PROBLEMS IN DETERMINING THE DATE OF RECEPTION IN PRINCE EDWARD ISLAND

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When lawyers need to know the law on a particular subject in a Canadian province or territory, they check the relevant legislation and case law. Assuming that the lawyer is dealing with a matter within provincial rather than federal jurisdiction, the lawyer must consider whether there is something of relevance not only in statutes that have been enacted by the legislature of the province or territory, but in statutes that might have been included in the body of law that applied when the legislature came into existence. A colony governed by the law of England begins life endowed with the wisdom and learning expressed in judicial decisions and in the legislation of England, or at least as much of the legislation as was suited to the circumstances of the colony. The colony receives whatever law exists at a date known as the date of reception. Legislatures may choose a date of reception by legislation, but the legislature in Prince Edward Island has made no such choice. In these circumstances, the date of reception depends on the specific history of the colony, including how it came to be a British colony, who lived there previously, and when the colonial legislature first met.[1] The date of reception of English law in Prince Edward Island, then, is found somewhere in the chronology that follows, but exactly which date is still an open question.

Long before Prince Edward Island was a British colony or a Canadian province, the Mi'kmaq inhabitants knew it as Abegweit or Minago.[2] The earliest French explorers and settlers noted the presence of Mi'kmaq on the Island, but gave the place a new name, Ile Saint-Jean.[3] The French capitulation to the British at

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[1] Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, 1966) at 544-46; J. E. Côté, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29, provides a comprehensive account of the doctrine of reception including an Appendix on the date of reception in various jurisdictions in Canada.

[2] Milton Acorn explains that he chose *The Island Means Minago* for the title of his volume of poems from Prince Edward Island because Minago is a translation of the aboriginal word for the Island and "the senior race has precedence." (Toronto: NC Press, 1975) at 9. Abegweit translates loosely as "Cradled on the Waves."

[3] The Mi'kmaq presence on Prince Edward Island has not been extensively researched. L. F. S. Upton, "Indians and Islanders: The Micmacs in Colonial Prince Edward Island" (1976) 6:1 Acadiensis 21, focuses on the establishment of a Mi'kmaq reserve on Lennox Island, purchased for that purpose in 1870 by a philanthropic organization; D. C. Harvey, *The French Régime in Prince Edward Island* (New Haven: Yale University Press, 1926) at 4-6, quotes Jacques Cartier's account of his encounter with Indians on

Louisbourg on 26 July 1758 included an agreement that French soldiers would be removed from Ile Saint-Jean as soon as the British acquired transport. The British, however, decided to evacuate the Acadian and Mi'kmaq inhabitants, too, although two hundred or so of each group avoided evacuation and remained on the Island. The Treaty of Paris, signed on 10 February 1763, confirmed Britain's sovereignty over Ile Saint-Jean, which the British treated as an uninhabited territory. The French name was anglicized to Island of Saint John or Saint John's Isle, and the territory annexed to the existing British colony of Nova Scotia by the Royal Proclamation of 7 October 1763. A government survey divided the Island into 67 lots, or townships, of around 20,000 acres each and on 23 July 1767 these were allocated by lottery to a carefully-selected group of about one hundred individuals. Some of these estate holders petitioned the Crown to make the Island a separate colony, and on 14 July 1769, the Crown issued a commission to the new colony's first governor, Walter Patterson. Patterson convened the first meeting of his legislative council on 19 September 1770 and opened the first session of the Island's first elected assembly on 7 July 1773.[4]

Note that we are dealing here with an abstraction – a "new" colony exists as a juridical entity, but not, at least in its "newness", as a physical territory. The "new world" which the European powers carved up into New France, New Holland, New England, New Spain, and so on, was already home to peoples who had their own explanations of how the territory they occupied came to be theirs, and their own laws and customs for maintaining order in their territory. European international law recognized three ways in which a European power could acquire sovereignty over territory beyond its existing borders: by conquest, by cession, and by discovery and subsequent settlement. In conquered or ceded colonies, the law of the conquered or ceded territory continued in effect until changed by the new sovereign power, although "barbarous laws, repugnant to the fundamental principles of English law" were immediately nullified.[5] In a colony acquired by discovery and settlement, the settlers received the law in effect in the colonizing country at the date of settlement, excluding those statutes or judicial rulings that were clearly unsuited to conditions in the colony.[6]

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what became Prince Edward Island, along with other references to Island Mi'kmaq; Earle Lockerby, "The Deportation of the Acadians from Ile St.-Jean, 1758" (1998) 28:2 *Acadiensis* 45 at 71-73, describes the role played by Island Mi'kmaq as allies of the French against the English.

[4] J. M. Bumsted, *Land, Settlement, and Politics on Eighteenth-Century Prince Edward Island* (Kingston: McGill-Queen's University Press, 1987) at 12, 14, 29-34, 40; James Munro, ed., *Acts of the Privy Council of England, Colonial Series, Vol. V, A.D. 1766-1783* (London: 1911) at 80-85; Lockerby, *supra* note 3, estimates that about 3,100 Acadians were deported, 1,400 to 1,500 fled, and 100-200 stayed. The Island Legislature adopted the current name for the Island in 1799.

[5] Roberts-Wray, *supra* note 1 at 99-101, 541-542.

[6] See Roberts-Wray, *ibid.* at 540-541. Bruce Ziff, "Warm Reception in a Cold Climate: English Property Law and the Suppression of the Canadian Legal Identity" in John McLaren, A. R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 103, concludes that judges in what became Canada were more willing to reject judicial rulings as inapplicable than they were willing to reject statutes, at least in the area of property law. Determining suitability is not simple; see Côté, *supra* note 1 at 62-81.

As with many other abstract legal principles, the comforting and confident simplicity of these rules disappears on contact with the complexity of the world of facts. According to accepted principles of international law, a European power could acquire sovereignty over only one category of territory by settlement: *terra nullius*, unsettled land, occupied by no one, and thus open for settlement. Although much of the "new world" was home to indigenous peoples who had occupied the land long before Europeans arrived, acquisition by settlement became the default categorization. *Terra nullius* was a legal categorization, not a literal or factual description of whether a land was occupied or unoccupied when "discovered".[7]

In Australia, for example, legislatures and courts denied for two hundred years that aboriginal peoples had any rights derived from their original occupation of the continent. Instead, the Crown granted property rights to settlers as if the English had acquired sovereignty by discovering and settling a land that was *terra nullius*, with no existing inhabitants and therefore no existing laws. In legal theory, although the aboriginal people lived on and from the land, their presence could not establish their ownership of the land; this was because the existing aboriginal inhabitants were regarded as so "uncivilized" that they had no laws worthy of recognition. In June 1992, the Australian High Court rejected the *terra nullius* theory, at least insofar as it invalidated all claims to aboriginal title, ruling that the Crown acquired sovereignty over Australia subject to any underlying aboriginal title. The Meriam people, the aboriginal title claimants in the case, were living in coastal villages and cultivating inland gardens at the time of contact with Europeans. Faced with evidence that the Meriam people were an organized society that recognized and enforced claims to property rights, the High Court ruled that they could not be characterized as people without civilization or law, and therefore that it was no longer appropriate to categorize the Murray Islands, where the Meriam people lived, as *terra nullius* at the time of acquisition of British sovereignty.[8]

The circumstances of European colonization in Canada present the same logical and conceptual problem as in Australia. Europeans did not occupy an unoccupied territory, nor did they conquer the indigenous peoples. Indeed, in parts of the continent, Europeans sought alliances with First Nations in order to better pursue their wars against other Europeans, as with the Treaties of Peace and Friendship negotiated between the English and the Mi'kmaq in what is now Nova Scotia and New Brunswick.[9] Despite such treaties, and some acknowledgment in Canadian courts of the continuing validity of pre-colonization aboriginal customary

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[7] Roberts-Wray, *ibid.* at 540; *Mabo v. Queensland* [1992] 107 A.L.R. 1, Brennan J., at 20-22 [*Mabo*].

[8] *Mabo, ibid.*

[9] For discussion of the historical context and continuing validity of these treaties, see *R. v. Marshall* [1999] 3 S.C.R. 456; *R. v. Marshall* [1999] 3 S.C.R. 533; William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall* (Toronto: University of Toronto Press, 2002). For a critical discussion of historical narratives that treat North America as legally vacant when the Europeans arrived, and of the legal conclusions that follow from these flawed narratives, see Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681.

law,[10] the Canadian claim to sovereignty rests ultimately on the doctrine of discovery. However, as Bruce Ryder observed, "[i]n applying this principle to British North America, judges have managed to skirt the fact that Aboriginal Peoples did indeed inhabit the territory."[11]

Beyond the difficulties of applying the *terra nullius* theory to occupied territory, there are difficulties deciding at what moment a colony is settled, particularly with colonies that were settled only after several tries. The history of a particular colony, too, may leave questions as to whether it is a settled colony, a ceded colony, or a colony acquired by conquest. Nova Scotia, despite being occupied by the Mi'kmaq, settled by the French, and ceded to Britain by the Treaty of Utrecht in 1713, is treated as an English settled colony. As is evident from the brief historical sketch above, Prince Edward Island was both a conquered and ceded territory, but it, too, is treated as a colony acquired by settlement.[12]

Legislation defining the date of reception gives certainty despite difficulties in categorizing the facts. In the three prairie provinces and the territories that were created out of the lands granted to the Hudson's Bay Company in May 1670, various statutes established a relatively recent date of reception of 15 July 1870. In Ontario, legislation established the date of reception as 15 October 1792, the end of the first session of the legislature after the new colony of Upper Canada was carved out of Quebec. In British Columbia, the legislated date of reception is 19 November 1858. In the absence of legislation, judicial rulings may establish dates of reception related to the first sitting of the colonial legislature, as is the case in Newfoundland and Nova Scotia.[13] In New Brunswick, the first colonial administration assumed that the date of reception was 8 May 1660, when Charles II was restored to the thrones of Scotland and England; this date was confirmed by the New Brunswick Court of Appeal in 1970.[14]

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[10] See Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press for the Osgoode Society, 1991) at 9-28.

[11] Bruce Ryder, "Aboriginal Rights and *Delgamuukw v. the Queen*" (1994) 5 Const. Forum Const. 43 at 44, commenting on the decision in the British Columbia Court of Appeal. Ryder's comments on this "ugly fiction" woven into "the fabric of our law" are even more pertinent in light of the ruling of the Supreme Court of Canada on aboriginal title in *R. v. Marshall, R. v. Bernard*, 2005 SCC 43, see articles in the Special Forum: Perspectives on *R. v. Marshall; R. v. Bernard* 55 U.N.B.L.J. 73-176.

[12] Côté, *supra* note 1 at 87; Robert Montgomery Martin, *History of the Colonies of the British Empire* (London: Dawsons of Pall Mall, 1967), categorizes Prince Edward Island as ceded and colonized. See his "Statistical Chart of the Colonies of the British Empire", categorizing Ontario, New Brunswick, Nova Scotia and Cape Breton as conquered and colonized, Newfoundland as colonized and Quebec as conquered.

[13] Côté, *ibid.* at Appendix. Newfoundland's date of reception is 1832, the day before the first meeting of the legislature. Nova Scotia's is 3 October 1758, the opening day of the first legislative session. See also Roberts-Wray, *supra* note 1 at 833-37, distinguishing, where appropriate, between the date of reception of English law in civil matters and English law in criminal matters.

[14] David Bell, "A Note on the Reception of English Statutes in New Brunswick" (1979) 28 U.N.B.L.J. 195, and "The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick" (1980) 29 U.N.B.L.J. 157. Thus, New Brunswick's date of reception is the earliest of any of the Canadian

The Royal Proclamation of 1763 annexing Prince Edward Island to Nova Scotia also introduced English law into all Britain's newly-acquired French territories. As both Prince Edward Island and New Brunswick were annexed to Nova Scotia, the law in those territories would have been the existing law of Nova Scotia including received English law. The 1769 order in council establishing Prince Edward Island as a colony separate from Nova Scotia is silent as to the content of the body of law received in the new colony, nor did the Island legislature address the question. In 1806, John Stewart, a land agent on Prince Edward Island, and son of the Island's chief justice, Peter Stewart, published an account of the Island that he hoped would attract immigrants. He included a chapter on the Island's laws, explaining that British colonies "are understood to take the common law, and all the Statute Law of England antecedent to their establishment, which may be applicable to their situation and circumstances." He then summarized "the innovations" on English law that had been enacted by the Island legislature, without identifying the date for determining what law had been received.[15]

In 1839, the question of Prince Edward Island's date of reception arose in the context of determining whether it was possible for someone to gain title to Crown land by adverse possession. At common law, time did not run against the Crown's right to bring an action to eject someone wrongfully in possession of Crown land; the Latin maxim expressing this rule is *nullum tempus occurrit regi.* In England, this rule was changed by the *Nullum Tempus Act*, providing that the Crown would be barred from asserting claims to land after sixty years. This Act was passed in 1769, after the date of reception in Nova Scotia, but before Prince Edward was made into a separate colony.[16] Whether the Act formed part of the starting law of the new jurisdiction of Prince Edward Island thus depended on Prince Edward Island's date of reception. The Island's Attorney General, Robert Hodgson, and the Island's Solicitor General, James Peters, when asked for their opinions on the matter by the Island's Legislative Council, concluded that the *Nullum Tempus Act* was not part of the received law of Prince Edward Island.[17]

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jurisdictions, and is earlier than the date of acquisition of British sovereignty over what is now New Brunswick. In *R. v. Bernard*, [2003] N.B.J. No. 320 (QL) at para. 61, the New Brunswick Court of Appeal accepted the trial judge's finding that the British acquired sovereignty over what is now New Brunswick in 1759. The case involved a claim to aboriginal title, which must be established as of the date of the acquisition of sovereignty. At trial, the aboriginal claimants argued that the relevant date was 1763, the signing of the *Treaty of Paris*, while the Crown argued for 1713, the signing of the *Treaty of Utrecht.*

[15] John Stewart, *An Account of Prince Edward Island in the Gulph of St. Lawrence, North America* (New York: Johnson Reprint Corporation, 1967) at 272.

[16] On the *Nullum Tempus Act*, 9 Geo. III., ch. 16 in Nova Scotia, see *Nickerson v. Canada (Attorney General)* [2000] N.S.J. No. 176 (Sup. Ct.) (QL), reproducing a legal opinion prepared for the parties by Dr. Philip Girard, Dalhousie University, Faculty of Law.

[17] The question arose in the context of debate on the Crown's rights in lands that had been reserved in the original Crown grants for carrying on the fishery. See Rusty Bittermann & Margaret McCallum, "The One That Got Away: Fishery Reserves in Prince Edward Island" (2005) 28(2) Dal L.J. [forthcoming 2006].

Hodgson and Peters each began with the general proposition that the common law of England is the common law of the colonies, and that all statutes passed in England prior to the settlement of a colony are also part of the law of the colony. Statutes passed in England subsequent to the colony's settlement, however, did not become part of the law of the colony, unless the statute stated expressly that it was intended to apply in the colony. Hodgson and Peters agreed that the *Nullum Tempus Act* did not apply in Nova Scotia, and therefore, did not apply in Prince Edward Island. As a general rule, with the division of one colony into two, the existing law in both colonies continued as it had been at the time of the division, until changed by legislation.[18] Peters argued that French law would have continued in force in Prince Edward Island until the conquered territory was annexed to Nova Scotia, when Nova Scotia law would have applied as provided for in the Royal Proclamation. After Prince Edward Island's separation from Nova Scotia, the existing Nova Scotia law would have remained in force in Prince Edward Island, until altered by the Island legislature. Peters noted that after the imperial government created New Brunswick as a colony separate from Nova Scotia, the new government expressly repealed all of the statute law of Nova Scotia, so as to start afresh. Prince Edward Island did not pass legislation repudiating its inheritance from Nova Scotia, and so its starting law was that in effect in Nova Scotia as of Nova Scotia's date of reception, along with legislation passed in Nova Scotia prior to Prince Edward Island becoming a separate colony. As Peters argued, "where a Colony is divided into two, the mere effect of that division cannot be to deprive the part separated of laws by which it was previously governed, or to introduce Statutes which before had no operation."[19]

Imperial officials accepted that time did not run against the Crown in Prince Edward Island, implicitly acknowledging that the *Nullum Tempus Act* was not part of the Island's received law, and thus that the date of reception of Island law was earlier than 1769, the date when both the *Nullum Tempus Act* was passed and when the Island became a separate colony from Nova Scotia.[20] There are various possibilities for an earlier date of reception. The earliest would be 6 May 1749, the date of the commission given to Edward Cornwallis, Governor of Nova Scotia, instructing him to convene a legislative assembly and to establish courts for the determination of

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[18] In a recent application of this rule, the laws of the Northwest Territories continued in force, *mutatis mutandis*, in the new Territory of Nunavut that came into existence on 1 April 1999. See *Nunavut Act*, S.C. 1993, c. 28, s. 29.

[19] Colonial Office 226/82/95-103, Bannerman to Newcastle, 6 Dec 1853, enclosing "Opinion of Honourable Robert Hodgson on Queries C [1839]" as Appendix C and "Opinion of Honourable James H. Peters on Queries C [1839]" as Appendix D; quotation at 101. As Peters explained, he and Hodgson offered their opinions without having had access to the basic documents establishing the Island as a separate colony. Neither the Royal Proclamation nor the instructions to the Island's first governor were available on the Island. The New Brunswick legislation to which Peters referred (31 George III, c. 2) was enacted in 1791, several years after New Brunswick was created as a separate jurisdiction in 1784. The legislation declared that statutes enacted in Nova Scotia prior to New Brunswick's creation henceforth had no force or validity in New Brunswick.

[20] CO 226/88/400-406, Murdoch and Rogers to Merivale, 10 March 1857.

civil and criminal causes. Roberts-Wray gives this as the date of reception for both Nova Scotia and Prince Edward Island, but raises the possibility that the Royal Proclamation of 1763 may have superseded the commission of 1749, and thereby made English law as of 1763 the received law in the existing colony of Nova Scotia and the newly-acquired territory annexed to it.[21] Constitutional law scholar Peter Hogg shares Roberts-Wray's view that Prince Edward Island's date of reception is "probably" the same as Nova Scotia's, by virtue of its annexation to that colony; Hogg identifies that date as 1758.[22] A.H.F. LeFroy, a constitutional law scholar of an earlier generation, argued that the date of reception for Prince Edward Island is 1773, when the Island legislature enacted its first statute.[23] J.E. Côté offers the date of the Royal Proclamation, 1763, as the date of introduction of English law into Prince Edward Island, but does not discuss whether the law thus introduced was the law in effect in England or in Nova Scotia.[24]

Judges rule on questions of reception when one party relies on legislation that the other party asserts is not part of the law of the jurisdiction, either because the imperial government enacted the legislation after the date of reception, or because it was excluded from the body of received law because of its unsuitability to the conditions of the colony. In many cases in nineteenth-century Prince Edward Island, judges applied English statutes in reaching their conclusion without objections from either party.[25] Even when judges had to address the question of whether a statute was in force, they could do so without having to determine precisely the date of reception, provided that the statute was passed prior to the earliest possible date of reception in Nova Scotia. Thus, in 1879, when Justice Hensley of the Prince Edward Island Supreme Court ruled on the applicability of an English statute, he began by noting that Nova Scotia received the statute when it became a British colony. It followed, then, that it was included in the law that Prince Edward Island received when it became a separate colony from Nova Scotia. As the statute in question had been enacted in the reign of Edward I (1274-1307), it did not affect the outcome whether the date of reception in Nova Scotia was 1763, as Justice Hensley believed, or a date much earlier or much later. Nor did it matter to the outcome that Justice Hensley conflated the date that the Island was created as a separate colony (1769) with the date that the Island legislature first met (1773).[26] Subsequent judges have

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[21] See Roberts-Wray, *supra* note 1 at 835-36, who does not note that the date of the meeting of Nova Scotia's first legislature, in 1758, is generally accepted as the date of reception for Nova Scotia.

[22] Peter W. Hogg, *Constitutional Law of Canada* (Scarborough: Thomson, 2003) at 42.

[23] *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) at 52. LeFroy rejects the basis of Peters' argument, quoted above, in suggesting that 1784, the date of the creation of New Brunswick out of Nova Scotia, is the date of reception for both provinces.

[24] Côté, *supra* note 1 at 88.

[25] For these cases, see Elizabeth Gaspar Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7 Am. J. Legal Hist. 95 at 109-11.

[26] *Cantelo v. Beales* (1878), 2 P.E.I.R. 292 (Sup. Ct.) at 294-95.

assumed that the law of England in force in 1773 is the law of Prince Edward Island, except where changed by Island legislation.[27]

Active, creative legislatures will, over time, render the reception issue increasingly irrelevant by replacing received law with local legislation that deals with local problems. The question that caused Hodgson and Peters to consider the date of reception – whether time ran against the Crown – was resolved, obliquely, with passage of *The Limitations of Action Act* in 1939, defining "action" as "any civil proceeding, including any civil proceeding by or against the Crown."[28] An authoritative determination of the date of reception awaits a court case in which a litigant's rights depend on legislation enacted in the United Kingdom between 1749 and 1773, or, failing that, when there is enough interest in the question to generate a legislative solution. Neither is likely, and so 1773 will prevail, perhaps for no better reason than that it was the date given in the text cited in 1971 by Island lawyers arguing before the Master of the Rolls about whether a UK statute of 1677 was part of Island law.[29]

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[27] *Delima v. Paton*, (1971) 1 Nfld. & P.E.I.R. 317 (P.E.I. Sup. Ct - Ch. D.), ruling on the *Statute of Frauds*, 1677 (Imp.), 29 Charles II, c. 3, quoting LeFroy, *Canadian Constitutional Law* [*Delima*]; *Coles v. Roach*, (1980) 112 D.L.R. (3d) 101 (Sup Ct. - T. D.), ruling on the existence of a tort action for criminal conversation. These cases are cited in J. M. Bumsted's discussion of reception in "Politics and the Administration of Justice on Early Prince Edward Island, 1769-1805" in Christopher English, ed., *Two Islands: Newfoundland and Prince Edward Island: Essays in the History of Canadian Law*, vol. IX (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 51-52.

[28] S.P.E.I. 1939 (3 Geo VI), cap. 30, s. 2(a).

[29] *Delima, supra* note 27.