THE ASSOCIATION OF METIS AND NON-STATUS INDIANS OF SASKATCHEWAN

A PROPOSED POSITION PAPER ON THE HUNTING AND FISHING RIGHTS OF NON-STATUS INDIANS.

(Draft for Discussion Only)

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ASSOCIATION OF METIS AND NON STATUS INDIANS
OF SASKATCHEWAN

1. Introduction

The purpose of this paper is to set forth the position of the Association on the question of the hunting, fishing and trapping rights of Non Status Indians and Metis, and to support that position with historical, constitutional and legal data.

This issue has been the basis of much confusion and a lack of consistent policy and practice by governments. The Non Status Indians and Metis have alsp been confused because of promises made and implied by government officials and politicans, about their rights in earlier times and the actual practices of provincial governments in more recent times, of attempting to make all provincial game laws apply to them as if they had no special rights.

There have, of course also been problems, regarding the hunting and fishing rights of Status Indian people. Since these are more clearly established in law, these rights have been tested on numerous occasions before the courts, and a fairly clear body of legal precedent both as to the nature and extent of these rights, as well as the limits of these rights, has been established. The Non Status native people, however, have only on occasions challenged the actions of provincial governments who have insisted that they were subject to the same laws as other people. Being poor, without advocates, and a defeated race, they had neither the means or the moral courage to take on the government on this issue.

In recent times there have been several cases, all argued in Saskatchewan Courts, that have been decided in favor of the Non Status Indian defendants. These have set some precedents dealing with a very limited aspect of the question, but have not dealt with the larger issue of Hunting and Fishing Rights as they apply to all Non Status Native people.

II. The Historical Background of Hunting and Fishing Rights.

A. Aboriginal Rights

In our position paper on aboriginal rights we have identified hunting and fishing rights as one incidence of what was commonly referred to as Indian Title. It could also be said to have been the more important aspects of these rights since the native people of North American generally, and of the Northwest in particular, depended largely on the hunt for their physical needs. The game and the fish provided the bulk of their food supply. Game also provided hides which were used for clothing and shelter, bones which were used to make tools, weapons, utensils and trinkets, and tallow for cooking and for other uses, etc. The lifestyle of the native people was structured around the supply, the migration patterns, etc. of the game and fish on which they depended. Their very survival depended on their ability to adapt themselves to the use of these creatures which Mother Nature made available to them.

This fact was readily recognized by the Colonial powers, and as a matter of practice, the right to the use of their hunting grounds in this way was not to be interfered with without the prior knowledge and consent of the native people themselves. It is a well known fact that many early colonists and settlers tended to ignore this recognition of a common law or aboriginal right of the native people. Nevertheless, such acts were looked upon by the British Crown, at least, as illegal and punishable under British Law.

The dependence of the native people of the Northwest on their traditional right to hunt and fish continued unchallenged long after the arrival of colonial settlers in North America. Indeed, the interests of the trading companies from France and from Great Britain depended upon these rights being kept intact and being protected. The Charters of the Company of New France and of the Hudson Bay Company were expressly granted on the basis that these companies would have the right to carry on trade in furs and hides with the native people. (see Appendix A-1 and 2)

The introduction of the fur trade to the aborigines of North America did, of course, have an impact on the life style of the native people, but it did not change their dependence on game and fish fof their livelihood. The new technology brought by the white man (steel traps, fishing nets, and guns) made the hunt easier. It also meant that the natives now could trade hides and furs (which the white man was after) for ready made clothes and blankets, steel knives and axes and other implements and tools which were of use and interest to them. It, however, did not reduce their dependence on the game for food or for materials to provide their shelter. It did introduce a situation where the supply of game and fish would eventually be seriously depleted by the new technology and by the greed of the fur traders.

Aboriginal rights were also recognized in more official ways. The early instructions given to representatives of the Hudson Bay Company included orders that they were not to take possession of any Indian lands without entering into an agreement or treaty with them and without compensating them for their lands, (see A-3). The same conditions appeared in letters of instructions given by the Massachusetts Bay Co. (see A-4). An early Statute of the Colony of Massachusetts (1633) also provided recognition of native rights (see Appendix A5).

It is therefore abundantly clear that the British Crown and the early colonizers recognized as a matter of law, the rights of the aboriginal people, and had begun to establish procedures by which these rights could be acquired by the settlers. The early practice was to allow the companies to whom charters had been granted, the colonies themselves, or private individuals, to purchase these rights. This led to many abuses in the form of fraud and/or swindles exercised upon Indians by unscrupulous politicians, officials, and private individuals, who often purchased valuable tracts of land from the Indians for trifling sums and/or in exchange for goods of questionable value. This practice also led to a great deal of conflict between the early settlers and the Indians, to Indian Wars, etc.

As a result, the British Crown became concerned about these problems and called together a Congress of the Colonies in 1754 at Albany. The Colonies were asked to establish a joint management plan for Indians' affairs. When they failed to agree on the means to do this, the British Crown took over the political control of Indian matters and appointed their own officials, who were given the authority to exercise this control.

B. The Royal Proclamation.

The problems in North American and in other Colonies, plus the 1754 Congress and actions taken by the Crown, soon led to the enactment of the Royal Proclamation of 1763 (see Appendix B). The Royal Proclamation became one of the British Constitutional documents, and as such forms part of the constitutional law of Canada. According to decisions rendered in "Rex v. McMaster (Lady) [1926] Ex. C.R. 68 at P.72;" and "Campbell v. Hall (1774) 1 Comp. 204;98 E.R. 1045", the Proclamation has the force of a Statute in Canada and has never been repealed.

It is generally agreed that the Proclamation did not establish new rights, but it confirms rights which were clearly recognized by the British Crown. Canadian courts have ruled in a number of cases that Aboriginal Rights applied throughout Canada not withstanding the geographic limitations contained in the Royal Proclamation. The most definitive decision in this regard was rendered by the late Mr. Justice Sissons of the Territorial Court of the N.W.T. In Regina v. Koonungnah the court stated:

> " The Proclamation has been spoken of as the "Charter of Indian Rights". Like so many great Charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimos had their Aboriginal Rights and English Law has always recognized these rights. "

The section of the Royal Proclamation which deals with the question of hunting and fishing rights, and which is important for the purpose of this discussion states as follows:

" And whereas it is just and reasonable, and essential to our interest, and the security of our Colonies, that the several Nations and Tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or distrubed in the possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds "

also

" If at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased by us, in our name, at some public meeting or Assembly of the said Indians, to be held for this purpose "

It is clear that the Royal Proclamation recognized aboriginal rights and recognized hunting and fishing rights as one incidence of those rights. It is also clear that these rights could be sold by the Indian people if they were so disposed or with their consent. It is also clear that such rights could only be acquired by the Crown when compensation for them was settled.

C. Early Practice in Canada.

What is now Canada was first occupied by the French. The French government gave little attention to the question of aboriginal rights when it came to claiming territory or occupying it. France operated on the basis that the Company of New France, to which it had granted a Charter, could settle whatever lands it could persuade the Indians to give them, or from which it could drive the Indians. Settlement starting in the 1500's took place mainly along the St. Lawrence River and its tributaries.

The rest of the country was maintained very much in its wild state, since the Company of New France was also interested in carrying on the fur trade. This it could only do successfully if

it respected the claims of the Indians in Indian territory, maintained peace with them, and did not interfere with their traditional right to hunt and fish. This type of relationship continued to exist between the French and the Indians until the capitulation of New France to Great Britian in 1760. The Company traded furs far inland with the Indians up until that time. In addition, Missionaries were active throughout the territory attempting to "Christianize" the Indians. During this period the H.B.C. limited its own activities to the immediate environs of the Hudson Bay and to some of the more northern areas of the N.W.T.

During this period began the emergence of the Halfbreed Nation. Since there was no white population in the area, the offspring of the white traders and hunters and of the Indian women were almost wholly assimilated into the Indian culture. In general they lived with and like the Indians. They were recognized by the Indians themselves as their brothers. This new group of aborigines also began to play a new role in the life of the country, acting as guides, traders, interpreters, and working in other capacities for the fur trading companies. In time, some permanent settlements began to develop in the N.W. These, however, were in a very embryonic state at the time that Canada passed to Great Britian.

Following this, the Hudson Bay Company gradually began to expand its area of operation, and in 1805 moved into the Red River country and tried to lay claim to this area and the vast southern prairies. Such claims, however, were over the trade and commerce and not over the land itself. The Indians were allowed to continue to hunt and fish and use the land as they pleased. Even British laws were only applied to relations between the British and the Indians and not to relations between the Indians themselves. These were always left to be settled by Indian custom and law. (see Appendix C1).

After 1763, the Northwest Company, representing French and English interests in the Colonies and operating out of Montreal, was set up to continue the traditional trade in the Northwest, which rights and privileges had been guaranteed to the citizens of Canada by the Articles of Capitulation. (see Appendix C-2). The Northwest Company resisted the claims of the Hudson Bay Co. and several decades of conflict, and at times even war, existed between the two Companies, each assisted by its Indian allies. These conflicts were never over the question of the land rights, but only over the rights of the respective Companies to carry on trade in the N.W. Territories. The practice by each Company was to preserve peace with the Indians, encourage them to continue their traditional pursuits of hunting and fishing, and to barter and trade with them, but not to attempt to establish permanent settlements. This conflict was very destructive to the fur trade and to the fortunes of the two Companies. In 1821, after the intervention of the British Crown and the Colonial Government in Canada, the two Companies merged and continued to operate under the name of the Hudson Bay Company. (see Appendix C-3).

In the above Appendix, the Commissioner of Crown Lands for Ontario has provided an excellent summary of the relevant history and legal questions relating to the N.W. and the claims of the H.B.C. This history is important both to demonstrate that the rights of the Indians had never been challenged or interfered with, and that as of 1857, when this Memo was written, this situation had not changed. Neither Great Britain, the Company of New France, the Northwest Company, or the Canadian Colonies, had ever made any laws limiting the right of the Indians to hunt and fish in their traditional hunting ground.

Cauchon, the Commissioner, concludes by raising the question of whether these rights shall be protected or whether the Indians should be driven from their lands, by stating as follows:

> " But the question really comes to be, whether these countries shall be kept in the status quo till the tide of population bursts in upon them, over an imaginary line,

" from a country where it has been the rule that the Indians must be driven from the lands the white man covets; or be opened up under the influence of the Canadian Government, which has always evinced the greatest sympathy towards the Indian race, and has protected them in the enjoyment of their rights and properties, not only in their remote hunting grounds, but in the midst of thickly peopled districts of the country. "

Cauchon's account, plus other accounts, also establish the fact that the first settlements in the Northwest were generally established around trading posts and Missions by the Indians and their Halfbreed brothers. Although these settlement took on a flavor of permanence, they still largely depended for their existence on the unfettered exercise of the right of the inhabitants to hunt, trap and fish over their traditional hunting grounds. Some limited agriculture had begun to develop, but these farms were either self sufficient units or units which continued to be subsidized by the hunt.

D. The Constitutional Basis of Aboriginal Rights.

It has already been stated that the Royal Proclamation, which is a constitutional document of Canada, confirmed native rights to hunt and fish. However, it excluded Ruptersland and other territories granted to the H.B.C. from the application of certain parts of the Proclamation. Therefore, some court cases have ruled that the provisions did not apply to Indian rights in the N. W. Territories for that reason. An example of one such case involving hunting and fishing was the case of "Sigeareah El--53 v. The Queen [1966], S.C.R. 645, 57 D.L.R.(2nd) 536."

However, the question of whether or not the Royal Proclamation does or does not apply is not important to our case. The B.N.A. Act clearly incorporates in O.C's enacted under Section 146 of the Act, provisions that the Indians would be compensated for any lands (and their rights) required for settlement, and that these rights would be settled in accordance with the fair and

equitable principles which have been established by the British Crown. Section 146 of the Act also says that these O.C's shall have the effect of Statutes as if they had been enacted by the British Government. (see Appendix C-4). It is quite clear that the principles referred to are those incorporated in the Royal Proclamation.

E. Legislative Base of Aboriginal Rights.

We can also look at what the intent was of the Fathers of Confederation in making such provisions in the B.N.A. Act. We have examples of Statutes enacted both prior to Confederation and following Confederation, which give us clear indications of legal practice in this regard. The first Act of the Colonies dealing with Indian matters was passed in 1851. It set out a clear procedure for dealing with Indian land claims and for acquiring Indian lands. This Act also contained a definition of who was considered to be an Indian. (That question will be discussed in a later section of this Paper). This surrender provision reappeared without alteration in amendments to the Act made in later years. Again in an Act passed by the Canadian Parliament in 1868 to organize the Department of the Secretary of State, these provisions continued intact. They also appeared in the first so called "Indian Act" in 1874, and in subsequent amendments. The fact that these procedures do not appear in today's version of the Indian Act only indicates that the government believed that it had acquired or settled all native land rights and rights pertaining to the land, and therefore no longer needed such a provision in the Act. (see Appendix D-1, D-2, & D-3.)

The provisions for release or surrender of Indian lands can be summarized as follows:

-- must be assented to by the Chiefs or the leaders of the people;
-- must be voted on at a public meeting of a group or groups (Band, Tribe, etc.) affected.

In other words, the officials of the Crown commissioned to acquire Indian lands had to negotiate with the leaders of all the groups of Indians who had an interest in the land. Any surrender of lands

or rights must be agreed to by the Chiefs, and the agreement must be voted on at a public meeting of the groups concerned and the consent of the majority of the adult members of that group must be obtained for the surrender to be legal.

F. Provisions of the Indian Treaties and Indian Act.

Agreements between the Indians and the Crown were set down in Treaties. These Treaties raise some interesting questions about what land rights consist of and whether in relinquishing such rights, they must be fully relinquished or whether some aspect of these rights can be retained. There have been legal arguments about whether land rights and the right to hunt, fish, and trap were separate rights. The evidence used to support this latter argument is that they appear to be dealt with as separate issues in the Treaties.

It is our view, however, that the right to hunt, trap, and fish is one aspect of a number of land rights. It is inconceivable that one could hunt, fish or trap without having access to land. However, it is possible when relinquishing one's rights to only relinquish or accept compensation for some of these rights. Even today an owner when selling his title may retain mineral rights, water rights, access rights, etc. while selling his surface rights.

Therefore, it is our contention that when signing Treaties the Indians did not relinquish all of their rights, and in particular retained the hunting and fishing rights within the limits spelled out in the Treaties. This was also a recognition by the Crown that the right to hunt, fish and trap was essential to the survival and livelihood of the Indians and must be preserved and guaranteed if the Indians were not to be left in a state of complete destitution and entirely dependent upon the State.

It is important to note that every Treaty except one has a hunting and fishing clause in it. It is also important to note that this clause guarantees the rights of the Indians to carry on their

vocation of hunting, trapping, and fishing. Although there are some slight variations in the wording from one Treaty to another, Treaty No. 4 is typical of these provisions:-

> " and further, Her Majesty agrees that Her said Indians shall have the right to pursue their avocations of hunting, trapping, and fishing throughout the tract surrended, subject to such regulations as may from time to time be made by the government of the Country, acting under the authority of Her Majesty, and saving and except such tracts as may be required or taken up from time to time for settlement, mining or other purposes under grant, or other right given by Her Majesty's said government. "

The Indian Act later limited this right to hunt and fish for food. In our view, this provision of the Act is illegal since the Treaties were concluded under Section 146 of the B.N.A. Act and any legislation which the government is empowered to enact dealing with Indians under Section 91 (24) of the Act can only be constitutional if it does not violate other Sections of the B.N.A. Act.

G. <u>The Natural Resources Transfer to the Provinces</u>.

When Manitoba, Saskatchewan and Alberta were established as provinces, the federal government retained jurisdiction over natural resources, including Crown lands. This situation continued until 1932 when legislation was enacted transferring this jurisdiction to the provinces; a step which put the three prairie provinces on a par with other provinces who had retained ownership of these resources when they joined Confederation. The natural resources transfers were amendments to the Constitution and took the form of Federal-Provincial Agreements in that the provinces agreed to assume certain responsibilities and fulfill certain obligations which had up to that time rested with the federal government.

One of these obligations assumed by the Province was to guarantee the hunting and fishing rights enjoyed by Status Indians.

The following standard clause is contained within each Act:

> " Section 13 -- In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing, game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. "

It must be assumed that the definition of Indian as contained in the above Section, must be consistent with the definition of Indian contained in the B.N.A. Act when it was originally framed. However, the practice by the provinces and the courts has been to limit this provision to Status Indians. The Province of Manitoba, in its Game Act, has even defined Indian in that way, ie: as it is defined in the Indian Act. However, authorities agree that neither this action by Manitoba or the actions of other provinces and the courts can legally limit or change the definition as it was originally intended in the B.N.A. Act.

It will also be noted that the above Section seems to further limit the rights of Indians as provided for in Treaties. The Section says Indians can hunt, trap and fish for food at all seasons, whereas the Treaties always guaranteed this right as a vocation or avocation, ie: a way of earning a living. Indeed, Section 13 seems in fact to contradict itself on this point in that it begins by saying "to assure to the Indians of the Province the continuance of a supply of game and fish for their support and subsistence....." Support and subsistence certainly imply more than a food supply. In our climate they must at least include food, shelter and clothing, and as such the introductory section of the Act seems to imply the original intent of the Treaty provisions

H. Provincial Government Practices in Saskatchewan.

Up to the time the province assumed the ownership of its natural resources, it would appear that the federal government dealt uniformily with the Indians and Metis, applying only those Game Laws to be found in the Migratory Birds Act and the Fisheries Act. Old people living in the Qu'Appelle Valley and Southern Saskatchewan area recollect that such Laws were first applied just after World War One. There seems to have been no other restrictions on the traditional rights of Indians (both Status and Non Status) up to the time of the transfer agreements.

Since that time, the Province however has tried to apply their Game Laws to the non status people, as if they had no more rights than other settlers. The old people recall these Laws being first applied on a uniform basis to them starting in the 1930's. At that time their application was generally limited to people in the settled areas of the province. The people in the north continued to hunt and fish fof both food and their way of making a livelihood as they had done from time immemorial.

It was not until after 1944 when the C.C.F. government was elected, that the Province began to apply Game Laws to the unsettled Crown lands of the north. Since that time the Province has increasingly interfered in the affairs of Northern Indian people, not only by prosecuting them for Game Law violations, but by introducing registered trap lines, fishing quotas, etc.

I. The Application of Hunting and Fishing Laws to Non Status Indians.

Although the application of hunting and fishing rights and privileges in the case of Status Indians has been fairly clearly established, the situation as it applies to the Metis and Non-Status Indians is very unclear. There has been a tendency, as indicated above, to deal with Non-Status Natives as if they had no special rights.

The idea the Indian people of mixed blood had no special rights as Indians is first to be found in Minutes of an investigation of the Hudson Bay Company by a select committee of the

British Parliament. In a report submitted by the H.B.C. they state as follows:

> " It is proper to observe in the outset, that there is an ambiguity calculated to mislead in the term "natives" as used in the Memorial, which is sometimes employed to denote halfbreeds, or persons of mixed race, and sometimes the Indians or aboriginal inhabitants. In the report (their report to the committee) it is applied exclusively to the latter. "

A. K. Isbister, himself a Metis, and a respected lawyer practicing in England, acted for the inhabitants of the Red River. He responds to this attempt by the Hudson Bay Company to distinguish between Indians and Halfbreeds as follows:

> " The distinction which is drawn between the native Indians and their half caste offspring is in itself unobjectionable, but the inference it afterwards attempted to found on this distinction, namely, that the halfbreeds are, from the circumstances of their mixed parentage, divested of their rights inherent in the aboriginal inhabitants, cannot be admitted. It is at variance with the established usage in Canada and the United States, where the half-castes are in every case admitted to full participation in the privileges of their Indian connections. Rupertsland, where the half-breeds are but too often abandoned by their unnatural white parents and cast upon the charity of their Indian relations, is the last place where such a distinction ought to be put in force. "

The question of whether hunting and fishing rights can be claimed by the Non-Status Indians and Halfbreeds, therefore, must be based on whether or not they are Indians within the meaning of the term as it was used in the B.N.A. Act. Unfortunately the Fathers of Confederation did not see fit to define the term in this Act itself. This was likely related to the fact that the meaning of the term had a well established usage in Great Britain and Canada and therefore they did not feel compelled to spell out the meaning of the term in the Act itself.

The question then arises as to what they intended when they used the term. The most reliable clues to this are to be found in Statutes dealing with Indian matters, passed in Canada both just prior to Confederation and just after Confederation. The earliest Statute in which Indian was defined was a Statute passed by the Colonies in 1851. This Act was further amended in 1859. The first Statute dealing with Indian matters passed after Confederation was an Act to establish the Department of the Secretary of State in 1868. The first Indian Act was passed in 1874 (four years after the Manitoba Act of 1870). The first three of those Acts set out in detail the same definition, and the fourth said that the definition from the 1868 Act shall apply. (see Appendix D-2 and D-3). This definition reads as follows:

" Section 15 -- For the purpose of determining what persons are entitled to hold, use or enjoy, the lands and other immovable property belonging to or appropriated to the use of the various Tribes, Bands or Bodies of Indians in Canada, the following persons or classes of persons, and none other, shall be considered as Indians belonging to the Tribe, Band or Body of Indians interested in any such lands or immovable property:

Firstly: All persons of Indian blood reputed to belong to the particular Tribe, Band or Body of Indians interested in such lands and immovable property, and their descendants;

Secondly: All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to a particular Tribe, Band or Body of Indians interested in such lands or immovable property, and the descendants of all such persons; and

Thirdly: All women lawfully married to any of the persons included in the several classes hereinbefore

designated; the children issue of such marriages, and their descendants. "

This is a very comprehensive definition, included persons of mixed blood, and their descendants, and can leave little doubt as to what the Fathers of Confederation had in mind. Therefore, the meaning of the term Indian in the natural resources agreement, must be taken as being the same since these Agreements form part of the Canadian Constitution. Although they are amendments to the Constitution, they do not purport to amend the meaning of the term "Indian". Therefore, the natural resources transfer should extend the hunting and fishing guarantees to all of the Indians and not just Status Indians.

The manner in which the federal government dealt with the Non-Status Indians up to the time of the transfers has already been outlined above and is further evidence that they accepted the definition of Indians as the one given above.

J. Scrip and The Acts Enabling Extinguishment.

As will be discussed in detail in our position paper on Constitutional questions relating to the alienation of Indian Rights, it is our view that the provisions for the extinguishment of Indian title as contained in the Manitoba Act and the Dominion Land Act are enabling provisions and do not in themselves constitute an extinguishment. We will also argue that the steps taken under these Statutes contravened Section 146 of the B.N.A. Act and, therefore, do not constitute an extinguishment of any rights, including hunting and fishing rights. However, setting this argument aside for the time, it is our contention that the Scrip issue, even if it should be found legal, did not constitute an extinguishment of hunting, trapping, and fishing rights.

From a study of the legislation and O.C's which purported to carry out the provisions of the legislation, it is not clear what was being extinguished other than "Indian Title". Nowhere is "Indian Title" defined and whether it referred to all rights and privileges which went with the land or just normal legal title and use is not clear. A study of the Scrip applications, Scrip

Certificates, and Scrip Notes, also throws no light on this subject since they make no mention of Indian title or rights. No one who received Scrip ever signed anything or was party to any agreement indicating what was being given up or for that matter, that any rights were being relinquished by taking Scrip.

What the people understood Scrip to be for is rather unclear at this date, since very few people who received Scrip are still alive. However, from the research we have done it is clear that most of the old people, both those who received Scrip and children or other relatives, did not understand that the Scrip issue inaany way interfered with their right to hunt and fish and trap. The evidence suggests that they continued to pursue this way of life unmolested until quite recently.

Their view is supported by debates in the House of Commons in 1886. Prior to that time there had been numerous petitions to the government from various Halfbreed communities in the N.W. Almost without exception the petitions contained a request that their rights to hunt and fish should be guaranteed. The government did not reply in any definitive or official way to these requests and answers given by officials in the civil service were confusing if not misleading. Laurier severely criticized the MacDonald government for this in H of C debates during 1886, and pointed out that the requests for hunting, fishing and trapping guarantees were one of the things on which the government had not given a response.

White, the Minister of the Interior at the time, implies that this was unnecessary since the government had never restricted this right. His reply was as follows:

" There were of course a number of other subjects referred to in the petitions. We have heard them read tonight. There was permission asked to hunt the buffalo, but I am not aware that anyone ever prevented a Halfbreed or Indian from hunting buffalo; the misfortune was that there were no buffalo to hunt. There was also the question of fishing rights, but I am not aware -- although I am bound to say, I think it would have been wise if it were

otherwise -- that anyone ever prevented a Halfbreed, an Indian, or a Settler, from fishing at his own sweet will. "

In his reply, White, then goes on to talk about the extinguishment of Indian Title in some detail. Nowhere in his reply does he link the question of hunting and fishing rights with the question of Indian Title.

In the negotiating of the Treaties, the question of hunting and fishing rights of the Halfbreeds always was raised by the Indians. In a number of cases the Indians refused to sign the Treaties until they had received what they believed were some guarantees on this question. The following excerpt from the diary of Morris at the signing of Treaty No. 4 is fairly typical of how this question was dealt with during these negotiations. In response to a question by Morris as to whether the Chiefs were ready to sign the Treaty, we find the following in Morris' diary:

> "Kamooses -- "Yes, we want each Chief to have a copy of the Treaty, we ask that the Halfbreeds may have the right of hunting.
>
> Lt. Gov. Morris -- "We will send a copy to each Chief. As to the Halfbreeds, you need not be afraid; the Queen will deal justly, fairly, and generously with all her children. "
>
> The Chiefs then signed the Treaty after having been assured that they would never be ashamed of what they did. "

These replies would certainly seem to indicate that the government would deal with the Halfbreeds, at least on this issue, the same as it was dealing with the Indians. There can be little question that that is the meaning that the Indians took from this reply by Morris.

It is also important to note that at the negotiating and signing of this Treaty, a large number of Halfbreed from the plains area were present. They had heard about the Treaty negotiations with the Indians and they had come to see what this was all about. At the same time on September 11, 1874, they presented their own

petition to Mr. Morris. In it they asked the following:

> " The right of fishing in all the lakes of the above mentioned River. The right of hunting freely in the prairies west and southwest of the lakes Qu'Appelle without being arbitrarily hindered by the Indians, but only in virtue of regulations that the Indians in concert with the Halfbreeds and the government, shall establish hereafter for the good of all. "

In Morris' reply dated September 16, 1874, one day after the signing of the Treaty, Morris stated:

" In regard to the chase you have the same rights that other subjects of the Queen have. "

Further evidence to support the contention is to be found in Morris' diary which indicates that the question of the rights of the Halfbreeds was extensively discussed during the negotiations with the Indians for Treaty No. 4, and was undoubtedly prompted by the petition referred to above, which was submitted to Morris on the third day of his conference with the Indians. During the fourth day of discussions, Morris had assured the Indians as follows:

> " You may rest easily, you may leave the Halfbreeds in the hands of the Queen who will deal generously with them. "

When the Noonan and Hodges Study was carried out in the 1940's, they located three persons who had been present at the signing of Treaty No. 4. One was a white woman, a Mrs. Kavanaugh, the second was a Metis, Pierre Le Cree, and the third one Indian Buffalo Bull. All three stated that Morris had made promises to the Halfbreeds which guaranteed them that they would have equal rights and receive equal treatment along with the Indians. Their recollections of what was said are similar and we quote as follows:

" One of the reasons the Indians delayed signing the Treaty was because they wanted to be assured that their Halfbreed brothers would have equal consideration with the Indians. Governor Morris declared on that they might be quite easy on that point and promised that the Halfbreeds would receive just as much as the Indians in accordance with their number. "

There can be little doubt that the Indians and the Halfbreeds came away from this meeting believing that the requested rights of the Halfbreeds would be recognized and respected by the government. Whether this is what Morris intended is another question. There is evidence that Morris, in spite of these assurances, did not accept the fact that the Halfbreeds had equal claims or rights with the Indians. In all his negotiations, he was careful to establish that he had come to negotiate with the Indians and not the Halfbreeds and that the Queen had made other provisions for the Halfbreeds.

The following is additional evidence supporting the claim that the hunting and fishing rights of Halfbreeds were recognized. On March 8, 1878, Inspector McLeod, writing to the Assistant Commissioner of the Royal Canadian Mounted Police, indicated instructions had been given to the R.C.M.P. constables to apply the Buffalo Laws in the same way to the Halfbreeds as they were being applied to the Indians. More recent evidence of this practice of applying these laws equally was contained in the report of a Royal Commission to investigate the fisheries industry in Saskatchewan in 1903, carried out under Judge Maquire and Senator Prince. After careful investigation of this question, they recommended that the Halfbreeds have the same privileges to fish for food at any time of the year as was granted to the Indians.

However, the idea that they had forfeited these rights persisted as evidence by the following references:

In an article written by R. E. Read, a recognized expert on Halfbreed matters, in 1939, he stated as follows:

" When we make a close study of the facts as brought out in the Treaties, it will be apparent that the Metis have had no claims in the clearance of the Titles to the Crown, but having been granted full citizenship by Federal Acts in Manitoba in 1870, and in the N.W.T. in 1874, they have had full citizenship and the franchise since those dates, and the full protection of all the laws in force in Manitoba, Saskatchewan, Alberta and the North West Territories, and their claim can only be considered as a moral one, due to any citizen, as exemplified by the Relief Act. "

Read no doubt draws on the views of some of the best known Commissioners and Administrators in Indian Affairs of earlier times. Dewdney, for example, in speaking to the question of Halfbreed Scrip said, "I contend that they have no right and it really is a question of whether we shall give any further consideration or not." There were other influential civil servants who argued in a similar way. The Indian Commissioner, Colonel Dennis, in 1875, argued against special rights for the Halfbreeds. He also argued that if they wanted special rights, then they should abandon all rights and privileges as citizens. It was common in correspondence and reports for Administrators to express their view that when Halfbreeds took Scrip and accepted citizenship rights, they became as white men, giving up any special rights as Indians.

This attitude was also reflected in government practice and the refusal to grant any compensation to the Halfbreeds in the form of help to get established in agriculture. The type of help requested was livestock, seed, some implements and tools, etc. The standard reply of the civil servants and politicians was that such help could not be extended because the Halfbreeds being citizens should be treated the same as other settlers and should have no assistance not available to other citizens. The practice of the provinces, in more recent times, of treating the Halfbreeds and Non-Status Indians, the same as all other white citizens, when it comes to dealing with hunting and fishing laws is a further

reflection of that philosophy.

That philosophy also, of course, prevailed in the government's dealings with the Status Indians. Although Indians were quite clearly given the status of British subjects, they were denied the franchise on the basis of being granted special rights as aborigines. The same provisions were applied to those Halfbreeds who took treaty. The underlying reason for denying the franchise to Indians seems to be based on the belief that Indians were savage and uncivilized and therefore in need of special protection. It was believed that they were not capable of exercising the franchise intelligently. The whole thrust of Indian policy was to bring Indians to the point where they could become enfranchised and capable of exercising full citizenship. When they did become enfranchised they relinquished their status as Indians and all claim to any special rights they enjoyed.

The origin of this confused thinking on aboriginal rights and citizenship rights is rather unclear, and the arguments used to sustain it are rather weak. The British Crown was responsible for making Indians and Halfbreeds British subjects. As such they were the first citizens of the country and should have full citizenship rights. These should not be dependent on or in any way limited by any special rights which they enjoyed as the original inhabitants of the territory. The ridiculousness of this argument was finally recognized in 1959 when the franchise was extended to all Indian people. That action also removed any possible argument that Halfbreeds had to forfeit their aboriginal claims because they wanted the right to vote, or because they were a "cut above the Indians" and therefore not in need of any special protection.

The results of this policy, however, are still inherent in the refusal of the provinces to recognize the hunting and fishing rights of the Non-Status Indians, and the unwillingness of the federal government to take a clear and firm position on this matter.

III. A Review of Legal Cases Dealing With Hunting and Fishing.

A. Introduction.

As was indicated previously, there have been a number of cases in which the hunting and fishing rights of Status Indians have received attention. There have also been cases dealing with the question of the rights of the Inuit. However, cases dealing with the rights of Non-Status Indians are few. Those that have been defended have produced rather inconclusive results.

B. The Case of the Status Indians.

The courts have generally protected native hunting and fishing rights from encroachment by the Provinces and have ruled that provincial restrictions on these rights are ultra vires of the authority of the Provinces. In general they have based their interpretations on provisions in the Indian Act and on whether the Indians of the jurisdiction in which the case was being hear were, in fact, covered by a binding Treaty. The definition of a Treaty has generally been liberal and has included Treaties made by representatives of the H.B.C. with the Indians. However, international Treaties such as the Jay Treaty have been excluded. In the case of Regina v. White and Bob, the B.C. Court of Appeal ruled that where there is conflict between an Indian Treaty and provincial Game Laws, the Treaty provisions would prevail.

In the case of the three prairie provinces there are the specific provisions in the natural resources agreement which have been cited previously. Decisions have hinged on the meaning of "Unoccupied Crown Lands" and of "other lands to which Indians have right of access". In Rex v. Wesley, the court ruled as follows:

> " I think the intention [of the Natural Resources Agreement S.12] was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to Section 12 reassured of the continued enjoyment of his rights. "

In a Manitoba case Regina v. Prince, the accused Status Indians were convicted of hunting game at night by the use of a light contrary to the Manitoba Game Act. The accused were convicted, but in a dissenting opinion Mr. Justice Freedman indicated as follows:

> " The statement in S-13 of the Manitoba Natural Resources Act that the law of the Province respecting game and fish shall apply to the Indians is, in my view, subordinate in character. Its operation is limited to imposing upon the Indians the same obligation as is normally imposed upon every other citizen, namely, that when hunting for sport or commerce he must hunt only in a manner and at times prescribed by the Act. But the ordinary citizen does not hunt for food for sustenance purposes. The Indian does, and the Statute, recognizing his right to sustenance, exempts him from the ordinary game laws when he is hunting for food in areas where he is permitted. "

An appeal to the Supreme Court of Canada set aside the convictions and expressly adopted the reasoning of Justice J. A. Freedman.

On the other hand, in the case of federal laws restricting hunting and fishing rights, the courts have almost unanimously upheld the federal government's right to legislate to limit such rights. In Regina v. Bob and White, the court ruled as follows:

> " .....their (Indians) peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which Parliament has exclusive authority, and only Parliament can derogate from these rights. "

In the case of Regina v. Sikyea, the accused, an Indian under Treaty 11, was charged with shooting a duck out of season under the Migratory Birds Act. The Court of Appeal of the North West Territories ruled as follows:

" The rights of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada -- in the early days as an incidence of their "ownership" of the land, and later by the Treaties by which the Indians gave up their ownership right in these lands. "

The court further stated:

" It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "Promise and Agreement", like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within S.91 of the B.N.A. Act, from doing so. "

C. The Case of the Inuit.

Section 146 of the B.N.A. Act and the Orders in Council passed under that Section which contained provisions for dealing with the rights of Indians, make no mention of the Inuit. However, in Regina v. Eskimos, the Supreme Court of Canada ruled that the expression "Indians" in Section 91(24) of the B.N.A. Act included "Eskimos". This is further support for the argument that the term "Indians" as used in the B.N.A. Act includes all aboriginal natives and their descendants, not just Status Indians, as the Indian Act attempts to imply.

In regard to hunting and fishing rights, Mr. Justice Sissons of the N.W.T. court ruled:

" there has been no Treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada. The Eskimos therefore have the right of hunting, trapping and fishing game and fish of all kinds, and at all times on unoccupied Crown lands in the Arctic. "

This statement was part of the decision rendered in Regina v. Kogogolak.

In yet another case, Regina v. Koonungnak, already cited (see Page 4, B. para 3), Justice Sissons ruled that the Eskimos had aboriginal rights along with the Indians and that these rights had always been recognized by British and Canadian law.

D. The Special Case of the Non-Status Indian.

As indicated in discussion above, the case of the Non-Status Indian would seem to hinge on whether he is an "Indian" as defined under the B.N.A. Act and on whether his hunting and fishing rights have been limited in any way by federal legislation. There is almost no decisive case law on any of these questions as it relates to hunting and fishing rights. On the later question of federal legislation, it can be assumed that the Fisheries Act and the Migratory Birds Act apply to Non-Status Indians in the same way they apply to Indians and that case law covering these Acts applies. In fact, both these Acts and the regulations made under them make specific provisions to extend the same rights to Status Indians and Non-Status Indians in areas such as the Yukon, the North West Territories, and Northern Alberta. Regulations applying to other parts of the country are silent on this question.

In the case of hunting and fishing rights of the Non-Status Indians in other areas, the only applicable case law has arisen in Saskatchewan. However, this case law is rather inconclusive and seems to have limited application in terms of setting precedents which recognize the rights of all Non-Status Indians. The first of these cases involving a Non-Status Indian is Regina v. Pritchard, (see Appendix D-1). In his decision, Judge Bendas used American case law to define the term Indian. He states:

> " In 31 C.J. at P.480, the name "Indian" is defined as follows:-
> "Indian" is the name given by the European discoverer of Americanto its aboriginal inhabitants, Frazee v. Spokane County, 29 Wash. 278,286. The term "Indian" when used in a Statute without any other limitation, includes members of the aboriginal race, whether now sustaining tribal relations or otherwise: Frazee v. Spokane County, 29 Wash. 278,286 ..... in my opinion the above definition would also be valid in Canada. "

However, Bendas then goes on in his decision to conclude that the term "Indian" in Sec. 12 of the Natural Resources Transfer Agreement must have the same meaning as it does in the Indian Act. R.C.C. 1970 C-1-6. He also concluded that the most recent Indian Act was the successor of a number of such Acts passed by Parliament since Confederation and that in all of those Acts the definition of Indian was essentially the same. (We can only conclude that Judge Bendas did not study the early Acts, or for other reasons ignored them in reaching this decision.)

Judge Bendas ruled in favor of Pritchard on the grounds that he was eligible to be registered under the Indian Act, and therefore was an Indian within the meaning of Sec. 12 of the Natural Resources Transfer Agreement. The original court decision by Judge Policha was appealed and was in essence upheld by Judge Bendas; but his decision placed serious limitations on the definition of who was an Indian. It further implies that the federal government can change the meaning of the constitution by statute.

To some extent, therefore, this case set a precedent, but a precedent which tied the definition of Indian to the present Indian Act definition. One could then conclude that if Parliament were to change the definition of "Indian" in the Indian Act, it would also change its meaning in the Transfer Agreement. This seems a questionable proposition since the Natural Resources Transfer Agreements are part of the B.N.A. Act and constitutional authorities agree that the Constitution cannot be changed by a Statute of the Canadian Parliament.

Approximately two years ago a similar case was argued in the LaRonge court in Regina v. Ashton Hawker. The Judge Fobard in this case again ruled in favor of the defendant using the Pritchard precedent, i.e. that the defendant, although a Non-Status Indian, was eligible to be registered and therefore was an "Indian" within the meaning of the Natural Resources Transfer. The decision in this case was an oral decision and apparently was acceeded to by the Crown, indicating that the Crown accepted the Pritchard decision.

More recently in Regina v. LaPrise, Judge DeShaye ruled that he essentially agreed with Judge Bendas' contention that one must look to the Indian Act to determine what Parliament intended as to the definition of the term "Indian". However, he ruled that one could not use the definition in the present Act but one must look at the 1927 Statute in force at the time of the Natural Resources Transfer to determine what the government had in mind when using the term "Indian". That Act contained a Section which included a definition of "Non-Treaty Indian" which groups of Indians were at that time covered by the Act. Judge DeShaye ruled as follows:

> " It is clear from the facts which I find that the accused, George LaPrise, would fall within the definition of the word "Non-Treaty Indian" as contained in the Statute of 1927. It would, in my opinion, not be within the power of Parliament to unilaterally abridge the right which is given to Indians in the Province by the proviso in Section 12 of the Natural Resources Agreement by a change in the definition of the word "Indian" as used in the Indian Act. "

On this basis Judge DeShaye ruled in favor of LaPrise. In another recent case, Regina v. ....., the Judge followed the reasoning of Judge DeShaye and also ruled in favor of the defendant. It is our understanding that the Crown is appealing both cases on the basis that the decisions are based on an error in interpretation of the law.

Although these cases extend hunting and fishing rights to a small group of Non-Status Indians, they set no precedents which could be said to confirm the rights of the bulk of our Non-Status native people, the Halfbreeds and the enfranchised Indians. There are no decisions on this latter group of Indians which we can draw on and, therefore, arguments for hunting and fishing rights for these people must be based on aboriginal rights, the Royal Proclamation, the B.N.A. Act, and the Natural Resources Transfer, and the meaning of "Indian" as used in these instances. Other arguments must be based primarily on tradition and practice as it developed under the rule of the Hudson Bay Co. and the Government of Canada.

IV. The Position of the Association of Metis and Non-Status Indians of Saskatchewan.

A. The Association's position is that "as descendants of the original Indian inhabitants of Canada, the Non-Status Indians and Metis have aboriginal rights, and these rights include the right to hunt, trap, and fish on the traditional grounds of their ancestors. It is further contended that, in its dealings with the Non-Status Indians and Metis, no mention was ever made, agreement concluded, or law enacted, which would in any way limit or alienate these rights. Therefore, the Non-Status Indians and Metis claim that they continue to enjoy the rights of their ancestors to hunt and fish and trap, without government interference, for their support and livelihood." To support our arguments we present the following additional facts and information to that which has already been covered above.

B. Practices under Hudson Bay Co.

In a book by Archer Martin, published in 1898, titled "The Hudson Bay Company's Land Tenures", he quotes Chancellor Kent who in his remarks on Mitchel v. United States said: "possession was considered with reference to Indians' habits and modes of life, and the hunting grounds of the tribes were as much in actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the law of all the Colonies. "

He also quotes Gwynne J. who 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. "

It is clear that Colonial law and practice recognized the rights of Indians to their land and that hunting rights were seen as a major incidence of such rights. Although territory claimed by the Hudson Bay Company was not a colony, it is also clear from the Royal Proclamation that the provisions relating to rights of Indians and the provisions for dealing with these rights applied to propietary governments, not just

to the Colonies. The Hudson Bay Company Charter specifically granted propietary rights to the company and the evidence given by a representative of the Hudson Bay Co. before a select committee of the British Parliament in 1857, indicates that the Company respected the provisions of the Royal Proclamation in its dealings with the Indians. (see Appendix B) It is also clear that they did not at that point distinguish between the rights of the Indians and the Halfbreeds. We quote as follows from Page 90 & 91 of the report of evidence given before the committee: (see Appendix C-1)

" 1747 - Mr. Grogan -- What privileges or rights do the the Native Indians possess strictly applicable to themselves? -- (Sir G. Simpson for the H.B.C.) -- They are perfectly at liberty to do as they please; we never restrain Indians.

1749 -- Lord Stanley. You exercise no authority whatever over the Indian Tribes? -- None at all.

1750 -- If any Tribe were pleased now to live as the Tribes did before the country was opened up to Europeans; that is to say, not using any article of European manufacture or trade, it would be in their power to do so? -- Perfectly so; we exercise no control over them.

1751 -- Mr. Bell. Do you mean that, possessing the right of soil over the whole of Rupertsland, you do not consider that you possess any jurisdiction over the inhabitants of that soil? -- No, I am not aware that we do. We exercise none, whatever right we possess under the Charter.

1752 -- Then is it the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? -- They are under our jurisdiction when crimes are committed upon Whites, but not when committed upon each other; we do not meddle in their wars.

" 1753 -- What law do you consider in force in the case of Indians committing any crimes 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 soley to the Whites? --- To the Whites, we conceive.

1754 -- Grogan. Are the native Indians permitted to barter skins from one tribe to another? -- Yes.

1755 -- There is no restriction at all in that respect? --- None at all.

1756 -- Is there any restriction with regard to the Halfbreeds in that respect? --- None, as regards dealing among themselves. "

C. Who Is An Indian?

It is the position of the Association that the term "Indian" as used in the B.N.A. Act, Section 91(24) included all persons of Indian ancestry including the Halfbreeds.

The above quotation supports the contention that the H.B.C. did not distinguish between Halfbreeds and Indians and for practical purposes considered all aboriginal inhabitants of Rupertsland, Indians. In the Rupertsland transfer agreement (see Appendix C-4, Schedule B, Sect. 8), which was approved by Order in Council under Section 146 of the B.N.A. Act, the agreement to relieve the H.B.C. of the rights and claims of Indians, and the obligation of Canada to assume responsibility for them, included all the aboriginal people not just Treaty Indians. To put any other construction on the term "Indian" in the B.N.A. Act would be absurd since Canada had no Treaties with the Natives in Rupertsland and the N.W.T. at that time. The only other Treaty in existence was the Selkirk Treaty. It only covered a very limited group of Indians and was of doubtful status.

The fact that Halfbreeds or mixed blood descendants of the Indians were recognized as Indians is further demonstrated by early Indian Acts, and the Act to organize the Department of the Secretary of State, already referred to above. (see Appendix D-1, 2 & 3)

D. What Rights Do Non-Status Indians Enjoy?

It is the position of the Association that as descendants of the aboriginal peoples, the Non-Status Indians and Metis of Canada enjoyed the same rights as those recognized as belonging to the Indians who made Treaty with the government and became known as Status Indians. This fact was recognized by the government as applying to natives not only in the N.W.T. but in all parts of Canada. The government made Treaty with the Halfbreeds of Rainy River by way of an adhesion to Treaty No. 3, in separate negotiations from those carried on with the Indians of this area. These Halfbreeds received all the rights, guarantees and privileges given to the Indians.

In addition, the government always allowed those Halfbreeds who lived with and like regular or irregular Indian Bands to enter those Bands. They receive both the benefits of Treaty and of the Indian Act. In an 1880 amendment to the Indian Act, the government confirmed the rights of the Halfbreeds of the Caughnawaga reserve with the following provision:

> " The Halfbreeds who are by the father's side either wholly or partly of Indian blood now settled in the Seigniory of Caughnawaga, and who have inhabited the said Seigniory for the last twenty years, are hereby confirmed in the possession and right of residence and property, but not beyond the tribal rights and usages that other members of the band enjoy. "

The Manitoba Act and the Dominion Land Act expressly recognize "Indian Title" even though we challenge the claim that those Acts do what they say they do, ie: extinguish Indian Title. Part of that title was the right to hunt and fish on the lands, which were known as "Indian Lands".

In the book by Archer Martin, referred to above, he, in his discussion of the provisions of the Manitoba Act, expresses the opinion that the use of the term "Indian Title" in the Act recognizes that they had a right in blood to participate to the extent of a moiety. This means they had a half interest in the Indian Title or shared the Indian Title with the Indians on an equal basis.

E. The Status of Hunting and Fishing Rights.

It is the position of the Association that the legal and administrative procedures surrounding the issue of Halfbreed Scrip, at no time raised or in any way dealt with the question of hunting and fishing rights. Therefore, we are of the opinion that these rights of the Non-Status Indians and Halfbreeds are fully intact and are not limited in any way except as provided for in specific Federal Statutes and in the Natural Resources Transfer Agreements.

During the early distrubances at Red River, there were numerous meeting of the leaders and inhabitants of the area where they discussed and formulated the demands they were to make on Ottawa. Reil and Bruce had been selected by the people as leaders of the provisional government, and they along with others framed a Charter of Rights which they first presented to the Governor of the Red River Settlement and to the Governor of the Hudson Bay Company. Three delegates were eventually chosen and sent to Ottawa to negotiate with the Canadian government the demands set out in this Charter, and the terms on which the Red River Settlement would come into Confederation. (see Appendix F-1) We have no Minutes of those discussions, but the Charter of Rights itself did not deal with the question of hunting and

fishing rights, or any other question dealing with aboriginal title by direct reference, but they did indirectly by reference to the traditional rights and priviliges of the people. However, the request for a new province was tied to provincial control over the land and the natural resources, as was the case in the old provinces. This would have given the predominate native population in the area control over land and resources, and they then could have made laws to protect their own interests. Clause 5 of the Bill of Rights presented in Ottawa also asked that their traditional rights be respected. However, when the federal government refused these concessions, the native people seem to not have provided the delegates who went to Ottawa with a back up negotiating position on Indian rights.

However, the federal government in its legislated response in the Manitoba Act, Section 31, did not deal with the issue of hunting and fishing rights. Nor did it deal with it in the provisions of the Dominion Land Act, Section 125(e), in the 1879 or subsequent amendments. (see Appendix F-2). The question, in addition, was not raised in any of the O.C's passed by Cabinet to implement the provisions of these Statutes. There are too many O.C's to include as an Appendix to this document, but we have included a typical O.C. to illustrate the provisions for implementation of Scrip issue made by the government. (see Appendix F-3)

In addition to the Scrip documents themselves said nothing about hunting and fishing rights being ceded. These documents included the Scrip application, the Scrip Certificate, and the Scrip Notes. (for samples of these see Appendix F-4)

The federal government, by retaining control over natural resources, retained the right to legislate on this matter. However, the legislation they did adopt, which we have already referred to above, treated all native people in the

same way. Therefore, we must assume that the provisions of the Natural Resources Transfer were also designed to treat all natives (people of Indian ancestry) the same.

It is therefore, our position that our hunting and fishing rights have never been extinguished. Therefore, at the least we must enjoy the same rights to hunt and fish as Status Indians. Indeed, we believe there is a strong argument to be made that our rights are more extensive than those of the Status Indians, since our people signed no Treaties or other agreement which in any way limited these rights.

F. Modern Day Recognition of Hunting and Fishing Rights. Is there any evidence that the federal and the provincial government have more recently recognized our rights, even though they pretend and act as if they didn't exist? We believe there is strong evidence that such rights have been recognized in recent times.

In the early 1950's the Canadian Government wanted to have an area just north and east of Cold Lake, Alberta, where there is an armed forces air base and training centre, set aside as a bombing range. For this purpose, Canada entered into negotiations with Saskatchewan, and the results of those negotiations are set out in an agreement, dated August 4, 1953. (see Appendix G-1). In that agreement, Clause 2-a makes provisions for Canada to assume responsibility for the payment of compensation to persons who had rights in the area. The rights included trapping and fishing, among others.

The Federal Government then proceded to negotiate compensation with the native people who lived within the weapons range for the loss of their rights (hunting, fishing and trapping), by which they had earned their livelihood. The Memo of Agreement entered into with each of the Native Heads of Families in the area, we believe, is prima facie evidence

that the Federal Government as late as 1957 (see Appendix G-2 for sample Memo of Agreement), recognized that native people still had hunting, fishing and trapping rights. Furthermore, we believe these Agreements clearly identify that compensation paid was only for rights in the weapons range and that the releasor only relinquished his rights in that area and nowhere else in the Province.

Many of the elderly people who lived in the area where the weapons range was established have been interviewed. It is clearly established from their recollections and from the life style of the people in the area, that after the Scrip issue in 1906, they continued to hunt and fish as they had always done, as a means of earning their livelihood. This lifestyle was not interfered with in any way up to 1954 when the Federal Government acquired the area and they had to move to other locations.

V. Summary

In summary, then, it is our contention that the aboriginal rights of the "Indians" were recognized by English Common Practice, confirmed by the Royal Proclamation of 1763, incorporated in O.C's under Section 146 of the B.N.A. Act, and were protected by the Natural Resources Transfer which also forms a part of the British North America Act.

It is further our contention that the term "Indian" included all aborigines of Indian ancestry, not just those who signed Treaties with the government. We believe our position is supported by early English Practice, the Practice of the Hudson Bay Company, and by early legislative provisions in the Colonies and in Canada after Confederation.

In addition, Canada gave legislative recognition to the "Indian Title" of the Non-Status Indians in specific provisions of the Manitoba Act and the Dominion Land Act, cited above. As well, we claim that the right to hunt, fish and trap was one of the most important incidents of our title. We at no time ceded

this right and this fact was recognized by the Federal Government in Federal Statutes such as the Migratory Birds Act, and the Fisheries Act, in certain parts of Canada.

The Federal Government has also recognized this right by the offer of compensation and payment of compensation to people who lived in the Primrose Air Weapons Range. The Federal Government has also recently recognized the rights of the Status and Non-Status Indians of the North West Territories as co-equal and has pushed this recognition to the point of asking the two groups to present their claims jointly. It has also indicated that until both groups have presented their case, no final settlement will be made.