Native rights in Canada : a critique

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This report critiques section by section, the report: "Native Rights in Canada" produced by the Indian-Eskimo Association of Canada, released April 1970. The report builds a case for the validity of "aboriginal title", as a concept accepted in international law and part of Canadian law.

CRITIQUE

TREATIES
June, 1970

"NATIVE RIGHTS IN CANADA"

Indian-Eskimo Association of Canada - Undated - Released mid-April, 1970

Summary Introduction

While there are some apparent errors and contradictions in this work, this is undoubtedly not the result of any desire to mislead but may be attributed to the fact that it is a collective production. At first view the organization of material appears very involved but this is understandable considering the time frame and other complexities of the subject; in any event, it is stated that the original purpose "... to clarify basic legal problems..." was, of necessity, expanded "... to identify and analyze the full range of problems surrounding aboriginal and treaty rights..." It is plainly evident that the underlying thesis of the Report is that "Aboriginal Title" is the basis of Native Rights in Canada; without overtly denying the validity of the new Indian Policy it does not, therefore, lend any support to the overall rationale of that policy.

The Report proceeds to build a case for the validity of "Aboriginal Title" first as a philosophical concept accepted by "most" of the colonial powers active in North America, projecting this to the hypothesis of the concept as a recognized doctrine of international law, finally buttressed by the assertion that "... it is a part of Canadian law ..." and, therefore, by implication the logical fount from which all native rights and claims in Canada arise. Although the statement is made that recognition of aboriginal title in British America was accorded "well before" the Royal Proclamation of 1763, the Committee's hypothetical legal case appears to depend most particularly on the Royal Proclamation and the St. Catherine's Milling case of 1888. There are, of course, inherent weaknesses in the argument that "most" of the colonial powers in North America accepted the high principle of Aboriginal Title - certainly only the British made recognition of an Indian interest in land a continuing (and evolving) matter not only of policy but of practice in their dealings with the native peoples over a relatively long period. History tends to show, unfortunately, that even the program of Great Britain was a matter of expediency rather than the strict observance of Aboriginal Title as an international legal doctrine to which she subscribed.

Pending a comprehensive jurisprudential definition of Aboriginal Title (and judicial direction as to its application Canada-wide) or a political resolution of the question, an alternative hypothetical case for the historical treatment of the native peoples as exercise of the Royal Prerogative can be made to appear as valid as that presented in the Report and, conjecturally, may be supported by the same "evidence" given. Accordingly, the Sovereign (in exercise of His Royal Prerogative) may conceive of an Aboriginal Title concept - if He so wills; recognize such a concept in any manner He sees fit; discharge that which He considers an attendant burden as He desires (usually as a matter of grace) and terminate, at His pleasure, in any manner He considers satisfactory to Him. Thus, the continuing aspects of British administration toward the Indian population of Colonial America may be seen to be more a matter of policy than an interpretation of a universal legal principle. If, however, the Sovereign chose to promulgate a decree (e.g., the Royal Proclamation of 1763) primacy exists in the instrument itself, not in any underlying international legal principle (which the Sovereign might not choose to admit).

There is at least as much historical evidence to support the limited, expedient idea of the Royal Proclamation promulgated in October 1763 as there is to project a broad application. The Indian Hunting Grounds cited in the Proclamation were bounded by the political facts of Rupert's Land on the north, the old colony of Quebec to the north-east, the thirteen colonies on the east, and Florida in the south; additionally, Louisiana was just as much a political boundary, although the Report states (p. 38), "It can be noted that the provisions were not envisaged to establish policy west of the Mississippi. The fact that no such limitation appears in the Royal Proclamation itself attests to the general character of the Proclamation." The

Proclamation could not establish policy west of the Mississippi simply because British influence did not extend west of that river - by the Treaty of Fontainebleau on 3 November 1762 France secretly transferred Louisiana to the Spanish Sovereign, by the Treaty of Paris (10 February 1763) that portion of Louisiana lying east of the Mississippi was ceded to Great Britain to become the greater part of the Indian Hunting Grounds mentioned in the Royal Proclamation; the boundaries of Louisiana had been Rupert's Land on the north, the thirteen colonies on the east, the Gulf of Mexico in the south and Spanish New Mexico to the west. The great bulk of the Indian Hunting Grounds were lost to the Americans as the result of the Revolutionary War twenty years later.

To support the view that British policy toward Indians was governed by specific formal acts (exercise of the Royal Prerogative) rather than by recognition of some legal doctrine of international law, it would seem more than a coincidence that the pivotal court action - the St. Catherine's Milling case - should arise clearly within lands unquestionably covered by the Hunting Grounds provisions of the Royal Proclamation and surrendered in a manner prescribed therein. In like manner, the haste with which surrender activities were entered into in Upper Canada (likewise well within the Indian Hunting Grounds) at the close of the Revolutionary War are indicative of a precipitate desire on the part of the administrators to discharge the requirements of a specific instrument, i.e. the Royal Proclamation, rather than to honour a pervasive Aboriginal Title.

In at least two different places in the Report there is an implicit preference expressed for a legislative (political) resolution of Aboriginal Title questions. Although it is stated that resort to law is a possibility it is undoubtedly realized that a case can be lost in court as well as won and for this reason it is unlikely that a major aspect will be brought to law except as a last resort. The ideal solution in light of the views expressed in the Report would be legislation that would confirm the concept that Aboriginal Title is a fact of law - thus any future restitution or compensation would be accorded as a matter of right (rather than grace and favour) with the full sanctity of legality; (this also presupposes, of course, that the legislative definition of the term would be in line with the views expressed).

While the Report generally appears to request the fulfillment (or compensation in lieu) of existing Treaty provisions as written, it is implied that, as the Indian signators could not be considered fully competent contracting parties, the terms should be liberally reinterpreted - if not renegotiated. Concerning the land areas where "orderly" land cession treaty activities were not engaged in, the Report advocates the remedy of compensation ostensibly based on a yet to be determined value for the Aboriginal Title as well as for the loss of traditional "rights" (hunting, fishing, etc.).

Considering the legal background of the committee members, the involved organization of the Report and the hypothetical method of presentation, there is a real danger that situations could be lifted out of context and pure conjecture taken as established fact. Major points are made throughout the Report which, when read out of context, appear to be factual rather than hypothetical or projected from a theoretical base. Then again because some of these points have apparently been considered by different writers for different reasons, what is advanced merely for the sake of argument in one place is propounded elsewhere ostensibly as established doctrine. Under these circumstances any interested layman could be hard pressed to distinguish legal conjecture from legal fact.

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"NATIVE RIGHTS IN CANADA"

ANALYSIS

Foreword: pp -1-3-

- a comparison of the foreword and summary will serve to point up two difficulties encountered in reviewing this work

  i) a tendency to present the same situation as hypothetical or conjectural in a particular section and as fact elsewhere; e.g., Indian interest in land is described as "legal possessory rights", elsewhere an endeavour is made to build on the descriptive term "usufructuary", i.e., "to have the use of something belonging to someone else" (obviously "to possess" and "to have the use of" are not synonomous) - although the projection from "usufructuary" to "possessory" was attempted, the equation cannot be considered to be established until the definition is so clarified in law or by appropriate legislation — pp -2-, 204; pp 155, 156

  ii) a misalignment of objectives which could be interpreted as subtle, or the result of hurried compilation; e.g., in the foreword alternative courses of action to resolution in the courts are presented as "including" a negotiated settlement of claims; a Claims Commission; and a legislative solution similar ... to the one currently proposed in the United States for native claims in Alaska - in the summary these elements are given, collectively, as the alternative — pp -2-,-3-; pp 204, 205

- it is doubtless true to maintain that while " ... Half of Canada's Indians entered into treaty arrangements... The other half were never given that opportunity..."; however, there is also the fact that the provisions of the Indian Act provided equalization to the so-called "non-treaty" status Indians, e.g., any status Indian living off-reserve has an indisputed interest in his reserve which is unquestionably more valuable than an annual stipend of $5.00 "treaty money"; this valuable interest would not only be maintained in the proposed Indian Lands Act but could be translated from "usufructuary" to "possessory" through the provisions to grant full title. — p -1-

Introduction pp 1 - 4

- this section lays the groundwork for Indian preoccupation with treaty and aboriginal rights, of which Indian (reserve) lands are part — pp 3, 4

- however, to blame the backwardness of reserves on government's encouraging Indians to leave reserves is simplistic: in the first place, the enlightened view is that any Indian person should be as free to go as to stay - this is a matter of free personal choice; in the second, any community is dependent for local improvement on sound, dependable fiduciary arrangements - in any other community this means local taxation (it may well be, of course, that Indian leaders prefer permanent subsidies, enshrined as rights, to the raising of local taxes). — p 2

Part I THE BASIS OF NATIVE RIGHTS pp 5 - 29

Section A The Range of Views pp 5, 6

- it is in this section that, indirectly, the thesis of the Report is first stated and the validity of the new Indian Policy questioned "... If the legal concept underlying treaties is a recognition of aboriginal title, then there is a contradiction in the government's position..." (i.e., the new policy) — p 6

- this, of course, presumes that Aboriginal Title is or was a fully recognized legal concept universally applied in British North America from sometime prior to 1763; this is not so, otherwise there would be no need for the Report under review

- it is at least as likely (and this is supported historically) that the British method of dealing with the native peoples in North America was basically one of expediency so modified by exercise of the Royal Prerogative (the Royal Proclamation of 1763) as to become an erratically evolving matter of policy (of which expediency was still the governing element); additionally, the British rarely, if ever, admitted the legality of an Indian or aboriginal title but almost invariably spoke of, and treated with, the question of Indian "pretensions" and "claims".

Section B The Nature of Aboriginal Possession and Ownership of the Land in Canada — pp 7 - 9

- undoubtedly, ideas of land holding and ownership vis-a-vis the native peoples and the British occupiers were radically different; unfortunately, all that subsequent events establish is that the initiative rested substantially with the occupying power.

Section C Possible Concepts of Aboriginal Title — pp 11 - 13

- in a rather involved manner the Report presents the principle that if the legal concept of Aboriginal Title "... is part of our law it does apply to Canada." — p 11

- the presentation of "... three possible concepts of aboriginal title ..." is, after all, rationalization after the fact when perhaps no such precise concept was entertained at the times in question, the British approach to the matter being at all times demonstrably pragmatic rather than philosophic — pp 11, 12

- while the Report endeavours to ascribe British activities in dealing with the native peoples to recognition of a pervasive Aboriginal Title, history tends to indicate that recognition of related claims was the result, not the cause, of specific prerogative acts as successive court actions have also shown, e.g.: in the Maritimes the absence of such acts has precluded recognition; in Ontario the fact of Treaty 3 and the fact that the Royal Proclamation of 1763 clearly obtained facilitated judicial scrutiny of the question in the St. Catherine's Milling case of 1888; in a word, the jurisprudence indicates that that which is "granted" is a matter of grace and favour arising from a particular incident (act or treaty) in exercise of the Royal Prerogative and is not legal cognizance of a pervasive Aboriginal Title concept

- the comprehensive "land cession" treaties dating from 1850 are clearly amplifications of a matter of policy (with overtones of a growing social conscience) modelled on, but not necessarily arising from, the Royal Proclamation.

Section D Origins of the Concept of Aboriginal Title — pp 14 - 29

- what is attempted here is probably the most difficult exercise undertaken in the Report; i.e., retrospectively, to take an assumption, raise it to the level of a hypothesis and from this project "... a doctrine of international law... that Canadian law corresponds to ..." — p 28

- as to evidence, the Report states that "... the legal concept of aboriginal title ... seems to have developed in the context of colonial dealings in North America." — p 14

- after reviewing dealings with the native peoples by the colonial administrations of the Spanish and Dutch in America, of the

British in America, Africa, New Zealand and Australia, and by the government of the United States the Report answers the question "... Is the notion of aboriginal title a doctrine of international law? ..." with " ... Certainly we are able to state a detailed concept of aboriginal title, the roots of which are international..." projecting this to "... If it can be said that aboriginal title is a doctrine of international law then there is a presumption that Canadian law corresponds to it." p 26 p 28 p 28

- in support of Aboriginal Title as an internationally accepted concept (recalling that it "seems to have" developed in colonial North America) the Report states that " ... It becomes accepted, historically, by most of the great colonial powers and is incorporated into their domestic law..."; precisely by whom? - Spain, with its record of spoilation and peonage? - France, which is not mentioned in this context? - Great Britain, which provides, substantially, the basis for this speculative exercise? - Russia, which was (as is mentioned in the Report) primarily interested in trade? If, as is stated elsewhere in the Report " ... the forces that might have eventually led to recognition to native title had not matured in Old Quebec in 1760 ... " how could they possibly have led to recognition by the Dutch whose sixty-four year tenure ended in 1674 or the Swedes whose activities were even more short-lived? For discussion's sake, if indeed the concept had been accepted by "most" of these colonial powers (including Great Britain) surely there would be no need for speculation at this late date; in any event " ... Even if international law is involved, that law has no enforcement mechanism and violations of it by the domestic law of a nation are, generally speaking, not remediable." p 28 p 52 p 66 p 66

- this section also presents the Royal Proclamation of 1763 " ... prompted by fears of clashes with the Indians ..." as dealing " ... with the method of acquiring Indian lands without questioning or commenting on the legal need to purchase an Indian title, it has the force of a statute and the Indian provisions have never been repealed ..." and links these provisions with the St. Catherine's Milling case wherein it is stated that the Royal Proclamation " ... shows that the tenure of Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign ... it is declared to be the will and pleasure of the sovereign that 'for the present' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point ..." pp 17, 18 pp 24, 25

- the Report states that the St. Catherine's Milling case " ... leaves no question but that it" (i.e. Aboriginal Title) "is a part of Canadian law (although it is not settled that the concept applies in all parts of Canada) ..."; from the evidence it would be more fitting to state that the St. Catherine's Milling case presents the definition " ... that the tenure of the Indians ... " on lands stated to be within the Indian Hunting Grounds provisions of the Royal Proclamation 1763, " ... was a personal and usufructuary right, dependent upon the goodwill of the sovereign ..."; on an Indian or Aboriginal Title this same quote states "... There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right but their Lordships do not consider it necessary to express any opinion on this point ..." - obviously the matter at issue in the quote is "Indian tenure" not "Aboriginal Title" p 29 p 24 pp 24, 25

- having left the matter of Aboriginal Title hanging on the proviso " ... If it can be said ..." etc., the Report now purports to determine " ... If aboriginal title has been extinguished where it existed ..." etc. p 29

Part II — THE HISTORICAL PATTERN OF DEALINGS WITH THE INDIANS AND ESKIMOS — pp 32 - 147

Section A — The Impact of the Europeans — pp 32, 33

- a recitation of dependency, retrogression and the debility arising therefrom; if anything this serves to point up that the native peoples were dealt with by expedient means rather than through recognition of a pervasive Aboriginal Title concept

- did not the relatively rapid rise in population since 1941 force a general appreciation of "things as they are" and the consequent desire for accelerated change?

Section B — The History of Dealings with the Indian — pp 34 - 48

- this recitation of historical events overlooks the fact that in the Maritimes the Indian people were kept in a state of disaffection (sometimes by agents provocateur from New France) up to the Conquest and were so dealt with by the British indeed until well after the Revolutionary War when it was felt that the influx of settlers would tend to overawe these former allies of the French sovereign

- even Sir William Johnson in an exchange with his superiors expressed the objective that the British would treat with the Indians only "... until we shall become so formidable throughout the country as to be able to protect ourselves and abate of that charge..."; this is as explicit a statement of British expediency as one could hope to find, is dated 25 September 1763 to the Lords of Trade, and does nothing for the Report's contention that "... British policy ... evolved into one of recognition of aboriginal title well before ... 1761 and 1763." p 54

- as is implied in the Report, the Royal Proclamation of 1763 as it applied to the Indian people was yet another example of British expediency, "... the Preservation of Internal Peace and Tranquility of the Country against any Indian disturbances..."; p 37 as the Royal Proclamation will be referred to with confusing regularity from this point on in the Report it might be as well here to cite its evidential aspects

  (a) as a factual historical instrument this Proclamation has more validity than the so-called "Belcher's Proclamation" of 1761-2 to which oblique reference is also made; in p 54 the first appendix what is actually an undated draft instruction is presented as a proclamation; historically there is doubt that Lieutenant-Governor Belcher had authority to issue his "Proclamation" (his Governor being located in England at the time) as he did so without the concurrence of the Legislative Assembly

  (b) while the Report leaves the impression that the "Royal Proclamation" has much broader scope, the "Indian Hunting Grounds" mentioned are clearly delineated and, in the best of British traditions, deal with circumstances as they actually were at that time - these lands were factually bounded by fixed jurisdictions: on the north, Rupert's Land; on the northeast, Old Quebec; on the east, the Thirteen Colonies; to the south, East and West Florida; to the west, Louisiana (then under the King of Spain) - whether by accident or design, the Report discounts the political fact of Louisiana with the statement "... It can be noted that the provisions were not envisaged to establish policy <u>west of the Mississippi</u>. <u>The fact</u> that no such limitation appears in the Royal Proclamation itself attests to the <u>general character</u> of the Proclamation..." this, despite the incontrovertible fact p 38

that at that time the only jurisdictions west of the Mississippi were Louisiana and Spanish New Mexico where British policy could not be applied under any circumstances

(c) the point here, of course, is that the Indian provisions of the Royal Proclamation were designed at a specific time, to cope with specific conditions, over a specific territory; another incontrovertible fact of history dictated that the bulk of the Indian Hunting Grounds would fall to the United States as a result of the Revolutionary War

(d) as is remarked in the Report, the Royal Proclamation is a prerogative act, however, since 1763 there has been no similar proclamation which has redefined, extended or expanded on the specific Indian Hunting Grounds provisions of that date; this is not to say that the principle of authorized purchase through the Crown could not be continued as a matter of policy (which indeed would appear to be the case from the record) p 159 p 45

- in addition, as equally much is made of the St. Catherine's Milling case it would be equally as meet here to review its factual aspects

(a) specifically, the case was raised to determine whether the Dominion or the Province (Ontario) had jurisdiction over the lands being cut for timber by the St. Catherine's Milling Company (south-easterly from a line south of Lakes Eagle and Wabegon to Lake Superior) on license from the Federal government; the case was decided in favour of the Province - in short, these were Provincial Crown Lands

(b) during deliberations, the effect of the Royal Proclamation was considered and the question of "... the tenure of the Indians..." under its Indian Hunting Grounds' provisions was raised; as has been remarked foregoing the judgement describes this "tenure" as usufructuary, at pleasure, and does not deem to rule on the question of Indian "right" or "title" pp 24, 25

(c) naturally, if all that was considered was the matter of tenure, the judgement cannot be faulted for not anticipating the nature of future Indian claims or the apparent need for a precise legal definition of Aboriginal Title; in classic British jurisprudential tradition, deliberation was confined to the question at issue, i.e., basically the effects of Treaty 3 on Dominion jurisdiction vis-a-vis that of the Province p 47

- concerning the historic treaty-making activities there is no gainsaying that grounds for claims exist where provisions have not been met; also, to use the device of the Report, if these activities represent a matter of policy then government has every right to change this policy if it has determined that the policy is inadequate, anomalous or anachronistic. p 48

Section C The Policies of the Various Colonial Powers pp 51 - 54

- it is quite evident that the question of an Indian "right" or "title" was dealt with by various British administrations, both before and after the Royal Proclamation, at least as a working hypothesis; it is equally evident that the actual arrangements were generally made on the basis of discharging Indian "claims" rather than fulfilling a matter of "right" - this may be a fine point but it is indicative of British expediency in dealing with the question

- there is no evidence in this section which would answer the questions raised (this Analysis p. 5) concerning recognition of a pervasive Aboriginal Title concept by "most" of the Colonial powers in North America; neither is it sufficient to conclude that "...British policy... evolved into one of recognition of aboriginal title well before it was declared in ...1761 and 1763..."; if this were so there would be no difficulty in substituting a date for the inconclusive "... well before ..." p 54

- it would be more fitting to conclude (as the evidence presented in the Report clearly indicates) that conditions after the Conquest dictated more formal recognition of Indian Claims than had been accorded previously; thus one is given a significant date, October 1763, and a conclusive instrument, the Royal Proclamation; additionally, it becomes more apparent that the current idea of a pervasive Aboriginal Title arises from Indian Claims (buttressed by the fact of the Royal Proclamation, no matter how specific in intent) rather than vice versa.

Section D New France pp 56 - 69

- despite the involved arguments and counter-arguments presented in this section, the significant statement is that contained in the first paragraph "...There were no Indian land treaties or surrenders in the Colony of New France. At no time was an aboriginal title expressly recognized ..." p 56

- despite the foregoing, there is an implication that Aboriginal Title requires to be dealt with " ... in the areas of the old colony where lands had not been granted by the French..."; due obeisance being made in passing to the Royal Proclamation; p 68
however, if the case is made that the Royal Proclamation is declaratory of an already recognized Aboriginal Title concept, British oversight not only in Old Quebec but also in the Maritimes is inexplicable - it is far more likely that, in their typically pragmatic fashion, the British considered these two areas a closed book leaving the concept of the pervasive Aboriginal Title to be expounded in the future.

Section E Maritime Provinces pp 72 - 82

- it is remarked in this section that "... there is no indication of land cession treaties or compensation to Indians ..." in the Maritimes, along with the inference that Aboriginal Title should have been dealt with after 1763 - one might well ask, "Why not before, if the British were governed by recognition of a pervasive Aboriginal Title?" It is unfortunate that the Report's thesis is so dependent on a precognition which on close examination of the evidence presented is nebulous, conjectural, questionable or non-existent

- as was observed herein (Analysis p. 6) the British, again as a matter of expediency, dealt with the Indians of Nova Scotia and New Brunswick until well after the Revolutionary War as disaffected (if not hostile) groups through what have become known as "Peace and Friendship" agreements, articles and treaties; substantially, these instruments did not confer, infer, concede or grant Aboriginal or any other form of land title to the Indian people of the area

- in this section oblique reference, with linkage to the Royal Proclamation of 1763, is again made to a "Royal" Proclamation of 1762 (previously referred to as that of 1761 or 1762, and in the first Appendix as the "Proclamation of 1761-62") leaving pp 36 - 54
the impression that the two are of equal force and stature; p 81
obviously this is not so as the 1763 instrument carefully bounds an area and prescribes method while no one is quite sure

precisely what the other accomplished; item (a) in the Appendix is actually an undated draft instruction to Governors, while the key document is item (c) "Belcher's Proclamation"; Belcher's Proclamation is questionable if only because, as item (c) the letter of 2 July 1762 indicates, it does not follow the instructions; in addition whether or not Belcher was empowered, or had authority, to issue his proclamation is questionable as (i) on Governor Laurence's death Jonathan Belcher as Chief Justice of Nova Scotia acted as Lieutenant Governor while the new Governor, Henry Ellis, remained in England, and (ii) Belcher "issued" the proclamation (but not "at large") without consulting the Legislative Assembly; the letter, item (c), is better evidence against, than for, the idea that Britain recognized a pervasive Aboriginal Title prior to 1763 and contains at least the seeds of the rationale wherebye the Maritimes and Old Quebec were passed by concerning application of the 1763 provisions, i.e., expediency can be plainly seen to rule from 1713 on "... no other claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claim can be made, by virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht ..." in 1713; it can plainly be seen here that Belcher's criteria are "...His Majesty's Instructions..." i.e., a prerogative act applying at a specific point in time, to a specific situation, in specified areas, i.e. the jurisdictions " ... of Nova Scotia, New Hampshire, New York ..." etc., etc. - it becomes apparent that exercise of this admittedly narrow and expedient principle would deny application of the Royal Proclamation's Indian provisions to Nova Scotia if only because that jurisdiction in this particular context was not named therein; again it can be seen that the prerogative act itself, not recognition of a pervasive Aboriginal Title, gives legitimacy to a Claim.

Section F Southern Ontario — pp 84 - 96

- there are several interpretations in this section which point up the inflections that can be given historical events

- treaty activity in Upper Canada is presented as substantially establishing the policy "... of extinguishing Indian title in the Prairies and the Northwest Territories ..."; history shows that after a hiatus of twenty years, land surrender activities were entered into precipitately in Upper Canada to cope with exigent situations arising from the Revolutionary War (1775-81) and the Treaty of Paris (Versailles) in 1783: scattered pockets of Loyalist refugees had settled along present Southern Ontario shores from what are now Windsor to Kingston and as these shores were well within the remnant "Indian Hunting Grounds" defined in the Royal Proclamation, administrators were well aware that the relevant provisions of the Proclamation would have to be discharged; in addition, promises made to Indian allies from the Six Nations of the Hudson valley had to be honoured ostensibly from lands being ranged by Ojibwa peoples who had moved in from the northwest after these lands had been pacified as the result of French influence — p 84

- the impression of continuous historicity from 1764 is left by citing the abortive Iroquois exercise of that date when this reflects a Six Nations desire to establish influence immediately after the Conquest in an area from which they had been excluded by the French presence and the fact that these lands were being ranged by the Ojibwa (Chippewas and Mississaugas) — p 84

- the reason for haste in the period immediately surrounding 1783, of course, was the need to accommodate United Empire Loyalists, half-pay British soldiers and Six Nations allies of whom Captains Joseph Brant and John Deserontyou are the most representative; at best, the early surrender exercises in Upper Canada were indicative of a precipitate desire to discharge the relevant provisions of a specific instrument - the Royal Proclamation; at worst, these exercises, as exemplified by the so-called purchase activities of Captain Crawford, show the worst that could be expected from British military administrators of the time regarding expedient misdirection and bumbling oversight; however, the agreements of 1923 are taken to have dealt with the Indian groups substantially concerned in the incomplete exercises and, under these circumstances, it is not correct to state that the area from the Bay of Quinte to the bounds of Old Quebec remain unsurrendered as these people were descended from those who could have ranged the area at the time in question — pp 84, 85

- just what construction can be placed on the so-called "Gun Shot" treaty is anyone's guess, however, there is documentary historicity regarding the mess of which it is indicative through to the agreements of 1923 — p 85

- the direct relationship of Ontario activities to those in the west can be truthfully stated to have originated with the comprehensive "land cession" Robinson Treaties (Robinson-Superior, Robinson-Huron) of 1850; however, it should be pointed out that these also clearly concerned the only relatively large areas of the "Indian Hunting Grounds" (Royal Proclamation, 1763) which remained within the boundaries of Canada; the Robinson Treaties were a definite departure from the earlier "purchase agreement" type of surrenders in Upper Canada and exemplify a growing social conscience concerning treatment of the Indian people. — pp 93 - 95

Section G Hudson's Bay Company Territories — pp 99 - 102

- although the administration represented by the Company and the compass of Rupert's Land cover by far the greatest land area in Canada this is accorded relatively light treatment in this section and is represented therein by the submission "... that the Hudson's Bay Company is a Proprietary Government ... and as such was within the provisions of the Royal Proclamation as much as the Colonial governments ..." — pp 100, 101

- this basic submission is at best an assumption that has been rejected by the Supreme Court of Canada — pp 99 - 101

- in any event it can clearly be shown that no part of the "Indian Hunting Grounds" as defined in the Royal Proclamation were within the confines of Rupert's Land; in this context Rupert's Land either existed or it did not, factually it did - so much so that, after the union of the senior company and the North West Company, the Company's license was extended in 1821 to cover trade with Indians in all unsettled parts of British North America thus paving the way for James Douglas in 1849 to be at one and the same time Governor of Vancouver's Island and Chief Factor of the HBC's activities throughout the island and on the mainland opposite (New Caledonia)

- the desire to establish that the Royal Proclamation provisions apply north and west of old Upper Canada are understandable but, as has been noted, is extremely difficult to raise above the level of conjecture; in 1763 "proprietary governments" were held to administer in Pennsylvania, Delaware and Maryland - the term was used to indicate a more dependent colonial status than that of the "corporate" governments of Connecticut, Rhode

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Island and Massachusetts Bay but also greater scope than obtained in the "Royal" colonies of, e.g., Nova Scotia, New Hampshire and New York who were yet half a step above Quebec, the Floridas and Grenada; the Hudson's Bay Company was an incorporated joint-stock company with exclusive rights of trade and of governing lands that, under the terms of the charter issued in 1670, fell within its competence - its circumstances are unique

- reference to Lord Selkirk's treaty with four Chiefs in 1817 is valid but to term it the "... most significant treaty in Rupert's Land..." is questionable in view of the further statement that the "... authority of the Chiefs was later questioned and Treaty No. 1 covered the same area without reference to the Selkirk Treaty..."; surely the decision to extend the comprehensive methods of 1850 to Rupert's Land (after its sale to the new Dominion in 1870) as a matter of policy and assumed obligation was of far greater significance.

Section H Northern Ontario, Prairies and Indian Areas of the Northwest Territories — pp 104 - 112

- while it is not specifically indicated, this section deals with treaty matters in what, substantially, was Rupert's Land prior to the sale of 1870

- the observation that the introductory remarks to each of the numbered treaties "... suggests political rather than legal reasons for treaty making..." could be prophetic as, perhaps, resolution of the Aboriginal Title question may also be found in a political (legislative) device; the counter-point is, of course, that there was no legal obligation to enter into treaty activities in what used to comprise the North-West Territories (prior to erection of the western provinces) — p 106

- although it is stated in this section that the Indian people "... were dealt with as owners of lands..." it should be noted that the stated objective in the numbered treaties is to have the Indian people concerned cede, release, surrender, yield up, transfer and relinquish all their rights, titles and privileges, whatsoever without specifically conceding what these rights, titles and privileges might actually be concerning the lands included within the limits of any particular treaty; it would seem that although a developing social conscience can be seen to be at work the Dominion representatives were just as inclined to deal officially with Indian matters in an expedient manner, as "claims" and "pretensions", as were their colonial predecessors — p 109

- there is a not unusual ambivalence here concerning the Indian treaty signators: on the one hand they are presented as demanding, exacting, farsighted - on the other, as illiterate unequal and unaware; the conclusion is presented that "... It seems fair to conclude that there were real negotiations ...", yet the distinct impression is left that the results are questionable, quite possibly as the exercises equate with the nebulous Aboriginal Title question. — p 109

The 1923 Treaties - (Why here?) — pp 110, 111

The 1923 agreements are at least as closely related to the imperfect "purchases" of Captain William Redford Crawford as they are to Ojibwa "...claims to ancient hunting rights between Georgian Bay and the Ottawa River..."; between 1783-87 Crawford is alleged to have purchased all the land from Niagara to the borders of Old Quebec from the Ojibwa (Chippewas and Mississaugas) who ranged those areas - certainly correspondence of the times and Crawford's requisitions for additional guns, powder shot and ball, tobacco and rum lend credence to the reported transactions - however, he did not obtain receipts; by 1798, after

considerable acrimony had ensued, Robert Prescott reported that if the matter wasn't resolved it would lead to "... dangerous consequences ..."; there is a progressive historicity of delay and procrastination directly from 1787 to the 1923 agreements during which time the Ojibwa became aware that no receipts could be produced; the 1923 agreements are concerned not only with "ancient, hunting rights" but the signators agreed to "... cede, release, surrender and yield up ... forever ... all their right, title, interest, claim, demand and privileges whatsoever, in, to, upon, or in respect of the lands ..." described; not only were the Indian signators deemed to be the descendants of those with whom Crawford had originally treated but the agreements were also designed to patch up shortcomings that had ensued in other dealings with the Ojibwa of southern Ontario. p 110

The Disallowance of the Northwest Territories Game Ordinance p 111

While the Game Ordinance of 1889 may have been disallowed, this does not gainsay that federal legislation, whether concerning the conservation of game or otherwise, has paramountcy over any treaty (or treaty provision) as has been remarked in this Report. p 101

Section I British Columbia pp 114 - 132

- due to the facts of geography and history British Columbia developed as a British colony separate from those on the Atlantic coast of North America; it is indisputable that the question of "Indian", "Aboriginal", "Rights", "Title", etc., were dealt with there as a matter of policy; it is also apparent that the principle that Claims arise from prerogative acts (rather than from a pervasive legal Aboriginal Title concept) are in effect; these observations are substantially and independently supported by the Supreme and Appeal Courts of British Columbia, it has been intimated that the question at issue of an existing Aboriginal Title will be referred by the Nishga Tribal Council to the Supreme Court of Canada pp 116, 119, 121 pp 131 - 132

- whether or not the Colony developed independent of those on the Atlantic coast, if (as is claimed in the Report) the British recognized a pervasive Aboriginal Title, it should have been evident here - that it was not is obvious and becomes even less supportable elsewhere in Canada.

Section J Non-Treaty Areas of the Yukon and Northwest Territories pp 136 - 138

- even as "... Discussion of aboriginal claims ... in the north seems to be beginning, presumably in response to the aboriginal claims being pressed in British Columbia ...", resolution of the "aboriginal claims" and "Aboriginal Title" questions in the Yukon will, in all likelihood, follow the same paths as pertain in the province p 137

- as a land feature, the Yukon is continuous with northern British Columbia west of the Great Divide; historically this is one of the most remote and latest to be explored areas in British North America, official maps of the 1763 period show it undetermined as being land or water; as a conjectural element of Russian America its destiny was not decided until the Alaska boundary agreement of 1825 had been concluded between Great Britain and Imperial Russia.

Section K Extensions of Quebec pp 139 - 141

- from an ethical standpoint the failure to conclude treaties (as was the obvious intent of the Dominion government) after the Quebec boundary extension of 1912 is vexatious p 139

- from the legal point of view there remains little doubt that such a treaty would be exercise of "... apparently a prerogative pwoer (sic)..."; the contrapuntal point here being, of course, that the question of Aboriginal Title (Rights) arises from exercise of such prerogative power, not that Aboriginal Title is a pre-consideration legally obligatory. p 140

Section L Metis and non-Status Indians pp 143 - 147

- the subject of this section is ethically as vexing as that foregoing; however, it does not fall within the aegis of this review.

Part III ABORIGINAL RIGHTS CASES IN CANADA pp 149 - 160

Section A Who is an Indian? pp 149 - 152

- considering the thesis of the Report, this is a very cogent (and perplexing) question; if Aboriginal Title is a manifestation of "special status" (or vice versa) and benefit will accrue accordingly, some authoritative body will have to rule on who is or is not an Aborigine

- the question, in this context, could have two aspects i) the philosophic, and ii) the material:

  i) in the philosophic aspect, an Indian is one who "feels" or "knows" he is an Indian - this is personal and could be (but not necessarily is) a subjective conclusion

  ii) in the material aspect, if benefit is an adjunct to such status, some authoritative dispensing body will have to recognize this status ostensibly by the application of objective criteria; the perplexing question here is, "Precisely by what criteria?"

Section B The Legal Content of an Aboriginal Claim pp 154 - 160

- at first glance it could almost be taken that, in this section, Aboriginal Title is an established fact; factually, " ... The doctrine of an aboriginal title is not in dispute in Canadian Law..." substantially "... because nowhere in our jurisprudence p 154
  has the question of aboriginal title been dealt with ..." - p 155
  there appears to be some fine hairsplitting at play here but one could more readily term Aboriginal Title a "question" than a "doctrine"; again, it has not been established that "... the
  Royal Proclamation was declarative of the law ..." regarding p 154
  Aboriginal Title - in para 1 we see this point stated as fact,
  it is presented in para 2 (a) as an argument and refuted for p 154
  lack of "substance" in para 3; juggling these points in various p 154
  combinations does not establish a fact of law no matter what p 155
  the motive

- we are also presented with the statement that "usufruct" is " ... used to describe the aboriginal title ...", this is not p 155
  so merely because the assertion is made in the Report; as was noted on page 5 of this Analysis " ... the tenure of the Indians..." was at issue in the St. Catherines Milling case, not Aboriginal Title - how many times does it have to be repeated "... that their Lordships did not consider it necessary to

express any opinion..." "... with respect to the precise quality of the Indian right ..."? p 157

- the arguments presented herein merely confirm that the basis of Aboriginal Claims are in prerogative acts such as the Royal Proclamation and are actionable (with the likelihood of success) where this can be clearly shown p 159

- nowhere has Aboriginal Title "... been described by the Court as, essentially, a fee simple without right of alienation ..."; this is merely a projection from a "theoretical analysis" the value of which is doubtful even as an exercise - one can only again refer back to the exact words of the Report "... nowhere in our jurisprudence has the question of the substance of aboriginal title been dealt with..." p 155

- the foregoing is as indicative as anything in the Report of the dangers inherent in presenting conjecture or projection as established fact.

Part IV TREATY RIGHTS pp 162 - 180

Section A The Legal Nature of Treaties pp 162 - 169

- whether or not the basis of the Indian treaties applicable in Canada lies in expediency, it might be as well to consider what they are rather than what they are not

  i) Indian treaties are solemn formal agreements between the Crown and the Indian people of Canada through their representatives p 163

  ii) it is government policy to honour Indian treaties p 167

  iii) Indian treaties have paramountcy over Provincial legislation but Federal legislation has paramountcy over Indian treaties p 163 p 167

  iv) Claims can arise from Indian treaties where it appears that promises made therein on behalf of the Crown have not, or are not being, fulfilled p 167

  v) Treaties can be discharged, abridged or terminated by valid prerogative acts p 169

- because of a treaty's unique nature, it is doubtful that raising questions as to duress, undue influence, etc., concerning treaty activities would be successful in court p 165

- ordinarily, breach of a treaty ensures its termination not necessarily its renegotiation; as treaty activity is seen to be a matter of policy, the initiative lies with the Crown. p 169

Section B Broken or Outstanding Treaty Promises p 172 - 180

- part of the mystique that has grown with Indian treaty activity is the apparent one-sidedness of the agreements to the effect that arising therefrom the people acquire only rights whereas government acquires only obligations; e.g., although it is not mentioned in the Report, the Maritimes treaty of 22 November 1752 was broken by the Indian signators and its provisions considered suspended (Patterson J., Rex v. Syliboy, 1928) p 179

- while it has been remarked that valid federal legislation has paramountcy over Indian treaties, it may well be that

Indian well-being was overlooked in the framing of that conservation measure known as the Migratory Birds Convention Act; this, however, is an ethical consideration and does not gainsay the constitutional and legal fact that the power to so enact lies with the federal government — p 172

- the government has stated that it will fulfill outstanding treaty provisions as a matter of policy, this cannot, of course, be taken to mean that it will suspend its paramount and discretionary powers — pp 172 - 176

- the Medicine Chest provisions of Treaty 6 point up the paradoxes which arise from projecting treaty provisions as written to what people think they should mean to-day; the government's committment substantially is that it will fulfill treaty provisions as written — pp 175 - 178

- in large part, the reserve provisions of the comprehensive "land cession" treaties from 1850 on are representative of a growing social conscience introduced and expanded on by government as a matter of policy; no matter why they were introduced, they are indicative of Indian "rights", "title", etc., which may be seen to arise from specific prerogative acts - invariably it can also be seen that the Claims that may be raised have their basis in the specific provisions of such an act rather than in the alleged legality or recognition of a pervasive Aboriginal Title.

Part V — THE POST TREATY-MAKING PERIOD AND ITS PROBLEMS — pp 182 - 193

Section A — Land — pp 182 - 186

- in the main, Indian reserves are Crown Lands set aside for the use and benefit of particular Indian groups; other lands are administered as if they were reserves; local taxes are not raised on-reserve for local improvements and in consequence the level of utilities and services suffer; in large part, the resources and financial returns which accrue arise from the administration of Crown Lands

- although it is not expressly stated in this section, the Crown Lands aspect of reserve lands as recited foregoing give rise to very peculiar and vexing problems concerning their administration and serve to point up the real need for drastic change in this regard.

Section B — The Division of Powers — pp 188 - 190

- this is a peculiarly indecisive section which tends to downgrade the benefits forthcoming from extension of provincial services to the Indian people on the basis of equality; it is hardly a fair assessment of what might be achieved through serious negotiation.

Section C — An Indian Claims Commission? — pp 192, 193

- the brief recitation of events provides little opportunity for analytical comment.

Part VI — EXPERIENCE IN OTHER JURISDICTIONS — pp 194 - 196

- again, the recitation of events does not appear to require critical comment.

Part VII — CONCLUSIONS — pp 198 - 202

- considering the thesis of the Report, it is odd that the concluding points presented should switch emphasis from "Aboriginal Title" to "Indian Claims"; in the Introduction to this Report the statement is made that "...the leaders stressed their concern with treaty and aboriginal rights..." p 3 here, obviously with reference to the same circumstance (i.e., the Ottawa consultation meeting of April 1969) we find "... Indian leaders are preoccupied with...claims..."; perhaps the explanation lies in the fine abandon with which the terms "Aboriginal Title", "Treaty Rights", "Indian Title", "Native Rights", "Indian Rights" and "Indian Claims" are interchanged

- considering that the case attempted in the Report to establish that Aboriginal (Indian) Title is the legal fount from which all treaties, rights, titles and associated claims flow has not been concretely established, it is understandable that the Report's writers would prefer a legislative p 205 (political) resolution to court action. p 202

Part VIII — SUMMARY — pp 203 - 205

- these points have been dealt with elsewhere; substantially the critical comment given immediately foregoing (conclusions) pertains.

ERRATUM
(in the original publication)

page 12	line 14	"... would, therefore, judge those dealings legally defective."
page 23	line 2	"... where it has assume these ..."
page 53	line 19	"wage was"
page 62	line 18	"... Indian territorial claims has passed to the French ..."
page 74	line 1	"Regina v. Syliboy"
page 75	line 11	"Worman v. Francis"
page 75	line 27	"Regina v. Syliboy"
page 76	line 21	"Worman v. Francis"
page 99	line 19	"Regina v. Wesley"
page 140	line 3	"pwoer"
page 151	line 12	"anscestors"
page 165	line 4	"attached"
page 166	line 7	"Regina v. Wesley"
page 168	line 2	"Regina v. Sikes"