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ASSOCIATION OF METIS AND NON-STATUS INDIANS
OF SASKATCHEWAN

DISCUSSION PAPER ON
ABORIGINAL RIGHTS, ORIGINS, THEORY,
HISTORY AND APPLICATION

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ABORIGINAL RIGHTS, ORIGIN, THEORY, HISTORY AND APPLICATION

I Introduction

In man's early history when land was plentiful, it is likely that the question of the rights of the original occupants of an area seldom arose. However, as society evolved and as man's numbers increased, various practices and rules began to develop around the occupation and use of land areas.

The purpose of this paper is to briefly trace these developments, including the development of the relatively modern theory of aboriginal rights and its application by colonizing nations. The concept of aboriginal rights as we know it today includes all those rights which go with the use of a land area of which the occupants had original possession. As such, it includes the right to hunt and fish on the land, the right to live on and move about in the area, the right to use water supplies, wood supplies, wild fruits and vegetation, etc.. Today, it would also include the right to the mineral resources, the right to cultivate, the right to use for recreation purposes and the right to divide, sell, etc.. Colonial powers generally defend and in North America in particular they defined aboriginal rights as a usufructory right. This means the right of native people to the use of the land and resources in all its aspects but it does not include the right to sell the land except to the Crown.

II Land Occupation Practices in Tribal Society and Early Nation Buildings

As the number of people occupying a land area increased, they generally banded together into what were called tribal groups. These groups were originally generally kinship groups and even in more developed tribal societies, there were usually strong kinship ties between the members of the group. Such tribal groups were generally nomadic moving about freely in the land area they occupied. Nevertheless, there were defined areas with relatively well defined boundaries occupied by each tribal group. They recognized each other's boundaries and possession of an area, and any violation of the tribal

II Land Occupation Practices in Tribal Society and Early Nation Buildings (Cont'd.)

hunting area would usually result in conflict between groups and sometimes open warfare.

Although early historical records are scarce, we do have some records such as biblical records which indicate that when a new group of people wished to acquire some land occupied by someone else, they would arrange to purchase it usually paying for it with livestock, jewels, or precious metals. The purchase of land by Abraham from the Canninites for the future Isreale nation was one such example.

As populations increased, some tribes soon found themselves in situations where the land area they occupied would no longer support all of the members of the tribe. These over-population problems were often made worse by natural disasters such as floods, drought, insect plagues, etc. Man's instinct for survival being very strong, he would naturally look to neighbouring land areas for additional food supplies and land areas to occupy. If these areas were already occupied, as they generally were, then it was a question of either acquiring some land by purchase, or taking the land from those people who occupied it. The people occupying the land might have their own population problems or may have wanted to save their extra land for future generations and therefore refused to give up any land.

Those groups facing the most severe survival problems generally would become very aggressive under these circumstances and would resort to force to get what they wanted. In this atmosphere developed what became known as one of the laws of nature, namely "might is right". In such situations, we also likely had the origins of nation building where an aggressive tribe faced with extinction would conquer more passive neighbouring tribes and organize them into a larger group to ensure their own survival and to do their bidding for them.

II Land Occupation Practices in Tribal Society and Early Nation Buildings (Cont'd.)

These actions would, of course, give the conquering tribe considerable power over the rest of the people and in time the pursuit of power itself was to become a powerful motive for nation building and colonial exploitation. In such a situation, the idea that the occupants of a land area who could not defend themselves against intruders or invaders had rights was paid scant attention. In particular, conquering groups usually viewed themselves as superior to the people they were conquering and therefore saw themselves as having a right to take what they wanted and to make other people labour for them.

III Colonial Practices

Throughout the eons of man's history, there have been many colonialists. Probably the best known and most successful prior to modern times were the Romans. However, by the 14th and 15th centuries, new colonial powers were emerging in Europe. The most powerful of these were the British, the French and the Spanish, although other European countries were also active in colonization. Early colonial activities were directed primarily against weak European groups and against North Africa and Asia Minor. As man improved his technology and became more mobile, he discovered new land areas previously unknown including North and South America, Australia and other Pacific Islands. In addition, the continents such as Africa and the eastern parts of Asia, although long known to Europeans, now became much more accessible to them and they too became the object of colonial conquest and exploitation.

The European colonial powers often had competing claims to the same areas and this resulted in both political conflict and open warfare. Such warfare soon was recognized as being detrimental to the interest of the colonial nations. These nations therefore began to seek political accommodations between themselves so they would not complete with each other by way of warfare. Out of these political

III Colonial Practices (Cont'd.)

accommodations developed what became known as international law. One of the international laws generally respected by all colonial nations was the law that the nation first discovering a previously unknown or unclaimed land area could stakean ownership claim to the area and declare its sovereignty over the land area and its inhabitants. These sovereignty claims were respected by the other colonial nations, although this did not rule out two nations fighting wars over these land areas at some future date with the stronger colonial power taking possession from the weaker. The conquering of the French in North America and the passing of their sovereign claim to the British is a good example of such an event. This international law, however, gave no recognition of any kind to the rights of the people who lived in such land areas prior to conquest. They were made subjects by the new colonial nation and were seen primarily to be there to serve the interests of the sovereign. If they objected or resisted, they would be put down by force of arms and possibly even punished in whatever way the sovereign nation considered appropriate. Since they were always looked upon as being inferior, they were not seen as being worthy of any particular rights.

IV The Doctrine of Aboriginal Rights

a) Origins

The origin of the theory of aboriginal rights is generally traced to a Spanish theologian, Francisco de Vitoria, who was a professor of sacred theology at the University of Salomonica. In 1532, he gave two famous lectures in which he dealt with the basic question of native rights. In essence, he argued that the theory of sovereignty by discovery could only be applied to a land area where there were no inhabitants. Since North America in particular and other land areas in general to which colonial powers were laying claim were already occupied by aboriginal people, the colonial powers could not lay claim to ownership of the land. He asserted that the Indian people were the true owners of the land both from a public and private point of view.

IV The Doctrine of Aboriginal Rights (Cont'd.)

The argument that the Pope had granted the new world to Spain and therefore ownership of the land was not valid according to Vitoria. First, he said that the Pope had no temporal powers over Indian lands and therefore had no right to make such grants. Second, he argued that the fact that the natives did not believe in the Roman Catholic faith had no bearing either. He pointed out that faith did not affect the question of property rights in Europe since even heretics were granted property rights. In addition, he said that the argument that aborigines lack civilization and intelligence was not a valid argument either. He argued that native people were no less intelligent than Spanish peasants and therefore are equally entitled to legal right.

These lectures set off a long series of discussions and controversy about this subject within the Church. These discussions culminated five years later in 1537, in Pope Paul III, issuing a Papal Bull (church law) Sublimis Deus, which states in part

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

b) Content of The Right

The legal rights of the native people as defined by Vitoria were the same as those legal rights generally recognized in Europe. From the public point of view, this meant that the tribe had complete control of and ownership over the land it had occupied from "time immorial". In addition to those land rights previously identified above, the natives also would have the right to jointly protect their land, establish government over it, wage wars on it, etc..

From the private point of view, the occupier would have all the ownership rights defined in the introductory section or he would

IV The Doctrine of Aboriginal Rights (Cont'd.)

have what we normally call fee simple title. Such title is absolute except that it may be restricted by a set of governing laws, made by the people through their democratic institutions and applied uniformly to all other private property. This concept of private ownership is rooted in the common law theory of Squatter's Rights.

c) Extinguishment of Aboriginal Title

If there was absolute ownership of the land, then a legal concept such as extinguishment of title could not apply. However, colonial powers found it necessary to make this new theory of aboriginal rights fit with the international law of the rights of the discoverer. Therefore, they developed the idea of usufructory rights. This in essence said that the sovereign had control of the lands, laws, government, etc. and that the native people had the right of use. Since the ruler had soveriegn rights, the native claim was merely a burden against the property. In other words, only the sovereign power could make decisions on how the land would be used or how its use would be changed. The occupier could only dispose of his rights by ceding them or selling them to the Crown.

The concept of extinguishment did not necessarily imply that the occupier would receive any compensation for his claim to or interest in the land. In practice, some form of compensation was usually provided as a means of placating the native people. Extinguishment could be by an agreement between the sovereign and the native people (a treaty) or it could be by statute. Once the native claim was so extinguished they in theory could have no further legal claim against the Crown for their land rights.

d) Compensation in Cases of Extinguishment

Early practice allowed private individuals or corporations to purchase land from the native people. In such cases, the extinguishment of the claim or interest of a group or of individuals in a specific tract of land was by the sale and the ensuing legal agreement which

IV The Doctrine of Aboriginal Rights (Cont'd.)

might be either verbal or written. Courts recognized such agreements as legal.

There were no rules governing compensation in such cases nor was there any suggestion that compensation must be fair. The buyer had the right to bargain and pay for the land for whatever consideration the native owners would agree to. Later on, this right was legally restricted by some colonial powers so only the Crown could obtain land from the native occupiers. As will be discussed later, definite procedures were established for acquiring the land but no rules or guidelines were established for deciding on compensation. The rule seemed to be that the Crown compensated to the extent necessary to get the agreement of the native people to give up their land. There still was no consideration of whether the compensation was fair and whether it would enable people to develop for themselves an alternate economic base.

The above aspects of aboriginal rights will all be examined in more detail both in terms of application and evolution as we examine in more detail the practices of various colonial powers.

V The Recognition of Aboriginal Rights

a) Spanish Practice

Spain being a strong Catholic country appears to have been most meticulous in following the Papal Bull by incorporating it into legal statutes. For example, Spain's Laws of the Indies ordered that Indians be placed in a position of equality with Spanish settlers and also provided for the protection of Indian lands. The writings of Spanish theorists and the principles expressed in the Spanish Laws of the Indies had a substantial impact on the early development of the theory of aboriginal rights. In practice, the Spanish settlers and those responsible for administering public policies and public laws often notoriously departed from theory and law to take from or cheat

V The Recognition of Aboriginal Rights (Cont'd.)

natives of their property. This was often done with a resort to brutal violence.

b) French Practice

France, although also a Catholic country, seems to have largely ignored the question of the aboriginal rights of native people in lands it was conquering or to which it lay claim. This notion of ownership by conquest is evident in powers granted by France to Champlain in 1612. He was directed to discover gold and other minerals and to find the Northwest Passage. He was also directed "..... to establish, extend, and make known the name, power, and authority of his majesty, and to the latter to subject, subdue, and make obey all peoples of the said land the adjacent; and by means of this and by all other licit means to call them, have them instructed, provoke, and move them to the knowledge and service of God and by the light of the Catholic faith and religion, apostolic and Roman, there to establish in the exercise and profession of it, to maintain, guard, and conserve the said places under the obedience and authority of His said majesty".

The thrust of French new world policy was conquest of territory for the glory of the king. One historian has described the policy as "francisation". When an Indian became Gallicized and Catholicized, he/she achieved legal equality with the French citizen. French policy, therefore, had two basic thrusts, one was to drive native people from territories they wanted or to, in some way, subdue or placate them. The second was to assimilate them as part of French society.

None of the French charters or land grants even made any mention of obtaining a surrender of Indian rights to the land. There were no instances in North America where the French bought or obtained Indians lands by treaties or agreements. The only recognition of native rights by the French are to be found in the articles of Capitulation of 1761, where the French asked and the British agreed

V The Recognition of Aboriginal Rights (Cont'd.)

that the Indians should be confirmed in the occupation of their lands in the Montreal area.

Further evidence of French policy is to be found in a judgement of Judge J. Taschereau of the Supreme Court of Canada. He indicated as follows -

" The Charter of the West Indies Company granted them full ownership of all lands whatsoever, in Canada, which they would conquer, or from which they would drive away Indians by force of arms".

c) Practices of Other Colonial Powers and Practices in Other Areas

Other European powers such as the Dutch, the Swedes, and the Portuguese all gave some recognition to the concept of aboriginal rights. Of these countries, only Holland was active in establishing any colonies in North America. Their colony in what is now New York was established on land purchased by the Indians.

The main body of international law on which concepts of aboriginal rights were based were developed in North America. However, this question also arose, and continues to arise, in other jurisdictions such as Australia, New Zealand, some Asian countries, and various African countries. Douglas Saunders, in his submission to the Berger Commission in April, 1976, examined in some detail the practices of colonial powers on the issue of aboriginal rights. He finds that even Great Britain did not approach the question of native lands rights in any uniform way. Their practices and those of their colonies varied considerably in different areas. For example, in one Australian case, the Judge ruled against aboriginal rights on the basis of occupation and settlement concluding that the aborigines did not exist, although he was presented with conclusive archeological evidence that they had occupied the area before the white settlers came to the area. Saunders, as a result, concludes that native rights

V The Recognition of Aboriginal Rights (Cont'd.)

did not have their roots in common law practice but rather in statutory recognition of such rights in documents such as the Royal Proclamation.

VI British Colonial Practice

a) Origins

The practices of the British Crown are examined separately here, since the concept of aboriginal title or native rights was most widely recognized and practised by the British. It is not entirely clear why Great Britain was more active in developing the application of the aboriginal rights theory than were other colonial nations. However, one can speculate that there were probably a number of considerations. First, the British had learned from experience with native people in other areas that the best way to deal with natives was to maintain good relations with them, placate them, and to at least appear to treat them fairly. In this way, they would more likely co-operate with British commercial interest and be less hostile to settlers where or when settlement took place.

Second, Great Britain was primarily interested in promoting trade with her newly claimed colonies. This involved obtaining from the natives raw products or other goods which were in demand in England and in return to offer in exchange manufactured goods produced in England. If such trade was to flourish and be prosperous, it was essential to maintain good relations with the native people and to maintain them in possession of their resources. Third, much of British practice developed during the period when the feudal system in Great Britain was breaking down and large numbers of people were being displaced from the land and left homeless. They generally made their way to the city slums where horrendous social and health problems developed. This put serious strains on the English legal and government systems which threatened the stability of the country.

VI British Colonial Practice (Cont'd.)

It seems likely, therefore, that the British wanted some simple system of guaranteeing legal title and claims so that, when land was traded as a commodity, there would be few legal problems regarding ownership.

Finally, the development of the practice was likely influenced by English common law practices. Saunders and other authorities are right in claiming that there was no common law recognition of the concept of native communal land rights. However, the concept of Squatter's Rights or the rights of the occupier was easily transferred to the area of native rights and to a larger extent was in Harmony with the theoretical and legal concepts developed by the Spanish. The idea of basing legal decisions on common practice was also already developed in England at the time and therefore it was natural that the practice should be used in colonial dealings with natives. As a result, a common law of native rights was built up over a period of time which was eventually affirmed by statutes.

b) British Practice in North America

British colonization in North America began through the granting of charters to trading and/or colonization companies as was the case with France. The British government claimed sovereignty over its new colonies but it did not claim legal ownership of the land. Nor did the government interfere in normal relationships between native people or with any particular system of local government that might have developed. Its primary concern was regulating trade and commerce, regulating the relationships between whites and natives, and in regulating any settlement of white settlers which from time to time took place. In these latter areas, however, the British Crown often granted very broad and sweeping authority over the land area granted. This is particularly evident in the charter of the Massachusetts Bay Company and the Hudson Bay Company, two of the earliest charters granted.

VI British Colonial Practice (Cont'd.)

In its instructions to companies and colonists, the British government, however, was usually careful to ensure that land claimed by the Indians would have to be purchased before it could be settled or developed. Included in letters of instruction to John Endicott, from the Company issued in 1629, was the following quotation -

" If any of the Savages pretend right of inheritance to all or any part of the lands granted in our patent, we pray you endeavor to purchase their title, that we may avoid the least scruple of intrusion".

The charter of the Hudson Bay Company made no specific reference to native land rights but neither did it purpose to grant legal title over the area granted to the Company. The Company was granted an exclusive right to carry on trade and to establish such laws and regulations as were necessary for this purpose. It is believed that the power given to it, to pass laws, would have permitted the Company to legislate with regard to aboriginal title, or to legislate to extinguish that title. However, research to date has produced no evidence that such ordinances were ever passed and in view of the provisions regarding Indian rights later included in the Rupertsland transfer, it seems unlikely that any such laws were passed.

We have not yet researched letters of instruction to officers of the Company to determine what instructions, if any, may have been issued regarding native land rights or the obtaining of land from native tribes. However, it would appear that such instructions were given and that they generally were in harmony with the general British practice of the day. For example, it is alleged that as early as 1668 a company official took steps to conclude a treaty to purchase Ruperts River and the adjacent lands from the Indians of the area. In addition, following 1670, the Company issued standing orders to expeditions into the territory, that if they wished to

VI British Colonial Practice (Cont'd.)

acquire any lands, treaties were to be concluded with the Indians. However, no treaties were ever entered into by the Company with the Indians in Rupertsland. This was probably due to the fact that the Company was primarily interested in the fur trade and not in colonization.

However, the Company did enter into some treaties with a few of the tribes on Vancouver Island and with some of the mainland coast tribes. These treaties are still considered by the courts to be legally valid today. In 1811, Selkirk decided to establish a settlement for Scottish immigrants in the Red River area of what is now Manitoba. He acquired a large land grant known as the district of Assiniboia from the Hudson Bay Company and in 1817 he entered a treaty with the Indians for the purchase of their land in the area and for the extinguishment of their land rights. The legality of this treaty has been questioned because by that time the Royal Proclamation was in force and it did not permit the purchase of Indians lands by private individuals. However, since Selkirk was a major shareholder in the Hudson's Bay Company, it is further evidence that the Company recognized Indian title and accepted the usual provisions for the extinguishment of such title.

In the Maritimes, the situation is somewhat less clear since Great Britain acquired much of the area from France by way of the Treaty of Utrecht in 1713. The French had no treaties with the Indians covering land cessation nor had they ever passed any other legislation either recognizing or extinguishing Indian title. Later action by the British suggest they recognized Indian rights in the Atlantic territory. In 1752, following further wars between the English and French, in which the Indians participated, a treaty or article of peace was signed with the Indians. That treaty stipulated that the Indians were to have "free liberty of hunting and fishing as usual".

VI British Colonial Practice (Cont'd.)

In a Proclamation of 1761 applying to the Maritimes, the following was included:

" and that the Indians be apprized of our determined Resolution to support them in their just rights and inviolably to observe our Engagements with them".

In a further Proclamation of 1762, there was the following reference to Indian rights:

" and if any person or persons have possessed themselves of any part of the same (Indian lands) to the prejudice of the said Indians in their claims before specified or without lawful authority, they are hereby required forthwith to remove, as they will otherwise be prosecuted with the Utmost Rigour of the law".

When New France was ceded to Great Britain in 1760, as already stated, provisions were made in the articles of capitulation to recognize the rights of the Indians. It is assumed that this provision was limited to what later became the colony of Lower Canada.

In the area of Southern Ontario or what was to be known as Upper Canada, there is no indication to suggest that any special provisions were applied by the British prior to 1760 when New France was ceded to Canada. Up to that time, the French lay claim to the area, although this claim was in dispute and there was some beginning British settlement of the area. In 1856, the British Secretary of Indian Affairs filed a report dealing with the land of the Six Nations Indians in which he indicated that the Indians did not understand the French invasion as having constituted a cession or surrender by them of their lands. They still looked upon the possession of the land as theirs and that of their heirs. Sir William Johnson, the Secretary, therefore, recommended that no further patents to land be issued until the land had been bought. The following is an exerpt from his report:

VI British Colonial Practice (Cont'd.)

" and that no patents for Lands be hereafter Granted but for such as shall be bought in the presence of the superintendent at public meetings and the sale recorded by his majesty's Secretary for Indian Affairs".

As can be seen from the above discussions, the practice and theory of aboriginal rights gradually developed over a period of several hundred years. Private purchase gradually gave way to the concept of public purchase and out of this developed a common law of aboriginal rights. The next significant step was the codification of this practice in the Royal Proclamation of 1763.

c) The Royal Proclamation

Although the British recognition of aboriginal rights is seen as having its roots in common law, the Royal Proclamation of 1763 was the first expression of that practice in legal form. The Proclamation is one of the British constitutional documents. As such, it also forms part of Canadian constitutional law, not having to this date been repealed by the British parliament and not having been superceded by any Canadian constitutional law.

There are differing opinions about the importance of the Proclamation to the recognition of aboriginal rights. Indian organizations have for some time referred to the Proclamation as the Charter of Indian Rights. Various legal authorities in Canada, although recognizing the importance of the Proclamation, have however declared that such rights existed in common law and have a valid basis in law even if the Proclamation had not been enacted by the British parliament.

Justice Sissons, for example, in Regina V. Koonungnah stated the view that the Proclamations did not create rights but rather it reaffirmed rights which English law always recognized.

VI British Colonial Practice (Cont'd.)

Saunders, in his submission to the Berger Commission, reviews British practice and law in various colonial areas including New Zealand, Australia and Africa, as well as in North America. He concludes from how the matter was dealt with in other British colonies that there was not a clear legal recognition of such rights in English common law and that the Royal Proclamation did in fact clearly establish such rights in North America which had not been so established and not necessarily recognized in other former British colonies.

The legal processes leading to the Royal Proclamation grew out of attempts by the British government to deal with Indian troubles in her North American colonies, as a result of Indian wars, dangers to settlers and probably some pressures from missionaries. The British practice up to that time can be summarized as follows:

a) the British Crown lay sovereign claim to all the lands it had discovered;

b) it recognized the rights of the native people to the use of their land for traditional purposes;

c) it gave instructions to companies and individuals that they were not to settle or to claim legal title to any of the land for themselves until they had purchased it from the Indians.

In 1754, the British government called a conference of her North American colonies in Albany, New York. The purpose of this conference was to attempt to get the colonies to adopt a common policy and administration of Indian Affairs in the colonies. When this effort failed, the government decided to assume centralized authority and administration over Indian matters itself. The first expression of this was the Maritimes Proclamation of 1761 which gave legal recognition to Indian rights and land claims and the further Proclamation of 1762 which required people to remove themselves from any lands to which the Indians had a claim.

VI British Colonial Practice (Cont'd.)

The Proclamation of 1763, which was given parliamentary assent, clearly established the centralized authority and control over Indian matters, and set out a number of important legal principles and procedures. These can be summarized as follows:

a) Indian rights were protected in those areas of the colonies which had not been ceded by the Indians or purchased by the government;

b) No one was to grant patents, conduct surveys, etc. beyond the bounds of their land grants, or to take possession of any lands reserved for the Indians;

c) Anyone settled on Indian lands were to remove themselves;

d) In future, no private person could purchase land from the Indians;

e) Any lands required for future settlement must be -

- acquired by the Crown by purchase with the consent of the Indians;

- such negotiations for purchase must take place at a public meeting or assembly at which the Indians who had an interest in the land were present;

- purchases would be on such conditions as the government thought proper;

- purchase could also be made in a similar manner by proprietary governments (example, the Hudson Bay Company);

f) That trade with the Indians must be free and open to all British subjects provided they had obtained a licence to carry on trade. This provision also applied to proprietory governments, i.e. they had to grant licences to British subjects to carry on trade in their area;

g) Anyone committing crimes in Indian territory could be brought to nearest colony to be tried.

VI British Colonial Practice (Cont'd.)

There has always been some dispute as to whether the Royal Proclamation applied to Rupertsland since all Hudson Bay Company grants were excluded from the central administration provisions of the Charter, i.e. the responsibility for the administration of those territories remained with the proprietary governments. There have been several legal decisions in Western Canada which have ruled that the Royal Proclamation did not apply in the area. For example, Justice Johnston in Regina V. Sikyea stated -

" ... Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation ...".

However, it is this writer's opinion that a careful study of the Proclamation can only lead to the conclusion that, although the company's lands were exempt from the provisions of the Proclamation, they were still responsible to ensure that the same recognition of Indian rights, the same procedures for acquiring land, the provisions against unlawful occupation, etc. applied in the Hudson Bay Company territory and that it was the responsibility of the proprietary government (Hudson Bay Company) to ensure that these provisions were observed. It is further the view of the writer that, since the Proclamation was a constitutional document, it would override any conflicting provisions of the Hudson Bay Company charter, such as the monopoly trade provisions.

VII Canadian Constitutional Provisions

Whether or not the Royal Proclamation applied to Rupertsland in 1760, its provisions were later made to apply by provisions incorporated into the B.N.A. Act. In 1867, when the B.N.A. Act was framed a section was included in the Act providing for a mechanism to bring other British territories or colonies in North America into the Canadian federation. Section 146 of the Act states as follows:

VII Canadian Constitutional Provisions (Cont'd.)

"It shall be lawful for the Queen, by and with the advice of Her Majesty's most Honorable privy council, on Addresses from the Houses of Parliament of Canada, and from the Houses of respective Legislatures of the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on addresses from the House of Parliament of Canada to admit Rupertsland and the North West Territories, or either of them, into the Union on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have the effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland".

Under this section of the Act, the Canadian parliament and senate in a joint address to Her Majesty the Queen, December 17, 1867, requested the admission of Rupertsland to Canada. One of the undertakings of the address was the guarantee of Indian rights which was stated as follows:

" ... and further more that, upon the transference of the territories in question, to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines".

On July 5, 1869, the Canadian government passed order-in-council No. 9, approving the provisions of the Rupertsland transfer Agreement. The order in council had three schedules attached to it which formed part of the order-in-council. Schedule A was an address to the British parliament from the Canadian parliament, which incorporates the above quoted statement on Indian rights. Schedule B is a copy of the transfer agreement. Clause 8 of that Agreement states that:

VII Canadian Constitutional Provisions (Cont'd.)

" It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial government, and that the company shall be relieved of all responsibility for them".

Schedule C is the actual "Deed of Surrender" and it again in Clause 14 repeats the above undertaking by the Government.

It is clear from these provisions plus Section 91(24) of the B.N.A. Act, that the Canadian government not only accepted the principle of aboriginal rights but that it also accepted the further principle of central administration of Indian matters. Section 91(24) states " ... the exclusive legislative authority of the parliament of Canada extends to ..... Indians and lands reserved for the Indians".

It is also clear that the Canadian government undertook to carry out its dealing with the Indians for the extinguishment of their rights and in regard to other matters, in accordance with the principles and practices followed by the British Crown as set out in the Royal Proclamation. Although the Royal Proclamation is not mentioned by name, one cannot possibly conclude that " ... the equitable principles which have uniformly governing the British Crown in its dealings with the Aborigines ..." could refer to other than the Royal Proclamation, since at the time of the Rupertsland transfer, it had been the basis of British dealings with the Indians for almost 110 years.

VIII Recognition in Treaties and Legislation

A full discussion of legislative provisions and treaty provisions will be undertaken in future discussion papers. However, it is useful to briefly identify these here as further recognition of the aboriginal rights of the aborigines and of the principles to be followed in dealing with them. Between 1871 and 1923, the government of Canada entered into the eleven numbered treaties with the Indians

VIII Recognition in Treaties and Legislation (Cont'd.)

of the Northwest including Northern Ontario, but excluding most of British Columbia. These treaties all clearly recognized the aboriginal title of the Indians, followed other accepted procedures for extinguishment of such rights, and set out the terms on which the title was being "purchased". Although the validity of some of these treaties are under question at this time, because of the circumstances under which agreements and signatures were obtained, this does not alter their recognition of Indian rights or the commitment of the Canadian government to the principles for dealing with the Indians.

In regard to the rights of the Metis or the Non-Status Indians, the Canadian government enacted enabling provisions for the extinguishment of these rights in three separate Acts - The Manitoba Act, the Dominion Land Act of 1874 and the Dominion Lands Act of 1879. These Acts all contained the key phrase " and whereas, it is expedient towards the extinguishment of the Indian title ..... preferred by the halfbreeds ...". These acts in themselves do not extinguish such title. This would be done by procedures to be enacted by the Governor in Council. However, the Acts are explicit evidence that the Canadian government legally recognized the aboriginal rights of the halfbreed people who were descendants of the original Indian tribes of the Northwest. The orders in council which were enacted under these Acts were arbitrary and provided for unilateral actions by the government. As such, they violate the principles of the Royal Proclamation which the Canadian government and British authorities had incorporated into the B.N.A. Act, and therefore do not constitute a valid extinguishment of the aboriginal title. This will be explored in more detail in later discussion papers.

IX Summary

In conclusion, it is our position that the concept of aboriginal title was established in international law and was accepted as the basis of dealings by a number of colonial powers, including Great

IX Summary

Britain, with the Indians. Second, Great Britain took specific steps to give constitutional status to certain principles and procedures for dealing with Indians, by enacting the Royal Proclamation. This Proclamation covered all British colonies and possessions in North America, including those territories under grant to proprietary governments such as the Hudson Bay Company. Third, the Canadian and British authorities, when enacting the B.N.A. Act, provided for the admission of certain territories into confederation on the undertaking to guarantee Indian title and further to only extinguish such title in accordance with accepted British law and practice. Finally, the Canadian government gave further recognition to the concept of aboriginal title for both status Indians and non-status Indians by treaties and legislation. In doing so, it followed the central administration principle of Indian Affairs and extinguished Indian title in accordance with the procedures set out in the Royal Proclamation. The exception to this was its dealing with the half-breeds (non-status Indians) where it did not follow accepted practice and in doing so therefore invalidated any claimed extinguishment of title of this group of Aborigines.