# I FORWARD

TO THE EXECUTIVE AND BOARD OF A.M.N.S.I.S.:

The report is being presented as the final summation and conclusions based on the extensive research carried out since 1976. You commissioned this research at that time to determine:

a) the position of the Metis in Canada in relation to their aboriginal rights;

b) to determine what rights Metis may still have;

c) to set out a proposed course of action to achieve the recognition of their rights;

d) and the implementation of various initiatives by the Metis by which they would exercise these rights.

The report therefore begins with a section which sets out a recommended course of action and strategy to be pursued by the Association in initiating activities designed to ensure that the Metis benefit from the legitimate exercise of their rights. Following the introduction there is also an executive summary which pulls together the historical findings.

The report is a historical examination of the following:

a) the origins of concepts relating to the rights of aboriginal peoples;

b) the application of these concepts to aid their further development in North America;

c) the specific application of aboriginal rights concepts to Canada and their relevance to the Metis people;

d) the origins of the Metis and their emergence as a seperate national aboriginal culture;

e) the recognition of Metis rights in Manitoba and implementation of the land and other provisions of the Manitoba Act;

f) the recognition of Metis rights in the Northwest outside of Manitoba and the implementation of the land provisions of the Dominion Lands Act;

g) a historical overview of the development of Metis culture, it's status in the period 1870 - 1885, and the social and economic decline of the Metis culture after 1885.

Historically, a number of terms were used to refer to the Metis, the most common being "half-breed". This term was generally used in statutes, orders-in-council, and other government documents. In some official reports such as the Manitoba census report the term "Metis" was used to refer to persons of mixed French-Indian ancestry and the term half-breed was used to refer to persons of mixed English-Indian ancestry. In this report we have used the word Metis to refer to all persons of mixed Indian and European ancestry who were recognized as a seperate group of aboriginal people by the government. The only exceptions will be found in quotations from other sources and/or authors or where the term half-breed is used in relation to a specific event where the term was used to identify them.

Since the report is detailed and examines many issues in depth, an executive summary has been prepared for the use of board members. This will enable you to obtain a comprehensive overview of the Metis history and should assist in sharing information with community people, the media and other interested persons. This summary however, cannot substitute for an in depth study of the report if you are to understand the historical issues and developments in which the Metis are involved and how these developments impact on the circumstances of your people today. Also a section acknowledging and identifying the work done by various persons on research, drafting of material for the report and editing is included. The final version of this report was prepared and edited by the research consultant.

Respectfully Submitted,

L. Heinemann
Research Consultant

## II ACKNOWLEDGEMENTS:

The Association wishes to acknowledge with thanks, the financial assistance provided by the Government of Saskatchewan and the Government of Canada for this research project. These major financial contributions enabled the Association to carry out the extensive research of primary source documents and of secondary resources and to undertake the organization, and analysis of that material and the selection of materials for inclusion in the final report. As well smaller financial contributions from the Saskatchewan Law Foundation and the Anglican Church World Primates Fund enabled us to undertake specific sub-projects which formed part of the larger research project. Without this assistance from all of these sources the overall project could not have been carried out.

Although much of the analysis of materials used in this report and the preparation of the report were undertaken by the research consultant, the following assistance is acknowledged with thanks:

- Rob Milen L.L.B. - preparation of the original draft material of the background legal history of aboriginal rights and extensive assistance in editing successive drafts of the report;

- Clem Chartier L.L.B. - who assisted with legal research, prepared discussion papers on a number of key issues, and who had some input into the editing of draft material for the report;

- Ron Bourgeault - who worked from the beginning on the Ottawa based research, planned that research, and supervised other Ottawa based researchers. He also did research at a number of other locations and worked on organizing sources materials and an analysis of that material;

- Ottawa based researchers:

    - Ritchie Allen;
    - Derek Ballantyne;
    - Jennifer Syndenham;
    - Pierrette St. Onge;

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- Marcia Weinstein;
- Researchers who worked part or full time at other locations:
  - Marian Desjarlais, Regina;
  - Lois Browne, Winnipeg;
  - John Burrelle, Winnipeg;
  - Verna St. Dennis, Saskatoon;
  - John Dorion, Winnipeg and Saskatoon;
  - Lyle Mueller, Saskatoon and Regina;

Also the laborious work of typing and retyping the many drafts of this report, performed by many typists, is acknowledged.

The assistance of many librarians and archivists must also be acknowledged. Their help and direction enabled our research staff to identify, locate and select materials more quickly than would have otherwise been possible. Specific mention must be made of public archivists in Ottawa and Winnipeg and the archivist of the Hudson's Bay Company records. Also the assistance of the archivist at St. Boniface is acknowledged.

The preparation of this final report could not have happened if each of the above individuals had not played a role in this project.

The project has resulted in the accumulation of a great deal of material concerning the socio-economic-cultural history of the Metis. This material is currently housed in a special archives section of the library, at Dumont Institute. This is a unique collection of source materials which has great potential value for Metis studies programs (at the Institute and in University) and as source material for public and high school history courses. Before that potential can be fully realized, further work needs to be done on completing the automated-computerized indexing system which has been developed and the actual indexing which has only just begun.

EXECUTIVE SUMMARY

## I THE HISTORY OF THE METIS AND THEIR RIGHTS AS ABORIGINAL PEOPLES

### A. HISTORICAL SUMMARY

Persons of mixed Indian and European ancestry have been present in what is now Canada since the early days of the first contacts between the European Colonists and the Indigenous populations. Early colonial settlements in the Atlantic Provinces and Central Canada were limited in numbers and in population. Depending on circumstances, those of mixed ancestry were either absorbed by the new settler communities or by the indigenous Indian communities. This fact was recognized in the earliest Indian Acts which dealt with Indians and their lands. Those of mixed ancestry who lived with the Indians were included in the definition of Indian. Those who lived in the settler communities were considered to be "Whites".

As the French trading companies began to penetrate the Northwest in search of furs, a population of mixed ancestry separate from the settler communities began to develop. They established new communities along the transportation routes to the Northwest. These persons came to form an important labor force in the trade of the French companies. By the mid-1700's they were the dominant labor force in the fur trade. A similar pattern of development took place as the Hudson's Bay Company began to move inland from the Hudson's Bay into the northern areas of what was known as Rupertsland.

Those persons of mixed French-Indian ancestry were known as the "Brois Brule" and later the "Metis". Those persons of English-Indian ancestry were known as "Half-Castes" or "Half-Breeds". Later, both groups became known by the term "Metis". This indigenous labor force was favored by the companies because it was less costly than imported European labor. As well, the Metis laborers had an intimate knowledge of the country and important familial connections with the Indians.

Over several centuries, the Metis, due to their role in the fur trade, established numerous communities along the fur trade routes which were isolated from the settler colonies. These communities were to be found all the way from the Ottawa River to the mouth of the McKenzie River on the Arctic Ocean. As the trade penetrated further inland, supply lines shifted from the inland rivers to the Great Lakes, to direct river routes to the Hudson's Bay and to overland routes through the United States. As these changes took place, old communities disappeared and new communities were established along these new transportation routes in the Northwest. In these new communities the Metis still lived separately from the Indians and were isolated from the settler colonies of Central Canada. Although the Metis travelled extensively throughout the Northwest, most claimed a small plot of land upon which they built a permanent home. Many of these new communities were adjacent to trading posts, key transportation exchange points on the rivers or at important river crossings.

The Metis began to develop economic, social and religious institutions in their communities. Accepted rules of behavior and relationships developed and informal systems of local self-government also developed. Some early agricultural experiments were attempted, but agriculture did not play an important economic role in the Northwest until the 19th Century.

After 1750, the Metis were a dominant force in the economic system and in the social and political life of the Northwest. In time, they also functioned as a quasi-military group. Under leaders such as Cuthbert Grant, they maintained that law and order which was necessary at the time. In their unique role, they not only lived separately but developed a separate identity and their own culture combining elements of both the Indian and European cultures. By the late 1790's, it is estimated there may have been as many as 10,000 Metis living in the Northwest.

The conflict between the Northwest Company and the Hudson's Bay Company in the late 1700's and early 1800's, which culminated in the amalgamation of the two companies in 1821, had a significant impact on the Metis. Large numbers of Metis were left unemployed and were encouraged to settle in the Red River to take up agriculture. Others remained in the employment of the Hudson's Bay Company, while still others settled in small communities and became independent entrepreneurs trading, hunting and carting goods into and out of the Northwest.

By the late 1700's a small number of Metis were already farming on river lots along the Red River. These were largely self-sufficient farms, but some surplus produce was sold to the Catholic Mission and to the trading companies. With the establishment of the Selkirk settlements in the early 1800's, and the amalgamation of the companies in 1821, agriculture took on a more important role. The Hudson's Bay Company became more dependent on the farmers to supply some of the basic food for staff at its posts throughout the Northwest as the supply of game decreased and the population gradually increased. Surplus produce began to be marketed in the St. Paul area of the United States where it was exchanged for agricultural technology, farm animals and consumer goods.

After 1821, a steady stream of new Metis immigrants arrived in the Red River from all parts of the Northwest. They settled on river lots, some buying their lots, others leasing their lots, with the majority claiming lots as squatters. The Red River became the economic, cultural and educational center for all of the Metis throughout the Northwest.

These developments resulted in the emergence of a more cohesive Metis community, which began to feel itself to be a new nation of people. This nationalism expressed itself: (a) in the Metis labour movements of the 1830's; (b) the Metis free trade movement of the 1840's; (c) the political domination of the Province of Assiniboia by the Metis between 1850 and 1870; (d) the events of 1870 in Manitoba; (e) the petitions from the Northwest and the Batoche uprising in 1885; and, (f) the continuing expression of Metis Nationalism up to the present time.

With the plans for the transfer of Rupertsland to Canada in 1869, the population coalesced even more. The result was the establishment in 1870 of the Provisional Government of the Red River. This government selected and sent representatives to Ottawa to negotiate the entry of their community as a province into the Canadian Federation. They demanded and negotiated for cultural and national rights, and what might today be called non-ethnic government. Since the Metis made up 80% of the population of the Red River, they believed they would control the new provincial government and could as well ensure that their other rights as aboriginal peoples would also be protected. The key issues were their concern that: (a) existing occupied lands would be confirmed by title given to the occupants, (b) additional lands be set aside for the children, (c) self-government be guaranteed, and (d) certain cultural and lifestyle usages be protected.

Outside the Red River the Metis also had begun some self-sufficient agricultural settlements. These were found along the Qu'Appelle River and at the Qu'Appelle Lakes, on the South Branch of the Saskatchewan River (Duck Lake, Batoche, St. Laurent, St. Louis) and on the North Branch of the Saskatchewan River (Prince Albert, Battleford, Fort Saskatchewan and St. Albert), as well as at other locations along the two river systems. These communities also provided some of the labor force for the buffalo hunt and for the overland transportation system. Shortly after 1870, the Metis of the Northwest outside Manitoba also became concerned about their land holdings. They began to petition for the guarantee of title to the lands they occupied, as well as for some cultural and self-government rights. Self-government outside the Red River was formally expressed through the written laws of the buffalo hunt (The Laws of the Prairie), the Laws of St. Laurent and The Laws of St. Albert. In most other communities, local self-governing structures existed.

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The settler Metis refused to be dealt with as Indians. However, many persons of mixed ancestry followed an Indian lifestyle or lived with the Indians. They were accepted into existing or newly-established Indian Bands and entered Treaty. These persons are now Status Indians. The main group of historic Metis were provided for separately through the "Indian Title" provisions of the Manitoba Act and the Dominion Lands Act. As well, both Acts made provisions to confirm title on lands the Metis occupied. Although self-governing rights were addressed in the Metis petitions up to 1884, the Government of Canada did not deal with these rights in 1885. It only responded to the Metis land requests. The Metis themselves, defeated, divided and intimidated, after the Northwest uprising were not able to vigorously pursue their demands for self-government.

When the government presented the settlement of the land question in 1870, as a partial extinguishment of the "Indian Title" of the Metis, the Manitoba delegates protested. When they were promised that for practical purposes this meant "the same thing"; i.e. a land grant in recognition of their giving up provincial control over the lands and resources, they reluctantly agreed to the provisions of the Manitoba Act. In the case of the Dominion Lands Act provision for Metis Scrip, the Metis were never consulted and the provisions in the Act were legislated unilaterally by the Federal Government.

Although both Acts purported to guarantee land rights and to make lands available to the Metis, the final results were much different. As a result of a number of illegal amendments to the Manitoba Act, and by maladministration of the land provisions of the Act, by 1885 over 90% of the Metis of Manitoba had been dispossessed of their land. They were forced by discrimination and poverty to move to new frontier areas. Here their request for land was denied on the basis that they had received land in Manitoba.

The Metis of the Northwest were similarly dispossessed of their Scrip and land rights by: (a) various changes in government policies and regulations governing Scrip; (b) the speculative and illegal actions of land speculators, some politicians and some government officials; (c) poverty, racism and other social pressures which forced the Metis to move further North and West; and, (d) their isolation from mainstream social and economic development.

The Metis, however, did not give up their petitioning for land rights, nor did they cease to exist as a distinct people. They continued to press their land claims until World War I. They requested seed, animals and machinery to help them get established in farming. These latter requests were generally denied by the Federal Government. The Metis also continued to seek more representation on the Northwest Territories Council. They organized political-cultural associations. They observed their nationhood through the Batoche Celebrations which have continued up to the present time.

Their political actions in Alberta in the 1930's resulted in the establishment of the Metis Colonies in that Province and in the limited form of self-government allowed on these Colonies. A similar restoration of land and self-government rights was not considered by other provinces. However, the Metis of Saskatchewan in the late 1930's and early 1940's were conducting research and petitioning for the recognition of their rights as aboriginal people. In spite of these struggles, the Metis have not been successful in re-establishing their place in the Canadian Mosaic as a prosperous people with a promising future such as they believed was their destiny prior to 1870.

To the contrary, the result is that more than one hundred years after the events at the Red River and at Batoche, the great majority of Metis are instead poor and landless. They have been unable to participate in and to take advantage of economic opportunities over the years to the same extent as other Canadians. They find themselves to a large degree powerless to do anything about their circumstances. They are today, as in the past, seeking to become full citizens in their homeland by gaining control over their lives

through some form of self-government, and by getting access to land and resources to provide a base for their own economic improvement.

Today, the Metis still continue their struggle to achieve their self-government and land rights. Some progress was made when the Metis were recognized as a distinct aboriginal people in the Canada Act, 1982. It is the view of the Metis National Council that the descendants of these historic Metis are the Metis recognized in subsection 35(2) of the 1982 Act. The provisions in Section 37 hold out the possibility of further progress in recognizing and restoring Metis rights by providing for a process by which these rights can be identified, defined and entrenched in the Constitution.

## B. RECOMMENDED ACTIONS

Historically, aboriginal rights for the Metis included national rights, cultural rights and land rights. They sought guarantees for all of these rights in a provincial Constitution which they believed they would be administering. However, as we have seen history was to prove, that this approach did not provide the necessary protection for their aboriginal rights. For example, the Metis in 1870 believed that individual land grants could guarantee their economic future. However, they soon found that individually they were easy targets for land speculators and unscrupulous politicians and officials. They could not withstand the economic, social and racist pressures designed to drive them from their homes. Nor did they possess the political influence necessary to ensure the guarantee of their rights. Subsequently, some Metis petitioned for control over a collective land base, within which only Metis could reside. Other Metis continued to petition for individual land grants and/or Scrip. In 1885, only Scrip was provided and the results were the same as in the case of the individual grants in Manitoba. As a result, the Metis have concluded that if their rights are to have any meaning for the future, those rights must be explicitly guaranteed in the Constitution. This means:

(a) their right to land must be recognized in and guaranteed by the Constitution;
(b) this right must be recognized as a collective right with the Metis communities as owners of their land and with the right to control and administer those lands for the benefit of their membership;
(c) control of the land must include ownership of both the surface and sub-surface resources;
(d) they must have the right to make laws to control and develop their land; and,
(e) these latter rights must also be entrenched in the Constitution.

The Metis in 1870 also accepted the idea of non-ethnic government. They soon found that they could not maintain control of the government when "swamped" by overwhelming numbers of new immigrants. The immigrants took over the control of this non-ethnic government and legislated for their own benefit and against the interests of the Metis. Therefore, the Metis have further concluded that to exercise self-governing rights, there must be:

(a) self-governing rights entrenched in the Constitution;
(b) given self-government jurisdiction through either entrenched authority or legislatively-delegated authority provided for in the Constitution;
(c) a land base on which these self-government rights can be exercised;
(d) legislative and administrative control, as a minimum, over those programs and institutions which are key to their cultural survival as a people;
(e) legislative and administrative control over their social and economic development on the land base; and,
(f) a degree of political autonomy outside the land base sufficient to give them administrative control over key institutions and programs.

Finally, the Metis realize that because their historic community has become disbursed and confused with Non-Status Indians in the minds of the public and governments, it is necessary to take steps, in cooperation with governments, to enumerate their members. To ensure that the right to identify their members is not taken from them by Courts or by legislative action, the Metis are requesting that steps be taken to give Constitutional force to the criteria by which they will identify their membership.

## CHAPTER IV: CONCLUSIONS AND RECOMMENDATIONS

### Historical Analysis:

#### a. The Research Approvals:

In conducting the Aboriginal rights and historical research, the Association, undertook a comprehensive examination of materials available and gathered an extensive amount of source documentation. The documentation, provides us with a perception of the views of the different individuals responsible for the documentation and/or the recording of historical events. It is therefore, not pure history, but the events of history as colored by the biases, prejudices, motives, and cultural mind set of the recorders. Most of the material is therefore, presented from the point of view of the colonial authorities, government officials, politicians and historians. There is limited written information available to give us a picture of the objectives and aspirations of the aboriginal people and in particular the Metis from their point of view

The problem for the researchers is to extract the most relevant material from the volumes available, and to organize it and assess it to give a balanced and objective picture of history and its importance for the Metis today. It is obviously possible to use the same source material to reach rather different conclusions. We are all aware of this fact based on the recent publication by Thomas Flanagan, Riel and the Rebellion, 1885 Reconsidered. In the book Flanagan selects a limited amount of source material from a limited time period to support a preconceived point of view and reaches conclusions which are potentially damaging to the Metis cause.

It is the view of the writer that a fair and objective approach is to examine the broad sweep of history and the results of that history, and to present the opposing

and conflicting views and events in a balanced way. In our presentation of the historical record we have attempted to do this. The reader then is left to reach his/her conclusions which may or may not agree with these conclusions we have drawn and which are recorded below.

b. Aboriginal Rights - What Are They?

The term aborigines refers to the original people who are indigenous to a particular land area, or at least whose occupation of that land area reaches into antiquity. In this context all of us have ancestors who at some point in time were aborigines in their own land. The rights of aboriginals must therefore, be viewed as all these collective and individual rights we claim as human beings and which have been recognized over the centuries in formal ways through the laws of nature, the laws of nations and the constitutions of Nation States. In the context of North America, the aborigines, are those peoples who occupied this continent at the time of its discovery by Europe and for centuries prior to that time. They commonly came to be referred to by the Colonialists as Indians. Originally this was a generic term which has been refined and defined in the Canada Act 1982 as Indian, Inuit and Metis.

The first inhabitants of North America, of course did not refer, to themselves as Indians, each tribe, each group, each nation of aboriginal peoples had their own move to identify themselves, as did the European peoples. Further, they were not one peoples culturally, economically or politically but the differences between the Iroquois, the Sioux, the Sene and the Inuit, were as significant as the differences between French, English, Spanish and Germanic peoples. It is therefore, a mistake to view all aboriginal peoples of North America as one amorphous mass, all

with the same level of socio-political-economic development and all practicing and or claiming the same rights.

Aboriginal rights therefore are in our view, the basic collective and individual human rights exercised and/or claimed by each of the autonomous "Indian" nations. Collective rights were those rights excercised by a group of people who occupied and controlled a defined area and included all of the political, social, cultural and economic institutions they had developed to more fully use and enjoy the resources of their lands. It also included the right to evolve and develop into the future as they should choose. The individual rights were those rights which people exercised and/or were granted by the collective of which they were a part.

c. Aborigines and Their Rights As Viewed By Europeans

By the fourteenth and fifteenth century the power centers of the christian church and of trade and commerce had shifted to Europe. Europeans appeared to possess superior technological skills as compared to other world populations, or at least they were much more aggresive in exploiting technology for their economic and personal goals. The christian church viewed itself as the one true religion and fostered the idea that the fruits of science, economics and commerce enjoyed by some Europeans, resulted from the fact that as christian nations they were being showered with such riches by their God for their adherance to and practice of the one true religion. They were therefore, God's chosen people and their leaders were divine, ruling by the will of God. This led to a kind of "Superiority Complex" on the part of Europeans and bred the racism which was to play such a large role in the conquest of the new world. Europeans were quick to identify aboriginal peoples as inferior to themselves and not blessed by their God because

they worshipped their own heathen Gods. As such they were worthy candidates for subjugation, exploitation and conquest. They were viewed by the majority as less human, underdeveloped, uncivilized (savage) and therefore, as having lesser rights or no rights as compared to Europeans. There were even debates as to whether the aborigines were simply part of the animal life and therefore sub-human. The European concept of aborigines predominated among the ordinary people and was deliberately fostered by some of the dominant leaders in the church and in particular by the ruling capitalist and communist classes.

However, as we have noted in the report, serious students of the time disagreed on this question. On the one hand there are authorities such as Hostienius who held the view that has been outlined above. On the other hand, more authoritative scholars such as Aquines, De Vittoria, and others held the opposite view. They claimed that aborigines were every bit as human and had rights every bit as good as those of christian Europeans. These rights they argued were based on natural law. Divine law was concerned with man's relationship with God and did not affect the rights of a collective of people to exercise national rights.

As much as this latter viewpoint found favor with liberal academics, leading churchmen, politicians, and some of the legal profession, the former viewpoint tended to dominate at the practice level of trade, commerce and settlement.

European nations wanted what aborigines possessed and controlled. To take their heritage from them and to justify their exploitation and subjugation, it was expedient to promote a belief that aborigines really were inferior, that their rights were really lesser rights than those of "civilized peoples" and that there was no injustice involved

in subjugating the people, taking their land and imposing European religious thought and culture on them. Indeed not only wasn't this unjust, they believed they curried favor with their God in pursuing such policies. This of course, was the approach and beliefs encouraged among the common people. Those who controlled power and had commercial goods in mind, didn't necessarily believe such nonsense, if they cared at all about aborigines. They were more generally concerned with achieving monopolistic goals which solidified their power and ensured that their enterprises were profitable.

d. The Impact on Legal Concepts of Aboriginal Rights

As a result of this predominate philosophy which undergirded practice, it was necessary to develop laws and legal practices which reflected this point of view. Therefore, the various colonial nations developed laws which:

1. gave them the right to lay sovereign claim to aboriginal lands, without consulting aboriginal nation;
2. denied that aborigines had social, political and economic institutions except of the most primitive form;
3. denied the rights of aboriginal nations to deal with anyone other than the new sovereign regarding their lands and resources;
4. limited the rights of aborigines to the use of their lands at the pleasure of the sovereign;
5. denied most other rights which aboriginal nations had traditionally exercised;
6. made aboriginal people second class citizens in the new North American colonies;
7. allowed the self-proclaimed sovereign to extinguish the rights of aboriginal peoples; and
8. in a number of other ways delegated aboriginal peoples and their rights to an inferior level compared to that of European settlers and their rights.

e. Aboriginal Nations - Primitive or Developed?

The term primitive is generally used to refer to human knowledge, skills, technology, etc. which are believed to be at a much inferior level to that of so called advanced peoples. Several of the most important cultural attributes considered when making such value judgements

include the nature of the technology and the degree of social and political organization possessed and practiced by a people.

It was generally believed, or at least the idea was prompted both at the time of colonial contact and in pre-colonial history that Indians:

1. were wandering nomads living primarily by hunting and gathering, and had no permanent homes;
2. had only limited and rudimentary forms of government;
3. had only vaguely recognized boundaries seperating different groups;
4. had few if any social, educational or political institutions;
5. had large areas of unused land;
6. used their land ineffectively and had inferior technology;
7. worshipped animals and graven images; and
8. followed patterns of sexual relationships which were immoral.

Other popular misconceptions could be added. However, the point to be made was that the use of primitive was based on value judgements dear to the hearts of Europeans, and to describe what Europeans didn't understand about or didn't want to recognize about aboriginal society. If they had accepted aboriginal development and institutions on a par with their own, their justification for exploiting and subjugating the aborigines would have disappeared.

In reality, the level of development among North American Indians, as traced by W.C. MacLeod in "North American Indian Frontier" was quite different from that claimed by the colonial powers. This author explicitly established that:

1. most Indians practiced some agriculture and had permanent homes. Even primarily hunter Indians had permanent homes;
2. tribal groups of Indians formed nations with well defined government systems and in some cases elaborately defined constitutions;

3. they had well defined national boundaries which were recognized by other Indian nations and which they defended when necessary;
4. they had well developed political, social and educational institutions, even though their traditions were primarily oral;
5. the land was all claimed and occupied;
6. based on their level of technology the land and its resources were used extensively and efficiently. Some nations were even technologically superior to Europeans in some regards. However, agricultural and industrial technology of the kind which was developing in Europe, had not yet reached North America;
7. the Indians worshipped a spiritual God who had many attributes similar to that of the christian God;
8. the relations between males and females were governed but well established social rules within each nation. Although, they were different from that of the standards of Christian Europeans they were no less moral.

Clearly the facts which emerged do not support the common view of Indians as a primitive people when compared with European society of that day.

f. The Metis - Who Are They?

The issue of aboriginal rights for a seperate group of people called Metis did not arise in the United States and generally has not arisen in other land areas which were once part of the British Empire. This was because the aboriginal population was generally identified on the basis of lifestyle and cultures. Therefore, in North America the tradition was to identify those persons of mixed ancestry who lived with and like the Indians as Indians. Those who lived in the white communities and who followed a non-Indian lifestyle were identified with the whites. This approach seems to have generally satisfied people since this was generally how they identified themselves.

In the northwest of Canada however, because of the nature of the fur trade and the role of the Metis in that fur trade, many Metis developed as a seperate

people. They were considered neither Indians nor white by these two groups nor did they consider themselves to belong to either one group or the other. This lead to the Metis identifying themselves as a seperate people from Indians but nevertheless children of the soil or a new aboriginal people. The commercial objectives of the trading companies was such that it was to their advantage to foster this new and seperate identity of the Metis. They were encouraged to think of themselves as a new nation. Since their right to share in the soil and the resources with the Indians was never challenged by either the Indians or their employers, they settled, used and claimed their share of the land as part of the indigenous population.

When the area was being joined to Canada, Canada planned to deal with them in accordance with the traditional policy. They would either be granted rights as white settlers or they would be treated as part of the Indian population. The Metis, of course, objected to this approach since they had developed as a seperate cultural and a new national community. They shared a language, lifestyle, customs and a role in the local governments. They exercised most of the national rights in their communities that the Indians exercised in their lands. They wanted to retain these rights and to control their own lives. Therefore they insisted on being dealt with seperately from the Indian population. They also insisted on having their rights recognized and institutionalized in a different manner than was the common British practice when dealing with the Indians.

To gain control of the area the government of Canada found it expedient to grant them special recognition first in the Manitoba Act of 1870 and later in the Dominion Land Act of 1879 and 1883. For its own reasons the government also found it expedient to characterize these rights as

"Indian rights" and land grants or Scrip allottment as a partial extinguishment of these rights. Therefore, the main body of the Metis today are all of the descendents of those persons who were legally recognized as "Halfbreeds" under the provisions of the two above mentioned Acts. There are also some persons of mixed ancestry, particularly in Northwestern Ontario, who considered themselves Metis but who were never dealt with under the above legislation as Indians or as Indians under the Indian Act. These persons as well have a claim to being indentified as Metis under the Canada Act of 1982. There may as well be similar Metis communities in other parts of Canada which have never been dealt with as either Indians or Metis and who could claim to be rightfully included today under the definition of Metis. As well any current definition of Metis must make provisions for Non-Status Indians who have been absorbed by and are now considered part of the Metis community.

## II Conclusions

### a. Indian Rights

Based on the research undertaken and documented in this report the following conclusions can be drawn:

1. the level of social-political-cultural development of aboriginal peoples in North America was not significantly different at the time of first European contact with North American Aboriginals during the 15th century from that which existed in Europe in the 13th and 14th centuries;
2. the major differences between Europeans and North Americans at the time were in the areas of scientific, technological, commercial and institutional development;
3. these differences however, according to the most objective authorities of the day, did not justify treating the collective and individual rights of aboriginal natives with laws and practices which were different than those which were applied in Europe;
4. the rights of aboriginal nations included all those national rights which were recognized and exercised by nations at that time;
5. these included the right to their lands, the right to govern themselves and the right to political, economic, social, legal and other cultural institutions

of their own choosing;

6. actions taken in law and practice by most colonial nations were in violation of accepted international laws and standards of church cannon laws accepted by the European notions as applying to relationships among themselves;
7. the invention of the concept of "Indian Title" was specifically designed to limit the rights of aboriginal nations. Such nations were the de facto owners of their land and were in control of those lands;
8. the legal prescription of "the extinguishment of rights" which developed in connection with concept of "Indian Title" has no valid basis either in International or domestic law;
9. the concept of "Indian Title" only was applied to land ownership and use of land did not deal with any of the other rights of Indian nations and peoples;
10. the practice of extinguishing "Indian Title" is a form of property expropriation and as such rules governing expropriation should have been applied;
11. the extinguishment of land rights even if held to be legal could not affect any other rights which Indian nations had a right to exercise;
12. the major British document dealing with Indian land, the Royal Proclamation of 1763, has the status of constitutional law in Canada and is specifically referred to in the Canada Act 1982;
13. the Royal Proclamation recognizes Indian nations as autonomous nations and the land as belonging to the Indian nations;
14. the acquistion of land was to take place only if the Indians were prepared to sell their land and was to be purchased by the Crown based on equitable principles. This is interpreted to mean that what the Indians received for the land was to be of equivalent value and/or fair market value;
15. the Royal Proclamation makes no reference to the extinguishment of something called "Indian Title", nor does it suggest that by selling some of their lands, the Indians were surrendering any rights other than the right to continue to own the land which they had sold;
16. the rights of Indians were severely limited by judical decisions in the United States and Canada. These decisions were designed to satisfy the political and commercial interests of the settler colonies and not to protect Indian rights;

17. the Marshall decisions dealing with the Cherokees, limited the rights of Indians to occupation and use of their lands and did not recognize the Indians as sovereign nations who had the right to control and administer their lands as autonomous nations. However, Marshall did not dispute the right of Indians to exercise their national rights.
18. In the St. Catherines Millings case the decision further limited Indian rights by denying that they were proprietors of their lands. The Indian right was limited to use of the land based on the goodwill and pleasure of the Crown and stripped the Indians of all national rights other then those which were specifically provided for in legislation or in treaties;
19. however, it is our view that there is still a strong legal and constitutional basis for claiming that Indians must be recognized as proprietors of those lands set aside for their benefits and that they have the legal right to practice all or any of those rights which a nation normally can practice and which are not in conflict with or in contradiction to the reality of the modern Canadian nation state.
20. the consequences of limiting Indian rights has been to leave them in a situation of dependent words, with no control over decisions which affect their lives. This has relegated them to a position of poverty and caused serious disintegration in their cultures. This has been followed by a broad range of social and health problems among the Indians which have resulted in their debilitation and in large non-productive costs to the tax payers. Furthermore, Indians are still relatively powerless to do anything about their circumstances.
21. the government finally seems to have recognized the folly of its policies and seems prepared to settle land rights and claims and to grant a degree of Indian self-government and autonomy which is not inconsistent with their position as citizens of Canada.

b. The Metis Rights

1. the traditional practice followed by British, American and Canadian authorities was to recognize only one group of aborigines, "Indians". Persons of mixed Indian and non-Indian ancestry were recognized as Indians if they lived with the Indians or followed an Indian life-style. Sometimes blood quantum criteria were specified as was the practice of the United States in later years;
2. Canadian colonies prior to Confederation and Canada

after Confederation did not use a blood quantum criteria. Early Indian Acts recognized anyone who belonged to or was descended from someone who belonged to a tribe or body of Indians as an Indian. Clearly this included these persons known as "halfbreeds" who lived with the Indians and who followed an Indian life-style. All other persons of mixed ancestry were considered non-Indians and full citizens;

3. the unique postion of the Metis in the Northwest of Canada led to many considering themselves to be neither Indians or white but a new recognized race of people. They had in fact developed a new and unique custom which was neither Indian or white but which incorporated some aspects of both cultures;
4. they had as well settled in their own seperate communities and had developed their own institutions, customs, usages and laws. They practiced local self-government, had a system of land holdings, had their own civil laws, their churches, their educational institutions and their own place in the economic system;
5. they considered themselves to be full citizens in their own lands and did not accept the idea that as descendents of the aboriginal people, their rights should be given inferior legal status as were those of Indians, or that they should be relegated to live on land reserves set aside for them by the government. They want to retain their communities and culture and to be masters of their own destiny;
6. as a result the main body of Metis insisted on being dealt with as seperate from Indians with full national (provincial) rights granted other colonies which made up Canada.
7. as a result of pressure from the Metis and others, the Canadian Government found it expedient to deal with the Metis as a seperate group of aborigines and to characterize the land grants to them as a partial settlement of their aboriginal claims;
8. those Metis who lived with the Indians or who followed an Indian life style were given the option of joining Indian bands and being identified as "Status Indians";
9. the negotiations leading to the Manitoba Act and a settlement of Metis claims in Manitoba, did conform with the provisions of the Royal Proclamation. The Metis of old Manitoba accepted the arrangement as a valid agreement or treaty. The Act itself was made a constitutional document;

10. the problems experienced by the Metis in Manitoba resulted from two factors. The first factor was a number of illegal amendments to the land provisions of the Act by both the federal parliament and the provincial legislation in Manitoba. The second factor was the gross maladministration of the provisions in the Act dealing with land;
11. the Act did not extinguish any other Metis rights, indeed it confirmed the right of the Metis to self government, to their languages and to certain institutions, usages and customs;
12. the challenge to the administration under the Manitoba Act of the provisions regarding Metis lands, directly affects many Metis outside Manitoba. It is estimated that between 1870 and 1900 at least two thirds of the Metis in old Manitoba left the area and settled elsewhere in the Northwest;
13. the provisions in the Dominion Lands Act were enacted unilateraly by the Government of Canada. Although, the Metis in the northwest had for many years petitioned for the recognition of their land and other rights, the government had ignored their petitions. As late as 1884 the government had taken the position that no such rights existed and if the Metis wanted special rights, they could go and join an Indian band;
14. since there were no negotiations leading to the provisions in the Dominion Lands Act dealing with "halfbreed" rights and since the Metis never consented to cede their land in return for land grants and other benefits, it is clear in our opinion, that the actions taken under the Lands Act did not conform with the constitutional provisions of the Royal Proclamation nor with the commitments Canada made under Section 146, Order-in-Council No. 9, of the B.N.A. Act 1867, regarding the settlement of Indian land claims;
15. therefore, it is our view that the constitutionality of the Dominion Lands Act can be successfully challenged. This would make the extinguishment provisions of the Act invalid and would mean that all of those Metis not covered by the Manitoba Act, still have a full and valid constitutional land claim;
16. in addition there is ample evidence of gross maladministration under the Act, which if fully proved would invalidate the actions taken under the Act;
17. the Dominion Lands Act did not deal with any of the other rights which the Metis had asked be recognized by way of petitions. Therefore, it

must be assumed that rights to selfgovernment, Metis institutions and cultural and language rights have not been satisfied and therefore, still exist;

18. the historical records clearly indicate that the dispossession of the Metis was planned and deliberate and part of a policy designed to get all aboriginal people out of the way of settlers. This was to ensure that they could not in anyway impede the Canadian government in implementing it's settlement policies and it's policies for the exploitation of resources in the northwest;
19. the position of powerless and poverty experienced by the Metis over the years is a direct result of these policies and not due to any general fault of the Metis or their lack of appreciation of the value of their land as is so often reported;
20. Canada is indebted to the Metis for opening up the northwest and for aiding it in the execution of it's early development policies. The country owes a debt to the Metis people but more important as part of its international posture of supporting the just causes of indigenous peoples around the world, it must first satisfy the just demands of its own aboriginal peoples if it expects to have any credibility either domestically or internationally on justice issues.

## III Recommendations

### a. Options For Action

There are at least three possible options the Association might pursue in attempting to have the rights of Metis recognized and satisfied. They might proceed by court action, seek to negotiate a political settlement with federal and/or provincial governments for the recognition of their rights to be spelled out in legislation or agreements, or seek a political solution through the constitutional process and through the entrenchment of certain rights in the constitution.

Each approach has it's advantages and disadvantages. Some of these are as follows:

1. Court Action - there are two possible avenues that could be pursued in a court action. The first would be to launch a collective action on behalf of all Metis to declare the provisions of the Dominion Lands Act 1879 - Ultra Viries the Royal Proclamation and B.N.A. Act 1867, Section 146, O.C. 9. Such an approach would be expensive and would likely involve a long time consuming process of appeals all the way to the Supreme Court of Canada. Courts might even refuse to hear the case on the basis of a challenge that the Association was not representative of Metis people and therefore could not take collective legal action on their behalf. In other words the Association may not be seen by courts as having any status to pursue this issue in court; even if the courts did agree to hear the case they might rule against the Metis on either technical grounds or on the basis of the "Supremacy of Parliament" doctrines, i.e. the right of parliament to so legislate regardless of whether the legislative action followed established international law principles. There could be other technical grounds on which the case might flounder. The Association would need to consult and obtain expert legal advice on this and other problems related to the use of court action as a means of achieving aboriginal rights.

   A second possible approach to court action would be to launch a number of different court actions brought by individual Metis who can prove their ancestors were illegally deprived of the benefit of their Scrip grant. Since there are over 16,000 cases involved, it is unlikely the courts could deal with such a massive influx of individual claims. However, since Scrip grants were given as a personal grant, courts may rule that it is necessary to prove claims by way of seperate individual actions. This would however, tie the issue up in courts indefinitely.

   This would result in decisions being made on a case to base basis. It is probable that such claims would not be decided on a uniform basis and that only some people would find their land claims satisfied and then only at considerable expense to themselves. This approach would be contraproductive to the achievement of the collective goals of the Metis.

A collective action based on maladministration of the Dominion Lands Act provisions, could encounter the same problems as a collective action taken on constitutional grounds. In addition, maladministration would be difficult to prove in the case of Money Scrip grants since they made up two-thirds of all grants issued this could negatively affect the case.

Even if court action was completely successful, it would, in the case of a constitutional challenge, only establish that the Metis still have rights. It would provide no direction that such rights must be settled. This would likely require a second legal battle to obtain an order to satisfy the claim(s) unless the government agreed to negotiate a political settlement. In the case of an individual claim to Scrip or a land grant it is difficult to see how the right would be satisfied if found to exist, as there is currently better land available which governments could use to satisfy such a claim, except in the north of the province. In other areas some form of equivalent or fair compensation would need to be negotiated.

2. Political Negotiations - this approach would in my view, involve setting out a strong legal argument that rights still existed and to use political and moral suasion to such an agreement. A political agreement might be easier and quicker to obtain but would lack safeguards and could be changed by governments unilaterally at some future date. Another problem is to establish a proper forum for such negotiations and to establish mechanisms for resolving disputes and disagreements, which arise in the course of negotiating a settlement.

3. The Constitutional Solution - the most likely solution appears to be the constitutional solution. This would identify specific rights for entrenchment in the constitution, would provide firm guarantees of rights which could not be arbitrarily changed, and could provide a mechanism for the implementation of those collective rights.

   The disadvantages include:

   -the strategy of the federal government to appear to grant rights without in fact providing meaningful rights;

-the desire of the provincial governments to recognize no rights or as few as possible, since they control the land and resources needed to settle such rights;
-the strategy of both governments to create diversion and confusion in the ranks of aboriginal organizations with the result being that they are not able to put forward consistent and strong negotiating positions;
-the fact that there must be an agreement by the federal government and seven provinces before any rights can be entrenched;
-the process of obtaining an agreement, if possible, will be time consuming and expensive. If it should prove possible to reach agreement on rights to be entrenched by 1987, there will still need to be an implementation process which could take a considerable additional time period before the constitutional provisions are implemented;

b. A Constitutional Strategy

It is not proposed to spell out any detailed constitutional position or strategy in this report. However, the following elements must in my view be part of the process:

1. the Metis people must determine precisely what rights they want and how they want these rights reflected in the constitution; i.e. they must have clear and precise objectives for the constitutional process;
2. a comprehensive approach must be developed ford land consultation, and for the identification of rights and the presentation of these;
3. the strategy should be to place this comprehensive and precise position on the table for negotiation;
4. a full historical and current justification for rights claimed must be provided since the section 37 process neither bestows such rights or admits the Metis have any rights. These must be "identified and defined". That involves a process of convincing those who control the decision making process (the federal and provincial governments) that certain rights exist and seeking their agreement on the context of these rights;
5. since, it is useless who the Metis are today, it will be essential to precisely define the Metis, to establish criteria to identify them

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and a process by which they can be enumerated and registered as a unique aboriginal people. This definition of Metis must be guaranteed in some way so that it is beyond the power of legislatures or courts to change it. It would appear that this could best be done through constitutional provisions which either directly entrench the definition or provide for it to be entrenched by reference through the technique of a constitutional accord;

6. the strategy and content for a Metis claim should be one which can reasonably be accomodated within the framework of the Canadian Federation. It must not result in positions or demands which would damage the structure of the Canadian Federation or which would lead to absurd situations if implemented;
7. if this process is to prove successful, confrontation policies should be avoided unless all other avenues have failed;
8. at present it appears the Metis National Council is the best vehicle through which the Metis can work together to process their case and involve themselves in constitutional negotiations;
9. however, if the council is to become an effective vehicle petty personal politics must be avoided and political differences must be put aside for now;
10. the Council must also establish a firm center of authority and rationale policies by which the content of Metis positions is developed and rationale strategy for its involvement in constitutional discussions if it is to achieve its constitutional objectives;
11. if national rights are argued it must be clearly established that they are aboriginal rights. A concentration on national rights without putting such rights into the context of aboriginal rights, could lead to doubts as to whether the Metis themselves believe they have aboriginal rights. Governments may also raise questions as to whether the Metis should have any role at all in the constitutional process since that process is designed to deal with "the rights of aboriginal peoples" and not to respond to the nationalist aspirations of a particular minority group.

Respectfully submitted,

L. Heinemann
Research Consultant.

CHAPTER I

# THE THEORY, LAW AND PRACTICE OF ABORIGINAL RIGHTS AND HOW THEY WERE APPLIED TO THE METIS

## I. INTRODUCTION:

In 1976 the Association began a process of research on the Aboriginal rights of the Metis people in the Canadian Northwest. The purpose of this research was as follows: a) to determine how the Aboriginal rights of the Metis were recognized; b) to examine how Metis rights were dealt with in law and practice; c) to determine how the Metis peoples' present position of poverty, powerlessness and dependence came about; d) to determine if the basis for a legal "aboriginal land claim" by the Metis might still exist; and e) to prepare a report on the findings including conclusions and recommendations as to possible action to be taken to restore Metis rights.

## II. ABORIGINAL TITLE:

### a) Its Origin

The term "aboriginal" has never been used in legislation by any nation as far as researchers could determine. It certainly has never been used in legislation in North America. In Canada the term "Indian title" was used in the Manitoba Act of 1870, in the Dominion Lands Acts of 1879 and 1883[1] and in numberous Orders-in-Council.[2] Even the term "Indian title" is not used in treaties, the Indian Acts or other legislation or regulations regarding Indians. Nor was the term used in the B.N.A. Act 1867. Modern writers have used the term synonymously with the term "Indian title", the assumption being the term Indian in 91-24 of the B.N.A. Act covers all aboriginal people.

The concept of "Indian title" was first referred to in Case Law in Canada in the St. Catherines Milling Case in 1888.[3] The term "aboriginal title" was first use in Case Law in 1969 in the Calder Case.[4] It was also used by Judge Morrow in the case of an application by Chief Francois Paulette for a caveat against Northwest Territories lands.[5]

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It has been used in many other legal cases since that time. One must assume that the learned judges used the terminology, "aboriginal title", and dealt with it in their decisions because the term was used by the counsel who presented arguments in these cases.

The term appears to have first been used in published material by Dr. Archer Martin in 1898 in his book The Hudson's Bay Company's Land Tenures.[6] It was also used by Noonan and Hodges in their research report of 1944 for the Saskatchewan Metis Society.[7] The next instance of its use seems to have been by Douglas Sanders in a research report prepared for the Indian and Eskimo Association of Canada in 1970. This report was published as a book in 1972 under the editorship of Peter A. Cummings and Neil H. Mickenberg.[8] If one who is uninformed about the history of Aboriginal rights, reads this book, he/she may be left with the distinct impression that the concept of "aboriginal title" was developed by Francisco de Vitoria and that it was first defined in North American Case Law by Judge Marshall in the case of Johnson vs. McIntosh.[9]

Neil H. Mickenberg, in an article published in 1971, used the terms "aboriginal rights" and "Indian title" which he equates with "aboriginal title".[10] The term "aboriginal title" would therefore appear to have been coined by relatively modern legal and academic writers and has been embedded in Case Law by judges, along with the active help of legal counsel. The term "Indian" in 91-24 of the B.N.A. Act was interpreted by the Supreme Court of Canada as encompassing Eskimos in Canada in 1939 in the case of Re: Eskimos.[11] Since Eskimos (Inuit) are one distinct group of Aboriginal peoples in Canada not generally referred to as Indians, the use of the term "Aboriginal title" may have appeared to have a broader application and to be less confusing that the use of the term "Indian title".

Most Inuit and Indian groups and organizations have eagerly grasped the terms and argued that it included a broad range of Aboriginal rights, ranging from national sovereignty to fee simple title vested in individual aborigines.

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MacLeod, in The American Indian Frontier, clearly outlines how the practice of recognizing Indian tribes and federations as sovereign nations developed, and how this became an established policy. The concept of sovereignty included all the rights that a sovereign was recognized as having in International Law at the time, including ownership and use of the land.[14] He further traces why the British took over the management of Indian Affairs. He also examines their confirmation of the practices of the colonies, in the form of Constitutional Law, in the Royal Proclamation of 1763. After the War of Independence in 1776, the Americans adopted this policy and incorporated it into their own laws.

The title of the Indians, therefore, included sovereign ownership of all National lands and the right of the Indian nations to decide on the use and management of their lands and resources as among themselves, to the exclusion of all other nations or sovereign powers.

In a series of landmark cases, from 1823 to 1831, Chief Justice Marshall of the U.S. Supreme court ruled in such a way as to seriously restrict the meaning of the now familiar "title of Indians" or what he referred to as "Indian title". In Johnson vs. McIntosh[15] Marshall ruled that the Indian nations did not possess full title to their lands but that they possessed only a right of occupancy. The court claimed their title had been reduced from full sovereignty because of discovery and occupancy. In Cherokee vs. Georgia,[16] the court ruled that the Cherokees were not a sovereign but a domestic nation, further justifying the decision that the Indian title was limited to use and occupancy. In 1831 Marshall softened his position somewhat but still ruled that Indian nations did not possess a full title to their lands. Interestingly, the American Government ignored these rulings and continued to treat the Indian nations as sovereign nations.[17]

In Canada the Indians in the Maritime colonies and Upper and Lower Canada were at an early date dealt with in a manner similar to Indians in areas where American colonies had been established. The Royal Proclamation of 1763 was applied to the Indian nations

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in these colonies. When Upper Canada wanted Indian lands on Manitoulin Island and in the area north of Lake Huron, it negotiated the Robinson Treaties in 1853 and 1854. These Treaties did not follow the practice of outright payment for Indian lands, which was the earlier policy. The Treaties instead introduced the practice of land cessions and a system of paying annual annuities and providing other compensation in goods and services in exchange for lands. Also, specific land areas were set aside for the Indians' use but these were not considered reserves.[19]

When the new Confederation of Canada began Treaty-signing in the Northwest in 1873, it continued the pattern of cessions established in the earlier Treaties, along with ongoing payments in money, goods and services. The Treaties now also established the reserve system.[20] The issue of "Indian title" is not dealt with in the Treaties. The Treaties followed those processes for land succession outlined in the Royal Proclamation of 1763 and the commitments made by Canada in Schedules to Order-in-Council No. 9 Section 146, incorporated into the B.N.A. Act, 1867. The Treaties suggest the recognition of the sovereignty of Indian nations. These nations ceeded, not sold, their land to the Crown and retained traditional hunting, fishing and trappings rights on these lands under certain conditions. These included their agreement to become British subjects, to swear allegiance to the Queen and to be subject to Canadian laws.[21] The reserves which were set aside for the Indians were Crown lands reserved for Indians, and not sovereign lands. In Canada, therefore, the Indians lost their land and sovereignty through a land cession. In theory, this was done through choice; therefore, it is clear that if the Indians owned the land before the Treaties were signed they may have given up that ownership as well as their sovereignty through Treaty agreements.

The first occasion on which the question of the title of Indians was considered legally in Canada was in the St. Catherines Milling Case. This occurred in the old section of Ontario known as Upper Canada. In this case the Federal Government argued that Indians had a full proprietary interest in the land, which had been purchased for them by the Federal Government.[22] This argument was

based on traditional British policy and practice in regard to the recognition of Indian ownership of their lands. Chancellor Boyd, in a decision later only partly upheld by the Privy Council, however, argued that American cases were more applicable, and adopted the view of Marshall that the Crown already had a proprietary interest in the land and that the title of the Indians was a personal right of use of land dependent on the good will of the sovereign.[23]

The net effect of the St. Catherines Milling Case was to deny that Indian nations existed either as sovereign Indian nations or as domestic nations. This was even more limiting than the Marshall ruling.

The result of the St. Catherines Milling Case can be summarized as follows:

1) It became accepted policy and law that Indians did not have a proprietary interest in lands they occupied.

2) It also became policy and law that the Aboriginal peoples did not possess a full proprietary interest or absolute title to lands they occupied before the Europeans arrived and before any Treaties were signed.

3) Until the late 1960s and 1970s, the Royal Proclamation of 1763 remained relatively unimportant as a source of rights for the Aboriginal peoples, with the exception of certain cases relating to hunting and fishing rights in areas falling within the geographical limits of the Proclamation.[24]

4) The "personal rights" of the Aboriginal peoples to their lands was limited to use and occupation "dependent upon the good will of the Sovereign".[25]

5) Indians subsequently looked to the Treaties or legislation as opposed to the Royal Proclamation for recognition of their rights.

As we shall see in the next chapter, the courts have not looked favourably upon the Treaties as a source for recognition of the rights of Indian peoples. The courts have variously interpreted these Treaties as:

a) not being International Treaties embodying agreements between independent nations;[26]

b) contracts or mere promises and agreements;[27]

c) treaties of peace and friendship in certain cases.[28]

It is of interest to point out that only within the last two decades has it been clear that Indians could bring land claims actions into the courts. In 1859 it was held that:

> "The Indians could not have adopted any legal proceedings for dispossessing trespassers either as holding in a corporate capacity or otherwise; it would seem unreasonable on the other hand that time should be considered as running so as to bar the Crown or the Indians...."[29]

In the 1920s the Indian Act was amended, making it illegal to:

a) take a legal court action against the Federal Government over land claims;[30]

b) raise funds for any legal action relating to land claims.[31]

This restriction was not removed from the Indian Act until 1951.

The adoption of this concept in effect legitimized the federal government's practice of extinguishing title through land cessions and through legislative instruments such as the Manitoba Act and the Dominion Lands Act. In the years since 1888, the federal government continued to follow the rule set down in the St. Catherines Milling Case. As well, this precedent has been followed since that time in Case Law, where the question of "Indian title" has been an issue. As previously indicated the term "Indian title" in recent times began to be referred to as "Aboriginal title".

In Native Rights In Canada, Cummings and Mickenberg also use Aboriginal rights (generally accepted as a broad concept encompassing a broad range of rights) interchangeably with "Aboriginal title", which has been used to narrowly define a usufructary title. They define Aboriginal rights as follows:

> "Aboriginal rights are those property rights which inure to Native peoples by virtue of their occupation upon certain lands from time immemorial."[32]

This definition limits Aboriginal rights to property rights deriving from occupancy, namely "Aboriginal title", a usufructuary title. Such a title can only be disposed of to the Crown and can be extinguished by the Crown either by legislation or treaties.

## III. THE USE AND CONSEQUENCES OF "ABORIGINAL TITLE":

The legal concept of Aboriginal title has been used in Canada by the government with the approval of the courts, to subjugate the Indians, to deprive them of their sovereignty, to assimilate them,

to dispossess them of their lands, and to leave them poor and dependent. A similar policy was applied to the Metis through the Manitoba Act and the Dominion Lands Act.

As indicated, the St. Catherines Milling Case denied any Indian sovereignty or self-determination except that which was granted at the pleasure of the Crown. The Crown's grand plan, developed as early as the 1850s, was to assimilate the Indians into the Canadian mainstream as a means of solving the Indian problem. Even that limited self-determination granted in local matters in Treaties and Indian Acts was largely denied, until recent times. This was done through a plan to manage the Indians and Metis. It was implemented on reserves through the employment of Indian agents, a pass system and laws controlling the rights of Indians to dispose of their produce or develop their resources on reserve lands. It was implemented through Scrip and Scrip speculation, which deprived most persons of their land entitlement in the case of the Metis. This policy left the Aboriginal people in abject poverty and in the unhealthy dependent state of wards. Its results for them and their culture have been devastating. It has led to large-scale family breakdown, alcoholism, high rates of crime and delinquency, serious health problems, high mortality rates, racism and a host of other social ills.

The Aboriginal peoples have been left powerless, with inferior education and training and lacking many of the social skills required to function as economically independent and socially self-sufficient citizens. They have also been left confused about their identity, guilty about their supposed cultural inferiority, and with a lack of confidence about their ability to care for themselves. Although there has been some improvement in the conditions and circumstances of some Aboriginal peoples in recent years, for the great majority their lives remain rooted in poverty and the social and physical ills which go along with poverty.

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"Aboriginal title" as defined in Law and Practice has produced negative results for the Aboriginal people of Canada. Its use, and the varying definitions given to the term by courts, governments and academics, has only confused the issue of what rights Aboriginal people had. It is not useful to argue about whether the rights of Aboriginal people flow from some legal concept called "Aboriginal title" which did not exist when the first settlers came to North America. These rights in fact flowed from the sovereign ownership, control and administration of their national lands according to laws and practices which they had developed. Their claim to a given geographical area was based on their occupancy and control of their lands. As W. C. Macleod states, "the Indians claimed they owned the land and they did".[32a] What is important to consider is how they lost this land and whether they still retain rights regardless of this loss of land. It is also important to establish what are these rights.

To determine these latter facts, it is important to examine how indigenous and national rights of people indigenous to an area were treated in the laws of colonial nations and in International law. It is also important to understand how the rights of Aboriginal peoples related to these concepts and were dealt with legally and historically. It is also important to understand how current concepts regarding aboriginal rights grew from these early concepts. This will give us some insights into modern legal concepts and practices regarding the Aboriginal peoples and their rights.

## IV. THE LAWS OF NATIONS AND THE LAWS OF NATURE IN THE 15TH AND 16TH CENTURIES:

### a) International Law and Colonial Nations

Throughout history, powerful tribal groups have aggressively acquired territories belonging to other less powerful people. These actions gave the conquerors considerable power over the occupants of the land areas conquered. In such a situation, the recognition that the occupants of a land area, who could not defend themselves against foreign intrusion, had legal rights was dependent upon the whims of the conqueror. Early colonists such as the Romans recognized in their laws no political rights for indigenous peoples.

However, in practice, the Romans allowed conquered peoples to maintain their own languages, religions, civil laws, and cultural practices, and allowed individuals to continue to occupy and use their lands as long as they obeyed Roman laws and paid Roman taxes.

By the 14th and 15th centuries, new colonial powers were emerging in Europe. The most powerful of these were the British, the French, the Portuguese, and the Spanish. Early conquests were directed against Africa, North America and Asia Minor. With improved Technology which made man more mobile, intrusions were made into new areas of North America and South America, and into Australia and the Pacific Islands. In addition, Africa and eastern parts of Asia, long known to Europeans, now became more accessible to them. These areas all became the object of colonial conquest and exploitation.

As colonial conquest and discovery proceeded, colonial nations came into competition with each other for new land areas. A need developed to resolve competing claims to such areas to reduce political conflict and open warfare between the colonial nations. Therefore, they began to seek political accommodations between themselves so they would not compete with each other by way of warfare or trade. These political accommodations and agreements came to be recognized as International Law or the Law of Nations. The attitude and practice of colonial nations toward so-called backward nations is described by Lindley as follows:

> "International Law places no veto on the acquisition of territory merely on account of its relative backwardness or advancement. It does, however, prescribe the mode or modes of acquisition which must be employed according to the condition of the territory if a valid title is to be obtained. The lines of division that are of importance for our purposes are not, therefore, those which might be considered to separate backward from advanced territory. They are rather

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those internal lines which subdivide backward territory from advanced territory according to the method or methods by which it can be validly acquired."[33]

The methods by which a valid acquisition could be made in conventional International Law depended upon the following:

1) No one nation could dispute the right of another to acquire new territory if any of them did not have a prior claim.[34] The method of acquisition was not a relevant consideration vis-a-vis another member of the International family.[35] However, as will be considered later, the powers of the colonizing nation were determined by whether acquisition was made by way of conquest, cession, occupation or settlement, and the laws in the acquired territories.[36]

2) Acquisition of uninhabited territory or territory of individuals whom it was believed did not form a political society could be made by way of occupation.[37]

3) If the inhabitants exhibited collective political activity, which although of a crude and rudimentary form, possessed the elements of permanence, the acquisition can only be made by way of cession or conquest or prescription.[38]

Lindley continued on the subject of the authority of so-called infidels as follows:

"Until comparatively recent times, the acquisition of sovereignty over the territories of backward peoples was discussed as a case of conquest, not one of occupation. The subject formed part of the

wider question, whether it was just to levy war against infidels and pagans as such, which was vigorously debated in the Middle Ages by jurists and theologians over a long period. The general trend of opinion was in the direction of denying sovereign rights to non-Christians, but, even among those who held this view, it was put forward as legitimizing a war of conquest and not as rendering the land of non-Christians territoria nulluis which could be acquired by occupation. But the opinion that sovereignty might be justly exercised by infidels received considerable support and included among its advocates men of high position and authority."[39]

b) International Law and the Status of Non-Christian Peoples

Ancient Writers (13th-15th Centuries)

According to Nassbaum:

> "International relations between 'Christian' and 'non-Christian' or 'infidel' peoples during this time was based on the belief that Christian states had a God-given right to take the lands and possessions of the infidels. It was commonly believed that infidel nations were non-states, that their rulers lacked true jurisdiction and that their lands were appropriable without compensation. It was also believed that war against infidels was inherently just and their conversion by the sword a duty."[40]

Medieval writers had taken the view that the heathens were nothing but the proper object of conquest, conversion and subjugation. (Vitoria, a 16th century thinker, was the first to insist that the heathens had legitimate princes, just as the Christians had, and that a war against them was permissible only for a "just cause").[41]

However, according to Brian Slattery, this isn't an accurate interpretation of the views of all writers. He claims that:

> "Even a limited survey of late medieval doctrine reveals a position substantially different from that suggested by these authors. The question of infidel rights was a controversial one, sparking sharp disagreement among the major canonists and theologians with many of the most respected adopting a stance broadly favourable to the unbeliever."[42]

This controversy lasted for centuries, having had its lines of argument developed by three major thinkers of that time--Aquinas, Innocent IV and Hostiensis. The major contributor in this area was Thomas Acquinas, who was born in 1225. His greates work, Summa Theologica, was begun in 1265 but remained unfinished at his death in 1274. Aquinas did not deal to any great extent with the rights of the unbelievers to jurisdiction or sovereignty over their lands. What he did do was deal with the question of the authority which unbelievers may have over the faithful. He made the following claim:

> "Dominion and authority are institutions of human law, while the distinction between faithful and unbelievers arises from the Divine Law. Now, the Divine Law, which is the law of grace, does not

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> do away with human law, which is the law of natural reason. Therefore, the distinction between faithful and unbelievers, considered in itself, does not do away with dominion and authority of unbelievers over the faithful."[43]

This, then, is an authority for the proposition or principal that the legitimacy of Dominion rests on the party exercising it, and so an infidel's authority is as valid as a Christian's. Aquinas does say, however, that the Church has the power to make war against the infidels to liberate the lands of converted peoples. This, however, doesn't go so far as to state that war can be justly waged against infidels because of their lack of faith alone. He claimed:

> "Among believers there are some who have never received the faith, such as the heathens and the Jews. And these are by no means to be compelled to the faith, in order that they may believe because to believe depends on the will; nevertheless, they should be compelled by the faithful, if it is possible to do so, so that they do not hinder the faith by their blasphemies or by their evil persuasions, or even by their open persecutions. It is for this reason that Christ's faithful often wage war with unbelievers, because if they were to conquer them and take them prisoners, they should still leave them free to believe if they will, but in order to prevent them from hindering the faith of Christ."[44]

A second major contributor to this line of thought was Innocent IV (1190-1254), who expressed these views in more detail. These two writers prompted Carlyle and Carlyle to conclude in their History of Medieval Political Theory that:

> "...it is important to observe that (the) principles of the legitimate nature and morality of the state are not limited to Christian states but were represented by the most authoritative writers of the 13th Century as extending to all states, even those of unbelievers."[45]

This, however, didn't take into account the writer Hostiensis (d. 1271), who held the view that the unbelievers didn't have a legitimate dominion over their lands, that the coming of Christ had nullified it.[46]

According to Slattery's research, Hostiensis and his followers weren't representative of the majority of thinkers at that time:

> "Our conclusions with respect to late Medieval European doctrine must, of necessity, be tentative because comprehensive studies of the period have yet to appear and the original texts are not easily accessible. But it appears that, with the outstanding exception of Hostiensis and certain others who followed his views on these matters, a goodly number of distinguished cannonist, jurists and theologians of the period recognized that infidel rulers were capable of holding true dominion over their subjects and territories, subordinate, perhaps to an asserted superior jurisdiction of the Pope of the Holy Roman Emperor--in the same way as

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> Christian rulers were said to be subordinate but legitimate nevertheless. Unbelief did not deprive them of authority not could it, in itself, legitimize wars waged against them by Christians.
>
> ...
>
> ...still it is a fact of importance to the law of territorial acquisition that in the eyes of many authoritative European thinkers from the 13th Century onwards, that the lands of unbelieving nations were not terrae nullius, appropriable by Christians at will."[47]

c) International Law and Christian Peoples

Important concepts employed by the Europeans dealt with the acquisition of the territory of another power by cession. The practice was that if the inhabitants agreed to place themselves under the soverignty of the acquiring state, it was an act of cession. If their country was taken possession of by superior force against their will, the mode of acquisition was conquest. Both modes of acquisition were a recognition that the territory belonged to the inhabitants. Cession implied the ability of the inhabitants to both make agreements and to refuse to make agreements. This was an essential test of independence.[48]

These understandings, as between various European powers, were known as the Law of Nations or International Law. The Law of Nations contained several important concepts. One is referred to as the doctrine of acquired rights. The acquired rights of the inhabitants are those rights to property, institutions and culture, which the inhabitants have exercised by virtue of their sovereign claim over their territory. International Law was based on the principle that such rights must be respected. Title to land, for example, was not to be affected by a change of sovereignty whether by conquest or cession.[49]

The new sovereign could expropriate rights or cancel them by legislation. However, if such action was taken, there was a recognized entitlement to compensation for such expropriated rights or the grant of some new rights or title of equivalent value.[50] It is also accepted that if the new sovereign did not pass such legislation, then the existing lands and other rights of the new subjects of the sovereign remain intact. The general practice among Europeans was to allow such subjects the right to the continuous use of their land, customs, usages and traditions and to apply European civil and criminal law to govern relationships among the Europeans.[51]

### d) The Origins of Theories Regarding the Rights of the Aboriginal Peoples

While the members of the "International Family" thus evolved a set of rules to acquire newly discovered territories, the question is, to what extent International Law was developed to devise rules for protecting the rights of the Aboriginal peoples. The more conventional view is that the International Law is not relevant here.[52] The theory is that International Law regulates the relationship of one nation to another, all nations being equal. The relationship of a nation to its Aboriginal inhabitants is a matter of municipal law and, hence, outside the purview of International Law. How, then, were the Aboriginal peoples to be treated? Did they have sovereignty over their lands?

The discoveries of the "new worlds" and new peoples during the 15th and 16th Centuries fueled the debate over the rights of the Aboriginal peoples. The Spaniards, in their search for gold and other riches, used their advanced military equipment, coupled with the class structure of Aboriginal populations first encountered, to completely destroy and conquer the indigenous societies. These intrusions were marked with ruthless brutality and complete disrepect for the rights of the Aboriginal inhabitants. This was so, even though the Aboriginal societies were highly-structured and politically

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developed. Wagley and Harris describe this level of political, social and economic development in the Americas as follows:

> "At the time of the Spanish conquest, the area of the new world, which is now Mexico, was inhabited in the main by American Indians who had achieved the cultural level of a great civilization. Only in the northern part of the country were there simple hunting and gathering tribesmen. In the central and southern parts of the country lived the Aztecs, the Tlaxcaltecans..and other highly civilized peoples. These people were divided into a series of native states often at war with each other, and at least one hundred twenty-five languages were spoken throughout the area. There was considerable cultural diversity from one native state to another but everywhere their complex cultures were based upon a system of hoe agriculture which produced maize, beans, squash and other aboriginal American crops. Trade was highly developed. A system of writing and an efficient numerical system was widely used. These peoples had a calendric system based in part on the solar year. They had an organized government and a priesthood which administered their elaborate religion. They constructed pyramids, temples, fortresses and palaces. Their stone and metal work was marked by a high degree of artistic refinement. Their society

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> was divided into classes of nobility, commoners, and slaves. While the majority of the people in these native states were rural farmers, there existed great cities such as Tenochitlan and Texcoco, both in the valley of Mexico, which, together, had a population of almost a half million. In these cities there were busy markets that rivaled anything in Spain at the time. The central and southern areas of Mexico had an Aboriginal population that numbered at least four million people, and perhaps as many as nine million in 1521."[53]

Many eminent scholars believed that the Aboriginal peoples and infidels in general were capable of possessing true dominion and ownership of their lands and goods. They rejected the idea that lack of European religious outlook, culture, customs or levels of technological achievement took this away.

Thomas de Cajetan (1469-1534), an Italian theologian, adopted the reasoning or viewpoint previously expressed by Aquinas. According to de Cajetan:

> "There are some infidels who are neither in law nor in fact under the temporal jurisdiction of Christian princes, just as there are pagans who were never subjects of the Roman empire and yet who inhabit lands where the name of Christ was never heard. Now their rulers, though heathen, are legitimate rulers, whether the people live under a monarchial or a democratic regime. They are

> not to be deprived of sovereignty over their temporal possessions. Against them, no king, no emperor, not even the Roman Church, can declare war for the purpose of occupying their lands or of subjecting them to temporal sway."[54]

In spite of the evidence that early concepts of International Law did or should have applied to indigenous peoples, this issue remained a very controversial one. The argument against the recognition of rights was often dependent upon whether infidels were perpetual enemies. If they were, upon acquisition of their lands by an enemy, they often lost their lands without compensation.[55]

As we have seen, Hostiensis held that unbelievers didn't have legitimate dominion over their lands, as the coming of Christ nullified it.

With the discovery of North America by Spain in the late 15th Century, the question of the status of the Aboriginal peoples in the new territory became more urgent. The Spanish rulers, because of conflict between commercial interest in the new territories and the missionary orders of the church, were uncertain as to how to deal with the many legal and practical questions which arose regarding sovereignty, land ownership and the personal rights of the Aboriginal peoples. They, therefore, referred the question of the rights of the Aboriginal peoples in the New World to the Pope asking Him to rule on these issues. The Pope in turn gave a commission to study the matter to a Spanish theologian, who taught at the Salamanca University, Francisco de Vitoria. He dealt with the question of the rights of the Indians in a series of lectures in 1532, entitled De Indis and De Jure Bellix. He was the greatest proponent of the rights of the Aboriginal peoples. Because of this, he was mistakenly credited with having developed the concepts of

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"aboriginal rights" and "aboriginal title" which are popular today.

Vitoria asked the question as to whether or not the Aboriginal peoples of the New World:

> "...were true owners in both private and public law before the arrival of the Spaniards, that is, whether they were true owners of private property and possessions and also whether there were among them any who were the true princes and overlords of others."[56]

Vitoria then went on to examine and demolish a number of arguments denying dominion and ownership to the American aborigines because they were so-called sinners, unbelievers, unsound of mind, or slaves by nature:

> "the upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters, just like the Christians, and that neither their princes nor private persons could be despoiled of their property on the grounds of their not being true owners."[57]

To do so says Vitoria, would be...

> "theft and robbery no less than if it were done to Christians."[58]

Their rights remained intact even though...

> "...the natives...are timid by nature and in other respects dull and stupid."[59]

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In an additional lecture entitled De Jure Belli, Victoria considered the justice of war against Aboriginal peoples in the New World. Where war was deemed just between the Spanish and the Aboriginal peoples, analogies were made to conflicts between Spain and France, two sovereign nations.[60] In his writings Vitoria never used the term "aboriginal rights" or "aboriginal title". This latter fiction was the invention of modern legal and academic writers. This concept when combined with the judge's decision in the St. Catherines Milling Case, led to the concept in Canadian law that the land rights of the Aboriginal peoples can be terminated because they have only the right of occupancy which is at the pleasure and based on the goodwill of the sovereign. Such termination could take place through a process called extinguishment. These errors have been compounded by modern legal academic writers and Canadian jurists who trace the origins of ~~the~~ extinguishment to Vitoria and the Royal Proclamation of 1763.[61]

The result of Vitoria's work and the ensuing debate saw the issuance of a Papal Bull in 1537, which was to guide the dealings of the Spanish rulers with Aboriginal peoples, but which was subsequently extended to be a guideline for the rulers of all Christian nations. The Bull Sublimis Deus issued by Pope Paul III stated in part:

> "...Indians are truly men...they may and should freely and legitimately enjoy their liberty and the possession of their property, nor should they be in any way enslaved, should the contrary happen, it should be null and of no effect."[62]

e) Observance by the Colonizing Powers of the Rights of Aboriginal Peoples

(1) General Practices

During the 15th and 16th Centuries colonial policy in Great Britain in particular and in Europe in general was

dominated by the laissen-faire theories of Adam Smith and John Locke. In practice there was a good deal of monopoly control exercised by large and powerful financial interests with the support of government. Nowhere was this more true than in the dealings of large companies in and with colonial territories. The concepts of conventional International Law regarding territorial acquisition ensured this monopoly. The nations claiming sovereignty on the basis of discovery obtained monopolistic trade rights. Often Charters were granted to colonizing corporations. This in particular was the practice followed by Britain and to a large degree by France.[63] The Charters of the Company of New France, the Hudson's Bay Company, and the Massachusetts Bay Company are good examples of such trading Charters. In general these Charters concerned themselves with control of trade and commerce and did not make outright land grants. The emphasis was on manufactured goods from European factories being exchanged for the raw materials from the colonies. In some cases the Charters also gave Companies the right to settle immigrants in the new territories. Although England claimed sovereignty it did not necessarily claim ownership of the land.[64]

The general intent of the colonial nations, therefore, was that of claiming new territories for the purpose of establishing and expanding trade and commerce in the first instance and to establish new settlements in the second instance. The first goal would ensure that idle capital which was being accumulated by the new merchant class would be put to work earning still more profit and thus wealth and power for both the wealthy class and for the government of the colonizing nation. The second goal would ensure an outlet for the surplus population being forced from the land by the industrial revolution and to ensure a place to where religious dissidents would migrate. It would also provide an outlet for surplus managerial, entrepreneurial and professional skills which could be employed in the new world. The effect was to help maintain some stability at home both among the poor working class and among the middle class, who might provide the potential leadership for uprisings

and revolutions, should they be unhappy with their lot.

For trade and/or immigration to be successful, certain conditions were necessary. These included the following:

a) unchallenged sovereign claim to the newly discovered territory

b) the ability to devise a system to get clear title to land and resources as needed

c) the existence of law and order and relative peace among and with the aboriginal nations

d) the availability of a cheap supply of labour to produce the raw materials and other goods coveted by the merchants, and

e) a system of trade which would ensure a free exchange of goods among the aboriginal peoples and the merchants, in a way which would generate huge profits for the merchants as well as an outlet for manufactured goods from European factories.

For these reasons the idea that Indians were not owners and the refusal to recognize Indian title in British Courts was developed. However, in practice, the new settler colonies were not strong enough to conquer the Indians. They needed them as allies to survive and also to ensure a prosperous trade. Therefore, for practical reasons, they recognized Indian sovereignty, made treaties of alliance with the Indians, and bought land from them. Some settlers believed that the Indians were the true owners of the land and that their ownership must be recognized based on the settlers religious and moral beliefs.[65]

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(2) Spanish Practice

The Spanish Government attempted to reflect the sentiments of the Papal Bull in their laws, which applied to the West Indies. However, they did not recognize the sovereignty of the Indian nations. Instead they passed laws to discontinue plantations based on forced and slave labour. They allowed instead the establishment of Indian missions to train the Indians in agriculture and in Christianity. When Indians could farm they would be resettled in villages and granted a plot of land to which they were given title. These legal provisions, however, were mostly ignored by the Spanish conquistadors who continued their plantations and continued to enslave Indians. Some practiced excessive cruelty and oppression toward the Indian people, which, along with disease and alcoholism, resulted in their extermination in some areas.[66]

Vattel (1714-1767), a leading authority on International Law, commented on these Spanish practices. Vattel was of the belief that "nature had established a perfect equality of rights among independent nations." In consequence, no one of them could justly claim to be superior to the others.[67] As no nation can take upon itself the right to judge the manner in which another sovereign governs his country:

> "...the Spaniards acted contrary to all rules when they set themselves up as judges of Inca Atahualpa. If that Prince had violated the Law of Nations in their regard, they would have been right in punishing him. But they accused him of having put to death certain of his own subjects, of having had several wives, etc., things for which he was not responsible to them; and, as the crowning point of their injustice, they condemned him by the laws of Spain."[68]

For Vattel "the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation..." for it is unlawful to reduce another nation to subjugation.[69] But the same considerations apply to societies composed of several independent families, such as "the savage tribes of North America".[70] Of these, Vattel writes:

> "...when several independent families are settled in a country they have the free ownership of their individual possessions, but without the rights of sovereignty over the whole, because they do not form a political society. No one may lay claim to sovereignty over that country, for this would be to subject those families against their will, and no man has the right to rule over persons born free unless they subject voluntarily to him."[71]

In essence, Vattel was of the view that the civilizations of Mexico and Peru constituted sovereign nations but that groups of independent families which did not form political societies did not possess sovereignty, but nevertheless would have had ownership of their possessions. Even though this last group was not sovereign, they could not be deprived of their lands nor could they be subjected to the sovereignty of another nation without their consent. Vattel further made a distinction between settled agricultural peoples and pastoral or hunting peoples. The former own the property they actually occupy. The latter own lands of which they are making "present and continuous use", but they couldn't claim more land than they actually needed, and certainly not large tracts of territory over which they merely wandered. Vattel was concerned with

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restricting the geographical extent of these rights, not with asserting their temporary or inferior character.[72]

In 1830 the Committee on Indian Affairs of the United States House of Representatives noted that:

> "In the Spanish provinces, the Indians became the property of the grantee of the district of the country which they inhabited and this oppression was continued for a considerable period."[73]

The Spanish established themselves as dictators and rulers, with all the privileges and prerogatives which go with such power. The results of this blatant disregard of the rights of the Aboriginal peoples is still evident in the social and economic conditions in Latin America today.

(3) French America

The French followed the Spanish policy and took a direct position of dominance over the Aboriginal peoples in those areas which they settled. In areas in which they only carried on trade, their policies were not dissimilar to those of the British. Friendship and peace were cultivated for the purpose of trade, and alliances were entered into with Indian nations to fight the British. France also considered that it was acting legally by claiming sovereignty to new land areas it discovered. The French practice was based on two overriding policies. These are best expressed in the following excerpts from the Charter of the Company of New France:

> "To establish, extend and make known the name, power and authority of His Majesty and to the latter to subject, subdue and make obey all the peoples of the said lands."

> "Have them instructed, provoked and move them to the knowledge and service of God and by the light of the Catholic faith and religion, apostilic and Roman, there to establish in the exercise and profession of it..."[74]

French writers such as Pradier-Fodere, Salomon, Bonfils, Jeze and Depagnet, however, held a different view and recognized the full rights of the Aboriginal peoples to their territories.[75] To summarize the foregoing, there is a uniformity of view:

> "...that wherever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as territorium nulluis and open to acquisition by occupation."[76]

Since the French believed that the Indians were fit subjects to be christianized and frenchified, the missionaries were employed to assist in this regard. Once having accomplished these two goals the Indians were treated as French subjects.[77] In settled areas there was no recognition of the Indians having any rights in law until they became French citizens. Outside the settlements the French traders and merchants were only interested in the Indians for economic reasons. They were vital to the fur trade and it was believed that if they acquired Christian ideas and habits, they would be spurred by self-interest to participate in the fur trade.[78]

As a result of this policy, the French simply took the lands they needed for settlement, either driving out the Indians or assimilating them. The taking of land for actual settlement, however, was limited to the St. Lawrence River Valley. The great interior of North America was granted to

the French trading Companies as areas where it could carry on trade and commerce and make laws to govern the trade. In these areas Indian rights were not interferred with because the land was not required for settlement and because it was necessary to allow the land to remain in an "untamed state", with the Indians having the right to move freely on the land. They were encouraged to give up agriculture and to follow a hunting and gathering lifestyle.[79] This lifestyle was necessary to the success of the fur trade and it was encouraged by the use of credit and other incentives. Indeed, the French traders and explorers adjusted their activities and their own life-style to the frontier conditions.

(4) Practices of Other Colonial Powers

Other European powers such as the Dutch and the Swedes gave some recognition to the concept that Indian nations were sovereign and that they owned their land. The Dutch introduced land purchase arrangements in North America and incorporated this policy into their colonial statute law. The first actual purchase of land by the Dutch from the Indians, was the Manhatten Island purchase, which according to MacLeod was bought on the basis of fair market value at the time.[80]

(5) British Practice

The British were the most active colonizers on a global basis. They were the most influential in shaping policy and law regarding Indian sovereignty, trade and settlement. The object of trade and commercial activities was to make profits, and nowhere was the art of making money better developed or more cultivated than it was by British companies. The merchant class had gained control of the government and used the power of government to enhance their own interests. These companies were most concerned with trade. However, in the early 16th Century, settler colonies were also established.

These colonies were made up of dissident religious groups such as the Puritans and the Quakers.[81] The trade was in hand-crafted and manufactured goods which were exchanged for raw materials and exotic products such as jewels, spices and perfumes. In some areas of the world such as Africa, India and in parts of North America, the settlement activities tended to be limited to the settling of a managerial, professional and an entrepreneurial class. The entrepreneurs were to establish and run the plantations on which some of the trade depended. The managers looked after business and related administrative activities. The professional class served the settlers and concentrated some attention on civilizing the Aboriginal inhabitants.

To maintain maximum profits it was necessary to keep down the costs of colonial government, policing and other services, and to appease the Aboriginal population. A reasonably satisfied Aboriginal populace could be called on as producers of raw products, workers in trading activities, as customers for the goods of English factories and as allies in war.[82] As the industrial revolution created a large class of landless workers in Great Britain, which was threatening the political stability of that country. At this point it became important for the new colonies to be used as an outlet for the surplus population and the policy of encouraging settlement developed. However, settlement was encouraged in ways which enhanced trade and commerce. Settlement also brought the British settlers into conflict with local Indian peoples in North America and it was necessary to find new ways to appease them.[83]

The British became masters of the art of expediency. This practice was based on the belief that one must avoid conflict by granting the Aboriginal inhabitants enough to satisfy their demands while doing that in a way which would ensure that the British would achieve their economic, political and settlement goals. For the settler colonies themselves,

good relations with the Indians and Indian allies ensured their survival.[84] As a result, the trading Charters and land grants which the government gave were based on the idea that Aboriginal peoples must not be disturbed in the possession of their lands. Although the British Government on the one hand refused to recognize the Indians as legal owners of their land, for the sake of expediency, they encouraged private purchase of Indian lands.[85]

Provisions regarding the rights of the Aboriginal peoples included in the Charter of the Massachusetts Bay Company were typical of the provisions made in other Charters and given in letters of instruction to local colonial governors and to the proprietors of trading companies. These provisions were also later incorporated into constitutional documents such as the Royal Proclamation of 1763. One of the provisions in the Charter of the Massachusetts Bay Company reads as follows:

> "Above all we pray you to be careful that there be none in our precincts permitted to do injury in the least kind to the heathen people...if any of the savages pretend right of inheritance to all or any of the lands granted in our Patent we pray you endeavor to purchase their title..."[86]

Similar instructions were given by the Hudson's Bay Company in letters of instruction to traders, who were told not to disturb the Indians in possession of their lands.[87] The purchase of title was often accomplished by having the Indians sign deeds which indicated they were selling the land for a given price to the settlers. This was a new concept for the Indians who had not developed a formal concept of land ownership by registered title.

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V. CONCLUSION

In conclusion, there is a distinct school of International Law which recognizes the sovereignty of the Aboriginal peoples and their right to their lands and their territorial integrity.[88] However, in the case of the Metis, they would be barred from arguing violations of International Law in municipal (i.e.-domestic) courts to challenge the authority of the British Crown in asserting its sovereignty over Aboriginal lands. The principal problem can be stated as follows:

(1) The Sovereign, who has "broad powers of conducting international affairs" is subject to International Law.[89]

(2) However, a municipal court is not competent to deny the Crown's claim to acquired territories.[90]

> "In British law the dominions of the Crown comprise all those territories and no more, which are authoritatively claimed by the soveeign at that time."[91]

> "The question of whether International legal criteria had been satisfied would not entitle a municipal court to decline to give effect to an authoritative Crown claim."[92]

Therefore, a fundamental problem persists in Western Canada where Britian asserted its sovereignty. Legal authorities clearly rule out a challenge by the Metis to original assertions of British sovereignty over Aboriginal lands, no matter how unjust.

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The second conclusion deals with certain conventional schools of thought regarding the denial of rights to non-Christians. Such an argument, when applied to the Metis, if accepted as valid, cannot stand and must fall to the ground. The devout Christianity of the Metis is undeniable.

The third conclusion deals with the denial of peoples to be sovereign entities if there was no settled political order (lex loci). Again, such an argument, if accepted a valid, must fall to the ground. The Metis had a highly developed system of law, land-holding and local self-government. There was clearly a settled political order.

The fourth conclusion deals with those writers such as Vattel, who argued for limited recognition of the sovereignty of the Aboriginal peoples. Such an argument is predicated upon "classifying lands as owned only if they were permanently used for living site or areas of culitvation."[93] There is support for such an approach in British colonial experience.[94] However, this argument must fail, as it is contrary not only to more widely recognized scholars in International Law, as outlined above, but to the terms of the Royal Proclamation of 1763:

> "And whereas it is just and reasonable and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our domains and territories as not having been ceded to or purchased by us, are reserved to them or any of them, as their hunting grounds..."[95]

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The fifth conclusion relates to the notion that title can be set up by right of "discovery". This was considered in the case of the Aboriginal peoples of North, Central and South America and rejected by Victoria, who stated:

> "...because, as proved above, the barbarians were true owners, both from the public and from the private standpoint. Now the rule of the Law of Nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the aforementioned passage of the Institutes. And so, as the object in question was not without an owner, it does not fall under the title which we are discussing...this title...in and by itself gives no support to a seizure of the aborigines lands any more than if it had been they who discovered us."[96]

Coupled with the notion of "discovery", the sixth conclusion deals with the theory of acquisition by "conquest". No less an authority than Dr. Lloyd Barber, the former Commissioner on Indian Claims, put it this way in 1974:

> "For us to accept their generosity and their assistance, to have accepted their basic concept of sharing and then to later claim that we were in fact conquerors in disguise and that they really have no rights, seems to me immense hypocrisy."[97]

[1]See revised Standard Statutes of Canada.

- Manitoba Act, 33 Victoria(Cap. 3-1870)
- Dominion Lands Act, 42 Victoria(Cap. 31-1879)
- Dominion Lands Act, 46 Victoria(Cap. 17-1883)

[2]Report of N.O. Cote, Esq. of the Department of the Interior, dated 3rd December, 1929. Public Archives of Canada.

[3]St. Catherines Milling Case and Lumber Company v. The Queen (1889), 14 A.C. 46 (P.C.)

[4]Calder v. Attorney General of B.C., (1973, S.C.R. 313)

[5]Paulette v. R. (1976) 72 D.L.R. (3d) 161.

[6]Archer, Martin, The Hudson's Bay Company's Land Tenures, London, William Clowes and Sons Limited, 1898.

[7]Noonan and Hodges (Unpublished). Public Archives of Saskatchewan, University of Regina.

[8]Cumming , Peter A. and Mickenberg, Neil H., Ed., Native Rights In Canada, The Indian and Eskimo Association of Canada (1972). Part II: The Law of Aboriginal Rights, pp. 13-52.

[9]Ibid.

[10]Neil H. Mickenberg, Aboriginal Rights In Canada. Osgoode Hall Law School (1971) p. 150.

[11]Re: Eskimos (1939) S.C.R. 104.

[12]William Christie MacLeod The American Indian Frontier, London, Kegan Paul, Trench, Trubner Co. Ltd., New York: Alfred A. Knoph, 1928, p. 195

[13]An Unpublished Thesis by Sharon O'Brien, From International Sovereign to Domestic Dependent Nation: Non-recognition of International Indian Sovereignty by American Courts, p. 22

[14]MacLeod, Supra, pp. 205-206.

[15] Johnson v. McIntosh, 21 U.S. (8 Wheat) 240 (1823).

[16] Cherokee v. Georgia, 5 Peters 1.

[17] Sharon O'Brien, Supra, pp. 53-54.

[18] Cummings and Mickenberg, Supra, pp. 94-100.

[19] The Honorable Alexander Morris, The Treaties of Canada with The Indians, Facsimile Edition reprinted by Coles Publishing Company, Toronto (1979).

[20] Ibid.

[21] Ibid.

[22] This is the first and only case in which the Government of Canada argued that the Indians had a full proprietary interest in their lands.

[23] St. Catherines Milling, Supra, p. 54.

[24] Kenneth, Lysyk, The Indian Title Question In Canada: An Appraisal In The Light Of Calder. (1973), 51 Canadian Bar Review, p. 450.

[25] A history of the Royal Proclamation can be found in: Brian Slattery: The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories, (Unpublished), 1979. See also: Kenneth Narvey: The Royal Proclamation of 1763, The Common Law and Native Right to Land Within the Territory Occupied By The Hudson's Bay Company, (1973), 38 Sask. Law Review, p. 12.

[26] Regina v. White and Bob (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), aff'd (1966), 52 D.L.R. (2d) 481 S.C.C.

[27] Attorney General For Canada v. Attorney General For Ontario (1879) A.C. 199 (P.C.). Rex v. Wesley (1932) 4 D.L.R. 774, 2 W.W.R. 337 (S. Ct. Alta., App. Div.).

[28] R. v Syliboy (1928), 50 C.C.C. 389 (N.S. Cty Ct.) The Queen v. Francis (1970), 10 D.L.R. (3d) 189, 9 C.R.N.S. 249 (N.B.C.A.). R. v. Simon 124 C.C.C. 110 (N.B.S. Ct. App. Div.).

[29]R. V. McCormick (1859) 18 V.C.Q.B. 131 at p. 136.

[30]Revised Standard Statutes of Canada (1926-27), Chapter 33, Section 6.

[31]Ibid.

[32]Cummings and Mickenberg, Supra, p. 13

[32a]William Christie MacLeod, Supra, p. 195.

[33]M.F. Lindley, The Acquisition and Government of Backward Territory in International Law, Reprinted 1969, Negro Universities Press, p. 1.

[34]Ibid. p. 45.

[35]Ibid.

[36]Brian Slattery: The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories. (Unpublished) (1979), p. 1.

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[37]Ibid.

[38]Ibid.

[39]Lindley, Supra.

[40]Nassbaum: A Concise History, p. 84.

[41]Francisco de Vitoria: De Indis et de Juri Belli Relections, NYS, Ernest, Ed., Carnegie Institute of Washington (1917) p. 120.

[42]Brian Slattery, Supra.

[43]Thomas Aquinas, Summa Theoligica, Quoted in Slattery, The Indigenous Peoples of Canade in Internal Law, p. 10.

[44] Ibid.

[45] R.W. Carlyle and A.J. Carlyle, A History of Medieval Political Theory in the West. London, Blackwood and Sons, Volume 3, p. 33.

[46] Michel Villey, La Croisade. Paris, Librarie Philosophique, J. Vren (1942) pp.30-31.

[47] Slattery (Unpublished Paper), Supra , p. 10.

[48] M.F. Lindley, Supra, p. 77 and following.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Slattery (Unpublished Paper), Supra, pp. 13-21.

[53] Wagley and Harris, Six Case Studies: Minorities In The New World. Columbia University Press, New York (1958), pp. 49-50.

[54] Hugo Grotius, The Freedom Of The Seas; J.B. Scott, Ed., New York, Oxford University Press (1916), pp. 19-20.

[55] See Calvins Case (1688), 7 Co. Rep. La., 77 E.R. 377.

[56] Francisco de Vitoria, Supra, p. 120.

[57] Ibid. p. 128.

[58] Ibid. p. 123.

[59] Ibid. p. 128.

[60] Ibid. pp. 163-187.

[61] Cummings and Mickenberg, Supra, Part II.

[62] Ibid.

[63]W. C. MacLeod, Supra. pp. 138-139.

[64]Ibid.

[65]Ibid. p. 199.

[66]Ibid. See Also Cohen, The Spanish Origins of Indian Rights In United States Law (1942), 31 GEO, Law JR. 1 at p. 109.

[67]Vattel, Le Droit des Gems, translated Washington, Carnegie Institute (1916), Vol. III, p. 126.

[68]Ibid. p. 131.

[69]Ibid. pp. 38 and 141.

[70]Ibid. p. 143.

[71]Ibid.pp. 142-143.

[72]The character of Vattel's work is therefore distinguishable from the preceeding authors who recognize sovereignty. Vattel is of the school of thought which gave a conditional or limited recognition of sovereignty to Aboriginal peoples. See also Lindley, Supra, p. 17.

[73]Lindley, Supra, 21st Cong., 1st Sess., H.R. Rep. No. 227, February 24, 1839, p. 328.

[74]J.H. Kennedy, Jesuit and Savage In New France, Yale University Press, New Haven (1950).

[75]Ibid. pp. 15-16.

[76]Ibid. p. 17.

[77]Cumming and Mickenberg, Supra, p. 81. See also Stanley, The First Indian Reserves in Canada (1950) Revue d' Histoire de l'Amerique Francaise, pp. 209-210

[78]Ibid.

[79]W.C. MacLeod, Supra, pp. 148-149.

[80]Ibid. pp. 197-198.

[81]Ibid. pp. 131-137.

[82]Ibid. pp. 193-207.

[83]Ibid.

[84]Ibid.

[85]Ibid.

[86]Chronicles of The First Planters of Massachusetts Bay (1623-1639).

[87]Letters Outward, Hudson's Bay Company Records, Vol. 12, p. 15.

[88]Slattery, Supra, p. 46.

[89]Ibid.

[90]Ibid. pp. 46-63

[91]Ibid. p. 63.

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[93]Sanders, Supra, p 152.

[94]See Snow, Supra, p. 80.

[95]Royal Proclamation of 1763. Cumming and Mickenberg, Supra,

[96]Francisco de Vitoria, Supra, pp. 138-139.

[97]Commissioner On Indian Affairs, A Report: Statements and Submissions. Minister of Supply and Services Canada (1977), p. 7.

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

### I. INTRODUCTION

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

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

### II THE CONVENTIONAL CONCEPT OF ABORIGINAL RIGHTS IN NORTH AMERICA

#### A. ~~The~~ Legal Positions

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

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

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

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

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

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

He further stated;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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According to Sanders:

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

These modifications, according to Sanders, were:

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

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

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

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

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

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

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

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

## III PRACTICE IN NORTH AMERICA:

### a) The Spanish

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

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

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

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

b) The French

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

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

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

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

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

c) The Dutch

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

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

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

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

d) The British

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

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

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

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

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

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

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

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

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

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

e) The British Assume Control

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

f) British Indian Policy in North America

MacLeod described this British policy as follows:

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

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

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

In summary then, the Proclamation provided for:

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

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

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

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

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

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IV. AMERICAN POLICY AFTER INDEPENDENCE:

a) The Recognition of Indian Sovereignty In the United States

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

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

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

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

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

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

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

b) The Treatment of Indians by Courts

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

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

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

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

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

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

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

Justice Marshall continued his argument in the following manner:

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

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

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

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

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

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

Justice Marshall further stated that:

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

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

Justice Marshall also concluded:

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

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

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

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

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

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

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

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

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

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

c) U.S. Policy and Practice After Marshall

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

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

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

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

d) The Breakdown of American Indian Policy

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

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

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

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

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

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

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

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

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

## V. CONCLUSION

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

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

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

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

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

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

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

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

FOOTNOTES

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

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

45. Ibid. p. 24

46. Ibid. pp. 17-18.

47. Ibid.

48. Ibid. pp. 395 and 403

49. Ibid.

50. Ibid. pp. 402 and 403.

51. Ibid.

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

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

54 Ibid. p. 462

55. Ibid. pp. 464 and 465.

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

57. Ibid.

58. Ibid.

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

60. Ibid. p. 80

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

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

63. Ibid. p.p. 573 - 586

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

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

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

67. Ibid. p.p. 39 & 40

68. Ibid.

69. Ibid, p. 65

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

71. Ibid. pp. 467 - 468.

72. Ibid. Chapter XXXI.

73. Ibid. pp. 472-476.

74. Ibid. pp. 476-477.

75. Ibid. pp. 441-442.

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

77. Ibid. pp. 853-854.

78. Ibid. pp. 538-539.

79. Ibid. pp. 540-544.

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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.

CHAPTER IV: THE METIS ORIGINS AND THEIR DEVELOPMENT AS A SEPARATE PEOPLE

I. The Metis As A Separate Aboriginal People:

The idea that Metis were a distinct group of aboriginal people separate from the Indians of Canada, first arose formally during the free trade agitation in the Northwest during the period 1846 to 1850. It did not arise at that time as a legal issue but was raised by the Hudson's Bay Company officials in their response to a memorial from the settlers of the Red River regarding the imposition by the Company of their monopoly trade provisions under the Rupertsland Charter.

In 1844, residents of the Red River sent a petition to the British government protesting that the rights of the citizens of the Red River were being trampled. In particular, the petition claimed that "this interference with those of aboriginal descent has been carried to such an extent as to endanger the peace of the settlement".[1]

Since most of the free traders were "Metis" or "half-breeds," it is clear that they considered themselves to possess the same right to conduct their affairs without interference, as did the Indians. As has been pointed out previously, the general legal principle of the Law of Nations, which was followed by the British in their dealings with aboriginal peoples, was that the sovereign had the right to make laws to control relations among colonists or settlers and between them and the Indians. They did not, however, purport to control relations among the Indians in unceded territory.[2]

In its response to the memorial of the petitioners, the Hudson's Bay Company attempted to limit the use of the term "Native" to the "Indians or aboriginals". They further attempted to make a distinction in their reply between persons of mixed-ancestry and Indians. Those of mixed-ancestry, who were descendents of Europeans fathers, they claimed were considered as Europeans, and therefore, subject to the laws and regulations made by the Company under the terms of their Charter.[3] A.K. Isbister, in his reply to the Hudson's Bay Company response to the memorial, dismissed the Hudson's Bay Comp

claim that persons of mixed-ancestry who were not aborigines, as having no basis in the Law of Nations and as repugnant to the circumstances in the Northwest, where the fathers often abandoned their mixed-ancestry progeny to be cared for by the Indians or by other "halfbreeds".[4]

It is in fact clear from the dealings of the British and Canadian governments in other parts of Canada prior to this period and up to Confederation, that those governments, as a matter of law and policy, did not distinguish between pure ancestry and mixed-ancestr aborigines. Nowhere in the literature, or in legislation dealing with Aboriginal issues, was the term "Metis" or "Halfbreed" used. The first Indian Act of 1850 contained the following definition of "Indian":

> "First, all persons of Indian blood, reputed to belong to a particular body or tribe of Indians and the descendents of all such persons;
>
> Secondly, all persons intermarried with any such Indians and residing amongst them and the descendents of such persons;
>
> Thirdly, all persons residing among Indians, whose parents on either side were or are Indians of such body or tribe, or entitled to be considered as such,
>
> and
>
> Fourthly all persons adopted in infancy by any such Indians and residing in the village or upon lands of such tribe or body of Indians and their descendents."[5]

This definition was carried forward in subsequent Indian Acts and was incorporated into the 1868 Act, which established the Department of the Secretary of State for the provinces. It was not until 1876 that the federal government changed this definition to exclude "Halfbreeds" covered under the Manitoba Act. Subsequent amendments have further restricted the meaning of the term "Indian" for legislative purposes. It is clear that this legislation cannot change or restrict the meaning of "Indian" in the British North American Act, 1867. The accepted meaning of the term "Indian" at the time must have been what the Fathers of Confederation had in mind when sub-section 91(24) was put into the B.N.A. Act.

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The identification of the Metis and Halfbreeds in Rupertsland, as a group separate from the Indians, related to their role in the economic, social and political development of the area and the way in which they viewed themselves in relation to the Indians and the European Trading Comapnies who were their employers. Therefore, it is important to briefly examine the origins of the Metis.

## II. Metis Origins

To some extent, the origins of the Metis are obscure. In other respects, they are well known. It is generally agreed that the first Metis were the offspring of French fathers -- "Courier de bois" -- and Indian women. These offspring became known as the "Bois Brule" and later were referred to as the Metis (persons of mixed-ancestry. The term "Halfbreed", which was later applied to the descendents of English fathers and Indian mothers was also later applied in legislation to all persons of mixed-ancestry implied that the offspring were of white fathers and Indian mothers. It is, however, likely that many of the workers who accompanied the first French expeditions of exploration and trade were already persons of mixed-ancestry[6].

In his book, Tremaudan traces the origins of the Metis to Jean Nicollet and his family, who penetrated the Northwest as far as the territory of the Cree and the Assiniboine while engaged in trade with the Indians during the period between 1618 and 1656. After this period, a number of expeditions were dispatched to the north and west to explore the country. Tremaudan speculates that some of the men who accompanied these expeditions were so enamored with the lifestyle of the new lands that they took Indian wives and established themselves permanently in the Northwest. There were a series of such expeditions beginning in 1659. The most famous and the ones with the largest entourages were under the direction of Radisson and Grosseillers in 1659 and up to 1670. These early expeditions were followed by others under the direction of La Verendrye in 1727 and 1731. In 1743 he explored the prairie regions. Other expeditions followed under other explorers. As well, the Hudson's Bay Company sent expeditions into the area under Anthony Henry

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in 1750 and sent the famous Henry Kelsey into the region as early as 1690. Tremauden believed that, since the records showed that not all the men returned from these expeditions, some stayed and became permanent settlers. They either lived with the Indians and were absorbed into the Indian tribes or they settled apart from the Indians and became independent trappers and traders.[7]

It is this latter group, which he believed formed the nucleus of the "Metis", who became an important labour force for the fur trading companies. This would suggest that the Metis lived in the Northwest before the trading posts penetrated the area. They were already acting as guides, independent traders, and freighters. They facilitated the process by which trading posts became established further inland. They assisted in the selection of sites for trading posts, they worked at the posts, often settled their families there and became an important liaison between the traders and the Indians. The Indians, on the other hand, remained as the gatherers of furs, food and other products which they traded to the companies. Therefore, even at this early period, the Metis began to have a role much different from that of the Indians. It is natural that from this role they would begin to identify themselves as a unique people, although closely allied with the Indians.

In the case of the English "half-breeds", who were the offspring of the traders and employees of the Hudson's Bay Company, they were initially brought up around the few trading posts that the Company established on the shores of the Bay. During the first century of its trade, the Company had a limited number of trading posts on the Bay and a few inland posts in the area north of Lake Winnipeg. It was also the practice of the traders and employers to take Indian mates. Children were raised at the trading posts. When employees finished their tour of duty, some returned to Europe, leaving Indian wives and children behind; others extended their contracts, and still others settled permanently in the new territory. The children and women either returned to live with the Indian tribes or remained around the trading posts. When the men settled, the wives and children settled with them. Although the "Halfbreed" population grew more slowly than the Metis population,

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it did grow. By the late 1700's the"Halfbreed" laborers formed the major part of the work force of the Company. This ready-made indigenous work force also played a major role in the Company's move to establish posts further inland and in their move into the prairie area, which the Company had not previously tried to claim as its territory. This indigenous work force was allowed to fill many positions in the company including clerks and traders. However, they were never allowed to hold management positions such as those of factors, chief traders and explorers. As a result, the "Halfbreeds"came to play much the same role in the commercial activities of the Hudson's Bay Company that the Metis played in the Company of New France. Again, this role was different from that of the Indians or the white managers. The use of this indigenous labour force and the fostering of a special role for the Metis was encouraged as part of the official policy of these Companies. This decision was made for several reasons. Firstly, it was less expensive to use an indigenous, rather than an imported, labour force. Secondly, the Metis knew the country well and didn't require guides. Thirdly, the Metis had valuable connections with their Indian relatives; they spoke the language and were able to develop and use these in the fur trade to the Company's advantage.

With the fall of New France in 1760 and the collapse of the Company of New France, which had established an extensive network of trading posts and travel routes right to the Red River, the Hudson's Bay Company began to consider moving south to establish its claim to all of Rupertsland as described in its Charter. However, before it could do so, a new company of Scottish adventurers and capitalists took over the trading empire of the Company of New France. This company, known as the Northwest Company, operated out of Montreal as a Canadian company and in direct competition with the Hudson's Bay Company. To establish their presence in the hinterlands of the northwest, they were, to a large extent, dependent upon the Metis. Although the Company did not entrust senior management positions to the Metis, it did give them positions of

importance as traders, and as managers in the fur posts, and depended upon them to enforce the Northwest Company presence and their trade regulations in the area they claimed.

The company quickly expanded its trading posts inland so that by the late 1700s it had posts as far west as the Rocky Mountains and as far north as the Athabasca. It also attempted to gain a foothold in the interior of what is now British Columbia and in the Oregon territory. In all of these areas it was in direct competition with the Hudson's Bay Company. During this period the Metis in the areas controlled by the Norwesters began to take on the characteristics of a separate cultural group. They also began to see themselves as having a right to the soil along with their Indian relatives. This idea was deliberately fostered by the Northwest Company and further re-enforced the idea of a Metis people or Metis nation.[8] The Metis, therefore, came to have a vested interest in trying to keep the Hudson's Bay Company and settlers out of the area.

As the Hudson's Bay Company began to move west and south, there was also increased contact between the Metis and the "half-breeds." In time, through marriage, these two groups began to have more in common and began to identify with each other as a new nation of people. Nevertheless, they were caught up in the fierce rivalries that developed between the two Companies. These included the frequent raids on each other's trading posts, open hostilities, and a variety of more subtle means of undercutting each other's trade. Since the Northwest Company employed many English managers who also began to produce offspring, by the early 1800s the Metis of the southern areas included a mixture of persons of French /English and Indian ancestry plus the products of liasons between these two groups of indigenous persons. This further served to integrate and consolidate the Metis population of the Northwest. The process was further fostered by Metis leaders such as Cuthbert Grant.[9]

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III. The Collison of the Two Companies and the Results

By the early 1800s both the Northwest Company and the Hudson's Bay Company had trading establishments in the Red River. The Hudson's Bay Company, however, was to have limited success in establishing a foothold in the fur trade in the south and to the west. The Northwest Company had a better network of posts and its relations with the Metis to support it. The Company was also stronger commercially so that the Hudson's Bay Company could not effectively compete price wise with the Norwesters. Although there were a number of skirmishes in the Red River and on the Saskatchewan, the Northwest Company made no concerted effort to prevent the Hudson's Bay Company from operating in the Red River, nor did it attempt to oust the Company.[10]

When Lord Selkirk, in 1808, bought what became known as the Province of Assiniboia from the Hudson's Bay Company, with the intention of establishing a significant settlement of Scottish settlers, this move presented a serious threat to the Northwest Company trade and a challenge to its control over the Territory. The headquarters of the Northwest Company were in the area. As well, all of the trade in furs and goods by the Company passed through the area. If the settlement became a reality, and substantial numbers of settlers established in the area, it would assist the Hudson's Bay Company in gaining control over the area and over the trade routes. The result would be the strangulation of the Northwest Company's trade and its quick demise.

This move by the Hudson's Bay Company also presented a serious threat to the Metis, for their livelihood depended on the activities and prosperity of the Northwest Company. Bringing settlers into the area could also have serious repercussions for their claim to the land and the resources of the area and it could, as well, affect their lifestyle.[11] Therefore,

the Metis leaders and their followers and the management of the Northwest Company were quick to join forces to attempt to keep out the settlers. When the settlers nevertheless arrived, the Company and its Metis allies resorted to a variety of means to get the settlers to leave, including legal suits in Canadian courts and various forms of harrassment.[12] This eventually led to the Seven Oaks incident and the attempt at the expulsion of the new settlers.

This development further served to consolidate the Metis and "half-breed" people into a more cohesive group. When the two Companies amalgamated in 1821 under the name of the Hudson's Bay Company and when the Selkirk settlement became an established fact, a series of events followed which would further serve to strengthen the idea and feeling of a Metis community.

The amalgamation of the two Companies threw large numbers of employees of both Companies out of work. They were encouraged to settle primarily in the Red River. An agricultural settlement in that area held out the best hope of success and would interfere the least with the fur trade. In addition, some of the Metis settled in various areas where trading posts existed, but the majority of the unemployed began to migrate to the Red River and take up residence on river lots. A number of communities were established and eventually took on the form of parishes. These included communities such as Grantown, which was established by Cuthbert Grant. By the mid-1840s over 4,000 Metis were resident in the Red River area. This figure had reached almost 12,000 by 1869. <u>At the time it was the largest settlement west of the Mississippi and north of the Missouri</u> in the plains of North America.

The majority of the Metis only farmed part-time. They also worked as boatmen, overland freighters, and hunted the Buffalo. The Metis labourers, hunters and traders soon came into conflict with the Hudson's Bay Company. Developments included worker strikes and the emergence of the free trade movement led by Jean Louis Riel and Metis leaders such as Sinclair, McDermott and Sayer. These developments and the successful challenge in 1850 of the trade monopoly of the Hudson's Bay Company further served to draw the Metis together as one people. It also further developed their ideas of rights, justice and the new Metis nation.

## IV. The Metis Role in the Economy and in Politics and Social Development:

As has been pointed out earlier in this presentation, the way in which the colonial powers dealt with indigenous peoples and the laws they made or recognized concerning them were to a large degree shaped by the political goals of each of the colonial powers. It is clear from a study of early Canadian history that both France and Britain were primarily concerned with the development of the commercial possibilities in the northern part of the continent. This required the economy to be built around the fur trade and the country to be maintained in a state which was most conducive to the profitability of that trade. This meant not disturbing the natural state of the country while introducing enough new technology to increase the fur harvest.[13] This also meant introducing a credit system which would keep the Indians entirely dependent on the fur trading Companies. Initially, the Company of New France depended upon the French voyageurs from Quebec and the Hudson's Bay Company on the Scottish workers, from Britian, for their labor forces. also had to form alliances of peace and friendship with different Indian tribes to facilitate trade in their areas and passage through their territories if the trade was to penetrate further inland.

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There were problems with the immigrant labour force. Firstly, the expenses of transportation, housing and food were high. Secondly, the immigrant labour force did not know the country and had no relationship with the Indians nor did they speak the language. Thirdly, this meant that the traders were entirely dependent upon the Indian tribes to act as guides and to provide extra labour while on inland trading expeditions. The Indians' main loyalties were to their tribe. In addition, the Indians were not accustomed to the backbreaking labour required to move big boats and large quantities of supplies long distances overland.

It soon became obvious to the Company that an indigenous labour force, with close relations with the traders on the one hand, and with the Indians on the other, would have definite advantages. Also, the indigenous labour force did not have to be housed and fed to the same extent, since they were more independent than the European labourers. As well, long-term employment contracts with the Metis were not necessary. This helped to keep down labour costs. It was also to the advantage of the Companies to encourage the Metis labour force to be independent of the Indian tribes in lifestyle and residence. This ensured that they would and could move easily over large territories. This also ensured that they would be readily available to work for the Companies when needed.

The Metis chose to settle at key trading posts, river crossings, or meeting places. They settled on the land and built their log cabins, which they usually occupied for at least part of the year. Nobody challenged their right to do this or to live off the resources of the land, namely, the game, the fish, and the wild plants. In time, the Metis and the half-breeds came to be essential to the economy. During the period 1820 to 1850, they almost entirely controlled the following:

- the boat brigades which provided the main transportation for freight and people travelling into and out of the Northwest;

- the development of overland freighting;

- workers and clerks in the trading posts;

- guides, hunters and traders;

- the gathering of food from the famous buffalo hunt;

- the development of river lot agriculture.

In addition, they functioned as:

- traders in furs and in goods from Europe and other areas;

- tradesmen(carpenters, millers, boat-builders);

- teachers and clergy.

They, in effect, were the mainstay of the economy, which exchanged raw furs for manufactured goods. They also began to develop a new dimension to the economy by expanding commercial trade activities and developing both markets and product sources in the United States.

In the area of politics they played a key role in providing the manpower for para-military forces under such leaders as Cuthbert Grant. He patrolled the plains and maintained some semblance of law and order. They also successfully pushed

for improvements in labour practices, broke the free trade monopoly, and became influential in the Council of Assiniboia and its political institutions.

In the area of social activities they developed a distinctive lifestyle built around the parish church and around activities such as the buffalo hunt and the freighting activities. As part of this development came well-established and accepted civil laws and codes referred to as usages. They also developed educational institutions, the arts, and the social-recreational activities and the style of dress which came to be associated with the Metis.

In summary they dominated the economy and the social life of the Northwest and they played a key role in politics, education and religion.

The developments during the period 1820 to 1869 further served to bring the Metis and the "half-breeds" together as one distinctive community, strengthening the feeling of Metis nationalism and the concept of Metis nationhood.

## V. Rights Claimed by the Metis by 1870

Prior to 1869-70, there was no comprehensive formal claim of rights made by the Metis people. However, certain rights were exercised and others were claimed in formal petitions in 1846-47. Other rights were simply taken for granted. It must be noted that the Metis themselves did not speak in terms of having something called aboriginal rights. It is likely that few of them were aware of the legal concepts regarding the rights of aboriginal people. However, they had a strong sense

of freedom and justice which showed itself in their actions and in their lifestyle. Rights that were taken for granted included:

- the right to travel wherever they pleased;
- the right to establish a residence where they chose, as long as no one else claimed the plot of land;
- the right to hunt, fish and trap and, in other ways, live off the land;
- the right to their own customs and usages;
- the right to practice the languages of their parents;
- the right to worship freely as they chose.

Other rights that had been claimed in more formal ways included the right to claim a plot of land and settle and cultivate that land. Usually the people conformed to the land regulations of the Hudson's Bay Company, particularly in the Red River, but many also claimed plots by squatter's rights. The right to a specific plot of land and to free access to the common land were claimed and even recognized in the laws of the Council of Assiniboia. The right to free trade was also claimed formally during the 1840s and 50s and this right was in fact widely exercised. When the Metis list of rights was drawn up in 1869-70, a number of other rights were claimed. These included:

- the right to local self-government;
- control over the public domain;

- language rights in education, courts and legislatures;

- the right to vote;

- the right not to be taxed without representation.

From this review, it can be seen that the Metis concept of their rights extended far beyond any limited concept of aboriginal title to the land. The Metis indeed claimed rights on two bases: the first was as descendents of the aboriginal peoples; the second was as the first settlers in the Northwest.

VI. The Rupertsland Transfer:

The Hudson's Bay Company had recognized as early as 1848 that the fur trade would not remain profitable on a long-term basis.[14] When Sir Edmund Head became Governor of the Hudson's Bay Company, he saw his task as one of making the trade profitable in the short-term, while seeking out a means as to how the Company could turn the terms of its Charter into long-term and profitable development based on other resources. The Company had not attempted to claim a legal title to the land but claimed trading rights and the right to develop resources. Negotiations began in the early 1860s over the eventual transfer of the territory to Canada. The process involved the Hudson's Bay Company giving up its Charter and its Charter rights then reverted to the British Crown. The British Crown then transferred its claim to the territory on request of the newly created Dominion of Canada

The Hudson's Bay Company believed it could obtain profitable short-term compensation as well as long-term access to resources such as land, minerals and timber, which it could

develop profitably. It, as well, aimed to retain its rights to trade in the Northwest. The Hudson's Bay Company did not consult either the Indians, the Metis, or its employees about this plan. The Company clearly recognized the title of the Indians but took the position that they had never interferred with or extinguished this title; therefore, the British and Canadian governments must deal with this claim. In the case of the Metis, it is not clear whether the Company identified them as Indians or as whites with no Indian rights. However, it is clear that at least the British and Canadian governments at the time viewed the Metis as part of the population of "uncivilized savages" of the area. The fact that employees were not consulted probably reflected the prevailing ideas of that time—that employees should have no say in the financial and policy decisions of the Company.[15]

It is unclear how much the Metis knew about the developments that were taking place regarding Rupertsland. However, there is no evidence that serious concerns were voiced prior to 1869. Negotiations for the Rupertsland Transfer had broken off in 1866. In part, this resulted from an inability to get an agreement among the three parties and, in part, it resulted from the fact that British and Canadian politicians became absorbed with the larger question of forming a new self-governing Dominion of Canada. They did not have time to deal with this issue. However, provisions were made in the B.N.A. Act 1867 for the joining of Rupertsland and the Northwest Territories to Canada. Serious negotiations on this matter began again in 1868, and by the summer of 1869 the transfer agreement had been finalized. This agreement spelled out the rights of Canada in the area. It did not have much to say about the rights of the Indians or Metis. The transfer agreement and an address from the Canadian Parliament, which formed part of Order

in Council Number 9 of the British Parliament, became incorporated into Section 146 of the B.N.A. Act 1867. These documents had two stipulations dealing with Indians: firstly, Canada would be responsible to deal with any claims of the Indians; secondly, Canada undertook to obtain from the Indians any lands required for settlement according to the fair and equitable principles which governed the British Crown in its dealings with the Aborigines. Given the nature of the Indian Act at the time, and the use of the term "Indian" in the B.N.A. Act 1867, it is clear that at least the British Crown saw the term as being all inclusive; that is, applying to all aboriginal peoples.

These documents, however, only dealt with the narrow question of land rights. They did not deal with other rights, which, as has been pointed out above, were rights claimed by the Metis. It is also clear that the Indians enjoyed and claimed certain other rights, some of which (education and local self-government) were provided for in the Treaties. It would appear that the British and Canadian governments took the position that Canada could not deal with the claims of the Aborigines until it had acquired the territory.[16]

Obviously the situation of the Metis was different than that of most of their "Indian brothers". They had claimed permanent plots of land which they cultivated, they had permanent homes; they also had their own churches, their own courts, their own local legislatures, plus other institutions such as schools. In addition, they enjoyed certain trading and entrepreneurial rights - or at least exercised them. The evidence suggests that Sir John A. Macdonald did not want to recognize any of these rights. In negotiations with the delegates of the Red River in 1870, he suggests that the Metis

as civilized men who had achieved a degree of self-government (provisional government) and who wanted full citizenship rights as Canadians, could not also have claims as aborigines. These suggestions were rejected by Ritchot and the other delegates, and the issue was not an important factor in the negotiations leading to the Manitoba Act.[17] However, when introducing the land provisions of the Manitoba Act in Parliament, Macdonald found it convenient to argue these provisions on the basis of the "Indian title of the Metis".[18] This, however, did not stop Macdonald from later claiming in Parliament that the Metis outside Manitoba had no claims as aborigines unless they wanted to join an Indian band.[19]

The Rupertsland transfer brought the issue of the Metis and their rights to a head for the first time. It also highlighted the fact that, whatever those Metis rights were, the Metis did not want to be dealt with in the same manner in which Britain and Canada had dealt with the Indians. They clearly considered themselves civilized men with full citizenship rights - not individual members of Indian tribes or "savages" as government officials were fond of calling the Indians. The Metis were demanding to have their rights fully recognized and dealt with as would be the claims of other British subjects. It was also clear that they did not see these rights limited to some narrow concept of Indian title; that is, use but not ownership of the land.

A study of the Indian Acts and of the government dealings with aborigines over a period of years shows a clear intent to limit aboriginal rights as much as possible. The goal was to eliminate any special status through policies which were designed to eventually assimilate the Indian people into the general population.

VII/. The Metis Resistance:

The Metis people had limited knowledge of what provisions, if any, were being made in the transfer agreement, to protect their rights. The Catholic Church and clergy were equally concerned. In many respects the interests of the Church and the French Metis were one and the same—the Metis almost all being devout Catholics. An alliance quickly developed between the clergy and the Metis. It is not clear how early this concern first developed among the Metis. However, records show that Metis of the Parish of St. Norbert, just north of Pembina, were already meeting in early 1869 and planning actions to protect their land rights. This movement was led by Father Ritchot and Maxime Lepine. A committee for the defense of Metis rights had been formed before the Canadian surveyors under Colonel Boulton had begun their survey in the Spring of 1869. The group protested to Boulton but he paid little attention to them. The action of the surveyors who were running survey lines, based on the Torrens land tenure system, was of great concern to the existing inhabitants. The surveyors were running survey lines across their properties with no attention paid to existing surveys or boundaries between properties. This was seen as a definite threat to the river lot holdings of the people.

It was decided to enlist the help of Louis Riel—recently returned to the settlement from Montreal—who was educated, had some legal knowledge and, it was believed, could readily explain the Metis position to Boulton. Riel did speak to Boulton about the surveys in the early summer of 1869 and explained the concerns of the people of the Parish. Boulton expressed his sympathies but protested that he was only carrying out his orders. After consulting with his superiors he did suspend the survey for the summer.

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Meanwhile, the Dawson Road from Thunder Bay was being pushed toward the settlement and the government was preparing to send McDougall west to install himself as the Lieutenant-Governor of the area. When this news was followed by the resumption of the survey in the early Fall of 1869, in the Parish of St. Vital, the Metis, under the leadership of Riel, decided to take action. Firstly, they stopped the surveys and drove off the surveyors. Secondly, they took steps to form the National Committee of the Metis. Its goal was to take steps to protect the rights of the local inhabitants.

The Committee resolved not to allow McDougall to enter the Red River or to allow Canada to establish its claim to the territory until the rights of the Metis and other inhabitants were formally recognized and guaranteed by the government or by some person having a full commission to act and make commitments on the government's behalf. To this end, the Metis began to draft a Bill of Rights. Attempts by the Council of Assiniboia to dissuade the Metis from this action failed. The Metis then called a conference of delegates from the English and French parishes. The English met with the Metis the second day after boycotting the meeting the first day. They showed little enthusiasism for the Metis actions, since they saw them as acts of hostility against the British Crown to which the half-breeds felt a great deal of loyalty.

The Metis immediately took action to put the territory under their control. Fort Garry was occupied and arms and stores were requisitioned. The Hudson's Bay Company was pressured into advancing a cash loan for the Metis army and Riel's men took control of the roads into and out of the settlement, including the road to the entry point into the Red River country north of Pembina on the Canada-U.S. Border.

More work was done on the Bill of Rights and a second convention of delegates was called in early December of 1869. This convention, however, did not succeed in setting up a provisional government or in agreeing on the details of the Bill of Rights. It did, however, agree on plans to call a third convention in January, 1870, and to have each parish elect their representative to this convention.

At the January convention it became clear that the English "half-breeds" and other settlers in the area were also concerned about their rights and landholdings. However, they felt that they would be committing acts of treason if they set up a provisional government. When the ailing Governor McTavish informed them that he no longer had authority in the area, and urged them to set up their own government, the objections disappeared and the delegates took steps to formally establish a provisional government. As well, an executive was elected by the delegates, with Riel as President. The Bill of Rights was also debated and a revised form was approved, with some of the original clauses dropped and others added. One of the contentious issues was whether the area should join Canada as a territory or as a self-governing province.[20] It is claimed by some that the final Bill of Rights was not the same as the one approved by the convention. Indeed, some changes were made by the executive council, who had been authorized to do more work on the Bill. The two main changes were the insertion of a clause to provide for provincial status and the insertion of a clause to guarantee language and religious rights in the educational system. The delegates to the convention also chose their representatives to present the Bill of Rights to the Canadian government in Ottawa.

## VIII. The Bill of Rights

In the final draft of the Bill of Rights presented by the

Manitoba delegates, the question of the "Indian Title" of the Metis people did not arise. This issue was, however, raised in the first draft of the Bill of Rights, a copy of which was sent to Macdonald on November 18, 1869, by John Young. The second clause of this draft asked for a certain portion of the money paid for the Indian title to be paid to the "half-breeds" because of their relationship with the Indians. In the final Bill, the Metis seem not to be claiming separate land rights from those of the other inhabitants of the Red River. The Bill, however, did request that the government deal with the Indians through the signing of Treaties. This clause acknowledged two facts: Firstly, the Indians had rights as autonomous nations; secondly, the responsibility for dealing with Indians rested with the federal government. The federal government was requested to sign Treaties with the Indians to satisfy their rights.[21]

The records of the deliberations of the Provisional Government on the Bill of Rights do not indicate any discussion of the concept that Metis people may had had a special claim to "Indian Title' However, it is clear from the discussions between Macdonald and the Red River delegates that the possibility of the Metis possessing Indian title was not ruled out, but was seen as something over and above other aboriginal rights claimed in the Bill of Rights. Nat: rights were being claimed for all of the residents of the Red River except the Indians.[22] Ritchot's position was that the question of the Metis having Indian title must be considered as a personal right possessed by virtue of their ancestry. This right could not be affected by the recognition of the national rights of the people of the Red River, which they claimed by virtue of having first settled and developed the area.[23]

It would, in fact, appear that the Metis, in requesting control over the public domain and sovereign rights as a province, may have believed that this would give them the authority to

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protect any rights they personally possessed as descendents of the Indians, or any national aboriginal rights that they claimed as new nation. On the other hand, they also clearly recognized the responsibility of the federal government to deal with the Indians.

Since this question of Indian title is an important issue, it is worth quoting Ritchot's interpretation of the conversation with Macdonald and Cartier on these points——as recorded in his diary:

> "After the exposition of these conditions that we accept, a long debate arose on the rights of the Metis.
>
> The Ministers made the observation that the settlers of the Northwest, claiming and having obtained a form of government fitting for civilized men, ought not to claim also the privileges granted to Indians. They do not claim them, they wish to be treated like the settlers of other provinces...but there are some expenditures to be made for the Indian title to be bought out... .
>
> From another side, the settlers of the Northwest, in asking a form of government similar to those of the provinces of other subjects of Her Majesty, do not propose by that to deprive anyone among them who possesses rights either personal or national, and because these settlers wish to be treated like other subjects of Her Majesty, does it follow that those among them who have a right as descendents of Indians should be obliged to lose these rights. I don't believe it, thus in asking control of the lands of the province, they have no intention of causing the loss of the rights that the Metis of the Northwest have as descendents of the Indians. They wish only the rights common to the other provinces of Confederation... ."[24]

It is clear from the above that the delegates had not come to Ottawa to deal with the separate aboriginal rights of the Met but were claiming national rights for all Red River settlers. It is also clear that they believed that the Metis had special rights and that they did not see these rights as being in any way affected by the actions they were taking.

What were the rights that the residents of the Red River were demanding? The Bill of Rights passed through eight versions before the final draft was approved, which draft was sent to Ottawa with the delegates. It is contained in its entirety in Tremauden's History of the Metis.[25] It consisted of 19 clauses. The rights being requested can be summarized as follows:

a) the Northwest Territory to join Canada as a province with all the rights and privileges of other provinces;

b) all property, rights, privileges and usages recognized at the time be respected;

c) separate schools run by the different religious groups;

d) voting privileges for all males 21 and over;

e) the local legislature of the new province would have control over all the territories(control of the public domain);

f) Canada to conclude treaties with the Indians;

g) legislatures and courts to be conducted in both French and English and public documents to be published in both languages;

h) that Canada assume certain debts, costs of certain public works, and agree to provide transportation and communications links;

i) the new province not to have any responsibility for the existing public debt of Canada;

j) certain political arrangements(i.e.- form of local legislature, representation in Parliament, etc.).

An examination of the Bill of Rights further clarifies that the rights were not just Metis rights but rights for all. It is also clear that the requests were consistent with the provisions made for other provinces in the B.N.A. Act 1867.

In the negotiations, Macdonald and Cartier agreed to most of the requests. Where there were differences, these were resolved through negotiation. For example, the government did not agree to the idea that the whole Northwest would be one province or that the new province would have control over the Northwest Territories outside its boundaries. However, one Lieutenant-Governor would be responsible for both the Territories and the new province. The key area on which an agreement could not be reached and around which a stalemate developed was the issue of control of the public domain. Again we quote from Ritchot's diary:

> "Then the Ministers asked us about what we wished to do in the matter of lands. Reply: the control of those lands as requested in our instructions. Impossible, said the Minister. We could by no means let go control of

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> the lands at least unless we had compensation on conditions which, for the population, actually would be the equivalent of control of their province."[26]

Macdonald and Cartier respond to this position by offering the following:

> Free possession of all lands or establishments on lands of the Hudson's Bay Company (on which Indian title is extinguished). This was the two-mile strip along the rivers which had been purchased under the terms of the Selkirk Treaty. Possession was recognized for persons who:
>
> 1. had a contract or connection with the Company.
>
> 2. had a contract or connection but had not paid for the land.
>
> 3. possessed land but had no contract or connection with the Company.
>
> 4. were settlers living on lands not Company lands.
>
> 5. had a right to common lands.

After the discussion on Metis land rights quoted above, the following was agreed upon:

> 1. All male and female Metis settlers were entitled to a parcel of land(settlers grant).
>
> 2. All children born or to be born prior to some fixed date were entitled to a land grant(Indian title grant).

The amount of land mentioned was 200 acres but this was not a firm figure. A Metis reserve of 150,000 acres to heads of families and 300,000 acres for children was offered by Macdonald. Ritchot asked for 3 million acres for the children. After extensive negotiations a figure of 1.4 million acres was finally settled on as the size of the Metis reserve for the children of the "half-breed "heads of families. This was interpreted as the off-spring of a white father and an Indian mother. Therefore, some government officials and politicians believed that the 1.4 million acres was to be divided between all persons of mixed-ancestry in the area. In addition, there was agreement that the local legislature would be responsible to select and distribute this land.[27]

With agreement on all questions now settled, the government proceeded to draft the Bill. The one outstanding issues was the question of a grant of amnesty for all persons involved in the Red River Resistance, but this was a separate issue from rights and was pursued outside of the discussions of legislative action.

## IX. Aboriginal Rights in the Manitoba Act

In discussions regarding lands to be set aside for the Metis, it is clear that the delegates understood the land grants to be compensation for giving up control of lands and resources in the new province. This is confirmed by Wickes-Taylor, an American representative of the U.S. Secretary of State. He was a close personal friend of The Honorable Joseph Howe, the Secretary of State for the provinces. Through Howe, he kept informed of developments in the negotiations and he reported to the U.S. Secretary of State, Hamilton Fish, on a regular basis. In a memorandum

to Hamilton Fish, dated May 24, 1870, he stated as follows:

> "I proceed to an analysis of the Manitoba Act in connection with a proposition, a bill of rights, of the Fort Garry convention...these provisions were accepted by the Red River delegates as an advance on the demands made by the Fort Garry convention. The grant of 1,400,000 acres to the children of the half-breed residents was regarded as an equivalent for the "control by the local legislature of the public lands" within a circumference of Fort Garry, of which the distance to the American line formed the radius".(Underlined for emphasis).[28]

When the delegates were presented with a draft of the Manitoba Act, Ritchot expressed his displeasure with some of its terms. On May 5, 1870, Ritchot wrote in his diary:

> "The Bill appeared very much modified. Several claused displeased me fundamentally. I saw our colleagues and some friends. We saw Sir George and Sir John, we complained to them. They declared that in practice it amounted to the same thing. For us, they promised that they would give us, by Order in Council, before our departure, assurance of the carrying out of verbal understandings, but that for the present it would be impossible to get the bill passed if one changed its form... . The two Ministers, seeing that we were strongly opposed, promised us, among other things, to authorize by Order in Council, the persons we choose to name ourselves, as soon as might be after the Bill should be passed, to form a committee charged with choosing and dividing, as may seem good to them, the 1,400,000 acres of land promised."[29]

Ritchot, in his diary expressed concern both about the land grants to children and to the heads of families. The debate centered around the fact that the government believed it could not dispose of promised land in "Indian territory" until the Indian title had been extinguished. It is not clear from the diary whether the objections were to the 1.4 million acres being designated as an extinguishment of Indian title or on some other basis. However, with the promise that the new Manitoba government could name the persons to select and allocate the lands, the delegates reluctantly accepted the Bill. The clause in the Bill dealing with the land reserve was Section 31 and read as follows:

> "And whereas it is expedient towards the extinguishment of the Indian title to the lands in the province to appropriate a portion of such ungranted lands in the province, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted that under regulations to be from time to time made by the Governor in Council, the Lieutenant-Governor in Council shall select such lots or tracts in such parts of the province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the province at the time of the said transfer, and the same shall be granted to the said children respectively in such mode and on such conditions as to settlement and otherwise as the Governor General in Council may from time to time determine."[30]

Clearly the delegates were unhappy with the mode of selection and distribution provided for above. It also seems likely that they had not understood that the land grants were to extinguish the Indian title and that they did not want this reference in the clause. This is supported by Wickes-Taylor's memo to Hamilton Fish, and also by the following excerpt from

the Northcotte diary:

> "This mode of introducing the vexed question of lands reserved for the half-breeds was ingenious. He, Macdonald, treated the land (1,400,000 acres) as being reserved simply for the purpose of extinguishing Indian title and he threw in the suggestion that grants to the people who might be entitled to them were to be made much in the same way as the grants to the U.E. Loyalists (United Empire Loyalists of the United States), a reference very acceptable to the Ontario men."

The other clauses in the Manitoba Act granted the language rights, education rights and other rights set out in the Bill of Right to the satisfaction of the delegates. For the most part, these other provisions created minimal problems in Parliament. Since it was generally agreed that the Manitoba Act was unconstitutional the Canadian Parliament asked the British Parliament to pass a special Act of the British Parliament making the Manitoba Act a constitutional Act. This was done in 1871.[32]

The Manitoba Act appeared to have dealt with both the national aboriginal rights of the Metis of Manitoba as well as their Indian title or land rights. In June of 1870, after the return of Ritchot to the Red River, Riel called the delegates of the provisional government into special session to review the agreement as contained in the Manitoba Act. Riel, Ritchot and Tache spoke in favour of approval of the provisions of the Act. The assembly formally and unanimously approved the agreement.

Today the Metis of Manitoba see it as a bad agreement but nevertheless accept it as an agreement. Their challenge

of the government claim to having extinguished the Metis "Indian title" or their other aboriginal rights is on the basis of the implementation of the Act. Since the implementation of this agreement currently affects many Metis living in Saskatchewan, we examine the process of implementation under the Manitoba Act in the next Chapter. A more detailed challenge of the implementation of the land provisions is to be found in the final research report of the Manitoba Metis Federation of 1979-80.[34]

As indicated above, the Manitoba Act affirmed other rights besides the "Indian title" of the Manitoba Metis. These rights were granted regardless of whether the residents were of French or English extraction. Earlier in this submission the nature and content of aboriginal rights was explored in some detail. The legal practice of the British had been to recognize the "Indian title" of the aboriginal people. This provided a convenient mechanism for the extinguishment of their land rights. Once this had been done, the policies developed were assimilation policies such as thos found in the Indian Acts. However, the policies in this regard were, at best, inconsistent. For example, in the Royal Proclamation of 1763, the reference is to "tribes or nations" of Indians. Nations, under the Law of Nations, are recognized as having full authority to make laws regulating a whole series of matters including language, education, criminal and civil law, police and the courts, economic development, religious practices, etc. The Law of Nations further accepted that a change of sovereign did not change these rights unless the new sovereign took specific action to limit, restrict or modify some or all of these rights.

In the signing of the Treaties the governments of Britain and Canada chose to recognize some of these rights in Treaties and later in the Indian Acts. These included the right to local

self-government and the right to make their own local laws. Other rights included hunting and fishing rights. Also, the right to education and health services was recognized in some of the Treaties. The Treaty provisions were silent on questions such as language, religion and other cultural issues. No laws were ever passed dealing with their rights except for administrative regulations which attempted to restrict the use of aboriginal languages or prevent aborigines from following some of their own religious practices. Attempts to implement rules which were made by the Department of Indian Affairs have been discontinued and are generally acknoledged as having been unfair and unjust. A strong argument could be made that many of the other rights of the aboriginal peoples still exist, even though they haven't been allowed to practice these rights.

In the case of the Metis people, the basic question revolves around whether there was a Metis nation. If we use the term in the sense of a nation state, then, except possibly for a brief period during January to July, 1870, there was no Metis nation state. However, if we accept the more common definition of nationhood as a community of people with a common language, purpose, customs, traditions, and with common institutions, then there clearly was a Metis nation.[35] This nationalism and the desire of the people of the Red River to ensure that the national characteristics of the people were maintained was reflected in the Bill of Rights. The clauses of the Bill have been examined earlier. They recognized the difference between the English-and-French-speaking population and they sought to have these priveges preserved in legislation. As indicated previously, this legislation became a Constitutional Act.

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What rights did the Manitoba Act recognize besides land rights? An examination of the Act indicates that the following additional rights of the people were recognized:

a) the right to local government and control over local affairs;

b) rights and privileges with respect to denominational schools. These included the language of instruction, (English was the language of instruction in Anglican and Presbyterian schools and French was the language of instruction in the Roman Catholic schools;

c) the use of both French and English language in the Legislature, in records of the Legislature and Acts of the Legislature, and in court proceedings and legal and court documents;

d) local laws, customs and usages are guaranteed as coming under the provincial legislature in the B.N.A. Act of 1867, and these provisions of that Act were to be applied. This would include provincial rights in the area of intra-provincial trade, certain aspects of economic development, and of social development. Since the natural resources were retained by Ottawa, the development of these resources such as timber, hunting and fishing, were subject to federal regulations. No special guarantees were granted in the Manitoba Act regarding natural resources.

The Manitoba Act, therefore, recognized a wide range of national rights of Manitobians and its minority groups. The question of how these rights were implemented will be dealt with in the next Chapter of this Submission.

X. Aboriginal Rights Outside Manitoba:

The Manitoba Act made no provisions for the territory outside the original boundaries of Manitoba. This immense tract of land, which was all to become known as the Northwest Territories, joined Confederation pursuant to the provisions of Section 146 of the B.N.A. Act. The Manitoba Act had two references to the governing of the Northwest Territories. The first provided for the Lieutenant-Governor of Manitoba to be appointed Lieutenant-Governor of the Northwest Territories. The second indicated that the Northwest Territories should be governed under the provisions of an Act entitled "An Act for the temporary government of Rupertsland and the Northwest Territories". None of these provisions made any reference to the aboriginal people in the territory. Therefore, the only provisions for aboriginal people in the Northwest Territories were those contained in the Rupertsland transfer agreement and the address from the Canadian Parliament to the British Parliament requesting the transfer to Canada of the Territories in question.

The transfer agreement made the Canadian government responsible for dealing with the Indians for their land.[36] The Address from Parliament indicated that Canada would deal with the Indians in accordance with the equitable principles which governed the British Crown.[37] It must be assumed that those principles were the ones set out in the Royal Proclamation of 1763, since those were the principles which the British Crown had followed in its dealings with the Indians. It is also clear that the term "Indian" as used in the transfer agreement and under Sub-section 91(24) and Section 146, O.C. 9, was all inclusive as defined in the Act which created the Department of the Secretary of State, 1868.[38] This Act wasn't

amended until 1876 to explicity exclude the Metis of Manitoba. By implication, it did not exclude other Metis in the Northwest Territories. This is supported by Macdonald's argument in Parliament as late as 1884 that if the Metis wished to have their land rights recognized they could do so by joining an Indian band or going into Treaty.[39] It is also significant that in an 1860 Act to manage Indian lands the government built in the process for obtaining surrenders from the Indians which closely followed the process for negotiating land surrenders established by the Royal Proclamation.[40] Archibald recognized as early as 1870 that the government must take immediate action to sign Treaties with the Indians in Manitoba to obtain their lands before it could actually begin to allocate land and grant title to land for settlement purposes. The only land area not in dispute was the 2-mile strip along the rivers, which had been obtained under the provisions of the Selkirk Treaty. The first two of the numbered Treaties were concluded in 1871 and covered primarily the territories within the Manitoba boundaries of 1870.[41]

Although reference is made to Metis having been present at the first meeting of the Commissioner and the Indians, there is no mention of Metis rights having been raised at this meeting. It can be assumed that this was because these rights had been dealt with under the provisions of the Manitoba Act. In a memo to the Secretary of State, dated November 3, 1871, Archibald mentioned that when some bands were paid annuity money, Metis among them were told they could claim land under the Manitoba Act. However, only a few took advantage of this opportunity at the time. The rest joined Treaty.[42]

In the year 1873, the Northwest Angle Treaty was negotiated (Treaty 3). It covered the areas east of the Manitoba boundary

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to Thunder Bay. When this Treaty was being negotiated, the half-breeds of the area were present and requested that their rights be covered in the Treaty. Alexander Morris, in a letter dated October 4, 1873, indicated the following:

> "They said there were some ten to twenty families of half-breeds who were recognized as Indians and lived with them and they wished them included. I said the Treaty was not for whites, but I would recommend that those families should be permitted the option of taking either status as Indians or whites, but that they could not take both."[43]

He makes no further reference to the subject of Metis in this letter. However, in his diary he indicates that one of the chiefs asked for the "half-breeds" to be included in the Treaty. Morris, at this time, responded as follows:

> "I am sent to Treat with the Indians. In Red River, where I come from, there is a great body of half-breeds, they must either be white or Indian. If Indians, they get Treaty money. If the half-breeds call themselves whites, they get land."[44]

Morris had introduced the concept that half-breeds were either Indians or whites, that they could not be both. A strange argument indeed, when they were products of both cultures but belonged to neither group. He does, however, suggest that even if they declared themselves white they would be entitled to a land grant. He gave no clue as to how they could avail themselves of these land grants. When the Treaty was signed many of the Metis were excluded. However, the following year, the Commissioners returned to the area and

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signed an adhesion to Treaty Number 3, which specifically dealt with the excluded Metis of the area and which brought them into the Treaty as a separate band. We have no indication of the rationale for this action by the government. The same year, 1874, Morris negotiated Treaty Number 4 (The Qu'Appelle Treaty). When Morris arrived at the Qu'Appelle Lakes he was met by a large party of Metis and Indians. The question of Metis rights was again raised by the Indians. Morris simply responded that he did not come to deal with the "half breeds" and concluded by saying:

> "You may leave the half-breeds in the hands of the Queen, who will deal generously and justly with them."45

During the course of the negotiations, Morris had a separate meeting with the Metis. He essentially repeated to them what he had told the Indians. The results of this meeting were reported separately to Macdonald. This report is included in Sessional Papers and it gives no indication as to how Morris believed the government would deal with the Metis.

In the negotiations for Treaty Number 5, no mention was made of the Metis. However, when Treaty Number 6 was negotiated, the matter of Metis rights was again raised but Morris gave no indication as to how he responded to the issue. He does, however, in his report of December 4, 1876, have the following comments on the question of the Metis:

> "There is another class of population in the Northwest, whose position I desire to bring to the attention of the Privy Council. I refer to the wandering helf-breeds of the Plains, who are chiefly of French descent and live the life of the Indians.

> There are a few who are identified with the Indians, but there is a large class of Metis who live by the hunt of the buffalo and have no settled homes. I think a census of the numbers of these should be procured, and while I would not be disposed to recommend their being brought under the Treaties, I would suggest that land should be assigned to them...and - if...it should be deemed necessary and expedient, some assistance should be given to enable them to enter upon agricultural operations."[46]

The the signing of Treaty 7 with the Blackfeet, the Indians requested that the Metis be removed from their area. It appears they were looked upon by the Blackfeet as part of the Cree nation, who were their traditional enemies. Morris made no reference to the question of Metis rights being dealt with in his report on these negotiations. Other authorities on the question of the Metis having aboriginal rights also supported the claim much more explicitly. In a book titled Hudson's Bay Company Land Tenures, published in 1898, Archer Martin, a leading authority on early Canadian history, commented on this question 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."[47]

Others who supported the claim of the Metis included various memebers of the Northwest Territories Council. These included Thomas McKay, Chairman of the Northwest Territories Council, who set forth the case of the Metis as contained in a resolution of the Council dated October 8, 1881. Others who wrote supporting the resolution included H. MacBeth, Secretary

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of the Council, and Lawrence Clarke, a member of the Council. Clarke, for example, states the position as follows:

> "The half-breeds have always been recognized as possessing rights in the same soil, subject to which the Dominion accepted the transfer of the Territories..."[48]

Judge Hugh Richardson writing on the subject in 1880 outlining the claim being made by the Metis to title in the soil stated, "that grounds exist for such a contention appears by reference to Statutes of Canada, 1870, Chap. 3, Sec. 31."[49]

Chester Martin, another historian of the early 1900s, in his book on Dominion Lands Policy, acknowledged the Metis claim.[50] Probably one of the most significant admissions of the Metis claim is to be found in a report of the Privy Council dated May 6, 1899, written by John McGee, Clerk of the Privy Council. The report deals specifically with the claim of the Metis that the children born between 1870 and 1885 are entitled to have their claim settled. He stated as follows:

> "After careful consideration, the Minister has come to the conclusion that the claim of the half-breeds is well-founded and should be admitted. As already set forth, he is of the opinion that the Indian and half-breed rights are co-existent and should properly be extinguished concurrently."[51]

Although Sir John A. Macdonald steadfastly denied that the Metis had special rights other than as members of the Indian bands, he did campaign in 1878 on a promise to grant the Metis Scrip. To this end he had an amendment passed to the Dominion Lands Act in 1879 providing for a Scrip issue to extinguish

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the Indian title of the "half breeds". This section of the Act was again amended in 1883, but the amendment did not change the intention of the Act in regard to Metis rights.[52] It was the 1883 amendment under which the 1885 Order-in-Council was issued.

On March 30, 1885, O.C. 688/1885 was passed which explicitly made provision for the issue of Scrip to satisfy claims existing in connection with the extinguishment of the Indian title preferred by the "half breeds". It is not chear why Macdonald made provision for Metis Scrip in legislation but then insisted as late as 1884 that no special Metis rights existed. Since only those Metis who lived like Indians were allowed to join a band and enter Treaty. Somehow it appears that in his mind aboriginal rights were only possessed by "uncivilized savages" and then only in the form of reserves and Treaty provisions. If one insisted on exercising full citizenship rights, one became white and could not longer claim rights by virtue of Indian ancestry.

The Metis outside Manitoba did not quietly sit back and ignore their own claims after the 1870 provisions made for Manitoba Metis. They were indeed very active in formulating and presenting petitions ot Ottawa, to Lieutenant-Governors and to Commissions appointed to negotiate Treaties. The first petitition was addressed to Lieutenant-Governor Alexander Morris by the Metis of the Fort Qu'Appelle Lakes on May 3, 1874. From that time until the Metis decided to ask Riel to return to Canada to help them pursue their cause, there were a minimum of 16 petitions forwarded to Ottawa or presented to the Lieutenant-Governors by the Metis of the Northwest themselves. There may have been more petitions but these are the ones that were reproduced for the record in Sessional Papers in 1886. The petitions came from many communities, with the largest group (6)

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from the Prince Albert area. In addition, 4 came from the Qu'Appelle Valley area and 3 from what is now Alberta. The remaining petitions came from Battleford, Cypress Hills and Manitoba Village. The first petition included the names of 11 male adults; the Cypress Hills petition included the names of 278 male adults.[53] In addition, there were a minimum of 14 additional petitions or resolutions received from the Catholic clergy and from members of the Northwest Territories Council. The only year between 1873 and 1885 in which the records show no formal petitions was 1879, the year of the amendment to the Dominion Lands Act. The petitions set out rights similar to those requested in the Manitoba Bill of Rights. These included:

- land or Scrip to be exchanged for land;
- the right to establish local government;
- hunting and fishing rights;
- free trade;
- represention on federal and territorial governments;
- language and education rights;
- assistance in setting up their farms; and
- religious rights.

The Commissioners or the Deputy Minister of the Interior would respond politely, indicating that these requests were under consideration by the government. However, the official records show no formal response by the politicians themselves. Furthermore, nothing happened and nothing was done. Occasionally the issue would be discussed in a House of Commons debate. In 1878, a special Commission under Nicholas Flood Davin was established to study the Indian and Metis problem. A comprehensive report was submitted to the government with recommendations.[54] Still nothing happened. The only policy seems to have been the one stated by Macdonald previously that Metis could join Indian bands if they claimed Indian rights. Requests

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for special land grants, for seed, animals and implements were all refused. Only when the resistance was already underway did the government act, and then only with a Scrip issue. The other rights requested were either denied or ignored. The 1885 Resistance did, however, firmly establish that the Metis had rights by virtue of their Indian ancestry. Such rights must be dealt with at the same time that Indian Treaties were negotiated. This was the pattern followed commencing with the signing of Treaty Number 8. The Commission would meet with the Indians and the "half breeds" at the same time. The Treaty would first be negotiated and then Scrip was issued. The people themselves were generally allowed to decide if they wanted to choose Scrip or Treaty.

The 1885 O.C. and Scrip issued covered the Metis only in those areas in which Treaties had already been signed. These included areas covered by Treaties 2 and 4 to 7. All half-breeds residing in the area as of July 1, 1870, were entitled to Scrip. In 1899 the government admitted that the application of that policy was wrong. The principle followed with Indians was that their rights were extinguished from the day on which the Treaty with them was signed. It was agreed that if the "half-breed" and Indian rights co-existed, the same principle must be applied to the Metis. Therefore, in 1899, under a new O.C., all Metis in the Territories born prior to July 16, 1885, were to be eligible for a Scrip grant. In spite of the government's attempt to evade its responsibility to the Metis, it is clear that the government acknowledged both in law and practice the validity of the Metis claim.

FOOTNOTES

[1]Extracts from Minutes of a Hearing of the Select Committee on the Hudson's Bay Company 1857, p. 438. Public Archives of Canada.

[2]Ibid. pp. 91 - 92.

[3]Hudson's Bay Company Response to the Claims of the Petitioners Memorial, 1847, p. 43. Public Archives of Canada, R. G. 7, G 21, Vol. 12, No. 49(1)(a).

[4]Ibid. p. 58.

[5]An Act Respecting The Management of Indian Lands, Victorie Regine.

[6]Auguste Tremauden, Supra, pp. 3 - 4.

[7]Ibid. Chapt. 2.

[8]George F. Stanley, Supra, p. 11.

[9]Margaret McLeod and W. L. Morton, Cuthbert Grant of Grantown, Warden of the Plains. McLelland and Stewart, 1974.

[10]See E.E. Rich, The Fur Trade and the Northwest to 1857. McLelland and Stewart, 1967.

[11]McLeod and Morton, Supra.

[12]George F. Stanley, Supra, pp. 1 and 12.

[13]Summing and Mickenberg, Supra, p. 85.

[14]Letter from George Simpson to Donalf Ross, August 21, 1848, Hudson's Bay Company Papers. Public Archives of Canada, R.G. 7, G 21, Vol. 12, No. 49 (1)(a).

[15]Supra. Appendix A of Select Committee Report on the Hudson's Bay Company.

[16]Documents related to Rupertsland transfer agreement,found in 1870 Sessional Papers and Statutes of Canada: An Act to Establish the Department of the Secretary of State, 1868, and An Act for the Temporary Government of Rupertsland, 1869.

[17]Excerpts from Ritchot's Diary. W. L. Morton, Manitoba, The Birth of a Province. Manitoba Record Society Publication, 1967, pp. 141-142.

[18]Ibid. p. 99, Extract from Northcotte's Diary.

[19]House of Commons Debate, 1886, p. 834.

[20]George F. Stanley, Supra, Chapters IV and V.

[21]The Manitoba Bill of Rights, Auguste Tremauden, Supra, p. 231, 4th French Addition, 1979.

[22]W. L. Morton, Supra, Ritchot's Diary, pp. 141-142.

[23]Ibid. p. 141.

[24]Ibid.

[25]Auguste Tremauden, Supra, pp 231-233.

[26]W. L. Morton, Supra, Ritchot's Diary, p. 140.

[27]Ibid. pp. 143 and 147.

[28]Wickes-Taylor Papers, Ed. W. D. Smith, Manitoba Record Society, 1968, p. 171.

[29]W. L. Morton, Supra, Northcotte's Diary, p. 99.

[30]The Manitoba Act, 1870, Supra.

[31]W. L. Morton, Supra, Northcotte's Diary, p. 99.

[32]The B.N.A. Act, 1871, 34 - 38 Victoria, C. 28(U.K.).

[33]George F. Stanley, Supra, pp. 124 - 125.

[34]Final Report of the Manitoba Metis Land Commission, 1979-80, D. N. Sprague, University of Manitoba.

[35]Nation: What Does It Mean and What Are Its Implications(Nation Definition) (International Law), A.M.N.S.I.S., 1978. Prepared by Clem Chartier, L.L.B.

[36]Order of Her Majesty In Council Admitting Rupert's Land And The North-Western Territory Into The Union, June 23, 1870, found at R. S. S. 1965, Vol VI, p. 142: See Section 14; See also Schedule (A) Paragraph 8, and Schedule (C), Section 14.

[37]Ibid.

[38]An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, Statutes of Canada, 1868, Chapter 42.

[39]Supra. House of Commons Debates, 1886, p. 834.

[40]An Act Respecting The Management of Indian Lands, Victorie Regine 23, Chapter 151, 1860.

[41]Alexander Morris, Supra, Chapter IV.

[42]Ibid.

[43]Ibid. . Chapter V, p.

[44]Ibid.

[45]Ibid. Chapter IV, P. 99.

[46]Ibid. p. 195.

[47]Archer Martin, Supra, pp. 99-100.

[48]Sessional Papers 116, 1885, pp. 70 - 80.

[49]Ibid. p. 80.

[50]Chester Martin, Dominion Lands Policy, Found in Vol. 2, Canadian Frontierism Series, p. 357, McMillan, 1938.

[51]Report Of Privy Council, May 6, 1899, P. C. No. 918.

[52]Amendments to the Dominion Lands Act, 1879 and 1883, S. S. of Canada.

[53]Sessional Papers, 1886, Paper No. 116.

[54]Report on Industrial Schools for Indians and Half-breeds, March 14, 1879. Public Archives, Ottawa.

[55]Sessional Papers, 1907, Paper No. 27, p. XIII.

CHAPTER V: IMPLEMENTATION OF "HALF-BREED" LAND GRANTS UNDER THE MANITOBA ACT.

I. Introduction:

The recognition of the Rights of the Aboriginal people by colonial nations have almost always been shaped or distorted by the policy goals of the concerned governments. This was also true of the actions taken by the Government of Canada to implement the land provisions of the Manitoba Act.

The policy of the British and Canadian governments towards Aboriginal peoples is traced in some detail in a paper prepared by the Association of Metis and Non-Status Indians of Saskatchewan entitled "Government Policy Respecting Native People".[1] The basic premise of the Paper is that the purpose of the law and policy, as it applied to Aboriginal peoples and Aboriginal lands, was to promote their economic and commercial exploitation. The protection of the rights of Aboriginal peoples was used as the rationale to justify these policies. During an earlier period, when the policy was to develop the fur trade, it was necessary to encourage Aboriginal peoples to move freely within their natural environment and with some modifications to their life-style, to encourage them to concentrate on the hunting aspects of that lifestyle. Once the fur trade was no longer profitable, it was decided that other resources such as land, timber and minerals must be developed to further economic and commercial goals of the government.[2] This required the development of new policies and new laws if these goals were to be achieved. These policies rarely took into consideration the socio-economic needs or goals of Aboriginal peoples. Canada's goal in wanting to have the territory of Rupertsland and the Northwest Territories transferred to it was to get access to the land and the resources. To develop these areas it was necessary that:

a) a transportation system be developed;

b) a communication system be developed;

c) Canada obtain control and administration of land, a sovereign claim without any encumberances;

The policy adopted included the following:

a) extinguishing the Indian land rights;

b) encouraging large-scale settlement with an attractive land policy;

c) getting the Indians out of the way of the settlers by establishing reserves;

d) using the large land base to make free land grants to developers of transportation and communication systems;

e) using the land base to satisfy aboriginal claims at no cost to the taxpayer.

Notwithstanding the aims and objectives of the Metis People, the agreement negotiated in Ottawa with the Red River delegates was designed from the point of view of the Canadian government to achieve these policies. Although the Manitoba Act, 1870 was created so as to recognize a certain land right of the Metis People, and to confer a benefit on them, it was done for the purpose of expediency. That fact is clear from the wording of Section 31 of the Act.[3] This was also confirmed some years later by The Honorable Clifford Sifton, when responding to a question in Parliament regarding the Scrip allocations to the Metis, he stated:

> "It must be remembered that the financial benefit to the Halfbreeds is not the primary object the government had in view in making this arrangement...but the main reason is to pacify the Northwest Territories, to settle a claim which must be settled... ."[4]

However, the government had found it necessary to follow accepted British legal precedent in forming it laws. Nevertheless, what it could not accomplish in law it would accomplish in practice through its implementation policies and procedures. The fact that the Canadian Government under Macdonald was never serious about recognizing the rights of the settlers of the Red River and ensuring that they would reap the benefits from their lands, is evident from the government's attitude toward the Northwest and toward the Hudson's Bay Company's claim to the territory.

Prior to 1857, Canada had shown only limited interest in acquiring the area. In 1857, Canada presented a detailed position to the Select Committee on the Hudson's Bay Company, which was considering the renewal of the Company's Charter. The Canadian position was presented by The Honorable Joseph Cauchon, Commissioner of Crown Lands, and was outlined in a memorandum dated 1857, which was presented to the Select Committee. The conclusions of the memorandum are that the Hudson's Bay Company had no special claim to Rupertsland. The argument was that France had laid claim to the western territory and that this claim was recognized until 1763 when, by the Treaty of Paris, the area was transferred to Great Britain, not to the Hudson's Bay Company.

He further argued that since the territory had been recognized by Europeans as part of New France, the rights of all colonists and French subjects in the area were protected by a clause in the Articles of Capitulation, which guaranteed the future rights of Canadians to the territory. He cited a number of other arguments to support the Canadian claim that the territory was rightfully Canadian territory, including the fact that Canadian Courts had jurisdiction over the area. In his closing remarks, he stated as follows:

> "It will be seen by the question of boundary already treated, that the Country about the Red River and Lake Winnipeg, etc., which they claim under their Charter, absolutely belongs to Canada,..."[5]

It is obvious from this memo that Canada, and in particular Upper Canada, believed it had a legitimate right to the territory and as such should be able to have Britain transfer the territory to Canada without any rights of the Hudson's Bay Company recognized, other than their right to continue their trade and commercial activities.

In 1869, during the negotiations for the transfer of the territory, the attitude of the Canadian government was further set out in a letter signed by Cartier and Joseph Howe, wherein they angrily disputed the right of the Hudson's Bay Company to have any say over whether Canada could build a road to the Red River or could carry on surveys in the Red River area. In this letter dated January 16, 1869, they stated the Canadian position as follows:

> "The Government of Canada, therefore, does not admit, but on the contrary, denies, and has always denied, the pretensions of the Hudson's Bay Company to any right of soil beyond that of squatters, in the territory through which the road complained of is being constructed."[6]

In the negotiations with Britain for the transfer, Canada steadfastly held to the position that since the Hudson's Bay Company claim to the territory had no legal basis, Canada refused to make payments to the Company for the territory part of the transfer agreement. Canada also refused to accept a direct transfer of the territory from the Company. Consequently, the territory was relinquished by the Company to Great Britain and the territory was transferred to Canada at the request of the Canadian Parliament by the British Crown. The payment of 300,000 pounds to the Company was included in the agreement as compensation for the commercial losses which the Company would experience and to cover their legal costs involved in the negotiations and transfer.[7]

Sir John A. Macdonald's personal papers give further clues to the attitude toward the territory and the claims of the inhabitants. In a letter dated September 29, 1869, to W. W. Carroll, he discussed in detail his plans for the development of the territory. These included the building of a transcontinental road, the survey of lands, plans for the railway, the proposed union with British Columbia, plus other matters.[8]

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Prior to the Fall of 1869, it was clear that Macdonald considered the "Halfbreeds" as part of the "savage Indian" population and gave no consideration to their claims. He may have looked upon the settlers as squatters, since, if the Company were merely squatters, how could they give land grants to settlers. Since Cauchon had also dismissed the Selkirk claim to land in Assiniboia, likewise the Scots settlers would be squatters.[9] When Macdonald was faced with the resistance of the inhabitants in November, 1869, he made plans to send various emissaries. They included de'Saleberry, Reverend Thibeault; and later he sent Donald Smith. As well he enlisted the aid of Bishop Tache. At this time he also began to make plans to build boats so that troops could be taken into the Red River via the Great Lakes. He made no firm commitments to the recognition of the rights of the inhabitants and did not give any of the persons he sent to the Red River to appease the people anything but vague promises of dealing justly with the people's claims. In his correspondence with various people during November, 1869, he variously blamed the Metis reistance on the Hudson's Bay Company, McTavish, Richott, the Catholic clergy, the French Metis and Riel. He schemed with Smith to organize the English"Halfbreeds"and whites against Riel and suggested that attempts be made to buy off Halfbreed leaders. Some of the more significant quotes from his letters, which reflected both his attitude toward Canada's claim to the territory and his attitude toward the Metis are cited below:

> November 27, 1869, Macdonald to McDougall, the Lieutenant Governor, elect;
>
> "We have certainly no intention of giving up the country and we shall make full preparations for operations in the Spring, via Fort William, by building boats and otherwise; we cannot send an armed force through the United States, the government would not consent to it..."[10]

December 12, 1869, Macdonald to McDougall;

"...the cost of sending a military force will be so enormous that, setting aside other considerations, it would be a pecuniary gain to spend a considerable amount of money in averting the necessity by buying off the insurgents..."[11]

December 12, 1869, Macdonald to Smith, one of Macdonald's emissaries to the Red River;

"...except that I think you should talk over with McDougall the best way of buying off the insurgents or some of them"[12]

February 23, 1870; Macdonald to John Rose, Member of Parliament who had been sent to London to oversee negotiations on the transfer of Rupertsland and the Northwest Territories with the British government;

"Everything looks well for a delegation coming to Ottawa, including the redoubtable Riel. If we once get him here, as you must know pretty well by this time, he is a gone coon. There is no place in the Ministry for him to sit next to Howe, but perhaps we can make him a senator for the Territory."

(Same letter)

"These impulsive Halfbreeds have got spoilt by that emeute and must be kept down with a strong hand until they are swamped by the influx of settlers."[13]

In spite of all this scheming, Macdonald recognized as early as 1869 that the Red River settlers had not only settlers' rights but could claim national rights.

In a letter to McDougall dated November 27, 1869, he stated that either McDougall or the Governor of the Hudson's Bay Company, Governor McTavish must continue to exert their authority, for;

> "...anarchy must follow. In such case, no matter how the anarchy is produced, it is quite open to the law of nations for the inhabitants to form a government ex-necessitate for the protection of life and property, and such government has certain rights by the juis gentum, which might be very convenient for the United States but exceedingly inconvenient to you."[14]

When the British offered to set up a Commission and send out a Commissioner to mediate and settle the grievances of the settlers of the Red River, Macdonald refused to accept the offer. In a letter to Rose dated February 23, 1870, Macdonald stated the following:

> "He (Tache' ) is strongly opposed to the idea of an imperial commission, believing as indeed we all do, that to send out an overwashed Englishman, utterly ignorant of the country and full of crotchets as all Englishmen are, would be a mistake. He would be certain to make propositions and consent to arrangements which Canada could not possibly accept."[15]

Obviously the goal was to get control of the territory with as few encumberances as possible in order to implement the government's development policy. The means of racial slurs, armed intervention, bribery and manipulation were deemed by Macdonald to justify the end, that being to join the Northwest to Canada and primarily to Ontario as part of a grand design of commercial exploitation and empire building.

Therefore, it is important to examine the processes used to implement the Manitoba Act, to analyze these processes,

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and to examine the results.

## II. Implementation of the Provisions of the Manitoba Act

### a) ~~A.~~ The Process Followed in Implementing Land Provisions

Although the Manitoba Act granted a number of rights, the land provisions of the Act were the most important. Metis access to and control over the land would determine if they could maintain their population base in the Red River and if they could develop an economic and commerical order in the area over which they had control. The delegates, as indicated previously in this report, had understood that the local Legislature would have a major role in the implementation of the land provisions of the Manitoba Act. The local people, and in particular the Metis, wanted exclusive land reserves around the existing parishes and they wanted the land to be made inalienable for three generations. In other words, the recipients of the land would not be able to sell it until the third generation. According to articles published in the paper, Les Metis, legislation was introduced into the local Legislature after its establishment to this effect.[16] However, this legislation was never passed because the federal government made it clear under the provisions of the Manitoba Act the federal Cabinet would decide on the terms for selection of and allocation of the lands.[17] The government had meanwhile appointed a Lieutenant Governor, A.G. Archibald, to replace McDougall, whose appointment had been rescinded. As the federal representative in Manitoba Archibald was to have a major influence over government policy and a major role in its implementation.

The Manitoba Act provided for three kinds of land grants. These were as follows:

a) the "Halfbreed" reserves for children;

b) title for the "Halfbreeds" to river lots and other lands, of which they were in possession and on which they resided;

c) the settlement of common land rights.

The Canadian Parliament enacted two statutes, one in 1873 and one in 1874, which allegedly amended the Manitoba Act as follows:

a) the granting of title to lands in possession of Selkirk and old settlers;

b) Scrip allocation to"Halfbreed"heads of families who were to be excluded from sharing in the reserves. (This latter amendment was made because of confustion as to who the children of the"Halfbreed" heads of families were, that were referred to in the Act. The original intention was it would cover all"Halfbreeds"who were children of a white father and Indian mother. This change limited the allocations of the 1.4 million acres to persons under 21 on July 15, 1870).[18]

On December 27, 1870, Archibald, in a letter to The Honorable Joseph Howe, raised a number of questions about the intent of the Manitoba Act and to whom it applied. He also spelled out a proposed western land policy. In regard to this issue Archibald raised some fundamental questions regarding "Indian title" and who could in fact claim such title. He said most of the"Halfbreeds"in the Red River did not descend from the tribes who traditionally occupied the area. Therefore, he questioned the intent of the Act and concluded by saying:

> "But I presume the intention was not so much to create an extinguishment of any hereditary claims (as the language of the Act would seem to imply) as to confer a boon upon the mixed-race inhabiting this province, and generally known as the Halfbreeds. If so, any person with a mixture of Indian blood in his veins, no matter how derived, if resident in the province at the time of the transfer, would come within the class of persons for whom the boon was intended."

In the same letter, Archibald confirmed that it was the wish of Metis to have the land titles made inalienable:

> "the French or their leaders wish the lands to be so tied up as to prevent them, at all events, for a generation from passing out of the family of the original grantee.... The land must descend to their children after them. It would not become alienable till the third generation."

Archibald then goes on to argue that the tendency of modern legislation is to make real estate like personal property with no restrictions on its sale. He then admitted that it was likely that some Metis, not knowing the value of their land, would sell it for a pittance and may not benefit:

> "Suppose, therefore, the worst were to happen that can happen, supoose the men for whose benefit the land was intended should not know the value of the boon conferred, still the land would find its way into the hands of other settlers. It would be cultivated and improved."[19]

To prepare for allocating the land grants in the reserves the first action taken was the taking of a census.[20] This census was taken in 1871. Archibald had lists of the persons eligible for land grants in each parish made up. These lists were posted in the parishes and quickly became public documents in great demand by land speculators. At the same time, Archibald was under great pressure from the Metis to select and set aside the Metis land reserves. Settlers were flooding into the area from Ontario. They were settling wherever they chose and where no one else was settled. (In some cases they even squatted on occupied lands while the residents were off on the buffalo hunt).[21] Archibald wanted to prevent disputes over claims to specific parcels of land and to placate the Metis. He believed the Manitoba Act gave him the necessary authority to proceed to select reserve lands. The reaction of the federal government was to severely reprimand Archibald for his efforts.

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The following, from a letter dated November 4, 1871, from Joseph Howe, Minister of the Department of Secretary of State, for the Provinces, to Lieutenant Governor Archibald, is typical of the Federal Government's reaction:

> "...I regretted very much seeing your pg. 735 letter giving countenance to the wholesale appropriation of large tracts of country by the Halfbreeds. As I understand the matter, all lands not in actual occupation are open to everybody; Halfbreeds, volunteers and immigrants. Either of these classes can establish rights in 160 acres by actual occupation, but none of them have authority to set off and appropriate large tracts of country until these have been surveyed and formally assigned by the land department with the sanction of the Dominion Government. Your answer to everybody is, "I have nothing to do in the matter." This is the view I take and I would, if I were you, leave the land department and the Dominion Government to carry out policy without volunteering any interference"[22]

The implementation of the "Halfbreed" and other land provisions of the Manitoba Act was therefore brought directly under the control of the federal government and the officials in the Dominion Lands Branch of the Department of the Interior. Key officials in the policy implementation were Colonel Dennis, who was Superintendent of Surveys, an enemy of Riel and the Metis[23] and Gilbert McMicken. McMicken had been the Superintendent of Police for Ontario at the time the delegates, Richott and Scott, were on their way to Ottawa to meet with the federal Ministers. He was responsible for their arrest and internment. He appeared to have been a close and trusted friend of Macdonald, and was put in charge of the Dominion Lands Office in Winnipeg. He supervised the implementation of the government's land policy in Manitoba. He reported directly to Macdonald on events in the Red River and seemed to take direct orders from

Macdonald, although he was answerable to Joseph Howe.[24] Letters exchanged between Macdonald and McMicken indicate that Macdonald used McMicken to undermine Archibald's efforts to develop his friendship with the Metis and to ensure that their land claims were dealt with fairly and justly.[25]

The Manitoba Metis Federation has launched court action identifying a series of legislative acts of the Manitoba government and the federal government, which altered the land implementation provisions of the Manitoba Act, and which they argue are unconstitutional.[26] The Manitoba Metis Federation, in addition, have identified a number of fraudulent and illegal practices followed by the Dominion Lands Office in implementing the "Halfbreed" land provisions of the Act.[27]

## B. Implementation of "Halfbreed" Land Provisions Of the Act:

The steps taken to implement the provisions of the "Halfbreed" land provisions for children include the following:

- a census was taken and parish lists were established;
- the total number of potential claims was calculated and an allotment of 190 acres per allottee was set;
- land was selected around some of the parishes after it had been surveyed and a list of land with legal descriptions was prepared;
- names of allottees were placed in a box and drawn. As names were drawn they were placed opposite the land descriptions on the land lists in descending order.

The next step was to have been the issuing of the patents to the land to the allottees, when they become of age. Where they were underage, the land was to be held in trust by parents or by the province in the case of orphans.

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This process had just nicely begun in 1874 when, as a result of a federal election, the government of Macdonald was defeated and the Whigs of William Lyon McKenzie were elected. This government halted the land distribution process and ordered a new census because of complaints that the original census was inaccurate. The whole process began again. Based on the new census the land allotment was set at 240 acres for each child. The land allotments again proceeded, and by 1878 most of the allotments in the English parishes (Halfbreed) had been completed and some allotments had been made in some French parishes (Metis). In 1878, as a result of another federal election, the Macdonald government came back to power. The process of land distribution again came to a halt.

In the interim, much of the land around the parishes had been claimed by new settlers from Ontario. It was now difficult to set aside land reserves and, therefore, the government of Macdonald decided to select the remaining land wherever land was available in the Province. The remaining allotments were made using a Scrip issue. Money scrip was issued in $20 denominations which were redeemable by the bearer for any open Dominion lands in Manitoba.[28]

C. River Lot distribution:

Meanwhile, the process of granting title to the river lots also began. To qualify persons had to have:

- resided in Manitoba at the time of the Rupertsland Transfer (July 15, 1870);
- have been in possession of and resided on their river lot on that date; or
- have staked a claim to a river lot prior to the transfer date, with the clear intention of taking up residence on that land.

The river lot provisions of the Manitoba Act applied to all residents in possession of land and not just the Metis. Before the river lot patents could be issued, it was necessary to survey the land.

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The federal government had agreed to use the existing surveys for the river lots. The purpose of this was to protect the existing land boundaries of the occupants. However, in spite of this promise, the surveyors were soon cutting survey lines through existing properties with the claim that the existing surveys were irregular and did not conform with any regular survey system. Many of the Metis farmers lost parts of their lots or had their lands cut up and re-allocated to neighbours and neighbours lands to them in rather arbitrary fashion.[29]

D. Common Lands

The other major problem which developed was over common lands, which provided settlers with hay, pasture and wood. Under the Ordinances of the Council of Assiniboia, occupants had haying, grazing and woodlot rights to an additional 2-mile lot in back of their river lots.[30] If the occupants did not use this right or did not use it fully, others in the settlement could use the land and hay on a "first-come first-served" basis. A long dispute developed over these lands, and the federal government refused to grant patents to the occupants of river lots for these lands. The government finally set up a Commission to study and report on the claims. The Commission validated the claims and recommended that they be settled by an issue of $160 of Scrip to the occupants of the adjacent river lots.[31]

E. Provisions for Heads of Families

Scrip was also the method used to settle the claim of the Halfbreed heads of families resident in Manitoba in 1870, who had been dealt out of the reserve lands by an Amendment to the Manitoba Act in 1873.

## F. An Analysis of the Implementation Process

The B.N.A. Act of 1867 provided for new provinces to join Canada. They had to be colonies which already had their own Constitution. Macdonald believed there was no provision that allowed Canada to creat provinces out of territories and to make their constitutions for them. Therefore, he believed that the Manitoba Act of 1870 was ultra vires of the B.N.A. Act 1867. Macdonald asked the British government to legitimize the Act by passing another Constitution Act which would provide for Canada to create new provinces and make their constitutions. He did not want any restrictions imposed on Canada's ability to amend such provincial constitutions. The British, however, did not accept this last clause of the proposed Act because it violated established British policy relating to its colonies.[32] Britain also realized it would leave the new provinces at the mercy of the federal government. Thus, Britain unilaterally amended Section 6 of the B.N.A. Act 1871, as proposed by Macdonald, be inserting the following into this clause:

> "It shall not be competent for the Parliament of Canada to alter the [Manitoba Act]... or any other Act hereafter establishing new provinces in the Dominion..." .[33]

This should have safeguarded the provisions in the Manitoba Act and ensured their implementation as had been promised the delegates. Macdonald, however, had no intention of keeping these promises. His plan had always been to get control of the land and to force the Metis to move from the Red River. This approach was based on an earlier report on the potential of the prairies, prepared by Henry Youle Hind, a geographer from Ontario. He concluded that the "savage half-breed" could never make good farmers and, therefore, would have to be displaced from the Red River lands by proper settlers.[34]

The new Lieutenant-Governor of Manitoba, Archibald, had been a member of the House of Commons in 1870 when the Manitoba Act was debated in Parliament. He participated in the

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debate and took the promises and the legislative provisions seriously. He had a plan for selecting the reserves on land immediately back of the river lots. He also interpreted the Manitoba Act as giving to the Lieutentant-Governor the right to select and allocate these lands. Although the Act placed all ungranted or wasted lands under the jurisdiction of federal government, he interpreted the river lots as being occupied and the commons lands so being granted by provisions of the Council of Assiniboia. In Archibald's view neither came under federal jurisdiction under the provisions of the Manitoba Act. Such an approach would have confirmed the titles of the occupants and would have provided the reserve lands for children in solid blocks around existing parishes in accordance with "the usage of the country". It in fact would have provided for the implementation of the provisions of the Manitoba Act in a fair way. It would have consolidated the Metis and"Halfbreed"parishes and provided for their development.[35]

As indicated previously in this Chapter, Archibald was rudely informed by Joseph Howe that the land distribution and administration was completely a federal responsibility and was none of the Lieutenant-Governor's business.[36]

There was, in practice, to be no local control over the distribution of lands. All lands were Dominion lands, and government policy defining the terms of distribution were altered on eleven different occassions between 1873 and 1884. Section 6 of the B.N.A. Act, 1871 did not prevent the Dominion Government from carrying out its policy, since the government ignored this provision of the Act.[37] No one at the time seemed to be inclined to challenge the federal action with an appeal to the Privy Council.[38]

However, it is clear that the government did not have the authority under the Act to pass such Amendments.[39] An initial reading of the Manitoba Act would seem to suggest that the land reserves were only for children. However, a further reading indicates that the land was set aside for the children

of the "Halfbreed" heads of families. Archibald interpreted this to mean not children literally, but for those persons who were offspring of a white man and an Indian woman. Since most of the occupants of the Red River fell into this category, they were all eligible even though they were adults. This is confirmed by Macdonald's statement in Parliament that the Metis had a claim on two bases: As the first settlers who occupied their lands and as descendents of the Indians who were entitled to reserve lands. The federal government apparently agreed with Archibald's interpretation since they passed a specific Amendment to the Manitoba Act in 1873, to exclude the heads of families from the reserve allocations, and then passed a second Amendment to the Act in 1874 providing Scrip for the partly-Indian heads of families.[40]

As mentioned previously, the federal government did not have the constitutional authority to amend the Manitoba Act. However, it proceeded to deliver money scrip to the heads of families. Money scrip was personal, not real property, and wide-scale speculation in Scrip resulted. The Money Scrip, being personal property, was not covered by real estate laws which provide certain safeguards in regard to the assignment and registration of land.

An active trade in Scrip quickly developed, with the speculators collecting assignments to large quantities of Scrip. Therefore, it is impossible to determine whether the heads of families ever received their Scrip, whether they used it to acquire land or whether the majority of this Scrip fell into the hands of speculators, who were buying it for approximatelly 1/3 of its face value.

The Provincial Legislature passed a law to discourage Scrip speculation by making asssignments invalid. Although the federal government considered disallowing the Act, it finally gave Royal Assent on the understanding that the Act would be amended. The Province then amended the Act to make such assignments legal if the allottee did not return the money to the buyer within a period of three months from the issue of the patent. If the money was returned the buyer had to be re-imbursed for his out-of-pocket expenses plus interest on the money. This law was first disallowed, but the federal government then approved the law in 1877 when the Provincial

Legislature re-enacted it.[41]

In the next ten years, a dozen more Acts were passed dealing with "Halfbreed" lands, which encouraged speculations and which resulted in "halfbreed" children's land not being protected by the same laws which protected the land rights of white children.[42] Although all of the 1.4 million acres had been allocated by 1886, only 90 per cent of the lands had been patented by that date. The remaining lands had not been patented for a variety of reasons. Of the lands patented only 20 per cent remained in the ownership of the allottees.[43]

Section 32 of the Manitoba Act provided for title to the river lots to be confirmed in the name of occupants. The administration of this matter should have been straight forward. There had been an agreement that the existing survey of the river lots would not be changed. Section 32 had five subsections with 1 to 3 covering persons who occupied lands they had either purchased, leased or on which they had settled with the sanction of the Hudson's Bay Company. These were all lots in the area covered by the Selkirk Treaty and to which the Indian title had, at least in theory, been extinguished. Subsection 4 covered all occupants of lots in Indian territory (title not extinguished). The occupants had pre-emption rights to their lots; and with the signing of Treaties 1 and 2, any legal impediment to the issue of patents was removed. Subsection 5 covered the hay or common lands in back of the river lots. The Lieutenant-Governor was authorized under the Act to adjust these claims on "fair and equitable terms."[44]

With the survey of the river lots completed in 1873, it should have been possible for the government to issue the patents immediately to all who could prove occupation of a river lot. It is known from Sessional Papers that more than 2,000 applications were received. Also, other applications were turned away pending a ruling by the Justice Department on claims by occupants covered under Subsection 4 of Section 32. In many cases, the Metis had a winter home and a garden on these lots with no other improvements. If the occupants were absent at the time

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of the survey, their lots were classed as vacant.[45]

An involved process was adopted to verify claims under subsections 1 and 2, of Section 32 of the Act. It took until 1878 before all of the patents were issued. In the meantime the legislature declared the cart trails and footpaths between the lots as grand highways and reserved a 132-foot strip for the Province. When patents were issued these strips were excluded. Most owners found their property cut into two irregular parcels. In addition, in 1871 the federal government ruled that haylands covered under subsection 5 were vacant lands open to any incoming settlers and, although the Lieutenant-Governor and officials of the Dominion Lands Branch recommended that these lots be withdrawn from settlement lands, the federal government declined to change the ruling.[46]

Also as indicated earlier in this Chapter, eventually a Commission was set up to investigate and report on the hayland claims. It recommended a grant of Scrip of $160 to the claimants in lieu of haylands. In regard to the subsection 4 claims, the department decided to defer applications, pending a ruling on what constituted occupancy. The federal government amended the Manitoba Act in 1874 to eliminate the distinction between subsections 3 and 4 claims. It was estimated that some 1500 families (known as winterers) fell into the subsection 4 category. They would have to prove continuous occupancy and undisturbed possession. Most of these persons were hunters, freighters, guides or fishermen, who lived in a log house on their property part of the year. During the summer season most pursued their livelihood elsewhere.

Hundreds of claims were denied. Those whose claims were approved were limited to a maximum of 80 acres. If buildings happened to fall on the "grand highway", these were lost. Often settlers were left with little more than a plot of land large enough for their buildings, a garden and a small pasture. The federal government also changed the legal provisions allowing claimants to take their case to a Claims Court so that con-

flicting claims to the same lot could not be heard by the Court.[47]

In regard to other provisions of the Manitoba Act, the main ones which could be considered to have confirmed special rights included:

- provisions for an upper house;

- provisions for the legislative debates and all records of such to be in both French and English;

- provisions for court proceedings and all court documents to be in both French and English;

- special language and religious rights in the Education system.[48]

As long as the majority of the members of the Manitoba Legislature were Metis, these provisions were implemented. However, the new Province soon ran into serious financial problems and had difficulty supporting the range of institutions provided for in the Manitoba Act. The reason for this was related to the fact that the Province, having given up its resources, had no access to the funds which could be secured from the sale of these lands and resources. In addition, with a small population and with no export outlets for agricultural products, the economy had a minimal circulation of cash. This meant opportunities to raise taxes were limited to duties on goods coming into and leaving the province. The Manitoba Legislature was soon petitioning Ottawa for an increase in the federal subsidey. Ottawa, at first, refused to increase the subsidy.

The then Premier, Norquay, a Scots "half-breed," eventually convinced Ottawa of the desperate finnancial need of the Province. The federal government, however, extracted on agreement from Manitoba that it would drop its upper house, "an unnecessary frill and cost" in Macdonald's view. The Manitoba Act was amended by the Legislature in 1876 to bring about this change.[49]

The provision that required the use of both French and English in the legislature and courts was changed by an Act of the Manitoba Legislature in 1890. These changes were not at the time legally challenged. However, these provisions still remain in the Manitoba Act. Several years ago a French Manitoban from St. Boniface decided to try to exercise his rights in this regard by refusing to acknowledge a traffic ticket issued to him unless issued in French. He was taken to court and found guilty of the traffic violation. The case was taken all the way to the Supreme Court, which upheld the appeal indicating that the rights granted by the Manitoba Act were still in effect. The Province is now in the process of deciding how it will be able to comply in practice with all of the implications of this ruling.[50]

In the late 1880s the issue of separate French schools in Manitoba became extremely controversial. There was a strong move to pass a new school Act in Manitoba to eliminate the special Education and Language rights granted under the Manitoba Act. Tache believed that he had Premier Greenway's support on this issue, but Greenway deceived Tache and threw his weight behind those demanding change.[51] In 1890 the Manitoba School Act set up one public school system with English as the main language of instruction.[52] This Act of Provincial Legislature was opposed by Tache. But when the federal government refused

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to disallow this Act, even though it was in violation of Section 22 of the Manitoba Act, Tache withdrew his appeal since the French Catholics were not required to attend public schools. They were allowed to set up their own private school supported by fees and donations but they could not qualify for tax funds.

## III. The Results and Consequences of the Implementation of the Manitoba Act

When the first government was formed in Manitoba, the Metis representatives were in the majority. The first Premier of Manitoba was John Norquay, an English "half-breed." This was so in spite of continuous intimidation of the Metis population of the Red River by the volunteers from Wolsely's Army, who had been left behind. These persons, with the active urging of men like Dr. Schultz, Charles Mair, and others, caused a riot in Winnipeg on the night of the first election. A number of voters were assaulted, a polling booth in Winnipeg was burned, and Riel and Archibald were hanged in effigy and burned.

Prior to this the Orange volunteers had murdered several local Metis —one, Eliziar Goulet and another, James Tanner. Although the inquests that were held following these murders found that the two men had been victims of homocides and had named those responsible for their deaths, the guilty were never brought to trial.[53]

What followed the Manitoba Act was a reign of terror and lawlessness in the settlement. Some of the inhabitants, who had no firm roots in the Red River and only resided there seasonally, began to migrate west to the Qu'Appelle Lakes,

the Saskatchewan River, the Cypress Hills and to other locations. The newly established provincial government experienced serious difficulties in carrying out its role because of the lack of resources, because of conflict and tension between residents and new settlers, and because of the fact that the local populace was dependent upon persons like Royal, Dubuc and Clarke for legal advice and direction. The two former, who were friends of Riel and protegees of Taché, played a major role in organizing the structure and legislative base for the new province. Clarke, who was anti-French and an enemy of Taché and Riel, was also influential in the government, holding the position as the first Attorney-General and later as Premier. He co-operated with those who wanted to capture and prosecute Riel. He approved the warrants for Riel's and Lepine's arrests, and he vigorously pushed for the prosecution of Lepine. Therefore, another result of the Manitoba Act was the manhunt for Riel and Lepine and the continued effort to turn the populace against the goals of the Metis leader.[54]

The Legislature was largely ineffective in protecting the Metis land rights under the Manitoba Act, since the federal government retained complete control over the implementation of the land provisions. The decision by the federal government, to consider all lands other than the river lots open for settlement, resulted in large numbers of settlers from Ontario moving onto land around the parishes which the Metis had requested be set aside as reserves. The result was that Metis communities began to break up, since land allocated to Metis children was often too far removed from the settlements to allow for the maintenance of family and community ties. There was also the racist pressure and intrusions of the settlers from Ontario which made life in the Red River intolerable for many of the Metis settlers. These factors, plus the

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long delay in land distribution, resulted in more people pulling up roots and moving west where there was land and where they could maintain their lifestyle uninterrupted, among friends and relatives.

The various government decisions on the land issue and the changes in land distribution policy all contributed to this exodus. The ruling that persons residing outside the Selkirk Treaty belt would not have their land holdings granted until occupancy was proved further contributed to the Westward movement of the Metis. The ruling that common haylands were open Dominion lands and the road allowance provisions made by the Manitoba Legislature, resulted in many of the farmsteads along the Red River becoming uneconomical farm units. Added to this were the defective original surveys and the inaccurate census, which convinced many more people to move west.[55] By the late 1870s and early 1880s the exodus westward was on. Even stalwart settlers of the Red River, who had served in the first Manitoba Government, such as Charles Nolan and Louis Schmidt, moved west.

The result of government policies and of government implementation practices was that most of the Metis people of the Red River were to a large extent, deprived of their rights to land which the Manitoba Act had specifically set aside for them. Speculators bought their land entitlement cheap. Fraud was used in obtaining Scrip in the name of persons who had long since left the Red River. Other irregularities in land distribution and registration took place. These actions all happened with the active co-operation of federal land agents.[56] It is estimated that more than two-thirds of the Manitoba Metis left for new homes in the West. Those who stayed were pushed to the fringes of new settlements or were assimilated into the non-aboriginal population.

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Following is an example of how the Metis were forced out of their homes. At the junction of the Assiniboia and what is now known as the Boyne but which had been named "Riviere au Ilets du bois" by the Metis, a settlement of buffalo hunters had established themselves as early as 1835. This was well before the transfer of the Northwest to Canada.[57] This area, while in the Selkirk Grant, was outside the area in which the Indian title had been extinguished. The Metis, although squatters, had established their river lots in the usual manner and followed the accepted surveys of the day. They were among those who were covered under subsection 4 of Section 32 of the Manitoba Act. (It will be recalled that the Manitoba Act had been amended to exclude these claims).[58] In 1871 the Metis hunters and traders left in the Spring, after planting some crops and vegetables, to go to the prairie for the hunt. The elderly and the young children, as was the custom, were left behind to tend the farms. While the Metis were gone, settlers from Ontario arrived in the area and squatted on their lands.

When the Metis returned, the settlers were asked to leave but refused to do so. The Metis appealed to Lt. Governor Archibald, who, although sympathetic to their cause, found his hands tied by the interpretation of the federal government that all lands not legally occupied were open for settlement. He only was able to avoid open conflict between the settlers and Metis by promising the latter more generous land grants in the immediate area and pursuading them to move.[59] As a result the settlement was moved two and one-half miles to the Northwest. A new community named St. Daniel was established. In 1910 over 90 percent of the residents of the community were Metis. After 1910 white settlers flooded into the area,

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surrounding the Metis and exerting social pressures on them to sell their land. Those who were squatters on school lands and other Crown lands left the area as the land was sold. Other land owners, discouraged by these developments, began to sell their land and move west. By 1930 there were hardly any Metis left in this community.[60]

The Metis indeed, had been "swamped by the influx of settlers" as Macdonald had orginally planned, and had been dispossessed of their land and eventually of any means of earning a livelihood. Many had been dispersed to isolated agricultural settlements generally outside of the mainstream of social and economic development.

The final result of the manner in which the Manitoba Act was implemented was to drive the members of a thriving community from their homes and from their land. In the absence of a land base, the developing customs and lifestyle of their culture suffered a serious setback. As settlement soon engulfed their new homes further to the west, they were left poor, landless, without capital and without the employment skills needed to take advantage of the new economic development activities in the Northwest. They were isolated in rural areas or on the fringes of towns and cities, poverty stricken and victims of the policies of the federal government and of the racism which it promoted.[61]

The Manitoba Act and its "extinguishment" provisions were used as a ploy, part of the federal government policy to eliminate Metis influences and to gain control of the land. It, as well, got the Metis out of the way of the new settlers and new developments.[62] The people would become a useful source of cheap labour when needed to do the casual and seasonal and backbreaking and dirty labour which no one else wanted to do. They picked buffalo bones, rocks and stumps, cut brush and engaged in other

seasonal and casual occupations.

## IV. The Application of the Manitoba Act to Metis People Living Outside Manitoba:

The Manitoba Metis Federation, in its final report of 1979-80, sets out a number of constitutional and legal bases on which it believes the validity of the implementation of the land provisions of the Manitoba Act can be challenged. Some of these are constitutional, resulting from a number of amendments to the Manitoba Act by the Parliament of Canada and the Manitoba Legislature, even though the Act expressly indicated that Canada was not competent to amend the Act.[63]

A significant number of Metis people now residing in Saskatchewan are descendents of Manitoba Metis. The exact number residing in Saskatchewan is not known and might be difficult to determine. However, the Manitoba Metis Federation, using the Manitoba census of 1871 and 1874, did cross-computer comparisons with a printout of rejected and approved Scrip applicants outside Manitoba in the Northwest Territories and determined that approximately two-thirds of the residents of Manitoba left and migrated to the Northwest.[64] They made up approximately one-third of all Scrip applicants in the Northwest. Some of these people had received Scrip and/or a land allocation in Manitoba. The descendents of Manitoba Metis would still have the same rights as Manitoba Metis even though they may have received a Scrip allocation in the Northwest under the provisions of the Dominion Lands Act.

Many of those persons who were refused Scrip on the basis that they had received Scrip in Manitoba, had left Manitoba prior to any land allocations being made. They had

not applied for Scrip or land there, and were not aware that a land settlement had been made in their name. It can only be concluded that these grants were made to speculators by fraudulent means. They too would still have an existing right to land.

Some former residents of Manitoba applied for and received Scrip in the Northwest, even though their names appeared on the Manitoba census of 1871 and 1874. It can only be assumed that they were shomehow missed by the speculators and the government collaborators in the land office in Manitoba. Therefore, many of those persons not appearing on the lists of those who had previously received a land grant or Scrip in Manitoba were granted Scrip in the Northwest.

Therefore, the Saskatchewan Association, in arguing its case in support of the land rights of the Metis is doing so, on two bases: Firstly, on behalf of the current, descendents (living in Saskatchewan) of the Manitoba Metis under the terms of the Manitoba Act. Secondly, on behalf of the other Metis residents of Saskatchewan not covered by the Manitoba Act.

FOOTNOTES:

[1]Government Policy Respecting Native People: It's Development and Purpose. Unpublished, Association of Metis and Non-Status Indians of Saskatchewan, 1978, Dumont Institute Library.

[2]Letter from Governor Dallas of the Hudson's Bay Company to Watkins, August 7, 1863. Public Archives of Canada, M G 24 E 17 - Item 89.

[3]Manitoba Act, 1870, Supra.

[4]Quote from House of Commons Debates. From an article by D. J. Hall, "The Half-breed Claims Commission". Published in Alberta History, Volume 25, Number 22, Spring 1977.

[5]Cauchon Memo, Appendix B to the Report of the Select Committee on the Hudson's Bay Company, 1857, Supra. Public Archives of Canada.

[6]Cartier and Howe to Sir F. Rodgers, January 16, 1869, Sessional Paper No. 25, 1869.

[7]Letters and Memos Re: Negotiations for the transfer of Rupertsland and the Northwest Territories to Canada, Sessional Paper No. 58, 1869.

[8]From the Macdonald Papers, Macdonald to W. W. Carroll, M.P., September 29, 1869. Public Archives of Canada, Letterbook No. 13.

[9]Cauchon Memo, Supra.

[10]Macdonald Papers, Supra, Macdonald to McDougall, November 27, 1869.

[11]Ibid. Macdonald to McDougall, December 12, 1869.

[12]Ibid. Macdonald to Smith, December 12, 1869.

[13]Ibid. Macdonald to Rose, February 23, 1870.

[14]Ibid. Macdonald to McDougall, November 27, 1869.

[15]Ibid. Macdonald to Rose, February 23, 1870.

[16]Manitoba Legislative Journals, 1877, February 16, p. 64.

[17]Joseph Howe to Archibald, November 4, 1871. Found in the Howe Papers, Public Archives of Canada, C - 1831, Vol. 4, p. 496.

[18]Supra, Final Report, Manitoba Metis Federation, p. 39.

[19]Archibald to Howe, December 27, 1870. Found in the Dewdney Papers, Collection in Glenbow Archives, Calgary.

[20]Supra, Final Report, Manitoba Metis Federation, p. 34.

[21]W. L. Morton, Manitoba, A History. University of Toronto Press, pp. 29-80 and 153-154.

[22]Howe to Archibald, Supra, November 4, 1871.

[23]See Sessional Papers, 1870, Paper No. 12. Public Archives of Canada.

[24]Letters between McMicken and Macdonald, 1871 and 1872. Found in the Macdonald Papers, Public Archives of Canada, M G 26 A, Vol. 103.

[25]Ibid.

[26]Manitoba Metis Federation Inc. and Native Council of Canada Inc. v. Attorney General of Canada and Attorney General of Manitoba, 1010/81 of the Manitoba Court of Queen's Bench.

[27]Final Report, Manitoba Metis Federation, Supra, pp. 38-43.

[28]Sessional Papers of Canada, 1876, Paper No. 11.

[29]Ibid.

[30]From Manitoba Report, Supra, p. 55.

[31]Sessional Papers, 1878, Paper No. 10, p. 41. Public Archives of Canada.

[32]Final Report, Manitoba Metis Federation, Supra, p. 39 and following.

[33]Ibid. pp. 30-32.

[34] Ibid. pp. 10-12.

[35] Ibid. pp. 34-37

[36] Howe to Archibald, Supra, November 4, 1871.

[37] Final Report, Manitoba Metis Federation, Supra, pp. 37-38.

[38] Ibid. pp. 39-65.

[39] Ibid. pp. 30-41.

[40] Ibid.

[41] Ibid. pp. 42-44.

[42] Ibid. p. 44.

[43] Ibid. p. 45.

[44] Ibid. p. 47.

[45] Ibid. p. 48.

[46] Ibid. pp. 48-56.

[47] Ibid. pp. 57-59.

[48]Manitoba Act, 1870, Supra.

[49]Ibid. 1876 Amendments.

[50]Forest v A.G. Man (1979) 25 C R 1032 (1980) W. W. R. 758, 30 N R 213, 2 Man. R. (2d) 109, 49 C C C (2d) 353, 101 D L R (3d) 285 affirming, (1979) 4 W. W. R. 229, C C C (2d) 417, 98 D L R (3d) 405.

[51]D'Alton McCarthy, Equal Rights and the Origin of the Manitoba School question - J.R.Miller, Canadian Historical Review, December 1973. See also Tache Papers for correspondence with Greenway in early 1890s.

[52]W. L. Morton, Supra, pp. 246-250.

[53]A. Tremauden, Supra, p. 258.

[54]George F. Stanley, "Louis Riel", Chapter 10. Ryerson Press, 1963.

[55]Final Report, Manitoba Metis Federation, Supra, pp. 78-96.

[56]Ibid.

[57]Fred Conrad, "History of St. Daniel District". Manitoba Archives.

[58]Final Report, Manitoba Metis Federation, Supra, pp. 57-58.

[59]W. L. Morton, Supra, pp. 153-154.

[60]Fred Conrad, Supra.

[61]Final Report, Manitoba Metis Federation, Supra, pp. 39-41.

[62]Ibid. pp. 43-44.

[63]Ibid. pp. 38-67.

[64]Ibid. Appendix II Tables

## CHAPTER VI: SCRIP DISTRIBUTION UNDER THE DOMINION LANDS ACT: POLICY AND PRACTICE.

### I. Introduction:

In Chapter IV we reviewed the petitions from the half-breeds in the Northwest Territories outside of Manitoba. These requested the recognition of the Metis land claims, hunting, fishing and trapping rights, plus other rights similar to those granted in Manitoba. Also reviewed was the fact that the issue of "half-breed" lands came up in conjunction with the signing of Treaties during the 1870s. The response of the Commissioners was that the "half-breed" requests would be referred to Ottawa and that the Queen would deal with them justly and generously. However, in spite of support for a settlement with the Metis of the Northwest by churches, some government officials and members of the Northwest Territories Council, no action was taken by the federal government to deal with these petitions. Macdonald, in particular, did not put any of his views on record during this period. However, based on the position he outlined to the House of Commons in 1884, it can be assumed that his own view was that Metis had no aboriginal rights

In 1870 Macdonald had stated that the civilized Metis of the Northwest should not claim the privileges of Indians. As well, both Archibald and Macdonald took the position that it would be a mistake to recognize the "Indian title of the Metis".[1] Macdonald himself had put his views on record in Parliamentary debates in 1884 to this effect.[2] In fact, there had been a consistent line of thought since 1846 among certain government officials, including those of the Hudson's Bay Company, that Metis were white because they were descendents of whiteman and, therefore, had no aboriginal rights.[3] It has also been noted that these positions were contradicted by early Indian Acts which did not exclude Metis , and by Macdonald himself, who decided to include a land reserve provision in the Manitoba Act,

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which land would be a grant towards an extinguishment of the Indian title of the "half-breeds". It is also clear, however, that this was done as a matter of expediency to placate the Metis and not out of any conviction that they had rights as descendents of aboriginal people.[4]

As a matter of political expediency, Macdonald promised to settle the "Northwest Half-breed claims" during the 1878 election campaign. He made provisions in an amendment to the Dominion Lands Act to provide Scrip to settle these claims in 1879. The Act was further amended and clarified in 1883,[5] even though Macdonald was still insisting in 1884 that the Metis had no special land claims. The provisions of the Act were not implemented until 1885, when the government was forced to take action as a result of events leading to the Northwest Rebellion.[6]

## II Constitutionality of Provisions of the Dominion Lands Act, 1879 and 1883

The federal government proceeded unilaterally to enact the provisions of the Dominion Lands Act 1879, to extinguish the "half-breed" land claims. Also, the government proceeded unilaterally in drafting and passing Orders-in-Council to implement the provisions of the Act. Although there had been many petitions over the years from the Metis, the government had ignored them. During the signing of Treaties with the Indians in the 1870s, the Metis were consistently told that the Commissioners could not deal with them. When new Treaties were signed after 1886, the Commissioners dealt with the Metis at the same time that they made Treaty with the Indians. However, there were no negotiations with

the Metis only a distribution of Scrip in accordance with Orders-in-Council, and administrative regulations set down by the government. Therefore, the basic question which must be examined is whether these actions met the minimum requirement of Order-in-Council No. 9 incorporated pursuant to the terms of Section 146 of the B.N.A. Act 1867. This requirement was that the Canadian government would deal with the Indians in accordance with the equitable principles which had governed the British Crown.[7]

What were these equitable principles? They could only have been the principles spelled out in the Royal Proclamation of 1763. These principles were based on the practice of British North American colonies and the Crown who recognized the Indians as sovereign nations and purchased land from them as required. The Royal Proclamation confirmed these practices and this was the basis on which Britian had conducted its relationship with the Indians after 1763.[8] In addition, there were certain precedents which the British had established in negotiating Treaties with aboriginal peoples in other colonies and other continents. These had to do with the terms of Treaties which followed similar patterns regardless of whether they were concluded with aborigines in New Zealand, Africa or Canada.[9] As applied to Canada, the Royal Proclamation set out the following minimum conditions for a valid land purchase from the Indian peoples:

(1) lands could only be acquired by the central government in the name of the Crown;

(2) consent of the Indians was required before lands could be purchased;

(3) negotiations were to take place at a public meeting with the Indians who had an interest in the lands;

(4) the conclusion of an agreement (Treaty) suitable to both parties and the identification of the compensation to be received by the Indian peoples.[10]

It is clear from a study of the process used to conclude Treaties that the Government of Canada followed these principles rather strictly in its dealings with the Indians.[11] In addition, the Government included these provisions in Section 8 of the 1868 Act to create the Department of the Secretary of State. The Act included additional provisions for land acquisition which were based on established practice. This Act stated as follows:

> "No release or surrender of lands reserved for the use of the Indians or any tribe, band or body of Indians, or of any individual Indian, shall be valid or binding, except on the following conditions:
>
> 1. Such release or surrender shall be assented to by the chief, or if there is more than one chief, by a majority of the chiefs of the tribe, band or body of Indians assembled at a meeting or council of the tribe, band or body summoned for that purpose...held in the presence of the Secretary of State or an officer duly authorized to attend such council by the Governor in Council or Secretary of State... .
>
> 2. The fact that such surrender or release has been assented to...shall be certified on oath before some judge of a Superior county or district court, by the officer authorized...to attend such meeting, and by some one of the chiefs present...and shall be submitted to the Governor-in-Council for acceptance or refusal."[12]

These provisions were carried forward in later Indian Acts and covered both the ceding of Indian territories and surrenders from Indian reserves.

When the issue of Metis rights in the Red River was being considered, the federal government proceeded with legislation only after an agreement had been concluded with the Red River delegates. The provisions of the Royal Proclamation and section 146 of the B.N.A. Act were applied. The negotiations were held with the delegates of the people of the Red River, appointed by them for this purpose. The agreements were set out in the Manitoba Act, which Act was assented to by the Parliament of Canada and later by the Parliament of Great Britain. The only potential weakness in the process was that the negotiations themselves did not take place at a public meeting. However, the terms of this agreement were publicly debated both in Canada and the Red River.

It may be that the government, and Macdonald in particular, only went through this process because it was expedient to achieve their goals. However, the law is to apply equally to all citizens and is also binding on the government. Therefore, the Macdonald governments subsequent unlawful actions in implementing the Manitoba Act cannot be excused on the basis that he did not intend to implement the Act as approved by the parliaments of Canada and Great Britain. Further, the illegal steps taken by the government, clearly invalidate the implementation process itself.

In the case of the Metis outside Manitoba, was the rule of the law followed? Did the government act in a way consistent with constitutional requirements? Although the

Metis sent numerous petitions to the Canadian government, certain essential features were lacking in the actions taken by the government. These included the following:

a) the Metis did not consent to give up their claim to title in the land, nor were their other rights as aboriginal people ever discussed or considered;

b) there were no public meetings to negotiate an agreement or settlement. Indeed, there were never any formal consultations with any Metis leaders before the government took unilateral legislative action;

c) there was no document signed by the government or the Metis indicating that the government was acquiring their interest in the land for the government;

d) there was no compensation for the rights they supposedly surrendered;

e) the Metis signed no documents indicating they understood that by taking Scrip they surrendered their aboriginal rights.

The whole process of Scrip allocation was a unilateral process, with no negotiations whatever. In fact, the government acted in a manner which ignored all of the constitutional procedures which governed Canada's dealings with the aboriginal peoples.

Since early Indian Acts did not exclude the Metis from the definition of "Indians", there is no reason to

conclude that the government should have dealt differently with the Metis. Metis people were only excluded from the wording of the Indian Act after Scrip was issued, and then only in areas where Treaties had been signed with the Indians. The fact that no legislation was passed to institutionalize a method by which the government would deal with the Metis meant that it was bound to act in accordance with the provisions of the Royal Proclamation and Section 146 of the B.N.A. Act 1867. The fact that the Metis wanted to be dealt with differently from the Indians could not excuse the government from not following the constitutional process established for the purchase of aboriginal lands. The Metis were organized into communities and they clearly had leaders. They had made known their requests in the form of lists of rights they wanted recognized, which were essentially not different from those provided for in Treaties. These included:

(1) land grants (individual plots rather than reserves);

(2) schools;

(3) help in getting established in agriculture;

(4) local self-government in their communities;

(5) hunting, fishing and trapping rights;

(6) language, education and religious rights;

(7) representation in legislatures.

The form in which they wanted these rights provided was different from that desired by the Indians; however, this did not in any way condone the federal government's arbitrary use of unilateral procedures for dealing with the Metis. It must, therefore, be concluded that the Scrip distribution, as it was implemented, was not a legally valid way of acquiring the land title of the Metis. No action has ever been taken on other rights which the Metis claimed.

## III. The Government's Purpose and Reasons for Proceeding as They Did:

The government's purpose in recognizing the Metis rights and in allocating Scrip was primarily economic. As stated in Chapter IV, the government's purpose in acquiring Rupertsland and the Northwest as territories of Canada was to get access to the natural resources so that they could be developed as a means of profitably investing surplus capital.[13] The resources which the government wanted access to were:

- agricultural land
- timber
- fish and game
- mineral resources

Fish and game were not a major consideration since these had already been exploited and, to a large degree, depleted.

However, the other resources were important. The land would enable the development of a settlement policy. Farmers growing grain would provide a profitable export commodity and generate the need for all the infra-structure required to support the production, transportation and servicing of the industry. This would include transportation and storage facilities, plus a communications system. In order to have a successful settlement policy, a policy which combined free homesteads and low-cost pre-emption lands,to settlers was necessary. Land grants could also be made to capitalist entrepreneurs to encourage them to build railways and communications systems. In addition, land could be used to settle aboriginal claims. The whole approach required limited investment by the Government of Canada.

The timber provided the building materials required for the new developments which would take place in the West; the building of farmsteads, villages, towns and cities. It provided, as well, a useful source of fuel. In the longer term, forest resources had major export potential. The primary mineral in which the government was interested at the time was coal. Coal was required as a cheap supply of fuel to develop the railway transportation system. It also had potential as a fuel for factories, smelters, and domestic use. The government was aware of other resources in the Northwest, such as base metals, iron ore, gold, silver, etc. These had less immediate development potential but nevertheless did have long-term development potential. As concluded previously in this report, to achieve all of these goals the government needed:

- cheap land

- inexpensive transportation and communications systems;

- perfect title to the land;

- settlers who understood European methods of agriculture and industry, and who would be loyal to European forms of government;

- a condition of law, order and conformity in the settlement areas;

The Indians and"half-breeds"were not considered to be desirable settlers - they allegedly did not know how to effectively utilize European agricultural techniques, and could not be trusted to be loyal to the government. Therefore, the policy was to push aside, isolate, control, swamp and manage the Indians and"half-breeds".[14]

IV. Methods of Implementation:

Following the experience in Manitoba, the Government of Canada decided to avoid the use of land reserves in distributing land to the Metis Scrip issues became the preferred method of land distribution. The initial Order-in-Council providing for the 1885 Scrip issue provided only for money Scrip.[15] Money Scrip was easy to distribute and was popular with the land speculators. It ensured a quick method of passing Metis land entitlement to other persons, as Archibald had suggested in 1870.[16] When the Metis at the Qu'Appelle Lakes refused to accept money Scrip (personal property) and demanded land Scrip (real estate), the government quickly amended the P.C. Order to provide for a choice of money or land Scrip. (The difference in the Scrip and the legal impli-

cations will be discussed in the next section of this Chapter). As a result, the government rescinded P.C. Order 688/85, dated March 30, 1885, and passed a second Order, P.C. Order 821/85, dated April 18, 1885, to provide for a land certificate (land Scrip) as an alternate to money Scrip. The total number of Orders-in-Council passed dealing with Scrip and land grants numbered in the hundreds. They dealt with provisions to issue Scrip, the setting up of "half-breed commissions", individual cases, special classes of cases, special situations and regulations governing the process for issuing Scrip and its use. There are, however, a limited number of P.C. Orders dealing with major issues of Scrip. These included:

a) the March 30 and April 18, 1885, Orders covering all areas in which Treaty had been made (Treaty areas 1-6);

b) the May 6, 1898, Order covering Metis in the Treaty 8 area;

c) the March 2, 1900, Order covering children in the Treaty 1-6 areas born between July 15, 1870 and July 13, 1885;

d) the August 13, 1904, Order covering Metis who had moved to and were residing in the United States;

e) the July 20, 1906, Order covering Metis in the Treaty 10 area;

f) the June 27, 1921, Order covering Metis in the Treaty 11 area (this provided for a money payment rather than Scrip).

There were other Orders dealing with the Treaty 7 area and Adhesions, some of which included a substantial number of persons. All of the details, as well as background information, are to be found in a report prepared by N. O. Cote of the Department of the Interior, dated December 3, 1929.[17]

The method of distributing Scrip was through appointed Commissioners. They were appointed by Order-in-Council. Some of the rules governing their conduct were spelled out in these Orders. Other Orders were contained in letters of instruction. P.C. Order 309, dated March 1, 1886, appointing Rodger Goulet as a Commissioner, is typical of such Orders.[18] Originally, the Commissioners were appointed to deal with Metis only. However, starting with Treaty No. 8, the Commissioners dealt with Metis and Indians at the same time.[19] The procedures to be followed by the Commissioners included the following:

a) the time and place of Commission sittings were to be advertised in newspapers and on handbills in land offices, Indian Affairs offices, and other public places frequented by the Metis;

b) applications were received on a standard application form;

c) after review of the application the Commissioner would either reject the application, approve the application or reserve decision until further review;

d) an application would be rejected if the person's name appeared on the list of allottees in Manitoba or previous Northwest lists of allottees, if the person could not prove they were a Metis or if the person was registered as an Indian;

e) if the application was approved, the allottee was issued a Scrip certificate of the type requested;

f) this Scrip certificate, after being duly executed by the allottee or his/her agent, was sent to the Dominion Lands Office in Ottawa and exchanged for a Scrip note(only Scrip notes were negotiable for land);

g) if deferred, the application was referred to Ottawa for further investigation;

h) Ottawa might reject the application, approve the application, or have a special P.C. Order passed for persons who for one reason or another did not fit all of the criteria;

i) an allottee wishing to locate his/her Scrip was to go to the land office covering the area in which he/she wished to live and select a plot of open Dominion land of the specified size and ask that the Scrip be located on this land;

j) when the Scrip was registered against the land, the land patents would be issued;

k) the person would then apply for and be issued the certificate of title to the land.

In addition to the above, there were literally hundreds of individual rulings on cases in dispute or referred to Ottawa for a decision. These rulings usually became established government policy and often had no sound legal rationale. Rulings also changed from time to time, depending upon the policy of the government at various points in time and, in particular, upon the pressures exerted on politicians by Scrip speculators. (These will be explored in more detail later in this Chapter).

V. Scrip:

A. Origins and Purpose:

Scrip is defined as a certificate which gives the

person or corporation to whom it is granted the right to receive something. It is a temporary asset which, in the case of half-breed Scrip, could be exchanged only for land. The idea of using Scrip to make land grants was developed in the U.S.A. where it was allocated to settlers, aboriginal people, and others as a means of bestowing a land grant.[20] In Canada, Scrip was granted to a number of persons or groups other than to the "half-breeds". It was granted to volunteers in Wolseley's Army and Middleton's Army, South African volunteers, and to R.C.M.P. officers on their retirement from the Force. In addition, the government gave Scrip to land companies in exchange for their cash advances on colonization land schemes. Also, some colonization companies used Scrip to allocate lands to persons within the colonization tract.[21] In Canada, Scrip was granted with several key purposes in mind. These included:

i) a means of distributing land which would give individuals flexibility as to where they wished to select their land;

ii) to make certain that if persons did not plan to use their Scrip it would be easily negotiable and passed to speculators or settlers who would locate it on land;

iii) to ensure that land grants bestowed clear title on the grantee or the person using the Scrip.

B. Kinds of Scrip

The original practice was to issue a certificate, made out to "the bearer", on which a money value was specified. The certificate could only be exchanged for land of equivalent value. Since the government in the early 1870s had arbitrarily

set the value of open Dominion land at $1 per acre, a $160-Scrip note could be exchanged for 160 acres of land. Since the certificate was in effect a "bearer bond", it was easily negotiable for money, goods or services. Approximately two-thirds of all Scrip issued in the Northwest was money Scrip. This ranged from ninety per cent money Scrip during the 1885-87 issue to approximately fifty per cent money Scrip in the 1906 issue. Money Scrip was a personal asset covered by personal property laws. There were few restrictions other than those imposed by the government on its use.[22]

Land Scrip was a Scrip certificate which could be exchanged for the stated number of acres of land (160 acres for example) specified on the face of the certificate. The certificate was made out in the name of the person to whom the grant was allotted. Land Scrip was real property and was governed by real property laws. These provided a number of protections to the owner and required that the land title could only be transferred to some person other than the allottee after the allottee had acquired the patent in his/her name. Land Scrip was, therefore, not as negotiable because the speculators required the full co-operation of the allottee in having the Scrip allocated and patented before they could acquire the title. This often involved considerable risk to speculators and might involve substantial additional expenses for the process necessary to obtain the land title. As indicated above, one-third of all Scrip issued was land Scrip. This ranged from ten per cent of the 1885-87 allocation to fifty per cent or more of allocations during the early 1900s.[23] Money Scrip traditionally, therefore, brought a higher price when sold than did land Scrip. It was only when land was re-evaluated and cost considerably more than $1 per acre that land Scrip became popular with speculators and demanded a higher price.

C. Rules Governing Scrip Use

In the case of money Scrip, the Department of the Interior had originally adopted a policy that assignment of rights conveyed by the Scrip would not be recognized until the Scrip notes had been delivered into the hands of the allottee. The allottee had to make his/her own application and send the Scrip certificate to Ottawa. Once the Scrip note was delivered to the allottee, it was considered a personal asset, which he/she could dispose of as they wished.

The original policy included a refusal to accept Powers-of-attorney.[24] The speculators, however, soon challenged these policies which they argued to be in violation of existing civil law. In 1885, the Department allowed Commissioners to accept applications from agents with a properly executed Power-of-attorney, but assignments of Scrip entitlement were not accepted. However, in 1899, a P.C. Order was passed allowing the Commissioners to accept assignments, providing the Commissioners satisfied themselves that the assignments had been properly obtained.[25] In theory, Scrip notes were still to be delivered to the assignee. In the case of money Scrip, applications originally had to be made by the allottee in person. This practice too was changed when challenged by speculators, and agents were allowed to apply on behalf of an allottee. However, assignments of land Scrip were not recognized (except in several cases where exceptions were made). The Scrip note had to be delivered into the hands of the allotee, who had to locate it on land of his/her choice. Only once the patent was issued could the allottee assign his/her title to the land to someone else.[26] Speculators, of course, found ways of getting around these provisions (which will be discussed later in this

Chapter). Other important rulings on Scrip included the following:

i) money Scrip could be claimed by heirs of a deceased allottee and remained a personal right;

ii) land Scrip also could be claimed by heirs of a deceased allottee and remained a property right;

iii) military Scrip, on the other hand, which was all money Scrip, was ruled as being a property right (no rationale was given for this ruling);

iv) Scrip could be used to acquire homestead lands, pre-emption lands, coal leases, pasture leases, and timber leases;

v) if more than one person acquired a Power-of-attorney to the same Scrip certificate, the one to first send in their Scrip certificate with a Power-of-attorney would receive the Scrip note;[27]

vi) "half-breeds" could withdraw from Treaty to receive Scrip but the value of any annuity money received would be deducted from the Scrip.[28] This policy was changed in 1884 so as not to deduct annuities received;[29]

vii) Scrip could only be applied to lands in Manitoba and the Northwest Territories;

viii) the Department was not to be responsible to investigate charges of Scrip being acquired fraudulently. Individuals with complaints were to seek legal remedies through the courts;[30]

ix) large Scrip buyers could establish Scrip accounts with the Department of the Interior and bank Scrip in their accounts. When they decided on the use of the Scrip, the Department would assign the Scrip against land or other transactions on request;[31]

x) Scrip could only be located on open and surveyed Dominion land.[32]

D. Policy Changes or Exceptions:

Some of the changes in Scrip policy are noted above. Namely the policy on Powers-of-attorney and assignments were gradually changed. Specific policy changes included the following:

i) April 13, 1884 -- a P.C. Order was passed accepting assignments of the Scrip of "half-breed" children to the heads of families;[33a]

ii) November 26, 1885 -- the Department ruled that the issue was not who was entitled to Scrip but who could receive delivery of Scrip. A person holding a Power-of-attorney can receive delivery of Scrip;[33b]

iii) July 30, 1886 -- minor children were to be allowed to select their land and receive their patents before they became 18 years of age;[33c]

iv) titles acquired with Scrip were free titles; there was no settlement or cultivation requirement;[34a]

v) January 17, 1892 -- a special P.C. Order was passed to recognize the assignment of land Scrip made by deceased "half-breeds" or by deceased heirs;[34b]

vi) 1897 -- the government decided to accept land Scrip assignments for Scrip issued in 1885-87 which had not yet been redeemed by the allottees;[34c]

vii) October 27, 1899 -- Scrip could be delivered to an assignee if he had a properly executed assignment(money Scrip);[34d]

viii) December 1, 1903 -- Scrip assignments to all Scrip were to be accepted;[33e]

ix) May 29, 1919 -- land Scrip notes could now be located by the assignee without the appearance of the half-breed at the land office;[34f]

There is a proliferation of correspondence on the above policy changes in files dealing with Scrip rulings. They further support the above rulings and indicate how pressure was brought to bear on politicians by lawyers and speculators, which resulted in gradual policy shifts or changes in their favour. There were also several exceptions made to the general rules. In the case of one R. C. Macdonald, who was alleged to have fraudulently acquired large quantities of Scrip granted to half-breeds resident in the United States, a special investigation was held. The investigation cleared Macdonald of any criminal offense, even though a U.S. Court found that the allegations of the"half-breeds,"who had launched legal action of Scrip having been obtained by fraud, were proven. Following the report of the Commission, Macdonald was allowed to locate all of this Scrip on land of his choice without the presence of the allottees, even though all the Scrip was land Scrip. This was done on the authority of the Deputy Minister of the Interior.[35] Other similar exceptions were made at a later date

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E. (e) Law vs Practice:

The question of how the Indians and the Metis were to be dealt with had been of some concern to the Macdonald government for some time. As a result, the government commissioned Flood Davin to undertake a study of the question and make recommendations to the government. He visited the U.S.A. and studied their system, he consulted with the clergy in Western Canada and, as well, he consulted with other interested persons plus officials in the Department of the Interior.[36] He prepared a detailed report with recommendations which he submitted to the government on March 4, 1879. The main recommendations in his report which dealt with the "half-breed" question were the following (Flood Davin later settled in Regina and started the Regina Leader):

- the problems of the Metis could not be settled by an issue of Scrip;

- seed, tools, equipment and livestock should be provided to help Metis get established in farming;

- agricultural training should be provided;

- industrial training schools should be established.[37]

In 1878, David Laird, Minister of the Department of the Interior, urged the government to respond favourably to the Metis request for land and for help in becoming established on farms. In 1878, the Northwest Territories Council recommended that land reserves be set aside for the

Metis and that agricultural aid be given. Others who made similar recommendations to Macdonald during the same period included Colonel Dennis, Bishop Tache, Father Lacombe, and Judge Hugh Richardson.[38] Macdonald, however, rejected this advice and refused agricultural assistance.[39] His position was that the Metis should be dealt with the same as the whites.[40] Nevertheless, Macdonald himself sponsored the amendments to the Dominion Lands Act in 1879 and 1883 dealing with "half-breed" land rights. In spite of this action, in 1884, he still took the position that the Metis should be dealt with the same as whites and did not move to implement the provisions of the Act until forced to do so in 1885. As noted later by Sifton, the government's main concern in issuing Scrip was not the benefit of the Metis, but to placate them so the government could proceed with its development plans.

It would have been relatively simple for the government to set aside land reserves for groups of Metis in areas where they were settled. The government was helping colonization companies acquire blocks of land for colonization purposes at exactly the same time that they were refusing to deal with the "half-breed" land question.

Why did the government use easily negotiable Scrip issues to satisfy the "half-breed" land claims and not help them get established when many influential persons recommended against this approach? It is true that this, in theory, gave the Metis flexibility in selecting their land where they wished. However, since the Metis were inclined to settle together in one area or community, there was no pressure from them for a negotiable Scrip issue or for any form of

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Scrip as the method of providing land grants. This action of the government can only be explained on the basis of the government's policy of dispossessing the Metis.

The provisions of the legislation and the Orders-in-Council could be most easily subverted by an issue of money Scrip. The Metis were temporarily placated; they were dispossessed of their land rights and were forced into isolated rural areas. The land grants quickly and cheaply passed into the hands of speculators. The speculators, wishing to profit from their investments, helped promote the bringing of settlers into the Northwest. The government also eliminated any future challenges to the validity of the land titles which it had given out to individuals and corporations.

In practice, money Scrip notes were to have been delivered to the grantee. Nevertheless, records show that as many as ninety per cent of the Scrip notes were delivered into the hands of banks and other speculators.[41] For example, the government delivered to the banks fifty-two per cent of all Scrip notes. In the case of money Scrip, they had delivered to them sixty per cent of the notes.

It cannot be established from records that the banks had actually purchased all of these Scrip notes. In some cases, the Scrip may have been delivered to the banks at the request of the allottee or the assignee. However, since the Metis were not in the habit of dealing with banks, which were few in number, the amount of Scrip which would fall into this category would not be significant. In addition, we do have the Scrip accounts and correspondence with the Department of the Interior, into which banks deposited sub-

stantial amounts of Scrip to their credit.[42]

The banks also acquired land Scrip but the quantities were small compared to money Scrip - for two reasons. Firstly, the Scrip was classed as real estate and the banks were prohibited under the Bank Act from dealing in real estate. Secondly, the land Scrip was not readily negotiable and therefore had a more limited resale value.

There were many other speculators involved in purchasing Scrip. These included private financial institutions such as Osler, Hammond and Nanton, and Alloway and Champion; land companies such as the Haslam Land Company and the Saskatchewan Valley Land Company; merchants like the Dixon Brothers of Maple Cree; federal politicians including T.O. Davis of Prince Albert, A.J. Adamson of Rosthern; public servants such as Lowe (Deputy Minister of Agriculture), D.H. Macdonald (First Indian Agent in the Northwest), Isaac Cowey (Dominion Lands Agent), plus many legal firms and small town merchants.[43]

According to computer analysis of the data, approximately ninety per cent of all Scrip issued passed into the hands of Scrip buyers. Only ten per cent remained with the allottees.[44] The Manitoba Metis Federation found similarly that ninety per cent of the land grants in Manitoba, under the Manitoba Act, passed into the hands of speculators.[45]

Another method used to acquire Scrip from the Metis was that of using Powers-of-attorney. According to Ruttan, an official in the Indian Affairs office in Calgary, Scrip buyers presenting themselves as government agents would acquire Powers-of-attorney from unsuspecting Metis. Evidence indicates that for more than a year prior to the

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1898 Athabasca Scrip issue, agents were approaching Metis offering to represent them and to present their Scrip applications for them to the Commissioners when they visited the area to take Scrip applications. They would make a cash payment of $25.00 with the offer of more money at some future date when the Scrip was issued.[46] Generally the Metis would not see the agent again. The practice was to use Powers-of-attorney to make the application, and once having received the Scrip certificate, to use that same Power-of-attorney to obtain the Scrip note. In the case of money Scrip, the speculator then had a negotiable document. In the case of land Scrip, blank quit-claim deeds were used to assign the land entitlement. These were completed when the Scrip had been allocated. This was done either with the collusion of land agents or fraudulently.[47]

Not only did the government keep Scrip accounts for speculators but it actively advertised Scrip for speculators; and where Scrip could be obtained, by posting these on bulletin boards in Dominion Land offices.[48] In addition, various speculators, including banks, ran regular advertisements in daily and weekly newspapers advertising Scrip for sale. Some banks also ran advertisements which indicated they would buy Scrip.[49]

Other evidence of bank activity is to be found in the financial records of the Dixon Brothers of Maple Creek. (These records are now in the Public Archives in Regina. They give us a glimpse of the extent of the "behind the scenes" buying and selling of Scrip). The Dixon Brothers were direct buyers of Scrip, and according to Scrip records acquired

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approximately 200 Scrip notes with a land equivalent of $40,000 or 40,000 acres. However, they did extensive buying and selling either through agents or from others who bought and sold Scrip. They had extensive contacts with all the big Scrip buyers such as R.C. Macdonald, D.H. Macdonald, McDougall and Secord, Alloway and Champion, Fewing, the Cowdry Brothers and others. The quantity of Scrip they sold was substantial and far beyond what the records show they acquired. The following are examples of Scrip orders placed with the Dixon Brothers by several banks during the period 1900 to 1904:

i) Union Bank of Canada:

| | | |
|---|---|---|
| July 1901 | - | $ 5,000 |
| October 1900 | - | 10,000 |
| November 1900 | - | 15,000 |

ii) Imperial Bank:

| | | |
|---|---|---|
| 1901 | - | 10,000 |

iii) Merchants Bank:

| | | |
|---|---|---|
| March 1901 | - | 10,000 |

Other large orders were received from R.C. Macdonald - $25,000; Atkinson - $70,000; R.C. Macdonald - $15,000. Not all of these amounts were taken or supplied but the very size of the transactions indicates the nature and degree of the Scrip speculation, which is not in any way revealed by records (which will be reviewed in detail in this Chapter).[50]

A lawyer named Fillmore, who practiced law in Winnnipeg for many years, in an article published in the Manitoba Bar Review in 1945, described how Scrip speculators

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operated. He was an Articling student in a well-known Winnipeg law firm. In 1906, he was sent by his supervisor, a lawyer named McDonald, to go to Ile-a-la-Crosse to buy Scrip to be issued in connection with the signing of Treaty 10. He and several other buyers from Winnipeg travelled by train with Commissioner McKenna's party. Charles Mair, of Red River fame, was Secretary to this Commission, as well as to previous Commissions.

At Prince Albert they were met by other speculators who all travelled in the company of the Commissioner to Ile-a-la-Crosse. When they reached their destination the speculators got together and set up an informal syndicate to buy the Scrip at an agreed price. They set up their tents approximately 100 yards from the Commissioner's tent. As Metis were issued Scrip, they were escorted to the next tent where their Scrip was purchased from them. Fillmore believes they bought most of the Scrip issued.[51] This is not surprising, since Scrip could only be located on open and surveyed Dominion lands, of which there were none anywhere close to Ile-a-la-Crosse.

Approximately sixty per cent of all Scrip issued at Ile-a-la-Crosse was land Scrip.[52] Fillmore related how local Indians and Metis were enlisted to help locate this Scrip fraudulently in the Winnipeg land office. There is no reason to believe that similar practices were not followed by Scrip speculators from Regina, Prince Albert, North Battleford, and other centres, who were present and had purchased Scrip The records also indicate that Powers-of-attorney and blank quit-claim deeds signed by the allottees were widely used in these transcations.[53] Complaints to the Department of the Interior over this practice by the allottees were rejected.

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The Department claimed that it had no responsibility in the matter and persons could take their complaints to court.[54] Legal action was launched against one of the primary abusers of Scrip - the law firm of McDougall and Secord. The law firm was committed for trial after the preliminary hearing found sufficient evidence of fraud to warrant a trial. The government immediately rushed to pass legislation in 1920 limiting the time period between the commission of the allotted Scrip fraud and the date a charge could be laid to three years.[55] As a result, legal action against McDougall and Secord was dropped, even though the legislation was not retroactive.

F. The Uses to which Scrip was put:

When half-breed Scrip was provided for in Orders-in-Council the Orders made it quite clear that a land benefit was being bestowed on the allottee. The Scrip notes themselves also clearly stated they could be exchanged only for open Dominion land. This was the end use of Scrip notes. The Metis and speculators found that Scrip could be used for other puproses than those intended, since its end value in land made it negotiable for other purposes. This was true to a lesser extent for land Scrip.

Because of the desperate and destitute situation of the Metis the Scrip was often sold for cash, bringing amounts equivalent to 25 cents on the dollar or acre in 1878, to as high as five dollars per acre for land Scrip in 1908. The majority of the Scrip, however, was sold for approximately one-third of its face value. Scrip was also exchanged for farm animals, implements, seed, food, and other supplies.

Land Scrip in particular was useful for this purpose, as it was bartered with local merchants and local farmers who were able to obtain the co-operation of the Metis in locating the Scrip on land. In a money-starved economy, Scrip became a form of currency. Merchants and small-town lawyers may have sold their Scrip to banks or land companies for a profit rather than using it themselves.

Scrip also was to have a number of other official and unofficial uses. As mentioned previously, land companies such as the Haslam Land Company and the Saskatchewan Valley Land Company bought Scrip. The government allowed these companies to use it to make down payments on colonization lands and other classes of Dominion lands. Other speculators such as Alloway and Champion also used Scrip to acquire land. The Canadian Pacific Railway used Scrip to acquire townsites where these happened to fall on sections not owned by the Railway.[56] It would also appear that banks may have used Scrip to create money. (This will be discussed in more detail later in this Chapter).

The government itself gave official approval to a number of alternate uses of Scrip. Some of these were approved by P.C. Orders and others were carried out as a question of government policy. We would suggest that some of these uses were not legal under the terms of the P.C. Orders, which provided for Scrip issues. The following were some of the specific ways in which the government allowed Scrip to be used:

i) October 16, 1899 -- Scrip was accepted in payment for hay and grazing permits only;

ii) May 1, 1900 -- Scrip could now be used to pay rent on ranch lands;

iii) May 1, 1900 -- Scrip could now be used to obtain surface, mineral and coal rights;

iv) April 28, 1902 -- Scrip could be accepted in payment for rent due or occurring due on lands in the Rocky Mountain Parks of Canada;[57]

v) 1901 -- farmers could use Scrip to buy homestead and pre-emption quarters they occupied.[58]

In at least one case involving a politician, a former Lieutenant-Governor and other friends, Scrip was applied to the purchase of timber leases.[59] It is obvious that Scrip rulings were made to facilitate the government's policy for the West. (This fact will be examined in more detail later in this Chapter).

G. Scrip speculation:

Land speculation is of course an old art, since the source of all wealth is the renewable and non-renewable resources which the land relinquishes to its owners or to those allowed to exploit those resources. The interest in the land of the west by British and Canadian capitalists as a place where they could invest their surplus money and reap large profits was, of course, an entertaining prospect. However, the prevailing government philosophy of the time was not to allow wealthy corporations or individuals to acquire large tracts of land or control over large quantities of land in the West.

The Canadian and British governments recognized that it was not in the interest of their development and settlement policies to allow such control over land to take place. The merchants had become the new class of power and wealth. Their wealth was based on the production and sale of consumer goods and goods required for capital investment, such as buildings, machinery, tools, etc. The more consumers, the more goods could be sold. In addition, the transportation system and communications system required a large number of settlers. Therefore, it was in the general interest of those who controlled power to have most of the land owned and controlled by the government. This would allow the government to develop a generous land settlement policy to attract large numbers of immigrants. The government also needed the land to finance railway construction.

The government could give generous land grants to encourage private investment in railways. It was an inexpensive way for the government to ensure the building of the transportation system. In addition, both the railways and their investors would promote immigration to ensure that their investments paid off.

As well, the government offered cheap colonization lands, in what were considered to be less desirable settlement areas, to corporations who would take on the responsibility of recruiting and settling immigrants. This land was to be sold to these immigrants at a profit. For the most part, these were areas not served by railways and which were considered to have a more marginal climate for agriculture. These policies had worked in the U.S. and, therefore, the Canadian government

decided to implement them in the Northwest. All of these schemes had limits on the prices which the immigrants and settlers could be charged for the land. Naturally, the government and the merchants needed large-scale agricultural settlements if these policies were to encourage profitable development.

Therefore, land which could be acquired with Scrip was a very attractive speculative device because land grants given by the use of Scrip carried a clear title. There were no conditions on the use or resale value of the land. Also, there were no improvement conditions for agricultural use, as was the case with the homestead and pre-emption lands.[60] The "half-breed"money Scrip, in particular, was in more demand than land Scrip, since money Scrip was considered personal property and easily negotiable. It could easily be redeemed for land. Also, since the Metis , with their economy and lifestyle destroyed, found themselves desperately in need of cash or goods, the Scrip could be acquired inexpensively and turned into land or other assets which quickly appreciated in value.

The policy regarding"half-breed"land also accomplished the goal of getting the Metis off the land and out the way of the settlers. The policy with other forms of Scrip such as Scrip for soldiers, volunteers, and the N.W.M.P. encouraged them to settle in the Northwest. This, of course, did not prevent those who didn't want to farm from disposing of Scrip to speculators or using it themselves for speculative purposes. However, it did discourage the large speculators from dealing in such Scrip, making it more difficult to turn that type of Scrip to a profit.

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Speculation in"half-breed Scrip"began in the Northwest shortly after the Manitoba Act was put in place, and continued as long as Scrip could be redeemed for land. Speculators began to buy land entitlement (quit-claim deeds) and Scrip from the Metis at prices which gave settlers only about one-quarter of the actual value of the land as established by the legislation at the time.[61] As indicated above, there were a number of uses for the Scrip, which enabled buyers to sell for a profit to farmers, banks, and to those wanting to use the Scrip for other purposes. For those buyers who had access to surplus capital of their own, they could afford to buy, locate the Scrip, and hold the land until the influx of settlers and the availability of land was such as to drive up prices. Because of the low price of Scrip, such transactions proved profitable even though investments were drawing no interest.

Small town merchants, for example, exchanged goods for Scrip at prices which guaranteed the merchant a substantial profit when he sold it. Some of these persons also converted the Scrip into land to be held for future sale. Others such as politicians, civil servants, and lawyers, supplemented their income in this way and, in some cases, turned the Scrip into large holdings or into valuable mineral or timber resources. For example: A. J. Adamson, MP for Rosthern, and a business partner of Sifton, patented approximately 240 quarters of land in Saskatchewan using Scrip; D. H. Macdonald, first Indian agent in the Northwest Territories, patented approximately 160 acres in Saskatchewan under his name using"half-breed"Scrip. This speculation assisted the government in the achievement of its settlement and development policies.[62]

## H. Scrip and the Creation of Money

Although the Northwest had been added to Canada as a territory in 1870, and the federal government had high hopes for rapid settlement of the area, this settlement did not proceed as planned. The government, by 1878, through Treaties 1 to 6, believed it had acquired title to almost all the land in what was known as the fertile belt. Only land in some of the more northern areas of the prairies - now agricultural land, but not considered particularly suitable for agriculture at the time - had not been acquired from the Indian inhabitants. By 1885, all of the Indians in an area east of Battleford had been placed on reserves. In the western area, Indians were still resisting taking reserves. In spite of these preparations, the rapid influx of settlers did not take place. The building of the C.P. railway had encountered many problems and, unfinished, it had come to a standstill in 1884. Macdonald was unable to persuade Parliament to provide the builders with further funds.

Since there were no export markets and since getting goods and machinery into the area was extremely expensive, the area was still not attractive to European settlers, who were attracted by the better opportunities in the U.S.A. Government census figures indicated that in 1886, in all of the Northwest outside of Manitoba, there were not more than 10,000 non-aboriginal settlers. As a result, the area was not attractive for developers and investors. The needed services and infra-structure were slow in developing for reasons sited above. As well, the government was spending little money on public works in the area. According to old

settlers of the time, records of the Northwest Territories Council, and letters of William Henry Jackson, the area suffered from a perpetual depression. With investment limited, the fur trade and the buffalo hunt greatly depleted, and limited government expenditures, there was a serious shortage of money in the western economy. Farmers and businessmen had great difficulty acquiring loans ,as there was no cash market for their produce.[63]

The military action in 1885 did inject badly needed cash into the Northwest economy. This spurred the completion of the railway in 1886, which injected more money into the prairie economy. However, these events injected only a short-term cash flow into the economy. The solution to long-term injection of money depended on several factors. Firstly, rapid settlement which was still discouraged because of the lack of transportation connecting with the Canadian Pacific Railway. Secondly, the lack of private investment by farmers, small businesses, banks and other financial institutions and government investment. The major investments would have to come from the financial institutions. These were still small in number and reluctant to invest without good collateral, since the Northwest was still a high risk investment economy. Early settlers, nevertheless recollect that after 1886 they experienced no problems getting money from banks with little or no collateral demanded.[64]

In 1885, when "half-breed" Scrip began to be issued, money was still in short supply. In particular, the Metis themselves had access to very little cash because of the economic situation in which they found themselves. Therefore, Scrip notes became a form of currency and were accepted

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as such by merchants because of their end value. Records indicate that Scrip, in addition to being sold for cash, was also traded for groceries, clothes, farm animals, tools, equipment and other goods needed by the Metis. Money Scrip was mostly sold for cash and land Scrip was primarily exchanged for goods. This was due to the nature of the instrument which has been discussed in detail previously in this Chapter. Since speculators could use Scrip to acquire lands and for other economic purposes discussed above, it was as good as money to them. Merchants could also use it to acquire goods from wholesalers, and some wholesalers such as the Dixon Brothers of Swift Current and Maple Creek traded extensively in Scrip.

The direct use of Scrip as cash, although important, did not solve the need for large investments in a largely undeveloped economy. In addition, in 1886, only a limited number of farmers could get their products to market easily. For the rest, grain had to be hauled long distances at considerable cost. As a result, it appears the banks played a major role in the creation of money, using Scrip.

Our records, at first glance, indicated that the banks might simply be offering a service to speculators and allottees by receiving and selling Scrip for them. However, as more information was examined and analyzed, it became obvious that the major portion of the money Scrip notes were delivered to banks. A final computer tabulation of Scrip from individual files and from the Scrip accounts maintained by the Department of the Interior indicates that approximately fifty-two percent of all Northwest"half-breed"Scrip was delivered

to chartered banks.[65] Since the regulations followed by the Department originally were that Scrip must be delivered to the allottee or his/her agent (persons having Powers-of-attorney), one must question whether the policy was followed strictly, in practice. Alternately, one must conclude that banks were acquiring Powers-of-attorney from Metis entitling them to act as their agents. If this is so, many of the Scrip buyers who followed around the Scrip commissioners must have been buying for the banks. By the late 1890s, when assignments of money Scrip were accepted, the quantity of Scrip purchased by the banks increased. The bulk of the Scrip was issued between 1898 and 1908. This period coincided with the boom in immigration. It would also have been the period when the demand for money from the banks was the greatest.

Other evidence of the involvement of the banks in Scrip speculation is found in an article by Peter Lowe, titled "All Western Dollars". The article outlines how private banks were involved in Scrip speculation and how they used Scrip. The title of the article implies that the West was developed with western dollars.[66] (The question is, how could this happen when the resource base on which the creation of wealth took place was still largely undeveloped?) Other evidence of bank speculation in Scrip can be found in old newspapers where banks regularly advertised both the purchase and sale of Scrip.[67] In actual fact, it is likely that banks acquired much more than the fifty two per cent of Scrip shown by the individual files, since the banks also bought Scrip notes from merchants, Metis and other buyers after the notes had been delivered.

Why did the banks buy Scrip in large quantities? This question was puzzling from the beginning, since the Bank Act at that time prohibited the banks from dealing in real estate.[68] A check of the Land Archives in Saskatchewan indicates that banks did not use Scrip to patent any land in their own corporate names. It is known that banks sold Scrip "over the counter" to farmers. The records also indicated that they sold Scrip, in quantity, to land companies. At least one such transaction is verified by the Scrip buyers' accounts.[69] Lowe's article indicates that other buyers were corporations such as the Haslam Land Company and the Canadian Pacific Railway.[70] In the case of the former, Lowe's allegations were verified by a check of the Land Archives which show that the Haslam Land Company applied large quantities of Scrip to land acquisitions in Saskatchewan.

Although these sales would have brought the banks some profit, they did not in themselves explain the banks' involvement in Scrip speculation in such a major way. Although we can only speculate on this, since we do not have access to bank records, it appears that banks used the Scrip to create money. Here we draw on information regarding the essential nature of the banking system. Banks have two sources of funds: their own assets and the deposits from customers. In regards to deposits and bank assets, the banks could put into circulation bank notes to the equivalent value of these deposits and assets, less the margin of cash which banks had to keep on hand to meet day-to-day requirements. This would mean Scrip enabled banks to increase the cash they put into circulation. This additional cash was acquired at considerably less than the value of the bank notes. In addition, banks could make loans against both deposits and assets. There was no control on the ratio of bank loans to bank assets prior to 1930.

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In a 1930 House of Commons debate on amendments to the Bank Act, it was pointed out by an M.P. that it was not uncommon prior to that time for banks to make loans to the value of up to ten times their assets.[71] It will be recalled that speculators bought Scrip for approximately one-third of its land value. Banks were no exception to this practice. In the possession of banks, Scrip notes became an asset in the amount specified on the face of the notes. The banks could use these notes as an asset for the purpose of creating loans. Therefore, they had in their possession an asset that they could use to create money by granting loans on easy terms. Let us examine the following propositions:

- an Imperial Bank in Moose Jaw acquires $1,000 worth of Scrip for $350;

- the Imperial Bank issues up to $10,000 in loans against this asset at six per cent;[72]

- if sixty per cent of the creditors pay their interest the first year, the banks realize $360 interest or enough to cover the original cost of the Scrip;

- if only sixty per cent of the loans are repaid, the banks end up with a cash asset of $6,000. The original value of the original Scrip notes increased very quickly;

- since it is common knowledge that most settlers repaid their loans, the actual return to the banks would have been much larger than indicated above;

- since the banks had some two million dollars worth of Scrip delivered to them, and probably acquired additional amounts through purchases of notes from other holders of Scrip, it can be seen that enormous quantities of money could be created in a short period of time.

Hence, Peter Lowe's suggestion that the West was developed with "All Western Dollars". Even if there were defaults on loans, the loans still found their way into the economy and generated economic activity. Even on defaults the banks stood to lose nothing and the assets of the shareholders were not endangered in any way.

The Scrip records indicate that Scrip was sometimes held by the banks for up to thirty years before it was sold to someone who would redeem it for land. By this time, its value had increased substantially and banks could sell the Scrip at a profit to farmers and other persons who could use it, thereby recovering their initial investment. It is known from advertisements in newspapers and in land offices that banks pursued an active policy of selling Scrip in this way, after having it in their possession for some years.[73] It is interesting to note that the Government of Canada was obviously aware of the banks' purchase of Scrip and openly collaborated with them by allowing them to keep Scrip accounts in Ottawa and by advertising their Scrip free of charge in their land offices.[74]

## 1.i The Scrip Speculators

What is of interest about the speculators is that they were generally active - buying peoples' land entitlement or Scrip entitlement well before the administrative and legal machinery was set up to distribute the land entitlement. This was true in Manitoba where speculators obtained assignements to river lots, reserve lands and Scrip in advance of their issue. In Manitoba, this happened in part because of the years of delay in confirming title and in distributing land and/or Scrip. The speculators, therefore, had considerable time between the passing of legislation and the announcement of policy, and the actual implementation of that policy, to pressure people into selling their entitlement. Laws were passed disallowing such assignments, and although the Dominion Lands Branch policy was not to recognize these assignments, many indeed were recognized. Even where they weren't recognized, this proved to be only a matter of formality. The allottee usually co-operated in the process of obtaining his title and then by quit-claim deed transferring the title to the speculators.[75]

In Manitoba, the longer the delay in distributing land grants, the more desperate became the position of the Metis This increased the pressure on them to sell their entitlement to the speculators. When they sold their entitlement, many Metis left the area and moved west where they could find new land. In other cases they moved without selling their entitlement. The research of the Manitoba Metis Federation indicates that the census confirms that many people had left the Red River area before receiving their land grants. In spite of this, most of these entitlements were registered in the name of former residents and then transferred to the

speculators. In Manitoba the speculators were persons already well-known in the Red River, such as Dr. John Schultz, who, for example, acquired 10,000 acres of river lots; Donald Smith, Charles Mair, James McKay, Bannatyne and others. As well, newcomers such as the law firm of Bradshaw, Richards and Affleck and entrepreneurs like Alloway and Champion acquired land. Also, the trust companies and banks were active in Scrip and land speculation.[76]

Government files show that speculators often made conflicting claims to land - more than one speculator having purchased an assignment. As a result the government adopted a policy of recognizing the first assignment submitted for registration to the Department of the Interior. Speculation in land became such a pervasive practice that it prompted historians to liken the Manhatten Island purchase as a "Sunday school picnic" compared to speculation in Northwestern Canada.

Speculators in the Northwest, outside of Manitoba, included the following categories of speculators:

1. Chartered Banks:

| Name of Speculator | Number of Land Scrip Acquired | Number of Money Scrip | Totals |
|---|---|---|---|
| Imperial Bank of Canada | 1,721 | 4,659 | 6,380 |
| Merchants Bank | 271 | 2,286 | 2,557 |
| Bank of Hamilton | 25 | 878 | 903 |
| Bank of Montreal | 46 | 359 | 401 |
| Dominion Bank | - | 365 | 365 |
| Bank of Ottawa | - | 180 | 180 |

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| Name of Speculator | Number of Land Scrip Acquired | Number of Money Scrip | Totals |
|---|---|---|---|
| Federal Bank of Canada | - | 183 | 183 |
| Molson's Bank | 36 | 76 | 112 |
| Banks acquiring less than 100 notes (Nova Scotia, Union, Ontario, Commercial) | 22 | 253 | 275 |
| TOTALS | 2,189 | 9,314 | 11,499[77] |

Scrip notes were generally issued in 160-acre amounts, plus 80-acre amounts where the grant went to children. In the case of heirs, smaller amounts were issued depending upon the number of heirs. A spot check indicates that the average acreage per Scrip note was approximately 130 acres. The above statistics are based on tabulations of approximately eighty per cent of the files. The other twenty per cent were not available, having been lost or destroyed in other ways. If we assume that in the case of the twenty per cent of the files unaccounted for, the breakdown between the banks and other speculators is consistent with the above figures, we can project that in the case of the Imperial Bank, for example, that they acquired approximately 8,000 Scrip notes with a land value of 1.04 million acres. For all banks the number of Scrip notes would be approximately 15,600 and the land value would be somewhat in excess of two million acres.

2. Private Banks, Financial institutions and other major speculators:

| | Land Scrip/ | Money Scrip/ | Totals |
|---|---|---|---|
| Osler, Hammond and Nanton (private bank) | 8 | 1,366 | 1,374 |
| Alloway and Champion (private bank) | 15 | 814 | 829 |

| | Land Scrip/ | Money Scrip/ | Totals |
|---|---|---|---|
| Conroy(civil servant) | 408 | 45 | 453 |
| R. C. Macdonald(speculator) | 22 | 187 | 209 |
| Dixon Brothers(merchants) | 17 | 180 | 197 |
| McDougall and Secord(lawyers) | 75 | 103 | 178 |
| D. H. McDonald(civil servant) | 134 | 40 | 174 |
| Adamson(M.P.) | 94 | 53 | 147 |
| *Delivered to Dominion land agents | 1,946 | 172 | 2,118 |
| Speculators acquiring less than 100 | 83 | 413 | 496 |
| TOTALS | 2,812 | 3,363 | 6,175[78] |

*It is assumed that most Scrip delivered to land agents was passed on to the grantee by the agent. However, it is known that a few agents, such as Isaac Cowey, were involved in Scrip speculation after leaving their positions with the Dominion Lands Branch. There, however, is no direct evidence to verify that any individual land agent was involved in Scrip speculation while an employee of the Department.

Other speculators included Chaffey, Cowdry Brothers, Haslam Land Company, Tait, Hudson's Bay Company, Sgt. Watson Camkin, etc.

There were numerous other buyers who bought a small number of Scrip - less than 19 - accounting for approximately 3,000 Scrip notes. Approximately 2,800 Scrip notes were retained by the allottees. All of the above figures need to be increased by one-quarter to account for the lost files and records.

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The total number of Scrip notes issued was approximately 31,000. Of this number, they were delivered approximately as follows:

TO:

| | | |
|---|---|---|
| Allottees | 11% | 3,500 |
| Dominion Land agents | 8% | 2,600 |
| Small speculators | 12% | 3,700 |
| Private institutions and large speculators | 17% | 5,600 |
| Chartered banks | 52% | 15,600 |
| TOTAL | 100% | 31,000 |

Many well-known businessmen such as Donald Smith, George Stephens, and Senators, were on the Boards of banks. Alloway and Champion were volunteers in Wolseley"s Army in 1870. Osler, Hammond and Nanton was a politically well-connected private financial institution with interests in a private bank, a mortgage company, a trust company, and with major real estate holdings in Western Canada. Adamson was a Member of Parliament from Humbolt, a business partner of Michall Sifton, and a brother-in-law of Turrif who was for a time Chief Commissioner of Dominion Lands under Sifton. Conroy and D. H. McDonald were officals in the Indian Affairs Administration. Sgt. Watson was a N.W.M.P. officer. Other speculators had equally interesting backgrounds and careers, such as Lowe, Federal Deputy Minister of Agriculture, and T.O. Davis, an M.P. from Prince Albert who later became a Senator.

Many speculators were in a good position to know about government intentions before policy decisions were actually made. Even Dewdney, in a letter to Macdonald dated April 18, 1885, believed white speculators were encouraging the Metis to agitate for a land settlement. This was so even though there was little advance notice of the Scrip issue. In later issues, speculators always knew about these issues in advance of government decisions being made. As a result, speculators like R. C. MacDonald, McDougall and Secord, and others were busy buying entitlement to land before the allottees even knew that they would be granted Scrip.[79]

J. 1) Withdrawals from Treaties:

An examination of Scrip policy indicates that the government became increasingly more generous in its granting of Scrip and the rules surrounding the issue and use of Scrip. The government moved progressively from Macdonald's position in 1884 that the Metis had no aboriginal rights, to 1900 when they granted Scrip to all those Metis who were born prior to July 15, 1885, and to the policy of granting Scrip to all born before the date of the Treaties in areas ceded after 1885.

The question of who was a Metis or who was an Indian did not receive any major debate, nor were there any rulings on the question. Indians, of course, were defined in the Indian Act. Any Metis who lived with or followed a lifestyle like the Indians could join a band and enter Treaty. In the 1884 House of Commons Debates, Macdonald indicated that "half-breeds"who wished to be treated like Indians could join an Indian band and enter Treaty.[80]

In the issuing of Scrip, this rule of thumb policy was implemented by some of the Commissions quite rigidly, and by others not at all. The 1906 McKenna Commission, for example, allowed the aboriginal peoples to self-identity. In his report, McKenna said that they all looked the same to him and that they all lived the same; therefore, he let them decide whether they wished to choose Treaty or Scrip.[81]

The question of identification was not one of ancestry, but primarily one of culture and lifestyle. By 1886, there indeed were few full-blooded Indians in the Northwest.

This fact did not escape the notice of the speculators and they soon began a campaign of agitation among the people of mixed-ancestry living on newly formed reserves in the Northwest. The pitch was that they would be better off taking Scrip and should lobby the government to allow them to withdraw from Treaty and take Scrip. The speculators would buy their Scrip at a good price.[82] As a result, those Indians of mixed-ancstry did begin to agitate for their release from Treaty.

Before 1884, there already was a policy in place allowing withdrawal from Treaty by"half-breeds".[83] The reason for this policy is unclear but it must have related to Manitoba Indians. There was no definition of who fitted this category.[84] Applications for withdrawal from Treaty were approved unless it was quite clear that the applicant had always associated with an Indian band or always had been identified as an Indian by his/her band. The withdrawals from Treaty were to be granted on the basis that the value of any annuity money received by the allottee would be subtracted from the value of his/her Scrip

entitlement. Also, it was ruled that discharged "half-breeds" could not retain land on a reserve. The government amended the Indian Act in 1884 to provide for withdrawal by "half-breeds" from Treaty without the penalty referred to above.

As withdrawal applications were approved, Scrip applications were accepted and the Scrip certificates issued. Since the speculators had bought most of these Scrip entitlements, the Scrip immediately passed into the hands of speculators and the Metis after spending the little cash they received were left poor and, as they quickly discovered, had no place to live. The speculators had never informed the Indians of mixed-ancestry that they could not live on the reserves, and they assumed that they could do so, continuing their life-style. They soon discovered that Indian agents were attempting to evict them from reserves. They had no place else to go and were destitute. They would have been in extreme poverty if removed from reserves. This resulted in agitation by some to re-enter Treaty. The Indian Act was again amended to provide for this change, since to re-instate them under existing law was illegal, in the opinion of Reimer, a clerk of the Privy Council.[85]

In 1901, the policy of re-admitting "half-breeds" to Treaty was approved on the condition that the value of Scrip would have to be deducted from future annuity payments (Treaty money) before these persons could receive any more annuities.[86] As indicated above, the provision to deduct annuities received from the value of the Scrip issued was discontinued by an amendment to the Indian Act and Ministerial Order.[87] Not to do so would have put the speculators at a disadvantage, since

the Indians of mixed-ancestry would not have applied for withdrawal if there was no financial gain for them. The exact number of persons withdrawing from Treaty has not been tabulated but the numbers reached in excess of 1,500 families. During the period 1892 and 1901, approximately 100 families were discharged from Treaty and in 1885 to 1886 the number was approximately 750.[88] Some Indians withdrew from Treaty prior to 1884 and considerable numbers of persons applied for withdrawal between 1885 and 1890 and between 1900 and 1910. Many of these lists are to be found in Sessional Papers.[89]

Many of those Indian families withdrawing from Treaty were later allowed to re-enter Treaty. The result was that the government had to honor the Scrip issued to these persons, almost all of which passed to the speculators. The persons involved benefitted little from the money they received for their Scrip, since the proceeds had to be used to cover their living expenses. Having withdrawn from Treaty, these families could no longer qualify for Indian Affairs rations and had to support themselves.

The money was quickly used, leaving these persons destitute. The government's options were to let them starve, risk further trouble with the Indians and Metis , or accept them back into Treaty. The latter course was adopted. These events came to pass in spite of the fact that officials on the spot informed the political decision-makers of the activities of the speculators and of the possible consequences.[90] The result was suffering and deprivation for the Indians of mixed-ancestry, a double cost to the taxpayers (land grants, plus Treaty benefits) and a boon to the speculators who acquired the Scrip for approximately one-third of its value and who located it on lands of their choice.

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## K. How Policy Encouraged Speculation

The government policy was designed and/or changed in a number of ways to aid the speculators and to ensure that only a few Metis would ever benefit from Scrip. These policies and their effects included the following:

- in Manitoba there were long delays in implementing the provisions of the Manitoba Act, numerous changes to legislation and policy and, in general, the process of proving title to occupied lands was made difficult. Also, lots were divided up by surveys and road allowances. In addition, the rigid interpretation of regulations resulted in many occupants not receiving title to lands they occupied. The result was a large-scale exodus of persons from the Red River to areas in the Northwest where no restrictions on land use yet existed. Speculators were able to acquire assignments to entitlement and/or to title at fire-sale prices;

- parish lists of"half-breed"children entitled to Scrip in the reserves were duplicated and sold to speculators. There were long delays in distribution and much of the land selected was outside the existing parishes. As families left, so did the children, and entitlement and title were assigned to speculators;

- the Indian entitlement of heads of families was granted in money Scrip in small denominations easily distributed to and negotiable by speculators for land. As people left the area, Scrip entitlement was sold at low prices;

- title and access to haylands was denied. A Scrip issue was given to river lot owners to compensate them. This entitlement went with the river lots, many of which had already been sold, and since the Manitoba Scrip had no use outside Manitoba or in reserved areas, it too was sold.[91]

Outside Manitoba, in the Northwest Territories, policies also aided the speculators. Some of these policies and their effects were as follows:

- the grant was again to be made a personal property grant - money Scrip. As has been seen, this Scrip was negotiable and easily located by speculators. Since Metis were in desperate financial circumstances, their first priority was to acquire cash to survive. Also, their lack of education and knowledge of the English language made them easy prey for unscrupulous speculators who obtained signatures to Powers-of-attorney and blank quit-claim deeds;[92]

- although the Commissioners originally decided not to accept Powers-of-attorney, this decision was challenged by speculators as being contrary to the accepted law of the country. Powers-of-attorney were then accepted, allowing an agent to apply on behalf of the grantee;[93]

- assignments of money Scrip entitlement were also refused and challenged as in violation of personal property laws. The Commissioners were then instructed to accept assignments if they were satisfied they had been validly obtained. In 1893, it was decided that all assignments held by speculators for Scrip issued in Manitoba in the 1870s would be accepted. In 1897, it was decided that properly executed assignments for Scrip of children or minors would be accepted. In 1899, it was agreed that all properly accepted assignments of Scrip would be recognized.[94] All of these special rules were designed to accommodate speculators who held most of the Scrip;

- withdrawals from Treaty were accepted even though they were of little benefit to the Metis It was ruled that the value of annuities received had to be repaid or deducted from the Scrip entitlement. This ruling was quickly changed and Metis withdrawing from Treaty did not have to repay annuities. If they returned to Treaty, as many of them did, the value of the Scrip received was deducted from future Treaty annuities. Again, this

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practice facilitated the goal of the speculators and penalized the unsuspecting Metis who ended up with less cash than if he/she had not accepted the Scrip. A more interesting ruling was one which allowed Scrip to be granted to the children of Metis who entered Treaty if the children's names did not appear on the band register. Since such children could automatically be entered on the band lists, this seems to have been solely designed to aid speculators;[95]

- several other interesting rulings allowed patents to be issued to minors who owned land Scrip. However, title could not be issued or transferred until the minor reached the age of consent. As well, there were no requirements that Metis live on the land or improve it. Both of these rulings aided the speculation in Scrip. The first ruling was given because it was consistent with the laws applying to non-aboriginal children. On the other hand, unconditional land grants deviated from the government policy and practice in dealing with and encouraging settlement under the Homestead Act;[96]

- speculators were allowed to travel with the Scrip Commissioners. Fillmore, in his article on "Half-breed Scrip" describes this fact. Mr. Gregory, an MLA from the Battlefords, in a speech to the Saskatchewan Legislature on February 28, 1938, outlined this practice as

scandalous and common knowledge. In a letter dated March 10, 1900, a Department official, by the name of Cooper, suggested the activities of speculators in the company of Commissioners be closely regulated and set out some proposed conditions. Commissioner McKenna rejected the proposals as impossible to implement and requiring new laws;[97]

- the records are full of indications that speculators had advance notice of Scrip issues or rulings. In 1885, some speculators were buying assignments of Scrip entitlement before the P.C. Order was passed. That same year and the following years, speculators were buying Scrip from Metis who had entered Treaty. In 1896, speculators were buying Scrip assignments in the Athabasca district in anticipation of the signing of Treaty 8. Also, between 1896 and 1900, speculators were buying Scrip assignments from children born between July 15, 1870 and July 15, 1885. This Scrip wasn't issued until 1900. In 1901, R.C. Macdonald had agents in the U.S. buying Scrip from U.S. "half-breeds" who had formerly resided in the Canadian Northwest, and which Scrip was not issued until 1904. In October, 1896, a Department official alleged that a powerful group of politicians and bankers were organizing the Scrip buying. These complaints and warnings also came from clergy and others working in the Northwest. The letters all appear to have been ignored, with no official responses recorded, nor was there any investigation or even suggestions

that these allegations be investigated;[98]

- a number of special exceptions were made to the rules to accommodate all and, in some cases, specific speculators. Although the Department refused assignments for land Scrip, the government allowed speculators to exchange such land Scrip for money Scrip. In 1904, a P.C. Order was passed, authorizing a Scrip issue to U.S."half-breeds", formerly resident in Canada, to apply for Scrip. The Scrip could not be used in the U.S. and had only limited cash value. Since almost all these Scrip assignments were purchased by agents for one R.C. Macdonald, and since all the Scrip issues was land Scrip, Macdonald was the only one who stood to reap any great benefits. A court case was launched against Macdonald in North Dakota, alleging that his agents used fraud in acquiring Scrip. His ownership and location of the Scrip was also challenged by another Scrip buyer in Canada, named Chaffey. As a result, the government appointed Judge Myers as a one-man commission to investigate Macdonald's dealings. Myers found that Macdonald was not quilty of any criminal offenses and exonerated him of all charges. The Deputy Minister then immediately issued an order which allowed Macdonald to locate all his land Scrip, obtained from Metis resident in the U.S., to receive the patents in place of the Metis allottees;[99]

L.(2) Scrip Fraud:

There were numerous charges of fraud made by various officials and others knowledgeable about the activities of Scrip speculators. The frauds appear to have been of three kinds. The most common appears to have been fraudulent misrepresentation of the documents which agents asked the Metis to sign and the promise of further payment of money after the Scrip was issued. The agent generally made a down payment of $25, got the signatures on the documents and then was never seen again by the allottee.

The second kind of fraud was the agent presenting himself as a government employee who would look after the interests of the allottee and, again, the necessary documents would be signed (Powers-of-attorney and quit-claim deeds).

The third type of fraud was in regard to the location of land Scrip in particular. As implied by Fillmore and others, persons representing themselves as the allottee would accompany the speculator to the land office, identify the land desired and receive the patent. The speculator would then complete the blank quit-claim deed and have the land title registered in his/her name.[100]

There were some court cases over Scrip fraud. Most of these cases dealt with disputes between speculators. One case was launched in Edmonton by one L'Hirondelle, an allottee, against McDougall and Secord, an Edmonton law firm, in 1920, almost 20 years after the offense occurred. The preliminary hearing found sufficient evidence to proceed to trail.

At this point a political move was quickly organized in the Senate and a Bill was introduced to amend the criminal code to insert a limitations clause on Scrip fraud. This was the first limitation on prosecution in Canadian criminal law.[101] It limited to three years the period during which a charge for an alleged offense must be laid. This Bill quickly passed both Houses. The provisions of the Bill were not retroactive. The Crown, however, did not proceed with the case but dropped all charges.[102]

## M. Scrip Accounts

Another practice that was a great asset to the speculators was the keeping of Scrip accounts by the Department of the Interior. As speculators obtained Scrip certificates they would send a letter with the certificate to the Department. The Department would then write to the speculator informing him/her of the numbers of Scrip notes. When the speculators wanted these notes applied to land they selected, or to some other transaction, this would be requested by letter and the necessary debit entries would be made in the account. It is not clear whether Scrip notes were actually sent to the land offices. This is unlikely, since the notes had to be returned and filed in Ottawa in any event. Not everyone could open a Scrip account. This privilege was limited to approximately 20 corporations or individuals.

Those who had Scrip accounts included:

Dixon Brothers (Maple Creek)
Osler, Hammond and Nanton (Toronto)

Alloway and Champion (Winnipeg)

Banks:

| | |
|---|---|
| Imperial | Merchants |
| Dominion | Federal |
| Nova Scotia | |
| Union | |
| Commerce | |

Lawyers:

Bradshaw, Richards and Affleck

McDougall and Secord

The small speculators did not receive such privileges.

The banks usually had their Scrip applied to someone else's land transaction. This possibly constituted a Scrip sale, since the banks did not show as shareholders in such companies - a practice prohibited by the Bank Act. For example, the Scrip accounts show that the Imperial Bank transferred $125,000 in money Scrip to the Saskatchewan Valley Land Company, which was used to make payment on a 250,000 acre colonization scheme.[103] Although most of the Scrip entered in Scrip accounts was money Scrip, some land Scrip was banked. This was likely land Scrip where special policy exceptions were made, such as the 1892 exception for Manitoba Scrip and the R.C. Macdonald exception for U.S. residents' Scrip. However, the Imperial Bank entered a considerable amount of land Scrip in their account, which did not originate from either of the above sources. How they obtained this Scrip and the rationale for allowing the bank to do this is unclear.[104]

As indicated earlier in this Chapter, the government apparently followed a regular practice of posting in land offices the names of Scrip buyers and buyers who also sold Scrip.

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A letter of May 1, 1900, gives specific instruction to land offices to advertise the Scrip of Alloway and Champion, and Osler, Hammond and Nanton.[105]

N. J Scrip Use:

The Department approved a number of uses of Scrip other than those for which the Scrip was intended, namely to bestow a land grant on the Metis. . The right to locate the Scrip on open Dominion land made sense based on this intent. However, the other varied uses of Scrip approved, could only be of aid to the speculators and to those interested in using Scrip to acquire certain assets or access to resources. This included the following uses:

- to buy timber leases
- to buy coal rights
- to pay for colonization lands
- to pay recreation lease rents
- to pay for homestead not proved up
- to pay for pre-emption lands
- to pay rent on pasture and hay lands

None of these were uses to which a Metis person would put his/her Scrip. However, these uses greatly enhanced the value of the Scrip to speculators.[106]

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o) Government Action on Fraud:

As indicated earlier in this Chapter, the government was quite definitely aware of the activities of speculators and of allegations of fraud in the obtaining of Powers-of-attorney and of assignments, and even in the location of Scrip. As already indicated in the R.C. Macdonald case, the government set up a Commission to investigate Macdonald's dealings with "half-breeds" resident in the U.S. The Commission report limited itself to whether or not Macdonald committed any offenses in locating Scrip. The finding was that he had not. The use of fraud in acquiring assignments was not dealt with in any depth, since those making the allegations of fraud all resided in the U.S. , where Judge Myers had no authority to conduct an investigation.

In the McDougall and Secord case, the government acted to stop the legal proceedings. However, an appeal was launched by L'Hirondelle's lawyer. This was terminated by using the lawyer's fees as a bargaining tool. The Justice Department had agreed to cover L'Hirondelle's legal fees, as he was destitute. However, the payment was authorized only on condition that the lawyer would drop L'Hirondelle's appeal against the trial judge's decision.[107]

In 1897, D.M. Rothwell, Deputy Minister of the Interior, in a letter to his Minister, said that the policy of protecting Metis rights was no longer an issue. He argued that the Department should drop the requirement that the allottee appear in person to locate his/her land Scrip, so the holders could do this legally and thereby enable the Department to clear up a number of outstanding cases of un-

redeemed Scrip.[108] In a letter to Commissioner Smith on October 19, 1896, an Indian agent in Calgary informed the government that he was aware that hundreds of illegal Powers-of-attorney had been acquired.[109] He recommended against any further issues of Scrip. The Department appears to have ignored this warning and proceeded with the two largest Scrip issues in the Northwest, namely the 1898 Athabasca Issue and the 1900 Issue to children born between 1870 and 1885.

On April 24, 1904, a buyer by the name of Hitchcock was alleged to have illegally acquired all the "half-breed" Scrip in the Lac La Biche area. The Department investigated and agreed not to press charges if Hitchcock would pay all the Metis full market value for their Scrip.

In 1903, a Mr. Robinson, in a letter to Keyes, said large amounts of Scrip were being illegally located by speculators. He wanted to change the regulations to make such locations legal. In 1917, the government agreed to pay court costs for two Metis who claimed their names had been forged on Scrip documents. They lost the case.[110] In 1913, the government adopted a policy of refusing to investigate allegations of illegal practices involving Scrip. The government said allottees could take their cases to court if they had a grievance.[111] Earlier, in 1896 , after receiving a number of complaints of fraud, the Department conducted an investigation.[112] No report was prepared on the investigation, but in 1897 the Deputy Minister recommended another Scrip issue.[113] On May 2, 1910, a Reverend Holmes wrote the Minister, Frank Oliver, about a Scrip scandal and illegalities in Northern Alberta. On May 11, 1910, Oliver replied, saying that the government had no control over what the Metis

did with their Scrip. However, he indicated that if Reverend Holmes would name the persons against whom he was making allegations, the Minister would investigate his allegations. Reverend Holmes declined to name the individual involved in the scandal.[114]

It is quite clear that the government could have taken action to prevent the Scrip abuses if it had so wished. Yet, the government choose to do nothing, claiming that its only responsibility was to:

a) determine who was entitled;

b) deliver Scrip to the allottee, his agent or assignee;

c) in the case of land Scrip, to ensure that the Scrip was located in accordance with proper technical procedures.

As admitted by Sifton in Parliament, the benefit of the Metis was not the government's primary concern in issuing Scrip.

## VI. The Dominion Lands Act and Scrip as a Method of Extinguishing Aboriginal Rights

### A. Introduction

International policy, as well as the policies and laws of the major colonial nations - Spain, Britain and France - were contradictory on the issue of what the rights of aboriginal

people were, including whether they had the right to the land.

The Spanish believed that, based on the doctrine of first discovery, they had the right to claim sovereignty and ownership to the lands of the Indians. Due to abuses of the land grants to Spanish landlords, the religious orders succeeded in having the Royal Court refer the question of whether Indians, because they were heathens, should be recognized as having any rights for study by the Vatican. It will be recalled that Vitoria expressed the view that rights did not rest on one's religious beliefs, and the Indian rights were every bit as good and full as the rights of Europeans. The religious orders set up missions to "train, civilize and christianize" the Indians. When this task was accomplished to their satisfaction, they resettled the Indians in villages adjacent to the missions and where they were given a plot of land and legal title to that land.[115]

The British also claimed sovereignty in North America on the basis of the doctrine of first discovery and refused to recognize Indian title in law. However, British colonies were developed as proprietary colonies by commercial companies. They could not afford wars with the Indians and depended on them for trade and as allies. Therefore, in practice, they recognized them as sovereign nations with all the rights which a sovereign nation has. This included the control and ownership of land and the right to make war. The most expedient thing to do was to buy the land from the Indians. This practice became law in some colonies. This system was also abused, leading to wars with the Indians.

The result was that in 1763 Britain took over complete control of Indian Affairs in the colonies, and by way of the Royal Proclamation, recognized the policy of Indian sovereignty and land ownership and the practice of purchasing Indian land as constitutional law. This policy was continued by the Americans after independence. It was also introduced into the Canadian colonies by the British. However, the Canadian government, in its dealings with the Indians, did not apply the doctrine of Indian sovereignty as it had been applied and practiced in the United States. Only land rights in the form of "Indian title" were recognized.[116]

The French policy was to claim complete sovereignty in areas they settled and to proceed as the Spanish to civilize and christianize Indians and then grant them full citizenship rights. However, in the vast areas where they traded for furs, they did not disturb the Indians and de facto recognized their sovereignty.[117] However, even this land right, as has been seen, was limited by judicial decisions to being a usufructory right and not the right to "fee simple title". The concept of fee simple title is, of course, a European concept based on the individual ownership of land.

No similar concept of individual land title had developed among the Indian tribes of North America. Although individual ownership of land was not uncommon among the Indians, the right of access to or use of land varied considerably among Indian nations.[118] In some cases, land ownership was considered to be a collective right. In other cases, land was leased as in feudal estates, and in other cases, private hunting areas were recognized.[119] There was, however, no real estate

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practice of buying or selling land, but land could be inherited or transferred to other Indian persons of the nation. Sales of land to other Indian nations could only be made by the sovereign nation.[120]

International law at the same time was, to a large degree, dictated by the Catholic Church. The christian kings were believed to hold their rights to territory from the Pope and he, in effect, divided the known world up among the christian kings. It was for this reason that the Spanish government asked the Church for some direction on how to deal with aboriginal people. Were they humans like christians and did they have the same rights? Were they part of the plant and animal life? How should they be treated? The Church, as is known, referred the matter to its theologians at the Salamanca University in Spain. Here, one De Vittoria directed his attention to the problem.

As already outlined earlier in this report, he concluded that the rights of aborigines were every bit as good as those of Europeans.[121] He did not limit those rights to land rights but stated quite clearly that all rights exercised by the aborigines were valid. In the Papal Bull, which followed, it was stated clearly and comprehensively that the aboriginal people should not be disturbed in the enjoyment of their lands. Certainly this implied more than a land use right and suggested all those rights humans normally exercised in their homelands or on lands over which they had control.[122]

The actual practices of colonial nations, however,

were generally designed to achieve the political and economic goals of the colonizers and not to protect rights. The Church, which was supposed to be the guardian of these rights, had no system to monitor or enforce its Papal Bulls, other than moral suasion exercised through its missionaries, which oft as not was ignored.[123]

The Spanish, in their laws for the West Indies, did grant land title and guaranteed the land rights of the aborigines once they were civilized. There does not seem to be a recognition in those laws of other rights, since the Spanish were firm in the belief that they had the right to impose their religion, lifestyle and economic systems upon the aboriginal people.[124] The French had no statute law recognizing the rights of aboriginal people. However, some of their treaties of friendship, plus the Indian provisions in the Articles of Capitulation and various documents of instruction to explorers, as well as the manner in which the French dealt with aboriginal peoples outside the St. Lawrence River Valley, in fact, did recognize aboriginal peoples as possessing both land and other rights. Nevertheless, the French also felt quite justified in imposing their religion, language, lifestyle and citizenship on the aborigines of those areas which the French occupied and claimed as their own.[125]

Official British practice was to not recognize that the aborigines owned their land. They tried to discourage land purchase and even passed laws to this effect. However, individuals and colonies insisted on pursuing purchase arrangements. Since this was detrimental to British economic and settlement policies, Britain, in 1760, took over control of Indian policy. It provided that, in future, land could only be obtained from Indians by the Crown.[126] The Royal Proclamation

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confirmed this practice in 1763 because of alleged abuses of Indian lands. There is no reference to the idea of extinguishment of "Indian title" in the Royal Proclamation, 1763.

Land purchased belonged to the Crown and if Indians wanted to stay on this land they would be subject to British laws and could receive land grants from the Crown. However, land not purchased belonged to the Indians and they were allowed to use and enjoy their lands without interference as previously.[127] That approach confirms that the British, for purposes of expediency, recognized rights other than land use rights which the Indians were free to continue to exercise.

This same concept is reflected in the instructions to the Hudson's Bay Company officers[128] and their actual practice and relationships to the Indians in Rupertsland. Their Charter only gave them trading rights and jurisdiction over British subjects other than Indians. The other British treaties with aboriginal peoples, as well as the Pacific Islanders Protection Act, all give further proof of the fact that the British recognized rights other than land rights.[129]

In practice in North America, the early precedents were set by American courts, after the United States gained its independence from Britain in 1776. The case law which developed is based on British Common Law and the colonial practices and provisions in the Royal Proclamation. (These cases have been reviewed in detail in the early chapters of this report). Some of these cases recognize the Indian groups as nations with their own laws, customs, methods of land use,

economies, etc. Others limited the rights of the Indians to land. In treaties and agreements, the British generally granted rights other than land rights, such as local self-government, education, etc.

## 6.1 Rights recognized in Treaties and Agreements in North America

The provisions in Canada's treaties with the Indians were based on precedents set in treaties signed in New Zealand, Australia and Africa by the British and patterned as well on American treaties.[130] Many of these treaties provided for the cession of certain specified land areas to the Crown and the relinquishment of all claims in the area. The exceptions were hunting, fishing and trapping rights. What was being ceded was the land and the right to use the land in traditional ways, except Indians were allowed some hunting, fishing and trapping rights. There is no suggestion in the cession clauses that any other rights were being extinguished. In addition, numbered treaties set aside reserves for land where certain rights could be exercised. These included:

i) the right to live on and to cultivate reserve lands;

ii) the right to all other surface resources on reserve lands (the question of who owned mineral rights had not been discussed, but courts have recently ruled that these belong to the reserve);

iii) the right to self-government structures (traditional) and traditional methods of selecting their leaders was to be allowed. These rights are still provided for in the Indian Act;

iv) the right to make laws for local self-government and to operate such band programs as desired and which could be funded;

v) the right to schools on the reserve. (Since the Indians had no schools as we know them, this was the adoption of a whiteman's institution). Whether Indian languages could be used in these schools and whether Indian history, customs, etc., could be taught, is not addressed in treaties. However, early Indian Acts assumed this provision meant traditional school curriculum taught in English;

vi) the question of Indian rights to their own usages, customs and religion were not considered. However, again the Indian Act assumed these rights were not recognized and, therefore, assimilation policies were adopted and, at times, Indians were prohibited from practicing their own religions;

vii) in some treaties the rights to certain health services;

viii) the right of chiefs and headmen to symbols of office, such as uniforms and medals;

ix) the right to aid to assist Indians to become established in agricultural pursuits.[131]

In other agreements such as that concluded with the Metis of the Red River, a number of the above rights of the aborigines - in this case, the Metis - were also recognized. It is quite clear that the rights of the aboriginal people, both in law and practice, were not limited to land rights.

c) Method of Acquiring Rights:

There were two methods used in acquiring aboriginal land. The most common was a treaty which spelled out the terms of the agreement between the Indians and the Crown. The very use of the term "treaty" was a recognition of aboriginal sovereignty and therefore the recognition of all rights exercised by a sovereign nation. It was also clear in British law that the Crown or government could proceed by way of legislation to acquire aboriginal lands. However, which ever method was used, it was clear that the key provisions spelled out in the Royal Proclamation had to be applied to the acquisition of land. These included:

i) consent of the aboriginal peoples to the sale of their land;

ii) negotiations for the sale with the Crown;

iii) agreed terms of the sale assented to by the aboriginal peoples who had a claim in the area;

iv) equitable compensation for land ceded.

It is the Association's position that actions taken under the provisions of the Dominion Lands Act and the Orders-in-Council governing Scrip do not conform or adhere to any of the conditions set out in the Royal Proclamation and, therefore, are unconstitutional. As well, they do not meet prescriptions as spelled out in International Law. For example, the 1537 Papal Bull specified that if certain actions taken by colonial nations contravened the provisions of the "Bull", they would be null and void. Since the christian kings accepted the doctrine that they received their temporal powers from the Pope, this Papal Bull applied internationally. Therefore, the actions taken under Orders-in-Council designed to extinguish aboriginal land rights were, in our opinion, null and void.

Furthermore, when Metis applied for Scrip or when they received their Scrip, they were never informed that in accepting Scrip they were relinguishing their rights as descendents of the aborigines. Nor did they ever sign any documents indicating that they were relinguishing their rights to land. Likewise, there was nothing on the Scrip applications, Scrip certificates, or the Scrip notes, which made any reference to the concept of an "Indian title".

It must be assumed that Scrip was meant as partial compensation for the loss of land rights. Therefore, if Scrip could be supported as being constitutional and the compensation deemed adequate, the process did not deal with any of the other rights of aboriginal people, such as self-government, language, religion, culture, etc., which were recognized by the British and Americans in law and practice.

## D. The Legal Validity of Extinguishment

Human rights are defined in the United Nations Charter and in the constitutions of a number of nation states, including Canada. These rights are considered fundamental and inalienable. Such rights are possessed by virtue of being human. Such rights can therefore not be taken from an individual although they may be violated or denied.[132]

What are the rights of aboriginal peoples other than their human rights? They are not a special class of rights different from the rights of other persons and nations. In what is now Canada, it is taken for granted that human rights are guaranteed to all citizens by their government. In particular, this is now a fact, as a Charter of Rights has been entrenched by the Canada Act, 1982. However, it must not be forgotten that before the ancestors of the present population of Canada resided in Canada, the land was occupied by the aborigines of the area. They had human rights as well; and as the indigenous persons, their rights superceded those of the immigrants. These rights were recognized in International Law at the time of early colonial activity and are still recognized in International Law today. It follows that their descendents still possess these rights. These rights are both individual and collective rights.

At some point in history, the origins of which appear to be with American courts, the idea of limited land ownership was developed. (Modern writers have referred to this concept as "aboriginal title"). Following this, governments and courts unilaterally developed the concept that it was possible to extinguish or put out such title which, in Canada, was referred to as "Indian title". This concept is not spelled out nor is the terminology used in the Royal Proclamation. The Proclamation simply speaks of Indian lands and states that Indians can choose to sell their land to the Crown under certain conditions. These provisions were designed to protect Indian rights - not to extinguish them.[133] The term "extinguishment" is not used in pre-confederation Indian Acts nor is there any reference to such an idea in either Subsection 91(24) or Section 146 of the B.N.A. Act, 1867. In treaties the term "extinguishment" is not used either, but the concept of extinguishment as far as land is concerned is certainly spelled out in the treaties. Certain land areas are ceded by the Indians to the Crown and the Indians gave up all claim to the areas in return for certain compensation and other rights spelled out in the Treaty.[134]

The idea that an individual or group could sell its land was certainly not novel. This could be negotiated for an agreed price or compensation. Therefore, why acquire a cession and extinguishment of rights in the area ceded? This question can only be answered by examining the policies the government was attempting to implement. To promote settlement, build a transportation and communications system and to develop the resources the government needed the title

to the land. This could have been accomplished by purchasing the land from the Indians at its fair market value. This process could have proved rather expensive. Canada needed to acquire its title cheaply if its development plans were to prove economical and feasible. The same was true earlier in the United States and in other areas where the British signed treaties with the Indian peoples. This required the invention of a new legal doctrine of Indian land ownership, which would limit the nature of their title. With the Crown the only legal authority able to acquire the land, compensation could be limited. Because the economic base on which the Indians depended was to a large extent destroyed, it was not difficult to use the promise of reserves, rations, and other aid to gain the consent of the Indians. The Indians in all cases negotiated from a position of weakness and had little bargaining power. It is true that Canada's negotiators made some concessions to gain agreements. Annuities were increased a few dollars per head, schools were provided, a medicine chest promised and other minor concessions were made. None of these cost the government anything immediately, and did not significantly add to the government's long-term commitment to the Indian peoples. The aborigines, in fact, had generally to accept what they were offered by the government.

The first time that the words "extinguishment of the Indian title..." were used in a legal document was in the Manitoba Act. This term was later incorporated into the Dominion Lands Act and into the Orders-in-Council passed under that Act. This terminology appears in no other legal documents in Canada, except other Orders-in-Council. If the concept of extinguishment had any validity then, it could not be claimed to apply to rights other than land rights.

It is the Association's contention that, even in relation to land title, such title could not be extinguished under International or British Law. It could only be bought and/or sold. The aborigines' land was in fact taken from them with only limited compensation in the case of the Indians and no compensation in the case of the Metis. The setting aside of reserves for Indians and the provision of land grants to the Metis cannot be considered compensation. The land was theirs as sovereign nations to begin with, and this is confirmed by the Royal Proclamation. In addition, many other groups were given conditional and/or unconditional land grants, who had no claims as aborigines. These included:

- United Empire loyalists;
- volunteers in Wolsel Armies;
- the old settlers;
- the Selkirk settlers;
- the South African veterans;
- immigrants applying for homesteads;
- the R.C.M.P. officers.

Surely, if any or all of the above were entitled to land grants, the principles of equity would demand that aboriginal peoples receive equitable treatment. Above that,

they would still be entitled to compensation for selling their land. As for the proposition that rights other than land title can either be extinguished or sold, the Association rejects such an idea entirely. The Association also sees no evidence for such a proposition in any British or Canadian laws. As indicated above, those documents (treaties and statutes), which do address the issue of extinguishment, only deal with it insofar as land title is concerned.

## E.) The Nature of Aboriginal Rights:

What are the rights of the aborigines? This is the central most important issue in any discussion of whether aboriginal rights can be or have been extinguished. The favorite view of those government officials attempting to limit aboriginal rights is that they were a "personal usufructory right". This was the standard view of what was referred to as aboriginal title or "Indian title". That view held that the aborigines had a personal right to the use of the land and its surface resources (game, plants, wood, water, etc.) but that aborigines, because they were believed to have had no system of individual land ownership or title, did not own the land. The usufruct, therefore, was only a burden against the title of the sovereign which the sovereign alone could remove.

Once this was done the aborigines ceased to have any rights, except those spelled out in treaties or agreements. These agreements seldom recognized language, cultural or customary rights. Where other rights were granted, the treaties and legislation limited the citizenship rights of aborigines as compared to those of other citizens of the sovereign.

This certianly was the practice with the Indians of Canada. This practice was institutionalized in the Indian Act and provided for a process called "enfranchisement", which an Indian must go through if he/she wanted full citizenship rights. The process, of course, required the aboriginal person to give up any special rights granted under treaty agreements.[135]

A second concept of "aboriginal rights" is that they were both a collective or communal right, as well as a personal right. Any personal rights which the aborigines had were those protected by and recognized by the collective of which they were a part.

The idea of Indian land rights and that all rights flowed from the control of land is spelled out in a Paper by Leroy Littlebear, a Native Studies Professor at the Lethbridge University.[136] This concept holds that Indian land title was held collectively by the group or community to which one belonged. Insofar as Indian tribes recognized each other's territories and right to the territory, an Indian group was sovereign in the land area it used.

Although the collective may not have had political, social and economic institutions as they were structured in European societies, they nevertheless did have their institutions to govern their varied activities, often accompanied by elaborate rules and regulations. Every group had its headman and its own method of selecting that headman. Every group had accepted methods of using the land and its resources. In the

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case of the buffalo hunt, for example, both the Indians and the Metis had elaborate organizations for the hunt, well-understood rules of behavior surrounding the hunt, and well-established customs for dividing up the animals that were killed. In the area of social relationships, each person, each sex and each age group had a well-developed role in the social life of the community. There were accepted family structures and rules governing the role of family members. Religious ceremonies were elaborate and were governed by accepted traditions and customs. There were many social events and ceremonies which were also covered by elaborate rules, customs and traditions.[137]

The essential difference between aboriginal cultures in much of North America and European cultures related to the degree of technological development and oral - as compared to written - traditions. In those cases where Indians had simpler lifestyles, their institutions also were less complex.[138] The other major difference related to the fact that some aboriginal collectives were believed to be nomadic - that is, moved about their territory. Europeans thought of themselves as having fixed and stable settlements. This difference was in part real and in part illusory. Europeans did have fixed settlements and fixed places of work. However, for the European-style economy to function, it was still necessary for many people to be very mobile. Mobility, however, was at a personal level and highly specialized. European cultures had developed a series of new institutions (hotels, rest houses, etc.) and a number of new forms of technology (railways) to accommodate their mobility needs.

The essential point to be made from an extensive examination of Indian culture is that land and other rights were both personal and collective rights, as in European society. As in European society, personal rights were those recognized and/or granted in law by the community or nation state of which one was a citizen.[139] As has been detailed earlier in this report, such rights were protected in International Law. Also as detailed, some authorities as far back as the 13th Century were of the view that the aborigines possessed the same rights as Europeans. In more modern times, this view has been built on and expanded through International agencies such as the United Nations, the U.N. Human Rights Commission, the Russell Tribunal and the International Association of Jurists.

F. Transferability of Rights:

In the distribution of Scrip, one of the essential questions which arose was whether the Scrip was transferable. The answer to this question depends on how a person views the nature of aboriginal rights. Although the government in its alleged "extinguishment of rights" dealt with them as personal property rights, the statutes and Orders-in-Council governing Scrip did recognize that the personal right emanated due to the fact that one belonged to or was accepted as a member of a particular collectivity - "Indians or half-breeds". The legislation also recognized that one possessed rights by virtue of one being a descendent from a collectivity of aboriginal ancestors. It is of further interest to note that blood quantum has never been part of the Canadian definition of whether one belonged to one of the aboriginal groups or to which group one belonged. As we have detailed earlier,

the essential criteria for deciding whether one was Indian or Metis were:

- Indian ancestry;
- lifestyle maintained;
- personal preference (to which group did one wish to belong);
- self-identity;

In the case of self-identity, governments did exercise some control over who could join an Indian band, take Scrip, or who was white and therefore not Indian. However, notably in early Indian Acts, whites who lived with Indians were not excluded from the band if accepted by the band. White women who marry an Indian male still gain Indian status today.

The original position of the Government of Canada, when it began issuing Scrip, was that land rights were not assignable and therefore not transferable to someone else. Although the reasons for this were not clearly spelled out in policy statements, it can be concluded that the reason for this was that the government viewed this right as a right emanating from one's ancestry and connections to a certain collective group, namely "Indians". Therefore, only individuals who were of "Indian" ancestry could claim or benefit from such a right. This right was not considered to be a personal property right or a real estate right, which could be sold or assigned to someone else. Therefore, the government's

insistence that the benefit must be delivered to the allottee. In the case of money Scrip, this benefit was considered to be the Scrip note itself, which was highly negotiable. In the case of land Scrip, it was considered that the benefit had not been received by the allottee until he/she had received his/her land patent. Once the benefit had been delivered into the hands of the allottee, his/her benefit was then subject to domestic Canadian law and could be disposed of according to the personal property and real estate laws of the land.

The government, even before issuing Scrip or land grants, recognized that the real benefit would not likely go to the Metis but would be reaped by others.[140] For reasons already outlined, the government, in spite of this knowledge, took no action to protect the Metis rights and the benefits which flowed from them. This was in spite of requests from the Metis themselves for such protection, and of recommendations by officials such as Flood Davin, Dewdney, and others, and clerics such as Tache and Lacombe, which would have ensured greater protection to the Metis However, the direction of government policy and the influence of the speculators won out over recognized practices in International Law and the principles of equity to which the Government of Canada had committed itself.[141]

It is the Association's view that aboriginal rights, because of their nature, were not transferable and therefore the practice of purchasing such rights before they were recognized or before the benefit was received by the allottee

was clearly illegal. Furthermore, because an aboriginal right cannot be transferred to another collectivity, individual benefits in the form of compensation must only accrue to the aboriginal allottee and to no one else. In almost ninety per cent of all cases of Scrip grants, the benefits were reaped by speculators who were not part of an aboriginal collective and not by the allottees. The Metis grantees, therefore, were not adequately compensated for their loss of rights. As compensation is another of the essential features of the ceding of land, such claims to compensation still exist. As far as other rights such as language, culture, customs, self-government, etc., are concerned, no one would claim that such rights can be transferred to someone else. There are no laws, either domestic or international, to support such a proposition.

VII. The Implication of Law, Policy and Practice for Aboriginal Claims:

These implications have been discussed to some degree in the preceding presentation in this chapter. However, it is important to summarize and clarify them. The major of conclusions reached above are as follows:

a) one sovereign is not competent in any way to take actions affecting the rights of another sovereign on a unilateral basis (without consultation and formal agreement), as was done by the Government of Canada in its dealing with the Metis through the Dominion Lands Act and the Orders-in-Council providing for the issuance of Scrip.

The Royal Proclamation, which quite clearly applied to territory under Charter to the Hudson's Bay Company, set out a procedure by which the sovereign could acquire the lands of the aboriginal peoples.[142] In dealing with the Metis of the Northwest, outside the Province of Manitoba, at no time did the government follow the required procedures. Therefore, actions taken under the Dominion Lands Act are, in the view of the Association, unconstitutional;

b) the concept of "Indian title" which the Supreme Court of Canada has equated with aboriginal title was a fabrication of British, American and Canadian politicians and policy-makers, perpetuated by modern legal writers and invented as a convenient way of dis-possessing aboriginal peoples of their lands and of all other rights. It also ensured the implementation of the settlement and development policies of the government. The Royal Proclamation speaks of "Indian lands". It speaks of these lands as being protected for the use and enjoyment of the Indians, and it says the Indians can sell their lands if they are so inclined. Further, the sale could only be made to the Crown. There is nothing in the Proclamation from which one can infer a concept of aboriginal title as

a limited (unsufructuory) right, nor is there anything in the Proclamation to suggest that selling one's land in any way affects one's human rights.[143]

It is the view of the Association that the concept of "Indian title (aboriginal title)" as used in the Northwest outside Manitoba is unconstitutional. Therefore, the construction that successive governments and court rulings have put on the concept are legally incorrect.

c) the idea of extinguishment as enunciated in legislation, Orders-in-Council, and in policy statements, as well, has no validity in Constitutional Law. The Royal Proclamation provided that Indians could sell their lands to the Crown. It is clear that the purpose of this provision in the Proclamation was to protect and guarantee existing land and other rights - not to provide a process by which they could be extinguished. The Royal Proclamation gave no right of expropriation of Indian lands. Even if it were agreed that the sovereign is supreme and can, therefore, pass laws to expropriate the lands of all its citizens, including the Indian subjects, then the laws of expropriation must be applied. There must be compensation of equal value for expropriated property. This had to be the principle of equity referred to in the

Address from the Parliament of Canada to the Queen, regarding the transfer to Canada of Rupertsland and the Northwest Territories.[144]

d) the Association is of the view that the compensation of 160 acres or 240 acres of Scrip provided to the Metis of Canada was not an equitable payment for the Metis interest in the land. Since when can equity result from a transaction where someone takes everything you have traditionally owned by giving you back a small fraction of it?

The Metis had made their living from the land and they had developed their cultural lifestyle on that land. Whatever was given in compensation, therefore, would have to ensure an equal standard of living and the ability to continue to exercise their other rights. Since the Scrip settlement left most of the Metis homeless and poverty stricken, it fails the test of Canada's legal commitment to the aboriginal peoples;[145]

e) the Association further claims that, because of the nature of aboriginal rights, the method of settlement and compensation selected must guarantee that the benefits of the settlement will go only to those who are entitled to them - namely the Metis The government

took no steps to ensure that the Metis benefitted from the "Scrip settlement" of their land claims. This was so even though the government was fully aware of the consequences of its policy before it was implemented. Quite clearly, the government took the position that whether or not the Metis benefitted was not important. What was important was that certain prescriptions purported to be legal were followed to ensure that the government's claim to the land and the actions taken to obtain the land could not be successfully challenged in a court of law;

f) the Association is further of the view that the fraud, bureaucratic irregularities, and obvious government collusion with the speculators, brought about policies favourable to speculation and aided and abetted speculators in using Scrip in a number of rather imaginative ways, and for which it was not intended. The administrative processes followed in the Scrip issues and in the conversion of Scrip to other purposes were illegal under the legislation which provided for Scrip, notwithstanding our view that such legislation was not constitutional.

FOOTNOTES

[1]Manitoba, the Birth of a Province, Supra, Ritchott's Diary, p. 141; Also see Archibald to Howe, March 27, 1872 - Archibald Papers, Public Archives of Manitoba, 762 - No. 85.

[2]House of Commons Debates, 1886, Supra, p. 834.

[3]Records of the correspondence and reports dealing with the Red River Memorial, Supra, 1846, p. 58.

[4]Wording of the Manitoba Act, Supra, Section 31: "Since it is expedient... ."

[5]Wording of the Dominion Lands Act, 1879, Subsection 125(e): "...as may be deemed expedient."

A.D. Hall Article, Supra, Sifton's comments in Parliament, 1904.

[5]Ibid. The Dominion Lands Act, 1883 Amendments.

[6]P.C. 688, March 30, 1885, Public Archives of Canada.

[7]Order of Her Majesty in Council admitting Rupertsland and the Northwestern Territory into the Union, June 23, 1870, found at R.S.S. 1965, Volume 6, p. 142.

[8]W.C. MacLeod, Supra, The American Indian Frontier, p. 533.

[9]As stated by Dr. Lloyd Barber during interview in Regina, May 10, 1977, Indian Claims Commissioner.

[10]Royal Proclamation as found in "Native Rights in Canada", Cumming and Mickenberg, Appendix 2; Also see Chapter III.

[11]Alexander Morris, Supra, The Treaties of Canada with the Indians.

[12]An Act providing for the organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordinance Lands, Supra, 1868.

[13]Macdonald Correspondence, Supra, September 29, 1869, to Carroll, Macdonald Papers, No. 13, p. 209, Public Archives of Ottawa.

[14]Ibid. Macdonald to Rose, February 23, 1870.

[15]P.C. 688, 1885, Supra.

[16]Archibald's Letter, December 27, 1870, Supra.

[17]"Half-breed Claims", report by N.O. Coté, Esq., of the Department of the Interior, dated December 3, 1929, Public Archives of Canada.

[18]P.C. 309, March 1, 1886.

[19]P.C. 918, May 6, 1899.

[20]Noonan and Hodges, Supra.

[21]Department of the Interior Correspondence, R.G. 15, Volume 281, File #49579, Public Archives of Canada.

[22]Report by N.O. Coté, Supra, pp. 1-17.

[23]Ibid.

[24]Department of the Interior Correspondence, R.G. 15, Volume 239, File #13765, Public Archives of Canada.

[25]Ibid. March 15, 1876; November 26, 1885; See also P.C. 596, March 13, 1900.

[26]Ibid. November 26, 1885.

[27]Ibid. December 8, 1898; August 30, 1900.

[28]Department of the Interior, R.G. 15, Volume 503, File #153347/141427, May 19, 1886, Public Archives of Canada.

[29]Statutes of Canada, 47 Victorie, Chap. 27, Section 4.

[30]R.G. 15, Volume 239, File #13765, Supra, March 25, 1902.

[31]Ibid. April 6, 1900, Keyes to McDougall and Secord.

[32]N.O. Coté, Supra, p. 1

[33]R.G. 15, Volume 239, File #13765, Supra, various correspondence (a-c).

[34]R.G. 15, Volume 503, File #153347/141427, Supra, various correspondence (g-f).

[35]Department of the Interior, R.G. 15, Volume 783, File #556321(1-4), March 31, 1905, and various other correspondence, Public Archives of Canada.

[36]Noonan and Hodges, Supra, p. 119.

[37]Ibid. p. 120.

[38]Ibid. pp. 74-86.

[39]Ibid.

[40]Ibid. p. 72.

[41]Individual Scrip Files of the Department of the Interior, Public Archives of Canada.

[42]Scrip Account Files, Department of the Interior, Public Archives of Canada.

[43]Ibid.

[44]Ibid.

[45]Manitoba Metis Federation Report, Supra, p. 45.

[46]Letter by R.A. Ruttan to Commissioner Smith, October 19, 1896, Dewdney Papers, Glenbow Foundation.

[47]Fillmore, Supra.

[48]R.G. 15, Volume 784, File #557941, Supra, March 20 and May 1, 1900.

[49]Clippings in Newspaper File, Volume 24, Gabriel Dumont Library, Regina. taken from Public Archives, University of Regina.

[50]Dixon Brothers File, Public Archives, University of Regina.

[51]Fillmore, Supra.

[52]Cote', Supra.

[53]Fillmore, Supra.

[54]Department of the Interior Correspondence, R.G. 15, Volume 983, January 28, 1920, Public Archives of Canada.

[55]An Act to amend the Criminal Code, Stat. Can., 11-12 Geo. V, C. 25, S 20.

[56]Peter Lowe, All Western Dollars, Manitoba Historical Society.

[57]File R.G. 15, Volume 784, Supra.

[58]R.G. 15, Volume 239, Supra.

[59]Article on Public Domain, p. 12, Timber License Deals, Volume 35, Land Companies, Gabriel Dumont Library, Regina.

[60]Dominion Lands Act, 1879, Stat. of Can.

[61]Ibid.

[62]Information was gathered from the records of original patents found in the Saskatchewan Land Archives, University of Saskatchewan.

[63]Jackson Papers, Letter 13.9 b., University of Saskatchewan Archives; Grievances and Conditions in the N.W.T., 13.9 d and other papers in Jackson Files.

[64]Personnel Recollections of early settlers (After 1886) related to the writer.

[65]Records of Individual Scrip Transactions, Supra.

[66]Peter Lowe, Supra.

[67]Newspaper Clipping File, Supra.

[68]See Bank Acts, 1878 to 1930, Statutes of Canada.

[69]Scrip Buyers Accounts, Supra.

[70]Peter Lowe, Supra.

[71]House of Commons Debates, March 1, 1934, p. 1073.

[72]Bank Mortgage Documents from 1880-1910, Public Archives of Canada.

[73]Newspaper Clippings File, Supra.

[74]Scrip Buyers Accounts, Supra.

[75]R.G. 15, Volume 784, File #55794, Supra, May 1, 1900.

[76]Manitoba Metis Federation, Final Report, Supra, pp. 82-83.

[77]Compiled from Scrip Files and Scrip Buyers Accounts, Supra.

Supra, Footnotes 75, 76 and also see footnote 79.

[78]Ibid.

[79]Ruttan to Smith, October 19, 1896, Correspondence Re: R.C. Macdonald and the U.S.A. Scrip issue, R.G. 15, Volume 239, File #73765, Supra.

[80]House of Commons Debates, 1886, Supra, p. 834.

[81]McKenna Commission Report, 1906 - In 1909, Sessional Papers, Paper No. 27, p. 43.

[82]Report of the Supt. General, Indian Affairs, June 1886, Department of the Interior, Public Archives of Canada.

[83]Report of Commissioner of Indian Affairs to Supt. General, July 1886, Department of the Interior Correspondence, Public Archives of Canada.

[84]Sessional Paper No. 7, 1886, p. 5.

[85]Reimer, June 1899, Department of the Interior Correspondence, Public Archives of Canada.

[86]McKenna to McLean, December 1901, Department of the Interior Correspondence, Public Archives of Canada.

[87]Department of Justice, July-May 19, 1886, Margaret McLeod Case, R.G. 15, Volume 503, Public Archives of Canada.

[88]List of discharged half-breeds, Department of the Interior, 1892-1901 and for 1885, Department of the Interior Reports, Public Archives of Canada.

[89]Department of Indian Affairs, W.M. Graham to Commissioner, August 17, 1992, Registry of Half-breeds withdrawing from Treaty, 1885-86, plus list of half-breeds re-entering Treaty.

[90]Commissioner to Supt. General, Supra, July 1886.

[91]Manitoba Metis Federation, Final Report, Supra.

[92]March 1885 and April 1885, O.C. setting up Scrip Commission and providing for Scrip allocations.

[93]Department of the Interior Correspondence, December 4, 1893, P.C. Order No. 3058, R.G. 15, Volume 503; March 20, 1897, P.C. Order No. 670, R.G. 15, Volume 503; December 1, 1899, R.G. 15, Volume 503, Public Archives of Canada.

[94]December 26, 1900, R.G. 15, Volume 503; March 1, 1903, R.G. 15, Volume 503; 1899, Department ruling - Scrip can be issued to assignee if he/she has a properly executed assignment, Public Archives of Canada.

[95]Department of the Interior Correspondence, May 19, 1886, Annuities do not have to be repaid, R.G. 15, Volume 783 and 784, Margaret McLeod Case; R.G. 15, Volume 783 and 784, Children of H.B. who enter Treaty can receive Scrip if not on band list, Public Archives of Canada.

[96]Department of the Interior Correspondence, memo attached to letter dated August 19, 1927, Re: unconditional grants, Document No. 7114, R.G. 15, Volume 783 and 784; July 30, 1886, R.G. 15, Volume 784 Re: Patents to Minors. Children can buy land for cash. No law preventing patents to be issued to H.B. children outside Manitoba, Public Archives of Canada.

[97]J.A. Gregory to Legislature, February 18, 1983. Legislative Journals of Saskatchewan; Department of the Interior Correspondence, Cooper, March 10, 1900, R.G. 15, Volume 783 and 784; April 7, 1900, McKenna's Response, R.G. 15, Volume 783 and 784, Public Archives of Canada.

[98]Department of Interior Correspondence, letters from 1896 dealing with the activities of the speculators, dated October 1, 2, 16, 19, 22 and 28, R.G. 15, Volume 492, Public Archives of Canada.

[99]Department of the Interior Correspondence, dated October 22, 1900, R.G. 15, Volume 783 and 784, Macdonald insists that half-breeds have right to assign their Scrip entitlement, December 1, 1904, R.G. 15, Volume 239; March 30, 1906, R.G. 15, Volume 760, Macdonald Judge Myers' Commission Report to Wilfred Laurier, August 8, 1904, Public Archives of Canada.

[100]Ruttan to Smith, Supra, October 19, 1896, R.G. 16, Volume 492, Department of the Interior Correspondence; Department of the Interio Correspondence, R.B. Bennet, 1904, R.G. 15, Volume 868; Robinson to Keyes, March 17, 1903, R.G. 15, Volume 868; September 18, 1886, R.G. 15, Volume 492, 1885 Speculation; April 15, 1910, R.G. 15, Volume 782, Second Case.

[101]Fillmore, Supra, "Half-breed Scrip", L'Hirondelle Case, R.G. 15, Volume 1, Department of the Interior Correspondence, November 30/20, House of Commons Debates, 1920.

[102]Supra, See Footnote 55.

[103]Scrip Accounts, Department of the Interior, July 15, 1904, R.G. 15, Volume 857, Ref. 695671, No. 2.

[104]Individual Scrip Accounts, Volume 79(a-j) as found in the Gabriel Dumont Library; Department of the Interior Instructions Re: The Opening of Scrip Accounts, R.G. 15, Volume 784; April 1, 1900; May 1, 1900; May 16, 1900; May 25, 1900; June 18, 1900; July 2, 1900; July 13, 1900.

[105]R.G. 15, Volume 783 and 784, May 1, 1900, Department of the Interior Correspondence.

[106]Department of the Interior Papers: April 28, 1902, R.G. 15, Volume 784, Rent on land in a Federal Park; 1901, R.G. 15, Volume 239, Allow Scrip to be used to purchase pre-emption lands; November 29, 1904, R.G. 15, Volume 736, Various Uses of Scrip Outlined.

[107]Department of the Interior Correspondence Re: Lawyers fees in L'Hirondelle Case, dated March, April, May, 1920, found in Volume 67b, Gabriel Dumont Institute Library, Regina, Saskatchewan.

[108]Ibid. Rothwell to Sifton, February 16, 1897, R.G. 15, Volume 239, Pulbic Archives, Ottawa.

[109]Ibid. Ruttan to Smith, October 19, 1896, R.G. 15, Volume 503.

[110]Ibid. Robinson to Keyes, R.G. 15, Volume 868.

[111]Ibid. November 30, 1920, Not to Investigate Fraud Charges, Policy since 1913, R.G. 15, Volume 983.

[112]Ibid. Agree to Investigate Claims of Fraud, 1896, R.G. 15, Volume 235.

[113]Ibid. Recommend Another Scrip Issue, R.G. 15, Volume 492.

[114]Ibid. Rev. Holmes to Oliver, May 2, 1910, and Oliver's Reply, May 11, 1910, R.G. 15, Volume 784

[115]W.C. MacLeod, Supra, p. 100 and following.

[116]Ibid. pp. 402-404.

[117]Cumming and Mickenberg, Supra, Native Rights in Canada, pp. 75-88.

[118]W.C. MacLeod, Supra, pp. 17-18.

[119]Ibid.

[120]Ibid. Pp. 17-18, and pp. 533 and following.

[121]De Vittoria, Supra, p. 120 and following.

[122]Brian Slattery, Supra, pp. 47-48.

[123]W.C. MacLeod, Supra, Chapters VI, VII, VIII & IX.

[124]Ibid.

[125]Brian Slattery, Supra, p. 86.

[126]W.C. MacLeod, Supra, pp. 193-198.

[127]Supra, Royal Proclamation.

[128]Supra, Letters Outward

[129]Pacific Islanders Protection Acts, 1872 and 1875(35&36 Vict.) C.19(38&39 Vict.) C. 51, S. 7.

[130]Dr. Lloyd Barber, former Indian Claims Commissioner for Canada, Supra, personal interview.

[131]Supra, See Numbered Treaties 1 to 11.

[132]Stanely I. Stuber, "Human Rights and Fundamental Freedoms in Your Community", pp. 194-198, Universal Declaration of Human Rights.

[133]Supra, Royal Proclamation.

[134]Alexander Morris, Supra.

[135]Supra, Footnote 12.

[136]Leroy Littlebear, "A Concept of Native Title", Volume 27, Gabriel Dumont Institute Library, Regina, Saskatchewan.

[137]Ibid.

[138]W.C. MacLeod, Supra, pp. 24-26.

[139]Ibid.

[140]Supra, Archibald to Dewdney, December 2, 1870.

[141]Supra, See Footnote 55.

[142]Supra, Royal Proclamation.

[143]Ibid.

[144]Ibid. Proclamation; Supra, 146 O.C. 9, Appendix 3.

[145]Ibid.