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Chapter III

ABORIGINAL RIGHTS IN CANADA: POLICY AND PRACTICE

I. Introduction

In an earlier chapter, we documented how American case law decisions came to be applied to the definition of "Indian Title" in Canada in 1888, in the St. Catherines Milling Case. We also examined how the Privy Council further restricted the definition of "Indian Title" in that case. This decision applied the British legal fiction of prior discovery in the strictest sense. It was based on the theory that when the British Crown established a sovereign claim to the newly discovered territory, it acquired the ultimate title to the soil and therefore only the Crown had the right to give land grants, including land grants to the Indian occupants.[1] We also examined why that claim had no validity in International Law, since such a claim was only recognized if the newly discovered land area was vacant or where the inhabitants were so unorganized that there were no discernable political institutions, no laws or no social order.[2]

Britain took this position primarily as a means of defending its legal claim against other European countries. However, in its direct dealings with the Indians, Britain and the settlers operated from the premise that the Indians owned the land, were sovereign nations and that their lands could only be acquired with their consent and by purchase agreements.

In this chapter, the history of colonial dealings in

Canada will be examined and, in particular, how the aboriginal people were dealt with during the early Colonial period during the period immediately following Canadian Confederation, and during the period following the St. Catherines Milling Case.

II. First Colonial Nation in Canada - The French

(a) Did the French Recognize Indian Ownership of Their Lands

The first colonial nation to make sovereign claim to much of what is now Canada, was France. There are differing views on the exact nature of the French claim and its effect on the Indian inhabitants. Judge Taschereau of the Quebec Superior Court, for example, was of the opinion that under the French claim the French King was vested with the ownership of all ungranted land and only the King had the right to make land grants and convey full title to lands. He suggested that the argument that Royal grants and Charters merely established a claim against other European nations, but did not affect the ownership rights of the Indians, had not been thought of at that time.[3] Further, he was of the view that France recognized no "Indian Title" and, as a result, full title was vested in the Crown. He further argued that, when France ceded her North American territories to Britain in 1763, full title to all lands so transferred were vested in the new Sovereign.[4] The implication of this ruling, therefore, would be that Britain was under no obligation to recognize the Indians' ownership of their land, since they had no title recognized

in law. This would have included the Prairie Indians, since the French claim to the Interior stretched at least to the Rocky Mountains if not to the Pacific Ocean.

An opposing view was argued by Chief Justice J. Monk in another Quebec Case. In Monk's view, neither the Government of France, any of the French trading companies, or the French colonists attempted, over a period of 200 years of trade, to change the laws and usages of the Indians, except in those areas where the French had colonies or permanent settlements. Even in these areas this was done by persuasion and not by force. He goes on to argue that therefore the territorial rights of the Indians, as well as their political structures and laws, survived French rule.[5]

It is clear that the French did not at any time pursue a policy of buying Indian lands in North America. MacLeod argues that this was because the French and their trading companies were primarily interested in the fur trade and did not want settlers in the area. The fur trade required that the Indians be mobile and free to roam at will, over their lands. Indeed, even those Indians who practiced agriculture were encouraged to give this up and devote their time completely to hunting and trapping.[6]

MacLeod also argues that contrary to common belief, before the whiteman arrived, all hunter Indians had their own private hunting grounds which they owned. Also, they had permanent settlements or villages, although they often were away from the villages for several months at a time on a hunt.[7] Since no one has done a definitive study of land ownership among the Indians in Canada, outside the eastern provinces, we cannot be certain this applied to the vast area now occupied by the Woodland Cree and much of which

was then occupied by the Assiniboia and the Chipweyan Indians. However, there is some evidence that it did and that some limited agriculture was practiced by some tribes. The old economic system broke down because of the fur trade and the lifestyle changes brought about by this trade. In all likelihood, both communal and private ownership existed side by side. Smaller hunting grounds near the villages may have been privately owned while larger, more distant hunting grounds may have been communally owned. Indian tribes or nations, as a group, claimed sovereignity over a given land area, which claims were recognized by other Indian tribes. They also defended their land area against intruders from other tribes. Within that sovereign area both private and community ownership of land was recognized.[8]

Therefore, land ownership and territorial jurisdiction among the Indians was not sustantially different in North America from what existed in Europe during the 14th and 15th Centuries.[9] Given this, a more detailed examination of the French claim to Canada and her activities in the area are in order.

(b) The Early French Colonial Period (1540 - 1626)

Cartier's original voyage of exploration and discovery of the St. Lawrence was in 1534. The first Commission to Cartier in 1540 did not give him authority to claim land or territory for France and seemed to view the land as possessed, in part, by the Indians. He was merely commissioned to explore the territory and locate potential sites for a French settlement.[10] In 1854 Roberval was given a new Commission

which took precedence over a Commission he was given a year earlier and which changed the voyage from one of exploration to one of conquest and colonization. The French did not claim territorial rights by this Commission, but only the intention to acquire lands by subduing the inhabitants.[11] The Commission did not deny Indian land rights, in fact the method of acquisition, conquest, is an implicit recognition that the Indians are the owners. The rationale for the conquest was that it was pleasing to God to convert barbarian peoples to Christianity.[12] Neither of the Commissions, however, resulted in a permanent French colony in Canada or the actual acquisition of any territory. Since France argued factual control of land as a prerequisite to title, it could not claim that these expeditions gave them any sovereign rights in Canada.

The next Commission given by France was to de la Roche, in 1577. He was primarily interested in the fur trade. His Commission gave him the power to conquer and claim for France whatever lands he could, and then granted him the right to settle these lands. France made no pretense of any title in North America at that time. However, since de la Roche never reached North America, his Commission was never put into effect. It was ten years before France gave another Commission, this time to Jacques Noel. This Commission granted a trade monopoly, but the commission was eventually cancelled. In 1597 de la Roche secured another Commission and this time he did reach North America. This expedition was still a proposed enterprise of conquest. He, however, managed only to establish a small colony on Sable Island. The settlers returned to France five years later.[13]

In 1599 a trade Commission was granted to Chauvin, but when de la Roche objected, it was cancelled and a new trade Commission to the St. Lawrence only was granted but Chauvin acted as one of de la Roche's lieutenants. A fort was built and a colony was established but this one also failed to survive. In 1603 a new Commission was granted to de Monte to explore a specific territory, subdue the Indians and establish settlements. No land title was claimed. Treaties with Indians were seen as the way to spread French influence and authority. This was a de facto recognition of Indian sovereignity. The purpose of colonization was to be in the service of trade. Between 1603 and 1626, the French finally succeeded in establishing a number of small permanent settlements in the St. Lawrence River Valley and began an active trade with the Indians.[14]

(c) French Colonization and Trade To 1760

In 1627 the French government passed an Act establishing "the Company of 100 Associates." In this Act France gave a grant of land covering the whole eastern sector of North America in a north/south line probably to the Mississippi River. This was an assertion of title to this territory. The Company was also given authority to dispose of lands within its grant and, in addition, it was given a monopoly on trade in skins and furs within this territory. Although the French claimed title as against other Europeans, the grant indicated the land was still to be acquired and occupied by settlers. The extension of the Crown's authority was still taken as a basic goal. It would appear that France still recognized the Indian occupants as autonomous and their submission to French rule

was a goal for the future.[15]

In 1663 the Company had to relinquish its grant to the Crown. In 1663 a new Commission was issued to de Tracy, which again was expansionist in nature. It gave the authority to extend the King's boundaries as far as possible and again directed the local Indian inhabitants to be obedient to the King. In 1664 the East India Company was established and was granted a 40-year trade monopoly and full proprietary rights to parts of North America. It was granted full rights over territory already occupied by the French and the right to acquire other territory by conquest, regardless of whether the occupants were whites or Indians. However, the Company was also directed to establish friendly relations and alliances with Indian tribes for the purpose of trade and to enlist their aid to fight the English. The Indian nations were recognized as autonomous and capable of carrying on international affairs.[16] In 1664, this Company was abolished and the rights were assumed by the Crown. The goal now was to bring the Indians under the King's control, but this goal was to be accomplished without violence. The methods used were to be persuasion and fair treatment, and Indians were not to be deprived of their lands. The Commissions to French governors, granted up to 1755, all followed the same pattern as the various Commissions discussed above.[17]

Although the French did not pay for Indian lands, they, on the other hand, followed a policy that said for a claim to title, to be valid, it must be based on actual conquest and/or occupation of the land and not on just a piece of paper granting certain authority over the land. Although France did not explicitly recognize Indian title, legally it did acknowledge in practice that most lands in North

America were held by indigenous people. It also acknowledged in practice that these people had the capacity to enter into alliances as sovereign nations with other sovereign nations. For example, the French concluded a Treaty of Peace with the Hurons and the Algonquins on one hand and with the Mohawks on the other, in 1622.[18]

In areas which France occupied and settled, it considered the Indians to be its vassals and attempted to christianize them. They were deemed to hold their lands as a grant from the French King. Since the King claimed ultimate title to the land, they could be deprived of their land, but until such time as this was done, their right to their lands remained intact.[19]

III. Colonialism By Private Charter

(a) The Hudson's Bay Company and Rupertsland

In the northern territory of what is now Canada, as in the American colonies, the British practice was to carry out its colonial goals by granting trading and proprietary rights over large land areas to commercial companies, rather than by attempting colonizing activities on its own. As mentioned previously, this related to Great Britain's relative political and military weakness and her preoccupation with the Celtic wars.[20]

In 1670 the King of England, Charles II, granted a Charter to a Company of Adventurers, headed by Prince Rupert, a cousin of the King. The section of the Charter setting out out the privileges of the Company reads as follows:

> "...they shall have perpetual succession, and that they and their successors, by the name of "the Governor and Company of Adventurers of England, trading into Hudson's Bay," be, and at all times hereafter, shall be, personable and capable in law to have, purchase, receive, possess, enjoy and retain lands, rents, privileges, liberties, jurisdictions, franchises and hereditaments, of what kind, nature or quality soever they be, to them and their successors; and also to give, grant, demise, alien, assign and dispose lands, tenements, and herediments..."[21]

The wording of this section implies an implicit recognition that the land area covered by Charter is not yet that of the Company but that it can be acquired by purchase. Only when it has been purchased and received by the Company does the Company have the right to use and dispose of land. Since the occupants of the land were primarily Indians, the purchase of Indians' lands would have to be from the Indians. This is, therefore, an implicit recognition that the Indians were the true owners of the land.

The Charter further confirms this implicit recognition of Indian ownership in granting to the Company the following:

> "...the sole trade and commerce of all seas; straits, bays, lakes, rivers, creeks, and sounds ... that are not already actually possessed by someone else..."[22]

The Charter also goes on to specifically identify activities such as fishing, mining, fur trade, etc. It further indicates that the Governors are "... the true and absolute lords and proprietors of the same territory."

The territorial limits of Rupertsland are vague but were interpreted by the Company at a later date to include all the lands draining into Hudson's Bay. However, it is highly doubtful that the drafters of the Charter had this in mind, since they had no idea of the land area involved. In addition, a portion of the lands within the area were claimed by the French. The reference to the Governors being absolute lords and proprietors, would appear to establish the monopoly claim to trade and commerce as against the other European powers, and not the absolute rights possessed by the feudal lord.

There is no reference to settlement or the establishment of colonies in the Charter. In this respect, the Charter is different from Charters given to companies over various parts of what is now the eastern U.S. seaboard where settlement and real estate were the goals, rather than trade in furs as was the goal of the Hudson's Bay Company. Neither does the Charter itself make any reference to Indians or Indian rights directly. The Governors of the Company, however, had the power to enter Treaties with the Indians and to pass ordinances in regard to the land under their Charter.

Records show that for a number of years after 1670, the instructions to officers of the Company included an order that Treaties be made with the Indians. In actual

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fact, the records make reference to only two such Treaties, the first was in 1668, when a Captain Zachria Gillam, who led an expedition to James Bay and the Ruperts River, apparently concluded a Treaty with the Indians of the area wherein he allegedly purchased the river and the adjacent land from the Indians.[23] In 1688, the Governor of Rupertsland was given a Commission to make a Treaty with the Indians at the bottom of the Bay. There, however, is no direct evidence that a Treaty was actually ever concluded in either instance. Certainly no written terms of such Treaties exist.[24]

The only other Treaty made in the area was made in the Province of Assiniboia in 1817 by Lord Selkirk and the Ojibway Indians. By this treaty, Selkirk, who had earlier purchased the right to a tract of land known as Assiniboia, from the Hudson's Bay Company, purchased certain lands from the Indian chief, which included a two-mile strip along the Red River and parts of the Assiniboia River and certain other tributaries of the Red River. This treaty was to provide land for the settlers, Selkirk had brought to the area from Scotland.

This was again implicit recogntion that the Indians owned the land and were sovereign nations who could enter into international Treaties with other nations.

b) <u>The Application of Law in Rupertsland</u>

The Governors and Councils in the colony had the right to pass ordinances for the conduct of the trade and to control relationships between the employees of the company and the Indians.[25] The company, however, as late as 1857, did not claim that its authority or practice extended to controlling the trade or relationships between the Indians. For example,

during the hearings of the Select Committee on the Hudson's Bay Company in 1857, Mr. Grogan, a member of the Select Committee, asked the following question of Sir George Simpson, Governor of Rupertsland:

> "What privileges or rights do the Native people possess strictly applicable to themselves?"

Sir George Simpson answered as follows:

> "They are perfectly at liberty to do what they please, we never restrain Indians."

Grogan:

> "Is there any difference between their position and that of the halfbreeds?"

Sir George:

> "None at all. They hunt and fish and live as they please. They look to us for their supplies and we study their comfort and convenience as much as possible. We assist each other."

Lord Stanley(a member of the Select Committee):

> "If any tribe were pleased to live as tribes did live before the country was opened up to Europeans, that is to say, not using any article of European manu-

facture or trade, it would be in their power to do so?"

Simpson:

"Perfectly so, we exercise no control over them."

Bell(a member of Committee):

"Do you mean that, possessing the right of soil over the whole of Rupertsland, you do not consider that you possess any jurisdiction over the inhabitants of the soil?"

Simpson:

"No, I am not aware that we do. We exercise none, whatever we possess under our charter."

Bell:

"What laws do you consider in force in the case of the Indians committing any crime upon the whites, do you consider that the clause in your licence to trade, by which you are bound to transport criminals to Canada for trial refers to Indians or solely to whites?"

Simpson:

"To the whites, we conceive."

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Grogan:

"Are the Native Indians permitted to barter skins inter se from one tribe to another?"

Simpson:

"Yes."

Grogan:

"There is no restriction at all in that respect?"

Simpson:

"None at all."

Grogan:

"Is there any restriction with regard to the halfbreeds in this respect?"

Simpson:

"None as regards dealings among themselves."[26]

In earlier testimony it was also established that the Company no longer attempted to control the trade of the Metis traders into U.S. markets. The Company, however, did levy a tariff against both the outgoing and incoming trade. The issue of the trade monopoly of the Hudson's Bay Company was taken up by the Metis in the period 1846-49. It led to the famous Sawyer trial, the special memorial to the British Crown (a petition by the residents of the Red River to the Queen regarding the trade monopoly of the Hudson's Bay Co.) and the recognition by the Company that it could no longer

effectively prevent the Metis traders from trading with the Americans. (The Free Trade Movement is discussed in more detail in Chapter IV). By 1857, it would appear that the Company no longer considered this to be an issue. In the hearing, Mr. Roebuck, a committee member, asked the following question:

> "They do not demand free trade in furs? You have never heard of such a thing?"

Simpson:

> "They do not demand it, but they practice it, many of them do."[27]

The Hudson's Bay Company never exercised its right to sell land within the territory of its Charter, except in one instance—that was the sale of their proprietorship rights over Assiniboia to Selkirk. According to Hargrave, in his book, The Red River, this sale was conditional on Selkirk extinguishing the Indian title of the Indians before he settled the area.[28] Initially, he only planned to settle land along the rivers, acquiring the rights of the Indians through the Selkirk Treaty. The Indians later raised a question as to the validity of this Treaty and of the settlement in a letter to the House of Commons of Great Britain in 1860. The letter stated as follows:

> "That as it is usual for the British

> Government to recognize the Indian title to their lands and to enter into Treaty with the Native chiefs of the soil....granting them the right of reserves for themselves and the children of their nations, to settle upon and giving them compensation for tracts of land for white people to settle upon..."[29]
> (Emphasis mine)

All of the evidence from the employees of the Hudson's Bay Company itself indicates that the practices of the Company were similar to that of the settlers in the United States. These practices can be summed up as follows:

a) The Indians were recognized as sovereign nations and the true owners of their land;

b) Land, for purposes of settlement, could be obtained from the Indians by purchase agreements;

c) Land not purchased remained as Indian territory. (For Example, Sir George Simpson, in a letter to Trader Pelly, dated February 1, 1837, refers to the N.W.T. and Rupertsland as Indian country. Also, in an 1837 letter to the Privy Council, he

again refers to the N.W.T. as Indian country.)[30]

d) The Indians were to receive fair and equitable compensation for their lands.[31]

e) Anyone occupying Indian lands, the title to which had not been purchased, had only pre-emption rights.[32]

f) The laws of England and later the laws of Canada were applied only to:

(1) relations and dealings between the Company and its employees and between Company employees.

(2) relations and trade between the Company, its employees and the Aboriginal peoples.

(3) in all other respects the Aboriginal peoples were free to conduct themselves as they chose; in other words, they were considered sovereign nations competent of looking after their own affairs, trying their own criminals, etc.

Notwithstanding this, Cumming and Mickenberg in the book "Native Rights In Canada" seem to have reached a somewhat

different conclusion about the power and legal authority of the Hudson's Bay Company. They based this on a rather detailed analysis of the wording of the Charter itself. Their conclusions were as follows:

a) the Company had the authority to pass ordinances setting penalties and punishment on all offenders of the laws.

b) Apart from Company ordinances, the law in force in Rupertsland until 1870 was the law of England as it stood on May 2, 1670, or as altered by subsequent statutes.

c) The courts of Upper and Lower Canada had jurisdiction over all crimes committed in the N.W.T.

However, the Company, according to Canadian Courts, did not have the full authority to apply the laws of England to Rupertsland and the Northwest Territories.[33] As in the case of the English settlers of America, the Hudson's Bay Company found that it did not have the ability to exercise its alleged authority over the Indians or to apply the legal sanctions at its disposal. Therefore, necessity dictated a practical

approach to the question of authority based on what was possible or on the great British tenet of Expediency. On this basis, legal practices developed ipso facto, which were more in keeping with the reality of the frontier than the grandiose claims and powers bestowed by the Charter itself.

c) Was the Charter Legal?

The question of whether the Charter of the Hudson's Bay Company was legal in British law has been argued by many persons, as demonstrated in the exchange of documents and correspondence which took place between Alexander Kennedy Isbister and the British Crown. Apparently, the validity of the Charter was questioned by Parliamentarians about 1690. At that time, an Act was brought before Parliament to validate the Charter and to limit its term to seven years. This was a common practice at the time. After detailed study by the Commons and the Lords, the Act was passed and the term of the Charter was limited to seven years.[34]

In the proceedings of the Select Committee on the Hudson's Bay Company in 1857, direct questions concerning the legality of the Hudson's Bay Company Charter were put to several key witnesses. Allen Macdonnel gave testimony as follows:

> "...the claim which the Hudson's Bay Company set up in virtue of the Charter of Charles II, has engaged my attention

for some years past, and the investigations which I had the opportunity of making have led to the conclusion that those claims have no foundation in law or in equity; whilst I might not be disposed to dispute, that in itself the Charter may be good, so far as it creates a body corporate, with a common seal, and with power to sue and to be sued, yet I contend that it cannot confer upon the Hudson's Bay Company those powers and privileges which they assume to exercise under it. The sovereign, in the exercise of the prerogative of the Crown, may grant a Charter, but it has always been held that no sovereign can grant to any of his subjects exclusive rights and privileges without the consent of Parliament, and this Charter having been so granted, the powers and privileges sought to be exercised under it are illegal. And this evidently was the opinion of the Hudson's Bay Company themselves as early as 1690, viz., 20 years after the date of the Charter. At that period they petitioned for an Act to be passed for the confirmation of those rights and privileges which had been sought to be granted to them in this Charter.

> The Act first and second of William and Mary, is the Act alluded to, it did legalize and confirm them, but only for the period of seven years and no longer. That Act of Parliament has never been renewed since its expiry in 1697, consequently the Charter is left as it originally stood, and wholly unaffected by any confirmatory Act of Parliament. The very foundation for the Charter is a grant of territory presumed to have been made in the year 1670. Now, as Charles II could not grant away what the Crown of England did not possess, much less could he grant away the possessions of another power. The very words of the Charter itself exludes from the operation of the grant those identical territories which the Hudson's Bay Company now claim..."[35] (Emphasis mine).

Macdonnel then goes on to point out that much of the territory in question was claimed by France prior to 1763. By the Treaty of Paris, entered that year, it was to be governed in accordance with the provisions of that Treaty. Therefore, any attempt by the Hudson's Bay Company to claim the territory or to impose its laws or will on the people of the territory was illegal.[36]

Following the testimony of Macdonnel, the Select Committee next examined Mr. William Dawson and asked his views on this issue of the legality of the Hudson's Bay Company Charter. He replied as follows:

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"Mr. William Dawson called in and examined."

"I am head of the Woods and Forests Branch of the Crown Land Department, and reside in Toronto."

"I have never had any difficulty or quarrel with anyone connected with the Hudson's Bay Company."

"Have you particularly studied the titles under which the Hudson's Bay Company claim certain rights of soil, juirsdiction, and trade on this Continent?"

"I have made this subject a particular object of study for many years, and have omitted no opportunity of acquiring information upon it, and although with more time than I could devote to it, and a more extended research, much additional information could be obtained, I believe that it would only tend to fill up details, and strengthen and confirm the results of the investigation I have already made."

"Will you state to the Committee the results of your investigation?"

> "The result of my investigation has been to demonstrate that in the Red River and Saskatchewan countries, the Hudson's Bay Company have no right or title whatever, except what they have in common with other British subjects. Wherever they have any possession or occupancy there they are simply squatters, the same as they are at Fort William, La Cloche, Lake Nippissing, or any of their other posts in Canada."
>
> "The governmental attributes they claim in that country are a fiction and their exercise a palpable infraction of law...."[37]

The Government of Canada at the time took the same view which was set out ably and in detail by the Honorable Joseph Cauchon, Commissioner of Crown Lands. In a memorandum to the Select Committee in 1857, he outlined the history of the territory claimed by the Company and concluded that the Hudson's Bay Company at no time had a legal claim to the Northwest, which he also insisted was claimed by France. This vast territory, he concluded, was transferred to the British by the Treaty of Paris and if anyone had a claim to the territory it was the colony of Upper Canada, since it was simply a geographic extension of that territory.[38]

Although the Hudson's Bay Company did not specifically request a renewal of its Charter in 1697, on the basis that the Charter granted rights in perpetuity, the British Parliament

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and law officers proceeded, following that time, as if the Charter was legal. The powers of the Company to make laws and the jurisdiction of courts were dealt with in specific legislation. When the Company's Charter was challenged by Isbister in 1849, the Company based its legal arguments upon the Charter itself and upon subsequent legislation.[39]

As well, the British Foreign Secretary referred the matter to the Lords of the Privy Council for their opinion. They concluded that the claim of the Company was legal but suggested that the matter be decided by a tribunal. At this point Isbister was offered the option of pursuing the matter legally on condition that he and the petitioners would be liable for all of the legal and judicial costs involved.[40] Isibister decided not to puruse the matter. He himself was unable to pay the costs and the petitioners he was representing were no longer interested in the matter since they had now in practice, if not in law, achieved the right to carry on free trade with the United States.

IV. Recognition of Indian Ownership of Lands In Practice

a) Practice in the Atlantic Provinces

The question of Indian ownership in the Atlantic provinces is somewhat more complex than in other areas of Canada, since colonial claim to some of these territories was exchanged between

France and Britian from time to time. Originally, the territory was claimed by the French. As was the French custom, they settled lands which they first occupied without any formal arrangement to acquire the land from the Indians. The remaining territory was left to the Indians, and various treaties of peace and friendship were concluded with some of the tribes. In 1713, by the Treaty of Utrecht, all of the Maritimes, except P.E.I. and Cape Breton Island, were transferred to the British. The latter did not come under British colonial rule until 1763 following the Treaty of Paris.[41]

The British settlers, who had considerable conflict with the Indians, entered into several peace Treaties with the Indians prior to the Royal Proclamation of 1763. However, it has been assumed that these did not cover the Indians in P.E.I. and Cape Breton Island. These Treaties made no reference to the land rights of the Indians but they did imply that future settlements would be made for land yet to be acquired. This was a form of recognition of Indian ownership.[42] Some British authorities took the position that French sovereignty had extinguished Indian ownership. For example, Johnathon Belcher, in a letter to the Lords of Trade, July 2, 1762, stated as follows:

> "Your Lordships will permit me humbly to remark that no other claim can be made by the Indians of this province, either by Treaties or long possessions(the rule by which

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> the determination of their claims is to be made by virtue of His Majesty's instructions) since the French derived their title from the Indians and the French ceded their title to the English under the Treaty of Utrecht."[43]

However, the Indians were not mentioned in the Treaty of Utrecht and the Indians continued to consider themselves an independent people, an idea encouraged by the French. It is not clear whether the Lords of the Trade agreed with Belcher, however, the policy of the British in theory was not to recognize the Indians as independent nations.[44] This was no different than the policies the British attempted to impose in the U.S. colonies, which policies the colonists chose to ignore. The issue of land settlements did not become pressing until 1784, with the influx of substantial numbers of United Empire Loyalists from the United States.

The standing policy of the government at the time was expressed in a letter written to a local magistrate in New Brunswick which stated as follows:

> "No purchase or bargain or lease of any such kind made between the Indian natives and inhabitants of this province will be confirmed or allowed unless the same be made with the full consent of every man of the tribe and also assented to by the Governor or President in Council for their assent and approbation."[45]

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This letter gives an explicit recognition to Indian ownership and of the prescribed form for acquiring Indian lands as set out in the Royal Proclamation of 1763. In other instances, the colonial government purchased lands for Indians who had been displaced from their lands by settlers.[46] However, there was never any comprehensive approach in the Maritimes to negotiating Treaties and setting aside reserve lands. Even some of those lands set aside as reserves were later encroached upon by settlers and were taken without compensation. Although the pattern of settlement in the Maritimes and the way of dealing with the Indians was not substantially different than in other parts of Canada or the eastern United States, no overall Indian claim was ever recognized nor did British authorities ever move to extinguish Indian rights because of the claim that this had been done by the French.[47] The legal fiction that Maritime Indians had no rights was continued after Confederation and is still the policy of the present day Canadian government. In the Maritimes, as in the United States, and as shall be seen in Central Canada, persons of mixed-ancestry were treated as Indians if they lived with or like the Indians. There was no separate class of Aboriginal people called Metis or who self-identified as Metis. The practice of dealing separately with Metis did not develop until 1869 which shall be explored in detail in Chapter IV.

b) Quebec

The French policy in Quebec was as outlined previously in this Chapter. It was based on the claim of French sovereignty and the pacification of Indians in areas occupied by the French. Marc Lescarbot, a Parisian lawyer, in The History of France, noted that France's approach to acquiring colonies was not in keeping with the laws and policies of International Nations.[48] France laid claim to new territories by Divine Right. However, as previously noted, whether or not French authorities recognized Indian ownership depended upon whether a given territory was to be acquired for settlement or trade. Since little of French North America was settled, the French only interfered with the right of Indian ownership in the limited settled areas.

In spite of this policy the French at times gave explicit recognition to Indian ownership. For example, King Louis XIV in instructions to the Governor of New France, Daniel de Reme of Courcelle, in 1665, stated:

> "...nor will anyone take the lands on which they are living[the Indians] under the pretext that it would be better and more suitable if they were French."[49]

In spite of this recognition of Indian ownership the French never had any arrangements or procedures for purchasing

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Indian lands or extinguishing Indian title. They merely squatted on land which they desired for settlement.[50]

In contradiction to this official policy, the French argued against entering the Treaty of Utrecht on the basis that they did not claim sovereignty to the Maritimes, as the Indians were allies not subjects. They also recognized the Iroquois Confederacy as an independent sovereign entity.[52] The Articles of Capitulation signed in 1760 by Governor Vaudruèil of Montreal gave explicit recognition to the notion of Indian ownership of their lands, in Article IX which reads in part:

> "The savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they chose to remain there...."[53]

It is unclear as to whether the Royal Proclamation of 1763 applied to ungranted lands in Old Quebec. The British, and later Canada, followed the same policy here as in the Maritimes by claiming that since the area was acquired by Treaty from France, it had been under French sovereignty and therefore Indian rights had been extinguished. This is still claimed by the Government of Canada today. However, outside the boundaries of Old Quebec, the Royal Proclamation of 1763 clearly did apply. In territory claimed by the Hudson's Bay

Company, Order-in-Council #9, incorporated in Section 146 of the B.N.A. Act 1867 recognized Indian land claims.

The first extension of Quebec boundaries took place in 1774. This Act made no reference to Indian lands but instructions for dealing with Indians emphasized that the provisions of the Royal Proclamation were to be applied.

A second extension of the boundaries took place in 1898. This Act again made no reference to Indian lands, but Indian rights in the area were not disputed since the territory was traditional Indian country.[54] This Act included recognition of Indian claims and set out explicit instructions as to how these claims were to be satisfied. Part of the agreement for extension of the boundaries included an agreement with Quebec that it would be responsible for satisfying Indian land claims.[55] In spite of this provision, the Quebec Government took no steps to deal with these claims until it was forced to negotiate the James Bay Treaty in the 1970s. This agreement was subsequently confirmed by Provincial and Federal legislation.[56] No settlement of Indian land claims has been made to date in those areas added to Quebec in 1774 or in 1898.

In Quebec, as in the Maritimes, legislation did not distinguish between Indians and persons of mixed-ancestry where they followed a similar lifestyle. Those persons of mix-ancestry who lived among the Quebec French were not distinguished from the

Quebecois population and were rapidly absorbed into the population. A mixed-ancestry population existed on the Caughnawaga reserve, but they were accepted into the band by Indian Act amendments in 1885.[57] In the James Bay area those persons who identified themselves as Metis were dealt with as part of the Indian population under the James Bay Agreement. In other parts of Quebec some residents have more recently begun to identify themselves as Metis. However, they are persons who have lost their Indian status and therefore are Non-status Indians. They are not Metis in the sense that like the Metis in the Red River they were dealt with or recognized as "half-breeds" by a special Act and other legislative provisions, neither did they self-identify as Metis nor did they express Metis nationalism.

c) Ontario

The territory which became the British Colony of Upper Canada was originally part of Quebec. It did not become a separate colony until the Constitution Act of 1791. Up to that time it had operated under the French criminal and civil law system. The area had very limited French settlement prior to the Treaty of Paris in 1760. When New France was ceded to Britain the area became attractive to loyalist settlers from the United States who were fleeing from the American War of Independence of 1776. It was only a matter of time before

the loyalists rebelled against French laws and institutions. This led to the creation of a separate English province with English laws and institutions.

The relationship between the colonial government and the Indians was affected by developments in the American colonies after 1763. The Royal Proclamation of 1763 became the model for acquiring Indian lands for the new settlers. The first formal cession of land was obtained from the Indians in 1790 for the value of 1200 pounds. Earlier, the colonial government had recognized the land rights of the Iroquois Confederacy, who had been allies of the British during the American War of Independence. Land was purchased from another Indian band and given to them as their land in 1784. This land purchase, and later land cessions, obtained from the Indians, were motivated by fear that the Indians might turn against their allies if their land grievances were not satisfied.[58] Therefore, the policy, which developed in Southern Ontario, was, as in the U.S. colonies, based on the reality of the circumstances rather than on the often repeated assertions of British sovereignty by right of prior claim. In this case, the prior claim would have been the French claim as in Old Quebec, where the British did not recognize the Indians as having existing land claims.[59]

The situation in Ontario was complicated by the fact that the Indians refused to abide by the provisions in the Royal Proclamation of 1763 which stated that they could only cede

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lands to the Crown. The tribes often chose to sell their lands privately. This is consistent with the concept of nationhood. In addition, settlers often squatted on lands which were still Indian lands. Over a period of time, these problems were eventually solved by having the lands in question formally ceded to the Crown, with the final surrender of Six Nations land taking place in 1841. Other land surrenders were acquired from various tribes between 1763 and 1800. Further land surrenders were obtained following this period, so that by 1850 all of Southern Ontario, as far west as Lake Huron, had been surrendered, except those lands set aside as reserves for the Indians. There were, however, two areas in what was known as Southern Ontario in which surrenders were not obtained until 1923 by way of Treaties. The one area on the North shore of Lake Ontario around Toronto was surrendered by the Mississauga Treaty that year. The other area west of Ottawa and north of Ontario was surrendered the same year by way of a Treaty with the Chippewas.[60]

Other areas north of the Great Lakes had been surrendered by the Indians in 1850 by way of the Robinson-Huron and Robinson-Superior Treaties. Manitoulin Island and other islands in Georgia Bay were surrendered in 1861.[61] Following the joining of the North West Territories to Canada and prior to the extension of the Ontario boundaries, first west and then north, the Canadian government negotiated Treaties with the Indians

west of Lake Superior in 1873 and in the large Hudson's Bay watershed area to the north in 1905.[62] All of these land surrenders in what is now Ontario followed the general provisions set out in the Royal Proclamation. They were based on two principles: there was recognition of the Indian ownership of their lands and on the policy that the Indians could only dispose of their interest in the lands to the Crown.

In Southern Ontario, as in other parts of eastern and central Canada, no separate group of persons of mixed-ancestry called Metis emerged, or were recognized either in law or practice. They were dealt with as Indians if they lived with and like the Indians, or like whites if they integrated into the new settlements. Any persons who presently live in that area of Ontario who now call themselves Metis are primarily persons who lost their Indian status. In Northwest Ontario, Treaty 3 area, a distinct group of persons known as "half-breeds" were present as in all other areas where the fur trade had been carried on for some time. They were involved in the fur trade and carried on a lifestyle connected with the fur trade, similar to that of the Metis further to the west and north. When Treaty 3 was signed, the Commissioners refused to include these persons in the Treaty. However, a year later, some of them were accepted as a separate band by way of an adhesion to the Treaty and became Treaty Indians. There still are some Metis in this area whose claims were not dealt with at the time the

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Treaty was negotiated. With the exception of a few land grants to Metis around Moose Factory and in several other isolated areas, the Ontario government has never dealt with the land claims of the Metis of Treaty 9 area.[63]

e) The Numbered Treaties

The Commissioners, when signing the so called Numbered Treaties (prior to 1885) in the West, were given instructions not to deal with the Metis as a separate group of Aboriginal peoples. If they lived with or like the Indians, they could join an existing band and enter Treaty as Indians. If they lived a separate traditional Metis lifestyle, they were to be considered as whites.[64] The Commissioners promised that the government would deal with their claims but gave no indication how this was to be done. The reasons for this policy are not clear but it appears to have been a continuation of policies followed earlier in Central and Eastern Canada where persons of mixed ancestry were either absorbed into the Indian or white community. Also, the special recognition of the Red River Metis may have been a factor in the development of a policy of dealing separately with the Metis. However, in spite of the promises of Commissioners and numerous petitions from the Metis themselves, the government took no action on Metis claims. It appears that the government of Macdonald may have wanted to develop a policy in this regard as early as 1878, but, because of

strong objections from the voters in Ontario, found it impossible for political reasons to implement such a policy.

The rationale for a separate policy for the Metis, or "half-breeds" as they were called, related to their origins and role in the fur trades and the fact that they were the first group to establish settlements in the Northwest, separate from those of the Indians. The origins of this phenomenon and how the government dealt with the "half-breeds" is explored in depth in the next two Chapters. However, it should be pointed out that in spite of theories of prior discovery and sovereignty held by Great Britain and Canada, both found that reality dictated that they recognize and deal with the Indians and Metis, from Ontario west to British Columbia, on the basis of a policy of expediency which recognized "Indian title", as the American settlers had found it necessary to do several centuries earlier in the eastern U.S. colonies.

f) British Columbia

The colony of British Columbia developed quite differently in a number of respects, from settler colonies in the eastern part of the Continent. British Columbia became a Crown colony in 1858. James Douglas was the first Governor of the new colony and he received instructions from the British government as to how he was to deal with the Indians. The policy was to be the same as that followed in other parts of North America.

However, the instructions were sufficiently broad that Douglas chose to ignore them and he, instead, developed a policy of dealing with the Indians, which he claimed was based on the South African policy.[65]

Douglas, who was motivated by economies and did not want to pay for Indian lands, declared all such lands to be public domain and refused to recognize "Indian title". He, instead, gave the Indians title to whatever lands they occupied and had improved, which included farms, fishing stations, home sites, burial grounds, etc. He also refused to recognize the Indian tribes as independent nations but considered them subjects of the Crown like all other settlers. They were able to request and receive additional lands from the public domain on the same basis as other subjects.[66]

One reason that this policy proved feasible was the fact that the Indian population had been considerably decreased by disease prior to the arrival of the settlers. Therefore, there were vacant lands which the remaining Indians were not using for the time being and they did not immediately object to this loss of land. Treaties of peace and friendship had been signed with some B.C. tribes by the Hudson's Bay Company. However, no payments were made to the Indians for their lands. These agreements did not constitute land cession Treaties. The Indians were allowed to come and go as they pleased. There was no supervision and no Indian agents or Indian policy as such.

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According to MacLeod, British Columbia had liquidated her Indian problems before she joined Canada as a province.[67]

In actual fact, the policy which had been applied primarily to the Vancouver Island and Coastal Indians was not recognized by Canada. One of the conditions of British Columbia's entrance into Confederation in 1871 was that the Federal government would be responsible for Indian affairs. In spite of this non-restrictive Indian policy of British Columbia, lands given to Indians were set aside as reserves by the Government of Canada and new reserves were created. Both the general Indian policy and the reserve policy of British Columbia have been the subject of ongoing conflict between the Province and the federal government since that time.[68]

The situation which exists today is that in no part of British Columbia, except the extreme northeast, has there been any formal surrender of Indian lands or any settlement of Indian land claims. The courts have, in recent times, been favourable to the idea that the Indians of British Columbia still possess a legal claim to "Indian title".[69] The Province refuses to recognize such title or to accept any responsibility to settle the Indian land claims. It is willing to let the federal government deal with these land claims if the government takes full responsibility to settle the claims, including the remuneration of the province for lands required to satisfy the Indian claims.[70]

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With respect to the persons of mixed-ancestry in British Columbia, at no time did the province or federal government recognize or deal with a separate group called "half-breeds". There are some Metis in Northeastern British Columbia. Those persons in the rest of British Columbia, who identify themselves as Metis, are either recent arrivals from the Prairies or non-status Indians. The Metis in Northeastern British Columbia have a claim to "Indian title" which was not dealt with by the Canadians under the Dominion Lands Act.

V. Indian Rights In Law

a) Indian title and the Metis Claim

In the negotiations for the transfer of Rupertsland and the Northwest Territories to Canada, a clause was inserted relieving the Hudson's Bay Company of responsibility for Indian claims and making Canada responsible. Canada made a further commitment in this regard in its address to the Queen, which requested the transfer. The question of the Metis and their land claims was not specifically addressed in any of the documents which became incorporated into Section 146 of the B.N.A. Act, 1867. It is not clear whether this was because the government viewed the Metis as Indians, to be dealt with as Indians, or whether they viewed them as white settlers. It may be that some were considered as Indians and others as settlers. Therefore, some would have been recognized as having

a claim to "Indian title" and others only the right of homesteaders or squatters. The question of how the claims of those who had received valid deeds to their lands from the Hudson's Bay Company, would be dealt with, was not addressed in the negotiations or the transer documents involving the Rupertsland transfer. As will be explored in detail in subsequent Chapters, the Metis believed they had a right to the soil and constituted a new nation of people. Certainly the Metis were well-established on their river farms and were making a good living from the soil. Alexander Begg, an early resident of the Red River and a prolific writer, in his book The History of the Northwest, described the Red River settlement and the Metis as follows:

> "The number of settlers along the Red and Assiniboine rivers, including the French and English half-breeds were estimated to be from 12,000 to 13,000 souls. In the vicinity of Upper Fort Garry, the town of Winnipeg had grown to some dimensions, containing, as it did then, over thirty buildings. Of these, eight were stores doing business with the settlers and outfitting halfbreeds for the Indian trade, two saloons, two hotels, one mill, a church and the balance chiefly residences. The town could boast of an engine-house, post

office, and a small hall for entertainments and, at times, especially when the fur traders and hunters arrived from the interior, the vicinity presented a very lively appearance indeed. Along the banks of the Red and Assiniboine Rivers settlements had spread and everywhere could be seen signs of comfort and prosperity. The settlers, as a rule, were peaceful and law-abiding, and the disturbances, which we have noted from time to time, arose generally from the acts of a few men and were not participated in by the community as a whole.

The French half-breeds, who had on several occasions given the Hudson's Bay Company a great deal of trouble, were, at the time we are writing about, among the most peaceful and loyal of the settlers to the government of this day. The Scotch and English had always been law-abiding and, except in the case of a few won over by agitators, they had

invariably supported the authorities. But the company, knowing its weakness, unsupported by any force of soldiers or constabulary, was unable to give that protection through its courts, which a well-ordered community has a right to expect, and for this reason there was an undefined lack of confidence among all classes in its administration of affairs. The company's officers realized this and were looking forward eagerly for some change to relieve them of the responsibility. The Council, although appointed by the Hudson's Bay Company, was really composed of representative men of the settlement, because before an appointment was made, the views of the settlers on the subject were ascertained, and if the councillors had been elected by popular vote, the same men would probably have been chosen in most cases and, what is more, the authority of the Hudson's Bay Company would have been maintained, as it was not only the chief source of revenue but also possessed the most power to do good to the settlement.

The courthouse was situated outside but close to the walls of Fort Garry, and although we need not repeat the particulars relating to the administration of the law, we may say that the process, though well adapted for purposes of fair arbitration in simple cases, was liable to abuse, owing to its summary character and absence of preliminary and other necessary arrangements customary with regular courts of law. The agitation against the authorities and against the courts proceeded, as aleady shown, not so much from natives of the colony as from newcomers, and a few others who had an object in wishing to upset the government of the day.

The cultivated portions of the farms along the rivers were small, but immediately back of them could be seen great herds of domestic cattle feeding on the plains, unherded and left to roam at will, grazing freely on the rich grass of the prairie. Just before the harvest it was customary for the settlers to go "hay cutting", which

they did by travelling over the prairie until they came to a desirable spot, when they would cut in a circle and all the grass thus enclosed belonged to the party hay-making, no one by the acknowledged law of the land being allowed to disturb him within that charmed circle. Then a busy scene commenced, the mowers (for the settlers had learned already to make use of agricultural machinery) were kept busy; and men, women and children might be seen actively engaged in stacking the hay. During hay-time the people lived in tents on the hay ground and only returned to their houses when the work was finished.

Almost immediately after haying harvesting commenced and, anyone to have looked at the splendid fields of wheat would have been impressed with the great fertility of the soil. At that time there was no settlement skirting the river with tiny farm houses, comfortable barns and well-fenced fields of waving, golden grain like a beautiful fringe to the great fertile prairies beyond."[71]

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It is clear that at the time there was a substantial well-established settlement with its own social and economic systems, a system of government, laws and courts, and with the settlers recognized as the legal owners of the land they occupied. Therefore, the Metis, who made up approximately 80 percent of all the inhabitants, had a claim to their land as settlers, as did the Indians in the settlement, many of whom were also engaged in agriculture. This claim of the halfbreeds as first settlers was recognized by Macdonald when he presented the Manitoba Act in the House of Commons in 1870 for approval of the House. He, at the same time, indicated that they had a claim as descendents of the original inhabitants of the country, the Indians.[72]

The Metis themselves had developed a sense of nationalism, which exhibited itself in the idea that they were a new nation of people. This idea manifested itself in a real way during the free trade movement, which began in 1839 and lasted until 1850, when the goal of free trade was realized. As inhabitants of the Country, they believed that they had the right to take land, carry on trade among themselves and outside the settlement and, in general, to pursue their own development as they saw fit, without any interference from the Hudson's Bay Company.[73] Although they had won their freedom of trade and a degree of control over the local government in the settlement, their nationalism had not decreased.

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In an 1869 House of Commons Debate, reference is made to a report of Dawson, the road builder, who said Indians and half-breeds consider themselves to be lords of the soil.[74] George F. Stanley, in his book The Birth of Western Canada, also speaks of this Metis claim, which he blames on the encouragement of the Northwest Company. Similar Metis claims are referred to in reports dealing with the free trade movement of the 1840s and 50s.[75] The Metis claim put forward in the Metis Bill of Rights in 1870, and the fomration of the Provisional Government were further manifestations of this claim of nationhood or nationalism.[76] (The origins of the Metis, their development and the history of their dealings with the Canadian government will be explored in more detail in subsequent Chapters.)

The Metis claim, based on Indian ancestry or "Indian title" was explored in some depth by Archer Martin, in a book published in 1898. The book explores the concept of "Indian title" and its application to the Metis in some detail. In a previous Chapter it was indicated that the concept of "Indian title" became narrowly defined in the St. Catherine Milling Case. However, earlier judicial decisions, as well as more recent decisions, have often been broader and more favourable on the concept of Indian land rights. Martin points out the difficulty with

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this concept in the following comments:

> "The question of aboriginal title is one not too well understood, in spite of the fact that, in the course of the rapid extension of the British Empire, it is one that constantly crops up, for example, it was recently, if it is not yet, under consideration, in regard to the rights of the Matabele in Mashonaland.
>
> In the United States and Canada particularly, from the nature of the settlement of those countries, the matter has been the subject of the gravest consideration and has repeatedly taxed the abilities of the highest tribunals. Possibly the opinion of no one would be received with greater attention than that of Chancellor Kent in the first and third volumes of his commentaries(k) enters most lucidly into an inquiry concerning the claims of the original possessors of this country. At page 378 he states that, in the case of Fletcher v. Peck, 6 Cranch 87, the opinion of the Supreme Court of the United States

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was declared to be that "the nature of the Indian title to lands lying within the territorial limits of a state, though entitled to be respected by all courts until it be legitimately extinguished, was not such as to be absolutely repugnant to a sesin in fee on the part of the Government within whose jurisdiction the lands are situated." He adds, however, that though this was the language of a majority of the court, yet it was a "mere naked declaration, without any discussion or reasoning by the court in support of it; and Judge Johnson, in the separate opinion which he delivered, did not concur in the doctrine, but held that the Indian nations were absolute proprietors of the soil and that practically, and in cases unaffected by particular treaties, the restrictions upon the right of the soil in the Indians amounted only to an exclusion of all competitors from the market, and a pre-emptive right to acquire a fee-simple by purchase when the proprietors should be pleased to sell." In the subsequent case of Johnson v. McIntosh, 8 Wheaton, 543, this large view of the title of the Indians was somewhat curtailed, and in the language of Marshall, C. J., their right was defined to be that of occupancy only, and subject to the absolute title of the state to extinguish it. In the words of Kent, the

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Indians enjoyed no higher title than that founded on simple occupancy, and were incompetent to transfer their title to any other power than the Government which claimed the jurisdiction of their territory by right of discovery. In a still later case(l), Worcester v. State of Georgia, 6 Peters, U.S., 515, arising out of certain statutes of that State of 1828-29-30, the Supreme Court decided that the right to the soil claimed by European governments, as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, was only deemed such in reference to the whites, amounting, so far as the Indians were concerned, only to an exclusive right to purchase such lands as they were willing to sell; the various royal grants and charters asserted a title to the country against Europeans only, and were blank paper as regards the Indians. Chalmers(m) states that the practice of the European world had constituted a law of nations which sternly disregarded the possession of the aborigines, because they had not been admitted into the society of nations. This principle doubtless influenced the naïve "Councell's opinion"(n) given, about 1675, by six well-known counsel regarding lands in New York, when they found, in answer to the second question submitted to them—

> Though it hath been and still is ye ye usual practice of all proprietors to give their Indians some recompence for their land, and seem to purchase it of them, yet it is not done for want of sufficient title from ye King or Prince who hath ye right of discovery, but out of prudence and Christian charity, least otherwise the Indians might have destroyed ye first planters (who are usually too few to defend themselves) or refuse all commerce and conversation with ye planters, and thereby all hopes of converting them to ye Christian faith would be lost.
>
> Nevertheless, as Kent points out, "it is certain in point of fact that the colonists were not satisfied(with those loose opinions or latitudinary doctrines)or did not deem it expedient to settle the country without the consent of the aborigines under the sanction of the civil authorities. The pretensions were not relied upon, and the prior Indian right to the soil was generally, if not uniformly, recognized and respected by the New England Puritans." Finally, the same authority states that the government of the United States has never insisted upon any other claim to the Indian lands than the right of pre-emption upon fair terms."[77]

We have, of course, explained the American practice in detail in the previous Chapter. Martin's view only confirms our previous conclusion that the American settlers and their governments had recognized Indian sovereignty and their ownership of their lands both in law and practice.

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In Canada, however, as indicated in the St. Catherine's Milling Case, the situation of "Indian title" has been treated as of lesser importance. Martin, in his comments, also confirms this difference,

> "In Canada the government had proceeded upon similar principles, though Chancellor Boyd, in a later case(o), places the rights of the Indian on a much lower plane, and states that he has "no claim except upon the bounty and benevolence of the Crown", and he quotes with approval the extract given from "Chancellor's Opinions". Nevertheless, he admits(p) that the right of occupancy attached to the Indians in their tribal character, though they were unable to transfer it to any stranger, and it was susceptible to extinguishment at the hands of the Crown alone, "a power, which, as a rule, was exercised only on just and equitable terms." On appeal, one of the judges, Burton, entertained the same views as the Chancellor, but the other three took a broader view. Hagerty, C.J., stated that "Indian tribes were sparsely scattered over that region (Western Ontario) and the rest of the northern continent to the Rocky Mountains.

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No surrender of Indian rights had been made, and, according to the settled practice of the United Provinces of Canada, evidenced and sanctioned by repeated statutes, no attempt appears to have been made to grant titles or encourage settlement so long as the Indian claim was unextinguished." Patterson, J., p. 169, quoted with approval the rule as laid down in Story's Commentaries, on the Constitution of the United States, 1833 sec. 6, to the effect that the aborigines "were admitted to be rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion." When this case came before the Supreme Court of Canada(q), the findings of the courts below were upheld, and the title of the Indians put on the ground assigned it by Chief Justice Hagarty, not on that much lower one favoured by Chancellor Boyd. Chief Justice Sir W.J. Ritchie (with whom Fournier, J., concurred), stated "that the Indians possessed a right of occupancy, the Crown possessing the legal title, subject to that occupancy, and the absolute exclusive right to extinguish the Indian title either by conquest or by purchase."

Mr. Justice, now Chief Justice Sir Henry, Strong quoted with approval the expressions of Chancellor Kent above referred to, and held that the Crown recognized an usufructuary title in the Indians to all unsurrendered lands, which, "though not perhaps susceptible to any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the title was, in accordance with the English law of real property, considered as vested." The learned judge also quotes with approval the language of Chancellor Kent on the 383rd, 385th, and 386th pages of his third volume, and in particular his remarks on Mitchell v. United States, to the effect that that "possession was considered with reference to Indian habits and modes of life, and the hunting-grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies."

Gwynne, J., went further, and held that the Indians had an estate, title and interest in their hunting-grounds, which could not be

> divested from them nor extinguished except by cession made in the most solemn manner to the Crown.
>
> Henry, J., was of opinion that the right of the Indians certainly was not a fee, but stated that the Crown recognized such a right in them that they were not required to give up their lands without some compensation. Taschereau, J., quoted with approval the principle that while European nations respected the rights(claims) of the natives as occupants, yet they asserted the ultimate dominion and title to the soil to be in themselves.
>
> It is a matter of regret that the Judicial Committee of the Privy Council, when the matter came before it by way of appeal(r) from the Supreme Court of Canada, did "not consider it necessary to express any opinion" upon this interesting point but intimated that though there had been all along vested in the Crown a substantial and paramount estate, yet it did not become a plenum dominum until the Indian title was "surrendered or otherwise extinguished." The title was, however, distinctly stated not to be a fee simple but "a mere burden on the title of the Crown."[78] (Emphasis mine).

Martin indicated that in acquiring and settling land in the Red River, both Lord Selkirk and the Hudson's Bay Company recognized the rights of the Indians to the soil. Lord Selkirk took steps to acquire such rights in the areas he planned to settle. The Hudson's Bay Company took steps to protect itself from Indian claims when concluding the Rupertsland Transfer

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Agreement. On these issues Martin states as follows:

> "It was because the Company had not a plenum dominum to the land more than two miles back from the Red and Assiniboine rivers, save at its forts, that it granted no lots lying outside this belt to settlers. When the Transfer to Canada took place, it had been noticed that the Company was careful to make provision for the extinguishment of this Indian title, for the eleventh of the "terms and conditions" was that "any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."
>
> Canada at once assumed the obligation and carried it out faithfully, for Section 31 of the Manitoba Act provided for "the extinguishment of the Indian title to lands in the province" by appropriating one million four hundred thousand acres of the ungranted lands, vested by that Act in the Government of Canada, for the benefit of the children of the half-breed heads of families residing in Manitoba at the time of the Transfer to Canada, July 15, 1870, the same to be selected in lots or tracts in such parts of the province as the

> Lieut.-Governor of Manitoba might deem expedient, and to be granted in the mode and under the conditions to be prescribed by the Governor-General in Council."[79]

In regard to why the Metis would be considered to have "Indian title", Martin comments as follows:

> "One not familiar with the peculiarities of the people known in Manitoba as half-breeds, or Metis, would naturally ask how the gift to them would extinguish the Indian title, though the name itself would go to show that they had a right in blood to participate to the extent of a moiety. The half-breeds, then, are the descendents of the early fur traders, voyageurs, coureurs de bois, and white men generally, by Indian women. In early times these children were illegitimate, for even if there was the inclination to go through the marriage ceremony there was not the opportunity; but later, with the advent of missionaries at Red River, came a new order of things, and from that time (1818) marriages were regularly solemnized, and those who had not previously been married persuaded to become so, or, rather, they generally eagerly embraced the opportunity(t) to have their union legalized."[80]

In using the term "moiety", Martin is saying that the claim of the Metis is equivalent to the claim of the Indians. "Moiety" refers to an equal interest in the soil. The federal government explicitly recognized that the Metis had such an equal interest with the Indians in the soil. This will be discussed in Chapter V.

b) Who is a Metis?

The question of who qualifies or qualified as a Metis is of considerable importance in settling any unsatisfied aboriginal claims of the Metis. It is clear that at the beginning of their origins, the term "half-breed" referred to the off-spring of a white father and an Indian mother. That certainly appears to be the meaning attached to the use of the term in the Manitoba Act, as we shall see in a later Chapter. However, by the time the Province of Manitoba was formed in 1870, most Metis were off-spring of a number of generations of inter-marriage between Metis and whites, Metis and Metis, and Metis and Indians. Few of the settlers in the Red River fitted the traditional definition of a Metis. This was pointed out by Lt. Governor Archibald in a letter to Howe in 1870.[81] Martin had the following comments on this question:

> " It is difficult to say when a half-breed ceases to become a half-breed, and is looked upon as a white, the manner of life and associations has much to do with it. Colloquially speaking, those who are known to have Indian blood in them, not necessarily half, but possibly only a quarter or an eighth, and show traces of it physically, combining with that trait any characteristics of the Indian in their manner of life, are called, loosely, half breeds; but at the same time there are many cases where two people

might have exactly the same amount of Indian blood and be so different in appearance and mode of life, that while the one would be readily spoken of as a half-breed, the other would as readily be accepted as a white man.

Strangely enough, the Manitoba Act does not define the term. The difference between a half-breed and an Indian is pointed out in a negative way by the Indian Act, Sec. 12, which says that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian, and no half-breed head of a family, except the widow of an Indian, or a half-breed who has already been admitted into a Treaty, shall, unless under very special circumstances to be determined by the Superintendent General, be accounted an Indian or entitled to be admitted into any Indian treaty.

These half-breeds, then, considered themselves as representing the Indians, though they really did not, but were an intermediate class, and the government fell in with their view, as they were a large and influential body. The Indians had no objections to the arrangement, they themselves being given reservations ample for their wants, and entering into treaties on their own account satisfactory to them, an account of the more important of which may be found in the valuable work of the late Hon. Alex. Morris, formerly Chief Justice and Lieut-Governor of Manitoba, on that subject.

> Doubts arose as to who were exactly the children of half-breed heads of families intended to be benefited under the Manitoba Act, so it was explained in 1873, 36 Vic., Cap. 38, that they were "all those of mixed blood, partly white and partly Indian, who are not heads of families."[82]

From this it is clear that the identity of a half-breed or Metis (as they are now commonly known) was not based on blood quantum. However, it depended upon the following:

a) descendents of Indians. i.e. persons of mixed Indian and European ancestry;
b) a person of mixed-ancestry who identifies and holds himself/herself out as a Metis;
c) lifestyle and culture;
d) acceptance by the Metis community;
e) acceptance by the community-at-large as a Metis;

VI. Conclusion

The next four Chapters will examine in depth:

a) the origins of the Metis and their development as a separate people
b) the history of how they were dealt with in Manitoba
c) the history of how they were dealt with in the Northwest outside of Manitoba
d) the tragic results of their dealings with the Government of Canada.

However, the general policy of dealing with the Metis in North America can be summarized as follows:

1. In the American settler colonies the Metis were not recognized as a group separate either from Indians or whites, nor did they self-identify as a separate group. If they identified as Indians they could live on Indian lands and were entitled to all the other benefits accruing to Indians. If they identified as whites they were eligible for land grants in the same way and to the same degree as the white settlers.

2. This traditional policy came to be applied in the Atlantic provinces, Quebec and Southern Ontario. Any Metis in these areas are either recent immigrants or self-declared Metis. They form a class of non-status Indians different from the Metis nationalists of the Prairies and Northwestern Ontario.

3. The Metis in the Prairies were dealt with and recognized as a third group of aboriginal peoples by the federal government, firstly by way of the Manitoba Act and secondly by way of the Dominion Lands Act . (One aspect of their rights was to identify as a nation). They were recognized by legislation as having "Indian title" and by the Manitoba Act were granted certain other national rights. Whether there are any narrowly defined existing rights depends in part upon the constitutional validity of actions taken under the Manitoba Act. As well, existing legal rights may depend upon whether the extinguishment provisions of the Dominion Lands Act were ultra vires and on whether the subsequent implementation of the provisions of this Act were constitutionally valid. To date no court has ruled on these issues.[83] Nor have the courts ruled on additional rights which exist outside of the Manitoba Act or the Dominion Lands Act.

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4. Even if the Manitoba Act and the Dominion Lands Act and the implementation procedures under these Acts should be held to be valid, it may be that the Metis of the Prairies may still possess some unsatisfied claims. In both Acts the language of the provisions indicate that the land settlement was "towards the extinguishment" of the "Indian title" preferred by the "half breeds". There is no suggestion of a final and complete cession of land or the settlement of other rights. These Acts do not set out the terms of a land cession or of other rights such as is found in the Treaties with the Indians. If, as Archer Martin states, the Metis claim is the same as the Indian claim, then the Treaties with the Indians would not extinguish the Metis claim unless the Treaties explicitly stated that they did so. It could be argued that a separate Treaty or Treaties with the Metis would be necessary for this purpose.

5. The Metis in that part of Northern Ontario falling within Rupertsland were recognized as a separate group, as they were in other remote parts of Rupertsland and identified themselves as a separate and distinct nation of people. Some of the Metis in Treaty 3 and in the Robinson Treaty areas were dealt with as Indians. This was by choice since many of the Metis in these areas lived with the Indians and did not identify themselves as a group separate from the Indians.

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6. Metis in British Columbia, other than in Northeastern British Columbia were not recognized nor did they identify as a separate group. Their rights would be the same as the rights of the Indians. The Metis in Northeastern British Columbia belong to that group of persons of mixed-ancestry who traditionally identified themselves as part of the Metis nation.

FOOTNOTES

[1]W. C. MacLeod, Supra, p 196.

[2]Ibid. See Chapter II.

[3]Brian Slattery, Supra, p. 70.

[4]Ibid.

[5]Ibid. p. 71

[6]W. C. MacLeod, Supra, pp. 147-151.

[7]Ibid. pp. 17-18.

[8]Ibid.

[9]Ibid. pp. 19-23.

[10]Brian Slattery, Supra, p. 72

[11]Ibid. p. 73

[12]Ibid. p. 74

[13]Ibid. pp. 75-82

[14]Ibid. pp. 83-85

[15]Ibid. pp. 85-88

[16]Ibid. pp. 88-89

[17]Ibid. p. 90

[18]Ibid.

[19]Ibid. pp. 91-94

[20]W. C. MacLeod, Supra, pp. 127-143

[21]Brian Slattery, Supra, Appendix B, pp. 132-133. For purposes of reading we have put text into modern English.

[22]Ibid. p. 379.

[23]Cumming and Mickenberg, Supra, p. 142

[24]Ibid.

[25]Ibid. p. 143

[26]Report of the Select Committee of the Hudson's Bay Company 1857, p. 91. Public Archives of Canada, P.P. 91-92.

[27]Ibid. p. 89

[28]James Joseph Hargrave, Red River, Friesen printers, Altona Manitoba, First 1871, p. 72.

[29]Letter of Petition to British Parliament, 1860. Glenbow Alberta Institute. B. R. T 243.

[30]Hudson's Bay Company papers. Public Archives of Canada, 1837-1838 Collection - February 1, 1837 - Simpson to Pelly

[31]Archer Martin, Supra, pp. 94-95.

[32]Ibid. p. 84

[33]Cumming and Mickenberg, Supra, pp. 138-147. Authority for their proposition is challenged in the case Connolly v. Woolrich(1867), Lower Canadian Jurist 197.

[34]Report on the Hudson's Bay Company, R67, G21, NO49 (1)(b). Public Archives of Canada.

[35]Report on the Select Committee on the Hudson's Bay Company 1857, Shortt, F., 106043 C21, C3. Public Archives of Canada, pp. 7-8.

[36]Ibid. p. 14

[37] Ibid.

[38] Ibid. Appendix B. Cauchon Memorandum. Public Archives of Canada.

[39] Hudson's Bay Company Defense of Its Charter 1850. Public Archives of Canada, G21, Vol. 12, NO49(1)(b), pp. 3-7

[40] Ibid. pp. 9-10

[41] Cumming and Mickenberg, Supra, pp. 93-105.

[42] Ibid.

[43] Ibid. p. 96

[44] Ibid. pp. 98-101

[45] Ibid. p. 96

[46] Ibid. p. 104

[47] Ibid. pp. 104-105

[48] Marc Lescarbot, The History of New France. The Champlain Society, Toronto(1907)

[49] Cumming and Mickenberg, Supra, p. 79

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Documents relating to the Constitutional History of Canada, Articles of Capitulation(1760), Volume 10. Dumont Archives.

[54] Cumming and Mickenberg, Supra, pp. 88-89

[55]Quebec Boundary Extension Act, S.C. 1912, C.45.

[56]See the James Bay and Northern Quebec Agreement, Quebec National Library, Legal Deposit - 2nd Quarter, 1976.

[57]1880 Indian Act Amendments, S.C. 1880, C.28, 1885.

[58]Cumming and Mickenberg, Supra, pp. 108-112.

[59]Ibid.

[60]Ibid. pp. 113-117.

[61]Ibid. pp. 113-122.

[62]Ibid. Also See Treaties No. 3 and 9.

[63]See Ontario Boundary Extension Act, S. C. 1912, C. 40, Treaty No. 9 and the Commissioners Reports, Sessional Papers 1906.

[64]Alexander Morris, Supra, pp. 50 & 69.

[65]W. C. MacLeod, Supra, pp. 481-82.

[66]Ibid.

[67]Ibid. pp. 482-83.

[68]Cumming and Mickenberg, Supra, Chapter 17.

[69]Calder Case, Supra.

[70]Cumming and Mickenberg, Supra, Chapter 17.

[71]Alexander Begg, History of the Northwest, Volume 1, pp. 367-369, 1894, Hunter, Rose and Company, Toronto.

[72]House of Commons Debates, April 1870, pp. 1300-1320.

[73]Alexander Begg, Supra, pp. 252-273.

[74]House of Commons Debates, May 28, 1869, p. 498.

[75]George F. Stanley, Supra, p. 10.

See also Report on the Hudson's Bay Company, R. G. 17, G 21, Volume 12, NO 49 (1) (b), p. 448.

[76]Auguste Tremauden, Hold High Your Heads, pp. 83-93, Pemmican Publications, Winnipeg, 1982.

[77]Archer Martin, Supra, Chapter V, pp. 94-96.

[78]Ibid. pp. 96-98.

[79]Ibid. p. 99.

[80]Ibid. pp. 99-100.

[81]Archibald to Howe, Supra, December 27, 1870.

[82]Archer Martin, Supra, pp. 100-101.

[83]In 1981 the Manitoba Metis Federation and the Native Council of Canada commenced legal action against the Attorney General of Canada and of Manitoba pertaining to Amendments and other legislation made by Canada and by Manitoba (to the Manitoba Act) and to certain other Constitutional Acts dealing with half-breed rights.