

**THE PRIVY COUNCIL DECISION CONCERNING
GEORGE ALLSOPP'S PETITION, 1767:
AN IMPERIAL PRECEDENT ON THE
APPLICATION OF THE ROYAL PROCLAMATION TO THE
OLD PROVINCE OF QUEBEC**

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I. PRESENTATION

1. The Legal Context to the Allsopp Decision

a) Introduction

For some time, scholars have debated whether the Royal Proclamation's provisions protecting Indian land and Indian rights apply generally to that part of the Province of Quebec within the boundaries set out for it in 1763. Currently the question is before the Supreme Court of Canada, after two recent decisions by the Quebec Court of Appeal.¹

It is my contention that this question was actually settled in 1767 by

¹ *R. v. Adams* [1993] 3 C.N.L.R. 98 and in the original [1993] R.J.Q. 1011 (C.A.); *R. v. Côté* [1994] 3 C.N.L.R. 98 and in the original [1993] R.J.Q. 1350 (C.A.). The literature on the controversy is reviewed by Baudouin J.A. in *Côté* at 106-108 and 1361-63.

the Committee for Appeals of the Privy Council, in a decision which was judicial in nature. On the Committee's recommendation, the Privy Council rejected a petition for land at Tadoussac and Chicoutimi by the merchant George Allsopp² and endorsed the Legislative Council of Quebec's decision to demolish the buildings he had erected there. The Committee relied on the Royal Proclamation's protection of Indian land to arrive at its decision.

While a number of legal scholars have discussed the Legislative Council of Quebec's decision and were aware that it was confirmed by the Privy Council,³ it was not generally known that this matter was the subject of a full hearing by the Board of Trade, with both parties represented, followed by a judicial decision by the Privy Council's Committee for Appeals.⁴ The *Allsopp* decision therefore constitutes a binding imperial law precedent.

It should be noted that insofar as the Royal Proclamation applies to all of Quebec, the controversy over whether or not the French Crown recognized Aboriginal title becomes irrelevant.⁵ Even if French public law represented a transitory failure to acknowledge this pre-existing right in Quebec,⁶ British public law makes no room for it.

This question was settled by Justice Baldwin of the United States Supreme Court in his discussion of Indian land rights in East Florida, which Britain acquired from Spain at the same time that it acquired Quebec from France:

*The proclamation of October 1763, then, must be taken to be the law of the Floridas till their cession by Great Britain to Spain in 1783, superseding during that period the laws of Spain which had been before in force in those provinces, so far as they were repugnant; and according to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign.*⁷

² In spite of the many variations in the documents, "Allsopp" is the proper spelling: David Roberts, "George Allsopp", *Dictionary of Canadian Biography*, vol. 5, 1801 to 1820 (Toronto: University of Toronto Press, 1983) 19.

³ Brian Slattery first discussed this decision in *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories* (D.Phil. thesis, Oxford University, 1979, reprinted by Native Law Centre, University of Saskatchewan, 1979) 223-24. See also: Paul Dionne, "Les postulats de la Commission Dorion et le titre aborigène au Québec: vingt ans après" (1991) 51 R. du B. 127 at 144-45; Richard Boivin, "Pour en finir avec la Proclamation royale: la décision *Côté*" (1994) 25 R.G.D. 131 at 138-39; for the English version of this article see [1995] 1 C.N.L.R. 1 at 8-9.

⁴ This is probably due to the fact that accounts of the proceedings were not published in full and even the summaries were spread over several volumes. The full text was available only in the archives and, even there, is spread over several volumes of different collections.

⁵ *R. v. Côté*, *supra* note 1 at 108-110 and 1363-65.

⁶ This is far from being clear, however. The noted historian of New France, W.J. Eccles, states categorically that "the French Crown most certainly did recognize Aboriginal title." See his essay: "Sovereignty-Association, 1500-1783" (1984) 65 Canadian Historical Rev. 475 at 475.

⁷ *Mitchel v. United States* 34 U.S. 711 (9 Pet. 711) (1835) at 748 (emphasis added).

Similarly, the Royal Proclamation is the law of Quebec and supersedes any French law which may have been incompatible with it, so as to give full recognition to Aboriginal title.

b) *Appeals to the Privy Council: jurisdiction and procedure*

The right of appeal to the Privy Council stemmed from the ancient right of every English citizen to appeal for justice to the King in Council. While the House of Lords came to be the final appellate body for Great Britain and Ireland, the Privy Council retained final appellate jurisdiction for the colonies.⁸ This combination of executive and judicial authority may appear strange today, but as Joseph Henry Smith has pointed out, "if the House of Lords is to be treated as a court, the Privy Council is not less entitled."⁹

If the Privy Council's early decisions did not come to form a well-known body of jurisprudence, that is probably a result of the fact that it issued orders, rather than judgments, and even these were often not widely published.¹⁰ Nevertheless, it heard almost 1,500 appeals from 35 different jurisdictions between 1696 and 1783.¹¹ For any decision rendered in the colonies, "no litigant could ever afford to leave out of his calculations the possibility of recourse to the Council."¹² Moreover, appeals were not just from judicial decisions, but also against those made by the governors of the colonies.¹³

From 1696 on, the role of the Privy Council became that of "a nondeliberative, formal body" which directed matters presented to it "to the proper deliberative body."¹⁴ That body was generally a standing committee known as "the Lords of the Committee for hearing appeals from the Plantations" or simply, the Committee for Appeals. It was made up of three or more members of the Privy Council and heard appeals from the colonies on which it reported its opinion.¹⁵ (Only in 1833 would membership be reserved exclusively to judges, making it the

8 John D. Palmer, *The Practice on Appeals from the Colonies to the Privy Council* (London: Saunders & Benning, 1831) at 3.

9 Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Octagon Books, 1965 ed.) at 655.

10 *Ibid.* at 660.

11 *Ibid.* at 658.

12 *Ibid.* at 661.

13 Palmer, *The Practice on Appeals from the Colonies to the Privy Council*, *supra* note 8 at 3.

14 George A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776* (New York: Columbia University Studies in Social Sciences, 1923) at 137.

15 *Ibid.* at 58.

Judicial Committee of the Privy Council known to most Canadian lawyers.¹⁶)

As for the Board of Trade, its role was the "internal administration of the colonies" but it also had "broad inquisitory powers" and the advice of the Attorney General and the Solicitor General on legal matters.¹⁷ Since "its decisions had to be given force by the Privy Council",¹⁸ an appeal would usually be decided by the Committee for Appeals, based on the Board of Trade's report to it on the questions raised by the case.¹⁹ Finally, the Privy Council infused "executive force into decisions arrived at by such bodies."²⁰

Merchants and other individuals affected by colonial acts frequently petitioned the Privy Council to review them and the matter would ultimately be referred to the Board of Trade. A "memorial in reply", filed by the colony's London agents in defence of the enactment, was standard and a formal hearing with arguments by representatives or solicitors was common.²¹

The colonial appellate system as a whole has been summarized as follows:

... The King in Council was the center of the imperial system for the control of the administration of justice. Cooperating with the Council, but always subordinate to it, were the other imperial agencies. *The whole machinery included the King in Council which registered all final actions, the committee which acted in the capacity of a court of appeals and the Board of Trade which gathered material for investigation.* The Council was at once an executive and a judicial body. In its executive capacity it could control the organization and development of the colonial judicial system and in its judicial capacity it was the court of last resort for all cases arising in colonial courts.²²

This describes the exact process which Allsopp's petition followed, being submitted first to the Privy Council, which referred the matter to its Committee for Appeals. The Committee in turn asked the Board of Trade for a report, considered that report and adopted its conclusions in its own decision, before the Privy Council finally received and endorsed the Committee's opinion by an Order in Council.

16 John D. Palmer, *A Supplement to the Practice on Appeals, from the Colonies to the Privy Council* (London: Saunders and Benning, 1834) at 5.

17 Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies*, *supra* note 14 at 70.

18 *Ibid.* at 134.

19 *Ibid.* at 138.

20 *Ibid.* at 137.

21 Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York: Columbia University, Studies in History, Economics, and Public Law, 1915) at 50-53.

22 *Ibid.* at 72 (emphasis added).

c) *An analysis of the decision*i. *The facts*

The fur trade at Tadoussac and Chicoutimi had been a monopoly since a lease was first conceded by Louis XIV of France in 1676. It would remain a monopoly granted by the Crown until the Hudson's Bay Company gave up the lease on the King's Post in 1859.²³

After the Conquest, in late 1760, Governor James Murray had to placate the "Tadusac Indians" after two of their number had been murdered by the master of a schooner from New York which had stopped on the Saguenay River. Through "the intercession of the Hurons of Lorette", Murray was able to settle the matter and negotiated what he termed a "treaty", whose terms were that "they [the Tadusac Indians] having submitted to his Majesty's Government expected his Protection and to be exempted for the future from the insults of the crews of the ships trading in the river."²⁴

From 1760 till 1762, an agent of Governor James Murray administered what came to be known as the King's Posts on behalf of the Crown, but the revenue earned was "very trifling." As a result, Murray asked for and received the Board of Trade's and the Treasury's permission to lease the Posts.²⁵ In September 1762, they were leased to Thomas Dunn and John Gray, for the purpose of "carrying on the Indian Trade and several sorts of Fishery", on a term of one year certain and 14 more years upon approval by the King.²⁶ The lease was approved by the Board of Trade in 1764, after hearing representations opposed to it made by Anthony Merry.²⁷

The Royal Proclamation had declared "that the Trade with the said Indians shall be free and open to all our Subjects whatever", provided that traders take out a licence from the Governor of their colony and respect any regulations which might be passed.²⁸ By a proclamation in January 1765, Governor Murray confirmed that the trade was now "free

and open", subject to a prohibition on trading outside of the forts or posts already established and to a requirement for traders to post a bond.²⁹

Later the same year, George Allsopp and his associates applied for permission to trade in the King's Domain and were refused, though they did receive a general licence to trade with the Indians "within the Province."³⁰ By their own admission, they immediately set off for Lac St-Jean.³¹ An agent of Dunn and Gray later swore under oath that Edward Chinn built a house "about a quarter of a Mile below the said [King's] Post at Chicoutimy" and traded there all winter. Chinn also built a dwelling house and a store house in June 1765.³²

Dunn and Gray informed the Governor and Council in May 1766 that Chinn had traded and erected buildings at Chicoutimi and planned to build more.³³ Allsopp and his associates responded with a petition, pleading "That for carrying on the said Trade Your petitioners find it absolutely necessary to have at Tadousac and at Chegoutimi aforesaid a Tract of Land whereon to build a Dwelling house, Store houses and other offices as also Land for pasturage and fire wood" and asked for a grant of 100 acres.³⁴

The Governor and Council refused Allsopp's petition.³⁵ They were in some doubt as to his right to trade at the King's Posts, since the new Receiver General had not yet arrived from England. However, they were very clear that erecting buildings was illegal and issued an order "that Messrs. Alsop & Co. should be warned & forbid at their peril to erect buildings *on the lands reserved by his Majs Proclamation to the savages within the Province*, & that they or others transgressing in such case should be prosecuted according to law."³⁶

When Thomas Mills took up office as Receiver General in July, he approved the lease of the King's Posts to Dunn and Gray. At the same time, the authorities learned that Allsopp and his associates had

23 Russell Bouchard, *Le Saguenay des fourrures; Histoire d'un monopole* (Chicoutimi-Nord: Imprimerie Gagné, 1989) at 112-14, 230.

24 General Murray to William Pitt, 1 January 1761, in Great Britain, Privy Council, *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula* (1927) vol. 7, Joint Appendix, 3234 at 3234.

25 Reproduced *infra*, II. 2. b) ii., from the National Archives of Canada, RG 11, C.O. 42, vol. 6, pp. 106-108, reel B-23, "State of the Posts of the King's domain in Canada". This document was published in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 6, Joint Appendix 2760 at 2760.

26 "Lease of King's Posts, 20 September 1762", in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 7, 3234.

27 "Dunn and Gray Request Confirmation of their Lease of the King's Posts, 21 January 1764", reproduced in *Ibid.*, vol. 7, 3240.

28 R.S.C. 1985, App. II, No. 1, Royal Proclamation (1763) 1 at 6.

29 "A Proclamation" (31 January 1765) in Canada, *Report of the Public Archives for the Year 1918* (Ottawa: King's Printer, 1920), Appendix C, 402-403.

30 *Supra*, note 24.

31 Reproduced *infra*, II. 1. b) i. from National Archives of Canada, RG 11, C.O. 42, vol. 6, pp. 100-102, reel B-23.

32 National Archives of Canada, RG 1, C.O. 42, vol. 26, p. 266-67, reel B-30, Affidavit of Peter Stuart, 8 August 1766.

33 *Supra*, note 24.

34 Reproduced *infra*, II. 1. b) iv. from National Archives of Canada, RG 11, C.O. 42, vol. 6, pp. 103-104, reel B-23.

35 *Ibid.*

36 *Supra*, note 25 (emphasis added).

continued to erect buildings,³⁷ and were selling large quantities of liquor to the Indians.³⁸

The Attorney-General made a report to the Commander in Chief in August (Governor Murray having been recalled to London³⁹) and concluded:

... I have read and considered His Majesty's Proclamation, And as it is His pleasure to reserve under his Sovereignty, protection, and Dominion for the use of the Indians all the Land and Territories called the King's Domains, possessed by the Indians and has strictly forbid on pain of His Displeasure all His Subjects from making any Purchases or Settlements whatever, or taking possession of any of those Lands without special Leave and Licence for that purpose first obtained, I am of opinion,

That the Persons, who have presumed to erect any Buildings on the said Lands, should be ordered by the Government to take down the same immediately, and carry away the Materials, And as these kind of Offences are not only very daring, but may be attended with very dangerous Consequences, which were by the Proclamation intended to be prevented, and as the continuing the Buildings, during the Course of a prosecution against the Offenders, may prove fatal, I think the Government may, on Oath being made of the Facts, legally issue a warrant[.]

In case on application and Refusal to remove the Buildings, directed to such Number of Persons as may be thought necessary to pull down the same; And in case of Opposition the persons so to be authorized may be empowered to apprehend the Delinquents, and bring them hither to be punished in the ordinary Course of Justice.⁴⁰

As a result, the Commander in Chief and Council issued a warrant to an agent of Dunn and Gray (who was also a Justice of the Peace), "To take down and remove all Buildings, which were or should be erected by Messrs Alsop & Co. their Agents, or others, on His Majesty's said Domain."⁴¹

But Allsopp and his associates obtained their own warrant from Lieutenant-Governor Carleton, newly arrived in Quebec, who suspended execution of the earlier order and recalled a party of soldiers who had been sent to carry it out. A committee of the Council was struck in October 1766, "to enquire into the present State" of the King's Posts, but the same month Lieutenant-Governor Carleton learned that "the Parties

concerned intend to Litigate the Matter."⁴²

On December 4, 1766, the Privy Council read London merchant Anthony Merry's petition, presented on behalf of himself and his Quebec City associates, Allsopp, Chinn and John Howard. The matter was then referred to the Committee for Appeals.⁴³

ii. The law

Allsopp's petition to the Privy Council turned on two provisions of the Royal Proclamation: firstly, the declaration that trade with the Indians would "be free and open" and, secondly, the reservation to the Crown of an exclusive right to acquire Indian lands.

This meant that the petition raised the two fundamental issues which Smith has identified throughout the Privy Council's colonial appellate decisions:

The central principle of appeal jurisdiction as to the American plantations becomes [after 1696] the maintenance of the royal prerogative overseas, a legal doctrine the particulars of which were well understood, but the limits of which were not defined. A second and subsidiary principle was the maintenance of the trade policies embodied in statutes and of the interests of the English merchant class.⁴⁴

In rejecting Allsopp's petition, the Privy Council clearly demonstrated just how subsidiary trade was, in comparison to the royal prerogative.

At least two distinct powers under the royal prerogative were at issue, on a careful reading of the reports by Governor Murray to the Board of Trade. The first was obviously the Crown's exclusive right to purchase Indian lands: since "the lands of the Domain ... are to all intents & purposes reserved, as hunting grounds to the savages", Murray concluded that granting them to Allsopp would "have been in direct contradiction to His Majs. Proclamation."⁴⁵

But the Governor revealed another concern: if the trade were left open, the "lower sort of people" would enter it and "in a little time almost the whole of the trade to the domain will be confined to selling spirits to the Indians", leaving them destitute. Euro-Canadians had reason to fear that, "if he [the Indian] happens to survive the misery he is by this means

37 National Archives of Canada, RG 1, C.O. 42, vol. 26, p. 262-63, Messrs. Dunn and Gray to Thomas Mills, 4 July 1766.

38 *Supra*, notes 25 and 32.

39 G.P. Browne, "James Murray", *Dictionary of Canadian Biography*, vol. 4, 1771 to 1800 (Toronto: University of Toronto Press, 1979) 569 at 576.

40 National Archives of Canada, RG 1, C.O. 42, vol. 26, p. 264, reel B-30, Geo. Suckling to Ps. Ems. Irving, 1 August 1766 (emphasis added).

41 "Memorial of Dunn and Grant, Lessees of the King's Posts, 22 October 1766", in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24 vol. 7, 3251 at 3252.

42 *Ibid*: National Archives of Canada, RG 1, C.O. 42, vol. 26, p. 336 at 337-38, reel B-30, Guy Carleton to the Lords Commissioners of Trade and Plantations, 18 October 1766.

43 James Munro, ed., *Acts of the Privy Council, Colonial Series*, vol. 5, 1766-1783 (London: His Majesty's Stationery Office, 1912) at 46.

44 Smith, *Appeals to the Privy Council from the American Plantations*, *supra* note 9 at 656.

45 Reproduced *infra*, II. 2. b) iii., from the National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 109, reel B-23 (emphasis added). The document has also been published as "State of the Posts of the King's Domain in Canada" in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 6, 2760 at 2766.

exposed to, [he] will be sure to revenge himself the first opportunity on the first of the color he meets with."⁴⁶

Murray recalled the murder of two Indians at Tadoussac and maintained that, had he not intervened and ordered restitution for their families, "it's hard to say where the vindictive spirit of these people might have carried them."⁴⁷ To the extent that they disrupted a trading monopoly which had preserved good relations between the British and the Indians, Murray viewed Allsopp's requests as an intrusion on the Crown's prerogative power to make peace with Indian nations.

The Board of Trade's report, however, reached its conclusions on somewhat narrower grounds. It left decisions on the future administration of the King's Posts to the Treasury, but concluded that the land grant asked for in Allsopp's petition was not allowed under the Royal Proclamation:

... We are of Opinion, that, whatever Right he and his associates may have derived from His Majesty's Proclamation of the 7th of October 1763 to carry on a free Trade at these Posts, (which is a Question we shall not take upon us to decide;) yet that *the erecting Buildings and Warehouses there, upon the Idea of permanent Establishment, is expressly contrary to both the Letter and Spirit of that Proclamation;* That their proceeding to carry a plan of that Sort into Execution, after they had been warned to the Contrary by proper authority, was irregular, and that the Request they now make for a Grant of Lands at the Post of Chicoutimi ought not to be complied with.⁴⁸

The Committee for Appeals agreed with this conclusion and specifically described the King's Posts as an exception to the Royal Proclamation's promise of open trade with the Indians:

... That the Petitioners had no Right, by Your Majestys proclamation of the 7th of October, 1763, to trade at the Posts of the Royal Domain at Tadoussac and Chegotimi on the River Saguenay in the province of Canada or to erect any Magazines or make any Establishment for the purpose of Trade there, and that your Majestys Right thereto ought to be considered as excluded from the general Right of Free Trade Granted by the said proclamation....⁴⁹

When both the Board of Trade and the Committee for Appeals concluded that Allsopp and his associates had no right to erect buildings in the King's Domain under the terms of the Royal Proclamation, they were endorsing the conclusion of both Governor Murray and the

Attorney-General of Quebec that those lands were reserved for Indians within the meaning of its provisions.

If the point was not made explicitly, it is because the reports on Allsopp's petition had to decide what kinds of establishments by traders were compatible with Aboriginal title, rather than the manner in which Aboriginal title could be displaced under the Royal Proclamation, in order to allow for wide-scale settlement.

Just two months later, the Board of Trade dealt with the definition of lands reserved for Indians more directly, in a report on Sir William Johnson's request for confirmation of a grant to him of 66,000 acres in the Mohawk Valley of New York. The Board of Trade held this grant under "an indisputable Indian Title" would have been illegal, had it not occurred before the Royal Proclamation's enactment:

... Your Majesty's Proclamation of the 7th of October 1763 put a more effectual Stop to the practice of an express prohibition strictly forbidding any private person to presume to make any purchase from the Indians of any Lands reserved to the said Indians within those parts of the Colonies where your Majesty had thought proper to allow Settlement, alledging it as the Ground and Foundation of this prohibition, that great Frauds and Abuses had been Committed in the purchasing Lands to the great prejudice of the Interests of the Crown and to the great Dissatisfaction of the said Indians.

...

... Had this Transaction with the Mohawk Nation for the Surrender of a Considerable Tract of Lands to a private person, without a Licence from the Crown, taken place subsequent to the proclamation above referred to, it is clear beyond a Doubt that such a proceeding would have been expressly Disallowed as Contrary to the Letter of the said proclamation....⁵⁰

This report was endorsed by the Committee for Appeals and by the Privy Council in 1769.

After a review of the literature on the application of the Royal Proclamation to the old Province of Quebec, Boudouin J.A. reached the conclusion in *Côté* that it had only a very limited effect:

In my opinion, then, it only involved Indian territory outside the colonies that already existed or were to be set up, on the one hand, and land located inside the colonies, that had been set aside previously, specifically for the Aboriginal people, on the other. The latter lands were in fact mission lands (where, in some cases, several bands were gathered together) and Indian villages set up or authorized by the French authorities.⁵¹

This interpretation is, of course, directly contradicted by the Privy

⁴⁶ *Supra*, note 24.

⁴⁷ *Ibid.*

⁴⁸ Reproduced *infra*, II. 2. c) i., from the National Archives of Canada, RG 11, C.O. 43, vol. 1, pp. 353-54, reel B-831 (emphasis added).

⁴⁹ Reproduced *infra*, II. 3., from National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 171-72, reel B-23, "Order-in Council, 26 June, 1767, Respecting the Trade of Tadoussac, etc." This document has been published in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 7, 3259.

⁵⁰ Reproduced *infra*, II. 4., from James Munro, ed., *Acts of the Privy Council, Colonial Series*, vol. 4, 1745-1766 (London: His Majesty's Stationery Office, 1911) 748 at 749, 750.

⁵¹ *Ibid.* at 107-108 and 1362-63.

Council's decision concerning Sir William Johnson's petition: the 66,000 acres were granted under "an indisputable Indian Title" by the Mohawks, and had never "been set aside previously" for them by any European power.

Reading the decisions on Johnson's and Allsopp's petitions together offers a more complete interpretation of the Royal Proclamation's injunction, "that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement."⁵²

The Royal Proclamation had forbidden settlement beyond the existing colonial boundaries – all of that territory was reserved for Indians. But there were also large areas of land reserved for Indians within the colonies where settlement was allowed, because they were held under Aboriginal title. In those areas, no settlement was allowed without the surrender of the lands to the Crown and so long as they had not been surrendered, no individual could appropriate any part of them to his use.

2. *The Legal and Historical Context to the Application of the Royal Proclamation to Quebec*

a) *Introduction*

There is nothing exceptional about the Privy Council's decision on Allsopp's petition. It is perfectly consistent with the rest of imperial law, practice and treaty-making in the late eighteenth century.

Rather, it is the notion that Quebec constitutes an exception to the principles of the Royal Proclamation which fails to understand its purpose. The Royal Proclamation represented Britain's attempt to assure the Indians in territory formerly in the French sphere of influence of continuity, both with earlier French promises to protect them in their land rights and with the Indians' understanding of French presence on their land as having required their consent.

b) *French representations to the Indians concerning land*

The French had never led the Indian nations to believe that their rights were compromised by French forts and trading posts. Instead, they tried to secure the alliance or the neutrality of Indian nations by comparing themselves with their British rivals, whose presence they

⁵² *Supra*, note 28.

insisted would threaten the Indians in the possession of their land.

The French promised to respect Indian land rights and their efforts to exclude the British from their trade areas even led the French to promise themselves as the protectors of those rights. For instance, the Marquis de la Galissonnière, governor of New France, sent the following message to the Delawares near Kittaning in the Ohio Valley,⁵³ in August 1749:

The friendship which I entertain for you, my children, despite your estrangement from me, has induced me to send to you Monsieur de Céloron to bring to you a message and induce you to open your eyes with regard to the projects which the English form on your territories. Undoubtedly you are not aware of the establishments which they propose making thereon, which tend to nothing short of your total ruin. They hide from you their idea of establishing themselves therein in such a way as to render themselves masters of that territory, and drive you away, if I should let them do so.

...

Those whom we shall bring to you will never covet your territories, either by purchase or usurpation; on the contrary, I will order them to maintain you thereon in spite of all opposition, and your interests shall be common with mine, if you behave well.⁵⁴

The Marquis de la Jonquière, Galissonnière's successor as governor, warned the Onondagas of the Iroquois Confederacy in 1751 against trading with the English:

The English are much less anxious to take away your peltries than to become masters of your lands; they labor only to debauch you; you have the weakness to listen to them, and your blindness is so great, that you do not perceive that the very hand that caresses you, will scourge you like negroes and slaves, so soon as it will have got possession of those lands.

...

I repeat that the lands on the Beautiful river [the Ohio] are to be reserved for your hunting, and you may be assured that I will aid you with all my might to drive from them all those who will trouble you there.⁵⁵

It is difficult to see what weight should be attached to a theory that "in French law as it existed at the time of the colonization, taking

⁵³ Michael N. McConnell, *A Country Between: The Upper Ohio Valley and Its Peoples, 1724-1774* (Lincoln: University of Nebraska Press, 1992) at 84.

⁵⁴ A.A. Lambing, ed., "Céloron's Journal" (1920) 29 *Ohio State Archaeological and Historical Quarterly* 335 at 356-57. The French original has been published in Pierre Margry, comp., *Découvertes et établissements des Français dans l'ouest et dans le sud de l'Amérique septentrionale, 1614-1754*, vol. 6, *Exploration des affluents du Mississippi et découverte des montagnes Rocheuses (1679-1754)* (Paris: Maisonneuve et Ch. Leclerc, 1888) 694.

⁵⁵ "Conference between the Marquis de la Jonquière and the Indians" (July 11, 1751) in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, vol. 10 (Albany: Weed, Parsons and Company, Printers, 1858) 232 at 235, 236 (emphasis added). The original of this document, in French, can be found in the National Archives of Canada, MG 1, C11A Series, vol. 97, fol. 47 to 57v, reel F-97.

possession of a territory in the name of the King of France involved true conquest, occupation, or at least, colonization in its narrow sense, hence, the transfer of full ownership of the aggregate of property and territorial rights",⁵⁶ given that in practice the French promised the Indians protection of their land rights.

c) *The Indians' understanding of the French presence on their lands*

It is clear that the Indians generally did not view the French presence on their land as posing a threat to their rights, while they viewed British expansion with considerable distrust.

For instance, the Indians who lived closest to French settlements, the "domiciled" Mohawks of Sault St. Louis (Kahnawake) and the Lake of Two Mountains (Oka or Kanesatake), near Montreal, had views similar to Galissonière and Jonquière on how the French differed from the British. In 1754, they asked representatives of other Iroquois nations:

Brethren, Are you ignorant of the difference between our Father and the English? Go see the forts our Father has erected, and you will see that the land beneath his walls is still hunting ground, having fixed himself in those places we frequent, only to supply our wants; whilst the English, on the contrary, no sooner get possession of a country than the game is forced to leave it; the trees fall down before them, the earth becomes bare, and we find among them hardly wherewithal to shelter us when the night falls.⁵⁷

Even after the French gave up their interests in North America to the British at the end of the Seven Years War, the impact of their arguments lingered. Open warfare broke out in the Upper Ohio Valley and Lower Great Lakes when the British assumed that, simply by virtue of the Treaty of Paris with France in 1763, they could enter Indian lands.

The Indian nations taking part in what became known as Pontiac's War particularly resented the British taking over the French forts. They both denied their right to do so and feared the new British presence was merely the precursor to a larger attempt to take over their lands.⁵⁸

After open hostilities had ceased, at a meeting with deputy Indian superintendent George Croghan in August 1765, "the Chiefs of several Nations who are settled on the Ouabache" (the Wabash River) made their views clear to him as to their land rights:

⁵⁶ R. v. Côté, *supra* note 1 at 109 and 1363.

⁵⁷ "Secret Conference held by the Oneidas, Kaskarens and Cayugas with our domiciled Indians at Montreal, on the 23d [Octo]ber, 1754" in O'Callaghan, *Documents Relative to the Colonial History of the State of New York*, *supra* note 55, vol. 10, 267 at 269 (emphasis added). The original of this document, in French, can be found in the National Archives of Canada, MG 1, C11A Series, vol. 99, fol. 385 to 392v, reel F-99.

⁵⁸ Jack M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775* (Lincoln: University of Nebraska Press, 1961) at 65-66.

They then spoke on a Belt & said Fathers, every thing is now Settled, & we have Agreed to your taking possession of the Posts in our Country. We have been informed, that the English where ever they settle, make the Country their own, & you tell us, that when you Conquered the French, they gave you this Country. That no difference may happen hereafter, we tell you now the French never Conquered neither did they purchase a foot of our Country, nor have they a right to give it to you, we gave them liberty to settle for which they always rewarded us & treated us with great Civility while they had it in their power, but as they are become now your People, if you expect to keep those Posts, we will expect to have proper returns from you.⁵⁹

This understanding of French actions was shared by Indians outside of the Upper Ohio Valley and Lower Great Lakes area, even those very close to Montreal. The Missisquoi Abenaki spoke in similar terms to Governor Murray of Quebec and Governor Clinton of New York when the two met in September 1766 to discuss the boundary between the two colonies:

Brethn.

We are going to finish with a Remonstrance something similar but if possible more urging than the foregoing [an earlier speech by the Mohawks]. We the Misisqui Indns. of the Abinaquis or St. Johns Tribe have inhabited that part of Lake Champlain time unknown to any of Us here present without being molested or any ones claiming any Right to it to our Knowledge, Except abt. 18 Years ago the French Govr. & Intend. came there & viewed a Spot convenient for a Saw mill to facilitate the building of Vessells & Batteaux at St. Johns as well as for building of ships at Quebec and on the Occasion convened our People to ask their Approbation, when accordingly they consented & marked out a Spot large enough for that purpose for the cutting of Saw Timber abt. 1/2 League square, with the Condition to have what Boards they wanted for their own use, gratis, but on the Commencement of last War, said Mill was deserted and the Ironwork buried, after which we expected that every thing of the kind hereafter would subside....⁶⁰

The Indians considered the French presence on their land to be by virtue of a right of occupancy which they had granted and they were not willing to accept British assertions that those rights had been transferred without their consent.

⁵⁹ "Croghan's Official Journal", May 15, 1765-September 25, 1765, in Clarence W. Alvord and Clarence E. Carter, eds., *Collections of the Illinois State Historical Library vol. 11, The New Régime, 1765-1767* (Springfield, Ill.: Illinois State Historical Library, 1916) 38 at 47-48 (emphasis added). Croghan was trying to negotiate the arrival of British soldiers at Fort Chartres.

⁶⁰ "An Indian Conference [Isle a la Mote, Sept. 8-9, 1766]" in Milton W. Hamilton, ed., *The Papers of Sir William Johnson*, vol. 12 (Albany: The University of the State of New York, 1957) 172 at 173 (emphasis added). The fixing of the Quebec-New York boundary at the 45th parallel would ultimately leave the Missisquoi Abenaki in what became the State of Vermont. See: *State v. Elliott* 616 A.2d 210 (Vt. S.C., 1992), cert. denied, 113 S.Ct. 1258 (1993).

d) *The Royal Proclamation as Britain's response to Pontiac's War*

When the Board of Trade drafted the Royal Proclamation it was an attempt to end Pontiac's War by removing the grounds for Indian fears of imminent dispossession.

The most pressing problem in the fall of 1763 was restoring the British alliance with the natives broken by the Indian uprising under Pontiac earlier that year. Halifax [the Secretary of State] was hopeful that the "Measures of Equity and Moderation" contained in the proclamation would accomplish this by restraining "unjust Settlement and fraudulent Purchase of Indian lands" and suppressing "unfair Practices in the trade."⁶¹

British concerns about the Indian uprising were not restricted to the Upper Ohio Valley and Lower Great Lakes, where the fighting in Pontiac's War actually took place, but included the old Province of Quebec. The Indian Superintendent for the Northern Department, Sir William Johnson, and General Thomas Gage, commander of the British forces in North America, took very seriously rumours that war belts had issued from the Kahnawake Mohawks in 1761 and 1762.⁶² Johnson also worried, in 1761, about a Seneca ambition to create an alliance of "all the Indians from the Baye of Gaspie [sic] to the Illinois."⁶³

Governor Murray had decided to maintain the French policy for the King's Domain at Tadoussac, namely, that in return for exclusive trading rights, the lessee-merchants had to supply the Indians with food in time of need and were limited in the amount of liquor they could sell. Just months after the fighting in Pontiac's War had reached its height, this policy was credited with the decision by the Indians there to remain peaceful:

He [Murray] has by this means, conciliated the minds of the Savages to his Government, in so much, that when an [sic] universal revolt appears to have been entered into, by all the other Indians nations in North America those immediately under his jurisdiction, have not only remained faithful and peaceable, but when earnestly solicited to join the disaffected Tribes, they firmly declared they had no wish to change their Masters, as they had at no time before, met with better Treatment or more Justice, than since the English have been in possession of Canada.⁶⁴

Thus the context of the Royal Proclamation of 1763 – and of all Indian policy in the period – was Britain's concern to maintain peace with the Indian nations in the entire former French sphere of influence,

61 Sosin, *Whitehall and the Wilderness*, *supra* note 58 at 65.

62 Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) at 276, n. 13.

63 McConnell, *A Country Between*, *supra* note 53 at 172.

64 "Memorial to the Lords, Commissioners of the Treasury by Richard Murray, John Gray & Thomas Dunn" (21 January 1764) in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 7, 3242 at 3243 (emphasis added).

not just in the Lower Great Lakes and Ohio Valley where the fighting in Pontiac's War took place, but also in the Province of Quebec.

e) *Recognition of Aboriginal title to lands in British diplomacy and colonial policy*

While the Royal Proclamation constituted British recognition of Aboriginal title in imperial law, the Indian nations also forced the British to recognize explicitly by treaty that the French had not extinguished Aboriginal rights in the lands described in the Treaty of Paris.

On August 24, 1766, Croghan met with the chiefs and principal warriors including Pontiac himself, representing the four nations of the Illinois confederacy, as well as the Miamis, Seneca, Delaware and Shawnee.⁶⁵ The eight nations agreed on a peace and also on a treaty of alliance with the British, as Croghan reported to General Gage:

... I have now the Pleasure of Acquainting you, That I ratified and Confirmed a Peace, with the Several Nations on the following Terms.

...

Thirdly They Agreed, That His Britannick Majesty's Troops might, when ever they thought proper, Occupy such Posts, where the French had before, or make others; for the Security of Trade wheresoever His Majesty Judged best.

Fourthly They Agreed, that they had sold Lands to the King of Fra[n]ce to erect Forts or Posts on, and also Land to his Subjects; for all which, they had received a consideration. That these Lands they Agreed, the King of France had a right to cede to the King of Great Britain. -- But denied, That He had any right to cede any other party of their Country, to his Britannick Majesty. -- And to prove, The truth of their Allegations, they referred, to several Treaties, between then [sic] and the King of France's Officers since, their first entering their Country, as then deposited in Fort Chartres.⁶⁶

Thus the formal end to Pontiac's War required a formal British acknowledgment of Indian title where the French had previously been the dominant European power.

This recognition quickly became an organizing principle of British colonial policy. At the end of 1767, Sir William Johnson reported to the Board of Trade on conditions in the Northern Department of the Indian Superintendency. He described the effect of the defeat of the French by the British:

... They [the Indians] called themselves a free people who had an Independant Title to the Lands which were their Ancient possessions, that the

65 Howard Peckham, *Pontiac and the Indian Uprising* (Detroit: Wayne State University Press, 1994 ed.) 280-83.

66 "Croghan to Gage" (16 January 1767) in Alvord & Carter, *Collections of the Illinois State Historical Library* vol. 11, *supra* note 59, 487 at 490 (emphasis added).

French by ceding Canada, according to the Words of the Treaty granted what was not in their power to give, their Outposts and distant possessions being only held of them, not by conquest, but by favor, that if they admitted our Right to the posts we conquered, the Country was still theirs, and in fact it is most certain that the French never spoke to them in any other Stile, as Sensible as I presume of the consequences it might have [been] with regard to their Interests, So that whatever Words are usually made use of respecting their Expressing Submission, Subjection &ca, are only to be understood as in Compliance w[i]th Form and custom the latter having no Just Idea of such Expressions, and calling themselves no more than our Friends and Allies, their Treatys, Submissions, Cessions &ca literally implying no more and whoever should undertake to go farther on the Subject with them must have a good Army at his back to protect him from their resentment, --⁶⁷

Johnson was reiterating that for the British, recognition of Indian land rights in the former French sphere of influence was essential to maintaining peace.

f) *The consistency of Governor Murray's analysis with British policy*

Governor Murray's analysis of the rights of the Indians at Tadoussac is therefore neither unusual nor unique to himself, but perfectly consistent with the policy the British had adopted since at least 1763. He wrote to the Board of Trade in 1767:

The Lands of the King's domain were never ceded to nor purchased by the french King, nor by his Britannick Majesty; But, by Compact with the savages inhabiting the said Lands, the particular Posts or spots of ground, whereon the Kings buildings are erected and now stand, were ceded to the french King, for the purpose of erecting storehouses & other conveniences for the Factors Commis or Servants employed to carry on the trade.... The Lands of the Domain therefore, are to all intents & purposes reserved, as hunting Grounds to the savages, of which they are very jealous on the least appearance of an encroachment even amongst themselves. With what propriety therefore, could the Governor have complyd with Mr. Alsops petition for grants of Land there, would it not have been in direct contradiction to His Majs. Proclamation?⁶⁸

Governor Murray applied to the Province of Quebec the principle that French presence in North America was based on the consent of the Indians and that their underlying title remained unaffected; the legal statement of this principle was the Royal Proclamation.

⁶⁷ Sir William Johnson, "Review of the Trade and Affairs in the Northern District of America", 22 September 1767, in Clarence W. Alvord and Clarence E. Carter, eds., *Collections of the Illinois State Historical Library*, vol. 16, *Trade and Politics, 1767-1769* (Springfield, Ill.: Illinois State Historical Library, 1921) 24 at 34 (emphasis added).

⁶⁸ Reproduced *infra*, II. 2. b) iii., from the National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 109, reel B-23 (emphasis added). The document has also been published as "State of the Posts of the King's Domain in Canada" in Great Britain, Privy Council, *In the Matter of the Boundary*, *supra* note 24, vol. 6, 2760 at 2766.

g) *The Indians' understanding of the application of the Royal Proclamation to Quebec*

It is noteworthy that the Montagnais themselves understood the importance of the Royal Proclamation very well. Some eighty years after the Allsopp decision, their own petition was presented to the Governor-General of Canada by the Member of Provincial Parliament for Saguenay. He wrote in an accompanying letter that the Montagnais right to their land was confirmed by Article 40 of the Articles of Capitulation of Montreal in 1760,⁶⁹ but continued:

A subsequent proclamation of His Majesty George III, issued in 1763, gives them a [] guarantee of the possession of their hunting [grounds?]. The Indians consider this [Proclamation?] to be their charter!⁷⁰

The "domiciled" Mohawk, Algonquin, Abenaki and Huron, repeatedly reminded colonial authorities that the Royal Proclamation merely reiterated promises made to them earlier. The speech by Akwesasne Mohawk leaders from 1769, relied upon by the Court as proof of the Treaty of Swegatchy in *Côté*, began by recalling that treaty, but concluded:

You will likewise remember that in Spring 1764 you [Sir William Johnson] ordered your Deputy, to publish & explain to us *His Majestys most gracious Proclamation of Oct. 1763 confirming & securing to us our Possessions & Hunting grounds* when at the same time you desired to collect our still dispersed People to their respective Nations & Villages.⁷¹

Similarly, the representatives of the various domiciled Indian nations in 1766 said to Governor Murray of Quebec and Governor Clinton of New York:

Brothers;

Having at the same time heard, that you were to ascertain and fix the Boundaries between your respective Provinces, we saw it a very proper and

⁶⁹ See: "Articles of Capitulation, Montreal" in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759-1791*, part I (Ottawa: King's Printer, 1918) 7 at 20.

⁷⁰ The text I have inserted in square brackets replaces a portion of this letter which is missing because a corner of the page was torn off. "Pétition de M. de la Terrière, M.P.P., Montagnard Indians of Saguenay (1846)" in Anne-Marie Panasuk and Jean-René Proulx, "La résistance des Montagnais à l'usurpation des rivières à saumon par les Euro-Canadiens du XVIIe siècle au XXe siècle" (M.Sc. thesis, Université de Montréal, 1981) 396 at 399, reproducing National Archives of Canada, RG 10, vol. 122, p. 5790 at 5792, reel C-11841.

My translation of:

Une proclamation subséquente de sa Majesté George trois, émanée au mil sept cent soixante trois leur donne une [] garantie pour la possession de leurs [terres?] à chasse. Les Sauvages considèrent cette [Proclamation?] comme leur chartre!

⁷¹ "A Meeting with the Aughquisasnes [Sault St. Louis alias Caghnawagey, Aug. 21, 1769]" in Alexander C. Flick, ed., *The Papers of Sir William Johnson*, vol. 7 (Albany: The University of the State of New York, 1931) 109 at 109-110, cited in *R. v. Côté*, *supra* note 1 at 114 and 1367 (emphasis added).

Convenient opportunity to return the great King of England our Father our most humble Thanks through you for *having most graciously taken Notice of all Indian Nations, their Lands, & Trade in America in his Royal Proclamation of October 1763*; which our friend & brother Sir William Johnson had then published to us by his Deputy Capt. Claus & we most heartily Request of you to support and Protect us in the same, as our hunting grounds lay chiefly in your two Governments.

A large Belt of black Wampum.⁷²

In reply, the governors told them:

Brothers;

As we are persuaded that you will not be wanting on your Parts to merit that Protection which has been granted to you by the British Crown, we shall always discourage every attempt made in our respective Provinces of New York and Quebec to disturb you in these Rights and Privileges, which have been confirmed to you & shall endeavor, by every means, to promote a Mutual Confidence and good Understanding in the Seven Confederate Indian Nations;⁷³

It is difficult to understand why a treaty for which no text is available protects the hunting rights of the Algonquins whose ancestors lived at Oka, but not the Royal Proclamation,⁷⁴ even though their ancestors invoked it as the recognition of their rights, without contradiction by the colonial authorities and just a few years after it had been enacted.

h) The comparison with East Florida and West Florida

The Privy Council's decision on Sir William Johnson's petition for approval of a grant of land in the Mohawk Valley of New York demonstrates that even in colonies where settlement was allowed, the Royal Proclamation protected land held under "Indian Title" generally,⁷⁵ and not merely lands which "been set aside previously"⁷⁶ for Indians.

But, in addition, it should be recalled that two new southern provinces were established in North America by the same provision of the Royal Proclamation which established Quebec. East Florida took in lands claimed by Spain since the sixteenth century, and West Florida took in that part of French Louisiana lying east of the Mississippi. Treaties, the historical record and the case law for the Floridas all plainly contradict the suggestion that in these new North American provinces,

72 "At a Meeting of a Deputation from the Seven Confederate Indian Nations in the Province of Quebec with their Excellencies the Governors of New York & Quebec in the North End of Lake Champlain the 8th September 1766", in the National Archives of Canada, MG 11, C.O. 42, vol. 26, p. 278, reel B-30 (emphasis added).

73 *Ibid.* at p. 280.

74 *R. v. Côté*, *supra* note 1 at 109, 117 and 1363, 1370.

75 *Supra*, note 50.

76 *R. v. Côté*, *supra* note 1 at 107-108 and 1362-63.

the Royal Proclamation protected only those lands "that had been set aside previously, specifically for the Aboriginal people" by the old colonial power.

In fact, the British had to recognize Aboriginal land rights immediately in the former French colony of West Florida. Governor George Johnstone and the Superintendent of Indian Affairs for the Southern Department, John Stuart, reported to London:

The facts were, when we came to the province, our boundary with the Creeks was confined to the little brook which surrounded this town [Pensacola], at a distance of three hundred yards; with a prohibition of any goods being sent into that nation from this province, under the penalty of death. *The former inhabitants on the east side of Mobile, had been threatened with destruction, if they did not remove from the land which the Creeks said had only been lent to the French.*⁷⁷

The first grant of land by the Indians occurred less than a year after the enactment of the Royal Proclamation, in September 1764, when the Creeks ceded a few square miles to the commander of the post at Pensacola.⁷⁸

When Governor Johnstone and Stuart held a congress with the Choctaws and the Chickasaws in March 1765, the Governor began his address by reading the provisions of the Royal Proclamation which prohibited settlements on their lands.⁷⁹ That meeting resulted in the Treaty of Mobile, by which the Choctaws and Chickasaws agreed to a northern boundary for British settlement and ceded all of their land to the south.⁸⁰

A similar treaty was negotiated with the Creeks two months later, though Johnstone and Stuart reported that the land grant was "not all which we could have wished being only about fifteen miles back [from the sea], which does not reach the rich soil...."⁸¹ Another treaty ceding land was agreed on with the Creeks in 1765 at Pensacola, and with the Choctaws at Mobile in late 1771 and early 1772.⁸²

As for East Florida, at a meeting with the Creeks in Apalachie, in September 1764,⁸³ John Stuart told them:

77 Great Britain, Public Record Office, C.O. 5-582, p. 187, as cited in Louis De Vorsey, *The Indian Boundary in the Southern Colonies, 1763-1775* (Chapel Hill: University of North Carolina Press, 1966) 206 (emphasis added).

78 *Ibid.* at 205-207.

79 *Ibid.* at 208.

80 *Ibid.* at 209-210.

81 *Ibid.* at 214-15.

82 *Ibid.* at 220-23.

83 John Richard Alden, *John Stuart and the Southern Colonial Frontier; A Study of Indian Relations, War, Trade, and Land Problems in the Southern Wilderness, 1754-1775* (Ann

*I sent into your nation a copy of the Kings royal instructions to his governors concerning your lands, which you may be assured will be strictly observed, nor shall they [the English] any where be settled beyond the limits established at the late Congress [at Augusta, Georgia in November 1763] without your consent.*⁸⁴

A treaty with the Creeks, both to seal a peace and for a cession of land, was negotiated by John Stuart and Governor James Grant of East Florida at Fort Picolata in November 1765.⁸⁵ A historian notes that "by this treaty there was gained for settlement a little piece of East Florida in its northeast corner, ridiculously small in comparison with the total area of the province on the map."⁸⁶

East Florida also provides an example of proceedings similar to the *Allsopp* decision: in 1774, a warrant was issued for the arrest of a former legislative councillor who had violated the prohibition on the purchase of Indian lands in the Royal Proclamation. Jonathan Bryan had leased land from the Creeks outside of the area ceded for settlement, apparently by deception. He fled to Georgia, but an agent he later sent to confirm the lease was also arrested.⁸⁷

The treaties between East and West Florida and the Creeks were ratified at a congress with representatives of the Creek confederation as a whole at Augusta, Georgia in November 1768, where a southern boundary line was confirmed. In a report to the King, the Board of Trade endorsed the treaties and noted that their effect was "that the Lands in the Colony of West Florida ceded to your Majesty by the lower Creek Indians, shall be distinguished and separated from the Lands reserved to them for their use, as their Hunting Grounds."⁸⁸

Several decades later, Justice Baldwin of the United States Supreme Court took note of the same treaties.⁸⁹ In *Mitchel v. United States*, he had to deal with a controversy over title to land in east Florida, derived from grants by the Creek and Seminole Indians. Justice Baldwin had no hesitation in applying the provisions of the Royal Proclamation to find a general Aboriginal title existed in the Floridas.

Arbor: University of Michigan Press, 1944) at 198.

84 Great Britain, Public Record Office, C.O. 5-66, p. 3, as cited in De Vorsey, *The Indian Boundary in the Southern Colonies*, supra note 77 at 188 (emphasis added).

85 *Ibid.* at 191-95.

86 Charles Loch Mowat, *East Florida as a British Province, 1763-1784* (Berkeley: University of California Press, 1943) at 21-23.

87 *Ibid.* at 88-90, 93-94.

88 "Representation of the Board of Trade to the King upon Sir William Johnson's Treaty with the Indians" (25 April 1769) in O'Callaghan, *Documents Relative to the Colonial History of the State of New York*, supra note 55, vol. 8, 158 at 161. Identical language was used to describe the effects of the Creek cession of land to East Florida.

89 *Mitchel v. United States*, supra note 7 at 749.

He concluded:

*It is clear then that the Indians of Florida had a right to the enjoyment of the lands and hunting grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorise. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority.*⁹⁰

If the Royal Proclamation reserved and secured a general Aboriginal land right when it created the provinces of East and West Florida, it must have done the same when creating the Province of Quebec.

i) *The purpose of the Quebec Act*

The boundaries which the Royal Proclamation of 1763 established for Quebec applied to the colony for only eleven years. From the passage of the *Quebec Act* in 1774 till peace with the United States in 1783, the Province of Quebec extended to the Mississippi. Until the creation of Upper Canada in 1791, Quebec continued to include present-day southern and central Ontario.

There is no doubt that the Royal Proclamation's provisions concerning unceded Aboriginal land applied to the lands the Province of Quebec gained by the *Quebec Act*. Detroit was a predominantly French-Canadian community of some 321 families in 1782, with 8,723 arpents of cleared land under cultivation.⁹¹ Yet the Lieutenant-Governor of Quebec informed its residents that because the Royal Proclamation required purchases from the Indians to be ratified by the Governor, the lands they farmed were a "temporary indulgence" and not a grant.⁹²

After the Treaty of Paris of 1783 between the United States and Britain, Governor Haldimand instructed the Lieutenant Governor that he could not allow immediate settlement by Loyalist refugees in the Windsor region:

*It will be expedient that Mr. McKee [Deputy Superintendent-General of Indian Affairs] should explain to the Indians the nature and intention of the precautions the King has taken to prevent their being iniquitously deprived of the Lands, and that they formally, in council, make over to the King, by deed, the tract in question, for the purpose they wish.*⁹³

90 *Ibid.* at 748-49 (emphasis added).

91 "A Survey of the Settlement of Detroit Made by Order of Major De Peyster the 16 Day of July 1782 [South Shore Only]" in Ernest J. Lajeunesse, ed., *The Windsor Border Region; Canada's Southernmost Frontier, A Collection of Documents* (Toronto: Champlain Society, 1960) 68 at 73, 74. An arpent is roughly equal to one acre.

92 Lieutenant-Governor Hamilton to General Haldimand, Detroit, 9 September 1778, in *Ibid.* at 67.

93 Haldimand to Hay, Quebec, 14th August 1784, in *Ibid.* 159 at 159-60.

Similarly, the Land Board for the Judicial District of Hesse (including present-day Windsor) could not issue certificates to settlers until land had been ceded to the Crown by the Huron Indians in 1790.⁹⁴

On legal principles, surely the easiest way to explain why the Royal Proclamation applied to Aboriginal lands added to the Province of Quebec in 1774, is to conclude that they had also applied to the Province within its 1763 boundaries. The *Quebec Act's* restoration of French private law could not contradict the Royal Proclamation's recognition of Aboriginal title,⁹⁵ since the Act had no effect on any title to land:

III. Provided always, and be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise howsoever, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in Force, and have Effect, as if this Act had never been made.⁹⁶

In fact, the Imperial Parliament's intention in extending Quebec's boundaries was not to derogate from Indian rights, but to preserve them, according to a defence of the *Quebec Act* published shortly after its passage, by the Under-Secretary of State for the American Department. According to a leading historian, William Knox provided "probably the most authoritative statement" on the purposes of the Act, the "one which most closely corresponded with the thinking of the ministers."⁹⁷

The statute's first purpose, Knox wrote, was "the extension of the boundaries of the province."⁹⁸ This had become necessary because, while the small French-Canadian communities at Detroit, Michilimackinac and in the Illinois country accepted rule by the military with the purpose of discouraging further settlement, the same was not true elsewhere:

In such parts of this *pays deserte* [sic] as lay more contiguous to the prescribed limits of the old colonies, and where there were no military posts kept up, the effects were very different. Emigrants in great numbers flocked thither from other colonies, took possession of vast tracts of country without any authority, and seated themselves in such situations as pleased them best. As no civil jurisdiction reached these intruders upon the King's waste, and as

94 "Introduction" in *Ibid.* at cix; see also "Indian Deed of Present Southwestern Ontario to King George III, May 19, 1790" in *Ibid.* 171.

95 This seems to have been Baudouin J.A.'s suggestion when, following his discussion of the theory that Aboriginal title did not survive French régime public law, he held that "passage of the *Quebec Act*, in 1774, established juridical continuity of the ownership and civil law systems between the French colonizer and his British counterpart: it did not break with the former system." See: *R. v. Côté*, *supra* note 1 at 110 and 1364.

96 R.S.C. 1985, App. II, No. 2, 14 George III, c. 83 (U.K.), s. 3.

97 Sosin, *Whitehall and the Wilderness*, *supra* note 58 at 247.

98 [William Knox], *The Justice and Policy of the Late Act of Parliament for Making More Effectual Provision for the Government of the Province of Quebec* (London: [n.p.], 1774) at 18.

their numbers increased every day, insomuch that *the native savages, in dread of their power, quitted these lands*, and removed to others at a greater distance....

That the mischief might not, however, farther extend itself, and the like reasons for erecting new colonies at a still greater distance from the sea coast may not again recur, *the whole of the derelict country is, by the first clause of the act, put under the jurisdiction of the government of Quebec, with the avowed purpose of excluding all further settlement therein*, and for the establishment of uniform regulations for the *Indian trade*.⁹⁹

Thus, far from constituting an exception to the principles of the Royal Proclamation, the jurisdiction of the old Province of Quebec was seen as the best guarantee that the principles would be respected and that Indian title would be protected. This was the reason for extending Quebec's boundaries in 1774.

3. Conclusion

The Privy Council applied the Royal Proclamation's provisions concerning lands reserved for Indians to the old Province of Quebec when it refused Allsopp's petition asking for a grant of land on Lac St-Jean. The Royal Proclamation had forbidden settlement beyond the existing colonial boundaries, reserving all of that territory for Indians. But, within the colonies where settlement was allowed, there were also large areas of land reserved for Indians, held under Aboriginal title. In those areas, the decision on Sir William Johnson's petition for confirmation of a grant to him by the Mohawks makes it clear that no settlement was allowed without the surrender of the lands to the Crown, while the *Allsopp* decision held that so long as they had not been surrendered, no individual could appropriate any part of them to his use.

The Royal Proclamation of 1763 and British Indian policy generally in the late eighteenth century were based on the need to maintain peace with the Indian nations in the former French sphere of influence, not just in the Lower Great Lakes and Ohio Valley where the fighting in Pontiac's War took place, but also in the Province of Quebec.

The French had never led the Indian nations to believe that their rights were compromised by forts and trading posts. But they did warn them that the British would threaten them in their land rights. French efforts to exclude the British from their trade areas even led the French to promise themselves as the protectors of those rights.

The Indians considered the French presence on their land to be by virtue of a right of occupancy which they had granted. They viewed

99 *Ibid.* at 19-20 (emphasis added).

British expansion with considerable distrust and were not willing to accept British assertions that French rights had been transferred without their consent.

By the Royal Proclamation, the British recognized Aboriginal title in imperial law, but the Indian nations also forced them to recognize explicitly by treaty that the French had not extinguished Aboriginal rights in the lands described in the Treaty of Paris. This recognition was essential to maintaining peace.

The Indians of Quebec themselves repeatedly invoked the Royal Proclamation as the official recognition of their rights, without contradiction by the colonial authorities, in the years which followed its enactment.

The reports by Governor Murray which the Board of Trade relied on for its decision applied to the Province of Quebec the principle that French presence in North America was based on the consent of the Indians and that their underlying title remained unaffected; the legal statement of this principle was the Royal Proclamation.

Further support for the principle that the Royal Proclamation reserved and secured a general Aboriginal land right in Quebec is offered by its clear application to the provinces of East and West Florida, created out of former French and Spanish colonies respectively, at the same time as the Province of Quebec.

Similarly, the Royal Proclamation's provisions concerning unceded Aboriginal land applied to the lands the Province of Quebec gained by the *Quebec Act* in 1774. The historical record indicates that its boundaries were extended because, far from constituting an exception to the principles of the Royal Proclamation, the jurisdiction of the old Province of Quebec was seen as the best guarantee that the principles would be respected and that Indian title would be protected.

II. THE DOCUMENT

1. The Privy Council

a) The petition is referred to the Committee for Appeals¹⁰⁰

May 11, 1767

At the Council Chamber Whitehall

By the Right Honourable the Lords of the Committee of Council for Plantation Affairs

His Majesty having been pleased to refer unto this Committee the Memorial of Anthony Merry of London Merchant on behalf of himself George Allsopp, Joseph Howard and Edward Chinn Merchants and Inhabitants of His Majestys Province of Canada in North America,¹⁰¹ setting forth the Injuries they have sustained by being prevented from establishing a Trade with the Indians of a place called the Kings Posts of Tadousac and Chegotimi on the River Saguenay in that Province, And humbly praying that His Majesty will be graciously pleased to grant them an Order for liberty to dispose of such Goods as they have sent up to the said Posts or a Royal Mandate for a Grant of such Lands as are mentioned in a Petition presented by them to Governor Murray (a Copy whereof is annexed to this their present Petition¹⁰²) or to be otherwise relieved in the premises. The Lords of the Committee in Obedience to His Majestys said Order of Reference, this day took the said Petition and papers thereto annexed into consideration, and are hereby pleased to refer the same to the Lords Commissioners for Trade and Plantations, to hear the Petn. upon the Merits of the said Petition, and Report their Opinion

b) The petition and supporting documents are read¹⁰³

i. The petition to the Privy Council

To the Kings Most Excellent Majesty in Council.

The Humble petition of Anthony Merry of London Merchant in behalf of himself George Allsopp Joseph Howard and Edward Chinn Merchants

¹⁰⁰ Source: National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 100, reel B-23.

¹⁰¹ The Privy Council itself read London merchant Anthony Merry's petition on December 4, 1766 and then referred it to the Committee: James Munro, ed., *Acts of the Privy Council, Colonial Series*, vol. 5, 1766-1783 (London: His Majesty's Stationery Office, 1912) at 46.

¹⁰² See *infra*, II. 1. b) iv.

¹⁰³ Source: National Archives of Canada, RG 11, C.O. 42, vol. 6, pp. 100-104, reel B-23.

and Inhabitants of Your Majestys province of Canada in North America Sheweth.

That ever since the said provinces Submitted to your Majestys arms your petitioners have been Considerably Engaged in many Different Branches of Commerce both to and from the said province, but as the Trade that has (and might be more extensively) carried on with the Indians, at what has been called the Kings posts of Tadousac and Chegotimi on the River Saguenay in the neighbourhood of Lake St. John always appeared to them to be by much the most beneficial part of the Commerce of that province (not only by obtaining peltries from the Indians upon Reasonable and beneficial Terms but by Greatly augmenting the Consumption of British Manufactures and Increasing the Revenues of the Crown), they hoped from your Majestys most Gracious Proclamation of the 7th. of Octr. 1763 to have the free Benefit of that Branch of Commerce but to their great Concern & Surprize they found that all the Emoluments of such lucrative a Trade were Granted and Confined to particular persons for a Certain Term of Years.

That your Petioners deemed such a monopoly to be not only injurious to them but many more of Your Majestys Loyal and most faithful Subjects and inconsistent with the True Commercial Interest of Great Britain, they in the year 1763 and again in the year 1765 (joined by almost all the Considerable Traders to and from that part of Your Majestys Dominion) presented a memorial to the Honble. Board of Trade, and to your Majesty Complaining of the Hardships of such a Monopoly & praying that the said Commerce might be laid open and made free to any person that might think proper to engage therein.

That on the 31st January 1765 his Excellency General Murray, Governor of the province, issued out a proclamation in your Majestys name Declaring the trade from those parts to be free open to all such person as Chose to engage therein which Immediately encouraged Your petitioners to load a Vessell with sundry merchandize, provide Canoes, and every thing necessary & proper for carrying on said Trade then after obtained his Excellency the governors pass for that purpose, one of your petitioners having built a shed or warehouse for the reception of their Goods and the Traders and at a very considerable Expence Established themselves, gained the Indians to their Interest and made a settlement on Lake St. John they were Alarmed by the Annexed Notices and prohibition from prosecuting their plan, from Major Mills in Quality of Majestys Receiver General and another order for pulling down their warehouse from the president and Council.

Your petitioners likewise annex a petition presented by them to his

Excellency the Governor for the Grant of a Tract of Land whereon to Build a House, warehouse &ca that the Indians might come on their Land to Traffick, in order to Remedy by that Means the mischief & Inconvenience that must attend the prohibitions again taking place after having been opened only just long Enough for your pets. and others to Engage in such Traffick at a Considerable Expence in sending in Goods which if they are not permitted to Dispose of must occasion a very great Loss to them, which petition was absolutely rejected by the Governor without any reasons given for such Refusal; Therefore Your Petitioners most humbly pray your Majesty, to grant them an order for Liberty to dispose of such Goods as they had sent up, or Your Majestys Royal Mandate for a Grant of such Lands as are mentioned in the annexed petition, or such other relief as Your Majesty may think adequate to the Injury they sustained and in petitioners as in Duty Bound shall we pray

Anthy. Merry

ii. *Letter from T. Mills, Receiver General of Quebec*

(Copy)¹⁰⁴

Sirs

His Majesty having been pleased to appoint me Receiver General of the province of Quebec and amongst other Things given me the Charge of His Domain and Estate in Canada, and as it will be impossible for me to get to Quebec so early as may be necessary for the proper regulating of that part of His Domain commonly known by the Name of the Kings posts or Tadousac and its Dependancy agreeable to my Instructions on that Head, and as I am informed that you act as Receiver General in said province for the time being by Order of His Excellency Governor Murray, I am hereby to Direct and Require you upon no pretence whatever to allow any person to go to the said Ports of Tadousac and the Dependancy to Trade with the savages resorting thereto except those who are possessed of the Lease Granted by Governor Murray and should any Person have presumed to interfere or meddle with that part of His Majestys Estate before this comes to your Hand, I do hereby Charge you to represent the same to the Governor and Council, and to Demand on behalf of His Majesty that the said persons who have offered to Interfere (if any) may be warned of their Danger, and should permission have been Given by the Govr. and Council that the same may be Instantly withdrawn and these posts Conducted on the antient plan by reinstating

104 Certified to be a true copy in the original.

the Leasseees in the full Enjoyment of their Lease agreeable to the Tenor thereof until his Majestys Further pleasure is known

I am Sir

Your most hble servt.

Thos. Mills

Receiver General of the province of Quebec

London, 21st March 1766

To Richard Murray Esq.

Acting as Receiver General at Quebec

iii. Resolution of the President and Council of Quebec

(Copy)¹⁰⁵

Council Chamber Friday 8th. Augt. 1766

Present

The Honourable Paulus Emilius Irving Esq. President of the Council
Commander in Chief of the province

And

A Quorum of His Majestys Council

Resolved that an order be immediately sent to Mr George Allsop to cause take down and carry away the materials of the Houses by him Erected on the Kings Domain, being Land possessed by the savages contrary to his Majestys proclamation behest and the fifteenth day of october next, if Mr. Allsopp does not comply with said order within the time before mentioned

Resolved that a Warrant be granted to Peter Stuart Esq. one of his Majestys Justices of the peace to take down and Remove said Buildings

By Order of the Commander in Chief in Council

*iv. The petition to the Governor and Council of Quebec
and their response¹⁰⁶*

To His Excellency The Honourable James Murray Esq., Governor of the province of Quebec &c &c &c and To the Honble the Members of His

¹⁰⁵ Certified to be a true copy in the original; "Directed on the back to Mr. George Allsopp, Quebec."

¹⁰⁶ Certified to be a true copy in the original.

Majestys Council of the said province

The petition of Anthony Merry Merchant in London George Allsopp Joseph Howard and Edward Chinn Merchants and Inhabitants of the said province

Sheweth

That Your Petitioners under the Sanction of His Majestys proclamation of the 7th of October 1763 and of Your Excellencys proclamation of the 31st January 1765 have been at a great Expence and trouble in Establishing a Trade with the Indians at Chegoutimi on the River Saguenay in the Neighbourhood of the Lake of St. John and have also penetrated farther up that Country within the Limits of the said province in order to induce the Inland Indians to come down & traffick away their peltries which will not only lend to the Emolument of all that are or may be inclined to be Concerned in the said Trade but greatly Augment the Consumption of British Manufactures and also add Considerably to the Revenues of the Crown

That for carrying on the said Trade Your petitioners find it absolutely necessary to have at Tadousac and at Chegoutimi aforesaid a Tract of Land whereon to build a Dwelling house, Store houses and other offices as also Land for pasturage and firewood

Therefore Your petitioners humbly pray that Your Excellency & Honours will be pleased to order a Grant to be made out for your petitioners for a Tract or Tracts of one hundred acres of his Majestys unappropriated Lands at Chegotimi aforesaid for the purposes above mentioned under the Usual Restrictions and Limitations agreeable to his Majestys Instructions

And Your petitioners shall pray &c

Quebec 30th May 1766

Council Chamber Quebec, 7th June 1766

Present

His Excellency the Honble Ja. Murray Esq. Govr.

And

A Quorum of His Majestys Council

Read the above petition

refused

(Signed) Ja: Murray

2. *The Board of Trade*

- a) *The petition is referred to the Board of Trade by the Appeals Committee*¹⁰⁷

May 22, 1767

Read an Order of the Lords of the Committee of Council, dated 11th instant, referring to the Board, for their report, a memorial of Mr. Anthony Merry of London, merchant, in behalf of himself and others, relative to the injuries they have sustained by being prevented from establishing a trade with the Indians at the King's posts of Tadoussac and Chegotimi.

Ordered, that the said reference be taken into consideration on Tuesday next, and that the Secretary do write to Governor Murray, desiring the favour of his attendance at the Board on that day.

- b) *The hearing*

- i. *The record*¹⁰⁸

May 26, 1767

Their lordships took into consideration the reference of Mr. Merry's petition, mentioned in the minutes of the 22nd instant, and Governor Murray attending was called in, and laid before the Board a state of the King's post of domain in Canada and the proceedings of government there, in respect thereto, after which, Mr. Merry having been heard in support of his petition, it was ordered, that the draught of a report thereupon to the Lords of the Committee of Council should be prepared.

- ii. *Governor Murray's report to the Board of Trade on the State of the Posts of the King's Domain*¹⁰⁹

State of the Posts of the Kings Domain in Canada, with an abstract of the proceedings relating thereto since the reduction of that Country

¹⁰⁷ Source: *Journal of the Commissioners for Trade and Plantations from January 1764 to December 1767 Preserved in the Public Record Office* (London: His Majesty's Stationery Office, 1936) at 391.

¹⁰⁸ Source: *Ibid.* at 392.

¹⁰⁹ Source: National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 106-108, reel B-23. This document was published as part of "State of the Posts of the King's Domain in Canada" in Great Britain, Privy Council, *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula* (1927) vol. 6, Joint Appendix 2760 at 2760.

The Posts of the Kings domain vizt. Tadoussac, Islets de Jeremie, Chicoutimy and Sept Isles situated on the north side of the River St. Lawrence were during the french Government under the immediate management of the Director thereof who was appointed to that charge by the Governor & Intendant of Canada. He furnished them at the Kings expence with the merchandize & effects proper for the Indian Trade or fisherys which were carried on at these Several Posts, and received from thence likewise upon the Kings account the furs, oyl fish or other produce of the same. They had formerly been farmed but the lease expiring in 1756 they were advertised and no-one bidding for them on account of the war the Intendant lest the Savages should quit their usual haunts ordered them under the beforementioned direction, which continued until our arrival altho the expence far exceeded the produce. When they were let out to farm the highest rent paid for them under the french Government was 7000 livres or £291.13.4 Str.

After the reduction of Canada in 1760 The Indians of the Domain deputed their Chief & Missionary to adress General Murray in their favour, & represented to him that they were in the utmost misery & distress Since the Conquest, destitute of provision & every necessary, begging that they might be taken under the protection of His Britannick Majesty and supply'd & maintained in the same manner they had been in the time of the French.

The General after enquiring into the nature & establishment of the Domain, reported a State of it to General Amherst who ordered it to be continued on the same footing as formerly, and an Agent or Director was appointed to supply them with merchandize &ca. & to receive the returns on the Kings Account. An Officer & Party was also ordered to the Posts to preserve order & prevent abuses & irregularity. In the year 1762 when the Accounts of the Domain were made up after a two years supply the clear Revenue arising to His Majesty appeared to be very trifling, which the General reported to the Board of Trade & to the Treasury, and recommended the letting them out to farm as the most advantageous measure for the public. He received in answer that he might dispose of them as he should judge most expedient. They were accordingly let out at lease to those who offered the highest price vizt. £400 p. annum. The terms of this lease were that the Leasees should enjoy the Posts of the Kings Domain for one year certain commencing from the first day of October 1762, and for fourteen years if no orders to the Contrary should arrive from Great Britain, and if such contrary orders should not arrive before the month of June in the next or any of the subsequent years, that the Leasees should enjoy the same until the first of October in the year following. The General reported his proceedings in this behalf to the

Boards of Trade & Treasury for their approbation but received no answer at that time.

(7 Octr. 1763)¹¹⁰ His Majesty was pleased to issue His Royal Proclamation signifying his pleasure with regard to North America and enjoining that the Trade with the Indians described therein might be free & open to all His Subjects.

(31 Janry. 1765) Genl. Murray issued a proclamation in consequence of that of the King last mentioned setting forth that hostilities were now ceased with the several Indian nations who had lately appeared in arms against His Majesty and a friendly intercourse between His Majestys Subjects & them thereby restored, declaring that the trade with the several Indian nations living under his Protection was free and open to all His Subjects under the restrictions mentioned in said Royal Proclamation.

The General having been doubtful whether the Kings Domain in Canada & the lease thereof granted on behalf of His Majesty was or was not affected by the Kings Proclamation as no express mention was therein made of the same, had reported his thoughts on that subject to the Board of Trade and received for answer in general terms that the fate of the Posts of the Kings Domain was determined by the said Royal Proclamation of 7th. Octr. 1763.

(9 March 1765) Several merchants in Quebec misunderstanding the purport of the Kings Proclamation (as the Leasees apprehend) apply'd to the Governor & Council for liberty to Trade to His Majestys Domain. The Leasees did not conceive their Lease to be in any respect invalidated by the Royal Proclamation but rather strengthened as they apprehended the Proclamation could only be understood to give His Majestys American Subjects a free passage over his ungranted & unleased Lands which yield him no profit, but by no means to destroy such leases as produced a considerable annual rent to His Majesty and thereby render the lands so leased of no advantage to His Revenue; But as said Leasees had very considerable property at stake which by laying open the Domain would be greatly injured, and in order to gain time until His Majestys further pleasure should be known they Represented their case to the Governor & Council praying that they might be supported in their possession until the last day of September following. In council it was resolved that as their request appeared highly just & reasonable an Advertisement should be inserted in the Quebec Gazette forbidding all persons from interrupting them in their Trade to the Domain under any

110 The dates inserted here in parentheses appear in the margin in the original.

pretext whatever until the last day of August following which was giving sufficient time for any Traders to avail themselves of the same for the succeeding year if the Domain should finally be laid open.

(Octr. 1765) Messrs. Alsop Chinn & Co. Apply'd to Government for a special permission to trade with the Indians of the Domain in particular. The General on this occasion equally as tender of Injuring the Individuals concerned in the Lease by any Act of his, as zealous to comply with the letter of the King's Proclamation Granted to Messrs. Alsop & Co. a general permission to trade with the Indians within the Province in conformity to the same.

(21 March 1766) Thomas Mills Esquire upon his appointment to the Office of Receiver General for the Province of Quebec being among other things charged with the Superintendancy of the Kings Domain & Estates in Canada to receive the rents & Revenues thereof and to enquire into the state & nature of the lease of the Posts of the Domain granted as before mentioned by General Murray and to report thereon, wrote to the Acting Receiver General for the time being, directing him to apply to the Governor & Council to support the Leasees in the uninterrupted possession of their Lease until His Majestys pleasure should be further known.

(2 June 1766) The Acting Receiver General in conformity to the above directions laid Mr. Mills's letter before the Council & joined the Leasees at same time in representing that Messrs. Alsop & Co. had prepared two vessels laden with materials for Building on the Domain contrary to the spirit & meaning of the Kings Proclamation, praying that such proceedings might be prevented and that the Leasees might remain in peaceable possession agreeable to the tenor of their lease. In consequence of the aforesaid Representation the Governor & Council altho they did not consider Mr. Mills's letter to the Acting Receiver General as of sufficient authority to forbid any persons but the Leasees from trading to the Domain, ordered that Messrs. Alsop & Co. should be warned & forbid at their peril to erect buildings on the lands reserved by His Maj's Proclamation to the savages within the Province, & that they or others transgressing in such case should be prosecuted according to law.

(July 1766) The Receiver General arrived from England, and having examined into the state of the Kings Domain & the lease thereof granted, and finding that Mr. Alsop & Co. still persisted in erecting Buildings thereon to the great hurt of the Leasees and detriment of the Kings Revenue notwithstanding the notice that had been given them, moved the Governor & Council to reconsider the case & grant protection to the Leasees who had on their parts in every respect fulfilled the conditions of

the Lease, begging it might be made known to all His Maj's subjects that the Posts of the Domain were by no means laid open & that all other Persons whatsoever might be strictly forbid to trade thereto. At same time an Affidavit of Mr. Peter Stuart a Justice of the peace residing at the Posts as Agent for the Leasees, was laid before the Council setting forth, that Messrs. Alsop Chinn & Co. had tradeD with the Indians of the Domain, supply'd them with quantitys of spirits the preceeding winter which kept them idle instead of hunting as usual for their support & rendered it dangerous to reside at the Posts & that they actually had erected buildings there contrary to the King's Proclamation & the orders of the Governor & Council, and further that Mr. Chinn had declared he did not value the Orders of the governor & Council and would proceed with his buildings.

(15 August 1766) The Honble Paulus E. Irving, Esqr. Commander in chief & President of the Council for the time being taking the matter further into consideration with consent & advice of the Council ordered a Warrant to issue to said Mr. Peter Stuart authorising him to take down & remove all Buildings which were or should be erected by Messrs. Alsop Chinn & Co., their agents or others on His Majestys Domain and a Party of men was dispatched to see the warrant put in execution.

(9th October 1766) Lieut. Governor Carleton being arrived, Application was made to him by Messrs. Alsop Chinn & Co., requesting a suspension of the Warrant granted by Col. Irving to take down & remove their Bbuildings, which suspension was granted and another Party of men sent to recall the other, and to put Messrs. Alsop Chinn & Co. into possession with free liberty to trade with the Indians of the Domain.

I do certify the above to be a true state of the case.

Ja: Murray

As Messrs. Alsop Chinn & others may have complained of the Posts being farmed as a measure detrimental to the Trade of the Province and may have insinuated that their being laid open would occasion a greater consumption of British manufactures. It may not be improper here to remark

That the Country those Indians inhabit being altogether incapable of Cultivation and the hunting season lasting but for about six months of the year, they are reduced to almost an entire dependance the rest of the time on the supplys brought them by the person farming the Posts. It is well known that all Savage people are naturally indolent and calculate only

for the present moment, and were they indulged at pleasure with spirituous liquors to which they are unconquerably addicted, and which the introducing a general trade among them must inevitably occasion from the natural competition that would arise among contending adventurers they would in a few days perhaps often in a few hours consume the whole produce of their years labour, and on the approach of the rigorous winter finding themselves wives & children naked destitute & exposed to all the miserys of that climate would wreck their vengeance indiscriminately on the first Europeans of other white people they met as the immediate authors of their misfortune. To prevent these impending Consequences which were seen & proved by many Examples to be inseparable from the plan of laying the Posts open, The french who more than any other nation seem to have studied the temper and Genius of the Indians, adopted this plan of farming out the Posts & it is plain they succeeded in it. Clerks or Factors were established at the different Posts to supply the savages with what their necessitys reasonably required, rates were fixed for the Trade. When an Indian family came to a Post, whether they had been successful in their hunting or had nothing to exchange, they were always supplied with necessarys until the chance of the hunt should enable him to pay, and in the case of sickness or Death their wives & orphans were maintained & supported until capable to provide for themselves. This created the strongest tyies of Gratitude friendship & interest in both Partys. The Indian was spurr'd to industry & eagerly pursued the most probable means of obtaining wherewith to repay his Benefactor & to fit himself & family out anew for another season. The Merchant farming the Posts, his Agents or Factors on the other hand were bound by interest to supply the Indian; to keep him sober & support him in distress as the only means to recover his property, for if the poor savage is abandoned in the hour of want, or dyes by means of intoxication, as he leaves no property behind him so the Merchant loses his Debt. By this friendly intercourse, by this fatherly treatment of the Indians, which the French have alwise found it their interest to practice and encourage, The Indians saw the exchange or Traffick they made with the eyes of sober reflection, looked forward with joy for the returning season of meeting with the Trader whom they considered as their Father friend and Benefactor, were pleased upon a re-view of their past Transactions, and formed in the course of them such an attachment to the Trader & the nation to which he belonged as neither time, change of power, the Address of the English, nor any other consideration could efface. The proof of this is undeniable in the late troubles when the[y] massacred almost every English subject they could lay hands on, and at

same time allowed the French Canadian Traders not only a free access as their friends, but were by their interposition prevailed on to release or ransom such of the Prisoners as were alive when they came to a Parley at the late affair of Michilimackinac. By this System of management the affections of the Indians were also secured to the Crown without any expence to Government besides a clear revenue arising to the King. By laying them open every the lowest of the people whose Credit may extend to a cask of spirits will have access to them & take advantage of their simplicity. All those salutary purposes above mentioned will be frustrated, for it is irreconcilable to reason & the nature of things, that it can consist with the Interest of any individual to keep large storehouses with quantities of provisions & merchandize for the supply of the Indians without being assured of the produce of their hunting to pay the expence which cannot be while he is liable to be robbed of his returns by the first stranger who is wicked enough to intercept the Indian on his way to his Post & by alluring him with liquor deprive the Indian of a future Credit. And yet without such a sure & permanent resource of a fixed storehouse, the savages must often perish in numbers from mere want, so that in a little time almost the whole of the Trade to the Domain will be confined to selling spirits to the Indians which from the contiguity of the Posts to the Inhabited parts of the Province will be utterly impossible to hinder the lower sort of people from carrying among them. The Indian who has thus invested his produce, Glutted himself with liquor, & on the return of reason sees himself & his family naked & abandoned, now destitute of the resource of a certain Credit he formerly was sure of in all circumstances, will naturally inveigh against the man he has been injured by, and if he happens to survive the misery he is by this means exposed to, will be sure to revenge himself the first opportunity on the first of the color he meets with. Hence murders, rapine and devastation must ensue. An instance has already happened by a New England Vessel putting into these Posts since we have been in possession of the Country when several Indians were murdered, and had it not been for the timely interposition of the General who with trouble got them soothed & ordered a recompence to the suffering families of the Indians who were killed, it's hard to say where the vindictive spirit of these people might have carried them. On the whole it is plain that instead of encreasing the Consumption of manufactures as may be pretended, the sure & inevitable consequences that must follow the measure of laying the Posts open, will be fatal in their immediate Effects, will depopulate the country and end in almost the total extirpation of these unhappy people in a few years time, will bring the present consumption of manufactures to nothing & by losing the people will follow a total loss of Returns to Britain.

The above remarks coincide entirely with my Notions and Opinions of the Matter in Question.

Ja. Murray

iii. *Governor Murray's letter to the Board of Trade*¹¹¹

May 26, 1767

My Lords

The Lands of the King's domain were never ceded to nor purchased by the french King, nor by his Britannick Majesty; But, by Compact with the savages inhabiting the said Lands, the particular Posts or spots of ground, whereon the Kings buildings are erected and now stand, were ceded to the french King, for the purpose of erecting storehouses & other conveniences for the Factors Commis or Servants employed to carry on the trade; and the savages residing within the Limits of the Domain, & who resort to the said Posts of His Majesty at certain seasons of the year, were adopted as Domiciled Indians under the sole & immediate protection of the King, & so remained till the reduction of the Province, & a Missionary was sent to reside constantly among them. The Lands of the Domain therefore, are to all intents & purposes reserved, as hunting Grounds to the savages, of which they are very jealous on the least appearance of an encroachment even amongst themselves. With what propriety therefore, could the Governor have complyd with Mr. Alsops petition for grants of Land there, would it not have been in direct contradiction to His Maj's. Proclamation? & I flatter myself the contempt he has shown to the said Royal Proclamation, & his Maj's. Government, will be far from entitling him to the favor he claims from the Kings servants here. I must further add that this man has been the author of all the disputes, factions, & jealousies which have taken place, since the establishment of civil government in the Colony, and I firmly believe his Enterprise to these Posts was with a view to augment the same, he being the only man who attempted it corroborates this opinion.

I have the honor to be with great Truth and Regard

My Lords your Lordships most obedient, and most humble Servant,

Ja. Murray

¹¹¹ Source: National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 109, reel B-23. This document was published as part of "State of the Posts of the King's Domain in Canada" in Great Britain, Privy Council, *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula* (1927) vol. 6, Joint Appendix 2760 at 2766.

c) *The Board of Trade's Decision*i. *The report*¹¹²

June 2, 1767

To the Right Honourable the Lords of the Committee of His Majesty's most Honourable Privy Council for Plantation Affairs.

My Lords,

Pursuant to your Lordships Order of the 11th of May, we have taken into our Consideration the Memorial of Anthony Merry of London Merchant, in behalf of himself, George Alsopp, Joseph Howard, and Edward Chinn, Merchants and Inhabitants of His Majesty's Province of Canada in North America, setting forth the Injuries they have sustained by being prevented from Establishing a Trade with the Indians at a Place called the King's Posts of Tadousac and Chegotimi on the River Saguenay in that Province; and humbly praying that His Majesty will be graciously pleased to grant him an Order for Liberty to dispose of such Goods, as they have sent up to the said Posts, or a Royal Mandate for a Grant of such Lands as are mentioned in a Petition presented by them to Governor Murray on the 30th of May 1766, or to be otherwise relieved in the Premises: whereupon we beg leave to Report to your Lordships,

That we have thought it our Duty upon this Occasion to call upon His Majesty's Governor of Quebec, now residing here, for such Information, as he might be enabled to give us respecting the State of these Posts, and his Conduct and Proceedings in regard thereto.

The Report, which His Majesty's Governor has made to us (a Copy whereof is hereunto annexed)¹¹³ will fully inform your Lordships of the nature of these Posts; of the Regulations under which the Trade there has been carried on; and of the Grounds and Reasons upon which those Regulations were founded; and upon a full Consideration of this Matter and of all that has been offered by Mr. Merry in Support of his Petition, we are of Opinion, that, whatever Right he and his associates may have derived from His Majesty's Proclamation of the 7th of October 1763 to carry on a free Trade at these Posts, (which is a Question we shall not take upon us to decide;) yet that the erecting Buildings and Warehouses there, upon the Idea of permanent Establishment, is expressly contrary to both the Letter and Spirit of that Proclamation; That their proceeding to carry a plan of that Sort into Execution, after they had been warned to the Contrary by proper authority, was irregular, and that the Request they

¹¹² Source: National Archives of Canada, RG 11, C.O. 43, vol. 1, pp. 351-55, reel B-831.

¹¹³ See *supra*, II. 2. b) iii.

now make for a Grant of Lands at the Post of Chicoutimi ought not to be complied with.

As to the Request that they may have Liberty to dispose of such Goods as they have sent to these Posts, it is a matter which must finally depend upon the Question, whether the said Posts are, or are not, to be continued upon the Plan of their original Establishment as part of the Royal Domain. If His Majesty shall, upon the advice of the Commissioners of His Treasury, before whom this Consideration now lies, be induced to continue them upon that Plan, we think it will be just and equitable, that this Society of Merchants should be permitted to sell and dispose of such Goods and Merchandize as were actually and bonâ fide lodged and deposited there upon their account, antecedent to the Resolution of the Governor and Council of the 8th of August 1766, annexed to their Petition; with an Exception however to all spirituous Liquors of every kind, the unrestrained Supply of which to the Indians has been found to be attended with the most pernicious Effects.

ii. *Endorsement*¹¹⁴

June 3, 1767

Their lordships took into further consideration the reference of the petition of the Society for the propagation of the Gospel in foreign parts... and the draught of a report to the Lords of the Committee of Council thereupon having been prepared, was agreed to, transcribed and signed; as were also reports to the Lords of the Committee of Council upon the petition of Mr. Merry, relative to the King's posts in Quebec....

3. *The Decision of the Committee for Appeals and its Approval by the Privy Council*¹¹⁵

At the Court at St. James's

the 26th Day of June 1767

Present

The Kings Most Excellent Majesty in Council

¹¹⁴ Source: *Journal of the Commissioners for Trade and Plantations from January 1764 to December 1767 Preserved in the Public Record Office* (London: His Majesty's Stationery Office, 1936) at 393.

¹¹⁵ Source: National Archives of Canada, RG 11, C.O. 42, vol. 6, p. 171-72, reel B-23. This decision is reproduced as "Order-in-Council, 26 June, 1767, Respecting the Trade of Tadoussac, etc." in Great Britain, Privy Council, *In the Matter of the Boundary Between the Dominion of Canada and the Colony of Newfoundland in the Labrador Peninsula* (1927) vol. 7, Joint Appendix 3258 at 3259.

Whereas there was this Day read at the Board, a Report from the Right Honourable the Lords of the Committee of Council for Plantation Affairs dated the 12th. of this Instant in the Words following, vizt.

Your Majesty having been pleased by your Order in Council, of the 3rd of December last to Referr unto this Committee the humble Petition of Anthony Merry of London Merchant, in behalf of himself, George Allsopp, Joseph Howard and Edward Chinn Merchants and Inhabitants of your Majestys Province of Canada in North America, Setting forth, amongst other things, that in Consequence of your Majestys Royal proclamation of the 7th of October 1763, and of another proclamation issued in Your Majestys Name, by his Excellency General Murray, Governor of Quebec, on the 31st Day of January 1765, the petitioners were encouraged to load a Vessel with sundry Merchandize provide Canoes, and every thing necessary and proper for carrying on the Trade with the Indians at a place called the Kings posts of Tadousac and Chegotimi on the River Saguenay in the Neighbourhood of Lake St. John, and having built a Shed or Ware-house for the Reception of their Goods, and at a very considerable Expence established themselves gained the Indians to their Interest and made a Settlement on Lake St. John they were prohibited from prosecuting their Plan by your Majesty's Receiver General and the president and Council of Quebec, and humbly praying that your Majesty will be graciously pleased to grant them an Order for Liberty to dispose of such Goods as they had sent up or your Majestys Royal Mandate for a Grant of such Lands as are mentioned in a Petition presented by them to Governor Murray, or to be otherwise relieved in the Premises. The Lords of the Committee in Obedience to your Majesty's said Order of Reference this Day took the said Petition together with a Report made thereupon, by the Lords Commissioners for Trade and Plantations, dated the 2nd. of this Instant into their Consideration and do agree humbly to Report to your Majesty as their Opinion, That the Petitioners had no Right, by Your Majestys proclamation of the 7th of October, 1763, to trade at the Posts of the Royal Domain at Tadoussac and Chegotimi on the River Saguenay in the province of Canada or to erect any Magazines or make any Establishment for the purpose of Trade there, and that your Majestys Right thereto ought to be considered as excluded from the general Right of Free Trade Granted by the said proclamation and ought to be carried on only by your Majestys Lessees under your particular Licence for that Purpose, and that the Buildings and Magazines Erected at the said posts by the petitioners should be demolished, And that the Goods sent there by the petitioners be returned to them notwithstanding the manner in which they conveyed them thither. And their Lordships humbly submit

to your Majesty, that the said Petition of Anthony Merry and others should be dismissed.

His Majesty taking the same into Consideration, was pleased with the Advice of His privy council, to approve thereof, and to order, as it is hereby ordered, that the Buildings and Magazines Erected at the said posts by the Petitioners, be demolished, and that the Goods sent there by the petitioners be returned to them. And it is hereby further ordered that the said petition of Anthony Merry and others be Dismissed this Board. Whereof the Governor, Lieutenant Governor or Commander in Chief of His Majestys province of Quebec for the time being, and all others whom it may concern are to take notice and Govern themselves accordingly.

4. *Appendix: The Report on Sir William Johnson's Petition to Confirm his Grant of Land in the Mohawk Valley, New York (1767)*¹¹⁶

May 12, 1767

[Reference to the Committee, and by them on 8 July to the Board of Trade, of]¹¹⁷ the Memorial of Sir William Johnson Bart. -- His Majesty's sole Agent and Superintendant of Indian Affairs of the Northern district of North America, and Colonel of the Six United Nations, their Allies and Dependants &c. humbly praying for the reasons therein contained, that his Majesty will be graciously pleased to grant to him and his Heirs a certain Tract of Land on the North side of the Mohawk River, to which the Memorialist has an indisputable Indian Title, to confirm him in his Rank, to augment his Salary as Superintendant of Indian Affairs in such manner as to enable him to support the Expence thereof, to grant him a Recompence for his Pay as an Officer, and for the money he has advanced for the Publick Service, or to relieve him in such other manner as His Majesty in his great Wisdom shall judge most fit.

16 May 1767

[The Committee refer back to the Board of Trade their report of 20 Feb. for further information upon the authenticity of the grant made to Sir William Johnson, and whether any of the lands lie within the parts reserved to the Indians by the proclamation of 7 Oct. 1763, or by any compact with the Indians.]

¹¹⁶ Source: James Munro, ed., *Acts of the Privy Council, Colonial Series*, vol. 4, 1745-1766 (London: His Majesty's Stationery Office, 1911) 748 at 748-51.

¹¹⁷ Text in square brackets is in square brackets in the transcription cited and represents a summary by its editors.

August 26, 1767¹¹⁸

[On the Committee report of 24 Aug., the grant is confirmed and the Attorney and Solicitor General ordered to prepare the draft of an instrument for the purpose. The Board of Trade reported] That with respect to the first of these particulars wherein the Memorialist Solicits Your Majesty's Bounty for conferring upon him and his Heirs the Grant of a Tract of Land lying on the North side of the Mohawk River near Canajoharee the Memorialist sets forth that this Grant was bestowed upon him by a Deed from the whole Mohawk Nation in Testimony of their Friendship for him, for which he then paid them before Witnesses one thousand two hundred pieces of eight and that the expences of Surveying and of some Presents since made to the Indians amount to as much more

That before the said Lords Commissioners proceed any further in stating the several Circumstances that seem particularly to distinguish the Case of Sir William Johnson, they observe,

That there are certain General objections which have always been understood to take place against the practice of private persons obtaining Grants and Concessions of Lands from the different Tribes and Nations of Indians; a proceeding which the policy and Experience of all times have agreed to look upon in a very unfavourable Light, in as much as the many fraudulent and irregular Courses that have been taken for inducing the Savages to alienate and dispose of large Tracts of Land have been found not only highly injurious and offensive to them, but of very prejudicial Consequences to the Interest of the Crown, as well as those of the particular provinces within whose Limits such Grants have been obtained, and in no province have these Inconveniences been more sensibly felt than in that of New York;

That upon these reasons it was founded as a principle, That no Subject should purchase Grants of Lands from the Indians, and this Doctrine in General obtained throughout the Provinces till Your Majesty's Proclamation of the 7th of October 1763 put a more effectual Stop to the practice of an express prohibition strictly forbidding any private person to presume to make any purchase from the Indians of any Lands reserved to the said Indians within those parts of the Colonies where your Majesty had thought proper to allow Settlement, alledging it as the Ground and Foundation of this prohibition, that great Frauds and Abuses had been Committed in the purchasing Lands to the great

118 For ease of reading, paragraph breaks have been inserted into this text.

prejudice of the Interests of the Crown and to the great Dissatisfaction of the said Indians.

That having thus stated the general Objections and Impediments which stand in the way of Grants of Land obtained by purchase from the Indians, the said Lords Commissioners proceed to Consider the Case in Question by which it may be more clearly distinguished how far it is or is not affected by the Circumstances above Stated and consequently the Committee be better able to judge what Degree of Favour and Attention is due to this Branch of the Memorialists petition

Had this Transaction with the Mohawk Nation for the Surrender of a Considerable Tract of Lands to a private person, without a Licence from the Crown, taken place subsequent to the proclamation above referred to, it is clear beyond a Doubt that such a proceeding would have been expressly Disallowed as Contrary to the Letter of the said proclamation, it seems therefore in the first place necessary to premise that this Grant being obtained previous to the date of that proclamation and the Lands in Question not lying within these Territories which not being ceded to, or purchased by the Crown, are by the above proclamation reserved to the Indians, and all Settlement thereon expressly Disallowed, no absolute Deprivation or disability can result to the Petitioner from the Terms and provisions of your Majesty's Proclamation,

That upon these Grounds it is the petitioner finds what he Terms in his Memorial an indisputable Indian Title to the Grant in Question; not a Title obtained (as has been commonly the Case) by bace and fraudulent means, or which can be supposed to be productive of Illwill and Dissatisfaction to the Indians, not a Clandestine or partial purchase from a few deluded Savages, not specially empowered for such Purchases, but a free voluntary and general Concession made by the whole Mohawk Nation in Testimony of their Friendship and Esteem for his person.

That the Established Character and Reputation of Sir William Johnson leave no room to doubt of the Veracity of his relation of this matter as above Stated, and in this light it does not appear to the said Lords Commissioners that the Grant in Question can properly come under the description of a purchase, since the Money which the petitioner alledges that he paid to the Indians who bestowed these Lands upon him seems not so much to have been considered as an equivalent by way of Bargain as a Customary present regularly expected by them in acknowledgment even of their most disinterested Benefactions

That as the peculiar Nature of Sir William Johnsons Connections with these Indians and the extraordinary Degree of Influence which he is

known to have over them, may well account for this Mark of their Friendship and favour to him, so this Consideration not only exempts his particular Case from those general Objections that are found in the apprehension of prejudicial Consequences resulting from Dissatisfaction of the Indians, but leaves a Doubt whether on the Contrary they would not probably Consider themselves as suffering an Indignity and Affront by a Disallowance and refusal of their Grant,

That the Grant in Question does appear both by the returns of the said Lords Commissioners have received from your Majesty's governor of New York, as well as from the Survey made by Sir William Johnson to Amount to Sixty six thousand acres of Land, a larger portion than has been usually allotted professedly to any one Individual; To this Consideration they should naturally oppose the eminent Merits of the petitioner in the publick Service if they were not already too well known to need any particular Recapitulation or Description; They will undoubtedly have their due weight and Influence, and when taken into Consideration jointly with the Circumstances above related the Committee will then have everything before them that can direct their Judgments in this matter, according to which it will be for the Committee to determine what advice it may be expedient to give to your Majesty relative to this Article of Sir William Johnsons Memorial.¹¹⁹

...

That as to the Recompence which he is entitled to for his acting in a Military Capacity without pay, and which seems to be the only Circumstance which properly falls under your Majesty's Consideration, the said Lords Commissioners are inclined to think, that as Sir William Johnson has already received a parliamentary Bounty of five thousand pounds, if Your Majesty shall be pleased to bestow upon him the Grant of Lands above mentioned, such a Mark of Your Majesty's Favour may well be Considered by the Memorialist as an ample and sufficient Compensation for all such Arrears and Deficiencies on Account of his pay as in justice it may be incumbent on the Crown to make good.

3 May 1769

[The instrument is approved in accordance with a report of 24 April from the Committee, to whom the draft was referred on 14 April.]

¹¹⁹ The Board of Trade's report on the next two points of Johnson's petition - "to confirm him in his Rank, to augment his Salary as Superintendent of Indian Affairs in such manner as to enable him to support the Expence thereof" - is omitted.

THE HIGH COURT OF AUSTRALIA UPHOLDS THE FEDERAL NATIVE TITLE ACT AND REJECTS RACIST STATE LEGISLATION

Richard H. Bartlett*

On March 16, 1995 the High Court of Australia handed down its decision in the consolidated cases of the *State of Western Australia v. The Commonwealth of Australia*, *The Wororra Peoples v. The State of Western Australia*, *Teddy Bilajbu and Others (the Martu people) v. The State of Western Australia*.¹ The cases concerned the challenges to legislation passed to provide for the protection, dealings in, and extinguishment of Aboriginal title (hereinafter called 'Native title' in accordance with Australian usage). The State of Western Australia² had enacted the *Land (Titles and Traditional Usage) Act* (the "WA Act") on December 2, 1993 which provided for the extinguishment of all surviving Native title throughout the State, and the substitution of 'rights of traditional usage' (section 7) of subordinate and inferior status and protection. The Commonwealth of Australia had enacted the *Native Title Act* on December 24, 1993. It sought to provide for the protection of and dealings in Native title in accordance with the standard of "equality before the law" mandated by the *Racial Discrimination Act 1975*.

The State argued that Western Australia's history of settlement was unique in the common law world and had extinguished Native title throughout the State and accordingly the *Native Title Act* was inapplicable in the State. The High Court unanimously rejected the argument. An inordinate amount of the written and oral argument before the High Court was taken up with the State arguments relating to

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¹ Publication of the High Court's Reasons for Judgment is forthcoming in the Commonwealth Law Reports.

² The State concerned is Western Australia. The Constitution of the State was adopted in 1890 and provides for acute mal-apportionment in the election of members of the two houses of Parliament, the Legislative Assembly and the Legislative Council. The country area Assembly electorates have one half the number of electors, and in the Council one third the number of electors, as compared to Metropolitan electorates. The opposition party in the State, the Australian Labour Part (ALP) has never in the history of the State had a majority in both houses, although it has many times obtained a majority of the total vote. Changes to land and resource legislation which interfere with the interests of country voters have rarely, if ever, been made. In 1985 an attempt was made by the then ALP Government to pass an *Aboriginal Land Rights Act*. It was rejected by the Legislative Council. The appalling history of the Western Australian Government's relationships with Aboriginal people and their land can be explained in part by the acute electoral mal-apportionment. The present government of Western Australia is a conservative Liberal-National Party Coalition. In June 1995 the High Court will hear a constitutional challenge to the State electoral system.