ASSOCIATION OF METIS AND NON-STATUS INDIANS

OF SASKATCHEWAN

A DISCUSSION PAPER

THE NATURE OF ABORIGINAL TITLE - IS IT TRANSFERABLE OR ASSIGNABLE?

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I. INTRODUCTION

The purpose of this paper is to examine the nature of Aboriginal Rights, whether it is transferable or assignable. The writer will concentrate on this specific issue although there are a number of related questions which could be pursued. From previous papers it has also been noted that in Canada the Government has purported to have extinquished Indian title by both Treaty and scrip.

The writer will not analyze in great detail or at any length the issues of fraud or illegalities that may have flowed from the utilization of scrip for extinquishing Indian title and the various legislative and administrative changes made to accommodate the use of scrip to meet the Government's questionable purposes.

II. RE: BRITISH COLONIAL PRACTICE

Other than basing the source Aboriginal Rights under International law, the most widely acknowledged source in Canada is the derivation of Aboriginal title from British Colonial Practice or as is now commonly termed, the "common law". Without debating this point, even if Aboriginal title derives solely from the common law, there are specified ways that this right can be dealt with.

The first case to come to grips with the issue of Aboriginal title was Johnson V. McIntosh which was heard by the United States Supreme Court in 1823. Although this is a U.S. case the Justices dealt with the root of Aboriginal title as being derived from the common law which the U.S. was once under. In this classic case which is still widely used, Chief Justice Marshall deals with the concept of discovery which they use to justify the concept of Indian title.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the Government by whose subjects, or by whose authority, it was made, against all other European Governments, which title might be consumated by possession.

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

The relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired 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 soil, with a legal as well as 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 soil at their own will, to whom-soever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[2]

As noted earlier, the U.S.S.C. was aware of British Common Law, especially the Royal Proclamation of 1763 which had governed British North America before the United States of America gained its independence. "No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete". The court concluded that the Indian Chiefs were not capable of selling lands to private individuals and that no U.S. court could uphold such a sale. The court specifically referred to the Royal Proclamation to support this conclusion.

> The proclamation issued by the king of Great Britain, in 1763, has been considered, and we think, with reason, as constituting an additional objection to the title of the plaintiffs. By that proclamation, the Crown reserved under its own dominion and protection, for the use of the Indians, "all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.
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> ....; and the two grants under which the plaintiffs claim, are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the Royal Proclamation of 1763.

The Royal Proclamation itself deals with the frauds that was being perpetrated against Indians and in order to rectify this and ensure peace between the colony and Indians set forth the following procedure for the purchse of Indian Title or

as we now know it, the extinguishment of Indian Title.

> And whereas Great Frauds and Abuses have been committed in purchasing lands of the Indians, to the great prejudice of our interests, and to the Great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians, within those parts of our colonies where, we have thought proper to allow settlement; but that, if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for the purpose by the Governor or Commander in Chief of our colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the use and in the name of such proprietaries, conformable to such directions and instructions as we or they shall think proper to give for the purpose.

It would appear from this proclamation that the Indian peoples could only sell their lands to the Crown and that any sale to individuals would not be valid. It is suggested that this is one of the stronger authorities to support the proposition that Aboriginal Title cannot be bestowed or assigned to anyone else, but only extinguished by the Crown in conformity with the Royal Proclamation.

Support for this assertion is also found in the St. Catherine's Milling Case.[4] This is an historic case as it has set the tenure of Indian Title for Canada. This case sent

through 3 Canadian Courts and ended up in the Judicial Committee of the Privy Council which was the court of the last resort for all the British Commonwealth. This case involved a treaty between the Crown and the province of Ontario and the Dominion of Canada. Basically the Dominion of Canada claimed that Indian nations "from the earliest times...had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation.[5] They submitted that the "imperfect power of alienation" meant that the Indians by mixture of the Royal Proclamation and section 91(24) of the B.N.A. Act, 1867 could only dispose of their proprietary interest to them, the Federal Government. They argued that by virtue of Treaty 3, the ownership of the ceded land vested in them.

The Privy Council, however, ruled that the Royal Proclamation by its terms showed the Indian's tenure (Indian Title) to be "a personal and usufructuary right, dependent upon the good will of the sovereign".[6] They went on to state that:

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian Title, which became a plenum dominion whenever that Title was surrendered or otherwise extinguished?

This is similar to the statements above uttered by Chief Justice Marshall in Johnson v. McIntosh. Although Justice Strong in the Supreme Court of Canada, in a dissenting judgement in St. Catherine's Milling, would give the Indians greater protection in their lands, he nevertheless affirms the notion that the rights of Indians are for their enjoyment only and that it could not be alienated and I submit, assigned.

> It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one

> which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, while at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ulimate title was...considered as vested.[8]

Essentially, the Privy Council ruled that the Crown had the absolute fee and the Indians a personal and usufructuary right of use. That, at the time of the Union in 1867, the land in question remained vested in the Crown (Federal Government), but once it was surrendered by the Indians, it went under Ontario ownership by virtue of section 109 of the B.N.A. Act, 1867.

A number of years later, the Privy Council in the A.G. for Canada v. A.G. for Quebec (Star-Chrome) Case[9] had an opportunity to define what they meant by the "personal" nature of Indian Title. Justice Duff explained that it is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."[10] This therefore would rule out any possibility of assignment.

In the recent"Calder Case" the Supreme Court of Canada although again not directly dealing with the title did nevertheless deal with the issue of Aboriginal Title itself. Out of the judgements, one can reasonably conclude that the nature of Indian Title would rule against assignability as the judgements still deal with a direct link between a specific group of people and the land. It is submitted that once the link between the people and the land is broken that Aboriginal Title cannot any longer exist. This of necessity would rule out assignments of the right as the relationship between the land the Indians would no longer exist.

According to Justice Hall a claim to Aboriginal Title,

> ...is not a claim to title in fee but is in the nature of an equitable title or interest..., a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of

> nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.[12]

The other judgment rendered by Judson, J, gives another analysis as to what Indian Title means. He stated that:

> Although I think that is is clear that Indian Title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian Title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the good will of the sovereign."[13]

Although both judgments reach a different conclusion it is apparent that Indian Title as it is known can only be enjoyed and applicable where it is exercised by Indian peoples themselves and by no one else. Support for this is also found in the Caveat Case[14] which was heard in the Northwest Territories Supreme Court after the Calder decision. In this case the Chiefs of the Mackenzie Valley filed a caveat against further development of their lands. This action was successful in the N.W.T.S.C., trial level, but was in both the Court of Appeal and Supreme Court of Canada overruled on a technicality. However the statements made by Morrow, J. with respect to Aboriginal Title have not been overruled. These statements include the following:

> From these authorities I conclude that there are certain well-established characteristics of Indian legal title if the Indians or aborigines were in

occupation of the land prior to Colonial entry. These are,

(1) Possessory right - right to use and exploit the land.

(2) It is a communal right.

(3) There is a Crown interest underlying this Title - it being an estate held of the Crown.

(4) It is inalienable - it cannot be transferred but can only be terminated by reversion to the Crown.[15]

Clearly the weight of cases, both from the United States and the English Common Law, England and Canada, would support the pro-position that in no instance can an Aboriginal Tital or right be assigned or transferred to any group of individuals who themselves don't have a valid legal claim on the basis of possession from time immemorial. In other words, Aboriginal Title can only be enjoyed by those peoples of an aboriginal race in countries where this doctrine is practised.

III. CAN THE BENEFITS DERIVED FROM THE EXTINGUISHMENT OF ABORIGINAL TITLE BE ASSIGNED OR TRANSFERRED?

A. TREATIES

There have been no instances where a benefit derived from treaty has been asserted by any person not covered by the treaty. In fact if one restricts oneself to the area of hunting rights it would be clearly established that no Non-Indian or Non-Status (non-treaty) Indian could claim an assignment of this right by a treaty-Indian. In reality, the Provincial Wildlife Act of Saskatchewan makes it an offence for anyone to hunt with a status Indian, who is hunting for food as guaranteed in the Natural Resources Transfer Agreement of 1930 which was meant to confirm the treaty right of hunting, trapping and fishing. In addition the lands reserved to the Indians can only be alienated to the Crown and not to anyone else. It is however to be noted that when the treaties were made there was a concerted effort on

the part of the Crown to ensure the protection of Indian lands that were not surrendered. The current Indian Act regulates the majority of governmental activity with Indian peoples, however it does not cover all of the treaty promises, such as education and health. These services however are currently still being provided, although there is controversy surrounding them. Likewise, these services to Indians, as guaranteed by the treaties cannot be assigned or transferred to any persons not covered by the treaties or current Indian Act.

B. HALFBREED GRANTS AND SCRIP

As noted earlier the government has purported to have extinguished Indian Title in the Prairie Provinces by the making of Treaties and the issuance of land grants and scrip. As can be seen from the above discussions the Treaties with the Indians at least guaranteed retention of land and was made inalienable except to the Crown. Halfbreed land grants and scrip on the other hand did not protect in any great measure, the halfbreed recipient. In addition the halfbreed population didn't negotiate this form of settlement for extinguishment of the Indian Title, it was a unilateral act on the part of the Federal Government.

The Manitoba Act of 1870[16] was the first piece of legislation which provided for land grants to halfbreeds towards the extinguishment of Indian Title. This Act also left the mode and conditions of distribution to the discretion of the Governor-General in Council.

> S. 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor-General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada,

> 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.

Armed with this legislation and possessed of a desire to promote quick and orderly settlement of the west, the first Lieutenant-Governor, Archibald, suggested that halfbreed land grants be made alienable immediately with the objective that the lands would quickly reach the hands of white settlers.

> In December 1870, Lt. Governor Archibald, laid the cornerstone for such government policy, when he recommended to MacDonald against granting Metis Titles to land which would be inalienable for three generations or more. He recommended that Half-breeds be given clear title to their land. His argument was that these people didn't know the value of land and would leave it unused and lying idle. This would discourage development. If they had free title, they would likely sell it, even if for a pittance, to someone else who would make good use of the land or to a speculator. He would sell it to new settlers. Declaring money scrip as personal property seemed to facilitate the achievement of this objective, since it made it simple for land to pass quickly into the hands of developers and speculators who in turn, it was believed, would facilitate getting the land into the hands of settlers.[18]

This recommendation of Archibald was implemented through the various Dominion Lands Acts and Orders - in - Council passed thereunder. As a matter of legal and administrative history, the Orders - in - Councils were used to implement and amend previous governmental policy so as to achieve the government's objective. with respect to freeing the halfbreeds' land for settlement.[19]

The issue here however is whether the half-breed's entitlement to aboriginal title can be assigned or transferred. From the discussion under part II above, it is apparent that an Aboriginal Title is a "personal" right and therefore cannot be assigned. The question with respect to halfbreeds is at what

point in time was the Indian Title extinguished? Was it extinguished when the legislation was passed or was it only extinguished at the point in time the halfbreed recipient actually received the land he was entitled to or at the point in time that his application was approved. This is an important question because the majority of halfbreeds assigned or transferred their rights to benefit from the purported extinguishment of their Indian Title before they actually were in a position to claim the very land itself.

A careful reading of s. 31 of the Manitoba Act reveals that the Federal Government intended to make the granting of lands to the halfbreed children a condition precedent to the extinguishment of their Indian Title. Therefore before their title could be extinguished they would have had to be granted the land. This however still leaves it unclear as to whether or not the title was extinguished at the time the recipient was notified of his land grant or at the moment he actually came into possession of the land itself. Numerous Orders-in-Council were passed to deal with the land entitlement and assignments and powers of attorney.

There have been numerous Justice rulings with respect to land grants and scrips, however there are only a few actual court cases dealing with them. In the case of McKilligan v. Machar[20] the court in equity dealt with a situation where a child of a half-breed head of family entitled under s. 31 of the Manitoba Act, 1870 on June 14, 1878 by deed of assignment conveyed the lands to be allotted to him as such child of a half-breed head of family to one William Young. That deed was registered on February 13, 1880 and was subsequently conveyed to another and finally to the plaintiff. On June 10, 1880 the land was allotted to the child, St. Germain and he on August 4, 1880 assigned the land to another which finally reached the hands of the defendant. Although the judge couldn't find sufficient admissible evidence to finally decide the case he nevertheless dealt with the issue of the assignment or transfers before allotment.

> A great many questions have been raised affecting the validity of transfers before allotment, such as those under which the plaintiff claims, and the applicability of the Registry Acts. The defendant does not admit the allotment of the specific lands in question to St. Germain in the right alleged. The patent from the Crown was produced, but it contains nothing to show that the lands were granted upon any such allotment. The assignment from St. Germain to Young was produced, and it is necessarily indefinite as to the specific land conveyed, being a transfer of St. Germain's "right, title, interest, claim, property and demand, both at law and in equity", of which he was then in possession or which he might thereafter become possessed of, in and to the land to which he might become entitled as such half-breed in Manitoba, with covenants that as soon as the land should be ascertained, allotted or determined, so as to admit of a proper description thereof, he would grant and assure the same to Young, if requested so to do, and that in case the patent should issue to St. Germain he would grant and convey the lands to Young, his heirs and assigns, upon request.
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> The first point is then, necessarily, to determine whether St. Germain had a right to any, and if so to what, lands as a child of a half-breed head of a family resident in Manitoba at the time of the transfer to Canada. That an instrument such as this assignment from St. Germain to Young operated to entitle the grantee, upon allotment to the lands alloted to the half-breed child, was first held in this court by the late learned Chief Justice in Aiken's v. Black, ... and the same principle has subsequently been adopted and followed in several cases.[21]

From this it can be seen that court decisions have ruled that assignments before the actual allotments of land are legally valid. From this it can be concluded that Aboriginal Title must have been extinguished at the time that the recipient was entitled to participate in the land grant.

Another case, this one heard by the full court of the Queen's Bench, dealt with land scrip. The case is noteworthy because it deals with the nature of land scrip and what rights are actually acquired by a person buying that land scrip certificate. The court had this to say with respect to land scrip:

> The evidence of the Dominion Lands Agent shows that no rights to any lands will be recognized under the scrip certificate unless and until the person named in the certificate presents himself in person at the proper Lands Office and indicates in the proper way the particular lands which he wishes to receive and have appropriated to the scrip. It would appear, therefore, that what is commonly spoken of as a sale of scrip is nothing more than an agreement on the part of the person named in the scrip certificate to appear at the proper office and comply with the regulations and requirements necessary to obtain title for the purchaser to the lands he may select and the delivery of the scrip certificate merely secures the purchaser against its use by the person named in it to the prejudice of the purchaser. ..., Nolan did not acquire Rouselle's rights by becoming holder of the scrip certificate, and those rights continued in Rouselle until exercised in the manner indicated.[22]

In this situation, i.e. land scrip, it is arguable that Aboriginal Title is not extinguished until the person named on the scrip actually registers it for a specified piece of land. As noted from the case, the purchase of the scrip certificate is not the actual purchase of the land itself until the requirements of the legislation are complied with. On this basis it is arguable that all the land scrip registered by speculators in a fraudulent manner, i.e. misrepresenting the person filing the claim as the person named on the certificate, have rendered the transaction null and void, with the land right still remaining in the person whose name is on the certificate. That in essence his Aboriginal Title is not extinguished as he did not legally

receive the land which was to be the final act in the extinguishment of his right.

This same argument would not apply to money scrip as it was, in essence, a bearer bond and as such was of value even if not cashed in for land by the halfbreed recipient. Anyone, including the speculators, could register this form of scrip for open Dominion Land.

From the above discussions, it is apparent that benefits derived from the extinguishment of Indian Title by Treaty and land grants and scrip differed. The basic difference is that the Treaties provided against alienation of lands and bestowed the benefits to the actual party to the agreement. With respect to halfbreed land grants and scrip, the government did not ensure any of these safeguards, but to the contrary, by legislation and Orders-in-Council, facilitated the alienation of halfbreed lands. In this latter instance, it was possible to assign a benefit, i.e. land that was acquired by halfbreeds in the purported extinguishment of Indian Title.

The further issues are whether this form of extinguishment is legally valid and whether the federal government has breached its trust obligation, if in fact a trust relationship does exist. These issues have been dealt with in previous discussion papers [23] and will not be dealt with here.

IV. CONCLUSION

It is submitted that an Aboriginal Title cannot be assigned or transferred, that it is a personal right and can only be alienated to the Crown. It is also apparent that by Treaty, any benefits derived from the extinguishment of Indian Title can only be enjoyed by those people covered by the Treaty. With respect to the Indian title of halfbreeds, their Aboriginal Title cannot be assigned or transferred. However, according to the judiciary, the sale benefit, being the acquisition of land, can in fact be assigned or transferred.

If in fact the half-breed's Indian Title has been legally extinguished, it is still possible to pursue a course of action demanding rectification of the wrongs perpetrated against half-breed peoples. A demand can be made to reinstitute that sale benefit, i.e. land in a manner or mode to be decided upon by the half-breeds themselves. If the Government admits its wrong doings and agrees to compensate the half-breeds, the nature of the compensation will have to be strictly reviewed. It is conceivable that the Government will want to utilize a monetary form of compensation and this may not meet the desires of the half-breed peoples or in fact be of any significant benefit in the long term.

There is a precedent in the U.S.A. for the recognition by a Government of past injustices, however the method chosen to rectify them is not the most appropriate.

> It is therefore fully accurate to say that restrictions on native sovereignty are today being imposed by the United States against the wishes of Native Americans by the threat and use of force. Examples include the Indian Claims Commission, which awards damages to tribes for what the United States admits were illegal, fraudulent or unfair takings of land. The Commission has no authority to return the land, which is what tribes need to protect and reassert their sovereignty. The Commission merely seeks to legitimize the theft of native land with money payments.[24]

FOOTNOTES

1. (1823) 8 Wheaton 543.
2. Ibid., at 527-573 (Emphasis Added).
3. R.S.C. 1970, Appendices Vol., at 127-129.
4. St. Catherine's Milling v. R (1889) 14 A.C. 46.
5. Ibid., at 48.
6. Ibid., at 54.
7. Ibid., at 55.
8. (1887) 13 S.C.R. 577 at 608. (Emphasis Added).
9. (1921) 1 A.C. 401.
10. Ibid., at 408.
11. Calder v. A.G. of B.C. (1973) S.C.R. 313; (1973) 3 DLR(3d) 145.
12. Ibid., at 173-74.
13. Ibid., at 156.
14. Paulette v. R (1973) 6 WWR 97.
15. Ibid., at 135 (Emphasis Added).
16. Manitoba Act, S.C. 1870, C. 3.
17. Dewdney Papers, Volume 21, A.M.N.S.I.S. Library.
18. A.M.N.S.I.S. DISCUSSION PAPER, The Question of Half-breed Scrip as an Extinguishment of Aboriginal Title, December 24, 1979, at 11-12.
19. Ibid., at 6.
20. (1886) Manitoba Reports 418.
21. Ibid., at 419-20.
22. Patterson v. Lane (1904) Territories Law Reports, Vol. 6, 92 at 95.
23. See: The Concept of the Supremacy of Parliament and How it Relates to and Affects the Rights of Aboriginal People in Canada, January 14, 1980 and The Federal-Indigenous Trust Relationship, March, 1980.

24. Clinebell & Thomson, Sovereignty and Self-Determination: The Rights of Native Americans under International Law, Vol. 27, No. 4 Buffalo Law Review (1978) 669 at 690.