crown retained its power to dispose of any lands in the colony which had not previously been granted by it or were not otherwise the subject of recognized private rights. There were, as of October 1763, no imperial or local statutes circumscribing or abridging in any substantial manner the Crown's authority in that sphere. It follows that the King was in general competent to recognize the rights of Indians to lands held by them in Nova Scotia, to define those rights, to prohibit the Governor from granting Indian lands, and to restrain private individuals from settling on them, as was done in the Proclamation of 1763. However this would not hold true of lands already the subject of conflicting private interests. These the Crown could not, generally speaking, affect by prerogative act.

42 See discussion in Chapter 7.
43 See discussion in ibid., and documents in Kennedy, Documents, 6-18.
44 For the principal Nova Scotia acts affecting land prior to 1764, see 32 Geo. II, c. 2 (1758), 32 Geo. II, c. 3 (1758), 32 Geo. II, c. 11 (1758), 32 Geo. II, c. 14 (1758), 32 Geo. II, c. 15 (1758), 32 Geo. II, c. 24 (1758), 32 Geo. II, c. 31 (1758), 33 Geo. II, c. 3 (1759) (last session of first assembly), 33 Geo. II, c. 5 (1759) (first session of second assembly), 34 Geo. II, c. 3 (1760), 34 Geo. II, c. 4 (1760), 34 Geo. II, c. 5 (1760), 34 Geo. II, c. 8 (1760), 1 Geo. III, c. 2 (1761), 1 Geo. III, c. 3 (1761), 3-4 Geo. III, c. 3 (1763), 3-4 Geo. III, c. 8 (1763); in Uniacke, Nova Scotia Statutes 1758-1804.
5) Newfoundland

Newfoundland has generally been treated as a settled colony, where English law prevailed in a qualified form. In Kiely v. Carson, the Privy Council held that Newfoundland is a settled, not a conquered colony, and to such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects.

So, although no assembly had as yet been granted to the inhabitants of Newfoundland in 1763, it appears that the Crown possessed no right in its prerogative to legislate for the colony, and that Newfoundland, in this respect, stood in the same position as Nova Scotia.

The Crown's title to lands in the island of Newfoundland (leaving aside the newly annexed coast of Labrador, which was ceded territory) was full and unimpaired in 1763, as was its power to dispose of lands there, except to the extent that the Crown had previously granted such lands or recognized existing rights thereto, or that title to land had been acquired under the Imperial Act of 1698 to Encourage the Trade to Newfoundland. Within these limits, then, the King possessed the authority to recognize indigenous land rights in Newfoundland.

So far as Labrador is concerned, whether the Crown's powers over lands there were the same as those held in the ceded territories or rather those possessed as regards Newfoundland, it would appear that on either hypothesis the Proclamation's provisions were in general valid there.

45 Legal opinion rendered by Francis Fane, Counsel to the Board of Trade, on 30 March 1730, reported in Reeves, History of Newfoundland, 111; Yonge v. Blaikie (1822) 1 Newf.L.R. 277 (Newf.S.C.) at 283; Clark, Colonial Law, 21; Walbank v. Ellis (1853) 3 Newf.L.R. 400 (Newf.S.C.) at 407.

46 (1843) 4 Moo.P.C. 63 (P.C.) at 84-5.

47 Nevertheless it was only at a later period that the Crown's legislative authority was denied in the colony; see Jennings and Long v. Hunt and Beard (1820) 1 Newf.L.R. 220 (Newf.S.C.), and discussion in Chap. 1.

48 10 & 11 Will. III, c. 25, see esp. s. 7 (also cited as 10 Will. III, c. 14; the year is variously given as 1698 and 1699). See Walbank v. Ellis (1853) 3 Newf.L.R. 400 (Newf.S.C.) at 403-5 for the nature of the interest recognized there.
6) Rupert's Land

As seen earlier, Rupert's Land was treated initially as a conquered colony where the Crown held full powers of legislation. Although the Hudson's Bay Company had been granted certain limited rights of legislation respecting the territory in its Charter of 1670, no representative legislature had been established in the colony. It would appear on this basis that the Crown's original legislative competence remained unimpaired, and that the Proclamation's provisions regarding Indian lands were valid and binding in Rupert's Land.

Several arguments may be brought against this view. It may be contended that, even assuming that the Crown retained in most respects its original legislative powers in the colony, it was incapable of modifying by prerogative act land rights previously vested in the Company by Royal Charter, which rights were indefeasible. In response, it could be said that one must distinguish between the Crown's legislative authority and its power over lands. Where the Crown grants lands to a subject with no reservation of rights, it loses its power of disposal over such lands, generally speaking. However where the King is also competent to legislate for that territory, he may by virtue of his authority modify such rights, as might any other legislature empowered to make laws for the country.

The leading case on the subject is *North Charterland Exploration Company (1910) Ltd. v. R.* (1931). The supplicant Company had inherited certain proprietary rights over a large territory (known as the North Charterland Concession) in North-Eastern Rhodesia, which had been granted to a predecessor company by the British South Africa Company within areas comprised in the latter's Charter. In 1923, the Crown agreed to relieve the British South Africa Company of the administration of Northern Rhodesia.

49 See Chapter 8. 50 On the general issue see Chapter 1.
51 [1931] 1 Ch. 169 (Ch.).
In 1928 it issued an Order in Council, by virtue of powers held under the Foreign Jurisdiction Act, 1890, or otherwise vested in the Crown, setting apart certain lands as native reserves, which lands were located within the Concessionary territory still held by the suppliant Company. The Company then sought a declaration that the Order in Council of 1928 was void in so far as it purported to deal with the Concessionary lands. The Company argued that the Concession was the Company's property by virtue of a grant made by the British South Africa Company under its Royal Charter, and so the land was ultimately held by virtue of a Crown grant. It was further argued that at common law the Crown cannot derogate from its grant, and that this principle was not affected by the Foreign Jurisdiction Act, 1890, which attributed to the Crown a general legislative authority.

The court did not accept these arguments. It noted that, in countries where the Crown does not hold legislative powers, all grants of land, whether by the Crown or its grantees, are necessarily subject to laws passed by the relevant legislative body. By parallel, where the Crown holds the legislative authority for a country, it is difficult to see how its powers could be fettered in that respect by a mere grant of land without more. In making use of its supreme legislative authority, the Crown was exercising a prerogative to which every grant must necessarily be subject. The Crown, concluded the court, could not deprive itself of its legislative competence by merely making a grant of land within the territory over which that authority existed.\textsuperscript{52}

It may be remarked that although the source of the Crown's legislative powers in the \textit{North Charterland} case was arguably an Act of Parliament, the case was not decided on that basis and the principles laid down there appear applicable to situations where legislative competence derives from the common law. The inference is that the Crown's grant of proprietary rights to the Hudson's Bay Company in the Charter of 1670 did not of itself strip the Crown of the power to affect those rights by virtue of its general legislative powers.

\textsuperscript{52} At 185-7.
legislative authority in the territory.

A more comprehensive argument might be advanced against the Proclamation's validity, to the following effect. Whatever constitutional status Rupert's Land may have held in 1670, the territory had by 1763 gained the status of a settled colony, where the Crown had no general legislative powers. Under the law obtaining in the late eighteenth century, territories which were not gained by conquest or cession from a civilized power, but rather by the establishment of an English presence in an uncivilized region, were viewed as acquired by settlement. Rupert's Land fell into the latter category, and so was viewed as a settled colony at the time the Proclamation was issued. Thus the validity of its provisions cannot be sustained upon the ground that the Crown retained the power to legislate for the colony.

In reply, it may be noted that there is considerable doubt whether the common law of the eighteenth century recognized a principle whereby so-called "uncivilized" acquisitions automatically constituted settled colonies. The evidence suggests that such a doctrine did not achieve prominence until the following century. Indeed its precise scope and status remain uncertain today. We have discussed these points at some length in Chapter 1, and will not repeat what was said there, except to point out that Blackstone, writing only two years after the Proclamation's appearance, affirms that the American colonies were principally conquered and ceded territories, gained by driving out the indigenous peoples, or by treaties. 53

Were it true that Rupert's Land originally constituted a settled colony, or had gained that status by the late eighteenth century, it would appear to follow that the legislative powers conferred upon the Hudson's Bay Company in the Charter of 1670 were (or became) for the most part invalid. While the Crown held the power to call an assembly in a settled colony, it could not grant to an unrepresentative body, such as the Company, a legislative authority which it did not itself possess. Yet it is clear,

53 See text in Chapter 1, at note 122.
for example, that the Governor and Council established by the Company for the settlement of Assiniboia in Rupert's Land, which lacked any representative element, passed legislation for the area in question from at least 1832 onwards.\textsuperscript{54} These laws and regulations have (so far as this writer is aware) been generally accepted as valid. The point merits more detailed consideration.

The Charter of 1670 gives the Company, assembled in Court, the authority to make laws governing its officers and employees in Rupert's Land, not repugnant to the laws of England.\textsuperscript{55} The Company is also empowered to transport people to the colony and "to governe them in such legall and reasonable manner" as the Company thinks best, and to punish them for breach of its orders.\textsuperscript{56} In 1822, the General Court provided by resolution for the appointment (\textit{inter alia}) of a Governor and Council for Assiniboia, and named the Councillors to be appointed. It also provided that the Governor and any two Council members should be competent to form a Council to administer justice and exercise "the powers vested in them by the Charter".\textsuperscript{57} Various regulations were subsequently passed by the Council to govern the settler community in Assiniboia. These were codified in 1851 by a Law Amendment Committee set up by the Council, which was headed by the lawyer and former Recorder of Rupert's Land, Adam Thom. The Committee's Report discusses at some length the legal restrictions existing upon the legislative powers of the Council, such as, for example, its inability to make laws repugnant to Imperial statutes extending to the colony. But at no point does it question the Council's general legislative competence as regards the local settler community.\textsuperscript{58}

The Crown law officers, Jervis A.-G. and Romilly S.-G., when considering the validity of the Company's Charter in 1850, stated that the powers

\textsuperscript{54} Gibson and Gibson, \textit{Substantial Justice}, 18, 22-3, 30, 41-3.
\textsuperscript{55} HBC Charter, 140 (Appendix B).
\textsuperscript{56} HBC Charter, 146-7.
\textsuperscript{57} Text in \textit{CNW}, I, 219-21.
\textsuperscript{58} Text in \textit{CNW}, I, 369 at 370-2. The Committee's proposed Code was accepted by Council in July 1852; \textit{ibid.}, 386-7.
claimed by the Company in respect to territory, trade, taxation, and government properly belonged to them. In 1857, their successors, Bethell A.-G. and Keating S.-G., expressed more qualified views. They noted, as a preliminary, that "nothing could be more unjust, or more opposed to the spirit of our law, than to try this charter as a thing of yesterday, upon principles which might be deemed applicable to it, if it had been granted within the last 10 or 20 years" They went on to hold that the Company's territorial ownership of the lands granted, and rights necessarily incidental thereto (such as the right to exclude persons violating their regulations) ought to be deemed valid. But any rights of government, taxation, exclusive administration of justice or exclusive trade, other than those flowing from the rights of ownership, could not be legally insisted upon. However this statement, they remarked, requires some explanation:

The Company has, under the charter, power to make ordinances (which would be in the nature of bye-laws) for the government of the persons employed by them, and also power to exercise jurisdiction in all matters, civil and criminal; but no ordinance would be valid that was contrary to the common law, nor could the Company insist on its right to administer justice as against the Crown's prerogative right to establish courts of civil and criminal justice within the territory.

We do not think, therefore, that the charter should be treated as invalid, because it professes to confer these powers upon the Company; for to a certain extent they may be lawfully used, and for an abuse of them the Company would be amenable to law.

The law officers, then, conceded to the Company a somewhat amorphous regulatory power flowing from its territorial rights, and a limited authority to make ordinances. At the same time they clearly doubt whether the Company possessed a more general legislative power, while failing to explain the basis for their misgivings.

Whichever opinion is the more correct, it would appear that the actual regulations passed by the Company's Councils in Rupert's Land have been generally accepted. The Crown, in conferring a legislative power upon an

59 Papers Regarding HBC, (1850), Document No. 6, dated January 1850.  
unrepresentative institution such as the Company, would not lose its own legislative authority. Upon this ground, then, the Proclamation's provisions regarding Indian lands would be valid in Rupert's Land.

If we adopted, however, the contrary view and held that Rupert's Land had by 1763 assumed the status of a settled colony, and that the Crown no longer enjoyed any legislative competence there, several new issues would arise. It could be argued that, on the assumption that the Company's proprietary rights were initially valid and still alive in 1763, the Crown could not affect such rights, on the principle that (apart from any legislative authority held) the King cannot derogate from his own grants of land. From this it could be inferred that the Crown, in 1763, had no power to recognize and protect indigenous land rights in Rupert's Land.

However as seen earlier, proprietary grants of American territories held by Indians were generally construed as grants of the underlying title subject to the Indians' right to use and enjoy the land, and of an exclusive right to extinguish that title by purchase or cession, or by conquest in a lawful war. So far as Rupert's Land and the other proprietary colonies are concerned, then, the measures concerning Indian lands in the Proclamation of 1763 do not alter the rights and powers of the proprietors over the territories granted to them. Rather these confirm and clarify the implicit reservations in favour of indigenous land rights to which the proprietary grants were originally subject.

In any case, Royal Charters granting vast and often unknown regions in America to private parties or companies were not in practice treated in the same manner as grants covering relatively modest tracts with definite boundaries. In theory, perhaps, the two stood on the same footing, and the Crown's powers were no greater in the one instance than in the other. But

61 For applications of this principle in other contexts see the opinions of Thomson S.-G. of 18 December 1717 and 15 February 1718 in SP 1717-18, #261, p. 125 and #383, p. 185; see also the opinion of Yorke A.-G. and Talbot S.-G. of 11 August 1731, Forsyth, Opinions, 144-5; and that of Garrow A.-G. and Shepherd S.-G. of 22 January 1817, ibid., 153 at 154.

62 See Chapter 6.
the history of North America is witness to a striking difference in practice, accurately described in an opinion written in 1761 by the Attorney-General, Charles Pratt, concerning the claims of Connecticut to lands within the chartered limits of Pennsylvania. He writes:

If all the Colonies in North America were to remain at this Day bounded in point of Right as they are described in the Original Grants of each I do not believe there is one Settlement in that part of the Globe that has not in some measure either been encroached upon, or else usurped upon its Neighbour So that if the Grants were of themselves the only rule between the Contending Plantations there never could be an End of their Disputes without unsettling large Tracts of Land where the Inhabitants have no better Title to Produce than either Possession or posterior Grants w'c in Point of Law w'ld be superseded by Prior Charters. Hence I conceive that many other Circumstances must be taken into Consideration besides the Parchment Boundary, For that may at this Day be Extended or Narrowed by Possession Acquiescence or Agreement; by the Situation & Condition of the Territory at the time of the Grant, as well as by various other Matters with respect to the present dispute; . . .

By the same token it may be suggested that in ascertaining whether the Proclamation of 1763 encroached upon rights conferred in the Charter of 1670, one must not only look to the words of the instruments concerned, but also consider the degree to which the Company had availed itself of its paper rights, and weigh that against the long-standing possession of the indigenous inhabitants.

It is interesting that the Indian provisions of the Proclamation were accepted and implemented in the proprietary colony of Pennsylvania. A survey of official documents over the succeeding decade furnishes abundant evidence of its application there. To cite but a few examples, the Proclamation proper was published in Pennsylvania by John Penn, Lieutenant Governor of the province, on 8 December 1763, who commanded all His Majesty's subjects in the colony "to take notice of His Royal Will & Pleasure therein made known, & to conform themselves thereto accordingly". Royal Instructions were later sent to the colony which note the existence of settlements west of the Allegheny Mountains, and order Penn to secure their

63 7 March 1761, SCP, II, 64-5. The opinion is also printed, with certain omissions, in PCR, VIII, 620-2. See also the opinion of Charles Yorke S.-G., dated 30 March 1761 on the same subject in SCP, II, 67-9.
64 PCR, IX, 80 at 85.
evacuation and in general ensure a more strict obedience to the Proclamation's terms. On 23 September 1766 Penn compliantly issued a further Proclamation carrying out these instructions.

In conclusion, whichever view we adopt as to the constitutional status of Rupert's Land in 1763 and of the Crown's authority there, there are good reasons for thinking that the Proclamation's provisions regarding Indian lands were valid as applied to the colony.

65 24 October 1765; ibid., 321.
66 Ibid., 327-8.
CHAPTER 19

LEGAL EFFECTS

We have seen that the Royal Proclamation of 1763 is formally valid, and that its provisions regarding Indian lands are binding in the colonies affected. It remains to consider the precise legal effects of these provisions, as obtaining in 1763. Would grants of unceded Indian lands made by colonial governors in violation of par. 1 be invalid, or merely invoke the Crown's displeasure? Would purchases of such lands by private individuals contrary to par. 4(a) be void? Would cessions of Indian lands to the Crown or proprietaries be null for failure to comply with the conditions laid down in par. 4(a), and would the normal causes of nullity in contracts also apply to surrenders of this type?

1) Land grants

The first paragraph of Part IV sets forth restrictions upon the powers of governors to issue warrants of survey or patents for specified lands. What would happen if a colonial governor granted lands falling in one of the prohibited categories -- unaware, perhaps, of the Proclamation's precise terms, or misunderstanding their purport, or indeed not informed of Indian claims to the lands in question? Would such a grant be nullified by the Proclamation's terms, or would it merely invite the Crown's displeasure? The argument differs for royal colonies such as Quebec, Nova Scotia and Newfoundland, and on the other hand for a proprietary colony such as Rupert's Land.

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1 The question of the validity of grants made by the Imperial Crown itself is tied to the question of the Crown's power to modify the Proclamation's terms and to extinguish rights held thereunder, and will be considered in Chapter 20.

2 See discussion in Chapter 16.
a) Royal colonies

Generally speaking, the Governor of a royal colony enjoys only limited authority, the bounds of which are prescribed in his Commission and Instructions, or in other prerogative instruments such as Orders in Council and Proclamations. He is a creature of the Crown, exercising such powers as are conferred upon him from time to time, powers which may be extended or restricted at the Crown's pleasure. He is not a viceroy, nor does his office import a full delegation of the Crown's authority. His acts are not equivalent to the Crown's acts: they are not necessarily valid in all instances where the Crown's would be. Their validity depends upon the terms of the instruments from which the Governor derives his authority. Acts done in excess of such authority, or violating the Crown's direct prohibition, are invalid. Land grants made by a Governor fall into this category, and so are null if ultra vires.

So much is clear in principle. Some uncertainty, however, surrounds the effect of particular sorts of prerogative instruments conveying the Crown's orders. We will consider first the respective positions of Commissions and Instructions, and then examine the effect of Proclamations.

There is good authority to the effect that, in general, acts exceeding limits prescribed in a Governor's Commission are void. It is rather less certain whether specific strictures laid down in Royal Instructions, standing alone, will nullify acts of a Governor falling within the general terms of his Commission. The two instruments are, of course, closely

3 For an example of a royal proclamation containing directions as to the manner in which the governor of a royal colony should exercise his authority, see that issued in respect to Trinidad on 19 June 1813, partial texts of which are given in Clark, Colonial Law, 307-8, and Howard, Colonial Laws, I, 531-2.

4 These principles are laid down in: Cameron v. Kyte (1835) 3 Knapp 332, 12 E.R. 678 (P.C.); Hill v. Bigge (1841) 3 Moo.P.C. 465 (P.C.); Musgrave v. Pulido (1879) 5 A.C. 102 (P.C.).

5 See Smith, Appeals to Privy Council, 597 seq.; Swinfen, "Royal Instructions"; Roberts-Wray, Commonwealth Law, 146-9. We refer here to the legal position obtaining in 1763. One aspect of the question was eventually settled by section 4 of the Colonial Laws Validity Act, 28-29 Vict., c. 63 (1865), which declares in effect that colonial laws assented to by a Governor are not to be considered void merely because
linked and normally accompany each other, the Commission containing the general grant of authority, and the Instructions embodying detailed directives as to how it should be exercised. They differ, however, in several respects. A Commission is a public document, issued as letters patent under the Great Seal, and read out upon a Governor's entry into office. Instructions constitute private communications from the Sovereign, and are issued under the Signet and Sign Manual. In principle, at least in the 18th century, they remained confidential, only such parts being disclosed publicly as were thought useful or essential for particular ends.  

As early as 1713, the Attorney-General of England, Edward Northey, held that land grants made by Governors of New York beyond the authority conferred in their Commissions would be void. The Board of Trade had requested his opinion respecting a situation where certain persons, originally holding lands in New York under a stated quitrent, subsequently obtained new grants for the same lands, or grants of confirmation, for a lower quitrent. The specific query was whether the subsequent grants, with their reduced rents, were good in law, or whether the original grants were still binding. The Attorney-General held that, if the Governors had sufficient authority under their Commissions to make such new grants, they were valid. But, he continued, "if the succeeding Governors had not by their Commissions authority to make such reductions, which I am of opinion they had not, . . . their old Quit Rents are and ought to be paid, and the Grants of reduction will be void."

The same view was expressed at a 1765 Committee hearing relating to

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6 See Labaree, Royal Government, 6 seq., and Swinfen, "Royal Instructions", 22-3, 34-6.
7 Secretary Popple to Attorney-General Northey, 28 April 1713; NYCd, V, 362.
8 Opinion of 5 May 1713; ibid., 362-3.
the conduct of the New Hampshire Governor in granting lands which were claimed by both New Hampshire and New York. It was said there that "if the Governor grants in direct Violation of his Commission, the Grant is void". A memorandum dating from the same era found among the Secretary of State's papers goes rather beyond this in affirming that "the governors derive their power of granting land solely from their instructions", and that "a fresh instruction may either erase, diminish, or entirely annul the governor's power of granting lands". Royal Commissions and Proclamations would, of course, stand in an even stronger position.

A legal opinion rendered in 1765 by John Kempe, Attorney-General of New York, in a letter to Sir William Johnson, Indian Superintendent for the Northern Department, is more cautious, raising doubts as to whether invalidity would attend the disregard of Instructions, while conceding that effect in the case of Commissions. He writes:

the Crown has thought fit by its Instructions to its Gov'r, here to direct them not to Grant Lands, before they were purchased from the Indians, but this is not a Restriction contained in his Commission by which he has Power to Grant, but exists in the private Instructions, And tho' if a Governor should act contrary to his Instructions it would justly expose him to the Kings Displeasure, yet perhaps his Acts might be nevertheless binding, and a Grant contrary to the Instructions good, if the Gov'r. pursued the Powers in his Commission. . . But of this I speak doubtfully, rather inclining to think there is a Clause in the Commission would make it void.

A more liberal attitude is exhibited in submissions made before the Privy Council by the Attorney-General for England, Sir Alexander Cockburn, in the case of R. v. Clarke, where he affirms that a land grant made by a Governor would be void if it exceeded the limits of his power, as laid down in his Commission and Instructions.

9 Smith, Appeals to Privy Council, 607, note 434, citing PRO W.O. 1/404/13. The author of the statement is not clearly indicated by Smith, but the context suggests that it may have been John Kempe, the Attorney-General of New York.


11 Dated 12 August 1765; JP, XI, 886 at 888. Later in the opinion, Kempe allows for the possibility of Instructions voiding a grant, at 889.

12 (1851) 7 Moo.P.C. 77 (P.C.) at 83.
We may conclude, then, that if the effect of instructions is doubtful, it would appear that land grants made in excess of powers conferred in a Governor's Commission are void.

Royal Proclamations, as public acts under the Great Seal, are prerogative instruments of a high order, equal in authority to Governor's Commissions, and normally accompanied with greater solemnity and publicity. Like Commissions and Charters, they are susceptible of operating as colonial constitutions. The Proclamation of 1763 performed this function for Quebec, and the basic constitution of Trinidad was for many years a Royal Proclamation. As with Commissions, acts done by a colonial Governor in violation of a Royal Proclamation under the Great Seal would appear to be void.

Nevertheless, one authority questions whether a Royal Proclamation should be classified, as regards the colonies, as an instrument under the Great Seal. He points out that in England a Proclamation was first signed by the King, and later appended to Great Seal writs to be distributed for publication. But Proclamations sent to colonial Governors for publication, he affirms, never bore the Great Seal and so should be treated as instruments under the Sign Manual. The passage is somewhat misleading. The author appears to confuse the question of the legal character of an instrument with the manner of its distribution for publication. A Royal Proclamation which passes the Great Seal in England would not become any less of an instrument under the Great Seal by the happenstance that copies distributed to the colonies do not bear the Seal, or are not accompanied by Great

13 See note 3 above.
14 Labaree, Royal Government, 18; the author is a noted historian. No authority is given for the statement that Proclamations sent to Governors did not bear the Great Seal; he refers to Steele, Bibliography of Royal Proclamations, xx as a general authority for his discussion, but Steele does not consider the situation of the colonies there. Questions are raised by a marginal note made to a proclamation entered in the Privy Council Register, Geo. III, Vol. IX, p. 428 (Proclamation for Apprehending Destroyers of the Gaspee, 26 August 1772), which reads: "N.B. The original proclamation under the Great Seal was sent over to Rhode Island..."; BRP, 225, note 1.
Seal writs. What we are concerned with here is the legal weight to be attached to a Proclamation. There can be little doubt that having passed the Great Seal, a Proclamation carries the authority of such an instrument, however we may classify it for other purposes.\textsuperscript{15} Lord Mansfield, in considering the effects of the Royal Proclamation of October 1763 on Grenada in Campbell v. Hall, refers to the instrument as being "under the Great Seal".\textsuperscript{16} Similarly, the Crown law officers, Ryder and Murray (later Lord Mansfield), advised in an opinion of 1752 that the proper method of continuing officers in Georgia after the surrender of the Charter there was "for his majesty to issue a proclamation for that purpose, under the great seal of Great Britain, to be published in Georgia."\textsuperscript{17}

Acts done by colonial officials in violation of Imperial Orders in Council pertaining to the government of a colony have been held invalid. The same, \textit{a fortiori}, would hold true of Royal Proclamations, which are essentially acts of the Crown embodied in Orders in Council, the difference being that they subsequently pass under the Great Seal and are published.\textsuperscript{18} The leading case is Jerusalem-Jaffa District Governor v. Murra.\textsuperscript{19}

The question before the court was whether an Ordinance promulgated by the High Commissioner for Palestine was invalid for violating an Imperial Order in Council of 1923 authorizing him to issue ordinances not inconsistent with the League of Nations' Mandate for Palestine of 1922. The Privy Council

\textsuperscript{15} Indeed our author recognizes that Proclamations equal Commissions in authority; Labaree, \textit{Royal Government}, 19.

\textsuperscript{16} (1774) Loft 655, 98 E.R. 848 at 894. See also discussion and references in Chapter 18.

\textsuperscript{17} Chalmers, \textit{Opinions}, I, 187-8. \textsuperscript{18} See our discussion in Chap. 18.

\textsuperscript{19} [1926] A.C. 321 (P.C.). See also Tschekele Khama v. High Commissioner (1936) [1926-1953] H.C.T.L.R. 9 (Bechuanaland Special Court). The latter case dealt with the effect of an Imperial Order in Council made pursuant to the Foreign Jurisdiction Act, 53 & 54 Vict. c. 37, the 11th section of which provides that such Orders shall have effect as if enacted there (see p. 12 in the case). But the court did not rely on this fact in its treatment of the point at issue (at p. 15). The precise status of the Imperial Order in Council considered in the Jerusalem-Jaffa case is not described there, which suggests that it was not viewed as of decisive relevance.
stated that, as the Ordinance was made under the authority of the Order in Council of 1923, "if and so far as it infringed the conditions of that Order in Council the local Court was entitled and indeed bound to treat it as void", 20 but went on to hold that in the circumstances there had been no such infringement.

We turn to authorities dealing specifically with the Proclamation of 1763. In Montgomery v. Ives, the Mississippi High Court held that the Proclamation's prohibition of grants of unceded Indian lands operated so as to invalidate a grant made in 1772 by the Governor of West Florida. 21 The Quebec Council acted upon similar views, declining on several occasions in the late 1760s to accede to petitions for grants of land in the Restigouche area for this reason. Thus, on 27 December 1766, the Council confirmed the report of a Committee, including among its members the Chief Justice of the Province, William Hey, which recommended that the petition of one Marie Joseph Philebot should not be granted, as "the Lands so prayed to be assigned are, or are claimed to be the property of the Indians, and as such by His Majestys express command as set forth in his proclamation in 1763, not within their power to grant; . . .". 22

b) The proprietary colony of Rupert's Land

We have argued earlier that in 1763 the Crown retained the power to legislate for Rupert's Land, as a conquered colony where no representative legislature had as yet been established. 23 Upon this basis, then, the restrictions imposed upon land grants would be valid and binding there.

In any case, the Hudson's Bay Company could not grant what it did not possess. The Company's proprietary rights under its Charter would

21 (1849) 13 Smedes & M. 161, per Clayton J. at 175, per Sharkey C.J. at 179.
23 See Chapters 8 and 18.
seem to have been held subject to indigenous interests, with respect to which the Company held an exclusive right of preemption. While the Company might grant its underlying title and rights of preemption to third parties, it could not by this method extinguish indigenous rights to the lands concerned. In a general way, then, the Proclamation's restrictions on land grants confirm the existing position in Rupert's Land.

2) Private purchases

In par. 4(a) of the Proclamation, the Crown provides that no private person shall purchase any lands reserved to Indians. Considered in itself, this provision has an ambivalent character. Does it purport merely to prohibit private parties from acquiring Indian lands by purchase, or rather does it characterize Indian land rights as inherently inalienable, except to the Crown or its delegates? In either case, what happens when a private individual buys lands from the Indians? Does he merely incur the Crown's displeasure, or does he render himself liable to some penalty? Is the transaction invalid, or does the purchaser acquire the rights held by the Indians? On wording alone, these matters are open to debate. Fortunately, the authorities have adopted a uniform point of view, holding, in effect, that the Proclamation characterizes the Indian title as inalienable, except to the Crown or its delegates, so that purchases of Indian land by private parties are invalid. The same reasoning has been applied to long-term leases, and would also seem applicable to other dispositions of Indian lands, by way of gift and the like.

In 1767, the Board of Trade considered the authenticity of a land cession made by the Mohawk Indians to Sir William Johnson, Superintendent of Indian Affairs for the North, and its status under the Proclamation of 1763. The Board reported that

24 See Chapters 6 and 8.
Had this Transaction with the Mohawk Nation for the Surrender of a Considerable Tract of Lands to a private person, without Licence from the Crown, taken place subsequent to the proclamation above referred to, it is clear beyond a Doubt that such a proceeding would have been expressly Disallowed as Contrary to the Letter of the said proclamation. ..

But as the surrender had occurred prior to the Proclamation's issue, it could not be faulted on that ground.

This interpretation was upheld in several American cases decided in the 1820s. In the leading case of Johnson and Graham's Lessee v. M'Intosh (1823), Chief Justice Marshall of the Supreme Court held that the Proclamation invalidated certain land conveyances made in 1773 and 1775 to private individuals by the Illinois and Piankeshaw Indians. In the same year, the Kentucky Court of Appeals decided in Halloway v. Doe d. Buck that a deed executed in 1775 by certain Cherokee chiefs purporting to grant a large tract of land to one Henderson and company was invalid.

Chief Justice Boyle, speaking for the court, stated:

The Indian deed certainly conveyed no interest. .. All purchases by individuals from the Indians, were expressly forbidden by the royal proclamation of 1763, which remained in force until the revolution, by which the then American colonies became independent states. ..

A similar view was taken by the New York Circuit Court in Jackson v. Porter (1825), where it was held that a deed to land supposedly executed by the Seneca Indians and confirmed by the Indian Superintendent, Sir William Johnson, in 1764 was invalid under Royal Instructions of 1761 and the Proclamation of 1763. The court stated:

The authority of the king to regulate and control purchases from the Indians within his colonies, was not questioned on the argument, and cannot be denied. Any purchase made. in violation of such regulations, must of course be void. ..

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25 Recited in Order in Council of 26 August 1767; APC, IV, 750.
26 (1823) 8 Wheaton 543 at 594-7.
27 (1823) 4 Littell 293; 14 Kentucky R. 293 at 294. Though this case was decided in November 1823, subsequent to the judgment in Johnson v. M'Intosh delivered in March, it does not cite the latter case and seems to have been decided independently of it; see note at p. 296.
Canadian courts have adopted the same position. In *R. v. Lady McMaster*, the Exchequer Court of Canada held invalid a 99 year lease (with right of renewal) executed in 1817 by the Indians of the St. Regis reserve relative to an island comprised within the reserve. The court referred to the Proclamation's prohibition of private purchases of Indian lands as having statutory force and held that the lease in question was consequently void, as "the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale." 29 The identical conclusion was reached by the Supreme Court of Canada in the parallel case of *Easterbrook v. R.*, which also concerned the validity of a 99 year lease, with covenants for renewal, given in 1821 by the St. Regis Indians for reserved lands. The court stated that

the lease was ineffective and void at law, by reason of the absence of any authority on the part of the grantors to make it, and for non-compliance with the peremptory requirements of the proclamation [of 1763], which have the force of statute. . . 30

3) Purchases by the Crown or proprietaries

The Proclamation provides in par. 4(a) that Indian lands may be purchased exclusively by the Crown, or where located in a proprietary colony by the proprietaries thereof. Two conditions are mentioned. It is stated that the transaction must take place at a public meeting of the Indians in question called by the Governor or Commander in Chief of the colony concerned. It is further assumed that the purchases must be made with the Indians' free consent, when, as the text puts it, they are "inclined" to dispose of their lands. It would appear that purchases not complying with these conditions would be inoperative, and would not extinguish Indian interests in the lands concerned.

29 [1926] Ex.C.R. 68 at 73.
One may infer that a number of other conditions are imported by the use of the term "purchase" in par. 4(a), and by the allusions to cessions elsewhere in Part IV. A purchase is a contract of a well-understood kind. It cannot be presumed that the Crown, having stated the aim of avoiding the "Frauds and Abuses" of past eras, intended to benefit from cessions or purchases tainted by irregularities. Cessions of Indian lands which fail to satisfy the fundamental rules of common law governing the formation of such contracts, or which are affected by the recognized causes of nullity -- misrepresentation, duress and so on -- would appear void or voidable, in the same manner as normal contracts.

To conclude then, land grants made by colonial authorities of unceded Indian lands contrary to the Proclamation are invalid. Private purchases of Indian lands are void, as are purchases or cessions concluded in favour of the Crown or proprietaries which do not comply with the conditions laid down in the Proclamation or with the common law rules governing such contracts.
PART VI

THE ROYAL PROCLAMATION OF 1763:

MODIFIABILITY AND FUTURE APPLICATION
CHAPTER 20

MODIFIABILITY

The Royal Proclamation of 1763 recognizes the rights of Indians throughout British North America to unceded lands in their possession. It prohibits colonial officials from granting these lands and private individuals from settling on them. It forbids their alienation save to the Crown or proprietaries. The question is, in what manner might these provisions and their attendant rights be altered or abrogated, and by whom? We will consider here the position as it existed up until Confederation in 1867.

1) The Imperial Parliament

Throughout the period under review, the Imperial Parliament had the authority to modify or to rescind the Proclamation's provisions regarding Indian lands, and to extinguish the land rights recognized there, in any of the American colonies under the Crown's sovereignty. The overriding authority of acts passed by the King in Parliament in relation to mere prerogative instruments is clear,1 as was Parliament's power to legislate for the British colonies in America in this field, despite the challenge to parliamentary authority presented by the events leading up to the

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1 Section 2 of the Colonial Laws Validity Act, 28 & 29 Vict. c. 63 (1865) provides for the primacy of Imperial Acts of Parliament extending to a colony over colonial laws. The latter are defined in s. 1 so as to include Imperial Orders in Council made for the colony. The principle, in its application to Orders in Council, was not a new one, and would extend to other prerogative instruments, such as Proclamations and Letters Patent. See Roberts-Wray, Commonwealth Law, 210-1.
American Revolution. Nevertheless, in the absence of clear and unequivocal language, no statute would be construed so as to interfere with property rights such as those recognized and protected by the Proclamation, and in particular to abrogate them without providing for compensation.

2) Local legislatures

Prima facie, it would appear that, in the absence of an express or necessarily implied restriction, a colonial legislature empowered to make laws for the peace, order and good government of a colony, or at least to legislate regarding land and indigenous peoples, would possess sufficient authority to amend the Proclamation's provisions in respect to Indian lands, and to modify the rights held thereunder. Matters deemed essential to the furtherance of imperial policy would, in theory at least, be safeguarded by the normal requirement of the Governor's assent to local legislation, and the provision for subsequent disallowance by the Crown.

Nevertheless, the question of the power of a colonial legislature to pass laws at variance with prerogative instruments extending to the colony is controversial, and the more so in the case of instruments under the Great Seal, such as Letters Patent and Proclamations. There is little judicial authority on the matter. In Yeap Cheah Neo v. Ong Cheng Neo, the Privy Council gave effect to a local Ordinance which abolished a court originally established under Imperial Letters Patent and substituted another, while enacting that all the rules applicable to the former court.

2 See the famous Act of 6 Geo. III, c. 12 (1766) which declares that the King in Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever." The question is briefly reviewed in Todd, Parliamentary Government, 209-13.


4 (1875) L.R. 6 P.C. 381 (P.C.).
under Imperial Acts of Parliament, Orders in Council, Letters Patent, and so on, would apply to the new court. However the decision did not turn on whether the latter effectively repealed the former, and so the precise issue was not discussed in the judgment. But the court apparently did not envisage the possibility of the Ordinance's invalidity for repugnancy to the Letters Patent, as is evidenced by their conclusion that "while the repealed letters patent ceased to have any operation of their own, all the provisions contained in them applicable to the old Court were virtually reenacted and made applicable to the new Court...".

The main source of doubt is the principle that colonial laws repugnant to the laws of England are invalid. The rule was incorporated, in varying forms, in many Royal Charters, Commissions and other instruments defining the powers of colonial legislatures, but the precise meaning of the phrase "laws of England" was never satisfactorily explained. Clearly it covered Imperial Acts of Parliament extending to a colony, and in the 18th century was also thought to refer to certain fundamental features of English law, and generally matters vital to imperial interests. An opinion of 1718 delivered by the Solicitor-General, Thomson, treats as void a Carolina law imposing a heavy duty on British goods, on the ground that it effectively prohibits trade to British subjects, "which is by no means agreeable to the laws of Britain". In 1737 the Crown law officers held that an act of a colonial assembly, even if confirmed by the Crown, could not create a monopoly on trade with the Indians inhabiting the colony, "as an absolute exclusive trade with the Indians would be destructive of that general right of trading which all his Majesty's subjects are entitled to, and therefore repugnant to the laws of Great Britain...".

5 At 397, emphasis added.

6 For an early formulation of this doctrine, see the opinion of Yorke A.-G. and Talbot S.-G. of 1 August 1730 on the powers of the Connecticut assembly; Chalmers, Opinions, I, 353-4.

7 Opinion dated 5 April 1718; ibid., II, 292-3.

8 Opinion of Ryder A.-G. and Strange S.-G. dated 28 July 1737; Forsyth, Opinions, 431.
General, Ryder, and Solicitor-General, Murray (later Lord Mansfield), advised in 1747 that the provisions of a North Carolina act of 1715 giving priority to country debts and postponing the execution on judgments for foreign debts were void as "contrary to reason, inconsistent with the laws, and greatly prejudicial to the interests of this kingdom".  

The doctrine of invalidity for repugnancy to fundamental principles of English law waned in strength during the 19th century, and was finally disposed of in section 3 of the Colonial Laws Validity Act of 1865, which provides that no colonial law either shall be, or be deemed to have been, void for repugnancy to English law, unless it is repugnant to an Imperial Act of Parliament extending to the colony, to an order authorized by such Act, or to one having the force or effect of such Act.  

Basic doctrines of English law are not mentioned, and the section is given a retrospective operation. If at one time it was possible to argue that colonial acts interfering with Indian lands were void for inconsistency with fundamental principles of English law as declared in the Proclamation of 1763, that view can no longer be entertained.

Nevertheless the 1865 Act allows for a different argument. Section 2 refers to repugnancy with, not only an Act of Parliament, but "any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act." The Proclamation of 1763 was not issued under the authority of an Act of Parliament. But it has been held, as an instrument under the Great Seal, to have the force of a statute in the colonies to which it applies. So the Proclamation, on one view, satisfies the criteria mentioned in the final clause.

A contrary line of reasoning proceeds from the fact that the term

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9 Opinion dated 3 June 1747; Chalmers, Opinions, II, 62.
10 See discussion in Swinfen, Imperial Control, 53-63, and Roberts-Wray, Commonwealth Law, 400-01.
11 28-29 Vict. c. 63; s. 3 must be read together with s. 2.
12 See discussion in Chapters 18 and 19.
"colonial law" is defined in section 1 of the Act so as to include laws made for a colony by the Queen in Council. The effect of this provision, taken in conjunction with section 2, is that an Imperial Order in Council made for a colony is null if repugnant to an Imperial statute applying there. So much is clear. It is argued from this that such an Order in Council does not meet the description in section 2 of an order having the force of an Act of Parliament in the colony, because while an Imperial statute repeals earlier Acts which conflict with it, an ordinary Order in Council is rendered null by such a conflict. In essence, it is contended that section 2 envisages only orders and regulations having the capacity to repeal existing Imperial statutes.\textsuperscript{13} Royal Proclamations, like Orders in Council, cannot ordinarily repeal or amend Acts of Parliament. Therefore, it might be said, the Proclamation of 1763 is not an order envisaged in section 2 of the Colonial Laws Validity Act, which in effect contemplates only orders specially endowed with statutory force by virtue of an Act of Parliament.

In reply it might be noted that section 2 refers both to 1) orders made under an Act of Parliament and 2) to those having the force of such an Act. Thus the provision contemplates the existence of orders which carry the effect mentioned and yet are not issued under an Imperial statute. If the only orders covered were those deriving their force from statutory provisions, as is contended, this would appear to make the second category of orders redundant.

In the end, the question turns on how broadly we are prepared to interpret the second class of orders referred to. Does the section envisage orders which are wholly unconnected with Imperial statutes and whose force is not derived from them? If so, one can hardly complain that such orders are not in every detail identical to Acts of Parliament in their effect,

\textsuperscript{13} An argument akin to this is mentioned in Roberts-Wray, Commonwealth Law, 376, par. 4, at note 3. The author also develops several other arguments there to a similar result.
as statutes occupy a uniquely paramount position. Alternatively, does the section contemplate only orders which, while not precisely issued under statutory authority, derive their special effect from statutes? If so, the Proclamation of 1763 would not qualify.

The question cannot be resolved here. But it appears that the latter interpretation has the greater semblance of truth. Section 2, on this view, extends only to orders which are either issued by virtue of powers conferred by Act of Parliament, or given statutory effect by such an Act, neither of which categories would encompass the Proclamation. We may conclude, tentatively, that colonial legislatures had the power, in principle, and subject to any particular restrictions, to modify or abrogate Indian land rights recognized by the Proclamation. It must be remembered nonetheless that clear language would be requisite.

3) The Imperial Crown and local Crown officers

In colonies where the Crown retained a prerogative power to legislate for the inhabitants, it could by virtue of this power abolish or modify any of the Proclamation's provisions regarding Indian lands, or rights recognized there. We have considered this general point in another context earlier, and the reader is referred to our discussion there. Canadian territories where the Crown held this legislative competence after the Proclamation's issue would appear limited to Rupert's Land and those sectors of the ceded French territories not encompassed within the boundaries of Quebec or annexed to existing colonies. Quebec itself was granted an assembly in the Proclamation, and so the Crown's prerogative legislative authority there was lost.

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14 Cf. R. v. White and Bob (1964) 50 D.L.R. (2d) 613 (S.C.A.) per Norris J.A. at 662: "It would have required specific legislation to extinguish the aboriginal rights, and it is doubtful whether Colonial legislation, even of a specific kind, could extinguish these rights in view of the fact that such rights had been confirmed by the Royal Proclamation of 1763." Quoted in R. v. Isaac (1975) 13 N.S.R. (2d) 460 (N.S.S.C.App. Div.) at 485.

15 See Chapter 18, Section 6.

16 See ibid.
In areas where the Crown held no general prerogative power of legislation, the question of its authority to modify the Proclamation's provisions regarding Indian lands, and the rights held by virtue of them, involves a series of related sub-questions:

a) May the Imperial Crown by virtue of its prerogative power alone (as distinct from powers conferred by statute) extinguish or modify rights held by Indians to unceded lands under the Proclamation of 1763, without securing a valid cession under the terms of Part IV, par. 4(a)? This also encompasses the question of whether the Crown might validly grant such unceded lands to third parties, in a manner prejudicial to Indian title.

b) May the Crown in its prerogative alter the restrictions placed upon land grants by colonial officials in par. 1, so as to authorize the issue of patents for unceded Indian lands? The answer depends upon the resolution of question (a), as the Crown may not confer on its officers powers greater than those which it possesses itself.

c) May the Crown in its prerogative authorize settlement upon unceded Indian lands, and so remove the restraints imposed in Part IV, pars. 2 and 3? Again this turns upon question (a), as such authorization would prejudice Indian rights to exclusive possession, and amount to a partial confiscation.

d) May the Crown allow Indians to alienate their lands to private individuals, and so remove the strictures laid down in par. 4(a)? Unlike the situations envisaged in the previous questions, all of which involve the extinguishment or diminution of Indian land rights, this contemplates a Crown act which supplements the bundle of rights making up Indian title. The issue may be resolved with relative ease. Except in instances where the Crown has already granted away its exclusive right to purchase Indian lands, as in the case of proprietary colonies, there would appear to be nothing barring the Crown from permitting the private purchase of Indian
lands. In instances where the Crown has already granted to a third party an exclusive right of pre-emption in relation to Indian lands (and it must be remembered that a purported grant of such lands might only bestow a right of pre-emption, depending on how we resolve question (a) above), the Crown would not be able to prejudice this right by allowing free alienability.

   e) May the Crown provide for modes of extinguishing Indian title, other than by voluntary surrender as stipulated in par. 4(a)? To the extent that such modification would adversely affect Indian interests, it would be valid only if our response to question (a) is affirmative.

   All of these questions, then, saving only (d), depend upon the way in which we resolve the initial issue posed above. Let us now consider it more closely.

   There are two ways of characterizing the Indian title recognized by the Proclamation. It may be said that the Proclamation concedes to the Indians the exclusive right to use certain lands during the Crown's pleasure. This right is terminable at the Crown's will, without the need for a voluntary cession by the Indians concerned, or their consent. On this view, the Proclamation grants what might be termed a mere "licence" to use the lands in their possession, revokable by the Crown at its sole pleasure. This interpretation derives some support from the Proclamation's phraseology. The restrictions concerning land grants imposed on the old colonies in Part IV par. 1 are said to be "for the present, and until Our further Pleasure be known", and the creation of an Indian Country in the next paragraph is effected "for the present as aforesaid". From these references, it may be argued that the Crown reserves to itself the right to modify not only the protective measures laid down there but also the rights which they are designed to protect.

   This view appears to find support in a familiar obiter dictum made
by the Privy Council in the St. Catherine's case, to the effect that Indian
tenure under the Proclamation of 1763 was "a personal and usufructuary
right, dependent upon the good will of the Sovereign". The clearest,
and at the same time most extreme statement of this position is found else-
where in the same case, in the opinion written by Taschereau J. in the
Supreme Court of Canada, where he peremptorily dismisses the notion that
the Proclamation grants to the Indians full title to the soil. He continues:

nor can I see anything in that proclamation that gives to the Indians
forever the right in law to the possession of any lands as against
the crown. Their occupancy under that document has been one by suf-
ferance only. Their possession has been, in law, the possession of
the crown. At any time before confederation the crown could have
granted these lands, or any of them, by letters patent, and the grant
would have transferred to the grantee the plenum et utile dominium,
with the right to maintain trespass, without entry, against the In-
dians.

On the other hand, it may be maintained that the Indian title recog-
nized in the Proclamation is extinguishable only by voluntary cession to
the Crown or proprietaries, as laid down in Part IV, par. 4(a), in the ab-
sence of valid legislation providing otherwise. Indian tenure under the
Proclamation is not revokable at the Crown's sole will. Here again, the
Proclamation's wording may be invoked. Paragraph 4(a) states that "if, at
any Time, any of the said Indians should be inclined to dispose of the said
Lands", they shall be purchased only for the Crown, or, in the case of pro-
prietary colonies, by the proprietors thereof. The consent of the Indians
concerned is mentioned as a vital ingredient in the transaction, and no

17 (1888) 14 A.C. 46 at 54. This *dictum* has been repeated in a number of
succeeding cases, but the view expressed in its final phrase has not
been the subject of a judicial holding. For examples, see: A.-G. for
Quebec v. A.-G. for Canada [1921] 1 A.C. 401 (F.C.) at 410-1; Point
v. Dibblee Construction Co. [1934] 2 D.L.R. 785 (Ont.S.C.) at 793;
Warman v. Francis (1958) 20 D.L.R. (2d) 627 (N.B.S.C., Q.B.div.) at
537; A.-G. of Canada v. Toth (1959) 17 D.L.R. (2d) 273 (Sask.Q.B.) at
275. See also the remarks in La Forest, *Natural Resources*, 159-60.
interprets the Privy Council's statement that Indian tenure was depen-
dent upon the good will of the Sovereign to mean only that Indian title
could be extinguished by competent *legislative* authority.

other mode of extinguishment is envisaged. Gwynne J. of the Supreme Court of Canada explicitly adopts this position in his dissenting opinion in the St. Catherine's case, stating that the Indian interest recognized by the Crown in the Proclamation "could be divested or extinguished in no other manner than by cession made in the most solemn manner to the crown."\textsuperscript{19}

The question of the correct interpretation is not free of difficulty, and awaits definitive judicial treatment. But careful consideration of the issue in all its facets draws one to the conclusion that the effect of Part IV, par. 4(a), is to characterize the Indian title as extinguishable only by voluntary cession to the Crown, and to rule out the possibility of abrogation by prerogative act alone, in the absence of statutory authority.

We begin with the text. There can be no question that the creation of an exclusive Indian Country in the American interior, closed to grants, settlement and purchases, was a temporary measure, and that the Proclamation reserves to the Crown the power to redefine the territory's boundaries or indeed to abolish it entirely. The principal passages in Part IV relating to the Indian Country, that is pars. 1 and 2, provide that the suspension of all colonization in this immense area was to be "for the present, and until Our further Pleasure be known", clearly indicating that the matter remained subject to the Crown's will.\textsuperscript{20} It was intended that the King would, at appropriate times and in considered stages, open up sectors of the interior to colonization, in which case the purchase provisions of par. 4(a), relating to areas where "We have thought proper to allow Settlement", would become applicable. So long as an area remained part of the Indian Country, no purchases of Indian lands might be made there (even by colonial Governors) without special licence of the Imperial Crown. But once the Crown had removed a certain region from the Indian territory, the

\textsuperscript{19} Ibid., at 664; see also pp. 674-5.

\textsuperscript{20} For the use of a similar phrase in a Crown instrument of the era, in a context clearly referring to a merely temporary suspension of a Governor's powers regarding land, see the Instructions of 1773 to Nova Scotia and East Florida, in RI, II, No. 764, p. 533.
relevant colonial officials would be free to negotiate land cessions from Indians holding title there, under the conditions laid down in par. 4(a).

The Imperial Crown, then, retained for itself the power to control the pace at which colonization of the interior proceeded, and to select the areas where land cessions were to be secured from the indigenous occupants. But it does not follow from this that the Crown had the authority to grant Indian lands without first purchasing them. That is a distinct question.

Paragraph 4(a) lays down a single mode whereby Indian title may be extinguished, by purchase on behalf of the Crown or proprietaries, voluntarily agreed to by the Indians concerned in a public assembly. The concept of purchase by the Crown appears incompatible with the notion that what is transferred is an interest held at the Crown's pleasure, and terminable at its sole will. A purchase involves the transfer of something in return for a consideration. The vendor must initially possess rights to the thing sold as against the prospective buyer; he must be free to sell it or to retain it at his will. If the prospective 'buyer' already owns the object, and the 'vendor' has only the right to use it during the owner's pleasure, there is no possibility of a sale. The holder of the object may, of course, voluntarily surrender it to the owner, and the owner may make an ex gratia payment in return. But the object has not been purchased. The stipulation in par. 4(a) that Indian lands shall be purchased only for the Crown or proprietaries, when the Indians holding them are "inclined to dispose of the said Lands", envisages interests held by the Indians as against the prospective purchasers, and not terminable at the sole will of the latter.

There is evidence that this was the official view taken at the era, of the effects of the Crown's recognition of Indian land rights. Royal Instructions sent to the Governor of Georgia on 9 February 1759 contain directions as to the disposal of certain lands in the colony recently ceded
to the Crown by the Creek Indians, lands which had originally been re-
served to the Creeks out of a larger cession made by them in a treaty
executed in 1733. The instrument refers to the lands as originally re-
served to the Indians "to be held by them as tenants in common for their
hunting grounds", and goes on to describe the recent cession to the Crown
in these terms:

    several of the chiefs of the said Indian nations, being solemnly
deputed for that purpose, did by treaty with you our governor
formally cede and surrender to us, our heirs, and successors for-
ever all the lands and islands so reserved by the said treaty as
aforesaid [i.e. the treaty of 1733], whereby the said lands and
islands are become subject to our royal grant and disposal in
such manner as we shall think fit to direct; . . . 21

The original reservation effected in 1733 is viewed as having deprived
the Crown of the power to grant them, and the recent cession as having
placed them in future at the Crown's disposal. The cession itself is
described in terms leaving little doubt that the Indians were transferr-
ing interests which were held as against the Crown.

    We find similar language employed in Royal Instructions sent to New
York in 1770, dealing with the disposal of certain lands which had been
recognized as reserved to the Indians under the Proclamation of 1763 and
had subsequently been ceded to the Crown in the Treaty of Fort Stanwix in
November 1768. The text recites that "it is both just and reasonable that
lands the property of which has been acquired by us at a very considerable
expense should be made subject to other terms and conditions than those
prescribed for lands in general. . . .", 22 and goes on to lay down special
rules governing the disposal of the lands ceded.

    The famous Stamp Act of 1765, 23 curiously enough, contains a section
describing Indian land cessions in terms appropriate only to the transfer
of rights held as against the Crown. Section 8 provides that no duties
under the Act shall be charged upon

21 RI, II, No. 804, pp. 567-8, emphasis added.
22 RI, II, No. 870, pp. 606-7, emphasis added.
23 5 Geo. III, c. 12.
any Deed or other Instrument, which shall be made between any Indian Nation and the Governor, Proprietor of any Colony, Lieutenant Governor, or Commander in Chief... for or relating to the granting, surrendering, or conveying, any Lands belonging to such Nation, to, for, or on Behalf of his Majesty, or any such Proprietor, or to any Colony or Plantation.24

Further evidence is provided by a petition to the King made in May 1765 by Major Thomas Mant and others for land grants in the region of Detroit, an area reserved to the Indians under the terms of the Proclamation. The petition was referred by Order in Council to the Lords of Trade, who reported back in terms unfavourable to the request, stating among other things, in Alvord's summary, that they "did not think that they had power to grant lands in that region, since it was contrary to the terms of the proclamation of 1763."25

The leading case is Mitchel v. The United States,26 decided by the Supreme Court of the United States in 1835. Baldwin J., speaking for the court, discussed the effects of the Proclamation of 1763 in the colonies of East and West Florida, holding that the Indians there "had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize." The latter phrase might be thought to allow for the Crown to act in a manner prejudicial to the rights recognized. But the court seems rather to envisage only changes consistent with their essential character, as later passages suggest. Justice Baldwin refers to the treaties of cession concluded with the Indians at Mobile, Pensacola and Picolata in 1765, and states:

By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of

24 Emphasis added.
25 Alvord, Mississippi Valley, I, 244-5, citing C.O. 323/18, pp. 393-404, and an undated document in the Dartmouth Manuscripts. References to this petition may be seen in APC, IV, pp. 567-8, 820, VI, pp. 395-6; JBT 1764-67, 221, 223-5.
26 (1835) 9 Peters 711.
property which they could cede or reserve, and that the boundaries
of his territorial and proprietary rights should be such, and such
only as were stipulated by these treaties.

The court appears to hold, then, that the interests held by the Indians
in the lands reserved to them were good as against the Crown itself. They
were "rights of property which they could cede or reserve", and so not
mere licences to occupy, extinguishable at the Crown's pleasure. The in-
defeasible character of Indian title is linked by the court to the rule
that rights or privileges granted by the Crown to the inhabitants of a
colony cannot subsequently be withdrawn by the Crown, acting by preroga-
tive power alone. 27 Baldwin J. refers to the

principle of law settled and declared in the case of Campbell v. Hall,
that the proclamation of 1763, which was the law of the provinces ceded
by the treaty of 1763, was binding on the king himself, and that a
right or exemption once granted by one proclamation could not be an-
nulled by a subsequent. 28

The Exchequer Court of Canada made parallel observations in R. v.
Lady McMaster (1926). Speaking of Indian lands reserved under the Procla-
mation of 1763, Maclean J. held that a lease executed by Indians to a pri-
ivate individual was void, and further that "the Crown could not itself
lease, or ratify any lease, made by the Indians of such lands at any time
since the proclamation, save upon a surrender of the same by the Indians
to the Crown." 29

The same court stated in Brick Cartage Ltd. v. R. (1965) that the
Indian possessory right held under the Proclamation of 1763 could only be
extinguished by a formal contract, duly ratified at a meeting of the Chiefs,
for surrender to the Crown. 30 For all practical purposes, affirmed the

27 For applications of this principle see: the opinion of Yorke A.-G. and
Talbot S.-G. on the King's right to the lands of Pemaquid of 11 August
1731 in Chalmers, Opinions, I, 78 at 108-9, also found, in extract, in
Forsyth, Opinions, 144-5; Campbell v. Hall (1774) Loftt 655, 98 E.R.
848; the report of Yorke A.-G. and De Grey S.-G. on the civil govern-
ment of Quebec of 14 April 1766, in CD, I, 251 at 256; Chitty, Preroga-
tives of the Crown, 32; the submissions of the Crown law officers in
Re Island of Cape Breton (1846) 5 Moo.P.C. 259 (P.C.) at 273.

28 All passages quoted are at p. 749.

29 [1926] Ex.C.R. 68 at 73.

court, Indian possession carries the same day to day effects as possession under a title in fee simple. "Neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute." 31

To review, the rights held by Indians to unceded lands in their possession under the Proclamation of 1763 appear to have been indefeasible, and could not in the ordinary course be annulled or modified by the Crown or its officers under the prerogative, except in conquered or ceded areas where a prerogative power of legislation was retained. Such rights could be extinguished only by voluntary cession to the Crown or proprietaries, by specific imperial or local legislation, or by the exercise of powers conferred by such legislation.

CHAPTER 21

CONTINUING APPLICATION

British possessions in North America underwent a number of mutations in the period from the cession of Canada to the times of Confederation. New governments were founded and old ones were split up or amalgamated. Boundaries were both extended and reduced. Territory was lost and (possibly) acquired. How were the Proclamation's provisions dealing with Indian lands affected? This depends in part upon that instrument's inherent adaptability to change, and partially upon the specific manner in which these changes came about. In this chapter we will deal only with the first question.

The main stages in the evolution of British North America up to 1873 are shown in a series of maps reproduced in Map Appendix 3. Let us swiftly review them. In 1769 St. John's Island (later Prince Edward Island), which had been annexed to Nova Scotia in 1763, was placed under a separate government.\(^1\) Five years later the colony of Quebec was extended to the Labrador coast on the east, to the borders of Rupert's Land on the north, and as far west and south-west as the banks of the Mississippi and Ohio Rivers.\(^2\) Large sections of the Indian Country created by the Proclamation were thus brought within a definite colonial jurisdiction.

The American Revolution made short shrift of this. All territories located south of the Great Lakes and east of the Mississippi were recognized as pertaining to the United States in the Treaty of Paris of 1783.\(^3\)

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1 Commission to Walter Paterson, as Governor of St. John's Island, 4 August 1769; Can. Sess. Papers, 1883, No. 70, pp. 2 seq.
2 Quebec Act, 14 Geo. III, c. 83, Imperial (1774).
3 CTS, XLVIII, 487 seq.
The influx of loyalist refugees prompted the separation of New Brunswick\textsuperscript{4} and Cape Breton Island\textsuperscript{5} from the body of Nova Scotia in 1784, and the division of Quebec into Upper and Lower Canada seven years later.\textsuperscript{6} The coast of Labrador, originally annexed to Newfoundland in 1763, and transferred back to Quebec in 1774, was reassigned to Newfoundland in 1809,\textsuperscript{7} where it remained until 1825, when the southern portion was given back to Lower Canada, the successor to Quebec.\textsuperscript{8} Meanwhile in 1820 Cape Breton Island had been reintegrated with Nova Scotia.\textsuperscript{9}

In the west, the original claims of the Crown in 1763 to an indefinite extension of its territories toward the Pacific and Arctic Oceans were gradually consolidated with explorations of the western interior and the Pacific coast conducted by such men as Hearne, Cook, Mackenzie, Vancouver and Thompson. In 1818 the border between British North America and the United States was extended by international convention along the 49th parallel from the Lake of the Woods to the Rocky Mountains,\textsuperscript{10} and in 1825 the boundary between Russia's territories in Alaska and British possessions in the west was delineated.\textsuperscript{11} This left unsettled only the relative extent of British and American rights in what was known as the Oregon territory, between the Rockies and the Pacific. The matter was not resolved

\textsuperscript{4} Commission to Thomas Carleton, as Governor of New Brunswick, 16 August 1784; Can. Sess. Papers, 1883, No. 70, pp. 47 seq.
\textsuperscript{5} Commission to Frederick Desbarres, as Lieutenant-Governor of Cape Breton Island, 3 September 1784; quoted in \textit{Re Island of Cape Breton} (1846) 5 Moo.P.C. 259 (P.C.) at 262; see also Can. Sess. Papers, 1883, No. 70, p. 10. Cape Breton was given a separate government under the overall authority of the Governor-General of Nova Scotia.
\textsuperscript{6} Constitutional Act, 31 Geo. III, c. 31, Imperial (1791).
\textsuperscript{7} Newfoundland Act, 49 Geo. III, c. 27, Imperial (1809), s. 14.
\textsuperscript{8} Seignioral Rights Act, 6 Geo. IV, c. 59, Imperial (1825), s. 9.
\textsuperscript{9} Commission to the Governor-in-Chief of Nova Scotia, 27 April 1820; quoted in \textit{Re Island of Cape Breton} (1846) 5 Moo.P.C. 259 (P.C.) at 263.
\textsuperscript{10} Convention of Commerce between Great Britain and the United States of America, London, 20 October 1818; \textit{B & FSP}, (1818-19), VI, 3 seq.
\textsuperscript{11} Convention between Great Britain and Russia, St. Petersburgh, 28/16 February 1825; \textit{B & FSP}, (1824-25), XII, 38 seq.
until the Oregon Treaty of 1846, which continued the existing boundary along the 49th parallel westward to the middle of the channel separating Vancouver Island from the mainland, and then southerly around the Island to the Pacific Ocean. 12

Meanwhile in 1821, the Hudson's Bay Company had been awarded exclusive trading privileges in the entire north-western sector of the continent, 13 and its license was renewed in 1838. 14 In 1849 the Crown granted Vancouver Island to the Company on condition that it found a settlement there, 15 and issued a Commission to the new colony's first Governor. 16 The distinct colony of British Columbia was established in 1858, 17 and attained its present northern and western boundaries five years later. 18 In 1866, Vancouver Island was united with the mainland. 19

Returning our gaze to the eastern colonies, we find that in 1840 Upper and Lower Canada were reunited in a single province. 20 This uneasy marriage continued until 1867 when Canada, New Brunswick and Nova Scotia merged in a federal union styled the Dominion of Canada, with the old Canada being split into the constituent provinces of Ontario and Quebec. 21

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13 Royal License to the Hudson's Bay Company for a trading monopoly in the north-western territory, 5 December 1821; PP, HC(UK), 547 of 1842, pp. 21 seq.

14 Renewal of Royal License to the Hudson's Bay Company for a trading monopoly in the north-western territory, 30 May 1838; PP, HC(UK), 547 of 1842, pp. 9 seq.

15 Royal Grant of Vancouver's Island to the Hudson's Bay Company, 13 January 1849; PP, HC(UK), 103 of 1849, pp. 13 seq.

16 Commission to Richard Blanshard as Governor of Vancouver Island, 16 July 1849; extract in Ireland, "Boundaries of British Columbia", 270.


18 Act to Define the Boundaries of the Colony of British Columbia... 26 & 27 Vict., c. 83, Imperial (1863).

19 Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia, 29 & 30 Vict., c. 67, Imperial (1866).

20 Union Act, 3 & 4 Vict., c. 35, Imperial (1840). The union actually became effective upon the issue of a proclamation in February 1841.

21 British North America Act, 30 & 31 Vict., c. 3, Imperial (1867).
Three years later, the rights of the Hudson's Bay Company in Rupert's Land and the North-Western Territory were largely extinguished and the territories in question were transferred to the Dominion of Canada.22 A diminutive version of the province of Manitoba was established in the new accessions.23 British Columbia joined Confederation in 187124 and Prince Edward Island followed suit two years later.25

What we wish to consider here is the manner in which these multiple changes modified the Proclamation's operation, ipso facto and apart from explicit provisions, and also the extent to which the Proclamation affected the character of the changes themselves.

Four types of territorial modifications concern us. Let us briefly review them.

a) The Crown's acquisition of new territories in the north and west of America. In Chapter 10 we saw that there is good reason to think that the entirety of modern Canada was authoritatively claimed by the Crown as of 1763. However the courts have on occasion taken a narrower view of the matter. Assuming for the sake of argument that portions of modern Canada were not acquired by the Crown until sometime after 1763, what effects, if any, would the Proclamation have on Indian lands in the "after-acquired" territories?

b) The creation of new colonies. This might occur by the subdivision of an existing colony (as when Prince Edward Island and later New Brunswick were severed from Nova Scotia), by the merging of two or more existing colonies (as when Upper and Lower Canada were reunited), or by the creation of a new government in a hitherto unorganized area (as was the case with both Vancouver Island and British Columbia). In all such instances the question is whether the new government is bound

22 Imperial Order in Council, 23 June 1870; BNA Acts, 157 seq.
23 Manitoba Act, 33 Vict., c. 3, Dominion (1870).
24 Imperial Order in Council, 16 May 1871; BNA Acts, 174 seq.
25 Imperial Order in Council, 26 June 1873; ibid., 181 seq.
by the strictures concerning the granting and purchasing of Indian lands laid down in pars. 1 and 4(a) of Part IV, which in their terms govern all colonies.

c) **The incorporation of part of the Indian Country within colonial boundaries.** This might come about with the extension of an existing colony (as with Quebec in 1774) or by the creation of a wholly new one (such as British Columbia). In what way is the status of the lands in question affected by the change?

d) **The transfer of unceded Indian lands from colony to colony.** The classic case is Labrador, originally part of the Indian Country under Newfoundland's jurisdiction, transferred to Quebec in 1774, returned to Newfoundland in 1809, and partially restored to Lower Canada in 1825. The effect of such assignments upon Indian land rights must be considered.

The last question may be answered with relative ease. The mere transfer of territory from one British colony to another cannot in itself affect private rights in the lands transferred, absent provisions to the contrary. Problems may arise, of course, where differing legal regimes governing property rights prevail in the two colonies. Each such situation must be examined on its own merits. In the present case, as we will see, the Proclamation would initially apply to both colonies concerned, so that this difficulty would occur only where the Proclamation's provisions had been superseded in one of the colonies.

The third question may also be disposed of in a summary way. The integration of a sector of the Indian Country within the bounds of a colony probably had the tacit effect of freeing it from the absolute prohibitions on purchases, grants and settlement laid down in Part IV, pars. 1 to 3, and substituting the qualified regime described in par. 4(a), whereby the government concerned may purchase Indian lands and subsequently grant them to settlers. Whether this inference is correct or not, it is clear that the transfer does not **per se** affect the existence or character
of the Indians' interest in any unceded lands held by them. It merely brings into operation the purchase provisions of par. 4(a). In Montgomery v. Ives (1849) it was held that when the boundary of West Florida was moved northward in 1770 so as to encompass part of the Indian Country, this did not affect Indian rights there or empower the colony's Governor to grant Indian lands without purchasing them first.\textsuperscript{26} In similar fashion a number of authoritative Canadian decisions have made it clear that the expansion of Quebec in 1774, which took in a large sector of the Indian Country, did not modify indigenous land rights in the region.\textsuperscript{27}

The first two matters, namely the acquisition of territory and the erection of new colonies, pose questions requiring detailed consideration.

1) New colonies and territories

The indigenous peoples covered by the Proclamation are characterized in the preamble to Part IV as "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection", and this description is incorporated by reference into a number of later provisions. The preamble also defines the lands affected by the instrument as "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", and abbreviated versions of this formula are employed in paragraphs 1 and 3. The second paragraph describes an exclusive Indian territory held under "Our Sovereignty, Protection, and Dominion", and comprising "all the Lands and Territories" lying beyond the limits of Quebec, the

\textsuperscript{26} (1849) 13 Smedes & M. 161 (Miss.H.C.), \textbf{per} Clayton J. at 175, \textbf{per} Sharkey C.J. at 179. The limits of West Florida were actually moved northward by a supplementary commission issued to the Governor on 7 June 1764 (Narvey, "Royal Proclamation", 143), but the court had only the commission of 1770 before it; see Clayton J. at 172-3.

Florida's, and Rupert's Land, and a line drawn along the Appalachian divide. This territory is also referred to in paragraphs 3 and 5. Do these phrases refer only to lands and peoples over which sovereignty was asserted at the time of enactment, or do they also cover those subsequently brought under the Crown's dominion at any given time during the Proclamation's life?

Again, the restrictions on land grants in par. 1 are said to apply to the Governors of certain named colonies as well as of "any of Our other Colonies or Plantations in America". The provisions governing the purchase of Indian lands in par. 4(a) speak generally of "Our Colonies" and of "any Proprietary Government". The measures regulating the Indian trade set out in par. 4(b) are described as obtaining in "all Our Colonies respectively, as well Those under Our immediate Government as those under the Government and Direction of Proprietaries". The question is whether these provisions apply exclusively to colonies existing at the time of enactment, or whether they also extend to colonies erected at later stages during the Proclamation's life, such as, for example, New Brunswick, Upper and Lower Canada, and British Columbia.

These questions raise, in their various ways, a more general issue concerning the extent to which the Proclamation has a prospective application. This in turn depends upon whether the words which it employs designate in each case "fixed" or "floating" categories. A legal category may be termed "fixed" when it applies exclusively to entities falling within its purview at a particular time, in this case the time of enactment. A "floating" category, by contrast, applies to all entities coming within its purview at any time during the period for which the provision as a whole is valid. So a description such as "all voluntary societies of athletes registered with the Commissioner of Sports" would normally be a floating category, comprehending all societies which meet the stated criteria at any given time, -- a class whose membership might change from day to day. The addition of the words "as of the time of enactment" would
transform it into a fixed category comprising a finite number of societies. As such it would not extend to societies formed at a later date.

A public enactment employing general words is usually understood to apply to all entities falling within its scope at any time during its life, even to things which did not exist and could not have been anticipated at the time of enactment, unless a narrower temporal compass is expressly stipulated or necessarily implied.\textsuperscript{28} It would be awkward were this not so, as express words would be necessary in each case for a law to cover situations arising in the future. As the Interpretation Act of Canada provides:

The law shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment and every part thereof according to its true spirit, intent and meaning.\textsuperscript{29}

Where a non-prospective effect is desired, specific words are usually employed, unless the subject matter clearly rules out any other interpretation.

In \textit{Associated Newspapers Ltd. v. Corporation of the City of London},\textsuperscript{30} the House of Lords considered an exemption from taxation granted by public statute, which was stated to apply to "all taxes and assessments whatsoever". It was contended that the exemption extended only to taxes existing at the time of enactment. But the court held\textsuperscript{31} that it covered all local taxes and assessments "whether then existing or thereafter to be imposed",\textsuperscript{32} in effect finding that the category referred to was floating not fixed. Lord Parmoor stated:

\begin{quote}
I can find no ground to imply any limitation on the generality of the words. . ., or to infer that there was not an intention to maintain in perpetuity the non-liability of the reclaimed lands to pay local taxes and assessments, in return for the perpetual charge placed upon them.\textsuperscript{33}
\end{quote}

\textsuperscript{28} See the remarks made in a parallel context, in Maxwell, \textit{Statutes}, 12th ed., 102. Note the exceptions made with respect to penal enactments, at 243-4, and to private acts, at 262.

\textsuperscript{29} \textit{R.S.C. 1970, c. I-23, section 10.}

\textsuperscript{30} \textit{[1916] 2 A.C. 429 (H.L.)}. \textsuperscript{31} Lord Sumner dissenting.

\textsuperscript{32} \textit{Per Viscount Haldane at 442.} \textsuperscript{33} At 457.
Lord Wrenbury noted that the exemption was granted in "words of the widest possible meaning", remarking particularly on the word "whatsoever".  

Similarly in the case of Beard v. Rowan it was argued that a Kentucky statute which provided that "any alien... who shall have actually resided within this Commonwealth two years" would be enabled to hold land, embraced only aliens who had actually resided for two years prior to the passing of the act. The United States Supreme Court rejected this argument remarking: "This is certainly too narrow an interpretation of this law to meet the obvious intention of the Legislature, even admitting that such is the strict grammatical construction." After referring to the preamble of the Act and the underlying policy, the court concluded that the Act must be construed as having a prospective as well as retrospective application. 

Applying these considerations to the Proclamation, it is clear that the Indians referred to in the preamble of Part IV are not confined to those alive on the date of enactment, but include all those possessing the requisite characteristics who exist at any time during the Proclamation's legal life. Nevertheless it might be contended that the description covers only Indians belonging to nations or tribes which, in October 1763, were in possession of "Parts of Our Dominions and Territories", and not to groups over whom the Crown asserted sovereignty at some later time. Indeed it might be said that the phrase "the several Nations or Tribes", which couples a definite article with an adjective suggesting numerical limitation, must refer to a fixed number of tribes which might be listed once and for all. This view, however, strains the meaning of "several", which (we are authoritatively informed) when qualifying a plural substantive and preceded by a definite article means "each and all of the various

34 At 461. See also, to similar effect, the case of Pole-Carew v. Craddock [1920] 3 K.B. 109 (C.A.).
35 (1835) 9 Peters 301 (U.S.S.C.).
36 At 317.
37 At 318.
or different". 38 So the phrase in question reads simply as "the various Nations or Tribes".

Does the subject-matter of the various provisions referring to "the said Indians" indicate that a fixed group of tribes is designated? A neutral test is furnished by par. 4(b). This specifies that persons intending to trade with "the said Indians" must obtain a license and give security to observe certain regulations. Would this provision apply as regards Indians over whom sovereignty was first asserted only after the relevant date, say in 1775 or 1780, or would traders in such cases be subject to its dictates? The date when a tribe first fell under British dominion does not appear relevant to the underlying policy, which was to regulate the entire Indian trade conducted at any given period. It is difficult to imagine that the measure draws a fixed line representing the outer limits of British dominions at the time of enactment, beyond which unlicensed trading would be permissible even in areas subsequently brought under the Crown's sway. The description of Indians in the preamble clearly functions in this instance as a floating category, and the trade provisions operate prospectively so as to apply to new tribes and territories.

By parallel, do the provisions regarding Indian lands apply not only to territories held by the Crown in October 1763, but also to those acquired subsequently? This depends upon whether the Proclamation should be understood as establishing a temporal divide, whereby lands acquired prior to a certain date are treated in one manner, and those acquired later in another manner, or rather as enunciating general principles applicable throughout the whole of British possessions in America, both present and future.

It may be remembered that the measures in Part IV are for the most part hardly novel. They represent a consolidation of principles and practices already prevailing in many old colonies. The intention was to bring the various British holdings in North America, both new and old, under a

38 Oxford English Dictionary, LX, 568, par. 2b. Numerous examples of this usage are given from the 15th century onwards.
uniform regime regarding Indian lands, and to infuse the whole with poli-
cies conceived in a global manner, rather than piecemeal and haphazardly.
There is no indication that Indian lands acquired after October 1763 were
meant to be treated differently from those acquired previously.

Looking at the actual language of the Proclamation, there appears
to be nothing to reverse the presumption favouring a prospective operation.
To the contrary, words of the broadest application are employed. Para-
graph 1 forbids grants of "any Lands whatever" which, not having been ceded
to the Crown, are reserved to the Indians. Paragraph 2 reserves for Indian
use "all the Lands and Territories" located beyond specified limits. Para-
graph 3 proscribes settlement upon "any Lands" within the Indian territory
and "any other Lands" remaining unceded. Paragraph 4(a) prohibits private
purchases of "any Lands reserved to the said Indians". The language is
uniformly comprehensive. There is no hint of temporal restrictions.

In particular, it may be noted that the Indian territory delineated
in par. 2 functions as a residual category, comprising the entirety of
British territories in North America not otherwise spoken for. No speci-
fic boundaries are assigned to the territory in the west, with the appar-
ent result that new accessions in that quarter would merge with the Indian
Country. Indeed it is improbable that the Proclamation, having forbidden
all settlement west of a designated frontier, should permit settlers to
"leap-frog" beyond the Indian Country as it existed at the time of enact-
ment, to colonize far-western areas acquired only subsequently. Further
evidence is furnished by par. 5, where British officers serving "within
the Territories reserved as aforesaid for the Use of the said Indians" are
ordered to apprehend accused persons who take refuge there, and to return
them for trial to the colony concerned. It would be remarkable if the
powers of arrest conferred here could not be exercised in western areas
which fell under the Crown's rule only subsequent to enactment.

Finally we must consider whether the provisions in pars. 1 and 4(a),
which are said to apply generally to British colonies in America, govern only those existing at the time of enactment, or also those established at some later date during the instrument's period of validity. Without repeating arguments made earlier, it may be said that the latter interpretation appears correct. A neutral test is once again furnished by the trade provisions of par. 4(b). It seems unlikely that the residents of a colony erected in 1784, such as New Brunswick, would not be required to obtain licenses for the Indian trade, or that the Governor of such a colony would not be authorized to issue such licenses.

On the whole, then, both the particular language employed in the Proclamation and the underlying policies implemented there support the view that its provisions regarding Indian lands have a prospective operation, applying to North American colonies and territories established or acquired at any period during the instrument's life.

The question has not as yet received extended consideration in the courts, although judicial opinions have been expressed on both sides of the question. Hall J. of the Supreme Court of Canada stated in Calder v. A.-G. of British Columbia that the Proclamation "was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories." The opposing view was expressed by Tysoe J.A. dealing with the same case in the British Columbia Court of Appeal:

Nor can I give the Royal Proclamation a prospective operation so that it applies to later discovered land on the North American continent which might turn out to be inhabited by Indian tribes rather than by Eskimos or people of some other race and whose mode of living, nature, character, intelligence and state of culture was quite unknown.

Neither judgment, however, deals with the question in a comprehensive or decisive manner.


2) Parallels

It is interesting to consider how other legal enactments have been interpreted in similar circumstances. The general issues involved are these: a) does an enactment framed for a particular territory, designated by name or descriptive phrases rather than precise boundaries, extend to lands subsequently attached to that territory which *prima facie* fall within the enactment's descriptive phrases; b) does an imperial enactment drafted so as to apply to British "colonies and plantations" (or some similar group) cover colonies created only subsequently? The difference between these questions should be noted. The first deals with a single territory which expands in geographical extent. The second concerns a group of distinct territorial units which increase in number. We shall treat them separately.

a) Expansion of territory

An intriguing problem arose in the early 18th century in relation to Newfoundland. In 1713, by the Treaty of Utrecht, France abandoned its claims to certain parts of Newfoundland, and recognized the island as henceforth belonging wholly to Great Britain, while retaining for its subjects certain rights in relation to fishing.\(^{41}\) It then became a question whether the ceded part of the island was subject to the earlier Act to Encourage the Trade to Newfoundland of 1698.\(^{42}\) As explained by Reeves, the issue came up when certain of the departing French residents sold their plantations, and "In this manner, attempted to convey a right and property, which was not recognized by the general usage of the island, as confirmed by that statute."\(^{43}\) The matter came before the Board of Trade, which took the view that the Act of 1698 "extended to the ceded lands, and that all the beaches, and plantations there, ought to be left to the public use,

\(^{41}\) Article 13.

\(^{42}\) 10 & 11 Will. III, c. 25. Sometimes also attributed to the year 1699.

\(^{43}\) Reeves, *History of Newfoundland*, 55, citing Entries, D. 406, 408.
and be disposed of, as directed by that act" 44 and this was confirmed by an opinion obtained from the Crown law officers. 45

Nevertheless, a half-century later the law officers took a different view on a related matter. The Act of 1698 provides in section 1 that no alien whatsoever, not residing in England or Wales, shall fish in Newfoundland. But in the Treaty of Utrecht it was stipulated that French subjects might resort to a certain stretch of the Newfoundland coast for purposes of fishing and drying fish, 46 and this article was renewed by the Treaty of Paris in 1763. 47 If indeed the Act of 1698 extended to the entire island of Newfoundland as ceded in 1713, it would nullify the treaty provisions allowing for French fishing rights. Not surprisingly the law officers of the Crown expressed the opinion that, as the French at the time the Act was passed both claimed and possessed several parts of the island and carried on a fishery there, and as that claim had not previously been disallowed in the treaties of 1686 and 1697,

it seemed to them, that the statute was not meant to extend to such parts of the island... as were then left in the possession of the French; nor to abridge or restrain the power of the crown over the same, consequential upon the making of peace; the exercise of which... had received the repeated approbation of both houses of parliament in their resolutions upon the treaties of Utrecht and Paris. 48

Without access to the full texts of the two opinions in question, it is difficult to say how far they genuinely conflict. Much, obviously, turned upon the words of the Act as applied to the peculiar circumstances of each case.

Another precedent is furnished by an opinion concerning Senegal delivered by the law officers in 1759 and reiterated four years later. Upon the capture of St. Louis in Senegal from the French in 1758 and its cession to Great Britain in 1763 49 the question arose whether the King was entitled

44 Ibid. 45 Ibid., 59. 46 Article 13. 47 Article 5. 48 Opinion of 21 March 1764, summarized in Reeves, History of Newfoundland, 120-1, citing Bund. S. 61. Ent. H. 236, 240. This appears to be the same opinion referred to by the Board of Trade in its Representation to the King of 29 April 1765; LBC, IV, 1849, at 1850. 49 Treaty of Paris, Article 10.
to make a grant of the exclusive trade to the area. The Statute of 1750 for Extending the African Trade had provided that all British subjects might lawfully trade "to and from any Port or Place in Africa, between the Port of Sallee in South Barbary, and the Cape of Good Hope... without any Restraint whatsoever, save as is herein after expressed." 50 It might have been contented that this provision would not impair the Crown's powers and rights in territories within the limits designated which were acquired only subsequent to enactment, as was the case with Senegal, so that the King might grant a monopoly on trade there. Pratt A.-G. and Yorke S.-G. took a different view, stating that as Senegal came within the limits mentioned in the Act, the Crown could not grant an exclusive trade there, in effect holding that the Act operated prospectively so as to clip the King's powers in new accessions. 51

An example of a different sort is provided by the constitutional history of New Zealand. In 1839 the British government proposed to obtain a cession of the islands from the indigenous rulers and then to annex them to the colony of New South Wales in Australia. But the government was unsure whether the authority of the Legislative Council of the latter colony, established in 1828 by the Act of 9 Geo. IV, c. 83, would ipso facto extend to the newly annexed territories, and so the opinion of the Crown law officers was requested. Section 20 of the Act of 1828 refers to the necessity of furnishing laws for the "said Colonies of New South Wales and Van Diemen's Land, and the Dependencies thereof" and provides for the establishment of a Council in "New South Wales and Van Diemen's Land respectively". The Attorney and Solicitor-General, Campbell and Rolfe, stated that in their view the word "Dependencies" in section 20 "must receive an extended construction so as to include future as well as then existing dependencies", so that the legislative authority in question would

50 23 Geo. II, c. 31, Imperial (1750), section 1.
51 JBT 1759-63, 324. The opinion was revived and reapplied by Yorke, as Attorney-General, in 1763.
extend to New Zealand if annexed to New South Wales. They conceded that section 20, if construed apart from the context, might "perhaps" properly be confined to dependencies existing at the time of enactment. But they pointed out that section 3 explicitly provided for the jurisdiction of courts in both present and future dependencies of the colonies concerned, and observed that "it could hardly have been the intention of the Act to give a different extent of jurisdiction to the Courts of Justice and the Local Legislature." 52

The leading modern authority is the case of Post Office v. Estuary Radio, Ltd., 53 decided in 1967 in the English Court of Appeal. The defendants had been broadcasting from a disused fort in the Thames estuary more than three nautical miles from the low-water mark of the nearest English coast. They were broadcasting without a license from the Postmaster General, which was unlawful under the Wireless Telegraphy Act, 1949, if the fort was located in the United Kingdom "or the territorial waters adjacent thereto". The question was whether the geographical extent of the U.K. and its territorial waters, for the purposes of the Act, was that existing at the time of enactment in 1949 or rather that existing at any subsequent period. It was agreed that the area claimed by the Crown at the time the case arose was more extensive than that originally claimed in 1949, in view of the Territorial Waters Order in Council of 1964. Diplock L.J., speaking for the court, held that when an Act of Parliament refers to the United Kingdom and its territorial waters,

those expressions must prima facie be construed as referring to such area of land or sea as may from time to time be formally declared by the Crown to be subject to its sovereignty and jurisdiction as part of the United Kingdom or the territorial waters of the United Kingdom, and not as confined to the precise geographical area of the United Kingdom or its territorial waters at the precise moment at which the Act received the royal assent.

52 Opinion of June 1839, reproduced in Foden, Constitutional Development of New Zealand, 10-11.

The court pointed out that the geographical extent of a country may fluctuate over time due to natural processes such as erosion and accretion, and that an "accreting shingle bank at Dungeness is no Alsatia in which a citizen enjoys immunity from the law of the land". On this point it adopted the majority judgments of the Divisional Court in the parallel case of R. v. Kent Justices, where it was held on the same facts that, in the absence of any definition of "territorial waters" in the Act of 1949, that expression "must mean waters over which from time to time the Crown may declare sovereignty".

These examples, then, tend to support the conclusion that the protective provisions laid down in Part IV of the Proclamation apply not only to Indian lands in territories claimed by the Crown at the time of issue, but also to those located in adjacent areas falling under British sovereignty in succeeding periods. In particular, when paragraph 2 speaks of "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", this should be read as meaning all lands of that description held by the Crown from time to time during the instrument's life.

b) Creation of new colonies

The second issue is whether the references in Part IV of the Proclamation to His Majesty's "colonies and plantations" in America apply exclusively to those existing at the time of enactment or also encompass American colonies erected subsequently. Identical problems were frequently encountered in the application of 17th and 18th century imperial legislation concerning trade and the plantations, with illuminating results. These were accurately summarized in 1820 by Holt:

56 At 564, per Lord Parker C.J. See also Blain J. at 574.
The legal meaning of a colony or plantation is, any land, territory, island, or possession, beyond the sea, belonging to, or under the dominion of the crown of Great Britain; and, not only those that now are, but any such as may hereafter become permanently so, by cession or conquest. 57

Clark, writing in 1834, confirms this view. Imperial Acts of Parliament, he writes, generally have no force in conquered or ceded colonies acquired only subsequently, unless extended there by royal or legislative act. But there is an important exception:

all statutes which are manifestly of universal policy, and intended to affect all our transmarine possessions, at whatever period they shall be acquired, such, for example, as navigation acts, or the acts for abolishing the slave trade and slavery... will upon the conquest or cession ipso facto, and independently of posterior legislation, be binding upon a conquered or ceded colony.

In colonies gained by occupancy, he continues, the entire English law then in existence will be introduced, at least to the extent applicable, including in general statute law. 58

The notion that the laws of trade apply automatically upon the acquisition of a new colony is given authoritative support by Lord Mansfield in Campbell v. Hall, where he states:

if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade... 59

The question of the application of the acts of trade and navigation to new colonies arose in a number of particular instances. In 1759, upon the conquest of Guadeloupe from the French, it became an issue whether the island was a plantation or territory belonging to His Majesty or in his possession, within the meaning of the Act of Tonnage and Poundage of 1660 and subsequent acts, which lay down different scales of duties for imports

58 Clark, Colonial Law, 15-6.
59 (1774) I Cowp. 204 at 209, 98 E.R. 1045.
60 12 Chas. II, c. 4 (1660).
from British and foreign plantations. The matter was submitted to the
Crown law officers, who reported, in independent opinions, that the is-
land should be considered a British plantation within the meaning of the
Act in question. 61 Yorke S.-G. specifically stated that

the act of navigation refers not only to the plantations and terri-
tories belonging to, or in the possession of, the crown, at that

time, but, to future acquisitions; and the later acts, which relax,
or vary, in some respects, the provisions of it, are equally exten-
sive.62

It is interesting that the particular act in question contains nothing
which explicitly extends its application to after-acquired colonies, but
simply employs general phrases such as "the English plantations" in its
book of rates.

In 1767 the law officers were asked whether the Act of 12 Anne stat.
2, c. 18 (1713) 63 for Preserving Ships Stranded upon Coasts of This King-
dom or Any Other of Her Majesty's Dominions, extended to the British col-
onies and plantations in America. De Grey and Willes gave an affirmative
response, citing the references to Her Majesty's dominions in the title
and also the enacting part of the Act. 64 Significantly, the opinion does
not differentiate between colonies acquired prior to the statute's enact-
ment and those erected or acquired only later, which indicates that the
date when a colony first came into existence was not considered relevant.
This was also the understanding of the Attorney-General of Quebec, Francis
Maseres, who in 1769 interpreted the opinion (a copy of which had been
sent to the Governor of Quebec) as holding that the Act was applicable to

61 Opinions of Pratt A.-G. and Yorke S.-G. of 7 and 13 August 1759, in
Chalmers, Opinions, II, 355 seq.
62 Ibid., 359. A case raising a similar issue in relation to the con-
quered island of Dominica came on appeal before the King in Council
in 1766, with the same result; see Smith, Appeals to Privy Council,
496 seq.
63 Also cited as 13 Anne c. 21. The statute was originally passed for
a limited period, but was made perpetual by 4 Geo. I, c. 12 (1717).
64 Opinion of 25 June 1767; Chalmers, Opinions, I, 200 seq. The enac-
ting part of s. 1 of the Act refers to "the Constables of the several
Ports within Her Majesties Dominions nearest to the Sea Coasts...".
new colonies such as Quebec, even though, as Maseres was quick to note, the Act was made before the conquest of Quebec "and [was] not extended by express words to the future dominions of the crown." 65 Indeed Maseres' report also contains a valuable review of Imperial Acts of Parliament thought to relate to the province. Maseres divides them into two categories: those passed prior to the conquest of Quebec and those enacted subsequently. Acts falling into the first group, he remarks,

extend to your Majesty's future American dominions, as well as those which belonged to the Crown of Great-Britain at the times of passing them, either by express words for that purpose, or by some general words that have been deemed by your Majesty's ministers and law-officers, by just construction in law, to comprehend them. . . .66

The cases which we have just considered concern Imperial Acts of Parliament. But there appears to be no reason why the same principles should not apply to Imperial prerogative instruments dealing with colonial affairs falling within the Crown's prerogative powers. For example, the Royal Proclamation of 30 November 1674 strictly prohibits

all and every of Our Subjects whatsoever, Except the said Royal [African] Company and their Successours, at any time or times hereafter, to send or Navigate any Ship. . . or Exercise any Trade from any of Our Plantations, Dominions, or Countrieys in America with respect to a specified sector of the African coast. It also orders all Governors and other officers "in every of Our said American Dominions or Plantations" to secure the enforcement of this prohibition. 67 Could it be said that these strictures would not apply to colonies and territories erected or acquired only after the Proclamation's appearance, and that an African trade might be carried on without compunction from, say, the colony of Pennsylvania as chartered in 1681?

Similar questions might be asked in respect to the Royal Proclamation of 18 June 1704 which, referring to the different rates at which

65 Draft of an intended report of the Governor and Council of Quebec to the King concerning the state of the laws and the administration of justice in that province, February 1769; CD, I, 327 at 336. For Maseres' authorship see p. 369. For reasons not affecting the present question, the Governor did not approve of the draft report, which was consequently never delivered to the King.

66 Ibid., 333.

67 ERP, 120 at 122.
foreign coins pass "in Our several Colonies and Plantations in America" publishes and declares that from 1 January next "no Sevill, Pillar, or Mexico Pieces of Eight. . . shall be. . . Received. . . within any of Our said Colonies or Plantations, as well those under Proprietors and Charters, as under Our immediate Commission and Government" at more than a stipulated rate, and commands all Governors, Officers, and subjects "within Our said Colonies and Plantations" to observe these directions. 68 It is difficult to imagine that this instrument was, on its true interpretation, confined in operation to American colonies held by the Crown at the time of issue.

There is, however, one obvious difference between Imperial statutes and Royal prerogative instruments in their application to new accessions. It has been held that Imperial statutes of the requisite type bind ipso facto upon the acquisition of a new territory, and that the Crown has no power to exempt such a territory from their operation. But this would not hold true of prerogative instruments. In the case, say, of a Proclamation applying in a general manner to American colonies and plantations, the Crown would presumably have the power to withhold its application to a newly-acquired possession. But in the absence of specific acts to the contrary, the Proclamation would take effect.

To review our findings, the provisions concerning Indian lands in the Proclamation of 1763 would appear to operate in a prospective manner so as to apply to American territories acquired by the Crown and colonies established there at any time during the Proclamation's life, in the absence of Crown acts or legislation to the contrary. In this respect, the Proclamation follows a long-established pattern set by Imperial acts and prerogative instruments relating to trade and the plantations in the 17th and 18th centuries.

68 BFP, 161-3.
CONCLUSION

THE SOURCES OF ABORIGINAL TITLE

The time has now come to tie together the diverse strands of our inquiry. In the light of the evidence considered here, three distinct, although inter-related, sources may be posited for aboriginal title in Canada. The first lies in general principles of colonial law, applicable throughout the former British empire. The second consists of constitutional structures which evolved in the British American colonies to accommodate the existence, within their boundaries, of differently situated groups, settler and indigenous. The third source, which confirms and generalizes the legal position resulting from the previous two, is the Royal Proclamation of 1763. We will briefly review each of these in turn.

1) Principles of colonial law

Under British law, the Crown, upon acquiring an American territory, was generally free to modify or abrogate any existing private land rights, including those held by Indians, as an act of state incidental to the acquisition.¹ This principle has been held applicable to British overseas dominions generally, whatever their precise mode of acquisition, be it conquest, cession or settlement. There appears to be no basis in British law for holding that American Indians (or indeed "indigenous peoples" generally) occupied a more favoured position in this regard than other sorts of local inhabitants in newly-acquired territories, such as, for example, the French of Canada or the Dutch of New York.

However, in the absence of confiscatory acts performed in the course of acquisition, or other relevant evidence of the Crown's intent, it is

¹ Leaving aside the possible effects of undertakings made in treaties of cession or submission, or in articles of capitulation.
presumed, as a matter of British law, that rights of private property have been respected by the Crown and continue to exist under the new regime. This presumption is one of municipal law, and may be applied by a domestic court in ascertaining the position of private property upon a change of sovereignty. As with the principles considered earlier, it is applicable to all sorts of acquisitions, and all types of local inhabitants, whatever their racial origins, culture, religion, or way of life. As such it benefits indigenous Americans. Of course, the property rights in question must be sufficiently distinct in their own terms to be enforceable in a British court. However, it must be remembered that the material wealth or technological sophistication of a society is no necessary indication of the precision or complexity of its concepts of property.

Nevertheless, some have suggested that the principle of continuity did not apply to colonies acquired by settlement which were inhabited by indigenous peoples at the time of acquisition. Arguments to this effect take two distinct forms. The first affirms that the very fact that a colony was classified as settled necessarily implies that it was deemed to have been uninhabited (whatever the true situation); therefore the Crown automatically gained a complete and unqualified title to the soil, as in a truly vacant territory. The principal weakness of this theory is its rigid and somewhat sweeping character, which appears to take little account of the remarkably complex history of the concept of settled colonies, and the varied situations in which it has been applied. The original concept was expressed in the rule that Englishmen carry English law with them when settling in uninhabited lands. However the same rule has been recognized as operating in colonies which were in fact already inhabited upon acquisition, but where the lex loci was unsuited to the needs of English settlers. In such situations, the rationale and effect of the extended interpretation is to enable settlers to enjoy the benefit of English law, not necessarily to deprive the local inhabitants of their own laws, or indeed to deem those inhabitants out
of existence. In brief, the proposition that uninhabited territories planted
by Englishmen constitute settled colonies does not, in logic, justify the
conclusion that all settled colonies were, or must be deemed to have been,
uninhabited upon settlement. Nor does it appear that such a conclusion can
easily be supported on historical grounds.

The second argument takes a different tack. It proceeds from the pre-
mise that, in an inhabited territory acquired by settlement, English law comes
into force ipso facto, superseding indigenous systems of law and custom. It
is a fundamental principle of English law that the King is the original pro-
prieto and lord paramount of all lands in his dominions. No subject can
show any title to lands save such as is derived from the Crown, medially or
immediately, by grant or act of recognition. Therefore, it is argued, the
indigenous inhabitants of such colonies are not considered to hold land rights
arising from aboriginal possession or customary law. A Crown grant or act
of recognition is requisite.2

The theory has, at first sight, a certain force, in its simplicity and
apparent logic. Closer inspection, however, reveals several weaknesses. The
argument depends for its validity upon the unstated premise that the replace-
ment of a foreign legal system by English law in a given territory has the
effect, ipso facto, and in the absence of contrary provisions, of extinguish-
ing all rights acquired and held under the former system, or at least rights
not conforming, in origin and essential character, to the requirements of
the new system. Thus, the land rights originally held by the local inhabi-
tants are said to be nullified, not by some act of the Crown or other com-
petent authority, or indeed by reason of some morally abhorrent aspect of
their make-up, but simply because they do not satisfy the requirements of
English law. The premise, once stated in a general form, can be seen to be
highly questionable. Is it true, for example, that marriages validly con-
tracted under the former system, and which have no morally objectionable

at 201-4.
features, would nevertheless be automatically dissolved upon the introduction of English law, for failure to conform to English rules governing such matters as place of marriage, parental consent, number of witnesses, or competent officials? Such a result would itself appear morally offensive. Again, would a gratuitous transfer of moveable property properly effected under the old system be retroactively nullified upon the changeover if it failed to satisfy English requirements concerning gifts? To take a case still closer to home, can it be imagined that a person who had inherited certain moveable property under the old laws of succession prior to the changeover, would now find himself stripped of that property in favour of a third person, or indeed the Crown itself, by the retrospective operation of English rules? These examples concern rights which in their origins fail to satisfy the requirements of English law. Similar considerations would apply as regards rights whose character and incidents are unknown to the English system. Would a contract of a type not recognized in English law (moral questions apart) necessarily be nullified upon the changeover? Again, would a right to moveable property whose incidents are wholly or partially foreign to English concepts be modified or rescinded ipso facto?

The true rule would appear to be that, where English law is introduced into a territory formerly governed by a different legal system, the new laws will not, in the absence of explicit provisions, operate retrospectively so as to nullify private rights validly created or vested under the former system, at least if they do not present unconscionable features; rather the requirements of English law concerning the creation and transfer of rights will operate only for the future. It follows that private land rights held under the law formerly prevailing in a territory will not be automatically nullified upon the introduction of English law, merely because they do not conform, in character or origins, to the new system. The operation of this rule is best illustrated, perhaps, by the example of a conquered or ceded territory where the lex loci is allowed to remain in force for a period, and
then is superseded by a Crown act introducing English law. In the absence of explicit words, such an act would not appear to abrogate *ipso facto* all rights vested under the old laws which do not meet the new requirements, and in particular land rights not deriving from Crown grants. What holds true of a conquest where English law is introduced by an explicit act would appear equally true of a settled colony where English law comes into force by operation of a principle of colonial law.

The second argument involves a further doubtful premise. It is assumed that where an inhabited territory is acquired by peaceful settlement, English law automatically prevails not only among the settlers, but also, and to the same extent, among the local peoples, whose proper laws and customs are instantly and totally superseded. This extreme consequence, it must be said, seems quite improbable. The original rule governing settlements, as already noted, states that Englishmen carry their own laws with them when settling in a previously uninhabited land. The principle contemplates the *retention* of English law by those who had always enjoyed it, not its automatic imposition upon those who had hitherto lived under other dictates. If the principle be extended to territories which were already inhabited, but where the local law was inappropriate to the settlers' needs, it would operate, in its rationale, to introduce English law among the settlers, but not to sever in one stroke the legal sinews of the traditional societies already in place. Yet it is suggested that this occurs, not by virtue of the rough hand of the conqueror, but by the silent and automatic operation of a principle of law, which the Crown would be powerless to control and unable to reverse under the prerogative. Were this the case, the inhabitants of a colony gained by peaceful settlement would stand in a worse position than those of a territory won by conquest. In the latter case, existing laws remain generally in force, until altered by the Crown or other competent authority. Can it be true that British colonial law directed that the original inhabitants of a settled territory must automatically forfeit their laws, while those of a conquest presumptively retain them?
In any case, the rule governing settlements affirms that English law is introduced only to the extent applicable in the circumstances of the new colony. The applicability of English law to the indigenous inhabitants is a matter to be determined by reference to their particular situation, including the fact that they have hitherto lived under different rules. Or shall it be contended that the sole test of applicability is the situation of the settlers, and that what holds true for them must also hold for the local peoples, in the same way and in precisely the same measure?

If we conclude, more reasonably, that the introduction of English law into a settled colony allows for the retention by local peoples of their own laws in some degree, then the contention that indigenous land rights are necessarily nullified falls to the ground. The question of how far principles of English land law are applicable to indigenous communities, as with other questions of reception, would be decided by the courts of the territory concerned.

Assuming that Indian lands were not expropriated by Crown act in the course of a colony's acquisition, the question then arises whether the Sovereign retained the power to dispose of such lands even after the process of acquisition was complete and the Indians were accepted as subjects. Could the Crown abrogate indigenous land rights at some succeeding period by the explicit terms of a prerogative instrument such as an Order in Council, or indeed implicitly, by issuing patents for Indian lands to third parties? The law is far from clear on these matters. However the following propositions appear relatively well-established. Once a territory has been acquired and its inhabitants have been received as subjects, the Crown is governed in its acts by the law prevailing in the territory. As between the Sovereign and a subject, there can be no act of state on British soil. If the Crown continues to hold, then, a general power of disposition over private property even subsequent to acquisition of the territory, it must derive that power either from the law obtaining in the territory, or (conceivably) from an act of state
performed at the time of acquisition explicitly placing such property at its future disposal. The former point requires closer examination.

Where the territory has been acquired by conquest or cession, existing laws remain for the most part in force, subject, however, to an overriding legislative authority held by the Crown. If the lex loci attributed to the former sovereign a general executive power to rescind rights of private property, then it is arguable that the incoming sovereign inherits this power.

Nevertheless, the contrary argument can be made that such an extensive power is inconsistent with fundamental principles of British law governing the Crown's prerogative and the rights of subjects in British territories. However this may be (and we cannot resolve the question here), British colonial law clearly affirms that the Crown, by virtue of its legislative power in a conquest, may modify or rescind private property rights. Once that power is lost, upon the grant of a local assembly, it appears doubtful (arguments as to the lex loci apart) whether the Crown holds any further authority to affect private property rights under the prerogative.

In a colony acquired by settlement, the Crown has no greater powers than those accorded by the law prevailing there, which is English law, so far as applicable in the circumstances. If it is accepted, as argued above, that the introduction of English law in such cases does not automatically nullify private land rights vested under the former system, and that such rights are cognizable in courts of law, it would appear to follow that the Crown has no general authority under the prerogative to modify or abrogate such rights, any more than it has to nullify marriages or commercial contracts concluded under the former regime, -- leaving aside acts of state performed in the course of acquisition.

In summary, then, the source of Indian land title in Canada, considered as an abstract question of British law, is, primarily and originally, the rights held by Canadian Indians to their lands prior to the Crown's acquisition of sovereignty, and, secondarily, principles of British colonial law
which allow for or direct the recognition of such rights by the courts in certain circumstances. The most fundamental of these principles holds that, in the absence of confiscatory acts incidental to the acquisition of a territory or subsequent acts of a competent authority, pre-existing private property rights are presumed to have been respected (the principle of continuity). In a conquered or ceded territory, this rule is reinforced by a parallel one which provides that the system of laws and consequential rights obtaining in the territory upon acquisition remain generally in force, until altered by the Crown or other competent authority. In a settled territory, the rule providing for the automatic introduction of English law is tempered by two distinct rules: the first allows for the validity of rights acquired under the former legal system (the principle of non-retroactivity), and the second ordains that English law is introduced only to the extent that it applies in the circumstances (the principle of suitability).

We must now turn from these rather abstract considerations, to examine the legal regime which actually evolved in the American colonies.

2) The constitution of British American colonies

In those parts of North America which were originally colonized by the Crown, and not gained by conquest or cession from other European powers, territories were claimed and settlers introduced without in most cases any preceding conquest or peaceful subjugation of the neighbouring indigenous peoples. Throughout the colonial period, many of these groups retained an autonomous status, and were not ruled in any direct manner by the colonial governments. Their relations with imperial and local authorities were regulated by treaties or agreements concluded by consent of both parties. Some of these treaties involve the submission of the Indian signatories to the sovereignty of the Crown, and the reciprocal extension of the King's protection. In such instances, however, the autonomy of the Indian group in internal matters is often recognized, and the authority of its leaders acknowledged. The status
of such a group vis-à-vis the Crown is sometimes described in terms recalling that of a vassal, or of a tributary people.

The American colonies were initially considered to hold a status akin to that of a conquest, where English law did not obtain ipso facto, and the Crown held extensive legislative powers. This view was maintained in certain quarters as late as the American Revolution. However, it was more usually acknowledged during the eighteenth century that English law had, in considerable measure, come to prevail among the settlers in most American colonies, whether by virtue of provisions in royal instruments, by the actions of colonial assemblies and courts, or by "birthright" and bare necessity. Nevertheless, English law was not thought to extend in most respects to neighbouring Indian groups, with the exception perhaps of the mission-influenced remnants of decimated groups living in settled areas. The idea that Indian laws of status, marriage, property, descent and so on were at a stroke rescinded and replaced by English law was a fiction too great, perhaps, to maintain, and was in any case simply unworkable. Thus it was admitted that multiple systems of law existed within the limits of British colonies in America, one for the settlers, and the others for the various Indian groups.

This multiplicity was reflected in the land system developed to meet the circumstances. The Crown initially asserted sovereignty over vast American territories which it had neither explored in their entirety nor reduced to its control, and which were inhabited by powerful and numerous indigenous groups. From that initial assertion of sovereignty, it was deducible, perhaps, by dint of exporting feudal theory to America, that the Crown held a complete title to the soil, and unrestricted powers of disposal. But such a theory was never applied in its most extended form to North American lands during the colonial period. It was asserted that the Crown held an ultimate or underlying title to the soil throughout the whole of its possessions. Beyond this, however, a dual system of tenure was recognized as prevailing. So far as settlers were concerned, lands were in principle to be held exclusively by virtue of grants
from the Crown or its assignees. Indian groups, on the other hand, were admitted to hold rights arising from their factual possession and control of certain lands, rights which did not derive from Crown grants. The existence of Indian title might be partially reconciled with feudal theory, if desired, by the doctrine that the Indian nations had been recognized, or were presumed to have been accepted, as vassals of the Crown. In whatever manner these rights were explained, there can be little doubt that the existence of an Indian title was admitted by both the Crown and local authorities in the colonial period.

A system of this kind inevitably gave rise to conflictual problems. Two sorts were particularly common, and were not resolved with any great certainty or uniformity until the issue of the Royal Proclamation of 1763. The first centred upon the question whether settlers might purchase lands from the Indians, and so acquire the title which they enjoyed. Several objections might be made to such a practice. Firstly, it was not easily reconcilable with doctrines of English law applicable to settlers, whereby title was held to derive from Crown grant. Secondly, it would have largely deprived the Crown (or proprietary bodies) of control over the settlement of ungranted lands claimed by Indians, and of revenues deriving from their disposal. Finally, the practice was open to fraud and other abuses. Where it was allowed to prevail, it was the occasion of much animosity between settlers and Indians, who claimed, often with justice, to have been cheated of their lands. For all these reasons, the unlicensed purchase of Indian lands by private individuals was prohibited by local laws passed in a number of English colonies at an early stage, and was later proscribed throughout the whole of British territories in North America by the Royal Proclamation of 1763. The view which eventually prevailed was that the Crown or its assignees held an exclusive right of acquiring Indian lands by cession or purchase, or by conquest in times of war. Despite this, the practice of private purchasing or leasing of Indian lands was fairly widespread in certain areas, and examples of it can be found as late as the 19th century in Canada.
The second conflictual problem concerned the effect of grants made by
the Crown or its assignees to lands possessed by indigenous peoples. It
could be argued that under English law, as prevailing among the settlers,
these grants furnished a complete and unqualified title to the soil, clear
of any Indian rights. However, this view took no account of the existence
of competing rights to the same lands held by the local peoples under their
own laws, rights accompanied, in most cases, by actual possession, and de-
fended by force. Both logic and a sense of reality suggested the adoption of
a different view, namely that Crown grants took effect subject to Indian
rights, which required to be extinguished by purchase or cession. This was
the view expressed by American courts after the Revolution, and there are in-
dications that it represented doctrines inherited from the colonial period.
At any rate, in many colonies it was usual to secure a surrender of Indian
title before issuing patents. This practice was elevated to a rule of law
by the Royal Proclamation of 1763, which proscribed the patenting of unceded
Indian lands throughout the colonies, and laid down procedures for the ex-
tinguishment of Indian title by purchase effected by public authorities.

Large portions of Canada were acquired, not by virtue of an original
claim advanced by the British Crown, but by conquest and cession from France.
These include the modern provinces of Nova Scotia, New Brunswick, and Prince
Edward Island, the southern portions of Quebec and Ontario, and perhaps also
sections of Manitoba and areas farther west. In these territories, the
French Crown had asserted sovereignty as against other European states, and
exclusive rights of dealing with the indigenous peoples. The latter it had
sought, with considerable success, to secure as allies and ultimately as vas-
sals. There appears to have been no attempt, generally speaking, to dispossess
them. Upon cession of these territories to Great Britain, the land rights of
the Indians presumptively continued undisturbed, subject to the Crown's ulti-
mate title. The position of Indian lands in the ceded territories was appar-
ently thought to differ little from that obtaining in other colonies. This
indeed was the view expressed in the Royal Proclamation of 1763, which we will now briefly consider.

3) The Royal Proclamation of 1763

This instrument clarifies and confirms certain general legal principles already in place in many American colonies, and extends these to other British territories on the continent, in particular to those recently acquired by conquest and cession from France, and also to such older, but less developed, colonies as Newfoundland and Rupert's Land. The most important and enduring features of the Proclamation are its recognition that Indian peoples hold rights to unceded lands in their possession throughout British dominions in North America, and its provision that such rights may be extinguished only by surrender to the Crown or proprietary bodies, executed in a prescribed manner. We have submitted here that the provisions of this instrument were constitutionally valid and binding in the territories to which they referred, and that these territories, in 1763, comprised virtually the whole of modern Canada, including the west and north-west, long-standing claims to which had been advanced by the British Crown and its predecessor-in-title, the French Crown. In any case, it is submitted that the Proclamation presumptively applied to any American territories acquired after 1763 which satisfied the terms of that instrument, so long as it remained in force.

The point cannot be documented here, but it may be added that although the position of Indian lands has subsequently been affected by statute in various parts of Canada, and their geographical extent has been considerably reduced by cession to the Crown, there has been, to the present writer's knowledge, no general repeal of the Proclamation's basic provisions regarding Indian lands. The Proclamation thus has a continuing relevance in many parts of Canada today.
APPENDIX A

THE ROYAL PROCLAMATION

OF 7 OCTOBER 1763

Source: Brigham, ed., British Royal Proclamations Relating to America, 212-8.
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; 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, 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, from thence 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

1 Text of treaty can be consulted in Chalmers' Collection of Treaties, i. 407.
2 The events leading up to the issuing of this proclamation have been thoroughly treated in C. W. Alwood's "Genesis of the Proclamation of 1763" in Michigan Pioneer and Historical Collections, vol. xxxvi, p. 20, and in C. 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.
3 Nipissin in proclamation as printed in the London Gazette.
1763, October 7.

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 Penticchartrain; 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 Chatehouchee; 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
Royal Proclamations.

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
1763, October 7.

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.

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.

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 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
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.

5) 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, Misdemeanors 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 Tryptal for the same.
Royal Proclamations.

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.

APPENDIX B

THE ROYAL CHARTER INCORPORATING

THE HUDSON'S BAY COMPANY, 2 MAY 1670

THE ROYAL CHARTER INCORPORATING
THE HUDSON'S BAY COMPANY, A.D. 1670. ¹

CHARLES THE SECOND By the grace of God King of England Scotland France and Ireland defender of the faith &c To all to whome these presentes shall come greeting WHEREAS Our Deare and entirely Beloved Cousin Prince Rupert Count Palatyne of the Rhyne Duke of Bavaria and Cumberland &c Christopher Duke of Albemarle William Earle of Craven Henry Lord Arlington Anthony Lord Ashley Sir John Robinson and Sir Robert Vyner Knightes and Baronettes Sir Peter Colliton Baronett Sir Edward Hungerford Knight of the Bath Sir Paul Neile Knight Sir John Griffith and Sir Phillipp Carteret Knightes James Hayes John Kirke Francis Millington William Prettyman John Fenn Esquires and John Portman CITTIZEN and Goldsmith of London have at their owne great cost and charge undertaken an EXPEDITION for Hudsons Bay in the Northwest part of America for the discovery of a new Passage into the South Sea and for the finding some Trade for FurrS Mineralls and other considerable Commodities and by such there undertaking have already made such discoverys as doe encourage them to proceed further in pursuance of theire said designe by meanes whereof there may probably arise very great advantage to us and our Kingdome AND WHEREAS the said undertakers for theire further encouragement in the said designe have humbly besought us to Incorporate them and grant unto them and theire successors the sole Trade and Commerce of all those

¹ H.B.C. Archives.
Seas Streights Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streights commonly called Hudsons Streights together with all the Landes Countrie and Territoryes upon the Coastes and Confynes of the Seas Streights Bayes Lakes Rivers Creekes and Soundes aforesaid which are not now actually possessed by any of our Subjectes or by the Subjectes of any other Christian Prince or State. Now know ye that Wee being desirous to promote all Endeavours tending to the publique good of our people and to encourage the said undertaking have of our especiall grace certaine knowledge and meere mocion Given granted ratifyed and confirmed And by these Presentes for us our heires and Successors doe give grant ratifie and conforme unto our said Cousin Prince Rupert Christopher Duke of Albemarle William Earle of Craven Henry Lord Arlington Anthony Lord Ashley Sir John Robinson Sir Robert Vyner Sir Peter Colleton Sir Edward Hungerford Sir Paul Neile Sir John Griffith and Sir Phillipp Carterett James Hayes John Kirke Francis Millington William Prettyman John Fenn and John Portman That they and such others as shall bee admitted into the said Society as is hereafter expressed shall bee one Body Corporate and Politique in deed and in name by the name of the Governor and Company of Adventurers of England trading into Hudsons Bay and them by the name of the Governor and Company of Adventurers of England trading into Hudsons Bay one Body Corporate and Politique in deede and in name really and fully for ever for us our heires and successors Wee doe make ordeyne constitute establish conforme and declare by these Presentes and that by the same name of Governor & Company of Adventurers of England Trading into Hudsons Bay they shall have perpetuall succession And that they and their successors by the name of the Governor and Company of Adventurers of England trading into Hudsons Bay bee and at all tymes hereafter shall bee persons able and capable in Law to have purchase receive possessse enjoy and retayne Landes Rentes priviledges libertyes Jurisdicticions Franchisyes and hereditamentes of what kinde
nature and quality soever they bee to them and their Successors. And alse to give grant demise alien assigne and dispose Landes Tenementes and hereditamentes and to doe and execute all and singuler other thinges by the same name that to them shall or may appertaine to doe. And that they and their Successors by the name of the Governor and Company of Adventurers of England Tradeing into Hudsons Bay may pleade and bee impleaded answere and bee answeread defend and bee defended in whatsoever Courties and places before whatsoever Judges and Justices and other persons and Officers in all and singuler Accions Ples Suits Quarrells causes and demandes whatsoever of whatsoever kinde nature or sort in such manner and forme as any other our Liege people of this our Realme of England being persons able and capable in Lawe may or can have purchase receive possesse enjoy retayne give grant demise alien assigne dispose pleade defend and bee defended doe permit and execute. And that the said Governor and Company of Adventurers of England Tradeing into Hudsons Bay and their successors may have a Common Seale to serve for all the causes and busynesses of them and their Successors and that itt shall and may bee lawfull to the said Governor and Company and their Successors the same Seale from tyme to tyme at their will and pleasure to breake change and to make a new or alter as to them shall seeme expedient. And further We will And by these presentes for us our Heires and successors Wee dos ordeyne that there shall bee from henceforth one of the same Company to bee elected and appointed in such forme as hereafter in these presentes is expressed which shall bee called The Governor of the said Company. And that the said Governor and Company shall or may elect seaven of their number in such forme as hereafter in these presentes is expressed which shall bee called the Commitee of the said Company which Commitee of seaven or any three of them together with the Governor or Deputie Governor of the said Company for the tyme being shall have the direccion of the Voyages of and for the said Company and the Provision of the Shipping and Merchandizes thereunto belonging.
and alsoe the sale of all merchandizes Goods and other thinges returned in all or any the Voyages or Shippes of or for the said Company and the mannageing and handleing of all other busnesse affaires and thinges belonging to the said Company. AND WEE WILL orderyne and Grant by these presentes for us our heires and successors unto the said Governor and Company and their successors that they the said Governor and Company and their successors shall from henceforth for ever bee ruled ordered and governed according to such manner and forme as is hereafter in these presentes expressed and not otherwise. And that they shall have hold retayne and enjoy the Grantes Liberties Priviledges Jurisdictiones and Immunityes only hereafter in these presentes granted and expressed and noe other. And for the better execution of our will and Grant in this behalfe WEE HAVE ASSIGNED nominated constituted and made And by these presentes for us our heires and successors WEE DOE ASSIGNE nominate constitute and make our said Cousin PRINCE RUPERT to bee the first and present Governor of the said Company and to continue in the said Office from the date of these presentes until the tenth of November then next following if hee the said Prince Rupert shall see long live and see until a new Governor bee chosen by the said Company in forme hereafter expressed AND ALSOE WEE HAVE assigned nominated and appointed And by these presentes for us our heires and Successors WEE DOE assigne nominate and constitute the said Sir John Robinson Sir Robert Vyner Sir Peter Colleton James Hayes John Kirke Francis Millington and John Portman to bee the seaven first and present Committees of the said Company from the date of these presentes until the said tenth Day of November then alsoe next following and see untill new Committees shall bee chosen in forme hereafter expressed AND FURTHER WEE WILL and grant by these presentes for us our heires and Successors unto the said Governor and Company and their successors that itt shall and may bee lawfull to and for the said Governor and Company for the tyme being or the greater part of them present at any publique Assembly commonly called the Court
Generall to bee holden for the said Company the Governor of the said Company being alwayes one from tyme to tyme to elect nominate and appoint one of the said Company to bee Deputy to the said Governor which Deputy shall take a corporall Oath before the Governor and three or more of the Committee of the said Company for the tyme being well truely and faithfully to execute his said Office of Deputy to the Governor of the said Company and after his Oath soe taken shall and may from tyme to tyme in the absence of the said Governor exercize and execute the Office of Governor of the said Company in such sort as the said Governor ought to doe. And further we will and Grant and by these presents for us our heires and Successors unto the said Governor and Company of Adventurers of England trading into Hudsons Bay and their Successors That they or the greater part of them whereof the Governor for the Tyme being or his Deputy to bee one from tyme to tyme and at all tymes hereafter shall and may have authority and power yearely and every yeare betweene the first and last day of November to assemble and meete together in some convenient place to bee appointed from tyme to tyme by the Governor or in his absence by the Deputy of the said Governor for the tyme being And that they being soe assembled itt shall and may bee lawfull to and for the said Governor or Deputy of the said Governor and the said Company for the tyme being or the greater part of them which then shall happen to bee present whereof the Governor of the said Company or his Deputy for the tyme being to bee one to elect and nominate one of the said Company which shall bee Governor of the same Company for one whole yeare then next following which person being soe elected and nominated to bee Governor of the said Company as is aforesaid before hee bee admitted to the Execution of the said Office shall take a Corporall Oath before the last Governour being his Predecessor or his Deputy and any three or more of the Committee of the said Company for the tyme being that hee shall from tyme to tyme well and truely execute the Office of Governour of the said Company in all thingses concerninge the same and that Ymediately
after the same Oath soe taken hee shall and may execute and use the said Office of Governor of the said Company for one whole yeare from thence next following and in like sort Wee will and grant that aswell every one of the above named to bee of the said Company or fellowshipp as all other hereafter to bee admitted or free of the said Company shall take a Corporall Oath before the Governor of the said Company or his Deputy for the tyme being to such effect as by the said Governor and Company or the greater part of them in any publick Court to bee held for the said Company shall bee in reasonable and legall manner sett downe and devised before they shall bee allowed or admitted to Trade or traffique as a freeman of the said Company. And further Wee will and grant by these presentes for us our heires and successors unto the said Governor and Company and their successors that the said Governor or Deputy Governor and the rest of the said Company and their successors for the tyme being or the greater part of them whereof the Governor or the Deputy Governor from tyme to tyme to bee one shall and may from tyme to tyme and at all tymes hereafter have power and authority yearely and every yeare betweene the first and last day of November to assemble and meete together in some convenient place from tyme to tyme to bee appointed by the said Governour of the said Company or in his absence by his Deputy and that they being soe assembled itt shall and may bee lawfull to and for the said Governor or his Deputy and the Company for the tyme being or the greater part of them which then shall happen to bee present whereof the Governor of the said Company or his Deputy for the tyme being to bee one to elect and nominate seaven of the said Company which shall bee a Committee of the said Company for one whole yeare from thence next ensueing which persons being soe elected and nominated to bee a Committee of the said Company as aforesaid before they bee admitted to the execution of their Office shall take a Corporall Oath before the Governor or his Deputy and any three or more of the said Committee of the said Company being their last Predecessors that they and every of them shall
well and faithfully performe theire said Office of Committees in all things concerninge the same And that imediately after the said Oath see taken they shall and may execute and use theire said Office of Committees of the said Company for one whole yeare from thence next following And moreover Our will and pleasure is And by these presentes for us our heires and successors we do grant unto the said Governor and Company and theire successors that when and as often as itt shall happen the Governor or Deputy Governor of the said Company for the tyme being at any time within one yeare after that hee shall bee nominated elected and sworne to the Office of the Governor of the said Company as is aforesaid to dye or to bee removed from the said Office which Governor or Deputy Governor not demeaning himselfe well in his said Office we will to bee removeable at the Pleasure of the rest of the said Company or the greater part of them which shall bee present at their publick assemblies commonly called theire Generall Court holden for the said Company that then and soe often itt shall and may bee lawfull to and for the Residue of the said Company for the tyme being or the greater part of them within convenient tyme after the death or removeing of any such Governor or Deputy Governor to assemble themselves in such convenient place as they shall thinke fitt for the election of the Governor or Deputy Governor of the said Company and that the said Company or the greater part of them being then and there present shall and may then and there before theire departure from the said place elect and nominate one other of the said Company to bee Governour or Deputy Governour for the said Company in the place and stead of him that soe dyed or was removed which person being soe elected and nominated to the Office of Governor or Deputy Governour of the said Company shall have and exercize the said Office for and during the residue of the said yeare taking first a Corporall Oath as is aforesaid for the due execution thereof And this to bee done from tyme to tyme soe often as the case shall see require And also our Will and Pleasure is and by these presentes for us our heires and successors we
pos grant unto the said Governor and Company that when and as often as itt shall happen any person or persons of the Comittee of the said Company for the tymne being at any tymne within one yeare next after that they or any of them shall bee nominated elected and sworne to the Office of Comittee of the said Company as is aforesaid to dye or to bee removed from the said Office which Committees not demeaning themselves well in their said Office Wee will to be removeable at the pleasure of the said Governor and Company or the greater part of them whereof the Governor of the said Company for the tymne being or his Deputy to bee one that then and soe often itt shall and may bee lawfull to and for the said Governor and the rest of the Company for the tymne being or the greater part of them whereof the Governor for the tymne being or his Deputy to bee one within convenient tymne after the death or removing of any of the said Comittee to assemble themselves in such convenient place as is or shall bee usuall and accustomed for the election of the Governor of the said Company or where else the Governor of the said Company for the tymne being or his Deputy shall appoint And that the said Governor and Company or the greater part of them whereof the Governor for the tymne being or his Deputy to bee one being then and there present shall and may then and there before their Departure from the said place elect and nominate one or more of the said Company to bee of the Comittee of the said Company in the place and stead of him or them that soe dyed or were or was soe removed which person or persons soe elected and nominated to the Office of Comittee of the said Company shall have and exerize the said Office for and dureing the residue of the said yeare taking first a Corporall Oath as is aforesaid for the due execution thereof and this to bee done from tymne to tymne soe often as the case shall require And to the end the said Governor and Company of Adventurers of England Tradeing into Hudsons Bay may bee encouraged to undertake and effectually to prosecute the said designe of our more speciall grace certaine knowledge and meere Mocion Wee have given granted and confirmed.
And by these presents for us our heirs and successors doe give grant and confirme unto the said Governor and Company and their successors the sole trade and Commerce of all those Seas Streights Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lye within the entrance of the Streights commonly called Hudsons Streights together with all the Landes and Territoryes upon the Countryes Coaste and confines of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that 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 with the Fishing of all Sortes of Fish Whales Sturgions and all other Royall Fishes in the Seas Bayes Islettes and Rivers within the premisses and the Fish therein taken together with the Royalty of the Sea upon the Coaste within the Lymittes aforesaid and all Mynes Royall aswell discovered as not discovered of Gold Silver Gems and pretious Stones to bee found or discovered within the Territoryes Lymittes and Places aforesaid And that the said Land bee from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America called Rupertis Land. AND FURTHER WE DOE by these presents for us our heirs and successors make create and constitute the said Governor and Company for the tyme being and there successors the true and absolute Lourdes and Proprietors of the same Territory lymittes and places aforesaid And of all other the premisses saving always the faith Allegiance and Soveraine Dominion due to us our heirs and successors for the same To have hold possesse and enjoy the said Territory lymittes and places and all and singular other the premisses hereby granted as aforesaid with theire and every of their Rightes Members Jurisdicions Prerogatives Royaltyes and Appurtenances whatsoever to them the said Governor and Company and there Successors for ever to bee holden of us our heirs and successors as of our Mannor of East Greenwich in our County of Kent in free and common Seccage and not in Capite or by Knightes Service yielding and paying yearely to us our heirs and
Successors for the same two Elks and two Black beavers 
whenever and as often as Wee our heires and successors 
shall happen to enter into the said Countryes Territoryes 
and Regions hereby granted. AND FURTHER our will and 
pleasure is And by these presentes for us our heires and 
successors Wee doe grant unto the said Governor and 
Company and to their successors that itt shall and may bee 
lawfull to and for the said Governor and Company and their 
successors from tyme to tyme to assemble themselves for or 
about any the matters causes affaires or businesses of the 
said Trade in any place or places for the same convenient 
within our Dominions or elsewhere and there to hold Court 
for the said Company and the affaires thereof. And that alsoe 
itt shall and may bee lawfull to and for them and the greater 
part of them being soe assembled and that shall then and 
there bee present in any such place or places whereof the 
Governor or his Deputy for the tyme being to bee one to 
make ordeyne and constitute such and soe many reasonable 
Lawes Constitucions Orders and Ordinances as to them or 
the greater part of them being then and there present shall 
seeme necessary and convenient for the good Government 
of the said Company and of all Governors of Colonyes Fort 
and Plantacions Factors Masters Mariners and other Officers 
employed or to bee employed in any of the Territoryes 
and Landes aforesaid and in any of their Voyages and 
for the better advancement and continuance of the said 
Trade or Traffick and Plantacions and the same Lawes 
Constitucions Orders and Ordinances soe made to putt in 
use and execute accordingly and at their pleasure to revoke 
and alter the same or any of them as the occasion shall require 
And that the said Governor and Company soe often as they 
shall make ordeyne or establish any such Lawes Constitucions 
Orders and Ordinances in such forme as aforesaid shall and 
may lawfully impose ordeyne limitt and provide such paines 
penaltyes and punishmentes upon all Offenders contrary 
to such Lawes Constitucions Orders and Ordinances or any 
of them as to the said Governor and Company for the tyme 
being or the greater part of them then and there being present
the said Governor or his Deputy being alwayes one shall seeme necessary requisite or convenient for the observation of the same Lawes Constituciones Orders and Ordinances. And the same Fynes and Amerciamentes shall and may by their of Officers and Servantes from tyme to tyme to bee appointed for that purpose levy take and have to the use of the said Governor and Company and their successors without the impediment of us our heires or successors or of any the Officers or Ministers of us our heires or successors and without any accppt therefore to us our heires or successors to bee made. All and singuler which Lawes Constituciones Orders and Ordinances soe as aforesaid to bee made Wee will to bee duly observed and kept under the paines and penalties therein to bee conteyned soe alwayes as the said Lawes Constituciones Orders and Ordinances Fynes and Amerciamentes bee reasonable and not contrary or repugnant but as neare as may bee agreeable to the Lawes Statutes or Customs of this our Realme. And furthermore of our ample and abundant grace certaine knowledge and meere mocioun Wee have granted and by these presents for us our heires and successors doe grant unto the said Governor and Company and their Successors That they and their Successors and their Factors Servantes and Agentes for them and on their behalfe and not otherwise shall for ever hereafter have use and enjoy not only the whole Entire and only Trade and Traffick and the whole entire and only liberty use and priviledge of tradeing and Trafficking to and from the Territory Lymittes and places aforesaid but alsoe the whole and entire Trade and Traffick to and from all Havens Bayes Creekes Rivers Lakes and Seas into which they shall find entrance or passage by water or Land out of the Territoryes Lymittes or places aforesaid and to and with all the Natives and People Inhabiteing or which shall inhabit within the Territoryes Lymittes and places aforesaid and to and with all other Nacions Inhabiteing any the Coastes adjacent to the said Territoryes Lymittes and places which are not already possessed as aforesaid or whereof the sole liberty or priviledge of Trade and Traffick is not granted.
to any other of our Subjectes. AND wee of our further Royall favour And of our more especiall grace certaine knowledge and meere Mocion have granted and by these presentes for us our heires and Successors doe grant to the said Governor and Company and to their Successors That neither the said Territoryes Lymittes and places hereby Granted as aforesaid nor any part thereof nor the islandes Havens Portes Cittyes Townes or places thereof or therein conteyned shall bee visited frequented or haunted by any of the Subjectes of us our heires or successors contrary to the true meaning of these presentes and by vertue of our Prerogative Royall which wee will not have in that behalfe argued or brought into Question Wee straightly Charge Command and prohibit for us our heires and Successors all the subjectes of us our heires and Successors of what degree or Quality soever they bee that none of them directly or indirectly doe visit haunt frequent or Trade Traffike or Adventure by way of Merchandize into or from any the said Territoryes Lymittes or Places hereby granted or any or either of them other then the said Governor and Company and such particuler persons as now bee or hereafter shall bee of that Company their Agentes Factors and Assignes unlesse it bee by the Lycence and agreement of the said Governor and Company in writing first had and obtened under theire Common Seale to bee granted upon paine that every such person or persons that shall Trade or Traffike into or from any the Countrys Territoryes or Lymittes aforesaid other then the said Governor and Company and their Successors shall incurr our Indignacion and the forfeiture and the losse of the Goodes Merchandizes and other things whatsoever which soe shall bee brought into this Realme of Engleand or any the Dominions of the same contrary to our said Prohibicion or the purport or true meaning of these presentes for which the said Governor and Company shall finde take and seize in other places out of our Dominions where the said Company their Agentes Factors or Ministers shall Trade Traffick inhabitt by vertue of these our Letters Patente As alsoe the Shipp and Shippes with the Furniture thereof wherein such goodes Merchandizes
and other thinges shall bee brought or found the one halfe of all the said Forfeitures to bee to us our heires and successors and the other halfe thereof Wee doe by these Presentes cleerely and wholly for us our heires and Successors Give and Grant unto the said Governor and Company and their Successors And further all and every the said Offenders for theire said contempt to suffer such other punishment as to us our heires or Successors for soe high a contempt shall seeme meete and convenient and not to bee in any wise delivered untill they and every of them shall become bound unto the said Governor for the tyme being in the summe of one thousand Poundes at the least at noe tyme then after to Trade or Traffick into any of the said places Seas Streightes Bayes Portes Havens or Territoryes aforesaid contrary to our Expresse Commandment in that behalfe herein set downe and published And further of our more especiall grace Wee have condiscended and granted And by these presentes for us our heires and Successors doe grant unto the said Governor and Company and their successors That Wee our heires and Successors will not Grant liberty lycence or power to any person or persons whatsoever contrary to the tenour of these our Letters Patente to Trade trafficke or inhabit unto or upon any the Territoryes lymittes or places aforespecified contrary to the true meaning of these presentes without the consent of the said Governor and Company or the most part of them And of our more abundant grace and favour to the said Governor and Company Wee doe hereby declare our will and pleasure to bee that if it shall soe happen that any of the persons free or to bee free of the said Company of Adventurers of England Tradeing into Hudsons Bay who shall before the going forth of any Shipp or Shippes appointed for A Voyage or otherwise promise or agree by Writing under his or their handes to adventure any summe or Sumes of money towards the furnishing any provision or maintenance of any voyage or voyages sett forth or to bee sett forth or intended or meant to bee sett forth by the said Governor and Company or the more part of them present at any Publick Assembly commonly called
theire Generall Court shall not within the Space of twenty Dayes next after Warneing given to him or them by the said Governor or Company or theire knowne Officer or Minister bring in and deliver to the Treasurer or Treasurers appointed for the Company such summes of money as shall have beene expressed and sett downe in writeing by the said Person or Persons subscribed with the name of the said Adventurer or Adventurers that then and at all Tymes after itt shall and may bee lawfull to and for the said Governor and Company or the more part of them present whereas the said Governor or his Deputy to bee one at any of theire Generall Courtes or Generall Assemblyes to remove and disfranchise him or them and every such person and persons at their wills and pleasures and hee or they see removed and disfranchised not to bee permitted to trade into the Countrieys Territoryes and Lymittes aforesaid or any part thereof nor to have any Adventure or Stock goinge or remaininge with or amongst the said Company without the speciall lycence of the said Governor and Company or the more part of them present at any Generall Court first had and obtayned in that behalfe Any thing before in these presente to the contrary thereof in any wise notwithstandinge And our will and pleasure is And hereby wee doe alsoe ordeyne that itt shall and may bee lawfull to and for the said Governor and Company or the greater part of them whereas the Governor for the tyme being or his Deputy to bee one to admitt into and to bee of the said Company all such Servantes or Factors of or for the said Company and all such others as to them or the most part of them present at any Court held for the said Company the Governor or his Deputy being one shall be thought fitt and agreeable with the Orders and Ordinances made and to bee made for the Government of the said Company And further Our will and pleasure is And by these presente for us our heires and Successors wee doe grant unto the said Governor and Company and to theire Successors that itt shall and may bee lawfull in all Eleccions and Bye-Lawes to bee made by the Generall Court of the Adventurers of the said Company that every person shall have a number of votes
according to his Stock that is to say for every hundred pounds
by him subscribed or brought into the present Stock one
vote and that any of these that have subscribed lesse then
one hundred pounds may joyn their respective summes
to make upp one hundred pounds and have one vote joyntly
for the same and not otherwise. And further of our
especiall grace cemein knowledge and meere motion we
doe for us our heires and succesors grant to and with the
said Governor and Company of Adventurers of England
Trading into Hudsons Bay that all Landes Islandes
Territoryes Plantations Fortes Fortificacions Factoryes or
Colonyes where the said Companyes Factoryes and Trade are
or shall bee within any the Portes and places aforesaid
shall bee ymmediatly and from henceforth under the power and
command of the said Governor and Company their Successors
and Assignes saving the faith and Allegiance due to bee
performed to us our heires and successors as aforesaid and
that the said Governor and Company shall have liberty full
Power and authority to appoint and establish Governors and
all other Officers to governe them. And that the Governor
and his Councill of the severall and respective places where
the said Company shall have Plantations Fortes Factoryes
Colonyes or Places of Trade within any the Countryes
Landes or Territoryes hereby granted may have power to
judge all persons belonging to the said Governor and
Company or that shall live under them in all Causes whether
Civill or Criminall according to the Lawes of this Kingdome
and to execute Justice accordingly. And in case any crime
or misdemeanour shall bee committed in any of the said
Companyes Plantations Fortes Factoryes or Places of Trade
within the Lymittes aforesaid where Judicature cannot bee
executed for want of a Governor and Councill there then in
such case itt shall and may bee lawfull for the chiefe Factor
of that place and his Councill to transmitt the party together
with the offence to such other Plantacion Factory or Fort
where there shall bee a Governor and Councill where Justice
may bee executed or into this Kingdome of England as
shall bee thought most convenient there to receive such
punishment as the nature of his offence shall deserve. And Moreover Our will and pleasure is, And by these presents for us our heires and Successors We doe give and grant unto the said Governor and Company and their Successors free Liberty and Lycence in case they conceive it necessary to send either Shippes of Warre Men or Amunicion unto any there Plantacions Fortes Factoryes or Places of Trade aforesaid for the security and defence of the same and to choose Comanders and Officers over them and to give them power and authority by Commission under their Common Seal or otherwise 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 bee most for the advantage and benefit of the said Governor and Company and of there Trade and alsoe to right and recompence themselves upon the Goodes Estates or people of those parts by whom the said Governor and Company shall susteyne any injury losse or dammage or upon any other People whatsoever that shall any way contrary to the intent of these presentes interrupt wrong or injure them in their said Trade within the said places Territoryes and Lymittes granted by this Charter and that its shall and may bee lawfull to and for the said Governor and Company and their Successors from tymc to tymc and at all tymes from henceforth to Erect and build such Castles Fortificacions Fortes Garrisons Colonyes or Plantacions Townes or Villages in any partes or places within the Lymittes and Boundes granted before in these presentes unto the said Governor and Company as they in there Disrecions shall thinke fitt and requisite and for the supply of such as shall bee needefull and convenient to keepe and bee in the same to send out of this Kingdome to the said Castles Forts Fortificacions Garrisons Colonyes Plantacions Townes or Villages all Kinde of Cloathing Provision of Victualls Ammunition and Implemetes necessary for such purpose paying the Dutyes and Customes for the same As alsoe to transport and carry over such number of Men being willing thereunto or not prohibited as they shall thinke
fitt and also to governe them in such legall and reasonable manner as the said Governor and Company shall thinke best and to inflict punishment for misdemeanors or impose such Fynes upon them for breach of their Orders as in these Presentes are formerly expressed. And further Our will and pleasure is And by these presentes for us our heires and Successors We do grant unto the said Governor and Company and to their Successors full Power and lawfull authority to seize upon the Persons of all such English or any other our Subjects which shall sayle into Hudsons Bay or Inhabit in any of the Countreyes Islandes or Territoryes hereby Granted to the said Governor and Company without their leave and Lycence in that Behalfe first had and obtained or that shall contemne or disobey their Orders and send them to England and that all and every Person and Persons being our Subjects any wayes Employed by the said Governor and Company within any the Partes places and Lymittes aforesaid shall bee lyable unto and suffer such punishment for any Offences by them committed in the Partes aforesaid as the President and Councill for the said Governor and Company there shall thinke fitt and the merit of the offence shall require as aforesaid And in case any Person or Persons being convicted and Sentenced by the President and Council of the said Governor and Company in the Countreyes Landes and Lymittes aforesaid theire Factors or Agentes there for any Offence by them done shall appeale from the same. That then and in such Case itt shall and may bee lawfull to and for the said President and Councill Factors or Agentes to seize upon him or them and to carry him or them home Prisoners into England to the said Governor and Company there to receive such condigne punishment as his Cause shall require and the Law of this Nation allow of and for the better discovery of abuses and injuryes to bee done unto the said Governor and Company or theire Successors by any Servantes by them to bee imploied in the said Voyages and Plantacions itt shall and may bee lawfull to and for the said Governor and Company and their respective Presidentes Chiefe Agent or Governor in the partes
aforesaid to examine upon Oath all Factors Masters Pursers Supra Cargoes Commanders of Castles Fortes Fortificacions Plantacions or Colonyes or other Persons touching or concerninge any matter or thing in which by Law or usage an Oath may bee administred soe as the said Oath and the matter therein conteyned bee not repugnant but agreeable to the Lawes of this Realme AND WE DOE hereby streightly charge and Command all and singuler our Admiralls Vice-Admiralls Justices Mayors Sheriffes Constables Bayliffes and all and singuler other our Officers Ministers Liege Men and Subjectes whatsoever to bee aydeing favouring helping and assisting to the said Governor and Company and to their Successors and to their Depuyes Officers Factors Servantes Assignes and Ministers and every of them in executeing and enjoying the premisses as well on Land as on Sea from tyme to tyme when any of you shall thereunto bee required ANY STATUTE Act Ordinance Proviso Proclamacion or restraint heretofore had made sett forth ordeyned or provided or any other matter cause or thing whatsoever to the contrary in any wise notwithstanding IN WITNES WHEREOF we have caused these our Letters to bee made Patentes WITNES OUR SELVES at Westminster the second day of May in the two and twentieth yeare of our Raigne

By Writt of Privy Seale

PIGOTT

Seal.
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11. Limits of Territory granted to Proprietors of Carolina by Charles II, 1663
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COLONIAL GRANTS, 1603-1732

Map showing colonial grants from 1603 to 1732. The map includes various tracts granted by different authorities, with notes indicating the dates and recipients of the grants.
English colonies, charter grants, 
& frontier of settlement, 1660;
Lord and Lord, Historical Atlas (Rev. ed.),
plate 22, p. 21.

The United Colonies of New England, 1643-94
Massachusetts Bay, Connecticut, New Hampshire,
Plymouth and eastern Long Island,
All lands within fifty leagues of any waters
flowing into the St. Lawrence and the Gulf of
California were granted to Sir William Alex-
ander in 1629.

Frontier of settlement
Present state borders
Figure 7. The extent of the territory of the Hudson's Bay Company according to a map by J. Arrowsmith, published in 1857.

The extent of the territory of the Hudson's Bay Company according to a map by J. Arrowsmith, 1857; Nicholson, Boundaries of Canada, p. 35.
Territory known by Europeans at the end of the French regime;
Harris and Warkentin, Canada before Confederation, p. 14.
Figure 3. Major voyages of discovery and exploration in eastern Canada between 1600 and 1763.

Major voyages of discovery and exploration in eastern Canada between 1600 and 1763;
Figure 4. Major voyages of discovery and exploration in western Canada before 1763.

Major voyages of discovery and exploration in western Canada before 1763;
North America as of the Royal Proclamation of 1763;
The Maritime Provinces;
Proposed boundaries in Hudson Bay,
after the Treaty of Ryswyck, 1697;
Savelle, "Forty-Ninth Degree", p. 185.
Proposed boundaries in Hudson Bay, 1719;
Savelle, "Forty-Ninth Degree", p. 198.
Northern boundaries of Ontario, 1867-1889;

Figure 5. Major voyages of discovery and exploration in western Canada between 1763 and 1814.

Major voyages of discovery and exploration in western Canada between 1763 and 1814;
Figure 8. Major voyages of discovery and exploration in western Canada between 1814 and 1867. (The name “McClintock” is sometimes spelled “M’Clintock”).

Major voyages of discovery and exploration in western Canada between 1814 and 1867;

The western frontier, 1763;
Western land cessions, 1780-1802;

The probable boundaries of Virginia under the Royal Charter of 1609; base map derived from Odyssey World Atlas, p. 12.
Claims and cessions of western lands,
Virginia and Georgia, 1776-1802;
Paullin, Atlas, plate 47D.
State claims to western lands, 1783-1802;
North America in 1756 and 1763;
North America in 1713;
28 The Growth of Population

NOTE:
Figures in italics are estimates; other figures are based on censuses or other reasonably reliable sources.

**CANADA**

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</table>

**KEY**
- Total population
- Population of Montreal and vicinity
- Population of Quebec

Growth of population in Canada to 1763;

**ACADIA**
MAP 3. Boundary disputes of Rhode Island.
(Drawn by Richard J. Sinely, Williamsburg, Va., from a sketch by the author; adapted from maps in John Hutchins Cady, Rhode Island Boundaries, 1636-1936 [Providence, R.I., 1936]; base map from United States Geological Survey, Department of the Interior, Washington, D.C.)

Boundary disputes in Rhode Island;
Jennings, Invasion of America, p. 256.
Early boundaries in the maritimes;
Ganong, "Boundaries of New Brunswick", p. 159.
MAP APPENDIX 2

EIGHTEENTH CENTURY MAPS

LIST OF PLATES

1. Carte d'Amérique, by Guillaume Delisle, Paris, 1722 (section); Wagner, Cartography of Northwest Coast, I, p. 143.


3. Amérique septentrionale, by Jean-Baptiste D'Anville, 1746 (section); Warkentin and Ruggles, Manitoba Historical Atlas, p. 113.

4. Amérique septentrionale, by Robert de Vaugondy, 1750 (section); Warkentin and Ruggles, Manitoba Historical Atlas, p. 115.

5. Carte générale des découvertes de l'Amiral de Fonte... , by Joseph N. Delisle, Paris, 1752 (section); Wagner, Cartography of Northwest Coast, I, opp. p. 158.


7. Carte de l'Amérique septentrionale, Nicolas Bellin, 1755 (section); Warkentin and Ruggles, Manitoba Historical Atlas, p. 119.


10. A Physical Planisphere..., by B. Cole (section); (1757) XXVII Gentleman's Magazine, opp. p. 110.

11. Nouvelle carte des découvertes faite par des vaisseaux Russiens aux côtes inconnues de l'Amérique septentrionale... , Imperial Academy of Sciences, St. Petersburg, 1758; PAC, Map Division, H12/1-4000-1758.


13. An Accurate Chart of the World with the New Discoveries by T. Kitchin (section); (1758) XXVII London Magazine, opp. p. 64.


17. A Map of Canada and the North Part of Louisiana with the Adjacent Countrys, by Thos. Jefferys, 1762; Muller, Voyages from Asia to America, 2nd ed. (London: 1764), PAC, Map Division, H2/1100-1762 (reduced).

18. A New Map of North America from the Latest Discoveries; (1763) XXXII London Magazine, opp. p. 64 (2 sheets) (reduced).

19. A New Map of the British Dominions in North America with the Limits of the Governments Annexed Thereto by the Late Treaty of Peace and Settled by Proclamation, October 7th, 1763, by T. Kitchin; (1763) VI Annual Register (1st ed.) end-papers (2 sheets).

20. An Accurate Map of North America Describing and Distinguishing the British, Spanish and French Dominions on This Great Continent; According to the Definitive Treaty Concluded at Paris 10th Feb' Y 1763... by Eman. Bowen; hand-coloured version enclosed with the Report of the Board of Trade of 8 June 1763, reproduced for purposes of the Labrador Boundary Case; PAC Map Division, H11/1000-1763 (reduced).


22. A New and Accurate Map of All the Known World... by Eman. Bowen, 1764 (section); Anderson, Origin of Commerce (1764), I, frontispiece.

23. A New Map of the North East Coast of Asia, and the North West Coast of America, with the Late Russian Discoveries; (1764) XXXIII London Magazine, opp. p. 224.

Carte d'Amérique, by Guillaume Delisle, Paris, 1722 (section);
Wagner, Cartography of Northwest Coast, I, p. 143.
Amérique septentrionale, by Robert de Vaugondy, 1750 (section); Hartnup and Ruggles, Manitoba Historical Atlas, p. 115.
A General Map of the Discoveries of Admiral De Fonte and Others,
by M. De l'Isle; (1754) XXIV Gentleman's Magazine, opp. p. 123.

CARTE DE L'AMÉRIQUE SÉPENTRIONALE, NICOLAS BELLIN, 1755 (section); WARKENTIN AND RUGLES, MANITOBA HISTORICAL ATLAS, P. 119.
Nouvelle carte des découvertes faites par des vaisseaux Russiens aux côtes inconnues de l'Amérique septentrionale. . . Imperial Academy of Sciences, St. Petersburg, 1758; PAC, Map Division, H12/1-4000-1758.
A Map of the New Continent according to its Greatest Diometrical Length. . . , by J. Gibson; (1758) XXVIII Gentleman's Magazine, opp. p. 584.
A Map of the Icy Sea... by J. Gibson;
A Map of Canada and the North Part of Louisiana with the Adjacent Countries.

By Tho. Jefferys, Geographer to the Royal Highness the Prince of Wales.
An Accurate Map of the British Empire in North America as Settled by the Preliminaries in 1762, by J. Gibson; (1762) XXXII Gentleman's Magazine, opp. p. 604.
A Map of Canada and the North Part of Louisiana with the Adjacent Countries, by Thos. Jefferys, 1762; Muller, Voyages from Asia to America, 2nd ed. (London: 1764).
PAC Map Division, H2/1100-1762 (reduced).
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The British Governments in Nth America laid down agreeable to the Proclamation of Octr 7, 1763.

The British Governments in Nth America laid down agreeable to the Proclamation of Octr 7, 1763, by John Gibson, (1763) XXXIII Gentleman's Magazine.
A New and Accurate Map of All the Known World...
by Emanuel Bowen, 1764 (section); Anderson, *Origin of Commerce* (1764), I, frontispiece.
A New Map of the North East Coast of Asia, and the North West Coast of America, with the Late Russian Discoveries; (1764) XXXIII London Magazine, opp. p. 224
MAP APPENDIX 3

THE EVOLUTION

OF THE

BOUNDARIES OF CANADA

First successful French settlements in North America: Port Royal (1605), and Quebec (1608). English settlement in Virginia begins (1606-07). French and English territorial claims overlap Acadia. Acadia is recognized as French possession by the Treaty of Breda (1667). A Royal Charter (1670) grants sole trading rights in Hudson Bay drainage basin to the Hudson's Bay Co.

By the Treaty of Utrecht, France cedes Nova Scotia (excluding Cape Breton Island) to Great Britain, relinquishes her interests in Newfoundland and recognizes British rights to Rupert's Land.

By the Treaty of Paris (1763), eastern North America becomes British territory except St. Pierre and Miquelon Islands (France). British colonial governments for Quebec: Newfoundland (with Isle d'Anticosti and Iles de la Madeleine), Nova Scotia (including present-day N.B. and P.E.I.). Hudson's Bay Co. still administers Rupert's Land. Louisiana is ceded to Spain by France.

St. John's Island is separated from Nova Scotia (1769). The Quebec Act (1774) enlarges Quebec to include Labrador, Isle d'Anticosti, Illas de la Madeleine, and Indian Country to the north and to the west and south to the Ohio and Mississippi rivers.
3.2

The United States of America gains independence from Britain by the Treaty of Paris (1783). U.S.A. boundaries are described from the Atlantic to Lake of the Woods. New Brunswick and Cape Breton Island are separated from Nova Scotia (1784).

Following the Constitutional Act, Quebec is divided into Upper and Lower Canada (1791). Spain cedes Louisiana back to France (1800). U.S.A. purchases Louisiana (1803).

St. John's Island (Île St.-Jean) is renamed Prince Edward Island (1798). Île d'Anticosti and the coast of Labrador from the St.-Jean River to Hudson Strait are transferred from Lower Canada to Newfoundland by the Labrador Act (1869).
The international boundary is extended westward along the 49th parallel to the Rocky Mountains (1818). The Oregon Territory is occupied jointly by Britain and U.S.A. Reannexation: Cape Breton Island to Nova Scotia (1820). Ille d'Anticosti and part of the coast of Labrador to Lower Canada (1825). Agreement between Russia and Britain on the description of Alaska boundary (1825).

The Province of Canada is formed by uniting Upper and Lower Canada (1840). The international boundary from the Rocky Mountains to the Pacific is described by the Oregon Treaty (1846). The northern portion of the Oregon Territory is called New Caledonia, a name used by Simon Fraser in 1806. The Hudson's Bay Co. is granted Vancouver's Island to develop a colony (1848).
New Caledonia, with extended boundaries, becomes the British colony of British Columbia (1858). The Stickeen Territory is delimited (1862).

British Columbia attains its present boundaries by the uniting of the colonies of Vancouver's Island, British Columbia and the Stickeen Territory with a northern boundary along the 50th parallel.
New Brunswick, Nova Scotia and Canada are united in a federal state, the Dominion of Canada, by the British North America Act (July 1, 1867). The province of Canada is divided into Ontario and Quebec. The United States of America proclaims the purchase of Alaska from Russia (June 20).

The North-West Territories (Rupert's Land and the North-Western Territory) are acquired by Canada from the Hudson's Bay Company. From part of them Manitoba is created as the fifth province.
British Columbia joins the Dominion of Canada as the sixth province (1871), followed by Prince Edward Island as the seventh province (1873).

New provisional northern and western boundaries of Ontario are described (1874). From part of the North-West Territories, the District of Keewatin is created (1876).
British rights to the arctic islands pass to Canada (1880). The boundaries of Manitoba are extended (1881), but the extension to the east is contested by Ontario. The provisional Districts of Assiniboia, Saskatchewan, Athabaska, and Alberta are created (1882).

The Ontario-Manitoba boundary dispute is settled by the Ontario Boundary Act. Ontario is enlarged west to Lake of the Woods and north to the Albany River.
Ungava, Mackenzie, Yukon, and Franklin are established as Districts in the North-West Territories. The creation of the District of Franklin acknowledges the inclusion of the arctic islands in Canada. The Districts of Athabaska and Keewatin are enlarged.

Boundaries are changed in the Districts of Mackenzie, Keewatin, Ungava, Franklin, and Yukon (1877). The District of Yukon becomes a Territory separate from the North-West Territories (1886). Quebec boundaries are extended north.
Alberta and Saskatchewan are created as provinces to make a total of nine provinces in the Dominion of Canada (1905). The District of Keewatin is transferred back to the Northwest Territories. Due to changes in adjoining areas the boundaries of the Northwest Territories are redefined (1909).

Ontario and Manitoba attain their present boundaries. Quebec is extended northward to Hudson Bay and Hudson Strait thereby absorbing mainland Ungava. Quebec-Labrador boundary remains unsettled.
Canada's boundaries are extended northward pursuant to provisions of international law. The Imperial Privy Council provides a settlement of the Quebec-Labrador boundary question.

[Map showing Canada's extended boundaries with dates 1927 and 1949]

At its own request, after a plebiscite, Newfoundland enters the Confederation as the tenth and most recent province of the Dominion of Canada.
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