A Brief to
The Royal Commission
on Aboriginal Peoples

From
The Ontario Metis Aboriginal Association

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Introduction

The Ontario Metis Aboriginal Association are pleased to submit this brief to Royal Commission on Aboriginal peoples. The brief will detail information in six priority areas that fall under the terms and references of the Royal Commission on Aboriginal peoples. The most talked of priority area was in the area of land claims and aboriginal title. The second, priority area was the history of relations between aboriginal peoples the two levels of government and the Canadian society as a whole. The third, most talked of priority area was the constitutional legal position of the metis and off reserve aboriginal people of Ontario. The forth, priority area that was brought to the attention of the research team was the social issues facing aboriginal peoples of Ontario. The fifth, priority area was the Economic issues of concern to the aboriginal peoples. The sixth, and final priority of concern was the education issues facing aboriginal peoples of Ontario.

The Ontario Metis Aboriginal Association greatly appreciate the chance to submit this brief for four main reasons. First, as a people are investments are tied up in the communities we now reside in. Second, we have a responsibility as metis and off reserve aboriginal with roots in both native and non-native cultures within are communities. Third, in many communities our

people are living evidence of the disjuncture between economic and social development in Ontario. Forth, this gives the metis and off reserve aboriginal peoples a prime opportunity to have our recommendations stated and viewed by the Royal Commission on aboriginal people.

SUMMARY OF RESEARCH

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Summary of Research Activity

The research activity reflected in this report breaks down into three basic categories; field research, research by consultants, and archival library. Each of the three elements play a key role, but coordinated in the overall. Objectives of the commission will be defined. Basically the field research was designed to identify and locate information sources in the areas involved, and on a priority basis, and to return that information to our archives for closer examination. The consulting research was constructed around both specific and comprehensive research targets related to the professional specialty of the individual consultant. All of this information and related documentation involved are in our archives for this research project and for future reference. Our archives now contain considerable volumes of significant information from both primary and secondary sources of archival documents, pictures, books, sound tapes, video tapes, and magazines related to our peoples. The priority of this project was to collect and access information that is relevant to the terms and references of the Royal Commission on aboriginal people. Given that the collection of information was a priority of the commission the project has been quite successful. Information gathered was both at the community level and at the archival levels by both research consultants and researchers in the field.

Both the research consultant and field researcher produced many contacts with local people and other experts who were also a valuable source of information. Community sources of information included churches, universities, libraries, historical societies, local media, and most important, local elders and the residents. Archival sources of information were primary those of the federal and provincial public archives although special historical collections in libraries and universities also proved useful. The overall priorities of the commission have been meet, but it should be emphasized that this project is dedicated to the development of the aboriginal perspective in relations to the recommendations that will be put forward to the Royal Commission on aboriginal people.

The historical background, the effect of laws and policies the alienation and non alienation of who we are as aboriginal peoples. For aboriginal title, and recognition of these factors are all developed from a native point of view. The development of these perspectives has literally forced us to collect and access the information in a technique more compatible with the native perspective. With this in mind the researcher is pleased to present the major issues that the membership of the Ontario Metis Aboriginal Association have brought forward .

Here are issues that are put forward by the Ontario Metis Aboriginal Association on behalf of its membership.

Recommendations

1. Land Claims and aboriginal title for the metis people.

2. History of relations between Ontario-Canada-O.M.A.A

3. Recognition of aboriginal self government.

4. Social issues facing aboriginal peoples.

5. Economic issues facing aboriginal peoples.

6. Education issues facing aboriginal peoples.

LAND CLAIMS

Land Claims

This is the biggest and most talked about issue that has been brought to the attention of the researchers and consultants. If the metis people have a land base, the metis community could lease to local business and native or non native corporations leading to the economic revival of metis communities. It is very obvious that land claims and aboriginal rights are the main basis upon which long term economic independence can be gained.

The traditional economics of metis people were based on the natural resources of Ontario for centuries before money became the basis for wealth, and this situation will not change. In the last twenty years the government has seemed only to willing to force feed the native problem with grants, affirmative action, equal opportunities, and government controlled programs or projects.

Most of the native claims in Ontario are based on the historically documented fact that metis and off reserve aboriginals were either left out of the treaty entirely or later excluded by amendments to the treaties. Those native peoples, mostly metis, who were never included in most treaties obviously never surrendered any lands, aboriginal right, including aboriginal title.

(See appendix A for documented archival information)

History of Metis peoples of Ontario

Canadian history does not describe the critical significance of metis participation in the historical development of modern Canada. The fur trade was described as the backbone of the colonial society, but we never hear that fur trading companies were totally dependent on the metis people for their survival and success. When most of the treaties were signed a metis negotiator was the middle-man between the colonial governments and the chiefs of the aboriginal people.

Many metis communities in Ontario were solely that just metis people until the white population moved into these communities the metis moved to the land outside the communities and basically in that day and age claimed titles to the land they had chosen. Although the metis are not defined as an Indian by the Indian Act, the metis have played a significant role in Canadian history.

Metis peoples find themselves in a unique position by living outside reserves and outside the jurisdiction of the Indian Act, yet they also live in clearly defined communities and constitute a distinct native Canadian Group.

(For more details please refer to appendix B)

Self-Government

Many years before the invasion of the white man to North America aboriginal peoples governed themselves in independent sovereign nations. Our forefathers never gave up their right to self-government, and we still have not. All over the world aboriginal nations are forcing their right to self-government and self-determination. All nations have the right to self-determination, we as metis people of aboriginal decent are no different. Our right to self-government was given to us by the creator. Since that right belongs to all aboriginal peoples of our past and to our children of the future and for many generations after that it cannot be given up. Our creator has given us the right to self-government and self-determination, we have the responsibility to exercise that right, we have a responsibility to govern ourselves.

International law, which Canada has said it respects, recognizes the right of all nations self-determination and self-government. The Canadian government has recognized these rights of the peoples of Palestine, South Africa, and the aboriginal nations of Russia and rightly so.

The same government has, however here in Canada, the government has refused to recognize the right of their own aboriginal peoples.

(See appendix C for documented archival information)

Social Issues

There are many social issues facing the aboriginal peoples of Ontario, the extent of the social disintegration and deprivation arising from the history of relations between government and aboriginal peoples of Ontario. Many of the social issues or conditions demand immediate attention, some of the social problems that were discussed was as follows.

- Child welfare
- Education
- Housing
- Income
- Unemployment
- Prisons
- Cause of death\ Death rate
- Violent death
- Suicide
- Infant mortality
- Life expectancy
- Hospital Admissions

The Ontario Metis Aboriginal Association would support a program to provide social and health program to our off reserve and metis peoples. Some objectives that may be taken into consideration may include programs for prevention or early intervention programs for example aboriginal counselors, workshops, health programs or education on social problems that have existed in the past, present and in the future.

(Further details can be found in Appendix D)

ECONOMIC
ISSUES

Economic Issues

The majority of metis and off reserve aboriginal people participate in the economy of Ontario at the primary level of resource extraction as follows.

- Logging
- Guiding
- Fishing
- Trapping

Plus supplementing their incomes with traditional activities such as Hunting, wild rice harvesting and berry picking.

For many people this is the preferred work because it puts them in touch with the land and their traditions, however our activities in these areas are being increasingly restricted by mechanicalization, government policies and lack of understanding on government contracts, tendering process and education about these new policies.

The metis and off reserve people must get more actively involved in the Ontario district and regional economy, they must lobby government to get more control of our natural resources . Research funding sources for business startups and get the people more involved or aware of economic development

strategies that have been under taken in the past few years by government and private lending institutions.

(For more details refer to appendix E)

Education Issues

There are a lot education issues facing the aboriginal people of Ontario, it is well known that among the total population within the Ontario system of education the young native people represent the most disadvantaged groups. Clearly a major challenge facing aboriginal peoples not living on reserve land in Ontario is dealing with revisions in the current education system.

A further challenge exists in the aboriginal peoples need to preserve their cultural heritage while still being able to share in the general and individual rights enjoyed by every other citizen of our province. Through the various methods of research which has been engaged in trying to understand or find solutions to the problems of youngsters dropping out of school. One objective is to develop programs to meet the specific need of aboriginal peoples thereby enhancing their educational need or opportunities. The education of aboriginal peoples should reinforce there culture and their identity rather than destroying them.

All educational system should use this mold not just to formally enrolled students, this means adult education, literacy campaigns. This might enhance the older aboriginals willingness to learn to read and write because he or she would be learning in a way where they are just not learning how to read and write but they are also learning about their culture or heritage. In many cases

the aboriginal person need something that they are familiar with before they have the confidence to try.

(For additional information please refer to appendix F)

Appendix A

ABORIGINAL JURISDICTION

OVER LAND AND RESOURCES

ABORIGINAL JURISDICTION OVER LAND AND RESOURCES

Land is at the centre of Aboriginal tradition, culture and legal and political systems. Aboriginal self-government must, if it is to serve to allow Aboriginal nations to preserve their distinct identities, strengthen Aboriginal communities' ties to the land and its resources.

THE INDIAN ACT

Indian bands have some control over their reserves. The most important control is in the fact that reserve lands cannot be sold or otherwise alienated without the consent of the band. If a band decides to sell some of its land it may attach conditions to this sale. By attaching conditions, a band may control the use of lands which it decides to sell. The Minister of Indian Affairs may, however, grant one year permits for the use of reserve lands without the consent of the band. The permits may be renewed for further one year periods. The federal government can also allow provincial governments or municipalities to expropriate reserve land (without band

consent).

Band councils may pass by-laws limiting access to their reserves but such by-laws must be approved by the Minister of Indian Affairs. Furthermore, because of Section 88 of the Indian Act, bands cannot deny access to provincial government employees.

Bands can make by-laws regarding the use and zoning of reserve lands and the taxation of reserve lands held by band members. Any such by-laws must be approved by the Minister.

The development and management of natural resources on reserves is controlled by the Department of Indian Affairs. Bands have no control over timber management or logging on their lands (Section 57). The Indian Oil and Gas Act and the Indian Mining Regulations (which apply in every province except B.C.) provide only that bands must be consulted before oil or gas are extracted from reserve lands. Bands may however refuse to surrender any sub-surface oil or minerals. Alternatively, the band council may surrender minerals but attach conditions to the surrender. A band can therefore demand fees or royalties in

exchange for allowing mining or oil extraction.

Band councils make by-laws regarding fishing, hunting and trapping on reserves. Such by-laws must be approved by the Minister. Once such a by-law has been approved by the Minister, however, it supercedes both federal and provincial laws on the same subject matter within the boundaries of the reserve.

THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT

The land claim agreement divides the lands of Northern Quebec into three main categories:

1) Category I lands (a total of 5,403 sq. miles) are reserved for the "exclusive use" of the Aboriginal peoples.

2) Category II lands are those over which the Aboriginal peoples have the exclusive right to hunt, fish and trap, no special right of occupancy. 58,500 sq. miles make up category two lands.

3) On Category III lands (346,000 sq. miles) Aboriginal

peoples have priority of food harvesting rights but non-Natives are also allowed to occupy and use these lands.

Under the Agreement Quebec still has jurisdiction over sub-surface, mineral and oil rights on category I lands, although the "administration, management and control of these lands is controlled by the federal government". Furthermore, "existing mineral interests" and "seashore, beds and shores of the lakes and rivers are not included in category I lands".

Quebec also retains jurisdiction over timber management and the issuing of licenses for logging.

Under the Agreement the federal and provincial governments have the power to expropriate Cree, Naskapi and Inuit lands.

Resource development (primarily mining exploration and development) on Category I lands must be approved by both the government of Quebec and the Aboriginal community which will be affected. The Aboriginal communities have no power, however, over any mineral development interests which existed at the time

the Agreement was signed.

The Cree, Naskapi and Inuit have some jurisdiction over surface rights on Category I land. They may lease Category I lands but may not sell them except to the government of Quebec. The Aboriginal communities may also control access to their lands, but may not deny access to holders of mineral rights or federal or provincial civil servants.

The Aboriginal communities have some limited powers over wildlife and fisheries on Category I lands. The Aboriginal communities (bands) may make by-laws on hunting, fishing and trapping (including the allocation of quotas), but these by-laws must be approved by both the federal and provincial governments. The bands may also make by-laws for the protection of the environment on Category I lands.

The Aboriginal peoples have only advisory powers in relation to food harvesting on Category II lands. The federal government still has jurisdiction over migratory bird hunting and fishing, and the province still has jurisdiction over trapping and

hunting. The only change to the status-quo created by the Agreement is the creation of a Coordinating Committee of twelve (six Aboriginal) members to advise the federal and provincial governments on fish and wildlife management.

The Cree and Naskapi also have no control over major development projects on Category II or Category III lands, except through their participation on the Advisory Committee on the Environment.

Under the Cree-Naskapi (of Quebec) Act, band councils become local (municipal) governments on Category 1A lands. The bands have the same powers as other municipal governments in Quebec, plus a few others. By-laws relating to zoning, land use, planning, and hunting, fishing and trapping must be approved by the members of the band. Unlike other municipalities in Quebec, the bands can make by-laws for the protection of the environment and the use of natural resources but this power is almost meaningless since the by-laws may be vetoed by the province and cannot conflict with Quebec's ownership of all subsurface

minerals and resources.

SECHELT

Under the Sechelt Indian Band Self-government Act (1986), the band has fee simple title to its reserve lands. The band may sell or lease any of its lands.

The band may make by-laws regarding access to and residence on its lands, zoning and land use, expropriation for community purposes, the use and construction of buildings and roads, taxation for local purposes (property taxes), and the "preservation and management of natural resources on Sechelt lands". The band may also make by-laws for the conservation and management of wildlife and fish on Sechelt lands and on "matters related to the good government of the band, its members or Sechelt lands".

The power to make by-laws relating to natural resources is limited by the fact that the British Columbia Government retains its ownership of sub-surface minerals and resources.

Furthermore, the Indian Act and the Indian Oil and Gas Act and all federal laws of general application will to apply to the band and its members unless they are inconsistent with the Sechelt Act, (s.39). Provincial laws also continue to apply except to the extent of inconsistency with the Sechelt Act or any treaty. The Sechelt Band is therefore like any other band under the Indian Act except for the few added powers given by the Sechelt Self-government Act.

Under the Sechelt Act the federal and provincial governments may give the "Sechelt Indian Government District" jurisdiction over lands outside of the reserve.

NATURAL RESOURCES CO-MANAGEMENT

Several wildlife and fishery co-management agreements exist in Canada. Most are tripartite and all create bodies which have only the limited power to advise the federal and provincial governments.

The Beverly and Kaminuriak Caribou Management Board is an example. The Board was created by an agreement between the

governments of Canada, Manitoba, Saskatchewan, and the Northwest Territories, signed in June of 1982. The Board has 13 members; 2 representing the federal government, one representative each of the Saskatchewan, Manitoba and Northwest Territories governments, and eight Aboriginal representatives.

The major function of the Board is to study and make recommendations to the participating governments on:

1) Limitations to and allocations of the annual harvest;

2) Criteria for regulating the methods of harvest;

3) Methods of traditional user participation;

4) Caribou research proposals;

5) Standardized data collection and presentation;

6) A Herd Management Plan (including predator management).

The Board also has a mandate to study the Caribou habitat (environment), conduct information programs and public meetings and produce annual reports.

The Board's priority is to provide advice to the governments and the Aboriginal peoples on the conservation and management of

t Beverly and Kaminuriak caribou herds "in order to restore the herds, as far as reasonably possible, to a size and quality that will sustain the requirements of the aboriginal caribou users". The traditional users are the Inuit of south Keewatin (Northwest Territories), the Metis of northern Saskatchewan and the south Slave regions and the Chippewa of northern Saskatchewan and Manitoba and the south Slave region.

The Board has an annual budget of $75,000.00. 40% is paid by the federal government, with the governments of Saskatchewan, Manitoba and the N.W.T. each paying 20%. These are the administrative costs only, and allow for the establishment of a Secretariat to arrange meetings, record and distribute minutes. The Secretariat consists of an Executive Secretary and a Treasurer. A separate budget also allows for the production and distribution of a newsletter and an annual report, and some independent research. Each government is responsible for funding the travel expenses and fees (if any) of its members of the Board, independently of the funding agreement.

Any programs recommended by the Board and agreed to by the governments are paid for by the governments.

The Board has reported that many of its recommendations, especially those related to the protection of the environment and the caribou habitat, have not been implemented by the governments.

THE DENE METIS AGREEMENT IN PRINCIPLE

Under the agreement in principle made in 1988, the Dene and Metis nations of the Northwest Territories would agree to sell most of their lands in the Northwest Territories to the federal government in exchange for lump sum cash payments, a portion of mining and other mineral extraction royalties, the establishment of reserve-type land bases (including some minimal sub-surface rights), and a role in managing traditional Dene and Metis lands throughout their traditional territories.

The agreement in principle calls for the establishment of several tripartite natural resources management authorities: a

wildlife management board, a forestry and parks (including tourism) management board, a surface management board and joint (Aboriginal plus non-Aboriginal) management of water and heritage resources (ie. sacred/archeological sites).

The agreement also provides that, although Dene or Metis lands may be expropriated by the federal government, any expropriated lands must be replaced by land of comparable value, if possible.

STATEMENT OF CLAIM

We, the Metis and unregistered Indian people of Canada, are indigenous peoples who possess an aboriginal title to this land. This is a heritage and a right, passed from one generation to the next. It has always been a part of our understanding of ourselves. In the past many governments have recognized our rights but through evasion, delay and neglect, the question of the extent of our rights remains unresolved. Today we are asking that this question be resolved and our rights be defined and acknowledged.

The Metis people developed as a distinct national group in the Canadian west. They successfully asserted their rights against the Selkirk colony in 1816 and against the Hudson's Bay Company in 1849. In the Provisional Government of 1869, the Metis asserted their rights against the Government of Canada and their rights were recognized. The Government of Canada met with negotiators representing the Provisional Government and the terms of the *Manitoba Act* were drafted and agreed to. The *Manitoba Act* was passed by the Provisional Government, by the Canadian Parliament and confirmed by Imperial legislation. It stands as part of the constitution of Canada. The *Manitoba Act* provided for provincial status for Manitoba, recognizing the political power of the Red River Metis. The *Manitoba Act* recognized Metis land rights and provided for a Metis land base of one million, four hundred thousand acres. However, the federal government betrayed the provisions of the *Manitoba Act*. The government ensured that the Metis land base was not established, with the result that political power in the new province passed to the European settlers who flooded into the west. The bulk of the Metis population was displaced and moved further north and west. The second Metis stand in Saskatchewan in 1885 led the federal government to again recognize Metis land rights and again pledge to establish a Metis land base under provisions of the *Dominion Lands Act*. For a second time, governmental actions frustrated that goal, leaving the Metis as a forgotten people in the marginal areas of the west.

The Metis rights which were recognized on the prairies were not peculiar to that part of Canada. The Metis or Half-Breeds were recognized as sharing in the "Indian title" to the land. In the colonial history of North America aboriginal title to land was recognized, at one time or another, by all the colonial powers. It was recognized in the Articles of Capitulation of Montreal in 1760. Belcher's Proclamation of 1762 recognized it for Nova Scotia and New Brunswick. The Royal Proclamation of 1763 formalized the British recognition of aboriginal title and came to be called the Magna Charta of aboriginal rights. The Royal Proclamation applied, at least, to the Atlantic provinces, and probably to the rest of Canada as well. Its principles were confirmed for Nova Scotia and New Brunswick in the 1764 and 1775 Plan(s) for the Future Management of Indian Affairs and, for Quebec, in the 1775 Instructions to Governor Carleton. Its principles were applied in Rupert's Land and the North West both by the terms of the transfer in 1870 and by the provisions of the *Manitoba Act* and the *Dominion Lands Act*.

In Canadian history the aboriginal rights of mixed blood peoples were recognized in a number of ways. Half-breeds were included in the Robinson Treaties of 1850, in the Half-Breed Adhesion to Treaty No. 3 in 1875 and in other treaties. Federal Indian legislation was never based on a simple racial classification. As a result the government has always recognized many mixed blood people as status Indians and, therefore, as

parties to treaties with the Crown. The recognition of Half-Breed land rights extended through the prairies and the present Northwest Territories and into British Columbia and northern Ontario.

Canadian history records a legal and political tradition of recognition of aboriginal rights. Mixed blood peoples were recognized as sharing in those rights.

It is now recognized that the government's response to aboriginal rights was faulty and incomplete. Native people struggled for many years to convince Canada of its unfinished business. After the dispersal of the Metis in the final thirty years of the 19th century, there was a re-grouping. Gradually new Metis political organizations were formed. Those organizations gained a limited recognition of Metis needs from the governments of Alberta and Saskatchewan in the 1930's but no resolution of the rights recognized by the *Manitoba Act* and the *Dominion Lands Act* was attempted. In the 1960's Metis made common cause with other people of Native descent who were excluded from the *Indian Act*. Organizations were formed in all parts of Canada representing both Metis and "non-status" Indians. Some achievements have resulted. It is now accepted by the federal government that comprehensive settlements of aboriginal title claims must include Metis and unregistered Indians. That has been acknowledged in northern Quebec, the Northwest Territories and the Yukon.

The outstanding issues today are (a) the aboriginal title claims in Atlantic Canada and much of Quebec, (b) the specific claims of Metis and unregistered Indians in Ontario, (c) the unsatisfied Metis claims on the prairies under the *Manitoba Act* and the *Dominion Lands Act*, and (d) the aboriginal title claims in British Columbia, the Yukon and Northwest Territories. Claims have been formulated by provincial and territorial organizations. In addition, the Native Council of Canada has made a series of declarations and proposals to the Government of Canada involving constitutional issues, hunting, fishing and other resource rights and a proposal for a major socio-economic development program. To date there has been no government response.

We are hereby stating our claim against the Government of Canada. It is a claim supported by history, morality and law. While governments have acknowledged the history of injustice, they have not proposed solutions. We propose that negotiations begin to develop a comprehensive settlement of the claims of Metis and unregistered Indians in Canada.

DOCUMENT OF SUPPORT

Between 1670 and 1870 the Metis developed as a distinct national group in the Canadian west. In no other British colony or American nation did a mixed blood population achieve equivalent political power in a region of the country. The Metis had a clear sense of their collective rights. They resisted the attempt of the officials of the Selkirk colony to restrict the sale of pemmican and prohibit the running of buffalo on horseback. This led to armed conflict at Seven Oaks in 1816. Later the Metis challenged the Hudson's Bay Company fur trade monopoly and in the political events surrounding the Sayer trial in 1849, they succeeded.

After Confederation in 1867, Canadian politicians campaigned to acquire the west for Canada. The federal government arranged to purchase the rights to the lands of the west claimed by the Hudson's Bay Company under its charter. The Imperial government acted as an intermediary in this transaction. Upon payment of the agreed sum by Canada the Company was to transfer its rights to the Imperial government which would then transfer them to the Dominion. Because of premature action in the west by the Canadian Government, the Metis, led by Riel, took action to protect their interests. This was followed by an unauthorized proclamation by the Canadian lieutenant-governor designate purporting to assume sovereignty over the west before the Hudson's Bay Company had even relinquished its rights. As a result of this precipitate action no legal government then existed. In the face of this void Riel formed a Provisional Government. When Canada once more took action to acquire sovereignty over the west the Dominion Government agreed to negotiate the terms of transfer with delegates of this Provisional Government.

The three delegates of the Provisional Government began negotiations with the Government of Canada on April 26th 1869. They were received officially and met twice with the Governor General. In direct negotiations with Sir John A. Macdonald and Sir George Etienne Cartier, the terms of the *Manitoba Act* were drafted. The *Manitoba Act* was passed by the Provisional Government, by the Canadian Parliament and confirmed by Imperial legislation. It is part of the constitution of Canada.

It was basic to the Metis position that Red River should enter Canada as a province. This would have the effect of continuing both the democratic form of government and the Metis political power which had been achieved with the Provisional Government. Canada agreed to this demand and the province of Manitoba was created. Continuing Metis power, however, required action on the land question. The Metis wanted provincial control of land, as in the other provinces. The Canadian Government insisted on federal control of land, but agreed to special land grants for Metis families. There was hard bargaining on this question. The Government of Canada initially suggested one hundred thousand acres. The Metis pressed for three million acres. In the end both sides agreed to one million four hundred thousand acres. A negotiator for the Provisional Government recorded the understanding as follows:

> *These lands will be chosen throughout the province by each lot and in several different lots and in various places, if it is judged fitting by the local Legislature which will have to distribute these parcels of land to family heads of proportion to the number of children at the time of the land distribution; so that these lands are then distributed to the children by parents or guardians, always under the supervision of the above-mentioned local Legislature which will be able to pass laws to ensure that these lands are kept in Metis families.*

The *Manitoba Act* recognized the Metis claim to Indian title and established a system of "half-breed" grants. But elements to protect the grant were not written into the *Manitoba Act*. Section 31 read:

> *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.*

During debate on the *Manitoba Act*, Sir John A. Macdonald, who had been involved in the negotiations, described the purpose of the Half-Breed grants:

> *No land would be reserved for the benefit of white speculators, the land being only given for the actual purposes of settlement. The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused.*

In correspondence, Sir John referred to

> *. . . the general desire that the land given to the Halfbreeds should not be alienable.*

A scrip system, he said, would "be more mischievous than beneficial . . .".

The federal government had agreed to protect the Half-Breed grants. That promise was broken. When further Half-Breed grants were established by legislation in 1874, the use of scrip was authorized, though Macdonald knew the problems that would arise. The scrip was expressly non-assignable, but the government, in fact, aided scrip speculation. The government had promised to establish a Metis land base, protected in Metis hands. In fact they ensured that no land base would be established by using systems of grants that previous experience had shown would be subject to corrupt speculation.

A second major element of the Half-Breed grants scandal was delay. The historian G. F. G. Stanley has written:

> *White immigration had rushed into Manitoba after the Red River Rebellion, and the Metis soon found that a new order had descended upon them, sweeping aside their old methods of life and leaving them helpless . . . Despairing of ever receiving their land patents, many disposed of their rights for a mere song.*

The government delayed making the Half-Breed grants for differing reasons. There was a need for a census of claimants. There was confusion on eligibility criteria. There was a need for surveys. But European settlers were getting land while the Metis grants were snarled up in red tape. No grants were made under the *Manitoba Act* for six years. Since the grants were made over a four year period, it was ten years before the grants were completed. In the meantime land in Metis use was lost to new settlers. Even when certain townships were reserved for Half-Breed grants and specific lands had been chosen by Metis, European settlers moved onto the land. Instead of a Metis land base being established in conformity with the *Manitoba Act*, most of the Metis population was displaced. Riel pleaded in 1874:

What we want is the . . . proper execution of the Manitoba Act. Nothing more, but equally nothing less.

That plea was ignored.

In 1879 the *Dominion Lands Act* was amended to permit grants to Half-Breeds to

. . . satisfy any claims existing in connection with the extinguishment of the Indian title preferred by the half-breeds resident in the Northwest Territories, outside the limits of Manitoba, on the 15th of July, 1870, by granting lands to such persons, to such extent and on such terms and conditions, as may be deemed expedient.

This applied to what is now Alberta, Saskatchewan, the Northwest Territories and parts of what is now Manitoba. No use was made of this provision for six years. It took the "Northwest Rebellion" to move the government into making Half-Breed grants outside Manitoba. While the legislation provided for land grants, claimants were given scrip redeemable in Dominion lands open for homesteading. Some of the grants were in the form of "land scrip" which stated the grant in acres. However many of the grants were in the form of "money scrip" which stated the grant in dollars and had no direct connection to land. This contradicted the *Dominion Lands Act* and ensured widespread corrupt speculation. In 1924 the government started making direct cash payments, abandoning any pretense that the system was one of land grants.

The *Dominion Lands Act* said that the grants would be made "on such terms and conditions, as may be deemed expedient." As with the *Manitoba Act* the "terms and conditions" were not spelled out in the legislation and subsequently the government deliberately chose to have no terms or conditions. Every decision facilitated speculation and the loss of rights. The federal government would allow a homesteader to abandon his homestead entry in order to have a Half-Breed locate his land scrip on the abandoned homestead. The scrip claim would then be transferred to the homesteader, who no longer had to fulfill the ordinary homesteading requirements. Pearce, who had originally drafted the scrip forms in the Northwest to prevent speculation, opposed this use of scrip, for he knew

. . . of no single case where the original grantee (of the scrip) obtained the land . . .

The federal government went so far as to maintain scrip accounts for the major scrip speculators, transferring scrip credits to whatever land district the speculator requested.[10] The federal government instructed Dominion Lands Agents to post the names of scrip dealers in a conspicuous place in their offices. Further, when a private prosecution began against one of the most notorious scrip speculators in 1921, the federal government amended the Criminal Code to establish a new limitations period which killed the charges.

The Government of Canada had recognized Metis rights. Parliament had enacted legislation to make land grants to the Metis. In practice the grants were not land grants and the administration of the scheme, over and over again, ensured that Metis would lose their rights. With surprising cynicism, Sir John A. Macdonald even excused his government's delay in implementing the *Dominion Lands Act* on the basis that the *Manitoba Act* grants had been such a failure.

The federal government has not yet acknowledged the fundamental failure to implement the *Manitoba Act* and the *Dominion Lands Act* provisions which were designed to establish a Metis land base in extinguishment of Metis aboriginal title claims. That failure means that the Metis have a comprehensive aboriginal title claim on the prairies and in the Northwest Territories, a claim expressly recognized by Canadian and Imperial legislation.

The history of Metis land rights on the prairies is partially known to Canadians, because of the drama of the "rebellions" and the fascination with Louis Riel and Gabriel Dumont. But the basis for Metis land rights on the prairies was no different than that for indigenous peoples in all parts of the Americas. The issue of indigenous rights has been a continuing theme in colonial history, from the early Spanish settlements in the Carribean to the current corporate search for minerals in the Baker Lake area of the Northwest Territories. The European appetite for the lands and resources of the indigenous peoples has been continuous, but, according to the Europeans, was to be governed by principles of morality and law. An aboriginal title to land was recognized, at one time or another, by all the colonial powers — by Spain, France, Holland, Sweden and England. The French in Quebec formed political alliances with certain tribes and were able to establish their limited agricultural settlements along the St. Lawrence. The term "conquest" does not apply to French dealings with the Indians, but to the English dealings with the French. In the Articles of Capitulation of Montreal in 1760, the English agreed that the

> *. . . Indian allies of his Most Christian Majesty (of France) shall be maintained in the lands they occupy if they wish to remain there . . .*

This was not limited to reserves. Substantial parts of New France were still under Indian control in 1760. In the Atlantic region of Canada, where some of the most tragic colonial history occurred, there were a series of treaties which recognized the political and territorial rights of the Native people. In 1762 Belcher's Proclamation recognized Indian rights based on treaties and long possession in Nova Scotia and New Brunswick. The following year the Royal Proclamation of 1763 established a general recognition of aboriginal rights.

There has been considerable debate about the area to which the Proclamation applied. All would agree that the Proclamation applied to southern Ontario, where a series of land treaties were signed between 1763 and Confederation in 1867. Clear historical evidence supports the application of the Proclamation to Atlantic Canada and southern Quebec. The Plan(s) for the Future Management of Indian Affairs of 1764 and 1775 were based on the principles of the Proclamation. The Plan of 1775 was sent to the Governor of Nova Scotia for his use and two of the Plan's provisions were immediately implemented, namely the appointment of a deputy agent for Indian Affairs in Nova Scotia and the re-establishment of a truckhouse system for trading. The latter implied the existence of large tracts of land in traditional Indian use. The 1775 Instructions to Governor Carleton show the application of the principles of the Royal Proclamation to Quebec. The application of the Proclamation to Rupert's Land and the Northwestern Territory is likely, but less certain. In any case other constitutional documents establish the same principles for those areas. The Imperial Order in Council transferring Rupert's Land and the Northwestern Territory to Canada in 1870 required the Government of Canada to compensate Indians for lands

taken up for settlement. The Quebec and Ontario Boundaries Extension Acts of 1912 required treaties to be signed with the Indians of northern Quebec and northern Ontario as a precondition to settlement. And, of course, the provisions of the *Manitoba Act* and the *Dominion Lands Act* required land grants to Metis to settle their claim to "Indian title". The Imperial government gave instructions to the colonial government on Vancouver Island in the 1850's to follow the same policy in that part of Canada. In the 1870's the federal government disallowed British Columbia legislation on the basis that it did not respect aboriginal title, citing the Articles of Capitulation of Montreal in 1760 and the Royal Proclamation of 1763.

The historical evidence suggests the application of the legal principles of the Royal Proclamation of 1763 to all parts of what is now Canada.

In the tradition of recognition of aboriginal title, the rights of mixed blood peoples were acknowledged in many ways. In the treaty process there are numerous examples of the inclusion of mixed blood peoples. In the Robinson Treaties of 1850 Half-Breeds were included in the treaty population. In 1875 the government signed the Half-Breed Adhesion to Treaty No. 3. Both the federal and provincial governments recognized the aboriginal title of Metis at Moose Factory in the Treaty No. 9 area of Ontario. The federal government stated that the "Halfbreed title is of the same nature as the Indian title . . ." and asked Ontario to make land grants of 160 acres each to the Metis. In the treaty period on the prairies it is clear that mixed blood peoples were given a choice between entering treaty or receiving Half-Breed grants. By the end of the 19th century, the *Indian Act* definition of the term "Indian" was firmly in place. The legislative definition was not a purely racial definition but relied on kinship and patrilineal descent. As a result many mixed blood people have always been recognized as coming within the *Indian Act* and, therefore, in the treaty areas of Canada, as being parties to the treaties with the Crown. The *Manitoba Act* and the *Dominion Lands Act* recognized the Metis share in "Indian title" for the prairie provinces and the treaty areas of the Northwest Territories. The Privy Council Order establishing the 1899 Half-Breed Scrip Commission for the Treaty No. 8 area gave a mandate to make scrip grants to Half-Breeds in north-eastern British Columbia.

Canadian history records a legal and political tradition of the recognition of aboriginal rights. In law and practice mixed blood peoples were recognized as sharing in those aboriginal rights. The legal tradition was consistent. Government practice was uneven. In certain areas, such as British Columbia, the principles were actively resisted by local governmental authorities. In other places the principles were betrayed by the federal government, as in the implementation of the *Manitoba Act* and the *Dominion Lands Act*. It is now clearly recognized that the government's response to aboriginal rights was faulty and incomplete. It took Native peoples many years of struggle and organization to achieve even a partial recognition of that fact.

The failure of the *Manitoba Act* and the later failure of the scrip system in Saskatchewan and Alberta forced the Metis from the fertile agricultural lands of the southern prairies. The dispersal of the Metis meant that new political organizations had to be created. In Alberta the work of the Metis Association led to the Ewing Commission of 1936. Following the recommendations of the Commission, the province established a limited number of Metis colonies in northern Alberta. The province described the program

as a form of charity or relief, not as a recognition of rights. The federal government denied any responsibility for Metis and declined to be involved in the work of the Commission. Metis in Saskatchewan and Manitoba attempted to press claims against the federal government in the same period. While Saskatchewan established the Green Lake colony in 1940, no systematic response to Metis claims came from the federal or provincial governments in the 1930's and 1940's.

In the 1960's Metis made common cause with unregistered Indians in all parts of Canada. Organizations were formed in each of the provinces and territories representing both Metis and unregistered Indians. At the national level, the Native Council of Canada was established to unite the provincial and territorial organizations. Perhaps in the 1980's the political and legal issues of the 1870's and the 1930's can finally be tackled and resolved.

There have been some recent accomplishments. In 1973 the federal government stated its current policy in relation to aboriginal title claims. In certain parts of the country the government recognized a need to negotiate settlements of aboriginal title claims. The federal government has clearly acknowledged that a settlement of these comprehensive claims must include the Metis and unregistered Indian populations of the region. Unregistered Indians have been participants in the land claims negotiations in the Yukon since 1973. Though relations are currently at an impasse in the Northwest Territories, the federal government has recognized that both the Metis and the Dene have claims to aboriginal title that should be resolved. In British Columbia and Atlantic Canada the recognition or non-recognition of aboriginal title claims has been the same for registered and unregistered Indian populations. The simple fact that the *Indian Act* does not deal with aboriginal title has been acknowledged. As a result the federal government has recognized that the holders of aboriginal rights are the indigenous people, whether registered or unregistered, whether full blood or mixed blood.

The outstanding issues today are:

(a) The aboriginal title claims of both registered and unregistered Indians in Atlantic Canada and much of Quebec. These areas were not dealt with by the federal government in their policy statement in 1973. Since then, the Government has denied the existence of aboriginal title claims in Nova Scotia and New Brunswick, although there are no land cession treaties and no other form of termination of aboriginal title;

(b) The specific claims of Metis and unregistered Indians in Ontario. In parts of Ontario the rights of mixed bloods were recognized in treaties but the process was incomplete. There are a series of specific claims in particular parts of the province that demand government recognition;

(c) The unsatisfied Metis claims on the prairies under the *Manitoba Act* and the *Dominion Lands Act*;

(d) The aboriginal title claims of both registered and unregistered Indians and Metis in British Columbia, the Yukon and Northwest Territories. These claims have been acknowledged by the federal government, though little progress has been made. Only the Yukon claim may be close to a settlement.

The Native Council of Canada has made a series of declarations and proposals to the Government of Canada. These have dealt with constitutional questions, with resource rights and with socio-economic development. These proposals, together with the positions and claims formulated by the provincial and territorial organizations, are parts of the comprehensive claim of the Metis and unregistered Indian people of Canada to recognition of their aboriginal title.

A PLAN FOR ACTION

These claims are to be resolved by a political process of negotiation or through the courts. There is a legacy of bitterness and deprivation which has not disappeared and will not disappear as long as these claims persist.

There are three ways in which these questions could be approached. The first is preferable. By it, the government and representative leaders of the Metis and unregistered Indians of Canada would begin a process of negotiation designed to settle the historic claims of our people. The injustices of the past would be recognized and a willingness to plan for the future would be accepted.

A second possibility would be a joint commission of inquiry whose personnel and terms of reference would be agreed to by both the Government and the Native Council of Canada. The commission would be charged with reporting on the character of the historic claims and proposing a modern resolution of them. The commission would be unique in being a joint commission. It would also be unique in being charged, from the beginning, with developing a response to our claim.

The third possibility is a major law suit, placing the question of Metis and unregistered Indian claims before the courts of Canada.

A proper settlement of Metis and unregistered Indian claims would reflect federal constitutional responsibility. It would stimulate the distinctive potential of the Metis and unregistered Indian populations of Canada and respond to a great historic injustice.

Appendix B

ONTARIO'S FORGOTTEN PEOPLE

An Overview History of the Off-Reserve Aboriginal Peoples of Ontario

250,000 Aboriginal (Indian, Inuit and Metis) people live in Ontario. Most Ontarians would probably be surprised to learn that most of those 250,000 are Metis and non-status Indians (there are more Metis in Ontario than in any other province), and that almost half of all status Indians live off-reserves. .

When the news media carry stories about Aboriginal peoples, it is usually coverage of a conflict such the Mohawk action to defend their land at Oka, or the defense by the Bear Island Band (Teme-Augama Nation) of its land at Temagami. The occassional "success story" is also carried, but Ontario's 200,000 forgotten Aboriginal peoples have few success stories to report.

Of Ontario's 250,000 Aboriginal peoples, only about 50,000 live on reserves. Reserves are administered by band councils which are registered and operate under the federal Indian Act. Under the Indian Act, only status Indians who are "ordinarily resident" on a reserve may vote in band council elections. The remaining 200,000 Indian and Metis people live off-reserves. These people can not vote in elections for the chiefs and councils of registered bands. Most of these 200,000 therefore insist that they are not represented by the "official" (registered) band councils.

The Moose Factory Metis are an example of such a community. In 1905, the Crown negotiated a treaty (Treaty #9) with the Cree and Ojibway nations of northern Ontario. Like other treaties, it was intended to permit European settlers to share Aboriginal lands. In return for allowing settlement and economic activity on their lands, Aboriginal peoples asked for and received certain promises. Some (but not all) of these promises appear in the english language texts of the treaties. One of the most important promises - found in virtually all treaties - was that Aboriginal peoples would be allowed to "reserve" some of their lands for their exclusive possession and occupation.

The Moose Factory Metis, who today number approximately 450, were promised a reserve in 1905 at their homeland on the coast of James Bay. The Metis have lived up to their end of the Treaty #9 bargain - they have allowed non-Aboriginal settlement in their homeland - but, to date, they have no reserve and no recognition by either the federal or provincial government as an Aboriginal community. Since neither government will accept any responsibility for settling the land claims of Metis and landless Indian communities, neither government will even agree to negotiate with the Moose Factory Metis. They are simply forgotten by Ottawa and Queen's Park.

Many other Metis and Indian communities never signed treaties with settlers. They have therefore never given up any of their Aboriginal title to their traditional lands. Such "unrecognized" communities exist in the Ottawa Valley (Manomin Keeziz Algonquin), in the towns and villages around Lake Nipigon, and in northwestern Ontario, near Dryden and Kenora.

Many Aboriginal people *did* sign treaties, but were later declared "non-Indian" by the Department of Indian Affairs.

Treaties and the Indian Act

When European fur traders came to what is now called Ontario in the the mid-1600's, they often married Indian women. The descendants of these unions, who were niether Indian nor white, formed distinct Metis or "Half-breed" communities, usually on the peripheries of, and loosely aligned to, Indian bands. The Moose Factory Metis, for example, were the result of marriages of Hudsons Bay Co. staff to Cree women. By the mid-1700's, many distinct, self-governing Metis communities existed throughout Ontario.

As settlers and their businesses sought to spread out from southern Ontario, the Crown had to negotiate treaties with the Aboriginal nations of central and northern Ontario. Under British law, Canadian law, and international law, no Aboriginal lands could be used or taken without a treaty first being signed by the Crown and the Aboriginal nation affected.

At the Robinson treaties negotiations in Sault Ste. Marie in 1850, several Chiefs argued that the Crown should include the Half-breed families which were related to their respective bands in calculating reserve allocations and treaty annuities. As a result, some Metis families were included on Band lists (and therefore, if they still lived on reserves, became eligible for registration as "status" Indians when the first Indian Act appeared in 1876), while others were not included, and were therefore were forced to live off reserves.

During the 1800's, the Crown wavered between two policies towards the Metis nations, and communities, each of which was enforced at various times in various parts of the country:

1. Assimilation/Extermination of the Metis

Under this policy, the Crown and its agents would recognize only those people of Indian descent who, in the opinion of the local Indian agent, lived "the Indian mode of life". If a mixed-blood individual or family (families were often split by this categorization) were classified as "Indian" by the Indian agent, they would be eligible to live on reserve, collect treaty annuities, and be recognized as "treaty Indians" for the purposes of exercising treaty food harvesting rights. Those Indian or Metis people who were not classified by the local Indian agent as "Indian", would be considered, for all official purposes, to be "white".

Under this policy, Metis were not recognized as distinct Aboriginal peoples, and no Metis title to lands or resources was recognized. Without the opportunity to live together on reserves, this policy presumed, Aboriginal peoples would lose their cultures and distinctness to the "superior" Christian farming culture of the settlers.

The Indian Act, in all its various incarnations, declared that eventually all Indians, as a result of marriage to non-Indians, or having achieved an education in a residential school, or having lived away from their reserve for a sufficient period of time, would be classified as "civilized" and "fit for white society". They would then be "enfranchised" (stripped of status under the Indian Act and given

Canadian citizenship) as a "reward". Once stripped of status under the Indian Act, an Indian his immediate family would be forced to leave their reserve.

Thousands of today's off-reserve Aboriginal people are the descendants of those Indians who were stripped of official Indian status under this policy and forced to leave their reserve communities. Instead of surrendering their identity and assimilating into white society, however, many of these people became members of already existing off-reserve Indian and Metis communities.

2. Recognition of Metis Title

Under this policy, some Metis communities were recognized as distinct Aboriginal peoples, having Aboriginal title to the lands which they used and occupied. In Manitoba, "Half-breed title" was recognized in the Manitoba Act, by which Manitoba entered Confederation in 1871. Likewise, in 1875, the "Halfbreed Adhesion" to Treaty #3 resulted in the establishment of Canada's only Metis Reserve at Couchiching, near Rainy River in northwestern Ontario. The western Canadian Metis were offered scrip which could be traded for plots of land, or, as more often happened, sold for cash to speculators. This brief period of relatively fair dealing with the Metis was probably the result of the agressvie Riel defense of Metis lands in 1869-70. Once it determined that the Metis had been pacified (suppressed), Canada returned to its policy of cultural genocide of the Metis and non-status Indians.

3. Assimilation/Extermination - *Again*

After 1875, Canadian policy was to consistently refuse to recognize Metis title. People of Indian descent would be classified as either "Indian", under the Indian Act, or "white". The constitutional validity of this policy, by which the federal government has sought to unilaterally limit its responsibilities, and therefore the costs of honouring those responsibilities under s. 91(24) of the British North America Act for "Indians *and* lands reserved for Indians", by using a statute to arbitrarily narrow the constitutional definition of "Indian", has not yet been directly tested in the Supreme Court of Canada.

Many of those Metis who were included in the provisions of the Robinson Treaties in 1850 were later stripped of status under the Indian Act. Rather than assimilate into the dominant society, however, many have either joined the distinct Metis communities which existed before 1850 and which were excluded from the treaties, or they have developed their own off-reserve Aboriginal communities which are distinct from both registered Indian bands and the surrounding settler societies.

About 200,000 people live in these landless Aboriginal communities today. They are represented politically by "Local Associations" - known simply as "Locals" - which are linked to each other in a federation known as the Ontario Metis and Aboriginal Association (OMAA). OMAA serves its constituents from a single office in Sault Ste. Marie.

Most landless Aboriginal communities today are composed of Metis, status and non-status Indians. They have no reserves and no recognition under any law or government policy as Aboriginal communities, yet they have developed and maintained distinct and unique Aboriginal communities. Their cultures, while differing from region to region, usually combine elements of urban Metis entrepreneurship with a strong, traditional attachment to the land.

Their attachment to the land is reflected in their firm insistence that their members' natural resource harvesting traditions are not subject to federal or provincial regulation, but rather to the community's own conservation laws and regulations. Unfortunately, this position has also brought them increasingly into conflict with Ontario's Ministry of Natural Resources, which refuses to treat the members of "un-registered" Aboriginal communities as having any food harvesting rights distinct from those of non-Natives, despite clear legal authority supporting OMAA's position.

The Aboriginal and Treaty Rights of OMAA's Peoples*

In order for a community to have Aboriginal rights, it must first be found to be a *community*. That community would have an Aboriginal right to do anything that it has done since time immemorial. Some people have suggested that these requirements will prevent OMAA's communities from proving Aboriginal title or Aboriginal rights. This is not so.

No Aboriginal community, whether a registered Indian Act band, or an off-reserve community composed of some mixture of status Indians, non-status Indians and Metis, etc..., is today exactly as it was before European contact, or even as it was 100 years ago. All communities, and especially Aboriginal communities, change over time. They divide, sub-divide, amalgamate and merge. The process may be gradual or sudden. In the case of Aboriginal communities, the changes have often been imposed through the operation of the Indian Act.

Aboriginal rights belong to the descendants of the original occupiers and users of lands and their resources. OMAA's communities are just as much composed of the descendants of those people as are the registered bands.

To adopt a narrow definition of "community" - ie., one that would depend upon a community being, at some time, registered as such under the Indian Act - might produce results that render s. 35 of the Constitution Act, 1982 effectively meaningless for many groupings of Aboriginal peoples who consider themselves "communities". Such a result would conflict with the Supreme Court of Canada's declaration in the recent Sparrow case that "aboriginal rights must be interpreted flexibly to permit their evolution over time".

Aboriginal communities, in order to establish that they have Aboriginal title, and Aboriginal rights, must be composed, mainly, of descendants of the original users of the territory in respect of which the right is claimed.

* This is merely an overview description of the rights of OMAA's peoples. The Aboriginal and treaty rights of OMAA's peoples will be dealt with in witness statement #3 by Prof. Bradford Morse.

Even if the test used in the Hamlet of Baker Lake case (a trial court decision) - that a community must show that it has been an "organized society" since the time that sovereignty was asserted by England - is still good law (which must be doubted), most OMAA communities should have little trouble bringing themselves, and their ancestors, within a reasonably broad definition of "organized society". A broad definition would be one which would permit communities to evolve over time. That evolution should allow for communities to divide, sub-divide, merge, amalgamate etc... . It must also allow for some shifting of the geographical boundaries of "traditional" harvesting areas.

OMAA communities could meet such a test just as easily as most registered bands. There is no reason to expect courts to adopt a narrower definition of "community". Most OMAA communities could just as well trace their descent from original bands and tribes as present-day "official" bands.

In any event, proof of the existence of a right will depend on showing some evidence that the community, in whatever form or forms it may have taken over the years, has done a particular thing, as a community (or "communities", if a reasonably broad, "liberal" test is adopted), or that it is one of two or more communities which are descendants of an original community, or communities, which have done a particular thing.

A broad definition of "community" or "organized society" is necessary to prevent a finding that a group of people have lost their rights simply because they have ceased, for whatever reason, to be a part of the community which has been registered as a band under the Indian Act, or allowed by that status to reside on reserves. Such a result would contradict the rule (from Sparrow) that rights can only be extinguished through the "clear and plain" act of the sovereign. It would also conflict with the rule that Aboriginal rights must be allowed to evolve over time.

Every Aboriginal community is composed of families. It should be sufficient to establish that an individual has an Aboriginal right to show that he is a member of family which has, together with other Aboriginal families (which may be different from time to time) done a particular thing.

Conclusion

There is a common myth that Native communities are awash with cash from the federal and provincial governments. In fact, however, those communities which are not registered under the Indian Act as bands receive no funding whatsoever from any source to provide even basic services to their people. Since the majority of Indian and Metis people in Ontario live in un-registered, landless communities, and since the federal Minister of Indian Affairs refuses to register these communities as bands under the Indian Act, this myth is really a cruel joke.

Many popular myths hurt Aboriginal peoples. It is widely believed that Aboriginal people pay no taxes. In fact, with only two small exceptions (personal income earned on a reserve is exempt from personal income tax, and goods purchased for consumption or use on a reserve are exempt from provincial sales taxes), Indian and Metis people pay exactly the same taxes as do all other Ontarians. The majority of Aboriginal people in Ontario - those living off reserve - have no special tax treatment. In fact, they pay for government services twice, since they have already paid for government services by allowing their lands and resources to be used by settlers.

Canada's federal and provincial governments often claim that they are committed to the principle of Aboriginal self-government and to helping to settle land claims. In fact, however, they have consistently refused OMAA's offers to negotiate with the representatives of landless Indian and Metis communities. To this day they maintain the rigid policy of their predecessors and refuse to even consider the requests of the majority of Aboriginal peoples in Ontario to negotiate for a new sharing of this province's land and natural resources.

The federal government claims (with no legal or moral justification) that it only has a duty to deal with "official" registered Indian bands. The provinces, in turn, claim that the federal government has exclusive jurisdiction over all Aboriginal peoples, whether they live on or off reserves, or whether they are registered under they Indian Act or not. The result is that both levels of government "pass the buck" and refuse to deal in good faith with Ontario's 200,000 off-reserve Aboriginal peoples. This has been going on for over 100 years. The result, which is well

known to both governments, is that Ontario's landless Indian and Metis peoples are this province's poorest and most oppressed people.

To Ontario's landless Aboriginal peoples, the ongoing refusal of Canada and the provinces to deal fairly with them is at best insulting. At worst, it is criminal. Aboriginal peoples continue to peacefully allow *their* lands to be used by non-Aboriginal peoples for forestry, mining, settlement etc... In return, they receive nothing but endless promises and speeches from non-Native politicians. (During and immediately after the Oka crisis, for example, federal ministers Kim Campbell and Tom Siddon promised that their government would begin real negotiations with Aboriginal peoples as soon as the barricades came down. That, of course, was just another lie. They still refuse to negotiate with OMAA, or even to meet with OMAA's leadership.)

No compensation is paid to OMAA's peoples for the use of their lands and resources - not even the crumbs paid to their reserve-based relatives. Meanwhile, as enormous wealth is daily extracted (stolen) from their lands before their eyes - lands which they have never surrendered - they live in poverty.

SECTION I

TRADE

Since the 1800's the Metis played a significant role in the commerce of their respective regions. Indians viewed employment as a form of slavery, such was not the case with the Metis. As a result of being the principal handlers of trade goods whether as a labourer or post owner the Metis were viewed as essential 'middlemen' in the trade process. Although trade policy may have been set outside the region, local trade practices were largely defined by the Metis. The period of rivalry between the H.B.Co. and N.W.Co. pushed the Metis to a position of prominence in the world of trade, a position of power which was never regained by these corporations after their amalgamation. By the mid-1800's over a third of all commissioned officers were Metis. The most successful trading posts were those either controlled by or owned by the Metis.

Prior to European contact trade was essential to Indian survival. A complex system of exchange with ceremonial significance arose which set the stage for their reaction to European influence. The Metis culture arose from these values, and were implicit in their dealings with other Aboriginal groups. In many significant ways we practice trade according to the values of the Aboriginal world. As a result we often built on a base of mutual support within the community as well as over extended regions. We [illegible] develop another set of values which were applied to Europeans. The differences became very significant to the development of their leadership role and of particular importance at the time of treaty signing.

LEADERSHIP

To avoid misinterpretation it must be stressed that the term [illegible] is [illegible] in the Aboriginal sense of the word [illegible] the master-slave relationship favoured by the European [illegible] existent.

In the process [illegible]

traditional chiefs who had previously represented extended hunting groups, lost much of their leadership role. The Metis sphere of influence [illegible] that their [illegible] function in that role. Metis males married women from the leading families in the communities around which they operated. This further legitimized their role as community leaders. Metis families grew and encompassed a wide range of [illegible] communities, further verifying the leadership position.

PRIOR TO TREATY

Europeans had benefitted immensely from the fur trade and the harvesting of resources in eastern Canada. They didn't settle as a people in northwestern Ontario, so actual control of the resources still lay with the residents. The fur trade was not of international significance by the early 1800's. Other resources were.

Commercial fishing was becoming a significant economic activity. In areas such as Sault St. Marie and the Lake of the Woods the colonial merchants quickly realized that their main competitors in the U.S. were reaping the benefits. In essence they had no control, and attempted to step in and take over. In the interim the locals were having problems with their American cousins as well. Often the situation heated up. Violence occurred on several fronts. The sturgeon fisheries in Kenora were almost decimated. As one might expect the Metis were on the forefront defending their homeland.

Several characters were involved in the creation of the treaties in the affected areas, one of the most notorious was Robinson. His mining interests are well documented. Although appointed as the government's representative to negotiate the treaty, the [illegible] in Michipicoten [illegible] ended up in Robinson's hands. [illegible] was quickly set up and digging began. Of course the [illegible] community objected. [illegible] Robinson and his [illegible] they had the right to do whatever they pleased [illegible] have [illegible] a reputation for [illegible] were [illegible], and Robinson [illegible].

Robinson was typical in that he [illegible] of the [illegible] family [illegible]

Large tracts of land inhabited by the Metis, have been subject to the treaty process. In many cases the Metis were not [illegible] to the agreement. Other aboriginal inhabitants had negotiated on a treaty representing their 'share', but not that of the Metis. [illegible] with other aboriginal people [illegible] as being vested in terms of usage. This often means two or more groups inhabiting the same or overlapping territories which does not negate the vesting of title in either group. The Metis still hold the right of unextinguished aboriginal title in several [illegible] areas.

Section II

SUMMARY

Prior to treaty the Metis [illegible] relationship with other Aboriginal [illegible] with [illegible]. The [illegible] treaty [illegible] the most [illegible] recognize the nature of [illegible]. They [illegible] direct negotiations with the [illegible] with the Indian Act [illegible].

The Metis have continued to grow and develop in Ontario. Despite the efforts of the British and then the Canadian governments the Metis have striven to exercise their aboriginal rights. Each [illegible] represents a gain. Resolving issues relating to the signatories of treaty is often an extension of the original process. The Metis were stewards of large tracts of land and have never transferred that responsibility or right to anyone else. Eventually the Metis will [illegible] what their entitlement.

It should be obvious that the Metis can't be legislated out of existence. Certainly won't disappear as the result of some form of osmosis. In the long term the Canadian government will have to come to grips with the situation.

Throughout the years the Ontario Metis have been [illegible] as though they are invisible.

APPENDIX "C"
SELF GOVERNMENT

Appendix C

INTRODUCTION

The Metis and Aboriginal people of Ontario live in many different geographic, social and cultural environments. Consequently, it is necessary for OMAA to develop a number of models for self-government to meet the varied needs and aspirations of the Metis and Aboriginal people of Ontario wherever they live. The following models are suggested for purposes of discussion. These models, after preliminary discussions will be developed and expanded into a discussion paper on Models of Self-Government which can be used for purposes of consultation with OMAA members, and in negotiations with Canada and Ontario.

MODELS OF OMAA SELF-GOVERNMENT

1. LAND-BASED OMAA COMMUNITY

- a self-governing Metis/Aboriginal community on its own Metis/Aboriginal land base
- some parallels may be found to the Metis settlements in the Province of Alberta
- the land is owned either by the community itself or by a regional aboriginal corporation. The issue of who should own the land will be the subject of further discussion.
- government by an Aboriginal Community Council
- each aboriginal community will have its own local constitution
- community government will exercise municipal functions, and may also exercise some provincial and federal jurisdiction

2. ABORIGINAL CO-MANAGEMENT ZONES

- in some parts of the province Metis/Aboriginal people have an interest in land and resource-based activities outside of their community
- such communities could negotiate a Metis/Aboriginal lands and resources zone
- in these zones there would be Metis/Aboriginal participation in the management of designated activities, e.g. trapping, fishing, land use planning, etc. the types of powers and the structure of the institutions required for management of these zones would have to be developed.

3. ABORIGINAL INSTITUTIONS OF SELF-GOVERNMENT IN URBAN AREAS

- in certain geographic areas the development of aboriginal Institutions is a pragmatic approach to self-government in an urban environment
- institutions could be developed in areas such as economic development, housing, social services, child and family services, health, legal services, etc.
- such Institutions might be developed in co-operation with other aboriginal groups, e.g. Native Women, Friendship Centres, Urban Status Indians, etc.
- some such urban aboriginal institutions already exist, e.g. Anishnawbe Health, Aboriginal Legal Services, etc. in the City of Toronto

4. INTEGRATED GOVERNMENT MODELS

- in areas where there is a significant proportion of aboriginal people it might be possible to develop an integrated aboriginal/non-aboriginal form of local government
- one possible form that this could take would be the establishment of designated aboriginal seats on a local government council
- many options are possible which would allow for participation of aboriginal people in the government of their local area

5. METIS/ABORIGINAL REGIONAL INSTITUTIONS

- in some areas it may be desirable to establish aboriginal institutions which will serve a number of Metis/Aboriginal communities, e.g. an Aboriginal Health Authority might serve all of the aboriginal communities in an OMAA zone
- such Institutions could be under the direction of a "zone council" or could have separate and independent boards of directors

This list is only a beginning of the possible models for Aboriginal Self-Government for OMAA members. It is proposed to refine these models through discussion with OMAA members in order to develop models for presentation to Canada and Ontario.

OMAA GOVERNMENT STRUCTURE

- How does OMAA relate to or have input into aboriginal self-government models and institutions?
- The future function and structure of OMAA will require extensive development
- OMAA will continue to provide support to OMAA communities, to carry out political functions on behalf of OMAA, and to work in the area of program development, the establishment of regional and local corporations, etc.
- OMAA may develop into a governmental body exercising certain responsibilities on behalf of all OMAA members. For example, certain functions may be exercised by OMAA communities or local OMAA institutions, while some functions may be exercised on behalf of OMAA as a whole. This issue requires extensive discussion.
- As OMAA Self-Government develops there may be a need for changes in the representation of communities, local institutions, etc. at the OMAA level. e.g. The head of a community council of an OMAA community may need to be appointed, as a representative to OMAA. Similarly, representatives of aboriginal institutions may also need representation at the OMAA level.
- As self-government is developed OMAA may need to consider changes to its current executive structure, and the desirability of creating a small working board, which might exercise cabinet-like functions.
- Considerable discussion will be required to develop appropriate relationships between OMAA locals, self-governing institutions, and aboriginal community governments.

ABORIGINAL SELF-GOVERNMENT

AND

THE ADMINISTRATION OF JUSTICE

ABORIGINAL SELF-GOVERNMENT

AND

THE ADMINISTRATION OF JUSTICE

The administration of justice involves, essentially, the enforcement of community standards and laws reflecting those standards. In order to be self-governing, a community must be able to not only make its own laws, but enforce them. A self-governing community will have it's own systems of policing, civil and criminal courts, and corrections. We should not be deterred by the complexities of current constitutional divisions of powers as between the federal and provincial governments with respect to the establishment and administration of justice systems and courts (tripartite agreements can address jurisdictional questions).

TRIBAL COURTS IN THE U.S.

Three types of Aboriginal courts exist in the United States:

1. Traditional Courts;
2. Courts of Indian Offenses;
3. Tribal Courts.

1. Traditional courts are operated by the Pueblos Indians of the Southwestern U.S. These courts operate more or less as they have since time immemorial and enforce traditional (customary) law.

2. The Courts of Indian Offenses were established late in the 19th century. The Courts of Indian Offenses were intended to assimilate Aboriginal peoples. The Courts enforced laws intended to destroy traditional cultures and break up communal land holdings into individual land allotments. The courts, some of which still exist, are entirely under the control of the Bureau of Indian Affairs.

3. The U.S. Supreme Court recognized the inherent right of Indian tribes to self-government early in the 19th century. The Indian Reorganization Act of 1934 gave some official recognition to the right of self-government. Under the Act each tribe could establish it's own tribal government and establish a court to enforce laws of that government. Most tribes decided to replace their Courts of Indian Offenses with Tribal Courts. Unfortunately, the tribes were not given the resources to research and codify traditional laws and court structures. Instead, they were given model civil and criminal codes. Under the codes, which most tribes adopted completely, the Tribal Courts operated very much like the Courts of Indian Offenses (like most non-Aboriginal courts). Recently, however, most tribes have re-written their laws and restructured their courts to reflect their respective traditions and customs.

Judges are appointed or elected by the Tribes.

Under the Major Crimes Act and the Indian Civil Rights Act of 1968, and because of their inherent jurisdiction, Tribal Courts have jurisdiction over Indian offenders, where an offence has been committed against another Indian on a reserve, unless the offence is one of the 14 listed in the Major Crimes Act. Tribal Courts have no jurisdiction over non-Indians, whether on or off-reserve and have no jurisdiction off reserves, except where a member of a Tribe is accused of breaching tribal fishing laws within a treaty area.

For civil matters, Tribal Courts have much broader jurisdiction. Tribes have jurisdiction over marriage, divorce, child welfare, estates, taxation, licencing, real property and commercial transactions. The tribal governments can make laws in relation to these matters and the Tribal Courts can enforce them. The civil jurisdiction of the Tribes applies to both Indians and non-Indians within the external boundaries of the reserve. In 1981 the U.S. Supreme Court said that "the Tribe retains inherent authority over non-Indians when their conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the Tribe."

In child welfare matters (ie. placement or adoption) the Tribal Courts have jurisdiction over all children of the Tribe, whether they live on or off reserve.

It is important to note that the Tribes have complete jurisdiction over the determination of their membership.

ABORIGINAL COURTS IN AUSTRALIA

1. Queensland

In the State of Queensland, Australia, 14 Aboriginal Trust areas (reserves) have Aboriginal courts. These courts have jurisdiction to enforce local by-laws and to resolve disputes between members of the community. In addition to enforcing laws of the Local Aboriginal Councils, the courts, staffed by two Aboriginal Justices of the Peace, can apply traditional (customary) law.

The Local Aboriginal Councils can also establish their own police forces.

The Aboriginal Courts have jurisdiction over all residents of reserves (whether Aboriginal or non-Aboriginal) but cannot imprison offenders for breach of local bylaws.

In all other ways the Aboriginal Courts in Queensland are

like any other lower courts. A person convicted by an Aboriginal Court has a right of appeal to a higher court in the general (non-Aboriginal) court system. As a result, according to the Australian Law Reform Commission, Aboriginal peoples have very little real control over the courts. The courts are therefore unable to take into account local customs and traditions since they are required to operate, essentially, like any other lower courts in the State. Furthermore, the bylaws which are enforced by the Aboriginal Courts may be vetoed by the Queensland State Government. The State government therefore has the power to dictate the laws of Aboriginal communities.

2. Western Australia

A similar Aboriginal court system exists in the State of Western Australia. In Western Australia regular Justice of the Peace courts are staffed by Aboriginal Justices, trained by non-Aboriginal Justices of the Peace. As in Queensland, the courts enforce bylaws of local Aboriginal Councils relating to entry on reserve lands, sale or consumption of alcohol, disorderly conduct and possession of weapons. As in Queensland the bylaws apply to all persons within the reserve lands. The bylaws may provide for imprisonment for up to 3 months.

As in Queensland, there is a right of appeal to higher, non-

Aboriginal courts. The Western Australia State Government also has a veto over community bylaws. Thus, according to the Australian Law Reform Commission, Aboriginal communities have very little real control over the administration of justice. It is therefore almost impossible for the Aboriginal courts to incorporate or reflect local customary laws.

3. The Northern Territory

In local courts in the Australian Northern Territory, Aboriginal elders advise local judges and justices of the peace on sentencing where a member of their community is involved. Other members of the convicted person's community and family are also entitled to advise the court as to sentencing. An anthropologist is employed to assist the elders and the community in gathering information for the court about the community and traditional methods of law enforcement. Two local Aboriginal trainees work with the anthropologist and will eventually replace the anthropologist.

The Yirrkala community in the Northern Territory of Australia has a traditional justice system. The Law Council of the community, composed of representatives of the clans which make up the community, has responsibility for enforcing local customary laws and traditions and resolving disputes between members of the community.

The Council itself is not a court. In each case the Council appoints judges who may be any adult members of the community. In addition, when a member of the community comes before a court of the general (non-Aboriginal) justice system, the Yirrkala Law Council acts as an advisor to the court.

All decisions of the Yirrkala Law Council are submitted to public meetings of the community for final approval.

The Law Council has broad powers to impose penalties (sentences) but the emphasis is on compensation (restitution) and community service orders rather than imprisonment.

VILLAGE COURTS IN PAPUA NEW GUINEA

Papua New Guinea moved toward national independence in the 1970's. An important part of the movement to independence was the re-establishment of the indigenous legal system. The Papua New Guinea Constitution therefore recognizes the right of Aboriginal communities to establish their own justice systems. The courts have the power to "ensure peace and harmony in the area for which it is established by mediating in, and endeavouring to obtain, just and amicable settlement of disputes". In addition to mediating, the court has

jurisdiction to try both civil and criminal disputes. The court can enforce written laws or local customary law. The courts exist in both rural and urban areas. In urban areas the accused has, in some cases, a right to choose to be tried by the general (non-Aboriginal) court system.

The Australian Law Reform Commission studied the Papua New Guinea Aboriginal court system and found it to be the most successful system of Aboriginal justice. The Commission found that the Papua New Guinea system benefitted from the fact that the village courts are established by and for indigenous communities. The Commission was also impressed by the fact that the courts rely on local customs rather than a written code and emphasize mediation rather than trials.

ABORIGINAL JUSTICE ARRANGEMENTS IN CANADA

The Indian Act (section 107) allows the Minister of Indian Affairs to appoint Justices of the Peace to enforce Band bylaws on alcohol and traffic offences which have been approved by the Minister of Indian Affairs. These J.P.'s can also enforce the provisions of the Indian Act itself and some sections of the Criminal Code.

Many believe that section 107 Courts have historically been used by the Department of Indian Affairs as instruments of assimilation. They have therefore been adopted by very few

Bands.

It has been suggested that Indian Band Councils could probably also use sections 81 and 83 of the Indian Act to establish courts. These courts would also be subject to the limited jurisdiction given to Bands under the Indian Act (by-laws must be approved by the Minister and can only be made on a narrow range of matters, etc...).

Courts established under any parts of the Indian Act can only exercise jurisdiction over status Indians on reserves.

Policing

The Special Constable program began in 1975. Special Constables are appointed by the O.P.P. under the Police Act (s. 69), usually upon the recommendation of the Chief and Council of an Indian band (until recently there has been no requirement that the O.P.P. consult with bands before appointing Special Constables).

The Special Constables enforce band by-laws, the Criminal Code and the Young Offenders Act. Generally, they work only on reserves.

Under a recent agreement between Ontario, Canada and the Chiefs of Ontario, a "First Nations' Police Commission" will

be established. The FNPC will be made up mostly of representatives of Indian bands and will take over from the Ontario Police Commission the role of employer of Special Constables.

THE NATIVE COURT WORKER PROGRAM

This program is not a self-government arrangement, but rather it is designed to assist Aboriginal people in the general criminal law system. Court workers assist individuals in understanding the legal system and the services available to them (ie. legal aid, treatment programs and counselling). In some areas the court workers also provide the court with pre-sentence reports, probation and parole supervision and translation services. In Ontario the services are available to both adults and young offenders. In Ontario, the costs of the program are shared 50/50 by the federal and provincial governments.

The court worker program is administered in Ontario by Indian Friendship Centres and is available to all Aboriginal peoples (many OMAA communities have complained, however, that priority is given to status Indians).

In Alberta the Native courtworker program (through the Native

Counselling Services of Alberta) operates some correctional services, an Aboriginal supervision parole program, probation supervision programs and young offenders open-custody group homes. The NCSA also runs summer camps, cultural programs and youth employment projects.

In B.C., courtworkers assist Aboriginal peoples in family court, as well as in criminal court.

THE CREE-NASKAPI AGREEMENT

The 1975 Agreement between the James Bay Cree and Naskapi and the Inuit of Northern Quebec and the governments of Quebec and Canada includes a section (Article 18.07) which requires the government of Quebec to appoint judges for the region who must be "cognizant with the uses, customs and psychology of the Cree". All judgments and other proceedings must be translated into Cree. The Agreement also calls for the establishment of a local juvenile corrections facility.

According to the Cree and Inuit (and the staff of the Circuit Court - according to the report by the Canadian Bar Association Committee on Imprisonment and Release entitled "Locking Up Natives in Canada"), very little has changed because the Cree and Inuit communities still do not have the power or resources to establish truly indigenous justice

systems. They have proposed that the jurisdiction of the Aboriginal governments to establish their own criminal and young offender justice systems should be recognized. They point out that no amount of Aboriginal staff and Aboriginal judges will change the fact that the Canadian and Quebec courts systems are alien to the Aboriginal communities. A judge of the Circuit Court in northern Quebec has recommended that local Aboriginal governments should establish justice committees which would have jurisdiction over most criminal matters, provided the accused admits responsibility for his offence. The local justice committees would then be able to use mediation or make orders of compensation (restitution) and community service instead of simple "punishment" of offenders. The justice committees would also be able to develop their own procedures.

SENTENCING

In parts of Australia and in some parts of Canada (ie. Christian Island, Ontario), it has become common for courts to rely on the advice of representatives of an Aboriginal community, usually elders, in sentencing offenders. Typically, these arrangements allow offenders to be sentenced to probation which includes family and community supervision and community service or restitution instead of imprisonment.

Studies have found that these arrangements have been more

successful in reducing crime within Aboriginal communities than has the general court system. Furthermore, community involvement in sentencing allows for the strengthening of community values and morality.

PRE-TRIAL DIVERSION UNDER THE YOUNG OFFENDERS ACT

Section 4 of the Young Offenders Act allows the Attorney General of a province to authorize alternative programs (instead of judicial proceedings). An accused young offender must consent to participation in the program and must admit responsibility for the alleged offence. Several such diversion programs exist in Canada.

The South Island First Nation Tribal Council of Vancouver Island has adopted a "Native Alternative Youth Program" under the Young Offenders Act. Under this Program a Tribal Court composed of 5 elders (alternates are appointed in the event that one or more of the elders has a conflict of interest) and enforces the customary law of the Coast Salish Nation. The Tribal Court first decides whether the accused offender is eligible for the diversion program. Both the victim and the family of the accused offender have a right to participate in this process. A "Diversion Coordinator" acts as a liaison between the local Crown Attorney's office and the Tribal Court.

If the young offender is accepted by the Tribal Court for the Diversion Program, an elder will be appointed by the Tribal Court to "sponsor" the young offender. The parents or guardians of the young offender must approve of the elder. The elder also has responsibility for making progress reports to the Diversion Coordinator.

The South Island Tribal Court is regional - having jurisdiction over 5 Aboriginal communities (bands) - and handles cases involving either status or non-status Indian young offenders.

RECOMMENDATIONS

1. Self-government agreements should recognize the jurisdiction of Aboriginal communities to establish their own justice systems.

2. Aboriginal communities should have the authority to make all decisions with respect to the sentencing of Aboriginal offenders.

3. Self-government agreements and legislation should recognize the authority of Native communities to establish and maintain their own correctional facilities, parole and probation programs.

4. Aboriginal inmates in federal provincial correctional institutions (prisons) should have the right, recognized in legislation, to practice traditional spiritual ceremonies, with the assistance of elders.

5. Aboriginal communities should have the right to be represented at parole hearings and to make presentations with respect to proposals for the reintegration of offenders to their communities.

OTHER MATTERS RELATED TO THE IMPLEMENTATION OF ABORIGINAL JUSTICES SYSTEMS

1. Should individual rights be protected by a right of appeal, or a right to elect an alternative form of trial? Should appeals be to an Aboriginal court (ie. the Aboriginal Court of Ontario) or to a non-Aboriginal court?

2. Should Aboriginal communities determine the procedures to be followed by their courts?

3. Should Aboriginal communities themselves appoint judges and train them?

4. Should defendants in Aboriginal courts have a right to be represented by legal counsel?

5. Should Aboriginal courts have the power to act as mediators, in addition to their other powers?

6. Should legislation require that the general (non-Aboriginal) courts officially recognize Aboriginal customary laws with respect to family matters, estates and inheritances, and in exercising discretion as to whether an accused should be prosecuted, and in sentencing?

Appendix D

Child Welfare: The proportion of Indian children in care has risen steadily to more than five times the national rate.

Education: Only 20 per cent of Indian children stay in school to the end of the secondary level; the comparable national rate is 75 per cent.

Housing: Nearly 19 per cent of on-reserve homes have two or more families living in them; these conditions affect 40 per cent of all status Indian families.

Facilities: In 1977, fewer than 40 per cent of Indian houses had running water, sewage disposal or indoor plumbing facilities; the national level of properly serviced houses is over 90 per cent.

Income: The average income of Indian people is one-half to two-thirds of the national average.

Unemployment: The unemployment rate among Indian people is about 35 per cent of the working age population; in some areas it is as high as 90 per cent.

Prisoners: Native people are over-represented in proportion to their population in federal and provincial penitentiaries. In Manitoba, Saskatchewan and the North, Native people represent more than 40 per cent of the prison population. The proportion of Indian juveniles who are considered delinquent is three times the national rate.

Death Rate: Despite improvements over the past 10 years, the death rate among Indian people is two to four times the rate for non-Indians.

Causes of Death: Accidents, poisoning and violence account for over 33 per cent of deaths among Indian people, as compared with 9 per cent for the Canadian population as a whole. Indian people die from fire at a rate that is seven times that for the rest of the Canadian population.

Violent Death: The overall rate of violent deaths among Indian people is more than three times the national average.

Suicide: Indian deaths due to suicide are almost three times the national rate; suicide is especially prevalent among Indians aged 15 to 24.

Infant Mortality: The infant mortality rate (up to the age of four weeks) among Indian children is 60 per cent higher than the national rate.

Life Expectancy: If an Indian child survives its first year of life, it can expect to live 10 years less than a non-Indian Canadian. The life expectancy of Indian women, for example, is 66.2 years, while non-Indian women can expect to live 76.3 years.

Hospital Admissions: Indians use hospitals about 2 to 2.5 times more than the national population.

GOAL #1 SOCIAL DEVELOPMENT

To provide social and health programs to our off-reserve Aboriginal and Metis people.

OBJECTIVES

1.1 Child Care

- Hire Aboriginal social worker
- Hire Native teacher or counsellor

1.2 Welfare

- Implement a suicide prevention programme
- Secure money for workshops to educate our people

1.3 Family Violence

- Coordinate and present more awareness workshops
- Hire more aboriginal counsellors
- Develop our own programs to combat family violence.

1.4 Teens

Develop centre for the teens so there is a safe place for them to go for recreation and referral (in instances of drug or alcohol abuse problems).

1.5 Other

Develop a Metis museum and archives
Implement more public relations
Develop a membership drive and a Metis and off-reserve registry.

GOAL #4 - HOUSING

To provide adequate housing and homes for Metis and off-reserve Aboriginal people.

OBJECTIVES

4.1 Meet with the Kenora Housing Authority to see how they are organized.

4.2 Develop a series of steps to gain control of our own housing construction.

4.3 Work toward the establishment of a housing trust fund so there are funds there when our youth need them.

4.4 Find out how to use the OMAA program for Metis and off-reserve Aboriginal peoples housing.

GOAL #5 - HEALTH

To ensure the highest level of health care for all Metis and off-reserve Aboriginal people.

OBJECTIVES

5.1 Develop plans for a home for elders and secure funding.

5.2 Research available medical, dental and eye care plans which could be made available to our members.

5.3 Inform our members of travel grants available for health purposes.

5.4 Present workshops of health problems.

5.5 Hire a staff person with responsibility for health issues.

5.6 Institute preventative programs on issues such as aides, sex counselling, etc.

GOAL #6 - EDUCATION

To provide information and support to our youth and adults in education and career advancement.

OBJECTIVES

6.1 Hire an Aboriginal guidance counsellor

6.2 Appoint a Wesakwete spokesperson who will be informed and speak out on Aboriginal education issues.

6.3 Educate the educators, so they know who the Metis and off reserve people are.

6.4 Apply for funding to enable the continued education for Metis and off-reserve Aboriginal people.

6.5 Work to elect Aboriginal directors on school Boards.

6.6 Develop Adult Education projects and search out appropriate funding sources.

GOAL #7 - ECONOMIC DEVELOPMENT

To become actively involved in the district and regional economy.

OBJECTIVES

7.1 Lobby government to get more control of our natural resources.

7.2 Research funding sources for business start up.

7.3 Present workshops on economic development.

SOCIAL DEVELOPMENT

	Need	Solution
1.	Child Care	
	- Aboriginal Day Care centre - Drug and Alcohol Rehabilitation Centre (everybody)	- Hire Aboriginal social worker - Hire Native teacher or counsellor
2.	Welfare	
	- suicide	- suicide prevention programme - money for workshops to educate our people
	- family violence	
3.	Family Violence	- more awareness workshops - more aboriginal counsellors - develop our own programs
4.	Lack of facility for pre-teens (no place for them to go) (drug and alcohol sexual abuse problems)	- develop centre for the teens
Other		
	- Archives are needed - strengthen our locals, members - Metis and off reserve registry is needed	- develop a Metis museum - more public relations - develop a membership drive - negotiate for funding, government and private for programs
	- funding is a major problem	

HOUSING

	Need	Solution
1.	Financial Obligations - CMHC maintenance of dwellings	- meet with East Kenora Housing (how are they set up)
2.	No land base to build houses	- more funding, get control of building our own houses
	- no funding	- organize so funds are there for our youth
3.	Lack of housing Lack of property (subdivide: government does not want to subdivide unorganized territory)	- lobby the government for for funding and land base
4.	Difficulty in getting a down payment	- program to implement a housing program for Metis and off-reserve people

HEALTH

	Needs	Solutions
1.	Elders Nursing Home in Zone Medical Plans; dental and eye care Travel grants -	- find funding to develop - find funding
2.	Lack of funding in Wesawkwete	- find funding money for the travel grants
	Dollars, travel grants	- money will stay in Wesakwete
3.	Health problems	- have workshops on Health problems
	Lack of education amoung our people	- Zone 1 to have staff people educated on health issues
4.	Health problems (aides, etc) counselling etc., sex	- preventative programs education

EDUCATION

	Needs	Solutions
1.	Get control of funding for Metis and off-reserve students Aboriginal culture awareness class in school	- Aboriginal guidance counsellor in school systems - Aboriginal director on the school Board
2.	We, as Metis, cannot separate No funding for off-reserve students More information on educational options, programs, etc. No funding for an adult to return to school	- Metis Counsellors etc sit on school boards - spokesperson on Aboriginal education issues
3.	Need more funding for Metis and off-reserve people Continued education for Metis and off-reserve Aboriginal people No support services for metis (ie, counsellors) Lack of educated teachers (do not understand the Metis culture)	- educate the educators, so they know know who the Metis and off reserve people are - apply for funding - Aboriginal counsellor in school
4.	Funding of Adult Education	- develop Adult Education projects - Metis on school boards

APPENDIX "E"
ECONOMIC ISSUES

Appendix E

ECONOMIC DEVELOPMENT

ECONOMIC DEVELOPMENT

Independent, self-governing communities must have strong economies. Aboriginal communities must become, once again, economically self-reliant if they are to become politically independent and self-governing.

THE CREE/NASKAPI AGREEMENT

The Cree Regional Authority

The Cree Regional Authority is composed of 16 members - 2 from each of the Cree bands which signed the James Bay and Northern Quebec Agreement. The Authority appoints members to, and coordinates the activities of:

1. The Cree School Board;

2. The Cree Regional Board of Health and Social Services;

3. The Cree Housing Corporation;

4. The Cree Construction Company;

5. The Cree Arts & Crafts Association (Cree-ations); and

6. Air-Creebec.

The Authority, when asked to do so, also represents the interests of the 8 Cree bands in negotiations with Canada and Quebec. The Authority may also establish training courses and commission feasibility studies for economic development projects.

The Authority is primarily financed by the Board of Compensation. The Board of Compensation administer the Cree portion of funds ($225 million to be paid out over 20 years to

the Cree and Inuit of northern Quebec) paid to the Cree in the land claim settlement (the Cree/Naskapi Agreement). Funding for the administration of federal programs delivered by the Authority isprovided by the federal government.

The land claim settlement cash ($225 million) was paid by Canada, Quebec, and Quebec Hydro for the use of Cree and Inuit lands for the construction of the James Bay Hydro Project.

Income Security Program for Cree Hunters and Trappers

The Cree/Naskapi Agreement provides that, as far as possible, Aboriginal peoples should be able to pursue traditional employment (hunting, fishing and trapping). Under the Agreement, anyone who relies primarily on hunting, trapping and fishing for his income, receives a cash subsidy for each day spent harvesting food or furs. The program is administered by the Cree Hunters and Trappers Income Security Board. The Board has 6 members - 3 appointed by the Cree Regional Authority and 3 by the Government of Quebec.

The Board has a staff of 8 local administrators (one for each Cree community) who are supervised by a Director responsible to the Board. The program is financed by the Government of Quebec.

Quebec must provide payments at least equal to amounts payable under general provincial welfare programs. A beneficiary cannot receive both general welfare payments and payments under the Hunters and Trappers Income Security Program.

The Agreement also provides (sections 28 and 29) that the federal and provincial governments will finance economic and social development projects for Native people who are displaced from their traditional hunting, trapping and fishing economies as a result of industrial developments. The governments are also to provide job training programs and assistance in job placement for displaced Cree hunters, trappers and fishermen.

The Board of Compensation

The Board of Compensation manages the cash paid to the Cree as a result of the land claims settlement of 1975. In addition to administering and investing the funds paid in the land claims settlement, the Board has a mandate to undertake programs for:

1. The relief of poverty, and the advancement of education of the Crees; and
2. The development, and other improvements of the Cree communities within the territory.

Under the Agreement, 25 percent of the cash settlement may be invested in corporations which are subsidiaries of the Board. These subsidiary corporations are profit-making businesses, but their profits are to be used primarily for social programs. The remaining 75 percent of the cash settlement may be invested in any Cree businesses or social programs.

The Board of Compensation has 22 members - 2 from each of the 8 Cree bands, 3 appointed by the Cree Regional Authority, 2 appointed by Quebec and 1 by the federal government.

The Makivik Corporation

The Makivik Corporation administers the funds paid to the Inuit of northern Quebec as a result of the James Bay Land Claims Agreement (the James Bay and Northern Quebec Agreement).

The Corporation can invest in wholly-owned subsidiaries or in privately (Inuit) owned economic development corporations.

The Corporation has a board of directors composed of representatives of the Inuit communities of northern Quebec plus representatives of the Government of Quebec and the federal government. Makivik also has a research department which focuses on economic development projects related to wildlife management and renewable resource development. The Corporation also has a

mandate to provide education and technical training programs.

The Aboriginal Development Commission (Australia)

The Commission is an Aboriginal-controlled body which administers an annual budget in excess of $60 million. The fund can be used to assist Aboriginal-controlled economic development initiatives or the purchase of lands for Aboriginal communities. The Commission is to eventually become self-sufficient by investing part of its funds in secure capital investments.

Appendix F

EDUCATION

EDUCATION

The school system has been one of the primary tools in the destruction of Aboriginal cultures. The survival and growth of Aboriginal nations depends upon the creation of new, Aboriginal-controlled school systems.

THE CREE/NASKAPI AGREEMENT

Section 16 of the James Bay and Northern Quebec Agreement recognizes the jurisdiction of the Cree School Board over elementary, secondary and adult education. The Cree School Board serves 8 isolated communities. It has jurisdiction over school curriculum, but generally follows the provincial (Quebec) grading system.

Curriculum is to be consistent with the "Cree philosophy of education". A Committee on Cree Education, appointed by the Board, is responsible for advising the School Board on whether school programs are in fact consistent with the Cree philosophy of education.

The Cree School Board operates under the Quebec Education Act, except where that Act is inconsistent with the Cree/Naskapi Act. (The Cree/Naskapi Act provides that the Cree schools will promote the Cree language and culture. The Act also provides for some direct parental control over schools and a modified school year to accomodate hunting and

trapping communities).

Each of the 8 Cree communities elects one member to the Cree School Board, and one member is appointed by the Grand Council of the Crees. Each school in the system (whether elementary or high school) has a "school committee" composed of parents elected by a general assembly of the parents of the students attending the schools, plus a representative of the local Band Council.

The area committees control the staffing of schools and administer a budget which is determined for each school by the Cree School Board. The School Board negotiates funding, which is provided jointly by the government of Canada and the government of Quebec and distributes that funding to the schools within the Cree school system. The federal government contributes 75% of the budget, and Quebec pays the remaining 25%. The Cree School Board is not required to collect property taxes.

Under Section 16 of the James Bay and Northern Quebec Agreement, the Cree School Board has responsibility for the following:

1. The development and selection of courses, textbooks and teaching materials designed to preserve and transmit the language and culture of the Aboriginal peoples;

2. Negotiating arrangements with universities, colleges and other institutions or individuals for the development of the courses, textbooks and teaching materials for the programs offered by the Cree School Board;
3. The establishment of courses and training programs to qualify Aboriginal persons as teachers;
4. Negotiating agreements with universities, colleges, institutions or individuals to provide training for the school board's teachers and potential teachers;
5. The use of Cree as a language of instruction along with a choice of English or French;
6. The hiring of Cree teachers who may not have the same qualifications which are required of teachers elsewhere in Quebec;
7. Changes to the school calendar to accommodate the lifestyle and culture of the Cree.

The Crees report that federal and provincial financing have been inadequate to allow the school board to fulfil its mandate.

THE DUMONT INSTITUTE

The Gabriel Dumont Institute of Native Studies and Applied Research was established in 1980 by the Association of Metis and Non-Status Indians of Saskatchewan (AMNSIS). It has campuses at Regina, Saskatoon and Prince Albert.

The goal of the Institute is to "promote the renewal and development of Aboriginal culture." This goal is to be achieved through research and the development of teaching materials for use in schools in Saskatchewan. The Institute also designs educational and cultural programs and services.

The Institute has been governed by a 23-member Board of Directors. Four members were appointed directly by AMNSIS, one by each of the 11 AMNSIS zone organizations, two by the Saskatchewan Native Women's Association, one each by the University of Saskatchewan and the University of Regina, one each by the federal and provincial governments, and two student representatives. (AMNSIS recently split into the "Metis Society of Saskatchewan" and a non-status Indian organization. It is not yet clear how these two groups will be represented on the Dumont Institute's Board).

The Board elects a 4-member Executive Committee which works with the Executive Director to ensure the implementation of policies made by the Board of Directors and the AMNSIS annual assembly.

The Institute is funded by the government of Saskatchewan, with some funding for certain programs from the federal Secretary of State and Dept. of Employment and Immigration Canada.

In addition to research and curriculum and program development, the Institute operates the Saskatchewan Urban Native Teacher Education Program (SUNTEP). This program is offered in cooperation with the University of Saskatchewan (Saskatoon) and the University of Regina. Graduates of the program receive a Bachelor of Education degree from one of the affiliated universities and are considered fully qualified Aboriginal teachers.

Other programs related to social work, skills training, language and cultural instruction are offered at locations throughout Saskatchewan. Students receive fully recognized college credits for all of the Institute's programs. AMNSIS and the Dumont Institute have recommended the establishment of the following:

1. An Aboriginal Kindergarten to Grade 12 school system, where numbers warrant, similar to the existing Catholic school system;
2. Aboriginal community colleges under local Aboriginal control, offering language and

cultural programs and other programs related to community development;

3. At least 1 Aboriginal-controlled technical Institute.

THE SASKATCHEWAN INDIAN FEDERATED COLLEGE

The SIFC was born in 1976. The College is a University, fully accredited, affiliated with the University of Regina. The College operates under the SIFC Act (1986) Saskatchewan, negotiated between the Indian governments of Saskatchewan (the Federation of Saskatchewan Indians) and the governments of Saskatchewan and Canada.

Under the Agreement, the college is run by a Board of Governors composed of 10 Chiefs chosen by the FSI, 1 representative of each of the two Saskatchewan universities, one representative of the province, one representative of the federal government, and one student representative of each of the two (Regina and Saskatoon) campuses.

The general goal of the College is to preserve and promote the language, culture and history of the Indian people of Saskatchewan. The College offers degrees (formally given by the University of Regina) in Arts, Science, Social Work and Education. The College also has one-year programs intended

to enable students who do not otherwise meet University admission requirements to qualify for admission to courses at other universities or the SIFC. The College also offers programs in business management and public administration as well as adult education courses both on campus and in Indian communities.

The tuition fees of status Indian students are paid by the federal department of Indian Affairs. Operational funding is provided by the federal government.

YELLOW QUILL COLLEGE

The Yellow Quill College is an independent community college located at Portage La Prairie, Manitoba. It is the result of an agreement between the Dakota Ojibway Tribal Council, Canada and Manitoba and has a board of directors appointed by the bands which make up the Tribal Council. Funding is similar to that of the SFIC.

THE NISHGA SCHOOL DISTRICT

The Nishga Nation inhabits the region in north coastal British Columbia. The Nation has a total population of approximately 4,000 - 3,000 living on reserve and 1,000 off reserve.

The Nishga began demanding, in the 1960's, community control over the education of their children. The province offered to build a high school in Nishga territory but the Nishga refused since the school would have been under the control of a regional school board with a non-Aboriginal majority. In the mid-1970's the B.C. government accepted the principle of Nishga community control and agreed to create a new school district (and therefore a new district school board).

The Nishga School Board has control over all areas of Nishga education from pre-school, through elementary and secondary school to adult education. An education committee of the Tribal Council works with the school board to ensure that the curriculum of the Nishga school is geared to community development.

The Nishga School Board operates three schools - 2 elementary and 1 combined elementary and high school. Anyone, regardless of ancestry, may attend the schools.

The Nishga School Board and its programs are funded by the B.C. government but the federal Department of Indian Affairs reimbruses the province for the costs of educating status Indians who live on reserves.

ALBERTA

In northern Alberta electoral boundaries are drawn to ensure

Aboriginal majorities in some school districts. Thus, some school boards have Aboriginal majorities even though there is nothing unique about the structure or organization or funding of the schoo boards.

ROUGH ROCK, ARIZONA

In the 1960's the Navajo Nation demanded control of the education of its children. Negotiations resulted in the pilot project at Rough Rock, which began in 1966.

The Rough Rock School Board has complete jurisdiction over the education of Rough Rock's citizens.

Meetings of the Rough Rock Board of Education are open to the entire community and regular community-wide workshops are held to maximize community participation in the control of education.

In addition to teaching Navajo history and culture, the Rough Rock school system emphasises language retention. In the earliest grade levels instruction is primarily in the Navajo language, with English being taught as a second language. In high school, instruction is primarily in English with Navajo being the secondary language of instruction.

Studies of the Rough Rock/Navajo School System have found dramatic decreases in the numbers of dropouts.

RECOMMENDATIONS

1. Regionally based Aboriginal school boards with jurisdiction to establish and administer elementary and secondary schools, and pre-school and adult education programs, where numbers warrant.

2. At least one Aboriginal controlled institution of post-secondary education, geared to promoting Aboriginal self-determination, with campuses throughout Ontario.

3. Direct, community-based Aboriginal participation in development of curriculum, teaching materials, staffing and counselling in the non-Aboriginal elementary, secondary and post-secondary institutions.

STATEMENT OF REVENUE AND EXPENDITURES

Financial Statements

Ontario Metis Aboriginal Association
Statement of Revenues and Expenditures
Royal Commission on Aboriginal Peoples
For the year ended March 31 1994

	1993-1994 Budget	Actual Expenditures	Differnce
Revenue			
Government of Canada Privy Council	$22,725.00	$22,725.00	$0.00
Expenditures			
Consullation / Consultants	$10,500.00	$10,133.00	$367.00
Salaries (staff)	$0.00	$0.00	$0.00
Benefits	$0.00	$0.00	$0.00
Travel (Coodinator)	$4,000.00	$1,946.00	$2,054.00
Workshops	$2,225.00	$1,200.00	$1,025.00
Administration	$4,000.00	$2,362.00	$1,638.00
Advertising and Promotion	$2,000.00	$2,719.00	($719.00)
Accounting and Audit	$0.00	$3,000.00	($3,000.00)
Bank Charges	$0.00	$2,172.00	($2,172.00)
Total	$22,725.00	$23,532.00	($807.00)
Surplus or Deficit	$0.00	($807.00)	($807.00)

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   Directors
   August 1979

3. Ontario's Forgotten
   People an overview
   history and discussion
   paper
   December 6 1991

4. Metis History in
   Northern Ontario
   thesis paper from
   consultant: Will Hedican
   December 10 1994

5. Model of O.M.A.A
   Self government
   Draft report
   December 6 1991

6. Aboriginal Self Government
   and Administration of Justice
   a discussion paper on
   Self government
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7. Social Condition
   Indian Self Government
   in Canada Report of the
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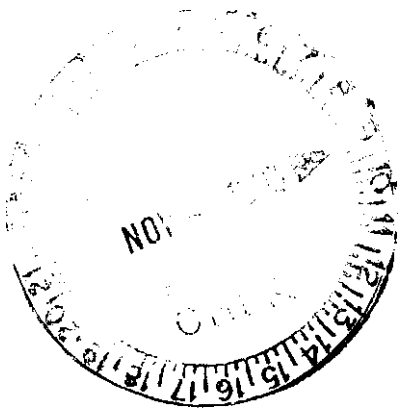
   House of Commons
   Issue number 40
   First session of the
   Thirty second Parliament
   1980-1981

8. Social Development
   Conditions from a
   Needs Assessment/ Goal
   setting workshop
   Saturday July 11 1993

9. Economic Development
   a discussion paper
   All presidents seminar
   April 8-9 1989

10. Education a Discussion
    Paper
    All Presidents seminar
    April 8-9 1989



RESEARCH PAPER ON MÉTIS ABORIGINAL RIGHTS, TITLE AND TREATY RIGHTS IN ONTARIO

September 30, 1993

Métis Nation - Ontario

Jean Teillet

Introduction

The law[1] can be seen as the means by which our community and culture are established, maintained and transformed. The law, in addition to all the other things it does, tells us stories about the cultures that helped to shape it and which it in turn helps to shape. The cultural stories that are circulating now in our legal system have a powerful influence not only on how legal norms are invented and applied within that system, but on how facts are perceived and translated into the language and concepts of law. Therefore it is vital to ask how law interprets the world around it, what analogies and images it employs, what segments of history and what aspects of human experience it treats as relevant.

This has never been more true for any society than it is for the Métis people. For Métis people the questions to ask are: (1) what sorts of meaning is the law creating; and (2) what sort of Métis society is the law helping to constitute? It seems self-evident that law for Métis people is being created right now. For the most part it is being created as Aboriginal law and the presumption is that since Métis are aboriginal peoples within the ***Constitution Act, 1982***, these newly created concepts of law apply to Métis as well. Unfortunately there is a bias to Aboriginal law as it is being currently conceived, which works to the detriment of Métis people. This bias expresses itself in a tendency to treat the subject of Aboriginal title and rights as a monolithic structure with an emphasis on uniformity of Aboriginal experience and universality of Aboriginal structures and functions, which are largely seen as flowing from historic and legal experience of Indians (Indian role model).

Another bias within the emergent Aboriginal law is a strongly conservative theme which expresses itself in the tendency to either largely ignore recent changes, or to treat them as ephemeral, rather

[1] By "law" I mean not only the legislated rules but also court declarations, Royal Commission investigations and legal scholarship.

than conceiving of them as central and fundamental. A good example of this is the re-emergence of the Métis Nation as a political entity. The conservative bias (on the part of government, the courts and Indian organizations) results in using analytic frameworks which are totally inadequate for newly emergent situations. These institutions also exhibit a tendency to analyse the Métis Nation in terms which were developed for the initial Indian role model.

These conservative and monolithic biases of Aboriginal law apply a double standard when dealing with the diverse experiences of the Métis. There is no uniformity of experience for all members of the Aboriginal *Indian* model let alone for the Aboriginal *Métis* model. For the Métis it is particularly important to understand in what manner their history and behaviours have been affected by extraneous factors. Understanding for example that the historical and modern pressures placed on the Métis of Ontario are completely different than those placed on Red River Métis. If we are serious about including Métis within this newly forming Aboriginal law we must understand what sort of legal personality the law is creating for the Métis. We must begin to create space for Métis inside the Aboriginal law scheme, as it is being created, now - not later when Métis may have to prove themselves more Indian than than the Indian people themselves in order to satisfy narrow legal criteria.

The purpose of this paper then is to examine the legal Métis presence in Ontario. Part One of this paper gives a very brief history of the legal experience of the Métis in Ontario. Part Two is a discussion of the foundations of Métis Aboriginal rights and title in Ontario. Part Three examines whether Ontario Métis communities can be identified as legal Métis claimant groups. Throughout this paper the underlying purpose is to examine whether this emerging Aboriginal legal landscape has created any space in the legal spectrum for the Métis of Ontario and to examine whether the

conservative and monolithic biases which are inherent in Aboriginal law as it exists can incorporate the Métis people of Ontario.

1. A Brief History of the Legal Experience of the Métis in Ontario[2]

Any legal discussion of Aboriginal peoples in North America must begin with ***The Royal Proclamation, 1763.*** This proclamation in part, was issued by the British Crown to establish territorial control and to correct the "frauds and abuses" which were endemic among the Aboriginal peoples who were allied with the Crown.[3] The proclamation recognized land from the Gulf of Mexico to the St. Lawrence River as *Indian* (Aboriginal) land. It excluded established settlements and ordered removal of all "inadvertant" settlement. No new settlement was to take place without the consent of the Indians involved. The purpose was to placate suspicious and potentially dangerous Indian populations, to appease settlers and to establish Crown title to a vast tract of land. This document is a seminal document in the history of sovereignty and Aboriginal title in North America. It clearly specifies that Indian people had possession of land and that this title was not to be eroded by expanding settlement without consent. The ***Royal Proclamation*** does not define the Indian peoples, it describes them as the *"several Nations or Tribes of Indians with whom We are connected, and who live under our protection"*[4]. The notion of being allied or connected to the Crown created, by implication another class of Indian peoples - namely Aboriginal peoples who were not-recognized or not allied to the Crown. It is in the Royal Proclamation that we can see the origins of the identification problems which still plague us today.

From 1763 to the 1820s Aboriginal peoples fought a rearguard action to maintain control over their lands. The ***Treaty of Paris, 1783*** which created the United States border and ceded so much Indian land to the United States without notice or consultation can be seen as the demarcation

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[2] While I will begin this section with an encapsulated history of the Metis in Ontario, this is included merely to set the background for the discussion of Metis title and rights and it is not intended as an extant history. For further historical information please see attached bibliography with special attention to Long, Peterson, McNabb, Sanders, etc.

[3] Saunders, D. ***"Group Rights-The Constitutional Position of the Canadian Indian"*** (NCC and OMAA: 1972) pp1-2.

[4] Morse, B.W. *The Royal Proclamation of 1763* [RSC 1970, Appendices, p.125] in ***Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*** (Ottawa: Carleton University Press, 1991) p.52.

line, the effective end of Aboriginal sovereignty in North America, even though the newly established arbitrary border between the two countries was for all practical purposes a fiction. Trade routes which functioned on a north-south axis were unaffected and the Iroquois Indian confederacy certainly ignored the border. The ***Jay Treaty, 1794*** specifically excluded Indians from the border's restrictions.

By the 1820s the whole issue of Native sovereignty had faded into the background. Aboriginal peoples were dispirited by war, fragmented and disconnected from each other by treaties and borders, their numbers were decimated by disease and they gradually were no longer perceived as a threat to settlement. Certainly they were no longer in any position to assert their sovereignty and the increasingly ambiguous position of many Aboriginal peoples particularly those of mixed blood confused matters even more. As the military and political significance of Indians decreased the influence and significance of mixed bloods temporarily flourished. Political and economic activity, military security, Indian relations and exploration were quite simply impossible without the mixed bloods. The mixed bloods, a result of two centuries of adaptation were forming a new people and a new nation in the new world.

Political self-determination and free trade, the building blocks of the United States were also the building blocks of the Métis Nation. In the west, the Battle of Seven Oaks was a proclamation of the Métis that they considered themselves the masters of their land. The Métis of Red River succeded in establishing a social, political and military presence. While the Métis Nation was flourishing in Red River, likewise their counterparts in Ontario were developing politically aware communities. Even so, there were events at play during this period which served to blunt any Métis aspirations in Ontario to nationalism.

Some of this is attributable to the decline in the fur trade which necessarily happened in Ontario before it hit the prairies. Mixed bloods were the middlemen in the vast empire of furs and with the depression of the trade and the amalgamation of the Northwest and Hudson's Bay companies in 1821 their utility was severely undercut. Major job cuts in Ontario followed the initiation of the newly combined Company and most of those terminated were mixed bloods. This was not just a loss of employment it was also a loss of home and land because the Company owned and controlled job, home and land.[5]

Another factor was the re-organization of the Indian Department in 1828. At this time when the Department was still under Imperial funding, emphasis shifted from 'alliance and pacification' of Indians to 'civilization and Christianization.' In this work, mixed bloods were not only seen to be unnecessary to further the objectives of the government and the Church, but were also viewed as a distinct hindrance. Finally the preoccupation of the Indian Department was definately on cutting costs.[6] As the frontier moved west and north, economic concerns completely replaced military concerns. Settlements surrounded Indian lands and surrenders accompanied by "reserves for Indians" became a feature of treaty negotiations.

As the possibility of termination of Imperial funds to the Indian Department grew, pressure to cut costs increased. One major expenditure was the cost of "presents" distributed to "loyalist" Indians since the War of 1812.[7] The down-sizing plan devised to trim expenditures was a foreshadow of policies to come. "Visiting" or American Indians, all Indians born after 1846 and half-castes

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[5] Ray, A.J. ***Indians in the Fur Trade: Their role as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870*** (Toronto: University of Toronto Press, 1974)

[6] Komar, R.N. ***The History of the Legal Status of the Canadian Indian to 1867*** (University of Toronto Press: Toronto, 1971) pp. 57-58.

[7] ***Royal Commissioners Report, 1847: On the Affairs of the Indians in Canada.*** sIII (ssII) "Presents".

without tribal membership were to be excluded from annual presents.[8] At this time, in reaction to Department policies, many Indian nations in Ontario held Grand Councils. The purpose of these councils was to discuss strategies, to defend land title, to maintain the Indian peoples traditional relationship with the Imperial Crown,[9] to counter the new policies of assimilation and to assert Indian rights. Inclusion was the goal of the Grand Councils. In 1836 they declared that:

> *"if any man or woman, being a half-Indian wished to become a part of, or attached to any tribe, he or she shall be claimed, and in every respect considered as belonging to that tribe."*[10]

The Indian Department continued well into the 1840s to investigate into the halfbreed Native population. But their view, contrary to the inclusionary wishes of the Chiefs was to exclude mixed bloods in any way possible. Various economic cost-cutting steps were recommended by the Indian Department, including a recommendation that half-breed "squatters" on Indian lands be removed.[11]

In 1849 a half-breed uprising in Sault Ste. Marie soon eclipsed the administrative concerns of the Indian Department. The mining boom of the Upper Great Lakes was causing serious problems for the Indians and Métis on unsurrendered lands. Complaints and petitions were ignored. Local Métis and Indians joined together, stole some canon[12] from the Hudson's Bay Company and took over the Quebec Mining Company's mine at Mica Bay.[13] Realizing that the courts had no

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[8] ***Ibid.***, p67-189 (- RC 1847)

[9] United Kingdom, ***Copies or extracts of correspondence since 1st April 1835 between the Secretary of State of the Colonies and the Governors of the British North American Provinces respecting the Indians in those Provinces*** (London: 1839), p5 - dispatch from Lord Glenelg to Earl Dalhousie, July 14, 1827.

[10] Royal Commissioners Report, 1845, op. cit., sIII p197 ***"Resolutions of the Council of Principal Chiefs, Jan. 28, 1836"***

[11] ***Ibid.*** p199.

[12] Metis living in the Sault Ste. Marie area in 1993 claim that they still know the location of these buried canons.

[13] Newspaper articles - Montreal Gazette, July 6 & 7, 1849, Nov. 23, 1849 and Dec. 7, 1849; Lake Superior News, Nov. 8, 1849; British Colonist, Dec. 14, 1849; British Whig (Kingston), Nov. 30, 1849. Sault Ste Marie Star, article by JW Curran, 1849, n.d.; Globe and Mail, Nov. 23, 1849.

jurisdiction on unsurrendered lands and that there could be no action against these rebels, authorities instituted negotiations for a treaty in that area.[14] Simultaneously the Red River Métis were engaged in their own uprising with the Sayer trial out of which evolved a new leader, Louis Riel Sr. What became clear from these two events was that the Métis were a factor which now had to be dealt with.

In a petition[15] from 1840 written by Métis[16] residing in Penetanguishene who were originally from Drummond Island and Sault Ste. Marie,

> *"That your Petitioners, have always proved themselves, to be good and loyal Subjects, and a number of them when Call'd upon, have served in the Militia, and will always be ready at any Call when their services may again be required. That your Petitioners are generally speaking, in poor circumstances, and that they do not share in any advantage in presents issued to the Indians as a member of the half breeds, from the Sault St. Marie and other places on the shores of Lake Huron have done for the last two years. Therefore your Petitioners most humbly beg your Excellency will take their case under your Excellency's consideration and that your Excellency would be pleased to allow them to have the same advantage that persons of the same class living at the Sault St. Marie and other places on the shores of Lake Huron, desire from the issue of Indian presents to them and their families."*

In the response from Chief Superintendent of Indian Affairs in Toronto, Samuel Peters Jarvis we have an early example of the federal government using the "we don't know who you are" line. Jarvis replies that the petitioners are mistaken in their belief that Métis from the Sault received

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[14] Alexander Morris. ***The Treaties of Canada with the Indians*** (Toronto: Coles Canadiana Reprint, 1971), pp.20.

[15] Public Archives of Canada, RG10, Indian Affairs Records, Vol 72, File 67087-67111.

[16] List of petitioners includes the family names of: St. Onge, Langlade, Frechette, Labatte, Payette, Lalonde, Beausoleil, Vasseur, Genoux, Trudeau, Toms, Lavalle, Thibeau and Blette.

"presents" for the past two years. He acknowledges that while some of them may have received presents he claims "*it is extremely difficult to decide in many cases who are or who are not of the Caste.*" The government here is making a general distinction between Métis and Indians and some Métis are included in the annual present-giving while others are not. Note that Jarvis made no attempt to relate "present-giving' to aboriginal or treaty rights for these were clearly separate considerations for the government.

Prior to 1850 Métis in Ontario were seen either as distinct families or as groups of families. Some of the main centres in Ontario at this time included: Moose Factory, Sault Ste. Marie, Penetanguishene, Rainy Lake Area, and Lake Nipigon. Many of these Métis peoples were identified as Indians by virtue of the lifestyle they adopted from their Indian mothers' culture. Some of them were prominent individuals who acted as Indian Chiefs (eg: Shinguacouse, signator of the Robinson Huron Treaty)[17], some were officials of the Indian Department (eg: Claus & Johnson until the mid 1820s)[18], and as facilitators at treaty negotiations (eg: Nicholas Chatelaine - Treaty 3)[19].

Some Métis were beneficiaries of the Robinson Treaties of 1850. Métis who had figured prominently in the Mica Bay resistance participated in the treaty negotiations. It is significant to note that the negotiator of these important treaties was not a neutral party to say the least. William Robinson, was a mining magnate. He reported after the treaties were signed that there were eighty-four "half-breeds" in the Robinson Superior Treaty area and two hundred "half-

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[17] Provincial Archives of Ontario, J.C. Robinson Papers, 1850 ***"Diary of Wm. B. Robinson on a visit to the Indians to make a treaty 1850."***

[18] Sanders, D. ***"Group Rights - The Constitutional Position of the Canadian Indian"*** (NCC & OMAA Archives, 1972) p1-2.

[19] ***Indian Treaties and Surrenders, Vol. 1: Treaties #1-138.*** (Ottawa: Fifth House Publishers, 1992) p.309.

breeds" in the Robinson Huron Treaty area.[20] The claims were presented either as individuals who had rights based on their prior claim to land, or as individuals who were part of, or affiliated through family connections with, certain Indian bands. These included those of Garden River, Mississagi River, Thessalon River, Dokis, Michipicoten, Fort William and others.

After forcing a split between the Mica Bay faction, who were holding out for local development of mining resources, Robinson refused to negotiatie with the Métis of the area. On September 9, 1850 Robinson in his personal diary noted that at the treaty signing [Robinson Huron Treaty]:

> *"Shinguacouse (who was himself a progeny of an Indian woman and a British officer) & Nebanaigoching came later in the day, objected to sign unless I pledged the Govt to give the halfbreeds mentioned in the list handed to me free grant of 100 acres of land."*[21]

In his official report Robinson stated that the Indian spokesmen

> *"insisted that [he] insert in the treaty a condition securing to some sixty half-breeds a free grant of one hundred acres of land each."*[22]

He refused and his excuse was that he had no such power to give free land grants. Halfbreeds in the Sault were denied a claim to their lands because Robinson created a Catch 22 situation which served to deny Métis their rights. On the one hand the *Indian lands* were required to be surrendered before title could be transferred. Formal surrender was accomplished with the Robinson treaties but the Métis were denied their share by the claim that they were not Indians.[23]

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[20] Morris ***supra.***, note 15 at p16-17.

[21] Robinson Papers ***supra.***, at note 18.

[22] Morris ***supra.***, note 15 at p.20.

[23] The Americans recognized half-breeds and included them in their treaties of the same period. see Kappler, C.J. ***Indian Affairs: Laws and Treaties, Vol II: Treaties*** (Government Printing Office: Washington, 1904) p.268-70 *"Treaty with the Chippewa, 1826"*.

In the end the Métis were only included separately as "half-breeds" on the annuity paylists for the Indian Bands in the Fort William and Michipicoten annuity paylists of 1852 [24]. Métis became the beneficiaries of these treaties, but no lands were identified as Métis reserves nor were any lands specifically identified and set aside for Métis groups or families or individuals in those treaty areas.

Beginning in the mid 19th century the governments used legal definitions of Indians to identify those Aboriginal peoples who were entitled to have their rights and title recognized in some form. The defntn was inclusionary of all peoples with Aboriginal blood up to, and immediately following Confederation. While the legal position of the Métis in mid 19th century Ontario could be described as what Douglas Leighton has called *"legal limbo,"*[25] clearly Métis were included as Aboriginal people by implication, in the early Indian Acts. The ***1850 Indian Protection Act***[26] included *"Indians or any person intermarried with any Indian."* It recognized as *"aboriginal people"* those individuals and their offspring who had *"intermarried"* with the Indian people. In the 1857 ***Civilization of Indian Tribes Act*** [27] the province of Canada had this definition of Indian which implicitly concedes that a Métis person could be treated in legal terms as an Indian.

> *...the term "Indian" means only Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands residing upon [unceded Indian or Indian Reserve] lands...*

In the ***Indian Act, 1868*** the definition of those considered as Indians included:

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[24] Provincial Archives of Ontario, RG10, Vol 9497. Annuity Paylists of the Fort William Indian Band, the Pic Indian Band, and the Long Lac Indian Band, dated 1852-3, p25-38.

[25] Ontario Ministry of Citizenship and Culture, ***"A Profile of Native People in Ontario,"*** January 1983, p.16.

[26] 13 and 14 Victoria (1850) Cap. 74 (Province of Canada). ***An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property occupied or enjoyed by them from Trespass and Injury.***

[27] 20 Victoria (1857) Cap.26 (Province of Canada). ***An Act to Encourage the Gradual Civilization of the Indian Tribves in this Province, and to Amend the Laws Respecting Indians.***

"all persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians..."

In the period leading up to Confederation and immediately following, all authorities chose a broadly based inclusionary definition of those who were to be treated as Indians and thus, those who were to be recognized as having Aboriginal title.

However, shortly after Confederation, and ever since, Canada has taken steps to deliberately exclude *certain* Aboriginal peoples who previously were treated with, and dealt with, equitably since the ***Royal Proclamation of 1763.*** The ***Indian Act*** was changed in 1869 to add this amendment:

"provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act..."

In the ***1876 Indian Act*** the definition becomes even more restrictive.

"First. Any male person of Indian blood reputed to belong to a particular band; Secondly. Any child of such person; Thirdly. Any woman who is or was lawfully married to such person."

"Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty."

The progressively restrictive definition is reflective of the government's desire to its streamline obligations to Aboriginal people. Each definition from 1869 on excludes whole classes of people previously considered as Aboriginal people.

Federal Native policy between 1867 and 1885 in northwestern Ontario recognized both Métis and Indian claims and the need to satisfy those claims. Recognition of the Métis of northwestern Ontario[28] was a direct response to the events at Red River in 1869-70. The federal government was afraid that the Saulteaux Ojibwa would join the Métis in their resistance. There were many family and political connections between the Métis of Manitoba and the Métis of northwestern Ontario. Sir John A MacDonald sent Robert J.N. Pither, of the Hudson's Bay Company to placate the people in the Lake of the Woods, Rainy River area during the events of 1869-70.

After the ***Manitoba Act*** was passed in 1870, the federal government attempted to deal with the issue of Aboriginal rights and title by legislation or by treaty. The federal governmentt included Métis in present-giving and in the treaty process. In 1871 Simon Dawson, paid compensation for outstanding land claims to nine Métis families, (forty-nine people) located at Fort Frances and along the Rainy River. The lands were needed for the right of way for the Dawson Road. The nine heads of family were listed separately from the Indians in the area who received similar compensation. Names included: Morrisseau, Jourdain, Mainville, Linklater and Ritchot.[29]

Métis participated in the Treaty Three negotiations in 1873. Alexander Morris in his report on the Treaty Three negotiations wrote that fifteen families wished to be included in the treaty:

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[28] Part of the Northwest Territories from 1867-1889.

[29] Public Archives Canada. RG10. Vol. 1675 *"Dawson Route Paylists"* dated Octover 17, 1871.

> *"I said the treaty was not for whites, but I would recommend that those families should be permitted the option of taking either status as Indians or whites, but that they could not take both."*[30]

Some Métis became beneficiaries of Treaty Three as members of Indian Bands. Two years later, in 1875 the half-breeds of Rainy River and Rainy Lake signed a Memorandum of Agreement at Fort Frances that was to provide them with the same treaty benefits as those enjoyed by the Indians, including two areas of land identified as *"reserves"* for the *"half-breeds at Rainy Lake"*. These areas were *"160 acres for half-breeds to build and live on as a village," plus 11,200 acres of "wild and farming land"*. The rationale for the land grant was that:

> *"Whereas the half-breeds above described, by virtue of their Indian blood, claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake or Rainy River, for the commutation or surrender of which claims they ask compensation from the Government."*[31]

In return the Métis here surrendered

> *"forever, any and all claim, right, title or interest which they, by virtue of their Indian blood, have or possess in the lands or territories above described..."*[32]

The half-breed adhesion to Treaty Three was *"subject in all respects to approval and confirmation by the Government, without which the same shall be considered as void and of no effect..."*[33] The Memorandum of Agreement was never authorized by any act or executive authority of the federal government. In administration of Treaty Three, the federal public servants

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[30] Public Archives of Canada, RG10, Vol. 1918, File 2790-B, ***Alexander Morris to the Honourable Alexander Campbell, Minister of the Interior***, Octover 14, 1873. Reprinted in Morris, p. 47-52.

[31] Public Archives of Canada, RG10, Vol. 1846 Consecutive Nos. 131 and 132. ***"Memorandum of Agreement"*** of 12 September 1875.

[32] ***Ibid.***

[33] ***Supra*** note 20 p. 309.

ignored the substance of the Memorandum of Agreement. By 1894 the people who lived on the "half-breed" reserves became in federal government eyes known as *"Treaty half-breeds,"* a term which was analogous to "Indian". The Métis lands were identified by the Government of Canada on its "schedules of Indian Reserves in 1890, 1896, 1904 and 1914 called Rainy Lake Indian Reserves Nos. 16A and 16D.[34]

Alexander Morris divided the Métis into three classes of half-breeds in the Northwest Territories:

1) *those who...have their farms and homes...*
2) *those who are entirely identified with the Indians living with them, and speaking their language...*
3) *those who . . . live after the habits of the Indians, by the pursuit of the buffalo and the chase.*[35]

For each class he recommends that they should receive land.

By the late 19th century we also begin to see more restrictive and racial views expressed about the rights of Métis. These increasingly restrictive views were indicative of the growing body of opinion in Ontario to cut costs and to restrict the rights of Aboriginal people.[36] Edward Borron (an Ontario and later a federal civil servant), in his series of reports on the Robinson Treaties and on Treaty Three argued that the inclusion of the Métis as beneficiaries in those treaties had been an error[37].

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[34] Ministry of Natural Resources Indian Lands File #186214, Vols 1 and 2. In 1967, by federal OIC OC/PC #1967-1145, the lands in Rainy Lake Indian Reserves #16A and #16D became part of the present Couchiching Indian Reserve #16A.

[35] Morris ***supra.***, p. 69.

[36] Born out later in that there were no Métis adhesions to Treaty Five in Ontario (signed in 1876, 1908, 1909 and 1910) Public Archives of Canada, RG10, Vol.1847 Consecutive No. 149.

[37] Seems a 19th Century precursor to Flanagan's arguments.

"They had nothing to cede or surrender and no treaty with them was required. They suffered no loss and had consequently no claim whatever to compensation... They had no moral claim whatever under such circumstances to compensaion either in the form of annuities or otherwise."[38]

With the exception of a small portion of the area covered by Treaty Three, Treaty Nine was the only other treaty of the Post-Confederation numbered series which covered an area in Ontario. The Government of Ontario became a signator to that treaty in 1905-6. The Métis at Moose Factory did not become beneficiaries as an identifiable group but rather as individual families. There were Métis who resided with and were regarded as members of some of the Treaty Nine Bands and who became beneficiaries of the treaty. For example the Fort Albany, New Brunswick House and Moose Factory Indian Bands.[39] Within the Métis community at Moose Factory some members became beneficiaries and some did not. It is also noteworthy that Métis who were contracted as servants of the Hudson's Bay Company were not allowed by the terms of their standard contracts, to participate in Treay Nine as beneficiaries.[40]

Some Métis were refused treaty at Moose Factory in 1905 on the grounds that they were not living the *"Indian mode of life"*. The heads of those families petitioned the Department of Indian Affairs for provision in the Treaty. The federal Department of Indian Affairs wrote to the Ontario Government requesting land for these people, about twenty-five to thirty people all together. The Treasurer of Ontario replied that

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[38] Public Archives Ontario, ***Irving Papers***, MU1468, 30/36/06(1); 31/37/10; MU1465, 27/32/08.

[39] Ministry of Natural Resources Indian Lands File #186220, ***"Treaty #9"*** MNR (OIRP) Files on the New Brunswick House Indian Land Claim and on Moose Factory Indian Reserve #68.

[40] John Long, *"Treaty 9 and Fur Trade Company Families: Northeastern Ontario's Half-breeds, Indians, Petitioners and Metis,"* in ***The New Peoples: Being and Becoming Metis in North America***, ed. J. Peterson and J.S.H. Brown (Winnipeg: University of Manitoba Press, 1985), p137-162.

> *"this Government would be prepared to allow these half-breeds, the number not being over fifty, 160 acres of land reserving minerals, to be selected in the District in which they at present reside, such selection not to interfere with Hudson's Bay posts, or Indian Reserves, or lands to be required for railway purposes or for town sites, as it may be some time before the district in question is surveyed."*[41]

No action was taken in response to the Treasurer's reply and thus there was no effective response to the original petition.

Adhesion by the Métis to treaties did not always have the support of the Band members. The effect was to more sharply define Métis as distinct from Indian people. In 1917 the Curve Lake Indian Band requested the Department of Indian Affairs to remove Métis people from the reserve. Also in the Williams Treaty, 1923, the same demand from the Mississaugas of the Mud Lake Indian Band protested that some signators to the treaty should not have done so. In both cases the Métis signators remained in the treaty.[42] Clearly though they were perceived as a community set apart from Indian society. Status as an Indian within the meaning of the ***Indian Act*** in these instances is shown to be the vehicle which evolved to further the federal policy of excluding Métis from their Aboriginal and treaty rights. It could also be said that geographically defined Métis communities were the direct result of the treaty process. A good example of this is the Métis community at Burleigh Falls. The Métis had to move from the Indian reserve after the Band signed the Williams Treaty in 1923. They relocated to Burleigh Falls, where they still maintain an

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[41] Ministry of Natural Resources Indian Lands File #186220, ***"Treaty #9"***. The petition was signed by Andrew Morrison, George McLeod, William McLeod, William Moore and William Archabald. There was a further notation that they also represented absentees at Charlton and on HBC vessels.

[42] Public Archives Canada, RG10, Vol. 2330, File 67, 071-73, Part 1.

active Métis community. McNabb[43] concludes from all this that the treaties have been a catalyst in the development of Métis communities in Ontario.

By the 1840s the Métis of Ontario were living in distinct communities along the fur trade routes in all parts of the province. They had presented to the government some of their claims based on aboriginal rights to presents, land and resources. Government officials recognized those claims and they resulted in adherence to Indian treaties on the basis that they were "Indians" and had aboriginal claims. Still in the 19th century the Métis who lived in these communities were aware of the political implications of their actions.

By the 20th century they had developed into or as part of, communities within or near Indian reserves or communities. And it is in these communities that they still reside today. If these communities of Métis in Ontario have any claim to Aboriginal title, then Aboriginal title itself must be redefined since its present requirements are reflective of the conservative monolithic model of "Indian" previously discussed.

2. The Foundations of Métis Aboriginal Title in Ontario

The courts have decreed that Aboriginal title[44] has a common law existence[45] because the common law recognises the survival of traditional Aboriginal rights and interests and operates to protect them. s35(1) of the *Constitution Act, 1982* confirms that "existing" Aboriginal rights are afirmed. The Métis are one of Canada's Aboriginal peoples and have been recognized as such in the *Constitution Act, 1982*.

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[43] David McNab *"The Metis and the Treaty Making Process in Ontario"* (paper presented to Metis Symposium, University of Saskatchewan, 1984)

[44] Alternatively called 'native title', 'traditional title' or 'Indian title'.

[45] *Calder v. Attorney General of British Columbia* (1973) 34 DLR (3d) 145 (SCC).

35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Therefore it is reasonable to assume that s35 of the ***Constitution Act, 1982*** must also protect the Aboriginal title of the Métis. There is really only one way to establish a coherent theory on the origins and persistence of Métis title. That is within the doctrine of Aboriginal title. This can be accomplished by laying stress on the *sui generis* nature of Aboriginal title which must accommodate the Métis people. Since Métis are aboriginal peoples, then the ***Constitution Act*** must be interpreted in a meaningful and purposive manner that makes Métis rights and title not be so impossible to attain as to be illusive. The inclusion of the Métis in s35(1) combined with the term 'existing' in s35(2) should mean that if the Métis can establish the existence of Métis Aboriginal title that has not been extinguished then that title should be recognized.

The emerging law on Aboriginal title has paid very little attention paid to proof of *Métis* Aboriginal title. The predominant approach to proof of Métis Aboriginal title lays in establishing that Métis have a legitimate share in Indian title. This has mainly been argued by including Métis in the s91(24) definition of Indian. On the Prairies proof can also be established by the recognition of the governments in specific legislation like the ***Manitoba Act*** or the ***Dominion Lands Acts***. These pieces of legislation specify that they were enacted in order to extinguish Métis claims to Indian title and therefore the presumption is that Métis title did exist. In Ontario recognition of "half-breeds" by the governments in the adherence of Treaty Three can be seen as proof. Since Aboriginal title has a common law existence and because the common law recognises the survival of Aboriginal interests and operates to protect them, the proof that those interests do indeed exist becomes the threshold question in any inquiry. The content of these interests is that which already existed and was recognized by the Aboriginal community itself when the common law was asserted.

Obviously Aboriginal title is a communal right not an individual one. The common law has established a test for proving Aboriginal title. This test is known as the ***Baker Lake***[46] test. In order to meet this test the Métis must first establish that they are currently, always have been, or are the ancestors of, an organized society. They must establish a political entity which they themselves recognise and which the common law can subsequently give credence to. Secondly, proof of Métis Aboriginal title requires facts which prove that the claimant Métis group possesses or occupies the land which is claimed. The third proof requirement is the time/depth requirement. This is where the often repeated themes of *time immemorial* and *substantial period* enter. The final proof criteria is the relationship of the claimant's Métis Aboriginal title to crown sovereignty. A crucial part of this claim is proof that the title has not been subsequently extinguished.

The very format of these tests presupposes that some claims for title will not pass even though coherent, existent and underlying a functioning society. These tests are based on concepts of colonialism, English property law and progressive civilization and have been used by the Ontario Court of Appeal in ***Bear Island***[47] and the British Columbia Court of Appeal in ***Dick***[48] and ***Delgamuukw***,[49] and by the Australian Supreme Court in *Mabo*. These criteria were also cited in Manitoba in ***McPherson*** to discredit the Métis claim to Aboriginal hunting rights. The Supreme Court in ***Bear Island*** held that the test[50] used by Steele J was too difficult to prove, however the court was maddeningly evasive as to exactly which parts of the test were too difficult.

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[46] ***Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*** [1980] 1 F.C. 518 (F.C.T.D.)
[47] ***Ontario A.G. v. Bear Island Foundation***, (1989) 2 CNLR 73 (Ont. CA)
[48] ***Dick v. The Queen***, (1985) 23 DLR (4th) 33 (SCC).
[49] ***Delgamuukw v. British Columbia*** (1991) 79 DLR (4th) 185 (BCSC) The BCSC confirmed the findings of "fact" by McEachern J.
[50] ***Supra.***, at note 48.

The earliest legal reference to Aboriginal social, political and economic organization comes from the United States in ***Worcester v Georgia***[51] where Chief Justice Marshall recognized Indian nations as *"having institutions of their own, and governing themselves by their own laws."* Mahoney J refers to Mr. Justice Judson's reference to the level of Indian societal organization in ***Calder***, but misses the point Judson was attempting to illuminate, namely that it was necessary to eliminate cultural bias and accept Indian societal organization at any level which would be sufficient to recognize that their lands were not *terra nullius*. He was not attempting to delineate criteria for levels of social organization.

In ***Baker Lake*** Mahoney attempted to create criteria which could be used to determine the communal nature of aboriginal title. He proposed that enquiries into the kind of society were not relevant as long as there was a recognition by the Aboriginal peoples themselves of the rights they were claiming. A major element in proof of title is the fact of the presence of the Aboriginal peoples on the land claimed. This presence must be related to the society's economic, cultural or religious life and the presence must be meaningful from the point of view of the claimant society not from the dominant society's vantage point.[52] Presence which amounts to occupancy is the foundation of title. This is what must be proved in order to claim the protection of the common law and it is this which must be proved to establish Aboriginal title. In order to establish proof of presence amounting to occupation, the threshold question is factual.

> *"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many*

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[51] ***Worcester v. Georgia***, 6 Peters 515 (1832) at p13.
[52] ***Supra.***, note 47 at p147

tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866."[53]

Occupation is a fact and the extent, nature or degree of physical presence on the land occupied by the claimant Aboriginal peoples is determined by a subjective test.[54] Mahoney J in ***Baker Lake*** rejects arguments based on *quality of use* and recognises the central question to be one of occupation or possession. He notes that the requirement of proof of occupancy is by reference to the demands of the land and society in question. Here he is building on the holding in ***Calder*** that presence on land need not amount to possession at common law in order to amount to occupancy and that a nomadic lifestyle is not inconsistent with occupancy.

> *"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals . . . The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites."* [55]

It is important to distinguish occupation from possession since Mahoney uses these concepts interchangeably. According to English property law, occupation is a fact while possession is a conclusion of law. The legal presumption is that in the absence of circumstances which show possession is in another, the occupier of land is also in possession. In order to establish possession under English property law, proof must be provided of: (1) the right to use or enjoy;

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[53] ***United States v. Santa Fe Pacific RR***, 314 US 339 (1941) at p345.
[54] ***Baker Lake***
[55] ***Mitchel v. US***, 9 Peters 711 (1835) at p 76.

(2) the right to exclude others and; (3) the right to alienate. The proof requirements of Aboriginal title have evolved from these three elements. And it is the absence of any of these (usually #3, the right to alienate) which precludes the adoption of the term proprietary when speaking of Aboriginal title.

Blackburn J in ***Milirrpum et al v. Nabalco Pty. Ltd***[56] held that communal native title involved proof that the Aboriginal interests comprising the title were: (a) capable of recognition; and (b) proprietary in nature. This judgment is overruled in ***Mabo*** on the issue of proprietary interest. Toohey J held that:

> *"A determination that a traditional right or duty amounts to a proprietary interest, however that is defined, will not reveal the existence or non-existence of traditional title . . . requirements that Aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of traditional title."*[57]

While Toohey is adamant that it is unnecessary to determine proprietary interest it is a distinguishing feature of McEachern's discussion in ***Delgamuukw***. McEachern seems to equate the source of proof of title - use & occupancy - with the content of the title. The proprietary interest in Aboriginal title is not relevant to proof. But the fact is that, as against any other owner, Aboriginal peoples do *own* their land. In *Calder* Hall J was unequivocal in finding that

> *"Unchallenged possession is admitted here. . . In enumerating the indicia of ownership, the trial Judge overlooked that possession is of itself proof of ownership. Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial, and therefore the burden of*

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[56] (1971) 17 F.L.R. 141 at p198. (Hereinafter ***Milirrupum***)
[57] Mabo at p 146. fix cite

> *establishing that their right has been extinguished rests squarely on the respondent."*[58]

Exclusivity is a *right* of property in property law[59] and not an obligation. Therefore it should not be necessary to prove exclusive possession. The basic principle is in ***US v Santa Fe Pacific Railroad Co***[60]

> *"...that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title'"*

It is hard to see the basis for the rule if it precludes title merely on the ground that more than one group utilises the land. Alternatives could be that each smaller group has title comprising the right to shared use of land in accordance with traditional use; or traditional title is in the larger umbrella society which comprises all the occupiers. Therefore the society in occupation wouldn't need to correspond to the most prominent cultural group among the indigenous people. In ***Milirrpum***[61] the court expressly leaves open the possibility of a larger group title. Also *joint and amicable possession* can promote the common good of the community and should not be a negative factor in the threshold enquiry into proof of Aboriginal title. The American cases recognize that two bands could be in joint and amicable possession because of the extensive cooperation between them. They hold that such contemporaneous joint possession by two or more Indian groups is sufficient to establish Aboriginal title to land.[62]

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[58] ***Supra*** note 46., at p77.
[59] Blackstone as quoted in ***Supra*** note 58 at p113.
[60] (1941) 314 US 339 at 345
[61] ***Supra.***, note 57 at p273.
[62] ***Turtle Mountain Band of Chippewa Indians v. US*** (1974) 490 F. 2d 935 at p.944. [Hereinafter ***Turtle Mountain***]

More recent Canadian cases have held that these English property law concepts of uninterrupted and exlusive exercise of the right are inappropriate, however in ***Delgamuukw*** McEachern still appears to be applying them as necessary attributes for claiming title to land other than the villages the Gitksan or Wet'suwet'en lived in. In doing so he jumps 70 years of developing theories on the nature of Aboriginal title.

> *"They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except possibly in a social sense to the far reaches of the territory. To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'an villages and no law known to me would have required them to depart."* [63]

In the USA the concept of Indian title is a right of occupancy based upon aboriginal possession. Proof of this possession requires showing *'actual . . . continuous use and occupancy'* [64] Proof of the nature and extent of the use is important. For example whether the land was used for agricultural pursuits which resulted in a village-centred lifestyle or whether their life was nomadic and based on hunting, in which case their *use and control* of the land would be more far reaching. In the USA recognition of wide-ranging land use to sustain hunting and trade is recognized as sufficient use and control and actual possession is not essential. Intermittent contacts in areas are considered sufficient to establish the tribe's control of the land.[65] This is in sharp contrast with the position established by McEachern in ***Delgamuukw*** where he was unwilling to consider wide-ranging land use as sufficient use and control to be considered as occupation.

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[63] ***Supra.***, note 50 at p.222

[64] ***Confederated Tribes of the Warm Springs Reservation of Oregon v. USA***, (1966) 177 Ct. Cl at 194.

[65] ***US v. Seminole Indians*** (1967) 180 Ct. Cl. [Hereinafter ***Seminole Indians***]

In the American case of ***Worcester*** it was first suggested that there were three sources of Indian rights: original occupation, immemorial prescription and ordinary prescription. This is still given credence in American Indian law. In the USA it is sufficient to possess the land for a long time or long enough to transform the area into domestic territories. In the ***US v Seminole Indians*** the court, while stressing the difference between equating *capacity to occupy* with actual possession, puts the key to Indian title in evaluating the manner of land use over a period of time.

> *"For, even if the Commission had measured the Seminole's occupancy at a later date, i.e., from the time that they were first clearly denominated as Seminole (1765), **still the more than 50 years that would have elapsed between that date and the date of cession (1823) would have been sufficient, as a matter of law, to satisfy "the long time" requirement essential for Indian title.**"* [66]

This time requirement is necessarily a relative concept. ***Milirrpum*** required proof of occupancy from a *"time in the indefinite past"* and rejected *"from time immemorial"* in favor of occupancy proof from the acquisition of English sovereignty. Mahoney J in ***Baker Lake*** required the same while noting that the evidence didn't suggest that the Inuit had occupied and used the ***Baker Lake*** area since time immemorial.

> *"I take it that, in this context, "time immemorial' runs back from the date of assertion of English sovereignty over the territory which was probably no earlier than 1610 and certainly no later then May 2, 1670."* [67]

Also it is not clear what date Mahoney means by assertion of sovereignty and it could be assumed that he means the date of European settlement. *Calder* cannot be cited as precedent for this

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[66] ***Ibid.***, at p. 387.
[67] ***Supra.***, note 47 at p114.

criteria since Judson states only "when the settlers came" and makes no reference to assertion of sovereignty and he does not state that title cannot be acquired after settlement. This is particulary appropriate to the Métis situation if it could be proven that settlement occurred as a result of wrongful appropriation of Indian lands. Canada acquired much of its endowment of land by way of sales and grants of land which dispossessed the indigenous inhabitants. In other words the 'patrimony' of the nation was obtained at the expense of the indigenous citizens. It does not follow however that these ill-obtained lands were owned absolutely by the Crown. The Crown acquired a sovereign *political power* over the land as distinguished from a *proprietary* power and that is not the same as absolute ownership of land.

> *"The dispossession of the indigenous inhabitants . . . was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. **Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.**"*[68] [my emphasis]

The American view which reflects the three views of source of title refuses to relate the time reference to the assertion of English sovereignty. In the USA it is well established that sovereign and Indian title are separate, non-exclusive forms of ownership. They can both be held in the same lands at the same time and it therefore follows that either can be created or transferred independently of the other. Therefore Indian title can be acquired after the assertion of sovereignty.[69] In ***Turtle Mountain*** the court was adamant in its insistence on the separation of these two concepts.

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[68] ***Supra.***, note 58 at p42, Brennan, J.
[69] ***Supra.***, at note 66.

> *"To require, as the Government would have us do, that Indian title assumed after the attachment of American sovereignty be related to a preceding Indian title by conquest, merger, or exchange, or to exclusive pre-sovereignty use and possession, would ignore the distinction between these two forms of ownership."*[70]

In this case the government was arguing that the assumption of sovereignty over the claimed area by the ***Louisiana Purchase of 1803*** prevented the Chippewas from acquiring Indian title. Since the Chippewas migrated to this area around 1800, the government was arguing that any title acquired after the assertion of US sovereignty must be somehow related to pre-sovereignty possession and use for a long time before 1803. The logical result of this kind of argument would be that if an Indian group migrated and conquered territory from another group shortly after 1803 they could acquire aboriginal title, but if there were no other Indians present, then their own exclusive use and possession, no matter for how long, would not give them any ownership at all.

In the ***Baker Lake*** criteria, Mahoney focuses on this sovereignty assertion date in order to determine the nature and existence of aboriginal title. The assumption underlying this criteria is that the group claiming title *"cannot inherit title from earlier occupants or tack its possession on to theirs."*[71] As Brian Slattery suggests, the theory is based on the assumption that the source of aboriginal title lies in a Crown grant by assuming dominion in the Crown and its permissive policy toward use and occupation of lands by Indian peoples. This forces aboriginal title into English law model and disregards its *sui generis* nature.

In ***Guerin*** Chief Justice Dickson does not impose the *time immemorial* criteria on aboriginal title. His removal of limitations of possession other than restrictions on alienation were a hopeful suggestion that Canadian law was prepared to recognize title from original occupation,

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[70] ***Ibid.***, at 941.
[71] ***Supra.***, note 47 at p 759.

immemorial occupation and perhaps ordinary prescription. Dickson's reference to *sui generis* should have been taken to suggest that the legal formalism engaged in by Mahoney in ***Baker Lake*** would be rejected in favour of actual patterns of occupancy and land tenure recognized by Indian societies which is in accordance with the statement in ***Calder*** that possession gives rise to a *prima facie* presumption of ownership which the crown must then rebut.

In summation then, Aboriginal title is a group claim. Our courts should adopt the legal presumption that it is impossible *not* to have an organized society and should shift the onus of proof to the crown. The analysis of the group should proceed on the assumption that the Aboriginal group is a political entity instead of racial one. This negates any enquiry into direct ancestral connections and allows groups to evolve. For the Métis, emphasis must be laid on the *sui generis* nature of each claim to Aboriginal title.

Title should be established by occupancy. The fact that occupancy is the standard by which title is proved must not be confused with content of that title. Occupancy theory should be given an expansive interpretation. It should not be required to equate with property law use and control, or exclusive possession ideas.

The occupancy time requirement should be enough to establish occupancy *as against any other claimant group*. Requirements which require Aboriginal claimant groups to establish evidence which links them back hundreds of years to ancestral occupants and concepts such as 'time immemorial' are evidentiary nightmares and irrelevant to title. Canadian courts would be better to adopt the recognition that Aboriginal title can arise through various means and at any time and therefore 50 years should be enough to establish a claim to Aboriginal title.

If the crown is responsible for dispossession which defeats a claim to title then this should give rise to a fiduciary duty which should give rise to a subsequent claim to compensation in the form of alternative land and resources or a financial arrangement.[72] For the Métis people this is particularly important and could be further supported by the argument that the Crown is honour bound to work in the interest of Aboriginal peoples.

Aboriginal title to land has two complementary aspects - possessory and governmental. If the possession aspect is found to be in existent in the Aboriginal title then it is logical to argue that the governmental counterpart should also survive. The *sui generis* nature of the title would be in the restrictions on alienation and the fiduciary obligation this raises in the Crown.

With regard to the relationship of Aboriginal title to Crown assertion of sovereignty. It is necessary to repeat that Aboriginal title and sovereignty are exclusive concepts and can arise in the same land or separately. *They are not related.* Aboriginal title exists and is therefore recognized by the common law. It does not exist *because* of that recognition. The only reason to relate the two is to establish that the common law does protect Aboriginal interests and title. Proof of title has nothing whatever to do with assertion of sovereignty and it is a confusion of the concepts to think they do.

3. Distinguishing the Métis of Ontario as an identifiable Claimant Group

As can be seen by the examples previously included from the various versions of the ***Indian Act***, the Department of Indian Affairs from 1850 to the present, has been attempting to grapple with

[72] ***Lipan Apache Tribe v. US*** 180 Ct. Cl 487 (1967).

the identity question for Indians. A key part of analysis into a claimant group such as the Métis revolves around this identity question. This identity marker usually involves two basic enquiries. The first is defining the claimant group as an identifiable entity. This is the basic *who are you* question. The question is exclusionary in that it seeks to define by isolating the Métis from other groups. This line of inquiry includes evidence of historical linkage to the Métis group's ancestors who occupied the same land base, and enquires into the Métis group's political organization. It involves a search for evidence of religion, customs, systems of government and relationships with neighbouring groups, usually neighbouring groups of Indians. The second enquiry is a lifestyle analysis. This is essentially an enquiry into the Métis group's economic base and extends to an examination of land and resource use.

In the courts, judges grapple with the connection of the present claimant society to their ancestral society.[73] This is part of a larger identity/membership question which has plagued indigenous peoples in Canada since contact. Nowhere does this issue succeed so well as it does with Métis people. Since the Métis have been recognized as an aboriginal people in the ***Constitution Act, 1982*** the question of whether they are native people has been effectively dealt with. Now the controversy is in ascertaining who the Métis people of today are. The term originally referred to the French and Cree-speaking descendants of the French-Catholic Red River Métis. Their geographical position, nomadic lifestyle, social and military organizations all combined to isolate them. By 1635 the Métis Nation in the west was begun and it prospered until the 1870s when the Canadian dominant culture began a systematic plan of extinguishment. These people spoke of themselves as the "New Nation", the "Métis Nation" and emerged as a distinct cultural group. Similarly historical evidence supports the theory that the "mixed bloods" or "half-breeds" of Ontario formed distinct cultural groups who fought for their resource development rights as in

[73] ***Delgamuukw*** at note 50 and ***Baker Lake*** at note 47.

the Mica Bay Insurrection, banded together as communities when ostracized from newly forming reserves as in the Burleigh Falls situation, and petitioned as a community for "presents" as in the Penetanguishene petition.

The only definition of Métis in Canadian law can be found in ***The Métis Population Betterment Act***[74] which adopts a racial view for the purpose of defining Métis persons within Alberta. It is more than a bit ironic that the only "status" Métis in Canada are *not* descendants of the Red River Métis Nation. In ***The Manitoba Act, 1870*** and ***The Dominion Lands Acts, 1879***[75] and ***1883***[76] the federal government granted lands to the Métis. Subsequently scrip and land grants were granted to Métis to further the stated government aim[77] of extinguishing Indian title. In Ontario this was accomplished more by treaties than by legislation.[78] A distinction was drawn between Indians and Métis on a lifestyle, self-identification and group-identification basis. Treaty was granted to those living the lifestyle of Indians and associated with Indian tribes. In the west the "others" received scrip. In Ontario some got annuity payments, some presents and some took treaty as "Indians". Eventually public perceptions and popular usage came to equate Métis with non-status Indians. This equation also occurred in federal and provincial government consciousness.

The result today is that Métis are defined in many different ways. Ethnic consciousness can be defined in terms of a specific cultural group with a common history, such as the Métis Nation, or it can be understood as a political consciousness that defines its members in response to many cultural stimuli. If ethnicity is understood as both a cultural and political phenomenon, the

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[74] ***Statutes of Alberta***, c.6, Assented to November, 22, 1938.
[75] 42 Victoria, c.31.
[76] 46 Victoria c.17.
[77] 33 Victoria, c.3, s33.
[78] Note half-breed adherence or participation in Treaties 3, 5, 9, the Robinson and the Williams Treaties.

emphasis on different identifying criteria by different Métis organizations can be easily understood. Refusing to select identifying criteria by freezing cultural idioms at a specific historical point (eg: only Métis who are descendants of those who received scrip) allows for Métis self-determination of membership. The result? The Métis National Council, considered the official voice for Métis people in Canada, accepts differing definitions from each member province or territory[79] as long as those definitions are consistent and acceptable to the Métis Nation.

Thomas Flanagan[80] argues that *"Ideally, one wants to demonstrate that the Métis would be logically entitled to aboriginal rights **under normal definitions.**"* [my emphasis] For Flanagan normal definitions means there is a global test which can be applied to all Aboriginal peoples. Flanagans insistence on this global test is perhaps the best example of monolithic bias in the emerging definition of *Aboriginal* title. He is insisting on uniform Aboriginal experience and universal structures, functions and recognition, but this is specifically what Hall warned against in

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[79] **Metis Nation of Alberta**: A Metis is an aboriginal person who:
(1) Declares himself/herself to be a Metis person, and
(2) Can produce satisfactory historical or acceptable legal proof that he/she is a Metis, or
(3) Has traditionally held himself/herself out to be Metis, and
(4) Is accepted by the Metis community as a Metis.

Metis Nation of Ontario: Anyone of Aboriginal ancestry who is distinct from Indian and Inuit, who self-identifies as Metis, and who is accepted by the Metis Nation, is Metis.

Metis Nation Accord: For the purposes of the Metis Nation and this Accord,
(a) "Metis"means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit and:
(i) is a descendant of those Metis who received or were entitled to receive land grants and/or Scrip under the provisions of the Manitoba Act, 1870, or the Dominion Lands Acts, as enacted from time to time; or
(ii) a person of Aboriginal descent who is accepted by the Metis Nation.
(b) "Metis Nation" means the community of Metis persons in subsection (a), which is represented nationally by the Metis National Council and provincially by the Pacific Metis Federation, Metis Nation of Alberta, Metis Society of Saskatchewan, Manitoba Metis Federation, Ontario Metis Aboriginal Association and the Metis Nation-Northwest Territories, acting either collectively or in their individual capacity, as the context requries, or their successor Metis organizations, legislative bodies or governments.

[80] Thomas Flanagan, *"Metis Aboriginal Rights: Some Historical and Contemporary Problems"* in ***"The Quest for Justice*** (Toronto: University of Toronto Press, 1985) at p235-6.

Calder when he called Aboriginal title *sui generis* and held that each case would have to be taken in context.

> *"If the claim . . . in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis."*[81]

The result of attempting to use a monolithic global test can be seen in Gregoire J's judgment in ***McPherson***, with the result that he can find no organized Métis society. His attempt to link the Big Eddy Métis with the Red River is historically inaccurate. The Métis peoples are the product of the fur trade and the trade routes stretched across Ontario and the prairies into British Columbia and the North West Territories. The Red River settlement, while it may have succeeded Sault Ste. Marie and Michilimackinac as the hubs of the economic fur trade, was by no means *the* only Métis settlement. These fur trade routes are the home of many Métis settlements which still exist today. Attempting to assert that any Métis must be related to Red River Métis, is like asserting that all British must geneologically come from the city of London. Their ancestors could not, according to this thinking, come from Manchester or Dover or Cambridge.

It is acknowledged that Métis Aboriginal title is a group right. The court must therefore be able to identify a Métis Aboriginal group. The question is, which terms of reference should the courts use for identifying that group. Inquiries into blood lines, ancestral connections and laws or customs have a tendency to reflect the Eurocentric perspective of the court. The problem with this method of analysis is that it mixes two different concepts. The confusion is between racial identification and political entity. It is important to distinguish whether Métis Aboriginal rights flow from race, or from a nationality-based political definition. In Canada our legislature and

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[81] ***Supra.***, note 46 at p109.

courts have created a racial classification which we call *aboriginal peoples*. S91(24) uses the word *Indian* and refers to a racial identification.

> *"**The British North America Act, 1867** . . . by using the word 'Indians' in s91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of special treatment."*[82]

The ***Constitution Act, 1982*** is more specific in that the racial classification of *aboriginal* is re-defined as inclusive of *Indians, Inuit and Métis*. In creating this racial classification and conceiving of it as being what former Chief Justice Dickson[83] called a *sui generis* situation, Canada has rejected any recognition of Aboriginal peoples as a political entity. The Canadian preference for racial differentiation is very different from the situation in the USA.

> *". . . special federal programs benefiting Indians can be justified constitutionally because the classifications are not racial; the programs may go to individual Indians, but those Indians are properly viewed not as members of a race but as citizens of a government with whom the United States has a special government-to-government relationship.* [The program] ***is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities*** *. . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."* [my emphasis] "[84]

Thus the American rationale, rejects racial classification in favour of recognition as a political entity and it is on this basis that the United States justifies the law's special treatment of Indians. It is worthwhile noting that this case was decided in 1974 just two years before the Canadian decision in ***Canard***.

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[82] ***Canard v. AG Canada*** (1972) 5 WWR 678 (Man CA) at p140.
[83] ***Supra., note 46.***
[84] Wilkinson, ***American Indians, Time and the Law*** (New Haven: Yale University Press, 1987) at p85-6.

If our Canadian courts were to recognize Métis Aboriginal claims to title on the basis of use and occupation by a political entity rather than a racial group, the identity quest would take a different, more logical and coherent track. Occupancy by a claimant Métis Aboriginal group in Ontario would then be a question of fact. The analysis required to prove this fact should proceed along the lines of enquiry into the claimant Métis Aboriginal group as a political entity. In this way the fact that the ultimate claimant of Métis Aboriginal title to land acquired its rights from other groups who were assimilated or who joined the original owners of the land does not mean that the land rights possessed by those groups who were absorbed may not be recognized as inhering in the culture which emerges. This recognition of an ultimate political claimant is particularly relevant to Métis claims in Ontario. An enquiry into the existence of a political entity would enable recognition of Métis claims to Aboriginal title. The Métis political entity is not the same as the Indian society structure, but it is existent, coherent and it does underly a functioning society and it should be recognized as such by the courts.

The second line of inquiry - into lifestyle and the requirement that Métis Aboriginal title would have to be established by adhering to an Indian lifestyle simply does not make sense. It is reflective of what Brian Slattery[85] calls the *frozen title theory* and what Sally Weaver[86] calls the *hydraulic Indian* analysis. It is based on the assumption that Aboriginal peoples will eventually assimilate. Métis Aboriginal title will be granted only if the culture is frozen developmentally as what the courts will recognize as *Indian lifestyle* and by extension can be removed if the lifestyle evolves or does not fit into the conservative monolitic model. It also forces Métis claimant

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[85] Slattery, Brian. ***Understanding Aboriginal Rights***. Canadian Bar Review, Vol. 66 (December 1987) 727-783.
[86] Weaver, Sally in ***"The Quest for Justice"*** (Toronto: University of Toronto Press, 1985) at p235-6.

groups to be "more Indian" than Indians. In *Mabo* the court was clear that arguments about lifestyle are not relevant.

> *"There is no question that indigenous society can and will change... But modification of traditional society in itself does not mean traditional title no longer exists.* ***Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life.*** *So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist.* ***An indigenous society cannot, as it were, surrender its rights by modifying its way of life.***"[87] [my emphasis]

What emerges from any examination of Métis in Ontario is that care must be taken to define these Métis communities on their own terms and not with reference to either how much their lifestyle resembles the Indian's nearby or how much they resemble the Red River Métis.

Conclusion

Even though half-breeds and mixed-bloods in Ontario did not rise to nationalism in the 19th century, they are most certainly asserting their Métis-ness today. There are several communities in Ontario which can and do assert the required identity markers to lay claim to being Métis.

As in the west, there remain outstanding legal obligations concerning the Aboriginal title and treaty rights of the Métis in Ontario. Clearly the federal and provincial governments must acknowledge that Métis title was not extinguished by law and that Métis in Ontario have outstanding claims which must be recognized. The federal government has therefore both a constitutional and a fiduciary obligation to settle Métis land claims.

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[87] *Supra* note 58 at p150.

The settling of Métis title to land in Ontario is necessary because the Métis in Ontario are faced with acute problems due to lack of a land base. Because of this they have no ability to gain any control over their lands and resources. As a result the Ontario government is leasing or selling lands to resource development corporations with little or no benefit to the Métis from these contracts. At the same time the Ontario government is tightening restrictions on hunting, fishing and trapping. Métis people in Ontario have (according to the provincial government) no Aboriginal rights to hunt, fish or trap. They have only privileges granted to them by the government, privileges which may be removed arbitrarily. Also when any of their resources, such as fish in the Trent waterway system are being depleted due to inept Natural Resources[88] management, the Métis people who are dependant on those fishing sources have no rights or effective protest available to them. The problem of landlessness is escalating also by expansion of Indian reserves, provincial parks and game preserves. In Ontario the trend towards privatizing of beaches also cuts off access for Métis to necessary fishing sources.

In conclusion the Métis people of Ontario believe that the governments of Ontario and Canada should recognize them as distinct Aboriginal peoples with unique needs and requirements. The Métis people of Ontario further believe that they have title to lands in Ontario and Aboriginal rights which flow from that title.

> *Métis aboriginal rights must rest on Métis customs, traditions and practices which formed an integral part of their distinctive culture. They can not rest on Indian aboriginal rights because if they did they would be Indian aboriginal rights held by Métis and not Métis aboriginal rights. That would surely introduce*

[88] See oral presentation to RCAP by Ontario Metis Aboriginal Association.

too much complexity into the already difficult questions of biology and genealogy governing questions of entitlement to aboriginal rights.[89]

[89] ***Delgamuukw v. BC*** (1993) BCJ No. 1395 at 495.

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