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Commentary on “Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute”*

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Thomas Flanagan’s article on adhesion to Indian treaties in this issue of the *Canadian Journal of Law and Society* is a bold foray into a virtually unexplored area of aboriginal rights. Although adhesions to most of the eleven Numbered Treaties in northern and western Canada were common, as Flanagan points out, not much attention has been paid to them. The matter is nonetheless of major importance for many aboriginal peoples, as was demonstrated by the decision of the Supreme Court of Canada last year that the Teme-Augama Anishnabai had surrendered their aboriginal title by adhesion to the 1850 Robinson-Huron Treaty.¹ There can be little doubt that the issue is going to arise more frequently as other aboriginal peoples challenge the application of treaties to their ancestral lands.

Flanagan’s article deals with two matters. First, it examines adhesions to the Numbered Treaties generally, and presents a classification for them based on the federal government’s treaty-making practice. Secondly, it looks at the Lubicon land claim in northern Alberta in light of this classification, and suggests that failure to resolve the claim is due largely to “a disagreement over the concept of adhesion.” I find Flanagan’s characterization of the nature of the Lubicon dispute to be helpful, as it clarifies a fundamental issue in Indian treaty law. The issue is this: In a situation where an aboriginal group² whose ancestral lands are within a treaty area did not sign the treaty, do they have existing aboriginal land rights, or simply a claim to receive the same treaty benefits as the aboriginal groups who did sign the treaty? Or, to put it another way, assuming the treaty validly extinguished the land rights of the aboriginal signatories,³ would it have had the same impact on

* I would like to thank Brian Slattery for his very helpful comments on a draft of this paper.

1. *A.-G. for Ontario v. Bear Island Foundation*, (1991) 127 N.R. 147 (S.C.C.).
2. I use the general term “group” instead of nation, tribe, band or other designation in this context to avoid problems of definition which might otherwise occur, and because I do not want to limit the application of my discussion of land claims to a particular kind of collectivity. My use of this term is not an implicit denial of the legitimate claims of aboriginal peoples to nationhood.
3. A “clear and plain” intention to extinguish would have to be proven (*Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 at 1099), taking into consideration the historical context,

the rights of the group who did not sign? The significance of an adhesion to the treaty by this group depends on how this initial issue is resolved.

Flanagan suggests that a clear distinction exists between what he calls “internal” and “external” adhesions. Internal adhesions involve aboriginal groups whose ancestral lands are *within* the area described by the treaty but who were not present at the original treaty negotiations or who did not accept the terms at that time. They signed later, either in the same year at another meeting-place on the treaty commissioners’ initial circuit, or in a subsequent year. External adhesions involve aboriginal groups whose land claims lie *outside* the treaty’s original limits, requiring a territorial extension of the treaty.

Flanagan’s research has revealed that the federal government seems to regard internal and external adhesions as legally distinct. An external adhesion involves the surrender by the adherents of their aboriginal rights to specific lands which they claim as a distinct aboriginal group. Those lands then become part of the treaty area as extended by the adhesion. According to Flanagan, internal adhesions are different because the government apparently thinks that all the lands within the original treaty area form a whole, aboriginal title to which is extinguished when “a sufficient number” of claimant groups within the area sign the treaty. The Lubicon claim contradicts the government’s understanding because the Lubicons allege that they have unextinguished aboriginal title to their ancestral lands within the original limits of Treaty Eight on the grounds that they have never signed the treaty.

While Flanagan presents both sides in this debate, he devotes much more space to the government’s position, support for which he finds in both Crown practice and the treaties’ terms. The treaties, however, are at best equivocal in this respect. Treaty Eight provides:

... the said Indians [Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described] do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada ... all their rights, titles and privileges whatsoever, to the lands included within the following limits ... [a]nd also the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.⁴

the record of negotiations, and the aboriginal understanding of the agreement (*A.-G. of Quebec v. Sioui*, [1990] 1 S.C.R. 1025, esp. 1035–36, 1045). One cannot, as Flanagan appears to suggest, rely simply on the surrender clause in the treaty itself: see *Re Paulette*, (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.) esp. 30–35, reversed on other grounds (1975) 63 D.L.R. (3d) 1 (N.W.T.C.A.), [1977] 2 S.C.R. 628; K. McNeil, “The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case” [1992] 1 C.N.L.R. 40 at 62–68.

4. *Treaty No. 8 Made June 21, 1899, and Adhesions, Reports, Etc.* (Ottawa: Queen’s Printer, 1966) at 12.

This may imply, as Flanagan suggests, that the Cree, Beaver, Chipewyan and other Indian parties were regarded by the government as having one common claim to the whole treaty area. But it could also mean that they each had a claim to distinct lands within the treaty area (and possibly elsewhere) which would all be covered by this general surrender provision, thereby avoiding the unnecessary and potentially contentious task of delineating each group's claim separately. As the Supreme Court of Canada has repeatedly said that ambiguities in treaties are to be resolved in the Indians' favour,⁵ this interpretation is to be preferred over that suggested by Flanagan. Moreover, it corresponds with the reality of aboriginal life as, making allowance for some overlap, each group did have a definite territory for hunting, fishing and other resource use.⁶ Certainly the treaty commissioners were not so ill-informed as to believe that the Cree, Beaver and Chipewyan Indians living within the treaty area all claimed the same lands.⁷

Canadian case law confirms that distinct aboriginal groups have land rights to specific areas. In *Baker Lake v. Minister of Indian Affairs* Mahoney J. said that a claim to aboriginal title requires proof that the claimants and their ancestors formed an organized society and that they "occupied the specific territory over which they assert the aboriginal title . . . to the exclusion of other organized societies."⁸ With some modifications, this test for proof of aboriginal title has been applied in other cases.⁹

The view that a treaty extinguishes aboriginal title throughout the designated area when enough aboriginal signatures are obtained encounters other obstacles as well. For one thing, just how many signatures are required? If aboriginal leaders representing over 50 percent of the aboriginal population in the treaty area sign on, is that sufficient? What if all the Beaver and Chipewyan but none of the Cree leaders had signed Treaty Eight—would the Cree's title have been extinguished by the acceptance of the treaty by those other tribes? The very idea that extinguishment could occur in

5. E.g., see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 402; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 906–07.

6. See M. Rossignol, "Property Concepts among the Cree of the Rocks" (1939) 12 *Primitive Man* 61; H. Brody, *Maps and Dreams* (Harmondsworth: Penguin Books, 1983).

7. The reports of the treaty commissioners and the record of signatures reveal that the commissioners dealt with different aboriginal groups at different places within the treaty's territorial limits: e.g., see Report of Commissioner for Treaty No. 8 in *Treaty No. 8*, *supra*, note 4, at 20, where J. A. Macrae reported taking "adhesions of certain of the Indians of Fort St. John and the whole of those of Fort Resolution on Great Slave lake, whose hunting grounds lie within treaty limits" (my emphasis).

8. [1980] 1 F.C. 518 at 557–58 (F.C.T.D.).

9. See *A.-G. for Ontario v. Bear Island Foundation*, (1984) 15 D.L.R. (4th) 321 (Ont. S.C.) at 335. In *Delgamuukw v. The Queen*, [1991] 3 W.W.R. 97 (B.C.S.C.) at 388, McEachern C.J. questioned whether the occupation had to be exclusive.

such a way is all the more suspect when one considers that the territorial extent of Treaty Eight appears to have been determined in advance by the government.¹⁰ Extinguishment of the aboriginal title of a group who did not sign would therefore depend arbitrarily on whether their ancestral lands happened to lie inside or outside the treaty's boundaries. Moreover, the government would be able to extinguish the title of recalcitrant groups simply by manipulating the boundaries.

So the suggestion that the land rights of all aboriginal groups within a treaty area would be extinguished when the representatives of some unspecified number of groups signed does not stand up to scrutiny. Regardless of the practice and views of the Canadian government, as a matter of general constitutional principle, the Crown (i.e., the executive branch of government) cannot make law.¹¹ In entering into Indian treaties as in other dealings with vested rights, the Crown must follow the legal rules established by legislation and judicial decisions.

The legal rules respecting Indian treaties were laid down in the Royal Proclamation of 1763,¹² the Indian provisions of which are still in force.¹³ Among other things, the proclamation provides that, if any of the nations or tribes of Indians connected with and living under the protection of the Crown wish to dispose of their unsurrendered lands, the lands can be purchased only by the Crown at a public assembly of those Indians held for that specific purpose.¹⁴ This

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10. See Order in Council Setting Up Commission for Treaty 8, P.C. No. 2749 in *Treaty No. 8*, *supra*, note 4, at 3–4; R. Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870–1939* (Toronto: McClelland & Stewart, 1973) at 58–60.
 11. See S.A. de Smith, *Constitutional and Administrative Law*, 4th ed. by Harry Street and Rodney Brazier (Harmondsworth: Penguin Books, 1981), 79–80; E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, 10th ed. (London: Longmans, 1985), 60–63; Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 284. The Crown can make law only to the extent that authority to do so has been delegated to it by the legislature.
 12. R.S.C. 1985, App. II, No. 1. Ironically, the Royal Proclamation is Crown legislation, issued under authority of the rule of British colonial law that the Crown can legislate in conquered and ceded colonies until a representative assembly is promised or created: see *Campbell v. Hall* (1774) Lofft 655 (K.B.). It was made possible by the cession of New France to Britain in 1763. See generally Brian Slattery, *Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979).
 13. See *The King v. McMaster*, [1926] Ex. C.R. 68 (Can. Ex.) at 72–74; *Easterbrook v. The King*, [1931] S.C.R. 210 at 214–15, 217–18; *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] Q.B. 892 (Engl. C.A.) esp. 913; and commentary on *A.-G. for Ontario v. Bear Island Foundation*, (1989) 68 O.R. (2d) 395 (Ont. C.A.) in McNeil, *supra*, note 3, at 55–58.
 14. R.S.C. 1985, App. II, No. 1 at 6. Although there is uncertainty over the proclamation's territorial extent, the Supreme Court of Canada appears to regard its surrender provisions, at least, as being generally applicable: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 376–82.

provision, which is as applicable to purchases of Indian lands by adhesion as by original treaty, obliges the Crown to obtain a formal surrender from each group holding aboriginal title within a designated area for the Crown to have a clear title to all the lands located there.¹⁵

The protection accorded to aboriginal land rights by the Royal Proclamation is supported by general principles of Anglo-Canadian law. Since at least the seventeenth century, the common law has been vigilant in shielding vested rights—especially property rights—from violation by the Crown.¹⁶ Although the Supreme Court of Canada has successfully avoided any clear definition of aboriginal land rights by saying they are *sui generis*,¹⁷ the Court's unanimous decision in *Canadian Pacific Limited v. Paul*¹⁸ indicates that these rights are proprietary in nature. As such they are entitled to as much common law protection as other vested property rights.¹⁹ One consequence of this is that the Crown cannot extinguish the title of one aboriginal group by signing a treaty with other groups, any more than it can extinguish the title of one homeowner by purchasing the houses of other homeowners on the same city block.²⁰

Returning to the Lubicon claim, if the Lubicons were a distinct aboriginal group with land rights within the Treaty Eight area, those rights could not as a matter of law have been extinguished by the treaty if they did not sign it. The Lubicons' lands would therefore have to be excluded from the lands purportedly surrendered by the treaty. Currently, one option for the Lubicons would be to adhere to the treaty, and accept the benefits provided by it. One can call this an internal adhesion if one likes, but the legal effect would be precisely the same as in the case of an external adhesion. Another option would be for the Lubicons to negotiate their own "treaty" with the federal government, which would probably be more beneficial, given the kind of settlements other aboriginal groups have obtained in modern land claims agreements.²¹ However, given that the government is unlikely to accept negotiations on that basis, the Lubicons would probably be

15. For detailed discussion, see McNeil, *supra*, note 3, esp. 55–61.

16. See H. Broom, *Constitutional Law*, 2nd ed. by G. L. Denman (London: Maxwell & Son, 1885), at 225–33.

17. See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, esp. 382; *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 at 1108.

18. [1988] 2 S.C.R. 654 at 677.

19. Contrast *Mabo v. Queensland*, (1993) 175 C.L.R.1 (H.C. Aust.).

20. For detailed discussion of this issue in the context of the 1850 Robinson-Huron Treaty, see K. McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-Jacket" in M. Bray and A. Thomson, eds, *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990), at 185.

21. *E.g.*, see *The Western Arctic Claim: The Inuvialuit Final Agreement* (Ottawa: Indian and Northern Affairs Canada, 1984).

obliged either to pursue their claim in court, or to continue asserting their land rights directly by resisting trespass by oil companies and others who have been invading their lands.²² In my view, the latter approach has certain procedural advantages, as the Lubicons would then be able to rely on their possession in any legal action involving trespass.²³ But whatever the form of action, the suggestion that Treaty Eight extinguished their land rights even if they did not become parties to it is a legal fantasy which no court in Canada should accept.

22. See generally J. Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991).

23. For discussion of this approach in another context, see K. McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 *Monash L. Rev.* 91 esp. at 107-10.