Our generation has become aware of the fact that the Vikings and the early European fishermen, who preceded such adventurers as John Cabot and Jacques Cartier, were not the "discoverers" of North America. This paper will concern itself with the French intrusion and colonization in the context of Amerindian occupation and exploitation of the Americas. In other words we shall examine how in this early colonial period concepts of French sovereignty and Native nationhood were reconciled. Europeans, of course, had a long-established experience with colonization and the occupation of new lands. Ancient and medieval history are replete with instances of conquest and annexation.

The first historical fact that must be kept in mind in dealing with the matter of sovereignty and nationhood is that the early whalers, walrus hunters, and cod fishers from the French Atlantic ports did not find an uninhabited New World. Virtually from the moment of first contacts those in authority, both civil and ecclesiastical, were aware of the Native peoples, or "new men," of the Western hemisphere. The first record of Amerindians being taken to France for official presentation and public display dates from a fishing expedition undertaken by Thomas Aubert of Dieppe in 1508.

Presumably, the Amerindians had migrated into terra nullius and as first occupants had established undisputed possession of North America, at least so it now appears in terms of international law as subsequently canonized by European jurists. There is no archaeological evidence, or corroborating scientific evidence, to suggest that the remains of earliest humans on this continent are not of Mongoloid origin and predecessors of the Native peoples "discovered" by Europeans in the tenth and following centuries. Whether the Skraelings contacted by the
Norsemen or the sauvages encountered by the crews of fishing vessels were lineal descendants of the first peoples to inhabit northeastern America is problematical. Oral tradition and archaeological research point to major displacements of Amerindian cultural and ethnic groups before European contact. Major migrations and traumatic demographic shifts occurred both at the time of and subsequent to first French contact. The disappearance of the Laurentian Iroquois, between Cartier's departure in 1542 and the reappearance of his nephews at the sites of Quebec and Montreal in the 1580s, is probably the best known example of such important demographic change. Important territorial redistributions render unreliable even so basic a cultural boundary as the demarcation between the territories of the nomadic Algonkian hunting bands and the sedentary Iroquoian tribes.

The second historical fact which will need to be kept in mind in dealing with the matter of sovereignty and nationhood is that the French established beachheads for settlement in largely unoccupied lands. The valleys of the St. Lawrence and the Annapolis, where they started settlements in the early seventeenth century, were not at that time inhabited. The presumed annihilation, or adoption and assimilation following conquest, of the Iroquoian peoples who had met with Cartier and Roberval's expeditions in the 1530s and 1540s, and shunning by Algonkian Micmac bands of the salty marshlands along the Bay of Fundy which attracted de Monts and Champlain, gave initial French colonization a unique and important characteristic. In these restricted areas, the French, not unlike the Amerindians who had migrated from Asia to North America, were able to move into terra nullius from another continent. The immediate consequence of this rather unique situation was that from the outset there was no question of displacement of aboriginal residents or of concern about legitimate title to lands appropriated. The colonization of New France, therefore, began without evident concern about territorial occupancy as a factor in French-Amerindian relations. Hospitality, sharing of
possessions, and exchange of gifts—all Amerindian cultural qualities—marked the initial French intrusion into Amerindian America. Even when pursuit of trade and missionary work resulted in deep penetration into the heartland of North America, neither was associated with land acquisition.

The objectives of French intrusion into North America are well documented. By contrast, we know virtually nothing of the Amerindian motives for migration to this continent, the pressures that may have been exerted upon them to leave Asia, or the circumstances of their arrival. The French came in the first instance in search of walrus, whale and cod, then of fabulous riches similar to those found by the Spaniards in Central and South America, and of the route to the exotic Orient. None of these necessitated extensive settlement. Religious motivation developed only later in the French contact. Cartier's third commission, that of 1541, ordered him to penetrate inland and "converse with the said peoples thereof and live among them, if need be" in order to facilitate the spread of the Christian religion. Yet none of the French expeditions to the New World was accompanied by missionaries before 1610.

By the late 1690s, however, it was becoming clear that France's chief interest in North America was no longer commercial but rather strategic. The priority given military matters in Europe during the closing decades of Louis XIV's reign was mirrored in New France. This significant shift in colonial policy placed new emphasis on holding the pays d'en haut, conciliating Native inhabitants, associating the fur trade with military operations, and opening career opportunities to the Canadian nobility in the Marine contingents. In this context the need to reconcile Native self-government with French claims remained imperative.

The historiography of this question of sovereignty and ancestral rights during the French regime is neither extensive nor particularly illuminating. The Department of Indian Affairs assumed that the French had never concerned themselves with aboriginal rights, the concept of guardianship, or ancestral
territorial rights. Consequently, writers such as T. MacInnis could assert that the French government "never recognized them as having special legal rights." Robert Surtees perpetuated the traditional view by asserting that "since the French had never recognized Indian title to land" no agreements had been entered into. He also confused seigneurial grants to missionaries for reserves, as described by George F.G. Stanley, with ancestral hinterland territories inhabited by Amerindian bands and tribes. Not surprisingly, these erroneous views were repeated by Francis Jennings in works which reached American readers principally. Bruce Trigger also cited Olive Dickason to conclude from a supposed lack of acknowledgment of aboriginal rights, "French lack of sensitivity," that they "claimed ownership as well sovereignty over it by right of discovery." Such a view could apply to the sixteenth- and early seventeenth-century ("heroic age") ventures but scarcely to the period following Louis XIV's assumption of direct rule in the metropole (1661) and in New France (1663).

Of little help in clarifying the issue was Peter Cumming and Neil Mickenburg's magisterial study, Native Rights in Canada, which reasserted the "non-recognition by the French of any aboriginal proprietary interest in the soil," yet concluded that the French had vigorously defended Iroquois independence from Great Britain and their right to negotiate their own prisoner-of-war exchanges. An otherwise competent study of aboriginal, treaty and human rights by Russel Barsh and James Henderson followed the same line of reasoning and began its exposition with 1763, presuming that the French regime was irrelevant. Native groups such as the Ontario Metis and Non-Status Indian Association have repeated the same views. Bradford W. Morse's Aboriginal Peoples and the Law is largely silent on the French role. Perhaps there is some consolation in the fact that these are not historians' interpretations.

W.J. Eccles muddied the waters somewhat by affirming that "the French kings most certainly did recognize Indian land title and sovereignty," that the French claimed sovereignty for their
Crown, although they were never able to exercise it, and that therefore the sovereignty and title to Native lands later accruing to Canada "were not acquired by virtue of France having ceded a non-existent title to the British Crown in 1763." Eccles made the important observation that sovereignty comprised the right to levy taxes, to enact laws and enforce them, to demand military service and the right of eminent domain. Beyond demonstrating that the French did not exercise these rights over the Amerindians of New France, he argued that the Native peoples "could, and did, maintain that they satisfied all those requirements." Amerindian societies, including the Iroquois Confederacy, were not equipped either institutionally or ideologically to assume sovereign rights as defined in the European context. Indeed, even the assumption that any claim to sovereignty required "occupation and military force to impose the will of the occupying power" distorts the relationship that the French developed with the Native peoples.

More pertinent is Lloyd Barber's cautious observation that "France, as a colonizing nation, did not form an explicit theory of aboriginal title and did not treat with indigenous people for the surrender of their rights in the land." A.G. Harper had observed in 1947 that "it was assumed when a tribe or band of Indians assented to French rule, the title to their land passed to the French sovereign, including their right of occupancy." The few treaties that were negotiated were not land cessions but were designed "to formalize the Indian's consent to the authority of the King of France and to acknowledge that sovereign as the rightful ruler over themselves and the territory they occupied." Brian Slattery has argued that not only did the French assert sovereignty over the vast expanse of New France but also they exercised their rights through the allied "nations" as vassals of the Crown in a quasi-feudal relationship. Slattery has also drawn attention to "the coexistence and interaction" of two levels or "diplomatic spheres"—a French-Native context and an international context—while affirming that the doctrine of aboriginal rights in Canada draws from French as well as British sources.
All of which brings us to a consideration of the concept of sovereignty. By the thirteenth century, French and British monarchs were using the right of eminent domain (i.e. power of state expropriation of private property in the public interest) and levying taxes and armies whenever enemies threatened the realm. There is much truth in Francis Jenning’s observation that sovereignty "had been invented to justify kings’ conquests of their own peoples, [and] lent itself readily to export." Jean Bodin (1530–96) defined sovereignty as unitary and indivisible, a monopoly of power in the sense of control and creation of law. But he made an important distinction between the location and exercise of power. Thus France, without renouncing the doctrine that sovereignty was its exclusive possession in the colony, could exercise its power in various ways and could bring it to bear, or not to bear, upon its inhabitants. Sovereignty was conceived as residing in the Crown; nevertheless, Bodin pointed out that the monarchy, while above human positive law, was subject to divine and natural law. By the time France began to colonize North America sovereignty was thought of in terms almost exclusively of diplomatic and political overlordship. Economic control was perceived as being somewhat different. Also, sovereignty was seen as being subject to limitations as an authority might have full power in one sphere and none in another. On this basis we are prepared to submit that, although indispensable to any concept of the sovereign state is the attribute of its own constitutional or public law, in relations with the Amerindians of New France the French had arrived at a more complex arrangement. Indeed, metropolitan France itself was neither centralized nor unified during the seventeenth and eighteenth centuries in the sense of contemporary sovereign states. The French had come to the conclusion, faced with their inability and the undesirability of imposing universally their metropolitan concepts and laws, that the colonists in New France would be governed only by selective and modified French laws and customs and usages. This dualism, it will be argued, did not mean that the French did not assert sovereignty or that the
British did not regard New France as being under French sovereignty. Amerindians did not share European concepts of either sovereignty or property; their perceptions did not and do not fall within the realm of Western European legal definitions. However, the French and Amerindians had reached a mutually satisfactory working relationship which is worthy of consideration and record.

In order to review the French relationship with the Amerindian peoples in juridical, political and military terms, four aspects of the question of sovereignty and Native nationhood need to be considered. First, we shall consider European traditions respecting colonization and the acquisition of new territories. Secondly, we shall examine formal French claims and acts of possession in the light of European legal formulations. Thirdly, we shall review French definitions of Amerindian nationhood and their reconciliation of such a view with their own claims of sovereignty. Finally, we shall consider briefly the question of Native possessory and territorial rights. These are all relevant to contemporary issues of aboriginal rights and Native self-government.

By what right did France come into possession of New France? Her invasion of America, to employ a term popularized by Francis Jennings, seemed justified by a European tradition that evolved out of classical Roman, medieval Christian and feudal concepts. Roman civil law clearly set forth the rules to be observed in settling disputes between individuals over ownership of lands previously unclaimed. Hugo Grotius in 1625 applied this Roman legal concept of lands previously unclaimed to nations: "as to things without a master, if we follow nature alone, they belong to him who discovers and occupies them." On the basis of this argument in Droit de la Guerre et de la Paix the "vacant lands" of America could legally be claimed by the nation which first discovered and took possession of them. Colonization was seen as a normal expansion of European law and government into a legal vacuum and of European peoples into vacant lands.
thirteenth century that non-Christian states enjoyed the same rights and authority as Christian states, and Thomas Aquinas taught that legitimacy of dominion did not depend on the religious beliefs of those exercising authority, the church undertook Crusades and used the Ostiensian thesis to justify its actions. Henry of Susa, Cardinal of Ostia (d. 1271), held that infidel nations were not legitimate, their rulers lacked recognized jurisdiction, and the lands of such states could be appropriated without compensation. He argued in favour of universal papal dominion over pagans, whom he alleged had lost their sovereignty to Christ.

Gallican theologians were willing to go along with the dispossession of pagan rulers but they regarded the Christian prince, not the Pope, as the instrument for bringing the entire world under Christian dominion in expectation of Christ's second advent. The Spanish monarchs had consulted churchmen on the manner of taking possession of "new found lands," but the French ignored papal claims and used the religious justification to bolster royal claims. Marc Lescarbot, New France's first historian, explained France's claim to Acadia in the following terms in 1618:

The earth pertaining then, by divine right to the children of God, there is here no question of applying the law and policy of nations, by which it would not be permissible to claim the territory of another. This being so, we must possess it and preserve its natural inhabitants, and plant therein with determination the name of Jesus Christ and of France, since today many of your children have the unshakable resolution to dwell there with their families. 13

Lescarbot was aware that the Micmacs had some legitimate claims to Acadia also, but he restricted himself to observing that they should not be exterminated "as the Spaniard has those of the West Indies." Even the Protestant Jacques de Charron supported the French claim to "inherit" the New World in the name of Jesus Christ, adding the argument that the Gauls were the descendants of Gomar, of Japheth and of Noah. The extension of the kingdom of God and of the kingdom of France were seen as concurrent.

Feudalism held that the acquisition of a territory presupposed the possibility of holding it effectively, so that if
"positive rule and legal authority" were not exercised all legitimate claim was lost. On such grounds Francis I had challenged the papal division of the New World between Portugal and Spain with the celebrated phrase "Show me Adam's will!" The royal commission to Roberval in 1541 commanded him to take possession of regions "uninhabited and not possessed or ruled by any other Christian princes." Effective occupation was the only recognized claim to possession. International law eventually pronounced in favour of such an interpretation. In 1672, Pufendorf expanded on Grotius' concept of the rights of discovery to include physical appropriation because "'twould be in vain for you to claim as your own, [that] which you can by no means hinder others from sharing with you." The Swiss legal scholar, Emmerich de Vattel, in Le Droit des Gens (The Law of Nations) held that it was not ancient occupation of the land, as consecrated in the phrase "from time immemorial," that was the basis of title and right, but the use made of the land which was the ultimate justification for its possession.

Emmerich de Vattel thought that the majority of the Native peoples of "those vast tracts of land rather roamed over them than inhabited them" and by pursuing "this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for"; therefore, it was just "if other nations more industrious and too closely confined, come to take possession of a part of those lands..." He concluded of the Native inhabitants of New France that "their unsettled habitation in those immense regions cannot be counted a true and legal possession," whereas Europeans "were lawfully entitled to take possession of it, and settle it with colonies." This view represented the culmination of conceptualization, based on Roman, Christian and feudal principles, regarding the European right to colonize. The philosopher-encyclopaedist Diderot could not help but wonder if his compatriots would defend the thesis had some Amerindians by chance landed on French soil and "had written on the sand of your beaches or on the bark of your trees: This land belongs to us."
By what means did France establish and proclaim her sovereignty over New France? The official view of the French administration in the eighteenth century was that Jean da Verrassano had taken possession for Francis I in 1523 and Jacques Cartier had reaffirmed this prise de possession in 1535. The formal taking possession of a territory was usually expressed through some symbolic act such as erecting a cross, posting the King's arms, burying inscribed lead plates, and reading a proclamation in the name of God and the King. The French did not read a requerimiento as did the Spaniards on approaching new lands, but it has been stated that they erected crosses in Brazil with the intention of imposing French laws and customs and the Catholic religion, as well as laying formal claim to the land. Cartier planted many crosses on his journeys to North America but most of these, as Brian Slattery has demonstrated, were markers or navigational aids, religious symbols, or commemorative pillars without any symbolic taking of possession of the country.

Nevertheless, as Slattery has also noted, there were formal French claims in the sixteenth century which tended to support the view that New France was acquired through right of conquest. The royal commission to Roberval, dated 15 January 1541, said explicitly that he was to "descend and enter these lands and put them in our possession, by means of friendship and amicable agreements, if that can be done, or by force of arms, strong handed and all other hostile means," to destroy its strongholds and establish French control. Roberval was instructed to acquire the region either through voluntary cession or "consent and tuition of the said countries." These instructions must be understood in the light of Cartier's rather troubled relations with the Laurentian peoples during the six previous years and the fact that settlement was going to be undertaken in an inhabited region.

This aggressive approach continued throughout the remaining years of the sixteenth century. The Marquis de la Roche received authority in 1577 to "invest and make his all lands which he can
make himself master of" and not previously claimed by other Europeans. The following year he was named governor of "new found lands and countries which he shall take and conquer from the said barbarians." In the letters-patent of 1588 to those who had inherited Jacques Cartier's privileges in New France "conquests under our name and authority by all due and licit means" were authorized. The commission to La Roche for Sable Island in 1598 authorized him to acquire possession "by means of friendship and amicable means" and failing that "by force of arms, strong handed and all other hostile means" as had been the directive to Roberval. Fortunately for French-Amerindian relations, these early colonization attempts failed.

The seventeenth century witnessed a very different approach. The planting of a trading post at Tadoussac in 1600, the founding of "habitations" at Port Royal (1605) and Quebec (1608), and the inauguration of missionary work in Acadia (1611) and Canada (1615) were accompanied by a policy of pacification and reconciliation. De Mont's commission of 8 November 1603 did stipulate that he was "to establish, extend and make known our (royal) name, power and authority" but there was no longer any mention of coercive measures. The commissions of 1612 and 1625 for Champlain employed the same conciliatory tone, and the articles establishing the Company of New France in April 1627, with full title to the "property, justice and seigneury" of the colony, made no mention of acquisition of title, or imposition of French sovereignty, but contented itself with granting converted Amerindians the same rights as natural-born French subjects when in metropolitan France. Thus, under royal charter company rule (1627-1663), as drawn up by Cardinal Richelieu for Louis XIII, it would appear that those Natives who accepted the King's religion (and by extension his sovereignty?) were granted the same status as other colonial subjects.

What knowledge the Native inhabitants had of these European legalities is uncertain. Although missionaries interpreted actions such as presenting gifts to the King as "paying hommage," when Amerindians were presented at Court, their own reception in Iroquois country suggested a different perspective.
The successful diplomatic mission, so-called, of Jean Bourdon and Father Isaac Jogues to the Mohawk in May 1646, for example, extracted only the promise that the French would always have "an assured dwelling place" among them and that the missionary personally "will always find his mat ready to receive him." The continued hostility of the Iroquois in the 1660s, however, resulted in several military raids on their villages, described by the colonial bishop at one point as a kind of crusade. The several Iroquoian tribes found themselves obliged to adhere to a series of peace treaties in 1665-66 by which Louis XIV was acknowledged "from this time as their Sovereign," the Huron and Algonkian allies of the King as being "not only under his protection but also as his proper subjects" and with whom they pledged "to live fraternally for their mutual defense under the common protection of the said Lord the King." This treaty, which ended a war regarded somewhat as a baronial struggle and which involved no territorial appropriation, also provided for exchanges of families between the French colonists and the Five Nations and explicitly provided that the Iroquois should provide French exchange families with agricultural land and hunting and fishing rights in their territory. The language of the treaties would appear to substantiate the interpretation that the Iroquois, under the protection of His Most Christian Majesty, were bound by fealty and allegiance, while enjoying seigneurial rights under the Crown.

The charter of the Compagnie des Indes Occidentales, issued in May 1664, reflected the troubled relations with the Iroquois. The Company was instructed to establish its commercial activities "by chasing or submitting the natives or natural inhabitants of the said countries" who were not allies of the Crown, to develop "all lands it shall be able to conquer and inhabit," and to enter into negotiations with "the kings and princes of the country" for "peace and alliances in our name." As it turned out, the Crown assumed direct control of the colony and limited the opportunities for its corporate subjects to exploit the Native peoples.
In the interior of the country, as exploration, missions and trade progressed, more formal claims of possession through symbolic acts occurred. Saint-Lusson’s prise de possession at Sault Ste. Marie on 14 June 1671 is probably the best known ceremony. As the representative of Louis XIV and special envoy of the Intendant Jean Talon, Saint-Lusson with Nicholas Perrot as chief interpreter and in the presence of four Jesuit missionaries, fourteen Native chieftains and about two thousand spectators took formal possession of the upper country "bounded on the one side by the oceans of the north and west, and on the other side by the South Sea." He did so "declaring to all nations therein that from this time henceforth they are subjects of His Majesty, bound to obey his laws and follow his customs." In return for what the French called a submission to the King of France, the assembled "nations" were promised "all succor and protection against their enemies." A great wooden cross had been planted, and Saint-Lusson made the declaration with sword drawn in one hand and a symbolic handful of soil in the other. A religious celebration followed and in the evening the fourteen "nations" were treated to a large bonfire, the distribution of the "King’s presents," and a Te Deum sung in their name to thank God for having made them "the subjects of so great and powerful a Monarch." No dissenting voices were recorded as the Native people joined in a celebration which cemented commercial and military relations.

Formal claims appear to have been directed more at European competitors than at Amerindians who were theoretically becoming French subjects. When Sieur de Villieu was sent in 1693 "to post the King’s coat of arms along a line separating New France from New England," he underscored the fact that the Iroquois insisted they had never been subjects of Britain and he opined that such a categorical statement should be kept in the French archives for use at an appropriate time. Sieur de Louvigny, in concluding a treaty with the Fox in 1716, gave them "a copy on a sheet of paper as an authentic testimonial of our convention and the taking possession of a conquered land by the King’s arms"
for the benefit of the English, whom he described as "ever jealous of the success of French arms" and liable to challenge the French claim to the western interior. In 1732, Joseph Normandin undertook to mark the boundary along the height of land north of Lac St. Jean separating the French territory from that of the Hudson's Bay Company. He made a formal claim of possession for Louis XV, placing four *fleurs de lys* on four trees and in the middle of a portage three crosses on the largest red pine. In 1743, Louis Fornel erected two large crosses on a promontory at Baie St. Louis in Labrador, kneeled before them singing hymns of thanksgiving, and then raised a royal standard as a sign of "the Taking of possession which we make in the name of the King and the French nation of land which has never yet been inhabited by any nation and among whom we are the first to take possession thereof."  

Sometimes the French were challenged when they sought to take formal possession of a region. La Verendrye the elder, among the Mandan, gave a chief a flag and an inscribed lead tablet decorated with ribbons. He recorded that "this tablet was placed in a box, so that it might be kept forever, in memory of my having taken possession of their lands in the name of the King." But in the explanation he offered the Mandans concerning its significance he merely said "I made them understand as best I could that I was leaving this token in memory of the visit of the French to their country." His son penetrated even farther westwards to the Arikaras where he erected a pyramid of stones, as he told them "in memory of the fact that we had been in their country" but under which he had managed to deposit secretly a lead table "bearing the arms and inscription of the King." In 1749, in order to forestall British claims to the Ohio valley, Celoron de Blainville buried a series of six lead plates asserting French claims to the region, as well as posting the King's arms on prominent trees along the river bank. The Native people, even those allied with the French, wondered about the significance of these objects, removed them and asked the English about their meaning.
It seems evident that the French never doubted their right to acquire lands not already under Christian control. In asserting their sovereignty, they directed their claims against European rivals in particular, while with Native nations they formed alliances and observed many traditional ceremonies in cementing good relations. The role of the King's presents was an important component of this special relationship. Only with the Iroquois and Fox in the pays d'en haut, both of whom were regarded as being under British influence and against whom they waged war, did they sign treaties. Relations in the lower Mississippi region, emanating from the government of Louisiana, were of a different order, marked notably by military action directed at the Chicakasaws and the Natchez. This region of French America, characterized by plantation agriculture, slavery and the intermingling of French colonists with slaves and indigenous peoples, in terms of relations with the Amerindians should be studied in the context of the French Antilles and Guiana, not Acadia, Canada and the pays d'en haut.

How did the French view the status of Amerindian "nations" and how did they reconcile Native nationhood and self-government with their own claims of sovereignty in North America? There seems to have been no conceptual problem for the French because they distinguished between nationhood as understood in the international family of nations, where states were organized under sovereign governments possessing coercive powers to maintain order in their communities, and nationhood as understood locally, where collectivities organized as bands and tribes could conclude agreements, enter into alliances and wage wars.

Thus, while the French claimed sovereignty in terms of international law, they conceded self-determination to Native "nations." Native "Nations" were seen as independent in the sense of retaining their own forms of social and political organization, customs and practices. The intention was to restrict French settlement in Canada to the St. Lawrence valley,
where some domiciled Natives might come voluntarily to live on reserves under missionary guidance, and to permit only small French communities at trading posts, military forts and mission stations in the vast Amerindian territory. There was, in other words, a French area with limited Native settlement, and there was a Native area with limited French settlement. Royal instructions in 1716 not only required leaving the Native peoples to govern themselves but also forbade the French from settling and clearing land above the Montreal seigneuries. This dualism had far reaching consequences and moved a Lower Canadian judge to make the following observation in his judgment in the famous Connolly v. Woolrich and Johnson et al. case:

Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion....

In answer to the rhetorical question whether "the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated," he opined:

In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives. 31

Royal policy was outlined for Governor Councelles soon after the Crown abrogated government by charter companies in 1663. He was reminded that although the primary objective remained the Indians' rapid conversion to Catholicism, it was imperative that "the officers, soldiers, and all his adult subjects treat the Indians with kindness, justice and equity, without ever causing them any hurt or violence." The second objective was the Indians' eventual assimilation into French civil and commercial life provided "all this be carried out in goodwill and that these Indians take it up out of their own interest." 32

This innovative dualism of Native self-determination under French sovereignty was remarked upon by an observant Spanish visitor to eighteenth-century Louisbourg. He wrote:
These natives, whom the French term savages, were not absolutely subjects of the King of France, nor entirely independent of him. They acknowledged him lord of the country, but without any alteration in their way of living; or submitting themselves to his laws; and so far were they from paying any tribute, that they received annually from the King of France a quantity of apparel, gunpowder and muskets, brandy and several kinds of tools, in order to keep them quiet and attached to the French interest; and this has also been the political practice of the crown with regard to the savages of Canada. 

It was not merely a European interpretation of the unique French relationship with the Amerindians but the Native peoples themselves were explicit in their declarations. When British officers tried to get Micmac headmen to swear allegiance to King George I in 1715, they consulted their councils and concluded that "they did not want any king to say that he had taken possession of their land." They affirmed that the French could not have ceded their rights to Britain by the Treaty of Utrecht since they had always been allies and "brothers" of the French and independent. The Abenakis made the same affirmations ten years later, and as late as 1752 responded to the official delegate of the Governor at Boston in these terms:

We are entirely free; we are allies of the King of France, from whom we have received the Faith and all sorts of assistance in our necessities; we love that Monarch, and we are strongly attached to his interests.

In the autumn of 1748, Governor La Galissoniere and Intendant Francois Bigot met with eighty Iroquois delegates in the audience hall of the Chateau St. Louis in Quebec. As a result of this conference, officials at Versailles could reaffirm their belief that "these Indians claim to be and in effect are independent of all nations, and their lands incontestably belong to them." La Galissoniere was congratulated for having "induced them to maintain their rights" against British claims. "These nations govern themselves alone," said a report noting that they were becoming "more friends and allies of the French." In fact a number of Iroquois did choose to leave their territory to take up residence in the French colony at that time.

The other side of this coin, so to speak, was well illustrated by an incident which occurred at the reserve at La
Presentation (Ogdensburg). The abbe Picquet had had to obtain "the consent necessary from the Iroquois nations" to proceed with his project to found this reserve in 1748. The grant was made without any thought of alienation of lands but with the idea simply of extending the rights and privileges to others which they themselves enjoyed on ancestral lands given them by the Great Spirit. No payment was made for such lands. When Governor Vaudreuil made the mistake of recognizing as "chief of the cabin" at La Presentation a certain Onondaga who had not been chosen in the traditional way, the abbe Picquet went with a delegation of sixty Iroquois to wait on the Governor and protest an action "which seemed to them to be contrary to the rights of a free and warlike people, which recognizes as chiefs only those they give themselves and for the term they wish." Vaudreuil backed down hurriedly, said there had been a "misunderstanding," reaffirmed the Native council's authority, and made suitable presents of pikes and stiff collars to the seven war chiefs to wash away the stain of his momentary lapse of good judgment.

While it seems clear that the French had succeeded in having their sovereignty in New France recognized in international circles, and never having it seriously contested by the Amerindians, the right to Native self-determination was never denied by Versailles. Recognition of French sovereignty was usually expressed in terms of receiving the French as "brothers," the Governor-General as Onontio, and His Most Christian Majesty as Onontio-Goa, their "Father." The acceptance of missionaries, the concluding of military pacts and the conduct of trade were intertwined aspects of mutually beneficial and mutually binding relations from which it became almost impossible for either the French or the Amerindians to extricate themselves. Although the French never doubted that sovereignty resided in their Crown, they sensed that Amerindian independence and self-esteem would never permit a political relationship that went beyond voluntary association. In exchange for the recognition of their nationhood, Native collectivities submitted to what European nations considered to be French sovereignty.
This dualistic approach was not unique in European dealings with an expanding known world. Two different treaty systems evolved: a European continental system in which the Great Powers dealt among themselves, and an extended treaty system in which they dealt with the rest of the world using "a different timetable than the strictly European system."

Finally, one might ask what was the status of Native possessory and territorial rights under the sovereignty-association arrangement just described. Even if the French recognized and legitimized existing Native customs and practices in this domain, there remains much obscurity. Little is known about the diverse and flexible patterns and concepts of Amerindian property rights, hunting territories and territorial delimitation. Although various clans, bands, tribes and confederacies differentiated themselves from one another in their occupancy of land, all seem to have recognized some territorial limits. Hunting territories and traditional homelands each had their boundaries. From the days of Jacques Cartier's crossing the "boundary" between the Stadaconans and Hochelagans, and the exacting of tribute by Algonkin bands from Huron and French canoe brigades passing on the Ottawa River, through to the end of the French regime, care was taken about crossing various frontiers.

All Native peoples allocated resources within their territory among themselves, whether in terms of horticultural plots or hunting ranges. Since there are no modern survivals of the aboriginal systems of tenure, or of the social and ecological conditions which formed their historical context, we are obliged to rely on Native oral tradition and scholarly reconstructions. For the Algonkian hunters it may even be that the game animals were reckoned to be the true "owners" of the hunting grounds. Land was no more "owned" by human beings than was the air or the sea. Whether exclusive hunting territories were aboriginal in origin or traced their beginnings to European intrusion and the advent of the fur trade with its demands, a matter of continuing debate among anthropologists, the fact
remains that a spiritual relationship to an area as well as practical concerns (sometimes even economic) regulated behaviour. Scholars seem agreed that ownership was not conceived in terms of modern land tenure; therefore, modern courts have sometimes refused to recognize any Native proprietary rights.

The French administration has been depicted by W.J. Eccles and L.F.S. Upton, among others, as avoiding all definition of Native property and territorial rights, as well as avoiding the Dutch and British ambiguity of purchase. Slattery argued, on the contrary, that recognition of Native possessory and territorial rights was the keystone of French sovereignty. He stressed the fact that France's primary concern was to extend its dominions in North America and it did this by incorporating Native nations under its rule rather than by acquiring lands for European settlement or attempting to extinguish aboriginal title. Through alliances and trading arrangements the French hoped "to attach the Indian nations to the French Crown as subjects and vassals, and thereby obtain dominion over their territories." Consequently, he concluded,

The Crown's rights to the soil were to be held, not to the exclusion of the indigenous peoples, but through them. This approach was consonant with the economic gains initially sought for the establishment of French colonies in America, which centred upon the fur trade, and depended upon the Indians' retention of their hunting territories. 40

Property has two aspects. There are first of all the privileges and benefits which derive from the exclusive use of property. Secondly, there is the power which control of property puts into the hands of a seigneur or feudal owner. In the area of French settlement the seigneur enjoyed both revenues from their censitaires and privileges and honours under the Crown. In the Native regions, however, the aspects of property were separated with the Amerindians retaining their territories and enjoying the fruits of their property, yet remaining theoretically subject to the rights of the King of France as superior lord. This relationship flowed naturally from Samuel Pufendorf's definition of usufruct, "a right in a thing which
belongs to another," in *De Jure Naturae et Gentium* (1688). He wrote:

> For although whoever is the owner of a thing is regularly the owner of its fruits, yet nothing prevents the separation of these two, so that dominion lies with one and the right to enjoy the fruits with another. 41

Pufendorf, on the other hand, had also observed that although "usufruct cannot be alienated" it terminated with the death of the usufructuary, or if it had been "left in legacy to a state" Roman law had ruled that "it should terminate after one hundred years."

Among the many affirmations made by French officials two important declarations, one made during the early years of Royal government in Canada and the other in the closing years of the French regime, stand out. The royal instructions to Governor Courcelles in 1665 said that no one was to "take the lands on which they are living under pretext that it would be better and more suitable if they were French." In 1755, the Ministry of War issued a directive governing relations with the "allied nations" of America. It said: "The natives are jealous of their liberty, and one could not without committing an injustice take away from them the primitive right of property to the Lands on which Providence has given them birth and located them." 42

Access to food resources for Algonkian bands often required the mobility offered only by nomadism. Royal instructions in 1755 repeated views which had been expressed when the French first established forts in the hinterland. The pertinent passage said:

> The allied Natives must be deemed well everywhere... and Sieur de Vaudreuil must leave to certain nations the liberty to wander and go about the lands of the colony, provided that they do not receive foreigners, for that last point is the most essential. 43

When the Amerindians, like the French inhabitants of Canada, came under British rule in 1760 the French did not forget their "brothers." Article 40 of the Articles of Capitulation of Montreal stated:

> The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chose to remain there; they shall not be molested on any pretence whatsoever, for having
carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. Article 4 of the definitive Treaty of Paris (1763) permitted the inhabitants of Canada, "French and others," to emigrate and protected their property rights. The laws and customs by which the Amerindians had been governed in New France would remain in force until specifically abrogated or changed by the new Sovereign.

It was a well established principle of international law by 1763 that the laws and civil rights of subjects acquired by conquest or cession continued in force unless repugnant to the Crown's sovereignty. In other words, the ancestral rights of Canada's Native peoples were protected as much as the laws and private rights of the French Canadian "new subjects." Just as the Canadian seigneurs and censitaires continued to possess and use their land under their customary law, so the Native peoples as agriculturalists, hunters and fishermen continued to possess and use their ancestral territory according to their group customs under the French regime. The Royal Proclamation of 1763 was the British Crown's formal declaration of adoption of a policy similar to French imperial policy regarding the Native peoples of the upper Canadian region. Just as the French had restricted seigneurial tenure to the St. Lawrence lowlands, with the Crown through its Marine officers regulating all French acquisition of property in the hinterland which had no western boundary, so the British declared a virtually identical area "reserved" to "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection," and closed to European settlement except when voluntarily ceded to the Crown and opened to colonization.

Royal instructions sent to Governor James Murray in December 1763 directed him to gather information concerning the several bodies of Native peoples, "of the manner of their lives, and the Rules and Constitutions by which they are governed and regulated." There was some recognition that under the French regime they had enjoyed a generous measure of independence and
non-interference with their indigenous system of internal order. Murray was instructed as follows:

And You are on no Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess; but to use the best means You can for conciliating their Affections, and uniting them to our Government.... 46

In 1765 the Montagnais asked their missionary, Father Coquart, who had served them since 1746, to intervene with the British authorities to assure that the Royal Domain would not be broken up and lands parceled out to private owners and that Native hunting and trapping rights not be permitted to lapse. They said, "we have always been a free nation, and we would become slaves, which would be very difficult after having rejoiced for so long in our liberty." General Amherst ordered that matters should "continue on the same footing as previously" under the French regime.

Similarly, the chiefs of the Wabash peoples agreed to the British "taking possession of the Posts in our Country" in 1765 but warned that "we have been informed that the English where ever they settle make the Country their own." They dispute the claim that "when you Conquered the French they gave you this Country." Instead, said they:

That no difference may happen hereafter, we tell you now the French never Conquered [us] 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 your People, if you expect to keep those Posts, we will expect to have proper returns from you. 48

A few years later the Hurons of Detroit made similar statements asserting they had previously informed Sir William Johnson at Niagara that the lands on which the French were settled there belonged to the Native people and "they never had sold it to the French."

The British interpretation seems to have been, as it had been earlier in Nova Scotia following the cession of 1713, that all lands had belonged to the French Crown and that the Native "nations" had enjoyed a usufructuary and personal interest in the land. The French had done all they could to guarantee a
continuation under British rule of their special relationship with the Amerindians. The transfer of sovereignty, nevertheless, seemed to imply that legally the Native peoples could only make good such rights as the new Sovereign through his officers recognized.

In summary, the French claim to New France was based on concepts of Christian appropriation, settlement of vacant lands, and effective cultivation and "policing." The establishment of French sovereignty through symbolic acts met with little overt opposition; nevertheless, in the early decades the French did indicate a willingness to resort to the use of force if necessary to establish their claims. French claims were asserted against European rivals. They were not directed against the Native peoples because French settlement was geographically restricted to areas largely uninhabited by them. There were no spectacular confrontations which might have indicated the degree to which the Amerindians understood and accepted French concepts of sovereignty.

Instead, a type of dualism evolved as some Native people accepted the hospitality of the reserves in the French seigneurial tract of the riverine colony and as some French accepted the hospitality offered in the Amerindian hinterlands. The recognition of the independence and rights of Native "nations" under an umbrella of French sovereignty posed no major problems for either Quebec or Versailles. In seventeenth century France, sovereignty was generally deemed to be undivided and indivisible. The realm was governed by an unalterable set of fundamental rules and the monarch was sovereign by divine right. Yet in New France there emerged the concept of sovereignty being divided. In other words, an authority might have full power in one sphere and none in another. This followed closely the geographic division of the Canadian sector of New France into a Laurentian colony of European settlement and a vast pays d'en haut or Amerindian region claimed and exploited for commercial, strategic and missionary purposes. Three
components of aboriginal rights had been recognized in this upper country: self-rule, as evidenced in the negotiation of alliances and inapplicability of French laws to Native peoples; possessory and territorial rights as evidenced in the need to acquire property for emplacements for forts, missions and a few French agriculturalists; usufructuary rights, specifically unhampered hunting and fishing rights.

The term "nation" was employed for what later would be called a "tribe," to designate an ethnic group and a geographical location. European powers were nation-states whose peoples were politically organized under sovereign governments which possessed coercive powers to maintain order, impose laws and exact dues. The French did not see the Illinois or Micmacs as possessing coercive governments, but they did envisage them as "nations" in the sense that they were ethnic identities, that they were bound by ties of consanguinity, that they thought and acted as a group in terms of defense, trade, religious observances, and that each "nation" had its own distinctive unwritten laws, customs and traditions.

The French operated on different levels of diplomacy in dealing with members of the "family of nations" and the Native "allied nations." On the international level, France like other European powers involved in colonization of America asserted her sovereign rights over a vast continental expanse. At the regional level, dealing with "independent" peoples, she refrained from interference with original territorial rights, customs and mode of life. French laws since 1664 applied only to colonists and were not imposed on Native inhabitants. The relationship with the latter was couched in terms of military alliances, trading arrangements, and the annual payments of the King's presents rather than in terms of the exercise of coercive social and legal powers, taxation and military service.

The Janus-like French position can be understood only when account is taken of the two diplomatic levels or spheres in which French statements must be situated. Sovereignty was stressed in interactions with other nation-states whereas
independence was stressed in the context of continental coexistence. The genius of French Native policy was therefore that no inherent contradiction was perceived between these two positions. Nevertheless, pursuit of this line of conduct did require the French to do two things: first, to restrict Canadian settlement almost exclusively to the Lower St. Lawrence valley below the junction of the Ottawa River; secondly, to instruct its marine commandants at upper country posts to be circumspect in their statements and actions when dealing with the "allied Nations." So long as this relationship was maintained it would appear that France could assume responsibility under international law for colonists and aboriginal peoples. Native nationhood was protected by French sovereignty and French sovereignty was exercised through Native nationhood and self-government.

NOTES

1 Revised version of a public lecture given at the Native Studies Department, University of Saskatchewan, 4 October 1984.


9 Cited in Walter B. Scaife, "The Development of International Law as to Newly Discovered Territory," Papers of the American Historical Association, 4, No. 3 (July 1890); Hugo Grotius, Droit de Guerre et de la Paix (Paris, 1667), II, ch. 2, art. 11, 5; Christopher C. Joyne, "The Historical Status of American Indians under International Law," The Indian Historian, 2, No. 4 (1978), 30-36; James Simsarian, "The Acquisition of Legal Title to Terra Nullius," Political Science Quarterly, 53, No. 1 (1938), 111-128.


13 W.L. Grant, ed., The History of New France by Marc Lescarbot (Toronto, 1907), I, 17.

14 Jacques de Charron, Histoire universelle de toutes nations et speciallement des Gaulois ou Francois (Paris, 1621), ch. xii, p. 13. Catholics often interpreted their discovery of the New World, as a special grace of God, who revealed the existence of "Adam's other children" to them in order to compensate for the losses suffered through the rise of Islam and the Protestant Reformation. It was unusual, therefore, for a Huguenot to use an essentially Catholic argument of universal Christian dominion.

15 Biggar, Collection of Documents, p. 178.


25. *PAC., MG 1, Series CIIA, Vol. L.* "Extrait de diverses relations qui peut servir a etablir le droit de la France sur le pays des Iroquois, 1646 a 1681," 427; *Edits et Ordonnances, III, 41, 46.*


31 Cited in Brian Slattery, Canadian Native Law Cases (Saskatoon, 1980), I, 77.

32 Collection de Manuscrits, I, 125.


34 PAC, MG 1, Series CIIA, Vol. 35, Ramezay to Governor, 16 September 1715, 120.


38 Dorothy V. Jones, License for Empire. Colonialism by Treaty in Early America (Chicago, 1982), pp. 5-18.


41 Pufendorf, De Jure naturae et Gentium, p. 600.
Collection de Manuscrits, I, 175; PAC, MG4, C-1, Article 14, VoI. I, No. B, "Moyens pratiques pour concilier la France et l'Amerique," (1755), 72.

H.R. Casgrain, ed., Extrait des Archives (Quebec, 1890), Instructions to Vaudreuil, 1755, p. 33.


The Royal Proclamation of 7 October 1763 (London, 1763), passim.


Lorenzo Angers, Chicoutimi, Poste de Traite (1676-1856) (Montreal, 1971), 60.


Sir Francis Bond Head in 1836 made an assessment which indicated that the British following the Conquest had adopted a policy similar to the French relationship. He said: "Over these lands His Majesty has never exercised his paramount right, except at their request, and for their manifest advantage—within their own communities they have hitherto governed themselves by their own unwritten laws and customs. The lands and property have never been subject to tax or assessment or themselves liable to personal service. As they are not subject to such liabilities, neither do they yet possess the political privileges of His Majesty's subjects generally." PAC, RG 10, Vol. 60, Head's reply to House of Assembly, nd.