CHAPTER II: COLONIALISM IN NORTH AMERICA - LEGAL POSITION, POLICY AND PRACTICE.

I. INTRODUCTION

In the preceding Chapter we examined the general origins of the concept of Aboriginal rights, both in International Law and how this concept emerged from colonial practice. In this Chapter we will examine in more detail the development of legal positions and the policies and practices of colonial nations, as they specifically applied to the territory which now is contained within the United States. In particular, this Chapter will examine early Law and Practice as it applied in what was generally North America.

The early British colonies included the Maritimes and parts of Ontario, as well as the New England colonies. After 1760 part of what is now Quebec became a British colony. Britian at the time did not distinguish in its application of laws between its various colonies. The French also applied similar colonial policies regardless of where the territories were located. In the next Chapter we will examine in depth the development of colonial Law and Policy in Canada. That Chapter will cover both the pre- and post-Confederation era.

II THE CONVENTIONAL CONCEPT OF ABORIGINAL RIGHTS IN NORTH AMERICA

A. ~~The~~ Legal Positions

As indicated earlier, the term "Aboriginal rights" (or Aboriginal title) is a relatively modern term used by historians and jurists. It was not used in any of the early constitutional documents, Charters, letters of instruction or Acts of Parliament dealing with the question of the rights of the Aboriginal peoples. Neither does the Royal Proclamation of 1763 use this term. As stated in Chapter I, the term

"Aboriginal rights" has been defined as a land right by Cummings and Mickenberg, in the publication "Native Rights in Canada":

As will be demonstrated, the development of this concept will be seen for what it really was -- an attempt by the British to legalize theft of Indian lands or, at best to "legally" acquire and extinguish the interest of Indian peoples in their lands without having to adhere to the accepted principles applying to the purchase of lands, in particular, those principles which provided for fair and equitable compensation.

The origins and recognition of the fictitious concept of Aboriginal Title is rooted in Case Law dealing with the acquisition of the territory of infidels.[2] In 1765 Blackstone wrote that plantations or colonies are claimed:

(1) By right of occupancy where lands are deserted, uncultivated and peopled from the Mother Country.[3]

(2) Where cultivated, by conquest or by cessions in the form of treaties.[4]

He further stated;

"...both these rights are founded upon the law of nature, or at least upon that of nations.[5] However, in uninhabited lands peopled by the English, English laws are then in force but only so much English law "as is applicable to their own situation (that of the settlers) and the condition of an infant colony..."[6]

In occupied lands the King could alter and change the laws of Sovereign peoples who had been conquered or who had ceded their lands.[7] Until and unless this was done, their laws remained in force, with the exception of those laws which were deemed to be against the law of God.[8]

Lord Mansfield, in the classic case Campbell v. Hall, stated that, unless altered by the King, the laws of a conquered country remain in force.[9] Thus there came to be recognized;

> "...three basic methods of acquisition of new territories; (1) occupation or settlement, (2) cession, and (3) conquest.[10]

Therefore, where lands were settled or occupied and the colonists took with them English Law, they were subject to the Imperial Parliament. Where lands were ceded or conquered, existing laws remained in force unless altered by the Crown. How the lands came to be acquired was thus critical in determining the powers of the Crown and the Imperial Parliament, as well as whether English law applied.[11]

That then is the conventional school of thought used to rationalize the character of the acquisition of indigenous lands in North America? One view is that the lands were unoccupied, "open to appropriation by discovery or symbolic acts". However, if lands acquired by occupation were deserted and uncultivated and therefore peopled from another country, then how was the presence of Aboriginal peoples (Indian, Inuit) explained?

It was argued by some authorities that as "pagan and uncivilized" peoples, Aboriginal peoples were not sovereign entitiies nor capable of holding title to their lands.[12] The only rights to land were those granted or recognized by the Crown.[13]

To the same end it is argued that land was deemed to be "uninhabited" if no settled political order existed.[14] Therefore, the British in their early dealings with North American Indians refused to recognize Indian ownership in British Law. They did not concede that the land belonged either to the sovereign Indian Nations or to individual Indians. Britian took the legal position that it had sufficient sovereign claim to North America so that it possessed the ultimate title to the land. Therefore, the legal fiction was invented that only the Crown could make land grants, including grants to the Indians.

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Legal deeds of title given by Indians or Indian nations to settlers were not recognized by British Courts.[15]

As recent as 1902, Sir Henry Jenkyns, a Justice of the Privy Council, wrote:

> "The colonies differ according as they have been acquired by settlement or by conquest or cession, and the courts of law have sometimes been called upon to decide whether a colony was a settled or a conquered colony. the distinction appears to depend upon whether at the time of the acquisition of any territory there existed on that territory a civilized society with civil institutions or laws, whether in fact there existed anything which could be called a lex loci."[16]

The Judicial Committee of the Privy Council undertook the onerous burden of having to rule on such a subject-matter. In 1919 the Committee ruled:

> "Some tribes are so low in the scale of social organization that their usages and conceptions are not to be reconciled with the institutions or the legal ideas of civilized society...[17]

It was thus argued that a right of occupancy existed because the lands are territorium nullius, land subject to no recognizable jurisdiction or rights, and open to appropration by discovery or symbolic acts.[18] Accordingly, the "culture-bound perceptions" of the European powers determined the nature and extent of the rights of the Aboriginal peoples.[19] Therefore, the only rights to land were those granted or recognized by the crown.[20] The purpose of Treaties was merely a policy of "prudence and benevolence"[21] This was the legal mythology which Britain attempted to apply in the settler colonies of North America.

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It has been argued that the issuance of Charters extinguished the rights of the Aboriginal peoples since the Charters provided for no reservation of their rights. In that regard the Hudson's Bay Company Charter is of concern for the purposes of the study. Sovereignty is asserted in that Charter and the territory acquired as "one of our plantations or colonies in America". According to Lindley:

> "The company was given legislative and judicial powers over all the inhabitants of the lands ceded to it. It might build fortifications, maintain military and naval forces, and make peace or war with any non-christian prince or people. Although the political powers granted to the Company were so complete, the ultimate sovereignty of the British Crown was fully recognized."[23]

A reading of the Charter plus the instructions to the Company staff and subsequent legal positions taken by the Company do not support Lindley's interpretation. This will be discussed in Chapter III.

According to Lindley the argument then is that there exists in the Crown:

> "... the power to abrogate or disregard indigenous property rights upon acquisitions, and assert that in fact the Crown ignored these rights and treated America as a vacant territory, disposing of it by Charter."[24]

Earlier we discussed briefly that if lands were deemed to have been acquired by conquest, then the King may alter and change laws in conquered or ceded countries having their own laws.[25] Until this was done, existing laws remained in force with the exception of those against the laws of God.[26] If such was the case, then the Privy Council ruled in 1921:

> "A mere change of sovereignty is not presumed as meant to disturb rights of private owners..."[27]

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According to Sanders:

> "The logic of English colonial thought led necessarily to the alternative conclusions that the aboriginal inhabitants of Australia and North America either did not exist (in law) or that their ownership of the land survived the change in sovereignty which established England as the political master of the area. To avoid the strict logic of these alternatives, certain modifications of theory occurred...[28]

These modifications, according to Sanders, were:

1) if there was no settled political order lands were "uninhabited".[29]

2) if lands were used for cultivation or living sites on a permanent basis such lands were owned.[30]

3) judicial invention:
"...to reconcile theory and practice. Essentially it involved a misuse of the term discovery", a re-interpretation of the term "conquest" and a distortion of the concept of the impact of "conquest" on the existing legal order."[31]

According to Snow, the net effect of this approach was a legal relationship between conqueror and conquered, wherein even the Treaty process was reduced to a matter of little consequence as:

> "By the modern practice of nations, treaties with aboriginal tribes, instead of attempting to regulate the relations between the State exercising sovereignty and the tribe, as if it were independent, are made for the purpose of arranging the terms of the guardianship to be exercised over the tribe."[32]

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Slattery in commenting on this misapplication of International Law concludes that:

> "...the old North American colonies appear to have occupied a middle ground between conquests and settlements. Regarded initially as conquests by the Crown, they eventually, in most instances, assumed the characteristics of settled colonies with English law and representative institutions, at least so far as the settler communities were concerned."[33]

Let it be said for now that a continuous history of contact with the Aboriginal peoples led the British, after the Treaty of Paris on February 10, 1763, to review many matters in British North America. The question of the Aboriginal peoples was important. It was necessary to ensure that good relations be established, or where established, be continued. To further settlement and commercial policy, it was also necessary that the British acquire a clear title to the land, since the land had become an important commercial product, namely real estate. In this process the Courts whose justices were a product of British legal thought and training, played a key role in helping the British perpetuate its legal myths regarding the rights of the indigenous peoples which would eventually ensure termination of their interest in most of their lands.

III PRACTICE IN NORTH AMERICA:

a) The Spanish

As indicated in Chapter I, the Spanish legal position was to grant Indians citizenship and land rights once they had become "civilized". However, the Spanish government in practice did not recognize the sovereignty of Indian nations. They claimed sovereignty for themselves and pursued a policy of pacification.[34] Columbus and early Spanish aristocrats established plantations, and used forced and slave labour on these plantations. The Missionary Orders, which had consider-

able influence in the Spanish court, convinced the Spanish Royalty that this policy was offensive to Christian morality. (The Spanish Court had been making land grants to the Spanish conquistators and also sanctioned the forced labour policy in 1503. These plantations were known as encomienda. As a result of the missionary influence, the policy was changed in 1524 to outlaw the practices of private land owners. However, existing owners were allowed to carry on until their grants expired.[35]

In their place the missionaries established mission plantations. They used a process of peaceful persuasion to get Indians to live on the plantations. Here they were trained in modern agriculture of the day and in the use of other existing technology. When fully self-sufficient, villages were established outside of the mission plantations where the Indians and their families were resettled. They were given a plot of land, to which they had title, and tools and seed to get them established. McLeod claims this was a superior policy to that pursued by the British, since it enabled the Indians to be self-sufficient and eventually resulted in a considerable increase in their numbers.[36] This, however, conveniently overlooks the fact that as sovereign nations the Indians were self-sufficient and had looked after themselves quite successfully before the Europeans arrived. Some, such as the Mayans and the Aztecs, even had achieved a level of development far beyond anything which existed in Europe.

The Spanish government took direct control of the implementation of its colonial policies and laws and in this way exercised a significant degree of control over events in their new colonies. However, Spain was not able to eliminate the private plantations and the forced labour policies of the conquistadors.[37]

b) The French

The French government also took direct control of its colonial policy. In some respects the French followed a policy similar to the Spanish in that they refused to recognize the sovereignty of Indian nations. They also granted citizenship rights, including the right to own land once the Indians were "civilized and christianized". The French also used missionaries to help accomplish this process. The missionaries undertook some agricultural training of Indians, but there was no policy of establishing Indian settlements similar to that pursued by the Spanish, except in the case of the Huron Indians.

The French were not primarily interested in settlement. Their main thrust was in the area of trade and commerce. They did, however, to some extent, settle the St. Lawrence River Valley. In this area they simply acquired the land and/or drove out the Indians if necessary. Indians who stayed were generally assimilated into French settlements although in some instances land was set aside for their use. In the great hinterland of interior North America the French pursued a different policy. Here they did de facto recognize Indian nations and their claim to the land. They entered Treaties of peace and friendship and obtained the permission of the Indians to build trading posts. Although the French claimed the right to sovereignty over the Indians in their dealings with other European nations, this was based on the doctrine of prior discovery and was for the purpose of excluding competition. In their dealings with the Indians the French neither attempted to exercise sovereignty or control over the Indians. They limited their laws to their own employees and to their trade.

The French workers, however, mingled rather freely with the Indian population, the men taking Indian wives. The Indians were treated as equals and as indicated above, wives, children and other Indians who settled in the French settlements were

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assimilated into the general population and accepted as French citizens. This practice was followed by the French throughout its North American colonies including Louisiana.

All of the lands claimed by the French in Canada were ceded to Great Britain by the Treaty of Paris in 1763. The conventional view at the time was that the new King need not recognize any rights of the Aboriginal peoples as they were extinguished by the former Sovereign. However, in practice, the British recognized the rights of the Indians to the extent that it bought private lands in the Maritime, Quebec, and Ontario colonies and gave them to the Indians as reserves. Also, certain rights of Indians were recognized in the articles of Capitulation in Quebec and by the Treaty of Paris in other parts of Canada.[39]

c) The Dutch

The Dutch came to North America early and occupied the area around the Hudson River before either the English or French came to the area. Dutch colonial policy was carried out directly by the Dutch government. The Dutch began very early to recognize Indian sovereignty and to purchase land from the Indians. As mentioned earlier, the first such land purchase was the purchase of Manhatten Island for $25.00. This event has often been characterized as a major "rip-off" of Indian lands. However, Macleod, concluded that the price was fair market value at the time, keeping in mind the fact that the Indians retained the right to continue to hunt on the Island.[40]

It is not clear whether the Dutch did this out of a sense of justice or whether it was a question of expediency. MacLeod suggests that it was done to consolidate their legal claim to the land so as to resist the British claim of sovereignty. Whatever the reason, the Dutch government gave its early settlers and traders instructions to purchase Indian lands which were wanted or needed for settlement and trade pruposes. The Dutch also made provisions in their colonial laws

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for land purchases. The Dutch as well were encouraged to conclude Treaties of peace and friendship with the Indians and to form alliances with them for the purpose of protecting the colony, which they in fact did.[41]

Although the Dutch did not remain for long in North America as a colonizing power, as they were defeated and evicted by the British, they did establish a practice which, as we shall see was picked up by British settlers and developed on an extensive basis.

d) The British

There would appear initially to have been some contradictions between British policy which recognized the King as Supreme Sovereign in new land areas claimed in America and their instructions to settlers of the Massachusetts Bay Company that if the Indians claimed to own land which they needed, they were to purchase it from them. This was likely due to the fact that the British Government did not take charge of colonizing activity but gave large land grants to proprietary companies to whom it also gave trading rights and colonizing responsibilities. The task of government, therefore, rested with the proprietors and the settlers and although British laws applied the government did not become directly involved in colonial affairs until a much later date.[42] To justify its land grants to proprietors in its dealings with other European nations, it had to establish the fiction that legally Britain owned the land and had the right to give land grants, including land grants to the Indians. The companies and settlers on the other hand—faced with the reality of powerful Indian nations in the areas they were trying to colonize—had to develop practices which were consistent with that reality and not based on legal myths. Therefore, in practice, they developed a policy like the Dutch of recognizing the Indians as sovereign nations, purchasing their lands, making

Treaties, establishing alliances, etc. The reason the British turned this responsibility over to companies related to the fact that the government was at the time economically and militarily weak and preoccupied with the Celtic wars.[43]

It is worth briefly examining the main tennets of these legal British myths, which were to be stated as Case Law by Jurists in years to come. Britain based its claim to title on the following arguments:

(1) Occupation - as the land was unoccupied. This was not true, since, as Mac Leod clearly establishes, there were no unoccupied lands—the Indians having completely taken up the land which they needed to support themselves based on their use of the land and their level of technology. There were a few Indian agricultural settlements on the East Coast such as the Plymouth settlement, which the Indians had abandoned when they were devastated by a smallpox epidemic. They had contracted the disease some years before the settlers came, from sailors and traders. They had abandoned their fields and these were taken over by the Puritan Pilgrims but could not be claimed as belonging to no one.[44]

(2) Lack of Political Organization - the Indians had only a rudimentary form of social organization and could not claim status as sovereign nations. Therefore, under International Law, Britain could claim sovereignty.

MacLeod concluded that in many respects political organizations were better developed and more stable among the Indians than those which existed in Europe at the time. Although there were no written laws, the government forms and institutions which existed in Europe were common in North America. There were federations, alliances of sovereign groups for purposes of protection, there were Kings and Queens, aristocratic classes, feudal systems and both collective and private ownership of land.

MacLeod concludes that there was little difference in the level of development of land use and social, political and cultural institutions between Europe and North America. The main differences in the 14th and 15th Centuries were in the areas of economics, commerce and technology.[45]

(3) The Indians were Nomadic - therefore had no settled land base and no stable forms of government. Again MacLeod clearly establishes that most North American Indians, with the exception of those in the far northern climes and along the West Coast, were engaged in agriculture as the primary source of their food supplies. There were permanent villages, tilled fields, and hunting ground, which were often privately owned and in close proximity to the villages. This was true even of the Plains Indians who later were primarily known for their habit of following the buffalo herds. However, MacLeod claims that this lifestyle did not develop until after the Plains Indians acquired the horse. This was what made them mobile and the horse played a large role in agriculture becoming less important in their economic system.[46] In fact, almost all Indians depended to some extent on agriculture to supplement their hunting, fishing and gathering of wild foods. The exceptions were in those areas where agriculture was not feasible because of the climate and soil conditions, such as the woodland and barrenland areas within the Precambrian Shield.

(4) By Conquest - although there were from time to time wars and skirmishes between the settlers and the Indians, there was never any policy enunciated or pursued either by the settlers or the British Crown to conquer the Indians and take over their lands. Although and extermination policy was discussed from time to time, it was never officially sanctioned.

The policy was instead one of pacification through friendship, alliances, purchase of lands, etc. Wars were waged for the purpose of protection and more frequently for the purpose of revenge.[47]

e) The British Assume Control

The British did not assume control over colonial and in particular Indians Affairs in North America until 1754. This was done because the British failed in their attempts to get the colonies to adopt a standard Indian policy. Because of increasing population pressures, the increasing demand for land and the illegal squatting of settlers on Indian lands, the British concluded that they must take appropriate action to prevent further conflict between the Indians and settlers and the resultant massacres on both sides. In addition, Britain was in conflict with France for control of the whole of the North American Continent and needed the Indians as allies.[48] There was also internal conflict in the colonies, such as the battles between the Irish-Scotts settlers on the frontier and the old established settlers of Eastern Pennsylvania.[49]

f) British Indian Policy in North America

MacLeod described this British policy as follows:

> "The Crown in its dealings with the Indians adopted the policy which had been evolved by the colonies, and made that policy uniform and definite. The Indian tribes were to be treated as independent nations under the protection of the Crown. Their lands were their own until they voluntarily might transfer any or all of them to the Crown. This policy furthermore was extended to its dealings with the many Indian tribes who had hitherto been under the French influence and had been dealt with according to the somewhat different French policy."[50]

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MacLeod points out the contradiction between this policy and the British legal claim that it had sovereignty over Indians and Indian lands and the British refusal to legally recognize that Indians had full title to their lands. In fact, MacLeod claims that the British recognized the actual ownership by the Indians of their lands and only claimed an exclusive option to purchase these lands.[51]

The British formalized this policy in a Statute known as The Royal Proclamation of 1763. This Statute is considered to have the force of Constitutional Law in Canada, since it has never been repealed by either the British or Canadian governments. (it is now mentioned in Section 25 of the Constitution Act 1982.) The Proclamatic adopted several new ideas and gave legal standing to some old practice The central provision was that in future only the Crown could acquire land from the Aboriginal peoples. Up to this time purchases had been made by both private individuals and the settled colonies. In practic this was always done by cession and Treaty.

In summary then, the Proclamation provided for:

1) The rights of the Indians to be protected in those areas of the colonies which had not been ceded by the Indians or purchased from them by the Crown.

2) No authority to its colonies to grant patents, conduct surveys, etc., beyond the bounds of their land grants, or to take possession of any lands reserved for the Indians by the Crown.

3) Anyone settled on Indian lands were to remove themselves.

4) No one other than the Crown was to purchase lands from the Indians, and then only with the Indians consent. Such a cession of Indian lands must take place at a public assembly of the Indians.

5) Free trade by British subjects with the Indians to be guaranteed.[52]

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IV. AMERICAN POLICY AFTER INDEPENDENCE:

a) The Recognition of Indian Sovereignty In the United States

The traditional view of the causes of the American War of Independence are only partially correct. It is true that the right to control taxation and the right of self-government were important issues in the dispute between Britain and her colonies. However, the fact that Britain took direct control of colonial policy, including Indian policy, was a more important factor in events which led to this War. Up to the mid-1700's this control had rested with the companies. There were disputes over illegal settlements on the frontier and the forceable removal of the settlers from Indian lands. There were, in addition, disputes over whether the laws of the individual colonies could be applied to Indians whose lands were within the territory of a particular colony. In 1774, the State of Georgia insisted that the murder of an Indian agent by an Indian should be punishable under State law, the same as in the case of the murder by a white. The result of this policy was that the Indian traders joined the British in their war against the colonies.[53]

After the War of Independence, the newly formed U.S. nation, in its Constitution, followed the practice of giving exclusive authority over Indian matters to the central government. The Constitution stated that the federal government had:

> "...the exclusive right to treat with and otherwise regulate trade and intercourse with foreign nations, including the Indian nations."[54]

According to MacLeod some of the states refused to fully concede this constitutional provision:

> "What was wanted was either the federal government should promptly buy from the Indians, land claimed by them within the state, liquidate the tribal government; and thereby end the inconsistency of a sovereign state of the United States having domciled within its borders a foreign government

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and foreign territory whose Indian citizens and inhabitants were not subject to the sovereignty of the white state and its laws and could be treated with only by the federal government of the United States. Or the state itself be permitted to apply the policy of the Spaniards, confiscate the Indian hunting lands, grant the Indians title to their agricultural lands, dissolve the tribal governments and place the Indian communities under the sovereignty and law of the state.[1] Upon such insistence the Cherokees sold their lands in Tennessee and North Carolina and held only their original homeland in the Georgia piedmont. In 1827 the Cherokee Confederation remodelled itself in imitation of government in the United States and Europe. It adopted a written constitution and organized three departments, legislative, executive, and judicial.[2] Georgia determined once and for all to end this division of sovereignty within her own borders. She determined, in disregard of the constitution of the United States, to apply the Spanish method of handling the Indians with respect to land and government. In 1827 the state legislature refused to recognize the Cherokee government, and declared Cherokee land to be the public domain of the state. She prepared to grant the Indians lands on which to subsist in the same way and same amount that whites would be granted parcels of the public domain. The Indians were to become individual subjects of the state, but under some of the legal disabilities attaching to freed negroes.[3] Georgia prepared to enforce her will on the Indians in spite of the federal government, with military force. There was doubt that the federal government would protect the Indians.[4] For several years the

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situation developed slowly, with many negotiations. In 1833 Georgia again prepared for the clash, and the Cherokees, in despair at their own helplessness, agreed to trade their Georgia lands for lands in the West.[5] The Cherokees began their westward trek, and by 1838 all but a few insistent mountain refugees--whose descendents are still there in their old homes--had gone to their new home in the prairies. Georgia thereby missed the perhaps unpleasant task of instituting a change in the old established order of things in dealing with the Indians."[55]

b) The Treatment of Indians by Courts

An examination of judicial decisions which follow show how the American courts emasculated the rights of the Aboriginal Peoples. While it has been suggested that American cases set the pace for the concept of Aboriginal rights/title and should only be used as pursuasive examples, they have been applied in the most rigid way in Canadian cases, as we shall later see. This was done in spite of the fact that generally in Canada, American case law has been held to not be applicable as precidents in the trials of Canadian cases.[56] A 1979 decision of the Federal Court of Canada, Trial Division, dealing with Indian matters, for example, stated that the American cases are more appropriate than Privy Council cases dealing with Africa and Asia.[57] Going further, the Court held:

"The value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalization"[58]

The judicial starting point is 1793. This is followed by a classic decision on Indian title delivered by Chief Justice John Marshall of the United States Supreme Court in 1810.

The first case (1793) ruled that the rights of the Aboriginal peoples to land did not constitute a full legal title--it could be "extinguished by government".[59]

> "The old claim of the Crown...gave a right to the Crown against other European Nations... The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the Crown.[60]
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> "...that the nature of Indian title, which is certainly to be respected by all Courts, until it is legitimately extinguished, is not such as to be absolutely repugnant to a seizin in fee on the part of the State."[61]

In 1823 the Supreme Court had an opportunity to restate and clarify the above judgement. Chief Justice Marshall again delivered the judgement of the Court. He went to great lengths in dealing with the concept of discovery, the law of nations, and the compatability of Indian title and ultimate fee in the Government, as follows:

> "The inquiry...is, in great measure, confined to the power of Indians to give; and to private individuals to receive, a title which can be sustained in the Courts of the Country."[62]

Justice Marshall continued his argument in the following manner:

> "On the discovery of this immense continent, the great Nations of Europe were eager to appropriate themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World

found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new land, by bestowing on them civilization and christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consumated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the Natives, and establishing settlement upon it. It was a right with which no other Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

The relations which were to exist between the discoverer and the Natives were to be regulated by themselves. The rights acquired thus being exclusive, no other power could interpose between them. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired.

They were admitted to be the rightful occupants of the land with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the land at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the rights of the Natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the Natives. These grants have been understood by all to convey a title to the grantee, subject only to the Indian rights of occupancy."[63] /emphasis mine/.

Justice Marshall further stated that:

"The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the Crown, or its grantees. The validity of titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negate the existance of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time; in different persons, or in different governments. An absolute title, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to Indian rights of occupancy, and recognize the absolute right of the Crown to ex-

tinguish that right. This is incompatible with an absolute and complete title in the Indians.[64] /emphasis mine/.

Justice Marshall also concluded:

> "However estravagant the pretension of converting the discovery of inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the inhabitants are to be considered merely as occupants, to be protected, indeed while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However, this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by Courts of Justice."[65] /emphasis mine/.

The claim in these cases is clear--the federal government had outright ownership of the land, but before the government could deal with the land, Indian title had to be extinguished by the government.

Sharon O'Brien, in a recent Thesis, examines Chief Justice Marshall's decisions in their full historical content and gives a somewhat different perspective on the Marshall rulings. She states the following:

"In 1802, the State of Georgia ceded it western land claims to the federal government in return for the government's promise to extinguish Indian title in Georgia. By the 1820's, however, the Cherokees and other southern tribes had converted from hunting to farming at the insistence of Southern officials and were not longer willing to part with their lands. In 1827, the Cherokees adopted their own constitution and declared themselves an independent nation with full title within their boundaries.[90] The Georgia legislature reacted immediately passing laws to resdistribute Indian lands to various counties and declaring all Indian laws and customs void after June 1, 1830. In support of Georgia's actions, President Andrew Jackson introduced legislation in Congress to set aside lands west of the Mississippi River for the tribes.[91] Despite arguments by opponents of the measure that it violated previous treaties and laws recognizing Indian sovereignty and title to their lands, the Bill passed by five votes, giving individual Cherokees a choice of staying in the South and submitting to the State laws or moving West.[92]

At the urging of several members of Congress, Daniel Webster among them, the Cherokees sought an injunction against the State of Georgia "from the execution of certain laws of that State, which... go directly to annihilate the Cherokees as a political society and to seize for the use of Georgia the lands of the nation which have been assured to them by the United States in solemn treaties...[93] Former United States Attorney General William Wirt, the tribe's attorney, argued the Cherokees constituted a foreign state. Georgia's laws were, therefore, inapplicable. The Cherokees, Wirt stated, had

> been sovereigns from time immemorial, "acknowledging no earthly superior".[94]
>
> Discovery had not altered their status. Discovery granted to the first discoverers only "the prior and exclusive right to purchase these lands from Indian proprietors against all other European Sovereigns" and had in no manner changed the political nature of the tribe.[95] Nor had the tribes been conquered or made citizens of the nation or the State of Georgia. Within their own domain they were recognized "as sovereign and governed exclusively by their own laws.[96]
>
> In addition to the federal government's recognition of the tribe's internal sovereignty, the treaties concluded with the tribes were proof of their external sovereignty. The treaties with the Cherokees, Wirt contended, bore the same characteristics and stipulations as was usual in treaties between two sovereigns.[97] That the tribes had agreed to treat only with the United States was proof of their capacity to act as sovereigns. Similarly, the fact the Cherokees' treaties had placed them "under the protection" of the United States did not imply conquest or subjugation. The decision by a weaker state to align itself with a stronger state was a common practice among nations and did not reduce the sovereignty of the less powerful state.[98]"[66]

O'Brien points out that the Chief Justice made his decision in spite of the evidence presented to him. She suggests that Marshall did not want to rule the Georgia Law unconstitutional for several reasons. Firstly, he did not want to precipitate a dispute between the Judiciary and the Executive since Jackson was looking for an excuse to limit the powers of the Court. Secondly, Jackson had campaigned on the promise of removing the Cherokees to the West of the Mississippi, on land which the American

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government would purchase for them. Thirdly, Marshall believed his ruling might prevent this forced removal of the Cherokees from their lands. Finally, Marshall had a substantial investment in a land company which stood to profit considerably if Georgia acquired Indian Lands.[67] O'Brien goes on to point out that:

> "Two days following its ruling, the Court issued a special mandate to the Georgia Court ordering it to reverse its decision and release Worcester and Butler. Supposedly, President Jackson, upon hearing of the decision, remarked, "John Marshall has made his decision, now let him enforce it."[193] Jackson made no attempt to execute the decision and it was more than a year before Georgia released the two men. Marshall, upon realizing Jackson still intended to move the Cherokees despite his opinion in Worcester, wrote to Justice Story, "I yield slowly and reluctantly to the conviction that our constitution cannot last."[194] Former President John Quincy Adams, at the height of the Cherokee controversy, declared, "the Union is in the most imminent danger of dissolution...The ship is about to flounder.[195]"[67]

Not only did Jackson not enforce the law but, as we shall see, the American Congress and future American Courts developed an Indian policy based on the dissenting opinion of Judge Johnson, who viewed the Indians as absolute owners of their lands, and as sovereign nations.[68]

c) U.S. Policy and Practice After Marshall

When the State of Georgia, after 1827, passed laws outlawing the Cherokee's attempts to establish their own government institutions and moved to enforce this law militarily, a crisis in U.S. Indian policy resulted. A stand-off developed over a period of several years during which three-way negotiations took place between the State, the Federal government and the Indians. In 1833, the Cherokees, in despair, agreed

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to trade their agricultural lands in Georgia for larger tracts of land West of the Mississippi. This land was purchased for them from other Indian tribes by the U.S. government. Although large in area, the land was less fertile, the climate, less favourable and the land not cultivated or in any way readied for agricultural production.[69]

A Constitutional crisis was averted by this action, and the United States began the implementation of its grand design to have the Mississippi settlements in the east and the mountains in the west as the boundaries between Indian country and the American states. The plains would be reserved forever as Indian country. As the Indians developed politically and socially, it was believed the territory could be divided into a number of individual Indian territories, which could be brought into the U.S. federation as states with full states rights. A report of the Senate Committee on Indian Affairs, in 1836, stated, "with this uninhabitable region on the west of the Indian territory, they cannot be surrounded by white population. They are on the outside of us, and in a place which will remain on the outside..."[70]

Most of the major eastern tribes who had not taken reservations, were moved to the new lands in the plains. This process was completed by 1842. The U.S. believed that it had segregated the Indians into a consolidated Indian territory which could be protected against white intrusion. In this territory, Indians would be assisted to develop their own government institutions, make their own laws, have their own economic and social systems, etc. They would be sovereign to the extent that individual States are sovereign but would have, unlike the States, exercised complete control over their lands and resources.[71] These new Indian boundaries were established in 1820 and remained largely intact until 1850.

d) The Breakdown of American Indian Policy

The dryland plains of what are now the States of Kansas, Oklahoma, Colorado, the Dakotas, Nebraska and Montana, were not

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considered prime agricultural lands. It was, therefore, believed that immigrants would have no interest in settling there. This policy might have succeeded if it had not been for a number of developments which began to take place about the time this consolidation was completed. Settlers attracted to Spanish territory in Texas and California developed overland trade and transportation routes through Indian territory in the south Indian country. A similar attraction of settlers to Oregon country resulted in the development of a northern transportation and trade route through Indian country. The whole process was further aggravated by the migration of the Mormons to Utah in 1846 and 1847, the California gold rush in 1849, and other later mining developments in the West and in Indian country. [72]

Prior to 1848, the United States had protected the emigrant caravans by making agreements with the Indians for their passage through Indian territory. This agreement also prevented emigrants from settling in Indian territory. However, with the advent of the gold rush in 1849, 20,000 persons left the eastern states that year and crossed over the Oregon trail and hence to California. This mass migration resulted in the arrangements with the Indians and in the U.S. government's ability to protect the settlers and the Indians, to break down. The government could not stop emigrants from settling and establishing farms along the route. The result was that, in 1854, the consolidated Indian territory began to break up as a result of further enforced land purchases by the federal government. The Indian tribes were gradually induced to sell their land and become reservation Indians. [73]

The British had begun entering Treaties and establishing reservations in the eastern United States as early as 1754. Tribes on reservations were reduced to the status of protectorates or protected nations. The land was still theirs, but they were under obligation by Treaty not to sell their land, except to the Crown. These practices were continued by the United States after Independence. In other regards the Indian nations were considered sovereign and some of the Treaties explicitly recognized the right of the Indian nations to make war on the United States

if it violated its Treaty commitments to the Indians.[74] One of the practices which developed during Treaty-making was the payment of ongoing annual annuities to the Indians for the sale of their lands to replace the old system of lump sum cash payments. Also, the practice of allowing Indians to continue hunting on government lands, until they were occupied by farmers, developed during these Treaty signings. However, in spite of the limitations on Indian sovereignty, the reservations were owned by the Indians and were not government land. The Indians were provided a great deal of latitude in establishing their own government system.[75]

When reservations were established in the West the same pattern was followed as with eastern reservations. The primary reason for the annuity system was the heavy financial cost to the colonies of lump sum payments. In some cases, portions of the annuities were in the form of agricultural assistance such as seed, animals, tools, etc.[76]

The first step towards official assimilation of U.S. Indians was taken in 1887. This was done by legislation known as the Dawes Act. The purpose of this Act was to individualize the Indian problem and treat with the Indians as individuals rather than as nations. This was to be done by providing for an allotment of land among the members of the tribes. The individual Indian family received a trust patent which could be converted to a fee simple title after 25 years or earlier if it was believed the Indian was ready to assume responsibility as a full citizen of the United States. During the trust period the Indian did not have to pay taxes on his land. However, there were no exemptions from taxes once the title had been granted. Reservation Indians were designated by the Dawes Act as "restricted" until they received their land title, at which time they became "unrestricted" Indian or full citizens. In this way it was believed that tribal structures and tribal loyalties would eventually break down and the "great reservations" would eventually be eliminated.[77] In 1924, Congress passed an Act to make all Indians citizens regardless of their "readiness for such citizenship". Such citizenship was granted independently of the allotment

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system. It was also assumed during this period that because of the rapidly declining Indian population, that the restricted Indians would eventually die off or become unrestricted Indians and therefore the "Indian problem" in the United States would be completely eliminated.[89]

That these plans did not succeed is evident from the fact that many of the Indian reservations still exist today. The numbers of Indians in 1983, are several timeswhat their numbers were in 1924. Although there have been further limitations placed on their sovereignty, the reservations remain as Indian land, owned and controlled by the tribes. Tribal self-government still exists, although in a more limited form and subject to the great paternalism of the white government administrators. The current U.S. Administration has reached the conclusion that Indians must be granted greater self-government, that is have their sovereignty increased. This is considered necessary to their survival and to their development as an independent people.

V. CONCLUSION

(a) The policy which was developed in eastern colonies by the settlers, later pursued by the British and then by the United States, was the same policy which initially developed in what is now Canada.

(b) The policy was one of recognizing the Indians as sovereign nations and treating them as such.

(c) This policy was based on realities which dictated what it was necessary to concede to implement the colonial and commercial goals and objectives of the immigrant colonists and their mother country.

(d) As Indians were weakened by disease and wars, and were overwhelmed by numbers and superior technology, these sovereign rights were gradually reduced but were never completely eliminated.

(e) Judicial decisions which emasculated Indian sovereignty were contrary to the generally accepted principles of International Law and were made to further the self-interest of the colonial masters, not to dispense justice to the Indians.

(f) All persons of Indian ancestry, who lived with or on Indian lands were treated as Indians. Neither in the United States nor in Eastern and Central Canada were people of mixed-ancestry dealt with as separate from Indians, or as having lesser rights than the Indians. (The practice of dealing separately with the halfbreeds and Metis did not develop in Canada until after 1869, for reasons we shall explore later).

(g) The principles which were applied to the Indians in the U.S. should have been applied equally in Canadian law since they both derived from early British practice and law.

This examination of Indian affairs in the United States provides the background for the next Chapter of this report, which similarly examines the development of Aboriginal policy in Canada.

FOOTNOTES

1. Cumming and Mickenberg. Supra. p. 13
2. See Calvin's Case (1608), 7 Co. Rep.; 77E R. 377; East India Company v. Sandys, 10 State Tr. 71 (K.B.); Blankard v. Galdy, Holt 341; 91E.R. 356, and Anonymous (1722), 24 E. R. 646.
3. Sir William Blackstone, Commentaries on the Laws of England. London, 1830, Vol. 1, Introduction, Paragraph IV, pp. 106-107.
4. Ibid.
5. Ibid.
6. Ibid.
7. Ibid.
8. Ibid.
9. Campbell v. Hall (1774), 98 E.R., 848 at 896.
10. Douglas, Sanders, The Legal Origins of Aboriginal Rights and The Resolution of Claims based on Aboriginal Title, Dene, Rights. Supporting Research and Documents, Volume I, Legal and Constitutional Bases for Dene Rights, p. 164.
11. Ibid. pp. 146 - 147. See also Brian, Slattery The Land Rights of Indigenous Canadian Peoples, As Affected by The Crown's Acquisition of Their Territories. Unpublished, 1979, pp. 6, 10 - 44.
12. Ibid. Slattery, p. 95.
13. Ibid.
14. Sanders, Supra. p. 150.
15. MacLeod Supra. p. 196
16. Sir Henry Jenkyns, British Rule and Jurisdiction Beyond the Seas. Oxford at the Clarendon Press, 1902, p. 4.
17. In Re: Southern Rodesia, (1919) A.C. 211. at. p.p. 233-234 See Also M. F., Lindley, The Acquisition and Government of Backward Territory in International Law. Negro Universities Press, New York, pp. 22 - 23.

18. Slattery, Supra. p. 95
19. Sanders, Supra. p. 151.
20. Slattery, Supra. p. 95
21. Ibid.
22. Ibid. pp. 95 - 96
23. Lindley, Supra. pp. 95 - 96.
24. Ibid. p. 96
25. Sir William Blackstone, Supra. p.p. 106 & 107.
26. Ibid.
27. Amodu Tijani V Secretary Southern Radisin (1921) 2 A.C. 399
28. Doug Sanders, Supra. p. 150.
29. Ibid. See also Footnotes 14 and 15.
30. Ibid. p. 152.
31. Ibid. p. 153
32. Alpheus Henry, Snow, The Question of Aborigines in the Law and Practice of Nations. Metro Books Inc., 1972, p. 126.
33. Slattery. Supra. p. 44
34. W. C. MacLeod Supra. Chpater VII-IX.
35. Ibid. p. 81.
36. Ibid. pp. 92-93.
37. Ibid.
38. Cumming and Mickenberg, Supra. Chapter 11
39. Ibid. page 85.
40. W. C. MacLeod Supra. p. 194
41. Ibid.
42. Ibid. pp. 127-128
43. Ibid. Chapter XI.
44. Ibid. pp. 188-189.

45. Ibid. p. 24

46. Ibid. pp. 17-18.

47. Ibid.

48. Ibid. pp. 395 and 403

49. Ibid.

50. Ibid. pp. 402 and 403.

51. Ibid.

52. Cumming and Mickenburg, Supra - Appendix II - The Royal Proclamation of 1763.

53. Supra. W. C. MacLeod, p. 458.

54 Ibid. p. 462

55. Ibid. pp. 464 and 465.

56. Baker Lake V. Minister of Indian Affairs and Northern Developmen

57. Ibid.

58. Ibid.

59. Marshall v. Clark (1973), Ky Rep. 77.

60. Ibid. p. 80

61. Fletcher V. Peck, U.S. (7 Cranch) 87 at pp. 142-143.

62. Johnston V. Peck, 8 Wheaton 543 at pp. 572-973

63. Ibid. p.p. 573 - 586

64. Ibid. p.p. 587 - 588.

65. Ibid. p.p. 591 - 592.

66. Sharon, O'Brien, Supra p.p. 38 & 39.

67. Ibid. p.p. 39 & 40

68. Ibid.

69. Ibid, p. 65

70. Supra. W.C. McLeod, pp. 464 - 465.

71. Ibid. pp. 467 - 468.

72. Ibid. Chapter XXXI.

73. Ibid. pp. 472-476.

74. Ibid. pp. 476-477.

75. Ibid. pp. 441-442.

76. Ibid. pp. 450-451 and pp. 536 and 532.

77. Ibid. pp. 853-854.

78. Ibid. pp. 538-539.

79. Ibid. pp. 540-544.