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CONSTITUTIONAL ENTRENCHMENT OF ABORIGINAL SELF-GOVERNMENT

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ABORIGINAL GOVERNMENT: SOURCE, NATURE.

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I should like to begin by thanking the organizers of this conference for inviting me to participate; I shall endeavour to sketch out some of the issues that are to be dealt with in some detail in later panels.

You all know that in 1982 certain constitutional amendments dealt with the "aboriginal and treaty rights of the aboriginal peoples of Canada". Included in these provisions are the Inuit, the Indians and the Metis, and in the area upon which my presentation will focus, namely the prairie region, there are Indian people and Metis people. Who are these people?

The ancient indigenous peoples include the Eniniw (Cree) Anishinabe (Ojibway} and others, and also the Dakota who came to the area in more recent times. It is to these people that the constitutional term "Indian" refers. The term is not of recent vintage and is attracting some considerable attention in these times when many are inclined to recall a certain sea-faring venture that took place some 500 years ago. At a conference of lawyers it is appropriate to point out that all these people do not have the same legal status. Some are included in the group over which the federal government has asserted its jurisdiction pursuant to the terms of the original Constitution Act of 1867, and are "Indians" in accordance with the terms of the federal Indian Act (RSC 1985 c.I-5).These people are entitled to live on federal reserved lands and are organized on these reserves in what are termed "bands"in the federal legislation. In recent times a preferred designation has been First Nations. Others are not caught by the terms of the Act and consequently have no entitlement to reside on reserves or participate in band affairs except to the extent they may be admitted as band members pursuant to changes in the Act that were passed in 1985. Many of the bands form part of larger "treaty" groups, that is, they are descendants of those who entered into historic treaties with representatives of the Crown.Individuals who have lost their status under the Indian Act and their descendants, have been stripped of their treaty status by the federal government. The constitutionality of this policy has not, so far as I know, been determined judicially.There are other bands on reserves, for example, the Dakota in Manitoba,

who did not enter into treaties with the Crown. These "status "Indians are not, then, "treaty Indians." The fact that in everyday language the term "treaty" is often used to mean "status " does nothing to clarify these various categories. I turn now to a brief identification of the Metis.

Generally European settlement of what is now Canada proceeded from east to west, but the process of settlement took a very long time.After the initial eastern settlement and before the eventual western settlement, European individuals and groups came to the West, notably to participate in the fur trade economy.During this interval, the many descendants of the

European-Aboriginal unions came to assert their distinct political character and to participate in Aboriginal occupation of the western plains. The distinctive Metis culture developed in the context of the Metis buffalo hunt, which was its central institutional feature.Canadian historians have recounted the story of the Metis resistance to Canadian western expansion in the second half of the nineteenth century, including the Metis participation in the creation of the province of Manitoba in 1870.The Manitoba Act 1870, the constitution of the new province included a provision for settling the issue of Metis aboriginal title to the lands.Before leaving this brief introductory sketch I should refer to the legal distinctions between Metis and persons under the Indian Act. Until 1985 the act excluded from entitlement to Indian status those individuals who were descendants of persons who had received Metis lands or scrip. The reference is to the different policy used historically in the West to deal with the purchase of Aboriginal title. In the case of indigenous communal societies whose members were accorded status under the Act, title was dealt with by way of a communal treaty. In the case of the Metis, individuals were allocated lands or scrip but generally no communal lands were set aside.The exception is the case of section 31 in the Manitoba Act which provided for a settlement scheme for the entire community but which was administered in fact as a scheme of individual grants. [The interpretation of s.31 is dealt with in Paul L.A.H. Chartrand, Manitoba's Metis Settlement Scheme of 1870. Saskatoon. University of Saskatchewan Native Law Centre. 1991.]

The subjugation of these Aboriginal peoples within the Canadian system has been the subject of scholarly analysis. [See, e.g. John Tobias, The Subjugation of the Plains Cree, etc. and Sarah Carter's recent book on western agricultural policy.See also Katherine Pettipas' Ph.D. dissertation on religious suppression of western Aboriginal peoples.] The great question facing the country today involves the determination of the proper "place" of the Aboriginal peoples within the institutions of Canada, including its constitution.Canadians generally, it seems, have come to believe that the vision of their country must incorporate the vision of the Aboriginal peoles. The fact that the constitution of the country was crafted largely without Aboriginal partners is having its consequences. Canadians are leaning to a notion that the constitution should represent the consent of the governed to be ruled according to certain principles that they have freely endorsed.In looking to the future, Canadians are asking themselves fundamental questions about their society and its political structures. What are the relevant communities that are to participate in decision-making? How is power to be distributed and how is it to be constrained? The world-wide sweep of the decolonization process of the twentieth century and the stresses between pressures towards economic unity on the one hand,and pressures towards regional and ethnic insularity on the other hand, have influenced the domestic debate about the future of Aboriginal enclave populations whose economic and social circumstances have been described as those of a third world caught within a first world: the fourth world of Aboriginal peoples.All the Aboriginal peoples share most of these characteristics but I should like to focus briefly on the distinctions between the Metis people and the Western First Nations which characterize the complex nature of the present constitutional debate.

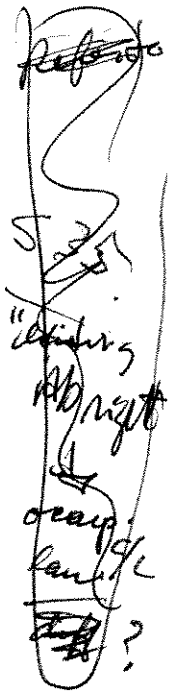
In fact the Metis did participate in federation building but the continuing legitimacy of the constitutional order in respect to them is liable to be challenged. The agreement to join the Canadian union was made subject to certain conditions. One was the matter of an amnesty and it is well known that in fact Riel and Lepine did not get the benefit of an amnesty. More formally, the provincial constitution itself contained some important compact provisions. There was a denominational schools

provision, and that provision was interpreted around the turn of the century. There was a language provision and that was judicially interpreted with finality only in 1985. There was also the Metis land settlement scheme that was designed to keep the Metis community together during the expected transition to the new agricultural settlement economy. Section 31 is the last of that provincial trilogy of constitutional deals that has yet to be settled. There is much significance in the temporal ordering of the determination of this issues. It is only the last of the three provisions that were fought for by the Metis. After 1870 they quickly lost political power in the province and the relative value of constitutional entrenchment alone as effective protection of rights was tested.It is appropriate today, then, when we are contemplating fundamental changes to our constitution, that it be determined exactly what it is that the exising constitution provides in respect to the Metis people.Parenthetically, I should state that the Metis action based on s.31 is of interest also because it tests the new judicial function in the enforcement of positive governmental obligations that are constitutionally based. Today, then, the Metis are in a position to assert the illegitimacy of a constitutional order to which they originally agreed subject to conditions that were never fulfilled by the other side. They are in a position to reassert their right as a people to freely determine their political destiny. In their present circumstances the Metis assert their position on the basis of moral and legal claims; they make no claims to separate statehood. They insist, in fact, that their brand of nationalism is one that should be incorporated within the Canadian vision of a new constitutional order, one which reasserts a commitment to the great principle that promises ought to be kept. There is a challenge, in reordering our constitution, to apply established principles to new situations. If the international realm is a useful source for guiding principles, for example, the notion of a right of self-determination in the case of all historically and culturally distianct peoples, then the challenge is to craft a new application to the circumstances of Aboriginal enclave populations without a discrete territory and who have been absorbed into a political order that has not done justice to the highest principles to which Canadians wish to adhere. But there should be no quibbling about the value of keeping promises that were made as part

of a federation compact.It is not only contract that has based itself upon the notion that promises ought to be kept; the international order has recognized the contribution of the notion to the promotion of social order: pacta sunt servanda.

The notion of self-determination for culturally and historically distinct peoples is one that would in principle apply to the First Nations in the West whether or not they in fact participated in an historic Indian treaty.For those who have signed treaties, these historic agreements provide a particular basis for the elaboration of principles that must guide any efforts to establish a just and lasting relationship with the Canadian state.For reasons that should be well known to this audience, the matter of interpreting the treaties is one that has not historically been well-served by the legal profession and the judiciary. The western treaties have also been the subject of constitutional enactments.There is a requirement in the North Western Territory Order of1870 which requires the Canadian government to deal with the land claims of the western "Indian" Nations. The 1930 Natural Resources Transfer Agreement contains provisions directed to the setting aside of lands promised in the treaties over one hundred years ago.The fact that there are outstanding claims in 1992 says something about our adherence to the principle of keeping promises in a context where the position of the promissee is one of significantly less political power.

This brief sketch has referred to only a very few of the existing asymmetries in our existing constitution in respect to Aboriginal peoples.Since most of them involve outstanding issues of interpretation and unfulfilled obligations, they add a challenging dimension to the matter of constitutional reform.These are some of the details of the move towards self-government that will have to be dealt with. The first task in this still very young process has been the assertion by the Aboriginal peoples of their claim. Their priority has been to assert the legitimacy of their claim, and to challenge the legitimacy of the existing constituional order.It is difficult to move on to the details of building a relaltionship with Canada that includes a right of self-government before both parties are convinced that the other party is indeed a legitimate partner to the negotiations.The existing exclusionary and otherwise flawed nature of the present constitutional provisions respecting Aboriginal people indicate the need for a formal



recognition of the legitimacy of the claims of the Aboriginal peoples. Once that is accomplished it should then be less difficult to move on to the minutiae of institutional structures . At this stage there are still uncertainties about the structural details of a new self-government arrangement.There is no uncertainty, however, about one of the principles that both the Metis and the Indian First Nations of the prairies are asserting in their quest for a better relationship with Canada. Both insist on the application of the principle that promises ought to be kept. The principle should continue to apply when those promises are incorporated into a treaty or a provision of the constitution. As Louis Riel said, it should not matter in this context that one party is weaker than the other because in the case of rights, the right is the same for the small society as it is for the large.

Aboriginal peoples are gaining more political power in recent times. The notion that in a multi-national state all individual citizens are not fungible items is gaining widespread popularity in the late twentieth century.Let us work towards agreement on a brand new vision of Canada, a vision that incorporates the aspirations of the Aboriginal peoples and that recognizes the value of keeping promises. There must be optimism because the sun still shines and still the waters run .

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