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THE CASE AGAINST METIS ABORIGINAL RIGHTS*

Les amendements à la constitution du Canada ont imposé le concept de droits aborigènes pour les Métis. Dans ce texte, l'auteur soutient que les 'droits aborigènes des Métis' sont une aberration historique, un expédient politique conçu en 1870 pour pacifier les insurgés de la Rivière Rouge. En vertu des conditions définies subséquemment par la jurisprudence les Métis n'auraient pas le statut d'aborigène. Au point où nous sommes, la meilleure stratégie pour minimiser les dommages causés par cette élévation irréfléchie des Métis au statut de peuple aborigène distinct consisterait à mettre l'accent sur le terme 'existant' dans l'interprétation de l'Article 35 de la Charte des Droits et Libertés.

Canada's constitutional amendments entrench the concept of Métis aboriginal rights. This paper argues that 'Métis aboriginal rights' are a historical mistake, conceived out of political expediency in 1870 to pacify the insurgents in Red River. The Métis do not meet the tests for aboriginal status which have subsequently been elaborated in Canadian jurisprudence. At this point, the best strategy to minimize the damage caused by the thoughtless elevation of the Métis to the status of a distinct 'aboriginal' people is to emphasize the word 'existing' in section 35 of the Charter of Rights and Freedoms.

After long and bitter controversy, amendments to the Canadian constitution approved in 1982 have entrenched the aboriginal status of the Métis. The relevant sections are:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
>
> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (Canada. Parliament, 1981:9,11.)

No one will know precisely what these guarantees mean until they have been interpreted in the courts. In particular, uncertainty hovers about the word 'existing' in section 35(1), inserted at the last minute to assuage the opposition of Premier Lougheed of Alberta. This could be of major importance to the Métis, for one

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school of thought holds that the Métis no longer have any existing aboriginal rights, at least in Manitoba, Saskatchewan, Alberta, and the Mackenzie Valley, where the majority of Métis live. Whatever rights they may have had were extinguished by the series of half-breed land allotments and scrip distributions which began with the *Manitoba Act of 1870* and concluded in 1923 in the Mackenzie Valley. The competing view is that the half-breed land grants were so poorly administered that they did not effectively deliver the compensation necessary to extinguish the aboriginal title of Métis claimants. Hence their aboriginal rights are still 'existing'. The implications for the Métis of this word 'existing' will depend upon which view is adopted by the courts.

A second source of uncertainty is the word 'Métis'. In historical usage it refers to the mixed-blood population of Rupert's Land, the children of the fur trade, who had become a cohesive social group long before 1870, when Rupert's Land was acquired by Canada. These were the people who received the land grants and scrip mentioned above. But in contemporary usage 'Métis' also refers to any person in Canada of partially Indian descent who is not a legal Indian under *The Indian Act.* 'Métis' in the popular sense may mean about the same as 'non-status Indian,' and there are considerable populations of native persons in all provinces and territories who refer to themselves, and are identified by others, as Métis, even though they have no connection to the historic Métis of Rupert's Land.

For aboriginal rights purposes, any definition would have to be a legal one establishing objective criteria under which courts and administrative agencies could operate according to the rule of law. The only such definition of the term now in existence is in the *Alberta Métis Population Betterment Act.* In the original version of the Act (1938), 'Métis' meant 'a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act.* (Sawchuk *et al.*, 1981:258.) In 1940, the qualification was added that a Métis must have no less than one-quarter of Indian blood. (Sawchuk *et al.*, 1981:198.) What 'Métis' means in the new constitution is completely unknown. Will it be limited to the traditional Métis of Rupert's Land, or will it include non-status Indians? The answer to this question could be vitally important. If non-status Indians are to be included, the number of legal Métis may vastly increase from generation to generation as a result of racial mixing. The answer will have to come through legislation or litigation.

Judicial interpretation of both these problems may have already begun. In 1981 the Manitoba Métis Federation launched a court case in Winnipeg, seeking a declaratory judgment that the aboriginal title of the Métis people (whoever they are presicely) was not extinguished by the half-breed land grant in Manitoba.[1] Questions of this type will turn largely on historical analysis. Thus, it is timely to take another look at the origin of the Métis claim to be an aboriginal people with the special rights conferred by that status under Canadian law. The research presented here suggests that the establishment of the Métis in Canadian statutes as a distinct aboriginal people, separate from the Indians, was an act of political expediency not based on cogent reasoning. It was a decision which has had, and will continue to have, regrettable consequences for the Métis themselves as well as for the larger society.

Prior to Confederation, persons of mixed Indian-white ancestry were not treated as a separate category in British North America. They could be either Indian or white, but nothing in between. The first statutory definition of who was an Indian, *An Act for the better protection of the lands and property of the Indians in Lower Canada* (1850), listed four ways to be an Indian:

> First——All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants;
> Secondly——All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons;
> Thirdly——All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such; and

> Fourthly——All persons adopted in infancy by any such Indians; and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants. (13 & 14 Vict., c.42, s.5.)

This definition was ample enough to include any person of mixed blood living with Indians. It was a partly racial, partly social definition.

Similarly, when the Robinson Treaties were concluded in 1850, half-breeds were admitted to treaty with the consent of the chiefs. Robinson wrote afterwards:

> As the half-breeds at Sault Ste. Marie and other places may seek to be recognized by the government in future payments, it may be well that I should state here the answer that I gave to their demands on the present occasion. I told them I came to treat with the chiefs who were present, that the money would be paid to them——and their receipt was sufficient for me——that when in their possession they might give as much or as little to that class of claimants as they pleased.[2]

In other words, half-breeds could claim a share of aboriginal title to the extent that they were willing to be classed as Indians and that Indians would accept them as such.

This approach to dealing with mixed-bloods collided with the existence on the prairies of a large half-breed population which was socially distinct from the Indian tribes, and which saw itself as a 'new nation,' neither white nor Indian. At least since the clash with the Hudson's Bay Company and the Battle of Seven Oaks (1816), many Métis thought of themselves as in some sense the owners of the land which they inhabited. However, it was not inevitable that these social realities would result in the emergence of the Métis as a distinct aboriginal people under Canadian law. That this happened was an unintended consequence of the Red River insurrection of 1869–70; it had been desired neither by the government nor by the Métis themselves.

The Native Council of Canada (NCC) has recently published a document, rather misleadingly entitled the 'Manitoba Bill of Rights,' which purports to show that as early as November, 1869, the Métis of Red River were demanding a land grant to compensate them for the loss of aboriginal title:

> 1st——That the Indian title to the whole territory shall at once be paid for.
> 2nd——That on account of their relationship with the Indians a certain portion of this money shall be paid over to them.
> 3rd——That all their claims to land shall be at once conceded.
> 4th——That 200 acres shall be granted to each of their children. (Daniels, 1981:56.)

However, the NCC has misinterpreted the 1869 document. In reality, it was a letter written to the Prime Minister by a Canadian antagonist of the Métis.[3] It cannot be taken as an authoritative exposition of their views. Such ideas may have existed, but they did not dominate the political process over the winter of 1869–70 in which the Métis demands were articulated. The view implied in the manifestoes and lists of rights produced by the Métis was that they were civilized men, part of the community of Red River, and possessing exactly the same rights as the white inhabitants. There was never a demand for special treatment of the Métis as a group. It was assumed that as equal members of a self-governing community, they would look after their own interests in a locally elected legislature in which they would constitute a majority. Their consistent demand was not for a land grant to extinguish their aboriginal title but for local control of public lands. The 'first' list of rights, drafted by the French members of the first convention, December 1, 1869, did not have an explicit clause about control of public lands.[4] The 'second' list, presented to the second convention January 29, 1870, demanded

> 17. That the Local Legislature of the Territory have full control of all the public land inside a circumference, having Upper Fort Garry as the centre, and that the radii of this circumference, be the number of miles that the American line is distant from Fort Garry. (Morton, 1965:243.)

This demand was amplified in the 'third' list of rights, drawn up by Riel's Provisional Government in March, 1870, to include control of all of Rupert's Land and the North-West, to be admitted into Confederation as the single province of Assiniboia:

> 11. That the Local Legislature of the Province of Assiniboia shall have full control over all the public lands of the province.... (Morton, 1965:246.)

The same wording appears in the 'fourth' list of rights secretly modified by Riel and Archbishop A.-A. Taché and carried to Ottawa by Father N.-J. Ritchot. (Morton, 1965:249.)

Ritchot, thus, was not officially instructed to negotiate the extinguishment of Métis aborginal title, to request a land grant, or to do anything of that sort. His private instructions from Riel hint that there were other aspects of the land question under consideration; but to the extent that they emerge from the text, they seem to involve French-English ethnicity rather than specific Métis rights. Riel wrote:

> Exigez que le pays se divise en deux pour que cette coutume des deux populations vivant séparément soit maintenue pour la sauvegarde de nos droits les plus menacés.
>
> Cette mesure, je n'en doute pas, va faire bien des grimaces, mais pour que la grimace soit plus complète, ayez la bonté d'exiger encore que cette division du pays soit faite par l'autorité de la Législature seulement.[5]

Again, note the emphasis on provincial control of public lands through the Legislature.

This position was bound to be unacceptable to Sir John A. Macdonald, for it would have impeded his plans for nation-building. He wanted surveying, settlement, land distribution, and railway construction to be under the control of the federal government. Father Ritchot discovered this in April, 1870, when he negotiated with Macdonald and Cartier the entry of Manitoba into Confederation. As a compromise, Ritchot suggested that the federal government could retain control of public lands if it would guarantee to the old settlers title of the lands on which they were now living and if it would reserve a quantity of lands for distribution to future generations of Métis. The Métis, it appears, became an aboriginal people at Ritchot's initiative, although he may have been articulating views which already existed among them.

Thanks to Ritchot's diary, the emergence of Métis aboriginal rights can be traced in detail. On April 26, Macdonald and Cartier presented to Ritchot and his colleagues a draft of the *Manitoba Act* which reserved control of all public lands in the new province to the federal government. Ritchot argued stoutly for provincial control of public lands; but seeing that it was impossible, he conceded:

> We cannot renounce control of lands unless we have compensation or conditions which, for the present population, would be the equivalent of control of the lands of their province. (Stanley, 1964:546.)

The government offered all inhabitants free possession of lands on which they were settled; this was accepted and became section 32 of the *Manitoba Act*.

Ritchot then raised the question of special Métis rights. At first, the ministers resisted, saying that 'the inhabitants of the North-West, claiming and having obtained a form of government suited to civilized men, ought not to claim the privileges accorded to the Indians'. (Stanley, 1964:547.) Ritchot insisted that the Métis, in claiming the same rights as other Canadians, had no intention 'of losing the rights which they can have as descendants of Indians'. (*Ibid.*) Here arose for the first time the idea, analyzed in more depth below, that aboriginal title could be transmitted through racial inheritance, even though the descendants' way of life might differ radically from that of their ancestors.

Ritchot did not record whether the ministers were persuaded by the logic of his position; but at this point they began to bargain, offering to set aside 100,000 acres for distribution to the children of the Métis. Ritchot, dismissing this offer, countered with a demand of 200 acres of land for each adult Métis, male and female, and a like amount for all children as they reached maturity, this process to be extended

for several generations (the diary cannot be deciphered at this point, so it is unclear how many generations Ritchot had in mind). The ministers would not accept such a far-reaching scheme, but they did grudgingly increase their own offer in stages, until an acceptable compromise was reached at 1,400,000 acres.

Ritchot thought it had been agreed to allow the Manitoba legislature to supervise the half-breed land grant. However, the draft of the *Manitoba Act* which received first reading on May 2 reserved all details of the land grant to the Governor General in Council.[6] The ministers at first claimed this made no practical difference. When Ritchot protested, he was told that it would not have been possible to pass the bill in the desired form. To assuage Ritchot, the ministers promised to appoint through order in council persons nominated by the delegation to supervise the land grant – a promise which was never kept.[7] In the end, the federal government succeeded in keeping the half-breed land grant entirely under its control, thus negating much of Ritchot's victory at the bargaining table. The land grant would not have its ostensible effect of consolidating the Métis as a landowning class in Manitoba.

The diary contains no evidence that Macdonald and Cartier, who were at first opposed to any special consideration for the Métis, accepted Ritchot's theory of a Métis aboriginal title inherited from Indian ancestors. The ministers were obviously engaged in bargaining, wishing to concede the minimum required to get Manitoba into Confederation. They would worry later about the rationale of their concessions.

The *Manitoba Act*, drafted while negotiations were in progress, bore some traces of Ritchot's inheritance theory:

> 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....[8]

It is hard to say exactly what these words meant. They linked the land grant to the extinguishment of Indian title, but did not specify the nature of the Métis share in this title. Were the Métis a distinct aboriginal people like the Indians? Or had they, as Ritchot maintained, inherited a share of Indian title? The only link between the Métis and aboriginal title was the unhelpful word 'towards'.

In the House of Commons, Macdonald was a little clearer. On May 2, 1870, he claimed that the 1,400,000 acres were 'for the purpose of extinguishing the Indian title'.[9] Two days later he added: 'Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers'.[10] The Liberals rejoined that it was strange to give a land grant to people who had never asked for it, but they did not have the votes to obstruct Macdonald.

Later events showed that the notion of a Métis share of Indian title had not been thought through. In 1874, Parliament created an additional land grant for the Selkirk settlers and their white descendants. (36 Vict., c.37.) This was done out of political considerations, to treat all old settlers of Red River in more or less the same way. There was no pretence that the Scots deserved the land grant as a right; it was purely a matter of policy. In the end, all old settlers of Red River received approximately the same thing: title to land on which they lived and an extra allotment which they could sell or retain as they pleased. Métis aboriginal title was tenuously vindicated in the *Manitoba Act*, but in practice was merged into a wider policy toward old settlers of all races (excluding Indians, who were considered by all parties to be in a separate category).

Fifteen years later, in 1885, Macdonald declared to the House of Commons that the land grant had been a matter of policy, not of right:

> In that Act [the *Manitoba Act*] it is provided that in order to secure the extinguishment of the Indian title 1,400,000 acres of land should be settled upon the families of the half-breeds living within the limits of the then Province. Whether they had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province....

> 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians.[11]

But the clock could not be turned back. The *Manitoba Act* still stood, and its language had been imitated in the *Dominion Lands Act* of 1879, which provided for a half-breed land grant in the North-West Territories: 'To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories....'. (42 Vict., c.31, s.125(e).) In January 1885 the government had decided to go ahead with the distribution authorized in the *Dominion Lands Act*. It was now predictable that Métis claims based on aboriginal title would have to be satisfied whenever new parts of Rupert's Land were opened to settlement. There was a series of scrip allotments from 1885 until 1923. Each time that a new part of the prairie provinces or the Mackenzie Valley was ceded by Indians in a treaty, persons of mixed blood who chose not to adhere to treaty were allocated scrip redeemable in Dominion lands.[12]

Contemporary spokesmen for Métis aboriginal rights now ground their claims on this sequence of precedents. Harry Daniels writes on behalf of the Native Council of Canada:

> The paramount issue, after 1870, was that of aboriginal title. Among its other purposes, the Manitoba Act sought to extinguish Métis title by means of special land grants. This measure was obviously predicated on a recognition of the aboriginal nature of Métis rights and identity. Similarly, the land rights of the resident half-breeds in the North-West Territories were recognized in the Dominion Lands Act of 1879 in connection with 'extinguishment of Indian title'. (Daniels, 1979:9.)

Such statements could be endlessly multiplied. Yet what does the existence of precedent prove? Is government always bound by what it has done in the past? Ivor Jennings, writing about the conventions of the British constitution, has argued that the mere existence of precedents, no matter how numerous, does not create a binding constitutional convention. Exploration of this constitutional analogy may suggest some considerations relevant to our problem of whether or not to project past Métis policy into the future.

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail.... (Jennings, 1959:136.)

The same three questions can be posed about Métis aboriginal title: (1) What are the precedents? Clearly there is a train of precedents recognizing a Métis share of aboriginal title to be extinguished in a way other than simply allowing persons of mixed blood to become treaty Indians. (2) Did the actors in the precedents believe they were bound by a rule? John A. Macdonald is certainly the most important 'actor' to look at, since he was responsible for the *Manitoba Act*, the *Dominion Lands Act* of 1879, and the decision to grant scrip in 1885. It is probable that to him the half-breed land grants were a matter of policy, not satisfaction of a right. (3) Is there a reason for the rule? In answering this question the notion of the Métis as a distinct aboriginal people runs into the most trouble. Ideally, one would want to demonstrate that the Métis would be logically entitled to aborginal rights under normal definitions. The leading Canadian textbook says:

> Aboriginal rights are those rights which native people retain as a result of their original possession of the soil. We have defined aboriginal rights as those property rights which inure to native peoples by virtue of their occupation upon certain lands from time immemorial. (Cumming and Mickenberg, 1972:3 n.3.)

Can one reasonably construe the Métis as having 'original possession of the soil' or as having 'occupation upon certain lands from time immemorial'? By definition, there could have been no Métis until the commencement of contact between Indians and whites. Thus their possession of the soil could not have been original in the usual sense of pre-dating European contact. The Métis of Rupert's Land did not become a distinct social group until the end of the eighteenth or the beginning of the nineteenth century. They dramatically signalled their existence to the outside world in 1816 in the Battle of Seven Oaks. They were very much, as they called themselves, a 'new nation'. The relatively short duration of their occupancy may not be an insuperable problem in itself, for the United States Supreme Court has held that 50 years of possession was sufficient to secure the aboriginal title of the Seminole Indians to part of Florida. (*Ibid.*:50.) But the Métis presence was so obviously a result of white intrusion that it challenges credibility to call it original possession.

The difficulties are even greater if we set out from the recent decision of Justice Mahoney in the Baker Lake case. Regarding Inuit claims to barren lands in the eastern Arctic, Mahoney held:

> The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:
> 1. That they and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other organized societies.
> 4. That the occupation was an established fact at the time sovereignty was asserted by England.[13]

The Métis seem to be disqualified on all four counts.

1) They were certainly members of an organized society, but they did not constitute a distinct society to themselves, which is what Mahoney's *dictum* means in context. The Métis were born in the fur trade through contacts between white and Indian. They were always a bridge between these two. In the nineteenth century they (particularly the French-speaking element) began to develop a distinct national identity, but they never constituted a separate society in the classic sociological sense of a self-sufficient group of people living under common rules of conduct. They were never self-sufficient demographically, economically, or culturally.

2) and 3) The Métis had no exclusive territory over which they roamed. Most had quasi-permanent residences around Fort Garry or other trading posts; in this respect they differed little from white pioneers, such as the Selkirk settlers, in Rupert's Land. Such residences were conveyed to the Métis, as to other occupants, by section 32 of the *Manitoba Act*. Beyond that, the Métis did not hunt and gather food in a specific territory, marked perhaps by rivers or mountain ranges. Rather they travelled for commercial purposes over much of North America, from the Oregon territory to the Mackenzie Valley, from the Dakotas to Hudson's Bay, from Minnesota to Montreal. They repelled by force of arms any Indians who tried to interfere with their cart trains or hunting expeditions, but they did not interdict specific areas to Indian tribes, as the Indians tried to enforce such prohibitions against each other. The Métis claimed the right to go anywhere they chose.

Recognizing this, Louis Riel asserted Métis aboriginal title to the whole of Rupert's Land, which he estimated to comprise 1,100,000,000 square miles.[14] This, as Riel explicitly stated, required recognition of a double aboriginal title for all land – one held by the Métis, the other by the local Indian tribes. Such a requirement differs from Mahoney's conception of aboriginal title based on exclusive use and occupancy.

4) Obviously, the Métis cannot claim to have been in possession of Rupert's Land 'at the time sovereignty was asserted by England'. Assuming this date to be as late as 1670, when the Hudson's Bay Company Charter was emitted, it would be absurd to speak of Métis possession. English half-breeds did not yet exist because the white fathers had not yet arrived. A French Métis population was arising as a consequence of the Canadian fur trade, but the large majority

of these people would have been in the St. Lawrence drainage, Great Lakes basin, or Mississippi Valley. (Peterson, 1981.) French penetration of Rupert's Land, and particularly of the West, did not come until the next century.

All these difficulties point to a deeper problem. In my view, the doctrine of aboriginal title evolved in British law to cover the situation where British sovereignty was imposed upon nomadic, hunting, food-gathering peoples. The underlying theory was that the introduction of European methods of agriculture, which would multiply the productivity of the soil and enlarge the population, justified the sovereign in requiring the natives to surrender their right to live off the land and to settle down in a way compatible with European-style agriculture. Where, as in India, the British encountered a dense agricultural population, they left the local structure of property rights intact and did not impose land-surrender treaties on the inhabitants. The logic of aboriginal rights, extinguishment, and compensation was irrelevant to that situation. It was relevant to the Indians of British North America because they would have to renounce their right to roam at will over the land before agricultural civilization could develop. A formal surrender with compensation was one way of obtaining the land for purposes of civilization without resorting to brute force.

Aboriginal title makes no sense unless the imperial power recognizes a distinction between agricultural and nomadic existence. Conquest of agricultural peoples calls for retention of their property rights, as part of the successor-state doctrine of the law of nations. The less individualistic property rights of uncivilized peoples are protected through the different devices of aboriginal title, extinguishment, and compensation. Thus, A.H. Snow wrote in 1919 in a summary of European practice at that time:

> Aborigines are the members of uncivilized tribes which inhabit a region at the time a civilized State extends its sovereignty over the region, and which have so inhabited from time immemorial; and also the uncivilized descendants of such persons dwelling in the region. (Snow, 1972:7.)

In other words, aboriginal rights are not merely, or even chiefly, a question of who was there first; they arise rather as an adjustment in the contact between agricultural and nomadic peoples.

Now the Métis of Rupert's Land were vastly different from the Indians. They did not exist in a natural economy of hunting, fishing, and food-gathering. They were from the start part of the commercial economy of the fur trade. Some were long-term employees of the companies. Others worked intermittently on the cart trains and boat brigades. Many hunted buffalo, but not in a subsistence fashion. Their hunts were highly organized affairs which resulted in a sale of pemmican and robes to the trading companies. Still other Métis, particularly in the Red River settlement, were self-employed as free traders or craftsmen. Finally, almost all half-breeds engaged in some agriculture using the same methods as white pioneers in the area. Although the Métis travelled a great deal, to hunt and trade, they were not nomads. Many were commercial people accustomed to money, contracts, business dealings, and the division of labour. The way of life of most was much closer to that of their paternal white ancestors than to that of their maternal Indian forebears. Their religion was Protestant or Catholic Christianity. Many were familiar with, and used in their life, white political institutions such as written law, courts, magistrates, elections, representative assemblies, and committees. Their families were essentially monogamous, although Métis men, like white fur traders, often practised serial monogamy as they moved from one location to another. They all spoke some English or French, sometimes both, although of course many also spoke one or more Indian languages. Their food, clothing, housing, and other artifacts were largely derived from European models, modified by Indian influences, as was also true for many white settlers. The Métis were mostly illiterate, but this did not rigorously differentiate them from whites in an age when formal education was not universal. A substantial minority of half-breeds, especially those of English or Scottish background, could read and write to some degree; and some half-breeds were well-educated

merchants, lawyers, doctors, or surveyors.

There were some mixed-blood people who had Indian wives, lived with Indian bands, and were scarcely distinguishable from Indians. But they could be, and usually were, allowed to adhere to treaty as part of the bands with whom they lived. To the extent that the Métis led a truly aboriginal life, they were not distinct from the Indians; and to the extent that they were distinct from the Indians, their way of life was not aboriginal.

Perhaps recognizing the difficulty of showing that the Métis are a distinct aboriginal people, proponents of Métis aboriginal rights, from Ritchot and Macdonald in 1870 to the Native Council of Canada today, have resorted to the notion of inheritance. The Métis allegedly have aboriginal rights because their Indian ancestors had them. As the Lands Commission of the Manitoba Métis Federation said in 1978, 'Let us start with the premise that the governments of England and Canada recognized that the Métis of Manitoba in 1870 had aboriginal rights by virtue of their Indian blood.'. (Manitoba Métis Federation, 1978:1.) But this argument based on inheritance faces difficulties. Indians have been endowed with aboriginal rights under British law because of their level of social development. If they had been as advanced as the peoples of the Indian sub-continent, the British would not have invented the concept of aboriginal status for them. Aboriginal title is not a racial characteristic to be passed along like dark eyes or straight hair. It is a legal formula for reconciling nomadic peoples to the demands of European civilization through the devices of treaty, extinguishment and compensation. It is inheritable as long as the aboriginal people retain their way of life, so that those born into the people participate in the same community. But mere racial extraction is irrelevant. An Indian child kidnapped by British explorers and raised in London among white men would have had no need of aboriginal rights; a white child kidnapped and brought up among Sioux or Cree Indians would quite properly have been allowed to adhere to treaty. To speak of aboriginal title being passed on to the Métis through inheritance from the Indians, even though the Métis way of life was very different from that of the Indian, contradicts the nature of aboriginal title. It would be as logical (and as absurd) to argue that Métis, because they are descended from whites, could never enjoy aboriginal rights. That also contradicts common sense, as shown by the sensible practice of admitting to treaty Métis who lived with and like Indians. The determining criterion should always have been way of life, not racial extraction.

This analysis suggests that the case for Métis aboriginal rights is weak at the level of first principles. There is a train of historical precedents since 1870, but they are not compelling because they lack internal rationale. The notion that the Métis were a distinct aboriginal people with rights different from those of either whites or Indians was never thought through and was accepted by the government for reasons of short-term expediency.

A decade ago, it was generally assumed that whatever aboriginal rights the Métis might once have possessed had been effectively extinguished through the series of land grants and scrip distributions which took place between 1870 and 1923. The second edition of *Native Rights in Canada* (1972) stated somewhat tentatively, 'Those Métis who received scrip or land may ... have had their aboriginal rights extinguished.' (Cumming and Mickenberg, 1972:203.) It thus seemed that while a few Métis living outside the three prairie provinces or the Mackenzie Valley might be able to mount a claim, the vast majority of Métis had been dealt with. But the various Métis organizations now claim that their aboriginal rights are still in existence. They hold that the land grants and scrip allotments were so poorly designed and administered as to constitute bad faith. So little benefit came to the Métis that they did not effectively receive the compensation required to extinguish their title to the land. In the words of the Métis Association of Alberta:

> ... the government was guilty of a breach of trust. The government had the responsibility of dealing fairly with the native people in their land settlements. In dealing with Treaty Indians, the government extended itself to protect the Indians' lands by making them inalienable. The government made only

half-hearted attempts at providing any similar protection to the Half-breeds. (Sawchuck, 1981:246.)

The land grants and scrip allotments are now criticized on several counts. It is alleged that many instances of fraud took place, in which grant or scrip documents were delivered not to Métis claimants but to white speculators. Beyond this, it is argued that both the land grant and scrip programs were designed in such a way as to facilitate quick sale by the Métis recipients. Scrip was payable to bearer, parents were allowed to sell children's entitlements, and so on. In fact, the various half-breed commissions were physically accompanied by agents representing major speculators. The recipients in most instances sold their scrip to these agents the same day they received it, usually at a discount of about 50 per cent on the nominal value. The contemporary position of Métis spokesmen is that this sort of payment was so transitory as not to constitute a realistic compensation for the value of the land surrendered, and hence did not extinguish aboriginal title. The argument is persuasive in some respects, but it suffers seriously from anachronism. At the time these distributions took place, the Métis insisted on receiving their entitlements in as liquid a form as possible. For example in an attempt to curb speculation, the Minister of the Interior instructed the half-breed claims commission of 1899 to issue scrip that was not simply payable to bearer but would require a legal assignment of title. The Métis of Lesser Slave Lake refused to accept such scrip until it was rewritten payable to bearer. (Hall, 1977.)

Another argument, applying only to Manitoba, has been developed by the historian D.N. Sprague (1980a and 1980b). In that province, land and scrip were distributed under section 31 of the *Manitoba Act*, a statute which has constitutional status, as emphasized by the Forest case. The Imperial Parliament, in section 6 of the *British North America Act* of 1871, expressly prohibited the Canadian Parliament from amending the *Manitoba Act*. According to Sprague, eleven statutes passed by the federal government between 1873 and 1884 were in effect amendments to the *Manitoba Act*, even though they were given other titles. It is now contended that most of these were *ultra vires* of the Parliament of Canada, and that the land grant which took place was accordingly illegal.

The strategy of litigation has now begun in the case of *Manitoba Métis Federation and Native Council of Canada vs. Attorney-General of Canada and Attorney-General of Manitoba*. A statement of claim filed by the two native organizations in the Court of Queen's Bench of Manitoba April 15, 1981, maintains exactly what Sprague has contended in the learned journals:

> The Plaintiffs contend that all of these purported alterations and elaborations by the Parliament of Canada and the Legislature of Manitoba of the rights conferred by sections 31 and 32 of the *Manitoba Act* were, by reason of section 6 of the *British North America Act*, 1871 (34 & 35 Vict., c.28) beyond the constitutional competence of both Parliament and the Legislature and were therefore invalid and of no effect.[15]

The Manitoba Métis are seeking only a declaratory judgment that the government acted unconstitutionally; they are not seeking redress or compensation from the courts. A decision in their favor would nullify the government's claim that whatever share of aboriginal title their ancestors may have had was extinguished, but it would not establish what that title consisted of. The case is better seen as a step in a political campaign to force the government to make negotiated concessions rather than as a definitive judicial test of Métis aboriginal rights.

The current campaign on behalf of Métis aboriginal rights superficially takes the form of recovering what should rightfully have come to the Métis in the first place. Since they did not receive their promised compensation for extinguishment of aboriginal title, they should receive something else now. However, the substance of the claim is quite different. The original land and scrip programs involved grants to individuals as individuals; they did not purport to set up the Métis as a continuing corporate entity. In that respect, the extinguishment of

the aboriginal rights first ascribed to the Métis by the *Manitoba Act* was very different for the extinguishment of Indian title. If it can now be shown that some Métis did not receive their entitlement, the logical consequence would be to compensate their descendants as individuals. However, contemporary Métis spokesmen realize that the lapse of time has made such a solution impractical. It would be impossible to determine with certainty which Métis were defrauded of land or scrip, who sold it to speculators, and who retained it, let alone to identify the descendants of these different categories. Thus, the current Métis proposal is not for a repetition of land or scrip but for new programs which will establish the Métis as a continuing corporate entity. Aspects of this corporate existence might be ownership of selected lands, control of a Métis trust fund, administration of special economic and social programs, and native representation in Parliament.[16] But this is a quantum leap in aboriginal status which cannot be derived from precedent. It clearly departs from the historical model of individual extinguishment of whatever share of aboriginal title was ascribed to the Métis. The new approach should thus be justified at the level of first principles; but it is precisely here, as I have tried to show, that the gravest intellectual obstacles exist. My opinion, therefore, is that the best policy for the time being would be to emphasize the word 'existing' in section 35(1) of the *Constitution Act, 1982*. If there is to be a major change in the status of the Métis to a corporate entity, there ought first to be full and informed public discussion, culminating in Parliamentary debate over such fundamental issues as who the Métis are and whether they are different from non-status Indians, why they are thought to have a share of aboriginal title, and why the historical mechanisms of extinguishment are now considered to have been ineffective. None of this discussion took place in the rapid series of political deals which led to the final wording of the constitutional amendments. Once again, as in the years 1870 to 1885, a major step regarding the Métis was taken almost by accident. It is time to stop making Métis policy by inadvertence.

Notes

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1 *Manitoba Métis Federation, Inc. and Native Council of Canada, Inc. vs. Attorney-General of Canada and Attorney-General of Manitoba*, statement of claim filed April 15, 1981, in Court of Queen's Bench of Manitoba.

2 W.B. Robinson to Col. Bruce, Superintendent General of Indian Affairs, September 24, 1850, reprinted in Morris (1979:20).

3 The document is confusingly described both as a letter of John Young to John A. Macdonald, November 18, 1869, and as a letter of J.Y. Bown to John A. Macdonald, November 27, 1869. It is in fact a letter to John Young Bown to Macdonald, November 18, 1869. Public Archives of Canada, J.A. Macdonald Papers, MG 26 A, 40808-15. J.Y. Bown, an Ontario MP, was the brother of W.R. Bown, proprietor of the *Nor'Wester* in Red River and an active member of the Canadian party in the settlement. In the letter, J.Y. Bown was trying to inform the Prime Minister about the situation in Red River at a time when verified information was scarce. Bown's source was undoubtedly correspondence from his brother or one of his brother's associates, such as J.C. Schultz. Such antagonists of the Métis are hardly reliable transmitters of their views.

4 Reprinted in Peel (1974:18).

5 Louis Riel to N.-J. Ritchot, April 19, 1870, in the hand of Louis Schmidt. Archives de l'Archevêché de Saint-Boniface, T7316-18.

6 Two copies of the draft with Macdonald's annotations are in PAC, MG 26 A, 40559 ff.

7 Ritchot's protest is documented in his letter to G.-E. Cartier, May 18, 1870, PAC, MG 26A, 41528-30. Cartier's disingenuous reply, dated May 23, 1870, is in *ibid.*, 41531-34. While I am critical of the whole idea of Métis aboriginal rights, I certainly do not endorse the duplicity with which Macdonald and Cartier treated the Métis. My point is that the creation of Métis aboriginal rights was itself part of that double-dealing.

8 33 Vict., c.3, p.31, cited in Morton (1965:258).

9 Commons *Debates*, May 2, 1870, p.1302.

10 *Ibid.*, May 4, 1870, p.1359.

11 *Ibid.*, July 6, 1885, p.3113.

12 Sawchuck (1981:ch.4) gives an overall description.

13 *Baker Lake v. Minister of Indian Affairs and Northern Development* (1980), 1 F.C. 518 at 557-58.

14 See 'Les Métis du Nord-Ouest,' originally published in the Montreal *Star*, November 28, 1885.

15 Section 11 of the claim. Section 12 advances the potentially explosive claim that all regulations of the Manitoba government respecting Métis lands

were *ultra vires* because they concerned 'Indians and Lands Reserved for Indians' (s.91(24) of the *B.N.A. Act*, 1867). A judicial victory on this point might have the unintended consequence of outlawing various provincial programs for Métis people, e.g., the Alberta Métis reserves.

16 See the proposals in Daniels (1981).

References

Canada. Parliament (1981) *The Constitution Act 1981* (Ottawa: Minister of Supply and Services).

Cumming, Peter A. and Neil H. Mickenberg (1972) *Native Rights in Canada* (Toronto: General Publishing) 2nd. ed.

Daniels, Harry W. (1979) *We are the New Nation* (Ottawa: Native Council of Canada).

——— (1981) *Native Peoples and the Constitution of Canada* (Ottawa: Mutual Press).

Hall, D.J. (1977) 'The Half-Breed Claims Commission,' *Alberta History*, 25:1–8.

Jennings, Ivor (1959) *The Law of the Constitution* (London: University of London Press) 5th ed.

Manitoba Métis Federation (1978) *Riverlots and Scrip: Elements of Métis Aboriginal Rights* (Winnipeg).

Morris, Alexander (1979) *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto:Belfords, Clarke & Co., 1880; Cole's reprint 1979).

Morton, W.L. ed. (1965) *Manitoba: The Birth of a Province* (Altona: Manitoba Record Society).

Peterson, Jacqueline (1981) 'Ethnogenesis: Settlement and Growth of a 'New People' in the Great Lakes Region, 1702–1815,' Conference on the Métis in North America, Newberry Library, Chicago, September 3–5.

Peel, Bruce (1974) *Early Printing in the Red River Settlement* (Winnipeg: Peguis Publishers).

Sawchuck, Joe *et al.* (1981) *Métis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta).

Snow, Alpheus Henry (1972) *The Question of Aborigines in the Law and Practice of Nations* (Northbrook, Ill.: Metro Books).

Sprague, D.N. (1980a) 'Government Lawlessness in the Administration of Manitoba Land Claims, 1830–1885,' *Manitoba Law Journal*, 10:415–441.

——— (1980b) 'The Manitoba Land Question,' *Journal of Canadian Studies*, 15:74–84.

Stanley, G.F.G. (1964) 'Le Journal de l'Abbé N.-J. Ritchot, 1870,' *Revue d'Histoire de l'Amérique Française*, 17.