ASSOCIATION OF METIS AND NON STATUS INDIANS

A RESEARCH REPORT:

An Investigation into the Origins and Development of the Metis Nation, the Rights of the Metis as an Aboriginal People, and their Relationship and Dealings with the Government of Canada.

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March 31, 1984.

Page

of the Dominion Lands Act;

g) a historical overview of the development of Metis culture, its 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 "halfbreed". 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 "halfbreed" 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 separate group of aboriginal people by the government. The only exceptions will be found in quotations from either other sources and/or authors or where the term "halfbreed" is used in relation to a specific event when the term was used to identify them.

Because this report is detailed and examines many issues in depth, an Executive Summary has been prepared for the use of the 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. However, this summary 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 have an 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,

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  - John Burrelle, Winnipeg;
  - Verna St. Dennis, Saskatoon;
  - John Dorion, Winnipeg and Saskatoon;
  - Lyle Mueller, Saskatoon and Regina.

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 laborious work of typing and retyping the many drafts of this report, performed by many typists, 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 programmes (at the Institute and at 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.

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 the law and order which was necessary at the time. In their unique role, they not only lived separately but also developed a separate identity and their own culture combining elements of both the Indian and European cultures. By the late 1790s, 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 1700s and early 1800s, 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

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 for what might today be called non-ethnic government. Because 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 had also 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.

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. <u>These persons are now Status Indians</u>. The main group of historic Metis were provided for separately through the "Indian title" provisions of the <u>Manitoba Act</u> and the <u>Dominion Lands Act</u>. As well, both <u>Acts</u> made provisions to confirm title on

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 1930s resulted in the establishment of the Metis Colonies in that Province and in the limited form of self-government allowed in 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 1930s and early 1940s 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.

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) self-government jurisdiction either entrenched in the Constitution or delegated by legislation, the authority for which comes from the Constitution;

(c) a land base on which these self-government rights can be exercised;

(d) legislative and administrative control, on their lands, 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 co-operation 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 provisions identifying the Metis and establishing the charter membership.

conclusions we have drawn, and which are recorded below.

2. 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. 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 for all aborigines in North America 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 because each tribe, each group, each nation of aboriginal peoples had their own name to identify themselves as did the European peoples. Further, they were not one people culturally, economically or politically, but the differences between the Iroquois, the Sioux, the Dene, 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 exercised by a group of people who occupied and controlled a defined area which included all of the political, social, cultural, and economic institutions they had developed to use more fully and enjoy the resources of their lands. Those rights 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

scholars such as Aquinas, de Vitoria, 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 of these peoples, it was expedient to promote the belief that aborigines really were inferior, that their rights were really fewer than those of "civilized people", and that there was no injustice involved in subjugating the aboriginal people or in taking their land and imposing European religious thought and culture on them. Indeed, not only was this unjust, but also they believed that they carried favor with their God in pursuing such policies. This, of course, was the approach and the belief encouraged among the common people. Those who controlled power and had commercial goals in mind did not 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.

4. The Impact of Legal Concepts on 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 nations;
2. denied that aborigines had social, political, and economic

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 is that the use of the term primitive was based on value judgments dear to the hearts of Europeans and to describe what Europeans did not understand or did not want to recognize about aboriginal societies. 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 aboriginal 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.

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 because they had developed as a separate culture and a new national community. They shared a language, lifestyle, customs, and a role in the local government. 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 separately 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.

In order 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 Lands Act of 1879. For its own reasons the government also found it expedient to characterize these rights as "Indian rights" and land grants or scrip allotments 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 Metis or as Indians under the Indian Act. These persons as well have a claim to being identified as Metis under the Canada Act of 1982. There may 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.

8. The legal prescription of "the extinguishment of rights" which developed in connection with the 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 and 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 previously exercised.
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 acquisition of land was to take place only if the Indians were prepared to sell their land, and if the land 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 judicial decisions in the United States and Canada. These decisions were designed to satisfy the political and commercial

of its policies and seems prepared to acknowledge land rights, and settle land claims, and grant a degree of Indian self-government and autonomy which is not inconsistent with their positions as citizens of Canada.

2. 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 practise 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 those 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 position of the Metis in the Northwest of Canada led to many considering themselves to be neither Indians or white but a new and unique race of people. They had, in fact, developed a new and unique culture which was neither Indian nor white, but which incorporated some aspects of both cultures.
4. They had as well settled in their own separate communities and had developed their own institutions, customs, usages, and laws. They practised 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

and customs.

12. The challenge to the administration under the Manitoba Act of the provisions regarding Metis lands directly affected 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 unilaterally 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. Because there was no negotiations leading to the provisions in the Dominion Lands Act dealing with "halfbreed" rights, and because the Metis never consented to cede land in return for land grants and other benefits, it is clear, in our opinion, that the actions taken under the Dominion Lands Act did not conform to the constitutional provisions of the Royal Proclamation nor to 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 proven would invalidate the actions taken under the Act.

political settlement with federal and/or provincial governments for the recognition of their rights, or seek a political solution through the constitutional process and through the entrenchment of certain rights in the constitution.

Each approach has its advantages and disadvantages. Some of these are as follows:

a) 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 Vires of 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 that the Association is not representative of Metis people and, therefore, has no legal standing to take collective legal action on their behalf. Even if the courts did agree to hear the case, they might rule against the Metis on either technical grounds or the doctrine of the "Supremacy of Parliament", i.e., the right of Parliament to legislate an aboriginal right regardless of whether the legislative action followed established principles spelled out in International law. 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 of court action would be to launch a court action brought by individual Metis who can prove their ancestors were illegally deprived of the benefit of their scrip grant. Because there are over 16,000 alloters involved, it is unlikely the courts could deal with such a massive influx of individual claims.

Individual claims would result in decisions being made on a case by case 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.

The disadvantages include:

The current strategy of the federal government appears to be to favor granting rights and placing the onus for failure to entrench rights, if that should be the outcome, on the provinces and the aboriginal peoples themselves.

The reluctance of the provincial governments to recognize any rights or to grant as few as possible, because they control the land and resources needed to settle claims arising from the recognition of 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 containing a majority of the population of Canada 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 will take a considerable additional time period before the constitutional provisions are implemented. The constitutional approach, nevertheless, holds out the best hope of success in the continued efforts of the aboriginal peoples to achieve their rights.

2. 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 to local

constitutional negotiations.

9. However, if the Council is to become an effective vehicle, provincial politicians must work for greater unity in their positions on issues and strategy being used to achieve their objectives.

10. The Council must also establish a firm center of authority and rational policies by which the content of Metis positions is developed. It must also adopt a rational 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,

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"aboriginal title" was first used 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]

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. Cumming 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 equated 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 Section 91-24 of the B.N.A. Act 1867 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 than the use of the term "Indian title".

Most Inuit and Indian groups and organizations have eagerly

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.[17] 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.[18]

In Canada, the Indians in the Maritime colonies and Upper and Lower Canada were from 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 in these colonies.[19] 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, a system of paying annual annuities and providing for 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.[20]

When the new Confederation of Canada began treaty-signing in the Northwest in 1873, it continued the pattern of land cessions established in the earlier treaties along with ongoing payments in money, goods, and services. The treaties now also established the reserve system.[21] The issue of "Indian title" is not dealt with in the treaties. The treaties followed those processes for land cessions outlined in the Royal Proclamation of 1763 and the commitments made by Canada in Schedules to Order-in-Council No. 9 which was incorporated into Section 146 of the B.N.A. Act, 1867. The treaties imply that the government recognized the sovereignty of Indian nations. These nations ceded, 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.[22] The reserves which were set aside for the Indians

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.[25]

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".[26]
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 favorably 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;[27]
b) contracts or mere promises and agreements;[28]
c) treaties of peace and friendship in certain cases.[29]

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 . . . [30]

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

a) take court action against the federal government over land claims;[31]
b) raise funds for any legal action relating to land claims.[32]

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 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 peoples 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 lacking 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.

"Aboriginal title" as defined in law and practice has produced negative results for the aboriginal peoples 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 peoples have. It is not useful to argue that the rights of aboriginal peoples 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 Indians ownership, control and administration of their national lands according to the 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 indicated, the Indians claimed they owned the land and they did.[34] What is important to consider is how they lost this land and whether

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 in order 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 those internal lines which subdivide backward territory from advanced territory according to the method or methods by which it can be validly acquired.[35]

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.[36] The method of acquisition was not a relevant consideration vis-a-vis another member of the international family.[37] 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.[38]

(de 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").[43]

However, according to Brian Slattery, the above medieval view is not an accurate interpretation of the views of all writers at that time. 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.[44]

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 Aquinas, who was born in 1225. His greatest 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 on jurisdiction or sovereignty over this lands. Rather, he did 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 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.[45]

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, does not go so far as to state that war can be justly waged

> 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 Christian rulers were said to be subordinate but legitimate nevertheless. Unbelief did not deprive them of authority nor 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, appropriative by Christians at will.[49]

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 sovereignty 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.[50]

These understandings 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.[51]

The New Sovereign could expropriate rights or cancel them by legislation. However, if such action were taken, there was a recognized entitlement to compensation for such expropriated rights

> 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 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.[55]

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

> . . . 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.[58]

De 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.[59]

To do so says de Vitoria, would be "theft and robbery no less than if it were done to Christians."[60] Their rights remained intact even though "the natives . . . are timid by nature and in other respects dull and stupid."[61]

In an additional lecture entitled De Jure Belli, de Vitoria considered the justice of war against aboriginal peoples in the New World. Where the war was between the Spanish and the aboriginal peoples, analogies were made to conflicts between Spain and France, two sovereign nations.[60] In his writings, de 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 national rights of the aboriginal peoples can be terminated because they have only the right of occupancy of their lands 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 extinguishment to de Vitoria and the Royal Proclamation of 1763.[61]

The result of de Vitoria's work and the ensuing debate saw

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 ownership 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

Mexico was a notorious usurpation"[71] for it is unlawful to reduce another nation to subjugation. But the same considerations apply to societies composed of several independent families, such as "the savage tribes of North America".[72] 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.[73]

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 could not claim more land than they actually needed, and certainly not large tracts of territory over which they merely wandered. Vattel was concerned with restricting the geographical extent of these rights, not with asserting this temporary or inferior character.[74]

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.[75]

The Spanish conquistadors established themselves as dictators and rulers with all the privileges and prerogatives which go with such

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.[80]

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 they could carry on trade and commerce and make laws to govern the trade. In these areas, Indian rights were not interfered 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.[81] 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 lifestyle 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.[82]

(5) British Practices

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 by British

settler colonies themselves, good relations with the Indians and Indian allies ensured their survival.[86] 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.[87]

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 . . . .[88]

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.[89] 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 formal practices involving the recognition of land ownership by registered title.

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.[90]

as owned only if they were permanently used for living site or areas of cultivation."[95] There is support for such an approach in British colonial experience.[96] However, this argument must fail as it is contrary not only to the views of 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 . . . .[97]

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 de Vitoria, 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.[98]

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.[99]

[17]Sharon O'Brien, Diss., University of Indiana (1982), p. 22.

[18]O'Brien, pp. 53-54.

[19]Cummings and Mickenberg, pp. 94-100.

[20]The Honorable Alexander Morris, The Treaties of Canada With The Indians (Toronto, Ontario: Coles Publishing Company, 1979).

[21]Morris.

[22]Morris.

[23]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.

[24]St. Catherines Milling Case, p. 54.

[25]Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal In the Light of Calder," Canadian Bar Review, 51 (1973), p. 450.

[26]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," Saskatchewan Law Review, 38 (1973), p. 12.

[27]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.

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

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

[30]R. v. McCormick, 18 V.C.Q.B. 131 (1859).

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

[32]Revised Standard Statutes of Canada.

[33]Cumming and Mickenberg, p. 12.

[34]MacLeod, p. 195.

[54]Slattery, pp. 13-21.

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

[56]Hugo Grotius, The Freedom of the Seas (New York: Oxford University Press, 1916), pp. 19-20.

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

[58]de Vitoria, p. 120.

[59]de Vitoria, p. 128.

[60]de Vitoria, p. 123.

[61]de Vitoria, p. 128.

[62]de Vitoria, pp. 163-187.

[63]Cumming and Mickenberg, Part II.

[64]Cumming and Mickenberg, Part II.

[65]MacLeod, pp. 138-139.

[66]MacLeod.

[67]MacLeod.

[68]MacLeod. See also Cohen, The Spanish Origins of Indian Rights In United States Law, 31 GEO, Law JR. 1 (1942), p. 109.

[69]Vattel, Le Droit des Gems, translated by Washington, Volume 3 (Carnegie Institute, 1916), p. 126.

[70]Vattel, p. 131.

[71]Vattel, pp. 38 and 141.

[72]Vattel, p. 143.

[73]Vattel, pp. 142-143.

[74]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, p. 17.

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

[98]de Vitoria, pp. 138-139.

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

Proclamation of 1763 use this term. As stated in Chapter I, the term "aboriginal rights" has been defined as a land right by Cumming and Mickenberg in the publication "Native Rights in Canada"[1].

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 acquire and extinguish "legally" the interest of Indian peoples in their lands without having to adhere to the accepted principles of international law which applied 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]

Blackstone 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) cessions, and (3) conquest.[10]

> 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]

Thus, it was argued that a right of occupancy existed because the lands were territorium nullius, land subject to no recognizable jurisdiction or rights and open to appropriation 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.

It has been argued that the issuance of Charters extinguished the rights of the aboriginal peoples because 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 were 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

treaty process was reduced to a matter of little consquence 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]

Slattery in commenting on this misapplication of international law concluded 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 is 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 those that were established be continued. To further settlement and commercial policy, it was also necessary that the British acquire a clear title to the land because 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

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 attempted neither to exercise sovereignty nor 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 with French 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 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

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 the settlers 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

The land was unoccupied. This was not true, because, as MacLeod 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

Indians acquired the horse. This made them more 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 an 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, Indian 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-Scots settlers on the frontier and the old established settlers of Eastern Pennsylvania.[49]

3) Settlers 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 was guaranteed.[52]

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 to 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-1700s, this control had rested with the colonizing companies. There were disputes over illegal settlements on the frontier and the forcible 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 law should apply if the murder has been committed by a white person. 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 United States 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]

> 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 followed 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 persuasive examples, they have been applied in the most rigid way in Canadian cases, as we shall see later. This was done in spite of the fact that generally in Canada, American case law has been held to not to be applicable as precedents 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 was 1793. This was 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]

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 existence 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

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. 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.

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 . . . . 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."

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. 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."

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. 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

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 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 neither cultivated nor 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,

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 systems.[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 were believed that an Indian was ready to assume responsibility as a full citizen of the United States. During the trust period, the Indians did not have to pay taxes on their lands. 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

(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 fewer rights than the Indians. (The practice of dealing separately with the 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 as 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.

[19]Sanders, p. 151.

[20]Slattery, p. 95.

[21]Slattery.

[22]Slattery, pp. 95-96.

[23]Lindley, pp. 95-96.

[24]Lindley, p. 96.

[25]Blackstone, pp. 106-107.

[26]Blackstone.

[27]Amodu Tijani v. Secretary Southern Rodesia (1921), 2 A.C. 399.

[28]Sanders, p. 150.

[29]Sanders. See also Footnotes 14 and 15.

[30]Sanders, p. 152.

[31]Sanders, 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, p. 44.

[34]MacLeod, Chapter VII-IX.

[35]MacLeod, p. 81.

[36]MacLeod, pp. 92-93.

[37]MacLeod.

[38]Cumming and Mickenberg, Chapter 11.

[39]Cumming and Mickenberg.

[40]MacLeod, p. 194.

[41]MacLeod.

[42]MacLeod, pp. 127-128.

[66]O'Brien, pp. 38-39.

[67]O'Brien, pp. 39-40.

[68]O'Brien.

[69]O'Brien, p. 65.

[70]MacLeod, pp. 464-465.

[71]MacLeod, pp. 467-468.

[72]MacLeod, Chapter XXXI.

[73]MacLeod, pp. 472-476.

[74]MacLeod, pp. 476-477.

[75]MacLeod, pp. 441-442.

[76]MacLeod, pp. 450-451, 536, and 532.

[77]MacLeod, pp. 853-854.

[78]MacLeod, pp. 538-539.

[79]MacLeod, pp. 540-544.

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 which had not been thought of at that time.[3] Further, he was of the view that France recognized no "Indian title", and that, 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 as they had no title recognized in law. This would have included the Prairie Indians, because 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 nor any of the French trading companies, nor 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 those 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

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 or 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 nor the actual acquisition of any territory. Because 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 it granted to him the right to settle these lands. France made no pretense of any title in North America at that time. However, because de la Roche never reached North America, his Commission was never put into effect. It was ten years later that France gave another Commission, this time to Jacques Noél. 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, and Chauvin acted as one of

directed to establish friendly relations and alliances with Indian tribes for the purpose of trade and to enlist their aid in fighting 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 required that a claim to title 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 peoples. It also acknowledged in practice that these peoples 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. Because 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 part of the territory which is now known as Canada, the British also followed the practice of granting trading

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 as they had no idea of the land area involved. In addition, a portion of the lands within the area was 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 practice, the records make reference to only two such treaties. The first treaty mentioned was in 1668 when a Captain Zachria Gillam, who led an expedition to James Bay and 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 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. With this treaty Selkirk, who had earlier purchased the right to a tract of land known as Assiniboia, from the Hudson's Bay Company,

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

Bell asked: "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 replied: "To the whites, we conceive."

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

Simpson answered: "Yes."

Grogan then asked: "There is no restriction at all in that respect?"

Simpson replied: "None at all."

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

Simpson answered: "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 Company) and also led to 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

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

> 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, consquently 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 excludes 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: "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, jurisdiction,

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] Isbister decided not to pursue the matter. He himself was unable to pay the costs, and the petitioners he was representing were no longer interested in the matter because 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 because colonial claim to some of these territories was exchanged between France and Britain 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 Prince Edward Island 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 Prince Edward Island and Cape

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 in 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 were 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 identified themselves 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. Because 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

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 ceded 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 mixed 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, who 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

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. This was done by way of treaties. The one area on the north shore of Lake Ontario around Toronto was surrendered by the Mississauga Treaty concluded 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 recognition of 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 either 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 "halfbreeds" were present as in all other areas where the fur trade had been carried on for some time. They were involved in the fur

settlements in the Northwest, separate from those of the Indians. The origins of this phenomenon and how the government dealt with the "halfbreeds" 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.

e) 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, instead, he developed a policy of dealing with the Indians, which he claimed was based on the South African model.[65]

Douglas, who was motivated by economics 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

recent arrivals from the Prairies or non-status Indians. Some Metis in Northeastern British Columbia may still 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 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 transfer 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 lot 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

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 already 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, anyone 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 settler away from the river, the line of 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]

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, with the settlers recognized

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. Catherines 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 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 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 is 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

> 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 to 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.

In Canada, however, as indicated in the St. Catherines Milling Case, the situation of "Indian title" has been treated with 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. No surrender of Indian rights had been made, and, according

> 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 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

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 "halfbreed" 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 Lieutenant 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.
>
> Stangely 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.

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 themselves as Indians, they could live on Indian lands and were entitled to all the other benefits accruing to Indians. If they identified themselves 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 to 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, first, by way of the Manitoba Act, and second, by way of the Dominion Lands Act. (One aspect of their rights was to identify themselves as a nation.) They were recognized by legislation as having "Indian title", and by the Manitoba Act they 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.
4. Even if the Manitoba Act and the Dominion Lands Act and

FOOTNOTES

[1]MacLeod, p. 196.

[2]MacLeod, Chapter II.

[3]Slattery, p. 70.

[4]Slattery.

[5]Slattery, p. 71.

[6]MacLeod, pp. 147-151.

[7]MacLeod, pp. 17-18.

[8]MacLeod.

[9]MacLeod, pp. 19-23.

[10]Slattery, p. 72.

[11]Slattery, p. 72.

[12]Slattery, p. 74.

[13]Slattery, pp. 75-82.

[14]Slattery, pp. 83-85.

[15]Slattery, pp. 85-88.

[16]Slattery, pp. 88-89.

[17]Slattery, p. 90.

[18]Slattery.

[19]Slattery, pp. 91-94.

[20]MacLeod, pp. 127-143.

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

[22]Slattery, p. 379.

[23]Cumming and Mickenberg, p. 142.

[44]Cumming and Mickenberg, pp. 98-101.

[45]Cumming and Mickenberg, p. 96.

[46]Cumming and Mickenberg, p. 104.

[47]Cumming and Mickenberg, pp. 104-105.

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

[49]Cumming and Mickenberg, p. 79.

[50]Cumming and Mickenberg.

[51]Cumming and Mickenberg.

[52]Cumming and Mickenberg.

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

[54]Cumming and Mickenberg, 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, pp. 108-112.

[59]Cumming and Mickenberg.

[60]Cumming and Mickenberg, pp. 113-117.

[61]Cumming and Mickenberg, pp. 113-122.

[62]Cumming and Mickenberg. 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]Morris, pp. 50 and 69.

[65]MacLeod, pp. 481-482.

[66]MacLeod.

[67]MacLeod, pp. 482-483.

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]

Because most of the free traders were "Metis" or "halfbreeds", 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

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 legislative definition of the term "Indian" at the time must have been what the Fathers of Confederation had in mind when Subsection 91(24) was put into the B.N.A. Act.

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 to the way in which they viewed themselves in relation to the Indians and the European trading companies 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. It 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, Tremauden 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. Tremauden speculates that some of the men who accompanied these expeditions were so enamored with the lifestyle

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, it did grow. By the late 1700s, the "halfbreed" labourers formed the major part of the work force of the Hudson's Bay Company. This ready-made indigenous work force also played a major role in the Company's move to establish posts further inland. It also played a major role in the Company's move into the Prairie area, which the Company had not tried to claim prior to 1790 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 had 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. First, it was less expensive to use an indigenous rather than an imported labour force. Second, the Metis knew the country well and did not require guides. Third, the Metis had valuable connections with their Indian relatives. They spoke the language and were able to develop and use their connections 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

Company employed many English managers, who also began to produce offspring, by the early 1800s the Metis of the southern area included a mixture of persons of French/English and Indian ancestry plus the products of liaisons between these two groups of indigenous peoples. 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]

III. THE COLLISION 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 an established network of posts and 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 River, 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]

Lork Selkirk in 1808 bought what became known as the Province of Assiniboia from the Hudson's Bay Company. His plan was to establish a significant settlement of Scottish settlers in the Red River. 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, substantial numbers of settlers established in the area 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

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 and British workers for their labour forces. They 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.

There were problems with the immigrant labour force. First, the expenses of transportation, housing, and food were high. Second, the immigrant labour force neither knew the country and had no relationship with the Indians nor did they speak the language.

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 by 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 became well established and accepted, civil laws and codes were 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 "halfbreeds" together as one distinctive community, strengthening the feeling of Metis nationalism and the concept of Metis nationhood.

- 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, 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. Its Charter rights, then, reverted to the British Crown. The British Crown, then, transferred its claim to the territory, on request, to 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 at this time 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,

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, and 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 well as the claims of other British

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.

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. First, they stopped the surveys and drove off the surveyors. Second, 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 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 enthusiasm for the Metis actions for they saw them as acts of hostility against the British Crown to which the "halfbreeds" 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-United States border. More work was done on the Bill of Rights and

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 "halfbreeds" 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: first, the Indians had rights as autonomous nations; second, 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 have 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 an Indian title was not ruled out, but was seen as something over and above other aboriginal rights claimed in the Bill of Rights. National 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 protect any rights they personally possessed as descendents of the Indians or any national aboriginal rights that they claimed as a new nation. On the other hand, they also clearly recognized the responsibility of the federal government to deal with the Indians.

Because this question of Indian title is an important issue, it is worth quoting Ritchot's interpretation of the conversation

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:

officials and politicians believed that the 1.4 million acres were 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 issue 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 Honourable 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 halfbreed 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.[28]
> (emphasis mine)

When the delegates were presented with a draft of the Manitoba Act, Ritchot expressed his displeasure with some of its terms. On

> same among the children of the halfbreed 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 halfbreeds 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.[31]

The other clauses in the Manitoba Act granted the language rights, education rights, and other rights set out in the Bill of Rights to the satisfaction of the delegates. For the most part, these other provisions created minimal problems in Parliament. Because 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 Taché spoke in favour of

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. Some laws were passed which limited religious rights. However, the government made no attempt to restrict the use of aboriginal languages or prevent aborigines from following some of their other cultural practices. Attempts to implement rules which were made by the Department of Indian Affairs have been discontinued and are generally acknowledged as having been unfair and unjust. Also, the potlatch restrictions have been dropped from the Indian Act. A strong argument can be made that many of the rights of the aboriginal peoples still exist, even though they have not 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 the French speaking population, and they sought to have these privileges preserved in legislation. As indicated previously, this legislation became a Constitutional Act.

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

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, because 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 Subsection 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 was not amended until 1876 to exclude explicitly 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 British 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 two 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

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 3 was signed, the Metis were excluded. However, the following year the Commissioners returned to the area and 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 riased by the Indians. Morris simply responded that he did not come to deal with the "halfbreeds" and concluded by saying:

> You may leave the halfbreeds in the lands 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 halfbreeds 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

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 halfbreeds is well founded and should be admitted. As already set forth, he is of the opinion that the Indian and halfbreed 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 the Indian title of the "halfbreeds". 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 land 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 "halfbreeds". It is not clear why Macdonald made provision for Metis Scrip in legislation but then insisted as late as 1884 that no special Metis rights existed. Because 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

- 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 one stated by Macdonald previously, that Metis could join Indian bands if they claimed Indian rights. Requests 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 "halfbreeds" 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. This included areas covered by Treaties 2 and 4 to 7. All Metis 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

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]Extracts, pp. 91-92.

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

[4]Hudson's Bay Company Response, p. 58.

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

[6]Tremauden, pp. 3-4.

[7]Tremauden, Chapter 2.

[8]Stanley, p. 11.

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

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

[11]McLeod and Morton.

[12]Stanley, pp. 1 and 12.

[13]Cumming and Mickenberg, p. 85.

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

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

[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.

[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, Chapter 42 (1868).

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

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

[41]Morris, Chapter IV.

[42]Morris.

[43]Morris, p. 50.

[44]Morris.

[45]Morris, p. 99.

[46]Morris, p. 195.

[47]Martin, pp. 99-100.

[48]Sessional Papers 116, pp. 70-78 (1885).

[49]Martin, p. 80.

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

[51]Report of Privy Council, May 6, P.C. No. 918 (1899).

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

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

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

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

to the land and the resources. To develop these 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 its 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

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's 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]

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

> 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.
>
> 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 (Taché) is strongly opposed to the idea of an imperial commission, believing as indeed we all do, that to send out an

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 confusion 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:

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. 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 page 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, Ritchot 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

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 either:

- 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.

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

the federal government. Thus, Britain unilaterally amended Section 6 of the B.N.A. Act 1871 as proposed by Macdonald by 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 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 halfbreeds" 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 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 Lieutenant Governor the right to select and allocate these lands. Although the Act placed all ungranted or waste lands under the jurisdiction of the federal government, he interpreted the river lots as being occupied and the common 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

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 approximately 1/3 of its face value.

The Provincial Legislature passed a law to discourage scrip speculation by making assignments 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 speculation 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 percent 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 percent 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

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 courts so that conflicting 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

donations, but they could not qualify for tax funds.

III. THE RESULTS AND CONSQUENCES 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 "halfbreed". 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 former two, 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

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.

The 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 "Riviére 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 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 Lieutenant 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 was only able to avoid open conflict between the settlers and Metis by promising the

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 these two bodies were 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 print-out 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

FOOTNOTES

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

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

[3]Manitoba Act, 1870.

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

[5]Report of the Select Committee on the Hudson's Bay Company, Cauchon Memo, Appendix B.

[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., Letterbook No. 13, September 29, 1869 (Public Archives of Canada, 1869).

[9]Cauchon Memo.

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

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

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

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

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

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

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

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

[39]Final Report, Manitoba Metis Federation, pp. 30-41.

[40]Final Report, Manitoba Metis Federation.

[41]Final Report, Manitoba Metis Federation, pp. 42-44.

[42]Final Report, Manitoba Metis Federation, p. 44.

[43]Final Report, Manitoba Metis Federation, p. 45.

[44]Final Report, Manitoba Metis Federation, p. 47.

[45]Final Report, Manitoba Metis Federation, p. 48.

[46]Final Report, Manitoba Metis Federation, pp. 48-56.

[47]Final Report, Manitoba Metis Federation, pp. 57-59.

[48]Manitoba Act, 1870.

[49]Manitoba Act, 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 Taché Papers for correspondence with Greenway in early 1890s.

[52]Morton, pp. 246-250.

[53]Tremauden, p. 258.

[54]George F. Stanley, Louis Riel, Chapter 10 (Toronto: Ryerson Press, 1963).

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

[56]Final Report, Manitoba Metis Federation.

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

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

[59]Morton, pp. 153-154.

Chapter VI

SCRIP DISTRIBUTION UNDER THE DOMINION LANDS ACT: POLICY AND PRACTICE

I. INTRODUCTION

In Chapter IV we reviewed the petitions from the Metis 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 "halfbreed" lands came up in conjunction with the signing of treaties during the 1870s. The response of the Commissioners was that the "halfbreed" 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, put few of his views on this issue 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] As indicated, Macdonald 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 white men and, therefore, had no aboriginal rights.[3] It has also been noted that these views were contradicted by early Indian Acts which did

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 Britain 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 provisions for land acquisition which were based on established practice. This Act stated as follows:

their goals. However, the law is binding on the government as well as on its citizens. Therefore, the Macdonald government's subsequent unlawful actions in implementing the Manitoba Act cannot be excused on the basis that it did not intent 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 the land, nor were their other rights as aboriginal peoples 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 their land for the government.

d) There was no compensation for the rights they supposedly surrendered.

e) Individual 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.

Because 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

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, and
- 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 infrastructure 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

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 converting 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 with treaty 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. Coté 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

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 some assistance. It is a temporary asset which, in the case of "halfbreed" 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 peoples, 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 "halfbreeds". It was granted to volunteers in Wolseley's Army and Middleton's Army, South African volunteers, and to N.W.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

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 he/she 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 allottee, 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.

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 "halfbreeds" 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.[34e]

ix) May 29, 1919--Land scrip notes could now be located by the assignee without the appearance of the "halfbreed" at the land office.[34f]

There is a proliferation of correspondence on the above policy changes in files dealing with scrip rulings. This correspondence further supports the above rulings and indicates 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 "halfbreeds" 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 "halfbreeds", "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.

later by Sifton, the government's main concern in issuing scrip was not for the benefit of the Metis, but in order to placate them so that 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 "halfbreed" land question.

Why did the government use easily negotiable scrip issues to satisfy the "halfbreed" 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, as 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 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 percent of the scrip notes were delivered into the hands of banks and other speculators.[41] For example, the government delivered to the chartered banks fifty-two percent of all scrip notes. In the case of money scrip, they had delivered to them sixty percent of the notes.

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 also it actively advertised scrip for speculators from whom scrip could be obtained by notices posted 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, they acquired 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

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 transactions.[53] Complaints to the Department of the Interior over this practice by the allottees were rejected. 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 for which 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 "halfbreed" 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 purposes other than those intended for 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 and up 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

pre-emption quarters they occupied.[58]

In at least one case involving a politician, a former Lieutenant Govenor, 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, as 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.

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 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, M.P. 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 quarters of land in Saskatchewan under his name using "halfbreed" 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 1879, 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

lack of 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, as 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 "halfbreed" 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 as such by merchants because of their end value in lands. 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 land and for other purposes, 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 by 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 anlyzed, 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

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. We can only speculate on why the banks were involved in buying scrip in large quantities because we do not have access to bank records. However, 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.

In a 1930 House of Commons debate on amendments to the Bank Act, it was pointed out by a Member of Parliament that it was not uncommon at 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;

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 administration and legal machinery was set up to distribute the land entitlement. This was true in Manitoba where speculators obtained assignments 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 did not recognize these assignments, many indeed were recognized. Even where they were not 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 deeds 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 the 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

approximately ninety percent of the files. The other ten percent were not available, having been lost or destroyed in other ways. If we assume that, in the case of the ten percent 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, they acquired approximately 7,000 scrip notes with a land value of 1.2 million acres. For all banks, the number of scrip notes would be approximately 13,500 and the land value would have been approximately 2 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
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 is, however, 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

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. As a result, speculators such as 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) 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 then 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 and 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 "halfbreeds" 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-identify. 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 Indians in the Northwest who did not have some non-Indian ancestry.

This fact did not escape the notice of the speculators and

of Reimer, a clerk of the Privy Council.[85]

In 1910, the policy of re-admitting "halfbreeds" 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, because the Indians of mixed ancestry would not have applied for withdrawal from treaty if there were no financial gain for them. The exact number of persons withdrawing from treaty has not been tabulated, but the numbers reached in excess of 2,500 families. During the period from 1892 to 1901, approximately 100 families were discharged from treaty, and from 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. Some of the lists of those withdrawing from treaty are found in sessional papers.[89]

Many of those Indian families withdrawing from treaty were later allowed to re-entry 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 benefited little from the money they received for their scrip, as 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; thus, leaving these persons destitute. The government's options were either 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 politician 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

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. Because 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 to 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 laws 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, then, were instructed to accept assignments if they were satisfied that 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

- The records are full of indications that speculators had advance notice on 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 was not issued until 1900. In 1901, R.C. Macdonald had agents in the U.S. buying scrip from U.S. "halfbreeds" 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 nor 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. "halfbreeds", formerly residents of Canada, to apply for scrip. The scrip could not be used in the U.S. and had only limited cash value. Because almost all of these scrip assignments were purchased by agents for one R.C. Macdonald, and because the scrip issues were 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

to proceed to trial. At this point, a political move was quickly organized in the Senate and a Bill was introduced to amend the criminal code in order 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 scrip fraud 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 certificates to the Department. The Department would then write to the speculator informing him/her of the numbers of their scrip notes. When the speculators wanted these notes applied either to land which they had 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, as 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 coporations and individuals.

Those who had scrip accounts included:

Dixon Brothers (Maple Creek)

Osler, Hammond, and Nanton (Toronto)

Alloway and Champion (Winnipeg)

Banks:

Imperial	Commerce
Dominion	Merchants
Nova Scotia	Federal
Union	

Lawyers:

Bradshaw, Richards and Affleck

McDougall and Secord

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]

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, 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 "halfbreed" residents 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 as 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 for he was destitute. However, the payment was authorized only on condition that the lawyer would drop L'Hirondelle's appeal againt the trial judge's decision.[107]

In 1898, 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 that the holders could do this legally and, thereby, enable the Department to clear up a number of outstanding cases of unredeemed 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

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 the rights of aboriginal peoples, including whether or not 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 de 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 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 the 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

of the plant and animal life? How should they be treated? The Church, as is known, referred the matter to its theologians as the Salamanca University in Spain. Here, one de Vitoria 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 did state quite clearly that all rights exercised by the aborigines were valid. In the Papal Bull, which followed, it was clearly and comprehensively stated that the aboriginal peoples should not be disturbed in the enjoyment of their lands. Certainly, this implied more than a land use right and all those rights humans normally exercised in their homelands or on lands over which they had control.[122]

The actual practice 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 often 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 for the Spanish were firm in the belief that they had the right to impose their religion, lifestyle, and economic systems upon the aboriginal peoples.[124] The French had no statute law recognizing the rights of aboriginal peoples. 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 of the St. Lawrence River Valley, 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]

b) 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 were patterned on American treaties.[130] Many of these treaties provided for the cession of certain specified land areas to the Crown and the relinguishment 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 of land where Indians could exercise certain rights. 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,

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. Because 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 peoples, 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 cannot, therefore, 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

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 inexpensively 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, 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

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 certainly 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 that an aboriginal person 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 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 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, which were 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 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,

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 collective, "Indians or halfbreeds". The legislation also recognized that one possessed rights by virtue of one being a descendent from a collective 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); and
- 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 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

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 conclusions reached above are as follows:

a) One sovereign nation is not competent in any way to take actions affecting the rights of another sovereign people on a unilateral basis (without consultation and formal agreement), as was done by the Government of Canada in its dealings 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

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. Because when can equity result from a transaction where someone takes everything you have traditionally owned and, then, gives 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. Because 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 benefited 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 benefited 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 also of the view that the fraud, bureaucratic irregularities, and obvious government

FOOTNOTES

[1]Manitoba, The Birth of a Province, Ritchott's Diary, p. 141; Also see Archibald to Howe, March 27, 1872, Archibald Papers, 762, No. 85, Public Archives of Manitoba.

[2]House of Commons Debates, 1886, p. 834.

[3]Records of the correspondence and reports dealing with the Red River Memorial, 1846, p. 58.

[4]Wording of the Manitoba Act, Section 31: "Since it is expedient . . . . "

[5]Wording of the Dominion Lands Act, 1879, Subsection 125(e): " . . . as may be deemed expedient."

Hall, Sifton's comments in Parliament, 1904.

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]MacLeod, p. 533.

[9]As stated by Dr. Lloyd Barber during an interview in Regina, May 10, 1977, Indian Claims Commissioner.

[10]Royal Proclamation found in Cumming and Mickenberg, Appendix 2; Also see Chapter III.

[11]Morris.

[12]An Act providing for the organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordiance Lands, 1868.

[13]Macdonald Correspondence, September 29, 1869, to Carroll, Macdonald Papers, No. 13, p. 209, Public Archives of Ottawa.

[14]Macdonald Correspondence, Macdonald to Rose, February 23, 1870.

[15]P.C. 688, 1885.

[36]Noonan and Hodges, p. 119.

[37]Noonan and Hodges, p. 120.

[38]Noonan and Hodges, pp. 74-86.

[39]Noonan and Hodges.

[40]Noonan and Hodges, 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]Scrip Account Files.

[44]Scrip Account Files.

[45]Manitoba Metis Federation Report, p. 45.

[46]Letter by R.A. Ruttan to Commissioner Smith, October 18, 1896, Dewdney Papers, Glenbow Foundation.

[47]Fillmore.

[48]R.G. 15, Volume 784, File #557941, March 20 to May 1, 1900.

[49]Clippings in Newspaper File, Volume 24, Gabriel Dumont Library, Regina, University of Regina, Public Archives of Regina.

[50]Dixon Brothers File, University of Regina, Public Archives of Regina.

[51]Fillmore.

[52]Coté.

[53]Fillmore.

[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]R.G. 15, Volume 784.

[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.

[80]House of Commons Debates (1886), 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, Department of the Interior Correspondence, June (1899), 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 halfbreeds, 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 Halfbreeds withdrawing from Treaty, 1885-86, plus list of halfbreeds re-entering Treaty.

[90]Commissioner to Supt. General, July 1886.

[91]Final Report.

[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.

[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]Department of the Interior Correspondence, Re: Rothwell to Sifton, February 16, 1897, R.G. 15, Volume 239, Public Archives, Ottawa.

[109]Department of the Interior Correspondence, Re: Ruttan to Smith, October 19, 1896, R.G. 15, Volume 503.

[110]Department of the Interior Correspondence, Re: Robinson to Keyes, R.G. 15, Volume 868.

[111]Department of the Interior Correspondence, Re: November 30, 1920, Not to Investigate Fraud Charges, Policy since 1913, R.G. 15, Volume 983.

[112]Department of the Interior Correspondence, Re: Agree to Investigate Claims of Fraud, 1896, R.G. 15, Volume 235.

[113]Department of the Interior Correspondence, Re: Recommend Another Scrip Issue, R.G. 15, Volume 492.

[114]Department of the Interior Correspondence, Re: Rev. Holmes to Oliver, May 2, 1910, and Oliver's Reply, May 11, 1910, R.G. 15, Volume 784.

[115]MacLeod, p. 100 and following.

[116]MacLeod, pp. 402-404.

[117]Cumming and Mickenberg, pp. 75-88.

[118]MacLeod, pp. 17-18.

[119]MacLeod.

[120]MacLeod, pp. 17-18, and p. 533 and following.

[121]de Vitoria, p. 120 and following.

[122]Slattery, pp. 47-48.

Chapter VII

THE DEVELOPMENT OF A DISTINCTIVE METIS CULTURE

I. INTRODUCTION

Previously in this report we have discussed the rights of the Metis and the application of aboriginal rights theory to Metis national rights in law and practice. We have also traced the emergence of the Metis as a distinct aboriginal group. The first part of this Chapter discusses the main attributes of Metis national culture. It then goes on to trace the impact of the Northwest Rebellion on that culture after 1885, including the decline of the Metis into poverty. It also examines Metis nationalism and Metis organizations after 1885 with particular emphasis on the re-emergence of Metis nationalism in the 1960s.

II. METIS CULTURE FROM THE EARLY 1700s TO 1869

a) Economics

1) The Fur Trade and the Voyageurs

The early Metis lifestyle was built around the fur trade. The primary mode of employment for the Metis was as middlemen in that trade. This included the well known Metis boat brigades, the Red River cart brigades, the buffalo hunt, the Plains traders, and a variety of clerical, semi-skilled and labouring positions with the fur companies and, in particular, with the Hudson's Bay Company. Also, in time, and in particular by the middle of the 19th century, agriculture became an important mainstay of the local economy in the Red River, on the Saskatchewan River, and in other isolated locations.

Alexander Begg describes the role of the voyageurs, freighters, hunter, and trappers in the following excerpts from The History of the Northwest, Volume 1:

> Such is a description of the men who manned the canoes of the fur companies, and underwent the greatest hardships and privations during the long and arduous journeys they undertook for their masters. The picture may be over drawn, but from all we can learn, they were a reckless, and at times a dissipated lot of men, ready for the most onerous duties when required of them, and, when not engaged in tripping, idle, wasteful and dissolute. According to Sir George Simpson, there were 500 of them in the employ of the Hudson's Bay Company annually during his time.[1]

The above quotation indicates that a substantial number of voyageurs were employed in freighting, and it gives to us some insight into the character of early voyageurs. Harmon implies that they were French Canadians but it is certain in the later period during Simpson's Governorship, they were the Metis of Rupertsland. It is almost certain that Harmon has exaggerated and given a rather biased impression based on his limited observations. His view of the voyageurs is contradicted in a number of aspects by other writers. Begg then goes on to describe the mode of transportation as follows:

> In the early days, canoes, some of them being very large and strong, were used, but these gradually gave way to boats, which were worked by nine men, eight of whom were rowers and the other the steersman. Brigades composed of from four to eight of these craft, were kept constantly going during the summer between the various posts, carrying supplies and bringing back the bales of fur collected during the season. When a strong rapid was encountered in river travelling, the boats were unloaded, and, along with their freight, were carried overland, sometimes a considerable distance, so that the work was often very severe. If the rapids were not sufficiently formidable to render a portage necessary, the crew, going ashore, would pull the vessels along by means of lines. On the lakes, the men rowed, unless the wind was favourable, when a large square sail was hoisted, and they, for the time being, were free from toil, but this only happened occassionally during the long trip.
>
> The goods carried in the boats were usually done up in bales, each weighing about

> along the prairie. To each three carts there was one man, and the whole train had a supply of spare animals, varying in number according to the state of the tracks, in case of accident, or the giving out through fatigue, of oxen or horses, an event that frequently happened on a long trip. The rate of freight paid by the company from St. Paul, Minnesota to which place the freighting carts went in large numbers, was from sixteen to eighteen shillings per 100 lbs., but a large portion of this was paid in goods, at Fort Garry prices, which reduced the actual cost of freight very considerably. Advances were made to the freighters during the winter, to be applied on their spring and summer work on the same plan as carried out with the voyageurs, but in the case of the former, the money was generally spent in support of their families, while in the latter it was usually spent in drink. It was estimated that the Hudson's Bay Company and petty traders employed about fifteen hundred of those carts, between St. Paul and Red River, and from three to five hundred more to the Saskatchewan and other inland districts, so that there were from 600 to 700 men engaged in this business.[3]

3) The Buffalo Hunt

Another important economic activity in the late 1700s and in the 1800s was the buffalo hunt. Both Tremauden and Begg describe the hunt quite extensively. The hunt is also described by McLeod and Morton in their book about Cuthbert Grant. Of the four writers, Tremauden was most sympathetic to the Metis and worked closely with the Manitoba Metis Historical Society in compiling information for A History of the Metis, published in 1929. (The English version, Hold High Your Head, was only published in 1982.) He describes the buffalo hunt as follows:

> Like all nomadic people in good game country, the chief occupation of the Metis was hunting. The most important game was the buffalo or bison because this animal provided not only food but a large part of clothing and shelter. Because of the abundance (at times incalculable) of these mammal herds there had to be

> functions, who, during the entire expedition, had to lead the hunters to the land richest in game and free of enemies. The remainder of the men became soldiers. They were grouped in tens and each ten chose a captain. The first-comer could select one of his companions; it sufficed that nine others join him and group around the officer he had chosen for the ten to be formed.
>
> This primitive but extremely effective system assured each captain the right to count on the total devotion of each of his soldiers because it was at their own request that he led them. Groups divided the duties among themselves and took turns in scouting the camp's march or protecting the rear ranks.
>
> The Council was both a government and a tribunal. It not only laid down the laws designed for a sound conduct of the hunt in all its details but saw that they were respected. These rules were the law of the prairie. Captains and soldiers carried out the Council's orders and judgements. While the Council had a certain latitude in ordinary matters, in affairs of general importance, its authority was limited. In these it needed the assent of the entire camp.[4]

The numbers of persons involved in the hunt and its economic importance is evident in the following description by Tremauden:

> Thus organized, number 500 - 1,000 men, women and children in the proportion of two men and two women for each child, the camp set out around June 15 of each year. Each family had its tent and its wagon. Each hunter carried a gun. The camp's needs required about 3,000 pounds of shot, 150 gallons of powder, 1,400 butchering knives, large and small, as well as 150 axes to insure a supply of firewood, the necessary blankets and clothing, a great quantity of tea and sugar and a multitude of other articles. To transport all these people, munitions, provisions and gear took no less than 450 saddle horses, 650 wagon horses and 600 oxen. The women and children travelled seated on hay, straw or blankets in the bottom of the seatless wagons. These expeditions, real gala affairs, entailed considerable expense for equipment and each family vied proudly with the others. The Hudson's Bay

After the union of the fur companies, the plains hunters increased in number rapidly, the excitement and freedom of the life attracting many to follow it. In 1820, the number of carts assembled to go to the buffalo hunt was 540. In 1825, the number had increased to 680, in 1830, to 820, in 1835, to 970, and in 1840, to 1210, and to give some idea of the capital investment in the business we append the following statement relating to the outfit of the last named year:---

1,210	carts cost	£1,815	0s.	0d.
620	hunters' wages	1,860	0s.	0
650	women's wages	1,462	10	0
360	boys and girls wages	360	0	0
740	guns cost	1,480	0s.	0d.
150	gallons gunpowder cost	120	0	0
1,300	pounds trading balls cost	65	0	0
6,240	gun flints cost	13	0	0
100	steel daggers	15	0	0
100	couteaux de chasse cost	15	0	0
403	buffalo runners (horses) cost	60,045	0	0
655	cart horses cost	5,240	0	0
586	draught oxen cost	3,516	0	0
1,210	sets of harness cost	484	0	0
403	riding saddles cost	161	4	0
403	bridles and whips cost	201	10	0
1,240	scalping knives cost	31	0	0
448	half axes cost	56	0	0
Camp equipage, tents, culinary utensils, etc. cost		1,059	16	0
		£ 24,000	0	0 (sic)

or in the neighborhood of 120,000, one half at least of which being advanced to the hunters on credit.[6]

Begg also gave a detailed description of the hunt, which supports the description given by Tremauden, in the following excerpt:

> When all were assembled, the roll was called, a council of the principle men held, and a chief and staff officers selected. There were captains and guides appointed, the latter being the standard-bearers of the party, and the hoisting of the flag was the signal each morning for a start to be made, and when it was taken down it signified an order to encamp.

valley--the crier, in lieu of a horn, rides headlong among the tents warning the hunters to get ready. Hastily, they capture their horses on the outskirts of the camp and ride to the point of departure. A moving sight! Hundreds of riders with elaborate headgear, their costumes bright with multicolored beadwork, keep still rein on their panicky mounts that fidget, whinny and stamp with impatience.

The captains stand by to see that no one leaves before the word is given. The signal at last! The cavalcade springs forward in a swirl of dust midst yells that are echoed by the woods. But the buffalo also have their leader and their captains. Over there, the patriach of the herd, alert veteran of many pursuits, has sensed the approach of danger even before he hears the hunters' cries and the drumming of hooves beyond the hill. He raises his head, sniffs the air a moment and snorts with anger. The animals around him quickly sense his uneasiness and stop grazing. In a flash terror spreads through the herd. Suddenly, as if on signal with a common impetus, the mass of heavy ruminants, panic-stricken, starts off at full speed across the prairies like an unleased flood on which seem to float, in jerky bounds, myriads of black, woolly humps. Stampede: the frantic flight of a cohesive band all going in the same direction with sudden turns and brusque deviations that follow the uneven terrain. Galloping furiously, the hunters soon ride alongside the dangerous column, then gradually edge their way among the fleeing beasts. They choose the fattest and set upon them, shooting their victims that stumble and sink groaning on the trampled grass. The killing continues until the arranged signal--tumultous slaughter of the plains!

A hunt, full of emotion for both actor and spectator, and terrifying too because the buffalo may--and it has sometimes happened--upset horses and men in their passage and with their hooves trample them to death. So a priest always accompanies the expedition. It is difficult to describe

> the winter. But because of the rigours of winter, fishing was far from being as attractive as hunting. No matter how stolid one might be, it was not amusing to spend entire days, when a brisk northwest wind blew the finely powdered, cutting snow, waiting beside a hole cut in the ice for a fish to get hooked on a line or caught in a net. So the most foresighted made their provisions of meat last as long as possible and resorted to fishing only for the strict needs of days of fasting and abstinence.[9]

4) The Traders

Another important economic activity that some of the Metis engaged in was that of private traders and entrepreneurs. Begg indicates that private trading began to develop in the 1830s. He describes the development of the trade as follows:

> About the year 1834, private individuals began importing goods from England on their own account and for their own use. Gradually the system extended until those who commenced importing for themselves soon enlarged the field of enterprise, and sent for goods on speculation. This, for a time, was countenanced by the Hudson's Bay Company, until agitation against exclusive trade in furs began, when they placed obstacles in the way of it, especially as the petty traders had taken part in the agitation. But this did not destroy the trade, for the petty merchants, being not altogether dependent on the English market, received a large portion of their supplies from the United States. Up to the time of the demonstration in favour of Sayer, in 1849, these petty traders confined themselves to buying and selling ordinary merchandise, the traffic in furs being forbidden, although undoubtedly they did a good deal in a quiet way in the trading and smuggling of peltries. After 1849, however, they became bolder in this respect, and gradually came to deal openly in furs, until they finally threw off all restraint, and openly outfitted men and sent them into the interior to traffic with the Indians. The Company, then, instead of endeavoring to punish them, entered with

> owned 521 horses, 569 cattle, 36 ploughs, 394 carts, and one windmill. But they farmed only 526 acres--only 228 more than in 1833.[12]

Tremauden, who tends to romanticize the nomadic activities of the Metis as more important to them than their farming, does, however, confirm that agriculture existed and that, as well, the Metis practiced a variety of cottage industries:

> The Metis was essentially nomadic, both from his mother, accustomed to the free life of the plains, and from his father, fond of hunting and adventure. Despite the comfort of his dwelling or the fertility of his farm he found it hard to endure a sedentary life. Work on the land held no charm for him. The idea of growing grain or vegetables by breaking the soil with mattock or plow meant nothing to him. He disliked tending chickens or pigs, mowing grass, stacking it and then feeding it to beasts of burden and cows, when to him it seemed so simple, so natural on the prairie and in the woods to gather wild fruit, kill game and let livestock and horses graze as they liked. The instincts from his mother drew him to life in a tent, transporting roof, baggage and provisions wherever his fancy dictated. It was in the midst of open nature, free to fill his lungs with invigorating air, to hear his vibrant songs echoed in the vastness which surrounded him, that the Metis gave most easily free expression to his exuberance and gaiety. That does not mean, however, that the Metis spent their days in idleness and negligence. In addition to the agricultural activities already widespread by 1800--thanks to the initiative of the Canadian missionaries--and the necessary work required for maintenance of garden, horse and cattle, the Metis busied themselves with the construction of their houses, furniture, sleds, wagons and canoes, etc. Their women prepared the leather for making clothing and moccasins, spending as much time on needlework as in the preparation of food--drying fruit, smoking meat and fish.[13]

Other accounts indicate that the farms on the Red River constituted the most important and the only well organized agricultural settlement west of the Mississippi, north of the Missouri on the

following century, 1760-1860, and even during its first fifty years, 1760-1810, with the arrival of the gentlemen of the Northwest and the Hudson's Bay Company men, that the diverse elements of the Metis nation became crystallized.

Thanks to their geographical position, which protected them from foreign invasion, their nomadic way of life and their social and military organization for defence against savage tribes, the Metis of the West were able to maintain their national homogeneity, while their brothers in Acadia and Quebec became fused with the dominant element of the Canadian people. (emphasis mine)

At the beginning of the 19th century the Metis nation, then in its full flowering, was made up of two fairly distinct groups--the French or Bois Brules whose paternal language was French, and the English Metis whose paternal language was English. Since the Bois Brules were more numerous and generally more developed, we must turn to them to note their respect for ancestral tradition and their most characteristic traits in order to sketch a picture of the customs and mentality of the Metis nation. We should add that, in many cases, the first ancestors of the English Metis left the country once their period of service was ended, abandoning their Indian wives and children whom the French Metis often adopted and raised in the French culture. That explains why there are so many Metis families who speak French despite their Scottish or Irish names.[15]

2) The Men

Metis men are generally tall--some even of colossal build. Their faces, with high prominent cheekbones under brilliant black eyes, are usually copper-colored, often crowned with long, jet-black hair or adorned with bushy beards. Their countenance is marked by nobility and pride . . . .

The first Metis were giants. As we have seen, they inherited their strong physique from their fathers--mainly trappers, hunters, or adverturers and from the rich untainted blood of their Indian mothers. Moreover, their manner of life contributed

Tremaudin went on to describe the dwelling sites, the dwellings, and their furnishings as follows:

4) Metis Dwellings

> In their gradual adaptation to a more settled way of life, the Metis selected the best land locations. The geographic situation of Fort Garry, now Winnipeg; of Fort Auguste, today Edmonton; of Prince Albert, Calgary, Le Pas, and others show clearly that these groups appreciated the advantages offered by those sites. So Louis Riel could write with truth: "The Metis settlements were the foundations of future civilization. Well-chosen sites became centres on which emigration depends in everyway for colonization and development."
>
> Their dwellings, sheltered by wooded headlands, bordered the rivers and lakes. The cabins where the Metis spent the winter were made of squared tree trunks dovetailed one into the other. The axe was the only tool used for this work. They filled the chinks between the logs with clay. The inside and outside walls were whitewashed and the triangular roofs covered with thatch, bark or clay. A single door in the middle between two windows with panes of scraped skin allowed both light and inhabitants to enter into the only room of the dwelling, which often had no floor. Until stoves made their appearance, a large clay fireplace filled part of the wall at the far end. A big curtained bed for the parents and cots for the children stood against the other walls. A solid table flanked by two benches, a roughly-made armchair, a rocking chair for the elderly, a simple set of cooking utensils, a small mirror, some chests, a few buffalo robes, a flintlock or musket on the wall, a powder horn, a bag for shot or bullets, some nets, an axe, apparatus for lighting the fire, a crucifix or saint's statue and a few holy pictures made up the furnishings of most cottages. The kitchen cupboard where food was kept was simple and sparsely stocked. At that time flour was too rare for the Metis to use for bread or bannock. To

could always count on help from their neighbors. Family life was respected, morals were of high standards, honesty and charity were a religion. The first Metis settlements were like a large family where peace, hospitality and comradships reigned. Nothing was neglected to maintain friendly relations with their Indian cousins; nothing was spared to live as good neighbors with the colonists of various nationalities who came to settle in their native land. Remember, as an example, their speedy help to Lord Selkirk's first settlers to assist them to procure the food they needed because of lack of foresight.

They esteemed peace but held justice still more dear. The abuse of power troubled them more deeply than insults, ingratitude or even ill-treatment. The Metis people idolized their rights and refused to recognize that famous principle so honored among civilized peoples, "Might is right." From the French came an implacable logic and from their Indian forefathers a sense of probity and respect for other people's possessions. The thief was considered a contemptible creature and in the rules of the hunt we find this clause: "Any man guilty of theft will be brought into the middle of camp and called 'thief' three times by everyone." This veneration by the Metis for their personal rights and their scorn for theft, together with the teachings of the missionaries, explain their unyielding resistance to the Canadian authorities who seized their lands. When the Metis felt he had logic and right on his side, nothing could make him yield. Like his paternal ancestor, the Gaul, and his maternal ancestor, the Indian of the vast New World, with set face, decisive gestures and voice, he answered those who tried to coerce him: "I fear only one thing--that the sky might fall on my head." But old-time Metis were also fond on fun and merriment. Joyful reunions, feasts, dances and weddings were popular. Strangers and travellers were invited to the table and the dance. The storytellers, musicians and singers took advantage of these evenings to spin their marvellous tales, tune up their fiddles, and break out into Scottish or French songs . . . .

respectfully as that of Christ by the first Christians. Did some missionary need to penetrate the prairie vastness west of the Red River? Immediately the best guide in the colony was placed at the service of God's minister. If we admire the man of God who, leaving a beloved family, sacrificing a peaceful future in his desire to win new souls for heaven, disappears into almost inaccessible solitudes, clears a path through virgin forests, climbs mountains, braves blood-thirsty insects in summer and the terrible torments of winter, should we not also accord a part of his merit to the brave Metis? Without hesitation the Metis guide heads the caravan, traces the way, is first to overcome difficulties, endures more than others--intense summer heat or biting winter cold--carries the weight of the canoe and its contents in portages around obstacles and rapids, sees to the comfort of members of the expedition of which he is organizer, guide and interpreter, happy in spite of all to be the first to lead the priest towards the conquest of celestial riches as far as the foot of the western mountains. The reverence of the Metis for the priest was such that no one ever thought to challenge his advice even outside the spiritual domain. They went to him with all their little difficulties, even temporal. Indeed, everyone who spoke lightly of the priest in their presence was poorly thought of. They would have died rather than let anyone touch a hair of a missionary in their care. The Catholic Church in the Canadian West never had followers more deeply religious, more faithful and devoted than the Metis. Does this mean that the Metis had no faults? Far from us such a childish claim. Like any other people, they were not perfect, but also like other people their good qualities outdid their defects, which were more individual than collective. As elsewhere, the exceptions prove the rule. It is certainly not the reprehensible conduct of a few depraved or craven persons that should cause a people as a whole to be accused of being bandits and traitors. In such cases the Metis people are no exception; some of its members may have erred, but as a

> Maximilien Genthon, Roger Marion, Narcisse Marion, Louis Bousquet, Michel Dumas, Baptiste Lépine, Joseph Charrette and many others whose names are known from one end of the Northwest to the other. By their wisdom and determination they helped in the good organization and sound administration of the Metis nation during its difficult debut.[21]

8) Conflicting Views of the Metis People

Other writers such as Alexander Begg and George F. Stanley were inclined to take a less favourable and less sympathetic view of the Metis. For example, in an earlier quotation from Begg, we noted that he referred to the Metis as possessing the following negative characteristics:

> . . . fickle dispositions . . . good eating and good drinking constitutes their chief good . . . extremely thoughtless . . . never think of providing for future wants . . . they are exceedingly deceitful . . . gross flatterers to the face of a person they will basely slander behind his back.[22]

Stanley viewed the Metis in a somewhat less negative light and quoted W.B. Cheadle and Alexander Ross to justify his view:

> W.B. Cheadle, on his journey across the North American continent in 1862, found them unequalled as guides and voyageurs:
>
> > Of more powerful build, as a rule, than the pure Indian, they combine his endurance and readiness of resource with the greater muscular strength and perseverance of the white man. Day after day, with plenty of food, or none at all, whether pack on back, tramping in the woods, treading out a path with snowshoes in the deep snow for the sleighdogs or running after them at a racing pace from morning to night, when there is a well-beaten track, they will travel fifty or sixty miles a day for a week together without showing any signs of fatigue.
>
> The Metis were a hospitable people; all comers and goers were welcome guests at their board. Theft seems to have been uncommon among them.

> occassions, and when a half-breed drinks he does it, as he says, comme il faut, that is, until he obtains the desired happiness of complete intoxication.
>
> With few exceptions the French half-breeds were neither extensive nor successful farmers. Brought up in the open prairies they preferred the excitement of the chase to the monotony of cultivating the soil. They might have envied the lot of the more industrious and regretted their own poverty, but so strong was their attachment to the roving life of the hunter that the greater part of them depend entirely on the chase for a living, and even the few who attend to farming take a trip to the plain, to feast on buffalo humps and marrow fat.
>
> These Metis were not a savage, vicious or immoral people, but honest, hospitable and religious, rather improvident and happy-go-lucky, without care and without restraint, true sons of the Prairie, as free as the air that they breathed and by nature as independent as the land which gave them birth. As a rule the English-speaking half-breeds formed a contrast to the French. The greater number were of Scotch origin. Many of the officers of the Hudson's Bay Company came from Scotland and their half-breed children inherited the steadier disposition of their fathers, as the Metis inclined to the roving life of the coureurs des bois. They were, for the most part, economical, industrious and prosperous.
>
> Cheadle declared that the English and Scotch half-breeds "form a pleasing contrast to their French neighbors, being thrifty, industrious, and many of them wealthy, in their way . . . we met but few who equalled the French half-breeds in idleness and frivolity.[23]

Stanley in his writings, also shows his clear bias for the Scots "halfbreeds". One would have to doubt that the differences in the characteristics of the two groups, if factual, had anything to do with heredity but was primarily a reflection of the cultural differences of their fathers. However, as Tremauden suggests, one

> 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 . . . At that time, there was no settler away from the river, the line of settlement skirting the river with tidy farm houses, comfortable barns and well-fenced fields of waving golden grain, like a beautiful fringe to the great fertile prairies beyond.
>
> Socially there was much good feeling existing between all classes of the community and a more hospitable or happier people could hardly be found on the face of the earth than the settlers of the Red River in 1868-69.[24]

This is certainly not the description of an under-developed community of itinerant "savages" unable to govern themselves or without social organization. Nor is there any evidence, other than the agitation of the likes of Charles Mair and Dr. Christian Schultz, that there was any real desire on the part of the populace to change the affairs of the country by having it become a part of Canada.

There was little anxiety in the settlement when the news of the proposed transfer was made known. This was probably because the idea had been discussed in the community as early as the 1840s. The land tenure question was, however, to become a key issue. This became the case when the surveyors arrived and began laying out survey lines, based on the use of a unit of measurement called "chains"[25] which in many instances cut up farms. Stanley describes the state of affairs regarding Metis lands in the Red River as follows:

> Company and which, apparently, has always been exercised by the owners of these river farms--namely the exclusive right of cutting hay on the outer two miles immediately in the rear of the river lot. This outer portion came to be known as the "hay privilege" and was jealously guarded by local laws, infringements of which were visited with punishment.[26]

The events which followed the transfer of Rupertsland to Canada were to have a profound impact on the culture of the Metis and their lifestyle, both in the short and long term. The short-term impact was mostly on the Metis of the Red River, who were the first to be faced with the loss of their land and to be overwhelmed by the new immigrants. There were, however, many Metis outside the Red River settlement scattered throughout Rupertsland. The majority of these lived to the north and west and were involved in trading, freighting, and the buffalo hunt. They were not affected in that their land holdings or lifestyle were not immediately threatened. Nevertheless, the deluge of petitions which the Metis sent off to Ottawa over twelve years from 1873 to 1884 clearly demonstrates the concern of the Metis for their lifestyle and their lands. In the next section, we shall examine the culture and lifestyle of these people as well as their migration to the west and the north.

d) The Metis in the Northwest During The Period Up To 1885

The Red River settlement was only one of the many Metis settlements in the Northwest. Documents and correspondence indicate that these were numerous. Some of the better known Metis settlements were Manitoba Village, The Pas, Brochet, Cumberland House, Lebret, Cypress Hills, St. Albert, St. Paul, Prince Albert, St. Laurent, Duck Lake, North Battleford, Green Lake, Ile-a-la-Crosse, La Loche, etc. None of these settlements, however, had the concentration of population that existed in the Red River. Most were either closely tied to the buffalo hunt, the fur trade, or the freighting business.

The largest of these communities, Cypress Hills, may have consisted of as many of 1,000 persons at the height of its development. However, most communities were probably not more than several

have little to say about the people. However, we know from church and government correspondence[29] and from the reports of the Treaty Commissioners that the Metis carried on some subsistence agriculture wherever this was possible. Farms existed along the Qu'Appelle, on the South and North Saskatchewan Rivers, at Fort McLeod, and at St. Albert. This is evident from the petitions received by the federal government during the period from 1873 to 1884, where land grants and titles to land occupied was a major concern of almost all Metis people.[30] At a later time, it was even common for people at places such as Ile-a-la-Crosse to keep several cows, a few pigs and chickens and to grow a small garden.

After 1870, people began to migrate west, first in small numbers but, by the early 1880s, there was a wholesale exodus of people from the Red River to the west and north. Tremauden comments on these developments in the Northwest in the following excerpts from the Metis history:

1) The 1885 Insurrection: Its Cause

> Confronted with the violence of Dr. Schultz's disciples and friends, many Red River Metis, deaf to Riel's advice, packed their humble belongings on their little carts and headed West. They sought happiness in the vast prairie spaces that stretched as far as the eye could see, like an ocean, right up to the Rocky Mountains. They were headed for boundless land where they thought neither hatred nor injustice could reach them. From time to time, they came across already important Metis settlements like those around Portage la Prairie, on the Souris River at Moose Mountain and near the lakes of Qu'Appelle. There they were received with open arms. Their arrival was a sign for feasts and dances. Relatives found relatives, friends found friends, budding romance at times bloomed into happy marriages.
>
> Then, spurred by a desire to get as far away as possible from the place where they has suffered, the victims of the new system of Manitoba Government set out once more. It seemed to them that far away on the horizon, where the emerald of the plain merged

Now the happenings at Red River were being repeated in Saskatchewan. Surveyors arrived and shamelessly marked off the squares, never bothering to see if their chains and their stakes encroached on land already occupied by the Metis. Under these circumstances and in keeping with their custom, the Metis consulted the Missionary Fathers who ministered in their humble parishes. With their support they began, during the winter of 1877-78, to send petitions to Ottawa to try to obtain just compensation for the land being taken from them. These petitions remained unanswered. Other petitions followed, adding new claims and dealing only with land rights.

On February 13, 1878, through the mediation of Lieutenant Governor Laird, they asked for seed grain and farm implements. On September 4, 1882, Gabriel Dumont and forty-five others sent a protest expressing their surprise at being asked to pay two dollars an acre for the land they were living on, if, after the surveys, these were found to be among the odd-numbered sections. The petition ended with these splendid words, written long ago but which we cannot read today without emotion:

> Having been considered for so long as masters of this land, having defended it against Indians at the cost of our blood, we do not think we ask too much when we beg the government to let us occupy our land in peace, and to make an exception to the rule by giving the Metis of the Northwest free grants of land. (Gallant people willing to use the term "free" to acknowledge what belonged to them in all sovereignty, by rights most sacred!)

But the Canadian administration, as if set on discouraging these petitioners, whose persistence was beginning to irritate, devised a law that authorized the granting of letters patent, or land titles, only to those who had completely fulfilled their duties as settlers, and only after the date of registration. So the petitions multiplied; protests against this measure totally unjust towards the Metis;

Metis to give up the hunt and to settle down to full-time agriculture.[33] As well, minutes of public assemblies held during the winter of 1872 to 1873, where the laws of St. Laurent were developed, honed and amended, attest to the extensive social and cultural life of the community and the political organizations which controlled many aspects of life, generally covered today by Civil Law, including male-female relationships and marriages.[34] These proceedings attest to the degree of civilization and the agricultural development of the area and, as well, give us glimpses of the social life, morays, and morality of the Metis people at the time. This was clearly not a community of wandering, itinerant savages, but a community of civilized people probably as advanced or more advanced in its thinking, development, and social organization than any similar frontier community anywhere else in North America.

The presence of the Metis settlements and some indication of the people, their organizations, and their concerns for this land is also evident in the following excerpts from George F. Stanley regarding the land issues:

> The delay in the settlement of this question occasioned much dissatisfaction among the halfbreeds. White immigration had rushed into Manitoba after the Red River Rebellion, and the Metis soon found that a new order had descended upon them, sweeping aside their old methods of life and leaving them helpless. Their usual occupations, hunting, freighting, in a small way were no longer profitable or even possible. Trading was out of the question for those who had neither the goods to sell nor the credit to obtain them. Despairing of ever receiving their land patents, many disposed of their rights for a mere song. Some gladly sold their scrip for trifling sums to smooth-tongued speculators, packed up their few possessions and treked across the plains to the Saskatchewan to live again the old life of freedom. Others, who had been absent hunting during both enumerations, remained upon the plains, receiving neither the scrip nor the land to which they were entitled.

reinforced the demand for the recognition of the halfbreed Indian title. The French halfbreeds were not alone in making these demands. Their English and Scottish kindred of Prince Albert also forwarded to the Governor General a petition which contained, among others, this paragraph:

> Lastly, your petitioners would humbly represent that whereas a census of the halfbreeds and old settlers was taken in the Province of Manitoba shortly after the organization of that Province, with a view to the distribution of scrip, etc., said scrip having since (been) issued to the parties interested, and whereas, at the time this census was taken, many halfbreeds, both minors and heads of families, resided in the Territories and were not included in the said census. Your petitioners would humbly represent that their rights to a participation in the issue of the halfbreed or old settlers' scrip are as valid and binding as those of the halfbreeds and old settlers of Manitoba, and are expected by them to be regarded by the Canadian government as scrupulously as in that Province. And with a view to the adjustment of the same, your petitioners humbly request that a census of said halfbreeds and old settlers be taken, at as early a date as may conveniently be determined upon, with a view to apportioning to those of them who have not already been included in the census of Manitoba their just allotments of land and scrip . . . .

The agitation continued unabashed. In the spring of 1880 the Scotch halfbreeds of Manitoba village forwarded a petition with the usual demand for scrip. At the same time, the French Metis forwarded an identical petition from Edmonton--a fact which showed the existence of an effective collaboration among all the mixed-blood population from one end of the Territories to the other, and one which, owing to the lack of educated

> plots of land. Others settled at a later date. In these instances the Metis considered it a grievance to be obliged to enter their holdings as homesteads and wait until the expiration of three years for their patents. Moreover, those who remained on the Prairie until forced to settle down by the economic transformation of the country, regarded the Northwest as their patrimony. They resented the terms of the Dominion Lands Act, and refused to pay for lands taken up subsequent to the survey upon odd-numbered sections, Hudson's Bay Company or school lands. The Government Land Regulations were regarded as a legitimate grievance, but the real force underlying this grievance was the feeling of insecurity.[35]

Stanley indicates that petitions in the form of resolutions such as the following indicated the concern of the Metis settlers:

> Whereas many persons have been settled on land in this district for three years and more, and have performed the homestead duties required by law; and many persons have bought land from such settlers, depending on the good faith of the government for security in their holding such land--Resolved, that the Right Honorable, the Minister of the Interior, be requested to grant patents to such persons with as little delay as possible . . . Having so long held this country as its master and so often defended it against the Indians at the price of our blood, we consider it not too much to request that the government allow us to occupy our lands in peace, and that exception be made to its regulations, by making to the halfbreeds of the Northwest free grants of land.[36]

Stanley also points out that as in Manitoba the land survey system raised serious concern among the Metis:

> Another cause of insecurity among the mixed-blood population was to be found in the system of survey imposed upon the Metis settlements. In the Northwest the Metis, as at Red River, took up their land in long narrow strips running back a mile or two from the river. In this

e) The Metis People After the Northwest Insurrection

1) The Immediate Effect of the Uprising

It is noteworthy that most authors who write about the Metis as a distinct people do not go beyond 1885. There is a good deal of documentation regarding the "halfbreeds and scrip" following 1885, but little about their culture, lifestyle, social organization or political activities. It is as if most historians considered the culture and history of the Metis to have ended on the gallows with the hanging of Riel. There is one recent book by Murray Dobbin, but it only deals with the period from the 1930s to the present and primarily as that period is expressed in the life of Jim Brady and Malcolm Norris.[39]

As a result, it is necessary to depend to a large degree on source documents to the extent that these are available. The most fertile sources of reference to the Metis are the N.W.M.P. records along with church records. It is also possible to glean information from a few other government documents and official reports.

Although the lifestyle of the Metis outside Manitoba had not been materially effected by events in the Red River in 1870, the results which followed the Northwest uprising were almost immediate and devastating. The soldiers created widespread destruction in the Metis communities along the Saskatchewan River. This destruction is vividly portrayed in a letter by Royale to Taché in 1885, written while he was touring the area on horseback, immediately after the uprising:

> Alas, Mgr., if you could see your poor colony! How sad it is! . . . all along the right bank of the south branch, there are only ruins. The most beautiful houses are destroyed . . . You will meet only sometimes a poor hut which is most often devoid of its inhabitants. All the fields which were so beautiful at this time last year are a wasteland, the enclosures in disorder, often burned. You no longer see the herds which were the wealth of the country. The poor people who have not taken flight are shamed, humiliated . . . . Many have only the clothes on their backs.[40]

> Canadian territory, sent to them through emissaries. The Metis asked that complete amnesty be granted them, complaining that such a promise by no means figured in the guarantees of safe conduct, which were being offered. While some of them, who had been won over by the good counsels of the emissaries, finally abandoned their place of exile, many other families renounced all idea of returning. The latter established themselves in the Milk River Valley and in the region of Turtle Mountain where they can still be found today. Some of them have been assimilated into the society of the small settlements along the railways of North Dakota and Montana, while others, driven back to the periphery of those settlements, live miserably on the waste lands around them like so many nomadic groups without any definite occupation, and in poor looking huts which are often hidden amid rolling hills. Still others have been converted to the idea of agriculture and are found living on the small fields they cultivate. Certain of the Metis on their arrival on American territory had the limited ambition of doing odd jobs with mediocre renumeration, such as wood-cutting for the white settlers and ranchmen . . . Others, like their brothers of the Red River, lost no time in contracting debts in order to meet the taxes which encumbered their land plots or to meet the operating costs of an enterprise which they simply could not manage. In the Qu'Appelle River Valley, the Metis of St. Lazare, who had come originally from St. Francois Xavier area in hope of occupying new lands, were thus dispossessed by the very mortgage companies which had been set up to ward off their short-sightedness. After that, they were obliged to retreat to new locations, where today they live apart from the whites who became the masters of their holdings.[42]

Obviously not only the Metis of the Saskatchewan suffered as a result of the economic changes which took place in the Northwest after 1885. In addition, the government carried out official

- April, 1894--"Halfbreeds" at Willowbunch are destitute.
- November 27, 1900--"Halfbreeds" in Athabasca region of Alberta are destitute.[44]

There are literally hundreds of references in police correspondence and reports on the destitution of the Metis. Other references to the destitution of the Metis are to be found in the Oblate records. In the Chronicles of St. Laurent, for example, Father André in 1886 reported as follows:

> The principle questions which were posed at the beginning of the year were these: How to remove the misery and famine which threaten us? How to procure seed? . . . in the month of January the poorest of the families were visited by the Indian agents of Prince Albert . . . McKenna was sent by the government with the mission of aiding all those in misery. Following this visit supplies were distributed . . . if not to stop the misery, at least to demonstrate the good will of the government and its agents.[45]

Other references in the Chronicles are as follows:

- 1888--Relief supplies are distributed to the needy.
- 1889--Crops are poor.[46]

The destitution of the Metis was also raised from time to time in House of Commons Debates with specific reference to the "Breslayor Halfbreeds".[47]

3) The Government Response to the Problem

The Metis did not passively accept their lot and began to petition for help both in the form of immediate supplies and in the form of becoming established in farming. The police, who were generally the closest officials to where the Metis people lived, often played the role of relief agents, giving such relief from their own stores and then requisitioning supplies from the Indian Department to replace these. Since the territory at the time was under federal control, the Ottawa government had overall responsibility for all people in the territory. The government affairs,

The Chronicles of St. Laurent also make reference to the request for seed in 1886 and in 1890. There was apparently a crop failure in 1889. Other solutions to the Metis problems which were proposed to the federal government by Father André and others included the setting up of industrial schools and the establishment of Metis colonies where the Metis could exercise civil rights and administer their own affairs.[51]

The requests for assistance in farming, of course, only applied to those Metis who had land. This included many of the Metis around Prince Albert and some from the Qu'Appelle Valley. Most other Metis were landless and found themselves in a more destitute position if they lived in the Prairies of the south. According to Father André, some worked in freighting and on construction projects but, generally, the jobs were too few and the pay too low to alleviate their misery.[52]

The Metis of the lake regions and the woodlands fared somewhat better since they could continue to subsist on hunting, fishing, and trapping and by carrying on some simple agriculture. In some areas, they even prospered.

4) Metis Political Activities and Organizations Up To World War II

Some of the Metis fled to American territory, as indicated previously. There they attempted to organize to fight the Canadian government. This effort was, however, eventually given up, and some Metis settled permanently in Montana and others gradually returned to the Northwest, having been encouraged to do so by Dewdney.[53]

Those groups in the U.S.A. had been kept under close surveillance by spies of the N.W.M.P. The police also kept a close watch on events in the Northwest.[54] The following organizing and political activities are referred to by the police from time to time in their correspondence:

- October 18, 1887--Meeting at Batoche to petition Ottawa regarding the rejection of their claims for property damage as a result of the Northwest Rebellion.

openly hostile to the police. They were fishing, as in the past, to provide food and a cash income. These activities were now illegal and, in some instances, the government was prosecuting persons caught fishing out of season.[57]

Because of the serious concern over the depleting fish stock, the unfairness of these regulations to the Metis and the economic impact of the new fisheries regulations, the federal government set up a Royal Commission on Fisheries, known as the Prince Commission, named after its chairman, Professor Edward E. Prince. The Commission report has a section dealing with the Special Considerations which should be given to Indians and "halfbreeds" for special fishing rights. In this section, the Commission defines "halfbreeds" as Indians and recommends that they be given the same fishing considerations as Indians. This was a major concession to the Metis leaders.[58]

Tremauden's book, Hold High Your Heads, resulted from further political activities of the Metis. The Metis in the early 1900s believed their history was being systematically distorted and their role in the development of the Canadian West downplayed. As a result, a group of prominent Metis met in 1909 to discuss the situation. The meeting took place at Joseph Riel's home in St. Vital, Manitoba, and included a number of Louis Riel's former colleagues, including Ambrose Lepine, Nault, Lajimodiere and others. They decided to establish an organization known as "L'union Metisse Saint Joseph de Manitoba" to undertake research and to direct the gathering of material for a book. They eventually selected Tremauden to do the writing. The result was that in 1929 the French version of the book was published and copyrighted by the organization. That organization was to incorporate and change its name to "La Societe Historique Inc."[59] in 1932. It continues to function to this day.

Following the Prince Commission's report of 1911, it would appear that the Metis political activities were interrupted by the First World War when some Metis leaders joined the Canadian Army. During the period from 1918 to 1930, there is limited reference in

pursue agricultural development and other forms of economic independence. What was being requested was not a Reserve system such as the Indian Reserve system, but the setting aside of land which the Metis would own and control, in essence--a Metis homeland. These land areas were referred to as Metis colonies.[61] The Ewing Commission refused to deal with either the "Indian title" or "nationalism" issues in its report. It claimed that these issues were beyond its mandate. It treated the problems of the Metis as welfare problems. It recommended the establishment of Metis colonies and the passage of a Metis Betterment Act to be administered by the Welfare Department. The Commission set out some guidelines for the colonies, which dealt with issues such as the following:

- who could apply to live in a colony (definition of a Metis);
- modes of ownership in colonies of individual tracts of land;
- governing organizations for colonies;
- number and size of colonies, etc.[62]

The idea of Metis colonies was not new. It has originally been proposed by Father La Combe in the 1890s. Saskatchewan Metis had rejected the idea, but an experimental colony was established in Alberta in 1895 at St. Paul. The grandfather of Jim Brady had at one time lived in that colony. According to Dobbin and other writers, the colony was a success and a number of Metis farmed well and prospered on their farms. The Church itself, however, did not consider the colony a success and on April 10, 1909, it officially disbanded the colony and began replacing Metis settlers with French settlers from Quebec. Dobbin claims this was due to the fact that the colony had become a hotbed of Metis nationalists. The Church claimed it was because the Metis were poor farmers and the colony had not been successful in establishing the Metis as farmers. This is contradicted by accounts in Brady's papers, which detailed the numbers of cattle, horses, and other assets possessed by a number of Metis farmers who lived in the colony.[63]

There had been an assumption among the Church hierarchy and

the federal government could no longer be counted on to protect the Metis interests.

Many Metis were forced from their land and became the "road allowance people". They squatted on road allowances and depended on casual and seasonal employment and on relief rations consisting of beans, bacon, flour, and salt. Because most farmers also found themselves short of cash and, in many cases, dependent on relief, they were generally not able to pay the Metis for their labour, except in products such as grain, meat, eggs or milk. This created serious problems for municipalities who were responsible for welfare. They were already inundated with requests for aid from small town families and farmers and, now, they also had to deal with the added needs of their Metis residents.[65]

With the fall of the Saskatchewan Conservative Government in 1934 and the election of the Liberal Government, the response to the plight of the Metis became somewhat more positive. A number of schemes developed to move some of the Metis to other areas. For example, Metis from Willowbunch and Jedburgh were relocated on homestead lands in areas around Prince Albert, Debden, and Meadow Lake, where some still farm today.[66]

The most significant development was the organization by a number of prominent Liberals and some Metis leaders, including Klein, Pritchard, La Rocque and others, of an organization known as the "Saskatchewan Historical Society". This organization was funded with an annual grant from the Province. Prominent Liberals who were involved included J.A. Gregory, an M.L.A. from the Battlefords, who was the President of the organization and spokesman for the Metis in the Legislature and the government. Others included Zack Hamilton, who was the Executive Secretary of the organization and who seems to have been the only staff member, and J.P. Turner, who was the Recording Secretary. Both these men were married to Metis women and had a special interest in the Metis cause and problems. Through the efforts of the Metis leaders mentioned above, the Metis began to organize branches, and by 1938 a provincial

title" as it was a fiction created by the Dutch. They quoted Stanley, who quoted MacLeod, as their authority for this statement. Our analysis of MacLeod, whom Stanley quoted, does not support this conclusion.[69]

The conclusions of this report can be briefly summarized as follows:

1. There is no legal basis in International or Canadian Law for the idea of "Indian title". The government's decision to recognize such a title through treaties, the Manitoba Act, and the Dominion Lands Act were political decisions carried out for purposes of expediency, and not because of any legal obligation.
2. Although the Metis cannot claim a legal right, they do have a strong claim based on equity and moral grounds. The scrip allocations did not provide the Metis with an equitable opportunity to establish themselves in agriculture and to pursue a new lifestyle. Also, they were so blatantly cheated by speculators that on moral grounds they have a claim. This was particularly so because the federal government was aware of the activities of the speculators and aided them in a number of ways.
3. They recommended that the provincial government assist the Metis to present their claim to the federal government and assist them to negotiate a settlement. The settlement should provide land and assistance to get established in farming in the form of domestic livestock, seed and machinery. (They make no comments on the issue of self-government, nor did they deal with the issue in their research.)[70]

f) Metis Economic Activities to World War II

As we have seen prior to 1870, most of the Metis were gainfully occupied as freighters, farmers, hunters, trappers, traders, and in a variety of other trades, and they were prosperous and looked forward to the future with hope. Their economic position had begun to

There are a number of other reports in the police records regarding Metis economic activities during the period up to World War I. In the southern areas of the Prairies the Metis either farmed or worked as either casual or seasonal labourers. They supplemented this income with some hunting and trapping. On the open Prairies, they worked on farms picking stones (which some still do today), gathered the buffalo bones for shipment to fertilizer factories, built fences, cut brush, and did other similar menial tasks. In the northern areas, they continued their traditional lifestyle of hunting, fishing, trapping, and freighting. Those Metis who either were indigenous to the North or had moved there to escape immigration were able to continue a traditional lifestyle for almost another fifty years. Their economic situation fluctuated with the price of furs and fish as well as with the harvest of these products.

The Metis in the South saw their situation change rapidly, depending on the crops and markets. Relief was obviously a fact of life for many for at least part, if not all, of the year. Some drifted to the city slums or to the fringes of towns and villages. Most of these people continued as marginal labourers.

Since the establishment of the Provinces of Saskatchewan and Alberta, official federal government records are difficult to obtain other than those dealing with scrip issues. The Provinces kept few records or delegated services to the municipalities whose records are difficult to obtain. Because the federal government ceased to take responsibility for the Metis, there are few references in their records to the condition of the Metis. The lack of records for the period 1910 to 1930 is related to this shift in responsibility and the focus on other developments in what was still a frontier society.

The Metis continued during this period in marginal economic roles. However, the period from 1918 to 1929 was one of high economic activity in the Western Provinces and, therefore, it is possible that casual and seasonal jobs on construction, on farms, on railways, on roads and on other building projects provided employment

three Prairie Provinces are not all known. However, it is known that such organizations emerged in each of the Provinces during the Depression years in response to the new political realities of Provinces with fixed boundaries and the unfavourable economic circumstances of the time. In each of the Provinces, these organizations developed with a unique character with goals related to the needs of the time as perceived by the Metis people. For example:

1. In Manitoba, the emphasis was, and continues to be, on the full implementation of the benefits and rights provided under the Manitoba Act and, where these provisions can no longer be implemented, some alternate form of compensation is being sought. The Manitoba Metis Federation is also seeking a land base outside of old Manitoba, and is seeking more self-determination for all Metis people.
2. In Saskatchewan, there was a recognition that scrip was not an equitable settlement and did not deal with the issue of Metis self-determination. The emphasis today is on attempting to achieve a settlement of Metis rights based on the provision of some form of collective land base, and a greater degree of self-determination in the form of appropriate self-governing structures. Other forms of compensation are also being sought.
3. In Alberta, the emphasis was on acquiring a land base, not as the recognition of an aboriginal claim, but to provide a place where Metis people could pursue their own development and set up local government structures comparable to municipal government. The goal was to free Metis from the debilitating poverty and welfare structures, which had become their economic mainstay. The emphasis today is on expanding this land base and the role and authority of these local governments.[75]

In spite of these variations, there are some rights which the Metis in each Province seek through the process of constitutional

Historical Society, which had acted as a support system to the developing Metis organizations, was no longer funded. Also, certain non-Metis persons sympathetic to the government gained positions of prominence within the Saskatchewan Metis Society and the organization as a provincial force had become completely inactive by the late 1940s.

3) Post-War Development

Following the War and the re-adjustment period of the late forties and early 1950s, a number of local branches of the SMS again began to organize in centers such as Regina, Prince Albert, and North Battleford. Also, the C.C.F. employed two former Metis organizers from Alberta, Jim Norris and Malcolm Brady, who were given jobs where they could spend much of their time organizing the Metis. Whether Norris and Brady were Socialists or Nationalists or some of both is still debated today. However, they were quite active in kindling the embers of Metis nationalism and in bringing about a new political awareness among the Metis people.

Murray Dobbin's interpretation of their ideas and goals suggest that they were working towards the Metis becoming integrated into the mainstream social and economic life of the Province.[76] The fact that Metis organizations developed in more nationalistic ways with their emphasis on Metis nationalism is not necessarily an indication that Norris and Brady failed in their efforts, but that they may not have fully comprehended the strong feelings of nationalism that had continued to be nurtured in the lifestyle, philosophy, and political ideas of Metis families and communities.

Having assisted the people to organize structures, which became a vehicle for this expression, it was natural that the nationalism of the past should re-emerge and flower. It had, in fact, never been dead as it continued to exist in the minds and in the experience of Metis people. It was something the people knew and understood, and something with which they felt comfortable. The egalitarian ideas of the Socialists were not only unfamiliar but also were a contradiction and a threat to the individualism

These pressures led to the formation of the Native Citizen's Development Program in the Department of the Secretary of State, which officially began funding aboriginal organizations in the 1971-72 fiscal year. Some Provinces were already providing some funds to aboriginal organizations. The federal government's example provided incentives for some provinces to expand their funding.

Governments began to make available an array of program funding either to aboriginal political organizations or to other aboriginal groups. These included funds for housing, communications, alcoholism programming, and job creation projects. Other programs such as Native Recreation Development, Employment Outreach, and Court Worker Services were also funded.

The result was and continues to be that many aboriginal organizations are torn between their mandate to be the political voice of their people while, at the same time, attempting to deliver programs and services to their people. Both the political role and the service role have brought organizations into frequent conflict with governments. This has been particularly so at the provincial level where governments have been much less able to tolerate the nationalism and political activism of Metis organizations. The political and government structures have responded by either attempting to co-opt the organizations or by supporting actions of competing Metis organizations designed to weaken and, if possible, destroy the existing political organizations.

In the past 20 years, all three major political parties have formed governments in Saskatchewan. Each has had its conflicts with the Metis people. Each has attempted to follow an integrationalist policy which, from a Metis point of view, leads to assimilation.

h) Conclusion

A review of the history of the Metis people indicates quite clearly that in Western Canada they emerged as a distinct cultural and political group by the late 1700s. Their culture and their political nationalism was, in part, an outgrowth of the culture and political activism of their Indian and white heritage. In addition,

Is there any hope that this history of conflict can be resolved so as to benefit both the Metis people and the Canadian public? The process of constitutional reform holds out some promise for a beginning in resolving the issues and in recognizing the right of the Metis to a degree of self-determination as a legitimate political reality which must have a place within the structure of the Canadian body politic. Furthermore, this place must allow the Metis people to control their own institutions and lives and to develop as a unique people within the larger Canadian society.

[23]Stanley, pp. 7-11.

[24]Begg, pp. 367-369.

[25]One chain equals to 66 feet.

[26]Stanley, pp. 14-15.

[27]Tremauden, Part III.

[28]Scrip Files, Volume 75-78.

[29]Taché Papers, Volume 55, Gabriel Dumont Institute Library.

[30]Sessional Papers, 1885, Paper No. 116, Public Archives of Canada. See also Morris, on Indian Treaties.

[31]Tremauden, pp. 112-113.

[32]Tremauden, pp. 115-116.

[33]A. Blaineau to Editor, Manitoban, January 21, 1972, A H2640 F31, Glenbow Archives, Calgary.

[34]Laws of St. Laurent and Minutes of Proceedings of Public Assemblies, English Translation, R.C.M.P. Records, File No. 333-75, Public Archives, Saskatchewan.

[35]Stanley, pp. 247-253.

[36]Stanley, p. 254.

[37]Stanley, p. 255.

[38]Chronicles of St. Laurent, 1870-1884, Oblate Archives, University of Alberta, Edmonton.

[39]Murray Dobbin, The One And A Half Man. (Vancouver: New Star Books, 1982).

[40]Royale to Taché, July 14, 1885, St. Boniface Archives, Manitoba.

[41]Vegreville to Taché, May 23, 1885, St. Boniface Archives, Manitoba.

[42]The Western Metis After the Insurrection, Marcel Giraurd from Les Metis Canadien, Saskatchewan History, Volume IX, Winter (1956).

[64]Tremauden, p. 164.

[65]Supporting documents and letters in File 7A, Gabriel Dumont Institute Library. These are letters gathered by the Saskatchewan Historical Society as part of the Noonan and Hodges study.

[66]Supporting documents and letters in File 7A.

[67]Supporting documents and letters in File 7A.

[68]Noonan and Hodges, p. 13.

[69]Noonan and Hodges, p. 14; see also MacLeod, p. 195.

[70]Noonan and Hodges, pp. 43 & 107.

[71]N.W.M.P. Records, R.G. 18.

[72]Chronicles of St. Laurent.

[73]Oblate Collection, Box 88, D-IV-127, Public Archives, Edmonton.

[74]Newspaper Clippings from Regina Leader, Volume 24, Gabriel Dumont Institute Library.

[75]Dobbin, Part II, p. 18 and following.

[76]Dobbin.