

1999

## Sovereignty and the Aboriginal Nations of Rupert's Land

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### Source Publication:

Manitoba History. Number 37 (1999) p. 2-8.

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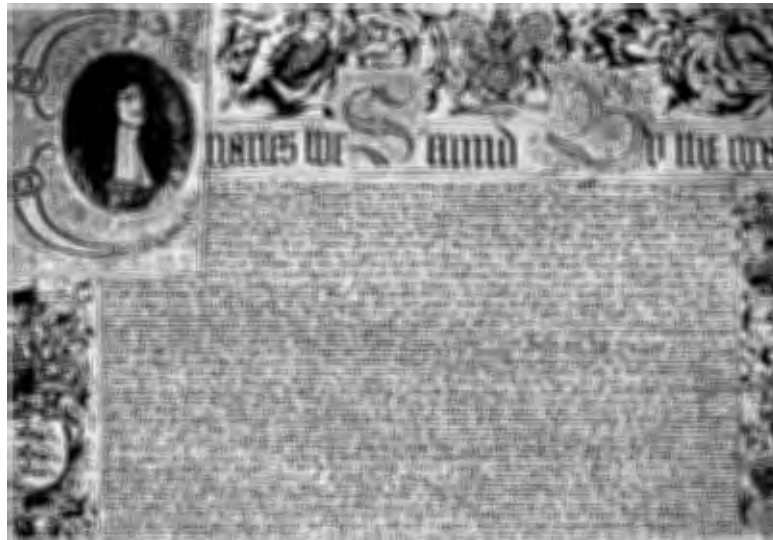
### Recommended Citation

McNeil, Kent. "Sovereignty and the Aboriginal Nations of Rupert's Land." *Manitoba History* 37 (1999): 2-8.

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# Sovereignty and the Aboriginal Nations of Rupert's Land

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1670 royal charter of the "Governor and Company of Adventurers of England Trading into Hudson Bay."

Hudson's Bay Company Archives

Where the rights of the Aboriginal peoples of Canada are concerned, history and law are inseparable. Lawyers working on Aboriginal claims ignore history at their peril. But the converse is also true — historians whose work involves the Aboriginal peoples cannot afford to disregard law. Nowhere is this more apparent than in Rupert's Land, out of which the province of Manitoba was at least partially created. Solutions to lingering questions of sovereignty, territorial boundaries, jurisdiction, title to land, and so on, all must be sought in the middle ground where law and history overlap. In this article, we will venture onto this ground in an effort to resolve a long-standing debate over the validity of Aboriginal and British claims to sovereignty in that region.

Rupert's Land, of course, is the territory that was granted to the Hudson's Bay Company by Royal Charter in 1670. It is commonly assumed that this territory encompassed all the lands in North America that drain into Hudson Bay and Strait. I am going to challenge the assumption that the Charter actually conveyed the whole of that territory to the Company. My view is that the Company's territory included only those lands within the Hudson watershed that the Company was actually able to possess and effectively control. Even in 1869-70, when the Company

surrendered Rupert's Land back to the Crown, most of the lands within the Hudson watershed were not possessed or controlled by the Company at all — they were possessed and controlled by Aboriginal nations, some of whom had inhabited the region for thousands of years.

This question of the extent of the Hudson's Bay Company's territory is obviously a matter of considerable historical interest, but does it have any contemporary significance? The answer is definitely *yes* — it could be of great importance for present-day Aboriginal rights. This is mainly because the Supreme Court of Canada, in its landmark decision in *Delgamuukw v. British Columbia*,<sup>1</sup> decided recently that Aboriginal title to land in Canada today depends on proof of exclusive Aboriginal occupation at the time the British Crown acquired sovereignty over the territory where the lands are located.

The date of British acquisition of sovereignty is thus vital to Aboriginal land claims, within Rupert's Land as well as in other parts of Canada, or at least those parts of Canada that were not first acquired by France. The questions of when the Crown acquired Rupert's Land, and the geographical extent of the Hudson's Bay Company territory, are thus crucial to Aboriginal land claims. In my opinion, these questions cannot be answered simply by looking at the date

of the Hudson's Bay Company Charter and the description of Rupert's Land in that document. Other factors, such as the means by which sovereignty could be acquired at the time in international and British colonial law, have to be considered. Even in 1670, it is very doubtful that King Charles' signature on a piece of parchment could effectively bestow sovereignty over a vast territory, most of which had not even been explored, let alone possessed, by British subjects. This is especially so when most (if not all) of that territory was actually possessed by Aboriginal peoples, the vast majority of whom had no knowledge of the existence of Britain or of Prince Rupert and his Company of Adventurers.

To properly assess this matter, we need to take a closer look at the Hudson's Bay Company Charter itself.<sup>2</sup> By the Charter, Charles II incorporated the Hudson's Bay Company and granted it a number of rights and privileges, including a monopoly on trade and commerce in Rupert's Land. But the provision that concerns us most is the grant to the Company of "all the Landes and Territoryes upon the Countryes Coastes and confynes of the Seas Bayes Lakes Rivers Creekes and Soundes" that lay within the entrance to Hudson Strait.<sup>3</sup> Assuming that this was meant to include all of the Hudson watershed (I am not contesting that interpretation), the question that must be asked is whether this grant was effective to convey what it purported to convey, namely, title to all those lands. This would depend on whether the Crown had sovereignty over Rupert's Land and title to the lands within it at the time the Charter was issued, as it is a fundamental principle of English law that no one — and this includes the King or Queen — can convey a title to lands that he or she has no interest in or power over.

In order to have title to the lands that he purported to grant to the Hudson's Bay Company, King Charles would first have had to have sovereignty over Rupert's Land. How might that have been acquired? In British colonial law, there were four ways for the Crown to acquire sovereignty — inheritance from another sovereign, conquest, cession by international treaty, and settlement.<sup>4</sup> We can immediately eliminate the first three possibilities, as they simply did not occur in Rupert's Land. That leaves settlement. Basically, this means peopling a territory with British subjects so that effective possession and control is established in the name of the Crown. In fact, it has been decided in a number of Canadian court cases that Rupert's Land was acquired by settlement.<sup>5</sup> What is not so clear is how and when this occurred.

A look at the historical record reveals that, at the time the Hudson's Bay Company Charter was issued in 1670, British claims to Rupert's Land rested precariously on voyages of discovery made by various English seafarers, including Hudson (1610), Bylot and Baffin (1615), and Foxe (1631).<sup>6</sup> While some of these captains did lay claim to the region for the Crown, none of them attempted to establish permanent settlements. Not until Groseilliers and Radisson escorted English traders to the rich fur region in James Bay in 1668-69 was a post, called Charles Fort, actually constructed at the mouth of the Rupert River. It was in fact the

success of those two voyages that prompted the organizers to petition King Charles for the Charter he issued the following year.<sup>7</sup>

The efficacy of voyages of discovery and symbolic acts as means of acquiring sovereignty in the seventeenth century is extremely doubtful, both in international and British colonial law. While the European colonizers all relied on these means to support their own territorial pretensions, they tended to ridicule such flimsy claims when presented by their rivals. Clearly, there was no established state practice — even among European nations — that would validate these means of acquiring sovereignty in international law.<sup>8</sup> Similarly, in British colonial law acquisition of sovereignty by settlement was based on the concept of occupancy, which required effective taking of possession.<sup>9</sup> Given that, apart from Charles Fort, the British had not even met their own standards for acquisition of sovereignty, the Crown's claim to Rupert's Land at the time the Charter was issued rested on shaky ground indeed.

What about the Hudson's Bay Company Charter itself? Could it serve as an effective assertion of sovereignty by Charles II and thereby give the Crown title to the territory of Rupert's Land that it had not previously acquired? The answer to this is clearly *no*. The very same issue arose in relation to Matabeleland in present-day Zimbabwe in the case of *Staples v. The Queen*,<sup>10</sup> decided in 1899 by the Judicial Committee of the Privy Council, the highest court of appeal for the British Empire. A major issue in the case was whether the British Crown had sovereignty over Matabeleland in the 1890s. Counsel for Staples argued that the Crown did have sovereignty because it had issued a Royal Charter to the British South Africa Company, authorizing it to hold lands in Matabeleland. The Privy Council rejected that argument. An exchange that occurred between the Lord Chancellor and legal counsel during the course of argument is particularly revealing:

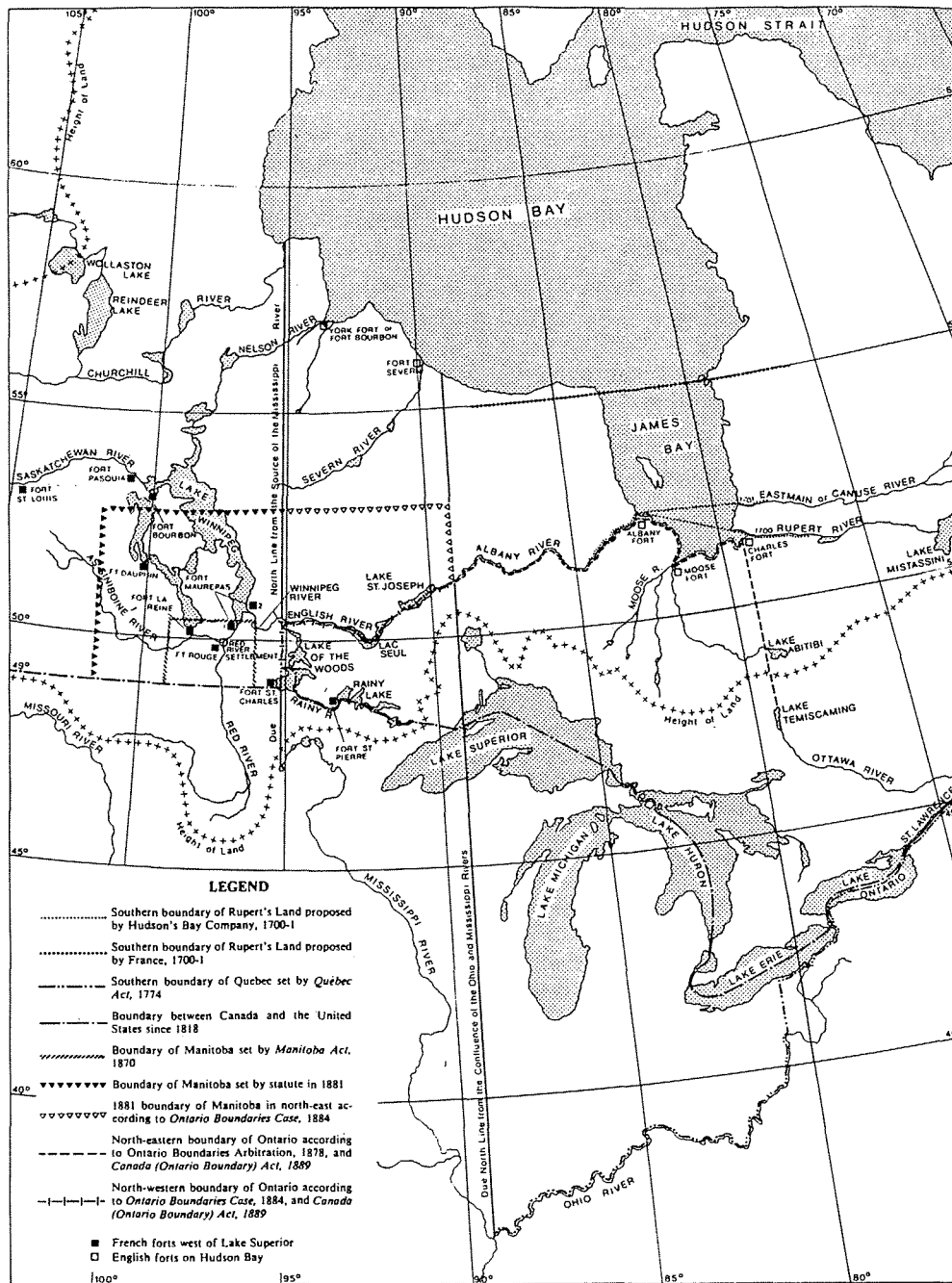
**The Lord Chancellor:** Have you ever heard of sovereignty being insisted upon by reason of such a grant? It is new to me that such a thing was ever heard of.

**Staples' Counsel:** I ask you to look at the terms of the grant.

**The Lord Chancellor:** The terms of the grant cannot do what you assume it can do, namely give jurisdiction of sovereignty over a place Her Majesty has no authority in.<sup>11</sup>

Similarly, the Hudson's Bay Company Charter could not give the Crown sovereignty over a territory where Charles II had no authority, and in fact was incapable of exercising authority, at the time the Charter was issued.

A better way of viewing the Charter is therefore not as an immediate grant of Rupert's Land to the Hudson's Bay Company, but as a grant of a right to acquire lands within the Hudson watershed by actually possessing them, or



Portion of a map prepared by Stanford's Geographical Establishment in 1884, with omissions, additions, and minor alterations made by the author. Redrawn by Waltraude Stehwiien.

purchasing them from the Aboriginal peoples.<sup>12</sup> On this interpretation, the grant of lands in the Charter was merely prospective. Whether this is what Charles II actually intended does not matter. In English law, when the Crown attempts to grant more than it has, the courts do not necessarily invalidate the grant (though that is a possibility). Instead, they usually give it some effect if they can, by allowing it to convey whatever title the Crown has.<sup>13</sup> While the Crown would not have had title to any lands in Rupert's Land prior to acquiring sovereignty there, it could have

authorized British subjects to settle there in its name and acquire lands for themselves. The effect of this, once settlement actually took place, would have been to give the Crown sovereignty over, and the settlers title to, any lands that they were actually able to possess or purchase from the Aboriginal peoples. By the Charter, the Crown therefore could have authorized the Hudson's Bay Company to acquire as much of Rupert's Land as it could by possession or purchase from the Aboriginal peoples, thereby vesting sovereignty over the acquired territory in the Crown. The

prospective grant of lands would then have taken effect to give the Company title to the lands it possessed or purchased on the Crown's authority.

This application of the Charter is supported by the decision of the Judicial Committee of the Privy Council in 1884 in the *Ontario Boundaries Case*.<sup>14</sup> That case involved a protracted dispute between Canada and Manitoba on the one hand and Ontario on the other regarding the location of the boundary between those two provinces. The location of that boundary depended on interpretation of the *Quebec Act of 1774*,<sup>15</sup> which defined the western boundary of Quebec, part of which later became the western boundary of Upper Canada and hence of Ontario, as running "Northward" from the confluence of the Ohio and Mississippi Rivers "to the Southern Boundary of the Territory granted to the Merchants Adventurers of England, trading to Hudson's Bay". What is interesting about the *Ontario Boundaries Case* for our purposes is that the Privy Council did not locate that southern boundary at the height of land between the Mississippi and Hudson watersheds, as one would have expected if the Hudson's Bay Company's territory included the whole of the Hudson drainage basin. Instead, the Privy Council decided that the western boundary of Quebec met the southern boundary of the Company's territory at the Winnipeg River, about 140 kilometers north-east of Winnipeg. That is a considerable distance north of the height of land.

So what was the basis for this decision respecting the southern boundary of the Company's territory? This is clearly revealed in remarks made by the Lord Chancellor during the course of argument. Referring to the Hudson's Bay Company Charter, he said this:

I do not think one would be disposed to dispute the proposition that, *so far as the Crown of England could give it, it gave to the Hudson's Bay Company a right, if they were able to make themselves masters of the country, to the territory up to the sources of the rivers; but they did not make themselves masters of the whole of that country, for some other nation had come in in the meantime.*<sup>16</sup>

The "other nation" referred to by the Lord Chancellor was France, which had established a string of fur-trading posts within the Hudson watershed in the eighteenth century, after the grant of the Charter. As the Winnipeg River was part of the main French route to the west, the Company clearly had not made itself master of the country south of that river. That, in my opinion, was why the Privy Council located the southern boundary of the Company's territory at the Winnipeg River.<sup>17</sup>

No real significance was attached to the presence of Aboriginal peoples within the Hudson watershed in the *Ontario Boundaries Case*. This is not surprising, given prevailing European and Canadian attitudes toward indigenous peoples at the time. When the case was decided in 1884, colonialism was still acceptable in Europe — in fact, the most powerful European nations, including Britain, were en-

gaged in the partition of Africa during the 1880s. So-called "scientific" theories of human evolution, classifying societies on a scale from barbaric to civilized, were also prevalent.<sup>18</sup> In jurisprudence, legal positivism, which views law as the command of the sovereign, dominated juridical thought. These factors all contributed to a European mind-set that viewed tribal societies as primitive, without law or sovereignty. These influences can be clearly seen in some of the leading decisions of the day, such as *Cooper v. Stuart*, where the Judicial Committee of the Privy Council in 1889 described Australia as "a tract of territory practically unoccupied, *without settled inhabitants or settled law*, at the time when it was peacefully annexed to the British dominions".<sup>19</sup> In Canada, the influence of legal positivism is revealed in *St. Catherine's Milling and Lumber Company v. The Queen*, where the Privy Council decided in 1888 that any land rights the *Saulteaux* Indians may have had, prior to signing Treaty 3 (1873) in the Lake of the Woods region, originated in the pronouncement of George III in the *Royal Proclamation of 1763* and depended "upon the good will of the Sovereign."<sup>20</sup>

Not only have the attitudes underlying those decisions been discredited and for the most part rejected, but the aspects of the decisions that rely on those attitudes have also been discarded. In Australia, in the *Mabo* decision of 1992,<sup>21</sup> the High Court (the equivalent of the Supreme Court of Canada) decided that the indigenous peoples did have settled law and did have title to land at the time of British colonization, and that their native title continued until validly extinguished. In Canada, in the 1973 *Calder* decision and subsequent cases the Supreme Court rejected the notion that Aboriginal land rights depend on royal proclamation or other official recognition.<sup>22</sup> In the *Delgamuukw* decision,<sup>23</sup> as mentioned earlier, the Court made clear that the Aboriginal peoples of Canada had title to any lands that were exclusively occupied by them at the time the Crown acquired sovereignty.

Moreover, in Canada even the idea that the Aboriginal peoples lacked sovereignty prior to European colonization has been undercut by more recent judicial decisions. An example of the old, ethnocentric attitude can be found in the 1929 Nova Scotia decision in *The Queen v. Syliboy*, where Justice Patterson said this:

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.<sup>24</sup>

Commenting on this passage in the 1984 *Simon* decision, Brian Dickson, Chief Justice of Canada, said:

...the language used by Patterson J., illustrated in this passage [quoted in part above], reflects the

biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and, indeed, is inconsistent with a growing sensitivity to native rights in Canada.<sup>25</sup>

In *Sioui v. Attorney-General of Quebec*<sup>26</sup> the Supreme Court went a step further toward recognizing the sovereign status of the Indian nations. Referring to the period prior to the fall of Quebec in 1759, Justice Lamer (now Chief Justice of Canada) observed:

...we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them *very close to those maintained between sovereign nations.*

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that *the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.*<sup>27</sup>

Returning to our discussion of Rupert's Land, we saw that the Privy Council in the *Ontario Boundaries Case* excluded territory occupied by the French from the Hudson's Bay Company's territory. But given the changes in judicial attitudes to the Aboriginal peoples since that case was decided, territory occupied by Aboriginal nations should be excluded as well. British sovereignty over that excluded territory would therefore not have been acquired until the British were actually able to take possession and exercise effective control. In international law, this mode of acquisition of territory is generally known as "prescription". However, according to R.Y. Jennings, for prescription to be effective "the possession must be long-continued, undisturbed, and it must be unambiguously attributable to a claim to act as sovereign;" moreover, where the possession is adverse to the claim of a prior sovereign, "there must also be acquiescence on the part of the original sovereign."<sup>28</sup>

To the extent that the Aboriginal nations acquiesced, the Hudson's Bay Company and French traders (prior to the defeat of the French by the British at Quebec and Montreal in 1759-60) probably had the requisite possession of their posts, and of the lands that they were able to control in the immediate vicinity of those posts. When Lord Selkirk signed a treaty with the Crees and Ojibwas in 1817 and established the Red River Settlement, that probably would have extended British possession and control, and hence sovereignty, over lands within the Settlement. Beyond that, the Hudson's Bay Company, and prior to 1759-60 the French traders, may have been able to acquire sovereignty for Britain and France over territory where they exercised effective control by the assertion of authority and enforcement of English and

French law. However, in the absence of Aboriginal acquiescence, this may not have been sufficient for the acquisition of sovereignty in international law.

Regarding the French, beyond the settled areas of New France it appears that they made no real effort to impose French authority or law on the Aboriginal nations. William Eccles, in an illuminating article published in 1984, referred to the French/Indian relationship as one of "sovereignty/association".<sup>29</sup> Cornelius Jaenen, in an equally informative article entitled "French Sovereignty and Native Nationhood during the French Régime",<sup>30</sup> concluded as follows:

On the international level, France like other European powers involved in colonization of America asserted her sovereign rights over a vast continental expanse. At the regional level, dealing with "independent" peoples, she refrained from interference with original territorial rights, customs, and mode of life. French laws since 1664 applied only to colonists and were not imposed on native inhabitants.<sup>31</sup>

As for the Hudson's Bay Company, its lack of authority over the Aboriginal nations was clearly revealed by the testimony of Sir George Simpson, Governor of the Company, before the Select Committee of the House of Commons on the Hudson's Bay Company in 1857:

**Mr. Grogan:** What privileges or rights do the native Indians possess strictly applicable to themselves?

**Simpson:** They are perfectly at liberty to do what they please; *we never restrain Indians.*

**Grogan:** Is there any difference between their position and that of the half-breeds?

**Simpson:** None at all. They hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible; *we assist each other.*

**Lord Stanley:** *You exercise no authority whatever over the Indian tribes?*

**Simpson:** *None at all.*<sup>32</sup>

What then are the implications of this absence of European possession and control of most of Rupert's Land? In my opinion, it means that neither the French nor the British acquired sovereignty over much of that territory prior to 1870. So when the Hudson's Bay Company surrendered Rupert's land back to the British Crown and the Crown transferred it to Canada in 1870, what territory actually passed? At the most, only the territory that had been effectively possessed and controlled by the Company. For the most part, in 1870 the Aboriginal nations in the Hudson watershed were still independent, and if anyone was in



The signing of Treaty Number One at Lower Fort Garry, August 1871.

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possession and control of most of the territory, they were. In short, they were the real sovereigns and owners of land in most of Rupert's Land in 1870.<sup>33</sup>

One implication of this is that the meaning and effect of the Indian treaties signed within Rupert's Land has to be reassessed. The commonly-accepted view is that Canada already had sovereignty over the territory covered by the eleven numbered treaties when they were signed from 1871 to 1921 (with some later adhesions), and that those documents were really land surrenders.<sup>34</sup> The analysis in this article challenges this. If this analysis is correct, Canadian sovereignty in most of the Hudson watershed would not have been acquired *until* the treaties were signed. Moreover, the sovereignty the Aboriginal nations surrendered to Canada by the treaties may not have been total. Instead, the treaties may well have involved a new regime of shared sovereignty, just as they involved a sharing of the land and its resources.<sup>35</sup> Put another way, there is room within the treaties for a continuing Aboriginal right of self-government. As the treaties were given constitutional status in Canada by the *Constitution Act, 1982*, this right would now be constitutionally protected.

If Canada did not acquire sovereignty over most of the Hudson watershed until the treaties were signed, a major problem with respect to Aboriginal capacity to sign those agreements disappears. The problem is this. In the *Delgamuukw* decision, the Supreme Court said that Aboriginal title can be proved by showing that the Aboriginal

nation asserting it occupied the claimed land at the time the Crown acquired sovereignty. Among other things, at least some of the numbered treaties involved a surrender of rights held by virtue of Aboriginal title. But in Rupert's Land, the Aboriginal nations who signed those treaties were not necessarily the same nations who had occupied the lands in 1670 — the Crees, Ojibwas and Assiniboines, for example, all moved into new territories in the course of the seventeenth and eighteenth centuries.<sup>36</sup> So if the Crown did acquire sovereignty over the whole of Rupert's Land in 1670, as is commonly assumed, in some instances the Canadian government may have signed treaties with the wrong Aboriginal nations! As I said, this difficulty disappears if Crown sovereignty was only acquired when the treaties were entered into.<sup>37</sup>

Not all of Rupert's Land was included in the numbered treaties. Aboriginal claims in some parts of the Hudson watershed, notably in Quebec and the Northwest Territories, were not dealt with until modern land claims agreements were signed, beginning with the James Bay and Northern Quebec Agreement in 1975. Moreover, some areas may still be subject to unsundered Aboriginal title. In the regions not possessed and controlled by the Hudson's Bay Company, and not covered by the numbered treaties, Canadian sovereignty may not have been acquired until sometime between 1870 and the present-day by the imposition of Canadian authority on the Aboriginal peoples living there, in most cases without their consent.<sup>38</sup> In areas of the

North, this may not have occurred until well into this century, an embarrassing instance of relatively recent colonialism on the part of our own government.<sup>39</sup>

So where the Aboriginal peoples are concerned, many important issues involving both law and history remain unresolved. Old questions of sovereignty, boundaries, and the like, often have profound contemporary significance for the rights of these peoples. These questions cannot be answered solely from the perspective of one discipline. As history and law tend to be intertwined in complex and intriguing ways, neither can be ignored if a proper understanding of Aboriginal rights is to be achieved.

## NOTES

1. [1997] 3 S.C.R. 1010. For commentary, see Kent McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, 1998).
2. The Charter is reproduced in E.E. Rich, ed., *Minutes of the Hudson's Bay Company 1671-1674* (Toronto: The Champlain Society, 1942), at 131-48.
3. *Ibid.*, at 139.
4. For detailed discussion, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 108-33.
5. E.g. see *Walker v. Walker*, [1919] A.C. 947, at 951; *Attorney-General for Alberta v. Huggard Assets*, [1953] A.C. 420, at 439; *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518, at 532.
6. For a map of these early voyages, see Norman L. Nicholson, *The Boundaries of the Canadian Federation* (Toronto: Macmillan of Canada, 1979), at 13.
7. See Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982), at 6-7.
8. See Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in J.M. Bumsted, ed., *Interpreting Canada's Past*, vol. 1, *Before Confederation* (Toronto: Oxford University Press, 1986), 2, at 13 (Slattery was referring to the period of French voyages in the first half of the sixteenth century, but a review of the sources cited by him in note 66 reveals that his conclusion regarding the inefficacy of voyages of discovery and symbolic acts is just as applicable to the seventeenth century). See also John Thomas Juricek, "English Territorial Claims in North America under Elizabeth and the Early Stuarts" (1976) 7 *Terrae Incognitae* 7.
9. See *Geary v. Bearcroft* (1666), Cart. 57, and discussion of occupancy in McNeil, *supra* note 4, at 198-99.
10. January 24, 1899 (unreported), reproduced in Stephen Allan Scott, "The Prerogative of the Crown in External Affairs and Constituent Authority in a Commonwealth Monarchy" (D. Phil. thesis, Oxford University, 1968), App. I.
11. *Ibid.*, at 41.
12. See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), at 107-25; Geoffrey S. Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument", D. Jur. thesis, Osgoode Hall Law School, York University, 1981, at 355-428, 1204-1373, esp. 1365-66, 1372-73.
13. See the *Duke of Chandos's Case*, (1606) 6 Co. R. 55a, at 56a, and discussion in McNeil, *supra* note 4, at 235-41.
14. Although unreported, the decision is embodied in an Imperial Order in Council made August 11, 1884, printed in *The Proceedings before the ... Privy Council ... Respecting the Westerly Boundary of Ontario* (Toronto: Warwick & Sons, 1889) (hereinafter *The Proceedings*), at 416-18, reproduced in McNeil, *supra* note 7, at 54-57.
15. 14 Geo. III, c.83 (U.K.), in R.S.C. 1985, App. II, No. 2.
16. *The Proceedings*, *supra* note 14, at 362 (emphasis added).
17. For more detailed discussion, see McNeil, *supra* note 7, at 26-33.
18. On the relevance of these theories to Aboriginal land rights, see Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s" (1999) 38:1 *Journal of the West* 68.
19. (1889) 14 App. Cas. 286, at 291 (emphasis added).
20. (1888) 14 App. Cas. 46, at 54.
21. *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1.
22. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. See also *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 376-79; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340.
23. *Supra* note 1.
24. [1929] 1 D.L.R. 307, at 313.
25. *Simon v. The Queen*, [1985] 2 S.C.R. 387, at 399.
26. [1990] 1 S.C.R. 1025.
27. *Ibid.*, at 1052-53.
28. R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), at 23. I am grateful to Professor Brian Slattery for bringing this point and this reference to my attention. See also D.H.N. Johnson, "Acquisitive Prescription in International Law" (1950) 27 *British Yearbook of International Law* 332, and "Consolidation as a Root of Title in International Law" [1955] *Cambridge Law Journal* 215.
29. W.J. Eccles, "Sovereignty-Association, 1500-1783" (1984) 65 *Canadian Historical Review* 475.
30. In J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 19.
31. *Ibid.*, at 38.
32. *Report of the Select Committee on the Hudson's Bay Company* (London: House of Commons, 1857), Minutes of Evidence, 91 (emphasis added). See also Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21 *Manitoba Law Journal* 343.
33. For further discussion, see Kent McNeil, "Aboriginal Nations and Québec's Boundaries: Canada Couldn't Give What It Didn't Have", in Daniel Drache and Roberto Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: James Lorimer & Company, 1992), 107.
34. For a map of the treaty areas, and summary descriptions of their negotiation and content, see *Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services Canada, 1996), at 159-173 (map at 162).
35. See *ibid.*, at 173-76. See also Delia Opekokew, *The First Nations: Indian Government and the Canadian Federation* (Saskatoon: Federation of Saskatchewan Indians, 1980), 9-21; Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective", in Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997), 173.
36. See David G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, University of Regina, 1979), 15-49; Leo Pettipas, *Aboriginal Migrations: A History of Movements in Southern Manitoba* (Winnipeg: Manitoba Museum of Man and Nature, 1996).
37. This problem would also be avoided if Aboriginal title were transferable from one Aboriginal group to another after the Crown acquired sovereignty. Canadian courts have not yet decided whether this is permissible.
38. Without Aboriginal acquiescence, query whether this would be effective in international law: see *supra* note 28 and accompanying text.
39. See McNeil, *supra* note 33, at 119-20.