

METIS ABORIGINAL TITLE

by

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ABSTRACT

This thesis is a legal analysis of the origin and persistence of Metis aboriginal title as an independent legal right. The popular doctrine of aboriginal title is rejected in favour of the natural rights of the Metis and first principles of aboriginal title. A theory of Metis title is developed through the examination of:

1. the inclusion of Metis peoples in s.35(2) of the Constitutional Act, 1982;
2. jurisdiction over Metis claims;
3. natural rights of indigenous peoples and the recognition of natural rights in domestic and international positive law;
4. natural rights of the Metis Nation of Manitoba; and
5. the persistence of Metis title in the face of unilateral and consensual acts of extinguishment.

The examination of natural rights reveals an increased importance of natural theories in aboriginal title cases. These theories provide the basis upon which Metis claims to title can be linked to aboriginal title claims and doctrines of extinguishment can be re-examined.

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CHAPTER 1

IDENTIFICATION OF THE METIS PEOPLEIntroduction

Throughout the course of Canadian history various terms have been adopted to refer to Canada's native population including Indians, status Indians, non-status Indians, treaty Indians, non-treaty Indians, Inuit, Metis, half-breeds, registered Indians, non-registered Indians and urban Indians. This fragmentation is partially due to the introduction of legal and administrative definitions for various native groups through federal Indian legislation and assistance programs which essentially created four legal categories of native people: status Indians, non-status Indians, Inuit and half-breeds (now commonly referred to as "Metis.") Further divisions have been created by the denial of federal responsibility for Metis and non-status Indians, the uniting of these groups into national and provincial organizations for the purpose of achieving social and economic goals common to both groups as disadvantaged aboriginal populations, attempts by provincial governments (namely Alberta and Saskatchewan) to establish programs in response to the exclusion of these groups from federal jurisdiction, and the movement back to segregation of Metis and non-status Indian issues after the recognition of Metis as a distinct aboriginal people in s. 35(2) of the Constitution Act, 1982.¹ As a result of these developments, the identification of Indians, Metis and non-status Indians has become a complicated exercise.

The most recent legal definition of aboriginal peoples is found in s. 35 of the Constitution which states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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

Unfortunately, this fairly simple division creates numerous definition problems as the selection of identifying criteria is left open for debate. The resolution of this debate is significant because it will specify the class of persons to whom sections 25 and 35 of the Constitution will apply. The debate is of particular importance to Metis and non-status Indians who through the process of political policy and legal definition have been excluded from federal schemes designed to benefit Indian peoples and who, until recently, have been denied recognition as an aboriginal people.

Section 35 is the logical basis from which to formulate a definition of the Metis as it contains the first national legal usage of the term "Metis" as an aboriginal people. Certain elements in s.35 may help in the definition process including the description of Metis as "aboriginals" and the collective reference to Metis "peoples." However, one is still left with a definition which lacks sufficient criteria to identify the Metis as a distinct group. Within the context of s. 35, two different approaches may be adopted to develop further identification criteria. The term "Metis" may be defined with reference to the inclusion of the term "Inuit" and "Indian" in s. 35(2) or in accordance with its unique meaning and history.

I The Impact of the Phrase "Aboriginal Peoples"

1. The Significance of the Term "Peoples"

(a) Collective Beneficiaries

It has been suggested that the inclusion of the word "peoples" in s. 35 reflects the collective nature of aboriginal rights.² This interpretation fails to account for the difficulty of proving that all aboriginal rights are collective and that the phrase "collective rights" has come to be used in two different ways. Although the courts have ruled on the collective nature of specific aboriginal rights, there has not been a judicial determination on whether an individual has aboriginal rights by reason of being aboriginal or because she is a member in an aboriginal collective. For example, aboriginal title is treated as a collective right vested in a group and claims to title can only be advanced by an organized group of aboriginal people.³ On the other hand, the court recognizes the legal entitlement of an individual aboriginal to seek judicial enforcement of aboriginal rights depending on the aboriginal right at issue. For example, an individual aboriginal may seek to enforce an aboriginal right to hunt or fish.⁴ It is true one can say the right accrues by virtue of membership in a collectivity, but is equally true that the individual, and not the group, exercises the right.

Further difficulty arises from the fact that "collective" or "group" rights is used in political and legal terminology in two different ways. The phrase refers to rights which only group members have that are exercised by individuals, such as the right

to hunt and fish. It also refers to rights of a collectivity as a collectivity such as the rights to self-government, an economic base and linguistic survival.

The matter is further complicated by the Supreme Court's classification of aboriginal rights as pre-existing.⁵ Douglas Sanders suggests that the implications of this characterization is to recognize "Indian rights based on the pre-contact Indian legal order."⁶ Consequently the classification of "existing aboriginal and treaty rights" as collective or individual or both may depend upon the treatment of that right by the Indian community within which it was created.⁷

It is beyond the scope of this thesis to provide a detailed analysis of collective rights and their application to aboriginal rights. The point is that one can not assume that the word "peoples" is included in s.35 only to clarify that the rights involved are collective or group rights. Rather, this may place unnecessary restrictions on the content of, and entitlement to, "existing aboriginal and treaty rights." The better interpretation is to view the term "peoples" as describing the collective nature of the beneficiaries of s. 35 and not the collective nature of their rights. As discussed below, the reference to "aboriginal peoples" instead of a single aboriginal "people" may simply reflect the governments' new recognition of distinct aboriginal groups in accordance with their own terminology. According to this interpretation, the existing aboriginal and treaty rights of the aboriginal peoples; whether collective, individual or a combination of both, are recognized and affirmed by s. 35.

If one accepts the above argument, there are two possible ways to read s. 35(2). The first assumes that there are three distinct aboriginal peoples in Canada - the Indian, Inuit, and Metis. The second assumes that "peoples" refers to numerous smaller aboriginal collectivities constituting the three broader named groups. That is, the aboriginal peoples of Canada are the Indian peoples, Inuit peoples, and Metis peoples of Canada. There are several reasons why the second interpretation is preferable to the first including:

1. Groups which identify as Inuit, Indian and Metis view themselves as distinct from other self-identifying groups of Inuit, Indian and Metis;
2. Contemporary aboriginal collectivities organized for social, political or legal reasons may draw their membership from two or more of the named groups in s.35(2) and therefore will not fall within any particular named group; and
3. Cultural, social and political differences among aboriginal groups result in the law treating them as distinct peoples.

The first point is illustrated by the definition of "aboriginal people" adopted by the Joint Council of the National Indian Brotherhood in the Declaration of First Nations:

"Aboriginal people" means the First Nations or Tribes of Indians in Canada and each Nation having the right to define its own citizenship.⁸

This viewpoint is expressed in the title of the national status Indian organization (The Assembly of First Nations), Indian literature and government literature.⁹ Similarly, the Inuit

peoples of Canada are viewed as a distinct group, but a group composed of various tribes or bands.¹⁰

Among the Metis, there is disagreement whether the Metis are a single people or several peoples. However, it is clear that a variety of mixed blood aboriginal collectivities identify as a Metis people. This is reflected in the following statement by a New Brunswick member of the Native Council of Canada:

There is no one exclusive Metis People in Canada, anymore than there is no one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from the Red River Metis as any two peoples can be. Yet all are distinct from Indian communities by ancestry, by choice, and their self-identification as Metis. As early as 1650, a distinct Metis community developed in LeHeve, Nova Scotia, separate from Acadians and Mic Mac Indians. All Metis are aboriginal people. All have Indian ancestry.¹¹

An example of the second point are the Metis people living on the settlements in northern Alberta. The Metis Betterment Act which established the provincial settlement scheme defines "Metis" on a racial basis as persons with a minimum of 1/4 Indian blood who are not status or treaty Indians as defined by the Indian Act.¹² The definition reflects the fact that the persons for whom the settlements were created were not a single people that could trace its origins to a distinct Indian or Metis people. Rather many (and perhaps the majority) were Indians who surrendered their treaty rights or were struck from government band lists.¹³ The creation of this group of self-identifying and legally recognized "people" resulted from the political unification of individuals from distinct cultural groups who were facing similar problems created by poverty, homelessness, disease and hunger and were seeking similar economic and social goals. United under the Metis

Association of Alberta, they successfully lobbied for the creation of the Metis Settlements.¹⁴ In the proposed Metis Settlements Act, the Metis are moving away from a racial definition and have proposed that "Metis" be defined as "an individual of aboriginal ancestry who identifies with Metis history and culture."¹⁵ Although this suggests affiliation with a single Metis people, it does not change the original composition of the group or assist us in the process of defining who the Metis people are.

It is generally agreed among academics that s. 35 entrenches aboriginal rights as they existed at April 17, 1982 but there is some disagreement whether the section applies to extinguished, restricted and future rights.¹⁶ It is clear that up to April 17, 1982 Canadian law recognized Indian tribes as distinct societies and responded to them as separate groups. This approach is not only reflected in aboriginal title cases,¹⁷ but also in historical legal documents. The historical treatment of Indians as distinct peoples is illustrated by Douglas Sanders in his discussion of the extent of recognition by Canadian law of legal orders established by Indian societies prior to European settlement:

The Royal Proclamation of 1763 referred to the "several nations as tribes of Indians with whom we are connected, and who live under our protection. . ." The treaties were made between representatives of the Crown and leaders representing Indian tribal groups. Indian legislation and the reserve system involved the formal definition of groups of Indians as bands that had certain rights of self-government on band-reserve land. Native people argue that one of their aboriginal rights is a right to continue as self-governing communities.¹⁸

This legal treatment of Indian societies as distinct peoples, coupled with the focus on self-government for Indian and Inuit communities at the First Ministers Conferences on aboriginal

matters, provides further support for the argument that "peoples" refers to smaller aboriginal collectivities of the three named aboriginal groups in 35(2).

At this point one might argue that s. 35(2) refers to a single Metis people, but numerous distinct Indian and Inuit peoples. To argue otherwise is to distort the factual history of the Metis and the emergence of the Metis as a distinct society in Western Canada. The first objection to this suggestion is it stretches the plain reading of s. 35 and is grammatically incorrect. Read properly, the words "Indian, Inuit and Metis" are coordinate modifiers of the word "peoples." However, it is trite to base a legal argument on a grammatical error. Rather, the resolution of this problem may depend on the following:

1. The definition of the word "people." Is the word people synonymous to "state" or is it something less?
2. The temporal nature of the word people. Does it refer to distinct historical groups or does it encompass contemporary self-identifying collectivities?
3. The approach adopted in selecting identifying criteria for the three named groups in s. 35(2).

Item 3 above is discussed in detail below. For now, let us concentrate on the potential limits placed on the terms "Indian", "Inuit", and "Metis" by virtue of their association with the word "peoples." The question which is of key importance to the Metis is whether the term "people" is equivalent to the term "state". If yes, some certainty or criteria for defining the Metis is made possible.

(b) Definition of the Word "Peoples"

Publicists in international law have used the terms "nation" and "state" interchangeably to refer to those communities recognized as states by the international community. Understood in this sense, international law identifies four fundamental requirements for a state to be recognized as a legal entity, namely: a permanent population, a defined territory, a government and the ability to enter international relations.¹⁹ Some publicists would add that the nation must also be a recognized member of the family of nations.²⁰ Others would dilute the criteria by arguing that the first three elements are requisite elements of the fourth rather than treating the fourth element separately.²¹ Regardless of how these debates are resolved, only one Metis group can meet the criteria - descendants of the Red River Metis who in the late 18th century emerged as a distinct national group.

Traditionalists will argue that mixed blood populations originated in Eastern Canada from the time of first contact between Indians and Europeans, but only in the North West did a distinct political and national consciousness develop among the mixed blood population. Some argue this consciousness is attributable to the geographic and social isolation of the Metis populations in the North West brought about by the discouragement of settlement and the control of the fur trade.²² Others argue that Metis nationalism was fostered by the North West Company in order to protect its economic interest in the West.²³ Whatever its source, it manifested itself in the social and political unification of various Metis collectivities in what was then known as Ruperts Land to oppose

Canadian expansions into the North West and to constitute a distinct people commonly referred to as the Metis Nation.

From the mid-sixteenth century until the early nineteenth century diverse Metis communities were forming in Western Canada. The population consisted of two fairly distinct groups "the French Metis" or Bois Brules, whose paternal language was French, and the English Metis, whose paternal language was English."²⁴ Among these groups distinct lifestyles developed including provisional bands of Metis who hunted buffalo and after the hunt returned to permanent sites in the Red River region, trappers, farmers, fisherman, voyageurs, interpreters and freighters.²⁵ Although it is clear that a definite political and social organization evolved around the buffalo hunt, the diverse elements of the population did not crystallize into a united people until the early nineteenth century.

It is difficult to pinpoint the exact date the Metis Nation came into being. The development of their political consciousness as a people can be traced from their initial unification in 1816 at the Battle of Seven Oaks to resist the establishment of the Selkirk Settlement, to the establishment of a provisional government in 1869 which negotiated what is now known as Manitoba into Canadian Confederation.²⁶ Although Lord Selkirk was successful in establishing his white settlement, by 1871 the population of the Red River consisted of 5,720 French speaking Metis, 4,080 English speaking Metis and 1600 white settlers.²⁷

After the creation of Manitoba a significant number of Metis migrated west and north-west into what is now Saskatchewan and part of Alberta. Distinct Metis communities with their own political

organization developed once again.²⁸ However, prosperity was short lived. The Metis, white settlers and Indians were threatened by poverty, an influx of settlers and government imposed changes to the existing land holding system. Numerous petitions were sent to Ottawa from various communities seeking a redress of grievances. Although sufficient compromises were made to satisfy the predominantly white communities (such as St. Albert), Metis concerns remained unresolved. Once again, the Metis political consciousness was displayed in the formation of a provisional government and a resistance to the Canadian government. This time, the Metis were deprived of the opportunity to negotiate their rights and the scrip system adopted in Manitoba was extended to Alberta and Saskatchewan to satisfy Metis claims.²⁹

Keeping this description of the Metis Nation in mind do they fit the aforementioned criteria of a state? It is undisputed that in 1871 the predominant population in Manitoba was Metis and that historical populations can also be traced to specific geographical areas in Alberta and Saskatchewan. Although one could take issue with the legitimacy, efficiency and recognition of the government established in Saskatchewan under Louis Riel in 1885 (and thus exclude these areas from the defined territories of the Metis Nation) strong arguments can be advanced in recognition of the historic Metis population in Manitoba constituting a recognized state in international law. Problems may be encountered in defining Metis territory if emphasis is placed on the method of land use. If one takes into consideration land uses ranging from freighting to hunting to cultivation, the extent of the Metis

homeland is vast. On the other hand, if emphasis is placed on cultivation, the area is significantly reduced. These problems are discussed in chapter 4 of this thesis. At this juncture it is sufficient to establish that the Metis Nation existed within a specific territory the definition of which may vary depending on the criteria adopted. This is not an unusual issue in international law which is often concerned with boundary identification. Stable state boundaries are a recent development. Arguably the issue is not one of stable boundaries so much as the existence of a territory that can be identified as Metis.

The main argument against the international status of the historic Metis Nation is the illegitimacy of Riel's government. According to this argument, the proper governing body in the Red River Settlement from 1835 until Canada assumed jurisdiction over the Metis in 1870 was the Council of Assiniboia established by the Hudson's Bay Company.³⁰ Whether Riel's provisional government is defended on the basis of the failure of the Council to effectively represent the Red River population or an inherent right to aboriginal sovereignty and voluntary surrender of aboriginal lands,³¹ it is clear that it was the representatives of Riel's provisional government that negotiated the terms of the Manitoba Act with Ottawa.³² The Act was "endorsed by the provisional legislature in the Red River, enacted by the Parliament of Canada and confirmed by Imperial legislature."³³

Metis nationalists would argue that they had a choice to either accept offers of annexation to the United States or to strike a deal with Canada in which a level of Metis autonomy could be maintained. In this sense, the Metis nation was capable of, and

did conduct, international relations with other nations. The form of government envisioned by the Metis Nation was a non-ethnic provincial government forming a component part of a federated state. By virtue of the population, the Metis would hold the majority of the seats in the newly created province of Manitoba. However, the massive influx of settlers soon resulted in the Metis becoming a minority in their homeland and control in the local legislature was lost.

The claim of aboriginal peoples to recognition as states is based in the legal order established by Indian societies prior to European contact; the suggestion in early United States decisions that at the time of British Colonial expansion in North America, Indian tribes were recognized by the British as sovereign nations capable of entering international relations; international law publicists and decisions challenging the legal and political assumptions upon which the denial of Indian sovereignty is based; and treaty practice in North America and international treaty practice. In order for all tribes to meet the criteria of statehood, the basis for comparison in determining the existence of a government must be something other than a western model of government. Further, the attributes of a tribal government and its ability to conduct international relations will vary depending upon the terms of the various treaties entered with the British and Canadian governments.³⁴ Given these limitations, numerous self-identifying Indian peoples could be excluded from s. 35(2) if the term "peoples" is equated with the term states. However, most would easily meet the contemporary definition of "nationhood" which

differs from statehood in that nations do not require unification of the collectivity under a government.

The use of the term "people" in international law suggests that a "people" need not meet the formal criteria of a state. Debate over the meaning of this term was raised by its use in various United Nations documents upholding the right to "self-determination of peoples" and the increasing activity of the United Nations aimed at putting an end to colonial domination.³⁵ To date the principle of self-determination has not been applied to aboriginal groups whose territories lie within the jurisdiction of recognized members of the United Nations. However, in 1975 the International Court of Justice gave an advisory opinion on the Western Sahara which attributed this right to a nomadic population with little in the way of a western style government. Although the tribes were not held out to meet the formal requirements of a nation, they were held to have sufficient social and political organization to require voluntary surrender of their lands and to exercise a right of self-determination. Further, traditional arguments used to deny aboriginal sovereignty were clearly rejected.³⁶

International organizations of indigenous peoples have focused on the question of self-determination but have not resolved the issue of what constitutes a people. Some indigenous groups have argued that "people" are distinguished from minorities in that the former are constituted of "persons who accepted incorporation into existing states" but "peoples were collective entities requiring self-determination."³⁷ The distinction is of little assistance in establishing identifying criteria. Rather than resolve the issue,

the participants at a 1977 United Nations Non-Governmental Organization Conference on Discrimination Against Indigenous Populations adopted the formal requirements of statehood for the purpose of identifying indigenous nations, but also declared that groups not meeting the criteria were proper subjects of international law entitled to the same rights as nations if they are "identifiable groups having bonds of language, heritage, tradition or other common identity."³⁸

The International Commission of Jurists has proposed a definition of people based on the following criteria:

1. a common history;
2. racial or ethnic ties;
3. cultural or linguistic ties;
4. religious or ideological ties;
5. a common territory or geographical location;
6. a common economic base; and
7. a sufficient number of people.³⁹

This definition accords with the social-science criteria of nationhood which emphasizes a psychological bond joining a people and differentiating them from others, an aversion to being ruled by others, common ideology, common institutions and customs, and a sense of homogeneity.⁴⁰ A collectivity may be a state or nation but not a people. For example, Canada is a state but its population does not constitute a single "people" given criteria one to four above.

The impact of adopting this definition is to expand the parameters of s. 35(2) to include aboriginal groups that do not meet the formal criteria of a state. For the Metis, this would

mean that it would not be necessary for a group identifying as Metis people to establish a link to the Metis Nation. An example of such a group would be the Metis in Grande Cache, Alberta. These people trace their origins to "Iroquois-Cree and White-Cree marriages between fur company men and Cree women."⁴¹

There are several reasons why the broader interpretation of "peoples" is preferable despite the arguments of Metis nationalists. The first, and most obvious in light of the above discussion is that the adoption of the formal requirements statehood or nationhood may result in the exclusion of self-identifying aboriginal peoples from the scope of s. 35(2). The second is that the inclusion of the term nation in the constitution would have been totally unacceptable because of Quebec's position and the rejection of "two nations" as a description of Canada. Further, the federal and provincial governments initially rejected aboriginal sovereignty and are still debating the meaning of self-government and its application to aboriginal groups.⁴² If Indian "nations" or "peoples" is interpreted in the manner suggested by the International Commission of Jurists, the term is given meaning without denying self-identification or admitting aboriginal sovereignty. Finally, Canadian courts have treated aboriginal groups as distinct cultural groups but not as independent self-governing societies. The federal and provincial governments did not intend to give aboriginals additional rights under the constitution than those they have by virtue of legislation, treaties or common law and thus they would not intentionally acknowledge their national status.⁴³

The difficulties faced by contemporary Indian collectivities and groups purporting to represent the Metis are not overcome by this conclusion. Although the Metis on Alberta settlements can establish a common history of poverty and deprivation, they have difficulty establishing a common history as a "people." A similar problem is faced by Indian bands on the prairies which are recognized as existing aboriginal collectivities by the Indian Act, but are constituted by descendants from more than one Indian tribe.⁴⁴ Given the emphasis on registered bands in self-government negotiations, the argument can be made that "peoples" should simply refer to identifiable collectivities having a common bond based on some, but not necessarily all, of the criteria enumerated by the International Commission of Jurists. The advantage of this approach is it is broad enough to encompass all self-identifying aboriginal groups without conferring rights that they would not otherwise have as only "existing aboriginal and treaty rights" are recognized and affirmed. Whether there is sufficient bonding to create entitlement to a collective right would be left as a question of fact for the courts depending on the right asserted. Accepting this approach "peoples" would simply be a body of persons united into a community for whatever reason.

(c) Temporal Consideration

The issue of whether "peoples" refers to historical or contemporary groups is significant for two reasons. First, an individual may not be associated with an ongoing collectivity but may be able to establish descent from a historical aboriginal collectivity. Second, contemporary aboriginal groups may not be

able to trace a link to a single historical "people" or they may have difficulty showing they have sufficient coherence and permanence to constitute a contemporary people. Rules of statutory interpretation are of little assistance in this regard. On the one hand, constitutional documents are to be defined broadly so that they are flexible enough to adapt to the times. On the other hand, one can argue there is no need for flexibility because Inuit, Indians and Metis are historically identifiable people.⁴⁵ The obvious problem with the second argument is it freezes aboriginal collectivities at a particular point in history and denies them the ability to reformulate for the purpose of achieving specific political, economic and social goals.

This problem is of particular importance to the Metis who may experience difficulties establishing a contemporary collective identity for the numerous reasons set out in sections III and IV of this chapter. This problem was briefly mentioned by Mr. Justice O'Sullivan in his dissenting opinion in Dumont v. A.G. of Canada where he stated that s. 35(2) recognizes the Metis as an aboriginal people and "[it] must be noted that the existence of the Metis people is asserted in the Constitution as of the present, not simply as of the past."⁴⁶ By this statement O'Sullivan suggests the term "people" is to be given both contemporary and historical significance. Regardless of whether O'Sullivan's views are accepted, peoples must refer to one of two possible groups - descendants of historic aboriginal collectivities or peoples associated with contemporary aboriginal collectivities.

2. Who Is An Aboriginal and What is an Aboriginal Group?

The shorter Oxford Dictionary defines "Aborigines", "Indians" and "Natives" as follows:

Aborigines: Usually explained as from the beginning, but this is not certain; inhabitants of a country; specifically the natives as opposed to the colonists, 1789. Indian: Belonging or relating to the original inhabitants of America and the West Indies, 1618. Native: Of indigenous origin, production as growth 1555; of or belonging to the natives of a particular place, 1796.⁴⁷

These terms have been used interchangeably and conjunctively, in common and legal use, to refer to the original race which inhabited Canada as distinct from European colonists.⁴⁸ Used in this way the term "aborigine" is a generic racial term and an aborigine is a descendant of the indigenous inhabitants of Canada. However, over time the terms "aboriginal" and "Indian" have taken on non-racial dimensions. As discussed below, many persons of non-native origin or mixed native and non-native origins have been drawn into the federally recognized Indian bands and other contemporary collectivities. If the term "peoples" is to be given any contemporary significance, then the broader named group of "aboriginal people", necessarily takes on non-racial dimensions.

How then do we determine if a group qualifies as "aboriginal"? Arguably the core of the group must be descendants of the original native inhabitants of Canada. The racial boundaries of the group may be expanded by a variety of means including legislated definitions, native customary law (eg. marriage and adoption) and recognition of self-identifying members by particular aboriginal communities. Professor Slattery suggests that additional factors

to consider in the classification of a group of people as aboriginal include:

1. the self-identity of its members, as shown in their actions and statements;
2. the culture and way of life of the group;
3. the existence of group norms or customs similar to that of other aboriginal people; and
4. the genetic composition of the group.⁴⁹

Although Slattery's criteria are useful in attempting to define an aboriginal group, the author submits that caution must be exercised in placing too much emphasis on factors (2) and (3) at this stage in the definition process. Problems arise from the tendency of non-natives to hold a static view of aboriginal culture by freezing it at a particular historic moment. This perspective is described by Sally Weaver as the "hydraulic Indian" view.⁵⁰ The Indian or native person is a cylinder which, at some undefined point in history is full to the top with Indian culture. As time passes, a group adopts certain aspects of European culture and the level of "Indianness" is dropped to the point that the cylinder is almost empty. The native group is then accused of having "spurious ethnicity" and is no longer considered aboriginal.⁵¹ This view is even more restrictive when combined with the tendency of non-natives to assume one culture or custom is more aboriginal than another by an ethnocentric comparison to their own white culture or customs.

These perspectives are adopted in arguments raised by opponents of Metis aboriginal rights. Emphasizing the European tendencies of the Metis of Ruperts Land in the 1870s and comparing

their lifestyle to the agricultural and nomadic tribes of the plains, Thomas Flanagan argues it is difficult to show that the Metis are a distinct aboriginal people.⁵² Flanagan describes the Metis as follows:

Now the Metis of Ruperts' Land were vastly different from the Indians. They did not exist in a natural economy of hunting, fishing and food gathering. They were from the start part of the commercial economy of the fur trade. Some were long term employees of the companies. Others worked intermittently on the cart trains and boat brigades. Many hunted buffalo, but not in a subsistence fashion . . . The way of life of most was much closer to that of their paternal white ancestors than to that of their maternal Indian forebears. Their religion was Protestant or Catholic Christianity. Many were familiar with and used in their life, white political institutions such as written law, courts, magistrates, elections, representative assemblies and committees . . .

He continues:

There were some mixed blood people who had Indian wives, lived with Indian bands, and were scarcely distinguishable from Indians . . . To the extent that the Metis lead a truly aboriginal life, they were not distinct from the Indians; and to the extent that they were distinct from the Indians, their way of life was not aboriginal.⁵³

Similar arguments are raised by Brian Schwartz in his consideration of whether the Metis are Indians within s. 91(24) of the British North America Act, 1867 (B.N.A. Act).⁵⁴ Schwartz argues that those Metis who identified as Indians and lived among Indians should be considered Indians under s. 91(24). He distinguishes these Metis from the Red River Metis described above. Of them he states:

The characterization of the Metis as an aboriginal people is etymologically dubious. The Metis are certainly indigenous to North America - they came into being as a distinct people on this continent. But they are not aboriginal in the same sense as the Indian and Inuit; they were not here from the beginning, but instead they developed when a large number of Europeans came to Canada in connection with the fur trade.⁵⁵

The difficulty with these arguments is the assumption that there is a single aboriginal way of life and the treatment of the Red River Metis culture without reference to its native origins. Extremely different pictures of the Metis culture emerge if one emphasizes their maternal native ancestry; Metis arts and crafts; the introduction of unleavened bread (bannock); the dependence of the community on the buffalo hunt, hunting and fishing; and the adoption of the dances of the plains Indians in the Red River Jig.⁵⁶ Like other aboriginal groups, the Metis combined the culture of their native ancestors with that of the European colonizers in order to survive political, social and economic changes introduced by the 'whiteman'. The main distinction between the Metis culture and other aboriginal cultures is the historic and contemporary Metis culture descends from the native and European cultures in a hereditary sense.

As an illustration of this point consider the Cherokee Nation as it existed in the State of Georgia in the early-to-mid nineteenth century. Prior to the jurisdictional and territorial fights between the Cherokee and the State of Georgia, the Cherokees lived undisturbed within their historic territory governed by their own laws, usages and customs. However, European contact resulted in the adoption of certain aspects of the European culture into the Cherokee way of life which, in the words of the United States Supreme Court, "lead the Cherokees to a greater degree of civilization."⁵⁷ A bill presented to the Supreme Court by counsel for the Cherokees described the Cherokee culture in part as follows:

They have established a constitution and form of government, the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments have all been organized. They have formed a code of laws, civil and criminal, adapted to their situation; have erected courts to expound and apply those laws, and organized an executive to carry them into effect. They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state and become agriculturalists, mechanics and herdsman; and under provocations long continued and hard to be borne, they have observed, with fidelity,⁵⁸ all their engagements by treaty with the United States.

The aboriginal and treaty rights of the Cherokee were argued before the United States Supreme Court again in 1832.⁵⁹ Eventually the Cherokee Nation was destroyed and displaced. Not once did the Court, or opponents of the Cherokee, take issue with the assertion that they were an aboriginal people despite their surrender of the nomadic hunting lifestyle traditionally associated with native cultures and the adoption of European cultural institutions. More modern examples of cultural blending are seen among tribes such as the West Coast Squamish who rely on real estate as a significant contribution to their economic base and the Hobbema in Alberta who are the beneficiaries of oil and gas development on their lands. It is ludicrous to suggest these people are not aboriginal because they have satellite T.V., drive Ford trucks, send their children to accredited provincial schools and have expanded or replaced their historic economic base.

As Professor Slattery implies in his suggested criteria, it is misleading to speak of a single contemporary or historic aboriginal lifestyle or culture among aboriginal groups. A comparison of aboriginal groups across Canada from the West Coast

Haida, through the Plains Cree, to the Mic Macs of the East coast illustrates the diversity of historic aboriginal cultures in areas such as religion, economic development and political organization. Although one might find several common features among groups within close geographic proximity, similarities are less frequent as the geographical distance between groups increases and the topography of the earth changes.⁶⁰

Given the diversity among historical aboriginal groups and the inevitability of the commingling of the aboriginal and colonizing cultures, it is difficult to identify a single common factor linking aborigines together as a group other than the ability to trace the descendency of the core of the group to indigenous inhabitants of Canada through maternal or paternal lines. Consequently it is more appropriate to consider culture, custom and lifestyle when defining composite groups of aboriginals than in the definition of the term "aboriginal." Even then, the emphasis given to these factors will vary in accordance with the cultural evolution of a particular aboriginal group. Ultimately, this may mean that traditional and contemporary cultures, customs and lifestyles become more important when defining entitlement to, and the content of, aboriginal rights than determining whether a group is "aboriginal."

3. Summary

In short, the impact of the phrase "aboriginal peoples" on the definition of its composite groups is:

1. the term people implies a collectivity of persons united together into an identifiable community;

2. identification as an Indian, Inuit or Metis under s. 35(2) is dependent on descent from a historical aboriginal collectivity or association with, and acceptance by, a contemporary aboriginal collectivity;
3. the collectivity must be a racial group to the extent that the core of the group must be descendants of the original inhabitants of Canada; and
4. the racial boundaries and unification of the group may be defined in numerous different ways including legislation (eg. Metis Betterment Act and the Indian Act), native customary law and membership criteria of specific aboriginal groups.⁶¹

II Who Are the Metis?

The criteria established by an examination of the phrase "aboriginal peoples" is useful to determine the minimum standards that must be met by a group purporting to be "Metis," but is not specific enough to define the Metis as a distinct aboriginal group. Within the context of s. 35, two approaches may be adopted to delineate more identification criteria. The first approach is to define the Metis by process of elimination. If an aboriginal group fits the criteria in section II, but does not fall within the definition of Inuit or Indian, the group is Metis if it identifies as Metis. The second approach is to treat each term separately according to its own use, rather than to adopt a "catch all" definition in fear of inadvertently excluding an aboriginal group from constitutional protection. The numerous problems associated with defining the terms "Indian", "Inuit" and "Metis"; the

political histories of each term; and the unresolved political and legal debates concerning their meaning suggests that the only feasible way to define these groups is by defining each group without reference to the other categories of aboriginal peoples.

1. The Comparative Approach

Prior to the definition of aboriginal peoples in s. 35(2), four main categories of aboriginal peoples were commonly used in legal and political spheres. These categories are status Indians, non-status Indians, Inuit and Metis. Non-status Indians are not specifically recognized as aboriginal peoples in s. 35(2). Consequently, in order for them to receive constitutional protection, they must fall within one of the three named groups. The central issue debated among groups purporting to represent the Metis is whether non-status persons of mixed origins can properly be identified as Metis if they have no connection with the Metis Nation. Essential to this debate is the scope of the term "Indian" in s. 35(2). If "Indian" refers to the same class of persons referred to in s. 91(24) of the B.N.A. Act, a narrow definition of Metis peoples focusing on a common political, national and historic background may not affect the constitutional recognition of non-status Indians. Although the term "Indian" has been interpreted to refer only to Indian Act Indians,⁶² this position has been subject to strong criticism⁶³ and cannot be applied to s.91(24) in the face of the Eskimo decision.⁶⁴ The Eskimo decision held that Eskimo peoples are s. 91(24) Indians even though they are not included as Indians in post-confederation Indian legislation. The term "Indian" in s. 91(24) was interpreted

to include "all present and future aboriginal native subjects of the proposed confederation of British North America".⁶⁵

The reasoning adopted in the Eskimo case can be applied to non-status Indians who were never registered under the Indian Act, were enfranchised, were excluded from treaties, never signed treaties or are descendants of the above as long as their ancestors were recognized by the fathers of Confederation as aborigines living within the territories to be included in the proposed confederation of British North America. The fact that Parliament has chosen not to exercise its jurisdiction over these people and has excluded them from the definition of "Indian" in an independent legislative regime does not mean they cease to exist as s. 91(24) Indians. Parliament cannot control or alter the constitutional definition of the term through legislation.⁶⁶

If one accepts the argument that s. 35(2) of the Constitution Act must be read independent of s. 91(24) of the B.N.A. Act, or that the term "Indian" refers only to a recognizable Indian group, the definition of the term "Metis" peoples takes on greater significance. There are several reasons why s. 35(2) should be read independently of s. 91(24) including:

1. The inclusion of the Inuit peoples in s. 35(2) suggests that the term "Indian" is not being used simply in its meaning in s. 91(24).
2. The functions of the two sections are separate. Section 91(24) centralizes control over Indian affairs by placing Indians and lands reserved for Indians under the jurisdiction of the federal government. Section 35 of the Constitution Act is not concerned with jurisdictional

issues but with giving constitutional recognition to aboriginal and treaty rights by limiting the abilities of federal and provincial governments to impair existing rights. Section 35(2) simply defines the class of persons to whom sections 25 and 35 apply.

3. Although the Native Council of Canada argued that the constitutional provision defining aboriginal peoples should reflect what was intended at the time of Confederation by providing a more explicit definition of who is an Indian, post 1982 activity suggests that this was not the approach taken.⁶⁷ The federal government has not changed its position on the issue of jurisdiction and some Metis organizations and leaders representing the Metis continue to press for constitutional amendments to deal with jurisdictions and responsibility.⁶⁸
4. The wording of the two sections is different. Although there are strong arguments that the word "Indian" in s. 91(24) means "aboriginal" and includes all full and mixed blood persons of aboriginal descent, there are several opposing opinions and the matter has not been resolved by the courts. If s. 91(24) and 35(2) were intended to be read together, the use of the word "Indian" instead of the word "aboriginal" in s. 35(2) would have helped to eliminate confusion.

If the "Indians" referred to in s. 35(2) are not s. 91(24) Indians who are they? One could argue they are identifiable groups of status Indians who fall within the Indian Act definition of "Indian." If this is so, defining "Metis" as requiring some link

to the Metis Nation could result in excluding a large number of native persons from s. 35(2). However, this interpretation is questionable because it allows Parliament to act beyond its competence to define terms in the constitution. Since the proclamation of the Constitution, the membership criteria of the Indian Act has been changed to include Indian women who had previously lost status through marriage. If "Indians" in s. 35(2) are only Indian Act Indians, Parliament might arguably have unilaterally amended the Constitution by amending its legislation. The alternative argument is "Indians" might mean Indians as defined from time to time by Parliament.⁶⁹ The courts are unlikely to foreclose Parliament's options by limiting the term to Indian Act Indians.

It is also clear from the context of the negotiations leading to the inclusion of s. 35 in the Constitution that this interpretation was not intended. During that time there was political concern with sexual discrimination in the Indian Act and proposals were being made for reworking the Indian Act membership system. Although there had been a little litigation on the application of aboriginal and treaty rights to non-status Indians,⁷⁰ a pattern of decisions had developed which failed to differentiate between status and non-status Indians when determining the validity of provincial laws of general application. The issue was one of federal occupation of the field.⁷¹ However, the question of differentiation has re-emerged after the proclamation of the constitution in Dick v. The Queen which made it clear provincial hunting laws only applied to Indians because of the wording of s. 88 of the Indian Act.⁷²

The main argument in support of a narrow definition of "Indian" is the differentiation between Indians and Inuit in s. 35(2). However, if one considers the political activity leading to the inclusion of section 35 in the Constitution, the inclusion of the term "Inuit" in s. 35(2) need not result in a restricted interpretation of the word "Indian." The federal government was lobbied by three independent national aboriginal organizations to protect aboriginal and treaty rights in the new Constitution - the Assembly of First Nations (A.F.N.) representing status Indians, the Native Council of Canada (N.C.C.) representing Metis peoples and non-status Indians (including the Metis Association of the North West Territories) and the Inuit communities of the North represented by the Inuit Tapirisat and the Inuit Committee on National Issues (I.C.N.I.). If s. 35 is viewed as a political response to these three independent organizations, the specification of Inuit peoples can be viewed as both a matter of political expediency and recognition of a distinct aboriginal people in accordance with their own terminology. This sophisticated distinction was not appreciated by the Fathers of Confederation and their historical counterparts who lumped "Indian-Esquimauxs" together with Indian nations in their usage of the terms "Savages" and "Indians."⁷³ The willingness of the federal government to recognize a distinction between these two aboriginal groups may simply mean the term "Indian" in s. 35(2) does not include the Inuit. Whether the term "Indian" includes status Indians has never been an issue. If one accepts that section 35(2) need not be analyzed by an "either-or" logic (that is either it encompasses Indians referred to in s. 91(24) or it does not) then

those persons who do not fall under a narrow definition of "Metis" peoples can logically be included in the reference to "Indians."

Who are the Metis People in this context? Why have they been given specific recognition in s. 35(2)? The "Metis" may be referred to in s. 35(2) as a matter of political expediency and recognition as an aboriginal group. The definition section was inserted primarily to satisfy the claims of the Metis to recognition as a distinct aboriginal people. The inclusion was made without making a previous determination of whether the Metis actually had aboriginal and treaty rights.⁷⁴ Further, the decision was made without determining who the Metis are. This latter point is illustrated by the subsequent debates at the First Ministers conferences on the question of Metis identity.⁷⁵

There are several broad choices from which to choose a definition for the term "Metis." Among these are:

1. anyone of mixed Indian/non-Indian blood who is not a status Indian;
2. a person who identifies as Metis and is accepted by a successor community of the Metis Nation;
3. a person who identifies as Metis and is accepted by a self-identifying Metis community;
4. persons who took, or were entitled to take half-breed grants under the Manitoba Act or Dominion Lands Act and their descendants;⁷⁶ and
5. descendants of persons excluded from the Indian Act regime by virtue of a way of life criteria.

Given the political nature of s. 35(2), one could argue that the Metis people are those persons intended to be encompassed by

the term when the N.C.C. negotiated this term into the Constitution. This definition would include populations distinct from the Metis Nation who identify themselves as "Metis" rather than as "Indians." Some of these persons whose ancestors did not live an Indian way of life may not fall within the parameters of s. 91(24) and thus specific mention is necessary to ensure the application of sections 25 and 35 to this group.⁷⁷ This position has not been accepted by all persons who identify themselves as Metis. In March, 1983 the Metis organizations in Saskatchewan, Alberta and Manitoba split from the N.C.C. and formed the Metis National Council (M.N.C.). According to the M.N.C. the Metis are the "Metis Nation" defined as:

All persons who can show they are descendants of persons considered Metis under the 1870 Manitoba Act, all persons who can show they are descendants of persons considered as Metis under the Dominion Lands Act of 1879 and 1883; and all other persons who can produce proof of aboriginal ancestry and who have been accepted as Metis by the Metis community.⁷⁸

The M.N.C. was allowed representation in the constitutional conferences and the debate surrounding the identification of Metis peoples remains unresolved.

Caution must be observed in placing too much emphasis on the role of the N.C.C. without taking into consideration some of their political and economic concerns. Prior to 1982 the N.C.C. received funding on behalf of Metis and non-status Indians for certain political, legal, economic and social activities. A large portion of its membership was composed of non-status Indian women who would ultimately be returned to status. If the N.C.C. recognized a narrow definition of Metis people and their need for special representation, their effectiveness as a lobbying group could be

marginalized and their funding base reduced. The First ministers conferences illustrate there was no specific definition of Metis at the time s. 35(2) was negotiated and after that time it was contrary to the N.C.C.'s political and financial interests to agree to a narrow definition of Metis peoples. Further, a narrow definition could potentially affect the constitutional rights of its non-status membership. By this discussion it is not the author's intention to down-play the achievements of the N.C.C. or their importance in representing Canada's non-status Indians, but simply to address some of the political realities which have created the identification problems associated with the term "Metis." Because of these considerations, the intentions of the N.C.C. during negotiations can not be determinative.

The above interrelated analysis of the terms used in s. 35(2) does little to assist in the definition process as we are still left with numerous variables. However, the analysis is useful because it illustrates non-status Indians fall within the term "Indians." This means the central issue is not whether non-status Indians will be inadvertently excluded from s. 35(2) if a narrow definition of Metis is adopted. Consequently, the most logical approach to determining the identification of the Metis is to look at the unique history and use of the term as well as the views of the Metis community.

2. Historical, Political and Legal Usage of the Term "Metis"

Basic to an understanding of the difficulties associated with defining the term "Metis" is an understanding of the history and use of the term. The word "metis" is a French word meaning "mixed"

and was first used to refer to the French speaking half-breeds of the Red River settlement and surrounding areas.⁷⁹ Initially the term was used to refer to the French and Cree speaking descendants of the French-Catholic Red River Metis as distinct from the descendants of English speaking half-breeds or "country born," who lived a more agrarian lifestyle and identified themselves as Protestant and British.⁸⁰ Later, both native and non-native scholars writing histories on the Red River area used the term collectively to refer to French and English speaking half-breeds who emerged as a distinct cultural group in the West and spoke of themselves as the "New Nation."

By the 1970's the term extended beyond its religious, geographic and linguistic boundaries to encompass "any person of mixed Indian-white blood who identified him or herself and was identified by others as neither Indian or white, even though he or she might have no provable link to the historic Red River Metis."⁸¹ The identification was a negative identification used interchangeably with the word "half-breed." They were Metis or half-breed because they were not somebody else.⁸² More recent historical works focusing on ethnic origins and changing dimensions of Metis identity use the term to refer to

those individuals, frequently of mixed Indian, Western, European and other ancestry, who are in the St. Lawrence - Great Lakes trading system, including its extension to the Pacific and Arctic coasts and chose to see themselves in various collectivities as distinct from members of the 'white' community.⁸³

Some suggest that the contemporary usage should be extended to persons of mixed metis/Indian ancestry.⁸⁴

The lack of consensus on the use of the term is illustrated in an article on Metis history by Jennifer Brown in The Canadian Encyclopedia. Cautioning that there is no agreement among writers concerning who the Metis are, she argues that distinctions must be made based on the context in which the term is used.

It is important to define specific meanings for the terms as used in this discussion, while cautioning that writers, past and present, have not achieved consensus on the matter. Written with a small "m", metis is an old French word meaning "mixed", and it is used here in a general sense for people of dual Indian-white ancestry. Capitalized, Metis is not a generic term for all persons of this biracial descent but refers to a distinctive sociocultural heritage, a means of ethnic self-identification, and sometimes apolitical and legal category, more or less narrowly defined . . . This complexity arises from the fact that biological race mixture (Fr, metissage) by itself does not determine a persons social, ethnic or political identity.⁸⁵

This same differentiation has been adopted by the Metis National Council. In its opening statement to the United Nations working group in August 1984 in Geneva it suggested that "metis" written with a small "m" be used as a racial term for any person of mixed Indian-European ancestry, and written with a capital "M" be used to refer to the Metis Nation.⁸⁶ For the remainder of this thesis this differentiated spelling will be adopted in the same way with the addition that the term "Metis" in quotation marks refers to the term as it appears in S.35(2). The use of the term "non-status Indians" will refer to those non-status aboriginals who do not identify as metis.

A consideration of the legal and common use of the term helps to understand how some of the confusion arose. The only legal definition of Metis is in the Metis Betterment Act which adopts a racial view for the purpose of defining Metis persons within the

boundaries of the province of Alberta. This is somewhat ironic in that the only "status" Metis are not descendants by the Metis nation. Although the federal government has not legislated with respect to Metis peoples, it has legislated with respect to half-breeds. In the Manitoba Act of 1870 and the Dominion Lands Acts of 1879 and 1883, the federal government granted lands to half-breeds. Subsequent federal legislation and subordinate legislation provided for the distribution of land grants and scrip to the half-breed people to satisfy claims existing in connection with the extinguishment of Indian title.⁸⁷ This procedure coincided with the extension of treaty making to the western prairies. For the purpose of treaty entitlement, a distinction was drawn between Indians and half-breeds on a lifestyle, self-identification and group identification basis. Those living the lifestyle of Indians and associated with Indian tribes were allowed to take treaty. The others were given scrip.⁸⁸

A review of the historical development of the Indian Act reveals that this same group of people were intentionally excluded from benefits received by Indian peoples pursuant to the Indian Act.⁸⁹ The term "half-breed" in this context can be used interchangeably with the term "Metis." The relationship between the Manitoba Act, Dominion Lands Act and Indian Act definitions of "half-breed" has lead Douglas Sanders to suggest that the only logical legal definition of "Metis" would be the descendants of those persons who took scrip and are excluded from status by the Indian Act.⁹⁰ William Pentney would extend this definition to include descendants of persons entitled to receive scrip.⁹¹

Non-status Indians emerged slowly as a group through intermarriage of Indians and non-Indians. Non-status Indians was not a category that was expected to perpetuate itself. Rather, these individuals were expected to assimilate and lose identification as an Indian. Further confusion arose when mixed blood status Indians were given the option to surrender their treaty rights and take scrip.⁹² Eventually, popular usage came to equate Metis and non-status Indians on the prairies. This equating of the two categories also occurred in federal funding and non-status Indian membership was accepted into Metis provincial organizations in order to achieve economic, social and political goals.⁹³

The contemporary usage of the term Metis has been adopted by the N.C.C.. They argue that Metis people include "both blood relatives of the Red River Metis and completely distinct Metis populations which pre-and-post date both the history and the people of the Red River."⁹⁴ They contend the term "Metis" in s. 35(2) of the Constitution refers to their constituents who identify themselves as metis and were never included in treaty, or were excluded from treaty as half-breed, or were refused scrip on a residency basis or are descendants of the above.⁹⁵ The M.N.C. have rejected both the contemporary and traditional usage of the term Metis and have adopted a definition consistent with the legislative and political activity of the federal government with respect to half-breeds living in Ruperts Land and the Northwest Territories. The M.N.C. define the Metis as follows:

1. The Metis are:
 - an aboriginal people distinct from Indian and Inuit;
 - descendants of the historic Metis who evolved in what is now Western Canada as a people with a common political will;
 - descendants of those aboriginals who have been absorbed by the historic Metis.
2. The Metis community comprises members of the above who share a common cultural identity and political will.⁹⁶

The provincial organizations comprising the M.N.C. adopt similar definitions but also accept non-status Indians who have been accepted as members of the provincial organization. For example, when the Alberta Metis Association was founded in 1932 it offered membership to anyone of native ancestry.⁹⁷ As recent as 1987, any person of native ancestry could be a member so long as a member of the Association was willing to take a sworn statement that the applicant was a metis.⁹⁸ In Manitoba, the Manitoba Metis Federation was started because of a split between status and non-status Indians. Their constitution provided that a non-registered person of Indian descent could become a metis member of the Federation. A non-native person could also be a member provided he or she was married to a metis.⁹⁹ It is likely this flexibility within the membership criteria of the prairie political organizations that is the reason behind the self-identification element in the M.N.C. definition of the Metis Nation.

The result is today "metis" can be defined in many different ways. A metis person is described as a person of mixed-blood, one who considers herself a metis, a non-status Indian, one who received land scrip or money scrip, one who is identified with a group that identifies as metis and a non-native married to a metis.¹⁰⁰ None of the definitions standing alone is satisfactory to all persons who identify themselves as metis. These potential usages and definitions have created the identity debate and have resulted in major divisions in native political organizations.

3. Resolution of the Definition Debate

Given the complexity of the definition debate is it possible to define the term "Metis" in s. 35(2)? This could depend on the view of ethnicity adopted by the interpreter of s. 35(2) and the willingness of the governments and metis organizations to accept varying definitions of the term "Metis" for constitutional and other purposes. If s. 35(2) refers to the metis ethnic identity and if we accept the proposition that ethnicity is an ongoing process defining its boundaries in response to and in the context of social change, culture bearing collectivities with a common history, such as the descendents of the Metis Nation, will not necessarily have to be equated to the ethnic group referred to in s. 35(2). Joe Sawchuk argues that the contemporary concept of metis is a drastic reformulation of the criteria that once identified the Metis Nation. However, if one views ethnicity as primarily political in nature reformulating itself in response to many cultural stimuli, the emphasis on different identifying criteria by different metis organizations can be easily understood.

Sawchuk contends that ethnic consciousness is more than recognition of cultural phenomena, it is a political assertion to defend predominantly economic interests of a collectivity. Consequently, ethnic identity is always in a state of flux and responds to the political climate of a given period.¹⁰¹ The fact that the two national metis organizations cannot agree on who is or is not a metis does not mean a contemporary metis ethnic identity does not exist. It may mean that these political organizations have adopted identification criteria that further their political and economic goals.

An example of this phenomena can be seen in the New Brunswick Association of Metis and Non-Status Indians. In the 1600s there was a significant amount of mixing between the French and Indian families in Acadia and New France, but a distinct cultural group did not emerge and their offspring were not classified as a distinct race.¹⁰² Research conducted by the New Brunswick Association supports these facts. Clem Chartier suggests this research represents a "conscious attempt" by "maritime organizations to distance themselves from any possible negative impact which may result from being identified as half-breeds or Metis."¹⁰³ Chartier argues that the tune of the provincial organization changed. After Constitutional recognition of the Metis as a distinct aboriginal people, focus was shifted to metis origins and racial criteria.¹⁰⁴

If the existence of more than one metis people is accepted, there will be some individuals of Indian descent who are not metis and do not have Indian status. The "Metis" in s. 35(2) will have to be one of two possible groups:

1. The descendants of the historic Metis Nation.
2. People associated with ongoing metis collectivities.

A refusal to select identifying criteria by freezing cultural idioms at a given point in history allows the interpreter of s. 35(2) to define "Metis" for constitutional purposes as small "m" metis. This interpretation makes sense in the context of the political activity surrounding the negotiation of s. 35 into the Constitution. The result is the constitutional term "Metis" does not refer to a homogeneous cultural group but a large and varied population characterized by aboriginal ancestry. This conclusion should not be surprising as the term "Indian" clearly encompasses a variety of Indian nations with different political, cultural and historical backgrounds. The common factor shared by all of these groups is their aboriginal ancestry. This interpretation also avoids unilateral application of a legal definition and allows for self identification.

So when does the distinction between small "m" metis and the Metis Nation become significant? It is significant in the context of entitlement to specific aboriginal rights such as a land base and the right to self-government. In this context the question is not so much one of definition but entitlement and standing. Membership criteria will vary depending on regional, historical, cultural and political differences and the nature of the claim asserted. The demands of the membership will vary depending on these differences and their history of dealings with the federal and provincial governments. Consequently, it may be impossible to design a single system of compensation for all metis claims which recognizes their diversity or resolve their grievances with a

single court action and at the same time upholds the unique identity of the Metis Nation.

III Standing to Sue

1. Introduction

The membership criteria and definition of a metis group will affect the basis upon which claims to aboriginal title are made and the form of compensation sought. Groups which have a difficult time establishing historical occupation of a defined territory may shift their focus to the mode of extinguishment adopted by the federal government creating a natural dividing line between those metis who took scrip and those who accepted treaty. On the other hand, persons living within the same geographic boundaries and joined together in pursuit of the same goals may select identifying criteria focused more on a contemporary solution than a common history. For example, the definition of "Metis" in the proposed Dene/Metis land claim settlement has racial, geographical, self-identification and group identification criteria and clearly includes persons who may have had treaty, scrip or other claims against the federal government.¹⁰⁵ Those metis who took scrip may organize into distinct groups based on claims to Metis nationality, claims to monetary compensation as opposed to the creation of a land base and membership in a group occupying a contemporary land base. Whether the claims of these groups are resolved by judicial determination or land claims settlement, the group asserting the right will concern itself with the constitutional protection of those rights. The necessity of the groups to create a plaintiff

recognizable in law is one more reason why a broad interpretation of the word "Metis" in s. 35(2) is desirable.

Recognizing the diversity among self-identifying metis groups and the reformulation of groups for the purposes of asserting various claims, this thesis will address the claim to aboriginal title by descendants of the Metis inhabiting Manitoba prior to 1870 and their descendants (Manitoba Metis). Where appropriate, reference will be made to other metis groups to illustrate particular points. Keeping this in mind, the following analysis of standing will focus on the Manitoba Metis.

2. Standing

In Calder v. A.G. of B.C. Mr. Justice Judson summarized aboriginal title as follows:

. . . when the settlers came, the Indians were there, organized in societies and occupying lands as their forefathers had done for centuries. This is what Indian title means...¹⁰⁶

This description of title has since been confirmed by the Supreme Court of Canada and forms the basis for the assertion that aboriginal title is a collective right.¹⁰⁷ Although the question of criteria for proof of title is the subject of debate, academic and judicial opinion agree that parties asserting a claim to title must constitute an organized group of native people.¹⁰⁸ In his article "Understanding Aboriginal Rights", Professor Slattery explains this criterion as follows:

This criterion excludes claims advanced by individuals. Aboriginal title is a collective right vested in a group. It should be noted that this does not mean that individual members of a native group cannot hold legally enforceable rights to share in a group's collective title

under the rules in force within the group. Such rights are not, however, aboriginal title in the strict sense. The criterion also disqualifies collections of people who lack sufficient coherence, permanence or self identification to qualify as an organized group. But these requirements must be applied flexibly, in light of the varying levels of organization found in aboriginal societies.¹⁰⁹

A similar view is adopted by Mr. Justice Steele who states the following on the question of standing in the Bear Island case:

It is trite law that aboriginal rights pre-date any treaty or setting up of reserves. Hence if there are persons who are recognized by native Indian groups as being Indians and members of their group, but who are not able to be registered under the [Indian] Act, then there must be a method whereby their rights can be asserted... The only way this can be done is by allowing a representative action on behalf of the band... Whether there is a band, and who its members are, is a matter to be determined in the action upon the evidence.¹¹⁰

The requirement that the plaintiff(s) represent an organized group of native people could result in a bar to a claim to aboriginal title by descendants of the Red River Metis given the problems associated with defining a contemporary metis identity and allegations that the Metis Nation died with Louis Riel. This point is illustrated in the recent decision of Dumont et al v A.G. of Canada.¹¹¹ This was not an aboriginal title case but a case concerned with the constitutional validity of orders-in-council and Acts of Parliament purportedly passed in accordance with sections 31 and 32 of the Manitoba Act of 1870. The individual plaintiffs claimed to be descendants of persons referred to as "half-breeds" in the Manitoba Act and the corporate plaintiffs (Manitoba Metis Federation Inc. and the N.C.C. Inc.) purported to represent the interest of "all other descendants of Metis persons entitled to land and other rights under Section 31 and 32 of the Manitoba Act of 1870."¹¹²

At the trial level, an application was made by the Attorney General of Canada to strike out the statement of claim on the grounds that the plaintiffs lacked standing in a public interest suit. The court held for the plaintiffs on the following grounds:

1. the court has jurisdiction to grant a declaratory order providing a real issue concerning the relative issues of each has been raised;
2. the real issues in the action are whether the Manitoba Act promised a Metis reserve and whether the alleged measures taken to extinguish Metis title were unconstitutional;
3. the practical effect of finding for the plaintiffs would be support in their land claim negotiations;
4. the legislation in question refers to a specific group or class represented by the plaintiffs; and
5. there is a current violation of the plaintiffs' rights relating to the Metis reserve.

This case was successfully appealed by the Attorney General. Speaking for the Court of Appeal, Mr. Justice Twaddle held that the declaration of invalidity would not serve the intended purpose of deciding an issue essential to the land claims negotiations as the legal basis of a land claim was a matter of "great uncertainty" and the federal government would also be influenced by social, political and historical considerations.¹¹³ Justice Twaddle also stated that the plaintiffs' assertion of a community of interest in land was not alleged in the statement of claim and was not supported by the Manitoba Act which granted individual, rather than

collective, rights.¹¹⁴ For the purpose of the appeal he assumes that "all half-breeds of 1870 were 'Metis'; that the Metis of 1870 were a distinct people; and that all of their descendants are included within the undefined group of persons constitutionally recognized today as 'the Metis people'."¹¹⁵ As discussed, the first two assumptions made by Mr. Justice Twaddle are currently challenged and are not statements of fact but issues to be resolved. The decision is currently under appeal.

Although the question of standing is not directly raised by Justice Twaddle, the dissenting opinion of Mr. Justice O'Sullivan notes that it is difficult for the courts and lawyers to understand what the rights of a "people" can mean and how they are asserted. Accepting that s. 35(2) recognizes the Metis as aboriginal people and rejecting the argument that the section is meaningless because the Metis have no rights, he argues that "it is impossible in our jurisprudence to have rights without a remedy and the rights of the Metis people must be capable of being asserted by somebody."¹¹⁶ He emphasizes that the constitution recognizes the Metis as a people of the "present" and not the "past."¹¹⁷ Treating their land rights as collective rights, he concludes that the "plaintiffs are suitable persons to assert the claims of the half-breed people" and comments on the need for the development of "a rule of law to make possible a legal solution to minority claims."¹¹⁸

The Dumont decision is significant because it rejects reliance on the Manitoba Act to assert a collective claim to aboriginal title. If it is upheld, some other source may have to be established. Further, certain factual assumptions were made to permit standing by the plaintiffs in the action. In the event of

an aboriginal title case, the assumptions would be issues of dispute. The inability of self-identifying metis to agree on a definition of "Metis peoples," the non-existence of an organization purporting to represent only descendants of the Red River Metis (to the exclusion of non-status Indians and other metis accepted by the organization), the scattering of the Metis population across Canada, the difficulty in establishing an ongoing Metis collectivity since 1870 and a static view of aboriginal culture are all reasons that can be employed to deny sufficient coherence, permanence of self-identification to qualify as an organized group.

The coherence of the plaintiff group should not be a bar to recovery but is more properly taken into consideration when determining the mode of compensation. Like other aboriginal groups who have been dispossessed of their lands, the Metis of the Red River can not show a continual link to a given territory to the exclusion of others up to the present day. Assuming dispossession was involuntary, illegal or wrongful in some other way, it is only just that the criterion for entitlement be determined as at the date of dispossession rather than the present day. Assuming an aboriginal group existed at the time of dispossession but lacks sufficient coherence to be called a group today, a land settlement for an existing group of descendants may not be appropriate. Rather, compensation may be in the form of cash payments or individual land grants coupled with cultural centres and scholarships to compensate for destroying the collective identity of the group. If a claim can not be brought because an existing collectivity can not be identified, the result is to deny the legal enforceability of the rights of an individual members of a group

to share in a group's collective title. The relationship between the identification of the group and the mode of compensation is illustrated through contemporary examples of land claims agreements and settlement schemes discussed in the conclusion of this thesis.

CHAPTER 1 ENDNOTES

1. Canada Act, 1982 (U.K.), 1982, c.11.
2. W.F. Pentney, The Aboriginal Provisions in the Constitution Act, 1982 (Saskatoon: Native Law Centre, University of Saskatchewan, 1987) at 100; 45-51.
3. See, for example, A.G. of Ontario v. Bear Island Foundation (1984) 15 D.L.R. (4th) 321 at 330 (Ont. H.C.J.); Hamlet of Baker Lake v. Min. of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513 at 542-543 (F.C.T.D.); B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 756-7.
4. See, for example, R. v. Simon (1985) 24 D.L.R. 390 (S.C.C.); Sparrow v. Regina (1987) 2 W.W.R. 577 (B.C.C.A.). But see A.G. of Ontario v. Bear Island, id., which refers to aboriginal rights as communal rights. This interpretation arises from a view that aboriginal rights are synonymous to, or are in some way derived from aboriginal title. Similar views are given by Slattery, id. at 744.
5. Guerin v. R. [1984] 2 S.C.R. 335.
6. D. Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada" (Vancouver: University of British Columbia, Faculty of Law, 1988), 35, photocopied, 1.
7. For an interesting discussion on different classes of aboriginal rights see D. Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition" in The Quest for Justice, eds. M. Boldt, J.A. Long and L. Little Bear (Toronto: University of Toronto Press, 1985) 24 at 25-26.
8. Reprinted in The Quest for Justice, id. at 359.
9. See, for example, D. Opekokew, The First Nations: Indian Government and the Canadian Confederation (Regina: Federation of Saskatchewan Indians, 1980); Ahenakew, supra, note 7; Report of the Special Committee on Indian Self-Government in

Canada, by Keith Penner, Chairman (Ottawa: Queen's Printer for Canada, 1983).

10. T. Berger, Northern Frontier Northern Homeland (Vancouver: Douglas and McIntyre Ltd., 1988) at 40-41.
11. R.E. Gaffney, G.P. Gould and A.J. Semple, Broken Promises: The Aboriginal Constitutional Conferences (New Brunswick: New Brunswick Association of Metis and Non-Status Indians, 1984) at 62.
12. The Metis Betterment Act, R.S.A. 1980, c. M-14, s.2(a).
13. D. Sanders, "A Legal Analysis of the Ewing Commission and the Metis Colony System in Alberta," Paper prepared for the Metis Association of Alberta (Edmonton: April 4, 1978) Photocopied, at 19.
14. For a discussion on the history of the Metis settlements see, for example, Metis Association of Alberta, P. Sawchuk and T. Ferguson, Metis Land Rights in Alberta: A Political History (Edmonton: Metis Assoc. of Alberta, 1981) at 187-214; Alberta Federation of Metis Settlement Associations, Metisism: A Canadian Identity (Edmonton: Alberta Federation of Metis Settlement Associations, 1982) at 5-11; D. Purich, The Metis (Toronto: James Lorimer and Company, Publishers, 1988) at 133-150.
15. Bill 64, Metis Settlements Act, 3d. Sess., 21st Leg. Alta., 1988 s. 1(1) h.
16. For a summary of academic opinion see W.F. Pentney, supra, note 2 at 182-188.
17. Aboriginal title is treated as a communal right of a tribe of Indians. See, Calder v. A.G.B.C. [1973] R.C.S. 313 and supra, note 3.
18. D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda, Vol. I, eds. S.M. Beck and I. Bernier (Montreal: Institute for Research on Public Policy, 1983) at 241.

19. L. Oppenheim, International Law, 18th ed. (London: Longman's, Green and Co., 1963) at 136; Draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, article 1, printed in National Lawyers Guild, ed. Rethinking Indian Law (New Haven: Advocate Press, 1982) 137-138; F. Snow, International Law (Washington, Gov't Printing Office, 1985) at 19.
20. See discussion in M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (Longman's, Green & Co. Ltd., 1926; reprint, New York: Negro University Press, 1969) at 19.
21. See, for example, R. Coulter, "Contemporary Indian Sovereignty" in Rethinking Indian Law, supra, note 19 at 117.
22. See, for example, D. Redbird, We are Metis: A Metis View of the Development of a Native Canadian People (Willowdale: Ontario Metis and Non-Status Indian Association, 1980) at 5; Tremaudan, A.H., Hold Your Heads High: History of the Metis Nation in Western Canada, trans. E. Maguet (Winnipeg: Pemmican Publications, 1982) at 8.
23. See, for example, G. Stanley, The Birth of Western Canada (Great Britain: Longmans, Green and Co. Ltd., 1936; reprint, Toronto: University of Toronto Press, 1960) at 11; A.S. Morton, "The New Nation: The Metis" in The Other Natives, vol. 1., eds. A. Lussier and D.B. Sealey (Winnipeg: Manitoba Metis Federation Press and Editions Bois-Brules, 1978) at 28.
24. Tremaudan, id.
25. For a discussion of the various lifestyles among the Metis see, for example Sealey, D.B. and Lussier, S., The Metis: Canada's Forgotten People (Winnipeg: Manitoba Metis Federation Press, 1975) at 17-30; M. Giraud, The Metis in the Canadian West, trans. G. Woodcock (Edmonton: University of Alberta Press, 1986); E. Pelletier, A Social History of the Manitoba Metis: The Development and Loss of Aboriginal Rights (Winnipeg: Manitoba Metis Federation 1987). This subject is discussed in further detail in chapter 4 of this thesis.
26. See, for example, Stanley, supra, note 23 at 107-125; Diary kept by the Reverend Father N.J. Ritchot when negotiating the entry of Ruperts Land into Confederation in 1870, trans. Berlitz Translation Service, Public Archives of Canada, Ottawa, photocopied 14; D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal

Interpretation" in The Forgotten People: Metis and Non-Status Land Claims in Alberta by H. Daniels (Ottawa: Native Council of Canada, 1979) at 10. There is some disagreement on whether Ritchot went beyond his delegated powers during the course of the negotiations. The development of the Metis as a distinct society and the negotiations leading to Manitoba joining confederation are discussed further in Chapter 4 of this thesis.

27. D. Sanders, id. at 8.
28. See, for example, discussion of early Metis settlement in Prince Albert, White Fish Lake, St. Albert, Lac la Biche, Lac St. Anne and St. Laurent (Batoche) in Stanley, supra, note 23 at 178-192; Tremaudan, supra, note 22 at 112-114; Metis Association of Alberta, supra, note 14 at 14-16; Sealey and Lussier, supra, note 25 at 91-109;
29. The sources on Metis history in the North West Territories are numerous. See, for example, Stanley, supra note 23 at 243-265 and 295-326; Sealey and Lussier, supra, note 25 at 111-132; Tremaudan, supra, note 22 at 112-159. Thomas Flanagan challenges the reasons for the 1885 insurrection arguing that the Metis wanted money, not land, and violence was not necessary to resolve Metis grievances. See, T. Flanagan, Riel and the Rebellion: 1885 Reconsidered (Saskatoon: Western Producer Prairie Books, 1983) at 14-74.
30. See, for example, Flanagan id., at 80-81;
31. Arguments for the legitimacy of the provisional government are outlined in chapter 4 of this thesis.
32. Manitoba Act, S.C. 1870, c. 3; see also, supra, note 26.
33. Sanders, supra., note 26.
34. These issues are discussed in further detail in Chapter 3.
35. See, for example Declaration on the Granting of Independence to Colonial Countries and Territories, 1960, article 2; International Covenant on Civil and Political Rights, article I (1); International Covenant on Economic, Social and Cultural Rights, article I (1) all reprinted in UNIFO, International

Human Rights Instruments of the United Nations 1948 - 1982
(Pleasantville: UNIFO Publishers, Ltd., 1983).

36. Western Sahara (1975) I.C.J. Reports 6.
37. M. Davies, "Aboriginal Rights in International Law: Human Rights", Chapter 13 in Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada by B.W. Morse (Ottawa: Carleton University Press, 1985) at 756.
38. Article 2, Draft Declaration of Principles for the Defence of Indigenous Nations and Peoples of the Western Hemisphere, supra, note 19.
39. Indian Law Resource Centre, Indian Rights - Human Rights: Handbook for Indians on International Human Rights Complaint Procedures (Washington D.C. : Indian Law Resource Centre, 1984) at 14.
40. M. Boldt and J.A. Long, "Tribal Traditions and European - Western Political Ideologies : The Dilemma of Canada's Native Indians", in The Quest for Justice, supra, note 7 at 344.
41. Metis Assoc. of Alberta, supra, note 14 at 16-17; see also 216-222.
42. See for example, D. Sanders, supra, note 18 at 263-267; R. Romanow, "Aboriginal Rights in the Constitutional Process" in The Quest For Justice, supra, note 7 at 73-82; R. Dalon, "An Alberta Perspective on Aboriginal Peoples and the Constitution" in The Quest for Justice supra, note 7 at 107-112.
43. See, for example, Dalon, id. at 96 and 105; Sanders, id. at 236; and for a discussion on various academic views see Pentney, supra, note 2 at 181-188.
44. It is not unusual for tribes of different origins or registered Indian bands to be reorganized into a single band for administrative or other reasons. An example is the Saddle Lake Band in Alberta which was reorganized into a single band to facilitate the payment of annuities.

45. P. Hogg, Constitutional Law of Canada, (2d) (Toronto: Carswell, 1985) at 340-342; 657-659.
46. Dumont et al v. A.G. of Canada (17 June 1988) Winnipeg 152/87 at p 6-7 (C.A.) dissenting opinion.
47. Shorter Oxford English Dictionary, 3d, Vols. I and II (Oxford: Clarendon Press, 1975) at 67, 1055 and 1386.
48. See, for example, Re Eskimo [1939] S.C.R. 104 at 118 per Kerwin J; at 119 and 121 per Canon J. where the term "Indians" in s. 91(24) of the British North America Act, 1867 is defined as "all present and future aboriginal native subjects of the proposed confederation . . ." and R. v. Guerin, supra, note 5 at 376 per Dickson J. who with the concurrence of three other judges states the Crown's fiduciary relationship to Indian peoples has its "roots in the concept of aboriginal, native or Indian title."
49. Supra, note 3 at 757.
50. S. Weaver, "Federal Difficulties with Aboriginal Rights Demands" in The Quest for Justice, supra, note 7 at 146.
51. Id. at 146-147.
52. T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) IX Canadian Public Policy 314.
53. Id. at 321-322.
54. British North America Act, 1867, 30 & 31 Vict., c. 3.
55. B. Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal People of Canada, 1982-84 (Kingston: Queens University Institute of Intergovernmental Relations, 1985) at 228.
56. See, for example, descriptions in B. Sealey, "One Plus One Equals One" in The Other Natives, supra, note 23 at 7-8; Purich, supra, note 14 at 10-12. E. Pelletier, supra, note 25 at 15-90.

57. Cherokee Nation v. Georgia, 8 L. ed. 25 (1831) at 26-27.
58. Id. at 27.
59. Worcester v. Georgia, 8 L. ed. 483 (1832).
60. See, for example, discussions of Canadian aboriginal cultures D. Jenness, The Indians of Canada, 7th ed. (Toronto: University of Toronto Press, 1977).
61. Indian Act, R.S.C. 1979, c. I-6, s. 2(1).
62. R. v. Laprise [1978] 6 W.W. R. 85 (Sk. C.A.).
63. See, for example, Sanders, supra, note 26 at 20; A. Jordan, "Who Is An Indian?" [1977] 1 C.N.L.R. 22.
64. Re Eskimo, supra, note 48. Despite the Eskimo decision, the federal government has argued that 91(24) only applies to status Indians. See for example H. Daniels, "Legal Basis of Metis Claims: An Interview with Doug Sanders" in The Forgotten People: Metis and Non-Status Land Claims in Alberta, supra, note 26 at 94 and Chapter 2 of this thesis.
65. Id.
66. K. Lysyk, "The Unique Constitutional Position of the Indians" (1967) 45 Canadian Bar Review 513 at 515.
67. H. Daniels, We Are The New Nation, (Ottawa: Native Council of Canada, 1978) at 7-8.
68. C. Chartier, In the Best Interest of the Metis Child (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 46-49 and 31-32.
69. K. McNeil, "The Constitutional Act, 1982, Sections 25 and 35" [1988] 1 C.N.L.R. 1 at 4.
70. See, for example, R. v. Pritchard (1972) 9 C.C.C. (2d) 488 (SK. D.C.); R. v. Generaux [1982] 3 C.N.L.R. 95 (SK.P.C.); R. v. Laprise, supra note 62.

71. Sanders, supra, note 18 at 257.
72. Dick v. R. (1985) 2 S.C.R. 309.
73. Re. Eskimo, supra, note 48.
74. See, for example, Sanders, supra, note 18 at 232 regarding the political atmosphere in which s. 35 came into being; Schwartz, supra, note 55 at 288.
75. See, for example, Chartier, supra, note 68 at 21; D. Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences" at 69; Metis National Council, Statement on Metis Self Identity, Paper presented at the "Federal-Provincial Meeting of Ministers on Aboriginal Constitutional Matters", Toronto, Ontario, 13-14 February, Doc. 830-143/016; Gaffney, supra, note 11 at 22-25.
76. Manitoba Act, S.C. 1870, c. 3; Dominion Lands Acts, 1879, 42 Vict., c. 31; 1883, 46 Vict., c. 17.
77. For a more detailed discussion on whether Metis are s. 91(24) Indians see Chapter 2.
78. Purich, supra, note 14 at 13; Metis National Council, supra, note 75.
79. Redbird, supra note 22 at 1; Metis Association of Alberta, supra, note 14 at 2.
80. See, for example, J. Peterson and J. Brown, eds., The New Peoples: Being and Becoming Metis in North America (Winnipeg: University of Manitoba Press, 1985) at 5; T. Berger, Fragile Freedoms: Human Rights and Dissent in Canada (Toronto: Irwin Publishing Inc., 1982) at 33; J. E. Foster, "The Metis: The People and the Term" (1978) 3 Prairie Forum 79 at 86-87.
81. Pentney, supra, note 2 at 96.
82. Metis Assoc. of Alberta, supra, note 14 at 10.

83. J.E. Foster, "Some Questions and Perspectives on the Problem of Metis Roots," in The New Peoples: Being and Becoming Metis in North America, supra, note 80 at 73.
84. M. Dunn, Access to Survival: A Perspective on Aboriginal Self Government for the Constituency of the Native Council of Canada, Aboriginal Peoples and Constitutional Reform Series (Kingston: Queens University Institute of Intergovernmental Affairs, 1986) at 6.
85. J. Brown, "Metis," The Canadian Encyclopedia, vol. 2 (Edmonton: Hurtig, 1985) at 1124.
86. Metis National Council, The Metis Nation, Paper presented to the "United Nations Working Group on Indigenous Populations," August 1984 quoted in Peterson and Brown, supra, note 80 at 6.
87. There are numerous references on the question of scrip distribution. See, for example, N.O. Cote, "Grants to the Half-Breeds of the Province of Manitoba and Northwest Territories" (Department of the Interior, 1929) P.A.C. RG 15 Vol. 227; Metis Assoc. of Alberta, supra, note 14 at 118-151; D.N. Sprague "Government Lawlessness in the Administration of Scrip" (1980) 10 Manitoba Law Journal (no. 4) 415; Sanders, supra, note 26 at 9-19. The scrip system is discussed in Chapter 5.
88. See, for example, A. Morris, The Treaties of Canada with the Indians of Manitoba and the Northwest Territories (Toronto: Bedford, Clarke and Co., 1880) at 294-195; Chapter 5.
89. See, for example, the Indian Act, 1876, 39 Vict., c. 18, s. 3(c); 1951, s. 12(1)a.
90. Sanders, supra, note 18 at 254.
91. Pentney, supra, note 2 at 97.
92. See, for example, R. v. Thomas (1891) 2 Ex. Ch. 607; Indian Act, 1879, s. 3(e); Sanders, supra, note 13 at 11-16; chapter 5 of this thesis.
93. Chartier, supra, note 68 at 3-4.

94. Dunn, supra, note 84 at 5-6.
95. Id. at 5-8.
96. Chartier, supra, note 68 at 22-23.
97. M. Dobbin, The One-and-a-Half Men: The Story of Jim Brady and Malcolm Norris (Vancouver: Newstar Books, 1981) at 61.
98. Purich, supra, note 14 at 14.
99. A. Lussier, "The Metis: Contemporary Problem of Identity" in The Other Natives, Vol. 2 (Winnipeg: Manitoba Metis Federation Press and Editions Bois Brules, 1978) at 190-191; Manitoba Federation Inc., Manitoba Metis Rights Position Paper presented at the "Manitoba, 11 March 1983 at 11; J. Sawchuk, The Metis of Manitoba: Reformulation of An Ethnic Identity (Toronto: Peter Martin Assoc. Ltd., 1978) at 48.
100. Lussier, id. at 191.
101. Sawchuk, supra, note 99 at 12-13.
102. J. Brown, supra, note 85 at 1125.
103. Chartier, supra, note 68 at 16.
104. Id. at 23.
105. Dene/Metis Comprehensive Land Claim Agreement in Principle (Ottawa: Department of Indian Affairs and Northern Development, 1988) sections 3.1.9, 4.1 and 4.2.
106. Supra, note 17 at 328.
107. R. v. Guerin, supra, note 5 at 376.
108. See, for example, supra, note 3.

109. Slattery, supra, note 3.
110. Supra, note 3, at 332.
111. Supra, note 46.
112. Dumont et al v. A.G. Can. and A.G. Man. (1987) 48 Man. R. (2d) 4 at 4 (Q.B.).
113. Supra, note 46 at 15-16 per Twaddle J.
114. Id. at 9-10.
115. Id. at 7.
116. Id. at 6 per O'Sullivan J.
117. Id. at 7.
118. Id. at 14.

CHAPTER 2

Jurisdiction Over Metis ClaimsI Are Metis s. 91(24) Indians?

Section 91(24) of the BNA Act provides that the federal government has jurisdiction over "Indians and lands reserved for Indians." Although the federal government has generally limited the exercise of its jurisdiction to status Indians living on reserves, it is clear that the reference to Indians in s. 91(24) encompasses a larger group of aboriginal peoples than those included under the federal Indian Act regime. Whether federal jurisdiction extends to the metis is a question which interpretation, historical evidence, pre-and-post confederation statutes and political practice can be used persuasively to support two contradictory conclusions - the metis are s. 91(24) Indians or only those metis who lived the way of life of the Indians are s. 91(24) Indians.

In their attempts to address this issue, academics adopt the approach taken by the Supreme Court of Canada in the Re. Eskimo decision.¹ In this decision historical evidence including official documents, government documents and published texts (which might be expected to be known to the fathers of confederation) were relied upon to conclude that Hudson's Bay Company officials, and Canadian and English parliamentarians regarded Eskimos as Indians at the time of confederation. All of the judges placed emphasis on a census taken by the Hudsons Bay Committee contained in an 1857 Report to the Select Committee of the House of Commons. This

census listed "Esquimaux" peoples in enumeration of Indians and listed whites and half-breeds together in a separate category. Brian Schwartz argues that the exclusion of half-breeds from the Indian category and the oral testimony given to the select committee is evidence that the terms "half-breed" and "Indians" were used historically to characterize two distinct groups of people.² He argues that his position is consistent with the claim of the M.N.C. and a number of historians who trace Metis nationalism to the Red River area. He concludes that the "development of distinctive behaviour and ethnic self-consciousness among the half-breeds would have been a matter of which a Hudson's Bay Governor would be well aware."³

On the other hand, Clem Chartier points out ambiguities in the Report and selects passages from the oral testimony of Hudson Bay officials to support an argument that half-breeds were included under the term Indians.⁴ Recognizing that the evidence in the Eskimo case is not concerned with metis issues and is capable of supporting opposite conclusions, Chartier argues that other sources must be consulted to determine the intention of parliament. Additional historical evidence cited by the author includes the 1837 Select Committee Report on Aborigines which distinguishes half-breeds from Indians but also includes them under the term "Indian", reports and correspondence which identify half-breeds as part of the tribe with whom they reside, and statements in Parliament concerning the renewal of the Hudson Bay Company's trading license which by their content logically include a reference to half-breeds. He concludes that the weight of historical evidence favours the inclusion of half-breeds in s.

91(24).⁵ The weakness of Chartier's analysis lies in his failure to address the emergence of the Metis Nation as a distinct socio-economic cultural group who identified themselves as separate from both Indian and white society,⁶ historical evidence that suggests only those persons of mixed ancestry who lived like Indians were treated as Indians for legal purposes,⁷ and further evidence that those mixed bloods who did not live as Indians may have been viewed by Parliament as having no greater rights than the original white settlers in Ruperts Land (Manitoba) and the Northwest Territories (including Saskatchewan and Alberta).⁸ Viewed in this broader historical context, Chartier's evidence may also support the view that the half-breeds, and in particular the Metis Nation, were seen as a distinct people except for the limited purpose of allowing those who lived like Indians to be treated as Indians.

Chartier addresses the argument that the Metis were a distinct people in a later publication entitled "In the Best Interest of the Metis Child." He points out that the distinctiveness of Metis culture can not be raised against the Metis as there is no such thing as a single distinct Indian people. He argues:

While it is true that the Metis developed as a distinct aboriginal people, it is also true that the Inuit were distinct aboriginal peoples as well. In fact, it is beyond debate that there is a distinctiveness among the different nations or tribes of peoples commonly referred to as Indians. The Metis did develop into a distinct nation, vis-a-vis the Cree nation and the Ojibway nation. Basically, this can be characterized as a new nation or group affiliation of aboriginal/native/Indian peoples.⁹

In support of this argument, Chartier refers to correspondence to Nor'Wester William McGillivray referring to Cuthbert Grant, leader of the Metis against the development of the Selkirk colony and employee of the North West Company:

Nor'Wester William McGillivray admitted in a letter of 14 Mar 1818 that Grant and the others were linked to the N.W.C. by occupation and kinship. "Yet", he emphasized, "they one and all look upon themselves as members of an independent tribe of natives, entitled to a property in the soil, to a flag of their own, and to protection from the British government." Further, it was well proved "that the half-breeds under the denominations of bois-brules and metifs [alternate form of Metis] have formed a separate and distinct tribe of Indians for a considerable time back."¹⁰

Although the Eskimo decision did not consider pre-confederation statutes, subsequent case law has held that they are relevant to the interpretation of the B.N.A. Act.¹¹ Chartier argues that the inclusion of half-breeds in the definition of "Indians" in pre-confederation legislation and the practice of the federal government to include them in treaty is further evidence that they were viewed by the government as Indians.¹² Of particular interest are An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada, 13 & 14 Vict. (1850) and An Act to Encourage the Gradual Civilization of the Indian Tribes in the Province and to Amend the Laws Respecting Indians 20 Vict. (1857). Section 5 of the 1850 legislation defines "Indians" as follows:

. . . that the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands: First - All persons of Indian blood, reputed to belong to a particular Body or Tribe of Indians interested in such lands, and their descendants. Secondly - All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons. Thirdly - All persons residing among such Indians, whose parents on either side were on are Indians of such Body or Tribe, or entitled to be considered as such: And Fourthly - All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such tribe or Body of Indians, and their descendants.

In 1851, the definition was changed to exclude non-Indian males married to Indian women and their descendants.¹³ The emphasis

on patrilineal descent continues under the federal Indian regime but is modified by the passing of Bill C - 31 which reinstated Indian women who lost status through marriage. The 1851 definition was carried into An Act Respecting Indians and Indian Lands, 31 Vict. (1868) Cap. 14 and An Act Providing for the Organization of the Department of Secretary of State of Canada and for the Management of Indian and Ordinance Lands, 31 Vict. (1868) Cap. 42 with minor modifications. A slightly different definition is found in the Act For Gradual Civilization of Indian Tribes, supra. Section one provides the following persons are to be covered:

. . . shall apply only to Indians or persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian Tribes or Bands . . . ; and such persons and such persons only shall be deemed Indians within the meaning of any provision of the said Act or of any other Act or Law in force in any part of this Province by which any legal distinction is made between the rights and liabilities of Indians and those of Her Majesty's other Canadian subjects.

The problem with relying on these statutes is they can also be used to support the argument that not all half-breeds were considered Indians because the half-breeds referred to in the legislation are reputed to belong to a particular tribe and are living among them. The term is not a racial term, but one that depends on an Indian way of life and familial and cultural ties.¹⁴ This argument gains greater force if one considers Alexander Morris' account of the negotiations of the numbered treaties shortly after Confederation. He states that only those half-breeds who lived as Indians could declare themselves as Indians and take treaty.¹⁵ Consequently without considering further archival evidence, arguments based on pre-confederation evidence are equally persuasive to support two opposite conclusions.

The resolution to the agreements may depend upon the weight given to post-confederation legislation, practice and case law. The importance placed by the judges in the Eskimo case on contemporaneous historical evidence to derive a historical definition of the term "Indian" in s. 91(24) suggests that the term is limited historically in its scope and the later in time the evidence, the less relevant it is. If, on the other hand, one places more emphasis on the finding that Indians are all aborigines within the territories to be included in confederation, a broader construction of s. 91(24) may be possible and later evidence may become more relevant. The question is not so much whether half-breeds were called "Indians", but whether they were considered an aboriginal people.

The strongest argument for metis being considered aboriginals lies in the recognition of the half-breed claim to Indian title in the Manitoba Act of 1870 and the Dominion Lands Acts of 1879 and 1883 and their ability to take treaty.¹⁶ At the time of the transfer of Manitoba to Canada, there were at least four distinct half-breed populations who lived in Manitoba: those who lived with the Indians, those of who had permanent homes close to the trading post and adopted the way of life of the white settlers; those who were semi-settled and lived by the buffalo hunt and freighting; and those who were semi-settled and lived by hunting, trapping and the buffalo hunt.¹⁷ The latter two groups joined together under the leadership of Louis Riel and opposed the transfer of Manitoba to Canada without protection of certain rights including provincehood and participation in government. This group is referred to by historians as the Metis Nation. Although the question of the

negotiation of a protection to aboriginal rights in land is a matter of academic dispute, the negotiations clearly resulted in a grant of land to all half-breed people in Manitoba who did not take treaty in satisfaction of their claims to title. When Canada extended its territories to include the Northwest Territories, similar provisions were included in the Dominion Lands Act of 1879 and 1883. The system of distribution through the provision of scrip redeemable in land or money developed pursuant to those provisions were initially limited in their scope but were eventually extended to all half-breeds within Manitoba and the Northwest. Those who lived as Indians were given the option to take treaty or scrip. Later, those who accepted treaty and fell under the Indian Act regime were given the option to opt out of treaty and take scrip. Those who received scrip remained outside the provisions of the Indian Act and treaties.¹⁸ The recognition of Indian title in the above legislation coupled with the option given to half-breeds to take treaty is consistent with the view that they were considered an aboriginal people by the government at the time of confederation.

Schwartz argues that s. 31 of the Manitoba Act does little to help resolve the issue. He states:

The opening words of s. 31, taken at face value, provide some support for the inclusion of the Metis within s. 91(24). Having "Indian title", however, is not necessarily the same thing as being an Indian. It is necessary to examine the purposes of assigning jurisdiction over "Indian" to the federal level of government. The same s. 31 that refers to "Indian" title of half-breeds also contemplates extinguishing it. That done, there would be no need for Parliament to retain jurisdiction over Metis and Metis lands.¹⁹

The inherent weakness of Schwartz's argument is he fails to consider that the federal government continued to exercise jurisdiction over the metis after 1870. They legislated metis rights to land, money scrip and land scrip by statute and orders-in-council until as late as 1921.²⁰ In December of 1895 the federal government established a reserve for metis people along similar lines of the prairie Indian reserves except control and management of the lands was given to the Roman Catholic church.²¹ The reserve lasted approximately 10 years and was opened for settlement in 1905. Since then, the federal government has signed land claims agreements with metis people in the Northwest Territories. They also provide limited financial support to metis and non-status Indians through funding of political organizations; grants for education, housing and business ventures; and core funding for the Urban Indian-metis friendship centres.²²

The system adopted by the federal government can also support the argument that reference to Indian title in the above legislation was simply a matter of political expediency. The Metis were viewed by the federal government as having the same rights as other original white settlers who were also entitled to receive scrip.²³ Their claim arises from being original settlers whose land holdings were threatened by government plans for settlement. This argument gains further support when one considers that the practice of the federal government towards Indians was to reserve lands for their use as collectivities and not to extinguish claims by individual allotments.²⁴ Several points can be raised in response to this argument including:

1. The Metis Nation understood they were to be granted land as individuals, but the land granted was to be assembled into Metis townships or reserves;²⁵
2. Individual grants were consistent with the government's Indian policy of "civilizing" so the system can not be taken as evidence that the metis are not Indians;
3. The government was likely influenced by the policy of the United States government at the time to breakdown tribal organizations through individual land allotments;
4. The fact that scrip was available to original white settlers does not mean the metis are not Indians, it means the system used to deal with their claims was not unique; and
5. The federal government did attempt to set up a reserve in 1895 for half-breeds when it realized the scrip system had failed (St. Paul de Metis in northern Alberta) and created separate half-breed reserves under the half-breed adhesion to Treaty No. 3.

Once again, the result is two persuasive arguments support two contradictory conclusions.

This ambiguity forces the academic to look at later statutes, case law and political practice. Once again, both Schwartz and Chartier are able to sue identical provisions of the Indian Act to support their case.²⁶ Adopting the Chartier analysis, two recent lower level court decisions have held that the metis are Indians and one has held that they are not.²⁷ Additional case law focusing on Indian legislation with a particular legislative goal such as

prevention of selling intoxicants to Indians and protection of hunting and fishing rights, also vary in their findings.²⁸

A second argument can be made that "Indian title" in s. 31 refers to claims by Indians, as distinct from metis, and the claims of the half-breeds are collateral claims resulting from the surrender of lands by the Indians. The foundations for a collateral claim are discussed in Chapter 4. At this juncture it is sufficient to point out that section 31 can be interpreted in different ways. Referring to the orders-in-council is of little help as they tend to adopt the exact wording of the legislation: "And whereas, it is expedient, towards the extinguishment of Indian Title to the lands in the Province . . ." Although the wording in the Dominion Lands Act is different, the same interpretation problem arises. Section 125(e) reads "To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by the half-breeds . . .". However, it is clear in the statutes and subordinate legislation that whatever the basis of the claim, the intention of the federal government is to extinguish it.

II Lands Reserved For Indians

Section 91(24) gives Parliament jurisdiction over "Indians" and "lands reserved for Indians" as two distinct heads of power. Even though the federal government has denied responsibility for the metis, certain metis populations may have been brought within the jurisdiction of the federal government by the establishment of colonies or settlements modelled on substantially similar patterns as reserves established under the federal Indian Act. Of particular interest are the half-breed adhesion to Treaty No. 3,

St. Paul de Metis, the farm colonies in Saskatchewan and the metis settlements in Alberta.

Professor Slattery suggests there are two types of reserves within the scope of s. 91(24). The first type he labels "aboriginal reserves." An aboriginal reserve is defined as land that has become permanently attached to a native group by virtue of original aboriginal title to those specific lands. The second type he labels "granted reserves." Title to lands forming granted reserves stems from statutory provision, Crown grant, or other similar instruments and is not associated with the common law doctrine of aboriginal title. An example of such lands are lands set aside for displaced Indian groups.²⁹ Both types of reserves fall within the definition of "lands reserved for Indians" given by the Privy Council in the St. Catherine's Milling case. The Court held that "the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation."³⁰

If the term "Indian" is taken to include all aboriginals, four groups of metis would be brought under s. 91(24) through the creation of reserves. The first group are those half-breeds involved in the Adhesion to Treaty No. 3. On September 12, 1875, a group of Ontario metis negotiated entry into the treaty separate from the Indian signatories and were allotted separate reserves. However, in 1876, the metis at Couchiching, Ontario were forced to join a nearby Indian band and claim as Indians in order to receive treaty annuities. In 1967 the half-breed reserves were amalgamated with the Indian reserve.³¹ Having brought the half-breed lands under reserves as defined in the Indian Act, however, prior to 1967

the basis for jurisdiction was s. 91(27) and the federal government's treaty with the half-breeds.

The second reserve created by the federal government was St. Paul des Metis.³² After the metis insurrection of 1885, many metis found themselves landless and poverty stricken. Reverend Father Albert Lacombe petitioned the federal government to establish four townships in the Buffalo Lake area of Alberta to help the half-breeds become self-supporting. The structure was similar to Indian reserves in that the designated lands were inalienable and vested in the Crown and whites were excluded from beneficial use of reserve areas. However, the metis reserve differed from Indian reserves in that administrative control was with a Board of Management composed of Roman Catholic Bishops (rather than a band council) and the townships were leased to the Episcopal Corporations of three Roman Catholic dioceses.³³ For some, the reserve was seen as "another example of the superior way in which Canadians treated their native races."³⁴ Others looked upon the reserve, favourably and unfavourably, as a humanitarian scheme.³⁵ The reserve operated primarily as a farm colony and metis children were educated in Catholic schools on the reserve. The reserve lasted approximately 10 years and was opened for settlement in 1905. Although the intentions of the oblate fathers and the reasons for the failure of the reserve are subject to debate, it is undisputed that the federal government created the reserve and then abolished it 10 years later.³⁶

The metis argue that the creation of the above two reserves is recognition of the existence of metis aboriginal title. According to Slattery's theory, the intent behind the creation of

the reserve and its link to the doctrine of aboriginal title is not necessary for the reserve to fall within s. 91(24). Consequently, regardless of the acceptance of the metis perception of these reserves, they could fall within s. 91(24). Based on the Supreme Courts decision in R. v. Guerin, Slattery argues that there is no significant legal difference between aboriginal and granted reserves and the Crown's fiduciary obligation is associated with Indian reserves of all sorts by virtue of their inalienability except to the Crown.³⁷ If the metis establish a usufructuary right to St. Paul de Metis and Slattery's definition of a reserve is accepted, the federal government could be liable to claims arising from its disestablishment.

Reserve-like colonies have also been established by the provincial governments in Saskatchewan and Alberta. The settlements in Alberta are created pursuant to the 1938 Metis Population Betterment Act.³⁸ The metis argue that the Alberta settlements were established in recognition of aboriginal title and the government argues they were created as part of a general welfare scheme.³⁹ Regardless of the intent, a statutory right of use was given to the Alberta metis and title was retained by the provincial government. Professor Sanders argues that the act of setting aside these lands was a recognition of metis usufructuary rights which could not be ended by the Province.⁴⁰ This usufruct would have fallen under s. 91(24) prior to 1982. As the settlements were established through negotiation, arguably the agreements leading to the Act are treaties as treaties do not have to be called "treaties" or take on a particular form. Consequently, the settlements may be protected under s. 35(1) of

the Constitution Act, 1982. Even if the treaty argument is rejected, the usufructuary interest is protected as an "aboriginal right."⁴¹

In his discussion of aboriginal and granted reserves, Slattery does not address the question of which government creates the reserve to bring the reserve within s. 91(24), but one would expect from the reasoning of his argument the question is not relevant. Once the reserve is granted, by whatever means, it falls within 91(24). Consequently, Slattery's analysis of s. 91(24) would also bring the Alberta metis settlements under federal jurisdiction.⁴² The problems associated with this conclusion are discussed later in this paper.

Similar arguments can be made to bring the farm colonies in Saskatchewan under federal jurisdiction. With the exception of Lebret which was first established by the Oblates, the Metis Farms in Saskatchewan were set up by the government of Saskatchewan as residential, training and economic development projects for the Metis. Ten farms were established in predominantly metis communities between 1939 and 1969 pursuant to the Local Improvements Districts Relief Act, 1940 s.s., c. 128 and the Rehabilitation Act, 1953 R.S.S., c. 245. The farms are operated by metis families and until recently were owned and operated by the provincial government.⁴³ In 1986, title to the Lebret farm was transferred to Lebret Farm Land Foundations Inc. which is owned and operated by metis and non-status Indians in the district of Lebret.⁴⁴ On the eve of the 1987 constitutional conference, Premier Grant Divine indicated his willingness to transfer title to the

remaining existing colonies to the metis and non-status peoples and to share resource revenues with the province.⁴⁵

The current position of the federal government is that they do not have jurisdiction over metis and non-status Indians but they are willing to assume some responsibility for them as a disadvantaged people. The position of the Provinces varies. Both Saskatchewan and Alberta have designed specific schemes to benefit them, but only Alberta has indicated a willingness to accept full responsibility under their provincial jurisdiction.

III Jurisdiction and the Question of Aboriginal Title

1. Land Claims Negotiations

It is generally accepted that the powers given to parliament under s. 91(24) are permissive and not mandatory. Consequently, unless there is political will to assist the metis, the resolution of the jurisdictional debate may not get the metis any further ahead in their demands for land, benefits, programs and services afforded to other aboriginal peoples under the Indian Act regime. Certain factions of the M.N.C. and the N.C.C. have pressed the federal government to accept jurisdiction over their constituents because they feel the federal government is generally more sympathetic to native issues and is more likely to adopt a broad national view.⁴⁶ In addition, the federal government can raise revenues by a variety of means - a matter of particular concern to metis living in a have-not province.⁴⁷

The assignment of jurisdiction to the federal government gives rise to the argument that the metis are entitled to equal treatment

as aboriginal peoples. Delia Opekokew argues that the practice of the federal government to refuse jurisdiction over metis and non-status peoples has resulted in a failure of both the federal and provincial governments to recognize their aboriginal rights and has created inequity in the provision of programs and services to all aboriginal peoples. The decision of the federal government to exclude certain aboriginals from the Indian Act regime has also affected the protection of aboriginal rights by the courts which often limit protection of Indian Act Indians. She contends that all persons of aboriginal ancestry whose ancestors lead an aboriginal way of life should have equal rights and suggests that the controversy surrounding a claim to aboriginal rights by the Metis Nation may result in their lobbying to be recognized as a band under the Indian Act.⁴⁸

The significance of Opekokew's argument in the context of aboriginal title is equity of access to a land base, a resource base beyond that available to other disadvantaged peoples, the process of negotiating title claims (example through land claims negotiations) and equality in the results of land claim negotiations. However, even if the federal government does not have jurisdiction they are not legally obliged to treat all aboriginals the same and may not necessarily be shamed into doing so. In support of this argument one could point to the permissive nature of s. 91(24), section 25 of the Constitution which states that the equality provision of the charter does not apply to aboriginal peoples, and the common law which recognizes aboriginal rights based on the unique histories and cultures of different aboriginal groups.⁴⁹ Although there has been some discussion of

equal treatment of Indian Act Indians, the matter is far from resolved. Rather, the current position of the federal government is to deal with proposals for land settlements on a tribal basis.

The conclusion that all metis and non-status Indians are not s. 91(24) Indians does not prevent the federal government from providing assistance to constituents of the M.N.C. and N.C.C. under other heads of federal power. Shared jurisdiction is constitutionally possible as the metis can be classified as aboriginal, disadvantaged or ordinary citizens of Canada and the provinces. Assuming the main concern of the provinces in refusing to accept jurisdiction is fiscal responsibility, the shift of focus from a jurisdictional debate to the establishment of federal-provincial cost sharing arrangements may do more to further the goals of the metis and non-status Indians. The federal government is already providing limited financial assistance and, as discussed above, are willing to provide assistance to the metis as "disadvantaged people." Consequently, one solution to this problem may be to guarantee existing levels of federal expenditures with a "no-off loading" rule acceptance of shared jurisdiction and establishment of mechanisms for tripartite land claims settlement negotiations.

The question of jurisdiction cannot be completely sidestepped through cost-sharing as the answer to this question will also affect the determination of a constitutionally valid method of implementing land claims agreements. If bilateral negotiations are entered with provincial governments, the settlement of claims reached through negotiations may be ultra vires. On the other hand, bilateral negotiations with the federal government may

produce the same result if negotiations involve the creation of a new land base as legislative powers do not carry property rights with them.⁵⁰ Consequently, metis land claims are best dealt with by expanding existing land claims practices to include metis claims. Negotiations for self-government could be considered at the same time.⁵¹ Settlements would be implemented through tripartite agreements, such as the proposed Dene/Metis land claim and the James Bay Agreement, or perhaps through "delegation of legislation to the provinces with any necessary complimentary legislation then being passed by parliament."⁵² As tripartite negotiations are cumbersome and necessarily lengthy, negotiations could be concentrated with one or the other government depending on whether more than simply a land base is being negotiated (eg. self-government) and the powers affected, but leaving access to the talks open to both governments.

The main problem with insisting on federal jurisdiction only is the potential affect this could have on existing metis programs and settlements. As an example, let us consider the metis settlements in Alberta. Unlike the colonies in Saskatchewan, the metis settlements are created pursuant to legislation aimed specifically at the metis as a distinct class of people. The government of Alberta has advocated a made-in-Alberta approach to resolving questions of metis title and metis self-government. On July 6, 1988 Solicitor General Ken Rostad introduced two bills in the Alberta legislature designed at transferring title in the Alberta metis settlements to the metis people and delegating self-governing powers to individual settlement corporations and the Metis Settlements General Council composed of elected councillors

from the settlement corporation and independently elected officers. Bill 65, the Metis Settlements Lands Act, authorizes the issues of letters patent for metis settlement lands to the Metis Settlements General Council with ownership of minerals remaining with the Crown. Bill 64, the Metis Settlements Act, gives the two levels of government specific by-law and revenue raising powers similar to those of a municipal government. The by-law making powers are subject to transitional Ministerial approval for a specified period of time and the Minister retains extensive regulatory powers. In order to give metis lands constitutional protection, the government proposes entrenching metis title through an amendment of the Alberta Act.⁵³

There are two problems with this "made in Alberta" approach. The failure to entrench the Metis Settlements Act in a constitutional accord, schedule or through some other means results in the ability of the provincial government to unilaterally terminate what they have established. The second relates to the question of jurisdiction. If the metis are s. 91(24) Indians, the present Metis Betterment Act and proposed legislation could be characterized as legislation in relation to Indians and thus ultra vires. Arguably any actions taken pursuant to this legislation would be invalid. For those metis in Alberta who are benefitting from this system and have negotiated the proposed self-governing scheme, a reference of the jurisdictional question to the courts could cause significant problems. Arguments can be made that the establishment of settlement lands places the metis settlements under federal jurisdiction pursuant to their power over lands reserved for Indians,⁵⁴ but even if this argument were accepted it

would not have the effect of validating provincial self-government legislation. Rather it would have the opposite effect. One can only assume that the court would attempt to find some way to uphold a system agreed to by the province and the metis and unopposed by the federal government. However, the best solution would be for the federal government to endorse the existing scheme to avoid jurisdictional problems.

Recognizing this dilemma, the following draft amendment to deal with jurisdiction was put forward by the M.N.C. at the 1987 First Ministers' Conference on aboriginal matters:

35(6) The Government of Canada and the Provincial Governments are committed to entering into negotiations directed towards concluding agreements with representatives of the Aboriginal Peoples relating to the land and resources, jurisdiction and financial arrangements for aboriginal self-government.(7) Notwithstanding Clause 24 of section 91 of the Constitution Act, 1867; the Parliament of Canada and the legislature of a Province shall have the competence to enact laws within their legislative authorities required for the implementation of the agreements with the Metis people as referred to in Sub-section (6).⁵⁵

The federal government responded with a more expansive clause which would not assist the metis if they were found not to be s. 91(24) Indians. The clause was rejected by the aboriginal representatives.⁵⁶

Chartier explains the intent of the proposed M.N.C. amendment as follows:

The intent behind this amendment is to overcome the impasse, as well as allow the provincial members of the Metis National Council an opportunity to pursue either tripartite or bilateral agreements or both, primarily with the provincial governments. This, for example, would have made it possible for the Metis of Alberta to pursue rights under the Alberta government's preference for a made-in-Alberta agreement. It would also have accommodated the Alberta Metis Betterment Act and its successor legislation.⁵⁷

An agreement on jurisdiction has not been reached. In Alberta, the provincial government is continuing with its approach of bilateral negotiations and implementation through provincial legislation. In Manitoba, the metis are involved in tripartite negotiations.⁵⁸

2. Land Claims Litigation

The question of jurisdiction has little effect on the selection of a defendant if the compensation sought is land as the province will necessarily be involved.⁵⁹ Further, relief will likely be claimed based on actions of the federal government, such as the half-breed land grants in the Manitoba Act and the scrip distribution program. If liability of the Federal Crown is in issue directly or indirectly, the Federal Crown must be joined as a party.⁶⁰ If the action raises a question of constitutionality of a federal or provincial enactment or the question of jurisdiction, most provinces have legislation that requires notice to the Attorney General for Canada and the relevant province.⁶¹

The question of jurisdiction may become significant in selecting the proper court. The general rule is that the Provincial Superior Courts have jurisdiction in all matters subject to the federal power to establish courts for the better administration of the "laws of Canada" under s. 101 of the B.N.A. Act, 1867.⁶² This phrase has been interpreted to include any matter within Parliament's legislative competence. However this interpretation has been altered to allow provincial court jurisdiction as long as the liability of the Federal Crown is not

at issue.⁶³ Consequently, unless the action is based on acts of the federal government, it may be necessary to bring a metis title case in the federal courts if the federal government continues to deny jurisdiction. Given the recognition of metis aboriginality in s. 35(2), this may be a purely academic point unless the federal government asserts that there is jurisdictional overlap in some aboriginal rights matters. Given the Federal Crown's current position that the metis are not s. 91(24) Indians, they are unlikely to accept that all aboriginal rights matters fall within s. 91(24) unless they deny "existing" metis aboriginal rights.⁶⁴ This approach treats the inclusion of the term "Metis" in s. 35(2) as political "fluff" because the metis do not have aboriginal rights.

It is beyond the scope of this thesis to examine the advantages and disadvantages of proceeding in the federal and provincial courts. The main concern for the litigant is the delay associated with the federal court because of less frequent sittings. Generally speaking, the question of jurisdiction is of little significance in the realm of civil procedure. Jurisdiction is relevant to questions of liability and compensation. The risks of finding one government liable to the exclusion of the other are set out above. This is the major concern associated with litigation and the reason why negotiated settlements are more advantageous to the metis in addition to the standard advantages of cost, expediency and public relations.

IV Conclusion

Although much of the debate has focused on archival evidence supporting the meaning of the term "Indian" in s.91(24), the author submits that the question may not be one of historical definition so much as constitutional interpretation. The historical development of Indian cultures, customary and contemporary rules of membership, reformulation of aboriginal identity into status and non-status Indians, extension of legal definitions to include non-aboriginal groups and political practice of the federal and provincial governments suggests the definition of "Indians" in 91(24) is not a closed category. This position is supported by the Re. Eskimo decision which anticipates a prospective definition by defining Indians as "all present and future aboriginal native subjects of the proposed confederation of British North America."⁶⁵ The contemporary term "Indian" has taken on many dimensions as foreseen by the Fathers of Confederation. These dimensions are reflected in the definition of aboriginal peoples in s.35(2) of the 1982 Constitution, a provision which should not be ignored in identifying federal jurisdiction. The fact Parliament chooses not to exercise jurisdiction over certain groups of aboriginals in s.35(2) does not mean they cease to be s.91(24) Indians as Parliament cannot alter the constitution by legislation or policy⁶⁶. It simply means the exercise of jurisdiction is permissive, not mandatory.

The question of jurisdiction has received considerable attention by the M.N.C. and N.C.C. However, resolving the jurisdiction debate will not place a positive obligation on either government to respond to metis grievances. Such an obligation will

have to have a source in law (eg. fiduciary obligation of the Federal Crown towards Indians) or arise from specific legislation (eg. Metis Betterment Act) to be enforceable. As jurisdiction has little impact on civil procedure, if obligations can not be agreed upon, the jurisdictional debate will not create an impasse to litigation. Unfortunately, litigation may be inevitable if the federal and provincial governments continue to associate obligation with jurisdiction and refuse to share jurisdiction over the metis as aboriginal citizens.

For the metis, a reference to the Supreme Court is of little assistance if it deals only with jurisdiction and fails to address the question of obligation. Even so, litigation is dangerous because it may have negative ramifications. Nevertheless, it is unlikely shared responsibility will occur unless a decision is made about the validity of scrip distribution as a method of extinguishing metis rights. The reason for this is the federal government has indicated it will accept jurisdiction over metis only if they are given provincial lands. Prime Minister Trudeau justified this position by saying the fathers of confederation intended to exclude Indian lands when Crown lands went to the provinces.⁶⁷ However, the issue is not that simple as metis claims were dealt with on a different basis than other Indian lands. Arguably, the practice of individual land allotment through federal legislation satisfied metis claims prior to Manitoba, Alberta and Saskatchewan obtaining ownership of Crown lands. These provinces could argue that metis lands were not intended to be excluded because they did not exist in the eyes of the law and, if they did, the federal government believed metis claims were extinguished.

Consequently, the question of "existing" metis title will likely have to be resolved by the courts before land claims agreements can be reached. It is the writer's opinion that the issue of jurisdiction is best left out of the litigation process and addressed in the settlement process once title issues have been resolved.

Given the cost, length and evidentiary problems associated with aboriginal title litigation, it would be in the interests of the metis to have title questions resolved outside of the litigation process. However, the Dumont litigation suggests that the federal government, provincial government of Manitoba, or both are placing significant emphasis on the receipt of scrip in current Manitoba land claims negotiations.⁶⁸ As indicated by Mr. Justice Twaddle, the purpose of the current litigation in Manitoba is to help the Manitoba metis reach a land claims settlement.⁶⁹ However, Twaddle believes more than legal considerations will have to be addressed to resolve metis claims and thus decides the determination of the constitutional validity of the scrip program will not be determinative in land claims negotiations. The decision of Mr. Justice Twaddle is currently under appeal.

CHAPTER 2 ENDNOTES

1. See, for example, Clem Chartier, "Indians: An analysis of the Term Used in s. 91(24) of the British North America Act, 1867," (1978-79) 43 Saskatchewan Law Review 39; B. Schwartz, "The Metis and s. 91(24): The Legal History" and "The Metis and s. 91(24): Policy Aspects" chapters in First Principle: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982 - 1984 (Kingston: Institute of Intergovernmental Relations, Queens University, 1985).
2. Schwartz, id. at 205-210.
3. Id. at 209.
4. Chartier, supra, note 1 at 42-49.
5. Id. at 51-59.
6. See, for example, Metis National Council, Statement on Metis Self-Identity, Paper presented at the Federal-Provincial Meeting of Ministers on Aboriginal Constitutional Matters" Toronto, Ontario, 13-14 February, Doc. 830-143/016; F.G. Stanley, The Birth of Western Canada (Great Britain: Longman's Green and Co. Ltd., 1936; reprint, Toronto: University of Toronto Press, 1960) at 48-49; A.S. Morton, "The New Nation: The Metis" in The Other Natives, Vol. 1., eds. D.B. Sealey and A. Lussier (Winnipeg: Manitoba Metis Federation Press and Editions Bois Brules, 1978); D. Bruce Sealey and A. Lussier, The Metis: Canada's Forgotten People (Winnipeg: Manitoba Metis Federation Press, 1975); E. Pelletier, A Social History of the Manitoba Metis: The Development and Loss of Aboriginal Rights (Winnipeg: Manitoba Metis Federation, 1974); H. Adams, Prison of Grass (Toronto: General Publishing, 1975) at 48-50.
7. See, for example, A. Morris, The Treaties of Canada with the Indians of Manitoba and the Northwest Territories. (Toronto: Bedford, Clarke and Co. 1880) at 294-295; W. F. Pentney, The Aboriginal Rights Provisions in the Constitution Act, 1982 (Saskatoon: University of Saskatchewan Native Law Centre, 1987) at 88; Schwartz, supra, note 1 at 218-220.
8. See, for example, T. Flanagan, "The Case Against Metis Aboriginal Rights," (1983) ix Canadian Public Policy 314 at 318-319.

9. C. Chartier, In the Best Interest of the Metis Child (Saskatoon: University of Saskatchewan, Native Law Centre, 1988) at 40-41.
10. Id. at 41 quoting J. Brown, "Metis" in The Canadian Encyclopedia, Vol. 2 (Edmonton: Hurtig, 1985) at 1126.
11. A.G. Canada v. A.G. Ontario [1896] A.C. 348 at 351.
12. Chartier, supra, note 1 at 57-63.
13. An act to repeal the 1850 definition, 14 and 15 Vict. (1850) c. 59.
14. Schwartz, supra, note 7.
15. Norris, supra note 7; see also E. Foster "The Metis: The People and the Term" (1978) 3 Prairie Forum 79 at 83.
16. Manitoba Act, S.C. 1870, c. 3, s. 31. Dominion Lands Act, 1879, 42 Vict. c. 31, s. 125(e). Dominion Lands Act, 1883, 46 Vict. c. 17, s. 81(e) & 83. Of particular interest is the half-breed adhesion to Treaty No. 3. They negotiated separately from the Indians and had separate reserves allotted to them but in 1876 they were forced to join a nearby Indian band.
17. See, for example, Sealey and Lussier, The Metis: Canada's Forgotten People, supra, note 6 at 13-73; Morris, supra, note 7; Foster, supra, note 15 at 80-87; D.B. Sealey, Statutory Land Rights of the Manitoba Metis (Winnipeg: Manitoba Metis Federation Press, 1975) at 4-50; G.H. Sprenger, "Metis Nation: Buffalo Hunting v. Agriculture in the Red River Settlement" in The Other Natives, supra, note 6 at 115-125.
18. Chartier, supra, note 1 at 64; D. Sanders, "A Legal Analysis of the Ewing Commission and the Metis Colony System of Alberta", Paper prepared for the Metis Assoc. of Alberta, Edmonton, Alberta, April 14, 1978, at 11-15.
19. Schwartz, supra, note 1 at 222.

20. Legislation included the Dominion Lands Act of 1879 and 1883, supra, note 16 and various provisions in early Indian Act legislation. There are numerous orders-in-council- passed pursuant to the Manitoba Act and Dominion Lands Act. Some are quoted in this thesis. An excellent summary can be found in D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in H. Daniels, The Forgotten People: Metis and non-status Indian Land Claims (Ottawa: Native Council of Canada, 1979) at 10-13.
21. P.C. No. 37233, 28. Dec. 1895. The establishment of St. Paul de Metis is discussed in further detail later in this chapter.
22. D. Purich, The Metis (Toronto: James Lorimer and Company, Publishers, 1988) at 176.
23. Flanagan, supra, note 8.
24. Schwartz, supra, note 1 at 222.
25. Dumont et al v. A.G. of Canada and A.G. of Manitoba (17 June 1988) Winnipeg, 152/87 at 10 (C.A.); G.F. Stanley, "Canada's Half-Breed Reserve, St. Paul des Metis" in The Other Natives, Vol. 2, supra, note 6 at 78. See also the discussion of consensual extinguishment in Chapter 5, Section II, 2(b).
26. Schwartz, supra, note 1 at 225 and Chartier, supra, note 1 at 60-61.
27. R. v. Generaux [1982] 3 C.N.L.R. 95 (SK P.C.); Ontario Public Employees Union v. Ontario Metis and Non-Status Indian Assoc. [1980] 3 C.L.R.B. 328 (Ont. L.R.B.); contra. R. v. Rocher [1982] 3 C.N.L.R. 124
28. See, for example, R. v. Howson (1984) 1 Terr L.R. 492; R. v. Pritchard (1972) 9 C.C.C. (2d) 488 (SK.D.C.); R. v. Verdi (1914) 23 C.C.C. (N.S. Co. Ct.). Contra. R. v. Hughes (1906) 12 B.C.L.R. 290; R. v. Budd [1979] 6 W.W.R. 450 (SK.Q.B.); R. v. Laprise [1978] 6 W.W.R. 85 (SK.C.A.)
29. B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 769 - 774.

30. St. Catherines' Milling and Lumber v. R (1888) IX A.C. 46 at 59 (P.C.).
31. Native Council of Canada, A statement of Claim Based on the Aboriginal Title of Metis and Non-Status Indians (Ottawa: Native Council of Canada, 1980) at 12; P.A.C. R.G. 10, Vol. 2313, File 62509-2.
32. Supra, note 21.
33. For a general discussion of the structure and operation of the reserve see G.F. Stanley, supra, note 25 at 75-707; Metis Assoc. of Alberta, J. Sawchuk and T. Ferguson Metis Land Rights in Alberta: A Political History (Edmonton: Metis Association of Alberta, 1981) at 159-185; Lacombe, "A Philanthropic Plan to Redeem the Half-Breeds of Manitoba and the Northwest Territories" 27 March 1985, P.A.C., R.G. 15, Vol. 708, file 360-530.
34. The Globe, Toronto, 12 February 1896, quoted in Stanley, id. at 84.
35. Stanley, id. at 84-85.
36. See, for example, Metis Assoc. of Alberta, supra, note 33 at 172-182.
37. Guerin v R [1984] S.C.R. 335; Slattery, supra, note 29 at 771.
38. The Metis Population Betterment Act, S.A. 1938 (2nd Sess.), c.6
39. See, for example, Metis Assoc. of Alberta, supra, note 33 at 187-214; Alberta Federation of Metis Settlement Associations, Metisism: A Canadian Identity (Edmonton: Alberta Federation of Metis Settlement Associations, 1982) at 57; Policy and Planning Branch, Native Affairs Secretariat, Government of Alberta, Background Paper No. 6 The Metis Betterment Act: History and Current Status (Edmonton: Native Affairs Secretariat, 1985) at 1-6.
40. Attorney General for Quebec v. Attorney General for Canada, (1921) 1 A.C. 401; D. Sanders, "Metis Aboriginal Title", Appendix I in Metisism, id. at 58-63.

41. Canada Act, 1982 (U.K.), 1982, c. 11
42. Slattery, supra, note 29 at 773.
43. "Central Farm is Established to Help Metis", Leader Post, Regina, 14 September 1940; Glen Benedict, Senior Negotiator, Lands, Treaty Entitlement and Resources, Government of SK. to C. Bell, Oct 28, 1988; Sealey and Lussier, The Metis: Canada's Forgotten People, supra, note 6 at 153-154.
44. Saskatchewan Indian and Native Affairs Secretariat, "Lebret Farm Transfer to Metis and Non-Status", news release, 18 August 1986.
45. Supra, note 22 at 200.
46. Id. at 177; Schwartz, supra, note 1 at 184-185; Native People and the Constitution of Canada: The Report of the Metis and Non-Status Indian Constitutional Review Commission, by H.W. Daniels, Commissioner (Ottawa: Ontario Mutual Press, 1981) at 30-31; R.E. Gaffney, G.P. Gould and A.J. Semple, Broken Promises: The Aboriginal Constitutional Conferences (New Brunswick: N.B. Assoc. of Metis and Non-Status Indians, 1984) at 60.
47. Schwartz, id. at 186.
48. D. Opekokew, The Political and Legal Inequities Among Aboriginal People in Canada, Aboriginal Peoples and Constitutional Reform Series (Kingston: Queen's University Institute of Intergovernmental Affairs, 1987). See also Schwartz, id. at 187-188; Gaffney, supra note 46 at 71; Chartier, supra, note 9 at 52-53.
49. Schwartz, id.
50. Opekokew, supra, note 48 at 33-34.
51. See, for example, proposals in Metis National Council, Options for the Implementation of Metis Self-Government, Paper presented at the "Federal-Provincial Meeting of Officials on Aboriginal Constitutional Matters", Working Group 3, Ottawa, Ontario, 14-15 December 1983, at 4.

52. Schwartz, supra, note 1 at 184.
53. Bill 65, Metis Settlements Land Act, 3d. Sess, 21st Leg. Alta., 1988; Bill 64, Metis Settlements Act, 3d., Sess, 21st Leg. Alta, 1988; Don Thomas, "Bills Give New Hope to Metis", Edmonton, The Edmonton Journal, 6 July 1988, B.1.
54. Sanders, supra, note 40.
55. Quoted in Chartier, supra, note 9 at 47-48.
56. Chartier, id. at 48 - 49.
57. Id. at 48.
58. Purich, supra, note 22, at 200-201; id. at 58-59.
59. Supra, note 50.
60. Crown Liability Act, R.S.C. 1970, c. C-38.
61. See, for example, Judicature Act, R.S.A. 1980, c. J-1, s. 25;
62. Northern Pipeline Agency v. Pehinec [1983] 2 S.C.R. s.13 at 521-522; R. v. Thomas Fuller Construction Company 1958 Ltd. [1980] 1 S.C.R. 695 at 173; A.G. Canada v. Law Society of British Columbia [1982] 2 S.C.R. 307 at 328-329. Note that the Federal Court Act, R.S.C. 1970, c. 10 (2d) Supp., s. 17(1) gives jurisdiction to the Federal Court where relief is claimed against the federal Crown. However, the constitutionality of this section has been challenged and Parliament is intending to amend the section to allow civil suits against the Federal Government in Provincial Superior Court.
63. Minister of Justice v. Berowski [1982] 1 W.W.R. 97 at 99 (S.C.C.).
64. Accepting that metis are s. 91(24) Indians, Slattery argues aboriginal rights are within s. 91(24) as they are "intimately connected with the special status and capacities of Indian peoples and the possession and use of their lands." Slattery,

supra note 29 at 775. Relying on R v. Dick [1985] 4 C.N.L.R. 55 (S.C.C.), Chartier suggests that for aboriginals not covered by the Indian Act, "provincial laws of general application which affect their 'Indianness', 'Inuitness', or Metisness' have to be read down in order not to constitutionally offend s. 91(24).

65. Supra., note 1 at 118, 119 and 121 (emphasis added).
66. K. Lysyk, "The Unique Constitutional Position of the Indians" (1967) 45 Canadian Bar Review 513 at 515.
67. Schwartz, supra, note 1 at 192.
68. Supra, note 25.
69. Id. at 8.

CHAPTER 3

A NATURAL LAW THEORY OF ABORIGINAL TITLEIntroduction

Generally speaking, commentators on the origins of aboriginal title can be divided into two groups. One group adopts a functionalist approach maintaining that British colonial policy and practice in North America was pragmatic and not necessarily related to the recognition of indigenous rights as a question of law. The other group link principles of international law, British colonial law, or both, to British practice in the American colonies in an attempt to develop a coherent theory on the common law doctrine of aboriginal title. Both groups engage in critical legal analysis of domestic and international positive law and may make reference to the role of native customary law in the positivist legal regime. Very little attention has been given to the natural rights of indigenous peoples and the extent to which these rights have been recognized or ignored in the positivist tradition.

The ruling of the Supreme Court of Canada in Guerin v. R. has reopened the question of the source of aboriginal title and its recognition in Canadian common law.¹ In Guerin, Chief Justice Dickson wrote an opinion (concurring in by Beetz, Chouinard and Lamer J.J.) upholding the existence of aboriginal title as a legal right which both pre-dated and survived claims to sovereignty in North America by European nations. According to Dickson C.J., aboriginal title is a legal right which arises from historic use and occupation of tribal land independent of Canadian or British

acts of recognition. The legal interest created by this right is classified as "sui generis" and is considered inappropriately described by terminology drawn from general property law.²

Dickson's statement on aboriginal title has been interpreted in a variety of ways. For example, Douglas Sanders argues Guerin recognizes rights based on the "pre-contact Indian legal order" and in this sense "represents a major change in judicial premise."³ Brian Slattery suggests that the decision upholds a uniform common law doctrine of aboriginal rights distinctive to Canada existing independently of statute or executive order and originating in English colonial law.⁴ Others appreciate the significance of confirming the existence of native title as a legal interest, but trivialize the statements by Dickson on the source and uniqueness of the right by reducing its "sui generis" nature to a difficulty in finding appropriate descriptive legal terminology.⁵ However, there is one matter upon which all authors are likely to agree. This is the willingness shown by the court to reconsider the broad principles upon which claims to aboriginal title are based.

The use of the phrase "sui generis" by Chief Justice Dickson is not accidental or without meaning. This same terminology is adopted by him one year later to describe the legal nature of Indian treaties. Assuming as a rule of international law that treaties can be terminated by subsequent hostilities, Dickson C.J. states:

While it may be helpful in some instances to analogize the principles of international law to treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement sui generis which is neither created or terminated according to rules of international law.⁶

The classification of aboriginal and treaty rights as "sui generis" suggests that the law of aboriginal title in Canada is not a closed set of legal relations determined by international or common law theories on the origins and acquisition of property rights. Both the Guerin and Simon decisions raise two important questions in that regard: 1) in what circumstances will courts apply principles of domestic common law and international law? and 2) what is the alternative source of principles to be applied? The alternative sources which immediately come to mind are natural law and native customary law. This chapter will examine the independent moral validity of aboriginal title in the natural law tradition and the extent to which natural theories have been incorporated into domestic and international positive law. My aim is not only to link the doctrine of aboriginal title to natural law theories of property, but also to illustrate the cautious return to first principles of natural law by Canadian courts in the area of aboriginal title claims. The idea of natural law as a valid basis for legally enforceable title claims becomes clear in the influence it has exercised in shaping the positive law on aboriginal title.

I Introduction to the Natural Law Tradition

1. A General Survey of Basic Principles

Simply stated, natural law can be defined as "a body of primary principles governing the obligatory conduct of men towards one another."⁷ It is "natural" in the sense that it "derives from the natural function of man's faculties and the natural inclination

to exercise them."⁸ Principles of natural law are determined by reason and are innate in human beings. The capacity to reason that distinguishes humanity from other forms of life. Natural Law theorists differ in their opinions on the role of the divine in human reasoning. However, all posit the existence of a higher legal order from which fundamental principles of law governing the correct order of human society are derived. Again, theorists differ on the role of positive law (legislated and judge made) within a natural law regime, but all would argue that positive law can be measured against the rational and moral validity of natural law precepts. These precepts are more than public opinion because they are constant and not subject to majority rule or the vicissitudes of juridical institutions. Simply put, in the natural law regime, law is reason unaffected by desire and humans, as rational creatures, are subject to this law.

The theory of natural law finds its origins in ancient Greek philosophy and Roman Stoicism.⁹ Both introduced a moral and universal aspect to the concept of law in the application of a "just" law to all men of reason. Both also assume positive law will be made in a moral framework towards the attainment of a good life.¹⁰ Aristotle explains relationship as follows:

I regard law as either particular or universal, meaning by 'particular' the law ordained by a particular people for its own requirements, and capable of being subdivided into written and unwritten law, and by 'universal' the law of nature. For there exists, as all men divine more or less, a natural and universal principle of right and wrong, independent of any mutual intercourse or compact.¹¹

Later in this work Aristotle defines particular law as the statutes of a given state and universal law as universally recognized

principles of morality.¹² In Ethics, he admits that it is not always obvious which rules of morality or "justice" are natural and which are conventional (i.e. imposed by agreement and no original natural reason for formation) but that it remains true there is both natural and conventional justice.¹³ However, the justice or injustice of a particular act is clearly identifiable by its voluntariness. We blame the doer and, with that, his deed becomes an unjust act."¹⁴

Stoicism also assumes that moral law has natural origins. However, the Stoics introduced variables into the Greek philosophy of natural law such as the distinction between necessary and accidental or circumstantial human nature (the latter of which is not considered essential to the moral nature of man), the concept of "humane" law, the rejection of "unequal moral capacity used to justify slaves "by nature," and the idea of man being born into two communities - the cosmopolis or universal rational order (joining men together by universal goodwill, love, and reason) and the native city or state. In the cosmopolis, prejudices associated with race and class are subordinated to a sense of universal kinship shared by men of reason. Stoic philosophy is the foundation of the principles of fairness and fundamental equality of man introduced into the Western legal tradition by Roman law.¹⁵

Perhaps the most prominent of the Stoic philosophers was Cicero. According to Cicero, legislation which contravenes principles of natural law is not law. Cicero explains this position as follows:

There is in fact a true law - namely right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible.¹⁶

In light of the eternal law (reason), Cicero views all men as equal and deserving of a measure of human dignity and respect.¹⁷ The idea that the moral validity of positive law can be measured against rules of natural law has been maintained throughout the development of the natural law tradition.

The natural law tradition is also heavily influenced by medieval Christian philosophy. Of particular influence are the writings of St. Thomas Aquinas which apply Christian principles to Aristotelian and Stoic philosophies of law. Aquinas accepts the ancient principle that natural law measures the actions of men and the guiding principle of law is reason. However, he differs from the ancients in the attribution of an eternal Divine reason to the Christian God and the recognition of Divine reason as the ultimate force behind action. According to Aquinas, human reason is derived from God and is subject to Divine reason (Eternal Law). Divine reason, or will, is the driving force behind nature and man's natural inclination towards perfection and moral order. For Saint Thomas, human reason and eternal law are not synonymous. Rather, man participates in eternal law by recognizing through human reason, which actions are right and wrong (natural law) or through scripture revelation (divine law).¹⁸

According to St. Thomas, one of the dictates of natural law is "That society is a demand of nature and . . . the individual is naturally a part of society."¹⁹ The assumption of man's natural inclination to socialization is not a new concept, but takes on significance in the Thomist tradition because of its relationship to the common good. As a member of society, the individual goods basic to human nature towards which a moral person will strive (such as knowledge and self-sufficiency) may become subject to the common good of society. Legitimate law within a given society is law ordained to the common good. Positive law in this context is legitimacy derived from natural law and is "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."²⁰ The concepts of "common good" and basic goods of human nature have survived the evolution of natural law and remain important concepts in contemporary legal philosophy.

In the Thomist tradition common good is more than the sum of basic individual goods. Further, there is not a single common good but a hierarchy of common goods ordered in accordance with right reason. At the top of the hierarchy is the common good of the human race which St. Thomas defines in terms of universal peace and happiness.²¹ The descending hierarchy of common goods reflects the hierarchical unity of the church and humanity. St. Thomas describes the hierarchy as follows:

. . . wherever many governments are ordained to one end, there ought to be one universal government over particular governments; because in all virtues and arts, as is pointed out in the first book of Ethics [Chapter 1], there is an order according to the order of ends. For the common good is more divine than a special good;

and therefore since the whole church is one body, if this unity is to be preserved, it is necessary that there be a certain governing power above the episcopal power with respect to the whole church, by which each particular church is ruled. . . [I]nasmuch as one congregation or community includes another; just as the community of a province includes the community of a city; and the community of the kingdom includes the community of a province; and the community of the whole world includes the community of a kingdom.²²

Philosophies of natural law from the 13th century onward incorporate ancient and Thomist precepts of natural law subject to certain modifications. The major change in the tradition is the secularization of natural law precepts and the gradual removal of ethnocentric bias. It is beyond the scope of this thesis to give an exhaustive account of the nuances introduced by the various philosophers, but a brief mention of prominent theorists may be useful in understanding their contribution to the positive law of nations and, in particular, the acquisition of aboriginal property discussed later in this chapter.

Two prominent philosophers of the sixteenth century were Francisco de Vitoria and Francis Suarez. Vitoria is essentially Thomist in the emphasis he places on human and Divine reason, but is unclear on the relationship between the will of the legislator and natural reason.²³ Suarez, on the other hand, emphasizes the role of Divine will, rather than Divine reason in the creation of legal obligations. Further, Suarez believes in a need for humans to recognize a promulgation of divine will to be bound by moral law and that such law is not promulgated naturally in human nature. At the basis of natural law is natural honesty and man's recognition of the obligatory character of precepts of natural law.²⁴ Major divergences from the Thomist doctrine by publicists

of the sixteenth century include Niccolo Machiavelli who viewed power as the ultimate end of politics and Albericus Gentilis who rejects the concept of eternal law and emphasizes the primacy of jurisprudence and human reason over theology and moral philosophies of law.²⁵

The most prominent advocate of the natural law tradition in the 17th century was Hugo Grotius. Although Grotius assumes a connection between the dictates of right reason and the will of God, passages of his work hypothesize the elimination of God from the study of natural law and for this reason he is often credited for beginning the secularization or modernization of natural law. Grotius also introduced a distinction between absolute and non-absolute natural law. The former is the equivalent of natural morality concerning matters such as the love of God and the avoidance of harm to the innocent. The latter are imperfect natural rights to carry out certain acts until such acts are prohibited by positive law. Grotius also assumes man has a natural inclination to sociality and summarizes the law relating to sociality as abstaining from that which is another's, restoration of another's property and benefits received therefrom, fulfilling promises, making good losses incurred through our fault and inflicting penalties on men according to their just deserts. At the same time, Grotius advocates individual autonomy as a first principle and the concept of social contract - man voluntarily surrenders personal autonomy for the objective good and the state.²⁶

In short, Grotius re-introduces Aristotelian and Stoic philosophy into natural law and at the same time revitalizes ideas later modified by influential positivists. For example, Thomas

Hobbes advocates the existence of a fictitious agreement among citizens that a government or Leviathan should be set up with absolute power over all citizens. Jeremy Bentham defines public interest or "good" as the greatest good for the greatest number. Their shared preference for legislation over the moralizing of the common law courts is a hallmark of what is now known as positivism.²⁷ Hobbes also introduces a subjective element into natural law by asserting that the natural precept of self preservation results in a natural state of conflict, or in the case of international relations, war.²⁸

The eighteenth century witnessed further modifications to natural law theory by two prominent philosophers - Christian Wolff and Emmerich De Vattel. The significant contribution of Wolff is his discussion of the relationship of the law of nature and the law of nations. Wolff attributes both collective will and natural liberty to a nation and suggests that the rules governing a nation are not necessarily connected with an objective moral order established by natural law. He distinguishes between voluntary and necessary laws of nations. The latter are laws of nature applied to nations which are immutable, the violation of which will never be right, but may have to be tolerated because of the practical impossibility of satisfying in all detail natural laws. This ambiguous attitude to the immutability of natural laws is distinctly different from traditional natural law theories. As in the philosophy of Grotius, self-preservation is given status in the resolution of conflicts. Further, the common good in Wolff's philosophy is different in that it is the right or good of individuals taken collectively.²⁹ Vattel is in many ways an

interpreter of Wolff, but differs in his understanding of the voluntary law of nations.³⁰ The views of Wolff and Vattel are discussed in more detail throughout this chapter.

Modern natural law theorists vary in their adoption of the ancient and Thomist philosophies of natural law. Of particular influence in the modern tradition are H.L.A. Hart and John Finnis.³¹ Hart argues that the minimum content of natural law is survival. In order to survive, humans adopt some form of social organization. In order to avoid chaos, rules are established to regulate areas such as social conduct and property rights.³² On the Hartian analysis, "the forms of cooperation which characterize any community properly so called, are a manifestation of the basic good of sociability."³³

John Finnis assumes the existence of basic human values or "goods" including survival, knowledge, sociability and practical reasonability (personal autonomy).³⁴ The latter value assists people in choosing actions to further other goods. As Daniel Gormley points out in his discussion of Finnis, the most fundamental principle of practical reasoning is "actions essential for the attainment of human good are to be performed."³⁵ According to Gormley, one of the actions derived from practical reasoning is the administration of "justice" by persons in authority, within a community. Gormley synthesizes Finnis' concept of practical reasoning with the concept of justice as follows:

We may term as the primary requirement of justice the imperative that one ought not to demonstrate arbitrary preference as to persons. If one ought to further human goods, then it follows that one must respect each human being as a focus of actual or possible participation in those goods . . . [I]n any situation in which one's

decisions may affect another person's participation in human goods, one takes that person into account of deserving of respect. The primary principle of justice is therefore of enormous significance to those in authority within a community . . . Success in this endeavour will yield 'the common good': 'the securing of a whole ensemble of material and other conditions which tend to favour the personal development of each individual.'. . . An application of the primary principle of justice to human affairs tells us that within a community, each individual is entitled to participation in human goods to an extent that does not restrict his fellows' participation in them.³⁶

It is beyond the scope of this thesis to give an exhaustive account of principles of natural law. However, from the general discussions above the following principles may be derived:

1. All humans are rational beings;
2. Natural law is reason (whether human or divine in origin) and all humans are subject to it by virtue of their rational nature;
3. Natural law is universal;
4. Natural laws apply equally to all people and are immutable at least in respect to the question of what is "right", "moral", "good" or "just";
5. People have a natural inclination to socialization and the achievement of common good, or at the very least, have a natural inclination to self-preservation or survival which requires some form of social organization; and
6. Positive laws are not necessarily derived from natural laws. However, the natural validity of a positive law may be measured against basic precepts of natural law such as the fostering of the common good.

Before leaving our discussion of the basic principles of natural law, it is useful to briefly examine the concept of rights and obligations in the natural law tradition. R. Begin defines "right" as follows:

Right is the relation existing between one person and the action or omission of another, according to which this person may demand this action or omission as due to him on the strength of equality of men, in virtue of the common good, goal of happiness toward which all men striveThe determinant factors in the circumscription of Right are the common good of humanity and the means necessary for each individual to attain it. These factors are evaluated by reason and thus give birth to a 'concretization' of Right expressed in laws.³⁷

Begin's interpretation of natural rights suggests all people as rational beings are able to regulate their own activity and are the subject of rights (even though historically they may not have been treated as the subject of rights). Individual rights are not limitless, but are restricted by the common good and the rights of others in society. States or collectivities of individuals created by individuals striving for the common good also have rights of their own vis a vis their members and other states, but these rights are ruled by reason and common good.³⁸ Justice in this context is the "obligation of rendering to others what is due to them" according to their rights which may or may not exist independently of rights conferred by a particular state.³⁹ For a positive right to be just or moral, it must be a right that concurs with the rational nature of humanity. Those fundamental natural rights which find their basis outside the state, such as an individual's right to live, are only subject to state regulation to the extent that they are regulated to the common good.⁴⁰

2. A Natural Interpretation of Property Rights

Rights of property can be viewed in two distinct ways - rights of property within a community and rights of property between communities.⁴¹ The recognition of aboriginal title as a pre-existing legal right suggests that rights of property within an aboriginal community may properly be governed by native custom rather than Canadian or British law.⁴² The extent to which these rights survived British settlement and form the basis of a claim to land is determined by the rights and duties of communities vis-a-vis one another. Consequently, natural theories concerning both the origin and acquisition of property rights have bearing on the natural legitimacy of aboriginal title claims.

A claim to a right of property is really a claim that someone do or omit to do something with respect to that property. In the natural law tradition, laws creating obligations with respect to property and claims arising from those laws are only morally valid if they concur with the fundamental precepts of natural law. Of primary importance in contemporary theories is the application of principles equally to all human beings and the advancement of the common good.

(a) Historical Views

The moral content of property regimes has been considered by numerous philosophers of law. In ancient Rome, the Stoics advocated that by natural law all things were originally held in common and the division of property was introduced by mankind.⁴³ However, positive laws of property were not considered contrary to natural law to the extent that they advanced precepts of natural

law such as living honourably, injuring no one and giving "to every man his own."⁴⁴ Although different philosophers have emphasized different precepts of natural law, such as common good and social stability, to legitimize property law per se, the view that all property was originally common has been carried through the development of the natural law tradition and remains essentially the same today.⁴⁵ Cicero explained the relationship of the natural law of common property and the positive law of private property as follows:

But just as though the theatre is a public place it is yet correct to say that a particular seat a man has taken belongs to him, so in the state or in the universe, though these are common to all, no principle of justice militates against the possession of private property.⁴⁶

As between communities, classical Roman law asserted that the origin and acquisition of property rights was governed by the positive law of nations or "ius gentium." To juriconsultants this was universal natural law in the sense that it was "everywhere observed among men, according to the dictates of natural reason."⁴⁷ However, the "ius gentium" was also used by them and others in a distinct sense. Where the phrase "ius naturale" was often used to emphasize the "raison d'etre" of a rule, the "ius gentium" was adopted when discussing its practical application.⁴⁸ Despite the link between Roman philosophy and classical law, it is to be historically naive to argue that the Romans were ruled by natural philosophy in the creation and practice of acquiring foreign property when expanding the Roman empire. For example, it is clear barbarian peoples were not viewed as rational beings capable of asserting natural rights.⁴⁹ Nevertheless, the influence of ancient Greek and Roman philosophy is evident in the assertion of natural

modes of acquisition found in the "ius civile" and the "ius gentium." As discussed below, many of these rules continue to be advocated by natural law theorists subject to certain modifications which take into consideration the ethnocentric bias of the Roman Empire in defining universality.

The application of the "ius gentium" to a particular community was to a certain extent dependant on the capacity of the community to enter treaties. At the time of Rome's political supremacy, the theory developed that if "there were no treaties of any kind with any particular community . . . the law of nations, as generally understood, or rather as they themselves understood it, had not full applicability to that nation."⁵⁰ Whatever concessions were granted were connected more with humane sentiments than a sense of legal obligation. Further, only communities with sufficient political organization were viewed as capable of entering treaties for the common good of the respective states.⁵¹ In that regard, Cicero defined a state as "a body politic or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength."⁵² Again, the practice of Rome suggests this definition was not always adopted in the expansion of the Empire. Of particular interest in the context of the doctrine of aboriginal title are the following rules of acquisition which find their origins in Roman law. As will be seen, most of these rules are justifiable in the natural law tradition assuming their equal application to all communities and their contribution to social stability and peaceful relations. The development of these rules in the sixteenth to eighteenth centuries

is discussed in the context of aboriginal title claims in section III of this chapter.

1. Res Nullius [the property of nobody] - What does not belong to anyone becomes the property of the person who first acquires it.⁵³
2. There is . . . no such thing as private ownership established by nature, but property becomes private either through long occupancy (as in the case of those who long ago settled in unoccupied territory) or through conquest (as in the case of those who took it in war) or by due process of law, bargain, or purchase, or allotment . . .⁵⁴
3. That which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation.⁵⁵
4. Public territory arises out of the occupation of nations, just as private property arises out of occupation by individuals.⁵⁶
5. Possession may be divided into two kinds for it is acquired either in good or bad faith.⁵⁷
6. Usucupation can not take place without possession.⁵⁸ Usucupation is the addition of ownership by means of continuous possession for a time prescribed by law.⁵⁹ A person can acquire by usucupation the property of which he has possession, thinking that it belongs to him; even if this opinion is false.⁶⁰

7. Prescription based upon long possession is usually not granted for the acquisition of places which are public by the Law of Nations.⁶¹ Prescription based on no matter how immemorial a time, sets up no title to those things which are recognized as common to the use of mankind [eg. sea].⁶²
8. Property which becomes ours by delivery is acquired by us under the Law of Nations; for nothing is so comfortable to natural equity as the wish of an owner, who intends to transfer his property to another, should be complied with.⁶³
9. When ownership is transferred to him who receives it, it is transferred in the same condition that it was while in the possession of the grantor.⁶⁴

Before leaving our discussion of historical principles, a few words should be said about the positive laws of prescription and conquest as both appear to be in direct conflict with the first principle of valid title by the original possessor. The ancient concept of first occupancy assumes full rights of dominion are acquired by the occupant who first takes possession of property with the intention of keeping it as his own.⁶⁵ Prescription finds its roots in the idea of usucupation and holds that property in the possession of a person for a long period of time becomes the property of the possessor regardless of prior ownership.⁶⁶ Conquest assumes the rightful appropriation of someone else's property by the victorious party in a war, without the consent of the losing party.

The apparent conflict between prescription and rights of first occupancy are explained by Joannes Andreae (1270-1348) by analyzing the relationship between positive and natural law. According to him, positive law specifies natural law and applies it to concrete situations. Where it is a concept of natural law that one should not benefit from damage done to another, positive law can specify those cases in which this can be accomplished without injuring someone's natural rights. The decisive reason in favour of such limitations is the common good of the community. With respect to prescription, the particular right of the original occupant is subordinated to the higher common good of peace and security arising from certainty of rightful ownership. The issue is not so much the justice of title by prescription as the consequence of silence or abandonment by the original owner. Arguments of modern authors remain essentially the same.⁶⁷

For prescription to be effective, the person acquiring title by prescription must do so in good faith. "Good faith may be defined as a prudent judgment according to which a person believes that the thing he possess is rightfully his."⁶⁸ Philosophers have generally agreed to this limitation on the positive law of prescription as "prescription would certainly be contrary to the Natural Law, inasmuch as it encouraged widespread dishonesty among citizens, a state or condition certainly harmful to the common good, to public peace and security."⁶⁹

The rationalization of acquisition by prescription suggests that the moral legitimacy of positive laws which limit or vary the first principle of title by occupancy of previously unoccupied lands can be measured against the extent to which they promote the

common good. Arguably, this standard can be used to measure the legitimacy of acquisition by conquest. By the time of St. Thomas Aquinas, it became a rule of natural law that conquest was only legally valid if it could be characterized as "just war." In his view the ultimate good was "peace" and offensive war was only legitimate if three conditions were met - legitimate authority, just cause and right intention.⁷⁰ By the sixteenth century, philosophers were focusing their attention on the condition of "just cause." The influence of Christian paternalism in the natural law tradition resulted in the adoption of ethnocentric views of the common good which were reflected in arguments legitimizing war on the grounds of infidelity and lack of sufficient political organization.⁷¹ Throughout the seventeenth and eighteenth century, the moral and intellectual tradition of international law debated the morality of war and the acquisition of conquered territories. Under the modern law of war, conquest is no longer accepted as a morally legitimate basis for continued possession of a territory.⁷² This rule of positive law accords with naturalist philosophy as it is hard to rationalize how forceful acquisitions foster inter-societal stability, universal happiness and peace. To accept the legitimacy of conquest would mean the acceptance of Machiavellian and Hobbesian philosophies of natural law and "might is right" as the primary governing principle in human relationships.

(b) Contemporary Views

Both Hart and Finnis have considered the morality of positive laws concerning the ownership of property.⁷³ Both begin with the

assumption of common property because of the simple fact that material resources do not "come into the world attached to a particular owner."⁷⁴ However, both appreciate the necessity of establishing a system of ownership to avoid chaos which would be threatening to individual and community survival. Both view rights to specified property as a creation of positive law. For Finnis, legitimate positive law is law aimed at achieving basic human "values" or "goods." He favours private ownership because in his view it is "most likely to produce an increase in the fruits of the common stock and to contribute to the good of personal autonomy."⁷⁵

In his article "Aboriginal Rights as Natural Rights," Gormley argues that Finnis' theory can be used as a framework to analyze the morality of inter-societal property laws. According to his analysis, the governing principles would necessarily include:

1. the fostering of the common good of all communities;
2. an imperative that laws ought not to show arbitrary preference as to communities;
3. an obligation on leaders of powerful communities to exercise power justly by taking into consideration the common good of communities affected;
4. the freedom of a community to choose its own ways of furthering its common good;
5. the avoidance of violence between communities;
6. the enhancement of stability which permits human development; and

7. the recognition of agreements entered between communities because of their contribution to inter-societal stability.⁷⁶

According to Gormley, the furthering of common good will seldom justify interference in the affairs of others. Rather, paternalism should be avoided because our knowledge of other communities is bound to be inferior to our knowledge of our own, the autonomy of a community reflects the basic human value of personal autonomy and unwanted interference can lead to violence.⁷⁷ Inherent in Gormley's analysis is the assumption of an objective common good and the removal of ethnocentric bias in inter-societal relations. Indeed, contemporary views of natural law would insist on the application of the above principles to all communities regardless of race, religion and western forms of political organization as these are no longer considered rational reasons for the denial of fundamental rights.⁷⁸

(c) Fundamental Property Rights

Both ancient and modern theorists agree that some form of property law is necessary to maintain stable and peaceful social relationships among individuals and peoples. All start with the fundamental principle that first occupation of previously unoccupied property establishes rights of property in the occupier. The extent to which this right can legitimately be altered by positive law will depend upon the extent to which the law contravenes natural law precepts and whether such contravention can be legitimized as furthering a greater common good. The application of this theory to relations between various communities

suggests legitimacy may be upheld on the basis of some international common good.

The following section will illustrate that the predominant views on the acquisition of aboriginal lands during the colonization of North America concurred with modern precepts of natural law in the recognition of aboriginal title based on first use and occupation. Those views which offended principles of natural law failed to become part of the early tradition of recognition in British Canada. Rather, principles of natural law are evident in both British Colonial legal theory and practice, subject to certain paternalistic modification. Although it is debated whether British Colonial practice was motivated by international or British jurisprudence, both theory and practice reflect the following first principles of aboriginal title:

1. aboriginal title finds its source in the occupation of land by organized societies prior to European settlement; and
2. aboriginal title should be extinguished by consent.

II Natural Law and The Origin of Aboriginal Title

1. Natural Law and the Law of Nations

Although it is debated whether the Greeks had a clear jurisprudence on the law of nations, influential principles such as the concept of universality and the moral validity of independent political communities can be attributed to famous Greek orators such as Plato and Aristotle.⁷⁹ Although there was clear hostility toward non-Hellenes or "barbarians" and Greek history

affords only few instances of political union, it was perceived that different societies would need different laws but "in so far as they were communities of civilized human beings; certain laws would be common to all, as their applicability is inevitably determined by universal nature."⁸⁰ On the other hand, Rome developed a clear jurisprudence on the law of nations referred to as the "ius gentium" but, as discussed above, the philosophical precepts of the "ius naturale" were not always adopted in the practical application of the "ius gentium." However, the "ius naturale" clearly influenced the positive law of nations and Roman juriconsultants all accepted the subordination of the law of nations to precepts of natural law.⁸¹ Thomas Aquinas also linked natural law to a universal law of nations and has been credited with introducing an ethical element into the realm of international law. St. Thomas recognizes the existence of a transcendent natural law binding states and individuals from which the positive law of nations is derived. By law of nations he does not refer to law between nations determined by agreement, but a law found in every nation by virtue of reason and experience. In determining specific rights and duties of nations, St. Thomas applies principles which govern relations between individuals. However, St. Thomas has little to say about the content of these rights and duties except in the context of the morality of peace and war.⁸² At the time St. Thomas was writing, the Catholic Church wielded significant political and religious influence in Europe and the Pope was considered the secular authority on the law of nations. The role of the Pope in determining rights under the law of nations encountered severe criticism in the sixteenth and seventeenth

centuries - a development which allowed the removal of religious bias in the application of the law of nations to non-Christian peoples.⁸³

Of particular interest in the sixteenth century are the views of Vitoria as he is credited with being the first publicist to deal with the question of aboriginal rights as a question of morality and international law (then referred to as the law of nations). Vitoria contends that the law of nations is derived from natural law and the consensus of the majority of the world regarding the common good of all. Its natural origins provide sufficient authority to create rights and obligations known to all nations through reason and subject to change only by the consensus of the world.⁸⁴ Suarez, who was writing at approximately the same time, takes the opposite view and argues that natural law and the law of nations are distinct. Unlike natural law, the law of nations is not universal and is derived from common judgment and usage. It is not observed always and by all nations, but only as a general rule and is binding only on those who participate in it.⁸⁵

The influence of Suarez can be seen in the work of subsequent publicists including Grotius, Wolff and Vattel. The general principles of international law advocated by Grotius are fundamentally the same as those outlined by Suarez.⁸⁶ Grotius sees the will of the people as the origin of public authority and carries a contractual analysis of civil government into his philosophy of international law. Like the state, any international authority is optional and rests fundamentally upon contract. Although the voluntary law of nations may reflect precepts of natural law, it may also oppose natural law in so much as it

represents the universal practice of mankind. For Grotius, the legal and moral aspects of international law are distinct.⁸⁷

As discussed earlier, Wolff accepts the idea of a voluntary law of nations and argues that there are two branches in the law of nations (necessary law of nations) and the consensus of nations (voluntary law of nations). The two branches are mutually exclusive although the voluntary law may incorporate necessary law which is aimed at the promotion of human good. A violation of necessary law is not right, but it may be left unpunished if it does not form part of the voluntary law of nations. Wolff's position allows for the separation of legality and morality. The validity of the law rests in the notion of a fictitious supreme state authority and the consent of nations.⁸⁸ According to this philosophy, it may be morally wrong or unjust to exclude aboriginals from the law of nations, but if all nations agreed, it would be legal.

Vattel adds little to the philosophy of Wolff. The major difference in their philosophies is Vattel's rejection of the idea of a supreme state⁸⁹ and his emphasis on cultivation as part of a nation's natural obligation to render its condition as perfect as possible.⁹⁰

The nineteenth century witnessed a shift from an emphasis on man as a social and moral being to individualism, utilitarianism and liberalism. Views of social contract thinkers such as Hobbes, Bentham Austin and Locke, who emphasized law making by legislators and morality in terms of public opinion, became increasingly popular and resulted in the predominance of a positivist philosophy in the nineteenth and twentieth century. Prominent philosophers

such as Rousseau asserted the infallibility of the general will and the willingness of rational men to subject themselves to it. Emmanuel Kant argued that morality is in man's autonomous will and that law has an independent validity in its enactment by the state. John Stuart Mill advocated freedom of choice as an end in itself and elevated the freedom of thought and speech to the position of society's highest good.⁹¹

It is in this philosophical atmosphere that international and domestic judicial principles were first formulated on the question of aboriginal title. As will be seen in the discussion on the judicial doctrine of aboriginal title, the courts soon lost sight of the natural origins of aboriginal title and rendered decisions in conformity with settled general principles of English common law and legislation. Political practice turned from the recognition of natural rights to the promotion of egalitarian and liberal philosophies which necessitated the denial of special rights of aboriginal peoples vis a vis other Canadian citizens. However, the federal government's plan to eliminate special status failed and, despite the historical distortion of first principles, the Canadian courts began a cautious return to a natural interpretation of aboriginal rights. Although it would be naive to assume the eventual freedom of the courts from the predominant positivist philosophy of law, the current blending of natural and positive philosophies of aboriginal title suggests that compliance or non-compliance with the first principles of prior occupation and surrender of land by consent may now be sufficient to establish a claim to title.

2. Natural Law and Theories of Acquisition

As discussed earlier, ownership through original occupation can be legitimized in accordance with fundamental precepts of natural law. The application of this principle in the context of the acquisition of territories by discovering nations suggests that land can only be acquired through occupation if the land is ownerless (*terra nullius*). The corollary of this position is land which is the property of someone, or some nation, must be acquired in some other manner. Keeping in mind the natural precept of promoting the common good of inter-societal stability and peace, the most valid method of acquiring owned property is with the owner's consent, or in the case of unoccupied property of a previous owner, through a right of prescription.

The validity of these principles was accepted by legal theorists of the sixteenth century in their attempts to legitimize European claims to lands already in the occupation of indigenous peoples in North America. As acquisition by European occupancy could only be regarded as lawful if North America was *terra nullius*, the characterization of land as *terra nullius* became the subject of juristic debate. Another disputed issue was the legitimacy of conquest as a method of acquisition. It is in the context of these debates that Vitoria gave birth to a natural theory of aboriginal title.

While some scholars argue classification of land as *terra nullius* by early jurists depended on the religion of the inhabitants, others argue Christianity was relevant only to the question of acquiring title and sovereignty through just war. Those in the latter group considered the crucial question to be

the level of political organization of the inhabitants and their ability to participate in the voluntary law of nations.⁹² The first known legal documents addressing these issues were the Alexandrian Bulls by which the Pope asserted moral and secular authority over indigenous lands ignoring the political and legal rights of the inhabitants because of their infidelity.⁹³ These were followed by the treaty of Tordesillas which divided the known world between Spain and Portugal upholding their claims to land and sovereignty in the Americas.⁹⁴

Regardless of whether one accepts the separation of natural law from the law of nations or views them as one and the same, the legal validity of the Papal donations is subject to severe criticism. The former perspective would require validation by the voluntary consent of all nations, or at the very least, the discovering nations. History shows us that European nations competing for power in the new lands ignored papal donations and were far from agreement on the Pope's authority over newly discovered land.⁹⁵ The latter perspective would require the denial of the capability of Indian peoples to reason, and thus a denial of their humanity, to justify their exclusion from the application of principles of natural law. At the very least, this view requires the acceptance of some ethnocentric view of the common good, such as the promotion of European civilization, to justify a refusal to recognize natural rights of aboriginal peoples arising from original occupation.

Francisco de Vitoria (1480-1546), a Catholic theologian, was one of the first people to support Indian ownership of the lands they occupied and Indian territorial sovereignty. He argued that

as true owners of their lands, Indians could not be deprived of them by discovery, occupation or conquest. He rejected the validity of the papal donations, asserted that only just war or cession gave rise to legal title in inhabited lands and argued that religion was not a justification for war. However, he was not completely free from bias in that he believed if Indians were incapable of achieving the status of a civilized state, the Spaniards could step in and control territorial sovereignty if such control was for the benefit and welfare of the original inhabitants (i.e. the common good of the community).⁹⁶

In De Indis, Vitoria justifies his views by drawing on fundamental principles of natural law as he believes it is "by divine law that questions concerning them are to be determined."⁹⁷ He argues that the rights of first occupants are clearly derived from natural law which is capable of creating rights and obligations.⁹⁸ Should a nation discover lands which belong to nobody, right of discovery is adequate title because "regions which are deserted become, by the law of nations and the natural law, the property of the first occupant."⁹⁹ Accepting that first occupancy gives dominion to rational creatures, he asserts that Indians cannot be barred from the exercise of true dominion because they have the use of reason.¹⁰⁰ Further, he asserts that their non-Christian beliefs do not affect the fact that they are possessed of their lands in absolute dominion. In his view, to conclude otherwise would be contrary to principles of natural law and common practice towards other non-Christian peoples.¹⁰¹ Consequently, Indian lands are not open to acquisition by discovery and unless it can be shown that they are not "in peaceable possession of their

goods . . . they must be treated as owners and not be disturbed in their possession unless cause be shown."¹⁰²

Vitoria considers other alleged titles to Indian lands asserted by Spanish jurists. He rejects title based on authority of the Holy Roman Emperor and the Pope as no one, by natural law, has dominion over the world.¹⁰³ Similarly, he argues rejection of the Christian faith is not adequate cause to wage war on Indians and deprive them of their property.¹⁰⁴ Although Vitoria does not dismiss the concept of title by voluntary surrender, he argues that choice played a very little part in the relation between Indians and Spaniards and asserted that "a consent to the taking of possessions in fear or ignorance is in truth no consent."¹⁰⁵ Other titles asserted based on the sin of aborigines and possession by the Spaniards by special grant from God are also rejected as contrary to natural law.¹⁰⁶

Vitoria does not deny that Spaniards may have title based on arguments other than those rejected. In this context, he looks to the consensus of the majority of nations, measured against the common good, as a source of title. It is here that Vitoria's paternalism and cultural bias is evident. The first legitimate title is that of natural society and fellowship which allows Spaniards to trade, travel and settle in America. It is legitimized by the natural precept it is humane and correct to treat visitors well and contrary to the natural law to dissociate oneself from others without good reason. It is assumed that in the exercise of this title, the Spaniards do not harm Indian country.¹⁰⁷ A denial of this title is just cause for war.¹⁰⁸ The second legitimate title involves rights of missionaries. Although Indians

have a right to their own religion, in Vitoria's view the Spanish priests also had the right to lay their views before the natives.¹⁰⁹ Christian conversion and inhumane treatment of natives by their own governments also justify intervention in Indian affairs as does true and voluntary choice of Spanish rule. Finally, while Vitoria upholds the humanity of aboriginals, their right to equal participation in fundamental natural rights, and their status as nations possessed of international rights; he is aware that their civilization is vastly different from European civilization and upholds the right of Spaniards to interfere with Indian government if it is "for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards."¹¹⁰

With the exception of voluntary choice, Vitoria's grounds for legitimate intervention were not incorporated into British colonial theory or practice towards aboriginal peoples.¹¹¹ Nor would these views be acceptable in contemporary natural law theory. Contemporary philosophers would take exception to interference on the grounds set out by Gormley in section I, 2(b) of this chapter. A modern definition of common good presupposes racial and religious equality and should attempt to avoid an ethnocentric perspective of civilization. The current emphasis on autonomy and avoidance of conflicts suggests interference will only be warranted on humane grounds without consent of the Indian community at issue.

The views of Vitoria were argued by Bartolome de La Casas (1474-1566) in one of the most famous debates concerning indigenous rights. His opponent, Juan Gines de Sepulveda (1490-1573) argued that Spain's conquest of the new world was legitimized by papal authority, the inability of Indians to govern themselves and the

failure of the Indians to yield to the Requirimiento - a proclamation read to American Indians requiring acknowledgement of the supremacy of the Pope and the Spanish Crown.¹¹² Numerous jurists in various countries supported and expanded on the views of Vitoria and La Casas. Eventually a body of jurisprudence emerged supporting the following principles:

1. whenever a country is inhabited by persons connected by some political organization, no matter how "primitive", it is not res nullius;
2. title to Indian lands can not be acquired simply by discovery and occupation;
3. native tribes in North America had sufficient political and territorial sovereignty to enter voluntary agreements for the surrender of their legal and political rights; and
4. the doctrine of just war is not applicable to Indian lands based on the justification of infidelity.¹¹³

Two other theories emerged alongside the recognition of aboriginal title and sovereignty. The first follows the views of Sepulveda. Most of the publicists supporting this view wrote in the mid-to-late nineteenth century. Among the most notable were Westlake and Oppenheim, both of whom emphasize the necessity of the existence of a civilized state to remove lands from the category of *terrae nullius*. Both assert aboriginal tribal organization was uncivilized and insufficient to constitute aboriginal populations states in the international sense.¹¹⁴ Their views are consistent with the contemporaneous movement in North America toward domesticating native issues and the intellectual

patterns of the nineteenth century which were dominated by Darwinistic thinking, economic liberalism and legal positivism.¹¹⁵

The second theory admits native title but only under certain conditions. The most well known publicist of this theory is Vattel (Switzerland, 1758). Vattel argues a distinction should be drawn between cultivated and uncultivated lands. For Vattel, cultivation is an obligation imposed by nature as the earth can only perform its function to feed its inhabitants if it is cultivated. Every nation is obliged to cultivate the land and has no right to enlarge its boundaries beyond what is necessary to furnish it with necessities. In his view, the hunt is no longer a sufficient means to provide for the human race. Those nations that refuse to recognize this and usurp more extensive territories than would be necessary if cultivation was employed might legitimately lose possession of uncultivated lands to those who put it to proper use. In Vattel's view, rights of property and dominium are dependant on fulfilling the obligation to cultivate. Consequently, nomadic peoples who possess land in common and fail to appropriate and cultivate specific parcels of land have insufficient possession of the land to acquire title.¹¹⁶

Vattel's theories of acquisition mirror those of Christian Wolff. Both agree that when a nation acquires title to unoccupied territory through occupancy, it also acquires sovereignty over the territory acquired.¹¹⁷ In Vattel's view, both ownership and acquisition require actual possession and cultivation. Wolff differs on this point by recognizing that an "alternation of specific lands for hunting and gathering was 'an intended use of lands' sufficient to yield property in them."¹¹⁸ Both also address

the concept of just war but their views will not be discussed here as conquest played little role in the development of Canadian law on aboriginal title. Of more interest are their views on prescription which are reflected in Canadian jurisprudence on aboriginal title.

Vattel and Wolff uphold acquisition through usucupation and prescription as part of the natural law and the voluntary law of nations. In this context Wolff distinguishes between ordinary and immemorial prescription. The latter assumes that there is no remembrance of the beginning of present possession and upholds the natural precept that every possessor is presumed owner unless the contrary is proven. Ordinary prescription arises from abandonment, neglect and silence on the part of the original owner for a considerable number of years. The loss of rights through ordinary prescription can be defended against someone, or some nation, that has been in possession for a long time only if the original owner has just reasons for neglecting his rights.¹¹⁹ Both immemorial and ordinary prescription are considered part of the voluntary law of nations because they contribute to the common good of certainty of ownership but for this reason are also subject to modification by the stipulative law of nations.¹²⁰ The validity of prescription in the natural law tradition has already been addressed.

The arguments that Indians can be denied title and territorial sovereignty based on insufficient political organization and land use are contrary to traditional and contemporary views of natural law. Although Indians have been historically viewed as irrational savages, today we do not hesitate to accept that there was a high degree of social, religious and political organization among North

American tribes.¹²¹ It is true that the form of organization varied from tribe to tribe and did not necessarily reflect European forms of community and political organization, but it is equally true that Indian peoples formed into societies and confederations. As Gormley points out, the failure to recognize them as land-possessing communities because of a foreign method of government and community organization reflects an arbitrary preference as to communities incompatible with contemporary views.¹²² A defence of these positions by persons purporting to uphold precepts of natural law can only be understood if placed in proper historical perspective and the influence of cultural and religious bias on theories of natural law is understood.

Similar arguments are raised against the exclusion of aboriginal peoples from the enjoyment of rights arising from original possession due to improper land use. A legitimate concern might be raised if Indian tribes simply wandered aimlessly and claimed title to any land they happened to pass over. However, this was not the case. Rather, non-agricultural communities and agricultural communities tended to hunt and gather within reasonably defined territories. Further, a focus on cultivation is clearly linked to a cultural bias on the question of economic value.¹²³ Accepting as a natural precept that there is a duty to use resources effectively to enhance the common good does not necessarily lead to the conclusion that cultivation is a more effective use than hunting and gathering or that the former is more beneficial to others than the latter. As Gormley points out, methods of technology and productivity will always vary between communities and a failure to recognize this would threaten

intersocietal stability. Further, communities are valued today as "more than mere vehicles for the efficient production of wealth."¹²⁴ Only if a community is "hoarding and making grossly inadequate use of a large amount of resources while the survival or viability of other communities is threatened by their lack of access to such resources" will land use be a natural justification for interfering with their property rights."¹²⁵ In this situation, interference may very well be justified for the sake of peace and stability.

In summary, Vitoria's view on occupancy and conquest are most indicative of a natural law theory of aboriginal title. In accordance with this theory Europeans were morally and legally obliged to recognize that first use and occupancy established Indian ownership over Indian lands. Such lands were not capable of acquisition through discovery and occupation but only through cession or prescription. All other justifications for acquisition or interference can not be upheld against contemporary views of natural law which attempt to eliminate cultural, religious, racial and any other subjective bias.

3. Natural Law and British Jurisprudence

The role of natural law in the law of nations and the property rights of indigenous peoples were considered by Sir William Blackstone (1723-1780) in his Commentaries on the Laws of England. Blackstone's theory is developed from a selective application of principles enunciated by preceding philosophers of natural law. However, a distinctive aspect of Blackstone's philosophy is his reliance on the Bible as a source of natural law. Blackstone distinguishes between laws dictated by a superior being that govern

the actions of all creatures and laws "in their more confined sense" (human law) which he defines as the "precepts by which man . . . a creature endowed with both reason and freewill, is commanded to make use of those faculties in the regulation of his behaviour."¹²⁶ Law in the former sense is the law of nature which is determined by the will of the maker and binding on all creatures. These laws are innate in man from the date of his creation and regulate his free will. They are discovered through the faculty of reason and are immutable. These laws have also been revealed in part through the Holy Scriptures and declared by God himself. Human laws are invalid if they are contrary to either the law of nature or the law of revelation.¹²⁷

In Blackstone's view, if "man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature and the law of God."¹²⁸ However, he accepts that man is naturally inclined to sociability and therefore human laws are necessary. Because man is not united into one great society, but many societies, he argues that a "third kind of law" is necessary to regulate mutual intercourse. This third law is the law of nations which "depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between several communities" which are also ruled by the laws of nature.¹²⁹ Like Vitoria, Blackstone accepts the formation of law through the consent of nations but views all laws as subject to a higher natural authority.

Blackstone's natural philosophy of law influences his opinions on the origins and acquisition of property. Blackstone defines a

right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."¹³⁰ He argues that the natural state of property is common property as the earth was gifted to all mankind by the Creator. In a state of primeval simplicity, nature and reason govern rules of acquisition such that he who first acquires the use of a thing, acquires a "transient property", right of possession, or "sort of ownership" which continues, to the exclusion of others, so long as he is in possession. In this property regime it is unjust, and contrary to nature, to drive out the possessor by force, but once he quits use and occupation, his property can be seized without injustice.¹³¹ In this description Blackstone is in agreement with previously established precept of natural law that first occupancy creates original title to property. The most interesting part of Blackstone's analysis in the context of his theory of aboriginal title is he points to "the manners of many American nations when first discovered by the Europeans" as an example of this natural state.¹³²

Blackstone's theory of ownership focuses on the common goods of stability and peace. Although he clearly adopts the precept of rightful occupation of previously unoccupied lands by individuals and nations, he differs from other philosophers by using the Biblical story of the distribution of lands among the sons of Abraham to legitimize his position. Using this same story he argues for the right of migration and the developing of colonies when the mother country (England) is overinhabited. Like Vattel, he links agriculture with the creation of a more permanent property

right than use and occupation because of the necessity to feed an increasing population.¹³³

Admitting that seizure of vacant possession could not subsist as the only method of acquisition in a civilized society, Blackstone elaborates on the positive law of acquisition of individual property rights developed in the English legal tradition such as succession on death, grants of title from the Crown, perfection of title, title by descent, title by occupancy and title by prescription. With the exception of his discussion on "that which is subject to the laws of England" discussed below, he does not elaborate on the application of these principles in the international sphere. However, it is worth mentioning his views on the acquisition of rights through custom and prescription as elements of his philosophy in these areas can be seen in subsequent jurisprudence on the question of aboriginal title.

In his discussion of "rules and requisites of proof relating to a particular custom," Blackstone asserts that the following must be established to make a particular custom good or legal:¹³⁴

1. The custom must be immemorial; that is, "it has been used so long, that the memory of man runneth not to the contrary."¹³⁵ A statute to the contrary of a particular custom is proof of a time when the custom did not exist.
2. The custom must have continued without interruption of the right. Interruption of possession only is permissible but makes the custom more difficult to prove.

3. The custom must be peaceful and acquiesced in; not subject to contention and dispute.
4. The custom must not be unreasonable in the sense that a good legal reason cannot be raised against it.
5. The custom must be certain.
6. The custom be compulsive even though it may have initially been established by consent.
7. Customs must be consistent. Two contradictory customs cannot be good or stand together.

Blackstone concludes his discussion of custom by asserting that customs in derogation of the common law must be construed strictly.¹³⁶

Blackstone distinguishes custom from prescription by stating the former is properly a local usage and the latter is a personal usage. Like custom, the prescriptive right is dependant on immemorial usage. However, in the case of prescription, limitations on acquisition prior to the passage of a specified period of time have been imposed by statute. Further, the positive law on prescription presupposes a grant of title to have existed prior to the creation of prescriptive rights.¹³⁷

Blackstone's comments on the acquisition of Indian lands in North America are very brief. Of the various theories, Blackstone seems to accept Vattel when he differentiates between the ability to acquire cultivated and uncultivated lands by occupation. In his discussion of the application of English laws in North America, he notes that desert and uncultivated lands are claimed by occupancy only and cultivated lands through conquest or treaties of cession.

Given Blackstone's general opinion that original possessor's cannot properly be deprived of their lands by force, it is surprising that he refers to conquest as a method of acquisition. However, this apparent conflict is resolved if one limits his statement to an observation of limited practice in North America. It is clear he is not upholding the legitimacy of conquest when he explicitly states his intention not to inquire into the natural justice of acquisition in this manner.¹³⁸

By including American Plantations in the category of conquered or ceded territories, Blackstone removes them from the category of terra nullius. In doing so, he recognizes the right of aboriginal peoples to dominion over their own lands. However, he places limitations on their territorial sovereignty based on their infidelity. Although he does not use religion to deny aboriginals their natural rights to property as had been done by many of his predecessors, he does not go as far as Vitoria and attempt to remove religious bias altogether. According to Blackstone, Indian laws only remain in full force until explicitly abrogated by the king. At the same time, Blackstone gives greater validity to aboriginal title by failing to address any of Vitoria's arguments for legitimate title other than cession.¹³⁹

The implications of Blackstone's opinions are that at the time of colonization in North America, British legal theory supported natural theories of aboriginal title plus accepted that aboriginal societies had sufficient political organization to assert territorial sovereignty. However, because of their infidelity, the legality of their own laws is called into question after the act of conquest or cession. The latter part of Blackstone's theory is

clearly bias and unacceptable to modern philosophies of natural law. Further, this aspect of his theory is contrary to the form and content of Indian treaties, the Marshall decisions and contemporary views on self-determination.¹⁴⁰

With the exception of the above revision to the law of nature, Blackstone upholds the two fundamental precepts of a natural law:

1. title to a specific parcel of land arises from original and continued occupation of that land; and
2. it is contrary to the law of nature to seize someone else's property by force.

Translated into a natural theory of aboriginal title (taking into consideration the distinction Blackstone makes between the natural justice and practice of conquest) these precepts can be restated as follows:

1. Aboriginal title to a specific parcel of land arises from use and occupation of that land by indigenous societies prior to European settlement in North America; and
2. It is contrary to the law of nature to extinguish aboriginal title of an aboriginal society without their consent.

4. Natural Law and British Practice

Although it may be presumptuous to suggest that natural law influenced government practice toward Indian peoples in North America, it is clear that by the 1700's it had become settled British policy to accept the legal validity of Indian title and to acquire Indian lands by formal cession. Upon discovery of North

America, the British Crown authorized acquisition and settlement of lands by issuing royal charters, letters and patents to private individuals and trading companies. However, in practice and law, these were held not to affect the legal rights of indigenous people.¹⁴¹ Initially, lands were acquired from the Indians by private agreements or conquest. In the former case, agreements soon became more political in nature and were entered between Indian tribes and colonial governments. In the latter case, the loss of land rights was addressed in subsequent treaties.¹⁴²

As settlement progressed, jurisdiction over Indian affairs became more centralized and a formal recognition of British policy was required. This was accomplished through the promulgation of the Royal Proclamation of 1763 which confirmed treaty making as the method of British colonial expansion in Canada.¹⁴³ This method was eventually abandoned in the United States, but remained the practice in Canada until the mid-twentieth century when the practice was replaced by agreements put into force by legislation. In British Columbia, the practice was not adopted and the validity of aboriginal title claims is denied.¹⁴⁴

The Royal Proclamation of 1763 translated natural precepts of Indian title, territorial sovereignty and acquisition of title through purchase into principles of positive law. At the same time, it introduced an element of paternalism into the common law doctrine of aboriginal title by confirming a Crown monopoly on the acquisition of Indian territory, centralizing Indian affairs and controlling expansion into specified areas.¹⁴⁵ Keeping in mind the fundamental right to transfer one's own property and Vitoria's opinion on the issue of voluntary consent, the paternalistic

elements are difficult to uphold in natural law without exercising an arbitrary preference as to community. Granted, the restriction on alienation to private citizens might be upheld on the basis of protecting Indian societies from mistreatment by private citizens. It is more difficult to uphold the validity of treaties with the Crown where land is given in fear or ignorance without arguing that the survival of one civilization is more desirable than another. It is beyond the scope of this thesis to examine the moral validity of specific treaty negotiations. The point here is that recognition of Indian title and acquisition through voluntary surrender became a part of British positive law and British practice in North America.

In the Royal Proclamation, Britain declares sovereignty or suzerainty over all Indians "with whom [the Crown] is connected." One could argue that this assertion of sovereignty does not affect aboriginal title but indicates that the British no longer recognized native territorial sovereignty and the capability of Indian nations to enter international legal relations. However, given the continued practice of treaty making and the content of treaties entered subsequent to 1763, the Proclamation is best understood as declaring a right to sovereignty vis a vis other colonizers and establishing British policy of consensual acquisition of native lands. The language of the Royal Proclamation also suggests that the British may have been declaring a colonial protectorate and thus the right to annex the protected territories to its Dominion. This right was enforceable only against other European powers. Regardless of the Proclamation, the rules of international law required continued and peaceful

sovereignty over uninhabited lands, cession or conquest of inhabited lands to accomplish annexation.¹⁴⁶ This analysis of the proclamation fits with the practice of acquiring lands and jurisdiction through treaty as lands were required and the view of the relationship between the Indian nations and the British Government adopted by Chief Justice Marshall in the Worcester case.¹⁴⁷

The form and content of Indian treaties varies throughout North America. In the Maritimes where settlement was prevented because of fighting between the British and the Indians, treaties were primarily political in nature and were aimed at obtaining peace and alliance.¹⁴⁸ Other treaties such as those entered with the Six Nations Confederacy established alliances, trade restrictions and boundaries crucial to the British competition with France in North America.¹⁴⁹ Some explicitly address the question of sovereignty. For example, the treaty of 1778 between the United States and the Delaware Nation explicitly recognizes the power of the Delaware to make peace and war, provides for the passage of American troops through Delaware country and recognizes the criminal jurisdiction of the Delaware nation over their own citizens.¹⁵⁰ Early New Zealand and maritime treaties have similar political and international law characteristics.

In Canada, the treaties entered with the Indians fall into six general categories; (a) the maritime treaties; (b) the treaties concluded in southern Ontario between 1764 and 1850; (c) the treaties concluded on Vancouver Island in the 1850s' (d) the numbered treaties and adhesions covering areas of Ontario, the Northwest Territories and all of the prairies provinces; (e)

specific treaties between authorized individuals or companies and the Indians; and (f) modern land claims settlements. Although treaties executed by the Government of Canada between 1871 and 1961 expressly indicate a goal of peaceful relations, only the Maritime treaties contain specific provisions on political relations. Most of the treaties dealt with the transfer of specific lands.¹⁵¹ As in the United States, the British and Canadian governments passed legislation confirming the treaty making process. Unlike the United States, Canada has constitutionally recognized the continuing efficacy of this policy.¹⁵²

It has been argued that the practice of entering treaties was purely practical in its inception and cannot be taken as recognition of legal or political rights. Peaceful acquisition avoided wars which resulted in loss of lives and money, both scarce resources in the colonies.¹⁵³ Although this argument carries some strength in the context of original settlement in New England and the Maritimes, it weakens in the context of continual pattern of treaty making in the United States in 1871 and Canada until the present day. Regardless of the "raison d'etre" behind British practice, the practice concurs with natural theories of property rights.

5. Concluding Remarks

The above discussion illustrates that pre-nineteenth century theories of acquisition and aboriginal title developed in the context of fundamental precepts of natural law and a natural interpretation of positive laws governing property rights. The direct link between natural interpretations of property regimes

and aboriginal title was made by philosophers of the sixteenth century who attempted to rationalize the legitimacy of European settlement in North America. Although there were clear differences of opinion on the question of aboriginal title, the views of Vitoria and Vattel predominated and are reflected in British legal tradition of the eighteenth century. Despite the influence of Vattel, British legal theory recognized the natural rights of aboriginal peoples arising from use and occupation. Although a clear relationship between the theories of Vitoria, Blackstone and British colonial practice is yet to be established, taken together or separately, each supports an argument for the natural origins of aboriginal title.

The natural origins of aboriginal title are upheld in early American and contemporary Canadian case law. However, from the mid-nineteenth to mid-twentieth centuries, Canadian courts lost sight of the natural origins of aboriginal title and began to distort or reject the natural theory of aboriginal title. Positivism became the prevailing general view of the legal system and the court took on a fact-finding and law-applying role. In the United States, associated with positivism was the election of judges "so that judges, like legislators, would be more responsive to public wishes."¹⁵⁴ Although the Canadian legal system continued to uphold the separation of the court from the electoral process, the appointment of the judiciary by government continues to ensure that the court will uphold the majority view.

In the area of title claims, judges themselves seemed to adopt a more positivist view by relying on legislation and a selective application of English, American and Canadian precedent to

legitimize their opinions. The "sui generis" character of Aboriginal title was lost in the reliance on positive law and a failure to consider the legitimacy of aboriginal rights as independent legal rights. The distortion of natural rights is particularly evident in early Canadian decisions on the source of aboriginal title and more recent decisions on questions of proof and extinguishment. The decision of the Supreme Court of Canada in Calder v. A.G. of B.C. signalled a selective movement back to first principles¹⁵⁵ by recognizing the natural origins of title claims. Subsequent decisions of the lower courts followed this lead, but only in the area of the source of aboriginal title. The most recent statement of the Supreme Court in the Guerin decision suggests that the Court is willing to reconsider the question of aboriginal title and the appropriateness of applying British and Canadian positive law to define aboriginal rights.¹⁵⁶ The remainder of this chapter will illustrate these patterns in the development of Canadian jurisprudence on aboriginal title by analyzing decisions frequently relied upon in attempts to present a Canadian theory of aboriginal title.

III Natural Law and the Common Law Doctrine of Aboriginal Title

Canadian law on aboriginal title is influenced by two separate positive legal traditions. Significant emphasis is placed on early American decisions but, as will be seen, a misunderstanding of the evolution of the Marshall court on the origins of title has resulted in reliance on doctrines severely modified by subsequent rulings. Of lesser influence, but worthy of mention, are more

recent Commonwealth authorities which are inconsistent in their treatment of aboriginal title as a natural right.

1. The American Doctrine

The question of aboriginal title in North America was addressed for the first time by the Marshall court in 1810 in the case of Fletcher v. Peck.¹⁵⁷ Although the case was litigated by non-aboriginal parties, one of the issues for the court to determine was whether the State of Georgia could convey a property interest in lands that were subject to a claim of Indian title. Counsel for Peck argued that Indians overran, rather than inhabited, the lands and therefore did not have true and legal possession of their lands. These arguments clearly reflect Vattel's cultural bias concerning land tenure. This is not surprising as one of the counsel for Peck was John Quincy Adams who had been elaborating on Vattel's theory for some time.¹⁵⁸ In his view, "by virtue of the cultural superiority of European institutions, the law of nations characterized the transfer of lands from aboriginal peoples to the European settler colonies as a natural law transaction that should not be impeded."¹⁵⁹

The opinion of the court was rendered by Justice Marshall who felt the main issue was a potential fight between Georgia and the United States over jurisdiction of lands.¹⁶⁰ Although he generally ignored the pleadings on the nature of Indian title, he asserted that Indian title should be respected by the courts until it is legitimately extinguished and it is not repugnant to seisin in fee on the part of the state.¹⁶¹ Marshall did not elaborate on the legal foundations of this conclusion. In the dissent, Justice

Johnson argued against compatibility and upheld Indians as sovereign nations and absolute owners of their lands. He argued that the United States acquired nothing but a right of conquest or purchase exclusive to all other competitors.¹⁶² Ironically, the same view is espoused by Marshall twenty two years later in the decision of Worcester v. Georgia, except conquest as a method of acquisition is clearly rejected.¹⁶³

The above discussion illustrates that natural law was argued and accepted by the court as legal argument in the early 1800s. The extent to which the position of John Quincy Adams concurs with fundamental precepts of natural law need not be addressed as they are based on the philosophies of Vattel which have been examined in detail earlier in this chapter. Johnson's dissent amounts to an endorsement of natural rights arising from original use and occupation, but deviates from more contemporary views on the legitimacy of conquest. Marshall's simple statement is loaded with implications that have been repeated continually in title cases namely: Indian title exists, the government has power to extinguish it, and the government has paramount property rights in the land.¹⁶⁴ The extent to which this position violates principles of natural law is discussed in the context of the St. Catherine's Milling case, infra.

Chief Justice Marshall is given a second opportunity to consider the questions of aboriginal title in a series of three cases beginning in 1823. Read together, these decisions reflect a progression of thought on theories of acquisition and Indian sovereignty. This reading of the Marshall trilogy is supported by close examination of the individual cases and statements in the

final decision which clarify rulings or overrule prior inconsistent statement. In its final form, Marshall's theory concurs in the main with fundamental precepts of natural law and, in the view of the American scholar Felix Cohen, can be traced "particularly to the doctrines of Francisco de Vitoria, the real founder of modern international law."¹⁶⁵

In Johnson v. M'Intosh (1823), Chief Justice Marshall invokes the doctrine of discovery to limit the authority of aboriginal people over their territories. He argues that discovery of lands in North America gave the European discoverer title to the lands discovered and the right to extinguish Indian rights of occupation by conquest or cession. Assuming the legal validity of this position, he states that Indian rights to sovereignty must necessarily be diminished on discovery thereby linking the expansion of sovereignty to the acquisition of title. Rather than support his assertions, he invokes the "political question doctrine" stating that the courts have not investigated, and should not investigate, the legal validity of the Crown's title.¹⁶⁶

It is worth considering this decision in some detail as Marshall's views on discovery, occupancy, dominion and conquest are continually quoted to limit and even deny aboriginal peoples a proprietary interest in their lands despite the fact that Marshall overrules himself less than ten years later. It is most often cited in Canadian decisions as a common law precedent for recognition of a legal right to sue for tribal lands based on aboriginal possession. The extensive powers granted to the discovering nation also provide the foundations for the principle that aboriginal title can be unilaterally extinguished by the

Crown. The acceptance of the theory of title set out in Johnson v. M'Intosh without considering the remainder of the Marshall trilogy is probably the greatest contributing factor to the subsequent distortion of first principles by the Canadian courts.

In Marshall's initial opinion, American title to Indian lands is rooted in discovery. He argues that in order to avoid conflict and war, all nations agreed to be bound by principles of discovery. According to this principle:

1. discovery gave title to the government by whose subject or authority it was made to the exclusion of other European governments;
2. exclusion of the Europeans gave the discovering nation sole right of acquisition and settlement;
3. relations to exist between the discoverer and the natives were regulated by themselves;
4. discovery necessarily diminishes Indian sovereignty;
5. the right of Indian peoples to transfer their title was necessarily limited by the fact that discovery gave exclusive title to the discovering nation;
6. the nature of the title acquired by discovery gave the discoverer right to grant the soil; and
7. discovery gives the right to extinguish aboriginal title by purchase or conquest.¹⁶⁷

The most basic objection to Marshall's theory is it is contrary to historical practice and without legal foundation. First, the colonization practices of various European nations illustrates that they were not in agreement that discovery gave sole rights to the discoverer.¹⁶⁸ Even if agreement could be

established, publicists were in general agreement that it was purely a distributional principle and had no effect on Indian title. There is nothing explicit or implicit in the opinion of publicists to suggest discovery gave absolute dominion to the discoverer.¹⁶⁹ Further, both publicists and contemporary international jurisprudence assert that discovery alone is insufficient to grant title, it must be coupled with effective occupation, or in the case of inhabited lands, land must be purchased.¹⁷⁰ Even England, which is referred to by Marshall as a supporter of the discovery principle, modified the principle to suit its national purpose. In responding to Spain's claim in the New World, Queen Elizabeth asserted that symbolic possession is not enough as prescription without actual possession is invalid.¹⁷¹ Finally, even if one accepts that discovery gives the right to grant title, it was settled English law that such grants did not affect Indian title.

In Johnson, Marshall also upholds the legitimacy of conquest. He argues that conquest gives an absolute title which is acquired and maintained by force. Rather than support his conclusion with precedent or legal theory, he invokes what is now referred to as the political question doctrine. According to this doctrine the courts will not rule on the validity of laws on certain subject matters.¹⁷² Further, Marshall's application of the theory of conquest to the United States is difficult to sustain in face of the fact that most of North America was surrendered by cession. Rather than deal with this apparent contradiction, he invokes the political question doctrine:

However extravagant the pretention of converting discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes law of the land and cannot be questioned.¹⁷³

Marshall's manipulation of the discovery principle and the right of conquest cannot be attributed to an ignorance of the natural law or law of nations as it was perceived at that time. Not only was their extensive literature on the rights of non-European peoples, but writings of philosophers such as Vattel, Grotius and Puffendorf were introduced in the pleading of Fletcher v. Peck and Johnson v. M'Intosh.¹⁷⁴ Marshall's judicial creativity can only be understood if placed in its historical context. As one author puts it:

The Indian title concept was born in an era of America's development when the Supreme Court was politically constrained to respect the power of the other branches of Government and to recognize the national imperative to clear the young nation's vast lands of adverse titles which threatened to impede westward expansion.¹⁷⁵

The legitimacy of conquest as a precept of natural law has already been examined. Title by discovery of inhabited lands is clearly contrary to the assumption that one should respect the rights of first occupants without introducing arguments based on land use, nature of community, religion, an ethnocentric view of the common good or some other bias which could not be sustained under contemporary views. Further, the justification of the common law principle that all title derives from a grant of the sovereign by relying on theories of discovery and conquest is contradictory to the assumption that original occupants have absolute title in the soil until their rights are abandoned or voluntarily

surrendered. The concept of absolute dominion by discovery and conquest is repudiated by Chief Justice Marshall only nine years later in the Worcester decision.

Given Marshall's clear reversal on the questions of discovery, dominion and conquest one is left wondering whether Johnson v. M'Intosh should be given any weight in developing a theory of aboriginal title. It is argued that rather than ignore his theory outright, it should be "analyzed in light of modern historical understanding, so that its useful elements may be salvaged."¹⁷⁶ If one takes this approach, the only useful element of Marshall's theory that can be legitimized in both the natural and positivist traditions are his views on Indian title. In his view, it is a legal right based on aboriginal possession and it includes a complete prerogative of Indian nations to determine their own systems of land tenure.¹⁷⁷ Unfortunately, even this theory of Marshall's has been used to limit the propriety rights of the Indians by focusing on Marshall's description of Indian title as a right of occupancy, which in positive law is less than fee simple but in natural law carries the rights of absolute ownership assuming occupancy is of previously unoccupied lands.¹⁷⁸ Recognizing that restrictions on Indian title may be opposed to natural rights, Marshall's stated intention is only to limit Indian title to the extent that it can be transferred to others.¹⁷⁹

Eight years later in the Cherokee case, Marshall addresses the question of Indian territorial and national sovereignty.¹⁸⁰ A motion was brought on behalf of the Cherokee Nation for an injunction to prevent the execution of legislation passed by the State of Georgia which had the effect of extending State laws over

Cherokee territory, seizing Cherokee lands and abolishing Cherokee laws. The motion was brought pursuant to Article III, section 2 of the United States Constitution which gives the Supreme Court jurisdiction over disputes between "the state or citizens thereof, and foreign states, citizens or subjects." The Court held that the Cherokee could not invoke the jurisdiction of the court pursuant to this clause because they were not a "foreign state" in the sense that the term is used in Article III. The merits of the application were not considered.

To support his opinion, Mr. Justice Marshall reasons: nations not owing alliance to each other are foreign to each other; by admission, Cherokee territories are within the territorial boundaries of the United States; in foreign dealings Indians are considered within United States jurisdiction; the treaties with the Cherokee evidence common reliance through limitations on Cherokee sovereignty and an offer of protection from the United States; Article III, clause 8 of the Constitution identifies Indian tribes separate from foreign nations; and the question of approaching the court to remedy a wrong likely never entered the minds of the Indians when the constitution was framed. Consequently, the framers of the legislation could not have intended to include Indian tribes in the term "foreign nations". This is "not because a tribe may not be a nation, but because it is not foreign to the United States."¹⁸¹

Recognizing the unique relationship of aboriginal tribes to the United States, Marshall analogizes the relationship to that of a ward to his guardian and refers to Indian nations as "domestic dependant nations."¹⁸² Although this statement is quoted to support

limitations on, or denial of, Indian sovereignty; it is best understood as a geographical conclusion which is legal or political to the extent that it recognizes the protectorate status of the Cherokee nation. The tenor of the judgment is most clearly stated in the dissent of Mr. Justice Thompson as follows:

. . . I do not understand it is denied by a majority of the court that the Cherokee Indians form a sovereign state according to the law of nations, but that although a sovereign state, they are not considered a foreign state within the meaning of the Constitution.¹⁸³

The proposed reading is supported by the judgments of Marshall and Johnson. At the beginning of his opinion, Chief Justice Marshall states counsel has been "completely successful" in persuading the court that the Cherokee are a "distinct political society" and that treaties and laws enacted pursuant thereto "plainly recognize the Cherokee Nation as a State."¹⁸⁴ Mr. Justice Johnson takes exception to this finding and argues that the Cherokee do not have the character of a state consistent with entities admitted to the family of nations; if they were recognized as a state, they were not recognized by any nation other than the United States (which is insufficient to pull them within the family of nations); and they were incapable of becoming a state because Great Britain acquired sovereignty upon discovery of North America.¹⁸⁵ These arguments are addressed one year later by Chief Justice Marshall in Worcester v. Georgia.¹⁸⁶

The significance of this decision in the area of property rights is twofold. As explained earlier, a school of thought was developing at this time legitimizing the exclusion of Indians from principles of the law of nations (derived from laws of nature) on the ground of insufficient political organization to be recognized

as states in the international sense. Insufficient political organization also meant their lands were *terrae nullius* and title and sovereignty could be acquired by a discovering nation through occupancy.¹⁸⁷ The Cherokee decision can be used in addition to arguments derived from natural law to oppose these views. Second, the recognition of Indians as independent nations supports the argument that the only valid method of acquiring their lands is through treaty, a practice that predominated in international relations of that time.

Before leaving the Cherokee decision, a brief word should be said about the characterization of the Cherokee as a domestic dependant nations which seems incompatible with their recognition as a nation in the international sense. This inconsistency can be resolved through a temporal distinction on the basis that external sovereignty is lost at the time of taking treaty, at which point the Cherokee assume a state of "pupillage." They are sovereign at the time of entering the treaty (and thus the treaty can still be considered an international agreement). Afterwards, they are dependant in the sense that sovereignty is lost. However, Marshall's statements in Worcester suggest this is reading too much into the analogy. He elaborates on the peculiarity of the relationship between the Indians and the United States as follows:

. . .the settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self-government by associating with a stronger and taking its protection . . . Examples of this kind are not wanting in Europe. 'Tributary and feudatory states' says Vattel, 'do not thereby cease to be sovereign and independent states so long as self-government and sovereign and independent authority are left in the state.'¹⁸⁸

Marshall concludes that the Cherokee retained certain aspects of sovereignty which could not legally be removed by the State in absence of agreement. His position on limited external sovereignty is consistent with the concept of sovereignty or protectorate status in international law.

The case of Worcester v. Georgia represents a culmination of an evolving theory on aboriginal title and sovereignty. In Worcester, a missionary was charged with residing in Cherokee territory contrary to the laws of Georgia. The court held that the laws of Georgia were inapplicable within Cherokee territory. Marshall rejects his earlier theory that title and sovereignty were acquired by the British at the time of discovery. He emphasizes that discovery may have affected rights vis-a-vis the European powers, but Indian rights could only be diminished through voluntary purchase and surrender. By overruling his previous views on discovery, he removes the justification for the assumption that sovereignty is necessarily diminished. Rather, he suggests that aspects of sovereignty may be surrendered pursuant to terms of a treaty (eg. restrictions on trade and alienation) but this does not necessarily have the effect of destroying internal self-government or preventing Indian nations from exercising powers not relinquished. Considering both the terms of the various treaties with the Cherokee and the fact of repeated treaties with them, he upholds Cherokee sovereignty. This reasoning reflects the natural philosophies of Vitoria and accords with principles of international law relating to dependant or vassal states.¹⁸⁹

Marshall begins his repudiation of the theory that dominion and sovereignty were acquired on discovery by admitting it is

difficult to comprehend the legitimacy of a proposition that "the inhabitants of either quarter of the globe could have rightful original claims of the dominion over the inhabitants of the other, or over the lands they occupied" or that the discoverer acquired rights "which annulled the pre-existing rights of its ancient possessors."¹⁹⁰ Although he continues to assert that discovery was a principle respected by European nations he clarifies that it did not affect the rights of those already in possession "as aboriginal occupants, or as occupants by virtue of discovery made before the memory of man."¹⁹¹ By this qualification, Marshall upholds original occupation and prescription as legitimate origins of property rights. However, because he continues to uphold discovery as a legitimate exclusionary principle, he does not change his position on the inability of aboriginals to transfer their lands to anyone other than the discovering nation. The right of the discoverer was not dominion, but simply a pre-emptive right of purchase.¹⁹²

Marshall removes the second basis for upholding absolute dominion in the Crown by specifically repudiating his previous views on conquest. He clarifies that the policy of Britain was not one of title by conquest but title by purchase. Although he admits the existence of some Indian warfare, he analyzes the right of the government to make war in the context of "just cause" rather than conquest.¹⁹³

The Worcester decision also contains significant statements on the question of aboriginal sovereignty. It is beyond the scope of this thesis to examine sovereignty in any depth. However, a summary of Marshall's views on this point are reflected in the

following quotation upholding the natural right of the Cherokee Nation:

The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. . . The words "treaty" and "nation" are words of our own language selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.¹⁹⁴

The court notes that final word of the concept of title arises from modes of usage foreign to European systems and includes communal tenure as an aspect of occupancy rights. The court affirms that Indians were considered to own their lands in common by a "perpetual right of possession"¹⁹⁵ and that Indian possession or occupation was considered with reference to their modes of life; "their hunting-grounds were as much in their actual possession as the cleared fields of the whites."¹⁹⁶

The above discussion reveals that natural law played a significant role in developing the first positive law on aboriginal title. Not only were precepts of natural law recited in the pleadings before the court, they were also eventually mirrored in principles enunciated by the Marshall court. By 1832, the United States Supreme Court upheld the pre-existing natural rights of Indian peoples and translated Vitoria's views on occupancy into positive law. The only conflicting principle with contemporary philosophies was the acceptance of discovery as an exclusionary

principle accepted by nations and the restriction placed on alienation. Even this position is hard to rationalize as limiting aboriginal rights because the effectiveness of the exclusionary principle lies in the absence of other buyers, not the inability of the Indians to sell. By 1835, the distinction between cultivated lands and uncultivated lands introduced by Vattel was rejected. The final theory enunciated in *Worcester* is in complete harmony with contemporary philosophies of natural law which rejects ethnocentric bias, upholds inter-societal agreements and emphasizes the role of community autonomy in the definition of "common good."

Unfortunately, this doctrine was formalized at a time when the political practice of the United States was moving toward domestication of Indian affairs. In 1830, Congress passed the Indian Removal Act, 4 Stat. 211, which provided for the removal of tribes from the eastern shores. Despite the ruling in *Worcester*, president Jackson forcibly removed the Cherokee from their lands.¹⁹⁷ Policy changed to favour the exercise of direct colonial power over native nations. This policy was augmented through legislation which had the effect of gradually wearing away Indian sovereignty and eventually the treaty making process was brought to an end.¹⁹⁸

2. The Commonwealth Doctrine

The significant decisions rendered by courts of the British Commonwealth are divided between those that uphold natural origins of aboriginal title and those that assert the need for legislative recognition or at least elements of title provable in a court of law. In *Symmonds*, Mr. Justice Chapman upholds that aboriginal title does not originate in the sovereign, but in occupancy since

time immemorial. In his view, the law requires if such title is to be extinguished, it must be by fair purchase.¹⁹⁹ This doctrine was approved by the privy council in Nireaha Tamaki v. Baker which at the same time refused to consider the Marshall decisions.²⁰⁰ This reflected the 19th century practice of the Judicial Committee of the Privy Council and British courts to consider United States authorities.

Two more recent cases distort natural principles in attempts to establish recognition of aboriginal title in the common law. In re Southern Rhodesia involved a dispute over unalienated land.²⁰¹ The undeveloped nature of tribal land was held not to disqualify natives from possessing legal rights, a principle clearly valid in the natural law tradition. However, the decision assumes that the tribe should prove that their property rights have survived the English assertion of sovereignty so that the native system can be reconciled with institutions of non-native society.²⁰² In Millirpum v. Nabalco Property Ltd., the court conceptualized native title in terms of English title despite its express intention not to do so.²⁰³ A property right is defined as "the right to use or enjoy, the right to exclude others, and the right to alienate" and the court concludes that the Indians do not have a legal propriety right.²⁰⁴ This decision has been subject to much criticism and has been rejected in Canada by Mr. Justice Hall on the grounds that it presupposes the necessity of recognition after discovery or conquest to establish a legal right.²⁰⁵

3. Canadian Decisions

As previously stated, a natural interpretation of aboriginal title upholds the following fundamental principles:

1. aboriginal title is an independent legal right derived from original occupation; and
2. aboriginal title may only be extinguished by consent.

The American doctrine of aboriginal title adds the following two principles, the second of which is questionable in natural law:

1. aboriginal title is derived from aboriginal (original) occupation or occupancy by virtue of discovery prior to the memory of man (prescription); and
2. aboriginal title is inalienable to anyone other than the Crown.

For the remainder of this thesis the term "first principles" will be used to refer to the first three above named principles which are not only legitimate when measured against contemporary philosophies of natural law, but have been translated into positive law first in the Worcester case and later, with slight modification in the Canadian decisions Calder v. A.G. of B.C. and Guerin v. R. The remainder of this chapter will trace the extent to which these principles have been upheld in the significant cases on aboriginal title in Canadian law.

The first decision in Canadian law is St. Catherine's Milling and Lumber Co. v. The Queen (1888).²⁰⁶ In St. Catherine's, the Privy Council made three major statements concerning the doctrine of aboriginal title in Canada namely: the source of a legal right

to aboriginal title is the Royal Proclamation of 1763, aboriginal title is dependant on the good will of the sovereign and the nature of aboriginal title is personal and usufructuary. Although the first principle is no longer upheld by the Canadian courts, it is worth discussing because it reflects the influence of positivism on the initial development of aboriginal rights theory in Canada. Judges who accept a positivst philosophy are bound to render decisions in conformity with settled principles of English law, applicable legislation and precedent. To the extent that right cannot be found in the royal prerogative, commonlaw or statute, it does not give rise to a legally enforceable interest in the English system.²⁰⁷ The predominance of this philosophy in the late nineteenth and early twentieth centuries explains why the Privy Council defined the nature and scope of Indian title based on an interpretation of the Royal Proclamation.²⁰⁸ If a source could not be found in English law, they could not uphold aboriginal title as a legal interest in land.

The validity of the Royal Proclamation as the source of Indian title rests on two assumptions - the legal reception of English law in Canada and the need for rights arising from independent legal systems to be recognized and implemented by domestic legislation. Both of these assumptions are based on the exercise of sovereignty by the British Crown. Although the former is left unchallenged by the Canadian courts, the latter has been explicitly overruled in the area of aboriginal title.²⁰⁹

The second principle that title exists at the sufferance of the Crown forms the basis of the Canadian position on the legitimacy of unilateral extinguishment. The court reaches this

conclusion by emphasizing possessive terminology in the Royal Proclamation implying property in the British Crown as well as passages that suggests the sovereign may not continue to recognize the legitimacy of aboriginal title at a later date. This interpretation of the Proclamation has been challenged on the grounds that emphasis on other passages support the characterization of all lands as Indian territories until they are purchased.²¹⁰ The latter interpretation is argued to be the most appropriate if one considers the historical context in which the Proclamation was made. It was a time when a moratorium had been placed on westward expansion and the British were formalizing their policy of expansion through consensual acquisition. It was not intended to be a source of Indian rights but a statement of when and how Britain intended to move westward.²¹¹ Argument on the different interpretations of the Royal Proclamation is endless and the question of its scope, meaning and legal effect are yet to be resolved by the court.²¹² The issue of scope is addressed to a limited extent later in this thesis. At this point, sufficient discussion has been given to illustrate the difficulty in relying on the Proclamation as a source of sovereign rights.

The third principle also finds its origins in positive law. The characterization of aboriginal title as "personal and usufructuary" and a mere "burden" on the underlying title of the Crown. The concept of usufruct finds its origins in positive Roman law on land tenure.²¹³ In Smith v. R, the court defined usufruct as follows:

1. Law: The right of temporary possession, use, on enjoyment of the advantages of property belonging

to another, so far as may be had without causing damage or prejudice to it.

2. Use, enjoyment, or profitable possession (of something).²¹⁴

This characterization has led some to argue that aboriginal title is not a property right but this argument has been effectively discounted in the Star Chrome case where the Privy Council explained that Indian title is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."²¹⁵

The St. Catherine's case is probably the clearest example of the movement away from the first principles of aboriginal title. Although the Supreme Court recognized the validity of the Marshall decisions as an attempt to state the pre-existing legal regime before America was formed, these decisions were not directly cited by the Privy Council in their attempt to rationalize aboriginal title within a positivist regime²¹⁶. The conflict between the St. Catherine principles and first principles of aboriginal title are so clear they need not be stipulated. The most obvious is the assumption that Britain could acquire ultimate title by discovery, conquest or some other manner than purchase; that somehow Britain gained absolute dominion and sovereignty without the consent of the original occupants; that British laws replace Indian laws regardless of their consent; and that the sovereign and proprietary rights of the aboriginals could not survive without recognition after the assertion of British sovereignty. Not only are these propositions questionable in the context of British legal theory

and practice, they are contrary to fundamental principles of natural law.²¹⁷

The next major opinion on the question of aboriginal title occurred almost ninety years later in the decision of Calder v. A.G. of B.C.²¹⁸ In this case the Supreme Court of Canada signalled a movement back to first principles by finding that the Royal Proclamation was not the exclusive source of aboriginal title, but that aboriginal title had its origins in the prior use and occupation of specified lands by aboriginal societies. However, a misunderstanding of the Marshall trilogy, other American case law and the nature of Indian title leads the court to uphold unilateral extinguishment and split on the question of methodology. Consequently, Calder opens the door to natural philosophies of aboriginal title but at the same time reaffirms limitations introduced by the positivist regime.

Both Mr. Justice Judson (speaking for three) and Hall deny the need for aboriginal title to be recognized by the Crown before it can be enforced as a legal right.²¹⁸ Justice Blackburn expands on this point by saying that to decide otherwise would be to assume that natives have no rights except those recognized after conquest on discovery, a principle which in his opinion is wrong.²¹⁹ Justice Hall denies the same principle on the ground that the Act of State doctrine is inapplicable to aboriginal title cases.²²⁰ Both Hall and Judson trace the source of aboriginal title to a pre-existing right of possession.²²¹ Mr. Justice Judson summarizes the concept of aboriginal title as follows:

Although I think it is clear that Indian title in British Columbia cannot owe its origins to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal and usufructuary right.'²²²

This simple statement of Mr. Justice Judson reaffirms the first principle of the natural theory of aboriginal title -- aboriginal title is derived from original occupation. The reference to organized societies reflects the historical fact that aboriginal lands were held in common. It is important to note that he does not add the same qualification found in Worcester that title may also be acquired through immemorial possession. Rather, it is sufficient that the land be in the possession of the Indians when the settlers came.

It is Mr. Justice Hall who introduces the concept of immemorial possession in his explanation of why the Nishga claim is not a prescriptive claim. He does not exclude prescription as a method of acquiring title, but argues its inapplicability because the Crown has admitted immemorial possession and a prescriptive right presupposes a prior right in some other person or authority.²²³ Hall fails to pick up on the point that prescription may also be based on immemorial possession if one accepts the natural philosophies of Wolff and Vattel in this area.²²⁴ This point was clearly understood in Worcester.

The natural law principle that aboriginal title may only be extinguished by consent is rejected by both Mr. Justice Judson and Hall. Instead, both uphold the principle enunciated in St. Catherine's that aboriginal title is dependent on the good will of

the sovereign.²²⁵ Both refer to Johnson v. M'Intosh and Worcester v. Georgia to uphold the description of the nature of Indian title in St. Catherine's. In Judson's opinion, St. Catherine's was influenced by the above named judgments. In particular, he quotes a passage from Johnson v. M'Intosh which upholds absolute title in the crown, subject to the Indian right of occupancy.²²⁶ Judson fails to appreciate that this statement assumes that the Crown obtained title and sovereignty through discovery and conquest. The reformulation of these concepts in Worcester resulted in the recognition of absolute title and sovereignty in Indian nations with the exception of a restriction on their right of alienation. This confusion could be due to the fact that counsel for the Nishga lumped the Marshall decisions together as representing a uniform approach to recognition of title as do most American texts and articles.

Hall refers to Johnson v. M'Intosh as the "locus classicus of the principles governing aboriginal title."²²⁷ Like Judson, he quotes it in support of a legal and just claim to aboriginal title, but fails to appreciate this is all Johnson can stand for. Mr. Justice Hall's error can be seen in the following passage:

The dominant and recurring proposition stated by Chief Justice Marshall in Johnson v. M'Intosh is that on discovery or on conquest the aborigines of newly-founded lands were conceded to be rightful occupants of the soil with a legal as well as just claim to retain possession of it and to use it according to their own discretion .

. . .

Hall would have accurately summed up the natural philosophy of aboriginal title endorsed by the Marshall trilogy if he stopped there, but he went on to say:

. . . but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil of their own free will to whomsoever they pleased was denied by the original fundamental principle that discovery of conquest gave exclusive title to those who made it.²²⁸

The acceptance of absolute power and title in the Crown lays the necessary theoretical foundation for the doctrine of unilateral extinguishment. In Mr. Justice Judson's opinion, extinguishment may be accomplished by legislation allowing alienations inconsistent with the existence of aboriginal title and does not give rise to a right to compensation in absence of a statutory direction to pay.²²⁹ Relying on some of the same precedents, Mr. Justice Hall concludes that Indian title must be presumed to exist unless the sovereign indicates a "clear and plain" intention to extinguish Indian title and that land should not be expropriated without compensation unless there is legislation to that effect.²³⁰ A more detailed analysis of extinguishment is given in Chapter 5 of this thesis. The point here is that a misunderstanding of the Marshall trilogy, which upholds cession as the only valid method of extinguishing title, has resulted in a drastic movement away from first principles beyond the single limitation on the right of alienation upheld in the Worcester decision.

The next decision worthy of note is Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development.²³¹ Although this opinion was delivered at the federal court trial level, it has been subsequently applied with approval by the Ontario High Court of Justice and the British Columbia Court of Appeal.²³² The decision has also been used by opponents of Metis title to illustrate the impossibility of Metis successfully proving a claim

to aboriginal title.²³³ Finally, it adopts the commonwealth perspective that aboriginals should be able to prove their claims and attempts to set out a series of proofs that must be met. In doing so, Mr. Justice Mahoney not only misinterprets common law precedent, but takes Canada further away from a natural philosophy of aboriginal title. For all of these reasons, the case is worth examining in some detail.

Mr. Justice Mahoney upholds the proposition that the Royal Proclamation is not the only source of aboriginal title. He quotes Calder and Worcester v. Georgia to support the general proposition that "the law of Canada recognizes the existence of an aboriginal title independent of the Royal Proclamation or any other prerogative Act or legislation."²³⁴ Had Mahoney appreciated that the four to three split in Calder on the recognition of Indian title as an independent right, he may have looked into the American decisions in more depth and come to terms with the first principles of aboriginal title. Instead, he jumps from this initial proposition to the elements of proof that must be proven by the plaintiff to establish aboriginal title cognizable at common law.

These are:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of others.
4. That the occupation was an established fact at the time sovereignty was asserted by England.²³⁵

The first requirement is derived from the reference to organized societies by Mr. Justice Judson in Calder and the reference to the level of Indian political organization in Worcester. In Mahoney's view, the level of organization need not be more "than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent to the territory."²³⁶ The level of organization is not to be measured against European structures, but the needs of the group asserting the claim taking into consideration their physical surroundings. The effective date for determining the level of organization is the date England asserted sovereignty and the fact that their society has changed since then is irrelevant.²³⁷

The requirement of organization likely finds its source in the argument that insufficient political organization renders lands terra nullius and open to occupation. As discussed earlier, this view was adopted to justify the taking of lands of nomadic peoples with limited social structure. It is in response to this tradition that the element of organization was built into original theories on aboriginal title. In Calder, Mr. Justice Judson and was not attempting to delineate criteria, but to eliminate cultural bias and accept Indian forms of political organization as sufficient to remove their lands from terra nullius.²³⁸ Be that as it may, Mahoney is not acting contrary to principles of natural law when he incorporates the defence of organization into a criterion of positive law because he does not impose an arbitrary preference to community or adopt a social darwinistic approach to defining political organization. Rather, he accepts as valid forms of

organization radically different from European standards. Further, the requirement of organization reflects the communal nature of aboriginal title which is acknowledged by scholars of natural law to be the natural state of property holding and which has been advocated by aboriginal groups themselves. However, it is important to note that a requirement of organization is not inherent in the first principles of original occupation of unoccupied lands or prescriptive rights to previously occupied lands and that organization need not mean more than "community" or "group" in the natural law tradition.²³⁹

The second criteria that the group occupy the territory claimed is in accordance with a natural philosophy of aboriginal title based on prior possession. Again, Mahoney adopts a subjective test and applies the test at the date of asserting sovereignty. In doing so, he rejects arguments based on "quality of use" such as those initially introduced by Vattel and recognizes the central feature in a natural interpretation to aboriginal title -- occupation or possession.²⁴⁰

It is in the third and fourth criteria that Mahoney introduces concepts of British law which are foreign to a natural interpretation of aboriginal rights. According to Mahoney, occupation must be to the exclusion of others. In natural law, (and in Canadian property law) exclusivity is a right of property and not an obligation.²⁴¹ It is not contrary to natural precepts for groups to share their lands by agreement or to hold distinct but overlapping titles if such arrangements promote the overall common good of aboriginal communities. Further, as Professor Slattery points out "the courts should endeavour to give effect to

the actual patterns of use existing among the groups in question, in keeping with their sui generis character."²⁴² The Americans have done this to a certain extent by recognizing lands held in joint and amicable possession.²⁴³

As authority for this proposition Mahoney cites United States v. Santa Fe Pacific Railway Co.²⁴⁴ However, exclusivity was not an issue in Santa Fe and there is nothing in the decision to suggest that territories mutually used by aboriginal groups were excluded. Whether justice Mahoney is conscious of it, the application of this criteria originates in early English law on the legality of custom and prescriptive rights both of which emphasize uninterrupted and exclusive exercise of the right asserted.²⁴⁵ The application of these principles are no longer appropriate in light of the Guerin case discussed infra.

The influence of British customary law and doctrines of immemorial prescriptions are most evident in the fourth criteria enunciated by Mahoney in which he asserts that the group must have had possession since "time immemorial" and he defines "time immemorial" as the date of assertion of English sovereignty over the territory claimed.²⁴⁶ This criterion can be attacked on several grounds. From the perspective of natural rights, it confuses rights arising from original occupation with rights arising from immemorial prescription. Further, in collapsing original and prescriptive rights, it fails to take into account ordinary prescriptive rights which arise based on possession for a substantial period of time. As indicated previously, the latter concepts are not contrary to natural law because they contribute to the common good of social stability.²⁴⁷

The acknowledgment of three sources of rights - original occupation, immemorial prescription and ordinary prescription was first suggested in Worcester and continues to receive recognition in contemporary American law. In the United States it is sufficient to possess the land for a "long time" or long enough to transform the area into domestic territories.²⁴⁸ This view is clearly more reflective of natural principles than one which refuses to recognize any form of title that does not pre-date the assertion of English sovereignty.

Calder can not be used as precedent for this latter criteria. Judson simply states that "when the settlers came" the aboriginals had been in possession of their land "for centuries." He does not state that rights could not be acquired after settlement if such settlement occurred as a result of wrongful appropriation of Indian lands. Further, it is not clear what Mahoney means by assertion of sovereignty, although it has been assumed that he means the date of European settlement.²⁴⁹ Other cases cited by Mahoney in support of the criteria of "time immemorial" may refer to the fact that the aboriginal group at issue had possession since time immemorial, but none of the cases referred to holds this as an essential proof of title.²⁵⁰

Finally, this requirement does not make sense in the context of aboriginal history. As professor Sanders points out, not all Indian groups that have settled title claims can assert occupation prior to settlement. For example, neither of the two major Indian communities in Southern Quebec were in control of their tribal lands in those areas prior to French settlement.²⁵¹ Further, groups which have moved away from traditional lands are not excluded from

advancing claims. For example, in the plains tribes can only trace their occupation back to the introduction of the horse by the Spaniards and migration from traditional lands, yet they have not been denied aboriginal rights.²⁵² Given the above criticisms, it is unlikely that this last criterion would survive a direct challenge in the courts.

Before leaving Hamlet of Baker Lake, the "frozen title theory" and question of extinguishment should be addressed. Mahoney focuses on the date of assertion of sovereignty to determine the nature and existence of aboriginal title. The theory assumes that the claimant group must "be in possession at the relevant date and it cannot inherit title from earlier occupants or tack its possession on to theirs."²⁵² As Slattery points out, this theory implicitly treats aboriginal title as finding its origins in a Crown grant by assuming dominion in the Crown and its permissive policy toward use and occupation of lands by Indian peoples. The basic objection to this approach is it forces aboriginal title into a "mold familiar to English law, while disregarding factors peculiar to its origin."²⁵³ Further, the theory freezes aboriginal rights at a point in history by limiting the legal rights of the group to those exercised at the relevant date. This approach refuses to recognize aboriginal peoples as evolving cultures with changing needs.

Mahoney also upholds the validity of unilateral extinguishment but introduces a new twist into the question of methodology. He argues that if "the necessary effect of legislation is to extinguish aboriginal title then the courts must give effect to

it."²⁵⁴ In his view the intention need not be set forth explicitly in the legislation.²⁵⁵

The final decision to be considered is Guerin v. R. In this decision, Chief Justice Dickson resurrects the concept of title upheld in Worcester by recognizing the origin of aboriginal title in a pre-existing right of possession and limiting the legal nature of aboriginal title only to the extent that it is inalienable to the Crown. In doing so, he moves away from the narrow legalism characteristic of St. Catherine's and Hamlet of Baker Lake. In Dickson's view, aboriginal title is "a legal right derived from the Indian's historic occupation and possession of their tribal lands."²⁵⁶ He does not qualify this possession by imposing criteria of possession prior to settlement since "time immemorial." Rather, he points to Johnson v. M'Intosh as authority for the proposition that aboriginal title predates and survives claims to sovereignty by Europeans and emphasizes that portion of the judgment upholding their legal and just claim to retain possession. Unfortunately, he also quotes passages in Johnson which have been overruled, but he only expressly relies on these passages to the extent they support the argument that change in sovereignty over a given territory does not affect pre-existing rights.²⁵⁷

Dickson upholds the characterization of aboriginal title as personal and usufructuary citing St. Catherine's, Star Chrome, Admodu Tijani and Johnson v. M'Intosh to support his views.²⁵⁸ However, he does not deny it is a proprietary interest. Recognizing the existence of a debate on the personal nature of the right he states:

. . . there is not real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it as a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.²⁵⁹

He goes on to characterize their interest as "sui generis" and states:

The nature of the Indians interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.²⁶⁰

The views of Chief Justice Dickson on the origin of aboriginal title translate the first principle of title from original or historic occupation and possession into positive law. The removal of limitations on possession other than restrictions on alienation suggests that there is room in Canadian law to recognize title from original occupation, immemorial occupation and perhaps ordinary prescription depending on the interpretation given to "historic." The reference to title as "sui generis" suggests the frozen title theory and legalistic restrictions on the nature of possession introduced in the Baker Lake case will be rejected in favour of actual patterns of occupancy and land tenure recognized by Indian societies, all of which accords with the natural precept that title in found in possession.

Whether the Canadian courts will go so far as to uphold the necessity of consent for the purpose of extinguishment is yet to be determined. The emphasis placed on Johnson v. M'Intosh suggests that the court does not yet completely understand the natural

origins of aboriginal title or the American doctrine on aboriginal sovereignty and dominion. On the other hand, the refusal to limit aboriginal title beyond restrictions on alienation and the classification of aboriginal rights as "sui generis" suggests that the Canadian courts are open to argument on the proper reading of the Marshall trilogy and natural theories of aboriginal title. The acceptance of inalienability was crucial in this decision in order to establish a foundation for the Crown's fiduciary obligation (or trust as characterized by Madame Justice Wilson). However, as Worcester illustrates, this limitation may continue to be adopted without upholding the proposition that title is "dependant on the good will of the sovereign." The latter conclusion is contrary to natural law principles and the law of nations.

IV Summary of a Natural Theory on Aboriginal Title

In summary, my theory on the natural principles of aboriginal title is:

1. The characterization of aboriginal rights as "sui generis" suggests that the Canadian courts are willing to reconsider the foundations upon which claims to aboriginal title are based.
2. The common law doctrine of aboriginal title is derived from principles of natural law. This fact was recognized by early publicists considering the acquisition of lands in North America, British colonial theory, and the judicial opinion of the Marshall court. Respect for natural principles of aboriginal title is also evidenced in the British

practice of treaty making, but a link between practice and contemporaneous jurisprudence is not proven.

3. The idea of natural law as a valid basis for legally enforceable claims is legitimate given the influence it played in shaping the original doctrine of aboriginal title.
4. Positive laws governing the origin and acquisition of property rights are not contrary to natural law to the extent they promote stability and peaceful social relationships. The fundamental principle at the basis of a just property regime is that first occupation of previously unoccupied land establishes rights of property in the occupant. The extent to which this principle can be legitimately altered by positive law will depend on the extent to which the law contravenes natural precepts and whether contravention can be legitimized as furthering the common good.
5. Vitoria's views on acquisition are most indicative of a natural law theory of aboriginal property rights. In accordance with his theory, Europeans were morally and legally bound to recognize that first use and occupancy established Indian ownership over Indian lands. Vitoria's views on paternalistic intervention are contrary to contemporary philosophies of natural law.

6. A natural interpretation of aboriginal rights upholds the following principles:
 - (a) aboriginal title to a specific parcel of land arises from original occupation of that land by organized societies;
 - (b) aboriginal title may only be extinguished by consent.
7. Despite the initial tendency of the Canadian courts to positivism, the first of these two principles has been upheld by the Supreme Court of Canada. The second is currently the subject of litigation.
8. A natural interpretation of title recognizes title arising from ordinary or immemorial prescription against the original occupant, but does not impose immemorial possession as a criterion. The reference to "historic" occupation in Guerin suggests immemorial and ordinary prescription may also be recognized in positive law as a legitimate basis for aboriginal title. Rights arising from possession for a substantial period of time have been recognized in the American tradition.
9. The legitimacy of title acquired prior to surrender of aboriginal title to a discovering sovereign depends on its legitimacy vis a vis the rights of the original occupants. Prescriptive rights acquired against the original occupant are valid assuming good faith and possession for a substantial period of time. Discovering nations are morally

obliged to recognize them as a derivative form of aboriginal property rights.

10. A natural interpretation of aboriginal title would require the following proofs of title: the existence of an identifiable group and occupation of a territory as original occupants or for a substantial period of time. These criteria are based on current occupation. If a group was wrongfully displaced, this criteria should be applied at the date of dispossession.
11. Unilateral extinguishment without compensation is contrary to natural law.

CHAPTER 3 ENDNOTES

1. Guerin v. R. [1984] 2 S.C.R. 335.
2. Id. at 377-79; 382.
3. D. Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada," (Vancouver: University of British Columbia, Faculty of Law, 1988) 35, photocopied, at 1.
4. B. Slattery, "Understanding Aboriginal Rights" 66 Canadian Bar Review 727 at 736-741.
5. See, for example, M. Mossman, "Developments in Property Law. The 1984-1985 Term." (1986) 8 Supreme Court Law Review 319 at 335.
6. Simon v. R. (1985) 24 D.L.R. 390 at 404 (S.C.C.).
7. R. Begin, Natural Law and Positive Law (Washington: Catholic University of America Press, 1959) at 50.
8. Id. at 56.
9. Contemporary theorists also point to the influence of Greek scientific and mathematical thought on the rational approach to reality prevalent in original theories of natural law and the creation of universal principles some of which could be stated mathematically. See, for example, J.C. Smith and D. Weistub, The Western Idea of Law (Toronto: Butterworths and Co. (Canada) Ltd., 1983)) at 242-243.
10. In the discussion of specific natural law publicists the term "men" or "man" is used in the same sense as intended by the publicists named. The author recognizes the historical context in which these philosophies developed and the consideration of "reason" as part of the "male" nature. Contemporary natural law theorists would extend the application of their theories to include all humans, male or female.

11. Quoted in C. Phillipson, The International Law and Custom of Ancient Greece and Rome, Vol. I (London: MacMillan and Co., Ltd., 1911) at 53-54.
12. Id. at 54.
13. Aristotle, Ethics, Book V, trans. J.A.K. Thompson (London: Penguin Books, 1955) at 157-159 in Smith and Weistub id. at 279-280.
14. Id. at 280.
15. See, for example, Ernst Cassirer, The Myth of the State (New Haven: Yale University Press, 1946) at 100-104; E. Vernon Arnold, Roman Stoicism (Oxford: Clarendon Press, 1936) at 273-385; George Sabine, A History of Political Theory (New York: Holt, Rinehart and Winston, 1937) at 163-173; all of the above quoted in Smith and Weistub, supra, note 12 at 288-289, 290-292 and 345-352 respectively.
16. Quoted in Sabine, id. at 345.
17. Sabine, id.
18. There are many sources of St. Thomas' view of natural law. See, for example, Thomas Aquinas, "Treatise on Law" in Summa Theologica (Indiana: Regnery/Gateway Inc., 1963) at 1-19; E.B.F. Midgley, The Natural Law Tradition and the Theory of International Relations (London: Elek Books Ltd., 1975) at 1-55; W.F. Roemer, The Ethical Basis of International Law Phd. Thesis, University of Notre Dame, 1927 (London: University Microfilms International, 1981) at 53-69.
19. Roemer, id. at 59.
20. Aquinas, supra, note 18 quoted in Smith and Weistub, supra, note 13 at 382.
21. Midgley, supra, note 18 at 23.
22. Quoted in Midgley, id. at 23-24.

23. Midgley, id. at 69-71.
24. Id. at 72-79.
25. For a general discussion see chapter 3 of Midgley, id. at 95-120; see also G. Van Der Molen, Alberico Gentili, 2 ed. (Leyden: A.W. Sijthoff, 1968) at 114-116.
26. Midgley, id. at 137-167; D. Hill, "Introduction" in H. Grotius, The Rights of War and Peace, trans. by A.C. Campbell (Washington: M. Walter Dunne, 1901) at 9-11.
27. A. D'Amato, "Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach" [1975] 14 Western Ontario Law Review 171 at 174-175; Roemer, supra, note 18 at 99.
28. Midgley, supra, note 18 at 168-171; Roemer, id.
29. Midgley, id. at 175-184; C. Wolff, Ius Gentium Methodo Scientifico Pertractatum, trans. by J. H. Drake in Classics of International Law, ed. J. B. Scott (Oxford: Clarendon Press, 1934) at 10-19.
30. Midgley, id. at 184-195; Foemer, supra, note 18 at 99-100; E. Vattel, The Law of Nations, trans. unnamed (London: G.G. and J. Robbinson, Patemoster-Row, 1797) at iv-ivii.
31. See, for example, H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961) and J. Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980).
32. Hart, id. at 188.
33. D. Gormley, "Aboriginal Rights as Natural Rights" (1984) 1 The Canadian Journal of Native Studies IV, 29 at 33.
34. J. Finnis, supra, note 31 at chapter 4.
35. Supra, note 7 at 14-15.
36. Id.

37. Supra, note 7 at 14-15.
38. Id. at 29-31 and 36.
39. Id. at 37.
40. Id. at 37-41. There are numerous theories on the concept of right in natural law. With the exception of his discussion on the role of the State in the natural law regime, Begin provides a general definition of right common to most natural law theorists as it is understood in the context of rational equality, the common good and the relationship to human nature and human development. For further discussion on rights see for example J. Finnis "Some Professional Fallacies About Rights" (1971-72), 4 Adelaide Law Review 377; H.N. Hoffield, Fundamental Legal Conceptions as Applied in Judicial Reasoning (New Haven: Yale University Press, 1923) and R. Dworkin, Taking Rights Seriously (Cambridge Mass.: Harvard University Press, 1978).
41. J.C. Smith, "The Concept of Native Title" (1974) 24 University of Toronto Law Journal 1 at 4.
42. R. v Guerin, supra, note 1; Sanders, supra, note 3; Slattery, supra, note 4 at 745.
43. See, for example, Cicero, De Officiis I. vii 21 quoted in J. Scott, Law, the State and the International Community, Vol. II (New York: Columbia University Press, 1939) at 161-162.
44. Ulpian, quoted in Sabine, supra note 15 at 349; see also Digest XLI.i.1 and Institutes II i. 11 quoted in Scott, id. at 163.
45. See, for example, the views of St. Thomas Aquinas, Suarez and Francisco de Vitoria quoted in Scott, supra, note 35 at 161-163, 250; H.L.A. Hart, supra note 31; Finnis, supra, note 31.
46. De Finibus, III. xx. 67 in Scott, supra, note 43 at 160.
47. Digest XLI. i.1 in Scott, id. at 163; see also Phillipson, supra, note 11 at 78-81.

48. Supra, note 11 at 92.
49. Roemer, supra note 18 at 30-31; T. Lawrence, The Principles of International Law (D.C. Heath & Co., 1985) at 29.
50. Supra, note 11 at 378.
51. Id. at 379.
52. Quoted in F. Snow, International Law (Washington: Government Printing Office, 1895) at 19.
53. Digest XLI. 1. 3 in Scott, supra, note 43 at 164.
54. Cicero, supra, note 43.
55. Grotius, Mare Liberum, Introduction in Scott, supra, note 43 at 160.
56. Id.
57. Digest XLI. ii.3 in Scott, supra, note 43 at 164.
58. Digest XLI iii. 25 in Scott, id. at 167.
59. Digest XLI. iii. 3 in Scott, id.
60. Digest XLI. x. 5. par 1 in Scott, id.
61. Digest XLI. iiid. 45 in Scott, id. at 165.
62. Grotius, supra, note 46 chapter vii in Scott, id. at 167.
63. Digest XLI. i. 9 par 3 in Scott, id.
64. Digest XLI. i. 20 par 1 in Scott, id. at 168.

65. Sir H.S. Maine, Ancient Law (London: Oxford University Press, reprinted 1959, copyright 1861) at 237.
66. Id. at 275, 278.
67. Supra, note 7 at 140-142.
68. Id. at 142.
69. Id. at 143.
70. Midgley, supra, note 18 at 43.
71. See, for example the discussion of Juan Gines de Sepulveda and publicists supporting his views at page 120 of this chapter in Section II, 2 of this chapter.
72. D. Sanders, "The Re-emergence of Indigenous Questions in International Law" (1983) 4 Canadian Human Rights Yearbook 3 at 27 and Lawrence, supra, note 49 at 368.
73. For general discussion see M. McCoubrey, The Development of Naturalist Legal Theory (New York: Croom Helm, 1987) at 169-186.
74. Gormley, supra, note 33 at 34.
75. Id.
76. Id. at 34-36.
77. Id. at 35.
78. See, for example, Western Sahara (1975) I.C.J. Reports 6 at 39; Sanders, supra, note 72 at 38.
79. For a summary of these views see Phillipson, supra, note 11 at 46-42.

80. Id. at 53; see also Roemer, supra, note 18 at 26-28.
81. For a discussion of the influence of ancient Greek and Roman law, philosophy and practice on the development of international law, see generally, Phillipson, id.
82. Roemer, supra, note 18 at 60-64.
83. See the discussion of the views of Francisco de Vitoria and his followers at pages 114-118 of this chapter.
84. Midgley, supra, note 18 at 83-85.
85. Id. at 85-86.
86. Roemer, supra, note 18 at 78.
87. Id. at 84-95 and Midgley, supra, note 18.
88. Supra, note 29.
89. Midgley, supra, note 30.
90. Vattel, supra, note 30 at 35-36.
91. See generally Midgley, supra, note 18 at 276-304 and McCoubry, supra, note 73 at 85-94.
92. M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (Longman's, Green & Co. Ltd., 1926; reprint, New York: Negro University Press, 1969) at 10; G. Morris, "In Support of the Right of Self-Determination for Indigenous Peoples under International Law" (1986) German Yearbook of International Law 277 at 280.
93. Alexandrian Bulls, May 3 and 4, 1493 reprinted in Paul Goltschalk, Earliest Diplomatic Documents of America (Berlin: 1927) at 21.
94. Morris, supra, note 92 at 281.

95. D. Sanders, "The Extent of Recognition of Pre-Existing Rights of Indigenous Peoples in the Legal History of Canada" (Vancouver: U.B.C. Faculty of Law, 1988), 28, photocopied at 5.
96. Francisco de Vitoria, De Indes et de Jure Belli: Reflectiones, trans by J.P. Bates in J.B. Scott ed., The Classics of International Law (Washington: Carnegie Institution 1917; reprint, Oceana Publications Inc., 1964) at 217-268.
97. Id. quoted in Scott, supra note 43 at 119.
98. Id. at 250.
99. Id. at 276.
100. Supra, note 87.
101. Supra, note 97 at 108.
102. Id. at 109.
103. Id. at 276.
104. Id. at 116.
105. Id. at 148.
106. Scott, supra, note 43, Vol. I at 315.
107. Id. at 316-318.
108. Grotius, Mare Liberum, quoted in Scott, supra, note 43 at 275.
109. Scott, supra, note 106 at 318-319.
110. Id. at 319-320; Scott, supra, note 43 at 320.

111. See discussion in Sections II, 2 and II, 3 of his chapter.
112. Morris, supra, note 92 at 286-287, Sanders, supra, note 72 at 5.
113. Publicists supporting these views are listed in Lindley, supra, note 92 at 12-17.
114. Id. at 18.
115. Supra, note 3, at 18.
116. Vattel, supra, note 30 at 35-37, 98.
117. Wolff, supra, note 29 at 50-51; Vattel, id. at 99.
118. Gormley, supra, note 33 at 38, Wolff, id. at 140-143.
119. Vattel, supra, note 30 at 187-192; Wolff, id. at 186-190.
120. Wolff, id. at 188-190.
121. See, for example, D. Jenness, Indians of Canada, 7th ed (Toronto: University of Toronto Press, 1977).
122. Gormley, supra, note 118 at 38.
123. Id. at 39.
124. Id.
125. Id. at 40-41.
126. Sir William Blackstone, Blackstone's Commentaries, Vol. 1, ed. St. George Tucker (Philadelphia: Birch and Small, 1830) at 34. Note that Blackstone seems to use the phrases "law of Revelation," "Divine Law" and "law of God" interchangeably to reveal to that part of the natural law revealed in the Bible as distinct from natural law revealed in the Bible as distinct from natural law known innately or stated by ethical writer.

127. Id. at 34-43.
128. Id. at 43.
129. Sir W. Blackstone, Blackstone's Commentaries, ed. J. Ehrlich (Wesport: Greenwood Press, 1959) at 777.
130. Id. at 113.
131. Id. at 114-115, 118, 276.
132. Id. at 114.
133. Id. at 117.
134. Id. at 27-28.
135. Id. at 27.
136. Id. at 28.
137. Id. at 280-281.
138. Id. at 36.
139. Id. at 35-36.
140. See, for example, discussions of Marshall decisions in Section III, 1 of this chapter; Sanders, supra, note 72; Morris, supra, note 92; Western Sahara, supra, note 78 and Sanders, supra, note 3, at 25-28.
141. Supra, note 95 at 4; supra, note 129 at 335.
142. Sanders, id. at 5-9; Royal Proclamation of 1763 reprinted in R.S.C. 1970, Appendices, at 127-129. For a general discussion of treaty practice in North America, see, for example, R. Fumoleau, As Long as this Land Shall Last (Toronto: McLelland

& Stewart Ltd., 1973) and A. Morris, The Treaties of Canada with the Indians (Toronto: Belford, Clarke & Co., 1880; reprint, Toronto: Cotes Publ. Co., 1971).

143. Supra, note 142.
144. Supra, note 3 at 5-6 and 28.
145. Supra, note 142.
146. Palmas Island Arbitration (1928), 2 R.I.A.A. 831; The Legal Status of Eastern Greenland (1933) P.C.I.J. Report Series A/B, No. 53; Lindley, supra, note 92 at 182-185.
147. Worcester v. Georgia, 8 L. ed 483 (1832).
148. Reprinted in Cumming and Mickenberg, eds. Native Rights in Canada, 2 ed. (Toronto: Indian-Eskimo Assoc. in assoc. with General Publishing Co., 1972) appendix III.
149. Sanders, supra, note 141 at 8.
150. Reprinted in Worcester, supra, note 147 at 497-498.
151. Sanders, supra, note 141. For an example of the numbered treaties see Cumming and Mickenberg, supra, note 148 appendix IV. Note the Sask. Indian Federation asserts the numbered treaties are not just land cessions but also explicitly recognize Indian government. Some of the Maritime treaties do not deal with land.
152. The Constitution Act (U.K.), 1982, c. 11, ss. 25 and 35.
153. Sanders, supra, note 72 at 6; St. Catherine's Milling v. R. (1887) 13 S.C.R. 577 at 609.
154. D'Amato, supra, note 27 at 178.
155. Calder v. A.G. of B.C. [1973] R.C.S. 313.

156. Guerin, supra, note 1.
157. 10 U.S. (6 Cranch) 87 (1810).
158. H. Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978) 27 Buffalo Law Review 637 at 639.
159. Id. at 640.
160. Id.
161. Supra, note 157 at 142-143.
162. Id. at 146-147.
163. Supra, note 147.
164. Supra, note 158 at 641.
165. F. Cohen, "Original Indian Title" (1947) 32 Minnesota Law Review 28 at 43-44.
166. 5 L ed. 541, 692-693 (1823).
167. Id. at 548-560, 562.
168. Supra, note 158 at 651-653, Sanders, supra, note 72 at 16-19; R. Barsch, "Indigenous North America and Contemporary International Law" (1982) 62 Oregon Law Review 73 at 74-75.
169. Lindley, supra, note 92 at 131.
170. Id.; see also Island of Palmas, supra, note 146 and Western Sahara, supra note 78.
171. Supra, note 158 at 652.

172. Supra, note 166 at 560-561.
173. Id. 561.
174. Supra, note 58, at 646.
175. D.G. Kelly, "Indian Title: The Rights of American Indians in Lands they Have Occupied Since Time Immemorial" (1975) 75 Columbia Law Review 655 at 656.
176. W.F. Pentney, The Aboriginal Rights Provisions in the Constitution Act, 1982 (Saskatoon: University of Saskatchewan: Native Law Centre, 1987) at 204.
177. Supra, note 166 at 693.
178. See, for example, St. Catherines Milling Co. v. R. (1888) 14 A.C. 46 (P.C.).
179. Supra, note 166 at 561.
180. Cherokee Nation v. Georgia, 8 L ed. 25 (1831).
181. Id. at 32.
182. Id. at 31.
183. Id. at 44.
184. Id. at 30.
185. Id. at 33-34.
186. Supra, note 147 at 500-501.
187. See discussion of political organization in Section II, 2 of this chapter.

188. Supra, note 147 at 501.
189. Id. at 494-495; 500-501; per McLean J. at 508; Lindley, supra, note 92 at 181-187.
190. Supra, note 147 at 494 (emphasis added).
191. Id. at 495.
192. Id.
193. Id. at 495 and 497.
194. Supra, note 186.
195. 34 U.S. (9 Pet.) 711 (1835)
196. Id., at 745.
197. Berman, supra, 158 at 665; Morris, supra note 92 at 300.
198. See, for example, Major Crimes Act, 23 Stat. 385 (1885) and the Dawes Severalty Act, 24 Stat. 388(1887). The practice of treaty making was ended by an Act of Congress of 3 March 1871 which provided "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty."
199. (1847) N.Z.P.C. 390.
200. (1901) A.C. 561 at 579. See also Amodu Tijani v. the Sec. of State [1921] A.C. 399 at 409-410 (P.C.).
201. [1919] A.C. 211 (P.C.).
202. Supra, note 176 at 206.
203. (1971) F.L.R. 141.

204. Pentney, supra, note 176 at 272.
205. Calder v. A.G.B.C. (1973) 34 D.L.R. (3d) 145 at 218 (S.C.C.) For criticisms, see G. Lester and G. Parker, "Land Rights: The Australian Aborigines Have Lost a Legal Battle, But . . ." (1973) 11 Alta. L. Review 189; L.J. Priestly, "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974) 6 Federal Law Review 150 and Dr. Hookey, "Chief Justice Marshall and the English Oak: A Comment" (1974) 6 Federal Law Review 174.
206. (1888) 14 A.C. 46 (P.C.).
207. D. Elliott, "Aboriginal Title" in Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada. ed. Bradford Morse, 48-121 (Ottawa: Carleton University Press, 1985).
208. Supra, note 65 at 46.
209. See, for example, Calder, supra, note 205 and Guerin, supra, note 1.
210. See, for example, Slattery, supra, note 4; M. Jackson, Memorandum submitted to the A.G. of the United Kingdom on behalf of the Union of B.C. Indian Chiefs in M. Jackson, Materials for Native Peoples and the Law, 1989, photocopied, 597 at 98, and 101-104; The Royal Proclamation, supra, note 143.
211. Jackson, id.; Plan for the Future Management of Indian Affairs, 1775 in A Statement of Claim Based on Aboriginal Title of Metis and Non-Status Indians (Ottawa: Native Council of Canada, 1980) appendix 5.
212. The interpretation of the Royal Proclamation is in issue in litigation brought by the Gitskan and Wet'suwet'en against the A.G. of B.C. See statement of claim filed in action No. 0843, May 14, 1987 reprinted in Jackson materials, id. at 374-394.
213. Scott, supra, note 43 at 113 and 121.
214. (1983) 147 D.L.R. (3d) 237 at 249 (S.C.C.).

215. A.G. Quebec v. A.G. Ontario [1921] A.C. 401 at 408.
216. (1886) 13 S.C.R. 577 at 610 per Strong J.
217. See summaries of fundamental principles in Sections I, 1 and I, 2(b) of this chapter.
218. Supra, note 205 at 328 and 390.
219. Id. at 416.
220. Id. at 404-405.
221. Id. at 390 per Hall J.
222. Id. at 328.
223. Id. at 353.
224. See discussion at pages 105 to 106 of this chapter.
225. Supra, note 205 at 328 per Judson C.J.; at 383-384 and 402 per Hall J.
226. Id. at 320-322.
227. Id. at 380.
228. Id. at 383 (emphasis added); See also 380-385.
229. Id. at 344.
230. Id. at 404.
231. (1979) 107 D.L.R. (3d) 513 (F.C.T.D.).

232. A.G. Ontario v. Bear Island Foundation (1984) 15 D.L.R. (4th) 321; R. v Dick [1989] 1 C.N.L.R. 132 (B.C. Prov. Ct.).
233. See, for example, T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) IX Canadian Public Policy 314.
234. Supra, note 231 at 541.
235. Id. at 542.
236. Id. at 543.
237. Id. at 543-544.
238. There was a similar trend in international law at the same time. See, for example, Western Sahara, supra, note 78; Sanders, supra, note 72 at 25-29.
239. Supra, note 187.
240. Supra, note 231 at 545.
241. See, for example, Wolff, supra, note 29 at 144; Blackstone, supra, note 129 at 113.
242. Supra, note 4 at 758.
243. F.S. Cohen, Handbook of Federal Indian Law Albuquerque: University of New Mexico Press, 1942) at 294.
244. (1941) 314 U.S. 399.
245. See discussion of prescription on customary law in Section II, 3 of this chapter.
246. Supra, note 231 at 546.
247. Supra, note 224.

248. U.S. v. Seminole, 180 Ct. Cl. 375 (1967); Confederated Tribes v. U.S., 177 Ct. Cl. (1966).
249. Slattery, supra, note 4 at 759; supra, note 141 at 6.
250. Slattery, id. at note 126.
251. Supra, note 249.
252. Slattery, id. at 759.
253. Id.
254. J. Bickenbach, "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title" (1980) 38 University of Toronto Law Review 232 at 251.
255. Supra, note 231 at 551-552.
256. Guerin, supra, note 1 at 551-552.
257. Id. at 376.
258. Id. at 377-378.
259. Id. at 379-380.
260. Id. at 382.

CHAPTER 4

NATURAL RIGHTS OF THE METIS NATION OF MANITOBAIntroduction

The identification of the metis people is discussed at length in chapter 1 of this thesis. In that chapter, contemporary revisionism of traditional historical accounts and views of self-identifying metis groups are examined to illustrate some of the difficulties associated with identifying a "metis" people. The phrase "Metis Nation" is used to describe French and English speaking half-breeds who emerged as a distinct cultural group in Manitoba, Saskatchewan and Alberta. Some insist that membership in the Nation is dependant on descendancy from Metis inhabiting territory in Manitoba (Rupert's Land) prior to 1870. Others extend membership to Metis originating in the historic North West Territories who shared a common political will and other persons accepted by descendants of the Metis Nation.

Although descendants of the Metis Nation share certain aspects of their history such as modes of survival, political organization, resistance to foreign settlement and unilateral imposition of government, advancement of land claims and participation in scrip programs; the histories of the Metis of Manitoba and the Metis of the North West Territories are also unique. Of particular significance in Manitoba history is the formation of a Provisional Government in 1869 and the role of that government in the creation of the Manitoba Act, S.C. 1870, c.3. For this reason, the natural rights of the Manitoba Metis are examined separate from those of

the North West Territories. This does not mean that arguments derived from the history of the Manitoba Metis will not, in some instances, apply to Metis in the North West Territories or that subsequent activities in the North West Territories do not affect claims of the Manitoba Metis. The latter point is illustrated in the discussion of extinguishment in chapter 5. Nor does it mean the Metis in the historic North West Territories, or contemporary self-identifying metis groups, do not have natural rights. Rather, the intention is to illustrate the application of a natural theory of aboriginal title to a metis group by way of examination of a sample population.

This examination recognizes certain limitations. First, the focus is natural rights within an inter-societal property regime. The concern is not with property systems within specific Metis communities except to the extent that those systems define natural rights to be respected by others. Second, although some reference is given to primary historical sources, considerable reference is made to secondary sources. If a claim was advanced in Canadian courts based on natural rights, the truth of historical evidence would be at issue unless admitted. This would necessitate the compilation of archival evidence and the utilization of expert evidence by historians, genealogists, anthropologists, archaeologists, etc. The purpose here is simply to outline an argument for natural rights drawing inferences from facts repeated in both primary and secondary sources. These are listed in Appendix I of this chapter. Where the opinion or interpretation of a particular author is relied upon, such reliance is indicated. Third, the discussion of positivist arguments may seem cursory.

The intent is not to critique their validity in detail, but to outline for the reader popular arguments concerning Metis title and issues that need to be addressed to develop a coherent theory. Finally, the reader will recall from the discussion in chapter three, two fundamental principles of aboriginal title. These are:

1. aboriginal title to a specific parcel of land arises from original occupation of that land by organized societies; and
2. aboriginal title may only be extinguished by consent.

This chapter is concerned with the first of these two principles. Chapter five is concerned with the second.

I Positivist Arguments For and Against Metis Title

Legal and political commentators on the question of Metis title have centred their energies on developing a theory of Metis title which can be upheld in the context of the common law doctrine of aboriginal title. Consequently, the limited legal opinion in this area has focused on establishing that the Metis are Indians and that Canada recognized a claim by the Metis to aboriginal title.¹ With the exception of tracing aboriginal rights of use and occupation through maternal lines, little attention has been paid to the origins or source of Metis title. Rather, the debate has focused on the Manitoba Act and Dominion Lands Acts as sources or, at the very least, legislative recognition of the existence of Metis title.² The central issue debated is not whether Metis aboriginal rights exist, but whether they have been lawfully extinguished. This approach is pragmatic within the context of a

positivist philosophy on aboriginal title claims and continues to be significant given the court's current reluctance to abandon the notion that title exists at the sufferance of the Crown.

Opponents to Metis title have also argued within the boundaries of positive law. The government asserts that the Metis are not Indians and any rights they may have had, for whatever reason, were extinguished through the land grant and scrip system established under the Manitoba Act.³ Challenges to the legitimacy of Metis title focus on lifestyle, aboriginality, federal recognition of "special" Metis rights, the concept of title in British colonial law, the ability of the Metis to prove title in accordance with Canadian common law, the legitimacy of the scrip system and the establishment of the Metis as makers of their own misfortune.⁴ As will be seen, these arguments are challenging in the context of the common law doctrine of aboriginal title, but are difficult to sustain in the natural law tradition.

1. Share in Aboriginal Ancestry

This theory asserts that the Metis are a distinct aboriginal nation who, by virtue of their aboriginal ancestry and partial Indian blood, are entitled to recognition of their aboriginal rights including rights to land and self-government. This position was advocated by Louis Riel,⁵ placed before the Canadian government by Father Ritchot when negotiating Manitoba into confederation,⁶ and according to some authors, motivated the formation of the Provisional Government and the Metis resistance to the unilateral imposition of title and sovereignty in the Red River Area.⁷ The theory rejects an arbitrary preference for patrilineal descent and

government definitions of who is, and is not, an Indian for the purposes of jurisdiction and responsibility. Rather, the assumption is the right to title by all original nations, regardless of the level of civilization or percentage of Indian blood, is qualitatively the same. The focus is on the Metis as an ethnic collectivity, or nation, in common possession of "Metis" lands. The subsequent recognition of Metis title as a collective or individual right by the federal government is treated as a separate issue and a violation of Metis rights.

Because of the tendency to use the words "aboriginal" and "Indian" interchangeably in reference to "title" claims, advocates of Metis title develop a concept of "Indian" that goes beyond racial, cultural and lifestyle definitions. Arguments for the inclusion of Metis within this concept are outlined in chapter two and need not be repeated here except to remind the reader of two points. First, all definitions accept that the core of the group identifying as Indian must be of native descent. Second, while there is clear disagreement on whether all Metis are Indians, there seems to be no opposition to the argument that half-breeds who lived among the Indians and were entitled to take treaty are legitimate beneficiaries of the collective title of the bands with whom they reside. For advocates of Metis title, this compromise is insufficient because it excludes most Metis and fails to recognize the existence of different aboriginal ways of life. Consequently a theory of inheritance has evolved ---- Metis have aboriginal rights by virtue of their Indian blood and inheritance from their Indian ancestors.⁸ Starting with this premise,

arguments are made to illustrate the conformity of Metis history and culture with common law proofs of aboriginal title.

At this point it is important to distinguish between political, historical and legal analysis of Metis title. Legal opinion has paid little attention to proof of title at common law. Rather, once "Indianness" is established, the emphasis is placed on express recognition of the Metis share in Indian title to land in legislation, acts of recognition by the federal and provincial governments, and the validity of land grants and scrip as a method to extinguish Indian title.⁹ As legal opinion in this area has been aimed at achieving results within the existing legal system, the failure to devote more time to origins and proof is readily understood. However, unless entitlement can be established outside of recognition, the courts may have difficulty recognizing legal (versus political and moral) obligations of the Crown. The need for the development of a more comprehensive theory on origins is illustrated in the following statement of Mr. Justice Twaddle in the Dumont case:

The legal basis of the [Metis] land claim is a matter of great uncertainty. Unlike the Nishga Indian Tribe in Calder v. Attorney-General of British Columbia (1973), 34 D.L.R. (3d) 145, the Metis people did not occupy a clearly defined area of land and only on one side of their families can they show descent from persons who inhabited the land from time immemorial. Even if they had aboriginal rights prior to July 15, 1870, these rights may have been extinguished by the Manitoba Act on its subsequent validation. The issue of extinguishment divided the Supreme Court of Canada in the Calder case. It cannot be assumed that it will be resolved in favour of the Metis.¹⁰

Some attention has been paid to the question of proof in political and historical writings. In some instances emphasis is placed on the similarity of Metis culture and subsistence

activities to traditional views of the Indian way of life. These writings emphasize the importance of activities such as hunting, fishing and trapping and the impact of the Indian culture on the Metis identity.¹¹ Most focus on the blending of the Indian and European cultures into a distinct aboriginal culture enjoyed by the Metis as a "people" and incidents in Metis history that evidence their attempt to continue in possession of their lands to the exclusion of others. Incidents cited include the battle of Grand Coteau, the battle of Seven Oaks, the trial of Guillame Sayer, the opposition to survey, the rejection of McDougall's government, the 1870 insurrection and the formation of the Provisional Government.¹² Both approaches evidence the existence of different Metis lifestyles and communities within a given geographic territory when Manitoba was transferred to Canada in the 1870's. Other commentators focusing on the question of indigenous rights add that the Metis are Canada's only true "natives" as both Indians and Europeans emigrated to Canada from other countries.¹³

The writer is aware of three attempts to translate these arguments into legal proofs of title.¹⁴ Two in favour of Metis title are cursory and emphasize the difficulties that the Metis will face if the court insists on compliance with the criteria enunciated in the Baker Lake case.¹⁵ Of particular concern are the criteria of exclusive occupation and possession since time immemorial. In his discussion of exclusive occupation, Steven Carter attempts to fit the mode of Metis land tenure into British property law. He suggest the issue of exclusivity is not vis a vis Europeans, but other Indians as the Metis were in effect

claiming dominion over land that at one point was in the possession of others. The solution proposed is to recognize degrees of aboriginal title and to accept a "legal interest in land akin to, perhaps, a tenant at will or sufferance holding the land from other aboriginal landlords."¹⁶ The immediate positivist rebuttal to this argument is the inalienability of Indian title, but the idea of degrees of title is one worth pursuing should the Baker Lake criteria continue to be of influence. The Metis Association of Alberta has also considered the potential difficulties in meeting these criteria but concludes:

Fortunately, the Metis in the Prairies don't have to establish an aboriginal title under the circumstances outlined by the court, since the Manitoba Act, and several successive Dominion Lands Acts have already acknowledged their rights to Indian Title.¹⁷

With the exception of Carter's challenge to the concept of time immemorial, the inherent weakness in both of these opinions is the acceptance of the validity of the Baker Lake criteria. This is of crucial importance in light of the Manitoba Court of Appeal's scepticism regarding the legal basis of Metis title outside of legislation and the emphasis placed on these criteria by opponents to Metis title. If the source of title is legislation, there is nothing preventing unilateral abrogation by the Crown. If legislation recognizes a pre-existing right, that right must have a source. If the source is common law and entitlement is determined in accordance with the legalism of Mr. Justice Mahoney in the Baker Lake case, arguments against Metis title below suggest the Metis will have a difficult time establishing a legal claim independent of statutory promises. Identifying the source of title is also significant if the Metis wish to obtain collective

compensation in the form of a land base. Reliance on legislative recognition may not logically give rise to the remedy desired. For these reasons, the Metis must challenge Baker Lake and develop a theory on the origins of their rights.

2. Recognition of Metis Title

Advocates of Metis rights argue that the government can not deny the existence of Metis title at common law in face of explicit recognition in s. 31 of the Manitoba Act, equivalent sections of the Dominion Lands Act and s. 35 of the Constitution Act, 1982.¹⁸ Opponents to Metis title will immediately argue the Constitution is not a source of rights and the inclusion of the term "existing" may mean that the reference to Metis in s. 35(2) has no effect as their rights, whatever they are, have been extinguished. Thomas Flanagan suggests that their inclusion in s. 35(2) is a "thoughtless elevation of the Metis to the status of a distinct 'aboriginal' people" and that the damage caused in the name of political expediency is best solved by emphasizing the word "existing."¹⁹ The inclusion of the word "existing" in s. 35(2) suggests that constitutional recognition will only be given to rights that exist in law and are not yet extinguished.²⁰

Manitoba Metis argue their rights are not a question of politics. Rather, they rely on s. 31 of the Manitoba Act as evidence of the existence of Metis aboriginal title. The Act is viewed as part of a tradition of recognition of aboriginal rights established in the Royal Proclamation of 1763.²¹ Section 31 reads:

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four thousand acres thereof, for the benefit of families of 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 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 (emphasis added).

Further support is drawn from similar language in Orders-in-Council passed under the Act,²² the extension of treaty entitlements to half-breeds and subsequent acts of recognition by the federal and provincial governments such as the establishment of St. Paul de Metis and the Alberta Metis settlements.²³ In face of these acts of recognition. Unfortunately, doubts have been cast on the intention of the legislation to recognize Indian title and thus the existence of Metis Aboriginal rights. The alternative source examined is the common law which increases rather than decreases the doubts surrounding the existence of Metis rights.

The important phrase in s. 31 is "towards the extinguishment of Indian title." The use of this phrase gives rise to some interpretation problems. The claims of the Metis may very well be collateral claims (rather than aboriginal title claims) arising from the surrender of lands by Indian bands. The satisfaction of the proprietary interest of the Metis, whatever it is, is a logical step "towards" the transfer and extinguishment of Indian title. In order to obtain clear title to Indian lands, it was necessary for the Crown to discharge all legal and equitable encumbrances on

Indian title. Title would have to be completely cleared before alienation through sale of grant was possible. This interpretation is supported by subsequent orders-in-council which make it clear the distribution of land grants and scrip is in "satisfaction of" Metis claims. However, with a few exceptions, the basis of the claim is never clearly stated.²⁴ Consequently the basis of the claim could vary among the Metis depending on the lifestyle enjoyed by a particular group or it could be uniform arising from the fact that they were original settlers with possessory rights. The latter argument receives some support from the fact that similar grants were subsequently made to the original white settlers of the Red River Valley.²⁵

Identifying the basis of the claim is important if the Metis assert a collective right to aboriginal title. Without a theory to support collective entitlement to a land base independent of the legislation, it is very difficult to prove that the legislation and subsequent acts of the government are contrary to the intention to establish a land base expressed to the Metis or, that unilateral extinguishment by individual compensation is illegal. On its face, it is difficult, if not impossible, to construe s. 31 as conferring a collective entitlement to a land base. A plain reading suggests a basis for individual claims rather than a collective claim by a "people." The logical consequence of illegality is to compensate the descendants as individuals, each individual claim asserted having examined on its own merits. Again, these concerns are expressed in the opinion of Mr. Justice Twaddle:

It is, in any event, impossible to construe s. 31 of the Manitoba Act as conferring on half-breed children generally a community of interest in the 1,400,000 acres appropriated for the benefit of the families of half-breed residents. The section makes it quite clear that the land was to be divided "among the children of the half-breed heads of families residing in the Province" and "granted to the said children respectively." The plaintiffs argue that, by reason of the loss of individual land rights, their forbears were unable to assemble the land which should have been theirs into townships . . . That argument is purely speculative of what might have been. It offers no justification for a finding that the plaintiffs have a community of interest in some unspecified land or that their own rights are at issue.²⁶

Taken alone, arguments against recognition based on interpretation are weak but coupled with arguments against the existence of Metis title they gain in strength. For these reasons, legal opinion must move beyond a dependence on legal recognition to develop a coherent theory on the origins and persistence of Metis aboriginal title. Two alternatives immediately come to mind. The first is to develop a theory within the confines of the popular doctrine of aboriginal title. The second is to reject the legalism introduced into the theory of aboriginal title and develop a theory supporting the natural rights of the Metis people based on first principles of aboriginal title. The difficulties encountered by the Metis in the positivist tradition and arguments advanced in favour of a natural interpretation of aboriginal rights law suggest that a natural theory of Metis title may be more helpful in advancing their cause.

3. Arguments Against Metis Title

Government lawyers have focused on the question of extinguishment and Indian status in their defence to Metis title

claims. With the exception of the proposed Dene/Metis land agreement in what is now the North West Territories, the setting aside of land for metis collectivities has been done under the guise of welfare legislation and, in the opinion of the participating government, without recognition of claims to aboriginal title.²⁷ Convinced that claims have been satisfied, until recently the federal government excluded metis peoples from the land claims negotiation process and paid little attention to the origins and nature of their claim.²⁸ Increased activity on the part of metis political organizations has re-opened negotiations, but the issues raised in the Dumont case suggest that the federal government is hesitant to admit legal obligations that may arise independent of defects in the scrip distribution system. Further, during the First Ministers conferences on aboriginal title, the federal government indicated a willingness to assist the metis as disadvantaged peoples, but would not accept responsibility for them as s. 91(24) "Indians" unless the provinces provided them with a land base. The author is not aware of a change in this position.²⁹

The existence and proof of Metis title at common law has been challenged by Thomas Flanagan, a professor of political science at the University of Calgary. Flanagan's views are worth examining in some depth as they challenge trends in academic literature concerning Metis history and land claims. In his book, Riel and the Rebellion: 1885 Reconsidered, Flanagan inquires into the events that lead to the 1885 insurrection and casts doubt on the validity of the Metis claim to aboriginal title.³⁰ Although his focus is the land question in the North West Territories and Riel's involvement

in the 1885 "rebellion," he does examine the legitimacy of claims in Manitoba in his discussion of aboriginal title.

According to Flanagan, the government erred in "gratuitously introducing the concept of aboriginal title" in the land grant provisions of the Manitoba Act and the Dominion Lands Act.³¹ He reasons that in Manitoba the Metis wanted control of all public land by local government. This was unacceptable to John A. MacDonald because it was contrary to his plans for railway expansion and nation building in the North-West. Ritchot, a delegate from the Provisional Government established by Riel, acted outside the scope of his authority when he accepted the land grant compromise contained in s.31 of the Manitoba Act. Citing Ritchot's diary as evidence of these assertions, Flanagan argues that it was Ritchot who was the first to claim that the Metis had aboriginal rights as descendants of the Indians. He states that inclusion of the phrase "towards the extinguishment of Indian title" in s.31 is not evidence that the government accepted Ritchot's view. Pointing to the vagueness of s.31, the numerous orders in council required to clarify the section, later statements of John A. MacDonald, and the fact that original white settlers eventually got the same concessions, Flanagan concludes that the inclusion of the fateful phrase was a thoughtless concession and quick solution to get Manitoba lands into the Dominion of Canada so that the railway could proceed.

The significance of Flanagan's argument is he reduces the aboriginality of the Metis to a mistake in the Manitoba Act. This mistake was carried over into the provisions of the Dominion Lands Act dealing with the claims of the North-West half-breeds. As will

be seen in the discussion of Metis natural rights given below, the evidence cited by Flanagan to reach this conclusion can be used to support the opposite view. That is, the Manitoba Act is a treaty negotiated between two governments and s.31, with its subsequent implementation, does not reflect the agreement reached.

Turning his attention to the method of scrip distribution, Flanagan argues that there were limited cases of fraud, theft and impersonation. In his view, Metis entitled to scrip under the Manitoba Act lost their scrip through speculation. He notes that the government attempted to avoid this problem when it passed the Half-Breed Land Grant Protection Act but later amended the Act to facilitate the sale of scrip at the request of the Metis. He rejects the theory that the speculators were villains and sees them as the "benefactors both of the half-breeds, whom they provided with sizeable amounts of cash, and of potential farmers, for whom they created a market land as an alternative to the government's requirement for homesteading."³² This view of the Metis as makers of their own misfortune is also applied to the system of scrip distribution under the Dominion Lands Act.

Comparing the acquisition of Manitoba and the North-West to a complicated real estate transaction, Flanagan asserts that the Hudson's Bay company was the legal vendor and Indian title was a mere encumbrance which had to be removed before the sale could be completed to the government. "From the offer of purchase through taking possession and finally clearing title, everything was based on the validity of the Hudsons Bay Charter and the contemporary understanding of aboriginal rights."³³ He argues that the view of aboriginal title found in the St. Catherine's case was implicit in

the dealings with the Metis.³⁴ Indian title was not seen as sovereignty or ownership, but a mere encumbrance which required compensation prior to removal. Indian title was limited and stemmed from the benevolence of the sovereign. According to this view the Manitoba Act is not a treaty, but a unilateral act of the government to clear title.

The main weaknesses in the Flanagan's argument is acceptance of controversial positions as "givens." Flanagan assumes that the judicial views presented in the St. Catherine's case are correct, that the source of Metis title and aboriginality is in the wording contained in the Manitoba Act and Dominion Lands Act, and that the Hudson's Bay Company was the legal owner of Rupert's Land and the North-West. Two of these assumptions have been refuted previously in this thesis and clearly form a weak basis for argument.³⁵ The assertion that Metis aboriginality arises from a mistake in history also rests on weak legal foundations if one considers the natural origins of title claims and the strength of academic opinion against Flanagan's acceptance of Baker Lake.³⁶ It also loses ground in Flanagan's discussion of the Manitoba Act. If the Metis are not aboriginals and were intended to be treated as all other white settlers as he contends, why did the government compensate them for their interest in the land in a separate provision referring to "Indian title?" Why was it necessary to "clear title" before the conveyance from the Hudson's Bay Company to Canada could be completed? Flanagan says the answer is one of political expediency not recognition of rights. It is emphasis on the political expediency arguments evidences his failure to understand that recognition is a red herring if one accepts the existence of

aboriginal rights independent of legislation. The issue is not recognition, but the legitimacy of extinguishment. The author's failure to address the existence of a unique Metis culture prior to the introduction of survey to Manitoba and the North-West and to question the accountability of the government for incompetence and mishandling of Metis claims is additional evidence of his failure to understand the important legal issues. However, in fairness to Flanagan, one must recognize his opinions were given prior to the Supreme Court's clear recognition of the independent existence of aboriginal title and in response to predominant legal and political arguments concerning legal recognition of Metis rights.

Flanagan develops his theory against Metis title and addresses the question of the emergence of the Metis as a distinct society in his article the "The Case Against Metis Aboriginal Rights."³⁷ Flanagan defends his case by examining Metis history in Rupert's Land. He argues that prior to the Manitoba Act, they were not considered a distinct people. Rather "half-breeds could claim a share of aboriginal title to the extent that they were willing to be classified as Indians and that Indians would accept them as such."³⁸ He argues that there was never a demand for special treatment of the Metis as a group and summarizes his argument on the reason for including s.31 of the Manitoba Act as evidence of this assertion.

Flanagan contends even if one accepts recognition of title in the Manitoba Act and Dominion Lands Act, it is not enough to establish Metis title. He applies the theory of Ivor Jennings that the mere existence of precedents is not enough to create a binding

constitutional convention. Rather one must ask what are the precedents, "did the actors in the precedents believe they were bound by a rule" and "is there a reason for the rule?"³⁹ Flanagan agrees that there are precedents recognizing extinguishment of Metis title, but contends John A. MacDonald considered this a matter of policy and not right. More significant, he argues, is the fact that there is no reason for the rule.

According to Flanagan, the reason should be found in the definition of aboriginal rights and Canadian law on aboriginal rights. Accepting that "aboriginal rights are those rights which native people retain as a result of their original possession of the soil," he argues that the Metis could not have had original possession in the usual sense of pre-dating European contact.⁴⁰ Although he acknowledges the trend in the United States to accept long term possession as sufficient, he argues this could not be applied to the Metis because their "presence was so obviously a result of white intrusion."⁴¹

Flanagan then examines the proofs necessary to establish an aboriginal rights claim set out in the Baker Lake case and concludes that the Metis fail on all four accounts. He contends that the Metis were an organized society but not a distinct society to themselves; that is, "a separate society in the classic sociological sense for a self-sufficient group of people living under common rules of conduct."⁴² According to Flanagan they were never self-sufficient demographically, economically or culturally. Although the Metis claimed a right to go anywhere they chose, they had exclusive territory over which they roamed. To accept a concept of Indian and Metis title to the land would be contrary to

Mahoney's concept of exclusive use and occupancy. Finally, he argues that the Metis are the product of intermarriage between whites and Indians so they cannot claim to have been in possession of Rupert's Land prior to the assertion of sovereignty.

Flanagan states an argument favouring Metis title is even more difficult if one accepts aboriginal title as a legal theory to allow for the adjustment required in the contact between agricultural and nomadic peoples. Pointing to the more European cultural tendencies of the Metis, Flanagan argues that the Metis were vastly different from the Indians and were not a nomadic people. He contends that aboriginal rights are given to Indians because of their level of social development to reconcile them as a nomadic people to the demands of European civilization. Thus, aboriginal rights are determined by way of life and not racial extraction. Therefore, he concludes, to "speak of aboriginal title being passed on to the Metis through inheritance from the Indians, even though the Metis way of life was very different from that of the Indian, contradicts the nature of aboriginal title."⁴³

Flanagan completes his case with a discussion of the scrip system and current litigation in Manitoba challenging the legality of the system. He argues that even if Metis rights were not effectively extinguished, they are asking for more than they were originally entitled to in law. He argues the logical consequence of illegality would be to compensate descendants of the Manitoba Metis as individuals and not the establishment of a continuing corporate entity as demanded by contemporary Metis politicians and litigants.

The strengths of Flanagan's argument lie in his analysis of section 35 of the Constitution and his application of the Baker Lake case to a claim to aboriginal title. He illustrates the importance of defining the Metis as a people, determining the effects of alleged extinguishment and the difficulty of applying traditional aboriginal rights tests to the Metis people. However, the weakness in his analysis lies in his misunderstanding of the legal origins of aboriginal title and his static view of ethnicity. An understanding of the history and development of aboriginal rights and a recognition of ethnicity evolving over time through the selection and adaptation of different cultural forms, forces one to question the appropriateness of Flanagan's definition of an organized society and an aboriginal culture. Arguments for a broad definition of aboriginal peoples have been outlined in some detail in chapter one of this thesis and will not be repeated here. The point is a definition of an aboriginal people should not depend on a lifestyle distinction.

In applying the Baker Lake criteria, Flanagan misinterprets Mahoney's test for an organized society. Mahoney saw the test as a subjective test and held that the society must be sufficiently defined to establish a relationship with the land. The key is whether there is sufficient coherence, permanence or self-identification to qualify as an organization or group because aboriginal title is viewed by him as a collective right. The difficulty in meeting the criteria of exclusive territorial occupation and possession since the assertion of time immemorial are more difficult issues to address. As discussed in chapter three, these criteria do not have a solid foundation in positive

law on aboriginal title and cannot be sustained in the naturalist tradition. Further, one can point out that Mahoney did not have to address the issue of equal or shared occupation. Finally, recent case recognition by the Courts of aboriginal title as sui generis may allow the courts to be more flexible in this area.⁴⁴

Most difficult to accept is Flanagan's argument that the doctrine of aboriginal title was created to allow for adjustment by nomadic peoples. This theory would deny title to large numbers of settled Indian communities that did not participate in a nomadic lifestyle.⁴⁵ This theory has historically been raised to discredit Indian claims and reflects the white stereotype that Indians have no culture or a single lifestyle. It is also contrary to the reasoning of the courts in the development of the doctrine and is impossible to maintain in face of the Supreme Court's recognition of Indian title as a pre-existing legal right. However, it is fair to say that the original doctrine has been distorted to enhance settlement and legitimize colonization practices in North America.⁴⁶

It is beyond the scope of this thesis to develop a detailed response to Flanagan's arguments relying on established principles of common law. Although some of the most obvious problems in the positivist analysis of Metis title have been addressed, our concern is to build an argument for Metis title in accordance with first principles. Taking this approach, most of Flanagan's arguments become irrelevant. Aboriginality is not defined by racial, ethnic, or cultural criteria. It simply means "indigenous." The origin of the right is not racial or dependant on a particular lifestyle. Rather, the basis of the claim is original occupation or rights vis a vis the original occupant. The requirement of the existence of

a group reflects the natural state of property as common property and recognizes the existence of group rights, in addition to individual rights, in natural law. Exclusivity is a right, not an obligation. Recognition of the right in legislation is irrelevant. The issue is whether the legislation has a legal effect on the pre-existing natural right. In essence, the only significant objections raised by Flanagan are the difficulty of defining Metis territory, the characterization of the Manitoba Act as a unilateral act of parliament and the legitimacy of the scrip distribution system. Each of these objections will be addressed in the following discussion of Metis natural rights or the discussion on legitimate methods of extinguishment in Chapter 5.

II Natural Rights of the Manitoba Metis

1. Proof of Title

Chapter three illustrates that the doctrine of aboriginal title originates in natural theories concerning the origin and acquisition of property rights. A naturalist interpretation accepts aboriginal title is an independent legal right derived from occupation of land by identifiable peoples prior to European acquisition. The most secure title arises from continuous occupation of previously unoccupied lands. However, title arising from immemorial and ordinary prescription may be legitimately asserted against first occupants and subsequent claimants assuming certain conditions are met such as good faith and possession for a substantial period of time. In each instance, recognition is given to title based on occupation and possession rather than some

form of derivative title through grant, or agreement. The legitimacy of the title at issue depends on its derivation from the original or "aboriginal" occupant and not the discovering sovereign if such title is acquired prior to voluntary surrender of the underlying aboriginal right.

It is through this layering of original title that Metis rights are linked to rights of first occupants. Both find their origins in principles of natural law regarding the origins and acquisition of property rights. This chapter will illustrate that Metis title is acquired from the first occupants through acquiescence and prescription.

Proof of title can be established by meeting three criteria: (a) the existence of an identifiable group, (b) original or prescriptive rights against the original occupant and (c) an identifiable territory. The right of exclusivity is important in the context of voluntary abandonment of land rights and territorial sovereignty, but need not be determinative in the event of shared jurisdiction.

Natural theory requires flexibility in the selection of an effective date for the application of the above criteria to different groups. For example, a group claiming to have been unlawfully dispossessed of its lands may not be in present occupation of the lands claimed and might have difficulty identifying a contemporary collectivity. Although descendants can be identified to assert the claim, the dispossession may have resulted in the breakdown of tribal organization and the cohesiveness of the group. If the effective date is the date a legal claim is commenced, groups or descendants of groups advancing

claims on a basis other than current possession might be barred from compensation for illegal activity. Although title is based on possession, natural theorists would find it repugnant to ignore claims of those wrongfully dispossessed. The preference given to surviving communities and the contemporary property regime inherent in a failure to adjust the effective date for dispossessed groups not only necessitates an ethnocentric bias, but endorses power, rather than justice, as the governing principle in human relationships. Further, ignoring the rights of disadvantaged communities is contrary to the moral obligation of powerful communities and persons in authority to consider the common good of weaker communities that may be harmed by their decisions.⁴⁷ For these reasons, natural justice requires that the criteria be applied at the date of dispossession or loss of rights.

One could argue that it is in the best interest of the Canadian community that the legality of titles held under the current regime be upheld without subject to challenge because of the chaos and social instability that would result if lands were returned to groups illegally dispossessed. This argument echoes the political question doctrine invoked by the Marshall court to legitimize actions of the Crown towards indigenous peoples that were without legal foundation.⁴⁸ At the same time, it addresses the practical problems associated with the resolution of title claims to settled lands. However, natural law will not simply deem unjust acts just because the act now seems irreversible. A naturalist approach attempts to overcome practical difficulties. This may be accomplished by considering questions such as contemporary identity and availability of historic land holdings in the determination of

an appropriate method of compensation, rather than denying the existence of a right or the occurrence of an injustice. Compromise will be necessary on both sides and the resolution of these difficulties may mean monetary compensation rather than the creation of a contemporary land base. The point is natural law will not condone ignoring the right because of the pragmatic problem of formulating a remedy.

Determining the date of dispossession is not without its own difficulties. The view one has on sovereign title and legitimate methods of extinguishment will affect her interpretation of "dispossession." Those who ascribe to the view that the Crown obtained an inchoate title upon discovery that is somehow perfected by effective occupation, conquest or purchase might argue the date of discovery is the effective date of loss even though the original inhabitants remained in actual possession. Others might argue the need for an overt action asserting sovereignty such as the enactment of legislation incompatible with the existence of Indian title. Both of these views are contrary to principles of natural law. Natural theory rejects the notion of underlying title in the discovering sovereign and the notion that title exists at the sufferance of the discovering Crown. Rather, it recognizes title in the prior possessor until it is voluntarily surrendered or abandoned. Therefore, a naturalist might argue the effective date of loss is the date a treaty is signed or land is voluntarily abandoned. The natural corollary in the event of wrongful dispossession is the date of the illegal agreement or forced abandonment.

The situation of the Manitoba Metis is particularly difficult. Because there is considerable disagreement among authors concerning the nature of the Manitoba Act and its affect on Metis claims. As discussed in further detail below, some argue it was a unilateral act of Parliament, some argue it represents a negotiated settlement that was later dishonored through amending legislation and orders in council, and some argue the Act does not represent the agreement reached. If the legislation is viewed as an agreement gone bad, it is reasonable to select as the effective date the date the agreement was reached, or given the short period of time between the agreement and its enactment, the date the Manitoba Act received royal assent. However, the appropriateness of this selection can be challenged if one considers the method and duration of implementation.

Selecting the date of dispossession as the effective date assumes the ability to pin point a date when rights were extinguished or land was involuntarily lost. Unfortunately neither is easily ascertainable. For example, the ambiguous phraseology contained in s. 31 of the Manitoba Act and subsequent legislation suggests the intention of parliament was not to extinguish title with a legislated statement to that effect. Consequently, the date of the enactment of the Manitoba Act is not the date the Metis were dispossessed. Rather, s. 31 is a statement of intent to satisfy Metis claims at a future date on an individual basis. Dispossession was purportedly accomplished through a land grant and scrip distribution process. Some Metis were issued and received scrip or patent or both, some never received either and some never located their lands. The majority were eventually displaced and

lost their traditional lands.⁴⁹ Unlike Indian tribes, the Metis were not removed as a group to designated lands or given reserve lands in exchange for the surrender of their collective rights enjoyed as an indigenous society. Rather, in practice extinction was an on-going process aimed at compensating individual claimants. Consequently the alleged cessation of Metis rights did not occur at once but at different times for different individuals over a period of several years.

A natural theory of Metis title may help to resolve some of the confusion surrounding the identification of the date of dispossession. First, theories based on the priority of sovereign title over that of first occupants prior to legitimate acquisition are rejected. Second, the existence of Metis rights is not dependent on the interpretation in s. 31. Therefore, a distinction is drawn between the existence of Metis rights and the decision reflected in legislation to extinguish those rights through individual compensation. Assuming the independent existence of Metis collective rights (discussed below) dispossession is properly viewed as the loss of dominion and territorial sovereignty of the Metis Nation over its lands. The issue is not when individual Metis lost their respective land holdings pursuant to terms contained in s. 31, but when the Metis Nation lost its right to assert ownership and sovereignty within its territories. The determination of the date of loss still varies depending on whether the Manitoba Act is viewed as an agreement or a unilateral act of parliament. The former perspective supports the conclusion that collective rights were surrendered or lost when an agreement was approved by Canada and the Metis Nation. The latter perspective traces the loss of

rights to the imposition of martial law in the Red River area immediately after the Manitoba Act was proclaimed and the breakdown of the Provisional Government. Practically speaking, the choice is more significant in reflecting one's perspective on the question of negotiation versus unilateral imposition than affecting the date of loss as both events occurred in 1870 within a couple of months of each other.

The following analysis of Metis natural rights uses June, 1870 as the effective date for the application of criteria to the Metis. This date is chosen because it is the month in which the Provisional Government approved the terms of the Manitoba Act and stopped asserting collective rights to Metis lands and self-government in exchange for certain guarantees. From this day forward land holding within Metis communities was regulated by the Canadian government. In August of 1870, Canadian troops entered the Red River area without opposition and imposed Canadian rule.⁵⁰ Although actual dispossession began several years later, this date reflects a loss of control by the Metis Nation.

2. Identifiable Group

(a) Aboriginality

Natural rights of property are possessory rights without racial or cultural definition. To suggest a particular race is entitled to property rights due to ethnic origin, lifestyle or method of land tenure violates natural precepts of equality and universality. To deny rights of occupancy based on any of these reasons is to deny the humanity of the group deprived and to

attribute special or "supernatural" rights to the beneficiary. Consequently, the extent to which the positive law on aboriginal title is affected by a racial or way-of-life distinction is the extent to which it deviates from its original and natural application. The issue is not one of race or culture, but the moral obligation of all races and cultures to respect pre-existing rights arising from legitimate possession.⁵¹

This point is significant to the Metis people who are of partial Indian ancestry and who, as an entire people, did not enjoy a single way of life. Rather, by 1870 there were at least three distinct classes of Metis living in what was then Manitoba - those who lived as Indians and were recognized as members of a particular Indian tribe; the hivernants, who continued to pursue the nomadic life of the buffalo hunter and those who engaged in farming. Those who farmed continued the traditional pursuits of hunting, fishing and trapping and some participated in communal buffalo hunts in the summer. In addition to these groups were Metis who continued to live as voyageurs, tradesmen freighters and employees of the Hudson's Bay Company.⁵² Those who lived among the Indians were viewed as Indians and their aboriginal rights are generally not disputed. The remaining Metis eventually united and identified as a Nation distinct from the Indians and the European immigrants.⁵³ The Nation formulated in response to threats to the existing way of life and in order to achieve common political and economic goals. Some of the threats included restriction on trade, changes in the economic base arising from rapid settlement and the loss of lands for which legal titles had not been issued. Members of the nation shared several significant bonds - aboriginal ancestry,

title to individual lands and common property (eg. hunting grounds) based on traditional occupancy rather than some form of derivative title from the Crown, indifference to the Hudson's Bay government (as long as it did not interfere with their economic and proprietary rights) and eventually formation of their own government when the existing government failed to meet their needs.⁵⁴

The diversified land use, economy and lifestyles of the communities forming the Metis Nation and the similarities between the lifestyles of many Metis to the contemporaneous European frontier culture is cited as evidence that the Metis Nation, if it did exist, is not an aboriginal Nation capable of asserting a claim to aboriginal title. This view has been discredited previously and will not be examined here except to illustrate the distortion of rights which occurs by equating the term aboriginal with the term Indian. The term "aboriginal" changes from a simple reference to native inhabitants of a country and gains racial, cultural and legal dimensions because of static and ethnocentric views of what it means to be an Indian. The term "Indian" was first used by Christopher Columbus to describe the aborigines - the original inhabitants of North America.⁵⁵ In its attempts to satisfy aboriginal claims and expand settlement in the West, the federal government fragmented original inhabitants into sub-groupings. Initially the division appears to have been based on race and on a way of life distinction determining group membership through paternal lines - if a person lived among and was accepted by an Indian tribe she was entitled to take treaty and participate in the reserve system established to satisfy aboriginal claims.⁵⁶ The

Indian Act evolved to administer reserve communities and defined the Indian population entitled to live on reserves. Status was not determined by a racial criteria, but according to the status of the father resulting in the exclusion certain original peoples and the inclusion of non-aboriginals.⁵⁷ In the government scheme, connection to Indian blood through family ties or ancestry was significant, but a percentage of Indian blood did not automatically make a person an Indian.

The problem with utilizing the term "Indian" in aboriginal rights theory is the tendency to lose sight of its initial meaning and to define it in accordance with government policy and practice. This approach is understandable if entitlement is based on recognition, but not if entitlement is based on pre-existing legal rights. In the latter scenario government practice is relevant only to the question of legitimate extinguishment. A focus on government policy and the implementation of a reserve system fosters arguments based on racial characteristics and a particular way of life. The translation of this perspective into aboriginal rights theory can result in a total misunderstanding of the basis of entitlement.

A clear example of this distortion is seen in Flanagan's understanding of the legal basis of entitlement. In his view entitlement makes no sense unless a distinction is drawn between agricultural and nomadic existence. The doctrine evolved in British law to obtain land from nomadic, hunting, food-gathering peoples for the purposes of "civilization" without resorting to force. Aboriginal rights are not "merely or even chiefly, a question of who was here first; they arise rather as an adjustment

in the contact between agricultural and nomadic peoples."⁵⁸ Unlike the Indians, the Metis were not a nomadic people. Their way of life was not aboriginal and so they cannot claim aboriginal rights.⁵⁹

Reliance on definitions in the Indian Act also results in a distortion of first principles. The fragmentation of the native population into status and non-status groups has resulted in jurisdictional tangles which complicate the advancement of title claims. This is of particular significance to the Metis who are excluded from the Indian Act regime and, until recently, were excluded from the land claims negotiation process. Rather than ask if the Metis were in legitimate possession of the territories claimed and thus entitled to recognition of their pre-existing rights by European colonizers, the argument has centred on whether the Metis are "Indians" as the term was understood by the government in 1867, the date it assumed jurisdiction over "Indians and lands reserved for Indians."⁶⁰ Although the majority of academic opinion agrees that "Indian" in the 1867 and 1982 Constitutions has a different meaning than "Indian" in the Indian Act, many will not transcend the racial and cultural boundaries of the term.⁶¹ Restraint is likely due to a focus on recognition as a basis of enforceability of rights and assumption of responsibility over specific aboriginal groups.

The natural theorist would say the question of whether Metis are "Indians" is a red herring because recognition is not necessary for legal entitlement. The issue is whether there is a legal and moral obligation to recognize the claims of the Metis as prior possessors and not whether the federal government chooses to

recognize and assume responsibility for their claims as "Indians." If the answer to the former question is yes, natural justice demands that their claims be treated on equal footing with other occupancy based claims and that the federal and provincial governments, when exercising their decision making power, take into consideration the common good of the Metis community. This argument echoes the equality argument advanced by the Metis people but is not dependant on their classification as an Indian people but their natural rights derived from possession.⁶²

Fewer restrictions are placed on natural rights if the term "indigenous" is incorporated into aboriginal rights theory. "Indigenous" simply means native to a particular land or region or "born or produced naturally in a land or region."⁶³ The term is commonly used in contrast to the word "immigrant" which refers to populations that originate in countries other than those in which they live. The Metis people are indigenous to North America in the sense that "they came into being as a distinct people on this content."⁶⁴ Although their paternal ancestors were immigrants, the Metis are indigenous because they became a distinct people independent of their aboriginal and immigrant ancestors. In particular, they are indigenous to Rupert's Land and the Northwest as it is within these regions they evolved into a people.⁶⁵ Like other indigenous peoples, they enjoy natural property rights if they can establish first occupation of previously unoccupied lands or legitimate title against the original possessor prior to European occupation of their territories.

Unfortunately, the use of the term "indigenous" can also result in non-compliance with the natural precepts underlying the

concept of aboriginal title. This occurs if emphasis is placed on the characterization of a group as indigenous without understanding the foundation of indigenous rather than understanding that the legal foundation of indigenous rights is original occupation. For example, one might argue that the characterization of Metis as indigenous depends on the ancestry of the population and not the birthplace of the nation. A focus on the ancestry without placing temporal restrictions renders every person born in Canada indigenous to Canada. Consequently, the term is to be used to refer to populations originating in Canada prior to its colonization. Indigenous rights are rights which accrue to the populations originating in a particular area prior to European immigration. These rights may, or may not, continue to survive depending upon the legitimacy of acts of extinguishment by the colonizing power. In this sense of the term it is impossible for Metis to have indigenous rights because their existence does not pre-date European immigration.

The problem with this interpretation is it focuses on the existence of a people prior to European contact rather than the origin and acquisition of property rights in unoccupied and occupied lands. Further, the emphasis on the date of European contact assumes the legitimacy of doctrines of discovery, conquest and unilateral extinguishment which cannot be sustained in natural law. Rather, rights can only be acquired by cession or prescription. Natural law is concerned with the recognition of rights arising from legitimate possession not the date a people comes into being. The entitlement to recognition or property rights is not dependant on the origins of the right holder so much

as the origin of the property right in legitimate possession prior to legal acquisition. It just so happens that the clearest right is one arising from original occupancy by original peoples. However, rights may also arise against the original occupant in natural theory "indigenous" comes to mean rights of, or arising from the rights of, first occupants. It can not be established that the Metis are original occupants or inhabitants of the lands in which their nation was born prior to European contact, it does not mean they did not acquire legitimate rights of property enforceable against Canadian claims to title and sovereignty over their lands. It simply means their rights arise against the original inhabitants prior to legitimate acquisition rather than by virtue of their own original inhabitation or Crown grant.

Because of the etymological debates concerning the classification of Metis as Indian, aboriginal or indigenous and the tendency of these debates to distort the natural basis of aboriginal title, naturalists should avoid labelling collective occupancy based rights through the use of inappropriate terminology. The terms "Indian," "aboriginal" and "indigenous" have been created within the positivist regime to explain the recognition of certain rights by colonizing nations and cannot be translated into natural theory without being accompanied by undesirable positivist baggage. For this reason it is best to refer to the natural rights of specific peoples arising from legitimate possession rather than attempting generic categorizations. The issue is not whether a people are Indian, indigenous or aboriginal but the identification of a "people" possessing natural rights arising from original occupation or

derived from the first occupants prior to legitimate acquisition of the original title by the Crown. Thus, we are concerned here with Metis rights or natural rights of the Manitoba Metis rather than categorizing the Metis as aboriginal, indigenous or Indian people.

(b) The Metis People

The emergence of the Metis as a "people" is significant in the natural tradition for two reasons. First, it is logical that a group exist before one can speak of group rights. Second, the law of nations requires some form social organization to pull lands not in actual physical possession of a person or community out of the category of *terrae nullius* and into the category of national public lands.⁶⁶ The definition of "people" and "nation" have been examined in Chapter one and will not be repeated here. Rather, we are concerned with one question. As of June, 1870 did the Metis of Manitoba have sufficient coherence, permanence, political organization and self-identity to qualify as a group? The natural rule against arbitrary preference to communities requires that identification criteria be applied flexibly in light of varying levels and forms of organization among different societies⁶⁷. If the existence of a group is confirmed, the primary concern is identification of Metis occupation of Metis territory and not the private land holdings of individual Metis. If it is denied, the analysis of natural rights must focus on the legitimacy of individual property rights or specific Metis community based rights and assume territories not in actual possession of Metis people or under the jurisdiction of local governments are open to acquisition

by mere occupation and assertion of sovereignty by the Crown. The latter conclusion necessitates negotiating Metis claims on an individual or community basis where as the former allows negotiations with representatives of a single people.

As it is impossible to identify the exact date that the mixed blood population emerged into a "people" a brief examination of their social and political history is necessary to determine their existence as a single group or distinct groups. Prior to 1835, the Metis enjoyed three distinct lifestyles geared at the maintenance of the familial unit rather than making a profit.⁶⁸ Those who secured employment with fur trading companies tended to settle close to the trading posts. Although the men had duties that took them from the settled areas, their families stayed permanently in one location. A second group lived semi-settled lives spending part of the year on small farms and part of the year hunting buffalo to feed and clothe their families. The third group sustained themselves by hunting and trapping. They lived a nomadic lifestyle and lived in temporary settlements of tepees and log shacks.⁶⁹ By the beginning of the 19th century two distinct cultural groups also emerged - the French and English speaking Metis. Generally, the former were nomadic or semi-settled and the latter permanently settled at the posts or in agricultural communities.⁷⁰

By 1810, numerous Metis communities lived settled, semi-settled or nomadic lives in Rupert's Land but the communities existed independently of each other and not as a cohesive group.⁷¹ However, the economic stresses experienced by these communities between 1812 and 1820 fostered the development of a unified

political consciousness particularly among the french-speaking Metis in the Red River area as their livelihoods were more dependant on hunting and trading. Of particular significance was the united opposition to restrictions on trade and armed resistance under the leadership of Cuthbert Grant to the establishment of the Selkirk colony.⁷² The resistance to economic change coupled with geographic isolation fostered a sense of ownership and nationality among the different groups concentrated in the Red River area. However, the primary cultural and economic division between French and English speaking Metis remained and was eventually recognized politically through equal representation in Riel's provisional government.⁷³ George Stanley describes the national unity felt by French and English speaking Metis as follows:

In spite of these differences there was a common bond between the English and French half-breeds. Both sprang from a common race, both claimed territorial rights to the North-West through their Indian ancestry; both in large measure, spoke their mother tongue in addition to French and English. The half-breeds as a race never considered themselves as humble hangers-on to the white population, but were proud of their blood and their deeds. Cut off, as they were, from European expansion by the accident of geography and by the deliberate policy of the Hudson's Bay Company, they developed a resolute feeling of independence and keen sense of their own identity which led them to regard themselves as a separate racial and national unit and which found expression in their name "The New Nation."⁷⁴

In 1821, the Hudson's Bay Company and the North West Company combined under the name of the Hudson's Bay Company. Numerous trading posts were shut down and persons settled in those areas were moved to the Red River area. Numerous settlements were formed along the Red and Assiniboine villages. Those Metis who refused to move to the Red River colony moved to Pembina or formed small villages at various parts on the plains. Later, after the drawing

of the 49th parallel, many Metis in Pembina moved back to Red River and established Grantown (St. Francois Xavier). Between 1821-25 missionaries also came to the colony and introduced the institutions of catholicism, formal education and domestic farming. Acculturation toward a more European lifestyle began but the community continued to depend on traditional forms of subsistence and in particular, the buffalo hunt.⁷⁵

By 1835 predominantly Metis communities in the Red River area included St. Vital, St. Norbert, Ste. Agathe, St. Paul, St. Charles, Grantown, Selkirk, High Bluff and Portage la Prairie.⁷⁶ Economically, the communities were semi-autonomous. "Their subsistence household economy was based on the buffalo hunt, small scale cultivation and seasonal labour for the Hudson's Bay Company."⁷⁷ During the 1840s there was increased Metis involvement in the capitalistic fur trade and in particular the buffalo trade. The emerging buffalo robe trade became a rural industry upon which most communities were dependant. The establishment of trading posts in the Dakotas, Montana and Minnesota resulted in an alternative market for the Metis. By 1840, they relied heavily on these posts. Freighting of buffalo hides and other goods by way of red river cart to trading posts and other settlements over land trade routes and hunting territories were established. This development also provided a communication system strengthening ties between the Red River and other, metis communities.⁷⁸

The change in the Metis economy was significant for three reasons. First, many Metis left the settled communities in the Red River Valley and began wintering on the plains. By 1856, the phenomena of wintering villages became widespread.⁷⁹ Second,

agricultural production in the Red River Valley suffered during this time and the communities became increasingly dependant on the buffalo hunt.⁸⁰ Third, the common reliance on trade resulted in unified Metis opposition in the Red River settlement to restrictions on free trade with Americans imposed by the Hudson's Bay Company and threats by the Company to dispossess them of their lands should they participate in illegal trade.⁸¹ Once again Metis nationalism was sparked as evidenced in the following opening words of a Metis petition presented to the Council of Assiniboine in August, 1845 demanding a definition of their special status:

Sir - Having at this moment a very strong belief that we, as natives of this country, and as half-breeds, having the right to hunt furs in the Hudson's Bay Company's territories whenever we think proper, and again sell those furs to the highest bidder; likewise having a doubt that natives of this country can be prevented from trading and trafficking with one another; we would wish to have your opinion on the subject, least we should commit ourselves by doing anything in opposition, either to the laws of England, or the honourable companies privileges. . . .⁸²

The Council of Assiniboine denied that the Metis had special rights. From 1846-1849 an imperial army was stationed in the settlement and resistance to the Company's action was illicit rather than overt. However, upon the removal of the regiment in 1849, the rule of the Hudson's Bay Company was directly challenged. The turning point was the trial of Guillaume Sayer for illegal trading. The Metis armed themselves and surrounded the courthouse during his trial. Although Sayer was found guilty, no penalty was imposed and the Metis, realizing the Company's rules were unenforceable, declared victory.⁸³ During this period a special committee was also set up by the British Colonial Office to investigate the Company's dealings in the North West. Although the

company was exonerated of wrongdoing, its monopoly on trade was broken.⁸⁴

During this period various forms of political organization developed. In 1835, the Hudson's Bay Company established the Council of Assiniboine to govern in the Red River Colony. Little resistance was shown towards the Council once the trade issue was resolved and Metis representatives were added until the 1860s when it failed to successfully defend Metis interests affected by settlement and the transfer of Rupert's Land by the Company to Canada.⁸⁵ Outside the colony courts were held to deal with civil and criminal matters. Otherwise, communities were left alone to rule themselves.⁸⁶ Local Metis governments in the Red River area and elsewhere organized around the buffalo hunt. Organization within the community prior to, and after, the hunt is described by Tremaudan as "a sort of simple, equitable communism based above all on the interests of the majority."⁸⁷ However, for the duration of the hunt a council was formed which acted as both government and tribunal with jurisdiction over the participants in the hunt. A leader and twelve councillors were elected. In addition, a public crier was made responsible for bringing rules, orders and recommendations to persons in the hunting camps. The remaining men were organized into groups of ten soldiers and placed under the direction of captains selected by the Council. Guides were also chosen. Captains and soldiers were responsible for the carrying out of the Council's orders. However, the authority of the Council was limited in that it required the consent of the entire camp it governed.⁸⁸

For a period of approximately ten years Metis communities continued to organize under the hunt and persist under different local economies. However, the threat of settlement and loss of lands caused Metis communities in the Red River area to unite once again to resist the Hudson's Bay transfer of Rupert's Land to Canada. The resistance began with opposition to government survey and culminated in the formal election of a provisional government representative of both the French and English half-breeds of the Red River Settlement. It is this government which negotiated the terms of entry of Rupert's Land into Confederation in April of 1870.⁸⁹

By 1870 the majority of the population in the area was Metis. In 1871, a census described the population of Red River as consisting of 5,720 French-speaking half-breeds, 4,080 English speaking half-breeds and 1600 white settlers.⁹⁰ A clear sense of Metis ownership and nationality had developed by this time and manifested itself in the establishment of the Provisional Government and armed resistance to the assumption of title and jurisdiction by the Canadian government. At the very least, those Metis living within the Red River settlement as it existed in 1870 can identify as a single people united by a common national political consciousness despite the semi-autonomous economic and political structures of the component communities and parishes.

The more difficult issue is whether the Metis who lived in hivernant villages and other settlements outside the area were part of the national consciousness. Movement from trading post settlements into the Red River area, migration out of the area with the expansion of the buffalo trade and freighting routes between

various settlements suggests that communications were maintained between Metis communities but this is mere speculation. More certain are studies on pre-1870 migration patterns which suggest that many of the nomadic communities with which we are concerned originated in the Red River area.⁹¹ These groups would have participated in the evolution of the Metis collective consciousness prior to 1840 and perhaps carried with them the sense of unity fostered by the organized resistance to trade restrictions. Clearly, all groups shared the common bonds of aboriginal ancestry, possessory title, reliance on the fur trade economy and resistance to intervention in their variant social systems. However, not all participated in the armed resistance to Canadian intervention in 1870 and the election of the Provisional Government.

Some assistance may be obtained if one considers the people over whom the Provisional Government claimed jurisdiction. Although the government was formed and conducted business in the Red River settlement, it had the interests of other Metis communities at heart when negotiating the entry of Rupert's Land into Manitoba. For example, the provisions pertaining to individual occupancy based rights and possessory title in section 32 of the Manitoba Act were intended to protect the interests of those inhabitants who established temporary residences but did not make sufficient improvements to the land to qualify for homestead rights.⁹² The list of rights formulated by the Provisional Government demanded the formation of a provincial legislature responsible to all inhabitants of Rupert's Land. It also demanded that "all properties, rights, and privileges enjoyed by the people" be respected and "that the arrangement and confirmation of all

customs, usages, and privileges be left exclusively to the Local Legislature."⁹³ These expressions of its will suggest that the Provisional Government was attempting to address concerns of all Metis inhabitants in Rupert's Land and not just those concentrated in the Red River area.

Although all Metis could not have participated in its formation, it is not surprising the government was born in the Red River area as this is where the majority of the population dwelled. The lack of resistance by outside Metis communities to its actions could mean they endorsed the government, but it could also mean they did not know about its formation or did not care. The actions of communities outside of the Red River area in response to their entitlement under the Manitoba Act suggests all Metis in Rupert's Land shared a sense of unity with the Red River Metis. Those who temporarily resided outside of Manitoba in 1870 put forward claims to a share of the lands set aside under s. 31 of the Act "towards the extinguishment of Indian title" as did other Metis living throughout the province.⁹⁴ On the other hand, one can also argue participation in the land grant scheme was motivated by self-interest and eligibility was based on mixed blood rather than membership in a distinct political community.⁹⁵

Another difficult issue is determining the permanence of the Metis as a community. The provisional government remained in power until August of 1870 at which time Riel fled to the United States fearing the arrival of Canadian troops and aware of the government's refusal to grant him amnesty.⁹⁶ Although historians dispute the reasons for migration, significant numbers of Metis left Rupert's Land between 1870 and 1881. Some moved to pre-

existing settlements in the North West Territories, some continued hivernant lifestyles in the North West and some migrated south to the United State.⁹⁷ When the land grant system was finally complemented, grants were given on an individual basis and many Metis never located their lands.⁹⁸ At the same time, Canada was encouraging settlement in Rupert's Land and immigrants were flocking in.⁹⁹ The end result was the Metis became a minority in their own lands.

The persistence of the Metis as a people is examined in chapter one and will not be repeated here. The point is strong arguments can be made for and against the persistence of the Metis Nation. Subsequent activities in response to Canadian settlement in the North West, in particular the resistance of 1885, suggest that the national consciousness survived at least until that point in time. Contemporary political activity suggests that the consciousness also exists today. However, the continuous existence of the Nation is subject to much debate as is its contemporary identification.

The difficulties raised seem to lead to the conclusion that the identification of a single Metis group as of June, 1870 is impossible. Rather, at best one can acknowledge the existence of various groups the largest and most influential being the one centred in the Red River Area. Any rights accruing to these groups must be determined on a group by group basis. Any lands not subject to use, occupation or jurisdictional control by a group or groups must be considered vacant. Canada's moral obligation did not extend to vacant lands despite any agreements reached with the Provisional Government.

In the author's opinion this conclusion is contrary to the spirit of natural law. First, it fails to assume flexibility in the application of identification criteria. The level of political organization and unity must be assessed within the context of the frontier. Emphasis on racial, economic and political ties as opposed to the isolation of individual communities balances the evidence in favour of a united people. The conclusion of non-alliance also runs contrary to the assumption of man's natural inclination to socialization and achievement of the common good, or at the very least preservation of the existing system. A united front is far more effective than a divided one. Although it may have ultimately failed, the Provisional Government attempted to exercise power justly and take into consideration all of the communities living in Rupert's Land that might be affected by its decisions. Although ignorance of the provisional government is a logical reason for non-alliance, it would be unreasonable for Metis communities not to identify with a consciousness and government advocating protection of their interests unless they were unaware of threats to their way of life. For a substantial number of Metis communities, their involvement in the fight for tree trade and resistance to settlement illustrates they perceived a threat. Finally, natural law recognizes the importance of allowing a community to determine its own good. For this reason, significant weight must be given opinions of self-identifying descendants of the Manitoba Metis. These views are predominantly in support of the existence of a united Metis Nation.¹⁰⁰ For these reasons, natural law supports a conclusion that as of 1870 the Manitoba Metis qualified as a group composed of various economic, social and

political communities united by a national consciousness and government.

3. Original or Prescriptive Rights

There are two potential arguments for Metis title based on first principles. The first is the Metis are the true owners of Rupert's Land by virtue of original occupation of vacant lands. The legitimacy of this argument is dependant upon the inability to establish occupation in another community prior to Metis occupation. The second is that the Metis acquired a form of joint aboriginal title arising from prescriptive rights against the original occupants by virtue of the latter's failure to assert their rights to the exclusion of the Metis, abandonment or consent. In the event of shared occupation, natural law would recognize equal rights in the Metis and the group with whom the territory at issue is shared. In the event of abandonment, absolute title would be vested in the Metis. These are the only two alternatives as there is no evidence the Metis purchased territories from original occupants and acquisition by conquest is not legitimate in natural law.¹⁰¹

The basis of Metis title is best understood by comparing it to the titles held by other inhabitants of Rupert's land and claims to ownership of Rupert's Land in 1870. Of particular interest are the entitlement of Indian peoples, the Hudson's Bay Company, the original white settlers, the Canadian government and the British Government. An examination of the legitimacy of the Metis claim to title as against each of these groups reveals that the Metis had a legitimate claim to title derived from the original native

inhabitants which the British Crown and Canadian government were morally bound to recognize. From this perspective the armed resistance of the Metis people against the imposition of Canadian sovereignty and assumption of title qualifies as a "just war" in defence of Metis rights and is improperly labelled a rebellion. Peace was obtained, Metis land rights properly purchased and self-government recognized by treaty which was translated into positive law through the enactment of the Manitoba Act. In the interest of social stability, natural law requires that the agreement between the Metis and the Canadian government be recognized and maintained. The extent to which this agreement has been honoured and its effect on the continuance of Metis title are the subject of the final chapter of this thesis.

(a) Rights of the Cree, Assiniboine and Saulteaux

The Metis in Rupert's Land were not its first occupants nor were all of them descendants of the first occupants. Prior to European immigration, the area now known as Manitoba was occupied by tribes known as the Chippewa (Ojibwa), Cree and Assiniboine - the latter two groups initially populating the central and southern portions of the territory. Those Chippewa originating from the Lake Superior Region were also called Saulteaux. The area northwest of Lake Winnipeg between the Red and Saskatchewan rivers is thought to have been occupied by the Cree as early as the 16th century. By the 18th century, they controlled Northern Manitoba. By this time the Assiniboine also lived northwest of Lake Winnipeg and in the southern portion of the valley of the Assiniboine River. Both groups claimed the Canadian prairies as their hunting grounds

and relied on the buffalo hunt for subsistence.¹⁰² By the mid-1800s some Cree remained in the Red River area but most had moved on to new areas or were forcefully driven out by the Saukteaux.¹⁰³ Although the maternal forbears of some Metis included the Cree and Saukteaux, many of the Metis in the area were not descended from either of these groups but migrated to Rupert's Land from elsewhere in Canada.¹⁰⁴

By the 1840's, the Sioux and the Saukteaux lived in the areas immediately surrounding the Red River Settlement. The Sioux territories were mostly in the Dakotas and Saukteaux shared their territories with the remaining Cree in Manitoba. Both of these groups competed with the Metis for hunting, trading and fishing lands. Although Metis political organization on the hunt served in part to be on guard against unfriendly Indians, the Metis generally maintained good relations with the Indians sharing unsettled areas in a free rivalry of hunting, fishing and trapping.¹⁰⁵ However, the tribes also had defined territories which were defended against unauthorized intrusion and acquired by conquest. In the 1840's the Sioux made several visits to the Red River area resulting in confrontations with the Saukteaux and Metis. In 1845 the Metis went so far as to treaty with the Sioux to ensure the maintenance of peace.¹⁰⁶

The most significant confrontation between the Metis and the Sioux occurred in July of 1851. The Metis dependant on the United States market for furs and needing to move further south to pursue buffalo, extended their hunting expeditions and trade routs across the territories of the Sioux. In July of 1851, the Sioux attacked a Metis hunting party on their lands but their attack was

unsuccessful. Although the Metis did not defeat the entire Sioux Nation, the battle was significant because it established new hunting territories in the Dakotas and Eastern Montana and secured a trade route through Sioux territory to St. Paul.¹⁰⁷

Although the Metis claimed ownership to Rupert's Land, they accepted that they were not the original occupants and acknowledged the land rights of the indigenous tribes. This is evident from the list of rights which demands treaties be concluded between Canada and the different Indian tribes in the proposed province of Assiniboine.¹⁰⁸ However, in their view prior to 1870 some treaties had been made with the wrong tribes. Traditionally the Cree and Assiniboine owned the Red River area but they had been driven out by the Saulteaux. The Selkirk treaty signed with Indians in the area included a recently arrived Saulteaux band. Both the Cree and the Metis objected because they viewed the Saulteaux as interlopers. The Saulteaux, on the other hand, did not recognize a Metis claim to the land.¹⁰⁹

Despite isolated incidents of violence, the Metis existed peacefully among the Cree, Assiniboine and later the Saulteaux. No significant attempt was made by any of these tribes to prevent Metis settlement or land use within Rupert's Land. Rather, the tribes settled in their own designated areas and shared the resources of unsettled lands in Rupert's Land with the Metis. This pattern of existence continued for more than a hundred years prior to the assertion of sovereignty by the Metis Nation in 1870. During this time the Metis respected the rights of the indigenous peoples but at the same time developed their own feelings of ownership towards the land.

The concept of shared use and possession makes sense if one considers the metamorphic nature of tribal boundaries prior to European settlement and implementation of the reserve system in North America. It also makes sense if one considers that tribes were often not in immemorial possession of the lands they occupied when they treated with the Crown. Slattery describes the pre-existing pattern of landholding as follows:

Native people migrated in response to such factors as war, epidemic, famine, dwindling game reserves, altered soil conditions, trade and population pressure. Lands that were vacant at one period might later be occupied, and boundaries between groups shifted over time. The identities of the groups themselves changed, as weaker ones withered or were absorbed by others, and new ones emerged.

Far from ending this fluidity, the coming of the Europeans in some cases increased it, as novel trade opportunities, technologies, and means of transport upset existing alliances and balances of power and stimulated fresh forms of competition and conflict . . . The Indian territories remained as before, an area open to movement and change, where the land rights of a native group rested on possession and title was gained by appropriation or agreement and lost by abandonment.¹¹⁰

Natural law recognizes the authority of the Metis to appropriate Indian lands assuming it is done with consent or the lands are no longer subject to the rights of previous occupants. Given the nomadic lifestyle of the Indian population in Rupert's Land and the nature of their land use, it is difficult to assess what lands they cease to occupy at a given point in time and what lands are temporarily out of their possession. At the very least some kind of time limit would have to be imposed to mark the loss of possessory rights. Similar difficulties are associated with the issue of consent. In the absence of treaties, consent must be implied based on a variety of factors including friendly relations,

limited incidences of violence, and use and occupation without interruption by prior possessors.

Unless there is evidence of bad faith, natural law will presume the legitimacy of title in groups that have possessed lands for a substantial period of time. This presumption is legitimized because of its contribution to social stability and peace. However, the presumption can be rebutted with evidence of forced abandonment or dispossession and absence of choice on the question of consent. Although the Metis can not demonstrate immemorial possession, natural law recognizes their prescriptive rights of ownership arising from occupancy of Rupert's Land for a substantially long period of time.¹¹¹ By 1870, they became the dominant nation in Rupert's Land. Their good faith is illustrated and moral obligations are met in their recognition of shared jurisdiction and their attempt to protect indigenous right by way of treaty when they negotiated Rupert's Land into confederation. As the more powerful nation, they took into consideration the rights of the weaker indigenous nations and consequently cannot be accused of knowingly acquiring rights that conflict with attaining the common good of the territorial community. The absence of bad faith coupled with a history of relations evidencing the implied consent of the prior occupants of Rupert's Land support the legitimacy of their claims to Rupert's Land in natural law. The foundation of their rights is a prescriptive claims against the original occupants.

This same analysis can not be applied to hunting territories and trade routes acquired from the Sioux as the mode of acquisition employed was conquest. As discussed earlier in this thesis,

acquisition by conquest is only legitimate in the eyes of natural law in the context of "just war."¹¹² The concept of just war presumes the illegitimacy of offensive war unless it is occasioned by the severe injustice of an enemy and advances the common good of humanity. This arises from the obligation of communities to respect the rights of others and promote peaceful relations. In effect, natural law reduces the warring rights of Nations to self-defence.¹¹³ Although the actions of the Sioux may not be legitimate under a natural analysis of self-defence, their immoral action and military failure does not justify non-consensual appropriation of their lands. Their failure to defend their lands subsequent to their defeat can not be interpreted as implied consent as intimidation may have played a significant role in their subsequent actions. One might consider in defence of Metis expansion the argument of necessity and the obligation of communities to foster the common good of humanity as a whole. This argument could lead to an obligation on the part of the Sioux to share lands that are not necessary for the livelihood. However, it is clear all tribes were suffering from the depletion of buffalo herds so it is difficult to take this argument any further than the allowance of rights of crossing. This is particularly evident if one compares the opportunities of the Metis to diversify their economy as compared to those of the Sioux. For these reasons, it is difficult to uphold Metis title to Sioux territory with the exception of some form of easement right to cross Sioux lands on their journeys to St. Paul.

(b) Hudson's Bay Company Title

Assuming the Metis had legitimate prescriptive rights to Rupert's Land, one must ask if these rights could be asserted against the title of the Hudson's Bay Company and, if so, whether they were abandoned by the Metis. In this context, the issue of exclusivity is relevant to entitlement and the acquisition of rights by the Company, but is not in itself a criteria for legitimacy. A comparison of the foundations of these two competing titles and the reaction of the Metis to Company rule suggests that the Metis, like their Indian brothers, allowed shared occupancy but at the same time asserted their independence and ownership rights. Based on their lengthy stay in Rupert's Land, the Hudson's Bay Company may very well have acquired prescriptive rights of their own resulting in a triple layer of title to the land.

Positive law maintains that the Company's title originates in a grant of lands by the English Sovereign in 1670 pursuant to the Charter, the Company received title to lands, and resources; monopoly over trade; and control of local government, law making and law enforcement in the watershed areas of Hudson's Bay the territories of Rupert's Land. The title and sovereignty granted to the company was similar to that exercised by a feudal land over his fiefdom placing in the Hudson's Bay Company Governor and Committee in London the same ruling privileges of the feudal land. The charter also empowered the company to create settlements and establish local government in those settlements capable of exercising judicial and administrative functions.¹¹⁴ Pursuant to the Charter, the Company established trading posts in the area, granted individual titles and district titles, promulgated laws

controlling the fur trade and established the Council of Assiniboine to govern the Red River Settlement.

Title and jurisdiction granted to the Company covered lands not yet surrendered to the English Crown by the original occupants. Rather, the foundation of the Company's title is England's assertion of sovereignty over North America which, according to Canadian law, placed absolute title to the soil in the Crown. The illegitimacy of this assertion in natural law has already been examined. At most, one can say the Charter protected English rights in North America against other discovering nations, but it did not affect the rights of prior inhabitants. Although this conclusion is more in tune with a proper interpretation of colonial law, it stretches precepts of natural law because it assumes European nations have the right to restrict the rights of alienation of other nations. To grant Europeans this power is to grant them a "super natural" power based on a preference for European civilization and an ethnocentric view of the best interests of indigenous nations. Restrictions on alienation are also contrary to the natural presumptions against interference and in favour of self-determination, or to put it another way, the community's right to determine for itself its own good.¹¹⁵

For these reasons, natural law would give priority to the rights of original inhabitants over those granted to the Company by the English Crown. As natural law does not recognize limitations on native rights of alienation prior to surrender or their ability to gain rights to new lands prior to legitimate acquisition, titles derived from that of original occupants should also be given priority over titles derived from the illegitimate

claims to sovereignty by the English Crown. Consequently, natural law favours the recognition of Metis title over that of the English Crown, the Hudson's Bay Company or any other non-aboriginal derivative title unless Metis rights are lost through abandonment, consent or prescription.

The loss of Metis rights does not automatically arise from their failure to occupy territories to the exclusion of the Hudson's Bay Company and original white settlers. Rather, if it can be shown they did not abandon their rights, but coexisted with the Indians and white settlers as an independent nation sharing their resources with other nations, the proper conclusion is their natural rights continued to exist in June of 1870 but were burdened by rights accruing to the Company and the beneficiaries of Company title by virtue of shared jurisdiction for a substantial period of time. Consequently, any legitimate transfer would have to compensate for the original title plus the derivative Metis title, Company title and original white settler titles arising from shared occupation for a substantial period of time.

The persistence of Metis rights is supported by their opposition to economic and trade sanctions and settlement; indifference to Company rule so long as it promoted Metis economic and employment interests and non-interference with Metis social and political organization; lack of participation in the Company land grant system; and resistance to the transfer of Rupert's Land to Canada without protection of the existing land holding system and provision of self-government for the predominantly Metis province of Assiniboia. As colonization was not an important goal for the Company, there was virtually no European settlement in Rupert's

Land prior to the 19th Century except for trading posts ruled by governors and chief factors. The first major change in this practice occurred when the Company granted title to the District of Assiniboia to Lord Selkirk for the purpose of Scottish settlement. Selkirk's grant was for approximately 116,000 square miles and covered the area commonly referred to as the Red River Valley but rights of government in the area were reserved in favour of the Company. Three major migrations contributed to the settlement in this area - the first two from Scotland in 1812 and 1813 (returning after being driven out in 1817) and the third between 1820-25 from various trading posts throughout Rupert's Land. Farm lands were allotted by Selkirk to individual Scottish settlers and later Metis settlers, but many Metis simply took possession.¹¹⁶ In 1835, the Company purchased title to the Red River Area back from Selkirk and established their own land distribution system.¹¹⁷

Initially the Metis did not appose the arrival of the Selkirk Settlers and the establishment of a settlement in the Red River area. However, due to the shortage of food throughout the area, Miles Macdonell, the newly appointed governor of Assiniboia issued a proclamation in January of 1814 prohibiting the export of pemmican except by license from himself. Not only was this a threat to the survival of North West Company trading posts, it also angered the Metis because the proclamation was issued without regard to the rights and wishes of the inhabitants. The situation was exacerbated in July of the same year when the governor issued a proclamation forbidding the running of buffalo. The Metis rose in anger under the leadership of Cuthbert Grant. They

systematically harassed colonists whom the North West Company could not persuade to leave and persisted in continuous attacks on the settlement. Finally in June of 1815 a peace treaty was negotiated between the Metis and Peter Fidler, acting governor of the settlement. Under the terms of this treaty the settlers were to leave the area, peace was restored between all parties and traders, Indians and Metis were not to be molested in their lawful pursuits of trade.¹¹⁸

The Metis resistance to trade and hunting restrictions is the first in a series of incidents evidencing assertion of title and sovereign rights. Although some historians attribute the initial spark of unrest to the influence of the North West Company, crediting the Company with fostering Metis nationality, Metis writers disagree. Regardless of the cause, all agree a national consciousness and sense of ownership arose and persisted in their relations with the Company and settlers.¹¹⁹ Tremaudan's book Hold Your Heads High, commissioned by the Metis Historical Society, describes the Metis reaction to interference as follows:

These provocations seemed unjust to them - these requirements of the Hudson's Bay Company which, through Lord Selkirk, had taken possession of what the Metis considered their country . . . when they saw the settler's cultivating the soil, they discussed it together and said that perhaps, after all, this might be to their interest. But when they were forbidden to hunt, fish, or cut wood without permission, things began to be singularly annoying and they became angry - still only in words. But, finally, when their age old way of life, an integral part of their being, such as hunting the bison on horseback was to be changed, their indignation really began to rise . . . [T]he Bourgeois of the North-West Company . . . could never have succeeded in arousing so much resentment.¹²⁰

He goes on to explain that the Metis avoided armed confrontation as long as possible because of their love for peace.

In 1815 the settlers returned to the colony under the governorship of Lord Semple. Grant was ordered to surrender to the new governor the North West fort at Qu'Appelle and its supply of pemmican. Once again violence broke out between the settlers and the Metis, who joined the Nor'westers in the fight for free trade. The battles culminated with the battle of Seven Oaks in June of 1816. The settlers were defeated and on June 22 all colonists left the Red River.¹²¹ Again, Metis writers point to these battles as assertion of Metis sovereignty.¹²²

At this point, a diversion from Metis history is warranted in order to consider the significance of the genesis of Metis feelings of nationality and ownership in the natural law tradition. In natural law, intent is primarily relevant to abandonment and acquisition from previous occupants. Regardless of the origins of their beliefs, Metis feelings of nationality and ownership coupled with acts asserting their rights is contrary to an intent to abandon. Their individual possessory rights do not originate in Metis nationality, but the existence of a group is necessary to assert public and collective rights to land and entitlement to territorial jurisdiction. The issue in natural law is not the reason for the origin of the nation or group but its existence at the date of dispossession or assertion of sovereignty by a subsequent possessor. The roots of Metis beliefs are only significant if one ascribes to the positivist theory of recognition and then only as evidence that the government could not have intended to recognize the Metis as a nation asserting national rights recognized by principles of international law.

By 1817 the Hudson's Bay Company regained its hold in the valley and settlers began to return to the Colony. Although trade wars continued between the two companies the Metis remained neutral as a nation perhaps because they did not experience immediate threats to their rights.¹²³ Between 1821 and 1825 many of the Metis moved to the Colony and their economy began to change. By 1835 Governor Simpson was attempting to make the Council in Assiniboia more representative. Council members were chosen from racial and religious groups including the Metis. However, Metis representation was minimal and ineffective in protecting Metis rights. Consequently, the legislative power of the Council was recognized only to the extent that it promoted Metis interests and non-interference with prevailing economic lifestyles. Free trade became increasingly important to the Metis and between 1835 and 1850 they continued to oppose any restrictions on their economic rights. As discussed earlier, their disobedience to trade restrictions helped break the Company monopoly on trade.¹²⁴

In 1835 the Company regained title in the Colony and introduced a formal land purchase and leasing system. Land holding in the form of river front lots continued to be predominant and the transfer was made without prejudice to those who held title from Selkirk. Many of the Metis settled in the area claimed their individual lots by virtue of possession and had no paper or document to show they held their land from the Company or Selkirk. Although the Company policy was to sell land, they made no effort to disturb Metis possession.¹²⁵ At the same time, the Metis exercised what one author has labelled "passive resistance" by "squatting" on company land and trading as they pleased.¹²⁶ George

Stanley attributes this resistance to "the view that the land was theirs by natural law and that there was no need to bother about the Company's title."¹²⁷ Stanley concludes that the lack of systematic land tenure contributed to unrest among the squatters when Rupert's Land was transferred to Canada.

In 1868 the Company agreed to transfer title to Canada in exchange for £300,000.00 without consulting the inhabitants of the territory. Prior to the transfer taking effect surveyors entered the Red River area but were prevented by the Metis from carrying out their duties. Angered at the audacity of the Company and concerned for the protection of their rights the Metis organized against the acquisition of title and imposition of sovereignty by Canada.¹²⁸ The details of the resistance are examined in the following section.

The brief account given of Metis relations with the Company and original white settlers suggests they were willing to share Rupert's Land provided shared jurisdiction and occupation advanced their best interests. Throughout the period of shared possession they asserted their independence, maintained control over their economic base and continued organizing under traditional hunting governments. The existence of a shared property regime with the Europeans is legitimate for the same reasons as a shared regime between Indians and the Metis. The extent to which the Metis allowed encroachment on their rights over a long period of time is the extent to which the Europeans gained rights as against the Metis. This system avoided unnecessary violence and accords with man's natural inclination toward socialization and peace.

Thomas Flanagan has described the acquisition of Rupert's Land and the North West as a complicated real estate transaction. In return for monetary compensation, the Company surrendered its lands to the Crown. The sale assumed that the Company was the rightful owner of the land based on the Royal Charter of 1670. Indian title in the area was an encumbrance on the underlying title and had to be extinguished before the Crown could alienate the land to private owners. "Logically, the situation was not different from other real estate conveyances where an encumbrance existed upon a title, as from mortgage or other debt."¹²⁹ The Indians were dealt with through the subsequent numbered treaties and the Metis through the land grant provisions of the Manitoba Act. From the offer of purchase to the taking of possession the transaction was based on a contemporaneous understanding of aboriginal rights and the concession to the metis was made in the name of peace and expediency.¹³⁰

Natural law would reverse the levels of entitlement to Rupert's Land. A valid conveyance must recognize the rights of the original occupants as the foundation for derivative title. The Hudson's Bay entitlement would be based on a prescriptive right against the Indians and Metis rather than the Royal Charter. Pre-existing title would not be recognized in the Crown but individual rights of occupancy may have accrued to her subjects living for substantially long periods of time in Rupert's Land. Although the Royal Proclamation of 1763 prevented the settlers from acquiring Indian lands through prescription in positive laws, natural law would require some recognition of their possessory rights. In the acquisition of title each of these interests would have to be taken

into consideration. The main parties to the transaction are those with the most secure title -the Indians and the Metis. Upon an agreement being reached with all interested parties, the Crown would be free to assert title and jurisdiction over Rupert's Land. According to this analysis, the Company's title is an encumbrance on Metis and Indian title and not vice versa. Although the Company is entitled to compensation for its interest, the failure to conduct the transaction without consulting all of the proper parties invalidates the initial transfer vis a vis the Indians and Metis and subsequent unilateral acts of extinguishment by the Crown.

(c) Title in the Crown

The assumption of title to and sovereignty over Rupert's Land by the Canadian government prior to the enactment of the Manitoba Act was founded in the sale of Rupert's Land and the North West to the Imperial Government which in turn vested these rights in the Colonial government pursuant to principles of colonial law. Assuming the legitimacy of the acquisition, natural law does not place restrictions on the voluntary alienation of rights to Canada by the Crown. However, the Crown could not transfer greater rights than it possessed. Consequently terms of acquisition agreed to between the Crown and the Company were binding on Canada.¹³¹

It has been argued that natural law would disregard the sale of Rupert's Land at least to the extent that it purports to affect Metis and Indian title. Consequently, in absence of consent or abandonment of rights by the Indian and Metis peoples, Canada's assertion of sovereignty prior to an agreement being reached with

all relevant parties is invalid to the extent it over-reaches the parameters of the rights which have been acquired pursuant to the transfer by the Company. The only rights acquired were those of the Company. As the Company title co-existed with Metis and Indian rights, so too must the rights of Canadian government until the consensual surrender or abandonment of these rights. An examination of consensual acquisition of Indian rights is beyond the scope of this thesis except to mention that moral obligation was placed on the Metis as the more powerful Nation occupying Rupert's Land in 1870 to take into consideration the rights of less powerful nations in its dealings with Canada. The recognition of this obligation by the Metis has already been discussed. The concern of this section is to examine the foundation of Canada's assumption of Metis title and jurisdiction in natural law.

There are three possible foundations for Canadian assumption of Metis rights in 1870. Although abandonment may be worthy of examination if the effective date for analysis is challenged, it is clearly ruled out as of 1870 given the armed resistance of the Metis and the formation of the Provisional Government in order to organize against the Canadian government. The issue of consensual acquisition rest on the interpretation given to the Manitoba Act. If it is viewed as the enactment of an agreement between the Metis and the Canadian government, the Canadians can be said to have gained legitimate rights to Rupert's Land unless they are the improper parties to the agreement, the Act does not reflect the agreement reached or the agreement has been breached. Each of these provisos is examined in chapter five. The third possibility is the assumption of rights by force evidenced by the control of

the area by Canadian military immediately after the passing of the Manitoba Act.¹³² For the reasons discussed throughout this paper, forceful acquisition of Metis rights cannot be upheld in the natural law tradition. Consequently, by process of elimination we are left to examine the issue of consent. In pursuit of this issue four questions will be addressed: (1) Is the resistance in 1870 properly referred to as a "rebellion?" (2) Was the Provisional Government a legitimate party to the treaty? (3) Does the Manitoba Act represent a negotiated settlement or is it a unilateral act of the Canadian government? and (4) How does a natural law analysis compare to the views espoused by Louis Riel?

The word "rebellion" implies resistance or defiance to legitimate authority. Because the Company could not pass more rights than it had itself, the Canadian government did not have authority to assume title to lands used and occupied by the Metis. However, an argument can be made that Metis acquiescence to and participation in the Company government and general adherence to Company laws (with the exception of trade laws) placed limited sovereign powers in the Company which it was entitled to transfer to the Crown. The Crown's sovereign authority would remain subject to Metis property rights and those aspects of Metis sovereignty that had not been surrendered such as independent local governments organized around the hunt and freedom of trade.

This argument assumes that territorial sovereignty is open to acquisition by a process analogous to that by which property can be acquired. The degree of political development of the inhabitants of the territory determines whether they have proprietary and sovereign rights. In natural law, political

organization will not be measured against European standards as this necessitates bias and preference to community. Rather, it is sufficient that a group have sufficient organization and unity to assert rights as a group.¹³³ This same standard is found in naturalist philosophies of the law of nations and contemporary international law which recognize varying forms of political structures accommodating to the particular lifestyles of the group at issue.¹³⁴ Assuming political organization, rights can only be acquired by consent or prescription. Arguably, Metis acquiescence gave rights to certain prescriptive sovereign rights in the company.

One response to this argument is the Metis only supported the Company government to the extent it continued to represent Metis interests. Both the Governor of the Company and the Council of Assiniboia failed to protect Metis interests in the sale of Rupert's Land and during the transfer process. Consequently it lost jurisdiction over the Metis because it no longer had their implied authority. Although some objection was made to premature survey in the Red River area prior to the transfer taking effect, no effective steps were taken by the Company to protect Metis lands and their existing pattern of existence in Rupert's Land. Instead, the Company decided to leave the question of trespass on Metis lands premature assumption or exclusive political authority by Canada in the hands of the Imperial Government and continued negotiations with Canada, an agreement was finally reached in April, 1869.¹³⁵

The continuance of survey in 1869 created unrest among the French Metis in particular who began meeting in small groups and

later larger political assemblies to discuss the defence of their legal and political rights. The reasons for the growing resistance are debated among commentators. Some emphasize feelings of ownership and nationality, some emphasize insecure land tenure, some emphasize the wish for control by a local public government reducing the significance of any desire for lands outside those in immediate possession and some emphasize a concern for compensation for aboriginal rights. Whatever the reasons, by September of 1869 a National Committee was organized to resist the Canadians and specifically to prevent the Canadian Lieutenant Governor's entry into Canada. The Lieutenant Governor had been appointed under the Act For The Temporary Government of Rupert's Land passed by Canadian parliament before the transfer was complete.¹³⁶ When the Committee's actions were challenged by the Council of Assiniboia their response was that they were "breaking no laws, but merely defending their rights and the communities liberties."¹³⁷

Another argument is the Metis were obliged to support the Company government, and no other, unless they could negotiate terms of acknowledgement. Assuming the concern of the Metis was to ensure no rights beyond those surrendered to the Company by the Metis were to be assumed by a new government without their consent, this position is also legitimate in natural law because the Company cannot transfer greater rights than it possesses. This view also gains support by the statements of the Metis National Committee to the Council of Assiniboia. They explained to the council they would not accept a Governor not appointed by the Company "unless Delegates were previously sent with whom they might negotiate as to the terms and conditions under which they would acknowledge

him."¹³⁸ Rather than meet this challenge, the Council of Assiniboia adjourned and, with the exception of a few councillors who joined the Metis cause, was prepared to accept Canada's unconditional take-over of the Colony.¹³⁹

For the above reasons, natural law recognizes the legitimacy of Metis opposition to unconditional assumption of sovereignty by Canada. Consequently, the subsequent formation of a Provisional Government to represent Metis interests in face of the Company's abandonment of Metis concerns can not be justly labelled a "rebellion" as the Metis, and not the Canadians, had legitimate authority over Rupert's Land. The proper sovereign jurisdiction reverted to the shared jurisdiction of the Indians and Metis people, or at the very least, the Metis had the right to take steps to ensure the Canadian government would not assume greater jurisdiction than that enjoyed by the Company. The representation of the English speaking Metis and white settler population in the Provisional Government prior to the negotiations of entry with Canada gave it authority to speak on their behalf as well.¹⁴⁰ Arguably, the government did not have authority to speak on behalf of the Canadian occupants of Rupert's Land who supported Shultz, had formally been subjects of Company rule and acquired their rights through the Company or the Crown. However, there was a moral obligation on the Metis government as the dominant government in 1870 to keep these interests of all occupants in mind when negotiating their terms of surrender.

Unfortunately, the re-assumption of sovereignty was not without violence because of opposition by Canadian supporters in the area and Canada's initial refusal to recognize Metis rights.

Under the leadership of Dr. Schultz, Canadians organized English support for the new Canadian government and against Metis government. Small battles were fought between the Metis and the English resulting in the arrest of Schultz and his supporters. The Metis took up arms and defended their government against their opposition. They established their own military court and enacted punishment in accordance with rules established by the Metis government.¹⁴¹

It is beyond the scope of this thesis to examine the morality of specific incidences of violence such as the execution of Thomas Scott by the Metis court. However, a general consideration of the use of arms to defend Metis rights per se is relevant to the determination of whether their actions constitute "rebellion" and are legal in natural law. As natural law views their resort to violence as means to establish the Metis Government and oppose unjustified assumption of authority by the Canadian government, rebellion is clearly an inappropriate description of Metis activity. However, the legitimacy of resorting to violence is a separate issue which is resolved by considering the natural precepts of "just war" between two competing national interests.

As indicated earlier, natural law recognizes a right to self-defence. Theorists argue different natural origins of the right ranging from an innate tendency for self-protection to a natural duty on a state to preserve itself and provide for its subjects those things required for life, peace and security. Further, there is no unanimity of opinion as to the precise rights or interests that may be protected by self-defence. However, all extend the right to protect property and rights of ownership and limit the

defence to the nation inflicting the injury.¹⁴² Some scholars also place an obligation on the defending party to measure the protection of its rights against a threat to the global community.¹⁴³ According to Bowett, the fundamental justification put forward by naturalists is "a right to exist, a right of self-preservation, and the limits of the right of self-defence are discernible by a prior argument from this postulate, reconciling the right of one state with the rights of others on the basis of equality and mutual recognition of rights."¹⁴⁴

On this analysis, the Metis would not be justified in using force to establish their government against opposition by its own subjects as the rights of the state are dependant on authority from the people, but it is justified in resisting interference with its rights by other nations. However, the global common good of peace and stability would require that they use no more force than reasonably necessary and that violence be utilized only if other means have proven to be ineffective. It is clear from the beginning of the resistance that the intent of the Metis was to resist assumption of title and jurisdiction without agreement on Metis issues. Arguably, any violence was spurred by offensive actions on the part of the Canadians, their refusal to recognize the legitimate rights of the Metis, and their unlawful intervention in Metis affairs. Once rebels against Metis authority were placed under guard and Canada began discussing terms of entry with the Metis, incidents of violence were substantially minimized until the imposition of military rule by Canada after the passing of the Manitoba Act.¹⁴⁵ For these reasons, the Metis can be said to have

acted in defence and in accordance with their moral obligations toward the offending nation.

The issue of whether Canada recognized the legitimacy of Riel's Provisional Government when it negotiated terms of surrender with delegates from the Provisional Government is a matter of great debate. Some who argue it did not raise this issue in support of interpreting the Manitoba Act as a unilateral act of Parliament which gratuitously introduced certain "Metis rights" and limit rights of the Metis to those specified by legislation.¹⁴⁶ Others argue this point to illustrate bad faith on the part of the Canadian government in negotiations with the Metis.¹⁴⁷ In natural law, the issue of recognition is a red herring except to the extent it evidences bad faith. This follows from the precept that Metis rights have their origins in natural rights of property which exist independently of recognition by the Crown. Consequently, the intent of Parliament to recognize Metis rights is irrelevant to the basis of their claim. The Manitoba Act is not relevant to the origins of Metis rights but to their persistence. If it does not represent a negotiated agreement, it cannot affect their rights in natural law. If it does, it does not affect their rights to the extent it deviates from the agreement reached.

There is substantial support for the argument that the Manitoba Act represents the enactment of an agreement reached between two nations. Arguments for Metis nationality have been made elsewhere in this thesis and will not be repeated here. Rather, our focus here is to establish the consensual acquisition of Rupert's Land as the legitimate basis for Canadian title and

jurisdiction. Historical evidence supporting this conclusion include:¹⁴⁸

1. The drawing of a List of Rights by the Provisional Government to be presented to the Canadian government. Although there is some contention over which draft formed the basis of negotiations, there is general agreement among commentators that the List of Rights provided the basis for negotiation.
2. The election of delegates by the Provisional Government to go to Ottawa and negotiate terms of entry on behalf of the Metis people. The diary of one of the delegates, Father Ritchot, provides an account of the negotiations and indicates that delegates were chosen to represent interests of English and French Metis. Pursuant to the List of Rights, delegates also sought recognition on pre-existing forms of land tenure enjoyed by all occupants of Rupert's Land.¹⁴⁹
3. Correspondence between officials and speeches to the legislature evidence Canada's recognition of the delegates, its intention to negotiate terms to satisfy Metis claims and its view of the Manitoba Act as the culmination of negotiations with the delegates. Although there is some debate as to their recognition of Metis rights derived from Indian ancestry, it is evident the government recognized claims by virtue of possession.¹⁵⁰ Of particular interest is the following explanation

given by Sir Wilfred Laurier when addressing half-breed grievances in the North West: . . . They rebelled; they objected to the further progress of the Canadian Government into what they considered their country, until their rights were recognized and guaranteed; and after the rebellion, the Government had to admit and did admit, that the same prudent principles that applied to the Indians should apply to the Half-breeds. The Government admitted that as original possessors of the soil they were entitled to the same compensation as the Indians . . . Though the principle was the same, its application in the two cases could not be identical, because of the difference in the state of civilization of the two races.¹⁵¹

4. The endorsement of the Manitoba Act by the Provisional Government and its enactment by the Government of Canada.

Additional support can be drawn from a comparison of the Manitoba Act and the final List of Rights. Although some demands from the List are excluded and new demands included the essence of the Act reflects Metis demands. The extent to which the Act deviates from initial demands is explained in Ritchot's account of the negotiations and has triggered debate on the question of delegates acting beyond the scope of their authority and the intention of the Provisional Government to establish a land base for the Metis.¹⁵² In particular, the Act concedes to the major political demand, that of provincial status, the demand for

recognition of individual possessory rights, and the demand for protection of both the English and French languages.¹⁵³

The argument that the Manitoba Act is a treaty also finds support in the views of Louis Riel. In his view, the formation of the Provisional Government was justified by the Law of Nations which allows rightful inhabitants of a land to form a government for the protection of life and property. He argued the sale of Rupert's Land may have affected Company rights, but it did not affect the rights of the Metis. As the Metis were the true owners of the land, their entitlement was not dependant on the English sovereign and transferring lands without their consent violated the law of nations. He also argued that the Company's abandonment of government gave the people a right to form a government to negotiate on their behalf. Subsequent union with Canada was not a unilateral action by declaration in Ottawa, but a treaty in the sense of an international agreement between two independent nations. The treaty had two parts - the written text and an oral promise of amnesty. Breach of the treaty legitimized subsequent resistance to the Canadian expansion in the North West in 1885. The foundation of Riel's argument was natural law and the law of nations he saw the Metis struggle as an effort to protect their national and natural rights.¹⁵⁴

The main arguments against this interpretation are the Metis lacked sufficient coherence to assert national rights, title did not rest with the Metis Nation, and Metis rights existed subject to the will of the sovereign.¹⁵⁵ As each of these arguments can not be sustained when measured against principles of natural law and

historical evidence supports the existence of an agreement, natural law favours interpreting the Act as a treaty.

(d) Conclusion

In summation, Metis title is properly viewed as arising from a prescriptive right against the original occupants. Prior to 1870 the Metis enjoyed shared occupancy rights and jurisdiction with the original Indian occupants, and the Hudson's Bay Company. The result was the creation of layered entitlement based on the acquiescence or indifference or abandonment of the original occupants. The further away the entitlement from the original source, the less secure that title is in natural law because of the presumption in favour of rights of original occupants. Upon the Company ceasing to represent Metis interests in 1870, their jurisdiction over Metis people was revoked, but any rights to land they may have acquired through occupation over a substantial period of time remained. The result was a return to shared sovereignty between the Indians and Metis but a quadruple layer of land entitlement (including settler titles derived from the Company). The entitlements were not justified by virtue of Sovereign recognition, but possession by the claimants.

Although the transfer of Rupert's Land may have affected the Company's proprietary rights and those derived from Company grant, it did not affect Metis rights. Rather, the surrender of Metis rights was affected through negotiations between Canada and the Metis Provisional Government. The persistence of Metis rights subsequent to an agreement being reached depends on the terms of

the agreement and the extent to which those terms have been honoured.

The theory of layered entitlement also receives some support from the land provisions in the Manitoba Act. It is clear the Metis were concerned about a variety of proprietary interests in their negotiations. These interests were intended to be protected by sections 31 and 32 of the Act. Where s. 31 is a general land grant provision in satisfaction of Metis claims, section 32 was intended to embrace individual Metis and settler claims arising from peaceful possession.¹⁵⁶ These provisions coupled with a payment to the Company and treaties with the Indians, would effectively cover all possessory claims derived from the original Indian title.

4. Metis Territory

The final, and perhaps most difficult, criteria to establish Metis natural rights is the identification of Metis territory in Rupert's Land. Some assert entitlement to the entire territory known as Rupert's Land prior to its surrender in 1870. This area consisting of approximately 123,000 square miles or 78,848 acres.¹⁵⁷ The difficulty with this position is it fails to take into consideration entitlement arising from the layering of titles; shared use of public lands for hunting, fishing and trapping; exclusive Indian territories and shared sovereign rights to unclaimed public lands. A second option is to limit territory to Metis settlements established in 1870. If this approach is taken at least 33 communities can be identified along the Assiniboine River, Red River, Whitemouth River, Siene River and along Lake

Manitoba.¹⁵⁸ The problem with this approach is it fails to take into consideration the extent of hunting territories and trade routes, lands traversed by hivernant groups of Metis, and public lands shared with the other inhabitants of Rupert's Land.

The difficulty in identifying territory is compounded by the lifestyle of the Metis. Although some were settled, many lead semi-settled and nomadic lives. Further, land use did not necessarily result in cultivation or other recognizable forms of improvement so it would be very difficult to obtain evidence of possession other than Metis claims to use. For example, in addition to hunting the Metis engaged in fur trapping, gathering, fishing, maple sugaring, limestone production and salt mining. Although predominant sites for these activities can be identified such as Lake Winnipeg, the limestone belt from the southern part of the province to the north of the Pas, the wild rice patches and the seneca root harvest areas; the Metis were free to pursue these uses throughout Manitoba along with their Indian neighbours.¹⁵⁹

The difficulty of identifying territory is further complicated by the migration patterns of the Metis prior to and immediately after 1870. After 1870 many Metis left settlements to pursue the hunt and live a hivernant lifestyle. The location of hivernant villages and camps can be ascertained through archaeological research, but it is clear the Metis did not reside in these locations for a substantial period of time.¹⁶⁰ After 1870, many migrated out of Rupert's Land for various reasons. Although the intimidation of the Woolsey reign of terror in the Red River Area, the rapid settlement of Rupert's Land, the scarcity of the buffalo and the loss of land through scrip are legitimate arguments against

voluntary abandonment by the Metis; subsequent migration adds to the difficulty in identifying a permanent territory.

The fluidity of Metis boundaries and their mode of existence has caused positivists to cast doubt on the ability of the Metis to establish a claim to title.¹⁶¹ Although natural law recognizes the difficulties of establishing their exclusive entitlement to all of Rupert's Land given the layer of titles in the area, it would determine it equally unjust to bar a claim to title when patterns of settlement and land use throughout Rupert's Land are undisputed. The solution to the difficulty does not lie in denial, but in the recognition of joint title and peaceful co-existence. As there is sufficient evidence to illustrate shared title and jurisdiction, natural law would reject showing preference to one claim to the exclusion of the other. Rather, the Indians, and Metis would be equally capable of asserting claims to the entire area. However, this does not mean the appropriate compensation in the event of transfer is a reservation of the entire area to one or the other group as this would be impossible without giving preference to one community over the other. Consequently the identification of specific territories within Rupert's Land is properly dealt with as a question of compensation and not entitlement to claim compensation. The problem is a pragmatic one in the acquisition of rights and not one of entitlement of the prior possessor.

III Summary of a Natural Theory of Metis Title

In summary, my theory on the natural origins of Metis Title is:

1. With the exception of tracing aboriginal rights of use and occupation through maternal lines, little attention has been paid to the origins or source of Metis title.
2. Contemporary arguments raised against the existence of Metis title are difficult to sustain within the natural law tradition. The focus on legislative recognition and common law proofs of title results in a failure to understand the natural origins of Metis title and its classification as an aboriginal right. The significant link between the Metis and Indian peoples is not just ancestry, but the fact that their rights are, or are derived from the natural rights of original occupants (aboriginals).
3. Proof of title can be established by meeting three criteria: (a) the existence of an identifiable group; (b) original rights or prescriptive rights against the original occupant; and (c) an identifiable territory. The effective date of application of these criteria to the Manitoba Metis should be June, 1870.
4. The terms "Indian," "aboriginal," and "indigenous" have been created within the positivist regime to explain the recognition of certain rights by colonizing nations and cannot be translated into natural theory without being accompanied by undesirable positivist baggage. Consequently, it is best to refer to natural rights of specific

peoples rather than attempting generic categorizations. The issue is not whether a people fits within one of the mentioned groups, but the identification of a people possessing natural rights derived from the original occupants prior to the legitimate acquisition of original title by the Crown.

5. As of June, 1870, the Metis had sufficient coherence, permanence, political organization and self-identity to qualify as a single group. The group was composed of various economic, social and political communities united by a national consciousness and government.
6. Metis title is a form of aboriginal title arising from prescriptive rights against the original inhabitants of Rupert's Land by virtue of the latter's failure to assert rights to the exclusion of the Metis. The absence of bad faith on the part of the Metis coupled with a history of relations evidencing the implied consent of the original occupants to share title and jurisdiction to Rupert's Land legitimizes the foundation of their claim in natural law. However, principles of natural law would exclude from Metis territories those territories outside of Rupert's Land acquired from the Sioux Nation through conquest.
7. Prior to June of 1870 the Metis Nation shared possession of Rupert's Land with the original

occupants, the Hudson's Bay company and eventually the Selkirk settlers. Entitlement of the Company and white settlers is not based on Crown grant, but prescriptive rights against the original occupants and the Metis. The further away from the source, the less secure the title in natural law. The result is a layering of possessory titles derived from the original occupants.

8. The transfer of Rupert's Land did not affect Metis rights. Rather, the surrender of Metis rights was affected by an agreement between Canada and the Provisional Government. The persistence of Metis rights depends on the terms of the agreement and the extent to which it is honoured.
9. Natural Law would recognize all of Rupert's Land as the joint territories of the Indians and Metis. The identification of specific areas within Rupert's Land is best dealt with as a question of compensation rather than entitlement.

CHAPTER 4 ENDNOTES

1. See, for example, D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" and "Legal Basis of Metis Claims: An Interview with Douglas Sanders" in H. Daniels, The Forgotten People (Ottawa: Native Council of Canada, 1979) 5-22 and 94-99; C. Chartier, "Aboriginal Rights and Land Issues: The Metis Perspective" in The Quest for Justice eds. M. Boldt and J. Long (Toronto: University of Toronto Press, 1985) 54-61; C. Chartier, "Indian: An Analysis of the Term as used in Section 91(24) of the British North America Act, 1867" (1978-79) 43 Saskatchewan Law Review 39; "Aboriginal Title" chap. in Metis Assoc. of Alberta, J. Sawchuk and T. Ferguson, Metis Land Rights in Alberta: A Political History (Edmonton: Metis Assoc. of Alberta, 1981) 53-78; Native Council of Canada, A Statement of Claim Based on Aboriginal Title of the Metis and Non-Status Indians (Ottawa: Native Council of Canada, 1980). B. Morse, Aboriginal Peoples and the Law: Indian, Inuit and Metis Rights in Canada (Ottawa: Carleton University Press, 1985) at 4-5; P. Cumming and N. Mickenberg, Native Rights in Canada, 2d ed. (Toronto: General Publishing Co. Ltd., 1972) at 200-204.
2. Manitoba Act, S.C. 1870, c. 3, s. 31; There were various Dominion Lands Acts which contained specific reference to the Metis. Of particular interest are Dominion Lands Act, 1879, 42 Vic. c. 31, s. 125; 1883, 46 Vic. c. 17, s. 81.
3. B. Schwartz, First Principles: Constitutional Reform With Respect to the Aboriginal People of Canada (Kingston: Queen's University Institute of Intergovernmental Relations, 1985) at 184; P.E. Trudeau, "Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters, 8-9 March 1984" in The Quest for Justice, supra, note 1 at 153; Metis Association of Alberta, supra, note 1 at 246-247.
4. See, for example, Schwartz, id. at 203-228; T. Flanagan, "Metis Aboriginal Rights: Some Historical and Contemporary Problems" in The Quest for Justice, supra, note 1 at 230-245; T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) IX Canadian Public Policy 314.
5. Metis Assoc. of Alberta, supra, note 1 at 72-73; T. Flanagan, Riel and the Rebellion: 1885 Reconsidered (Saskatoon: Western Producer Prairie Books, 1983) at 77-85.

6. Father Ritchot's Diary (1870), trans. Berlitz Translation Service, Public Archives of Canada, Ottawa, photocopied, 14. All commentators on the Manitoba Act acknowledge that negotiations centred on a Metis List of Rights approved by the Provisional Government. However, there is disagreement on whether the List was intended to deal with Indian title and Ritchot's authority to negotiate this claim. See, for example, Flanagan, id. at 59-61; Association of Metis and Non-Status Indians of Saskatchewan (A.M.N.I.S.) "The Nationhood Claim of the Metis - The Historical and Empirical Basis of the Claim in 1870" (Saskatchewan: July 15, 1979) 44 photocopied, at 21-31; Metis Association of Alberta, supra, note 1 at 70-72; Native People and the Constitution of Canada, by H. Daniels, Commissioner (Ottawa: Mutual Press, 1981) at 56-58. Regardless of disagreement on the question of authority and understanding, it is clear Ritchot explained the title question to the Provisional Government prior to its approval of the Manitoba Act. See discussion in Chapter 5, Section II, 2.
7. See, for example, D.B. Sealey Statutory Land Rights of the Manitoba Metis (Winnipeg: Manitoba Metis Federation Press, 1975) at 50-63; Native Council of Canada, supra, note 1; A.S. Morton, "The New Nation, The Metis" in The Other Natives: The Metis, Vol I., A. Lussier and D.B. Sealey, eds. (Winnipeg: Manitoba Metis Federation Press and Editions Bois-Brules, 1978) 27-37 at 34-37; Tremaudan, A.H. Hold Your Heads High: History of the Metis in Western Canada, trans. E. Maguet (Winnipeg: Pemmican Publications, 1982) at 51-98; H. Adams, Prison of Grass: Canada From a Native Point of View (Toronto: General Publishing, 1975) at 54-61. Other authors recognize the contributions of Metis views on ownership and nationality but place more emphasis on the threat of civilization to the Metis way of life. See, for example, G. Stanley, The Birth of Western Canada, A History of the Riel Rebellions (Great Britain: Longman's, Green and Co. Ltd., 1936; reprint, Toronto: University of Toronto Press, 1960, at 18, 48-49 and 61.
8. See, for example, supra, note 1.
9. Id.
10. Dumont et al v. A.G. of Canada (17 June 1988) Winnipeg 152/87 at 15 (C.A.). On appeal to the Supreme Court of Canada.
11. See, for example, E. Pelletier, A Social History of the Manitoba Metis: The Development and Loss of Aboriginal Rights (Winnipeg: Manitoba Metis Federation Press, 1974).

12. See, for example, R. McKay, "History of West Never Complete Until Interpreted by Metis People" in The Forgotten People, supra, note 1 at 23-31; Alberta Federation of Metis Settlement Associations, Metisism: A Canadian Identity (Edmonton: Alberta Federation of Metis Settlement Assoc., 1982) at 1-6; D.B. Sealey, "One Plus One Equals One" in The Other Natives: The Metis, Vol. II, supra, note 7 at 1-14. D. Sealey and A. Lussier, The Metis: Canada's Forgotten People (Winnipeg, Manitoba Metis Federation Press, 1975). This interpretation of Metis history is also adopted by legal scholars but has not been incorporated into a legal theory on origins or proof. Rather, these incidents are usually cited to support the argument of recognition.
13. Sealey and Lussier, id. at 9; D. Redbird, We are Metis: A Metis View of the Development of Native Canadian People (Willowdale: Ontario Metis and Non-Status Indian Association, 1980) at 55.
14. S. Carter, "Metis Aboriginal Title" (Saskatoon: University of Saskatchewan College of Law, 1978) 41, Photocopied; Metis Association of Alberta, supra, note 1 at 78-81; Flanagan, supra, note 4.
15. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513 (F.C.T.D.).
16. Carter, supra, note 14 at 23.
17. Metis Assoc. of Alberta, supra, note 14 at 81.
18. Constitution Act, 1982 (U.K.), 1982, c. 11.
19. Flanagan "The Case Against Metis Aboriginal Rights," supra, note 4 at 314. Flanagan's arguments against recognition are discussed in Section 3 of this chapter.
20. See note 16 in the endnotes to Chapter one of this thesis.
21. R.S.C., 1970, Appendices, p. 123.
22. See, for example, the following Orders-in-Council which make specific reference to aboriginal or Indian title: PC No. 369, 3 April 1873; PC No. 821, 18 April 1885; PC No. 918, 6 May 1899; PC No. 438, 2 March 1900; PC No. 1182, 6 June 1901; PC

No. 1060, 29 May 1909; PC No. 1172, 12 April 1921; PC No. 471, 26 March 1924; and PC No. 1409, 6 August 1906. Of these, PCs Nos. 406 and 438 refer to Manitoba half-breeds. The remainder implement provisions of the Dominion Lands Act or deal with half-breed claims in specific treaty areas. The latter contain the least ambiguous phraseology concerning Metis aboriginal title. Reference is made to aboriginal title "of" or "preferred by" the half-breeds.

23. Id. See also the discussion at pages 63 to 72 in Chapter two of this thesis. Of particular interest is the half-breed Adhesion to Treaty No. 3, 12 September 1875 which explicitly recognizes Metis aboriginal title. Reprinted in A Statement of Claim Based On Aboriginal Title of the Metis and Non-Status Indians, supra, note 1, appendix 13.
24. Supra, note 22. See also PC No. 238(a), 19 March 1876 which simply refers to satisfaction of "claims under the Act." Regarding the question of Indian blood, see PC No. 1202, 2 July 1885, which defines "children of half-breed heads of families" to include "all those of mixed blood, partly white and partly Indian, and who are not heads of families." Other Orders-in-Council referring to claims arising in relation to Indian blood deal with claims satisfied in conjunction with treaty negotiations. See, for example: PC No. 2675, 14 December, 1888; 1899 and PC No. 438, 2 March 1900.
25. See, for example, An Act to Authorize Free Grants of Land to Certain Original Settlers and their Descendants, in the Territory Now Forming the Province of Manitoba (1873), 36 Vic. c. 37; An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba (1874), 37 Vic. c. 20; PC No. 1102, 28 November 1872; PC No. 406, 26 April 1875; PC No. 895, 7 October 1876; PC No. 794, 27 August 1877; PC No. 1464, 10 December 1879; PC No. 810, 20 April 1885; PC No. 630, 12 March 1892; PC No. 485, 28 February 1894. See also T. Flanagan, "The Case Against Metis Aboriginal Rights," supra, note 4, at 318-319. The argument that Metis title is the same as that enjoyed by original white settlers is discussed within a positivist framework in Chapter two Section I of this thesis.
26. Supra, note 10 at 10.
27. Dene/Metis Comprehensive Land Claim Agreement in Principle (Ottawa: Department of Indian Affairs and Northern Development, 1988) sections 3.1.9, 4.1 and 4.2; Regarding the farm colonies in Saskatchewan and the Metis Settlements in Alberta, see the discussion in Chapter 2, Section II of this thesis. The position of the Alberta government is also discussed in Alberta Native Affairs, Alberta's Metis

Settlements: A Compendium of Background Documents, compiled by H. Beharry (Edmonton: Native Affairs Secretariat, 1984); D. Sanders, "A Legal Analysis of the Ewing Commission and the Metis Colony System in Alberta," Paper prepared for the Metis Association of Alberta (Edmonton: April 4, 1978) 36 Photocopied, at 6-7; Alberta Federation of Metis Settlement Assocs, supra, note 12 at 8-9.

28. Exclusion from the land claims negotiation process followed from the federal government's position on jurisdiction and extinguishment. However, research conducted by the Indian Claims Commission in 1975 admits three possible categories of claims. See, Metis Assoc. of Alberta, supra, note 1 at 243-247.
29. Schwartz and Trudeau, supra, note 3.
30. Supra, note 5.
31. Flanagan, id. at 59.
32. Id. at 68.
33. Id. at 80.
34. St. Catherine's Milling Co. v. R. (1888), 14 A.C. 46 (P.C.).
35. See the discussion of St. Catherines, id. at pages 152 to 155 in Chapter 3 of this thesis and the validity of the Company's title at page 131 of the same chapter.
36. See Chapter 3, Section III, 3 of this thesis.
37. Supra, note 4.
38. T. Flanagan, "The Case Against Metis Aboriginal Rights," supra, note 4 at 316; see also B. Schwartz, supra, note 3 at 218-220.
39. Id. at 319.

40. Id.
41. Id. at 320.
42. Id.
43. Id. at 322.
44. Guerin v. R. [1984] 2 S.C.R. 335.
45. See, for example, D. Jenness, The Indians of Canada, 7th ed. (Toronto: University of Toronto Press, 1977) at 327-376.
46. See, for example, G. Morris, "In Support of the Right of Self-Determination for Indigenous Peoples under International Law" (1986) German Yearbook of International Law 277; D. Sanders, "The Re-Emergence of Indigenous Questions in International Law" (1983) 4 Canadian Human Rights Yearbook, 29; See also pages 137 to 168 of Chapter 3 of this thesis.
47. Regarding the moral obligation of powerful communities see D. Gormley, "Aboriginal Rights as Natural Rights" (1984) 1 The Canadian Journal of Native Studies IV, 29 at 33-35 and 37. Choosing the date of dispossession has also been promoted as the "just" approach for dealing with claims of dispossessed people by the Canadian Bar Association and well known academics. See, Aboriginal Right in Canada: An Agenda for Action: Report of the C.B.A. Committee on Aboriginal Rights in Canada, by A. Thompson, Chairman (Ottawa: The Canadian Bar Association, 1988) at 26-27; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727 at 756.
48. See discussion of the Marshall cases in Chapter 3, Section III, 1 of this thesis.
49. See, for example, E. Pelletier, The Exploitation of Metis Lands (Winnipeg: Manitoba Metis Federation Press, 1975); Sealey, supra, note 7 at 67-79; D. Sealey, "Statutory Land Rights of the Manitoba Metis" in The Other Natives, Vol. II., supra, note 7 at 1; Metis Assoc. of Alberta, supra, note 1 at 87-158.
50. See, D. Sanders, supra, note 1 at 10; Stanley, supra, note 7 at 124 and 139-143; Sealey and Lussier, supra, note 12 at 87

and 92-94; Sealey, "One Plus One Equals One," supra, note 12 at 23-25; Tremaudan, supra, note 7 at 95-107.

51. For a more detailed discussion of the conclusions see Chapter 3 of this thesis.
52. Sealey, "One Plus One Equals One," supra, note 12 at 24. See also Metis Assoc. of Alberta, supra, note 1 at 18-20; Tremaudan, id. Chapters 1 and 2; Pelletier, supra, note 11.
53. See, for example, Stanley, supra, note 7 at 10 and 48-49; Morton, supra, note 7; Tremaudan, id. Chapters 1 to 3; Metis Assoc. of Alberta, id. at 20-39. For a general discussion of Metis nationality see the discussion at pages 10 to 16 in Chapter one, Sections I, 1(b) and II.
54. Although some of the English half-breeds purchased title from the Hudson's Bay Company, most were "squatters" under the eyes of English law claiming rights by virtue of possession. For these half-breeds and most white settlers their central concern was responsible government. Both groups, with the exception of the Canadians led by Shultz, eventually supported the Provisional Government. For a discussion of the unification of the French and English speaking populations see Stanley, id. at 62-63, 71-83 and 98-99. Sealey and Lussier, The Metis: Canada's Forgotten People, supra, note 12 at 80-84 and Tremaudan, id. at 61-99. Regarding the close social relationships between the two groups and their identification as a single community see I. Spry, "The Metis and Mixed-Bloods of Rupert's Land before 1870" in The New Peoples: Being and Becoming Metis in North America, eds. J. Peterson and J. Brown (Winnipeg: The University of Manitoba Press, 1985) 95-118.
55. Tremaudan, supra, note 7 at 1; D. Jenness, supra, note 45 at 2.
56. See the discussion in Chapter 2, Section II of this thesis.
57. D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in Canada and the New Constitution: The Unfinished Agenda, Vol. I, eds. S.M. Beck and I. Bernier (Montreal: Institute for Research on Public Policy, 1983) at 252-253.
58. Flanagan, supra, note 38 at 321.

59. Id. at 321-322.
60. British North America Act, 1867, 30 & 31 Vict., c. 3, s. 91(24).
61. See, for example, the limitations placed by B. Schwartz on the term "Indian" in s. 91(24) of the B.N.A. Act, id. at pages 59 to 67 in Chapter 2 of this thesis and the interpretation of the word "Indian" in s. 35(2) of the Constitution Act, 1982 (U.K.), 1982, c. 11 at pages 26 to 27 in Chapter 1 of this thesis.
62. Gormley, supra, note 47 re obligation of powerful communities. See also the discussion of Opekokew's equality arguments in Chapter two, Section III, 1 of this thesis.
63. Shorter Oxford English Dictionary, 3d, Vol. II (Oxford: Clarendon Press, 1975) at 1057.
64. Schwartz, supra, note 3 at 228. This view has also been adopted by certain Metis authors. See also H. Daniels, We Are the New Nation (Ottawa: Native Council of Canada, 1978) at 6; supra, note 13.
65. Those who support a definition of metis people beyond descendants of the Metis Nation defined in Chapter one would extend the argument to say the Metis originated where the first mixed-blood child was born and became a people indigenous to North America. See Chapter 1 of this thesis for a discussion of the debate and its effect on the identification of Metis territory.
66. See discussion at pages 114 to 124 in Chapter 3 of this thesis.
67. Supra, note 47.
68. G. Ens, "Dispossession or Adaptation? Migration and Persistence of the Red River Metis 1835-1890," Paper presented at the "CHA Annual Meeting" Ontario, University of Windsor, 9-11 June 1988, 33 photocopied at 5; see also supra, note 52; Sealey and Lussier, supra, note 54 at 13-14.
69. Supra, note 52; Sealey and Lussier, id. at 13-14.

70. Stanley, supra, note 7 at 9; Tremaudan, supra, note 7 at 8.
71. Sealey and Lussier, supra, note 54 at 29.
72. See generally, Sealey, Statutory Land Rights of the Manitoba Metis, supra, note 7 at 20-31; Stanley, supra, note 7 chapters 1 and 3; Tremaudan, supra, note 7 at 24-36; Morton, supra, note 7 and supra, note 12.
73. Supra, note 54.
74. Stanley, supra, note 7 at 10.
75. See generally, Sealey and Lussier, supra, note 54 at 44-45; Tremaudan, supra, note 7 at 36-39; A.M.N.I.S. supra, note 6 at 9-11 Ens, supra, note 68; Sealey, supra, note 72 at 30-38.
76. Sealey and Lussier, id. at 58-59.
77. Ens, supra, note 68 at 5-6.
78. Id. at 7-10; Sealey and Lussier, supra, note 54 at 60-64; Metis Assoc. of Alberta, supra, note 1 at 16-18; A.M.N.I.S., supra, note 75 at 10.
79. Ens, id. at 10.
80. Supra, note 78. See also H.S. Sprague, "The Metis Nation: Buffalo Hunting vs Agriculture at the Red River Settlement" in The Other Natives: The Metis, supra, note 7 at 115-130.
81. Sealey and Lussier, supra, note 54 at 60-62; See also, supra, note 72.
82. Quoted in Sealey and Lussier, id. at 62. Other petitions were forwarded to the Crown and the Hudson's Bay Government between 1835 and 1850 concerning free trade, Metis representation on the Council and french language rights. See Adams, supra, note 7 at 52; Stanley, supra, note 7 at 44-47; Tremaudan, supra, note 7 at 44-46.

83. Sealey and Lussier, id. at 63-64; Stanley, id. at 46-47; Tremaudan, id. at 46-49.
84. A.M.N.I.S. supra, note 75 at 11; C. Chartier "Indian: An Analysis of the term . . .," supra, note 1 at 44, Sealey and Lussier, supra, note 54 at 68.
85. See discussion in Section II, 3(b) of this chapter.
86. A.M.N.I.S., id. at 10-11; Tremaudan, supra, note 7.
87. Tremaudan, id. at 14.
88. There are numerous accounts of political organization around the hunt. See, for example, Sealey and Lussier, supra, note 54 at 51-53; H.S. Sprague, supra, note 80; Metis Assoc. of Alberta, supra, note 78; Tremaudan, id. at 12-14.
89. Morton, supra, note 7 at 35; See also discussion in Section II, 3(c) of this chapter and Chapter 5, Section II, 2.
90. Sanders, supra, note 1 at 8.
91. Ens, supra, note 68 at 7-20.
92. D.N. Sprague, "Government Lawlessness in The Administration of Manitoba Land Claims, 1870-1887" (1980) 10 Manitoba Law Journal 415 at 416-418; Letter from A. Archibald to Secretary of State (Dec. 27, 1870), P.A.C. R.G. 15, Volzza.
93. Reprinted in Metis Assoc. of Alberta, supra, note 1 appendix 2. There is some debate whether Ritchot based negotiations on the final list of rights. However, the difference between the two lists was insignificant. See Stanley, supra, note 7 at 113-114.
94. See, for example, Metis Assoc. of Alberta, supra, note 1 at 87-158; Pelletier, supra, note 49.
95. See, for example, Flanagan, supra, note 5 at 74.

96. Stanely, supra, note 7 at 141; Tremaudan, supra, note 7 at 99-109.
97. See Ens, supra note 68 at 20-33; Metis Assoc. of Alberta, supra, note 1 at 35-38; Sealey and Lussier, supra, note 54 at 91-101.
98. Supra, note 49.
99. See, for example, Sealey and Lussier, supra, note 72 at 93; debates, colonization Co. article.
100. Supra, note 53.
101. See Chapter three, Section I, 2.
102. Supra, note 11 at 2; Jenness, supra, note 45 at 277, 284, 308, 316-317.
103. Tremaudan, supra, note 7 at 45; Sealey and Lussier, supra, note 54 at 43.
104. See, for example, supra, note 54 at 99; P. Dickason, "From 'One Nation' in the Northeast to 'New Nation' in the Northwest: A Look at the Emergence of Metis" and J. Peterson, "Many Roads to Red River: Metis Genesis in the Great Lakes Region, 1680-1815" in The New Peoples: Being and Becoming Metis in North America, supra, note 54.
105. Tremaudan, supra, note 7 at 19-20.
106. Id. at 45; Sealey and Lussier, supra, note 72 at 43-49.
107. There are numerous accounts of the battle of Grand Coteau. See, for example, W.L. Morton, "The Battle of Grand Coteau" in The Other Natives: The Metis, supra, note 7 at 47-62. Regarding the expansion of Metis territories see McKay, supra, note 12 at 25 and D. McLean, Fifty Historical Vignettes: Views of the Common People (Regina: Gabriel Dumont Institute of Native Studies and Applied Research, 1987) at 30-32.
108. Metis Assoc. of Alberta, supra, note 1 at 252.

109. Sealey and Lussier, supra, note 54 at 43.
110. Slattery, supra, note 47 at 741-742.
111. Supra, note 101.
112. Id.
113. See, for example the views of Vitoria in De Indes et de Jure Belli: Reflectiones, trans. by J.P. Bates in J.B. Scott, ed., The Classics of International Law (Washington: Carnegie Institution 1917; reprint, Ocean Publications Inc., 1964) at 163-187. The numerous theories leading eventually to the predominance of this position are discussed in E. Midgley, The Natural Law Tradition and the Theory of International Law (London: Elek Books Ltd., 1975). Modern writers often start with Vitoria's proposition that just war must be considered in relation to the common good of the global community. See Midgley at 257-258 and D. Bowett, Self-Defence in International Law (Manchester: Manchester University Press, 1958) at 4-5.
114. Excerpts of the Charter are reprinted in Sealey, supra, note 72 at 4-7.
115. A different conclusion might be reached if restrictions were placed after the legitimate assumption of authority by the Crown. Once the Crown assumes authority, restrictions may be legitimately imposed as protective measures.
116. See, for example, Sealey, supra, note 72 at 9-17; Sealey and Lussier, supra, note 54 at 34; Stanley, supra, note 7 at 10-11 and 14.
117. Stanley, id. at 14.
118. Sealey and Lussier, supra, note 54 at 37-40.
119. Supra, note 53.
120. Tremaudan, supra, note 7 at 28.

121. Sealey and Lussier, supra, note 54 at 41-42; Stanley, supra, note 7 at 11-12; Tremaudan, supra, note 7 at 31-36.
122. Supra, note 12.
123. Lussier and Sealey, supra, note 54, at 42-43.
124. Supra, note 72; M. Hudson and M. Fladell "The Development of Government in Red River," paper prepared for the Native Council of Canada, 35 photocopied at 17-18.
125. Stanley, supra, note 7 at 14-15; Sealey, supra, note 72 at 40-43.
126. Quoted in McKay, supra, note 12 at 24.
127. Id. at 14.
128. Sealey and Lussier, supra, note 54 at 76.
129. Supra, note 5 at 79.
130. Id. at 77-80.
131. See Chapter three, Section II, 4.
132. Supra, note 50.
133. See discussion of political organization in Chapter three, Section II, 2.
134. See, for example the views of Vitoria discussed in Section II, 2 and the Western Sahara Case (1975) I.C.J. Reports 6 at 39.
135. Hudson and Fladell, supra, note 124 at 15; Stanley, supra, note 7 at 68-71, 75-85.

136. Id. at 21-24; Sealey and Lussier, supra, note 54 at 78-80; Stanley, supra, note 7 at 75-86; Tremaudan, supra, note 7 at 57-71.
137. Supra, note 124 at 24; See also Louis Riel's Case (1874) P.A.C., R.G. 7, G. 18, Vol. 26 (1) reprinted in Native Council of Canada, supra, note 1 appendix 10.
138. L. Dorge "The Metis and Canadian Councillors of Assiniboia" Part III (1974, Winter) Beaver 51 at 54.
139. Id.; Hudson and Fladell, supra, note 124 at 25-27; 29; See also, Stanley, supra, note 7 at 85 which suggests the council disbanded because of McDougall's premature assumption of authority.
140. Supra, note 54; Hudson and Fladell, id. at 25-30. Stanley.
141. See, for example, Stanley, supra, note 7 at 98-106; Tremaudan, supra, note 7 at 71-89; Sealey and Lussier, supra, note 54 at 80-89.
142. Bowett, supra, note 113 at 4-6.
143. Midgley, supra, note 113.
144. Bowett, supra, note 113 at 7.
145. Supra, note 141.
146. See, for example, supra, note 5 at 61.
147. See, for example, Native People and the Constitution of Canada, supra, note 6 at 54-60.
148. See generally, Stanley, supra, note 7 Chapters VI and Tremaudan, supra, note 7 at 52-110.
149. Supra, note 56 and 93; Stanley, supra, note 7 Chapter 4.

150. See, for example, House of Commons Debates, 9 May 1870, pp. 1488-89 (per Cartier); 4 May 1870, p. 1355 (per MacDonald); 6 July 1885, p. 3114 (per MacDonald); 6 July 1885, p. 3076 (per Blake); 20 April 1886, p. 810 and 7 July 1885, p. 3122 (per Laurier); Letter of Ritchot to John A. MacDonald, January 1881, photocopied.
151. House of Commons Debates, 20 April 1886, p. 810.
152. See, for example, Flanagan, supra, note 5 at 58-67 and Metis Assoc. of Alberta, supra, note 1 at 71.
153. See discussion in Stanley, supra, note 148 and Tremaudan, supra, note 7 at 89-95.
154. Stanley, id. at 85; Flanagan, supra, note 5 at 80-84; Riel's Case, supra, id. at 78-79.
- 155.
156. Supra, note 92.
157. See, for example, Tremaudan, supra, note 7 at 19; Native Peoples and the Constitution of Canada, supra, note 6 at 52; Pelletier, supra, note 11 at 1.
158. Pelletier, id. at 4-5.
159. Id. (entire book). See also, Metis Assoc. of Alberta, supra, note 1 at 16-20; Tremaudan, supra, note 7 at 9-18; Sealey and Lussier, supra, note 54 at 8-30.
160. See, for example, Sealey, supra, note 72 at 32-36 and Metis Assoc. of Alberta, supra, note 1 at 19.
161. See, for example, Dumont, supra, note 10 and Flanagan, supra, note 38 at 320.

APPENDIX TO CHAPTER 4

Historical Outline

- 1670 Hudson's Bay Charter granting rights of civil government and exclusive trade in Rupert's Land.
- 1688 Royal Commission of James I of 1688 instructs the Hudson's Bay Company (H.B.C.) to treaty with the Indians.
- 1717 Pierre Gaultier de Varennes spearheads fur trade in the Northwest.
- 1730 - Trading posts are established westward toward Lake
1750 Winnipeg and later at Cedar Lake and The Pas.
- 1763 The Royal Proclamation of George III.
- 1783 - The North West Company (N.W.C.), an amalgamation of fur
1784 trading interests operating from the St. Lawrence, is formed. From this time forward the N.W.C. competes with H.B.C. for control of the fur trade in Rupert's Land.
- 1800 Both companies have from 1,500 to 2,000 white men permanently stationed in the North West. Relationships were established with Native women.
- 1811 Grant of the district of Assiniboia by H.B.C. to Lord Selkirk. The land amounted to 116,000 square miles lying mostly within the present day Manitoba but including some of the present province of Saskatchewan and the states of Minnesota and North Dakota.
- 1812 The first Selkirk settlers arrive and begin to establish a settlement at Point Douglas, two miles north of the forks of the Red and Assiniboine rivers.

- 1813 A second group of Selkirk settlers arrive.
- 1814 Miles Macdonell, governor of the District of Assiniboia
(Jan.) issues the pemmican proclamation restricting export of pemmican and restricting hunting, fishing and wood cutting rights.
- 1814 Macdonell issues proclamation forbidding the running of
(July) buffalo.
- (Oct.) Macdonell advises N.W.C. they must surrender Fort Gibraltar and other trading forts within six months.
- 1814 - Cuthbert Grant of N.W.C. appointed Captain of the Metis.
1815 Macdonell seizes supplies at Desmarais' post and Fort Brandon. Grant and his followers systematically harass settlers to drive them out.
- 1815 Peter Fiddler, temporarily in charge of the colony,
(June) enters a treaty with the Metis after several attacks on the colony by the Metis. The H.B.C. was allowed to remain but settlers were to leave the colony.
- 1815 Settlers and new governor, Robert Semple, return to Red
(fall) River.
- 1816 Semple seizes Fort Gibraltar and cuts off the N.W.C.
(March) trade route.
- (June) Metis fight Semple under the leadership of Grant at the Battle of Seven Oaks. All colonists leave the Red River Valley.
- 1817 Selkirk captures N.W.C. forts of Fort William and Fort Douglas cutting off N.W.C. trade in pemmican. Grant voluntarily surrenders in June. Colonists return.

- 1817 Selkirk signs treaty with the Saulteaux for the Red River area.
- 1818 Arrival of priests Provencher and Dumoulin. Establishment of Catholicism in Red River Settlement.
- 1821 H.B.C. and N.W.C. amalgamate.
- 1821 Many Metis families relocate from elsewhere in Rupert's
1825 Land to Red River and Pembina.
- 1825 Several Metis communities established including Grantown (St. Francois Xavier), Pembina, St. Boniface.
- 1835 - H.B.C. declares trade in buffalo with Americans illegal
1844 and the Metis protest. H.B.C. responds by placing levy on goods coming in from the United States. Punishments enacted for illicit trading. Metis dependant on American trade. Company censors mail to control trade. Trading post established at Pembina.
- 1836 Selkirk's heirs transfer Red River lands back to the H.B.C.
- 1845 Metis petition the Council of Assiniboia asking for representation in the government and definition of special status as natives of the Red River area. Representation and rights are denied.
- 1846 - H.B.C. imposes martial law.
1849
- 1849 Trial of Guillame Sayer. Clash between Metis and H.B.C. breaks H.B.C. fur trade monopoly. (More Metis become involved with fur trade and abandon agricultural pursuits due to expansion of buffalo robe trade and poor agricultural conditions experienced in 1840's).

- 1852 Battle of Grand Coteau against the Sioux Nation. Trade route to Pembina secured.
- 1857 Hind expedition to North West gives favourable reports on settlement prospects in Red River area. Select committee appointed to consider acquisition of H.B.C. lands and to investigate complaints against them.
- 1858 Draft Bill to facilitate transfer of H.B.C. lands and colonization. H.B.C. and Canada are not in agreement so Bill is not introduced.
- 1865 Colonial Secretary recommends annexation of Rupert's Land to Canada subject to rights H.B.C. can establish.
- 1866 The United States government passes a Bill regarding annexation of the Selkirk colonies and Saskatchewan and the compensation of H.B.C. claims.
- 1867 British North America Act anticipates admission of Rupert's Land and the North West Territories into Canada.
- 1868 Agreement to surrender Rupert's Land to Canada for payment of £300,000.
- 1869 William McDougall appointed Lt. Governor pursuant to the Act for the Temporary Government of Rupert's Land and the Northwestern Territory When United with Canada (1869) 2 Vic. C. 3. In August McDougall sends Dennis to survey the Red River Settlement.
- 1869 (Oct.) Louis Riel halts surveyors between Lots 12 and 13 in the Parish of St. Vital. The National Committee is organized to resist the Canadians and McDougall's entry into the Settlement.

- (Nov.) Louis Riel and his followers seize Fort Gary and gain control of the settlement. Riel calls for a council of 24 (12 English speaking and 12 French speaking) representatives. Governor McTavish cities the insurrection as unlawful. On November 23rd the Provisional Government is established and replaces the Council of Assiniboia.
- (Dec.) McDougall issues proclamation appointing himself Lieutenant-Governor of Rupert's Land. Louis Riel is elected President of the Provisional Government.
- 1870
(Jan.) Donald Smith presents the case for Canada at a public meeting. On the 26th a newly elected convention draws up and approves the Metis List of Rights. Delegates of the Provisional Government are chosen to present and negotiate the list in Ottawa.
- (March) Thomas Scott is executed. Delegates are dispatched to Ottawa.
- (April) Delegates negotiate terms of entry with Sir George Cartier and John A. MacDonald.
- (May) The Manitoba Act, S.C. 1870, c. 3 receives royal assent. The Provisional Government ratifies the provisions of the Manitoba Act. The Woolsey expedition arrives. Riel flees.
- 1870 -
1871 Many Metis leave the Red River area for wintering sites. Some migrate south and north west. An official census is taken in the Red River Settlement.

- 1871 The British North America Act (1871), 34 and 35 Vic., C. 28 (U.K.) affirms the legitimacy of the Manitoba Act and declares Parliament incompetent to alter it.
- 1871 - Supplementary legislation and numerous Orders-In-Council
1889 passed revising and implementing sections 31 and 32 of the Manitoba Act.
- 1874 Parliament passes the Selkirk Settlers Act (1874), 36 Vic. C. 37 and subordinate legislation providing land grants to original white settlers in addition to s. 32 claims.
- 1879 - Second major migration from Red River area to settled
1880 communities in the North West.
- 1880 Legislation passed enabling the creation of colonization companies.

CHAPTER 5

PERSISTENCE OF METIS TITLEIntroduction

Pursuant to s. 31 of the Manitoba Act, land grants and scrip were distributed to Metis children and heads of Metis families to satisfy claims arising from "the extinguishment of Indian Title to the lands in the Province" of Manitoba.¹ The administration of the s. 31 land grant and its effect on the continuance of Metis aboriginal title is a matter of controversy currently debated in political negotiations and before the courts. In a report issued by the Indian Claims Commission in 1975, three potential categories of claims arising from the administration of the s. 31 land grant were identified. These are: (1) land and scrip issued were unjustly administered, (2) scrip was an inadequate form of compensation to satisfy Metis claims, and (3) the Metis are "Indians" and are therefore entitled to special consideration by the federal government.²

Since 1975, further legal argument has been developed by both Metis and academics. The additional claims fall into one of two general categories. Claims in the first category uphold parliamentary sovereignty but place limitations on the rights of the sovereign vis a vis her subjects. An example of claims falling within this category are: (1) intentional destruction of Metis communities and political organization through individual land compensation and the subsequent refusal to provide them with a land base is in violation of their human rights;³ (2) the government intentionally implemented a system that would not, and did not,

benefit the Metis and in doing so was in breach of its fiduciary obligation towards the Metis;⁴ and (3) the orders-in-council implementing the land grant and scrip system are ultra vires the powers of the federal government because they alter the intention of s. 31 of the Manitoba Act.⁵ Claims in the second category focus on the illegality of the distribution system rather than sovereign rights and obligations. Included in this category are claims that: (1) the Canadian government violated the national rights of the Metis by unilaterally imposing terms of extinguishment;⁶ (2) the Canadian government is in breach of treaty, or contractual obligations, owed to the Metis;⁷ and (3) the government encouraged and participated in fraudulent schemes for locating Metis lands.⁸

Should claims be taken out of the political arena and into the courts two central questions will need to be addressed: What is the legal basis of Metis title? Has Metis title in Manitoba been extinguished? Advocates of Metis rights have paid little attention to the first question relying on the theory of recognition as a defence to the assertion that a source in law must be identified. Instead, the predominance of research and argument has focused on the question of extinguishment. Although arguments of recognition are important and worthy of legal consideration, the Dumont case suggests that the Courts will have difficulty finding in favour of the Metis on the question of extinguishment in absence of a theory on the origins and legal enforceability of Metis aboriginal title. The absence of theory, regardless of recognition, makes it difficult to identify federal obligations toward the Metis independent of obligations imposed by legislation. The effect is

not only to narrow the basis of the Metis claim, but to cast doubt on the independent legal rights of the Metis.⁹

This thesis has been concerned with identifying the Metis people and developing a theory on the origins of Metis aboriginal title. The link between the Metis and other aboriginal peoples is both common racial ancestry and the legitimate assertion of original title, or rights derived from the original occupants, prior to the legitimate acquisition of original title by the Canadian government. Rather than consider the relative merits of arguments that Metis aboriginal title persists, the final chapter of this thesis is concerned with connecting the questions of origin and extinguishment through theory focusing on the natural rights of the Manitoba Metis. Although each of the listed arguments on extinguishment is worthy of analysis, this chapter will limit the examination of the issue of extinguishment to three questions:

1. Can the unilateral imposition of positive law legitimately abrogate the natural rights of the Metis?
2. Assuming an agreement was reached between the Canadian government and the Provisional Government, what arguments can be made in support of the persistence of Metis title?
3. To what extent can arguments founded in natural law be translated into positive legal obligations?

I The Question of Unilateral Extinguishment

1. Common Law

The St. Catherine's case is continually cited for the proposition that the sovereign has the exclusive right to extinguish aboriginal title.¹⁰ This position reflects a general premise of British legal positivism that parliament may extinguish common law rights. It is known in the common law tradition as the doctrine of parliamentary sovereignty. It is maintained in pre-charter case law and legislation such as the Royal Proclamation of 1763 which states that aboriginal title is "dependent on the good will of the sovereign."¹¹ This statement also appears in the St. Catherines decision. Reference to this power of parliament may mean aboriginal title is more vulnerable to extinguishment than other forms of title or it may simply be a Statement of Parliamentary competence.

Arguments concerning the proper interpretation of the Royal Proclamation supporting the policy of consensual acquisition and the relationship between doctrines of discovery, conquest and legitimate assertion of sovereign rights have been addressed in chapter three of this thesis and will not be repeated here. Rather, the intent is to remind the writer of two significant points. First, Canadian positive law has traditionally upheld the doctrine of parliamentary sovereignty in the context of aboriginal title claims. Second, positive law on unilateral extinguishment of Indian title is founded on theories which are discredited in the natural law tradition including the theories of discovery (as an

exclusionary principle), conquest, and the denial of the legitimate exercise of territorial sovereignty by aboriginal peoples.¹²

The method of unilateral extinguishment is not clearly defined in Canadian law. In Calder, the Supreme Court Justices disagreed on the extent to which legislation can effectively extinguish aboriginal rights.¹³ Where Mr. Justice Hall adopted the position that the intention to extinguish must be "clear and plain," Mr. Justice Judson held that aboriginal title can be impliedly extinguished by the existence of inconsistent legislation.¹⁴ To arrive at these conclusions both relied on selected passages from American case law. In doing so both missed an important development in American law: the initial tendency of the American court to recognize cession as the only legitimate method of acquisition. A second development was accepted by Mr. Justice Hall but not Mr. Justice Judson. This was the tendency of the American court to presume that the government acts in an equitable manner when extinguishing aboriginal title and that aboriginal title cannot be extinguished without compensation.¹⁵

The doctrine of unilateral extinguishment is in keeping with the legal positivism characteristic of English and Canadian law in the 19th and early 20th centuries. The founding fathers of English legal positivism were Jeremy Bentham (1748-1832) and his disciple John Austin (1790-1859). For both law breaks down into three basic elements: (1) a declaration of will, (2) by a politically supreme individual or body (sovereign), and (3) obedience to which is motivated by sanctions. As the sovereign is the source of law, restraints placed on the sovereign contrary to her will are illegal. As law making is a political act requiring obedience,

rather than a moral act generating duties and obligations, no moral or other obligations can be placed on the sovereign. However, limits can be self-imposed through declaration in the domestic forum through constitutions or through the execution of treaties in the international arena. The legal enforceability of these limitations is a separate issue.¹⁶

Although Guerin did not deal with the issue of extinguishment directly, the decision may have some impact on the development of this doctrine. In Guerin, the Supreme Court moves away from traditional precepts of legal positivism by placing duties and obligations on the Crown which are not intentionally self-imposed. The origin of the fiduciary obligation of the Crown towards the Indian peoples is found in the inalienable nature of aboriginal title and the statutory scheme governing its surrender.¹⁷ The foundation and scope of the Crown's obligation is discussed in further detail below. The point here is that the court is showing a tendency to impose legal and moral obligations on the Crown contrary to its will. This approach coupled with the recognition of "pre-existing" aboriginal rights may signal a cautious movement away from "law as will" back to natural theories of legal rights, duties and obligations existing independent of the Sovereign's will. This movement may result in more favourable approaches to extinguishment requiring consensual acquisition, or at the very least result in the abolition of the theory of implied extinguishment without compensation raised by Mr. Justice Judson. These arguments are currently before the British Columbia Supreme Court.¹⁸

2. Natural Law Analysis

Legislation and judicial opinion in the area of aboriginal rights illustrate the willingness of governments and courts to create positive laws which abrogate or derogate from the natural rights of aboriginal peoples. Whether they "ought" to and whether such activity is "just" are separate questions. Opponents of natural law will argue that these questions are of academic interest only because natural rights existing without recognition in the political or legal systems are impotent and not useful in a practical sense. Although this position may hold true in some areas of the law, it is difficult to maintain in the context of aboriginal title claims. The cautious return of the Canadian courts to first principles suggests that questions of "ought" and "legitimacy" are becoming increasingly important in the development of the common law doctrine of aboriginal title.

In natural law, the legitimacy of positive law is not determined by successful enforcement, but by its moral claim to obedience.¹⁹ Rather than focus on power of the successful assertion of sovereign will, naturalists are concerned with the authority of the sovereign and the moral obligation to obey the sovereign's laws. In more modern terms, the issue might be framed as one of "abuse of the sovereign's law making power."²⁰

The discussion of property systems in chapter three suggests that in some circumstances positive law may abrogate natural rights and maintain a moral claim to obedience. It was argued that the legitimacy of positive law can be measured against its contravention of natural precepts and the extent to which contravention can be viewed as furthering the common good. This

theory was born in the philosophies of Aristotle and Plato who defined the proper role of legislated law as facilitating the attainment of a "good" of moral life.²¹ Cicero developed this theory by examining law on three different levels: *lex caelestis* (divine or cosmic reason), reflected in human reason as *lex naturae*, which in turn may be translated into *lex vulgus* (positive law). To the extent that *lex vulgus* embodied the *lex naturae* it was considered "good law" worthy of obedience.²² St. Thomas translated these theories into the following definition of law: "an ordinance of reason made and promulgated for the good of the community by the person to whom its care is entrusted."²³ This definition has provided three basic elements of "true" law, or law worthy of obedience, common to traditional and contemporary naturalist opinion: "rational aim for the common good; enactment by authority; and promulgation."²⁴

Keeping in mind that the definition of common good varies in a historical and contemporary context, the aim for common good is a useful yardstick to measure the legitimacy of the doctrines of unilateral extinguishment and parliamentary sovereignty. The common good achieved by placing authority in one sovereign to determine the rights of people within its territories can be rationalized through social contract theory and its contribution to stable and peaceful social relations. The good achieved by the unilateral assumption of authority by one sovereign over another, or extending sovereign authority into newly discovered inhabited lands without consent, is more difficult to rationalize. Arguments based on religious conversion, civilization of primitive peoples, method of land use (resource and economic development) and the

absence of effective political organization traditionally invoked to justify the unilateral imposition of the sovereign's will are no longer acceptable within a contemporary society. Rather, the removal of ethnocentric bias reveals that these perceptions of the "common good" are based on racist ideologies and assumptions of cultural superiority. Further, these ideologies do not reflect the practice of the Crown at the time of colonization and arguably the policy of acquisition promulgated in the Royal Proclamation of 1763.²⁵

Traditions definitions of the common good resurfaced in early judicial opinion on the legal and political rights of aboriginal peoples through the doctrines of discovery, conquest and parliamentary sovereignty. The extent to which these doctrines are founded on principles contrary to natural law has already been examined.²⁶ Generally speaking, deviations from principles of natural law served the political and economic goals of the colonizing nation. A blatant example of this is the development of the "political question" doctrine in the United States which prevents the court from examining the legal validity of the Crown's title.²⁷ In Canada, the doctrines of parliamentary sovereignty and inalienability are invoked to justify Parliament's exclusive right to purchase or unilaterally extinguish Indian title.²⁸ In both countries, the application of these doctrines has been detrimental to the recognition and survival of aboriginal rights and aboriginal peoples. For example, in Canada the aboriginal rights of the Nishga people were recognized but their enforceability was placed in question because of the court's division on the question of extinguishment.²⁹ In the United States, the political question

doctrine was invoked to support legal rights of the United States that had no foundation in law. Eventually the court did "question" but its decision favouring Indians was rendered ineffective by political action.³⁰

Despite the affect of these doctrines on aboriginal peoples of the past and present, one might argue that contemporary circumstances justify their retention and attest to their contemporary validity. A law which was illegitimate in the eyes of natural law in the 1800s may be legitimate now because of new factors that have to be considered in identifying the overall common good of the existing American or Canadian community. For example, a challenge to the sovereign authority of the Canadian Parliament must now take into consideration the rights of non-aboriginals living within Canada's territories, the common good of Canada as a nation, and the affect of recognizing aboriginal sovereignty on national and international social stability. This does not mean the rights of aboriginals disappear in a contemporary context or that previous unlawful acts become lawful. It does mean the choice of enforcement or compensation of their rights must be determined in light of present day conditions.³¹

Despite these considerations, it is difficult to sustain the legitimacy of unilateral extinguishment. Supporters of the doctrine might argue that the retention of absolute parliamentary authority is necessary to maintain certainty in the law and stability in the Canadian and international community. Consequently, only Parliament should be able to place limits on it's own powers through constitutional documents or other self-denying legislation. A rejection of Parliament's power to

extinguish could lead to the conclusion that Parliament only has title to those lands, and jurisdiction over these matters, voluntarily surrendered to the Crown. All laws affecting aboriginal rights or lands not the subject of agreement would be ultra vires Parliament's jurisdiction and subject to pre-existing property and legal regimes. Given the substantial amount of law in violation of this conclusion, one might argue circumstances now exist that require the retention of the doctrine of unilateral extinguishment and the absolute power of Parliament. To avoid disruption, the absolute power of the legislatures of the provinces would also have to be upheld. Denying Parliament this power might conceivably result in a proliferation of rights, the compensation of which would bankrupt the country and the enforcement of which would threaten social, economic, legal and political stability. The resulting chaos is bound to give rise to prejudice and violence between aboriginal and non-aboriginal communities.

The obvious reply is the retention of unilateral extinguishment as a general principle is not necessary to avoid the anticipated evils. Rather, the legitimacy of non-consensual extension of authority of acquisition of rights should be measured by examining the common good achieved by a particular law and the particular effect of its abolition. For example, an aboriginal people may not have surrendered its right to hunt, but a positive restriction on this right might legitimately be placed without their consent if the object of the restriction is an endangered species. Similarly, an aboriginal people may own resources necessary for the survival of other communities or members of the Canadian community (eg. a root that can be used to cure cancer).

In absence of consent, use or acquisition by force might be justified to further the common good of the larger non-aboriginal community. The issue then becomes one of adequate compensation.

The above analysis suggests that the criterion of "rational aim for the common good" applied in a modern context requires an examination of particular laws rather than general principles. Chapter three argues that the correct starting point is to assume the need for consent in acquiring natural rights. The extent to which this principle may be violated depends on the extent to which the violation promotes the common good. The common good can only be measured by examining the effect of a particular law on a aboriginal people within the context of a particular community. This approach necessitates the abolition of general principles for and against unilateral extinguishment. Where the common good of a larger non-aboriginal community prevails, the issue is one of just or fair compensation.

The weakness in this approach is it is dependant upon the opinion of non-aboriginal decision makers who may be influenced by their own cultural bias or the pragmatic difficulty associated with compensating substantial title claims and recognizing entitlement to self-government. This is of particular concern in British Columbia where treaty making was not generally utilized to acquire aboriginal title or to extinguish specified aboriginal rights. This may be one reason why Mr. Justice Judson was prepared to make broad statements on the issue of unilateral extinguishment in the Calder decision without examining the doctrine's theoretical foundations. The elevation of this general statement to a principle of law without examining the basis of the Sovereign's

authority, or at least the common good achieved by violating principles of natural law, is from the perspective of natural opinion an example of the abuse of law making power.

Returning to the original question: "Can positive law abrogate the natural rights of aboriginal peoples?" The answer is yes, if the abrogation can be justified in terms of the common good. The general principle of unilateral extinguishment can not be upheld on this basis, but particular laws affecting aboriginal rights may because of the need to consider more than aboriginal rights in the determination of the "good" of contemporary Canadian society.

II The Persistence of Metis Land Rights

Opinions on the legal nature of the Manitoba Act are divided into two schools -- those who argue the Act was a unilateral action of the Canadian Parliament made in response to the demands of the Metis and those who contend that the act represents a treaty between two nations promulgated through legislation. The perspective adopted affects the availability of natural law defenses to the extinguishment of Metis land rights which were purportedly dealt with in sections 31 and 32 of the Act. Arguments for the proper interpretation of the Act as an agreement or unilateral action by the Canadian government have been made in chapter four. Here, the concern is to identify defenses originating in the natural law.

1. Defence to Unilateral Extinguishment

The unilateral imposition of the Crown's intent to extinguish Metis rights is legal in natural law if it can be justified in

terms of the common good of the parties involved or some higher common good of the international community. The promulgation of s. 31 of the Manitoba Act which purported to extinguish Metis title claims took place during a period of European colonization and more specifically within the context of Prime Minister MacDonald's National Policy for the development of Canada as an independent Nation. MacDonald's goal was to "stimulate new economic growth through various means; two of which were extensive settlement of the North West and construction of an intercontinental railroad."³² In order to accomplish these goals it was necessary to obtain clear title to the land, establish law and order to attract settlers, create a climate to encourage the investment of capital, and obtain control of the land and its resources.³³ The benefits to Canada were obvious including a larger land base and territorial jurisdiction, a stronger economy and an increase in power within the international community through wealth and numbers.

The benefit of Canada's action to the international community is difficult to determine when the action is viewed alone, but not when it is viewed in the context of the customs and practices of nations towards aboriginal peoples. According to some schools of international law, if "civilized" nations recognized by the international community agree to deny an obligation to respect pre-existing rights of indigenous peoples, or denial is the customary practice of nations, denial is legal in international law. This reasoning was employed to justify the forceful acquisition of, and sovereignty over, new lands for the purpose of settlement and increasing the power and wealth of European nations.³⁴ In this way the legitimacy of unilateral extinguishment is indirectly tied to

the broader question of the legitimacy of early colonization practices, the common good of colonizing nations and the stability of international relations which assumed the legitimate authority of colonizing nations.

It is difficult, if not impossible to identify benefits received by the Metis people arising from the unilateral abrogation of their rights. Although the Metis were free to share in the benefits of citizenship with immigrant settlers, entitlement was dependant on their successful adaptation to a foreign culture and economic system. Canadian expansion meant the destruction of Metis communities, traditional lifestyles and the fur trade economy. Canada's initial refusal to obtain the consent of the Metis resulted in violence harmful to both parties. Although the negotiation of the Manitoba Act contributed to the attainment of peace, the subsequent distribution of Metis lands under the Act was more beneficial to the Canadian government in achieving its objectives to settle the North West, speculators and immigrant settlers than the Metis, the majority of whom lost their lands and lived in poverty. Of those few Metis who located land, many later lost their land for taxes, sold their land or moved away. The majority can be said to have received no permanent benefits.³⁵ Regardless of individual benefits that may have been received, the Metis Nation was crippled. The common good and survival of the Metis as a people was sacrificed to further Canadian policy in the North West.

One might argue that the losses suffered by the Metis were not the necessary outcome of the government's action. If the Metis kept the lands they were entitled to under the Act and stayed in

Manitoba their communities might have flourished and they may have had the control of the local legislature through exercise of the majority vote. At the very least, they would have had title to land to pass down from one generation to the next, the social benefits derived from belonging to an integrated community and a significant voice in the local government.³⁶ Given the inevitability of European expansion in the North West and the greater power of European nations vis a vis indigenous nations, the method of government and land holding imposed was a beneficial compromise for both nations.

Although details of the method of distribution were left to the government's discretion, the government discussed the terms of the Act with the Metis to ensure its successful implementation. When the government exercised its discretion, it placed control over future security and long term benefits in the hands of the Metis people by allowing them to deal with their entitlements as they pleased. This decision accords with the principles of non-interference and self-determination of peoples. The government and its plan can not be characterized as contrary to the good of the Metis because many Metis made bad choices. With the exception of some Metis who were victims of fraudulent practices, many Metis sold their entitlements and moved further West to resume their traditional lifestyles. It was their choice to surrender the long term security of land entitlement for the short term gain envisioned with the receipt of cash.³⁷

There are several difficulties with this argument including the assumption that the Metis understood the long term benefits to be gained from private land holdings and the inevitability of the

extinction of the frontier economy. Most significantly, it assumes that the Metis were in a position to exercise freedom of choice in the retention of their land entitlements. Several points can be raised to support many were not including:

1. At the time the Act was passed a military force was on its way to the Red River area to ensure its implementation. The arrival of Woolsey's forces in the area resulted in a "reign of terror" which contributed to many Metis abandoning their lands and moving further west.³⁸
2. Rapid settlement in Rupert's Land prior to the distribution of Metis lands resulted in competition with immigrants for choice land, disagreements with settlers and the Metis becoming a minority on their own land. Changes in the nature of the community and the economy brought about by settlement and the movement of buffalo herds resulted in large migrations out of Rupert's Land before a land grant system was put in place.³⁹ Despite the protest of those who stayed, white settlers took possession of Metis lands and were supported in their activities by the Canadian government. Lands which had been identified as potential sties for Metis townships were lost to white settlers through Canada's homestead policy before a system to distribute the Metis land grant was in place.⁴⁰
3. Circumstances were such that is was difficult or impossible for Metis to locate land assigned to

them. Land had to be located in person and if scrip was issued, the recipient had to appear at the land office in person. This often involved travelling hundreds of miles through trackless wilderness. Once the location of the land was identified, more travelling was necessary and surveyor's posts had to be identified in order to locate exact acreages of land. Once located, land might not be suitable for farming.⁴¹

4. Many Metis had previously been forced to abandon unproductive farms and the issuance of patent or scrip did not assist them with the resulting poverty. Only those who were comparatively well off could take advantage of new opportunities to farm. Many sold their rights to pay debts or avoid starvation. They needed immediate cash to survive. Some purchased agricultural supplies and were able to establish themselves as farmers.⁴²
5. Locating land often meant moving to an isolated homestead away from their previously established communities.⁴³

Another significant weakness in the argument that the Metis are responsible for their own misfortune is the assumption that Canada recognized its obligation to exercise power justly by taking into consideration the common good of communities affected by its decisions. In fact, strong arguments can be made that the Canadian government intentionally implemented a system that would further its own economic goals and promote the predominance of European

social institutions in the west without giving equal consideration to the long term benefit or harm to its new Metis citizens. A substantial amount of research has been conducted by academics and Metis political organizations on the government's role in the destruction of Metis communities and loss of Metis lands. Points raised in support of allegations of bad faith, or at least negligence in the administration of Metis claims include:

1. Similar scrip and individual land allotment systems implemented in the United States prior to, and concurrent with, the distribution of s. 31 land grants suggest the misfortunes of the Metis community were a foreseeable outcome at the time the method of distribution was chosen. Of particular interest is the issue of scrip in 1842 to facilitate the removal of the Choctaw Nation from their tribal lands which was subsequently held to be inadequate compensation;⁴⁴ the issuance of scrip between 1858 and 1901 to Sioux and Ojibwa half-breeds, many of whom failed to locate their lands or lost their entitlements to others through the use of agents and powers of attorney;⁴⁵ and the individual allotment policy formalized under the General Allotment Act of 1887 which gave the President power to make reservation Indians land owners in severalty, allowed confiscation in the event of failure to develop located lands and provided for the sale of surplus lands to white settlers with tribal consent.⁴⁶ The Act has subsequently been

characterized as one of the most comprehensive programs to destroy "tribal consciousness and to replace it with a consciousness of the importance of private property and national aspirations."⁴⁷

2. There was substantial delay in implementing grants under s. 31 even after confusion arising from its interpretation had been cleared away. During this time many Metis left Manitoba and immigrant settlers located lands. The use of scrip for some of the grants avoided interfering with settler's choices reducing the choice of land available to the Metis.⁴⁸
3. The use of scrip for Metis Heads of Families and Supplemental s. 31 claims was for the stated purpose of preventing the obstruction of settlement and dissatisfaction to be caused by reserving large areas for the Metis rather than benefiting the Metis recipients.⁴⁹
4. Manitoba Metis were initially only offered grants of real property but eventually land scrip which was easily transferable was also provided. Departmental rules dealing with assignments could be easily circumvented and the uses of scrip approved by the government encouraged circumvention by speculators. The government recognized powers of attorney and allowed scrip to be used to acquire homestead and pre-emption rights and payment for pasture, coal and timber leases.⁵⁰

5. The government actively facilitated speculation in Metis lands by sharing information with speculators such as census lists and advance notice of scrip issues; allowing speculators to accompany scrip commissions; advertising names, availability and prices for scrip in Dominion Lands offices; setting up banking services for scrip speculators and refusing to take legal action against speculators who violated the law.⁵¹
6. The government refused to investigate complaints of fraudulent actions including allegations against highly placed civil servants. Although the government was aware of fraudulent activity, it left the initiation of actions to individual complainants who were often too poor to engage a lawyer or sufficiently knowledgeable in legal proceedings. The criminal code was amended to place time limits on the prosecution of these claims and in one case was applied retroactively to protect a prominent white settler who had numerous charges against him. Conflicting claims legislation enacted in 1885 prevented certain categories of claims from being brought against the Crown.⁵²
7. Those Metis who were entitled to land grants could get land grants immediately or, if minors, upon reaching the age of eighteen. Many of those entitled to receive land immediately sold their rights because of the reasons outlined at page

supra. The entitlements of half-breed children were not protected in law as were the land rights of other minor children. They could be assigned by their guardians and located prior to reaching the age of majority resulting in very few half-breed children having lands to locate upon reaching their majority.⁵³

8. Non-land rights provision promoted the Government's desire for control in the North West and assimilation of the Metis people. Although certain cultural rights such as language, religion and education were protected, without control over immigration and commercial development these rights eroded by the early 1900s. Debates in the House of Commons suggest that government delegates foresaw this outcome of events.⁵⁴

Regardless of the extent to which the Metis and the Canadian government contributed to the sufferings of the Metis people, the history of the Metis subsequent to the implementation of the Manitoba Act makes it impossible to argue that the effect of the Act was to promote the common good of the Metis as a people. Although a few Metis benefited from the land grant provisions, approximately 85% are alleged to have lost or never received their entitlements.⁵⁵ Arguments raised to support the proposition that the provisions of the Act could have been beneficial to the Metis weaken if one considers the issues of choice and the government's consideration of the common good of pre-existing Metis communities. Consequently, the legality of abrogating the natural rights of the

Metis through a unilateral Act of parliament rests on the priority given to the common good of other communities affected by the Act.

It is difficult to justify a preference to the common good of Canada and colonizing nations without adopting positions contrary to contemporary natural opinion. First, the obligation to respect natural rights of original occupants, or peoples whose rights are derived from natural occupants, introduces stability into human affairs by avoiding quarrels between communities and by allowing communities to focus their energy on fostering the common good of their members rather than securing their sovereign and territorial rights vis a vis other communities.⁵⁶ The decision of Canada not to respect these rights and disturb the peace through forceful acquisition of rights and imposition of Parliaments's will cannot be justified without resorting to paternalistic theories of development, civilization and salvation no longer acceptable in natural opinion or positive international law.⁵⁷ At the very least, one must adopt a bias in favour of the more powerful nation or a view that European culture is "superior" because any benefits that might have accrued to the Metis were dependant on assimilation of Metis individuals into the European Community and change in Metis social, economic, cultural and political life.

Given the above, natural law would hold that the unilateral abrogation of Metis rights in 1870 can not be legitimized in terms of the common good and was therefore illegal. Assuming the argument for extinguishment is based on Parliament's express intent to extinguish, the result of finding the Act illegal is Metis rights continue to exist. However, the scope of these rights, their enforceability and the determination of equitable

compensation may be affected by the contributions of the Metis and Canadian government to the losses of the Metis people and present day conditions. For example, the present government of Manitoba and the land holdings of her citizens assume the validity of the Manitoba Act. Chaos would result in Manitoba if suddenly all Acts passed by the Manitoba government were declared illegal and all titles to land were no longer valid in law. The calculation of contemporary factors into a modern definition of the common good prevents turning back the clock and restoring rights as they existed in 1870. The issue then becomes one of equitable compensation taking into consideration both compensation for the loss of land rights, which may involve assessing benefits received by individual Metis, as well as the affect of government action on the survival of the Metis as a people.

2. Defenses to Consensual Extinguishment

A List of Rights entrusted with the delegates of the Provisional Government outlined the conditions under which the Metis (represented by Father Ritchot), the non-Canadian white settlers (represented by Judge Black) and the English half-breeds (represented by Alfred Scott) of Rupert's Land originally consented to enter Confederation. Although there is some uncertainty regarding the final format of the List taken to Ottawa, it is clear that recognition and extinguishment of Metis aboriginal rights was not specified in the List.⁵⁸ The absence of a reference to aboriginal rights is one of several factors cited by Thomas Flanagan to support an argument that recognition of aboriginal rights was not an objective of the Metis people, but was initiated

by Father Ritchot who was acting beyond the scope of his authority. The idea was hastily accepted by Parliament in order to clear the way for expansion in the West.⁵⁹

A similar argument might be made to challenge the position that the Metis consented to land grant provisions in the Manitoba Act.⁶⁰ However, the weakness of a challenge based on the scope of Ritchot's authority becomes apparent if one considers the following facts:

1. Article 5 of the List of Rights spoke to property rights of the inhabitants by requesting recognition of previous customs and observations and placing responsibility for the protection of property rights, other than the rights of Indian peoples, in an elected provincial legislature.⁶¹
2. The importance of the protection of property rights is evidenced in letters of instruction which left no room for discretion on the inclusion of article 5 in any agreement reached between the two nations. Although the delegates may have initially exceeded their authority by agreeing to sections 31 and 32, these provisions were subsequently approved by the Provisional Government.⁶²
3. Ratification of the Act by the Provisional Government was followed by a letter of confirmation to the Secretary of State, Joseph Howe, indicating the Provisional Government's acceptance of the agreement concluded in Ottawa by the delegates.⁶³

Given the importance of self-determination of common good by communities, social stability and the promotion of peaceful relationships in formulating principles of natural law; it is logical that natural opinion supports the maintenance of agreements between nations unless good reason can be shown why the enforcement of an agreement would be "immoral" or "unjust."⁶⁴ For example, an agreement for the acquisition of rights might be considered immoral if consent was given in fear or ignorance.⁶⁵ Consequently, the fact that formal approval of an agreement has been given does not mean it is a valid agreement in natural law, but a presumption in favour of honouring the agreement may have been created. This reasoning applied to the events leading to the implementation of the Manitoba Act suggests that the formal approval of the Provisional Government does not bar a challenge to the legality of the agreement and that challenges to the agreement must go beyond the issue of formality in order to succeed.

Viewed in this light there are three major defenses to the argument of consensual acquisition and extinguishment. These are:

1. The agreement was imposed on the Provisional Government which was not in a position to exercise freedom of choice.
2. The subsequent implementation of the land grant provisions was contrary to the agreement reached and without the consent of the Provisional Government.
3. The method of implementation was agreed to be at the absolute discretion of the Canadian government but in exercising that discretion the Canadian government was in breach of its moral obligation as the more powerful of the two nations to exercise its power justly by taking into consideration the common good of the Metis Community.

The purpose of the following sections

is to provide an outline of these arguments. However, it is recognized that definitive conclusions can not be reached in absence of examination of primary historical sources.

(a) Freedom of Choice

It might be argued that historical circumstances prevented the Provisional Government from exercising true freedom of choice in its acceptance of the terms of entry into Confederation. Borrowing from Stanley's theory that the disintegration of the Metis community was already underway once the "geographical walls which isolated the North West were breached" and influences of the outside world began to affect political and economic structures in Rupert's Land; one might argue the Provisional Government accepted the inevitability of expansion in the North West and was concerned to protect the rights of the inhabitants of Rupert's Land in face of the unavoidable spread of European influences in the North West. The true wish was to maintain the status quo, but the foreseeable impossibility of this task forced them to compromise.⁶⁶ The compromise was articulated in the demands for entry into confederation presented by its delegates to the Canadian government.

Although the Provisional Government maintained an effective rule in Rupert's Land during the negotiation process, the parties to the process did not possess equality of bargaining power. Conditions in the settlement area would have prevented the continuance of the protection of Metis rights through the use of force. Drought, grasshopper plagues and famine threatened their survival.⁶⁷ The migration of buffalo herds and the reduction of the

frontier through increased agricultural settlement was forcing many Metis dependent on the fur trade to leave the Red River area.⁶⁸ Changes taking place in modes of transportation were eroding the economic position of Metis who earned their living as freighters.⁶⁹ Poverty would force the Metis to surrender or move in face of forced settlement.

This position contrasted with the wealth, population, and organized military forces of Canada coupled with its unrelenting desire to annex the North West and the support of the British government emphasizes the long term weakness of the Metis position. Their bargaining power rested on Canada's desire to avoid violence and the expense of war. Their acceptance of the final terms which placed economic and political control in the hands of Canada through control of land title, resource development, and settlement did not accord with their initial intent for the current inhabitants of Rupert's Land to be protected in their property rights and control decisions affecting their rights through a legislature elected by a predominantly Metis community. Whether the Metis understood the significance of the concessions they made on their original demands is a question of debate. However, the immediate dispatch of troops of 1200 men, roughly equalling the total number of adult male Metis in Rupert's Land,⁷⁰ upon the conclusion of negotiations in Ottawa suggests the concessions may very well have been forced if the Provisional Government withheld its approval.

The inherent weakness of this argument is it is speculative of what "might have been." Although historical evidence can be accumulated to support the argument, a shift in emphasis can give

rise to evidence supporting the opposite conclusion that the Provisional Government forced Canada to negotiate terms of entry. In fact, the latter conclusion is often argued by advocates of Metis rights in support of the existence and recognition of the Metis Nation.⁷¹ The dependence of both conclusions on evidence drawn from result oriented thinking suggests that a defence based on freedom of choice, or the fact consent was not "voluntary" in a true sense of the term, would be extremely difficult to maintain in absence of primary historical sources. Even then, the question may be reduced to one of interpretation rather than fact. Given the absence of doubt on the ratification of the Act by the Provisional Government and natural bias in favour of upholding agreements, a defence based on interpretation would be difficult to maintain in the natural law tradition.

(b) Violation of the Agreement Reached

Assuming the Provisional Government consented freely to the terms of surrender agreed upon by its delegates in Ottawa, extinguishment may not have been legitimately effected if the land grant provisions in the Act do not represent the agreement reached or, through subsequent implementation, Canada unilaterally changed the terms of the agreement. These arguments arise from the absence of a formal agreement was signed by negotiators for Canada and the Provisional Government and allegations that land rights promised in ss. 31 and 32 were distributed through supplementary legislation which did not conform with the provisions of the Act.⁷² Both arguments involve questions of statutory interpretation and

affect the assessment of whether the Metis consented to extinguishment of the natural title to their land.

The predominance of political and academic opinion supports the conclusion that s. 31 was intended by the Canadian government to satisfy aboriginal title claims of the Metis people and s. 32 was intended to protect individual property rights of all inhabitants, regardless of ancestry, from the influx of new settlers. However, section 31 has been attacked as not representing the original terms agreed to by the Metis. In a paper prepared by an unnamed author for the Association of Metis and Non-Status Indians of Saskatchewan, it is alleged that s. 31 was intended to compensate the Metis for surrendering their nationhood claim to control of land and resources in Rupert's Land.⁷³ Ritchot viewed these claims as distinct from Metis claims to aboriginal title. The inclusion of the reference to aboriginal title claims did not arise from negotiations, but was included as a matter of expediency by the Canadian government. The Metis did not agree to surrender claims arising by virtue of their Indian ancestry, but nationhood claims arising from their rights as original settlers. This explains the governments subsequent decision to treat other white settlers equally through the issuance of scrip. Presumably claims to individual lots would be dealt with under section 32 and the collective claims of the original settlers to the land and resources of Rupert's Land under s. 31, in the case of the Metis, and under special collateral legislation, in the case of the white settler.

Natural opinion would reject this argument because it makes artificial distinctions between aboriginal claims, nationhood

claims and collective possessory claims of a "people." Further, it fails to distinguish between a nation's claim to sovereignty over and title to its lands. If s. 31 was intended to compensate surrender of control, or territorial sovereignty only, white settlers would not be entitled to receive benefits of that compensation unless they are proven to be members of the affected nation. However, any property rights they may have legitimately acquired against lands within the control of the nation would be recognized in natural law and thus there would be an obligation on Canada to respect those rights. Arguably, the protection of individual claims to specific lots in s. 32 meets that obligation if s. 31 was intended to compensate nationhood claims to title and sovereignty, it would have the same effect in natural law as compensating aboriginal claims to title and sovereignty because the basis of Metis claims to title and sovereignty as a nation and aboriginal people is the same. Both are derived from the natural rights of the original occupants of Rupert's Land. Consequently if the nationhood claim is extinguished by consent, the aboriginal claim is also extinguished.

It may be argued that the Metis did not agree to the method of compensation specified in s. 31. The Metis expected to get a per capita allotment of land from designated townships reserved for Metis communities in addition to benefits they might receive as individual land holders under s. 32. The introduction of an individual allotment scheme, to be administered under the absolute discretion of the Canadian government and the limitation of entitlement to children of half-breed heads of families was not agreed to by Ritchot. Rather, it was his understanding that the

Province, assisted by a committee of Metis would be responsible for choosing and dividing a reservation of land among Metis families.⁷⁴ Leaving control over the choice of land in the hands of the Metis Province would have allowed for the creation of Metis townships and the continuance of Metis communities.⁷⁵ It was Ritchot's understanding of the agreement that was presented to and approved by the Provisional Government. There is no evidence that the Provisional Government actually had a copy of the Act before them when it was approved.⁷⁶

A slight variation of this argument is advanced by the Metis Association of Alberta. Regardless of Ritchot's understanding, they argue that the form of compensation was decided without consultation or approval of the Metis. Evidence that the Metis did not understand section 31 to treat Metis individually, rather than collectively, is drawn from Riel's views on aboriginal title and his perception of the Metis as a collective entity existing over time. Riel accepted the concept of extinguishment but felt compensation should be awarded collectively, based on the value of the land, and not individually, based on the number of Metis in the territory. His concern was to provide for future generations.⁷⁷ The weakness in this reasoning is it fails to account for Ritchot's presentation of s. 31 to the Provisional Government and their ratification of the Manitoba Act.

Support for the argument that the Act was supposed to reflect the intent to set aside townships or blocks of land to satisfy the collective rights of the Metis can be drawn from proposals made by A.G. Archibald, first Governor of Manitoba, regarding the distribution of Metis lands; early Orders-in-Council authorizing

the setting aside of townships for the benefit of the Metis; and debates in the House of Commons concerning the reservation of 1,400,000 acres for the half-breeds. Prior to the passing of the Manitoba Bill, concern had been roused regarding the large reservation of land for half-breeds. Initially MacDonald proposed that 1,200,000 acres be "appropriated as a reservation for the purpose of half-breeds and their children of whatever origin."⁷⁸ The amount was increased to 1,400,000 acres and was opposed by Liberal benchers who took exception to a large reserve of land for the half-breeds which would hinder settlement by white settlers. Arguments arose from the present wording of s. 31 which, despite the opposition, was given Royal Assent on May 12, 1870.⁷⁹

On August 2, 1870 Archibald was instructed to recommend a selection of lands and method of distribution under s. 31.⁸⁰ In a letter to Howe dated December 27, 1870 Archibald was instructed to recommend that land grants be made within a single block of land or within two blocks, one for the English and one for the French thus keeping those of one "Race, Religion and Language in a community by themselves."⁸¹ In his opinion, this arrangement would accord with the exercise of choice by the Metis. In separate correspondence of that same date he interpreted s. 31 as granting rights to any person of mixed blood, no matter how derived, if resident in the Province at the time of transfer.⁸² Arguably, Archibald would have known if his proposals violated the intended meaning of the section as he was present in the House of Commons when it was the subject of debate.⁸³ Nevertheless, Howe rejected Archibald's proposals saying the government could not condone appropriation of large tracts of lands by half-breeds.⁸⁴

Despite Howe's refusal, on April 25, 1871 an Order-in-Council was passed incorporating Archibald's recommendation to include every half-breed resident in the grant but the reservation of townships or parts of townships in which allotments were to be made was left to the decision of the Lieutenant Governor.⁸⁵ The intent to concentrate half-breed allotments within designated townships is evidenced in the Governor General's Report dated April 15, 1872. However, it is recommended that any white settlers who settled in designated Half-Breed townships be confirmed in their respective holdings.⁸⁶ Distribution of the land began in March of 1873 but heads of families were subsequently excluded from the distribution later to have their claims satisfied by the issuance of scrip. As a result of several delays, actual distribution of the s. 31 grants did not occur until October of 1876 and was largely completed by 1880. There was no local control of distribution and land grants were scattered or in many cases, concentrated in areas away from Metis communities and areas unsuitable for farming.⁸⁷

Although the reservation of designated townships and entitlement of all Metis to participate in the land grant system is hard to derive from a plain reading of s. 31, the above arguments suggest that section 31 may not accurately reflect the actual intent of the parties. This would not be a surprising conclusion given the haste in which the provision was drafted. The importance placed on consensual arrangements for the surrender of natural rights suggests that extinguishment should be dependant on the intent of s. 31, rather than its plain meaning. If it is proven that the "intent" was to satisfy collective rights through the reservation of townships selected and distributed in accordance

with the desires of the Metis, natural law would require that this intent be carried out before Metis claims can be considered extinguished (unless both parties agreed to alter the original intent). Consequently, even if it could be established that the method of distribution was in conformity with a plain reading of s. 31, the method would be illegal and ineffective in the eyes of natural law.

Assuming it is proven that s. 31 does reflect the original intention of both parties that Metis rights would be compensated on an individual basis and that the method of distribution would be at the absolute discretion of the Canadian government, arguments can be made that its subsequent implementation was still contrary to s. 31. Substantial work has been done by Metis organizations and several academics to support this allegation. Evidence gathered forms a significant part of the Manitoba Metis Federation's challenge to the constitutional validity of Statutes and Orders-in-Council authorizing the distribution under s. 31.⁸⁸ It is beyond the scope of this thesis to examine the credibility of the evidence and arguments advanced. However, some of the points raised by the Manitoba Metis Federation and others to support the allegation that the government exercised its discretion contrary to the Act are listed below:⁸⁹

1. Legislation was passed restricting the category of persons who could claim under s. 31, altering the method of distribution and permitting occupation by white settlers before settling entitlements to hay and common areas under s. 32.(5).

2. Legislation was passed authorizing the substitution of money scrip (personal property) for land grants (real property).
3. Legislation was passed imposing a limitation period on the advancement of claims under sections 31 and 32.
4. Legislation legalized the sale of land by person under the age of majority, retroactively legalized irregular and otherwise illegal transactions, and eliminated any recourse to the courts for Metis people who had lost their lands pursuant to retroactive legalization.
5. Despite the intention of s. 32 to protect possessory claims, the Act was amended to dissolve the distinction between "peaceable possession" and occupancy inherent in ss. 32(3) and (4) resulting in the necessity of improvements and the non-recognition of prior customs regarding identification of possession such as staked claims.

If the alteration of sections 31 and 32 through subsequent unilateral government action is established, natural opinion would conclude that Metis rights continue to exist unless they were subsequently extinguished by consent. Again, this conclusion relies on the first principle of consensual acquisition and the need to establish that unilateral alteration can be justified in terms of the common good or subsequent agreement. Previous arguments illustrate the difficulty of justifying the land distribution system in terms of the common good or implied consent.

The latter assumes the ability to exercise choice which, if one considers the historical circumstances of the Metis, might amount to no choice. Given this, natural law would conclude that legislation purporting to alter or elaborate the terms agreed to in sections 31 and 32 was invalid, Metis rights continue to exist and Canada has a moral obligation to recognize Metis rights. The scope of Metis rights, extent of recognition, and form of compensation would be assessed in a contemporary context and in accordance with a modern definition of the common good.

Before leaving this area some attention must be paid to subsequent attempts by the federal and provincial governments to satisfy Metis rights. In Alberta, settlements have been established for the benefit of the Metis and a land agreement was concluded with the Metis people in Grand Cache. In Saskatchewan, title to the Metis farm colony lands in Lebret has been transferred to a Metis owned corporation. Previous to both of these arrangements, the reserve of St. Paul de Metis was established for the benefit of the Metis by the federal government. If each or any of these actions is determined to amount to consensual compensation for Metis rights, specific Metis communities might be excluded from a claim to compensation based on natural rights. Further, one would have to question the effect of these concessions by fragmented groups on the Nationhood claim if members of these groups constitute a significant portion of the descendants of the Manitoba Metis.⁹⁰ These contemporary developments do not have the effect of legalizing previous illegal activity with respect to the whole community but would have to be considered in the determination of equitable compensation.

(c) Immoral Exercise of Discretion

A plain reading of s. 31 suggests that the Governor General in Council has the discretion to determine the selection and method of distribution of Metis lands and the conditions to be placed on entitlement. Assuming this interpretation of the Act is correct and the Metis consented to absolute discretion, Natural opinion may still find the distribution scheme illegal. Although naturalists recognize the importance of upholding agreements in the maintenance of peaceful intersocietal relations, contemporary theorists have also asserted the existence of a moral obligation on powerful communities to take into consideration the common good of their members and less powerful nations when making decisions that affect others. According to Gormley, this requirement is a logical extension of the maxim that justice requires persons who make decisions which affect the good of others to respect the rights of others. Justice within a community allows the achievement of individual good to the extent it does not restrict the good of others. These same principles can be applied between communities resulting in an obligation on more powerful communities to assess the impact of their decisions on other communities in terms of the common good.⁹¹

Arguments upholding Canada as the more powerful of the two nations have been given and will not be repeated. As the more powerful nation it had an obligation to take into consideration the affects its decisions would have on the Metis as a nation and as individual citizens of Canada when exercising its discretion under s. 31. Although it might be successfully contended that the

distribution system under s. 31 could have benefited individual Metis but for their own mishandling of their entitlements, it is more difficult to contend that the distribution scheme considered the benefits to the Metis as a nation. Within this framework one has to consider the effect of the Act on the survival of the Metis as a community and a distinct aboriginal culture. Again, arguments outlining the effect and intent of government action have been given and will not be repeated. The point is the same arguments can be raised to support the position that the government's discretion was subject the limitation that is be exercised taking into consideration the good of the Metis people and that the government exceeded its legal authority by acting in a manner indifferent to Metis rights. The result is Metis rights continue to exist regardless of the agreement reached. Again, contemporary factors must be worked into a decision regarding the enforcement or compensation of these rights.

III Translation into Domestic Positive Law

The strength of natural law defenses does not lie entirely in the movement in aboriginal title cases to accept principles originating in natural law. These defenses are mirrored to a certain extent in recognized defenses in the positivist tradition. The worth of the natural law analysis in this context is it provides an underlying theory that helps resolve ambiguities and overcome potential stumbling blocks when positivist defenses are applied to Metis issues. This point is illustrated in a discussion of parallel defenses. Some of the more obvious parallels are illustrated in this section.

1. Breach of Fiduciary Obligation

In R. v. Guerin the Supreme Court of Canada held that the government of Canada was liable for breach of fiduciary duties owed to the Musqueam band.⁹² The origin of the duty was found in aboriginal title coupled with a scheme under the Indian Act which governs the surrender of reserve lands to the Crown. Of particular importance in the reasons of Mr. Justice Dickson is the fact that Indian lands are inalienable to persons other than the Crown. The fact that Indian bands have a certain interest in land is not enough.⁹³ On the question of a statutory obligation he states:

[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity with then supervise the relationship by holding him to the fiduciary's strict standard of conduct.⁹⁴

Arguments derived from Guerin can be used to support the conclusion that the Crown has a similar fiduciary obligation toward the Metis. The statutory source of the obligation is arguably s. 31 of the Manitoba Act which stipulates the land grant therein is for the "benefit of the families of the half-breed residents." This is coupled with a discretionary power in the Governor General in Council regarding the method of distribution and terms of entitlement. Thus, both elements necessary to empower the Crown as a fiduciary are met. The stumbling block to finding an obligation lies in the second requisite of aboriginal title. Natural theories on the foundation of aboriginal title help overcome this problem by legitimizing the categorization of Metis claims as aboriginal claims. Further, they help clarify that the obligation does not arise from "inalienability and the obligations

of the powerful towards the weak. Therefore, the fact Metis lands could be alienated to persons other than the Crown does not relieve the Crown of its obligation. The issue is one of actual vulnerability and power involved in trust relationship and not the method through which the dependency is created.⁹⁵

Breach of the obligation is a question of fact which will vary according to a particular situation. Both the legislation and conduct at the time of surrender will set the standards to judge subsequent conduct.⁹⁶ In Guerin, "equitable fraud" was found to amount to breach. Although it is not defined, it seems to amount to the Crown living up to its promises.⁹⁷ As a concept in equity it is more than breach of promise. It amounts to abuse of power that offends "basic justice or good conscience" that may or may not be intentional.⁹⁸ Again concepts of natural law help define unjust acts through the assessment of common good. The utilization of natural law precepts should not be rejected as equitable remedies trace their origins to natural theories of law. Consequently moral arguments based on the effect of method of implementation on the common good of the Metis as a people and the obligation of Canada to consider the common good of the Metis in exercising its discretion take on legal importance in the context of fiduciary claims.

2. Breach of Agreement

A natural law analysis helps provide theoretical foundations for the conclusion that the Manitoba Act is supposed to be a legislative enactment of an agreement reached between the Metis and Canadian government. The ability to categorize Metis claims

as aboriginal claims raises a presumption against the Crown's intention to extinguish rights unilaterally given the obligation to respect rights of previous occupants, the historic practice of consensual acquisition of Indian rights throughout the prairie provinces and the historic evidence regarding negotiations preceding the enactment of the Manitoba Act. Without these foundations, it is difficult for the court to characterize the Act as a treaty between two nations.

The categorization of the Manitoba Act as a treaty gives rise to contractual defenses to the effect of the Act on Metis rights. Arguments derived in natural law focusing on lack of choice and the failure of the agreement to set out the original intention of the parties translate into contractual defenses of unconscionability, mistake, unjust enrichment and non-est factum to name a few. Allegations that subsequent implementation violated the agreement reached translates into the positivist argument that the Crown failed to live up to its obligations under the contract. The movement in positive law to find a party liable in negligence for duties arising in contract could also give rise to an argument that the Crown could be liable in both contract and tort for intentional or unintentional breach.

As in a natural law analysis, the resolution of these claims depends on interpretation. Those claims based in equity envision the court looking beyond the four corners of the contract to ascertain the intent and obligations of the parties. In the case of treaties, this investigation has been extended to oral promises intended to form part of the agreement.⁹⁹ On this analysis, arguments based on Ritchot's understanding are properly considered

to determine what the Metis expected from the agreement. Further, the courts have recognized the imbalance of bargaining power between Canada and aboriginal nations through the principle that ambiguities are to be resolved in favour of the Indians.¹⁰⁰ Both of these concessions in favour of aboriginal peoples accord with natural philosophies regarding the moral validity of agreements between nations discussed previously in this chapter.

Not only do natural theories support the characterization of the Act as a treaty, but they may also be the proper source of rules to be applied in determining whether the treaty has been honoured. In R. v. Simon, treaties were categorized as "sui generis."¹⁰¹ Both principles of contract law and principles of international law were held not to be determinative. The source of determinative rules was not named. Given the link between aboriginal rights and natural rights, arguments can be made that the most appropriate source of rules is natural law.

3. Constitutional Competence

Arguments have been made that the method of implementation of ss. 31 and 32 is unconstitutional. Pursuant to s. 6 of the British North America Act of 1871, Parliament could not alter terms of the Manitoba Act.¹⁰² This gives rise to the argument that subsequent legislation which alters the Act is ultra vires and of no force and effect. As the legislation authorizing land distribution under ss. 31 and 32 had the effect of altering the Act, it is unconstitutional.¹⁰³ The argument is founded solidly in positive concepts of Parliamentary sovereignty and constitutional limits on the sovereign's will and has little relation to a natural law

analysis except to the extent it focuses on intent. It is in this context natural theory is useful as it takes the interpreter of s. 31 beyond a plain reading of the legislation. Beyond this, the only link to natural theory is placing limitations on the sovereign's will. However, in natural law these limitations need not be self-imposed.

Constitutional arguments may also focus on the method of extinguishment. The validity of unilateral extinguishment through an act of Parliament prior to 1931 might be challenged on the basis that the Royal Proclamation has the force of an Imperial Statute. Prior to the enactment of the Statute of Westminster in 1931 the Canadian Parliament did not have the competence to alter an imperial statute.¹⁰⁴ The Royal Proclamation prescribes purchase as the method to acquire Indian title therefore acts of unilateral extinguishment prior to 1931 are of no force and effect.¹⁰⁵

The application of this argument to the Manitoba Act does not make sense unless the Metis can be brought within the definition of Indians in the Proclamation. Natural law helps rationalize this inclusion by illustrating the common origins of Metis and Indian claims and ruling against an arbitrary preference in the treatment of weaker communities by powerful nations. Theory will be of particular importance if historical investigations into the definition of the word Indian in the 1760s can not produce definitive answers.

IV The Hard Case

R.M. Dworkin defines a "hard case" as a case which can not be resolved by the straight application of positivist rules. In his

view these cases are decided by reference to non-rule criteria of which the positivist model takes no account.¹⁰⁶ An example of a hard case is the decision of Donoghue v. Stevenson.¹⁰⁷ Some positivists will argue that the court's finding of manufacturer's negligence amounts to judicial legislation based on some non-legal norm or value. Dworkin argues that this is not a necessary conclusion if one realizes that law is more than a set of rules. Rather, "law involves the application of rules in a political and moral framework, the desiderata of which must be included in any complete account of the operation of law."¹⁰⁸ Dworkin's analysis of the law suggests any theory of law which fails to account for non-rule factors, including moral factors, is incomplete. He divides these factors into two categories - policies which reflect economic, social or political goals and principles which involve justice, fairness, morality and recognition of community rights.¹⁰⁹

Aboriginal title cases are not easy cases that can be resolved by the simple application of legislated or common law rules. Rather, they fall within Dworkin's concept of the "hard case" and are decided primarily on the basis of policy and principle. In the past, policy or political considerations have outweighed the impact of moral criteria resulting in decisions that benefit the federal and provincial governments. However, decisions such as Calder, Guerin and Simon suggest contemporary courts are placing greater emphasis on moral issues. This movement illustrates that in the area of title cases, there is room for practical application of moral evaluations of positive law.

The concept of the "hard case" helps to conceptualize the procedure through which the courts can decide in favour of the

persistence of Metis aboriginal rights without being charged with judicial creativity or legislating. Dworkin's theory of law as evidenced in aboriginal title cases illustrates that definite lines can not be drawn between positive and natural law. The resolution of Metis claims can not be resolved by a simple application of common law rules on title without considering questions of policy and principle. The increased importance of natural theories in aboriginal title cases provides the basis upon which Metis claims can be linked to aboriginal title claims and which doctrines of extinguishment can be reexamined.

ENDNOTES

1. Manitoba Act, S.C. 1870, c. 3, s.31.
2. Anonymous, Indian Claims Commission in Canada: Ottawa, Research Resource Centre, Indian Claims Commission, 1975 quoted in Metis Association of Alberta, J. Sawchuk, P. Sawchuk and T. Ferguson, Metis Land Rights in Alberta: A Political History (Edmonton: Metis Assoc. of Alberta, 1981) at 243.
3. Of particular interest are articles 1 (self-determination of peoples) and 27 (rights of minorities to enjoy their culture in community with the other members of their group) in the International Covenant on Civil and Political Rights, 1966 in UNIFO editorial staff, International Human Rights Instruments of the United Nations 1948-1982 (Pleasantville: UNIFO Publishers Ltd., 1983). For a natural law analysis of aboriginal human rights arguments see D. Gormley, "Aboriginal Rights as Natural Rights," (1984) IV(1) The Canadian Journal of Native Studies 29.
4. This argument, prior to R. v. Guerin [1984] 2 S.C.R. 335, was framed as a breach of trust argument. See, for example, Metis Assoc. of Alberta, supra, note 1 at 245-247; Assoc. of Metis and Non-Status Indians of Sask. (AMNIS), "The Question of Half-Breed Scrip As An Extinguishment of Aboriginal Title," (Saskatchewan: 24 Dec. 1979) 22, photocopied.
5. See for example, Dumont et al v. A.G. of Canada (17 June 1988) Winnipeg 152/87 (C.A.); C. Chartier, "Half-Breed Land and Money Scrip: Was This a Constitutionally Valid Method of Extinguishing The Claim to Indian Title" (Saskatoon: University of Saskatchewan, Faculty of Law, 1978) 42, Photocopied; D. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 Manitoba Law Journal No. 4, 416.
6. See, for example, Metis Assoc. of Alberta, supra, note 1 at 244-245.
7. See, for example, Louis Riel's Case (1874) P.A.C., R.G. 7, G. 18 reprinted in A Statement of Claim Based on Aboriginal Title of the Metis and Non-Status Indians (Ottawa: Native Council of Canada, 1980); chapter four of this thesis at page 258.

8. See, for example, W. Moss and S. de Grosbois "The Alienation of Metis Lands Through Federal Policy and Speculation" (Ottawa: Native Council of Canada, 26 Sept. 1979) 50. Photocopied; A.M.N.I.S. "Speculation in Half-Breed Land and Scrip" (Saskatchewan: 28 Dec. 1979) 24; and Metis Assoc. of Alberta, supra, note 1 at 96-112, 118-158 and 245-247.
9. Supra, note 5; See also the discussion in Chapter 4, Sections I, 1 and 3.
10. St. Catherine's Milling and Lumber Co. v. R., (1889) 14 A.C. 46.
11. Reprinted in R.S.C. 1970, Appendices, at 127-129.
12. For a more detailed discussion see a discussion of the "American Doctrine" in Chapter 3 of this thesis.
13. Calder v. A.G. of B.C. [1973] R.C.S. 313.
14. Id. at 344 per Judson, J. and 404 per Hall, J.
15. See, for example, the discussion of the Marshall trilogy at pages to in chapter three of this thesis; P. Cumming and N. Mickenberg, eds., Native Rights in Canada, 2d ed. (Toronto: Indian Eskimo Assoc. of Canada and General Publishing Co. Ltd. 1972) at 42-47; and B. Morse, Aboriginal Rights and the Law: Indian, Inuit and Metis Rights in Canada. Ottawa: Carleton University Press, 1985.
16. H. McCoubrey, The Development of Naturalist Legal Theory (New York: Croom Helm, 1987) at 84-98.
17. Supra, note 4 at 494-495 per Dickson J. and 517 per Wilson, J.
18. Unilateral extinguishment is in issue in the Gitskan Wet'suwet'en case (Delgumuukw v. A.G. of B.C. and A.G. Can., Action No. 0843) currently before the Supreme Court of British Columbia.
19. Supra, note 16 at 32.

20. Id. at 51.
21. Supra, note 16 at 29.
22. Id. at 32-33.
23. Id. at 48.
24. Id. For a more detailed discussion of these theories see "Introduction to the Natural Law Tradition" in chapter three of this thesis.
25. See "Natural Law and the Origin of Aboriginal Title" in chapter three of this thesis. See also Gormley, supra, note 3.
26. Id.
27. See, for example, Johnson v. M'Intosh 5L. ed. 541, 560-561 (1823). See, for example, Johnson v. M'Intosh 5L. ed. 541, 560-561 (1823).
28. See, for example, St. Catherine's Milling and Lumber Co. v. R., supra, note 10 and Calder v. A.G. of B.C., supra, note 13. For a general discussion see discussion at the end of Chapter 3, Section III, 1.
29. Calder v. A.G. B.C., id.
30. Despite the recognition of aboriginal rights by the United States Supreme Court in Worcester v. Georgia 8 L. ed. 483 (1832) President Jackson forcibly removed the Cherokee from their lands. See discussion at the end of Chapter 3, Section III, 1.
31. Gormley, supra, note 3 at 41.
32. W. Moss and S. de Grosbois, supra, note 8 at 1.
33. A.M.N.I.S., supra, note 4 at 11.

34. See, for example, the discussion in "Natural Law and Theories of Acquisition" in chapter three of this thesis.
35. A substantial amount of research has been conducted to identify the beneficiaries under s. 31. See, for example, E. Pelletier, Exploitation of Metis Lands (Winnipeg: Manitoba Metis Federation Press, 1975); Sprague, supra, note 5; and supra, note 4 and 8; and infra., note 40.
36. A similar argument is made by the Manitoba Metis Federation in the Dumont decision, supra, note 5. The distinction blamed for the loss of lands is placed on the method of distribution implemented by the Canadian government.
37. Thomas Flanagan develops the theory that the Metis were the makers of their own misfortune in Riel and the Rebellion: 1885 Reconsidered (Saskatoon: Western Producer Prairie Books, 1983) chapters two, three and four.
38. See, for example, D.B. Sealey and A. Lussier, The Metis: Canada's Forgotten People (Winnipeg: Manitoba Metis Federation Press, 1975) at 91-93; G. Stanley, The Birth of Western Canada: A History of the Riel Rebellions (Great Britain: Longman's, Green and Co. Ltd., 1936; reprint, Toronto: University of Toronto Press, 1960) chapter vii; and A.H. Tremaudan, Hold Your Heads High: A History of the Metis in Western Canada, trans. E. Maguet (Winnipeg: Pemmican Publications, 1982) at 103-106.
39. Sealey and Lussier, id. chapter 7 and G. Ens, "Dispossession or Adaptation? Migration and Persistence of the Red River Metis 1835-1890," Paper presented at the "C.H.A. Annual Meeting" (Ontario: University of Windsor, 9-11 June 1988) 33, photocopied.
40. D. Sealey, "Statutory Land Rights of the Manitoba Metis: in The Other Natives: The Metis, Vol. 2., eds. A. Lussier and B. Sealey (Winnipeg: Manitoba Metis Federation Press and Editions Bois Brules, 1978) at 8 See also Sprague, supra, note 5 at 424-427; J. Taylor "Half-Breed Grants in Manitoba" a report to the Native Council of Canada, Vol I, (Ottawa: Native Council of Canada, 15 June 1979) 31, photocopied at 7-9 and D. Sealey, Statutory Land Rights of the Manitoba Metis (Winnipeg: Manitoba Metis Federation Press, 1975) chapter III.
41. Metis Assoc. of Alberta, supra, note 2 at 112-113 and Sealey (article) id. at 21-22.

42. Sawchuk, id. and supra, note 33 at 18. Regarding the economic conditions see Ens, supra, note 39; Sealey and Lussier, supra, note 38 at 76.
43. Metis Assoc. of Alberta, supra, note 3 at 114.
44. Choctaw Nation v. United States 30 L. ed. 306 (1886).
45. M. Fladell, "Survey of Land Grant Schemes in the U.S." in "A Submission to the Native Council of Canada" (Ottawa: Native Council of Canada, 15 August 1979) 62, photocopied, at 30.
46. Dawes Severalty Act, 24 Stat. 388 (1887).
47. M. Chamberlain, The Harrowing of Eden: White Attitudes Towards North American Natives (Don Mills: Fitzhenry and Whiteside Limited, 1975) at 38. For a general discussion on the land grant system in the United States see Fladell, supra, note 45.
48. Supra, note 40.
49. Metis Assoc. of Alberta, supra, note 2 at 110-111; Sprague, supra, note 5 at 426 and Moss, supra, note 8 at 29.
50. Moss, id. at 5.
51. There has been a substantial amount of research in this area. See, for example, Metis Assoc. of Alberta, supra, note 2 chapter 4; A.M.N.I.S. supra, note 4 at 16-18; Native People and the Constitution of Canada, by H. Daniels, Chairman (Ottawa: Native Council of Canada, 1981) at 61-63.
52. An Act Relating to the Titles to Half-Breed Lands (1885) S.M., c. 30. For a general discussion see Metis Assoc. Alberta, id. at 109-110 and 146-151; Sprague, supra, note 5 at 426-428; Moss, supra note 8 at 27-50.
53. See, for example, Metis Assoc. of Alberta, id., at 107; Sprague, supra, note 5 at 421; H. Daniels, supra, note 51 at 62-63.

54. A.M.N.I.S. "The Nationhood Claim of the Metis - The Historical and Empirical Basis of the Claim in 1870" (Saskatchewan: 15 July 1979) at 32-33.
55. A.M.N.I.S., supra, note 4 at 16-18; Sprague, supra, note 5 at 421, Daniels, supra, note 51 at 60.
56. Gormley, supra, note 3 at 37.
57. Supra, note 25.
58. Metis Assoc. of Alberta, supra, note 3 at 71; Sealey and Lussier, supra, note 38 at 83-84 and A.M.N.I.S., supra, note 54 at 21-22.
59. Supra, note 37 at 59.
60. See, for example, Metis Assoc. of Alberta, id. at 71-72.
61. The List is reprinted in Metis Assoc. of Alberta, id. appendix 2.
62. See, for example, Stanley, supra, note 38 at 115 and 123-124; Tremaudan, supra, note 38 at 92-93.
63. Stanley, id. at 124.
64. For a defence of this proposition see Gormley, supra, note 3 at 35-36.
65. This position was advanced by Fransisco de Vitoria in De Indis et De Jure Belli (Washington: Carnegie Institute, 1917) at 148.
66. G. Stanley, "Confederation 1870" in The Other Natives: the Metis, Vol. 1, supra, note 40 at 77-78.
67. Sealey and Lussier, supra, note 42.
68. Supra, note 39.

69. Sealey and Lussier, supra, note 38 at 91.
70. Daniels, supra, note 51 at 57.
71. See, for example, Sealey and Lussier, supra, note 38 at 87; Metis Assoc. of Alberta, supra, note 2 at 244-245; A.S. Morton, "The New Nation: in The Other Natives: The Metis, Vol. 2, note 40 at 27-37.
72. A useful summary of the relevant legislation is found in Sealey (article), supra, note 40 and D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in The Forgotten People: Metis and Non-Status Indian Land Claims, H. Daniels ed. (Ottawa: Native Council of Canada, 1979) at 10-13.
73. Supra, note 54 at 28-31.
74. Daniels, supra, note 51 at 57; Father Ritchot's Diary (1870), trans. Berlitz Translation Service, Public Archives of Canada, 14, photocopied at 8.
75. Supra, note 36.
76. Supra, note 54 at 31.
77. Metis Assoc. of Alberta, supra, note 2 at 72-73.
78. MacDonald, House of Commons Debates, May 2 1870 at 1292-1293; but see May 4, 1870 at 1395; Stanley, supra, note 38 at 120.
79. Stanley, id.
80. P.C. No. 43, 2 August 1870; See also, Sealey (article), supra, note 40; Sprague, supra, note 5 at 417-418.
81. Adams G. Archibald to Joseph Howe, Secretary of State, 27 December 1870, photocopied; Sprague, id.
82. Id.

83. Daniels, supra, note 51 at 58.
84. Sprague, supra, note 5 at 418.
85. Reprinted in Sealey (article), supra, note 40 at 7.
86. Id. at 9-10.
87. Sealey, supra, note 40 at 21-22.
88. Statement of Claim submitted in action No. 1010/81 in the Court of Queen's Bench of Manitoba, 15 April 1981.
89. See, generally clauses 9 and 10 in the Statement of Claim submitted on behalf of the Manitoba Metis Federation, id.; Sprague, supra, note 5; C. Chartier, "Half-Breed Land and Money Scrip: Was This A Constitutionally Valid Method of Extinguishing the Claim to Indian Title?" (Saskatoon: College of Law, 1978) 42, photocopied.
90. Research conducted on the Metis Settlements and Grand Cache Metis suggest the membership does not trace its origins to the Manitoba Metis. See, for example, D. Sanders "A Legal Analysis of the Ewing Commission and the Metis Colony System in Alberta" (4 April 1978) 36, photocopied at 19; Metis Assoc. of Alberta, supra, note 2 at 216.
91. Gormley, supra, note 3 at 33 and 35.
92. Supra, note 4.
93. Id. at 376. For a general discussion see W. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self Government and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19.
94. Guerin, supra, note 4 at 384.
95. This reasoning accords with the concept of fiduciary found in equity. See J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique: (1989) 68 Canadian Bar Review 1.

96. P. Lancaster, "The Present System," Paper presented at the First Nations' Land Ownership Conference (Vancouver: Native Law Program, Faculty of Law, 29 and 30 September 1988) 15, photocopied at 3.
97. Id.
98. Gautreau, supra, note 95 at 2.
99. Nowegijick v. R. [1983] 144 D.L.R. 3d 194 (S.C.C.).
100. R. v. White and Bob (1965) 50 D.L.R. (2d) 613, aff'd. (1966) 52 D.L.R. (2d) 481 (S.C.C.).
101. R. v. Simon (1985) 24 D.L.R. 390 at 404.
102. 34 and 35 Vict., c. 28.
103. Supra, note 89.
104. Paulette et al v. the Registrar of Titles (#2) (1973) 42 D.L.R. (3d) 8 (N.W.T.S.C.).
105. L. Mandell, "Constitutional Position of the Indian Nations in Rupert's Land: Claims and Options" prepared for the Indian Assoc. of Alberta, 13 October 1983, 7 photocopied at 1-2.
106. Supra, note 16 at 151-152.
107. [1932] A.C. 562.
108. Supra, note 16 at 153.
109. Id. at 157.

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